

BRIAN MALLARD'S TWO-YEAR  
STRUGGLE TO FIGHT THE REGULATORS  
AND SAVE HIS CAREER.

# THE **D**EFIA



# NT ONE

By Doug Watt &  
Matthew McClearn

## Word of Kent Shirley's death

arrived on Boxing Day, 2004. Brian Mallard, who owns a successful financial advisory firm in Saskatoon, was vacationing in Hawaii. He visited an industry website and read about the fate of his former 30-year-old administrative assistant. The news shocked Shirley's friends and family, but did not surprise Mallard. So today's the day, he thought.

By then, the two men were on the worst of terms. Nearly a year earlier, Shirley launched a wrongful dismissal suit in which he'd claimed that Mallard's company, Brian Mallard and Associates, and its mutual fund dealer, Assante Corp., flouted industry rules and placed their own interests above those of clients. The unproven accusations pitched Mallard into the fight of his career.

Shirley had become a potent symbol for those who distrust advisors and regulators. But he had a tormented history of drug addiction and mental illness. Even worse, some accused him of stealing the documents that he put forth as evidence against Mallard and Assante. Was this merely sour grapes, or did Shirley have a case?

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October 2004 Pursuant to  
Rule 130 dated 1<sup>st</sup> 2004

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Plenty of people thought Shirley's allegations warranted a closer look. Many would later regret their curiosity. Shirley's dispute with Mallard consumed reputations, destroyed careers and pushed some to self-destructive behaviour. And matters did not end with his death. If anything, they got worse.

### False Start

It was 1994, long before everything went wrong, and Kent Shirley was a 19-year-old looking for work. A former fencer who'd competed at an international level, he had few credentials besides ambition. He did, however, have a brother who already worked with Brian Mallard. It was enough to get him a summer job doing data entry. In an interview in September 2004, Shirley claimed he worked "his ass off" for Mallard.

"I worshipped him," Shirley said. "He was God. He was great. He was an idol . . . I did everything I could to please him."

A consummate salesman with the self-assurance of a five-star general, Mallard made a name for himself in Saskatoon. He began selling insurance at the Canada Life Assurance Company in 1973, and attained his chartered life underwriter designation in 1979. The following year, he founded Dataplan Consulting Associates (later Dataplan Financial Services) and added mutual funds to his product lineup in 1987. During the ensuing years Mallard fell out with his business partners and became a one-man dynamo. In 1996 Assante bought Dataplan; he held the position of CEO until Dataplan merged with another Assante acquisition, Equion Financial. After that, he formed Brian Mallard and Associates

but retained Assante as his mutual fund dealer.

In recent years, Mallard's branch has boasted \$350 million in assets under management from 4,000 clients, of which 650 were Mallard's own. He became sufficiently wealthy that he spends part of the year in Hawaii. Mallard has also been a leading voice in the industry, holding senior board positions with the Canadian Association of Insurance and Financial Advisors and its successor, Advocis, including a two-year term as the association's chair.

When Mallard needed a personal assistant in 1996, he chose Shirley. "He was hard-working, keen, followed the rules, and did what he was told as fast and efficiently as possible," Mallard recalled in an interview this summer. In his new role, Shirley sat in on client meetings with Mallard, taking notes as his boss provided clients with financial plans and advice. Shirley deemed his compensation generous, and at one point Mallard even co-signed a \$50,000 loan for him.

These were heady times. Winnipeg entrepreneur Martin Weinberg founded Assante's predecessor in 1987. It bought Optima Strategy Funds, a family of eight mutual funds, in 1993, and merged with The Equion Group of Toronto in 1995. That year, Weinberg embarked on an ambitious bid to buy up smaller mutual fund dealers across the country. He oversaw 18 acquisitions during the coming decade, including Mallard's Dataplan. The company went public in 1999.

As Assante's ranks of advisors and customers swelled, however, so did controversy about how it sold mutual funds. Many advisors across Canada sell third-party funds, and receive compensation from those third-party fund companies

in return. In contrast, Assante's business strategy hinged on selling its own in-house mutual funds, including its Artisan and Optima products. Assante told shareholders this approach offered "the potential for a nine- to 16-fold increase in operating margins."

Not everyone shared Assante's enthusiasm. The financial services industry has attracted an odd cast of characters, loosely described as "investor advocates," who attack behaviour they view as detrimental to the public. Some of them are former investment professionals who've been punted from the industry. Others claim they've lost fortunes at the hands of unscrupulous advisors. A number of investor advocates pounced on in-house funds. Despite the fact that other companies (like Investors Group) also sold them, Assante became the lightning rod.

