IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

DANIEL W PINKERTON,

Plaintiff,

vs.

SOA DEPT OF COMMUNITY & ECONOMIC DEVELOPMENT,

Defendant.

Case No. 3AN-04-11373 CI

FINAL JUDGMENT

Pursuant to the stipulation of the parties filed January 3, 2006 and the Order Re: Administrative Appeal issued by this Court on December 20, 2005, the Order of the Director of the Division of Insurance issued on August 26, 2004 is Affirmed. The Appellee has waived its right for costs and attorneys fees by stipulation of the parties.

DATED at Anchorage, Alaska, this 4th day of January 2006.

MARK RINDNER
Superior Court Judge

I certify that on January 4, 2006 a copy was mailed to:
J. Treptow AG-Atwood

Administrative Assistant

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

DANIEL W. PINKERTON, Appellant, v. DIVISION OF INSURANCE, Appellee.	Case No. 3AN-04-11373CI Div. of Insurance Case No. D99-01

ORDER RE: ADMINISTRATIVE APPEAL

Introduction

Appellant Daniel Pinkerton ("Pinkerton") was the financial advisor for Paula DeLaiarro ("DeLaiarro") after the death of her husband. Pinkerton provided advice to DeLaiarro on several investments for herself and her four children for approximately twenty-three months. In 1997 DeLaiarro filed a complaint with the Alaska Division of Insurance ("Division") alleging that Pinkerton failed to provide competent professional services for financial planning and investing. The Division investigated the complaint and the Director[1] eventually determined that Pinkerton had violated 1) AS 21.36.145 by failing to fully disclose his commissions; 2) AS 21.36.030 by misrepresenting the suitability of a life insurance policy to pay estate taxes with the estate named as the

[1] The Division of Insurance is created under AS 21.06.020. It operates under the supervision of the director of insurance. AS 21.06.020 (b). The Director "determine[s] whether any person has violated a provision of [the] title..." AS 21.06.090 (c).

beneficiary; and 3) AS 21.36.030 by misrepresenting the suitability of a universal life insurance policy for the four children. Pinkerton appeals the Director's findings.

Factual and Procedural Background

Paula DeLairarro's husband died of cancer in July 1995. Friends of DeLaiarro referred her to Pinkerton who was a financial planner for Shilanski & Associates. (R. 1224). At the time of their first meeting, DeLaiarro had about $1 million that needed to be invested; $363,000 was to be in a Trust for her four children.

From August 21, 1995 to July 14, 1997 Pinkerton served as a certified financial planner for DeLaiarro in which he provided financial planning advice and recommendations. In their initial meeting, Pinkerton and DeLaiarro reviewed the Shilanski & Associates' Financial Advisory Agreement and Shilanski's Disclosure Brochure. (R. 1225). The Agreement states that the advisors of Shilanski are registered agents with Sun Investment Company and Insurance Companies and that the agents "may participate in and receive the usual and customary commissions or fees" on client investments. (R. 816). DeLaiarro executed the Financial Advisory Agreement at the initial meeting. (R. 1225).

During their relationship, DeLaiarro's portfolio increased by $274,000, she realized an annualized rate of return of 11%, which exceeded her desired 7%, and her federal income taxes were reduced by 80%. (R. 1278, 1232). In 1997, DeLaiarro filed a complaint with the Alaska Division of Insurance alleging that Pinkerton failed to provide competent professional services. The Division investigated the complaint and filed an accusation against him on January 8, 1999 alleging violations of AS 21.36.030, AS 21.36.050, AS 21.36.020, and AS 21.36.145. (R. 209-220).

A hearing was held from September 20th to 24th. The evidentiary record was extensive, including testimony from 15 witnesses who were mostly experts and 145 exhibits. (R. 478, 479). The Hearing Officer ("H.O.") issued a Recommended Decision on October 29, 1999 holding that the State had failed to prove any of the alleged statutory violations. (R. 002-017). On October 26, 2000, the Director of the Division of Insurance ("Director") entered an order that remanded the recommended decision back to the H.O. for additional findings and conclusions (R. 410-413).

On November 27, 2001, the Division moved to reopen the record for submission of additional evidence which was granted. It sought to admit evidence of the Certified Financial Planner Board ("CFPB") disciplinary action against Pinkerton. The CFPB is a private, professional body that conducts its own proceedings to determine if disciplinary action is necessary against a member under its own standards. The CFPB held an evidentiary hearing where the Board and Pinkerton presented evidence and testimony through direct and cross-examination. The Board concluded by a preponderance of the evidence that a prudent financial planning professional would not have sold DeLaiarro the investments that Pinkerton sold her. (R. 375-400). The CFPB suspended Pinkerton for six months. Pinkerton appealed the decision; it was upheld and the Appeals Board found that Pinkerton's responses during the hearing were not direct or complete and extended his suspension to one year and a day.[2] (R. 247). On June 22, 2002, a hearing was held on Pinkerton's petition for reinstatement which was granted. During his reinstatement hearing Pinkerton acknowledged that he made mistakes with respect to his

[2] If the suspension is for more than a year, a person seeking reinstatement must prove rehabilitation by clear and convincing evidence. (R. 267).

financial planning advice to DeLaiarro. (R. 607-611). Pinkerton moved to admit supplemental evidence of his CFPB reinstatement.

On October 27, 2003 after reviewing the supplemented record, the H.O. issued her Supplemental Findings, Conclusions, and Recommended Decision in which she reached the same conclusion in her prior decision issued after the September 1999 hearing, finding that the "Division failed to prove the allegation of serious misconduct and statutory violations set forth in the Accusation." (R. 478-502). On November 3, 2003 the parties were provided with the opportunity to respond to the H.O.'s proposed decision. The Division filed a response requesting that the Director reject the proposed decision; Pinkerton did not file a response. On August 26, 2004 the Director issued an Order which is now the subject of the appeal.

The Director, in a 5-paged opinion, both accepted and rejected parts of the H.O.'s recommended findings. (R. 1710-1714). Specifically, she found that Pinkerton had violated 1) AS 21.36.145 by failing to fully disclose his commissions; 2) AS 21.36.030 by misrepresenting the suitability of a life insurance policy to pay estate taxes with the estate named as the beneficiary; and 3) AS 21.36.030 by misrepresenting the suitability of a universal life insurance policy for the four children. The Director decided, however, not to sanction Pinkerton because DeLaiarro and Pinkerton had settled their dispute and there was a showing of rehabilitation by Pinkerton. (R. 1714).

Standard for Administrative Appeals

There are four standards of review for administrative appeals. For questions of fact, the Alaska Supreme Court employs the "substantial evidence" test. Under that test, the Court asks, "whether those findings are supported by such relevant evidence as a

reasonable mind might accept to support a conclusion." Collins v. Arctic Builders, Inc., 31 P.3d 1286, 1289 (Alaska 2001). For questions of law utilizing agency expertise, the Court uses the "reasonable basis" test. In such situations, the Court "merely seek[s] to determine whether the agency's decision is supported by the facts and has a reasonable basis in law, even if [it] may not agree with the agency's ultimate determination." Tesoro v. Kenai Pipe Line Co., 746 P.2d 896, 903 (Alaska 1987). See also, CH Kelly Trust v. Municipality of Anchorage, Bd. Of Equalization, 909 P.2d 1381, 1382 (Alaska 1996).

For questions of law where no agency expertise is necessary, the Court employs the "substitution of judgment test." "Application of this standard permits a reviewing court to substitute its own judgment for that of the agency even if the agency's decision had a reasonable basis in law." Id. "Although we ordinarily review an agency's regulatory decision under the 'reasonable but not arbitrary' standard, 'when the decision raises a question of statutory interpretation involving legislative intent rather than agency expertise, we review that question independently, applying the substitution-of-judgment standard.'" State, Public Employees' Retirement Bd. v. Morton, 2005 WL 2901359, *2 (Alaska 2005) (citing Alaska Ctr. for the Env't v. Rue, 95 P.3d 924, 926 (Alaska 2004)); see also Greenpeace, 96 P.3d at 1061 n.10 (de novo standard applies if the case concerns "statutory interpretation or other analysis of legal relationships about which courts have specialized knowledge and experience") (quoting Kelly v. Zamarello, 486 P.2d 906, 916 (Alaska 1971)).

