

Disciplinary Hearing

Glen Raymond Fisher

Hearing Date: Wednesday, December 17th &
Thursday, December 18th, 2008

Place: Saskatchewan Life Insurance Council
310 – 2631 – 28th Avenue
Regina SK S4S 6X3

Hearing Committee: Sheila F. Hart, Chair
Doug Pennington, CFP, CLU, EPC, B. Geol-Eng.
Darin Offen

Appearances: John Waugh
Life Insurance Council Complaint Committee
Representative

Daniel J. Maddigan
Counsel for Accused

Witnesses: George Nystrom
DG
Glen Raymond Fisher



Origins of the Case

The Complaints and Investigation Committee of the Saskatchewan Life Insurance Council reviewed a complaint from DG against Glen Raymond Fisher. As a result of the review the Complaints and Investigation Committee determined that Glen Ray Fisher be required to appear before a Disciplinary Hearing Committee (hereinafter referred to as "DHC") of the Life Insurance Council to answer the committee's allegations of misconduct and/or incompetence that rise from Glen Raymond Fisher's insurance dealings with R M stated:

1. That, contrary to Bylaw 8, Section 1, subsection (b), of the Life Insurance Council Bylaws, your conduct has harmed the standing of licensees in the insurance industry.
2. That, contrary to Bylaw 8, Section 2, subsection (c), of the Life Insurance Council Bylaws, you provided false and/or misleading communications in the course of servicing RM's insurance business.
3. That, contrary to Bylaw 8, Section 2, subsection (h), of the Life Insurance Council Bylaws, you failed to place the interests of RM before that of your own.
4. That, contrary to Bylaw 8, Section 2, subsection (q), of the Life Insurance Council Bylaws, you failed to follow sound business practices.
5. That contrary to Bylaw 9, Section 1, of the Life Insurance Council Bylaws, you have demonstrated a lack of knowledge and/or skill and/or judgment of a nature or to an extent that you are unfit to continue in the business of insurance or to provide one or more services ordinarily provided as part of the business of insurance.

Evidence from the Hearing

At the outset of the hearing the Committee was presented with three binders of documents, Exhibit Book #1, Exhibit Book #2 and Exhibit Book #3, titled "Complaints and Investigation Committee, The Life Insurance Council of Saskatchewan, Glen Fisher". It was confirmed that the accused, Glen Raymond Fisher, (hereinafter referred to as "Fisher") received identical binders of documents prior to the hearing date. As well Fisher and his counsel had received a list of witnesses that the Complaints and Investigation Committee intended to call at the hearing.

During the hearing the following additional documents were received into evidence and marked as follows:

Book #3 – Tab D – April, 2004 and November, 2004 calendars with R M's handwriting, as identified by D G (two pages), filed by Mr. Maddigan. These copied documents were obtained by Mr. Maddigan from documents filed at the Court of Queen's Bench.



Book #3 - Tab E - Five pages prepared by Fisher, filed by Mr. Maddigan:

- RM's Non-UL Accounts under Management (1996-2007)
- RM – Summary of Policies & Disposition
- Value of RM's Assets Under Management
- Policy Deposit History
- Insurance Details

Book #3 – Tab F – Nine pages filed by Mr. Waugh

Mr. Waugh, representing the Complaint Investigation Committee (CIC), called two witnesses: George Nystrom (hereinafter referred to as “Nystrom”) (affirmed) and DG, (sworn). Nystrom, a lawyer, prepared a will for RM. DG is RM's brother.

Mr. Maddigan, representing Fisher, called one witness: Fisher (sworn).

After all the evidence was presented Mr. Waugh made his summation address. He filed with the Committee a written copy. Mr. Maddigan made his summation address. Mr. Waugh made a very short rebuttal.

Shortly after the hearing concluded, the DHC was approached by Mr. Waugh. He suggested there may be an apprehension of bias on the part of DHC member Kim Shaheen due to his past associations with various members of RM's family. Upon the agreement of both Mr. Waugh and Mr. Maddigan, Kim Shaheen excused himself from any further deliberations, discussions, decision making and decision writing duties that the DHC was now entrusted with. It was agreed that the DHC would continue with the remaining three members.

Uncontested Facts

An “Agreed Statement of Facts between The Complaints and Investigation Committee of the Life Insurance Council of Saskatchewan and Glen Raymond Fisher” can be found at Book #1, Tab 4. This Agreed Statement is attached as an appendix to this decision. For the purpose of this decision the Committee will review the history of events and facts as presented in the Agreed Statement and the hearing testimony. The Committee noted that in the “Agreed Statement” in Part IV, part 2), the parties agreed that the Complaint Investigation Committee (CIC) bears the onus of demonstrating the accuracy “of the Summaries and Work Sheet Analysis prepared by it and which are found at Book #1, Tab A, as well as at Sub-tab 1 for each of the policies listed in Part II, Paragraph 5 above” and the income tax summary at Book #1, Tab D.

