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10/3/03
Date

2003 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1265

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2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1265

House Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date 1/27/03

| Tape Number | Side A | Side B | Meter # |
|---|--------|--------|----------|
| 3 | | x | 5.6-30.9 |
| | | | |
| | | | |
| Committee Clerk Signature <i>Julie Hammer</i> | | | |

Minutes: Chairman Kelser opened the hearing on HB 1265.

Rep. Frank Wald, District 37, introduced HB 1265 that allows for an insurance agent or broker to collect a service fee in addition or in lieu of a commission. This would be applicable in situations when a prospective client request a quote but then does not take the policy. He read the bill to the committee. This is based on a Minnesota statute.

Rep. Thorpe: If customer contacted several agents, would he have to pay that many fees?

Rep. Wald: This legislation provides a safeguard, it would not apply to personal lines of insurance, but for those policies in difficult to place markets. The agent would be required to advise a customer upfront about the fee prior to producing a quote.

Rep. Ekstrom: How would you determine a reasonable fee? Would it be based on hourly rate, time and expense, a flat fee?

Rep. Wald: It depends on the risk an agent would be working on.

Chairman Kelser: Insurance is a regulated industry, fees are prohibited.

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Page 2

House Industry, Business and Labor Committee

Bill/Resolution Number HB 1265

Hearing Date 1/27/03

Rep. Nottestad: Could a community of agents band together and decide to charge a fee for normal lines of insurance, what would stop them from doing so?

Rep. Wald: The Federal Trade Commission could accuse them of collusion

Rep. Kasper: How would this work? Does the fee agreement need to be in writing?

Rep. Wald: Yes, it could be by fax or e-mail. There's probably a template for this type of thing since other states already allow it.

Kent Olson, Director of the ND Professional Insurance Agents Association, testified in support of HB 1265. This is a business bill, competition will dictate, especially on personal lines of insurance. This will work in the following areas: consulting, reviewing coverages, loss control and inspections, advice on commercial, claims analysis, inspections and photos, employment, human services and risk management, bum checks, lapsed notices and rewrites.

The service fee must be rendered prior to point of sale and in writing.

Rep. Ekstrom: How often does someone pay a fee and not purchase insurance in Minnesota?

Olson: I don't have statistics from Minnesota. Virginia has had this for several years and agents are beginning to use it. This is an elective option, not a requirement for agents.

Rep. Thorpe: Won't I have to buy your insurance if I've already invested in a quote by paying a fee?

Olson: Quoting is not a source of revenue.

Severson: Won't this hurt rather than help insurance agencies?

Olson: There is a trend to adopt fee based legislation in addition to commissions.

Severson: Isn't that consulting?

Page 3

House Industry, Business and Labor Committee

Bill/Resolution Number HB 1265

Hearing Date 1/27/03

Olson: A consultant's license is a different license and doesn't result in commissions. That's a different issue.

Rep. Boe: Your testimony earlier today on other legislation that led us to believe that anything that would unfairly skew favoritism from one party (the insurance industry or the client) would be unfavorable in the industry. Wouldn't this do that same thing?

Olson: Two different issues. One is payment, the other is licensing. For the controlled business statute, fee income would be excellent for the elevator to charge for their services with a licensed agent, with proper licensing. It's being done now indirectly with free mapping.

Patrick Ward, representing the National Association of Independent Insurers, appeared in support of HB 1265 and offered a proposed amendment. This is meant to be a contract between the insurance agent and the customer. It has nothing to do with the insurance company.

As there was no one present to testify in opposition to HB 1265, the hearing was closed.

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 1265

House Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date January 28, 2003

| Tape Number | Side A | Side B | Meter # |
|---|--------|--------|----------|
| 3 | X | | 5468-end |
| 3 | | X | 310-740 |
| Committee Clerk Signature <i>Elizabeth R. Feier</i> | | | |

Minutes: **CHAIR KEISER:** Opened committee work on 1265.

REP. ZAISER: Bill allows insurance companies to charge fees for services.

Rep. Froseth moved to adopt amendment by Pat Ward. 2nd by Rep. Kasper.

Voice vote on amendment. Amendment is adopted.

REP. JOHNSON: Would this be opening the door for more fees? Chair Keiser said it would. If they want to proceed, he suggests they make this only on commercial policies and take out health, life, etc.

CHAIR KEISER: Wondered how an insurance agent can get a consultant license in addition to an agent. Kent Olson, Director of Professional insurance Agents of ND, discussed the statutes concerning the consultants license. You can get a consultants license as an agent producer or as a consultant surplus or limited broker. Most get a license as a licensed agent. You can not have both.

CHAIR KEISER: Closed committee work on HB 1265.

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1265

House Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date 1/29/03

| Tape Number | Side A | Side B | Meter # |
|--|--------|--------|----------|
| 2 | x | | 33.0-end |
| | | | |
| | | | |
| Committee Clerk Signature <i>Judith Hammer</i> | | | |

Minutes: Chairman Kelsner called for committee work on HB 1265.

Rep. Ekstrom moved a Do Not Pass. Rep. Klein seconded the motion.

Rep. Kasper: I move against the motion. Potential fees being charged for personal lines of insurance are a big concern to me. We could do a better job if we amended those items out and only allowed fees and commissions for commercial lines and group insurances. It's a full disclosure with the insurance representative and business owner or buyer, the document must be prepared and signed in advance. Willing buyer, willing seller, if the fee is disclosed not in lieu of commissions...why don't we want to do this if they both are in accord?