Finally, for administrative regulations, the "reasonable and not arbitrary" test is used. Estate of Basargin v. State, Commercial Fisheries Entry Comm., 31 P.3d 796, 799 (Alaska 2001). This means that a court will defer to the agency's interpretation unless it

is "plainly erroneous and inconsistent with the regulation." Board of Trade, Inc. v. State, Dep't of Labor, Wage & Hour Admin., 968 P.2d 86, 89 (Alaska 1998).

Discussion

Pinkerton makes four points of appeal. First, the Director erred in finding that Pinkerton violated AS 21.36.145 by failing to fully disclose commissions. Second, the Director erred in finding that Pinkerton violated AS 21.36.030 by misrepresenting the suitability of a life insurance policy to pay estate taxes with the estate as the named beneficiary. Third, the Director erred in finding that Pinkerton violated AS 21.36.030 by misrepresenting the suitability of universal life insurance policies for the children. And finally, that the CFPB decision should not have been considered by the Director because it was inadmissible hearsay, it was insufficient to support the findings on appeal, and it was a decision based on incomplete evidence.

A) Did the Director err in finding that Pinkerton violated AS 21.36.145?

Pinkerton first argues that the Director's finding that Pinkerton violated AS 21.36.145 is not supported by substantial evidence and secondly, that the Director's statutory interpretation of full disclosure under AS 21.36.145 is incorrect. Since a violation of AS 21.36.145 depends on the statute's meaning, that issue will be addressed first.

Title 21, Chapter 36 of the Alaska Statutes deals with trade practices and frauds in the insurance industry. AS 21.36.020. Section 145, which was enacted in 1992, specifically addresses unfair financial planning practices and the pertinent parts read:

> (b) A person may not engage in the business of financial planning and solicit the sale of a product or service on the basis that the person is an insurance salesperson or that a commission for the sale of an insurance

> product will be received in addition to a fee for financial planning without full disclosure to the client before the execution of the agreement required in (c) of this section.
>
> (c) A person licensed under this title may not charge a fee other than a commission for financial planning unless the fee is based upon a written agreement signed before the performance of a service under the agreement. The insurance salesperson shall provide the client a copy of the signed agreement at the time of signing. The agreement must specifically state the service for which a fee is to be charged and how the fee will be determined or calculated. The agreement must provide that the client is under no obligation to purchase an insurance product. The licensee shall retain a copy of the agreement for not less than five years after completion of services and the agreement shall be available to the director upon request.

AS 21.36.145. The specific parts of this statute that are of concern are sections (b) and (c) and what level of disclosure for commissions is required by these sections. Since this is a question of law that does not require agency expertise, the Court will employ the "substitution of judgment test" and review the statutory meaning independently. State, Public Employees' Retirement Bd. v. Morton, 2005 WL 2901359, *2 (Alaska 2005). An Alaska statute is interpreted "according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters." Reust v. Alaska Petroleum Contractors, Inc., 2005 WL 2812745, *14 (Alaska 2005).

The purpose of Chapter 36 is declared in AS 21.36.010:

> The purpose of this chapter is to regulate an act or a trade practice in the business of insurance in accordance with the intent of Congress as expressed in 15 U.S.C. 1011 - 1015 (McCarran-Ferguson Act) by defining or providing for determination of all the practices in this state that constitute an unfair method of competition or an unfair or deceptive act or practice and by prohibiting them.

AS 21.36.010. In O.K Lumber Co. v. Providence Wash. Ins. Co., the Alaska Supreme Court also noted that "Chapter 36 of title 21 governs trade practices and frauds in the insurance industry. The purpose of chapter 36 is to 'regulate trade practices in the business of insurance' by defining and prohibiting 'unfair methods of competition or unfair or deceptive acts or practices.'" 759 P.2d 523, 526 (Alaska 1988). The court has also held that "Title 21 regulates the insurance industry in Alaska; its purpose is to protect the Alaskan insurance consumer." Northern Adjusters, Inc. v. Department of Revenue, 627 P.2d 205, 207 (Alaska 1981) (emphasis added). However, no court has interpreted section 145 specifically and the legislative history of this section also offers no guidance other than noting that it was added in 1992.

In Government Employees Ins. Co. v. Graham-Gonzalez, the court outlined the approach for statutory interpretation and noted that:

> [The court has] rejected a mechanical application of the plain meaning rule in matters of statutory interpretation, and have adopted a sliding scale approach instead. The plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be. In assessing statutory language, "unless words have acquired a peculiar meaning, by virtue of statutory definition or judicial construction, they are to be construed in accordance with their common usage."

107 P.3d 279, 284 (Alaska 2005) (citing Muller v. BP Exploration Inc., 923 P.2d 783, 787-88 (Alaska 1996)).

The Director determined that "AS 21.36.145 is intended to require full disclosure to consumers of the total compensation that a person will receive if they charge a fee for financial planning and also stand to earn a commission on the sale of an insurance policy." (R. 1711). The Director found that the purpose behind the statute is to "protect the public from the deceptive practice of misrepresenting sales of insurance as financial

planning and to require full disclosure of fees and services." (R. 1711). She concluded that "full disclosure is not met simply by providing 'notice' that a commission might be earned on investments or insurance policies." (R. 1711). This Court is inclined to agree with the Director's interpretation.

There was evidence that commissions from eight of DeLaiarro's forty-five investments came directly from her own funds, not from the insurance company. (R. 483). These commissions can be categorized as a "fee" under the statute since DeLaiarro was charged upfront and paid them herself, in a sense, as part of the sum charged for Pinkerton's services as a financial planner. (R. 483). Moreover, Pinkerton was an agent for Sun Life Insurance Company which created a fiduciary relationship between him and DeLaiarro. O.K. Lumber Co., Inc. v. Providence Washington Ins. Co., 759 P.2d 523, 525 (Alaska 1988) (noting that a "fiduciary relationship [is] inherent in every insurance contract"). As a fiduciary, Pinkerton had the duty to disclose all facts which materially affect her rights and interests. Greater Area Inc. v. Bookman, 657 P.2d 828, 830 (Alaska 1982) (citing Pashley v. Pacific Elec. Ry. Co., 153 P.2d 325, 330 (California 1944) (where the court found "Where there is a duty to disclose, the disclosure must be full and complete, and any material concealment or misrepresentation will amount to fraud.").

When Pinkerton and DeLaiarro first met he went over the Financial Advisory Agreement and the Shilanski Disclosure Brochure which disclosed that Pinkerton was an agent for Sun Life Insurance and may receive the usual and customary commissions on the investment which the client invests. (R. 816, 1225). DeLaiarro agreed that the fee schedule was reviewed and that she knew that Pinkerton may receive commissions on

products he recommended, but claimed that she did not realize until 1997 that he in fact did derive a commission on the products sold to her. (TR 34; R. 792-93).

Two of Pinkerton's experts and the Division's only expert agreed that an investment advisor is not required to disclose the specific amount of commissions earned on a particular product. (TR 125, 271, 300-01, 303, 304; R. 493, 1030). Pinkerton argues that this testimony proves that he was not required to disclose the specific commission amounts and that the notice he provided in the Financial Advisory Agreement was adequate. However, the statute's clear language requires "full disclosure" of commissions; if the legislature had intended this language to simply mean "notice" it would have expressly stated so. Moreover, the eight "commissions" that DeLaiarro paid up-front before purchasing the investments were paid out of her own funds—these "commissions" are more akin to a fee being charged for Pinkerton's services.