One oft-heard criticism was that, across the board, Assante's products were (and are) expensive to own. The Artisan Most Conservative Portfolio, for example, features a management expense ratio that has averaged around 3%, compared with an industry average of around 2%. In an article published in 2001, mutual fund analyst Dan Hallett observed: "Assante stands out in its apparent goal to use its growing advisor base to increase its in-house funds, most of which have fees that are far greater than their peers."

Did clients get what they paid for? A cursory analysis of Assante's products shows that many of them have performed admirably compared with peers. "At least a couple of managers running their funds have done a really good job," observed Hallett in an interview this summer. He adds, however, that to justify such fees, advisors should provide a high level of service.

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And, “the higher the fees, the tougher it is to put out strong returns over time,” Hallett added.

Another problem was that Assante encouraged its advisors to own company shares. The tactic was intended to encourage them to keep working with Assante, and align their interests with those of shareholders. The problem, though, is that the interests of shareholders don’t always square with those of clients. Assante didn’t gloss over this. In one mutual fund prospectus, it warned investors that the more Assante shares an advisor owned, the more he benefited each time he sold Artisan products to clients.

### Lighting the Powder Keg

Among investor advocates, there were whisperings of even deeper conflicts of interest. Rumours surfaced from former Assante advisors that the company set quotas for selling in-house products to clients, and offered company shares to advisors in exchange for meeting those targets. Such incentives would encourage advisors to favour Assante products regardless of whether they were right for clients. “I certainly got a lot of calls from media asking about it,” Hallett said. “People wanted to write about it, but they couldn’t until they had documented proof, and there wasn’t any.”

One journalist who jumped on the story was Jonathan Chevreau, a personal finance columnist with the *National Post*. In November 2002, Chevreau warned readers to be wary of firms hawking in-house funds. He cited Assante as an “egregious” example. “As in-house funds are added to the mix, investors should question how ‘independent’ these advisors are,” Chevreau wrote.

Chevreau’s criticisms were not well received by Assante. “Assante does not impose quotas, nor do we pressure advisors to sell our own in-house portfolio management solutions,” a company official wrote in a letter to the editor. Allegations that advisors received more compensation for selling in-house products were similarly untrue, Assante added. The *Post*’s executive editor, Doug Kelly, later wrote a letter to Weinberg apologizing for “any inaccuracies” in the *Post*’s stories. Weinberg considered Kelly’s letter a victory and distributed it to Assante employees.

profitability targets. Assante terminated these arrangements when rules governing industry sales practices changed in 1998. “There were no quotas, ever,” Weinberg reiterated.

In 2003, CI Fund Management (now known as CI Financial Income Fund) bought Assante for \$846 million. At the same time, CI purchased Toronto-based Synergy Asset Management and a new management team was brought in to steer the Canadian acquisitions. The team included former Synergy boss Joseph Canavan,

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Where did the rumours originate? In an interview this summer, Weinberg explained that when Assante acquired other companies, it offered owners of those companies additional compensation if they met certain profitability targets during the following three years.

“Some of the most profitable things they could sell were the Optima Strategy and Artisan funds,” Weinberg conceded. “But that wasn’t the only way to get there. You could have sold insurance or grown your practice or done other things” to reach the

## MALLARD

“I’ve been looked at by more goddamned people than I deserve, and none of them have found any evidence of malfeasance or inappropriate actions.”

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who was appointed as Assante's new chairman and CEO. Weinberg and his team departed.

In an interview with *Advisor's Edge Report* newspaper last year, Canavan said that at the time of CI's purchase, Assante was a "dog's breakfast"—a good company with a "challenged business structure," but one that had been "totally dressed up to be sold." He claimed that infighting was common and advisors were unhappy. He added that some of Assante's products paid advisors huge compensation—and described that as being "not legit."

By the time of its purchase by CI, Assante sat on a powder keg of suspicion. Kent Shirley lit the fuse.

### World War Three

A photograph of Shirley at an office pool party in August 2000 reveals broad shoulders and a powerful build. He sported tightly cropped hair and a confident smile. He was an avid bodybuilder, but his bulked-up physique concealed—and possibly expressed—tremendous vulnerability.

His life began to unravel in 2001. According to Mallard's court filings, Shirley's performance deteriorated markedly. He failed to complete paperwork, behaved erratically, forged client signatures, engaged in "inappropriate personal conversations" with female staffers, and showed up for work looking dishevelled. Mallard noted that Shirley was packing on muscle. "He went from being a little over six feet, 180 pounds to about 260 pounds—and it wasn't fat," he said in an interview. "I believed he was doing steroids. He denied it, but the signs were definitely there." Some days, Mallard claimed, Shirley flew into a rage over trivial matters or sat in his

office and sobbed for hours at a time. "He was GQ material," said Mallard, "but underneath that veneer, he was a mess."