Rep. Ekstrom: In discussions with the Insurance Commissioner, we talked about creating a special consultant/insurance agent license so the two functions could operate simultaneously. I don't know how long that would take to figure out how to administer that. The other thing was the idea of a special class of business, not including life or car policies. That's reasonable.

Page 2

House Industry, Business and Labor Committee

Bill/Resolution Number HB 1265

Hearing Date 1/29/03

Rep. Ruby: Why create another type of licensure? Can't this be worked down to specify commercial lines and group policies?

Rep. Ekstrom: There is a consultants's license and an insurance agent's license and you can't be both.

Rep. Kasper: Under current statute, an insurance agent may act as a consultant on a limited basis with an advance signed agreement, like this bill allows, and if the consumer signs. Here's the catch: the agreement has to be submitted to the Insurance Department for their approval. This law modifies that so it doesn't have to go through to the Insurance Department for review.

Rep. Froseth: Didn't the people who testified on record state that the intentions of this bill is for special types of insurance: house movers or elevators etc.

Rep. Johnson: This could escalate and everyone will try to charge fees. I think we should limit the situations where this can be applied.

Chairman Keiser: There's no reason for this to be applied in health and life and homeowner's insurance. This has to be applied only in difficult proposals and in a hard market.

Rep. Ekstrom: In my own business, I go to great lengths to write package bids and don't always get the job. It's a cost of doing business.

Rep. Klein: Is this anti-consumer? It might have a negative impact.

Rep. Dosch: I'd like to see this amended to exclude home, health and auto policies.

Results of the roll call vote for a Do Not Pass were 4-10-0. The motion failed. **Rep. Zaiser, Rep.**

Tieman and Rep. Kaiser will draft suitable amendments so that HB 1265 can move out of committee..

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 1265

House Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date February 10, 2003

| Tape Number | Side A | Side B | Meter # |
|--|--------|--------|----------|
| 1 | X | | 2648-end |
| 1 | | X | 322-570 |
| Committee Clerk Signature <i>Elizabeth R. Fisher</i> | | | |

Minutes: Chair Kasper opened discussion on HB 1265

Rep. Kasper had two amendments. The amendment from Pat Ward was already passed.

Amendment #1 excludes certain lines of insurance to charge a fee. The 2nd amendment limits what can be charged. When asked which is better, Rep. Kasper said that the 2nd amendment is safer if new lines of credit come up in the future.

Rep. Zaiser supports the 2nd amendment because it clearly defines for what you can be charged.

Rep. Ekstrom opposes because she does like charging fees for anything in this capacity.

Rep. Kasper moved to adopt amendment #2. Seconded by Rep. Zaiser.

Rep. Thorpe: Agrees this makes a better bill.

Rep. Froese: This bill offers producers some comfort level.

Rep. Nottestad: Asked if people wouldn't bid if they charge a fee. Rep. Kasper said yes and that it occurs most where they want health insurance.

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10/3/03
Date

Page 2

House Industry, Business and Labor Committee

Bill/Resolution Number 1265

Hearing Date February 10, 2003

Rep. Zaiser noted that other professions are able to charge fees. This doesn't say it has to be done, but it enables the fees to be charged.

Rep. Ekstrom: Worried about the idea that people won't understand the scope of liabilities with a complex policy. This will open a door.

Rep. Severson: Resists this bill. An engineer pays for estimates. With insurance, you won't pay four fees for four bids. You take away the reality because you have to pay. This limits opportunities for businesses to get lost.

Rep. Boe: Sees this to be a narrow window and does not see how this will work.

Rep. Kasper moved to recommend DP as amended. Seconded by Rep. Ruby.

Rep. Kasper: Explained the current system in ND. If a company wants to get bids for health insurance, the insurance agents gathers bids and reports to the employer. The employer pays the fees and can do whatever they would like with the information. The employer can then go to one of the higher bids and see if they will lower their rates. The agent then gets paid nothing because the employer went to the company with the now lower rate.

Rep. Severson: Noted that eventually people will stop checking because they won't want to pay the fee.

Rep. Ruby: Sometimes his company has been used to keep someone else's bid lower. Just won't bid anymore. You won't have a place to go and compare. If he could have a fee for submitting a bid, then he would. People won't be interested in going through the work of getting a bid. They need to get something for the amount of work they go through.

Rep. Severson: Is it not part of doing business to put yourself where you pay people to get bids?

Rep. Ekstrom: Bids are the essence of competition. To charge a fee, you reduce competition.

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House Industry, Business and Labor Committee

Bill/Resolution Number 1265

Hearing Date February 10, 2003

Rep. Keiser: In all businesses, they can charge a fee. The bottom line is that businesses can and insurances cannot.

Froseth called question.

Vote: 8 Yes 6 No 0 Absent and not voting. Carrier: Zaiser.

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10/3/03
Date

Date: 1/29/03
Roll Call Vote #: 1

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1265

House Industry, Business & Labor Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Not Pass 4-10-0

Motion Made By Ekstrom Seconded By Klein

| Representatives | Yes | No | Representatives | Yes | No |
|--------------------------|-----|----|-----------------|-----|----|
| Chairman Kelser | | / | Rep.Boe | / | |
| Rep.Severson, Vice-Chair | / | | Rep.Ekstrom | / | |
| Rep.Dosch | | / | Rep.Thorpe | | / |
| Rep. Froseth | | / | Rep. Zaiser | | / |
| Rep. Johnson | | / | | | |
| Rep.Kasper | | / | | | |
| Rep. Klein | / | | | | |
| Rep. Nottlestad | | / | | | |
| Rep. Ruby | | / | | | |
| Rep.Tieman | | / | | | |
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Total (Yes) 4 No 10