Pinkerton asserts that the evidence shows that he disclosed the commissions he would receive and that his disclosure complied with professional standards and applicable law. He claims that he made DeLaiarro aware of the commissions on the products she purchased in six different ways. (R. 1274). 1) the Disclosure Brochure (R. 1286-1301); 2) the Financial Advisory Agreement (R. 814-818); 3) delivering the prospectus for each investment that discloses fees and commissions before she invested – the prospectus along with the annuity contracts disclosed all fees; 4) discussing each of the companies with DeLaiarro that she chose to invest in (i.e. the sources of his commissions); 5) discussing penalties involved if DeLaiarro were to change her mind and want to liquidate the investments; and 6) mailing DeLaiarro a copy of every application

form she signed—all of which disclose either that Pinkerton will receive a commission or lists the percentages of the total commissions that he would be receiving. (R. 1274).

However, since the eight commission charges that DeLaiarro paid out of her pocket before making the investment purchases were more like fees for financial services, under the statute, Pinkerton should have explicitly stated in a written agreement which services DeLaiarro would pay the "commission" for and how those "commissions" were calculated. AS 21.36.145 (c).

Again, Pinkerton argues that his experts testified that the commission disclosure statement in the Financial Advisory Agreement and the Disclosure Brochure that provided notice to DeLaiarro that Pinkerton may receive commissions were sufficient to meet financial practice standards and determined that Pinkerton complied with the disclosure requirements of the law. (TR 303, 304). The H.O. agreed and found that Pinkerton provided reasonable and adequate notice that he would earn commissions on insurance sales. (R. 493). The Director rejected the H.O.'s findings and instead found that "full disclosure" means disclosure that is complete and unambiguous. (R. 1711). This Court agrees, especially given that the purpose behind Title 21 is to Title 21 is to "protect the Alaskan insurance consumer." Northern Adjusters, Inc. v. Department of Revenue, 627 P.2d 205, 207 (Alaska 1981).

Finally, the Division points to Pinkerton's testimony during his reinstatement hearing before the CFPB as substantial evidence that he violated AS 21.36.145. In that hearing, Pinkerton admitted that he did not make DeLaiarro fully aware of the

commissions he would earn.[3] (R. 683-84). This coupled with the fact that DeLaiarro testified that she did not become aware that Pinkerton was receiving commissions until 1997, almost 2 years after he became her financial advisor. (R. 792-93). She also testified that she had no understanding of the commissions that Pinkerton might earn and how lucrative it might be for him or how there may be a potential conflict of interest for him. (R. 793-94).

Since the Director's interpretation of the law was accurate and there is substantial evidence to support the conclusion that Pinkerton did not comply with the statute's disclosure requirements, the Director did not err in finding that Pinkerton violated AS 21.36.145.

B) Did the Director err in finding that Pinkerton violated AS 21.36.030 by misrepresenting the suitability of a life insurance policy to pay estate taxes with the estate as named beneficiary?

AS 21.36.030 prohibits the misrepresentation of insurance policies. The pertinent sections are a(1) and a(11) which state:

> A person may not make, issue, circulate, broadcast, or have made, issued, circulated, or broadcast an estimate, circular, statement, illustration, comparison, or other written or oral presentation that:
>
> (1) misrepresents the benefits, advantages, conditions, sponsorship, source, or terms of an insurance policy;
>
> ...
>
> (11) is in any other way misleading, false, or deceptive.

AS 21.36.030. The statute states that "'misrepresentation' includes any statement or omission of a statement that when taken in the context of the whole presentation may tend to mislead or deceive the person or persons addressed." AS 21.36.030 (b).

---

[3] The exact statement from Pinkerton when he discussed the commissions generated for himself was "What I did not do was let [DeLaiarro] know that I would have received a commission." (R. 683-84).

Pinkerton first argues that "suitability" is not defined by the statute. The Director, in her Order, noted that "for purposes of AS 21.36.030, 'suitability' falls within the scope of misrepresentations concerning the benefits or advantages of an insurance policy." (R. 1712). Even though the Director does not explain how suitability falls within the scope and the legislative history does not give any guidance, suitability seems to encompass the principles in section a(1).

For questions of fact, the Alaska Supreme Court employs the "substantial evidence" test. Under that test, the Court asks, "whether those findings are supported by such relevant evidence as a reasonable mind might accept to support a conclusion." Collins v. Arctic Builders, Inc., 31 P.3d 1286, 1289 (Alaska 2001). The substantial evidence standard is a fairly low threshold.

Pinkerton argues that there was not sufficient evidence to support the Director's findings and that deference should be given to the H.O. since she was at the hearing and was more able to evaluate the witnesses' credibility and weigh the evidence. After the hearing and reviewing the supplemental evidence the H.O. concluded that Pinkerton did not violate AS 21.36.030 in recommending the life insurance policy to pay DeLaiarro's estate tax and having the estate listed as the beneficiary. (R. 496). However, the H.O. believed that the question whether Pinkerton erred in recommending that DeLaiarro purchase the whole life insurance policy was close, but found there was substantial evidence supporting the reasonableness of the recommendation. (R. 496). The H.O. believed that Pinkerton should have let a couple months lapse so that DeLaiarro could have mulled over the idea of an irrevocable trust, but ultimately found that his recommendation was not a statutory violation. (R. 497).

After reviewing the record, the Director found otherwise. (R. 1712-13). The Director based her decision on the opinion of the Division's only expert witness, Mr. Lukehart. (R. 1713). She stated that there was no documented evidence that Pinkerton calculated the estate taxes that would be due nor evidence that he discussed more suitable means to reduce the estate tax liability such as implementing a gifting program to her children. (R. 1713). Pinkerton claims that the Director's conclusions are unsupported by the record and that the evidence is contrary to her final determination.

Pinkerton claims that he did evaluate the future estate tax based on the value of her estate at the time they first met and estimated what her estate would be worth in 10 years. (R. 1260, 1357). Both Pinkerton and DeLaiarro testified that he used his HP12c calculator to determine the future taxes. (TR 524, R. 796). He then asserts that at a conservative rate of growth over her life expectancy he estimated that the estate would be worth approx $3.5 million and the minimum estate tax owed would be $972,000. (R. 1260). Pinkerton recommended that DeLaiarro purchase a $1 million life insurance policy to pay the estate taxes and that the beneficiary be an irrevocable insurance trust. (R. 1260). Pinkerton asserts that an important aspect of the policy was that DeLaiarro could change ownership and beneficiary designation at any time after three years from purchase without any tax consequences. (R. 1193). Pinkerton also points to Lukehart testimony where he admitted that he has recommended that his clients purchase permanent insurance to pay estate taxes. (TR 110).

Additionally, DeLaiarro testified that Pinkerton did discuss alternate options to the whole life policy. (R. 795). The Division's expert, Lukehart, was critical that a gifting program was not implemented. However, Pinkerton's expert, Granzella, testified

that "gifting is a time-honored method of transferring assets from one generation to another. It should not be used as a replacement for life insurance." (R. 1194). Granzella also testified that there were problems with Lukehart's gifting schedule and determined that the whole life policy was an appropriate decision. (R. 1194).

The Division contends that it was unsuitable for Pinkerton to encourage DeLaiarro to purchase a large whole life policy with her estate as the owner given the tax consequences. However, Pinkerton testified that he was attempting to meet the needs of DeLaiarro and by placing her with this life insurance policy option she could change the ownership and beneficiary designations at anytime without tax consequences so long as she lived for three years from the date of purchase. (R 1261-62). Pinkerton did not think this was an issue since her life expectancy was 40 more years. (R. 1262).

Pinkerton points to Helmuth v. University of Alaska Fairbanks to support his argument that deference should be given to the H.O., not the Director, since the H.O. was more able to evaluate all the evidence. 908 P.2d 1017 (Alaska 1995). In Helmuth, the court found that "since the hearing officer had an opportunity to observe the witnesses when they testified, we accord great weight to his evaluation of the witnesses' credibility and demeanor. Cf. Parker v. Northern Mixing Co., 756 P.2d 881, 892 (Alaska 1988) ("it is the function of the trial court, not of this court, to judge witnesses' credibility and to weigh conflicting evidence"); Sheridan v. Sheridan, 466 P.2d 821, 824 (Alaska 1970) ("great weight must be accorded to the trial judge's experience and to his evaluation of demeanor testimony")". Helmuth, 908 P.2d at 1023 (emphasis added).

