

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 99-F-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.

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

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.").

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 45-02-02-09.²

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).

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.

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 time does not necessarily eliminate the conflict of interest concerns mentioned above³ 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

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.

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. 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.

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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.

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