Shirley denied some of Mallard's allegations. Those he admitted to were disturbing enough. In an interview months before his death, Shirley revealed he'd become addicted to Valium while fighting insomnia. He confessed that he was "very involved in the steroid scene." Things took a turn for the worse in 2001 after he broke up with his fiancée. He attempted suicide and was hospitalized due to an overdose. The personal turmoil spilled over into his professional life. "Apparently some clients said, 'Kent appeared as though he was stoned,'" Shirley said. "It may very well have happened. I was trying to work and function in life at the same time, and I probably shouldn't have been."

Shirley went on an eight-month leave of absence in 2002, on the condition that he enter a rehabilitation program. Mallard claimed that Shirley wasn't cooperating, and didn't want him to return. In December 2002, however, Mallard said he received a call from Shirley's father that changed his mind. "He was very afraid that Kent would hurt himself and felt that he needed a safe place to work and that was my place," said Mallard. "So I said I would look for a way." Mallard's change of heart was unpopular with his staff and lawyers.

When Shirley returned to work in February 2003, he and Mallard struck a written agreement stipulating that Shirley would refrain from abusing drugs, maintain a "neat and business-like appearance," and obtain the certified financial planner designation. The idea was that he would work under heightened supervision with less re-

sponsibility, but gradually resume his old duties. It didn't work. Shirley was upset with the demotion, and Mallard accused him of bungling a major project. Shirley also failed a CFP course.

At a performance review in January, 2004, Mallard told Shirley to go home and think about his future during the weekend. After Mallard left the room, Shirley remained seated, silent and unmoving, for about 10 minutes. "I left that meeting wanting to slit my wrists," Shirley recalled later. "They were so cruel." Shirley never returned to work, and soon advised Mallard in writing he would sue for constructive dismissal.

Months later, Brian Mallard noted something unusual about the credenza in his office. The dust inside one of its compartments had been disturbed. "It doesn't get opened that often," said Mallard, who thought little of it at the time. "We had this little skirmish going on with Kent but I didn't realize that World War Three was breaking out."

On Feb. 6, 2004, Shirley visited the offices of the Saskatchewan Financial Services Commission, the province's securities regulator. There he met two investigators, Vic Pankratz and Rick Mitchell, whom he deluged with allegations against Mallard and Assante. One was to become particularly significant: He claimed that Assante pushed in-house products because they produced bigger profits. "That's why 90% of our book is in Assante [products]," Shirley said. He offered the investigators documents to support his claims.

As the interview wrapped up early that afternoon, the investigators asked Shirley why he was speaking to them. Shirley categorized his grievances in detail—they were mostly personal. "A lot of people are going to say it's

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revenge," he told the investigators. "And somewhat, yeah, it is."

Shirley's documentation included much correspondence, such as letters and e-mails—everything from internal memos to communications between Mallard and senior Assante executives. There were also business plans, documents laying out internal policies and procedures, and lots of information about clients—including their driver's licences, social insurance numbers and account statements. Not, in other words, the sorts of things any employer would want floating about.

Shirley claimed that when he'd gone on leave, his own files had been placed in banker's boxes—and that he'd later received permission from the office manager to take them home. He also backed up the data on his office computer. "Did I steal information? Absolutely not," Shirley said in an interview. "I took information to give it to the regulatory authorities in the proper jurisdictions to show to them wrongdoing."

Mallard's account is strikingly different. Citing forensic evidence collected later in 2004, he claims that Shirley returned to the office the week-end following the fateful performance review. He gained entrance using his security pass, which the company had yet to cancel. He copied documents to a receptionist's computer, which he then burned onto a compact disc. And he collected the boxed-up documents. "He went into my desk drawer, took copies of my personal family trust documents, took copies of my income tax records, personal correspondence," Mallard said. "He ransacked my office." The company's computers and security system—and dust trails in the credenza—gave Shirley away.

Shirley was subject to numerous rules and regulations on handling client information. Be it his employment contract with Brian Mallard and Associates, or the codes of conduct of bodies to which he was accountable (like the Mutual Fund Dealers Association of Canada and the Insurance Council of Saskatchewan), these all said roughly the same thing: He couldn't disclose client information to others without express consent, unless he was required to do so by a court or regulatory authority. Shirley reasoned that "under [the rules of] pretty much every regulatory body there is, if you have information that pertains to illegal matters, you can take that information." That belief would soon be put to the test.

## FIGHT BACK

Mallard believed he was gaining the upper hand against Shirley. "I was thinking this thing is probably going to cost me \$20,000 in legal fees. We'll wrap her up and call it a day."

### Alone Against The Regulators

Shirley filed his constructive dismissal lawsuit in March 2004. The statement of claim alleged that Mallard breached the terms of their mutual agreement by "condoning, engaging and requiring Shirley to engage in unethical and/or illegal conduct and harassing and condoning the harassment of Shirley." It also claimed that Mallard had regularly breached industry rules by providing clients with inside information and personal loans, offering them stock

advice while lacking the necessary licence, selling his own shares to clients, and so on. Shirley claimed that one of his fellow employees regularly forged Mallard's signature on forms, with the latter's knowledge and consent.