The Division argues that the substantial evidence standard is a low threshold in the first place and the H.O.'s remarks should themselves cause the court to affirm the Director. Anderson v. State, 26 P.3d 1106, 1109 (Alaska 2001). The Division is correct.

Here, there was a litany of competing expert testimony on whether Pinkerton misrepresented the suitability of the life insurance policy. The H.O. even concluded that it was a close question. (R. 496). The Alaska courts have repeatedly held that it is not the role of the court to reweigh the evidence or make credibility findings. Since the Director makes the final determination of whether a person has violated Alaska insurance law and there is substantial evidence as to both sides, this Court must affirm the Director's final decision on this issue.

C) Did the Director err in finding that Pinkerton violated AS 21.36.030 by misrepresenting the suitability of a universal life insurance policy for DeLaiarro's children?

The H.O. in her first findings and conclusions determined that Pinkerton did not violate AS 21.36.030 in recommending that the purchase of universal life insurance policies on the children. (R. 517). The H.O. also found that life insurance is not simply an investment and that Pinkerton recommended the policy not just as an investment but as a gift of security. The H.O. determined that permanent life insurance policies on the kids is appropriate from a long term planning standpoint because the rates are much cheaper, the cash value grows on a tax-deferred basis, and the insured can access the cash values later in life for purposes such as financing a college education or starting a business. (R. 511).

After the H.O. initial findings, the Director issued an order directing the H.O. to make additional findings and conclusions of law. The order specifically listed out certain

factual findings and legal conclusions for the H.O. to find. Under the legal conclusions portion the Director listed five items for the H.O. to reconsider—none of which asked the H.O. to reconsider whether Pinkerton violated 21.36.030 with respect to the suitability of the children's universal life insurance policy. (R. 410-12). The H.O.'s supplemental findings determined that the Division failed to prove that Pinkerton violated AS 21.36.030 in recommending the universal life insurance policies for the children. (R. 501).

The Director, however, rejected the H.O.'s findings and conclusions. The reasons to support this finding were that 1) Pinkerton did not tell DeLaiarro that other forms of insurance were available at far less costs; 2) he did not tell her that she could purchase insurance for the children as a rider on her policy; and 3) he did not tell her about the benefits of a Guaranteed Insurability Rider. (R. 1713). The Director also stated that there "are other reasons submitted in the record that support a decision that these policies were not suitable" citing to Lukehart's prefiled direct testimony (p. 13-15).

Pinkerton asserts that the evidence does not support the Director's findings. Two of Pinkerton's experts' testimony contradicted Lukehart and refuted his claims of error. Granzella testified that the trust was the correct beneficiary because DeLaiarro did not need the funds for additional income; the trust benefited all the children and the proceeds could be better utilized and would enhance the future of any remaining children. (R. 1204). Lapito agreed that there was no error, noting that there was no indication that DeLaiarro needed additional income and that the Trust should have owned the death benefits and been the beneficiary since the Trust was set up to benefit all the children. (R. 1689).

As for having the children as riders on DeLaiarro's existing USAA term policy, Lapito and Granzella both believed that riders were not in the children's best interest. (R. 1206, 1690). Lapito testified that rider would be wasting premium dollars. (R. 1691). Lapito also testified that insurance is a guaranteed safe place for dollars on the fixed or guaranteed side of the portfolio, not on the equity side. He said that there were plenty of other assets on the equity side and noted there needed to be funds on the guaranteed side. He believed that a life insurance contract is an excellent place for the funds, noting that insurance provides a guarantee for the kids down the road that investments can't offer. (R.1691-92).

With respect to the desirability of a Guaranteed Insurability Rider, again, both Lapito and Granzella testified that such a rider was not necessary. (R.1204, 1684). Lapito disagreed with Lukehart's opinion that the rider was the most valuable benefit of the policy. (R. 1690). He testified that on a "pretty good sized contract, then [the GBI] is likely just a waste of money." (R. 1690).

Granzella testified that life insurance is not an investment and cannot be compared to investments adequately. He asserted the Lukehart wants to forget long-range planning and focus only on percentages and break-even points. He noted that in this case, the objective was to start each of the children on a sound insurance program early in life. He concluded that the loss of a few percentage points of interest now in order to provide for the children's future was an acceptable planning strategy for DeLaiarro. (R. 1207). The H.O. agreed with Pinkerton's experts and determined that he did not violate AS 21.36.030.

The Division asserts that Director relied on Lukehart's testimony where he described the problems with the policies when asked if they were suitable. (R. 919-21). Specifically, Lukehart was asked if the policies were unsuitable and he testified that they were not. (R. 919-21). The Division argues that Lukehart's opinion is sufficient to affirm the Director's decisions.

Again, here, there is competing expert testimony on whether Pinkerton misrepresented the suitability in recommending the policies for the children. As stated above, the Alaska courts have repeatedly held that it is not the role of the court to reweigh the evidence or make credibility findings. Since the Director makes the final determination of whether a person has violated Alaska insurance law and there is substantial evidence as to both sides, this Court must affirm the Director's final decision.

D) Did the Director improperly considered the CFPB decision?

After the H.O. issued her initial recommended decision in October 1999 finding that the Division failed to meet its burden of proof with respect to all counts of the accusation, DeLaiarro filed complaints with four professional regulatory organizations that Pinkerton belonged. (R. 1767). Three of the four organizations found that Pinkerton did not violate any ethical standards. (R. 361, 362, 363). The CFPB found that Pinkerton had violated certain "principles of integrity, objectivity, fairness, professionalism and diligence and rules of the Board." (R 1780).

On November 30, 2001 the Division moved to reopen the record for submission of additional evidence, the CFPB decision, and the Division alleged that the CFPB "had conducted an investigation and full adversary proceeding regarding the same conduct that

is involved in the instant case" and thereafter had suspended Pinkerton's CFP certificate. (R. 1758-59). The H.O. granted the motion to reopen the record. (R. 335-36).

Pinkerton filed a motion arguing that 1) the CFP documents were expert testimony in written form which was hearsay and denied Pinkerton's right to cross-examine; 2) the CFPB expressly recognized that its standards were not designed to be a basis for legal liability; 3) the procedurally deficient hearing process of the Board demonstrates that its standards and findings were not an adequate basis for legal liability. (R. 314-320). The H.O. found that the CFPB decision was expert testimony. (R. 499). She also found that the panel's opinion conflicted with the considerable expert testimony in the record that Pinkerton met professional standards and was ethical in advising DeLaiarro. She noted that it appeared that the panel believed DeLaiarro's testimony and that is how they came to their conclusion. (R. 500). The H.O. again found that in the hearing before her that DeLaiarro's testimony and memory was not as credible as Pinkerton's testimony. She found that Pinkerton's testimony at the CFPB hearing was entirely consistent with the hearing before her. (R. 500). The H.O. concluded that she gave little weight to the CFPB decision since there was evidence on key factual issues before her and she determined that Pinkerton did not violate Alaska Law. (R. 500).

The Director's order, however, cited the CFPB's decision on three occasions. (R. 1710, 1712, 1714). She concluded that contrary to the H.O's lack of reliance on the proceedings before for the CFPB, she found that the decision to suspend Pinkerton should be given consideration. Pinkerton argues that the CFPB's decision is hearsay and is not permitted. However, the Division argues that under AS 21.06.210(c) the formal rules of evidence do not apply, i.e. hearsay is admissible. The Division also argues that it is

important to distinguish between the CFPB decisions and Pinkerton's statements in the proceedings. It argues that the Director relied on his admissions of wrongdoing to support her findings and that Pinkerton's statements are admissible under any evidentiary standard as relevant non-hearsay. See Alaska Rules of Evidence 402, 801(d)(2).

