

EXHIBIT #6

OFFICE OF THE COMMISSIONER OF INSURANCE

STATE OF WISCONSIN

In the Matter of

Timothy P. Barry,
Respondent.

PROPOSED DECISION

Case No. 07-C31082

Anne Debevoise Ostby, Administrative Law Judge, presiding.

APPEARANCES

For the Office of the
Commissioner of Insurance:

James Harris, Attorney
125 South Webster Street
Madison, WI 53702

For the Respondent:

Timothy P. Barry
648 White Birch Ct.
Appleton, WI 54915

PRELIMINARY

Pursuant to a Notice of Hearing dated July 7, 2008, a prehearing conference was held on July 29, 2008 and a prehearing conference memorandum was issued that day.¹

On August 13, 2008, OCI filed a motion for partial summary judgment based on Respondent's answer to the notice of hearing. To support the motion, OCI filed the affidavit of Kevin Zwart with attached documents. Although given notice and an opportunity to respond, Respondent failed to file a response to OCI's motion or appear at the motion hearing. On September 5, 2008, the ALJ granted the motion for partial summary judgment finding that Respondent had violated ss. Ins. 6.57(6), 6.66(3), 6.60(2), and 6.61(16), Wis. Adm. Code. The findings and conclusions contained in the Order granting OCI's Motion for Partial Summary Judgment are incorporated by reference and adopted in support of the Proposed Order.

Pursuant to the Notice of Hearing and the Prehearing Conference Memorandum, a hearing was held on September 11, 2008. Having had no

¹ The prehearing conference memorandum was dated "August" instead of "July" in error.

communication from Respondent and after waiting for 5 minutes past the scheduled time to begin, the ALJ allowed the hearing to commence. OCI asked to confirm that the ALJ would take notice of the partial summary judgment order she had issued on September 5, 2008. The ALJ indicated she intended to do so. OCI requested a finding that by failing to appear, Respondent was in default. The ALJ granted the motion. Subsequently, OCI called Kevin Zwart, an OCI insurance examiner, to provide foundation for the exhibits OCI felt necessary for a full consideration of the issues. Around 10:30, approximately 5 minutes into the testimony of OCI's second witness, Respondent appeared. Respondent was informed of what had taken place and agreed that the hearing should continue.

The record includes the partial summary judgment order dated September 5, 2008, the recording of the hearing and Exhibits 1; 1-A; 2; 2-B; 3; 4; 5; 7; 7B; 8; 9; 10; 11; 12; 13; and 14.

APPLICABLE LAW

Wisconsin Statutes:

Section 628.10(2)(b) *For Other Reasons*. Except as provided in pars. (c) to (d), after a hearing, the commissioner may revoke, suspend or limit in whole or in part the license of any intermediary if the commissioner finds that the licensee is unqualified as an intermediary, is not of good character or has repeatedly or knowingly violated an insurance statute or rule or a valid order of the commissioner under s. 601.41(4), or if the intermediary's methods and practices in the conduct of business endanger, or financial resources are inadequate to safeguard, the legitimate interests of customers and the public. Nothing in this paragraph limits the authority of the commissioner to suspend summarily an intermediary's license under s. 227.51(3).

Section 628.34 (1) MISREPRESENTATION. (a) *Conduct Forbidden*. No person who is or should be licensed under chs. 600 to 646, no employee or agent of any such person, no person whose primary interest is a competitor of a person licensed under chs. 600 to 646, and no person on behalf of any of the foregoing persons may make or cause to be made any communication relating to an insurance contract, the insurance business, any insurer or any intermediary which contains false or misleading information, including information misleading because of incompleteness. Filing a report and, with intent to deceive a person examining it, making a false entry in a record or willfully refraining from making a proper entry, are "communications" within the meaning of this paragraph. No intermediary or insurer may use any business name, slogan, emblem or related device that is misleading or likely to cause the intermediary or insurer to be mistaken for another insurer or intermediary already in business.

(6) Gary met Respondent through an elderly uncle to whom Respondent had sold Metropolitan Life (Met Life) products. In May 1996, Respondent's sold a Met Life variable annuity, policy # 073 061 259 AB (Met Life annuity "259") to Gary. The premium was a gift from Gary's uncle and aunt. Respondent received a commission of \$800.21. (Ex.4).

