

**STATE OF MICHIGAN**  
**DEPARTMENT OF ENERGY, LABOR AND ECONOMIC GROWTH**  
**OFFICE OF FINANCIAL AND INSURANCE REGULATION**  
**Before the Commissioner of Financial and Insurance Regulation**

**John White**

**Petitioner**

v

**Enforcement Case No. 06-600-L**

**Office of Financial and Insurance Regulation**  
**Respondent**

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**For the Petitioner:**

**Howard Spence**  
**Spence and Associates**  
**1637 Willow Creek Drive**  
**Lansing, MI 48917**

**For the Respondent:**

**Marlon Roberts**  
**Office of Financial and Insurance**  
**Regulation**  
**611 W. Ottawa, 3<sup>rd</sup> Floor**  
**Lansing, MI 48933**

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**Issued and entered**  
**this ~~4<sup>th</sup>~~ day of November 2010**  
**by Ken Ross**  
**Commissioner**

**FINAL DECISION**

**I. Background**

In September 2006, John White (Petitioner) filed an application to be licensed as a solicitor. On his solicitor application, Mr. White disclosed that his insurance producer license had been revoked in 2005.<sup>1</sup> On October 12, 2006, the Office of Financial and Insurance Regulation (OFIR) staff issued a Notice of Refusal to Grant License. Mr. White appealed the denial and requested a hearing.

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1. The insurance producer and solicitor licenses are similar in that both involve the marketing of insurance products to the public. An insurance producer is appointed to represent one or more insurance companies. A solicitor does not have a direct relationship to an insurance company, but rather is appointed by a producer to market the insurance products of the insurers the producer represents. Both producers and solicitors are permitted to collect insurance premiums.

The hearing was held on various dates in 2007 and 2008. The parties submitted written closing statements and responses. The administrative law judge issued a Proposal for Decision (PFD) on February 26, 2010. (The complete procedural history of the case is described in the PFD.) The administrative law judge recommended that the Commissioner reverse the refusal to grant the solicitor license. Exceptions were filed by counsel for OFIR staff on March 18, 2010.

## **II. The Proposal for Decision**

The PFD is divided into eight sections:

1. Procedural history
2. Issues and applicable law
3. List of witnesses with dates of testimony
4. Summary of exhibits
5. Summary of testimony
6. Findings of fact
7. Conclusions of law
8. Proposed decision

The procedural history, issues and applicable law, list of witnesses, and summary of exhibits are adopted and are incorporated into this Final Decision. The remaining sections of the PFD are not adopted.

The summary of testimony is not adopted because the testimony itself is preserved in the hearing transcript, which the Commissioner has read. No purpose is served by having a shortened version of that testimony made a part of the Final Decision.

The ALJ permitted the Petitioner great latitude at the hearing to present his own views of the prior enforcement case. Unfortunately, the ALJ then used that testimony to reach conclusions which were inconsistent with the facts established in the 2005 consent order. This, the ALJ was without authority to do. The 2005 consent order constitutes a valid order of the

Commissioner. Because the PFD offered a set of facts inconsistent with the 2005 consent order, the PFD's findings of fact are not adopted.

The PFD's conclusions of law are based on facts not adopted. The conclusions of law, therefore, are also not adopted. In addition, the conclusions of law do not reference earlier agency decisions concerning license denials under circumstances similar to the present case. This precedent is important and is relied upon in the analysis that follows.

Finally, the proposed decision, being based on findings and conclusions that are not adopted, must also be rejected.

### **III. Analysis**

When an individual applies for a solicitor license, the application is processed according to procedures and standards stated in chapter 12 of the Michigan Insurance Code. Section 1214(3) of the Code describes the standards an applicant must meet in order to receive a solicitor license:

After examination, investigation, and interrogatories, the commissioner shall license an applicant if the commissioner determines that the applicant meets all of the following:

- (a) Is authorized by written contract to act on behalf of a licensed insurance producer.
- (b) Possesses reasonable understanding of the provisions, terms, and conditions of the insurance the applicant will be licensed to solicit.
- (c) Possesses reasonable understanding of the insurance laws of this state.
- (d) Intends in good faith to act as a solicitor.
- (e) Is honest and trustworthy.
- (f) Possesses a good business reputation.
- (g) Possesses good moral character to act as a solicitor.

