ADMINISTRATIVE PROCEEDING

BEFORE THE

SECURITIES COMMISSIONER OF SOUTH CAROLINA

IN THE MATTER OF:	)	
	)	
Robert W. Denton,	)	**REPORT AND RECOMMENDATION**
CRD # 1241683,	)	
	)	
Respondent.	)	

THIS MATTER comes before me on the request of the Respondent, Robert W. Denton, who challenges the Rule to Show Cause and Summary Suspension orders entered by the Securities Commissioner. For the reasons that follow, I recommend that the Summary Suspension and the Rule to Show Cause be **GRANTED IN PART and DENIED IN PART.**

PROCEDURAL HISTORY

On July 2, 2014, the Securities Commissioner entered an order summarily suspending the Respondent's broker-dealer agent registration pursuant to S.C. Code § 35-1-412(f). On the same date, the Securities Commissioner issued a Rule to Show Cause. The Securities Division seeks to have the Respondent censured and permanently banned from engaging in the securities business in South Carolina. The Securities Division also seeks to impose a civil penalty of $10,000 on the Respondent. The Respondent timely responded and requested a hearing. On August 7, 2014, the Securities Commissioner appointed the undersigned as hearing officer for this matter. The hearing took place on October 14, 2014.

STANDARD OF REVIEW

The South Carolina Securities Act of 2005 ("SCUSA") provides notice and the opportunity for a hearing following action by the Securities Commissioner such as a rule to show cause order and/or a summary suspension. *See* S.C. Code § 35-1-604(c) ("If a hearing is

requested or ordered pursuant to subsection (b), a hearing must be held."). The comments to that section indicate that such hearings are not governed by the South Carolina Administrative Procedures Act. S.C. Code § 35-1-604 S.C. Rptr. cmt. 3. SCUSA does not expressly provide a standard of review to be used by the hearing officer when conducting an administrative hearing. However, the comments to S.C. Code § 35-1-412, under which the Securities Commissioner issued the Rule to Show Cause and the Summary Suspension orders in this matter, indicate that "[u]nder Section 412 the administrator[1] must prove that the denial, revocation, suspension, cancellation, withdrawal, restriction, condition, or limitation both is (1) in the public interest and (2) involves one of the enumerated grounds in Section 412(d)." S.C. Code § 35-1-412 cmt. 2. This indicates that the burden of proof rests on the Securities Division to substantiate their findings against the Respondent.[2]

In terms of what standard of proof to apply, as no elevated standard is set forth in SCUSA, I find that the preponderance of the evidence standard applies in this matter. *Accord* S.C. Code § 1-23-600 ("Unless otherwise provided by statute, the standard of proof in a contested case in by a preponderance of the evidence."); *Anonymous (M-156-90) v. State Bd. of Medical Examiners*, 329 S.C. 371, 496 S.E.2d 17 (1998) (applying the preponderance standard in medical disciplinary proceedings); *Steadman v. S.E.C.*, 450 U.S. 91 (1981) (upholding use of the preponderance standard by the Securities and Exchange Commission in its disciplinary proceedings); *but see In re Friday*, 263 S.C. 156, 208 S.E.2d 535 (1974) (applying the clear and convincing standard in attorney disciplinary proceedings).

[1] "'Administrator' means the Attorney General." S.C. Code § 35-1-102(1).

[2] At the hearing, the Securities Division proceeded as plaintiff and the respondent as defendant. No objection was made as to this procedure.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Respondent, Robert W. Denton, has been in the business of providing investment advice and working as an insurance agent in South Carolina for several decades. Most recently, he was registered with Capital Investment Group, Inc. (hereinafter referred to as "Capital Investment") for his work in the securities business and as an agent of Midland National Life Insurance Company (hereinafter referred to as "Midland National") selling insurance policies.

The Respondent testified that he first met Joseph Tiller in the 1970s at the University of South Carolina. The Respondent knew Mr. Tiller and his wife for several decades and sold a life insurance policy to Mr. Tiller in the 1990s. As his health deteriorated, Mr. Tiller arranged for a long-time friend, William Frith, to help with various tasks, such as caring for the Tillers' dogs, running errands, and assisting Mr. Tiller with his personal hygiene. In March 2012, Mr. Tiller's wife passed away. At the time, the Tillers lived in a home owned by Dominion Sovereign Financial Services, in which the Respondent owned an 80% interest. Mr. Tiller now pays rent to the Respondent on this home as part of a rent-to-own arrangement. The home is in very poor shape, due in large part to Mr. Tiller's disabilities. Mr. Tiller suffers from various maladies including diabetes, congestive heart failure, and problems with his eyesight. In addition, Mr. Tiller has lost both of his legs. Mr. Tiller continues to live in the home and Mr. Frith continues to provide assistance to Mr. Tiller. Similarly, Timothy Quinn, an attorney in Columbia, provided the Tillers with a variety of legal services over the course of several years.