Findings of Fact and Testimonial Evidence

Glen Raymond Fisher is a life, and accident and sickness agent (licensed 1991). He is also a licensed mutual fund agent (licensed 1992).

RM was born in 1943. Her husband, JM, died in 1995. As of that date her immediate family consisted of:



- AY (her daughter)
- MM (her son)
- CM (AY's son), (RM's grandson)
- JY (AY's daughter), (RM's granddaughter)
- SY (AY's daughter), (RM's granddaughter)

RM was diagnosed with cancer in 2006 and died January 19, 2007.

In 1996 RM had assets with a net worth \$465,700 consisting of:

- cash or investments totalling approximately \$154,000 (Book #3, Tab C, (1) and Tab E)
- group coverage life insurance
- house (clear title) worth approximately \$250,000
- car
- jewellery

Also at this time (1996) RM owned and was the beneficiary of three life insurance policies, (see Book #1, Tab I). They were purchased through Fisher before her husband died:

- Mutual Whole Life LI – #1ML for \$50,000 issued 1993
 - RM– MM (her son)
- Mutual Whole Life LI – #2ML for \$50,000 issued 1993
 - RM – AY (her daughter)
- Mutual Whole Life LI – #3ML for \$50,000 issued 1993
 - RM– CM (her grandson)

At the time of her husband's death RM was not working, however she became employed in 1996 or 1997. Book #1, Tab D contains copies of documents from Canada Revenue Agency and some documents prepared by RM obtained by DG showing RM's income. Her taxable income varied from approximately \$25,000 to \$39,000 over the years 1997 to 2005.

After RM's husband's death Fisher became more involved with RM's financial affairs. He had an ongoing relationship until her death. When he first met RM he described her as a "GIC maven". He described how she became more financially sophisticated over the years. For investment purposes Fisher testified her risk tolerance was noted as moderate to aggressive.

As to RM's personality the DHC heard lots of evidence. DG, RM's brother, described his sister as: intelligent; bright; curious (she asked lots of questions), independent thinker; someone who paid attention to detail, detailed record keeper. He explained that RM made "the final say" in her own affairs. DG also described her relationship with her children as "rocky" "for the most part". RM found her daughter AY manipulative and she disliked AY's husband Colin. She was concerned for her son MM's wellbeing. DG testified that RM did trust him. DG further testified as to how his sister RM wanted to have control of her children and her only means of doing this was financially. He



described how after her death she wanted him to have a secret bank account in addition to an estate account to distribute money to her children and grandchildren as he thought fit. This reflected the fact that she made DG the beneficiary of some life insurance policies, contingent owner of some policies, and he was the named executor in her will.

Fisher in testimony described RM was “high maintenance”. Fisher explained that RM was intelligent and she never made a rash decision, only educated decisions. She was a private person and would not discuss business in front of other people.

Nystrom, who prepared RM’s will, testified his professional involvement was brief. He found her intelligent, mentally sound, rational, and that she took attention of details.

The panel, relying on this evidence, and documents of RM’s records (see Book #1, Tab B, (3), Book #1, Tab C, (3), Book #1, Tab I, (4), Book #3, Tab A, (4), Book #3, Tab B, (3), Book #3, Tab C, (3), (7), Book #3, Tab D) found RM to be intelligent, and extremely fastidious with respect to record keeping.

Much of the hearing involved Fisher’s relationship with RM. Fisher testified that from 1996 until her death they met regularly, at least once a month. As they lived close to each other, they often discussed her affairs over the kitchen table. At RM’s request Fisher would often review her insurance and investment statements. He testified he never made a decision for her; he only gave her information and advice. Fisher testified that often RM would not listen to him or the options he presented to her.

As noted in the Agreed Statement of Facts, RM purchased 13 Universal Life Insurance Policies between 1996 and 2000. All were purchased through Fisher. See Book #1, Tabs J, K, L, M, N, O, Book #2, Tabs P, Q, R, S, T, U and V. From review of the summaries prepared by CIC Waugh (Book #1, Tab A) and by Fisher (Book #3, Tab E), there appears to be only a slight variance on the total of the minimum annual premiums required to maintain these policies. CIC’s figures show \$34,599.00 and Fisher’s figures show \$34,791.97. From the time of their various purchase dates to the date of RM’s death, deposits totalling over \$210,000 were made to these policies. See Book #3, Tab 3 for Fisher’s calculations, which show total deposits of \$210,879 and see Book # 1, Tab A for CIC’s calculations, which show total deposits of \$223,630.

