

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF INSURANCE,)
)
 Petitioner,)
)
vs.) Case No. 01-2790PL
)
OSCAR GERARD MARTINEZ, JR.,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted on January 14 and 15, 2002, in Miami, Florida, before Claude B. Arrington, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: A. Collin Cherry, Esquire
Department of Insurance
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333

For Respondent: Richard B. Marx, Esquire
O. Frank Valladares, Esquire
66 West Flagler Street, Second Floor
Miami, Florida 33130

STATEMENT OF THE ISSUES

Whether Respondent, a licensed public adjuster, committed the offenses alleged in the First Amended Administrative Complaint and the penalties, if any, that should be imposed.

PRELIMINARY STATEMENT

On April 18, 2001, Petitioner filed an Administrative Complaint against Respondent. Respondent timely requested a formal administrative hearing to challenge the allegations of the Administrative Compliant. On July 13, 2001, the matter was referred to the Division of Administrative Hearings, and this proceeding followed.

By order entered November 15, 2001, Petitioner was permitted to file its First Amended Administrative Compliant against Respondent. The following is intended to be a general summary of the four counts of the First Amended Administrative Complaint. Any questions pertaining to the First Amended Administrative Complaint should be resolved by reading that pleading in its entirety.

Respondent is a public adjuster who represents consumers in dealing with their insurance companies following a covered loss, such as fire or other damage to property. Petitioner alleged that Respondent had either direct or indirect (through his wife) ownership interests in two companies. Petitioner also alleged that Respondent had a business relationship with a man named Carlos Schaparo (also known as Chaparo and Chapara).

Count I alleged certain facts pertaining to Respondent's acts and statements following a fire that damaged the home of Ms. Ileana Fuentes in March 1997. Based on those factual

allegations, Petitioner alleged in Count I that Respondent committed multiple violations of the Florida Insurance Code. Specifically, Petitioner alleged in Count I that Respondent violated the following provisions of the Florida Insurance Code: Sections 626.611(7), 626.611(8), 626.611(9), 626.611(13), 626.621(2), 626.621(3), and 626.878, Florida Statutes, and Rules 4-220-051(7)(c), 4-220.201(4)(a), 4-220.201(4)(b), 4-220.201(4)(l), and 4-220.201(4)(m), Florida Administrative Code.

Count II alleged certain facts pertaining to Respondent's acts and statements following a fire that damaged the home of the late Arthur Lee, Sr., in June 1997. Based on those factual allegations, Petitioner alleged in Count II that Respondent committed multiple violations of the Florida Insurance Code. The violations alleged in Count II include those alleged in Count I. In addition, Count II relied on the following: Rules 4-220.051(7)(c), 4-220.201(4)(s), 4-220.201(5)(c), and 4-220.201(5)(f), Florida Administrative Code.

Count III alleged certain facts pertaining to certain advertisements Respondent posted in February 1998. Based on those factual allegations, Petitioner charged Respondent with violating multiple provisions of the Florida Insurance Code pertaining to advertising. Petitioner alleged in Count III that Respondent violated the following provisions of the Florida

Insurance Code: Sections 626.611(7), 626.611(8), 626.611(9), 626.611(13), 626.621(2), 626.621(3), 626.878, and 626.9541(1)(b), Florida Statutes, and Rules 4-220.201(4)(a), 4-220.201(4)(1), 4-220.051(c), and 4-220.051(d), Florida Administrative Code.

Count IV alleged that Respondent failed to timely notify Petitioner of a change in his office address. Petitioner alleged in Count IV that Respondent violated the following provisions of the Florida Insurance Code: Sections 626.551, 626.611(13), and 626.621(2), Florida Statutes.