Absent 0

Floor Assignment Zaiser

If the vote is on an amendment, briefly indicate intent:

looking for amendment
committee wk

Motion failed
Accepted Amendment

30511.0101
Title.

Prepared by the Legislative Council staff for
Representative Kasper
February 3, 2003

#1

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1265

Page 1, line 7, replace "the solicitation, negotiation" with "soliciting, negotiating"

Page 1, line 8, remove "insurance" and replace "unless" with "for personal lines of insurance, including long-term care insurance, health insurance, disability insurance, automobile insurance, and property and casualty insurance. An insurance producer may charge a fee for a service rendered in connection with soliciting, negotiating, or servicing of bonds, a group health insurance contract, group life insurance contract, or commercial insurance contract if"

Page 1, line 9, replace "unless" with "if"

Page 1, line 11, remove "and" and after "commission" insert ", and that the insurer is not responsible for any part of the fees and does not receive any portion of the fees"

Renumber accordingly

30511.0102
Title.0200

Prepared by the Legislative Council staff for
Representative Kasper
February 3, 2003

VR
2/10/03

HOUSE AMENDMENTS TO HOUSE BILL NO. 1265 IBL 2-10-03

Page 1, line 6, replace "An" with "Except as otherwise provided under this section, an"

Page 1, line 8, replace "unless" with ". An insurance producer may charge a fee for a service rendered in connection with soliciting, negotiating, or servicing of bonds, a group health insurance contract, group life insurance contract, or commercial insurance contract if"

Page 1, line 9, replace "unless" with "if"

Page 1, line 11, remove "and" and after "commission" insert ", and that the insurer is not responsible for any part of the fees and does not receive any portion of the fees"

Renumber accordingly

Attachment 2
1/27/03

PROPOSED AMENDMENTS TO HB 1265

Line 11

Overstrike "and"

Replace period with a comma

Add, "and the insurer is not responsible for any part of the fees and does not receive any portion of the fees."

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Date

Date: 2/ /03
Roll Call Vote #: }

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1265

House INDUSTRY BUSINESS & LABOR Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Amendment #2

Motion Made By Kasper Seconded By Zaiser

| Representatives | Yes | No | Representatives | Yes | No |
|---------------------|-----|----|-----------------|-----|----|
| Chairman Keiser | ✓ | | Boe | ✓ | |
| Vice-Chair Severson | ✓ | | Ekstrom | ✓ | |
| Dosch | ✓ | | Thorpe | ✓ | |
| Froseth | ✓ | | Zaiser | ✓ | |
| Johnson | ✓ | | | | |
| Kasper | ✓ | | | | |
| Klein | ✓ | | | | |
| Nottestad | ✓ | | | | |
| Ruby | ✓ | | | | |
| Tieman | ✓ | | | | |
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Total (Yes) 14 No 0

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

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Date

Date: 2/10/03
Roll Call Vote #: 2

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1265

House INDUSTRY BUSINESS & LABOR Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 30511.0102 / .0200

Action Taken DP as amended

Motion Made By Kasper Seconded By Ruby

| Representatives | Yes | No | Representatives | Yes | No |
|---------------------|-----|----|-----------------|-----|----|
| Chairman Keiser | ✓ | | Boe | | ✓ |
| Vice-Chair Severson | | ✓ | Ekstrom | | ✓ |
| Dosch | ✓ | | Thorpe | | ✓ |
| Froseth | ✓ | | Zaiser | ✓ | |
| Johnson | | ✓ | | | |
| Kasper | ✓ | | | | |
| Klein | | ✓ | | | |
| Nottestad | ✓ | | | | |
| Ruby | ✓ | | | | |
| Tieman | ✓ | | | | |
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Total (Yes) 8 No 6

Absent _____

Floor Assignment Kasper Zaiser

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
February 10, 2003 4:37 p.m.

Module No: HR-25-2198
Carrier: Zaiser
Insert LC: 30511.0102 Title: .0200

REPORT OF STANDING COMMITTEE

HB 1265: Industry, Business and Labor Committee (Rep. Kelsor, Chairman)
recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends
DO PASS (8 YEAS, 6 NAYS, 0 ABSENT AND NOT VOTING). HB 1265 was placed
on the Sixth order on the calendar.

Page 1, line 6, replace "An" with "Except as otherwise provided under this section, an"

Page 1, line 8, replace "unless" with ". An insurance producer may charge a fee for a service
rendered in connection with soliciting, negotiating, or servicing of bonds, a group health
insurance contract, group life insurance contract, or commercial insurance contract if"

Page 1, line 9, replace "unless" with "if"

Page 1, line 11, remove "and" and after "commission" insert ", and that the insurer is not
responsible for any part of the fees and does not receive any portion of the fees"

Renumber accordingly

(2) DESK, (3) COMM

Page No. 1

HR-25-2198

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2003 TESTIMONY

HB 1265

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10/3/03
Date

**INFORMATION RELATING TO
HB 1265
SUBMITTED BY
TERRY WEIS
HEARD January 27, 2003
By
HOUSE INDUSTRY, BUSINESS AND LABOR COMMITTEE
George Keiser Chairman**

I am sorry that I did not have this information ready for the hearing. I have been out of town on business and following my son Zac with the Bismarck High Wrestling team. I also thought that the Insurance Department would weigh in on this matter.