At issue in this case is whether the Petitioner meets the qualifications for licensing under subsection (3)(b) through (3)(g), above. In its October 12, 2006 Notice of Refusal to Grant License (Hearing Exhibit B), the OFIR staff cited two factors in support of its decision to deny the new license: 1) the Petitioner's prior license revocation for fiduciary violations, and 2) the fact that, in agency rulings in similar cases, "[t]he Commissioner has repeatedly pointed out that dishonesty is rooted in character. Substantial changes in character, if they occur at all, take years. The burden is on the applicant to prove this change in character. It is a remarkably high hurdle to clear."

This standard was reaffirmed in a 1999 case in which an individual, Robert Maksymowski, whose agent license had been revoked in January 1998, sought a solicitor's license. The Commissioner, in affirming the license denial, noted:

Where an applicant has been found to have breached his fiduciary duty in the past, the Commissioner must proceed with great caution before again licensing that person.<sup>2</sup>

#### **A. Findings of Fact**

In determining whether the Petitioner has met the requirements of section 1214(3) of the Insurance Code, the Commissioner makes the following findings of fact.

Mr. White held an insurance producer<sup>3</sup> license for 30 years. He managed his own agency that specialized in aviation insurance. In 1998, he brought a partner, Rick Turner, into the agency. Mr. White owned 75% of the agency, Mr. Turner owned 25%.

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2. *Robert Maksymowski v Michigan Insurance Bureau*, OFIR Case No. 99-166-L, October 18, 1999.

3. The insurance producer category of license was renamed "insurance producer" from "insurance agent" in changes to Michigan's insurance licensing laws in Public Act 228 of 2001. In the Insurance Code and in this order, both terms are used for this class of licensee.

Mr. White's insurance producer license was revoked in January 2005 for failing to remit to insurers more than \$700,000.00 in insurance premiums collected in 2003 and 2004.

Mr. White's conduct violated the Michigan Insurance Code. Details of the violations were stated in a Notice of Opportunity to Show Compliance (NOSC) issued in Enforcement Case No. 04-2816. In January 2005, the Commissioner and Mr. White entered into a consent order (Hearing Exhibit 2) in which the Commissioner found that Mr. White had violated sections 1207(1) and 1239(1)(h) of the Michigan Insurance Code, MCL 500.1207(1) and 1239(1)(h) as set forth in the NOSC. (Mr. Turner received sanctions in a separate consent order.)

In stipulating to the January 2005 consent order, Mr. White neither admitted nor denied the factual allegations but agreed to the entry of the order.

Section 1207(1) of the Insurance Code provides that the failure "by an agent in a timely manner to turn over the money which he or she holds in a fiduciary capacity to the persons to whom they are owed is prima facie evidence of violation of the agent's fiduciary responsibility."

Section 1239(1)(h) of the Insurance Code authorizes the Commissioner to revoke an insurance producer's license for "[u]sing fraudulent, coercive, or dishonest practices or demonstrating incompetence, untrustworthiness, or financial irresponsibility in the conduct of business in this state or elsewhere."

#### **B. Conclusions of Law**

At hearing, Mr. White presented witnesses who testified to his good character and business reputation. In addition, he claimed that the earlier enforcement action that ended with the revocation of his producer license did not demonstrate that he lacked honesty or good moral character. Mr. White also claimed that, by furthering his education and working successfully

since his revocation, he has demonstrated that he is trustworthy and unlikely to make the same “mistakes” that led to his license revocation. These topics are addressed below.

### **1. The nature of fiduciary violations**

At hearing, Mr. White argued that the earlier enforcement action did not demonstrate that he lacked honesty or good moral character. Instead, he argued that his agency’s inability to make timely remittance of premiums was caused by the fact that the agency’s banking practices commingled premium funds and other money (e.g., “profits”) in a single account. (See PFD, pp. 13 and 34.) Petitioner’s present lack of understanding of his fiduciary responsibility is troubling.

Commingling funds, when combined with imprecise accounting practices, can cause harm to a business and its clients. Put another way, commingling can contribute to a fiduciary violation by placing the business owner in a conflict of interest which may cause the business owner to put his own financial interests ahead of his obligation to protect the client funds entrusted to him.

