BEFORE THE INSURANCE COMMISSIONER

OF THE STATE OF CALIFORNIA

In the Matter of the License and Licensing Rights of: **ALAN LUCIEN CERF,** Respondent.	File No. CO201201306 OAH No. 2017020669 **DECISION AND ORDER ADOPTING PROPOSED DECISION WITH NON-SUBSTANTIVE TECHNICAL CHANGE**

This matter came on regularly for hearing before Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, on August 20 through 31, 2018, and November 6 and 7, 2018 in San Diego, California. Thereafter, the Administrative Law Judge submitted the attached Proposed Decision, dated January 11, 2019, to the Commissioner. The Proposed Decision was received by the Commissioner on January 14, 2019 and was ordered officially filed.

Pursuant to the provisions of California Government Code section 11517(c)(2)(C), IT IS SO ORDERED that the Proposed Decision is hereby adopted by the Insurance Commissioner as his Decision in the above-entitled matter and is ordered officially filed with the following non-substantive technical changes:

On page 5, in the paragraph numbered 9, the Department's Actuarial Expert's name, "Savgit Samara", should be removed and substituted with "Sarvjit Samra".

Each occurrence where the name, "Mr. Samara", appears in the Order it should be removed and substituted with "Mr. Samra".

In accordance with Government Code section 11521, the following notice is provided to you concerning reconsideration of this Decision. You may file a petition for the reconsideration of this Decision. However, the Commissioner's power to order reconsideration expires on the date set by the Commissioner as the effective date of the decision.

Petitions for Reconsideration should be directed to the following:

Susan J. Stapp
Deputy General Counsel
California Department of Insurance
45 Fremont Street, 23rd Floor
San Francisco, CA 94105

You should also notify counsel for the Complainant by sending a copy of the Petition for Reconsideration to the following:

Jason S.Y. Gatchalian
Senior Attorney
California Department of Insurance
300 Capitol Mall, 17th Floor
Sacramento, CA 95814

Sara Urakawa
Senior Enforcement Counsel
California Department of Insurance
45 Fremont Street, 21st Floor
San Francisco, CA 94105

The Department of Insurance may, but is not required to grant a stay not to exceed 30 days for the purpose of filing a petition for reconsideration. Any request for a stay must be filed prior to the effective date of the decision.

If additional time is needed to evaluate a timely petition for reconsideration, the Department may grant a stay of the expiration, for no more than 10 days and solely for the purpose of considering the petition.

If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied.

The Decision shall be effective thirty (30) days from the date of this Order.

IT IS SO ORDERED THIS 25 Day of February, 2019.

RICARDO LARA
Insurance Commissioner

By: [signature]

SUSAN J. STAPP
Deputy General Counsel

#1110453.1

BEFORE THE
INSURANCE COMMISSIONER
STATE OF CALIFORNIA

In the Matter of the License and Licensing Rights of: ALAN LUCIEN CERF, Respondent.	File No. CO201201306 OAH No. 2017020669

PROPOSED DECISION

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 20 through 31, 2018, and November 6 and 7, 2018, in San Diego, California.

Jason S.Y. Gatchalian, Senior Attorney, and Sara K. Urakawa, Senior Enforcement Counsel, Department of Insurance, State of California, represented complainant, the Department of Insurance, State of California.

Alan Lucien Cerf, respondent, appeared on his own behalf.

The record was held open until December 12, 2018, to permit the parties to submit written closing arguments. Complainant's submission was marked as Exhibit 128 for identification and respondent's submission was marked as Exhibits E-15 and E-16 (containing attachments subject to protective order) for identification. The record was closed and the matter submitted on December 12, 2018.

SEALING ORDER

Exhibits were admitted into evidence that contain personal financial information. It was not practical to delete this information from these exhibits. To protect privacy and confidential personal information from inappropriate disclosure, a written Protective Order Sealing Confidential Records (Order) was issued on January 11, 2019. A reviewing court, parties to this matter, their attorneys, and a government agency decision maker or designee under Government Code section 11517 may review the documents subject to this Order, provided that such documents are protected from release to the public.

FACTUAL FINDINGS

Respondent's License History

1. On September 12, 1973, the department issued to respondent license number 0461609, authorizing respondent to transact insurance as an accident and health agent and life-only agent. That license is current and active.

2. On September 12, 2003, respondent signed a Stipulation and Waiver that the Commissioner adopted on October 3, 2003. In that stipulation, respondent denied having violated the Insurance Code but acknowledged that the facts set forth in the underlying accusation,[1] if true, were grounds for license discipline. Respondent agreed to pay a $5,000 monetary penalty and $15,000 in investigation and prosecution costs in the stipulation. In addition, respondent agreed not to use internal or external replacement as a method of sale or solicit any internal and/or external replacement sale that is not in the interest of the policyholder, and agreed to strictly comply with Insurance Code sections 10509.4 *et seq.*, concerning the duties of agents regarding replacement of life insurance.

The Third Amended Accusation

3. On July 20, 2018, complainant's counsel signed the Third Amended Accusation[2] on behalf of complainant. That Accusation alleged that between 2007 and 2013, respondent sold multiple annuities to six different individuals, some of whom were seniors, and committed the following violations of the Insurance Code[3] in the course of various transactions: made misrepresentations about policies (§ 780); made misrepresentations for the purpose of inducing another to take out a policy or surrender a policy (§ 781); violated his duty of honesty, good faith and fair dealing owed to prospective insureds who were 65 years of age or older (§ 785); engaged in unfair methods of competition or unfair trade practices (§ 790.02); failed to leave applicants with all printed communications used in sales presentations (§ 10509.4, subd. (b) (2)); recommended replacement of annuities by making materially inaccurate representations or recommending an "unnecessary replacement" to an insured who was older than age 65 (§ 10509.8, subd. (a)); engaged in a fraudulent act or conducted business in a dishonest manner (§ 1668, subd. (i)); demonstrated untrustworthiness, incompetency, or committed a wrongful act that exposed those dealing with him to a danger of loss (§ 1668, subd (j)); knowingly misrepresented the terms of a policy (§ 1668, subd. (k)); and showed a lack of integrity (§ 1668, subd. (e)). Complainant

---

[1] Complainant alleged in this matter that the 2003 order was based on a First Amended Accusation served on respondent on January 25, 2001. Complainant did not offer the First Amended Accusation as evidence. Moreover, the truth of the allegations set forth in the 2001 First Amended Accusation was not established in the stipulation that resulted in the October 3, 2003, order.

[2] All further references to the "Accusation" refer to the Third Amended Accusation.

[3] All further statutory references are to the Insurance Code unless otherwise specified.

also alleged respondent was not of good business reputation (§ 1668, subd. (d)) and that it would be against the public interest for respondent to continue to transact insurance in the State (§ 1668, subd. (b)). The Accusation seeks the revocation of respondent's license and licensing rights, as well as the imposition of an administrative penalty.

4. Respondent timely filed a Notice of Defense. This hearing ensued.

Annuities

5. An annuity is an insurance product by which an insurance company (known as the issuer) enters into a contract with a buyer (known as the annuitant) to make a series of future payments in exchange for the annuitant's payment of a premium. Some annuities begin paying income as soon as the annuity is purchased; deferred annuities pay income at a later date. During the accumulation period, the value of the annuity can change based on the type of annuity that was purchased. There are essentially two kinds of annuities: the variable annuity and the fixed annuity.

A variable annuity accumulates interest and capital based on the performance of subcontracts or upon the performance of stock or equity-based indexes. The rate of return is not guaranteed, but is variable. If the investment fund does not do well, the annuitant may lose some or all of his or her investment, i.e., principal.

In a fixed annuity, interest rates are set by the issuer. The interest rate may be set for one year or for a longer period. Fixed annuities have a guaranteed minimum interest rate. An equity-indexed annuity has an interest rate that is usually based on a stock market index. However, many products guarantee that the principal premium will not lose value due to market fluctuations.

Payments to annuitants are deferred until the annuity "annuitizes," i.e., results in a stream of payments. After payments begin, the annuitant cannot take any other money from the annuity. If the annuitant dies before the payment period ends, the survivor may not receive any payments, depending on the terms of the annuity. With deferred annuities, surrender charges are almost always imposed if a certain percentage or amount of funds are withdrawn before the pre-determined end of the surrender period. The purpose of imposing surrender penalties is to offset acquisition costs, including the premium paid to selling agents.

The Internal Revenue Code allows an annuitant to exchange an existing annuity for a new annuity without paying any tax on the income or gain from the existing annuity account. These tax-free exchanges – known as 1035 exchanges – are useful if the replacement annuity has features that the annuitant prefers, such as a larger death benefit, different annuity payout options, or a wider selection of investment choices. With an annuity exchange, however, the annuitant may be required to pay surrender charges if the exchange occurs during the surrender period for the existing annuity; in addition, a new surrender period generally begins to run when the annuitant moves into the new annuity. Qualified retirement accounts, such as an IRA, can also be used to purchase an annuity, without any tax consequences or penalties.

Statutory Requirements for Replacement Annuities

6. A "replacement" means any transaction in which a new annuity is to be purchased and it is known or should be known to the proposing agent that by reason of the transaction an existing life insurance or annuity has been or is to be lapsed, forfeited, surrendered, or otherwise terminated. (§ 10509.2.) An agent who accepts an annuity application must complete certain documentation to ensure that all information about the replacement is provided to the applicant. (§ 10509.4.) An agent or insurer may not recommend the replacement of an existing policy by use of a materially inaccurate presentation or comparison of an existing contract's premiums and benefits or dividends and values. (§ 10509.8, subd. (a).)

Special Statutory Protection for Seniors

7. An insurance producer and an insurance agent owe a prospective insured 65 years of age or older the duty of honesty, good faith, and fair dealing; the conduct of the broker or agent engaged in the transaction before and during the offer and sale or cancelation is relevant to any action alleging a breach of the duty of honesty, good faith, and fair dealing. (§ 785.) Any advertisement or other device designed to produce leads based upon the response of a person 65 years of age or older must disclose that an agent may contact the applicant as a result of the senior's[4] response. (§ 787.)

Any person who meets with a senior in the senior's home for the purpose of offering life insurance for sale or to generate leads for the sale of life insurance, including annuities, must deliver a notice in writing to the senior no less than 24 hours before the initial meeting in the senior's home. (§ 789.10.) The notice must state that the agent will be making a sales presentation relating to an insurance product (including life insurance and annuities); that the senior has the right to have others present during the meeting; that the senior has the right to terminate the meeting at any time; and that the senior has the right to contact the Department of Insurance to obtain further information and to make a complaint. After an initial greeting, the agent must advise the senior that the purpose of the visit is to talk about insurance or to gather information for a follow up visit to sell insurance. The agent must provide the senior with a business card containing the agent's name, business address, telephone number, and any insurance license number. No misrepresentation or ruse may be used to obscure the agent's true status or the purpose of the contact. (§ 791.03.)

Life agents and insurers are prohibited from recommending to an insured senior the purchase of an "unnecessary replacement" annuity. (§ 10509.8, subd. (a).) An "unnecessary replacement" annuity "means the sale of an annuity to replace an existing annuity that requires that the insured will pay a surrender charge for the annuity that is being replaced and

---

[4] All future references to "senior" are to individuals 65 years and older.

that does not confer a substantial financial benefit over the life of the policy to the purchaser so that a reasonable person would believe that the purchase is unnecessary." (*Id.* subd. (b).)[5]

Respondent's Background

8. Respondent is 68 years old. He has been married for over 45 years. He has worked in the life insurance industry since 1973. He is a Chartered Senior Financial Planner, a status he received after completing a course of study and exam. Respondent testified that he qualified for membership in the Million Dollar Round Table and Top Table (both trade associations), and he received the National Quality Award that signifies his knowledge and expertise. He was selected to serve on the "California State Legislative Insurance and Indemnity Committee."

The Department's Actuarial Expert

9. Savgit Samara has worked for the department since 2005. He is an Associate Life Actuary within the department's actuarial office. He received a Bachelor of Science degree in mathematics and is an Associate of the Society of Actuaries and a member of the American Academy of Actuaries. In his positon with the department, he reviews life and annuity products. He has worked in the field since 1986. In order to issue annuity contracts in California, an insurer must file policies with the department prior to being marketed. Only variable interest policies must be approved by the department, but non-variable contracts are also reviewed to ensure they meet the minimum values. Mr. Samara testified that he works with insurers to resolve issues.

10. As part of the investigation into respondent's practices, the department's investigations division requested that the actuarial office review various replacement policies respondent sold to determine "suitability." James Beal, an Actuarial Assistant in the

---

[5] The Accusation alleged that certain transactions were "unsuitable." This reference comes from Division 2, Part 2, Chapter 5, Article 9 of the Insurance Code, titled "Suitability Requirements for Annuity Transaction" (§ 10509.910 et seq.). Under Section 10509.914, an insurer and producer must have reasonable grounds for believing that the recommendation of a replacement annuity is suitable for the consumer on the basis of the facts disclosed by the consumer as to his or her investments and other insurance products and as to his or her financial situation and needs, including the consumer's suitability information. This Article became effective January 1, 2012, (Stats. 2011, Ch. 295, Sec. 2) and thus post-dated many of the transactions alleged in the Accusation. Ultimately, the Accusation did not allege respondent violated any provision contained in Article 9, and thus any reference to "unsuitability" is interpreted to mean "unnecessary replacement." Additionally, paragraph 106 of the Accusation alleged that *every* transaction listed in the Accusation (paragraphs 20 through 97) violated section 10509.8, subdivision (a). Thus, all transactions will be reviewed to determine whether they were unnecessary replacements.

actuarial office, prepared several reports[6] analyzing several transactions referred to in the Accusation. Mr. Beal is Mr. Samara's subordinate. Because Mr. Beal did not have sufficient experience and qualifications, Mr. Beal indicated that he is not permitted to offer expert testimony. However, in reaching his conclusions, Mr. Samara reviewed Mr. Beal's reports, the department's evidence, and observed the testimony of all the department's witnesses.

Respondent objected to Mr. Samara's testimony and designation as an expert witness. It is well settled that a person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. The determinative factor is whether the person has sufficient skill or experience in the field so that his or her testimony would assist in the search for the truth. The degree of expertise goes to the weight of the expert's testimony, not its admissibility. (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1318-1319.) Under this standard, Mr. Samara qualified as an expert in annuities.

Notwithstanding the acceptance of his testimony, California courts have repeatedly observed that an expert's opinion is only as good as the facts and reason upon which it is based. (*Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 924.) Relying on certain portions of an expert's opinion is entirely appropriate. A trier of fact may "accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted." (*Stevens v. Parke Davis & Co.* (1973) 9 Cal. 3d 51, 67.) The trier of fact may also "reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material." (*Id.* at 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal. App. 2d 762, 767.) The fact finder may also reject the testimony of a witness, even an expert, although it is not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal. 3d 875, 890.)