This bill would open up the flood gates for agents to charge any fee they choose, including services they presently are paid to do for the client through commissions and service fees. Examples below:

1. Charge for changing a Beneficiary on a life insurance policy.
2. Charge for changing an address on each policy you might have.
3. Charge for giving a quote on any type of insurance that the agent may sell.
4. Charge for helping Senior Citizens with any Medicare Insurance claim.
5. Charge for renewing any coverage.
6. Charge for contacting the Insurance Company for the insured.
7. Charge for reviewing and comparing Insurance Companies.

This bill is anti-consumer, and will have a negative impact on our relations with the general public in light of the declining number of insurance companies that operate in this state and the increase in premiums. We should not put up another hurdle for the homeowner to consider and plan for in this market place.

The concept of getting paid a commission and charging a fee recommending a product, as referred to in the Attorney General's opinion as well as the Insurance Department letter, would create a conflict of interest potential.

Tom Smith, former Insurance Department Attorney drafted the present code that was effective September 1, 1983. Tom was adamant that agents who are paid commission should not be paid for recommendations to buy their own products.

I would urge you to send HB 1265 out of this committee with a DO NOT PASS

Zac Costa Rickford
Operator's Signature

10/3/03
Date



Glenn Pomeroy
Commissioner of Insurance

DEPARTMENT OF INSURANCE
STATE OF NORTH DAKOTA

HB1245

FAX

January 13, 1997

Mr. Terry Weis, LUTCF, RHU
State Legislation Committee Chair
North Dakota Life Underwriters
P.O. Box 5010
Bismarck, ND 58502-5010

Dear Mr. Weis:

This letter is written in response to both your letter addressed to Commissioner Pomeroy dated December 10, 1996, and our follow-up meeting on December 19, 1996, with you and other members of the Life Underwriters Ad Hoc Committee regarding several issues involved with insurance agents acting as insurance consultants and collecting a fee therefor. First, I would like to address this topic generally and provide a basis for specific answers to your questions which are presented later.

The legal authority for the Department's position is based on statutory and administrative rule provisions within the insurance code and on general agent and principal law. Under N.D.C.C. § 26.1-26-02(2) an "insurance agent" is defined as:

[A]n individual, partnership, corporation, or limited liability company appointed by an insurer to solicit applications for an insurance policy or to negotiate a policy on its behalf. (emphasis added)

N.D.C.C. § 26.1-26-06 states:

Every insurance agent or limited insurance representative who solicits or negotiates an application for insurance of any kind is, in any controversy between the insured or the insured's beneficiary and the insurer, regarded as representing the insurer and not the

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Consumer Hotline: 1-800-247-0560
Relay North Dakota 1-800-366-6888 (TTY)

La Costa Rickford
Operator's Signature

10/3/03
Date

Mr. Terry Weis, LUTCF, RHU
January 13, 1997
Page Two

insured or the insured's beneficiary. This section does not affect the apparent authority of an agent.

These provisions clearly state that the insurance agent acts on behalf of the insurance company, not on behalf of the client, policyholder, or prospective policyholder. Additionally, other provisions of the insurance laws and North Dakota case law support the idea that an insurance agent acts on behalf of the principal, i.e., the insurance company, and owes a fiduciary obligation to that insurance company, as opposed to being held to such a standard or duty to the agent's clients. Of course, we expect and acknowledge that in most cases insurance agents treat their clients with all the professionalism, integrity, and loyalty that is due without breaching any fiduciary obligation they owe to the insurance company or companies with whom they are appointed. That practice, however, does not change the obligation owed to the insurance company.

Under N.D.C.C. § 26.1-26-02(4), an "insurance consultant" is defined as:

[A]n individual, partnership, corporation, or limited liability company that, for a fee, holds oneself or itself out to the public as engaged in the business of offering any advice, counsel, opinion, or service with respect to the benefits, advantages, or disadvantages promised under any insurance policy that could be issued in this state.

N.D.C.C. § 26.1-26-35 states:

An insurance consultant shall serve with objectivity and complete loyalty the interests of the consultant's client alone and to render the client such information, counsel, and service as within the knowledge, understanding, and opinion, in good faith of the licensee, best serves the client's insurance needs and interests. Before rendering any service set forth in subsection 4 of section 26.1-26-02, an insurance consultant shall prepare a written agreement on a form approved by the commissioner. The agreement must outline the nature of the work to be performed by the consultant and must state the fee for the work. The consultant and the client shall sign the agreement. The consultant shall retain a copy of the agreement for not less than two years after completion of the services. This copy must be available to the commissioner. (emphasis added)

La Costa Rickford
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Date

Mr. Terry Wels, LUTCF, RHU
January 13, 1997
Page Three

N.D.C.C. § 26.1-26-41 states:

No licensed consultant may employ, be employed by, or be in partnership or in a limited liability company with nor receive any remuneration whatsoever from any licensed insurance agent, insurance broker, limited insurance representative, surplus lines insurance broker, or insurer arising out of activities as a consultant. No person may concurrently hold a consultant's license and a license as an insurance agent, insurance broker, limited insurance representative, or surplus lines insurance broker in any line.

Under N.D.C.C. §§ 26.1-26-35 and 26.1-26-41, it is clear that North Dakota law recognizes the inherent conflict of interest in one person serving a client both as a paid consultant and as an agent who has a financial incentive, either directly or indirectly, to sell products to that client. The law recognizes that the same person simply cannot serve both interests equally and, therefore, the law does not allow it.

An exception to the requirement to be licensed as a consultant is provided for insurance agents at N.D.C.C. § 26.1-26-10(2) which states:

No license as an insurance consultant is required of:

...