In his statement of defence, Mallard claimed Shirley's allegations were lies intended to embarrass him. Mallard denied "breaching any ethical codes, laws, rules and regulations or requiring [Shirley] to do so." Mallard asserted in an interview: "I run a scrupulously compliant office and I will not tolerate anything that lacks integrity."

Upon learning of Shirley's lawsuit, Mallard says he notified Assante and requested an immediate audit of his office to address the allegations. He heard nothing until April 28, when he got a call from an Assante vice-president, who said the MFDA had raised the matter with company management. As the self-regulatory body for Canada's mutual fund dealers, the MFDA has the power to suspend a firm's licence, and the Saskatchewan Financial Services Commission had instructed it to investigate. Mallard, however, found the Assante conversation reassuring. "He made it sound like they were under siege by the MFDA and that they would be arm in arm defending me against these spurious charges," Mallard later recalled.

Actually, Assante was doing some digging of its own. Jaime Ross, the company's senior vice-president of risk management, said in an interview this summer that the new management team didn't know what took place under Weinberg's watch. It was eager, however, to demonstrate to regulators that it was serious about compliance. "We had to uncover all of this ourselves," Ross said. "[Shirley] cited facts with

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quite an amazing amount of specificity . . . The focus on sales incentives gave us some concern as a new management team.”

In May 2004, two Assante auditors conducted a two-day inspection of Mallard’s offices. Mallard claims the auditors, too, reassured him he had nothing to worry about. Several days later, one of Mallard’s employees told him some documents had disappeared from his office. These were incomplete forms that clients had already signed and Mallard’s employee broke industry rules by possessing them. Mallard knew they could be construed as evidence of improper discretionary trading. Mallard’s position, though, was they constituted an acceptable tactic for rural clients in a sparsely populated province like Saskatchewan. “Sometimes you have to do things that are beneficial to the client, but not necessarily compliant, just because of the distances and the geography,” Mallard explained.

Moreover, he believed Assante had no right to seize the forms in the first place. He phoned one of Assante’s auditors, and asked her whether she’d taken the forms. She confirmed that indeed, she had. He accused the auditors of committing a crime. Following the conversation, Mallard checked and determined that other documents were also missing. (Assante’s Ross admitted that taking documents during an audit is not standard practice, and that Mallard should have been notified.)

It didn’t take long for the other shoe to drop: Assante attempted to suspend Mallard and two of his employees. But Mallard’s suspension didn’t square with the terms of his employment contract, so he refused to accept it. Soon after, Assante told Mallard he would be removed as branch manager and fined

\$60,000. Mallard stepped down as branch manager and sued Assante for \$10 million.

Meanwhile, in March 2004, Shirley, frustrated that he could not find a job, moved to Red Deer, Alta. For the rest of the year, he contacted anyone and everyone who would listen to his claims about Mallard—and more than a few who wouldn’t. He regularly communicated with investigators from the Saskatchewan Financial Services Commission. He launched a complaint against Mallard with the Financial Planners Standards Council. “I’ve given the documents to the MFDA and the OSC,” Shirley said in an interview. “They’ve got them now, I’ve confirmed it.”

But Shirley quickly ran into a wall. For example, he claimed that he filed a complaint against Mallard with Advocis (Mallard was a board member at the time), and offered a document from Mallard’s office to support it. Advocis, however, demanded that Shirley obtain Mallard’s permission to use it. “It’s just ludicrous,” Shirley fumed. Meanwhile, investigations into his other complaints progressed slowly. “Every day, I think about dropping the entire thing because it’s so frustrating,” he said at the time.

That summer, Mallard believed he was gaining the upper hand against Shirley. “[We] seized some assets, brought financial pressure to bear—the usual tactics you use when you’re fighting a lawsuit,” he said. “You could see an end in sight. I was thinking this thing is probably going to cost me \$20,000 in legal fees. We’ll wrap her up and call it a day.”

But Mallard didn’t count on Joe Killoran.

An Oshawa, Ont. resident, Killoran describes himself as “Canada’s most feared investor advocate.” Killoran

worked in financial services during the 1980s but claimed that his employment was terminated four times “for having and showing a conscience.” More recently, Killoran has waged a one-man crusade against the financial services sector and Assante ranks among his favourite targets. “I was unfortunate enough to be on Joe Killoran’s e-mail list,” said analyst Dan Hallett. “Not all of his e-mails were about Assante, but a large percentage were.”

Shirley contacted Killoran in July 2004. The two men communicated mostly by e-mail and sometimes by phone; they never met. Killoran estimates he contacted Shirley more than 3,000 times in five months.