In this matter, Mr. Samara's ultimate conclusions as to a replacement annuity's suitability were not considered, except where he determined that a replacement annuity was *not* an unnecessary replacement, i.e., respondent did not violate the law. The reason for this finding has nothing to do with the quality of Mr. Samara's testimony, which was credible, thoughtful, and objective. Rather, in enacting Section 10509.8, the Legislature specifically provided that the standard by which to judge whether a senior was sold an "unnecessary replacement" is whether a "reasonable person" would view the transaction to be unnecessary because it would not be expected to provide a substantial financial benefit. Although expert testimony may be helpful to a trier of fact in understanding certain technical issues that are outside the trier of fact's scope of knowledge, in this matter the issue of whether an annuity sold by respondent constituted an "unnecessary replacement" requires consideration of what a reasonable person would believe, not an expert's opinion. Consequently, with the

---

[6] The department did not offer Mr. Beal's reports as evidence; however, respondent requested their admission. The reports were received, over the department's hearsay objection, pursuant to Government Code section 11513, subdivision (d), which provides that hearsay evidence may be used for the purpose of "supplementing or explaining other evidence" but may not be used as the basis for a factual finding.

exception of transactions where Mr. Samara believed the transaction was not unsuitable (or an unnecessary replacement), his ultimate conclusions were not considered.

Transactions Involving James and Patricia Sunderman

11. Patricia and James Sunderman testified at the hearing. Dr. Sunderman is a retired dentist. His wife, Mrs. Sunderman, is a college graduate who worked in interior design. In 2007, when they first met respondent, they were both retired. He was 61 years old and she was 58.

12. Dr. Sunderman testified that he has never been very knowledgeable about securities or annuities and is "an amateur" in financial matters. In 2003 the Sundermans sold a house. Around that time, they met Daniel Neil and his brother, insurance brokers, who suggested that they purchase annuities. They liked Mr. Neil, and with his assistance they purchased variable annuities from Metropolitan Life Insurance Company (MetLife) and John Hancock Life Insurance Company (John Hancock). They jointly and individually held four separate policies with these companies.[7] Over the next several years, the Sundermans became unhappy with their policies because they lost principal.

2007 ANNUITY TRANSACTIONS

13. In early 2007, the Sundermans received a postcard in the mail titled "2007 IMPORTANT ELDER LAW CHANGES." The card contained six check boxes listing different goals such as reducing taxes, protecting from stock market losses, and eliminating probate fees and estate taxes. The card requested the recipient check items of interest and return the postage paid card, which the Sundermans did. Respondent testified the card was delivered to the Sunderland Group in North Dakota. The Sunderland Group provided respondent with the Sundermans's contact information.

14. Prior to meeting the Sundermans at their home, respondent sent a notice to them stating that they would be given a sales presentation involving life insurance, including annuities. The notice also provided contact information for the department and explained certain rights. The department required the notice to be sent 24 hours in advance to meeting seniors. Although the Sundermans were not seniors, because their ages were not listed on the card mailed to the Sunderland Group, respondent testified that it was his pattern and practice to send this notice to prospective clients. Respondent retained and submitted as evidence a copy of the notice that the Sundermans signed on April 17, 2007, the day when respondent first met the Sundermans.

15. Mrs. Sunderman testified that when respondent arrived at their house, he impressed her with his manners and dress. She believed their insurance agent at the time, the

[7] The Sundermans testified that they held a policy with Manufacturer's Life Insurance Company (Manulife), which is referenced in the Accusation. However, the Manulife policy was not involved in any of respondent's transactions. Instead, it was actually a MetLife policy.

Neils, had been unnecessarily switching their products, which had cost them money. She felt that they had been "burned" by the Neils and viewed respondent as a "knight in shining armor." Mrs. Sunderman recalled that they discussed business with respondent for approximately 30 minutes, before her husband and respondent began to talk about golf. Dr. Sunderman testified that he had been unhappy with the Neils and was ready to make a change. He, too, was very impressed with respondent. He felt very comfortable working with respondent and noted that respondent was better dressed than the Neils. Respondent was of a "mature age" and Dr. Sunderman knew that respondent lived in an upscale community and was a member of a prominent country club. Dr. Sunderman felt that because respondent was well-off financially, he would not have any need to take advantage of them financially.

16. Dr. Sunderman testified that respondent reviewed the policies the Neils had sold them. Respondent said they were bad, and he had a much better "vehicle" offered by National Western Life Insurance Company (National Western). Dr. Sunderman told respondent his main concern was not wanting to lose principal. He was firm about this requirement and did not want the volatility associated with variable annuities.

17. The Sundermans testified that they were very impressed with respondent and immediately trusted him. When respondent recommended the National Western annuity, they agreed to purchase it. The Sundermans testified that respondent never showed them or left a brochure concerning the National Western annuity. They testified that respondent asked them to sign a number of forms, and that he told them he would complete and submit those forms later. Dr. Sunderman testified that he signed these forms without reading them. He explained that he is ignorant of financial matters and trusted respondent as a professional who knew what he was doing. Mrs. Sunderman also signed the blank forms in those areas respondent directed her to sign. She, too, did not read the forms before signing them. The Sundermans testified that they were positive that the forms were blank when they signed them.[8] They testified that respondent did not explain the provisions contained in the forms they initialed and signed. They felt that respondent did not give them time to read any forms and they felt rushed. Dr. Sunderman testified that he was embarrassed admitting that he signed forms without reading them, but he explained that he immediately trusted respondent.

---

[8] On cross-examination, respondent attempted to impeach each of the Sundermans with a department investigation report completed by Special Investigator Ruben Gastelum. The report included summaries of Mr. Gastelum's interviews of Dr. and Mrs. Sunderman. According to the report, Dr. Sunderman stated that he signed all applications after respondent completed them, but Mrs. Sunderman stated that she only signed blank documents. At hearing, both Dr. and Mrs. Sunderman testified that they had always maintained that respondent had them sign blank forms, and any statement in Mr. Gastelum's report to the contrary was inaccurate. Respondent subsequently called Mr. Gastelum as an impeachment witness. Mr. Gastelum testified that he believed that the report accurately reflected the content of his interviews.

They both denied that respondent explained that there was a 30-day "free-look"[9] period for the contracts. Each testified that the handwriting in the applications was not theirs, but confirmed they had signed and initialed all documents.

18. Respondent testified in great detail about the pattern and practice he used when introducing himself to potential customers, which is summarized as follows: Upon meeting potential clients he provides them with a business card and explains that he undertook courses and exams to qualify for the designation of Chartered Senior Financial Planner who specializes in life insurance and financial products. He also shares that he has received several industry awards, including the National Quality Award, Top of the Table, and Million Dollar Round Table. In the case of the Sundermans, he asked them about their financial concerns. They told him they owned mutual funds and annuities. Respondent asked whether they had information concerning the annuities and the Sundermans provided several statements from MetLife and John Hancock. Respondent made copies of these statements, which he retained and submitted at hearing. Respondent told them that the Hancock annuity had performed well, but the Sundermans were unaware of the numerous fees and charges associated with a variable annuity. Respondent asked permission to call John Hancock to obtain additional information on fees. Over speakerphone, they called John Hancock and MetLife and obtained additional information about the products. Respondent testified that the Sundermans were concerned about the extensive fees they were incurring.[10]

19. Respondent explained the difference between variable and fixed annuities, as well as the nature of indexed annuities. Respondent showed them a brochure for National Western Ultra Future, a fixed equity-indexed annuity. As evidence, respondent submitted a copy of the brochure, which is nine pages long. Respondent testified that he highlighted and marked various areas of the brochure to draw the Sundermans's attention to certain items. The brochure highlighted tax advantages and explained the different interest options. He told the Sundermans that the policies included a 10 percent bonus. He explained the withdrawal charges and penalties. He explained various benefits of an indexed annuity and various provisions of the contract. He told the Sundermans he received compensation directly from the insurance company and not from the Sundermans's premium. He explained withdrawal charge fees and the surrender charge period. Finally, he explained that California law allows for a 30 day "free-look" period from the date the contract is delivered, enabling the Sundermans to review the policy and cancel it without penalty.[11] Respondent testified that

---

[9] The "free-look" period is the time period when a policyholder can terminate an annuity contract without any surrender penalties and receive a full refund. Any policy delivered to a senior must contain language on the cover page notifying the policyholder of a 30-day cancellation period. (§ 10127.10.)

[10] At hearing, respondent provided great detail about the fees associated with the Sundermans's variable annuities. He also noted that had they retained these contracts, they would have lost significant value following the stock market crash of 2008.

[11] The "free-look" period was also specified in the National Western brochure.

he always explains the free-look period because it is a benefit to them to allow his clients to cancel within 30 days for any reason.

20. Respondent testified that the Sundermans wished to move forward with the purchase of National Western annuities to replace the four existing annuities: A joint non-qualified Hancock policy, a joint non-qualified MetLife policy, and two individual Hancock IRA policies for each of the Sundermans. The replacement involved 1035 exchanges, meaning that there would be no federal income tax imposed on the transfer. Respondent began to obtain information from them such as birthdates and social security numbers. He then began to fill out the first application. Respondent testified that it is customary for an agent to complete the application because it ensures that all information is reported correctly. In fact, some insurance companies require the agent to complete the application. After he completed the first application, respondent reviewed the contents of it with the Sundermans for accuracy. He explained exactly what the documents were and what the Sundermans were signing. Respondent then completed the remaining applications for the additional accounts.[12]

For each application, respondent produced a document from National Western entitled "Notice Regarding Replacement," which the Sundermans signed. The notice stated that replacing an existing life insurance policy or annuity could be either beneficial or a mistake and suggested a careful comparison between the existing and proposed policies.

The Sundermans signed authorizations to transfer funds from their existing MetLife and John Hancock annuities to National Western. The forms stated that the undersigned were aware that surrender/withdrawal penalties might apply to the transfer.

Dr. Sunderman signed a form entitled "Annuity Suitability Questionnaire for Applicants Age 65 or Older." The document provided answers to certain financial questions including investment objectives. In signing, Dr. Sunderman acknowledged that he reviewed the questionnaire, thoroughly discussed the suitability of the National Western annuity, and believed it was appropriate for his circumstances

The Sundermans also signed a Consumer Disclosure contained in the National Western Ultra Future brochure. The disclosure listed the "free-look" period and listed fees and notice of withdrawal charges. In signing the disclosure form, the Sundermans indicated that they reviewed and understood the disclosure.

On the same date, respondent mailed the application documents, required forms, and copies of the Sundermans's current statements with MetLife and John Hancock to National Western. Respondent retained the FedEx air-bill (as he did with every application he submitted involved in this case).

---

[12] The Accusation alleged that respondent told the Sundermans that the policies would include a 10 percent bonus, "which proved to be wrong." In addition to the fact that neither of the Sundermans testified about that allegation, the National Western policies did in fact contain a 10 percent bonus on premiums paid during the first year.

21. The Sundermans purchased four policies from National Western. Respondent went to the Sundermans's residence on May 17, 2007, to deliver three of the contracts (he delivered the fourth on May 22, 2017). Respondent testified that when delivering contracts, it was his custom and practice to review again the contract with the client and explain the different provisions. He did this with the Sundermans and explained the 30-day "free-look" period as well as the income allocation options. The Sundermans signed an acknowledgment of receipt for each of the policies. Respondent returned these delivery receipts to National Western.

22. The Sundermans invested a total of $352,727.70 in National Western annuities. As a result of the replacement of their existing annuities, they incurred surrender charges totaling $22,480.52.[13]

2008-2009 ANNUITY TRANSACTIONS

23. Dr. Sunderman's testimony is summarized as follows: When they met with respondent a year later, he highly recommended that they switch to an annuity offered by Forethought Insurance Company (Forethought). Respondent's "pet phrase" was that he had a better "vehicle or product" to put them into. That's all respondent said. He did not compare the features of the Forethought annuity to the National Western annuities. The rest of the time was spent with "chit-chat." At the end of the meeting, respondent "whipped-out" papers and had the Sundermans sign and initial those papers before he left. Dr. Sunderman had not been unsatisfied with the National Western annuities, but respondent said that the Forethought annuity was better. The Sundermans trusted him. Like with the previous applications, the applications and forms had not been completed when Dr. Sunderman and his wife signed them. Dr. Sunderman was unaware that he would incur surrender penalties by terminating the National Western annuities. Had he been aware, he never would have cancelled the policies. Respondent never showed them a brochure or explained the features of the product. Respondent did not explain the 30-day "free-look" period.

24. Mrs. Sunderman's testimony is summarized as follows: She remembered that respondent would stop by once a year and they would meet with him for approximately an hour. Respondent and her husband would talk about golf for approximately 45 minutes of that hour. At the end of the meeting, respondent would have them sign and initial documents, and he said he would complete the paperwork at his own home. Approximately a month later they would receive documents in the mail. Mrs. Sunderman did not know why they switched from the National Western annuities to the Forethought policies, other than because respondent may have suggested it was a better policy. She did not recall whether respondent left any brochures. Again, Mrs. Sunderman testified that she fully trusted respondent and believed he was acting in their best interest.

25. Respondent's testimony is summarized as follows: A year after selling the National Western annuities to the Sundermans, they received annual reports from National Western. The reports showed the premiums that they had received and reflected that the

[13] The Accusation incorrectly stated that the total surrender charges were $21,716.40.

participation rate[14] had markedly changed, reduced from 100 to 75 percent. Respondent later found out that National Western had a history of lowering participation rates. Respondent met with the Sundermans on April 15, 2008.[15] They discussed the annual reports, but respondent did not recommend that the Sundermans make any changes. Dr. Sunderman told respondent that he owned an apartment building with his sister from which he received monthly income, but he felt that his sister was not managing it properly. Dr. Sunderman told respondent that he was interested in obtaining guaranteed income. Respondent told Dr. Sunderman that there were products that had a guaranteed lifetime income component that could be started and stopped. He told them about Forethought and gave them a copy of the Forethought brochure.[16] He explained how the policy worked based on the client guide.

26. Respondent met the Sundermans again on September 26, 2008, at their request, and again on October 29, 2008. Respondent reviewed with them the Forethought Destination 15 client guide, which he had left with them in April. This contract offered a 15 percent bonus to the Guaranteed Lifetime Income (GLI)[17] benefit with a five percent annual increase. As an example, an initial account value of $200,000 would have a guaranteed lifetime income value of $230,000. Additionally, each year, the value would receive a five percent increase until the GLI benefit was triggered, guaranteed for 10 years. There was also a guaranteed participation rate of 100 percent.

Respondent testified that Dr. Sunderman told him he was interested in combining the two joint polices with National Western into one Forethought policy. Respondent completed the application. Respondent explained exactly what the surrender charges for National Western were, and that they would receive a conservation[18] letter in the mail explaining that they would incur charges from National Western because of the early surrender. According

---

[14] The participation rate is the percentage of the index's return the insurance company credits to the annuity. For example, if the market went up 8 percent and the annuity's participation rate was 80 percent, a 6.4 percent return (80 percent of the gain) would be credited. Most indexed annuities that have a participation rate also have a "cap," which is an upper limit put on the return over a certain time period.

[15] Respondent retained the gate passes for each of his meetings with the Sundermans, which established the exact dates of the meetings at their house.

[16] Respondent had not yet been "appointed" by Forethought when he sold the Sundermans the National Western annuities the previous year.

[17] The GLI benefit permits an insured after the first contract year to receive guaranteed annual income for life, even if the contract value falls to zero (assuming annual withdrawals do not exceed the GLI value). The actual amount of the annual income is a percentage of the GLI account value.

[18] The term "conservation" means any attempt by an existing insurer or agent to dissuade a policyowner from the replacement of existing life insurance or annuity. (§ 10509.2, subd. (b).)

to respondent, the Sundermans were looking for long-term income, and the 15 percent bonus and 5 percent roll-up of the GLI benefit were of great importance to them. Respondent explained that because of this bonus, the surrender charges were "of little consequence" to the Sundermans.