The Insurance Code of 1956 (Insurance Code) states:

An agent shall be a fiduciary for all money received or held by the agent in his or her capacity as an agent. Failure by an agent in a timely manner to turn over the money which he or she holds in a fiduciary capacity to the persons to whom they are owed is *prima facie* evidence of violation of the agent’s fiduciary responsibility. MCL 1207(1) (emphasis added).

In creating this fiduciary duty, the Insurance Code largely mirrors the statute which it replaced, which stated that “[a]ny money . . . received by any agent, solicitor, or broker as premium or return premium, on or under any policy of insurance . . . shall be deemed to have been received by such agent, solicitor or broker in his fiduciary capacity.” *Citizens Mut. Automobile Ins. Co. v.*

*Garner*, 315 Mich. 689, 693, 24 N.W.2d 410, 411 (1946) (quoting Comp Laws 1929, § 12369, Stat. Ann. § 24.174).

Michigan courts have consistently interpreted the older statute as stating that “an insurance agent receives payment of premiums in a fiduciary capacity.” *Glerum v. Spencer*, 251 Mich. 163, 164, 231 N.W. 38, 39 (1930). In *Glerum*, the insurance agent deposited the premium in a bank which subsequently became insolvent and was placed into receivership. Because the premium payments were held by the agents in their fiduciary capacity and the bank received those premiums knowing that they were received in a fiduciary capacity, the insurer was able to successfully file suit against the bank for those premium payments despite the bank having been placed into receivership. *See also Garner*, 315 Mich. at 697 (failure to remit premium payments to insurer constituted “defalcation”); *Travelers Ins. Co. v. Bishop*, 298 Mich. 600, 602, 299 N.W. 731 (1941) (debts regarding unremitted premium payments, arising out of a pre-existing fiduciary relationship, are exempt from discharge in bankruptcy).

Since premium payments received by an insurance agent are held in a fiduciary capacity, the next issue is to define the extent of the agent’s fiduciary responsibilities. In addition to the fiduciary duty established by section 1207(1) of the Insurance Code, courts have interpreted the statute and case law to conclude that “premium payments received by an insurance agency have the status of express trust funds for the benefit of the insurance principal.” *Capitol Indemnity Corp. v. Interstate Agency, Inc.*, 760 F.2d 121, 125 (6th Cir. 1985) (citing *Glerum*, 251 Mich. 163, 231 N.W. 38; *Gardner*, 315 Mich. 689, 24 N.W.2d 410; *Bishop*, 298 Mich. 600, 299 N.W. 731). While not binding on Michigan courts, this federal case has been noted with approval by

the Michigan Court of Appeals. *IBF Insurance Group, Inc. v. Travelers Indemnity Co.*, 2005 WL 3190513 (Mich. Ct. App. 2005).

Express trusts are essentially “an assignment of designated property to a trustee with the intention of passing legal title to the trustee, to hold for the benefit of others.” 24 Mich. Civ. Jur. Trusts § 2. Thus, when an insured pays the premium to an insurance agent, the agent becomes the trustee for that premium, which he or she holds for the benefit of the insurer.

In *Capitol Indemnity Corp. v. Interstate Agency, Inc.*, defendant Interstate, a Michigan insurance agency, commingled premium payments with its business operating funds, failed to remit these premium payments to Capitol, the insurer, and attempted to discharge the responsibility to remit premium payments in bankruptcy proceedings. The Sixth Circuit upheld the district court application of Michigan law and its finding that premium payments received by Interstate were held in an express trust for Capitol and were thus not dischargeable in bankruptcy.<sup>4</sup> *Capitol Indemnity Corp.*, 706 F.2d at 125.

Therefore, under Michigan law, premium payments received by an insurance agent are held in an express trust for the benefit of the insurer with whom a previous principal-agent relationship exists. Failure to properly administer the premiums violates the agent’s fiduciary duty and his or her duty as a trustee.

The next issue to be addressed is whether the premium payments, held by the agent in trust for the benefit of the insurer, may be commingled with other funds by the insurance agent.

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4. The Sixth Circuit also held that the president of Interstate was personally liable for agency’s breach of fiduciary duty because of his status as president, large shareholder, and personal signatory to agency agreement.