Killoran pressed Shirley to send him documents. He told Shirley that Eliot Spitzer, New York State’s attorney general, was interested in evidence regarding Assante’s practices. Killoran noted that whistleblowers sometimes receive a cut of court judgments in the United States, and predicted fines resulting from Shirley’s information “would be several billion dollars.”

Killoran received his first batch of documents from Shirley in August 2004. He became frustrated, though, that Shirley wouldn’t send him the rest. Killoran wrote:

*Kent, I’m offering you the best ray of sunshine, the best potential to light your way out of the tunnel that my creativity + contacts can achieve. If you don’t want my help, just tell me straight up and I’ll spend my time looking to help other abused individuals . . . your delay to forward the rest is really hurting our credibility with [Spitzer].”*

Shirley sent another bundle of documents in September 2004. All totalled, Killoran claimed he received

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more than 7,000 pages.

The internal documents shook Killoran. He began calling them “smoking gun whistleblower evidence,” claiming the documents showed that Assante not only encouraged advisors to sell in-house products, but gave them Assante shares in reward for doing so. Shirley confirmed that. He said that the scheme provided bonus shares to advisors when their clients invested 40% or more of their portfolios in Assante products. “I have a copy of [a document showing] all the advisors that got stock,” Shirley said, “and where they were sitting on the conversion basis, how many were still in escrow, how many had been released.” But Shirley added that Assante “kiboshed” the program around 1997.

Chevreau revealed that he’d obtained documents originating from Mallard’s offices.

### A Little Subterfuge

Working together for eight years, Mallard and Shirley knew each other well. Shirley predicted, for example, that Mallard would attack his credibility and portray him as a drug-crazed lunatic. “It’s a wonderful defence,” Shirley said, “but it certainly doesn’t hold up against a stack of documents.” Indeed, he believed that if he could make those documents public, he could turn the tables against his former employer. He also knew there were complicating factors. “I can see a problem being that none of the documents will be admissible because they’re all confidential,” he said.

session, which he eventually received.

He wasn’t alone. Assante, too, inspected materials returned by Chevreau, and it whetted the company’s appetite to see more. Brian Foster, a lawyer for Fraser Milner Casgrain who served as Assante’s outside counsel, wrote Shirley’s lawyer a letter in September 2004 demanding that Shirley return documents directly to Assante. “While these records and the information were located at the offices of Mr. Mallard and may have been produced by Mr. Mallard or others in his employ,” Foster argued, “the records remain the exclusive property of [Assante].”

Foster intended to use the documents to investigate Brian Mallard and Associates. “They thought there was something wrong with me,” Mallard said. “The fact that a psychopath had their clients’ information and could sell it to an identity theft ring in Brazil didn’t seem to enter into their psyche at all.” But Assante’s Ross claimed that the company didn’t know what information had been taken from Mallard’s office. “Having gone through an agonizing period of time defending the firm against the regulators related to sales practices, we didn’t know what we were going to find.”

Through his lawyer, Geoff Dufour, Shirley vowed that any documents pertaining to Mallard and Assante that “are not strictly personal to him” would be returned “to either Assante or Mallard.” Privately, however, Shirley had no such plans. “I’m scared if I return the docs, then I get charged for sure,” he fretted to Killoran in an e-mail. Killoran advised against returning the materials. “Bury it, hide it, rent a storage locker someplace,” he suggested.

## COURT ORDER

Mallard applied for an *ex parte* Anton Piller order. Sometimes described in the legal community as a “nuclear weapon,” the order allows a plaintiff to enter a defendant’s home to search and seize materials and documents belonging to the plaintiff.

Killoran concluded that the program constituted “the largest premeditated criminal fraud in Canada’s history.” He provided documents to the *National Post*’s Chevreau. In August 2004, Chevreau interviewed Mallard and produced an article calling the case a “classic David v. Goliath tale” and concluded that “this case may or may not end up swept under the rug. But from what I’ve seen, it merits closer attention.” Mallard was incensed. The two-hour interview did, however, provide him with a valuable insight. During it,

Mallard faced a dilemma of his own. He believed Shirley was mentally ill. “I’m dealing with a guy who has a psychosis,” Mallard said in a September 2004 interview. “He believes he’s a whistleblower and is out to prove I’m an evildoer. Once that fails, I’m concerned that he will try to commit suicide. I don’t want to push him into that position.”

But Mallard also worried that his clients’ confidential information was blowing in the breeze. He wrote a letter to the *Post* demanding return of internal documents in Chevreau’s pos-

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Shirley didn't guess that Mallard had other means of retrieving the documents. On Oct. 12, 2004, Shirley received an unexpected visit from Albert Sweet, who introduced himself as a fellow tenant in his apartment building. Sweet complained of wiring troubles, and inquired whether Shirley had experienced similar difficulties. He had. He invited Sweet in, and the two began chatting. "The apartment was generally messed up and had very disorganized papers all over the place," Sweet said in an affidavit. He described Shirley as shirtless, unshaven and thin.