The Sundermans signed applications to transfer their two National Western (non-qualified policies) they jointly held to a single Forethought policy. Like the National Western documents, the Sundermans signed and initialed that they understood the nature of the transaction and that they would incur surrender charges. With the application, respondent submitted a letter he wrote explaining why the Sundermans wanted to surrender the National Western policies.

Respondent also completed an Annuity Suitability Acknowledgement. The form provided information about the Sundermans's investment interests. The form also indicated that they had paid a premium of $328,000 for the National Western annuities and the surrender value would be $296,000. The Sundermans signed the form and initialed various disclosures. They also signed a Notice Regarding Replacement, which was similar to the National Western notice they had previously signed.

Respondent signed a disclosure statement page indicating that he provided the Sundermans the disclosure statement and buyer's guide.

Respondent mailed the application forms and documents to Forethought that day. Again, he testified that he completed the forms in the presence of the Sundermans and explained to them what they were signing.

27. Forethought issued the contract on December 10, 2008, with a premium of $301,433.58. Respondent delivered the contract to the Sundermans on January 8, 2009. The Sundermans signed that they received the contract, which clearly stated there was a 30-day right to cancel.

28. Respondent testified that at this point, the Sundermans told him that they each wanted to transfer their remaining National Western IRA contracts to Forethought. Respondent completed applications for Dr. and Mrs. Sunderman, which they signed. They also signed the same forms they had previously signed, including suitability acknowledgments and disclosures.

Forethought issued a contract for Mrs. Sunderman on February 18, 2009, with a $10,997.33 premium and issued a contract for Dr. Sunderman on February 25, 2009, with an $11,069.07 premium. Respondent delivered these contracts to the Sundermans on March 4, 2009. They signed delivery receipts.

29. In total, the Sundermans transferred $323,499.98 from National Western to Forethought. Based on these transactions, the Sundermans incurred surrender penalties from

National Western in the amount of $29,227.72.[19] Respondent noted the three Forethought policies provided a combined GLI account bonus of $48,525.

2012 ANNUITY TRANSACTION

30. Dr. Sunderman testified that in late 2011 and early 2012, he and his wife needed extra cash for home repairs. Respondent helped them withdraw $40,000 from Forethought, which was penalty free. Respondent then recommended to them an annuity from Americo Financial (Americo) and said they should take a portion of the Forethought account and put it in the Americo annuity. Respondent recommended that they only withdraw $100,000. Respondent did not explain the reason to make the change other than the Americo annuity was a better product. Respondent said that Forethought would be sending him a check for that amount and that he should deposit it into his checking account. Dr. Sunderman thought this was strange because all of the previous transactions had been roll-overs. But again, he completely trusted respondent and did what respondent recommended. Dr. Sunderman said respondent did not explain any features of the Americo product or why it was a good idea to purchase the product.

31. Respondent testified that he met with the Sundermans annually to review their situation and earnings after he delivered the Forethought policies. He demonstrated how the guaranteed minimum lifetime income amount increased by five percent after each year due to the roll-up. He helped the Sundermans change an incorrect cost basis that National Western reported to Forethought. In February 2011 and December 2011, he assisted Dr. Sunderman in withdrawing $40,000 from his Forethought policy, which was penalty free. In February 14, 2012, respondent met with the Sundermans.[20] He observed that the earnings in the Forethought contracts were declining. He told the Sundermans that it did not make sense for them to surrender the Forethought contracts at this point, but Forethought would allow them to make a penalty-free withdrawal that they could use to purchase another annuity. Respondent called Forethought to determine whether Forethought would allow the Sundermans to withdraw $100,000 penalty free. A Forethought representative confirmed this would be permissible.

32. Respondent provided the Sundermans with a copy of the Americo Ultimate One Index 9 client brochure. They were amenable to purchase a contract for $100,000. Respondent completed the application as he did with the previous contracts. The Sundermans signed all acknowledgments. Respondent also completed a suitability form that provided information about the Sundermans's finances, including total assets. One of the boxes on this form asked whether the annuity applied for would "replace, or otherwise reduce in value, any existing life insurance or annuity now in force." Respondent checked the box, "No." Additionally, respondent answered "Yes" to a question on behalf of the

[19] The Accusation incorrectly alleged that the Sundermans incurred $64,500 in surrender penalties based on these transactions.

[20] By this date, Dr. Sunderman had turned 65 years old.

Sundermans that they understood that the proposed annuity had a surrender charge and were aware of the surrender charge period.

33. Respondent testified that he did not view the transaction as a replacement because there was no penalty associated with the withdrawal from Forethought. He explained that if he were doing a full liquidated transfer, then there would have been a 1035 exchange. But it was not possible to do a 1035 exchange without surrendering a full policy. Thus, Forethought would not transfer the money directly to Americo, and Americo would not accept a third-party check. Consequently, the Sundermans had to receive payment from Forethought, deposit the payment, and then issue a check to Americo. Respondent advised the Sundermans that they would receive a check directly from Forethought and the letter from Forethought would state whether any penalty had been assessed. Respondent advised them not to accept the check if there were surrender charges.

34. Respondent testified that he did not, as alleged in the Accusation, falsely answer suitability questions in the Americo application. The Accusation alleged that respondent falsely answered "No" to the question of whether the Americo annuity would "replace, or otherwise recue in value, any life insurance or annuity now in force." Respondent noted that Americo's suitability form explicitly mentioned penalty-free withdrawals from annuities were considered "liquid assets." Respondent testified that because Forethought permitted the Sundermans to withdrawal $100,000 penalty-free and because Dr. Sunderman deposited the $100,000 check into his personal checking account, the Americo policy he purchased with a check drawn on his personal account was not a replacement annuity. Respondent believed he answered the question correctly because the money Dr. Sunderman withdrew from the Forethought policy, and then deposited in his checking account, was "free for him to do as he wished." Respondent believed that the purchase of the Americo policy did not reduce the value of the Forethought policy because the value had already been reduced by virtue of Dr. Sunderman's penalty-free withdrawal.

Respondent testified that he fully explained to the Sundermans that the new policy would charge a penalty if surrendered during a certain period.

35. Forethought sent a letter to the Sundermans dated February 24, 2012, which accompanied the check $100,000 check. The Forethought letter stated that no surrender penalties were assessed for the withdrawal.[21] The Sundermans then wrote a personal check for the same amount made payable to Americo and dated February 29, 2012. Respondent sent the check and a letter he drafted to Americo. Like all previous transactions, respondent completed all required forms, which the Sundermans signed. This included acknowledgment that they would incur surrender charges if the contract was terminated during the surrender

[21] The Accusation alleged that the Sundermans incurred a $5,948 surrender charge from Forethought for the withdrawal. In support of the allegation, complainant submitted an account balance spreadsheet that Forethought produced in response to the department's subpoena that included such a charge. However, the spreadsheet conflicted with the letter from Forethought stating that no surrender penalties would be incurred. There was no other evidence from Forethought regarding the penalty.

period. On March 13, 2012, respondent delivered to the Sundermans the Americo contract, for which they signed an acknowledgment of receipt. The contract delivery receipt provided notice of the "free-look" period.

36. Dr. Sunderman testified that after he purchased the Americo policy, he began to look at the details of his previous transactions and learned he had been assessed surrender penalties each time he transferred annuities. He wrote a letter to Americo on October 24, 2012, a copy of which he sent to Forethought and the department. In the letter, Dr. Sunderman asserted respondent had "scammed" him and his wife, and he had been unaware that he would have had to pay fees to withdraw $100,000 from Forethought in order to fund the Americo policy. Shortly after Dr. Sunderman sent the letter, he testified that respondent, called him "irate, and using inappropriate language." Dr. Sunderman terminated the call.

In response to the letter, Americo wrote Dr. Sunderman and notified him that at the request of the department, Americo was refunding him the $100,000 premium payment plus interest. The Sundermans surrendered their Forethought policies in 2014 for a total of $224,253.

EVALUATION OF THE EVIDENCE

37. The Sundermans were both under the age of 65 and did not benefit from any statutory protection for seniors with regard to any of the transactions except that involving Americo in 2012. The evidence clearly establishes that the Sundermans immediately placed great trust in respondent, that they unquestioningly deferred to his recommendations, and that they viewed respondent as a "financial advisor" and fiduciary, believing that he was looking out for their financial interests. However, with regard to the 2007 and 2008 transactions, respondent owed them no fiduciary duty. So long as he did not make misrepresentations or otherwise violate the law, he was permitted to sell them various kinds of insurance products, even if the products he sold were not financially in the Sundermans's best interest.

38. With regard to the four 2007 National Western annuities, the Accusation alleged respondent failed to explain the features of the annuities, he had the Sundermans sign blank applications and forms, and he later completed those forms. Additionally, the Accusation alleged that respondent failed to leave brochures or other sales materials with the Sundermans.

The Sundermans's and respondent's testimony regarding their interactions were vastly different.[22] The Sundermans testified that respondent spent almost no time discussing

[22] The credibility of all witnesses in this case have been evaluated pursuant to the factors set forth in Evidence Code section 780: the demeanor and manner of the witness while testifying, the character of the testimony, the capacity to perceive at the time the events occurred, the character of the witness for honesty, the existence of bias or other motive, other statements of the witness which are consistent or inconsistent with the testimony, the existence or absence of any fact to which the witness testified, and the attitude of the witness toward the proceeding in which the testimony has been given

the products; he simply requested them to sign blank paperwork, which they did because they immediately trusted him. Respondent testified that he methodically explained all of the features and contract provisions and left all pertinent sales materials with the Sundermans.

The allegations, as alleged in the Accusation, are of no legal consequence – because the Sundermans were not seniors, there was no requirement for respondent to provide an explanation of the contract or to leave brochures and other materials he used in the sales presentation. Ultimately, the Sundermans elected to follow respondent's recommendations and agreed to purchase multiple annuities. Although they now recognize they failed to perform sufficient due diligence, by signing documents they had not read or understood, they nonetheless entered into contractual obligations. They bore sole responsibility to read or understand the terms of the contracts in which they were entering. Since it was not established that respondent made any misrepresentations or committed unlawful acts, he is not subject to discipline for the conduct alleged.

39. Regarding the 2008 Forethought policies, the Accusation alleged that respondent failed to explain the policies or documents to the Sundermans, he had them sign and date blank forms, he incorrectly listed on one of the forms that Mrs. Sunderman's age of 60, when she was in fact 59, he failed to explain the 30-day "free-look" period, and he failed to explain the surrender charges associated with cancelling the National Western policies.

For the reasons discussed above, there was no requirement for respondent to provide an explanation of the features of the policies. By their signatures, the Sundermans acknowledged that they would incur surrender charges, which were highlighted in several different areas. It was not established that respondent made any misrepresentations.[23] Even if the Sundermans's testimony was fully credited, merely recommending a policy or saying it is "better" than an existing policy does not constitute misrepresentation unless there are inaccuracies or falsities in the statement; instead, it is merely the expression of an opinion. There are many reasons the Forethought policy might be "better" than the National Western. However, it is up to the consumer to decide whether the benefits of a policy outweigh the risks, including incurring surrender charges. This statement was contained in the notices provided to the Sundermans, which they signed. Even if the entirety of the Sundermans's testimony was fully credited, there was insufficient evidence to establish that respondent made misrepresentations or misleading statements in the course of recommending the replacement annuities.

40. With regard to the 2012 purchase of the Americo policy, the Accusation alleged that the transaction was "unsuitable." Dr. Sunderman was by then 65 years old, and respondent owed him a duty of honesty, good faith, and fair dealing. (§ 785.) Additionally, it would be unlawful for respondent to recommend to Dr. Sunderman that he purchase an "unnecessary replacement" annuity. (§ 10509.8, subd. (a).) By definition, in order for an

[23] That respondent listed Mrs. Sunderman's age as 60 when she was in fact 59 was not a willful misrepresentation. Although, Mrs. Sunderman was in fact 59 when she signed the document, she turned 60 a little over a week later. It was clear that this was a bona fide mistake and was immaterial to the application.

annuity to be an unnecessary replacement, it must "replace" an existing annuity for which the insured had to pay a surrender charge. (*Id.* subd. (b).) Clear and convincing evidence did not establish that the Americo policy was a replacement policy within the meaning of Section 10509.2, subdivision (b), because it was not established that Dr. Sunderman incurred any surrender charges by withdrawing $100,000 from the Forethought policy. The letter from Forethought accompanying the $100,000 partial withdrawal from the policy, which Dr. Sunderman used to purchase the Americo policy, stated there was no surrender penalty. The Forethought letter corroborates respondent's testimony that he spoke with a Forethought representative who said that Dr. Sunderman could withdraw this amount penalty free. Although it appears from a statement produced under subpoena that Forethought may have later assessed a surrender penalty, this document by itself was insufficient to meet the clear and convincing standard. Even if Dr. Sunderman was ultimately assessed a surrender penalty, respondent reasonably relied on the representations of the Forethought representative and the Forethought letter stating there were no surrender penalties in determining that the Americo transaction was not a replacement annuity.

41. With regard to the 2012 Americo transaction, complainant alleged that respondent falsely answered "No" to the question asking whether the Americo annuity will "replace, or otherwise reduce in value" any existing life insurance or annuity. Respondent argued that the purchase of the Americo policy did not reduce the value of the Forethought policy because the value had already been reduced by virtue of Dr. Sunderman's penalty-free withdrawal. Put another way, when Dr. Sunderman withdrew $100,000 from the Forethought policy, and then deposited in his checking account, the money was "free for him to do as he wished." He also noted that the Americo application included penalty-free withdrawals in its definition of "liquid assets."

Respondent's argument was unpersuasive. The Americo policy did in fact reduce the value of Dr. Sunderman's Forethought policy, which was funded by the $100,000 partial withdrawal. Had the withdrawal occurred prior to respondent completing the Americo application, respondent's argument would be more convincing. However, because respondent requested the $100,000 withdrawal simultaneously with submission of the Americo application, there is no question that the Americo policy was funded by the Forethought withdrawal, which in turn reduced the value of an existing annuity so as to require an affirmative answer on the Americo form. Indeed, respondent testified that he instructed Dr. Sunderman to reject the Forethought withdrawal if Forethought assessed a surrender penalty. Clearly, the two transactions were interconnected, and the fact that the money passed through Dr. Sunderman's checking account does not change this fact.

Ultimately, the fact that respondent falsely answered that the Americo policy was not a replacement annuity does not serve as cause to discipline respondent. The misstatement was contained on a form sent to the insurer on behalf of the Sundermans. The Code sections complainant cited in the Accusation that relate to misrepresentation (§§ 780, 781), involve misrepresentations to the consumer, not the insurer. Moreover, it was not established that the answer was material to Americo's suitability review, since it was not a replacement annuity.

42. Finally, complainant alleged that respondent failed to explain the 30-day "free-look" period, failed to fully explain the policy, had the Sundermans sign blank documents, stated in one of the forms that the Sundermans understood that the Americo annuity would have a surrender charge period when they did not, and failed to inform the Sundermans that they would incur penalties for withdrawing $100,000 from the Forethought policy.