Pinkerton argues that if the CFPB decision is found not to be hearsay, the decision is only a small part of the evidentiary record and is not sufficient basis for the findings on appeal. Pinkerton asserts that the matters in this case are not whether Pinkerton violated the professional standards, but whether he violated the statutory requirements under Alaska law. Pinkerton argues that the CFPB recognizes that its standards do not provide an adequate basis for legal liability: "conduct inconsistent with a standard in and of itself is not intended to give rise to a cause of action nor create any presumption that a legal duty has been breached. The standards are designed to provide CFP designees a structure for identifying and implementing expectations regarding the professional practice of personal financial planning. They are not designed to be a basis for legal liability." (R. 324).

Pinkerton also argues that the CFPB decision was based on incomplete evidence since it was not based on the full recorded submitted by Pinkerton and there is no way of knowing whether the omitted information would have altered the eventual outcome of the CFPB proceedings. The CFPB noted that Pinkerton submitted testimony of his expert witnesses in advance of the hearing, but due to the length the CFPB staff provided the deciding members of the panel with only selected parts of the testimony. (R. 316). It appears that 134 pages of Pinkerton's expert testimony were omitted and he was not

made aware of this procedural defect until it was too late to arrange live testimony.[4] (R.316). Pinkerton also argues that the H.O., based on the full record, found that Pinkerton did not violate the law.

The Division argues that the Director only relied on the CFPB decision to suspend and reinstate Pinkerton solely for her decision not to sanction him. (R. 1714). The Division argues that if the Court believes that she should not have considered the CFPB decisions then the correct result would be to remand the case back to the director for her to reconsider the imposition of the sanctions. However, this is unnecessary because the Director was allowed to review the CFPB Decision since the formal rules of evidence do not apply under AS 21.06.210 (c). Moreover, his admissions in his reinstatement hearing are non-hearsay under the Alaska Rules of Evidence 801(d)(2). The Director did not err in considering the CFPB decision.

For all these reasons the decision of the Director is AFFIRMED.

DATED at Anchorage, Alaska, this 20 day of December 2005.

Marie Rindner

MARK RINDNER
Superior Court Judge

I certify that on December 20, 2005 a copy was mailed to:
Treptow AG - Atwood

Administrative Assistant

[4] The board did receive a comprehensive list of all the documents and a summary of them for the hearing. (R. 311).

STATE OF ALASKA

DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT

DIVISION OF INSURANCE

In the Matter of:)
)
Daniel W. Pinkerton,)
Respondent.)
)

Case No. D99-01

ORDER APPROVING IN PART AND REJECTING IN PART HEARING OFFICER'S RECOMMENDED DECISION

I. Procedural History

The Director of the Division of Insurance (director) adopts the procedural history as described in the hearing officer's proposed Supplemental Findings, Conclusions and Recommended Decision dated October 27, 2003. The director notes that, since the Division of Insurance (division) filed its initial accusation and amended accusation against Respondent Daniel W. Pinkerton (Mr. Pinkerton) in 1999, no additional complaints have been brought to the director's attention regarding Mr. Pinkerton's conduct. The division based its accusation against Mr. Pinkerton on the complaint filed by Ms. D. Mr. Pinkerton and Ms. D entered into a settlement on April 21, 2000, which resolved all matters pending in 3AN-99-5778. The settlement did not affect the accusation, although Ms. D agreed that the consideration paid to her under the settlement would constitute full restitution if so ordered. The division was not a party to the settlement and therefore is not bound by that agreement.

In addition, the Certified Financial Planner Board of Standards conducted an investigation into Mr. Pinkerton's actions with respect to the financial planning services he provided to Ms. D. The CFP Board found by a preponderance of the evidence that Mr. Pinkerton failed to act in an appropriate manner in his professionalism and diligence and suspended his CFP certificate for six months. Mr. Pinkerton appealed to the CFP Board of Appeals. The Board of Appeals affirmed the findings that he violated the *Code of Ethics and Professional Responsibility* and the *Disciplinary Rules and Procedures* of the Certified Financial Planner Board of Standards, Inc. The Board of Appeals increased Mr. Pinkerton's suspension to one year and one day. On July 15, 2002 the CFP Board found that Mr. Pinkerton had demonstrated rehabilitation by clear and convincing evidence, and had complied with the disciplinary order and all provisions of the Board Disciplinary Rules and Procedures. The CFP Board concluded that he was fit to use the CFP certification again and granted Mr. Pinkerton's petition for reinstatement.

STATE OF ALASKA
DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT
DIVISION OF INSURANCE
ROBERT B. ATWOOD BUILDING
550 WEST SEVENTH AVENUE, SUITE 1560
ANCHORAGE, ALASKA 99501-3567
PHONE: (907) 269-7900
FAX: (907) 269-7910
TDD: (907) 465-5437

On November 3, 2003, the director provided the parties an opportunity to respond to the proposed decision referenced above. The division filed its response on November 25, 2003 and requested that the director reject the proposed decision, independently review this case, and find that the division has proved its case against Respondent Daniel W. Pinkerton. Mr. Pinkerton did not file a response.

II. Findings and Conclusions

As discussed below, based on the record I have determined that Mr. Pinkerton violated AS 21.36.145 by failing to adequately disclose commissions he would earn on products he offered to Ms. D, and AS 21.36.030 by misrepresenting the suitability of products for Ms. D and her children. Except where inconsistent with this order, I defer to the hearing officer's findings and conclusions on the remainder of the counts.

A. Count I, paragraph 17: Mr. Pinkerton Failed to Fully Disclose Commissions

Under AS 21.36.145(b), a licensee must make a full disclosure of the commissions the licensee might earn by selling a client a service or product before a financial planning agreement is executed:

> A person may not engage in the business of financial planning and solicit the sale of a product or service on the basis that the person is an insurance salesperson or that a commission for the sale of an insurance product will be received in addition to a fee for financial planning without full disclosure to the client *before the execution of the agreement* required in (c) of this section.

AS 21.36.145(b), emphasis added.

As a matter of law and policy, I find that the purpose of AS 21.36.145 is to protect the public from the deceptive practice of misrepresenting sales of insurance as financial planning and to require full disclosure of fees and services. I agree with the division staff that full disclosure means disclosure that is complete and unambiguous. Full disclosure is not met simply by providing "notice" that a commission might be earned on investments or insurance policies. As documented in Appendix 1 to the division's objection to the initial recommended decision, AS 21.36.145 is intended to require full disclosure to consumers of the total compensation that a person will receive if they charge a fee for financial planning and also stand to earn a commission on the sale of an insurance policy.

It is good policy for a consumer to know what the total compensation package will be to determine whether it is reasonable. Financial planners and licensees should disclose all facts that could affect a client's decision-making. Specific information on the amount of the compensation is required to be disclosed to adequately inform a consumer.

The Financial Advisory Agreement that Mr. Pinkerton and Ms. D executed stated:

> It is understood by and between the parties hereto that the Advisor Affiliates of Shilanski and Associates, Inc. are registered representative/agents with

STATE OF ALASKA
DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT
DIVISION OF INSURANCE
ROBERT B. ATWOOD BUILDING
550 WEST SEVENTH AVENUE, SUITE 1560
ANCHORAGE, ALASKA 99501-3567
PHONE: (907) 269-7900
FAX: (907) 269-7910
TDD: (907) 465-5437

> Sun Investment Company, a registered Securities Broker/Dealer, Insurance Company's, and in such capacity as registered representatives/agents may, if requested by the Client, implement the decisions of the Client and execute the corresponding transactions. In such capacity such representatives may participate in and received the usual and customary commissions or fees on the investments in which the Client invests, and may receive other commissions, such as new client fee and/or insurance commissions. In the event an Advisor of Shilanski and Associates, Inc. is acting in the capacity of registered representative/agent, he/she shall disclose any fees or commission as are required by existing federal and state securities laws and regulations.

