THE CANADIAN BAR ASSOCIATION
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March 31, 2006

Carol Shevlin
Policy Manager (A)
CCIR Secretariat
5160 Yonge Street, P.O. Box 85
Toronto, ON M2N 6L9

Dear Ms Shevlin:

Re: *Managing Conflicts of Interest:*
A Discussion Paper on Enhancing and Harmonizing Best Practices

I write to you on behalf of the Insurance Section of the Canadian Bar Association (CBA Section). Thank you for the opportunity to respond to the above-noted consultation paper by the Industry Practices Review Committee (IPRC) of the Canadian Council of Insurance Regulators (CCIR) and the Canadian Insurance Services Regulatory Organizations (CISRO). The consultation paper indicates that the IPRC intends to recommend principles for the regulators to consider in managing actual or potential conflicts of interest associated with insurance advice or transactions. The CBA Section supports these general principles. However, we believe that the intended operation of these principles must be explained in greater detail so that industry participants, consumers and eventually the courts have a common understanding of what is expected.

The three principles are:

1. Priority of client's interest;
2. Disclosure of conflict or potential conflict of interest; and
3. Product suitability.

Priority of Client's Interest

The CBA Section agrees that the priority of the client's interest is paramount. As we stated in our "Submission on: Relationships between Insurers and Sales Intermediaries Consultation Paper" dated September 2005 (the Sales Intermediaries Submission), this priority should be recognized using consistent language (if possible).

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Disclosure of Conflict or Potential Conflict of Interest

The Sales Intermediaries Submission states our belief that industry associations have made a concerted effort to self-regulate, and that the current level of compliance is very high. As this is a recent initiative, the CBA Section suggests that the regulators continue to monitor the level of compliance and consumer comments. As we discussed previously, there are a number of advantages in using a self-regulated approach, particularly when the compliance rate is high.

The IPRC has recommended guidelines to determine whether disclosure of information is necessary. One of the guidelines indicates that agents and brokers should disclose the name of any insurer(s) with which a "significant" volume of business is placed. From the March 8 conference call between Gordon Murphy on behalf of the CBA Section and Grant Swanson and others from CCIR/CISRO , we understand that IPRC has certain thresholds or guidelines in mind and it does not appear to be the intent of the regulators to impose an extremely broad approach to disclosure under this guideline. Our only comment on this initiative is that it would be prudent for the regulators to publicly state some threshold.

It is the CBA Section's belief that any publication by the CCIR setting out standards or guidelines (even if non-binding) could become the industry norm and would be a reference point for the courts in order to determine liability in civil matters. Therefore, if CCIR has an expectation that "significant" volume of business means that the broker sends 50% of the business to one insurer, we suggest that the guideline state that. Otherwise, there is a risk that a court may conclude that "significant" volume of business means 10%. Such a finding would be completely contrary to CCIR's intention.

Another guideline states, "All insurers should disclose on their websites or make publicly available clear and concise information about their relationships with intermediaries," and provides examples of the information required. The CBA Section's concern is that the information potentially falling under this guideline would be extensive, intrusive and potentially jeopardize privacy expectations. We understand the IPRC envisions insurers providing a general disclosure statement that would be helpful to consumers, but would not violate privacy rules or lead to anti-competitive behaviour. For example, an insurer would be in compliance with the requirement to disclose loan arrangements if it simply disclosed the existence of a company policy to extend loans to eligible brokers who sell its policies. Once again, the CBA Section recommends that the IPRC give examples of the general website disclosure statements for insurers so that industry participants, consumers and eventually the courts have a common understanding of what is expected.

Product Suitability

The CBA Section believes that this principle should not be based on a hindsight evaluation of what product would have produced the best outcome for the consumer. This is problematic on long-term contracts where many factors can influence the benefits of a product. As a result of the conference call discussion, we understand that this is not the intent and the IPRC believes that the proper time to determine the wisdom of the recommendation is at the point of sale. Again, our position is that such clarification should be included in the statement of principle.

In addition, it was unclear to the CBA Section whether the requirement to "obtain and confirm information about [the client's] needs," and in particular, to "conduct fact finding appropriate to the circumstances and assessment of the client's insurance needs" meant that the IPRC expected advisors to communicate with clients on an annual basis to determine if the insurance product was still suitable for the client's needs. We understand that this is not the intent, and that the IRPC believes the consumer still has responsibility to review their insurance needs each year and should communicate with their advisor if those needs have changed.

Thus, there are limitations on the insurance advisor's duty to ensure a product is suitable. There may be circumstances where an agent's recommendation was appropriate at the time it was made, but is no longer appropriate because of changing needs that are not disclosed by the client. The consultation paper is ambiguous in its recognition of these limitations. It states that the "intermediary…when making a recommendation, must reasonably ensure that any product or service offered is suitable to fulfill those needs," but then goes on to make the unqualified statement that, "An agent or broker's product recommendation should meet the client's needs." In our view, IPRC should articulate some examples of the limitations on the principle of product suitability including where there are changes in an existing client's needs that are not disclosed to the agent or broker.

It is essential that the responsibilities upon insurance advisors be clear, particularly where there are differing expectations in other professional contexts. For example, mutual fund advisors *are* expected to communicate with clients on an annual basis to determine whether the investments remain appropriate and whether investment goals have changed. There is potential for courts to confuse differing regulatory regimes and, without clarification, to apply one set of rules to another regime.

Thank you once again for the opportunity to consult on this issue. We look forward to reviewing IPRC's final recommendations and report.

Sincerely,

(Original signed by Kerri Froc on behalf of Monika Zauhar)

Monika Zauhar
Chair, National Insurance Law Section