At some point in 2012, a meeting took place between the Respondent, Mr. Tiller, Mr. Frith, and Mr. Quinn. The purpose of that meeting was to discuss Mr. Tiller's $250,000 life insurance policy. At that meeting, Mr. Tiller laid out a plan whereby the other three would be paid from the life insurance proceeds following Mr. Tiller's death. According to the Respondent's testimony, the purpose behind the change in ownership and beneficiary was

twofold: first to ensure that Mr. Tiller's wife's family received nothing upon Mr. Tiller's death, and second to provide financially for certain individuals who had furnished services to Mr. Tiller. An email from the Respondent to Mr. Tiller in December 2012 noted, however, that ownership of the policy was changed in order to avoid a Medicaid clawback, whereby Medicaid would seek repayment of funds paid on Mr. Tiller's behalf out of the money in his estate.[3]

For all of the help that Mr. Frith provided, he would receive $100,000. Mr. Quinn would be paid $75,000 for the legal services rendered, and the balance of $75,000 would go to the Respondent to reimburse him for the damages to Mr. Tiller's house. At a later meeting, Mr. Tiller executed the change of beneficiary and ownership forms in the presence of the Respondent, Mr. Quinn, and Mr. Frith. Additionally, emails between the Respondent and Mr. Tiller reveal that, throughout this time, the Respondent was named as personal representative of Mr. Tiller's estate and held a power of attorney for Mr. Tiller. The power of attorney was apparently approved by the investment firm with which the Respondent worked contingent upon the Respondent not deriving any personal benefit from it.

The Respondent submitted an ownership form and beneficiary change request to Midland National in February 2012 bearing the signature of Mr. Tiller. These forms sought to name the Respondent as owner and primary beneficiary of the policy. While Midland National rejected the first ownership form due to an issue recognizing Mr. Tiller's signature, the form was resubmitted in March 2012, this time with Mr. Tiller's signature notarized, and ultimately approved. According to the Respondent, he was not present when Mr. Tiller signed the second form, which took place in Mr. Quinn's office. As a result of the beneficiary change, upon Mr. Tiller's death, the life insurance proceeds would be paid to the Respondent, who testified that these proceeds would be distributed to the individuals who provided services to Mr. Tiller as

[3] I do not make any findings with regard to whether the life insurance proceeds were actually subject to Medicaid clawback either before or after the transfer of the policy to the Respondent.

described above. The form, however, designated the Respondent to receive 100% of the proceeds as primary beneficiary, with Mr. Quinn as contingent beneficiary.

In December 2012, Mr. Tiller approached the Respondent and expressed his desire to revert the ownership of the life insurance policy back to himself. While the Respondent claims he did not refuse this request, he informed Mr. Tiller that it was unfair for Mr. Tiller to put the Respondent in that position when Mr. Frith and Mr. Quinn also had an interest in the proceeds from that policy. The Respondent took no action at that time to revert the policy back to Mr. Tiller and testified that Mr. Tiller did not bring the matter up again. Mr. Tiller did, however, later file a complaint with the South Carolina Department of Insurance. At the time of the hearing in this case, the Department of Insurance had not taken any action on that complaint. Similarly, the Financial Industry Regulatory Authority ("FINRA") had conducted an investigation into the Respondent but again, at the time of the hearing, had not taken any action.

James Jensen, a compliance consultant with Midland National, testified that, as part of its corporate practices, Midland National maintains a compliance manual, with which all agents are expected to be familiar and to follow. Mr. Jensen also testified that, after Midland National received a copy of Mr. Tiller's complaint with the South Carolina Department of Insurance, Midland National launched an internal investigation. Midland National concluded that, by naming himself owner and beneficiary of Mr. Tiller's life insurance policy, the Respondent violated Midland National's compliance manual. Midland National subsequently terminated its relationship with the Respondent. Mr. Jensen also testified that Midland National reverted ownership of Mr. Tiller's life insurance policy back to Mr. Tiller and reinstated his original beneficiaries.

Similarly, Ronald King of Capital Investment Companies testified that he reviewed the allegations against the Respondent as part of his work as head of the compliance department.