Financial Advisory Agreement, August 14, 1995, page 3, paragraph 6.

Although the Shilanski disclosure brochure provides generic information about fees and commissions, I find that this was the only disclosure regarding the specific compensation that Mr. Pinkerton provided Ms. D before the agreement was executed. This statement alone regarding the commissions that Mr. Pinkerton would receive on investments and insurance products made by or sold to Ms. D was insufficient to adequately inform her of the total compensation that Mr. Pinkerton would receive and did not comply with the requirements of AS 21.36.145(b).

I specifically reject the hearing officer's finding on page six of the recommended decision that concludes that this statement in the Financial Advisory Agreement "provides reasonable notice to a prospective client that the financial advisor will receive commissions on investments that the client purchases through the advisor." I also reject the findings on page 16 that conclude that the "Agreement and Brochure" provide adequate and reasonable disclosure regarding the commissions. I find the legal arguments on this issue in the Division's Response to the Hearing Officer's Supplemental Findings, Conclusions and Recommended Decision, November 25, 2003, pages 7-9, to be correct and adopt them as part of this order. I reject all other findings and conclusions in the hearing officer's recommended decision that are inconsistent with my decision on this count.

I note that this finding is bolstered by Mr. Pinkerton's admission to the CFP Board of Standards at his reinstatement hearing that he did not inform Ms. D of the commissions that he would receive or how the commissions compared if she purchased a policy from Sun Life or USAA. CFP Board of Standards, Inc. Case No. LR 02446, June 22, 2002, transcript, pages 15-16.

B. Count II: Mr. Pinkerton Misrepresented the Suitability of a Life Insurance Policy to Pay Taxes and for the Estate to be the Beneficiary

Under AS 21.36.030, a person may not misrepresent the suitability[1] of an insurance policy. Mr. Pinkerton recommended that Ms. D purchase a life insurance policy of $972,000 to pay

[1] For purposes of AS 21.36.030, "suitability" falls within the scope of misrepresentations concerning the benefits or advantages of an insurance policy. AS 21.36.030(b) defines misrepresentation to include "any statement or omission of a statement that when taken in the contest of the whole presentation may tend to mislead or deceive the person or persons addressed."

STATE OF ALASKA
DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT
DIVISION OF INSURANCE
ROBERT B. ATWOOD BUILDING
550 WEST SEVENTH AVENUE, SUITE 1560
ANCHORAGE, ALASKA 99501-3567
PHONE: (907) 269-7900
FAX: (907) 269-7910
TDD: (907) 465-5437

STATE OF ALASKA
DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT
DIVISION OF INSURANCE
ROBERT B. ATWOOD BUILDING
550 WEST SEVENTH AVENUE, SUITE 1560
ANCHORAGE, ALASKA 99501-3567
PHONE: (907) 269-7900
FAX: (907) 269-7910
TDD: (907) 465-5437

estate taxes with her estate the beneficiary. Based on the tax law at the time and as Mr. Lukehart stated in his pre-filed direct testimony (pages 8-11), this policy was unsuitable for payment of estate taxes. In fact, designating her estate as beneficiary increased the estate tax liability. There is no documented evidence that Mr. Pinkerton calculated the estate taxes that would be due *before* he sold Ms. D the policy, and there is no evidence that he discussed more suitable means to reduce the estate tax liability such as implementing a gifting program to her children. See PRD-9, attached to the direct testimony of Ms. D, which is the Estate Planning Concepts that Mr. Pinkerton prepared for the D family approximately two years after he sold Ms. D the insurance policies on her children's and her lives. See also Mr. Lukehart rebuttal testimony page 6 and Mr. Lukehart transcript page 58.

Under the circumstances of this case, I find that Mr. Pinkerton misrepresented the suitability of a life insurance policy of $972,000 to pay estate taxes with Ms. D's estate named the beneficiary. I reject all other findings and conclusions in the hearing officer's recommended decision that are inconsistent with my decision on this count.

I also note that Mr. Pinkerton in his settlement with Ms. D worked with his errors and omission insurance carriers and canceled her insurance policies.

C. Count IV: Mr. Pinkerton Misrepresented the Suitability of Universal Life Insurance Policies for the Children

Again, under AS 21.36.030, a person may not misrepresent the suitability of an insurance policy. Mr. Pinkerton recommended that Ms. D purchase universal life insurance policies for her four children at an annual premium of $1,200 per child, with negative rates of returns for at least 14 years with a maximum return of 3.14 percent. Mr. Pinkerton did not tell Ms. D that other forms of insurance were available at far less cost, that she could purchase insurance for the children as a rider on her policy, or about the benefits of a Guaranteed Insurability Rider. Mr. Pinkerton pre-filed direct testimony, pages 49-50. There are other reasons documented in the record that support a decision that these policies were not suitable. See Mr. Lukehart's pre-filed direct testimony, pages 13-15. Of particular concern is the fact that the children had no income and no dependents whose security depended on them.

Given all of these factors and Ms. D's circumstances and that of her children, I find that Mr. Pinkerton misrepresented the suitability of universal life insurance policies for the children. I reject all other findings and conclusions in the hearing officer's recommended decision that are inconsistent with my decision on this count.

D. Remainder of Counts

I defer to the remainder of the hearing officer's recommended decision on counts I (paragraphs 16 and 18), V, VI, VII, and VIII contained in the amended accusation, dated May 7, 1999.

STATE OF ALASKA
DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT
DIVISION OF INSURANCE
ROBERT B. ATWOOD BUILDING
550 WEST SEVENTH AVENUE, SUITE 1560
ANCHORAGE, ALASKA 99501-3567
PHONE: (907) 269-7900
FAX: (907) 269-7910
TDD: (907) 465-5437

III. Sanctions

Contrary to the hearing officer's lack of reliance on the proceedings before the Certified Financial Planner Board of Standards, I find that their decision that resulted in Mr. Pinkerton's suspension should be given consideration. I have decided that their decision to reinstate Mr. Pinkerton upon a showing by clear and convincing evidence that he has been rehabilitated should, likewise, be given consideration. In addition, Mr. Pinkerton and Ms. D have resolved their disputes for an amount that represents full restitution.

Given the lengthy history of this case, the resolution of the dispute with the complainant, and a showing of rehabilitation by Mr. Pinkerton, I do not find that it is necessary to impose sanctions under the Alaska Insurance Code.

This is a final administrative decision. Mr. Pinkerton has 30 days to appeal this decision to the superior court under the Alaska Rules of Appellate Procedure.

DATED: August 26, 2004.

Linda S. Hall
Director

CERTIFICATE OF SERVICE

I certify that on August 26, 2004, a true and correct copy of the Order Approving In Part and Rejecting In Part Hearing Officer's Recommended Decision was mailed to:

Daniel W. Pinkerton
2201 Ironwood Place, Ste. 100
Coeur d'Alene, ID 83814
(Certified Mail)

John Treptow
Dorsey & Whitney
1031 W. 4th Ave., Suite 600
Anchorage, AK 99501-5907

Nathaniel B. Atwood
Assistant Attorney General
Department of Law
1031 W. 4th Ave., Suite 200
Anchorage, AK 99501-5903

Barbara Karl

STATE OF ALASKA

DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT

DIVISION OF INSURANCE

In the Matter of:)
)
Daniel W. Pinkerton,)
Respondent.)
)

Case No. D99-01

ACCUSATION

Marianne K. Burke, Director, Division of Insurance ("division"), Department of Commerce and Economic Development, State of Alaska, states and alleges as follows:

1. Daniel W. Pinkerton ("Pinkerton") is licensed in the State of Alaska as a producer for life, health, variable life, and variable annuity insurance under license number 007304, issued September 24, 1991. From December 11, 1991 until May of 1997, Pinkerton was licensed as an individual in the firm of Shilanski and Associates, Inc. From December 11, 1991 until July of 1997, Pinkerton was licensed as manager in a firm of Sunesco Insurance Agency, Inc. Since July 3, 1997, Pinkerton has been licensed as compliance officer/principal in the firm of Pinkerton Retirement Specialists, LLC, of Coeur d'Alene, Idaho.