2. A licensed insurance agent, insurance broker, or surplus lines insurance broker.

As we indicated to you, we do not believe the intention of that provision is to allow an insurance agent to act as a consultant and collect a fee for doing so, or to also collect a commission. We believe the intention of that provision is to except from the licensure requirement certain professions which may in their normal course of business perform similar kinds of services in advising clients to those of an insurance consultant and who are otherwise compensated for those services through salary, fees, or commissions. Reading all of these laws together, it is clear that the law recognizes the inherent conflict in allowing the same person to collect a fee for consulting services and an agency commission relative to the same client.

The issues you raise obviously came up some time ago and in part resulted in the adoption of N.D. Admin. Code § 45-02-02-10 which states:

La Costa Rickford
Operator's signature

10/3/03
Date

Mr. Terry Wels, LUTCF, RHU
January 13, 1997
Page Four

Although duly licensed insurance agents, insurance brokers, or surplus lines insurance brokers are exempt from licensing as consultants and are specifically prohibited from concurrently holding a consultant's license and a license as an insurance agent, or an insurance broker, or surplus lines insurance broker in any line, duly licensed insurance agents, insurance brokers, or surplus lines insurance brokers may perform consulting services in the ordinary course of their businesses. However, if duly licensed insurance agents, insurance brokers, or surplus lines insurance brokers charge a fee, or receive any type of remuneration, for rendering such consulting service, they shall comply with the provisions and requirements of a consultant's agreement set forth in section 45-02-02-09.

This provision appears to be the result of a liberal interpretation of all of the statutes cited above, but one that is at least arguable under the present statutory provisions. This provision of the Administrative Code recognizes that there may be times when an insurance agent may better serve his or her client in certain situations by entering into a contractual relationship with the client to provide consulting services for a fee. Though the rule is silent relative to the concurrent receipt of a commission for the sale of a product to that same client, it has consistently been the Department's position that such a financial incentive creates such an inherent conflict of interest for that agent that it simply must be prohibited, and in fact it is our position that is precisely the intention of all of the laws that are cited previously in this letter.

Now I will try to address your questions in the order you have presented them.

You asked in Question No. 1 whether it was possible for an agent to receive commission from the same client for the same line of insurance for which insurance consulting services were performed. It is and has been the Department's position that it is not permissible for an agent to receive both a fee for consulting services and also a commission for any product sold to that client. You also asked within that same question whether it was possible for the agent to receive a commission for a policy on the same client but for a different line of insurance than that covered by the Consulting Agreement. Though it may not make a difference, we are assuming under this scenario the lines you are inquiring about are other related lines of insurance, i.e., annuity/life or accident/health insurance products. Based on that assumption, such a practice would not be permitted, as it appears to be that the client could be detrimentally affected by the inherent conflict of interest present in this arrangement.

Question No. 2 refers to a client paying an agent for services previously performed. Specifically, the question asked if the Department feels that it would be inappropriate under the current statute for an agent to accept such an offer from a client, and further does the Department feel that there

La Costa Rickford
Operator's Signature

10/2/03
Date

Mr. Terry Weis, LUTCF, RHU

January 13, 1997

Page Five

should be any change in this and allow qualified purchasers to make the decision of fees after part of the services have already been rendered. The answer is yes, we believe it would be not only inappropriate but unlawful. As we indicated to you, we do not feel there should be any change to the existing laws to allow such an arrangement to take place. Under current law, acting without a Consulting Agreement in place, whether by a licensed consultant or licensed agent, is prohibited. Those provisions are based largely on the necessity of providing adequate disclosure and protections to the client or prospective client and, therefore, the Department feels that any change in the law to allow this practice may give rise to potential abuse by the agent. Further, it is the Department's opinion that the purpose of commissions and their design is such that agents are adequately and fairly compensated for their effort when a sale is made and for those times when a sale is not completed.

Question No. 3 refers to expiration dates for Consulting Agreements and whether or not the agreements are ongoing or should be renewed after any set time. The answer to this question will vary with each specific consulting arrangement depending upon the terms of the contract and the future needs of the client. We would be happy to discuss specific fact scenarios with you to give you some guidance.

In answer to Question No. 4, yes, the Department does believe that there are types of fees used in the insurance business other than consulting fees. Common terms for these are service fees and policy fees, and perhaps there are others. These types of fees are allowable under North Dakota law so long as the fee is reasonable, subject to premium tax, and filed and approved with the rates as part of the premium.

Finally, Question No. 5 asks whether the Department is willing to consider changing or clarifying the language of the model Consulting Agreement. As always, the Department is willing to consider any suggested changes that could help eliminate any confusion that may exist.

I trust that I have answered all of the questions presented in your letter of December 10, 1996, and our subsequent meeting. However, if you or other members of the committee have any additional questions or would like further clarification on this matter, please do not hesitate to either contact Laurie Wolf or myself.

Sincerely,



Trent C. Heinemeyer

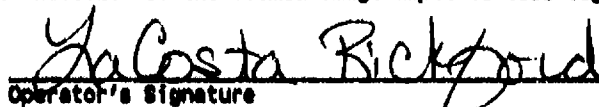
Deputy Commissioner and General Counsel

N.D. Insurance Department

TCH/njb

cc: Glenn Pomeroy

Laurie A. Wolf


Operator's Signature

10/3/03
Date



Heidi Heitkamp
ATTORNEY GENERAL

STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL

STATE CAPITOL
600 E BOULEVARD AVE
BISMARCK ND 58505-0040
(701) 328-2210 FAX (701) 328-2228

HB1265

February 26, 1999

Honorable Rich Wardner
State Senator
Senate Chambers
600 East Boulevard Avenue
Bismarck, ND 58505

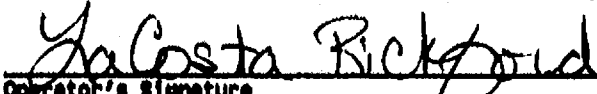
Dear Senator Wardner:

Enclosed is the Attorney General's opinion which you requested from my office.