Four of these policies insured RM’s life for a total amount of \$1,025,000 (through Zurich Life/Manulife). Page 3 of the Agreed Statement of Facts sets forth the various beneficiary designations and changes to beneficiary designation made by RM while these policies were in effect. Specifics are:

Policy #1 - Book #1, Tab J - effective February 26, 1996; face value of \$25,000; initially RM’s two children were beneficiaries, but in 1999 RM changed this to her brother’s children (niece and nephew) and then in 2006 she named her brother, DG, beneficiary; annual minimum premium \$426.25 (Book #1, Tab J, (4)). This policy remained in effect until RM’s death and paid out amounts to her brother and her estate. In total \$10,212 was paid into this policy.



Policy #2 – Book #1, Tab M - effective October 13, 1998; face value of \$250,000; her two children AY and MM were beneficiaries; annual minimum deposit \$6,197.50 (Book #1, Tab M, (4)). Initially the application was for \$100,000 but RM requested Fisher to bump up the policy face value to \$250,000. By notices dated April 4, 2004 and November 2, 2004 from Manulife Financial, RM was provided a “cancellation warning” wherein she was advised that her policy will lapse on May 3, 2004 and December 3, 2004 respectively due to non payment of premiums. By notice dated December 5, 2004 RM was advised that this policy was “no longer in force due to non payment of premiums.” See Book #1, Tab M, (6). In total, \$37,281 was paid into this policy.

Policy #3 - Book #1, Tab N - effective May 28, 1999; face value of \$250,000; her two children were beneficiaries; annual minimum deposit \$6,565.00 (Book #1, Tab N, (4)). By notice dated January 17, 2005 from Manulife, RM was provided a “cancellation warning” wherein she was advised her policy will lapse on February 17, 2005 due to non payment of premiums. By notice dated February 17, 2005 RM was advised this policy was “no longer in force due to non payment of premiums.” See Book #1, Tab N, (6). In total \$41,310 was paid into this policy.

Policy #4 - Book #1, Tab O - effective June 22, 1999; face value of \$500,000; her two children and two grandchildren were beneficiaries; annual minimum premium of \$11,890. Fisher noted that RM initiated the purchase of this policy. By notice dated January 14, 2004 from Manulife Financial, RM was provided a warning that her insurance coverage was in danger of “lapsing” as her net deposits had not reached the minimum required to keep coverage in effect. See Book #1, Tab O, (6). This policy lapsed April 2004. In total \$55,596 was paid into this policy.

The other nine Zurich Life/Manulife or Standard Life universal life policies insured her children or grandchildren. Specifics are:

Policy #5 - Book #1, Tab K - effective August 1998; face value of \$100,000; RM's grandson CY was insured, AM ,CY's mother (RM's daughter), was named beneficiary in application; annual minimum premium of \$417; RM appointed brother DG to be contingent owner in 2001.

Policy #6 - Book #1, Tab L - effective October, 1998; face value of \$250,000; RM's son MM was insured; RM was beneficiary; annual minimum premium of \$1,090; RM appointed brother DG to be contingent owner in 2001.

Policy #7 – Book #1, Tab P – effective December, 1999; face value of \$250,000; RM's daughter AY insured RM was named beneficiary; annual minimum premium of \$1,165; brother DG appointed contingent owner in 2001.

Policy #8 - Book #2, Tab Q – effective December, 1999; face value of \$150,000; RM's granddaughter JY insured; beneficiary named in application is AY , JY's mother, but later documents show RM was beneficiary (see Tab Q, (5)); annual minimum premium of \$534.



Policy #9 – Book #2, Tab R – effective April, 2000; face value of \$500,000; RM's daughter AY insured; beneficiary named is RM; annual minimum premium of \$1,995; brother DG named contingent owner in 2001.

Policy #10 - Book #2, Tab S – effective July, 2000; face value of \$350,000; RM's grandson CY insured; beneficiary is RM; annual minimum premium of \$1,186.50; brother DG named contingent owner in 2001.

Policy #11 - Book #2, Tab T – effective July, 2000; face value of \$350,000; RM's granddaughter JY insured; beneficiary is RM; annual minimum premium of \$973; brother DG named contingent owner in 2001.

Policy #12 - Book #2, Tab U – effective January, 2001; face value of \$200,000 (applied for \$500,000 but this was rejected); RM's son MM insured; beneficiary is RM; annual minimum premium of \$1,440; brother DG named contingent owner in 2006.

Policy #13 – Book #2, Tab V – effective July, 2003; face value of \$500,000; RM's granddaughter SY insured; beneficiary is RM; annual minimum premium of \$720; brother DG named contingent owner in 2006.