2. On September 11, 1997, the division received a consumer complaint concerning Pinkerton's actions in selling life insurance, annuities, and other financial products to the complainant after she engaged him for financial

STATE OF ALASKA
DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
DIVISION OF INSURANCE
3601 C STREET, SUITE 1324
ANCHORAGE, ALASKA 99503-5948
PHONE (907) 269-7900
FAX (907) 269-7910
TDD (907) 465-5437

STATE OF ALASKA
DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
DIVISION OF INSURANCE
3601 C STREET, SUITE 1324
ANCHORAGE, ALASKA 99503-5948
PHONE (907) 269-7900
FAX (907) 269-7910
TDD (907) 465-5437

planning assistance and investment advice. Specifically, the complainant alleged that Pinkerton's advice to her resulted in:

a) excessive and inappropriate use of annuities in her portfolio and her children's trust;

b) excessive life insurance policies on her and each of her four young children;

c) recommendations of risky investments (real estate limited partnerships and rare coins) for her and her children's trust;

d) recommendations of limited partnerships to reduce taxes without regard to her limited taxable income;

e) a completely unbalanced portfolio, void of liquidity;

f) incompetent advice regarding estate tax planning;

g) failure to disclose any information regarding commissions and fees including contingent deferred sales charges, 12b-1 fees, and commissions on annuities, coins, mutual funds, and limited partnerships.

3. Based on the complaint and the authority of AS 21.06.130 and AS 21.36, the division initiated an investigation into the insurance sales activities of Pinkerton in relation to this complainant.

4. When consulted by the complainant, Pinkerton was a licensed investment advisor representative in the State of Alaska, and held himself out to the public as a financial planner with the professional designation CFP ("certified financial planner").

5. The complainant sought financial planning assistance from Pinkerton in August of 1995, less than one month after the death of her 45 year old husband. On her husband's death, the complainant had received life insurance proceeds of $700,000 for herself and $365,000 as trustee of a trust for her four children, then aged three, five, eight, and ten.

6. The complainant sought financial advice from Pinkerton because she was not expert in the handling of complex financial matters, and wished to obtain professional help in the management of the financial assets for which she had become responsible.

7. Under a written agreement prepared by Pinkerton or his firm, the complainant engaged Pinkerton as a financial planner for a fee of $1,500. Paragraph 8 of the agreement provided that the work to be done would include "written review, analysis and preparation of the recommendations and findings to the Client."

8. Having engaged Pinkerton as a financial planner, the complainant trusted him and believed that he acted without a conflict and in her best interests, and, therefore, followed his advice in purchasing the investments he recommended, including life insurance and fixed and variable annuities.

9. Pinkerton advised the complainant to liquidate all of her existing investments, including stocks, mutual funds, and U.S. savings bonds.

10. Pinkerton advised the complainant to replace her existing $127,000 term life insurance policy with permanent life insurance. He

STATE OF ALASKA
DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
DIVISION OF INSURANCE
3601 C STREET, SUITE 1324
ANCHORAGE, ALASKA 99503-5948
PHONE (907) 269-7900
FAX (907) 269-7910
TDD (907) 465-5437

represented that she needed a one million dollar policy to take care of estate taxes should she die, and recommended a whole life policy from Sun Life of Canada with annual premiums of $19,000. He failed to provide any comparison of the benefits and costs of different types of life insurance, or any comparative price quotations for policies available from other insurers. He failed to disclose to the complainant that his own commission on the sale of the Sun Life policy he recommended would be approximately $8,000 for the first year alone, with additional commission on future renewals.

11. When the complainant inquired about purchase of a life insurance policy from USAA Life, the company that had provided her late husband's life insurance policies, Pinkerton falsely led her to believe that USAA Life was not financially sound, and stated a misleading basis for preferring the policy of Sun Life, the company he represented. He failed to inform her that he was not appointed as agent for USAA Life or that USAA Life would have provided a policy of similar size for a smaller premium.

12. After the complainant agreed to purchase the Sun Life policy he recommended, Pinkerton prepared the application on September 6, 1995 naming the complainant's estate as the beneficiary. He failed to disclose to her that the effect of naming her estate as beneficiary would be to add the insurance benefits to her taxable estate at her death, thereby enlarging the taxable estate and failing to achieve the estate tax benefits for which he recommended the policy.

STATE OF ALASKA
DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
DIVISION OF INSURANCE
3601 C STREET, SUITE 1324
ANCHORAGE, ALASKA 99503-5948
PHONE (907) 269-7900
FAX (907) 269-7910
TDD (907) 465-5437

STATE OF ALASKA
DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
DIVISION OF INSURANCE
3601 C STREET, SUITE 1324
ANCHORAGE, ALASKA 99503-5948
PHONE (907) 269-7900
FAX (907) 269-7910
TDD (907) 465-5437

13. Pinkerton also recommended that the complainant purchase life insurance policies on each of the four children. Because of her trust in his advice as a financial planner, the complainant bought universal life policies from Sun Life for each of her four children at an annual premium of $1,200 per child. Pinkerton failed to disclose to her that other forms of insurance for the children (such as a rider on her own policy) were available at far less cost, and that the Sun Life policies contained no clause guaranteeing the future insurability of the children. He failed to disclose to her that the long term return on the premium dollars invested in these policies would be less than other investments readily available to the trust. Pinkerton also failed to disclose to the complainant that his own commission on the sale of these four policies was approximately $2,000 for the first year alone, with additional compensation on future renewals.

14. Between September of 1995 and December of 1996, Pinkerton recommended, and the complainant purchased, seven fixed and two variable annuities in a total amount of approximately $717,273. Pinkerton failed to disclose to the complainant important terms of the annuity contracts, including severe surrender charges or penalties on withdrawal, that made these investments non-liquid. Pinkerton failed to disclose to her that other investments could obtain comparable or better returns without the loss of liquidity. Pinkerton also failed to disclose to the complainant that his own initial commissions on the sale of these annuities totaled approximately $40,407, with additional compensation on one or more to be paid in future years.

STATE OF ALASKA
DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
DIVISION OF INSURANCE
3601 C STREET, SUITE 1324
ANCHORAGE, ALASKA 99503-5948
PHONE (907) 269-7900
FAX (907) 269-7910
TDD (907) 465-5437

COUNT I

AS 21.36.145. Unfair Financial Planning Practices.

15. The director realleges paragraphs 1-14.

16. Pinkerton held himself out as a financial planning expert and investment advisor. The complainant sought his services as a financial planner and advisor, and trusted him to provide financial planning services without putting his own interests in earning commissions for the sale of life insurance or annuities ahead of her interests. Pinkerton failed to prepare a written financial plan and written recommendations for the complainant. Instead, he sold her five policies of life insurance and nine annuities without giving her accurate information about the disadvantages of these products or impartial advice about available options. In doing so, he misused the relationship of trust that existed because he represented himself as a financial planner when he was only engaging in the sale of insurance.

17. Pinkerton sold the complainant life insurance policies and annuities on the basis that he was licensed to sell these products and would receive a commission for doing so, but failed to disclose to her the commissions that he would receive.

18. Pinkerton violated AS 21.36.145 by representing himself to be a financial planner when in fact he was only selling life insurance and annuities. He also violated AS 21.36.145 by soliciting the sale of a product as an insurance salesperson who would receive a commission without disclosing to the complainant

the commissions he would receive. These violations are grounds to suspend, revoke, and/or condition Pinkerton's insurance license under AS 21.27.020, 21.27.410, and 21.27.440, and to order restitution or impose civil penalties under AS 21.27.440 or AS 21.36.320.

COUNT II

AS 21.36.030. Misrepresentations regarding the complainant's life insurance policy.