(7) Respondent told the Evensons that he did estate planning and financial planning. Gary and Respondent discussed Gary's desire plan to retire at age fifty-five. Gary had money in certificates of deposit. He gave Respondent the policies he had to review. Respondent told Gary that he could earn more interest investing in the products Respondent offered. Respondent made a list of all the Evensons' certificates of deposit and moved the accounts as the certificates matured.

(8) Respondent acted as Gary and Mary's financial advisor. They depended on him to take care of their money for retirement and trusted him with their financial future. He knew that they trusted and relied on him. He initiated the transactions in their accounts. He handled Gary's 401(k) plan. They accepted at face value Respondent's representations that his recommendations were in their best interest. At times Gary simply signed documents Respondent gave him to sign and at least once, Mary signed Gary's signature on a document at Respondent's request.

(9) On July 1, 1998, Respondent recommended Gary purchase a Met Life whole life insurance policy. At the time, Gary had worked at Spamcrete Industries for 29 years. He still intended to retire at the age of fifty-five. He wanted investments which would allow access to the funds for retirement income and which could provide for Mary and his daughters if he died. Respondent claimed his recommendation for a \$600,000.00 life insurance policy was based on Gary's income at the time and his projected need for income at retirement. (Ex.2B).

(10) The Met Life whole life insurance policy, #987906527PR, (Met Life Policy "527") was issued on July 7, 1998. The policy had a face value of \$600,000.00 and was issued as a preferred non-smoker policy. It had an annual premium of \$13,622.00, a guaranteed interest rate of 5% and was designed to be paid up at age 98. Gary paid \$1229.00 at the time the application was completed. Respondent received a commission of \$6,811.00 for the sale of Met Life policy "527". (Ex 2; Ex.2B)

(11) On the application for MetLife policy "527" Respondent requested that the company to "Please hold off on QA Call until after underwriting is done and I go back out and see them. We are doing a lot of business in Mutual Funds and Annuities with this client. We want to find out what his rating is before we figure out how we will fund it. I realize the QA is important but I don't want to confuse my client. If you have a problem with this please notify" (Ex.2).

(12) On July 22, 1998, Respondent and Gary Evenson signed a 1035 exchange authorization. Respondent also filled out and signed a "Replacement Checklist" indicating the \$75,000.00 Farm Bureau policy would be surrendered for the full cash value. His represented that Gary Evenson wanted whole life insurance with "guarantees" instead of universal life. (Ex.2B).

"527" to pay six months of premiums. In September, 2003, Respondent signed a sales representative's report for an application for reinstatement of Met Life policy "527" which was \$14,760.00 in arrears. (Ex.2B).

(22) Respondent failed to tell the Evensons of the status of Met Life policy "527". Mr. Evenson does not remember applying for a loan. He signed the papers because Respondent told him that was what they needed to do. The Evensons first became aware of the lapse of Met Life policy "527" in 2008 after it was pointed out to them by the OCI attorney during the investigation of the case.

(23) On March 27, 2003, acting on Respondent's advice and with his assistance, Gary Evenson surrendered his MetLife annuities # 357 and #259 to purchase an equity indexed fixed annuity from USG/ING. The policies were surrendered on March 31, 2003 with surrender fees of \$6,117.99 and \$356.97 respectively. Gary understood there would be surrender charges on the Met Life annuity policies but relied on Respondent's representation that the Evensons could not lose with the USG/ING policy because they were getting in when the stock market was low. Respondent had Gary Evenson sign a note to MetLife that said "I realize by moving my money a surrender charge will be applied of 3%. Mr. Barry tried to talk to us but we have decided to move our money. Thank you for your service please process now." Respondent did not execute the required replacement disclosures. Respondent did not provide Gary a preliminary contract summary. Respondent did not provide a Wisconsin Annuity Buyer's guide at the point of sale to Gary. (Ex.4).