Michigan case law establishes that an express trust creates an obligation in the trustee to “act for the beneficiaries and not for himself” and a trustee is “prohibited . . . from placing himself in any position where his *self-interest will, or may, conflict with his duties as a trustee.*” *Chambers v. Chambers*, 207 Mich. 129, 136-37, 173 N.W. 367, 369-70 (1919) (emphasis added). In *Chambers*, the trustee of an estate utilized his authority as a trustee in a manner that significantly increased his own estate. The court found that his actions were an abuse of his fiduciary duties and affirmed an equitable settlement, defining several standards by which trustees should abide.

While the Insurance Code does not explicitly require segregation of premium payments from other funds, where comingling places the agent in such a position that self-interest conflicts with the duties of a trustee, a fiduciary violation may be the result.

In the enforcement case which concluded with the revocation of Mr. White’s agent license, there was both the commingling of funds and the actual use of fiduciary funds for an improper purpose.

## **2. The prior enforcement case**

In his written closing statement, Mr. White’s counsel summarized the Petitioner’s position with respect to the initial enforcement case:

When charges and allegations were raised against Mr. White by OFIS, Mr. White had little choice other than to accept a settlement offer or stipulation to allow his long-standing insurance agent/producer license to be revoked. However, Mr. White refused to acknowledge or admit any wrongdoing on his own part because he did not believe that he had actually taken any

actions or done anything that was either illegal or in violation of his fiduciary duties as outlined in the Michigan Insurance Code.<sup>5</sup>

Petitioner's personal views regarding the enforcement case were expressed in a September 2006 letter he sent to the OFIR licensing director in support of his application for a solicitor license (Hearing Exhibit 7):

Upon reflection I now understand that even though shareholder loans were taken from profits over the years prior to 2003, I should have accounted for monies in a different manner. It is clear that if I had created a premium trust fund account, and placed all premium dollars due insurance companies in that fund, I would have quickly recognized the problem created by a rapid decline in income in 2003/2004. Because I had allowed operating and premium funds to be commingled I did not recognize the severity and urgency of the problem which arose in March of 2004. It was through poor management and a slow response to plummeting sales and income that resulted in the problem, which OFIS investigated in April 2004.

The following question and answer (Tr. 8/15/2007, 186-87) occurred during examination of Mr. White by OFIR's counsel:

*Q.* In your opinion, have you submitted any evidence to [OFIR] to indicate that you have rehabilitated since the revocation of your license?

*A.* . . . . Number one, some of the letters that I submitted with my original application were written well after the revocation, which indicated that – that I was – good moral character. In addition to that, I went out and I got a master's degree in Business Administration. I took CE [continuing education]; CE courses, particularly courses on Ethics. I – I tried to find whatever I could do to improve or correct the appearance that I was somehow needed to be rehabilitated.

Consistent with this view, Mr. White used much of the present hearing presenting testimony intended to contradict the findings of the 2005 consent order. Reviewing that testimony, there is reason to be skeptical about whether the Mr. White has accepted

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<sup>5</sup> Petitioner closing brief, p 17.

responsibility for the fiduciary violations, much less been rehabilitated. The following passage is from the hearing transcript and shows Mr. White's responses to questions from his attorney (Tr. 8/15/2007, 189):

*Q.* Okay. Out of the several transactions which are discussed in that NOSC, were all those transactions which you were personally involved in?

*A.* No, sir.

*Q.* Okay. If you were not involved in those transactions, who might have been involved in some of them?

*A.* Well, my partner, Rick Turner.

*Q.* Okay. And, out of all the transactions which are listed in the NOSC, in your opinion, do any of those reflect on dishonesty or poor business character on your part?

*A.* No, sir.

*Q.* And, do any of those transactions reflect on dishonesty or poor business transactions on the part of your partner, Mr. Turner?

*A.* Yes, sir.

It appeared to be Mr. White's purpose at the hearing to relitigate his original compliance case in order to demonstrate that he had done nothing to warrant the revocation of his insurance license. However, those facts were established in the consent order and cannot be relitigated in the present case.

A similar attempt was made by Mr. Maksymowski in his 1999 licensing case (p. 4, above). In that case, the Commissioner observed:

The finding that Maksymowski breached his fiduciary duty was clear and unequivocal. In the current matter, the Administrative Law Judge acknowledged that the finding was conclusive, but allowed background testimony by Maksymowski. This was done to allow him to explain, in some mitigatory fashion, that his bad moral character was not what it seemed.