19. The director realleges paragraphs 1-18.

20. Pinkerton represented to the complainant that she needed a life insurance policy of approximately one million dollars to pay estate taxes if she should die, and misrepresented the suitability for the complainant of the Sun Life policy that she purchased on his recommendation. In fact, the estate taxes that would have been due if the complainant had died soon after the purchase of the Sun Life policy were far less than one million dollars, and were readily payable from her existing term life insurance policy and a liquid estate. In computing future estate taxes, Pinkerton failed to show the effect of any other tax avoidance strategy, and misrepresented the taxation of the one million dollar life insurance policy proceeds when the designated beneficiary was her estate. Pinkerton also failed to disclose to the complainant any information about the benefits of other kinds of insurance or the cost of comparable policies from other insurers.

21. Pinkerton's representations that the complainant needed a one million dollar insurance policy to pay estate taxes, that the Sun Life policy he

STATE OF ALASKA
DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
DIVISION OF INSURANCE
3601 C STREET, SUITE 1324
ANCHORAGE, ALASKA 99503-5948
PHONE (907) 269-7900
FAX (907) 269-7910
TDD (907) 465-5437

recommended was suitable for her needs, and his failure to disclose other pertinent facts were misrepresentations in violation of AS 21.36.030 (a)(1),(7), and (11). These violations are grounds to suspend, revoke, and/or condition Pinkerton's license under AS 21.27.020, 21.27.410, and 21.27.440, and to order restitution or impose civil penalties under AS 21.27.440 or AS 21.36.320.

COUNT III

AS 21.36.030; AS 21.36.050; AS 21.36.070. Misrepresentation; Twisting; Defamation.

22. The director realleges paragraphs 1-21.

23. When Pinkerton recommended the one million dollar Sun Life policy to the complainant, he represented to her that her existing term life policy with USAA Life was inadequate to pay her estate taxes. He made this misrepresentation for the purpose of inducing her to surrender that policy and purchase another from him.

24. When Pinkerton recommended the one million dollar Sun Life policy to the complainant, she inquired about purchasing a policy from USAA Life, the company that had insured the life of her late husband. Pinkerton falsely suggested to the complainant that USAA Life was not financially sound.

25. By his statements that induced the complainant to replace her existing term policy, and by disparaging the financial condition of USAA Life, Pinkerton violated AS 21.36.030(5),(7) and (11), 21.36.050, and 21.36.070. These violations are grounds to suspend, revoke, and/or condition Pinkerton's license

STATE OF ALASKA
DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
DIVISION OF INSURANCE
3601 C STREET, SUITE 1324
ANCHORAGE, ALASKA 99503-5948
PHONE (907) 269-7900
FAX (907) 269-7910
TDD (907) 465-5437

under AS 21.27.020, 21.27.410, and 21.27.440, and to order restitution or impose civil penalties under AS 21.27.440 or AS 21.36.320.

COUNT IV

AS 21.35.030. Misrepresentations regarding the children's life insurance policies.

26. The director realleges paragraphs 1-25.

27. In selling the universal life insurance policies on the complainant's four minor children, Pinkerton misrepresented these policies as suitable investments for the complainant's children's trust. He failed to disclose that, as investments for the trust over a 25-year period, the premium dollars paid for these policies would earn far smaller returns than other readily available investments. He also failed to disclose that children's insurance could be purchased for much less as a rider on the complainant's own policy, and that the Sun Life policies purchased for the children contained no clauses guaranteeing their future insurability.

28. Pinkerton's statements that the four life insurance policies on the complainant's minor children were suitable investments for the children's trust, and his failure to disclose other pertinent facts were misrepresentations in violation of AS 21.36.030(a)(1),(7), and (11). These violations are grounds to suspend, revoke, and/or condition Pinkerton's license under AS 21.27.020, 21.27.410, and 21.27.440, and to order restitution or impose civil penalties under AS 21.27.440 or AS 21.36.320.

STATE OF ALASKA
DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
DIVISION OF INSURANCE
3601 C STREET, SUITE 1324
ANCHORAGE, ALASKA 99503-5948
PHONE (907) 269-7900
FAX (907) 269-7910
TDD (907) 465-5437

STATE OF ALASKA
DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
DIVISION OF INSURANCE
3601 C STREET, SUITE 1324
ANCHORAGE, ALASKA 99503-5948
PHONE (907) 269-7900
FAX (907) 269-7910
TDD (907) 465-5437

COUNT V

AS 21.36.030. Misrepresentations regarding annuities.

29. The director realleges paragraphs 1-28.

30. In selling fixed annuities to the complainant for herself or for her children's trust, Pinkerton misrepresented the benefits by his failure to disclose significant terms, including the very large surrender charges, a market value adjustment feature in the Jackson National Life Insurance Company annuity, and the potential tax implications of purchasing the annuities with the named beneficiaries.

31. Pinkerton's representations that the fixed annuities he recommended to the complainant were suitable investments were misrepresentations because the very large surrender penalties made them less liquid or reduced their return in comparison to other products available in the market.

32. Pinkerton's failure to disclose important terms of the fixed annuities, including the very large surrender penalties and the potential tax complications of the named beneficiaries, and his statements that the fixed annuities were suitable investments for the complainant were misrepresentations in violation of AS 21.36.030(a)(1),(7), and (11). These violations are grounds to suspend, revoke, and/or condition Pinkerton's license under AS 21.27.020, 21.27.410, and 21.27.440, and to order restitution or impose civil penalties under AS 21.27.440 or AS 21.36.320.

STATE OF ALASKA
DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
DIVISION OF INSURANCE
3601 C STREET, SUITE 1324
ANCHORAGE, ALASKA 99503-5948
PHONE (907) 269-7900
FAX (907) 269-7910
TDD (907) 465-5437

COUNT VI

AS 21.36.020 Unfair and Deceptive Practices.

33. The director realleges paragraphs 1-32.

34. Pinkerton's violations set out in counts I-V were also unfair and deceptive practices in the business of insurance in violation of AS 21.36.020. These violations are grounds to suspend, revoke, and/or condition Pinkerton's license under AS 21.27.020, 21.27.410, and 21.27.440, and to order restitution or impose civil penalties under AS 21.27.440 or under AS 21.36.320 for engaging in a general business practice in violation of the Alaska Insurance Code.

COUNT VII

AS 21.27.020; AS 21.27.410. Untrustworthiness, Incompetence.

35. The director realleges paragraphs 1-34.

36. By failing to disclose to the complainant that, in selling insurance policies and annuities, he was acting as an insurance salesperson, and not as a financial advisor acting in her best interests, Pinkerton showed himself to be untrustworthy and a source of potential injury and loss to the public in conducting affairs under his insurance license.

37. By selling policies of life insurance and fixed annuities unsuitable for the complainant and for her children or the children's trust, Pinkerton showed himself to be incompetent as a producer of life and variable products.

38. In preparing applications for the complainant's Sun Life policy and various annuities he recommended to her, Pinkerton named the complainant's estate as beneficiary, without advising her of the consequences of doing so. In fact, the effect of naming her estate as the beneficiary was to defeat the purpose for which he recommended the policy and the annuities. By naming the complainant's estate as the beneficiary of her Sun Life policy and various annuities, Pinkerton showed himself to be incompetent as a producer of life and variable products.

39. Under AS 21.27.020, the director may not issue or renew a license to a person who the director finds to be untrustworthy or incompetent and who has not established to the satisfaction of the director that the person is qualified to hold a license. A finding of incompetence or untrustworthiness is a ground to suspend, revoke, and/or condition Pinkerton's license under AS 21.27.410 and 21.27.440.

WHEREFORE, the Division of Insurance seeks the imposition of sanctions against Pinkerton's license, penalties, restitution, and other remedies within the authority of the director for the violations described above.

DATED this 8th day of January, 1999.

Marianne K. Burke
Director
Division of Insurance

STATE OF ALASKA
DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
DIVISION OF INSURANCE
3601 C STREET, SUITE 1324
ANCHORAGE, ALASKA 99503-5948
PHONE (907) 269-7900
FAX (907) 269-7910
TDD (907) 465-5437