(24) On April 9, 2003, Respondent sold Gary a USG/ING equity indexed fixed annuity (ING Policy # 90123769). The premium, paid by the Evensons' personal check, was derived from the sale of the two MetLife annuities. He did not sign the application. He forwarded it to Scott Van De Hey to process. Respondent failed to tell Gary Evenson that he was not qualified to transact an annuity sale with the company since he was not listed with them. Respondent did not realize that partial surrenders from the ING contract would not receive any benefit of the index returns. Respondent never mentioned a 1035 exchange of the Met Life policies to the ING policy # 90123769 with the Evensons. (Ex.4;Ex.6).

(25) In October, 2003, Respondent was terminated by Metropolitan Life. (Ex.13).

(26) On January 21, 2004, Respondent recommended that Gary Evenson replace his Met Life whole life policies "527" and "163" with a Lincoln Benefit Life Company Legacy Premier universal life insurance policy # 01N1184581 (Lincoln Benefit policy) having a face value of \$1,000,000.00. He told Gary the replacement was a good idea because since the State Street Research investment was not generating enough money to pay the premiums. Respondent discussed the difference between the amount Gary had invested in Met Life and what would be recouped when the Met Life policies were surrendered. Respondent failed to discuss other sources of premium or other options under the existing policies. He did not discuss the option of keeping the Met Life policies with reduced face values. Respondent represented that the Lincoln Benefit policy would have comparable or better guaranteed interest. Respondent did not talk with Gary Evenson about guaranteed cash values or administrative fees and charges when comparing the Lincoln Benefit policy.

proceeds of the sale of the Metropolitan Life stock would not be taxable if they were placed in a Midland annuity. Respondent placed calls to sell Gary's State Street Research shares and Met Life stock that day. The price he quoted Mr. Evenson for the Met Life stock was \$38.16 a share; at that price the Evensons would have realized \$176,032.03. Gary's 4613 shares sold several days later for \$34.5909 so the Evensons received \$159,567.82 a difference of \$16,464.26. (Ex.1.1).

(33) Respondent wrote a check to Gary for \$5,000.00 on September 13, 2005 and a second check to Gary for \$2,000.00 on November 17, 2005 in partial compensation for the loss resulting in the delay of the sale of Met Life stock. Respondent's attempt to compensate the Evensons for their loss based on his misunderstanding of the sales procedure of the MetLife stock resulted in sanctions from FINRA of a suspension and a \$5,000.00 fine. (Ex.12; Ex.13).

(34) The Evensons did not report the proceeds of the MetLife stock sale as income based on Respondent's representation the proceeds were "not taxable" since the stock was being rolled over into an annuity. During the summer of 2006, the Evensons received a notice from the IRS that the Met Life sale of stock was a taxable event and should have been reported on their 2004 tax forms. Gary had received the stock by demutualization of the company so the basis was zero. The IRS assessed interest of \$6,671.00 on the taxes the Evensons had failed to pay as a result of their failure to report the income. (Ex.11).

(35) As justification of the recommendation that the Evensons sell the Metropolitan Life stock, Respondent claimed he was diversifying the Evensons' portfolio by limited the amount invested in one company.

(36) On October 24, 2004, Respondent sold Gary two Midland deferred variable annuities, policy # 8800003340 (Midland "340") and policy # 880000341 (Midland "341"). The application for the Midland "340" indicated it was a replacement of Gary's Met Life annuity "440." Met Life assessed a surrender charge of \$2,363.71. The check issued to Gary by MetLife from the sale of stock for \$159,567.82 served as the initial premium for the Midland policy "340" which was issued on November 1, 2004. (Ex.4; Ex.7).

(37) The application for the Midland "341" indicated it was a replacement of the Met Life IRA "363". Met Life assessed a surrender charge of \$43.30. Respondent had Gary endorse the check for the redemption of the State Street Research Class B shares as "payable to Midland National" and sent the check in with Gary's application for the replacement of his Met Life IRA "363". (Ex. 7. p.24) 7B p.12 &13;21. As a result the State Street Research funds were co-mingled with the IRA funds. It was over a year before the Evensons discovered the error and worked to correct it. They finally received notice from Midland National that the account had been straightened out in January, 2006. (Ex.4;Ex.7).

(38) When he recommended the Midland National annuities, Respondent told the Evensons he was sacrificing some of his commissions that would be immediately applied to the Midland annuities as a bonus to help compensate for the surrender charges that resulted from terminating the MetLife policies. The Midland policies had a premium bonus rider of 6% which vested over a period of 8 years. (Ex.7).