Sincerely,


Heidi Heitkamp
Attorney General

pg
Enclosure


Operator's signature

10/3/03
Date

STATE OF NORTH DAKOTA
ATTORNEY GENERAL'S OPINION 99-03

Date issued: February 26, 1999

Requested by: Senator Rich Wardner

- QUESTIONS PRESENTED -

I.

Whether an insurance agent acting concurrently as an insurance consultant and agent may collect both a fee for the consulting services rendered to a client and a commission for any insurance product sold to that same client.

II.

Whether an insurance agent acting as an insurance consultant for a client in one line of insurance may collect a fee for that consultation and collect a commission for an insurance product sold while acting as an insurance agent in another line of insurance.

III.

If there is a prohibition against an agent receiving remuneration for both the sale of an insurance product and the provision of insurance consulting services, whether a break in time between the two transactions would remove that prohibition.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that an insurance agent acting concurrently as an insurance consultant and agent may not receive both a commission and a fee for services rendered to the same client.

II.

It is my opinion that an insurance agent acting as a consultant for a client in one line of insurance may not collect a fee for that consultation and a commission for an insurance product sold at or about the same time while acting as an insurance agent in another line of insurance.

III.

It is my opinion that a break in time between an insurance agent's provision of insurance agent services and insurance consultant services does not remove the prohibition against receiving remuneration for the provision of both types of services for the same or related lines of insurance to the same client. However, it is my further opinion that if a reasonably sufficient amount of time has passed between an insurance agent's provision of insurance agent services and insurance consultant's services, the prohibition against receiving remuneration for the provision of both types of services for unrelated lines of insurance to the same client no longer exists.

- ANALYSES -

I.

N.D.C.C. § 26.1-26-02(2) defines an insurance agent as "an individual, partnership, corporation, or limited liability company appointed by an insurer to solicit applications for an insurance policy or to negotiate a policy on its behalf." N.D.C.C. § 26.1-26-02(4) defines an insurance consultant as:

(A)n individual, partnership, corporation, or limited liability company that, for a fee, holds oneself or itself out to the public as engaged in the business of offering any advice, counsel, opinion, or service with respect to the benefits, advantages, or disadvantages promised under any insurance policy that could be issued in this state.

N.D.C.C. § 26.1-26-10(2) exempts an individual licensed as an insurance agent, broker or surplus lines broker from licensing as an insurance consultant. However, no person may concurrently hold both a consultant's license and a license as an insurance agent, broker or surplus lines broker. N.D.C.C. § 26.1-26-41.

The duty of an insurance consultant is explained in N.D.C.C. § 26.1-26-35. It states:

An insurance consultant shall serve with objectivity and complete loyalty the interests of the consultant's client alone and to render the client such information, counsel, and service as within the knowledge, understanding, and opinion, in good faith of the licensee, best serves the client's insurance needs and interests.

ATTORNEY GENERAL'S OPINION 99-03

February 26, 1999

Page 3

Id. (emphasis added). In contrast, an insurance agent's duty is toward the insurance company and stems from the agency relationship with that company. See Rawlings v. Fruhwirth, 455 N.W.2d 574, 576 (N.D. 1990). An insurance agent's duty includes the obligation to deal with the agent's principal in good faith and to carry out instructions. See id. N.D.C.C. § 26.1-26-06 further describes that duty by stating that in any controversy between an insured and an insurer, the agent represents the insurer and not the insured.

Nonetheless, while an insurance agent represents the insurer, the agent may in some situations owe a duty to the insured and may be held to higher standards of care than required of an ordinary agent.

[W]here an agent . . . holds himself out as a consultant and counselor, he does have a duty to advise the insured as to his insurance needs, particularly where such needs have been brought to the agent's attention. And in so doing, he may be held to a higher standard of care than that required of the ordinary agent since he is acting as a specialist.

16A J. Appelman, Insurance Law and Practice § 8836, at 64-66 (rev. ed. 1981) (footnotes omitted) (cited in Rawlings v. Fruhwirth, 455 N.W.2d 574, 576-577 (N.D. 1990)).

The difference in duties between an agent and a consultant may create a conflict of interest due to the same individual acting in dual capacities in the same transaction with the same client. A consultant's duties require complete loyalty to the client, while an agent's duties require loyalty to the principal. A person acting concurrently as a consultant and an agent could not fulfill the inherently conflicting duties of those two positions. That inherent conflict is reflected in N.D.C.C. § 26.1-26-41, which prohibits a person from concurrently holding a consultant's license and an insurance agent license in any line of insurance. N.D.C.C. § 26.1-26-41 further prohibits a licensed consultant from receiving any remuneration from any licensed insurance agent, insurance broker, surplus lines broker, or insurer arising out of activities as a consultant.

N.D.C.C. § 26.1-26-10(2) exempts an individual licensed as an insurance agent, broker or surplus lines broker from licensing as an insurance consultant. This section exempts from the licensure requirement certain professions which may in their normal course of business perform services similar to those of a consultant in advising clients and who are typically otherwise compensated for those services.

through salary, fees, or commissions. This section is silent¹ on whether an agent may act as a consultant and collect both a fee and a commission for the agent's dual role in the same transaction.