Though he didn't let on, Sweet knew of Shirley's history. A private investigator with Bison Security Group, he didn't live in the building and couldn't give a damn about its wiring. He was more interested in the computers and papers in Shirley's living room. He reported their whereabouts to Mallard.

Armed with that knowledge, Mallard approached the Court of Queen's Bench of Alberta and applied for an *ex parte* Anton Piller order. Sometimes described in the legal community as a "nuclear weapon," the order allows a plaintiff to enter a defendant's home (or other premises) to search and seize materials and documents belonging to the plaintiff. *Ex parte* meant that Shirley would not know about Mallard's request until the order was executed and, therefore, have no opportunity to prevent the seizure. Simultaneously, Mallard also filed a lawsuit against Shirley for misappropriation of the internal documents, defamation and for disclosing confidential client information.

Anton Piller orders are rarely granted. Theoretically, a court will place significant requirements on any plaintiff requesting one. Mallard's lawyer, Rich-

ard Billington, argued it was necessary because Shirley had misappropriated information, was disseminating it to reporters, and had defamed Mallard using Internet chatrooms. "We don't know what he has done with these documents," said Billington, who has considerable experience with Anton Pillers. He argued that Shirley was likely to destroy, alter or hide evidence Mallard needed for his court actions against Shirley. He nominated KPMG to supervise the search and seizure.

Justice D.B. Mason of the Court of Queen's Bench of Alberta granted the order. The following day, KPMG representatives—accompanied by Billington and a police officer—went to Shirley's apartment at 9:30 a.m. Shirley answered the door around noon.

Billington explained the court order to him. Billington remained near the front door while KPMG employees seized Shirley's computers, compact discs, paper files and other materials. They also conducted a "bit-stream imaging" of the hard drives—a process by which an exact copy is made to preserve it as evidence. KPMG summed up what it found in a seven-page report to Justice Mason. Among other things, it found more than 1,500 communications between Killoran and Shirley.

The Anton Piller order prevented both Assante and the MFDA from accessing Shirley's documents and its gag provision barred Shirley from talking with investigators. But both organizations still wanted to investigate. They subsequently asked the court to give them access to the documents. Assante suspected that Mallard—who ultimately paid hundreds of thousands of dollars for KPMG's custodial services—was hiding something. "One would wonder and question why Mr. Mallard wanted that [gag order];"

Assante's lawyer, Brian Foster, told the court. "One has to give some thought to that."

Judge Mason barred them from the documents. "I see the piggybacking of the MFDA and Assante under these proceedings as being simply that," Mason said at the hearing. "I do not propose to open these proceedings to a wholesale review and fishing expedition on behalf of Assante or [the] MFDA." Mason's ruling removed any doubt: The documents were kryptonite to anyone hoping to use them outside the context of the lawsuits between Shirley and Mallard.

During the fall of 2004, Killoran encouraged Shirley to keep up the fight. In one e-mail, he wrote: "You will persevere!! You will survive!! You will overcome it!! You will be much stronger when this is all over!!"

Shirley, though, understood that if he couldn't use the documents to support his allegations, his campaign was hamstrung. In an e-mail to an investigator with the Saskatchewan Financial Services Commission, Shirley pleaded: "Get me my computer from KPMG and I will show you [evidence of wrongdoing] . . . It's in there."

Continuing setbacks took an obvious toll on Shirley. When Mallard encountered him at a mediation meeting in November 2004, he was shocked by Shirley's appearance. "He looked like crap," Mallard later recalled. "He was unshaven, thin and had a pasty pallor. His eyes were bloodshot and sunken."

Shirley made a last-ditch effort to tell his story. In December 2004, he contacted several journalists (including Advisor.ca editor Doug Watt and John Lawrence Reynolds, author of several books about malfeasance in the financial services industry) about writing a

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book. Echoing Killoran, Shirley told Reynolds in an e-mail that he had first-hand information about “what may turn out to be the largst [sic] scandal in our industry.” The message, however, suggested his aptitudes were not equal to the task. “I have al [sic] the evidence etc., but not very good at writting [sic],” Shirley wrote. By then his communications were a mess of jumbled thoughts, and he clearly needed more than advice.

That month, Mallard informed Shirley that he intended to seek contempt-of-court charges against him for distributing confidential documents. Later, Mallard, Shirley and their lawyers participated in a settlement conference at which broad terms were reached. A week before the Christmas break, Mallard formally sent his proposed terms to Dufour. According to Mallard, they included a public letter of apology from Shirley.

“I’m very pissed off and depressed,” Shirley wrote in an e-mail to an associate in December 2004. “I wonder how many other cases they [regulators] sit on or sweep away.”