Clear and convincing evidence did not establish respondent failed to explain the "free-look" period to the Sundermans. The Americo contract, which respondent provided to the Sundermans, stated they had a 30-day right to cancel. As for the remaining allegations relating to whether respondent fully explained the contract's provisions, the Sundermans's testimony regarding their interactions with respondent was generally more credible than respondent's. Respondent's contention that he thoroughly explained all of the contracts and provisions was not believable, in part because of his pattern and practice with other clients detailed extensively below. Once Dr. Sunderman turned 65 years old, respondent owed him a duty of honesty, good faith, and fair dealings. Assuming that respondent failed to explain various provisions of the contract and had Dr. Sunderman sign forms without ensuring he understood the provisions, this would implicate his duty of honesty, good faith, and fair dealings and be a violation of Section 785. However, Section 785 does not provide independent grounds to impose discipline against a licensee, and complainant did not cite any other statutory authority providing grounds to discipline a license based on a violation of this section. As such, clear and convincing evidence did not establish grounds for discipline.

43. Complainant failed to establish that respondent violated any provisions of the Code in relation to the transactions involving Dr. and Mrs. Sunderman, which would subject him to license discipline or administrative penalties.

Transactions Involving Mary and Milo Malotte

44. Mary Malotte was 69 years old at the time she testified at the hearing. When she and her husband, Milo, met respondent in 2007, she was 58 and he was 82. Mr. Malotte passed away in December 2015. The Malottes were together for 30 years. Mrs. Malotte has been retired for the past 10 years, prior to which she worked at a bar her husband owned. At one point, Mrs. Malotte also owned a daycare and was a real estate agent.

2007 Annuity Transactions

45. Mrs. Malotte's testimony is summarized as follows: She thought she met respondent through a friend of her husband, but she did not recall the first meeting with respondent. Prior to this time, her husband had another insurance agent, but she could not recall any of the details. She was aware that her husband purchased an annuity through respondent, but she did not know why. She recalled respondent telling her and her husband that if his former agent called, they should not speak to him.

Mrs. Malotte also purchased an annuity through respondent. She later found out through the company that she had incurred a penalty for exchanging an annuity. Mrs. Malotte recalled that respondent filled out forms. She said respondent explained things, but she still knows little about annuities. She was aware there were penalties for withdrawals during the first 10 years, but she did not understand why they switched annuities if they were going to be penalized and lose money. She could not recall whether respondent left any brochures after meetings. There was nothing in the folder where she kept financial information, so she assumed he did not.

46. Respondent's testimony is summarized as follows: He met Mr. and Mrs. Malotte on November 6, 2007, as a result of a direct mailing entitled "2007 Important Tax Law Changes" that was forwarded by the Sunderland Group. Respondent's initial meeting was at their home, and it proceeded as it did with the Sundermans. In addition to explaining his experience, respondent gave them a copy of a book he wrote entitled Asset Protection and Wealth Preservation "A Guide To Help You Avoid Common and Costly Financial Mistakes." At the time they met, Mr. Malotte owned a Sun Life Financial (Sun Life) annuity that he purchased in 2004. Mr. Malotte did not have an on-going relationship with the agent who sold him the annuity. Mr. Malotte was unsatisfied with the annuity's performance. Respondent did not recommend changing policies. Instead, respondent showed Mr. Malotte a brochure for American Investors Life Insurance Company (American Investors) Income Select Plus, a deferred indexed annuity. This policy was easier to understand than the Sun Life policy, and Mr. Malotte understood that he could do a 1035 exchange. Respondent told Mr. Malotte about the "free-look" period. Respondent obtained necessary information from Mr. Malotte to complete the application to purchase an American Investors annuity. Respondent asked Mr. Malotte about which investment strategy he wished to select and referred Mr. Malotte to the client guide.

Respondent completed an application in which he indicated the new policy was to replace the Sun Life annuity, which had a nine percent surrender charge. Mr. Malotte signed the application, acknowledgments, senior disclosure, notice regarding replacement, and a request for funds.

47. American Investors issued a contract on November 21, 2007, which respondent delivered on December 6, 2007. Mr. Malotte signed an acknowledgment of receipt, which indicated that he had a 30-day "free-look" to review the contract and request a full refund. The contract's initial premium was $88,910.05. The contract included an additional five percent bonus for the first year's premium reflecting an account value of $93,356.[24]

48. Mr. Samara testified that the replacement of the Sun Life policy with the American Investors policy was "questionable," but he did not believe that it was "clearly" an unnecessary replacement because the new policy could have fulfilled some of Mr. Malotte's financial goals.

---

[24] The exact penalty Mr. Malotte incurred as a result of the Sun Life surrender was unclear. A Sun Life account statement indicated that the account balance as of October 2007 was approximately $98,775. This number, less the American Investors initial premium, equals $9,865, which is the estimated surrender charge.

49. Respondent testified that at the first meeting on November 6, 2007, Mrs. Malotte indicated she was interested in purchasing her own annuity. Respondent left a Forethought Destination Income brochure with her to review. On November 13, 2007, respondent again met with Mrs. Malotte. They discussed the Forethought brochure. Respondent noted that Mr. Malotte was not eligible for the Forethought product because he was older than 80. Mrs. Malotte decided to purchase a Forethought policy by a cash payment, which did not involve an exchange. As was his custom, respondent completed all the application forms that Mrs. Malotte signed.

50. Forethought issued a contract on November 21, 2007, which respondent delivered on December 6, 2007. Mrs. Malotte signed an acknowledgment stating she had 10 days[25] to examine and return the contract for a full refund. The contract's initial premium was $80,000. The Forethought contract contained a 12 percent bonus applied to the GLI account's value. Respondent testified that the GLI provision was an attractive feature for Mrs. Malotte, and she had no intention of surrendering the product.

51. Respondent testified that he explained to the Malottes, in accordance with his custom and practice, that when they purchase an annuity, any commission or compensation he receives is paid by the insurance company, not by the client or from the premium payment. He denied telling any client that he was not making a commission on a transaction.

2010 ANNUITY TRANSACTION

52. Respondent's testimony is summarized as follows: He met with the Malottes annually to review the performance of their annuities. In September 2009, Mrs. Malotte changed the allocation of her funds to a fixed account strategy from the annual spread with monthly averaging, because the existing account had not earned any interest. Around the same time, Mr. Malotte contacted respondent and said he had money in Certificates of Deposit (CDs) that were not performing well, and he wanted to put the funds into an annuity product. Respondent met with Mr. Malotte on November 10, 2009, and he gave them a Forethought Income 125 client guide, since the American Investors contract did not allow for additional deposits. They went through the guide in detail. Some of the benefits of the policy were that it had a 25 percent guaranteed lifetime income bonus with a 5 percent roll-up. Mr. Malotte's goal in purchasing the product was to provide guaranteed lifetime income. The American Investors policy did not contain an income product. Mr. Malotte wanted to combine the money from the CDs with the value of the American Investors contract. Respondent explained to him that he would incur a surrender penalty, but because Mr. Malotte's goal was to utilize the lifetime income benefit, the penalty would be more than offset by GLI bonus.

Respondent again completed all of the application paperwork, in which he indicated the product being purchased was a replacement annuity, and there would be a nine percent surrender fee to obtain the American Investors policy. Mr. Malotte signed a suitability

[25] Because Mrs. Malotte was not a senior, she was not entitled to a statutory 30-day "free-look" period.

questionnaire and all disclosures and acknowledgments. It is noted that in the suitability questionnaire, "lifetime income payment" was not checked as one of Mr. Malotte's financial objectives in purchasing the product.

53. On November 25, 2009, American Investors sent Mr. Malotte a conservation letter stating that his account's value was $111,736.51 and the surrender value was $99,409.18.[26] Mr. Malotte requested that American Investors proceed with the transfer.

54. Forethought issued a contract on January 6, 2010, which respondent delivered on January 12, 2010. Mr. Malotte signed an acknowledgment that stated he had 30 days to examine and return the contract for a full refund. The contract's initial premium was $198,904.69, which was funded from the American Investors transfer and the proceeds from Bank of America CDs. This Forethought contract had a 25 percent bonus applied the GLI account's value, equaling $248,630.86. However, as a result of the transaction, Mr. Malotte incurred $12,327 in surrender charges (surrender penalty less the MVA). Documents submitted by Forethought established that Forethought paid respondent $10,939.76 in commission for the transaction.[27]

55. Respondent testified that when he delivered the contract to Mr. Malotte, he again explained the product and how it was different than Mrs. Malotte's Forethought policy. Because the GLI bonus was higher than the bonus in Mrs. Malotte's policy, she expressed interest in exchanging her policy for the same type as his. Respondent explained that he did not think Forethought would do this, but he contacted Forethought's member services department, which confirmed his assumption. He advised Mrs. Malotte that there was no reason for her to exchange her policy.

2012 ANNUITY TRANSACTION

56. Respondent testified that he continued to meet with the Malottes annually. In 2012, Mrs. Malotte decided she wanted to put more money into annuities. On March 13, 2012, respondent completed an application for an Americo Ultimate One Index 9 annuity with a $30,000 premium that was funded by a cash payment. Respondent completed the application and all forms; Mrs. Malotte signed the acknowledgments and suitability forms. Respondent submitted a $30,000 check that Mr. Malotte drew from his business account.

---

[26] This sum reflected the difference between the accumulated account value, minus a $14,078.80 surrender penalty, plus a $1,751.47 market value adjustment (MVA).

[27] For each transaction in the Accusation, complainant alleged the amount of commission respondent received. Respondent argued that the amount of commission he received is a "red-herring" because the commission was received directly from the insurer and was not paid or absorbed by the client's funds. However, the amount of commission he received is relevant as a disciplinary consideration, but only in those transactions where respondent violated the Code. In all other transactions, the amount of commission is irrelevant.

57. At hearing, Mrs. Malotte did not recall many details about the Americo transaction, although she admitted she must have been aware of the purchase because she signed the application and forms and her husband wrote a check for $30,000. She testified that she did not understand the terms of the policy.

58. Americo issued a contract on March 15, 2012, which respondent delivered on March 28, 2012. Mrs. Malotte signed an acknowledgment of receipt. The contract's initial premium was $30,000. Respondent submitted account statements that were mailed to her and pointed out that she had signed all of the application documents to demonstrate that she had knowledge of the Americo policy.

2013 ANNUITY TRANSACTIONS

59. Mrs. Malotte testified that respondent told her and her husband that the Forethought policies were no longer paying out and Forethought was going out of business. She thought that respondent decided to put them into new annuities for this reason. She did not recall whether respondent explained the terms of the contract, but only that there would be penalties if she cashed out before 10 years had elapsed

60. Respondent's testimony is summarized as follows: During one of his annual reviews, he reviewed the Forethought policies with the Malottes, and they observed that there had been no gains from the index strategy. They were disappointed with the growth and performance of the Forethought policies. Respondent denied ever making a claim that Forethought was going broke or bankrupt. He suggested that the Malottes may have been confused because he told them that their index strategies were not growing. Respondent explained that they had the option of maintaining the existing strategy or to move some or all of the money to a fixed interest strategy. Mr. Malotte did not want to do this because he understood the value of the policy was the potential growth of the index. Another option was to consider surrendering the policy. Respondent said Mr. Malotte had income from the sale of his bar and rental income, which were both taxable. The guaranteed lifetime income benefit was also taxable and non-transferable. Because he was older, this complicated his tax situation. Respondent showed Mr. Malotte a brochure for Great American Secure American policy.

61. In December 2012, Forethought's General Counsel, Nigel Riggens, instructed Forethought to no longer process applications submitted by respondent. In late December 2012, respondent learned that Forethought had withdrawn policies sold by respondent that were pending and had terminated his appointment. Respondent denied that he recommended the replacement of the Forethought policy because his business relationship with Forethought had ended.

62. On January 8, 2013, respondent completed an application in which he indicated the new product would be a replacement policy for Mr. Malotte's Forethought policy. Concerning the purpose of the transaction, respondent wrote, "Improve income, shorten surrender period, income options." Respondent completed a suitability form, which Mr. Malotte signed, in addition to the disclosures and 1035 exchange forms.

63. On January 30, 2013, Forethought sent Mr. Malotte a conservation letter. The letter stated that his contract was currently valued at $179,014[28] and he would incur $17,901 in surrender charges for a transfer value of $161,112. Respondent completed an exchange release form to confirm that Mr. Malotte was aware of the surrender charges and his new policy would include surrender charges for the first seven years. Mr. Malotte signed the form.

64. Great American issued a contract on February 28, 2013, which respondent delivered on March 7, 2013. Mr. Malotte signed an acknowledgment of receipt. The contract's initial premium was $161,112. The contract had a 2.35 percent interest rate for the first year (1.35 percent on the cash value). It also contained a feature called the Beneficiary Continuation Option, which allowed for his beneficiary (Mrs. Malotte) to elect to keep the contract and receive distributions instead of receiving a lump sum death benefit.[29] Documentation from Great American indicated it paid respondent $8,095.92 in commission for the transaction.

65. At the same time, on January 8, 2013, respondent showed Mrs. Malotte a brochure for Fidelity & Guaranty Life (Fidelity) Prosperity Elite 14. Respondent testified that unlike her Forethought policy, which only had one index crediting strategy, the Fidelity product had seven different interest crediting strategies. There were also more liquidity benefits and it had a home-healthcare provision. The policy had an 8 percent bonus attached to the premium payment, and an18 percent bonus attached to the guaranteed lifetime income benefit, compared to 12 percent with Forethought. Like with all of his other policies, respondent completed and discussed all of the forms which Mrs. Malotte signed. He explained that she would receive a conservation letter from Forethought indicating what the surrender charges would be. The application required Mrs. Malotte to select her interest crediting strategy, which she divided between a point-to-point and monthly averaging with cap. Respondent completed a suitability form, which indicated Mrs. Malotte would incur a $4,000 surrender charge.

66. On January 28, 2013, Forethought sent Mrs. Malotte a conservation letter. The letter stated that her contract was currently valued at $88,715 and she would incur $4,436 in surrender charges for a transfer value of $84,279. Respondent completed an exchange release form indicating that Mrs. Malotte was aware of the surrender charges, and her new policy would incur surrender charges for the first 14 years. Mrs. Malotte signed the form.

67. Fidelity issued a contract on February 18, 2013, which respondent delivered on March 7, 2013. Mrs. Malotte signed an acknowledgment of receipt. The contract's initial premium was $84,357.

---

[28] In 2012, Mr. Malotte withdrew $19,890.46 from the contract penalty-free.

[29] After Mr. Malotte passed away, Great American notified Mrs. Malotte on March 26, 2016, that she could receive the death benefit of $179,014, or she could continue ownership of the contract. Mrs. Malotte elected to continue ownership of the contract.

68. Respondent testified that he never told any of his clients that he did not earn a commission, and that he always told them he was paid by the insurance company. He said it would make no sense for him to cheat a client for the benefit of a little money because so much of his business is based on referrals. He never erroneously told a client that they would not incur surrender charges.

EVALUATION OF THE EVIDENCE

69. Regarding the 2007 American Investors transaction, the Accusation alleged the following: Both Mr. and Mrs. Malotte had annuities with another agent, and respondent convinced them to surrender those annuities and purchase ones from him. Respondent told them that he was not making any commission by changing policies, and the only commission he made was when he set up their first policies with Forethought. In November 2007, respondent met Mr. Malotte and falsely told him that his insurance agent was charging him a commission, which he claimed was coming out of Mr. Malotte's policy premiums. Respondent told him that he would not charge as large a commission. Respondent instructed Mr. Malotte to stop talking to his current agent. Mr. Malotte surrendered his Sun Life annuity and purchased an annuity with American Investors. Mr. Malotte incurred $9,900 in surrender charges, and respondent earned a $6,445.98 commission.