However, N.D.C.C. § 26.1-26-41 prohibits a licensed insurance agent from concurrently holding a license as an insurance consultant. Furthermore, N.D.C.C. § 26.1-26-35 requires a consultant to give complete loyalty to the consultant's client. Thus, there arguably is an inconsistency between N.D.C.C. §§ 26.1-26-41 and 26.1-26-35, which prohibit the concurrent holding of licenses as an insurance agent and an insurance consultant and require complete loyalty by a consultant to the consultant's client, respectively, and N.D.C.C. § 26.1-26-10, which exempts a licensed insurance agent from the insurance consultant licensure requirement. Nonetheless, this apparent inconsistency is not irreconcilable based on ordinary rules of statutory construction and the conflict of interest analysis mentioned above. *Pari materia* statutory provisions which conflict must be reconciled, if possible. State ex rel. Olson v. Bakken, 329 N.W.2d 575, 578 (N.D. 1983). To give effect to N.D.C.C. §§ 26.1-26-41, 26.1-26-35, and 26.1-26-10(2), the statutes must be read to prohibit the concurrent receipt of a commission for the sale of an insurance product to the same client in which the consulting services were rendered and a fee received for the consulting services. To permit an agent to collect both a fee and a commission in the same transaction would create conflicting financial incentives for the individual working in such a capacity. Such conflicting incentives could create a conflict of interest for the insurance agent acting as an insurance consultant, and would detract from the complete loyalty owed by the consultant to the consultant's client.

N.D. Admin. Code § 45-02-02-10 was implemented to further help reconcile or harmonize the statutes. N.D. Admin. Code § 45-02-02-10 states:

Although duly licensed insurance agents, insurance brokers, or surplus lines insurance brokers are exempt from licensing as consultants and are specifically prohibited from concurrently holding a consultant's license and a license as an insurance agent, or an insurance broker, or surplus lines insurance broker in any line, duly licensed insurance agents, insurance brokers, or surplus lines insurance brokers may perform consulting services in the

¹ In construing a statute, more cannot be read into the statute than the actual language supports. See, e.g., *City of Dickinson v. Thress*, 290 N.W. 653, 657 (N.D. 1940) ("It must be presumed that the Legislature intended all that it said, and that it said all that it intended to say.").

ordinary course of their businesses. However, if duly licensed insurance agents, insurance brokers, or surplus lines insurance brokers charge a fee, or receive any type of remuneration, for rendering such consulting service, they shall comply with the provisions and requirements of a consultant's agreement set forth in section 45-02-02-09.²

Thus, when read together, N.D.C.C. §§ 26.1-26-10(2), 26.1-26-35 and 26.1-26-41 and N.D. Admin. Code § 45-02-02-10 do not allow an individual to act in a dual capacity as an insurance agent and insurance consultant and receive concurrent remuneration for both roles from the same client because of the inherent conflict of interest. Therefore, it is my opinion that these provisions, coupled with the underlying conflict of interest potentially present with an insurance agent acting in dual capacity as an insurance consultant, prohibit that agent from accepting both a fee and a commission for services rendered to that same client.

II.

N.D.C.C. § 26.1-26-41 states "[n]o person may concurrently hold a consultant's license and a license as an insurance agent, insurance broker, limited insurance representative, or surplus lines insurance broker in any line." Id. (emphasis added).

Words in a statute are to be understood in their ordinary sense. N.D.C.C. § 1-02-02. "Any," used in the context of a statute, ordinarily "means 'all' or 'every' and suggests a broad and expansive meaning." Christianson v. City of Bismarck, 476 N.W.2d 688, 690 (N.D. 1991).

By employing the broad term "any" in N.D.C.C. § 26.1-26-41, the apparent intent of this statute is to prohibit an individual from providing services in a dual capacity as both agent and consultant for the same client in every line of insurance. This would include providing services and receiving compensation as consultant in one line of insurance and providing services and receiving commission as an agent in another line of insurance.

Further, acting as a consultant in one line of insurance and providing services as an agent in another line of insurance at or about the same

² Although N.D.C.C. § 26.1-26-41 prohibits a licensed insurance agent from holding a consultant's license, N.D.C.C. § 26.1-26-35 and N.D. Admin. Code § 45-02-02-09 allow a licensed insurance agent to provide consulting advice and receive a fee for that advice should the agent file and receive department approval for the use of an insurance consultant agreement pursuant to these statutes.

time does not necessarily eliminate the conflict of interest concerns mentioned above' and, in any event, creates the further possibility of a likelihood of confusion of roles of the agent acting as a consultant. It may not be apparent to the insured that the same individual who as a consultant is acting solely in the insured's best interests as to one line at the same time is acting in the interests of an insurance company, and not the insured's, on another insurance matter and may therefore put undue reliance on the agent's statements or representations about the other insurance line being offered to the insured. Therefore, it is my opinion that the term "any" used to modify "line" in N.D.C.C. § 26.1-26-41 coupled with the existence of possible conflicts of interest and the likelihood of role confusion prohibit an individual from acting in a dual capacity as both insurance agent and insurance consultant at or about the same time and receiving remuneration in each capacity, even when the agent and consultant capacities relate to different lines of insurance.

III.