Allowing some testimony as to facts surrounding past misconduct may be appropriate where it is helpful to ascertain whether an applicant is rehabilitated. Unfortunately, allowing testimony in this instance set the

stage for Maksymowski's wholesale denial that he ever used Farmers' premium moneys for his personal expenses.

The Petitioner had a full opportunity to contest the breach of fiduciary duty allegations in the prior case. He chose not to testify. . . . His testimony, denials, and excuses presented in this case in no way militate against the previous finding that he violated his fiduciary duty as an agent. The Final Decision in that matter was, indeed, final.

The same may be said of Mr. White's approach to his licensing hearing. And the Commissioner's words in the *Maksymowski* case carry equal force here:

The Commissioner is not looking for false statements of contrition. However, an applicant who has been found to have repeatedly breached his fiduciary duties does not start with a clean slate. Even if the applicant disagrees with the finding, the applicant must accept the reality of the finding and show the Commissioner that, assuming the correctness of the finding, he has pursued a course of conduct that would lead to rehabilitation. There is no indication in this record that the Petitioner has undertaken any course of action that would change him from being untrustworthy to being trustworthy.

At the hearing, Petitioner White stressed two additional points—that no clients or insurers were harmed by the late submission of premiums and that insurers and agents sometimes agree to change the due dates for premium payments. (Tr. 8/15/2007, 201.)

The fact that clients did not have policies cancelled was because the insurers in question chose not to cancel the coverage. And so long as it appeared there was a reasonable prospect that Mr. White and the agency would be able to replace the fiduciary funds with other money, the insurers, acting through their managing general agents, agreed to wait for those funds. This effort represents a business decision by the insurers to preserve their business. The absence of harm to insureds is not attributable to any laudable conduct on Mr. White's part. The money he

should have remitted to insurers was gone. It is that misuse of fiduciary funds which justifies the license revocation. It is important to recall the relevant facts of the original compliance case:

- Mr. White's agency collected premiums from his clients as they were due.
- Mr. White's agency failed to remit the collected premiums to the insurers that were providing his clients with coverage.
- The funds in question were fiduciary funds, money held in trust to be remitted to the insurers providing coverage to Mr. White's customers.
- During this time, agency funds, comprised in large measure of fiduciary money, were used to purchase a condominium in Mexico and to fund construction of an office building, projects which were undertaken to benefit Mr. White both personally and as the majority owner of his insurance agency.

The facts stated in the 2005 consent order are an accurate depiction of the events that led to the revocation of Mr. White's agent license. The Commissioner declines to adjust those facts on the basis of the Mr. White's present views of those events.

### **3. Testimony as to good character**

In total, ten witnesses testified that Mr. White was of good moral character and possessed a good business reputation (sections 1214(3)(f) and (g) of the solicitor licensing statute). Each of these witnesses testified that they had been told of Mr. White's license revocation. They nevertheless testified to his good character, both before and since his revocation. While such loyalty may be a laudable mark of friendship, it is less than compelling as an objective assessment of good character. The fact that the witnesses expressed no change in opinion even

after learning of his failure to properly handle the funds entrusted to him by his clients diminishes the value of such testimony as a reliable measure of good character.

#### **4. Evidence of subsequent good conduct**

At hearing, Mr. White stressed the good work he has done since the revocation of his agent license. The Insurance Code does not specify the weight that should be accorded to post-revocation conduct. The Commissioner notes, as a starting point, that a license revocation is not a suspension. Revocation is intended to be a permanent loss of license. Granting a new license after a revocation will be done only under extraordinary circumstances.

OFIR's policy regarding the relicensing of previously revoked individuals is well-established. In 1993, the license of insurance agent Raymond Marosi was revoked when he failed to remit to various insurers approximately \$190,000 in insurance premiums which he had collected from his customers. He was denied a new agent license in 1997. In the final decision, the Commissioner wrote:

Insurance is a business of ultimate trust. Individuals and businesses place their financial well-being in the hands of agents. Untrustworthy agents can lead to their financial ruin. Where an agent . . . breaches his fiduciary duty by failing to turn over premiums to insurers, he has proven himself to be untrustworthy.

\* \* \*

Persistent financial misconduct is rooted in character. The passage of a few years following major and persistent breaches of fiduciary duties is a short time to change from being an untrustworthy person to being a trustworthy person. This consideration underlies the revocation of an agent's license in these circumstances.