On Dec. 20, Killoran wrote an e-mail to investigators at the Saskatchewan Financial Services Commission and Ontario Securities Commission, expressing concern about Shirley’s well-being. He requested employment at a rate of \$100 to \$200 an hour, half of which he vowed to pay to Shirley. The request was implausible and, in any case, too late. On Christmas Eve, Kent Shirley died suddenly in his parents’ home.

### Dust Never Sleeps

Kent Shirley’s death crippled the already shaky case against Brian Mallard. The star witness was dead. Not a single

client came forward to lend credence to the allegations. The documents Shirley put forth as evidence were locked in a vault. Copies were still circulating, but anyone who passed them around risked attracting the ire of a judge.

And yet, Mallard’s problems were not over. Numerous regulators—not to mention Assante—remained suspicious. By early 2005, a loosely organized group of investor advocates were pushing Shirley’s case. To them, Shirley had become a martyr.

Killoran was the most zealous. For his troubles, Mallard had already served him with a defamation lawsuit for a bizarre e-mail Killoran had sent to a long list of recipients several months earlier. It contained two cartoons and contained disparaging comments about Mallard. Mallard claimed Killoran’s antics damaged his reputation and humiliated him. Killoran continued to lobby various regulatory and law enforcement bodies to investigate and dug himself deeper.

He was assisted by Robert Kyle, an investor advocate with a controversial history. Formerly a derivatives trader, Kyle was suspended by the Investment Dealers Association of Canada in 1998. After he refused to provide his firm’s records to investigators, the IDA commenced a disciplinary process that eventually resulted in stiff fines for him and his firm, as well as the termination of their registrations.

Kyle has been a thorn in the IDA’s side ever since, unsuccessfully appealing its ruling to higher authorities. (The Ontario Divisional Court rejected Kyle’s case this year, effectively ending the matter.) Kyle operates a website dedicated to criticizing Canada’s regulatory system, and he began a page about the Shirley/Mallard struggle, to which he posted court documents,

correspondence and other materials. Mallard complained that the site was incomplete and defamatory and threatened to sue Kyle’s Internet service provider. The ISP immediately shut down the site, but Kyle found another service provider and re-established it. Mallard sued this summer. Kyle has since removed the material involving Mallard and Shirley from his site, but could still face legal action.

The two investor advocates pushed relentlessly, contacting various regulators and politicians, offering up evidence calling attention to Shirley’s allegations.

Mallard was particularly concerned about the MFDA, which requested a meeting with him in February 2005. “I believed that they would use information provided to them by Kent Shirley that he had obtained illegally and had altered to make their case against me,” he recalled.

## TRAGEDY

Kent Shirley’s death crippled the already shaky case against Brian Mallard. The star witness was dead. Not a single client came forward to lend credence to the allegations . . . And yet, Mallard’s problems were not over.

At that interview, Mallard claims, MFDA investigators (including enforcement counsel William Donegan) presented him with a two-inch-thick binder containing many of the same documents seized from Shirley’s apart-

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ment under the Anton Piller order. It was an audacious move: Donegan attended the hearing months earlier at which Judge Mason made clear he would not grant access to those documents. Mallard's response was equally audacious: He threatened to seek an injunction and sue Donegan personally. "I remember smiling and saying to Donegan that I would answer all of their questions providing that he admit where the MFDA got the stack of documents from," Mallard said. (Donegan declined comment.)

Gradually, the tide turned against Mallard's accusers. In February 2005, the FPSC told Mallard that Shirley's complaint had been dismissed. Less than three months later, the OSC informed Killoran that it had closed its file on the matter, with no action taken against Mallard or Assante. The RCMP's Integrated Market Enforcement Team, which deemed the matter insufficiently important to warrant its attention, refused to consider Killoran's calls for an investigation. And in July 2005, the MFDA informed Mallard that it had completed its investigation and would be taking no further action.

In an interview, Assante's Ross confirmed that as part of the OSC and MFDA investigations, the company hired forensic accountants and delved deep into its past. This internal investigation uncovered the Weinberg-era program under which advisors received bonus shares for meeting sales targets, but nothing more.

In other words, Shirley's allegations about the program were largely accurate, but Assante did not break any industry rules. Ross said Assante's investigation confirmed that no quotas or improper incentives existed

after 1998, and that the OSC cleared Assante after an "exhaustive and thorough" process.

What was it about Shirley's cache of documents that others found so alluring? Regulators seldom discuss investigations, so what they made of them is anyone's guess. (The MFDA, for example, refused to confirm or deny whether Mallard was ever investigated.) Defending himself against the numerous legal challenges sparked by those documents cost Mallard around \$1 million. "I've been looked at by more goddamned people than I deserve, and none of them have found any evidence of malfeasance or inappropriate actions," Mallard fumed. "It is mysterious to me why it will not die."