In fact, only Mr. Malotte had a preexisting annuity (Sun Life) at the time he met respondent. Respondent credibly testified that he has never told a client that he would not make a commission on a transaction, and that he explains that he is paid by the insurance company. There was no evidence establishing the allegations that respondent misrepresented anything regarding the previous agent's commission or Sun Life policy. Mr. Malotte did incur approximately $9,900 in surrender charges, but he also received a five percent initial bonus, which was approximately $4,445.

Because Mr. Malotte was a senior, and because respondent recommended a replacement annuity, a violation of Section 10509.8, subdivision (a), exists if it was an unnecessary replacement. The most significant advantage of the American Investors policy was the five percent premium bonus, although this benefit did not offset the surrender penalties. The American Investors contract was equity linked, as was the Sun Life contract, although they had different methods for calculating interest credits. In sum, the two contracts were quite similar and there was nothing in particular about the American Investors policy that clearly established that it would confer a substantial financial benefit over the Sun Life policy. However, Mr. Samara testified that while the transaction was "questionable," it was not clearly an unnecessary replacement. Accordingly, clear and convincing evidence did not establish that the American Investors policy was an unnecessary replacement subjecting respondent to discipline.

70. Regarding Mrs. Malotte's 2007 Forethought transaction, the Accusation further alleged the following: Respondent misrepresented the terms of the Forethought policy to Mrs. Malotte and told her it provided a cash bonus when it did not. He had Mrs. Malotte sign blank applications, and he completed the applications later, putting inaccurate

information in the suitability forms. Respondent also filled out a partial withdrawal form from the Forethought annuity.

No violations were established relating to Mrs. Malotte's 2007 Forethought purchase. At hearing, Mrs. Malotte recalled few details of her interactions with respondent, as would be expected for events occurring 10 years earlier. Respondent's testimony was not refuted; clear and convincing evidence did not establish any factual misrepresentations. Additionally, because Mrs. Malotte was not a senior at any point during her transactions with respondent, she did not benefit from any special statutory protections.

71. Regarding the 2010 replacement of the American Investors policy with the Forethought policy, the Accusation alleged the following: Respondent falsely assured Mr. Malotte that the Forethought contract had a $12,000 bonus, which would outweigh any surrender charge.[30] Respondent failed to explain the terms of the annuity, had Mr. Malotte sign blank forms that respondent would complete later, and failed to explain the 30-day "free-look" period. As a result of the transaction, Mr. Malotte incurred $12,327 in surrender charges while respondent earned $10,939.76 in commission.

There was no evidence that respondent made any misrepresentations, failed to explain the provisions of the annuity, or failed to explain the 30-day "free-look" which was printed on the signed delivery receipt form. Clear and convincing evidence did not establish a basis for discipline on these allegations.

In an effort to show there was not an unnecessary replacement, respondent argued that Mr. Malotte's primary goal was guaranteed lifetime income for himself and his wife, and the surrender penalty was acceptable because the client received a 25 percent bonus added to the GLI account's value. Though this was not one of the financial objectives indicated in the suitability questionnaire, Mr. Malotte never in fact elected to exercise this benefit, belying the assertion that this was his reason for purchasing the annuity (in addition to which, respondent recommended the replacement of the Forethought policy three years later; one of the reasons respondent cited for the switch was so Mr. Malotte could avoid the tax burden associated with the GLI income).

Furthermore, exercising the GLI option would make little sense for Mr. Malotte, who was 84 years old at the time of the purchase. According to the Forethought Destination Income 125 brochure, the GLI value does not apply to the cash surrender value or death benefit. Once the GLI benefit is activated (after the first contract year), Forethought determines the maximum amount of income that can be withdrawn every year going forward. This is based on the GLI account's value multiplied by the GLI benefit factor. The factor

[30] The Accusation alleged the initial premium was $93,516. The premium was in fact $198,904.69, which represented the transfer of CDs and the proceeds of the American Investors surrender.

ranges from 4.5 percent of the income level annually, down to 2.5 percent with a 2.0 percent annual cost of living increase and spousal continuation of income upon the owner's death.[31]

According to Mr. Malotte's Forethought annual statement from January 2013, the same year he ultimately surrendered the contract, he had not earned any interest on his initial premium. Considering the Forethought contract contained no other material difference when compared to the American Investors contract, the approximately $12,327 in surrender charges Mr. Malotte incurred to purchase this contract was patently detrimental to his financial interests.

Respondent argued, however, that because Mr. Malotte signed disclosures stating he was aware that the GLI bonus would not offset any surrender charges, and the transaction was approved by the replacing insurer's suitability department, respondent satisfied all legal requirements. Respondent repeated this argument with all of the replacement transactions referred to in the Accusation. However, Section 10509.8, subdivision (a), imposes liability on the agent even if all forms are signed and the insurer approves the transaction. There is no "safe harbor" provision for the agent – the clear legislative intent of the statute is to ensure that seniors are protected from agents selling them unnecessary replacements, which is defined by an objective standard. The fact that Mr. Malotte and all of the seniors involved in this case signed a document stating they understood the nature of the transaction and agreed to the transaction has no bearing on the issue of whether the transaction was objectively unnecessary. Thus, the Forethought contract would not confer a substantial financial benefit over the life of the policy, and a reasonable person would deem the replacement unnecessary. (§ 10509.8, subd. (b).)

72. Regarding Mrs. Malotte's 2012 Americo policy, the Accusation alleged that unbeknownst to Mrs. Malotte, she had a $30,000 annuity with Americo, had never seen the

---

[31] Throughout the hearing, respondent placed great emphasis on the fact that the Forethought policies he sold included this GLI bonus, which justified replacement of existing annuities. However, in reality, the GLI bonus can only be considered a "benefit" if the GLI provision is elected. In Mr. Malotte's case, after the first contract year, when Mr. Malotte could activate the GLI benefit and begin drawing an annual income for life, the GLI account value would have been $261,061, which would have included the 5.0 percent annual increase. By activating the GLI benefit, that account value would cease increasing in value, but he would receive 4.5 percent of the GLI value annually, or $11,747, for the remainder of his life. The contract value ultimately earned no interest in the first three years, remaining at $198,904. Once the GLI benefit was exercised, the contract value would decrease with the annual income payments. The main benefit of the GLI bonus is that it provides guaranteed income even when the contract account value is zero (the contract otherwise permits up to a 10 percent penalty-free withdrawal after the first year). Dividing the account value by the annual GLI payments would deplete the account value in approximately 17 years, at which point, Mr. Malotte would have to have reached 102 years old. If he had elected the spousal continuation option, at 2.5 percent, the annual income would have dropped to $6,526. Thus, the "benefit" of the GLI bonus would only mature for Mrs. Malotte approximately 30 years later, when she would be age 92.

application for that annuity until it was shown to her by a department investigator, signed documents that respondent told her to sign, never received any correspondence from Americo, and did not understand why her husband wrote a check to Americo. Additionally, it alleged that a review of the annuities purchased by Mrs. Malotte shows they were sold to her "under questionable circumstances" and it was "arguable [they] did not accomplish" any of her financial goals.

None of these allegations were established. Mrs. Malotte signed the application and her husband wrote a check for $30,000 to fund the purchase. Although she might not have remembered the transaction at the time she was interviewed by the department's investigator, complainant did not establish that respondent committed any wrongdoing with regard to this transaction. Although it is not clear what "questionable circumstances" the Accusation refers to, Mrs. Malotte did not enjoy any statutory protections afforded to seniors. Finally, it was not established that respondent made any misrepresentations to Mrs. Malotte regarding her transactions.

73. Regarding Mrs. Malotte's 2013 transactions, the Accusation alleged the following: Respondent told Mrs. Malotte that Forethought stopped making money and was going into bankruptcy, so she needed to move her annuity away from Forethought; she consequently agreed to purchase an annuity with Fidelity. Respondent informed her that there would not be a surrender penalty because it was Forethought's fault that it stopped making money. Like before, respondent failed to explain the various features of the annuity. He also had Mrs. Malotte sign blank application forms that he completed later with inaccurate information, such as misstating the reasons she was surrendering the policy. Respondent failed to inform Mrs. Malotte that the Fidelity policy had a 15-year surrender period. He told her that the Fidelity policy contained a bonus that would cover the surrender fees; however, Mrs. Malotte incurred $4,435.76 in surrender fees.

Clear and convincing evidence did not establish that respondent made any misrepresentations to Mrs. Malotte. Mrs. Malotte was a credible witness. However, her testimony to the effect that respondent told them that Forethought was broke, alone, was not sufficiently clear and convincing to establish that respondent made a material representation. The events occurred many years ago, and considering that Mrs. Malotte was uncertain about a number of other events, complainant did not meet its evidentiary burden. In addition, Mrs. Malotte signed the application and associated documents advising her of the terms of the policy and surrender fees. Even if she signed documents without reading the provisions, she did so at her peril since she did not benefit from any statutory protections for seniors.

74. Complainant failed to establish that respondent violated any provisions of the Code related to Mrs. Malotte.

75. Regarding Mr. Malotte's 2013 replacement transaction, the Accusation alleged the following: Respondent told Mr. Malotte that Forethought had stopped making money, and he needed to move the money away from Forethought to Great American. When asked about the move, respondent replied, "I know what I'm doing." Respondent misrepresented that the Great American annuity had the same terms at the Forethought annuity and that there

would be no penalties for transferring to Forethought despite the fact that Mr. Malotte would in fact incur surrender charges because of the transfer. Respondent told Mr. Malotte that he would not earn a commission, yet respondent earned $8,095.92 in commission. Finally, respondent incorrectly told Mr. Malotte the surrender period would start on the year Forethought's surrender period left off.

Clear and convincing evidence did not establish the factual allegations as alleged. Mr. Malotte did not testify and Mrs. Malotte's testimony did not establish that respondent made any misrepresentations concerning the Great American policy.

However, as with the previous transaction, clear and convincing evidence established that respondent recommended the purchase of an unnecessary replacement. Mr. Malotte incurred $17,901 in surrender penalties from the transaction. Unlike the Forethought policy, which was an equity-linked contract, Great American credited fixed interest with a guaranteed minimum. Respondent argued that Mr. Malotte was upset that his Forethought policy had not accrued any interest over the preceding two years. Had Mr. Malotte switched his Forethought policy from the equity-linked strategy to the fixed-interest strategy, he could have been guaranteed to earn 1.0 percent annually. The Great American policy's *first year* interest rate was 2.35 percent on the account's value and 1.35 percent on the surrender value. At the time Mr. Malotte surrendered his Forethought policy, the account's value was $179,014.23. At 1.0 percent interest, he would have earned $1,790 in interest over the next year, had he retained the policy and selected the fixed interest option. The Great American policy's premium was $161,112.81. With a first-year interest rate of 2.35 percent, the contract earned $3,786 in interest. This was approximately $2,000 more than the Forethought contract, which was the justification respondent used to support the replacement. However, the gain fell far short of offsetting the $17,901 in surrender penalties Mr. Malotte incurred from the transaction. In fact, three years later, when Mr. Malotte passed away, the account's value was $175,066, which was still less than the Forethought account's value at time of surrender three years before.

The Great American contract also offered an annuitization bonus which provided that if the contract is annuitized for a period of at least seven years, a bonus would be added to the account's value equal to 1.0 percent of the amount annuitized for each completed contract year, up to 10 percent. However, Mr. Malotte never expressed an intent to annuitize, especially at 87 years of age, and the contractual gain was not a benefit that would justify the high surrender costs to a reasonable person. In conclusion, the Great American contract would not confer a substantial financial benefit over the life policy, and a reasonable person would deem the replacement unnecessary. (§ 10509.8, subd. (b).)

76. Respondent recommended and sold two unnecessary replacements to Mr. Malotte over a three-year period. Respondent earned $19,035.68 in commissions for these transactions.[32] Mr. Malotte incurred total surrender penalties in the amount of $30,338. By

[32] Respondent's commissions for the sale of the initial annuities to Mr. Malotte and the annuities to Mrs. Malotte were not included as they were not found to be unnecessary

recommending these unnecessary replacements to Mr. Malotte, respondent also breached his duty of honesty, good faith, and fair dealing.

Transactions Involving Abel Salvador

77. Abel Salvador was 91 years old at the time he testified at the hearing. In 2008, when he met respondent, he was 81. His testimony is summarized as follows: Mr. Salvador has been retired for the past 26 years. He holds a high school diploma and spent his career at a tool company. He has never been very familiar with annuities. He did not remember how he came to meet respondent. He remembered purchasing a life insurance policy from Transamerica Life Insurance Company (Transamerica) before meeting respondent. He also held other investments, but he did not know much about them. He trusted respondent completely. Mr. Salvador simply signed the papers respondent directed him to sign. Respondent did not explain anything about the policies such as maturity date, withdrawal charges, or surrender charges. He said respondent never showed him any brochures or left information. Mr. Salvador testified that respondent retained the copies of his policies. In the first five years after he met respondent, Mr. Salvador engaged in eight annuity transactions with respondent. He testified that respondent was in charge of his money. For each of the transactions, respondent told Mr. Salvador that Mr. Salvador could make more money by transferring policies. Mr. Salvador had "full confidence" in respondent and did not question any of the transactions.

2008 ANNUITY TRANSACTIONS

78. Respondent's testimony is summarized as follows: Respondent met Mr. Salvador in 2008 after Mr. Salvador filled out the direct-mailer that the Sunderland Group forwarded to respondent. Respondent first met Mr. Salvador on June 4, 2008, at Mr. Salvador's home. Respondent testified that Mr. Salvador was mentally a lot sharper than he was at the hearing and understood much more about his finances. Often during his meetings with Mr. Salvador, Mr. Salvador's nephew was present. At the first meeting, Mr. Salvador showed respondent the Transamerica life insurance policy and a Prudential variable annuity. Mr. Salvador also had a UBS brokerage account that held non-qualified investments and an IRA that he inherited after his partner's death. Respondent gave Mr. Salvador a Forethought Destination 15 brochure. Respondent talked about the risk of investment in the stock market and explained that there would never be a loss of funds with a fixed annuity. Respondent also reviewed a brochure from American Investors. He explained that Mr. Salvador could not purchase a Forethought policy funded by the IRA account because it did not meet Forethought's minimum issue requirement of $25,000.

Respondent testified that he used the same procedures as were described with the Sundermans and Malottes in completing the application forms and discussing the features of the annuity. Respondent explained to Mr. Salvador what the forms were and confirmed that the information he used to complete the application was correct. At the first meeting, they

---

replacements and, in Mrs. Malotte's case, because she was not a senior who would be afforded the protections of section 10509.8, subdivision (a).

spent over three hours together and completed three application forms. Mr. Salvador signed or initialed each form to indicate that he understood the information.

79. Respondent completed and Mr. Salvador signed the Forethought application, suitability form, disclosure statement, replacement acknowledgment, and 1035 exchange authorization to replace his Transamerica life insurance policy and Prudential annuity on June 4, 2008. Respondent testified that he explained the surrender charges that were listed in the client guide. Respondent mailed these documents to Forethought the next day.

80. In addition, respondent completed and Mr. Salvador signed two American Investors applications, suitability worksheets, market value adjustment acknowledgment, "key terms" acknowledgement, California senior insurance disclosure, and IRA disclosure statement, to purchase two American Investors policies, one funded by the non-qualified investments, the other by the IRA. Mr. Salvador also wrote a check for $35,000 that was to be applied to the premium of the non-qualified account. On June 30, 2008, respondent wrote letters with attached Request for Funds forms authorizing the transfer of funds to American Investors.