At the final hearing, the following pre-marked Petitioner exhibits were admitted into evidence: 1-13, 15, 18, 19, 21-23, 25, 27, 28, 30, 31A, 31B, 31C, 31D, 32A, 33-36, 40-42, 44-52, 60C (deposition of Carlos Schaparo taken November 28, 1998), 60D (deposition of Respondent taken November 20, 1998), 60E (deposition of Respondent taken October 30, 2001), and 60F (deposition of Donna Presswood¹ taken November 8, 2001). The following pre-marked Petitioner exhibits were rejected: 14, 16, 17, 32B, and 53. The remaining pre-marked Petitioner exhibits were not offered. Petitioner presented the testimony of Judith Stanley, Carol Sheridan, Ileana Fuentes, Jaime Farach, Miguel Jimenez, Arthur Lee, Jr., Richard Walker, Patricia Lee, Guiermo Tejeda, Juan Rodriguez, and Luz Martinez. Ms. Stanley is employed by Bank of America. Ms. Sheridan, Mr. Walker, and

Mr. Rodriguez were, at the times material to this proceeding, investigators employed by Petitioner. Ms. Fuentes owned the property at issue in Count I. Mr. Lee and Ms. Lee are children of Arthur Lee, Sr., who owned the property at issue in Count II. Mr. Farach is a general contractor. Mr. Jimenez is an architect and contractor. Mr. Tejeda is an investigator employed by the Department of Business and Professional Regulation. Ms. Martinez is the Respondent's spouse.

Respondent testified on his own behalf and presented the additional testimony of Christian Fuxa, a public insurance adjuster and contractor. Respondent presented three sequentially numbered exhibits, each of which was admitted into evidence.

A corrected transcript of the proceedings was filed on March 28, 2002. Each party filed a Proposed Recommended Order, which has been duly considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material to this proceeding, Respondent has been licensed pursuant to Chapter 626, Florida Statutes, as a public insurance adjuster. Section 626.854(1), Florida Statutes, defines the term "public adjuster" as follows:

(1) A "public adjuster" is any person, except a duly licensed attorney at law as hereinafter in s. 626.860 provided, who, for

money, commission, or any other thing of value, prepares, completes, or files an insurance claim form for an insured or third-party claimant or who, for money, commission, or any other thing of value, acts or aids in any manner on behalf of an insured or third-party claimant in negotiating for or effecting the settlement of a claim or claims for loss or damage covered by an insurance contract or who advertises for employment as an adjuster of such claims, and also includes any person who, for money, commission, or any other thing of value, solicits, investigates, or adjusts such claims on behalf of any such public adjuster.

2. Pursuant to Chapter 626, Florida Statutes, the Florida Department of Insurance has jurisdiction over Respondent's insurance licenses and appointments.

3. Respondent owns Reliance Insurance Adjusters, Inc. (Reliance Adjusters), a corporation organized under the laws of the State of Florida. Respondent conducts his business as a public adjuster through Reliance Adjusters.

4. At all times pertinent to this proceeding, Respondent has been married to Luz Adriana Romero Martinez (Ms. Martinez).

5. A Insurance Restoration Contractors, Inc. (A Insurance Restoration) was a corporation organized under the laws of the State of Florida by documents filed with the Secretary of State on August 8, 1997. Respondent prepared the papers necessary to incorporate A Insurance Restoration and served as its Registered Agent. Respondent was not a shareholder, officer, or director

of A Insurance Restoration at any time pertinent to this proceeding. Ms. Martinez was an incorporator, owner of one-half of the corporation's common stock, and president of the A Insurance Restoration from its inception until December 20, 1997. Ms. Martinez had a financial interest in A Insurance Restoration through her stock ownership of the corporation. Carlos Schaparo was an incorporator, owner of one-half of the corporation's common stock, and vice president of the corporation from its inception until December 20, 1997. On December 20, 1997, Mr. Schaparo became the sole stockholder and president of the corporation. The corporation was administratively dissolved on September 24, 1999.