Mr. King confirmed that Capital had approved the Respondent's request to hold power of attorney for Mr. Tiller, so long as the Respondent did not derive any financial benefit thereby. Based on his review, Mr. King concluded that the Respondent had violated several firm rules and decided to terminate Capital's relationship with the Respondent. According to Mr. King, the Respondent did not disclose that he was Mr. Tiller's landlord and that the Respondent was thereby enriching himself by receiving rent as holder of the power of the attorney. Capital's termination of the Respondent triggered a notification to the Securities Division of the Attorney General's Office, which then commenced the present action.

The Securities Commissioner is authorized to take action against an individual if that individual has committed a violation of one of the enumerated grounds listed in S.C. Code § 35-1-412(d) and such action is in the public interest. One of the grounds enumerated, S.C. Code § 35-1-412(d)(13), states that a person violates SCUSA if he or she "has engaged in dishonest or unethical practices in the securities, commodities, investment, franchise, banking, finance, or insurance business within the previous 10 years[.]" The Securities Division contends that, by naming himself owner and beneficiary of Mr. Tiller's life insurance policy, the Respondent violated this subsection. As a result, the Securities Division seeks that the Respondent be censured, permanently barred from engaging in the securities business in the State of South Carolina, and ordered to pay a civil penalty of $10,000.

The first question is whether the Respondent committed a dishonest or unethical practice when he became owner and beneficiary of Mr. Tiller's life insurance policy. I find that he did. Generally, insurance agents do not owe duties to advise an insured. *See Trotter v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 465, 471, 377 S.E.2d 343, 347 (Ct. App. 1988). An insurance agent "may assume a duty to advise an insured in one of two ways: (1) he may expressly undertake to advise the insured; or (2) he may impliedly undertake to advise the insured." *Id.*

"In determining whether an implied duty has been created, courts consider several factors, including whether: (1) the agent received consideration beyond a mere payment of the premium, (2) the insured made a clear request for advice, or (3) there is a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relied on." *Houck v. State Farm Fire and Cas. Ins. Co.*, 366 S.C. 7, 12, 620 S.E.2d 326, 329 (2005).

In this case, I find that the Respondent both expressly and impliedly undertook a duty to advise Mr. Tiller. The Respondent expressly advised Mr. Tiller with regard to a wide variety of items as personal representative and as holder of power of attorney, including major financial decisions, payment of bills, and estate planning. There were specific meetings where Mr. Tiller's finances, including the division of proceeds under the life insurance policy, were discussed by the Respondent and others. In addition, the Respondent received consideration beyond the policy premium in the form of rent payments from Mr. Tiller and his designation as primary beneficiary of Mr. Tiller's life insurance policy. And the record here is replete with evidence of the extended course of dealing between the Respondent and Mr. Tiller. The two have known each other for decades, and the Respondent expended significant effort in working with Mr. Tiller on financial matters. The Respondent was clearly on notice that his advice was being sought and relied upon by Mr. Tiller.

The Securities Division relies heavily on Midland National's decision to terminate the Respondent based on a violation of the company's compliance manual. Noncompliance with Midland National's corporate policies and guidelines is not a dishonest or unethical practice *per se*. Failure to abide by certain policies may also be dishonest or unethical practices, but a mere violation of a corporate compliance manual is not always the *sine qua non* of a violation of South Carolina law. The same proposition holds true in reverse; an action may be dishonest or

unethical for purposes of the securities laws even if it does not violate Midland National's policies.

However, in this case, the Respondent's actions were both in violation of Midland National's policies and dishonest and unethical acts. The Respondent named himself as primary beneficiary of Mr. Tiller's life insurance policy and testified that he intended to recoup $75,000 from that policy upon Mr. Tiller's death as recompense for the damage done to the Respondent's property where Mr. Tiller resided. The Respondent further named himself owner of the policy, thus preventing Mr. Tiller from making any later changes, such as removing the Respondent as a named beneficiary. The Respondent also intended, through the ownership change, to avoid any Medicaid clawback that would diminish the proceeds of the policy to be paid to him and the other beneficiaries. When Mr. Tiller raised the issue of reverting ownership of the policy, the Respondent declined to take that action. Most importantly, the Respondent did all of this in his capacity as the agent on that insurance policy.