RM's calendars for April, 2004 and November, 2004 (Book #3, Tab D) show that she was aware of policies lapsing. The April 8, 2004 calendar has the notation "Glen: lapsed policy: 3 May". The November 8, 2004 calendar has the notation "MSG RE loss on insurance policy". There is no evidence to assist in determining what policies were lapsing or losing, but clearly RM was aware of something happening relating to Fisher and/or insurance.

DG testified how RM instructed him on how to deal with the \$1,025,000 insurance proceeds. He was to divide the proceeds as per the division in her will. It is noted that there is no time frame as to when this discussion took place.

The evidence is that RM's plan was to fund the various policies using her investments and not her employment income. To purchase the various policies RM used investment cheques as well as cash held in the joint accounts she held with her children and grandchildren. For example, see Book #1, Tab J, (5), Tab K, (5), Tab L, (5), Tab P, (5) and Book #2, Tab R, (5), Tab S, (5). RM had had success in mutual funds and hoped to use these gains to pay the annual premiums. In 1996, when Fisher began managing her assets, she had approximately \$154,000 (outside of any insurance investments) and when she died there was approximately \$165,000 (see Book #3, Tab E). The "open" account referred to on page 1 of Book #3, Tab E was used to fund her RSP's and her insurance policies. By Fisher's testimony RM was clearly aware of how universal life policies worked. Specifically, she knew that if the investment lost value there was the risk she would have to add in more money in order to keep the insurance going. None of the UL policies were pre-paid. Fisher testified he provided multiple illustrations to RM and all showed that the policies required a paid annual premium. For example, see Book #1, Tab O, (3) for the \$500,000 policy illustration. It shows large deposits for five



years and then it states: "Where funds are insufficient to continue the policy, additional cash deposits will be required."

In March, 2001 Fisher became concerned with and disagreed with RM's financial conduct. At this point in time RM made her brother DG contingent owner on the policies (she cut out her children). Also after that date she only invested a further \$5,000.00 which was for a new grandchild. In April, 2004 RM transferred \$3,000 from policy #1 into policy #2 to keep it going. In 2006 premiums or deposits were paid on three policies (see Book #1, Tab J, Book #2, Tab S and Tab U). Fisher's belief was that two factors contributed to this conduct: her relationship with her family, and the downward trend in the market. RM was well aware that her mutual fund and universal life investments were decreasing in value as they regularly reviewed their statements and the notices indicating certain policies were going to lapse. She was concerned about "putting good money after bad".

Another issue bothered Fisher. Since early in their relationship he had encouraged RM to get a will prepared. It was only after her cancer diagnosis that she took this advice.

RM attended on Nystrom for preparation of a will. Nystrom testified that initially RM wanted Fisher to be the executor but this did not happen because Fisher thought this would be a conflict of interest and he did not want to be executor. The final version (Book #3, Tab C, (7)) had her brother DG as executor with his children (RM's niece and nephew) as alternate executors. In the preparation of the will Nystrom did discuss insurance with RM. RM advised she would have Fisher contact him with particulars. Fisher testified that RM directed him to provide information to Nystrom. She specifically asked Fisher to show Nystrom that the policies had not lapsed as she was "taking care of it". Fisher emailed Nystrom on January 8, 2006 with an asset list (Book #1, Tab C, (1)) and again on January 13, 2006 with insurance beneficiary information (Book #1, Tab C, (2)). RM wrote a letter to Nystrom January 9, 2006 stating:

"I am enclosing a summary of all the Insurance Policies purchased for the family since 1993, along with a summary of the monies inside these policies that Glen is using to currently pay the premiums. As I mentioned to you these were to be paid up life policies with savings feature inside each policy."

Both the emails and RM's letter summary show insurance policies totalling \$1,025,000 on RM's life as of January, 2006. This was inaccurate. Fisher acknowledged the inaccuracy of the information he provided to Nystrom. As of January, 2006 there was only one out of the four policies on RM's life still in effect. Only \$25,000 insurance was in place at that time, not \$1,025,000. Nystrom assumed that these documents were accurate but they had no impact on drafting of the will. RM's instructions to Nystrom were that the insurance policies would not be dealt with in her will in order to avoid probate tax. She was going to deal with life insurance herself directly through Fisher. Her primary concern was control of assets after her death. In drafting her will RM's daughter was excluded, and her son's share was to remain in a trust until he was age 50 years. Her daughter was excluded because RM did not trust her son-in-law. She was concerned about her son's ability to manage his affairs and worried he could be manipulated by her son-in-law, so made the age 50 stipulation. Nystrom testified he



was not privy to the handwritten notations that were attached to RM's will (Book #3, Tab C, (7)).