6. Online Salvage Company, Inc. (Online Salvage) was incorporated under the laws of the State of Florida by documents filed with the Secretary of State on September 14, 1995. This corporation was administratively dissolved on October 16, 1998. Respondent was the registered agent for Online Salvage and helped his wife complete the paperwork necessary to incorporate Online Salvage.² Respondent was not a shareholder, officer, or director of Online Salvage. At all times pertinent to this proceeding, Ms. Martinez was an officer and stockholder of Online Salvage. On March 17, 1997, Mr. Schaparo became an officer and shareholder of the corporation. At the times pertinent to this proceeding, Respondent, his wife, and

Mr. Schaparo were authorized to sign checks on behalf of Online Salvage.

7. There was a dispute whether Respondent had a direct or indirect financial interest in Online Salvage. Petitioner established that Respondent had an indirect financial interest in Online Salvage, but it failed to establish that he had a direct financial interest in the corporation. Petitioner's assertion that Respondent had a direct financial interest in the corporation was based on the loan Respondent made to his wife to start the corporation. That assertion is rejected because the evidence established that Respondent loaned the money to his wife, not to Online Salvage. There was insufficient evidence to establish that Online Salvage was indebted to Respondent.

8. Petitioner established that Respondent had an indirect financial interest in the corporation based on the benefit that would inure to him if his wife profited from her ownership interest in the corporation. Ms. Martinez testified that any monies she received as a result of her ownership interest in the corporation would be placed in a joint account with Respondent.³ In addition, Ms. Martinez testified that she had in fact received monies as a result of her ownership interest in the corporation and that those monies had been deposited in a joint account with Respondent.

9. At all times pertinent to this proceeding, Sunshine General Contractor, Inc. (Sunshine Contractor) was a corporation that conducted business as a general contractor. Robert D. Monroe, a duly-licensed general contractor, was the owner and qualifier for Sunshine Contractor. Mr. Monroe died July 5, 1998. Following his death, there was no qualifier for Sunshine Contractor. There was no allegation that Respondent owned an interest in Sunshine Contractor that he should have disclosed.

10. Mr. Schaparo's legal relationship with Sunshine Contractor and the degree to which Mr. Monroe supervised Mr. Schaparo's activities at issue in this proceeding were not clearly established. On the work authorization forms Mr. Schaparo signed with Ileana Fuentes and with Arthur Lee, Sr., Mr. Schaparo identified himself as being a "Salesperson/Representative" of Sunshine Contractor. In a deposition, Mr. Schaparo referred to himself as a subcontractor and testified that he had never been an employee, agent, or representative of Sunshine Contractor, but he admitted that he had told people that he was a salesman for Sunshine Contractor. Mr. Schaparo further testified on deposition that he worked on commission with Sunshine Contractor, but that he had never received any compensation from Mr. Monroe or Sunshine

Contractor because he never completed any business with Mr. Monroe.⁴

11. On March 11, 1997, a fire damaged the home of Ms. Fuentes in Miami, Florida.

12. Respondent and other public adjusters appeared at the scene to solicit adjusting Ms. Fuentes' loss. Respondent talked to Ms. Fuentes on the evening of March 11, 1997, after the firemen had completed their work. He gave her his business card, informed her that he was soliciting her business as a public insurance adjuster, and learned where he could reach her the next day.

13. Respondent and Ms. Fuentes met for the second time on March 12, 1997. After listening to Respondent's sales presentation on March 12, 1997, Ms. Fuentes signed a contract with Reliance Adjusters to represent her as a public insurance adjuster. Respondent signed the contract on behalf of Reliance Adjusters. The contract provided, in pertinent part, as follows:

I/we hereby retain Reliance Adjusters, Inc. to be my agent and representative, to advise and assist in the adjustment of fire loss on March 11, 1997 at 6850 SW 78 Terrace and agree to pay, in consideration thereof, and hereby assigns to Reliance Adjusters, Inc. 10 per cent of the whole amount of actual loss and damages recovered by adjustment or otherwise, when paid by the Insurance Companies involved or any third

Parties, and authorize their interest to appear accordingly.

Reliance Adjusters, Inc. agrees not to accept any settlement or adjustment unless it is satisfactory to me. I also understand that I have three days to cancel this contract in writing.