81. American Investors issued a contract for a flexible premium indexed deferred annuity on August 4, 2008, with an initial premium of $261,228. The contract included a five percent first year premium bonus, making the account's value $274,290. American Investors also issued a contract for the qualified account funded by the IRA, with a premium of $19,064. The contract also included a five percent first-year premium bonus, making the account's value $20,018.

82. Mr. Salvador signed an acknowledgment of receipt for both contracts on August 7, 2008. The acknowledgment stated that Mr. Salvador had a limited time to review the contract and return it for a refund. Respondent testified that he reviewed the "free-look" period with Mr. Salvador as is his practice.

83. Forethought issued a contract on August 13, 2008, with a premium amount of $73,770.86. The contract included a 15 percent GLI income bonus with an additional 5 percent bonus if that benefit was exercised during the first 6 years of the contract. Mr. Salvador signed an acknowledgment of receipt for both contracts on August 22, 2008.

84. Mr. Samara testified about the suitability of the Forethought and American Investors transactions. Because only the Forethought policy was a replacement annuity, only Mr. Samara's testimony relating to that transaction is relevant to the Accusation. Mr. Samara opined that if the suitability statement respondent completed as part of the Forethought application was accurate, this transaction could have been consistent with Mr. Salvador's financial objectives and thus not an unnecessary replacement.

2009 ANNUITY TRANSACTIONS

85. Respondent submitted Mr. Salvador's 2009 American Investors statement, which showed that Mr. Salvador only received $15 in interest that year due to the stock

market crash. He noted that had Mr. Salvador kept his money in securities, he would have likely suffered significant losses. The statement also noted that Mr. Salvador withdrew $9,600 from the contract that year. Respondent testified that during the time that respondent worked with Mr. Salvador, Mr. Salvador made frequent and large withdrawals from the contracts.

86. Respondent testified that he met with Mr. Salvador on July 17, 2009. Respondent said that the IRA account with American Investors was small, and Mr. Salvador wanted to see it increase. Mr. Salvador wanted to see other options, so respondent showed him the Conseco Insurance Company (Conseco) Patriot policy. Mr. Salvador indicated his desire to purchase the policy.

87. Like with all previous policies, respondent completed the application, annuity suitability form, application supplement, notice regarding replacement policy, authorization to transfer funds, and benefit disclosure. Mr. Salvador signed all documents. On July 24, 2009, American Investors sent Mr. Salvador a conservation letter stating that he would incur a $3,146.38 surrender penalty. Mr. Salvador submitted a response requesting American Investors to continue with the surrender. On September 2, 2009, respondent delivered the Conseco policy to Mr. Salvador, with a premium of $16,953.88. Respondent earned a $957.90 commission on the transaction.

88. Respondent testified that Mr. Salvador was concerned that the remaining American Investors policy was not growing fast enough. Respondent made clear that Mr. Salvador did not have to purchase another annuity but could instead put his money somewhere else. The American Investors policy did not contain a GLI benefit. The only way Mr. Salvador could receive guaranteed income would be for him to annuitize the policy, which would be an irrevocable decision. Forethought Income 125 policy had a 5 percent roll-up attached to the GLI benefit and 25 percent bonus. It also had no spread and no fees. Respondent reviewed the client guide with Mr. Salvador. Mr. Salvador understood that penalties would apply for an early surrender.

89. On September 2, 2009, respondent completed the application, suitability questionnaire, disclosure statement, notice regarding replacement, and 1035 exchange authorization. Mr. Salvador signed all documents.

90. On October 5, 2009, American Investors sent Mr. Salvador a conservation letter, stating that he would incur a $36,258.95 surrender penalty. Mr. Salvador confirmed that he wished to continue with the transfer. American Investors issued a check to Forethought in the amount of $232,677.49.[33]

91. Respondent delivered the Forethought policy to Mr. Salvador on November 3, 2009. With the initial premium of $232,677.49, the policy had a guaranteed lifetime income benefit of $290,846.86. Respondent earned $11,633.87 in commission from the transaction.

[33] This reflected an account value of $265,560.15, minus a surrender penalty of $36,267.64 plus an MVA of $3,384.98.

2010 ANNUITY TRANSACTION

92. Less than a year later, on July 14, 2010, respondent met with Mr. Salvador. Respondent testified that by this time, Forethought had agreed to approve policies issued for less than a $25,000 premium. Respondent testified that Mr. Salvador wished to exchange his Conseco IRA policy for a Forethought Destination Income policy. Like all other transactions, respondent completed all of the application forms that Mr. Salvador signed. On September 15, 2010, respondent delivered Mr. Salvador a Forethought policy whose premium was $15,873. This policy contained a GLI bonus of 25 percent. Mr. Salvador incurred a 7.25 percent surrender penalty, or $1,079.90, for surrendering the Conseco policy less than one year later. Respondent earned $833.38 in commission.

2012 ANNUITY TRANSACTIONS

93. Respondent testified that over the next two years, Mr. Salvador made numerous withdrawals from his policies. As a result, Mr. Salvador had extra funds that he wanted to put back into Forethought. Respondent told him it was not possible to add money to an existing policy, so he showed him an Americo brochure.

94. On February 9, 2012, respondent completed the application, financial suitability form, and disclosure forms, which Mr. Salvador signed. The Americo application asked whether the annuity would replace or otherwise reduce in value any life insurance or annuity now in force. Respondent checked the box "No." Respondent again checked "No" on the financial suitability form and represented that in the past 36 months (60 months in California) there had not been an annuity replaced. In indicating the source of funds used to purchase the annuity, respondent only checked "Checking/Savings." Because respondent answered "No" to these two questions, the application did not require him to complete additional suitability information.

95. On the same day respondent completed the Americo application, respondent completed two partial withdrawal requests from Forethought on behalf of Mr. Salvador. One request was for the maximum free withdrawal amount, and the other was for an additional $20,000. On February 21, 2012, Forethought sent Mr. Salvador two checks, one for $6,420.33 with no surrender penalty and the other was for $20,000 with a surrender penalty of $926.92. Mr. Salvador wrote a check for $28,000 that respondent submitted to Americo on March 2, 2012.

96. Complainant called Rebecca Criswell as a rebuttal witness. Ms. Criswell is Director of Compliance for Americo, where she has worked for over 14 years. Ms. Criswell has been involved in producing compliance booklets that are sent to all agents appointed with Americo. Ms. Criswell reviewed the application respondent completed on behalf of Mr. Salvador. She believed that respondent should have answered "Yes" to the questions regarding replacement annuities. Had respondent indicated in the application that it was a replacement annuity, the application would have gone through Americo's suitability review process. Ms. Criswell stated that the guidelines that were sent to agents specifically stated that partial cash-outs of annuities were to be included. Ms. Criswell testified that her records

indicate that the guidelines were sent to respondent at the address listed on his appointment application, as well as by email.

In response to Ms. Criswell's testimony, respondent noted that the address where the guidelines were supposedly sent was different than the address that Americo sent contracts for respondent to deliver to his clients. He said that he was not living at this address, and the email address Ms. Criswell testified about belonged to his wife.

97. Americo issued a policy with a $28,000 premium. Respondent delivered the policy to Mr. Salvador on March 13, 2012. Respondent earned $2,100 in commission.

2013 ANNUITY TRANSACTIONS

98. Respondent testified that because Mr. Salvador was making so many withdrawals from the Forethought account, he wondered why Mr. Salvador did not trigger the GLI benefit, and he asked Mr. Salvador about this. Mr. Salvador said it would be insufficient to cover his expenses. Mr. Salvador could see the values of his accounts dwindling. Respondent showed Mr. Salvador a Great American brochure for its "Secured American" fixed-interest policy.[34]

99. On January 9, 2013, respondent completed the application, financial disclosure form, senior meeting disclosure, senior annuity questionnaire, replacement form, and 1035 exchange request, which Mr. Salvador signed. The premium was going to be paid by surrendering both non-qualified Forethought policies. On January 30, 2013, Forethought sent Mr. Salvador a conservation letter stating that his contract value was $163,664.66 and that he would incur a withdrawal penalty of approximately $17,366.47 for the surrender. A conservation letter for Mr. Salvador's other Forethought contract stated the account's value was $58,025.30, and he would incur a withdrawal penalty of approximately $3,601.52 for the surrender. Respondent completed and Mr. Salvador signed the transfer release.

100. On February 28, 2013, Great American issued a contract with an initial premium of $200,721.97. Mr. Salvador incurred surrender penalties in the amount of $20,967.99. Respondent earned a $9,534.29 commission from the transaction.

101. On March 7, 2013, respondent completed another Great American application for a product to replace the Forethought IRA policy. Respondent completed, and Mr. Salvador signed, all of the same forms. Great American issued this policy on April 23, 2013, with an initial premium of $11,702.07. Mr. Salvador incurred $1,571.72 in surrender penalties. Respondent earned $588.03 in commission.

//

[34] As noted above, in December 2012, Forethought stopped processing applications sold by respondent and terminated his appointment.

EVALUATION OF THE EVIDENCE

102. The Accusation alleged that Mr. Salvador did not have any copies of the annuity policies because respondent kept them all. This allegation was not established. Respondent produced delivery receipts signed by Mr. Salvador establishing that each contract was delivered.

103. The Accusation alleged that in 2008, respondent purchased an American Investors annuity that would not have matured until 2025, when Mr. Salvador would be 98 years old. This statement, although factually correct (except that Mr. Salvador purchased not one but two contracts from American Investors), does not establish grounds for discipline. Although the allegation implies that the contract would not have any financial value for Mr. Salvador until that date, this matter was not established because there was no requirement that the policy owner annuitize the contract.

104. Regarding the 2008 Forethought transaction, the Accusation alleged the following: Respondent failed to explain the Forethought policy to Mr. Salvador and made misrepresentations, such as that he would make money if the stock market went up and would not lose money when the market went down. Respondent failed to explain to Mr. Salvador that he would incur a penalty if he surrendered the Forethought policy within 10 years. By surrendering his Prudential and Transamerica policies for the Forethought policy, Mr. Salvador incurred $1,083.27 in surrender penalties, and respondent earned $5,717.24 in commission.

Clear and convincing evidence did not establish that respondent made any misrepresentations. Because Mr. Salvador had allocated his money to an indexed strategy, he was protected from market losses. The worst that would happen is that he would receive no interest, but his principal was protected against market loss by the terms of the contract. Although Mr. Salvador might not have understood clearly the nature of the surrender charges, it was not established that respondent failed to explain this adequately so as to establish a basis for discipline.

Finally, clear and convincing evidence did not establish that the Forethought policy was an unnecessary replacement.[35] The switch from a variable to an indexed annuity provided protection against stock market loss. The Forethought policy also provided a 15 percent GLI bonus, although this would only possibly be a benefit if Mr. Salvador triggered the GLI provision. The determination that the Forethought policy was not an unnecessary replacement is consistent with Mr. Samara's opinion that the policy could have satisfied Mr. Salvador's financial objectives.

105. The Accusation alleged that in August 2009, based on respondent's recommendation, Mr. Salvador made a partial surrender of his American Investors annuity to finance the purchase of a Conseco policy, for which he incurred a $2,722.45 surrender

[35] The two American Investors contracts were not replacement annuities since they were not funded by the sale of an annuity or life insurance policy.

penalty while respondent earned $957.90 in commission. The allegation is factually correct, with the exception that it was a full surrender of the American Investors qualified (IRA) account, not a partial surrender. As it relates to discipline, the sole issue is whether it was an unnecessary replacement.

The American Investors policy was an equity-linked deferred annuity, with a one-year average multiple index crediting option selected (multiple strategies available); containing a 10-year surrender period, free withdrawals for 0.5 percent of the initial premium and bonus per month; and a terminal illness waiver. The Conseco policy was an equity-linked deferred annuity; with a monthly average with cap interest crediting option chosen (other strategies available); containing a nine-year surrender period, free withdrawals of index or interest credits; and no terminal illness waiver.

Respondent contended that the purchase benefited Mr. Salvador by reducing and shortening his surrender charge schedule and improving the index performance strategies. While it is true that the Conseco policy had a shorter surrender charge schedule (nine years) and lower surrender charge percentages than the American Investors policy, the benefit in incurring a 16 percent penalty for surrendering the American Investors policy before the first year to justify a lower surrender charge on the replacement policy is nonsensical.[36] According to the contracts, the cash surrender value of the American Investors policy after 10 years was $27,020. The cash surrender value of the Conseco policy after nine years could range from $16,663.35 (for the option selected) to $22,537 (projected based on interest option). Of course, the Conseco projections were based on a lower premium than the American Investors contract, but this decrease in premium resulted from the surrender of the American Investors contract. In addition, both contracts had fixed interest options and interest crediting options, and the American Investors policy had a terminal illness waiver not contained in the Conseco contract. Thus, clear and convincing evidence established that respondent recommended that Mr. Salvador purchase an unnecessary replacement. The Conseco contract would not confer a substantial financial benefit, and a reasonable person would deem the replacement unnecessary.

106. The Accusation alleged that in 2009 Mr. Salvador fully surrendered the American Investors policy for purchase of a second Forethought policy with an initial premium of $232,677.49.[37] As a result of the surrender, Mr. Salvador incurred $32,882.66 in surrender penalties, and respondent earned $11,633.87 in commission.

The contract benefits of the American Investors policy were the same as discussed above. The Forethought policy was an equity-linked deferred annuity, with multiple interest crediting options (month-to-month spread chosen); allowed for free withdrawals up to 10 percent of the contract value annually; contained a GLI benefit, with 25 percent income

---

[36] Indeed, just a year later, respondent recommended to Mr. Salvador that he replace the Conseco policy.

[37] As noted above, there were two American Investors policies. The Forethought purchase involved replacement of the non-qualified American Investors policy.

bonus and guaranteed 5 percent roll-up until activation; and included nursing home and terminal illness waivers. Respondent argued that the benefits to Mr. Salvador were that he retained the original $261,228 cost basis; the American Investors policy did not include a GLI and bonus; he would continue to receive index credits even after activating the GLI benefit; he had the opportunity to increase his GLI income account each contract anniversary; and the contract contained a nursing home waiver. Respondent also asserted that Mr. Salvador was "fully informed" of the surrender charges, signing all required documents and suitability forms. Moreover, respondent argued that because the transaction underwent Forethought's suitability review and Forethought approved the transaction, it was suitable.

Respondent greatly emphasized Forethought's GLI provision and its bonus. However, the GLI bonus would only be a "benefit" if it were elected, which Mr. Salvador never did. Moreover, it was clear from Mr. Salvador's testimony that he did not – and never did – understand how the GLI benefit worked.[38] Considering the American Funds account's value was approximately $265,500 when he surrendered it for $232,677, there can be no reasonable justification for the surrendering the American Investors policy. Accordingly, clear and convincing evidence established that respondent recommended Mr. Salvador purchase an unnecessary replacement. The Forethought contract would not confer a substantial financial benefit, and a reasonable person would deem the replacement unnecessary.

107. The Accusation alleged that in 2010 respondent recommended Mr. Salvador surrender his Conseco policy for the purchase of a third Forethought policy, with an initial premium of $15,873.98. As a result of the transaction, Mr. Salvador incurred $1,079.90 in surrender penalties and respondent earned an $833.38 commission. As it relates to discipline, the sole issue is whether that transaction involved an unnecessary replacement.