RM passed away and a complaint to the Insurance Council was received from DG. The Complaints and Investigation Committee of the Saskatchewan Life Insurance Council initiated the charges and hearing.

The Issues

Issue 1

The issue is whether or not Fisher's conduct was misconduct in that it harmed the standing of licensees in the insurance industry contrary to the Bylaws. The specifics of the allegation are that he provided information to George Nystrom, who was RM's lawyer. The information he provided on two separate occasions was not correct and /or was incomplete, and misled the lawyer as to the status of three life insurance policies on the life of RM.

Bylaw 8, section (1), (b) defines misconduct as a question of fact but includes any matter, conduct or thing, whether or not disgraceful or dishonourable that may harm the standing of licensees in the insurance industry.

Issue 2

The issue is whether or not Fisher's conduct was misconduct in that he provided false and/or misleading communications in the course of servicing RM's insurance business contrary to the Bylaws. The specifics of the allegations are that:

1. On January 8, 2006 he emailed to RM's lawyer an asset list dated January 5, 2006 that showed RM had four Zurich/Manulife insurance policies with death benefits totalling \$1,025,000. That he further represented the cash values as minimal and were being used to pay the premiums. That he further represented that any remaining cash value would be paid out in addition to the stated death benefit. That at January 5, 2006 he knew or ought to have known that of the four insurance policies, only policy #1 was in force and that policy #4 had lapsed in April, 2004, policy #2 had lapsed in December, 2004 and policy #3 had lapsed in February, 2005.
2. In a further email to RM's lawyer dated January 13, 2006 he provided false and/or misleading information when he provided beneficiary details for the four Zurich/Manulife insurance policies. That at January 13, 2006 he knew or ought to have known that only policy #1 was in force and that policy #4 had lapsed in April, 2004 that policy #2 had lapsed in December, 2004 and that policy #3 had lapsed in February, 2005.

Bylaw 8, section (2), (c) defines misconduct where in the course of promoting, selling or servicing insurance business, a licensee provides in any advertising or other communications information that is false or misleading.



Issue 3

The issue is whether or not Fisher's conduct was misconduct in that he failed to place the interests of RM before that of his own. The specifics of the allegations are:

1. Between 1996 and 2003 he sold 13 insurance policies to RM that were not in her interests.
2. The 13 insurance policies he sold to RM were not within her financial means to fund at levels that would have made them appropriate for either an investment and/or insurance purpose.
3. The commissions that he earned were a motivating consideration for recommending and selling many of the insurance policies to RM.

Bylaw 8, section (2), (h) defines misconduct where the licensee fails to place the interests of the consumer before those of the licensee or others.

Issue 4

The issue is whether or not Fisher's conduct was misconduct in that he failed to follow sound business practices. The specifics of the allegations are:

1. When the funding of the policies was not maintained and/or could not be maintained at planned levels it should have been evident that action was needed, but there is no indication that action was taken by Fisher to inform RM of her situation. When policies began lapsing due to under funding in 2003, 2004, 2005 and 2006, there is no evidence that any action was recommended or taken to mitigate the losses.

Bylaw 8, section (2), (q) defines misconduct where the licensee fails to follow sound business practices.

Issue 5

The issue is whether or not Fisher demonstrated a lack of knowledge and/or skill and/or judgment of a nature or to an extent that he is unfit to continue in the business of insurance or to provide one or more services ordinarily provided as part of the business of insurance. The specifics of the allegation are:

1. He knew or ought to have known that the 13 insurance policies were not within RM's financial capabilities to fund at levels that made them appropriate investment and/or insurance products for RM.
2. He knew or ought to have known that RM's intention was to secure the financial security of her children and/or grandchildren. He was her financial advisor and had knowledge and/or should have had knowledge of her financial situation and the harm to her and/or her beneficiaries that could result if his recommendations proved to be ill advised and/or unworkable.



Bylaw 9, section (1) defines incompetence as a question of fact, that includes the display by a licensee of a lack of knowledge, skill or judgment of a nature or to an extent that the licensee is unfit to continue in the business of insurance or to provide one or more services ordinarily provided as part of the business of insurance.

The Decisions

Issue 1

The DHC finds Fisher guilty of misconduct in that he did breach the Saskatchewan Life Insurance Council Bylaw 8, (1), (b). We find his conduct has harmed the standing of licensees in the insurance industry.

Issue 2

The DHC finds Fisher guilty of misconduct in that he did breach Bylaw 8, (2), (c). We find he provided false and/or misleading communications in the course of servicing RM's insurance business.