OPINION

The issues in this case revolve around Respondent's sales of insurance products to the Evensons over the many years he acted as their financial advisor. His method of gaining control over their assets and placing their assets in products which did not meet their objectives constituted a course of business based on deception. He endangered the legitimate interests of his customers and the public with his business practices. The pattern of deceptive sales practices is disturbing and demonstrates that Respondent not trustworthy and is unqualified to be licensed by OCI.

The Order Granting Partial Summary Judgment in this matter, which is attached to this proposed decision, found that Respondent violated ss. Ins. 6.57(6) and 6.66(3), Wis. Adm. Code by soliciting insurance on the part of ING/USG Annuity and Life insurance company when he was not listed with the company and by failing to sign the annuity application when he forwarded the application to another agent to process. In addition, the Order found Respondent violated s. 6.60(2), Wis. Adm. Code by effecting a personal financial transaction with a customer and s.6.61(16), Wis. Adm. Code by failing to notify the commissioner in writing of formal administrative actions taken by any other regulatory agencies. The Order left the issue of the appropriate discipline to be determined after the hearing on the remaining issues.

The issues remaining include whether Respondent violated s. Ins. 2.16(6), Wis. Adm. Code or s.628.34(1)(a), Wis. Stat., whether his license should be limited, suspended or revoked, and what, if any, discipline should be imposed. OCI has proven its allegations by a preponderance of the evidence. Respondent violated s. Ins.2.16(6), Wis. Adm. Code and s. 628.34(1)(a), Wis. Stat. His license should be revoked under the standards of s.628.10(2)(b), Wis. Stat. In addition, a forfeiture and an order for restitution to Gary Evenson would be appropriate.

Suitability

A variant of misrepresentation, the suitability rule protects potential consumers of life insurance and fixed annuities from being wrongfully induced to purchase new coverage or surrender existing policies; the rule requires an intermediary have reasonable grounds to believe the purchase or replacement of a life insurance policy or fixed annuity is consistent with a particular consumer's objectives, financial situation and needs. Section Ins 2.16(6), Wis. Adm. Code. A recommendation is not suitable merely because a consumer acquiesces in the recommendation. Respondent violated s. Ins. 2.16(6) Wis. Adm. Code when he recommended the purchase of the two Met Life "Life 98" whole life policies, the replacement of the two Met Life "Life 98" policies and purchase of the Lincoln Benefit universal life policy, and the purchase of the ING equity indexed annuity.

When Respondent recommended Met Life policy "527" and Met Life policy "163," he knew Gary sought investments which he could access at the age of fifty-five to provide income in his retirement as well as support his wife and children if something should happen to him. While the whole life insurance would have provided cash to Gary's beneficiaries, the policies limited access to the money he had invested during his lifetime. To access cash in the Met Life whole life policies, Mr. Evenson would have had to take a policy loan and incur the related costs or surrender the policy at a

clear case of twisting. Respondent knew he was leaving Met Life and started to move the Evensons because it was in his interest not theirs.

Misrepresentations

The record supports a finding that Respondent repeatedly violated s. 628.34(1)(a), Wis. Stat. The statute prohibits an intermediary from making "any communication relating to an insurance contract, the insurance business, any insurer or any intermediary which contains false or misleading information, including information misleading because of incompleteness." Part of the unfair marketing section of the insurance code, the misrepresentation statute recognizes the inherent conflict of interest in which intermediaries' interest in generating commissions may be at odds with customer interests. In addition to the unsuitable recommendations which are inherently misrepresentation, the record shows that Respondent made many other misrepresentations, both directly and through omission to the Evensons and to insurers.

Respondent violated s. 628.34(1)(a), Wis. Stat. in his communications to Lincoln Benefit and to Met Life. Respondent's explanation to Lincoln Benefit that there was a need to adjust the premium because Gary was retiring and did not need as much insurance as he had was false. Gary was still working for Spamcrete, as he continues to do, when Respondent recommended the Lincoln Benefit policy; he had not "decided" to retire. Respondent made a misrepresentation to Met Life when he included a note he had Gary sign with surrender forms which read "Mr. Barry *tried to talk to us* but we decided to move our money"(emphasis added)." Not only was this deceptive since the replacement had been at Respondent's initiative and with his encouragement, the note clearly shows that Respondent was acting with scienter since the record is clear that Respondent initiated the recommendation.