Mallard and Assante reached a settlement earlier this year. In April, Brian Mallard and Associates transferred its registration to Quadrus Investment Services, a mutual fund dealer based in London, Ont. Although Mallard admits his relations with Assante were strained, he expressed satisfaction with the firm's cooperation during the transition.

"They [Assante] behaved in a manner which exhibited high integrity," he said. Mallard remains confident in

Assante's products. "We have not moved a single dime of [client] money away from Assante."

Ross expressed regret about the way Mallard was treated. "If this were to happen today, we'd deal with it in a far more supportive manner," he said. "He [Mallard] is a guy of integrity. It's clear that he was an innocent victim in this situation. We departed on amicable terms and we wish him well."

As Mallard's troubles eased, Killoran's mounted. The court took a dim view of his distributing documents. For example, Killoran e-mailed KPMG's report on the raid on Shirley's apartment to a diverse group of recipients. Spitzer, of course, made the list—as did another mysterious choice: Mallard's lawyer Richard Billington. Mallard promptly alleged that Killoran was in contempt of court.

Saying he couldn't afford a lawyer, Killoran chose to represent himself in legal actions in both Saskatchewan and Alberta. He proved a less-than-able advocate. Under cross-examination in the Alberta defamation lawsuit, Killoran refused to answer questions and contradicted himself. Judge W. F. Gerein of the Saskatchewan court

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## REGULATORY ROADKILL

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The irony of this dispute is both sides arrived at the same conclusion: The organizations regulating Canada's securities industry don't work. Killoran and other advocates continue to believe that regulators ignored Shirley's allegations.

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observed that Killoran's statement of defence read "like a bad speech."

Killoran attempted to have Shirley's documents entered as evidence, a move that would effectively make them accessible to anybody. But these efforts, too, came to naught. In a decision issued in April 2005, Judge Gerein

deemed most of the documents irrelevant to the matter at hand, and struck them from the record, along with large parts of Killoran's statement of defence. Gerein issued an injunction instructing Killoran to cease publishing oral or written statements about Mallard and his clients and advisors. It also barred him from distribut-

ing the documents obtained from Mallard's offices.

Court orders made little impression on Killoran; he promptly violated them. Among other things, he sent unsolicited e-mails to police officers making fresh allegations against Mallard. In October 2005, Judge Gerein found Killoran in contempt of court and fined him \$5,000.

The following month, this time in Calgary, Killoran was again found in contempt. Judge Mason cited him for distributing the KPMG report and for refusing to disclose from whom he obtained it. "By the conclusion of the hearing I was concerned about Mr. Killoran's mental state," Mason wrote in his decision. Mason sent Killoran to jail for 10 days and fined him another \$5,000.

Shirley's cache of documents continued to claim victims. Earlier this year, investor advocate Larry Elford and Toronto-based forensic accountant Al Rosen filed separate complaints to the Institute of Chartered Accountants of Alberta. Both alleged that because KPMG had conducted work for Assante prior to 2004, it had a conflict of interest when it served as court-appointed custodian for the materials seized from Shirley's apartment. But both made critical mistakes: They provided the ICAA with documents Mallard's lawyer believed they had obtained from Killoran.

When the Court of Queen's Bench of Alberta got wind of the complaints, it demanded that both men appear to explain why they should not be found in contempt of court. The court seized the documents from both men and the ICAA, effectively terminating the complaints.

Rosen was dropped from the

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proceedings, but Killoran and Elford are scheduled to appear before Judge Mason in Alberta later this year. For the previously jailed Killoran, in particular, the stakes may be high. "This is a private lawsuit," Mason said during a hearing this summer. "I thought I had got that through Mr. Killoran's

head; obviously I didn't... we will deal with that."

As of the time of this writing, there's no telling how far Shirley's cache of documents has travelled, where they might crop up next, or who will have cause to regret encountering them. Dan Hallett, for example, has received many e-mails from Killoran regarding

Assante. "Maybe there's real information in what Killoran was sending around," said Hallett, his tone dubious. "But like most people I have a day job and don't have time to read all that stuff." Perhaps it's for the best.

The irony of this dispute is both sides arrived at the same conclusion: The organizations regulating Canada's securities industry don't work. Killoran and other advocates continue to believe that regulators ignored Shirley's allegations. Mallard thinks the case illustrates both incompetence and unwarranted suspicion against advisors among regulators. "I worry that most advisors have neither the resources nor the tenacity [to defend themselves] if faced with a similar situation," he said. "They simply become roadkill on the regulatory highway."

Not surprisingly, Mallard is looking forward to the day the saga finally ends. "I'm going to go from 'who's who' to 'who's he' to 'who cares' in 18 months. Just another advisor, reasonably successful, but that's where I want to be." **AE**

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