The duty of loyalty to the client and the inherent conflict of interest principles stated above, which furnish the basis for N.D.C.C. §§ 26.1-26-35 and 26.1-26-41, contemplate that an agent may not collect both a fee and a commission from the same client for the same or a related line of insurance whether in the same transaction or not. The statutes appear to intend that this principle be absolute since the underlying reasons for this principle do not really depend on the passage of time. N.D.C.C. § 26.1-26-41 is silent regarding a time limit for remuneration simply because the statute does not appear to intend that an agent acting as a consultant receive compensation for acting as both an agent and consultant for the same client. However, statutes must be construed reasonably. In enacting a statute, it is presumed that the entire statute is intended to be effective and a just and reasonable result is intended. N.D.C.C. § 1-02-38(2) and (3). Further, the law does not require idle acts and every word and phrase of a statute is intended to have meaning. E.g., Ridl v. E.P. Operating Ltd. Partner, 553 N.W.2d 784, 787 (N.D. 1996).

N.D.C.C. § 26.1-26-10(2) implicitly permits a licensed insurance agent to act as a consultant without obtaining a consultant's license. It would be unreasonable to construe the provisions of N.D.C.C. ch.

³ An example of a possible conflict of interest is where an agent licensed in related lines of insurance, for example, life and annuity, acting as a consultant advises a client to purchase a life policy instead of an annuity. Although the purchase of an annuity may be in the best interests of the client, the consultant suggests that the client purchase the life policy because the consultant would be able to earn a higher commission on the life policy than the annuity.

ATTORNEY GENERAL'S OPINION 99-03
February 26, 1999
Page 7

26.1-26 to prohibit an insurance agent from ever receiving a commission for the sale of a totally unrelated line of insurance just because the agent previously acted as a consultant with regard to the same client. For example, if a licensed agent acted as a consultant with regard to life insurance for an individual and then ten years later the individual came in and sought to purchase a totally unrelated line of insurance like hail insurance, it would be an unreasonable result to construe the statutes as indefinitely continuing the prohibition when there is no realistic possibility of a conflict of interest or confusion of the roles of the agent by the insured. Particularly as to unrelated lines of insurance, at some point in time the possibility of a conflict of interest or confusion about the roles of the agent acting as a consultant becomes so attenuated as to render the prohibition of receiving both a commission and a fee meaningless. When the reason for the prohibition disappears, so should the prohibition. See N.D.C.C. § 1-02-38.

Consequently, it is my opinion that a break in time between an insurance agent's provision of insurance agent services and insurance consultant services does not remove the prohibition against receiving remuneration for the provision of both types of services for the same or related lines of insurance to the same client. However, it is my further opinion that if a reasonably sufficient amount of time has passed between an insurance agent's provision of insurance agent services and insurance consultant's services, the prohibition against receiving remuneration for the provision of both types of services for unrelated lines of insurance to the same client no longer exists.

- EFFECT -

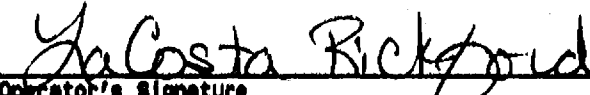
This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.


Heidi Heitkamp
Attorney General

Assisted by: Scott A. Miller
Assistant Attorney General

John J. Fox
Assistant Attorney General

pg


Operator's Signature

10/3/03
Date

HB1265

INSURANCE CONSULTATION AGREEMENT

Agreement made _____ between
(Date)

(Name) ("Client") and

(Name) ("Consultant").

THE PARTIES AGREE AS FOLLOWS:

1. CONSULTANT'S DUTIES

1.1 EVALUATE

The consultant shall evaluate the client's insurance program after review of the client's insurance program and needs. The consultant shall base evaluation on the needs of the client and the benefits, advantages, and disadvantages of the client's insurance program. The consultant shall render advice, counsel, opinion, or service to the client after proper evaluation of the client's insurance program and needs.

1.2 REPORT

The consultant shall prepare a final written report of the consultant's evaluation. The report must incorporate the consultant's advice, counsel, and opinion of the client's insurance program and needs. The consultant shall sign and deliver the original final report to the client. The consultant shall retain, for a minimum of two years, a copy of the final report. The report must be available to the Commissioner of Insurance upon request.

1.3 RECORD

The consultant shall retain, for a minimum of two years, a complete history of services, information, records, and reports used in connection with the interests of the client. The consultant shall treat all information concerning the client, the client's insurance program, and the client's needs as confidential. The consultant shall use all information concerning the client, the client's insurance program, and the client's needs only for advancement of the client's interests. The consultant shall make all reports, records, evaluations, history, and other information available at any time for the client's inspection.

1.4 LICENSURE

The consultant shall hold a valid North Dakota insurance consultant license.

License No. _____

OR

The consultant shall hold a valid North Dakota license as one of the following:

Attorney
Insurance Agent
Insurance Broker
Trust Officer
Actuary
Certified Public Accountant

License No. _____
Expiration Date (if applicable) _____

(See N.D.C.C. § 26.1-26-10.)

The consultant is prohibited from concurrently holding a consultant's license and a license as an insurance agent or an insurance broker or surplus lines insurance broker. (See N.D.C.C. § 26.1-26-41 and N.D. Admin. Code § 45-02-02-10.)

1.5 STANDARD

The consultant shall serve with objectivity and complete loyalty the interests of the consultant's client alone and to render the client such information, counsel, and service as within the knowledge, understanding, and opinion, in good faith of the licensee, best serves the client's insurance needs and interests. (See N.D.C.C. § 26.1-26-35.)

2. CLIENT'S DUTIES

2.1 COMPENSATION

The client shall pay the consultant _____
(Amount)
hourly/daily/monthly.

2.2 COOPERATION

The client shall submit to the consultant all records, information, and policies of insurance necessary to properly evaluate the client's insurance program and needs.

Signed _____
(Date)

Client _____

Client's Address: _____

Consultant _____

Consultant's Address: _____