Intermediaries can violate the misrepresentation statute by omission as well. Respondent failed to inform Gary that his Met Life policy "527" had lapsed.² Respondent failed to tell the Evensons that he was not listed with ING when he sold them the policy. Respondent failed to discuss the limitations on access to money in an IRA annuity between the age of 55 and 59 ½. Respondent failed to inform Gary that the guaranteed interest rate on the Lincoln Benefit policy issued as a standard non-smoker was 3.5% as opposed to the 5% guaranteed interest rate in the Met Life policies which were issued as preferred non-smoker policies. Respondent did not discuss the nineteen year surrender period on the Lincoln Benefit policy. Respondent failed to tell Gary that the Lincoln Benefit policy would lapse without further premium.

Respondent told the Evensons that the sale of the Met Life stock was not a taxable event since the money would be rolled over into the Midland annuity. Although Respondent denied that he made the representation, the Evensons were much more credible witnesses. Respondent also misrepresented to the Evensons that he had put money in the Midland annuity contract to make up for the difference between the value of the Met Life stock Respondent quoted on the day he initiated the sale and the day it was actually sold. In addition, to multiple misrepresentations regarding the replacement of the Met Life annuities with the Midland annuity,

² The record supports a finding that Met Life policy "527" lapsed more than once.

the Evensons incurred by the delay in the sale of their Met Life stock is also appropriate because it was a result both of Respondent's lack of competence and his greed in wanting to have the funds generate a commission for him. The restitution for the IRS penalty is a more difficult issue. The Evensons relied on Respondent's false representation that rolling the stock into the annuity would not be a taxable event in deciding not to report the income. While their reliance on Respondent for his advice concerning investments was understandable, their reliance on him regarding the reporting of the income after receiving a 1099 was unreasonable. The Evensons are competent adults who apparently file their own tax returns. They should have sought an independent confirmation of Respondent's assertion before filing. There is nothing in the record that suggests that they routinely relied on Respondent regarding the filing of their taxes. Finally, although restitution related to the replacement of the Met Life whole life policies with the Lincoln Benefit universal life policy would be appropriate, the record is insufficient to determine what would constitute fair restitution without speculation.

PROPOSED ORDER

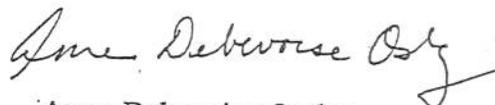
Now therefore, based on the findings of facts and proposed conclusions of law, I recommend that:

(1) Respondent's intermediary's license be revoked effective ten days after the date of service of the final decision.

(2) Respondent should pay a forfeiture of ten thousand dollars (\$10,000.00) to the state of Wisconsin within ten days of the date of service of the final decision.

(3) Respondent be ordered to pay restitution to the Evensons of eight thousand, eight hundred eighty-one dollars and ninety seven cents (\$8,881.97) of surrender penalties incurred in the replacement of the Met Life annuities, and nine thousand, four hundred and sixty four dollars and twenty six cents (\$9,464.26) for the balance of the transaction loss from the sale of the Met Life stock to generate premium for the recommended Midland annuity within ten days of the date of service of the final decision. Respondent should also be ordered to make the restitution payment by certified check and to provide a copy of the check to OCI.

Dated at Madison, Wisconsin this 18th day of December, 2008.



Anne Debevoise Ostby
Administrative Law Judge

phone there indicated that Respondent did not work out of that office and provided the phone number the ALJ had already called. After a last check was made at the OCI offices for Respondent, the ALJ proceeded with the hearing.