Based on this, it is clear that the Respondent acted in his own best interests rather than those of Mr. Tiller. In so doing, he committed dishonest and unethical acts and violated his duty to advise Mr. Tiller. I do note and consider that the Respondent's actions were taken with the full knowledge and consent of Mr. Tiller, at least until the point where Mr. Tiller desired to once again become owner of the life insurance policy. While Mr. Tiller's knowledge and consent does factor into the consideration of the appropriate sanction, as discussed below, it does not excuse the Respondent's conduct. This is even clearer when recognizing the special relationship between the two men, as well as Mr. Tiller's serious disabilities. The Respondent held a unique position of trust and power that was abused when he severed Mr. Tiller from the life insurance policy he sold. The Respondent had a clear conflict of interest in naming himself owner and beneficiary of this policy that he failed to disclose and neglected to avoid. For the above

reasons, the Respondent has engaged in dishonest and unethical practices in the insurance business in violation of S.C. Code § 35-1-412(d)(13).

The second question is whether action by the Securities Commissioner against the Respondent would be in the public interest. "The 'public interest' is a much litigated concept that has come to have settled meanings." S.C. Code § 35-1-412 cmt. 2. I find that action by the Securities Commissioner is in the public interest. Protection of the public is best served by requiring that those subject to the provisions of SCUSA not engage in dishonest or unethical acts. The public is further protected by avoiding conflicts of interest when possible and, at the very least, disclosing such conflicts. Finally, deterring this type of conduct both by the Respondent and by the insurance industry also serves the public interest.

Having answered these two questions in the affirmative, the inquiry then turns to the appropriate penalty. As noted above, the Securities Division seeks that the Respondent be permanently barred from engaging in securities business in South Carolina and that he pay the maximum civil penalty of $10,000. In considering this issue, federal courts have articulated several factors that should be analyzed in this regard, to include: "the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations." *Lowry v. S.E.C.*, 340 F.3d 501, 504-05 (8th Cir. 2003) (citing *Steadman v. S.E.C.*, 603 F.2d 1126, 1140 (5th Cir. 1979)).

As to the egregiousness of the Respondent's actions, I find that the Respondent took advantage of his position of trust and power over a person with severe disabilities. Although the Respondent took most of these actions with the knowledge and consent of Mr. Tiller, he did not restore ownership of the life insurance policy back to Mr. Tiller when so requested. He also

failed to disclose to Mr. Tiller his conflict of interest as insurance agent and holder of power of attorney, and could have avoided such conflict had he so chosen. That the Respondent acted in such a way as to protect his own financial benefit in the life insurance proceeds is evident from the record. This factor weighs in favor of the Securities Division.

On the second factor, the isolated or recurrent nature of the infraction, this is the first disciplinary action against the Respondent in approximately two decades of full-time work in the insurance and securities fields. Further, this case presents a unique set of circumstances with regard to the relationship between the Respondent and Mr. Tiller. There is no evidence in the record that the Respondent has such a relationship with any other individuals such that this fact pattern could be repeated. This factor weighs in favor of the Respondent.

With regard to the degree of scienter involved, I note first that the standard is based on the Respondent's willfulness in performing the actions involved, and not whether the Respondent intentionally violated any South Carolina law. *See Tager v. S.E.C.*, 344 F.2d 5, 8 (2d. Cir. 1965). There is no question that the Respondent intended to name himself owner and beneficiary of Mr. Tiller's life insurance policy. Whether he knew that such an action was a dishonest and unethical act under SCUSA is irrelevant. This factor weighs in favor of the Securities Division.

I consider the fourth and fifth factors together. The Respondent has not indicated any recognition of the wrongful nature of his conduct. Indeed, he contends that he did absolutely nothing wrong. As a consequence, he has not offered any assurances against future violations of which I could judge the sincerity. These factors weigh in favor of the Securities Division.

Finally, with regard to the likelihood that the Respondent's occupation will present opportunities for violations, there is some likelihood inherent in selling insurance policies that the Respondent could commit future dishonest or unethical acts. However, this likelihood does

not appear significant based on the record in this case, especially based on the unusual set of facts and the relationship between the Respondent and Mr. Tiller which led to the present case. Further, Midland National appears to have restored ownership of the policy to Mr. Tiller and restored his prior beneficiaries upon learning of what transpired. This factor weighs in favor of the Respondent.

After considering each of these factors, I find that the penalties sought by the Securities Division are too severe based on the Respondent's conduct and considering the public interest impacted in this case. Instead of the sanctions requested under S.C. Code § 35-1-412(c), I find the Respondent is more appropriately sanctioned under S.C. Code § 35-1-412(b). Based on the record in this case and the findings of fact and conclusions of law discussed above, I recommend that the Respondent's registration be suspended for a period of one year, effective as of the date of the Respondent's summary suspension.

Jared Q. Libet, Hearing Officer

Date: July 6, 2015

APPROVED:

Alan Wilson

Alan Wilson, Securities Commissioner

Date: 7-7-15