Respondent argued that the benefits of the Forethought contract were the same as with the previous Forethought contracts. Again, he placed great emphasis on the GLI benefit offered by Forethought. However, considering that Mr. Salvador had already incurred

[38] As stated in the Foresight Destination brochure, there was a guaranteed 5 percent annual accumulation on the GLI value at each contract year for the first 10 years or when the benefit is activated if earlier. The annual accumulation rate did not apply to the contract value or death benefit. The GLI annual income once activated was equal to the GLI account's value multiplied by the selected benefit factor. The maximum benefit factor was 4.50 percent. After the first contract year, when Mr. Salvador could have started the GLI benefit, his GLI account's value would have increased by 5 percent to $305,388. Based on his account statements, he earned no interest on his initial premium of $232,677.49. After the first year, he could begin drawing an annual income of $13,742. This annual income would diminish the account balance every year, and the GLI account's value would not increase. Thus, the bonus and 5 percent growth value would only become a "benefit" to Mr. Salvador when the account balance was exhausted, which would occur 17 years later. Considering Mr. Salvador would have been 83 at the time, the GLI provision would only begin to substantially benefit him once he was age 100.

significant surrender penalties to purchase the Conseco contract, which he had surrendered less than a year later, the GLI benefit provision cannot be viewed as a substantial financial benefit, especially since Mr. Salvador had never triggered the benefit (or understood what it was for that matter). Thus, clear and convincing evidence established that respondent recommended Mr. Salvador purchase an unnecessary replacement. The Forethought contract would not confer a substantial financial benefit, and a reasonable person would deem the replacement unnecessary.

108. The Accusation alleged that in February 2012, Mr. Salvador made a partial withdrawal of his largest Forethought annuity (purchased in 2009) to fund the purchase of an annuity from Americo with an initial premium of $28,000. As a result of the transaction, Mr. Salvador incurred $926.92 in surrender penalties and respondent earned a $2,100 commission.

Respondent contended that Mr. Salvador had additional funds that he wished to place into annuities, and Forethought did not permit additional premium payments. Respondent argued that the key benefits included tax deferred interest based on performance of the S&P 500 index, multiple crediting options, 10 percent annual penalty free withdrawals, income payout options, and full accumulation value death benefit payable to beneficiaries. Respondent noted that Mr. Salvador had made numerous withdrawals from his annuity policies, many of which exceeded his free withdrawal limit and resulted in surrender charges. Respondent argued that it was never established that the money Mr. Salvador used to fund the Americo purchase came from withdrawals from other annuities. This argument appears disingenuous because on the same date that respondent completed the Americo application, he completed requests to Forethought to withdraw the free withdrawal amounts in addition to a partial withdrawal of $20,000. On February 21, 2012, Forethought issued Mr. Salvador checks for $6,420.33 (penalty free) and $20,000 (with $926.92 surrender penalties.) These checks were deposited into Mr. Salvador's checking account, and on March 2, 2012, respondent submitted Mr. Salvador's $28,000 check to Americo. Despite respondent's contention to the contrary, the Americo purchase was a replacement annuity. That it was not a 1035 exchange, and the fact that the funds to purchase the product passed through Mr. Salvador's checking account before being submitted to Americo, have no bearing on this determination.[39]

[39] In completing the Americo application and suitability form, respondent checked the box "No" in response to a question asking whether the Americo annuity would "replace, or otherwise reduce in value, any life insurance or annuity now in force." Respondent also checked the box "No" in response to a question asking whether in the past 36 months (60 in California) Mr. Salvador had another annuity replaced. Had respondent checked "Yes" to either of these questions, he would have been required to complete additional questions in the application regarding suitability. Each "No" response was materially false as Mr. Salvador *had* reduced the value of the Forethought contract to fund the purchase and clearly had obtained other replacement annuities in the past 36 months. However, complainant did not allege these misstatements as grounds for discipline in the Accusation. Thus, they were not considered an independent basis for discipline.

Clear and convincing evidence established that respondent recommended an unnecessary replacement. The benefits provided by the Americo contact were not likely to confer a substantial financial benefit justifying the partial surrender of the Forethought contract. The policies were substantially similar, and the minor differences in crediting options were insufficient to justify reducing the value of the Forethought policy and incurring surrender penalties. The Americo contract would not confer a substantial financial benefit, and a reasonable person would deem the replacement unnecessary.

109. Complainant alleged that in February 2013, Mr. Salvador surrendered his smallest Forethought annuity to purchase a Great American annuity with a $28,000 premium. As a result, Mr. Salvador incurred $1,571.52 in surrender penalties, and respondent earned a $588.03 commission. Additionally, complainant alleged that in April 2013, Mr. Salvador surrendered his last two Forethought policies to purchase a second Great American policy with a $200,721.97 premium. As a result, Mr. Salvador incurred $20,967.99 in surrender penalties and respondent earned a $9,534.29 commission.

The dates alleged for these transactions in the Accusation are incorrect. On January 9, 2013, respondent completed a Great American application with the premium to be funded by transferring both non-qualified Forethought policies. On January 30, 2013, Forethought sent Mr. Salvador a conservation letter stating that his contract value was $163,664.66 and that he would incur a withdrawal penalty of approximately $17,366.47 for the surrender. A conservation letter for Mr. Salvador's other Forethought contract stated the account's value was $58,025.30 and he would incur a withdrawal penalty of approximately $3,601.52 for the surrender. On February 28, 2013, Great American issued a contract with an initial premium of $200,721.97. Mr. Salvador incurred surrender penalties in the amount of $20,967.99.

On March 7, 2013, respondent completed another Great American application to replace the Forethought IRA policy. Great American issued this policy on April 23, 2013, with an initial premium of $11,702.07. Mr. Salvador incurred $1,571.52 in surrender penalties.

Respondent claims that Mr. Salvador was concerned that his Forethought contracts were not growing in value, particularly in light of the number of withdrawals he was taking. He received no interest or gains. He also wanted more flexibility in taking withdrawals without surrender charges. Respondent claims that he fully explained that Mr. Salvador would incur surrender charges on the Forethought policies, and he wrote a memo to this effect that Mr. Salvador signed. As justification for the replacement, respondent states that the Great American policy had a guaranteed first-year interest rate of 2.35 percent on the account's value and 1.35 percent on the gross surrender value, a 10 percent annuitization bonus, additional purchase payments permitted during the first 3 years, guaranteed lifetime income, 10 percent penalty free withdrawal during the first year, extended care waiver and terminal illness waiver, 7-year declining early withdrawal charges, and no market value adjustments.

Any claim that the Great American policies conferred a substantial financial benefit when measured against the Forethought policies is utterly unsupported. While Mr. Salvador had his Forethought accounts allocated to an index strategy, the Forethought policies allowed him to utilize a fixed account strategy guaranteeing a 1.0 percent annual fixed account interest. While the Great American policy offered a first-year interest rate of 2.35 percent on the account's value and 1.35 percent on the surrender value, the annual guaranteed interest rate was also 1.0 percent. The Forethought policies also provided for a 10 percent penalty free withdrawal annually, but unlike Great American, extended beyond the first year. The Forethought contracts had five to six years remaining before the full contract value could be surrendered *penalty free.* Purchasing the Great American contract increased Mr. Salvador's surrender charge rate and required seven years before the full contract value could be surrendered without charge. Additionally, the biggest justification respondent used to justify his recommendation that Mr. Salvador replace earlier purchased annuities with the Forethought contracts was the existence of the GLI benefit and bonuses. The Great American policy had no such provision, except with annuitization (financially detrimental since Mr. Salvador was 86 years old). Finally, the Forethought policies had a nursing home and terminal illness waivers. Clear and convincing evidence established that respondent recommended to Mr. Salvador the purchase of an unnecessary replacement of three policies. The Great American contract would not confer a substantial financial benefit, and a reasonable person would deem the replacement unnecessary.

110. Respondent recommended and sold six unnecessary replacements to Mr. Salvador over a five-year period. Respondent earned $25,647.47 in commissions for these transactions.[40] Mr. Salvador incurred surrender penalties in the amount of $59,071.54, which constituted 20 percent of his initial annuities purchases from respondent (including the 5 percent bonus provided by American Investors). By recommending these unnecessary replacements to Mr. Salvador, respondent also breached his duty of honesty, good faith, and fair dealing. Although respondent repeatedly claimed that Mr. Salvador was aware of all of the details of the transactions at the time, and the transactions were ultimately approved by the replacing insurer, Mr. Salvador's testimony that he had little knowledge concerning these transactions and put complete trust in respondent to act in his best interest was far more credible than respondent's assertions to the contrary.

Transactions Involving Emmanuel Radicopoulo

111. Emmanuel Radicopoulo was 79 years old when he met respondent in 2010. He did not testify at the hearing.

112. Respondent's testimony is summarized as follows: Like all of the previous individuals, Mr. Radicopoulo returned a direct mail reply card, which the Sunderland Group forwarded to respondent. Respondent met with Mr. Radicopoulo at Mr. Radicopoulo's house. Mr. Radicopoulo was a retired engineer. He told respondent that he owned some mutual funds and was interested in earning extra income. Mr. Radicopoulo told respondent that he owned an annuity through American Equity Investment Life. Respondent left a brochure for Forethought Destination 125 for Mr. Radicopoulo to review. The first meeting

[40] Respondent's commissions for the sale of the initial annuities were not included as they were not unnecessary replacements.

lasted approximately an hour. At the next meeting, Mr. Radicopoulo was not prepared to make any changes, but at the third meeting on December 14, 2010, Mr. Radicopoulo told respondent that he wanted to purchase a Forethought policy and fund the purchase with two families of mutual funds he owned. One was an IRA held by Janus and the other was a trust account held by Vanguard. Respondent explained the guaranteed lifetime income feature, which included a 25 percent bonus and 5 percent roll-up. Respondent completed two applications, which Mr. Radicopoulo signed. Mr. Radicopoulo's wife also signed the application for the transfer of funds from the trust account because she was a trustee. Respondent did not discuss replacing an American Equity annuity Mr. Radicopoulo owned.

113. Respondent delivered the Forethought contracts to Mr. Radicopoulo on January 7, 2011. The contract for the IRA account had a premium of $57,850; the contract for the trust account had a premium of $66,627. Mr. Radicopoulo signed a form indicating he received copies of the contracts. Respondent discussed the contract and said there was no misunderstanding that the 25 percent bonus only applied to the guaranteed lifetime income benefit.

114. After respondent delivered the contracts, Mr. Radicopoulo shared his American Equity annual statement with respondent. After reviewing the statement, Mr. Radicopoulo said he wanted to exchange the contract because of the guaranteed lifetime income benefit and because there was no spread or asset fees. They reviewed the surrender penalty. Respondent informed Mr. Radicopoulo that he would receive a conservation letter from American Equity, and his previous agent would likely call him to discuss the exchange. Again, respondent completed all the paperwork. Mr. Radicopoulo signed a form indicating he was aware that the bonus would not offset the surrender penalty. Mr. Radicopoulo signed all disclosures and a notice of replacement.

115. On January 26, 2011, American Equity sent Mr. Radicopoulo a conservation letter stating that the contract value was $190,204 and he would incur a surrender charge of $22,836. Respondent completed a contract release form for American Equity that Mr. Radicopoulo signed to indicate he was aware of the surrender charges. In the document, respondent represented that the guaranteed interest rate was higher than American Equity's. American Equity also sent a letter to Forethought's suitability officer seeking an explanation of how the replacement was in the client's best interest. Respondent sent a note to American Equity with the signed release by Mr. Radicopoulo.

116. Respondent delivered the third Forethought contract to Mr. Radicopoulo on February 23, 2011. The contract premium was $167,467. It included a 25 percent GLI bonus, which provided a GLI value of $209,334.

117. On March 21, 2013, Mr. Radicopoulo sent a letter to Forethought asking why the GLI account value for his IRA account was less than what he had expected. Forethought provided no response, and on June 4, 2013, Mr. Radicopoulo wrote another letter to Forethought, alleging that respondent failed to explain to him that the 25 percent bonus applied only to the GLI account value, and not to the premium. He represented that this bonus was the justification for him to incur a surrender charge for his previous policy.

118. Forethought requested a response from respondent regarding Mr. Radicopoulo's letter. Respondent testified he wrote a letter in which he fully explained the contract's provisions using Forethought's client guide, and that he had obtained Mr. Radicopoulo's signatures indicating that Mr. Radicopoulo understood the provisions. Forethought allowed Mr. Radicopoulo to return all contracts, and Forethought charged back respondent's commission of $15,327.

EVALUATION OF THE EVIDENCE

119. The Accusation alleged the following: Respondent misrepresented the terms of the Forethought annuity Mr. Radicopoulo purchased by using funds from his Vanguard and Janus accounts. Respondent informed Mr. Radicopoulo that there would be a 25 bonus on the premium. Respondent also told Mr. Radicopoulo that he could double his money in three years. Additionally, respondent provided incorrect information in the suitability forms for both applications. With regards to the third Forethought policy, the Accusation alleged that respondent made the same misrepresentations and that the 25 percent bonus would cover the surrender charges from the American Equity policy.

These factual allegations were not established. Since Mr. Radicopoulo did not testify, no admissible evidence established the representations respondent might have made. In addition, Mr. Radicopoulo signed all disclosures and application documents. The Accusation did not state what "incorrect information" respondent provided in the suitability forms.

However, with regard to the third Forethought policy that replaced the American Equity annuity, clear and convincing evidence established it is an unnecessary replacement. The American Equity policy Mr. Radicopoulo surrendered had an equity-linked strategy with a monthly point-to-point with cap, similar to Forethought's equity-linked strategy. Unlike Forethought, American Equity's fixed interest strategy had a guaranteed minimum interest rate of three percent, whereas Forethought's was only one percent.[41] Like with all the other Forethought policies at issue that respondent recommended, he placed great weight on the fact that the GLI benefit with 25 percent bonus and annual 5 percent increase justified the replacement. As the other provisions were substantially similar, this could be the only justification for the surrender. However, as with all of the other Forethought policies respondent recommended as replacements, respondent did not meaningfully establish that this "bonus" would constitute a substantial financial benefit such as to offset the $22,836 in surrender penalties that would have been incurred as a result of the transfer, had Forethought not allowed Mr. Radicopoulo to return all contracts.

[41] In the suitability questionnaire, respondent incorrectly indicated that Forethought's guaranteed minimum interest rate was higher than American Equity's.

LEGAL CONCLUSIONS

Purpose of Insurance Licensing Laws

1. Insurance Code section 1737 provides: "The purpose of this chapter is to protect the public by requiring and maintaining professional standards of conduct on the part of all persons licensed hereunder."

2. The interest of the state in licensing those who act as life and disability agents clearly is legitimate and needs no extended discussion. The purpose of insurance licensing is to protect the public by requiring and maintaining professional standards of conduct on the part of licensees within this state. (*Goldberg v. Barger* (1974) 37 Cal.App.3d 987, 996.) Relevant provisions of the Insurance Code are designed to insure that the privileges granted under an insurance license are not exercised in derogation of the public interest and to keep the regulated activity clean and wholesome. (*Ready v. Grady* (1966) 243 Cal.App.2d 113, 117.)

Burden and Standard of Proof

3. The standard of proof in an administrative disciplinary action seeking the suspension or revocation of a professional license is "clear and convincing evidence." (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) The clear and convincing standard requires that the evidence be so clear as to leave no substantial doubt; sufficiently strong to command the unhesitating assent of every reasonable mind. (*Amerigraphics, Inc. v. Mercury Cas. Co.* (2010) 182 Cal.App.4th 1538, 1558.)