Based upon OCI's motion, the notice of hearing, Respondent's answer, the affidavit of Kevin Zwart and attached documents and OCI's argument, the following Order is issued:

Findings of Fact

1. Respondent admitted that on April 9, 2003 he sold a USG Annuity and Life Company (ING) fixed deferred annuity. (NOH ¶ 39; Ans. ¶ 39).
2. The application includes the ING logo and the USG Annuity and Life Company name. (Zwart Aff. attached Ex.5).
3. Exhibit 1-A is "an individual information inquiry (internal) consisting of insurance licensing and listing data regarding Respondent which is maintained by OCI as a regular activity of the regulation of its licensees." (Zwart Aff. ¶2)
4. Respondent was first licensed with ING on December 23, 2003 and with USG Annuity & Life Company on November, 5, 2003. (Zwart Aff. attached Ex. 1-A.)
5. Respondent admitted in his answer that he forwarded the sales documents for the annuity he sold on April 9, 2003 "to insurance agent Van de Hay, who was listed with ING, to process, but failed to sign the annuity application thus misrepresenting to the company the nature of the transaction." (NOH ¶¶ 29 & 31).
6. The annuity application dated April 9, 2003, shows only the signature of Mr. Van de Hey. (Zwart aff. ¶3; Ex. 5).
7. Respondent admitted that in October, 2004, he recommended "GE" sell approximately 4,163 shares of Met Life stock and invest the proceeds in a Midland annuity, contract 8800003340; that he did not tell "GE" there would be a delay between the sell decision and the actual sale of the Met Life stock; that there was a delay in which time the stock price declined and "GE" suffered a \$15,000 loss in value; that he offered to share in the loss and to reimburse "GE" \$15,000, conditioned on "GE's" purchase of Midland annuities with the stock proceeds, and that he made unlawful reimbursement payments totaling \$7,000 to "GE.". (NOH ¶¶ 42; 46, 47, 48; Ans. ¶¶ 42, 46, 47,48).
8. Exhibits attached to the affidavit of Kevin Zwart show the check for stock sale proceeds and the annuity contract purchased with those proceeds, as well as the checks which Respondent issued for the consumer and the signed letters of Respondent acknowledging the payments and his awareness of their unlawful nature. (Zwart Aff., ¶¶ 4& 5; attached Ex. 7A-1; Ex.7A-2; Ex. 12).
9. At all material times, Respondent held an occupational license with NASD (FINRA) and was subject to the jurisdiction of the Wisconsin DFI, Securities Division. (NOH ¶51; Ans.¶ 51).

provides that an agent may not exchange business with another agent unless "(b)oth the agent forwarding the business and the agent who places the business with the insurer sign the insurance application," s. Ins. 6.66(3)(c), Wis. Adm. Code. Findings of fact ¶¶ 1- 6 support a finding that there are no genuine issues of material fact, or undisputed material facts from which alternative inferences may be drawn, which would entitle respondent to a hearing on the issues of whether he violated ss. Ins 6.57(6) & s. 6.66(3), Wis. Adm. Code.

OCI has met its burden to present a prima facie case as to the issue of whether Respondent violated s. Ins. 6.60(2), Wis. Adm. Code. by effecting a personal financial transaction with a customer. Findings of fact ¶¶ 7 and 8 support a finding that there is no genuine issue of material fact, or undisputed material facts from which alternative inferences may be drawn, which would entitle the respondent to a hearing on the issue of whether he violated s. Ins. 6.60(2), Wis. Adm. Code.

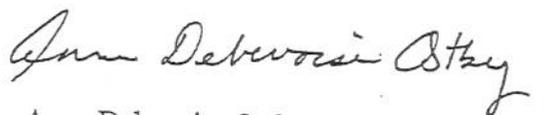
OCI also presented a prima facie case as to whether Respondent violated s. Ins. 6.61(16), Wis. Adm. Code which requires that insurance intermediaries notify the commissioner in writing of any formal administrative action taken by any other regulatory agency which licenses the person for any occupational activity. Findings of Fact ¶¶ 9-12 support a finding that there is no genuine issue of material fact, or undisputed material facts from which alternative inferences may be drawn, which would entitle the respondent to a hearing on the issue of whether he violated s. Ins. 6.61(16), Wis. Adm. Code.

Order

WHEREFORE, IT IS HEREBY ORDERED, that OCI's Motion for Partial Summary Judgment is GRANTED.

IT IS FURTHER ORDERED, that the findings and conclusions incorporated in this order will be considered in the proposed decision issued after the hearing on the remaining issues.

Dated at Madison, Wisconsin, this 5th day of September, 2008.



Anne Debevoise Ostby
Administrative Law Judge.