Where the Commissioner finds a violation of the Code that warrants a major sanction, but not removal from the business of insurance, the Commissioner may impose the suspension of a license, even for a period of years. However, some violations of the Code are so serious that there is no expectation that, following a designated period of time, the person

should again be authorized to act as an agent. That is the significance of a license revocation. That is the essence of protecting the public from someone who, having been granted the privilege of a license, fundamentally and egregiously abused that privilege.

There is nothing to prevent a person who has had his or her license revoked from applying for a new license. However, it would take an extraordinary demonstration of proven rehabilitation before the Commissioner would consider licensing a person who has had a license revoked for breach of fiduciary duty.<sup>6</sup>

The present case is similar to the *Marosi* case. The focus is on whether the applicant has demonstrated, in the period between revocation and application, that he or she has undergone rehabilitation sufficient for the Commissioner to conclude that the applicant meets current applicable licensing standards – is honest and trustworthy, possesses a good business reputation and good moral character.

The applicant with past fiduciary violations has the burden of showing that he has now been sufficiently rehabilitated that he meets these licensing standards. This is not merely the function of the passage of time. “Good moral character” is defined as “the propensity . . . to serve the public . . . in a fair, honest, and open manner.”<sup>7</sup> Until the time such a demonstration is made, it would be inappropriate to entrust that individual with another license which permits the individual to have access to fiduciary money entrusted to his care.<sup>8</sup>

The Commissioner must consider the applicant’s conduct since the time of the revocation. In this case, the time period is brief – only 20 months have passed between the

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6. *In the matter of Raymond Marosi*, OFIR Case No. 97-083-L, August 20, 1997

7. This definition is found in MCL 338.41, part of the Occupational License for Former Offenders Act, and is applicable to some licensing categories under the Insurance Code. See MCL 500.1200.

8. The Petitioner has argued that his prospective employer will not ask him to handle fiduciary funds. While this may be true for the present, the license Petitioner seeks would permit him to handle fiduciary

revocation in January 2005 and Mr. White's application in September 2006. (The period lengthened while the hearing was conducted.) During that time, Mr. White obtained a master's degree from the University of Phoenix and worked as a manager for an office interiors sales firm and as a customer service representative in an insurance agency. Mr. White has offered two conclusions based on these experiences: 1) his education has shown him the importance of not commingling fiduciary funds with other revenue, and 2) his work has demonstrated his honesty to his employers who support his licensing request.

These conclusions warrant a critical evaluation. It is doubtless true that any business courses dealing with business practices and ethics would stress the need to keep fiduciary funds separate from other money, whether in a separate account or through accurate accounting methods. The ethics of handling money held in trust for the benefit of another stresses the obligation not to misuse or misdirect those funds. However, these principles have always been a significant part of an insurance agent's responsibilities. They are not new principles. As an individual with 30 years of experience in the insurance field, Mr. White should have been very familiar with those principles. The fiduciary obligations of a solicitor under the Insurance Code are the same as those of an insurance agent.

Since the revocation of his license, Mr. White has worked in two businesses. The fact that he has been employed since his revocation and has apparently been a valued employee are positive developments which speak in favor of his application. The weight of this factor is

somewhat diminished by the fact that his tenure has been short and by the fact that his duties did not include the handling of fiduciary funds.

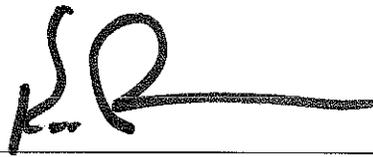
As stated in the *Marosi* decision, "it would take an extraordinary demonstration of proven rehabilitation before the Commissioner would consider licensing a person who has had a license revoked for breach of fiduciary duty." The showing made by Mr. White at hearing is not sufficient to constitute "an extraordinary demonstration of proven rehabilitation."

#### IV. Conclusion

The evidence presented by the Petitioner at hearing, taken as a whole, is insufficient to establish that the Petitioner meets the solicitor licensing standards of section 1214(3) of the Michigan Insurance Code.

#### V. Order

The refusal to grant a solicitor license to Petitioner is upheld.

A handwritten signature in black ink, appearing to be 'KR' followed by a long horizontal line.

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Ken Ross  
Commissioner