Applicable Statutes

4. Insurance Code section 780 provides:

> An insurer or officer or agent thereof, or an insurance broker or solicitor shall not cause or permit to be issued, circulated or used, any statement that is known, or should have been known, to be a misrepresentation of the following:
>
> (a) The terms of a policy issued by the insurer or sought to be negotiated by the person making or permitting the misrepresentation.
>
> (b) The benefits or privileges promised thereunder.
>
> (c) The future dividends payable thereunder.

5. Insurance Code section 781 provides:

(a) A person shall not make any statement that is known, or should have been known, to be a misrepresentation (1) to any other person for the purpose of inducing, or tending to induce, such other person either to take out a policy of insurance, or to refuse to accept a policy issued upon an application therefor and instead take out any policy in another insurer, or (2) to a policyholder in any insurer for the purpose of inducing or tending to induce him or her to lapse, forfeit or surrender his or her insurance therein.

(b) A person shall not make any representation or comparison of insurers or policies to an insured which is misleading, for the purpose of inducing or tending to induce him or her to lapse, forfeit, change or surrender his or her insurance, whether on a temporary or permanent plan.

6. Insurance Code section 782 provides:

Any person who violates the provisions of Section 780 or 781 is punishable by a fine not exceeding twenty-five thousand dollars ($25,000), or in a case in which the loss of the victim exceeds ten thousand dollars ($10,000), by a fine not exceeding three times the amount of the loss suffered by the victim, by imprisonment in a county jail for a period not to exceed one year, or by both a fine and imprisonment. Restitution to the victim ordered pursuant to Section 1202.4 of the Penal Code shall be satisfied before any fine imposed by this section is collected.

7. Insurance Code section 783 provides:

Whenever any insurance agent, broker, or solicitor knowingly violates any provisions of Sections 780 or 781, the commissioner, after a hearing in accordance with the procedure provided in Article 13 of Chapter 5 of this part, may suspend the license of any such person for not exceeding three years.

8. Insurance Code section 785 provides in part:

(a) All insurers, brokers, agents, and others engaged in the transaction of insurance owe a prospective insured who is 65 years of age or older, a duty of honesty, good faith, and fair dealing. This duty is in addition to any other duty, whether express or implied, that may exist.

> (b) Conduct of an insurer, broker, or agent, or other person engaged in the transaction of insurance, during the offer and sale of a policy or certificate previous to the purchase is relevant to any action alleging a breach of the duty of good faith and fair dealing. . . .

9. Insurance Code section 790.02 provides: "No person shall engage in this State in any trade practice which is defined in this article as, or determined pursuant to this article to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance."[42]

10. Insurance Code section 10509.4, subdivision (b)(2), requires an agent who submits to an insurer an annuity application to leave with the applicant the original or a copy of all printed communications used for presentation to the applicant.

11. Insurance Code section 10509.8 provides in part:

> (a) A violation of this article shall occur if an agent or insurer recommends the replacement or conservation of an existing policy by use of a materially inaccurate presentation or comparison of an existing contract's premiums and benefits or dividends and values, if any, or recommends that an insured 65 years of age or older purchase an unnecessary replacement annuity.
>
> (b) For purposes of this section, "unnecessary replacement" means the sale of an annuity to replace an existing annuity that requires that the insured will pay a surrender charge for the annuity that is being replaced and that does not confer a substantial financial benefit over the life of the policy to the purchaser so that a reasonable person would believe that the purchase is unnecessary.
>
> (c) Patterns of action by policyowners who purchase replacement policies from the same agent after indicating on applications that replacement is not involved, shall constitute a rebuttable presumption of the agent's knowledge that replacement was intended in connection with the sale of those policies, and such patterns of action shall constitute a rebuttable presumption of the agent's intent to violate this article.

---

[42] Section 790.03 provides a list of "methods of competition and unfair and deceptive acts or practices in the business of insurance."

12. Insurance Code section 10509.9 provides:

> (a) Any agent or other person or entity engaged in the business of insurance, other than an insurer, who violates this article [Sections 10509 – 10509.9] is liable for an administrative penalty of no less than one thousand dollars ($1,000) for the first violation.
>
> (b) Any agent or other person or entity engaged in the business of insurance, other than an insurer, who engages in practices prohibited by this chapter a second or subsequent time or who commits a knowing violation of this article, is liable for an administrative penalty of no less than five thousand dollars ($5,000) and no more than fifty thousand dollars ($50,000) for each violation.
>
> [¶] . . . [¶]
>
> (e) After a hearing conducted in accordance with Chapter 4.5 (commencing with Section 11400) and Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, the commissioner may suspend or revoke the license of any person or entity that violates this article.

13. Insurance Code section 1668 provides that the Commissioner may deny an application for any license for any of the following:

> (b) The granting of the license will be against public interest;
>
> [¶] . . . [¶]
>
> (d) The applicant is not of good business reputation;
>
> (e) The applicant is lacking in integrity;
>
> [¶] . . . [¶]
>
> (i) The applicant has previously engaged in a fraudulent practice or act or has conducted any business in a dishonest manner;
>
> (j) The applicant has shown incompetency or untrustworthiness in the conduct of any business, or has by commission of a wrongful act or practice in the course of any business exposed the public or those dealing with him to the danger of loss;

(k) The applicant has knowingly misrepresented the terms or effect of an insurance policy or contract; . . .

14. Insurance Code section 1738 provides:

> The commissioner may suspend or revoke any permanent license issued pursuant to this chapter on any of the grounds set forth in Article 6 [Sections 1666 – 1672] hereof on which he may deny an application. Whenever in such grounds the word "applicant" is used, such word shall for the application of this section be the words "the holder of a permanent license." . . . Suspension or revocation of any permanent license, except a restricted license, on a ground other than that set forth in Section 1669 shall be after notice and hearing conducted in accordance with Chapter 5, Part 1, Division 3, Title 2 of the Government Code, and the commissioner has all of the powers granted therein.

Cause Exists to Impose Discipline Against Respondent's License

15. Cause exists to impose discipline against respondent's license pursuant to Insurance Code section 10509.9, subdivision (e). Clear and convincing evidence established that respondent recommended that Mr. Malotte, Mr. Salvador, and Mr. Radicopoulo, each of whom was 65 years of age or older, purchase unnecessary replacement annuities in violation of Section 10509.8, subdivision (a). Nine transactions were established that provided cause for discipline under Section 10509.8, subdivision (a). Clear and convincing evidence did not establish respondent failed to leave with the applicant copies of printed communication as required under Section 10509.4, subdivision (b)(2).

16. Cause exists to impose discipline against respondent's license pursuant to Insurance Code sections 1738 and 1668, subdivisions (b), (e), (i), and (j). For reasons more thoroughly discussed below, complainant established by clear and convincing evidence that it is against the public interest for respondent to remain licensed; that he lacks integrity; that he has conducted any business in a dishonest manner; and that he has committed wrongful acts or practices in the course of his business that have exposed those dealing with him to the danger of loss.

Clear and convincing evidence did not establish that respondent is not of good business reputation (*id.* subd. (d)) or that he knowingly misrepresented the terms of an insurance contract (*id.* subd. (k)).

17. Cause does not exist to impose discipline against respondent's license pursuant to Insurance Code section 785. This statutory provision imposes upon any person engaged in the transaction of insurance a duty of honesty, good faith, and fair dealing to a prospective client who is 65 years of age or older. Clear and convincing evidence established that respondent breached this statutory duty of care with respect to Mr. Malotte, Mr. Salvador,

and Mr. Radicopoulo, by recommending unnecessary replacement annuities. However, the statutory provision is not an independent basis to impose discipline upon a license, and the Accusation does not cite any other statute that authorizes the Commissioner to discipline a license for a violation of this provision.[43]

18. Cause does not exist to impose discipline against respondent's license pursuant to Insurance Code section 790.02. This section prohibits any trade practice "which is defined in this article as, or determined pursuant to this article to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance." Section 790.03 provides a list of different kinds of conduct defined as "unfair methods of competition and unfair and deceptive acts or practices in the business of insurance." The Accusation does not specify a subdivision or describe the conduct which respondent is alleged to have violated. Therefore, the Accusation failed to provide respondent with sufficient notice to defend against the unspecified charge. Furthermore, Section 790.02 does not provide independent grounds to impose discipline against a license, and the Accusation does not cite any other statute that authorizes the Commissioner to discipline a license for a violation of this provision.

Appropriate Measure of Discipline

19. The department has developed criteria for evaluating rehabilitation, set forth in California Code of Regulations, title 10, section 2183.4, that must be considered in determining whether a licensee "has sufficiently rehabilitated from the prior act, misconduct, or omission such that the licensee or applicant is fit to hold an insurance license." The criteria relevant in this case are: nature and severity of the act, misconduct, or omission; the time that has elapsed since commission of the act, misconduct, or omission, with the caveat that the mere passage of time without unlawful or wrongful activity is not alone sufficient to establish rehabilitation; whether the licensee has made any restitution or done anything to recompense the injured party or to alleviate the wrong or damage caused by the act, misconduct, or omission; and significant and/or conscientious involvement in community or privately-sponsored programs designed to provide social benefits or to ameliorate social problems. These criteria were considered in rendering this decision.

20. Respondent recommended and sold two unnecessary replacement annuities to Mr. Malotte, causing Mr. Malotte to incur $30,338 in surrender penalties; he sold six unnecessary replacement annuities to Mr. Salvador, causing Mr. Salvador to incur $59,071.54 in penalties; and he sold one unnecessary replacement to Mr. Radicopoulo, who was able to return the policy without charge, thereby not having to incur $22,836 in penalties. As a result of these transactions, respondent earned $44,683.15 in commissions, and would have earned another $15,327, had Forethought not allowed Mr. Radicopoulo to return all contracts. Respondent's justifications for these transactions were unpersuasive and were often undercut by the fact that he recommended the replacement of that an annuity soon after he sold it to a client. His repeated defense to these transactions was that his clients

[43] Section 1738 allows the Commissioner to discipline a license for violations of Sections 1666 through 1672, which does not include Section 785.

signed all required documentation, which established that the clients fully understood the transactions and requested him to proceed. In addition, respondent argued that because the issuing insurer conducted its own suitability review and had approved each transaction, he himself should have no liability. However, there is no "safe harbor" for an agent who recommends an unnecessary replacement to senior consumers; respondent's reliance on the fact that his clients signed forms in all the right places reflects exactly why the Legislature enacted specific safeguards to protect seniors. By creating an objective standard by which replacement annuities must be evaluated, the Legislature has made it clear that merely providing evidence that a senior has signed a required form is inadequate evidence that the replacement was necessary.

Respondent's conduct with regard to Mr. Salvador and Mr. Malotte was egregious. Mr. Salvador, in particular, placed full trust and confidence in respondent to serve as his fiduciary in handling his money. Respondent abused this position of trust for his own profit. He repeatedly sold Mr. Salvador replacement products that had no benefit and caused Mr. Salvador to lose a great deal of money. Respondent's claim that Mr. Salvador understood the transactions and made rational informed decisions is not believable. In his closing argument, respondent stated that the department solicited Mr. Salvador's complaint by claiming respondent was guilty of embezzlement even though respondent continues to represent Mr. Salvador to this day. The fact that respondent remains in a position to take further advantage of Mr. Salvador, who clearly does not understand how respondent cost him so much money, is all the more egregious.

Rehabilitation is a "state of mind" and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved "reformation and regeneration." (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) Fully acknowledging the wrongfulness of past actions is an essential step towards rehabilitation. (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 940.) Respondent expressed no remorse and admitted no wrongdoing. He accused the department of seeking to destroy his career and of "soliciting complaints in an overzealous manner." Respondent provided no character witnesses or references. There is no mitigating evidence.

The egregious nature of respondent's interactions with Mr. Salvador and Mr. Malotte are sufficient, separately and collectively, to justify the revocation of respondent's license and licensing rights. The interactions with Mr. Radicopoulo provide additional support for revocation. Respondent's complete failure to accept any responsibility compels the conclusion that that public protection requires the revocation of his license.

Imposition of an Administrative Penalty

21. The Accusation alleges that respondent violated Sections 780 and 781, subdivisions (a)(1), (a)(2), and (b), relating to misrepresentations involving respondent's transactions. Complainant requests that respondent be fined pursuant to Section 782.[44] That

---

[44] The Accusation did not allege these violations as a cause for discipline of respondent's license pursuant to Section 783.

section provides that violation of Section 780 or 781 is punishable by a fine not exceeding $25,000 (or in a case in which the loss of the victim exceeds $10,000, by a fine not exceeding three times the amount of the loss suffered by the victim), by imprisonment in a county jail for a period not to exceed one year, or by both a fine and imprisonment. In addition to the fact that complainant failed to establish any material misrepresentation, the statutory language reflects that the imposition of a fine is authorized only in criminal proceedings. Unlike other provisions that provide the Commissioner the authority to issue an "administrative penalty" (*e.g.*, § 10509.9), Section 782 contains no such authorization. As such, the Commissioner lacks jurisdiction to "fine" respondent based on alleged violations of Sections 780 and 781.

22. Complainant requests the assessment of an administrative penalty pursuant to Section 10509.9. The evidence established that respondent committed nine separate violations of Section 10509.8, subdivision (a), by recommending unnecessary replacements to seniors. Section 10509.9 provides a minimum penalty of $1,000 for the first violation, and $5,000 to $50,000 for subsequent violations or for willful violations.

Although the Accusation alleged respondent was subject to a prior disciplinary order relating to the same violations, the stipulated order did not reference the specific violations or establish that respondent had admitted culpability. As such, the present violations will be treated as first violations.

However, the prior disciplinary order put respondent on actual notice that he should be extremely careful to avoid recommending unnecessary replacements, and he agreed to strictly comply with the Code's requirements regarding replacements. His custom and practice after the order was issued did not reflect a sincere commitment to change his recommendations that senior clients purchase unnecessary replacements. This, in addition to the circumstances surrounding each of these transactions, complainant established[45] that respondent willfully violated Section 10509.8, subdivision (a), for each of the nine transactions.

Respondent received a commission for each of the replacement annuities he recommended, with the exception of Mr. Radicopoulo's, for which Forethought rescinded the commission. It is determined that the appropriate penalty for each violation is the amount respondent received as commission. For the violation involving Mr. Radicopoulo, for which respondent did not receive a commission, a $5,000 penalty is assessed. Respondent is ordered to pay a total administrative penalty of $49,683.15.[46]

---

[45] Because the assessment of an administrative penalty cannot result in an order that suspends, limits, or revokes respondent's license, the preponderance of the evidence standard applies. (Evid. Code, § 115; *Owen v. Sands* (2009) 176 Cal.App.4th 985, 992.)

[46] The amount is calculated as follows: $19,035.68 (Mr. Malotte's two transactions) plus $25,647.47 (Mr. Salvador's six transactions) plus $5,000 (Mr. Radicopoulo's transaction).

ORDER

Insurance License No.0461609, issued to respondent, Alan Lucien Cerf, authorizing him to act in the capacity of a life-only agent and an accident and health agent, and all other rights conferred upon him under the Insurance Code are revoked.

Respondent shall pay an administrative penalty of $49,683.15 to the Department of Insurance within 90 days of the effective date of this decision, or under a payment plan if authorized by the department.

DATED: January 11, 2019

DocuSigned by:

19DEB247706C4F3...

ADAM L. BERG
Administrative Law Judge
Office of Administrative Hearings