Issue 3

The DHC finds that Fisher did not breach Bylaw 8, (2), (h), in that he failed to place the interests of RM before that of his own.

Issue 4

The DHC finds that Fisher did not breach Bylaw 8, (2), (q), in that he failed to follow sound business practices.

Issue 5

The DHC finds that Fisher did not breach Bylaw 9, (1), in that he demonstrated a lack of knowledge and/or skill and/or judgment of a nature or to an extent that he is unfit to continue in the business of insurance or to provide one or more services ordinarily provided as part of the business of insurance.

Reasons for Decisions

Issue 1

As stated in Bylaw 8, (1), (a) it is a question of fact but where there is any matter, conduct or thing, whether or not disgraceful or dishonourable that may harm the standing of licensees in the insurance industry, the DHC may make a finding of misconduct. The DHC has reviewed the above facts and duly considered the arguments presented by Mr. Waugh and Mr. Maddigan. Mr. Waugh argued that: Fisher's conduct has harmed the professional image that insurance agents seek to portray. He argued that it was unprofessional and irresponsible for Fisher to not fully and accurately portray the status of the insurance policies in a manner that would not be open to being misconstrued by Nystrom. Mr. Maddigan argued that had Fisher not carried out his client's instructions he would then be open to be charged under either Bylaw 8, (2), (k), "fails to reasonably carry out a consumer's lawful instructions" or (m), "fails to protect a consumer's personal information or divulges personal information about a consumer unless authorized to do so by the consumer or as required by law".



The facts establish that Fisher provided two emails to RM's lawyer Nystrom, both of which contained erroneous information. The asset list sent January 8, 2006 indicated that there were four life insurance policies on RM's life with total death benefit of \$1,025,000 and that cash values in the policies was minimal and was being used to pay premiums (Book #1, Tab C, (1)). Fisher was aware this was erroneous as at that time three of the four policies had lapsed and only \$25,000 worth of insurance was in place. The beneficiary list sent January 13, 2006 indicated there were four policies on RM's life when at this time three of them had lapsed. Also policy #71000234 was inaccurately portrayed as worth \$50,000, when in fact it was worth \$25,000 (Book #1, Tab C, (1)). Fisher was aware this was erroneous. His position is that he was carrying out RM's instructions. Nystrom testified that he assumed the information contained in the emails was correct. Nystrom did not rely on the information as it was determined that life insurance was not going to be dealt with in the will.

The DHC finds on a balance of probability that Fisher is guilty of misconduct by breaching Bylaw 8, (1), (b). His conduct of providing inaccurate information to a lawyer, who he knew was preparing a will for his client RM, was disgraceful and dishonourable and clearly harmed the standing of licensees in the insurance industry. In coming to this conclusion the DHC looked up and relied upon the definitions of:

- disgraceful – "shameful; scandalous"
- dishonourable – "characterized by or causing dishonour or discredit; having little or no integrity; unprincipled"
- standing – "social or financial position, status, or reputation"

Mr. Maddigan's arguments do not hold weight. If RM did in fact direct Fisher to lie to Nystrom, this was clearly not a lawful instruction. Also Fisher's duty to not provide false and misleading information in this case (see issue 2) outweighs any duty he had to RM to not divulge the fact that three policies worth \$1 million had lapsed and were ineffective. Fisher should have declined to follow his client's wishes to provide false information and directed RM to deal with Nystrom without his assistance. He had this option. We find his conduct was disgraceful and dishonourable.

Does the insurance profession want it known that it is acceptable for licensees to provide inaccurate or false information to lawyers? We think not. It is a common understanding that when one profession deals with another profession it is expected that they are dealing only with truths ---- it is not expected to deal with untruths. It is upon this fundamental basis of respect and integrity between professions that our society operates. By Fisher breaching this fundamental rule he has caused harm to the standing/reputation of licensees in the insurance industry.

Thus we make a finding of misconduct.

Issue 2

As stated in Bylaw 8, (2), (c) misconduct may be found if the licensee "in the course of promoting, selling or servicing insurance business, provides in any advertising or other communications information that is false or misleading." As noted above we have found that Fisher provided false information to Nystrom on the two occasions when he



emailed Nystrom. Fisher, when emailing Nystrom was servicing his insurance business with RM. The information given to Nystrom was false. We also find that it was misleading. Nystrom, although he did not rely on the information provided by Fisher, did assume it was true. We do not believe the information had to be used and relied upon to be misleading. So, although there was no damage done to the client RM by providing the false information, we do not know what the result would have been had he provided accurate information. We have only RM's letter of January 9, 2006 to Nystrom (Book #1, Tab C, (3)). Whether RM intended to also provide false information to Nystrom we do not know. We have no evidence other than the documents before us and Fisher's testimony that he was to show the policies in force even though they had lapsed.

We conclude that Fisher, in the course of servicing insurance business with RM, did provide false and misleading information. Thus we find misconduct.

Issues 3, 4 and 5 Overall

Mr. Waugh filed a written argument. This argument contains the evidence and his own interpretation or allegations of the evidence and of industry standards that he wishes us to rely upon. This is not evidence. Mr. Waugh was not a witness. He did not call any witness to testify about the matters addressed in his argument.

Mr. Maddigan argued that for issues 3, 4 and 5, we must follow the rules of natural justice and we cannot merely rely on allegations. He argued that these allegations require expert evidence for two reasons:

- 1) so that there is evidence; and
- 2) so that the defence then has the opportunity to cross examine.

He argued that if the DHC relies on its own thoughts we breach the rules of natural justice as the defence has had no opportunity to rebut or cross-examine our thoughts. He argued that the CIC only called Nystrom and DG as witnesses for the purpose of introducing evidence. No expert witness(s) was called to do an analysis and to indicate whether or not the allegations made were well founded. It was argued that should CIC have called an expert, Fisher then would have had the opportunity to cross-examine and to call his own expert. Relying on the witness list provided to the defence prior to the hearing, the defence prepared for the hearing accordingly.

Case law establishes that a regulatory body, like the Life Insurance Council, must complete an independent investigation into incompetence and must have cogent evidence for establishing incompetence. In preparation for this hearing the DHC was provided with a manual to assist with the procedural issues and our hearing obligations. At pages 147 and 148 of this manual ("A Manual for Ontario Adjudicators" 2000), it states:

"As a general rule, you can base your decision only on information obtained during the hearing from the parties in the form of evidence. There are two exceptions to this general rule that are set out in the *Statutory Powers Procedure Act*, which recognizes two kinds of facts of which a tribunal can take notice without proof. The first category consists of facts that are so commonly known as



not to be the subject of dispute among reasonable persons....This would include obvious facts such as the fact that a horse is a mammal....The second category of facts that need no proof consists of those that are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy....This category of facts permit you to apply your own knowledge, but only to matters that are inherently uncontroversial in your field."

Issue 3

As stated in Bylaw 8, (2), (h) misconduct can be found where a licensee fails to place the interests of the consumer before those of the licensee or others. Mr. Waugh has argued we should make a finding of guilt on this charge on the basis:

- that Fisher's plan for RM was deeply flawed and required equity returns much higher than any historical record of any equity return in any equity sector could justify;
- that RM did not have income to fund policies even at their minimum levels;
- that Fisher was the only person who benefited from the sale of the 13 universal life policies;
- that the up front funding guaranteed that the policies would not lapse until after the charge back period had passed;
- that the documents and Agreed Statement of Facts are sufficient to make this finding. He relied upon documents at Book #3, Tab F, and the tax records for RM (Book #1. Tab D).

We have reviewed the documents and oral evidence. We find that CIC's position cannot stand up to a probing examination. There is no evidence before us, only argument that would allow us to make a guilty determination. There is no expert testimony or expert documentary evidence before us to demonstrate that the 13 universal life insurance policies were not in RM's interests or were not within RM's financial means to fund.

On the contrary, we have Fisher's opinion and testimony that RM intended to fund the policies with income earned in mutual funds and as well with profits earned within the policies. We have his opinion that, had the market not had its downturn, the policies would have been maintained. The evidence is that RM chose not to fund the policies further. She could have. She had other sources of funds. There were funds in her account and in joint accounts that she could have accessed (see Book #3, Tab E). No evidence was given to explain the documents filed by CIC at Book #3, Tab F. There was no evidence provided in oral or documentary form about the commissions earned by Fisher and as to whether or not the commissions were a motivating consideration for his conduct.



We must conclude that there is insufficient evidence to make a guilty finding that Fisher placed his interests before that of RM's. We find that there was no misconduct by a breach of Bylaw 9, (2), (h).

Issue 4

As stated in Bylaw 8, (2), (q), misconduct can be found where a licensee fails to follow sound business practices. Mr. Waugh argued that Fisher's advice to RM was based on an assumption of continuing high returns in the underlying funds which proved overly optimistic. Further, that when the markets turned and when the three policies began to lapse there was no warning or viable options given to RM to mitigate her losses.

We have reviewed the oral evidence and documents. We find that Mr. Waugh's argument is not evidence. We find that there is insufficient evidence for us to find that Fisher failed to follow sound business practices. There is no expert evidence before us to explain what would have been a sound business practice in this instance. The oral evidence before us is that Fisher did take action to warn RM of the situation she was facing. She was warned that some of the policies could not be maintained and some were lapsing. Fisher testified that he did present options to RM. RM chose not to follow his advice. RM did receive notices of impending lapsing. She only made the one \$3,000 transfer to assist keeping one policy going. We cannot determine that our own opinions are inherently uncontroversial in the insurance field. The lack of expert evidence prevents us from forming and applying our own opinions, as to do so would result in this panel essentially providing its own evidence.

We must conclude that there is insufficient evidence to make a guilty finding that Fisher failed to follow sound business practices. We find there was no misconduct by a breach of Bylaw 8, (2), (q).

Issue 5

Bylaw 9 defines incompetence as a question of fact. It includes the display by a licensee of a lack of knowledge, skill or judgment of a nature or to an extent that the licensee is unfit to continue in the business of insurance or to provide one or more services ordinarily provided as part of the business of insurance. Mr. Waugh has argued that Fisher:

- did not properly consider the premium paying abilities of RM;
- he used overly aggressive interest rate assumptions to justify the viability of the universal life insurance policies;
- that the plans for RM had no reasonable chance of meeting her objectives as set out by Fisher in his letters to insurance companies;
- that Fisher represented RM would be maximum funding the policies and he should have known her income could not justify this conduct;
- he demonstrated a serious lack of judgment by emailing Nystrom on two occasions with information he knew was not correct or accurate.



We do note that we have found that Fisher demonstrated a lack of judgment by emailing erroneous information to Nystrom. See issues 1 and 2.

There was no expert evidence called to demonstrate that the 13 universal life insurance policies were not within RM's financial capabilities to fund at levels that made them appropriate investment and/or insurance products for RM. The only evidence before the DHC is that RM intended to fund the insurance with her mutual fund gains and gains within the policies. We are cognizant of RM's taxable income situation during the relevant years. Fisher felt RM was capable of funding her policies but when she took out the additional \$500,000 it was becoming "iffy". The evidence was that Fisher gave RM options but she made her own decisions. We further find that RM's own fastidious attention to details creates doubt in our minds. It is evidence she followed her financial picture very carefully. She knew what was happening or at least should have known what was happening (her calendars suggest she clearly knew). As commented above, RM could have kept funding the policies to some degree as there were funds in accounts available, but she chose not to do so.

Further, there is no evidence for the DHC to conclude on a balance of probabilities that Fisher knew or ought to have known that RM's intention was to secure the financial security of her children and/or grandchildren. The evidence is that RM had great distrust of her daughter AY. In fact in 2006 she cut her out as a beneficiary of her estate except for jewellery. RM wanted to financially care for her son MM, but she was not entrusting anything to him until he reached 50 years of age. RM wanted her brother DG to dole out money as he deemed fit from the secret account he was to establish. The evidence clearly indicates that family circumstances were a driving factor in the thinking and conduct of RM. Her personal notations attached to her will (Book 3, Tab C, (7)) clearly demonstrate a mistrust of certain family members. One example of this is the notation that directs that the debts owed to her by her children be collected by her estate should her children contest her will. This would appear to be a provision added after her will was drafted. There is no evidence that RM consulted Nystrom or any other lawyer about adding such a provision. This would give reasonable support to the idea that RM was comfortable acting on her own and without professional advice in matters of consequence. As her intentions changed, she acted and relied on her own judgment.

We have noted there was serious misjudgement exercised by Fisher in dealing with Nystrom. However, in conclusion we must find there is insufficient evidence for us to make a finding of overall incompetency. The lack of expert evidence to give direction on industry standards and competency prevents us from forming and applying our own opinions. To do otherwise would result in this panel essentially providing its own evidence.



The Law

BYLAW 8 – MISCONDUCT

(1) For the purpose of the Act, regulations and bylaws, misconduct is a question of fact but includes any matter, conduct or thing, whether or not disgraceful or dishonorable, that is:

(b) may harm the standing of licensees in the insurance industry.

(2) Without restricting the generality of subsection (1), a licensee may be guilty of misconduct if the licensee:

(c) in the course of promoting, selling or servicing insurance business, provides in any advertising or other communications information that is false or misleading;

(h) fails to place the interests of the consumer before those of the licensee or others;

(q) fails to follow sound business practices;

BYLAW 9 – INCOMPETENCE

(1) For the purposes of the Act, the regulations and the bylaws, incompetence is a question of fact, but includes the display by a licensee of a lack of knowledge, skill or judgment of a nature or to an extent that the licensee is unfit to continue in the business of insurance or to provide one or more services ordinarily provided as part of the business of insurance.

“Sheila Hart”

Chairman

Dated this 12th day of February 12, 2009.