14. The provision in the contract executed by Ms. Fuentes and Respondent that provided Reliance Adjusters would be entitled to ten percent of the whole amount of the actual loss included the insurance payoff for damages to the residence, for loss of contents, and for additional living expenses. The insurance company paid the final payment for each category of loss on June 4, 1997.⁵

15. The fire and/or the efforts of the fire department to extinguish the fire damaged the windows and doors to Ms. Fuentes' house. One of the first things that is typically necessary following a fire is to secure the premises by boarding up damaged or missing windows and doors. After Ms. Fuentes signed the contract with Reliance Adjusters, Respondent hired Mr. Schaparo and Online Salvage to board-up Ms. Fuentes' home. Online Salvage paid its workers the sum of \$150.00 to board-up Ms. Fuentes' home. This payment was made from Online Salvage's operating account by check numbered 1015 signed by Ms. Martinez on March 16, 1997.

16. On or about March 12, 1997, Respondent asked Ms. Fuentes whether she had a contractor to repair the damage to

her house. When she answered that she did not, Respondent made an unsolicited recommendation to Ms. Fuentes that she use Mr. Schaparo. Respondent told Ms. Fuentes that he had worked with Mr. Schaparo before on other claims and from church. Respondent told her he knew Mr. Schaparo's work and he recommended Mr. Schaparo as being very reliable. Respondent told Ms. Fuentes that Mr. Schaparo knew how to repair damages caused by fire. Respondent represented to Ms. Fuentes that Mr. Schaparo was a reliable person who would be the best person to take care of Ms. Fuentes' problems in an expeditious manner.

17. Mr. Schaparo is not and has never been a licensed general contractor. At all times pertinent to this proceeding, Respondent knew that Mr. Schaparo was not a licensed general contractor.

18. Respondent did not disclose to Ms. Fuentes that he had a direct or indirect financial interest or business relationship with Mr. Schaparo or with Online Salvage at any time pertinent to these proceedings. Respondent did not disclose his wife's business relationship with Mr. Schaparo or with Online Salvage at any time pertinent to these proceedings.⁶

19. As a result of Respondent's recommendation, Ms. Fuentes signed a form contract, styled work authorization (the work authorization), presented to her by Mr. Schaparo. The general contractor identified by the work authorization was

Sunshine Contractor. Mr. Schaparo signed the work authorization as "Salesperson/Representative" of Sunshine Contractor. The work authorization was dated March 12, 1997. Ms. Fuentes testified, credibly, that the work authorization was signed a few days after March 12, 1997.

20. On the work authorization form under the full corporate name for Sunshine Contractor appeared a general contractor's license number and what purported to be the address and telephone numbers for Sunshine Contractor. The general contractor's number was that issued to Mr. Monroe.

21. Ms. Fuentes testified, credibly, that she believed at the time she executed the work authorization that Mr. Schaparo was the owner and qualifier of Sunshine Contractor. Respondent deliberately misled Ms. Fuentes into believing that Mr. Schaparo was a licensed contractor, thereby engaging in fraud and dishonest dealing.

22. The final payment from the insurance company for damages to the residence was made payable to Florida Realty Mortgage (the holder of the mortgage on Ms. Fuentes' residence), the owners of the residence, and Reliance Adjusters. The check, dated June 4, 1997, was signed by the payees and deposited in an escrow account maintained by Florida Realty Mortgage.

23. On July 21, 1997, Florida Realty Mortgage, at Respondent's request, issued a check, in the amount of

\$15,290.00 made payable to Ms. Fuentes, Reliance Adjusters, and Sunshine Contractor as the first draw to begin repairs to Ms. Fuentes home. Respondent had Ms. Fuentes endorse the check and he thereafter deposited the check into the Reliance Adjusters operating account at First Union Bank. Respondent then transferred these funds to the control of Online Salvage by writing a check out of the Reliance Adjusters operating account and personally depositing the sum of \$15,290.00 into the Online Salvage operating account at First Union Bank.

24. Respondent received the first draw from Florida Realty Mortgage in his capacity as agent, representative, and public adjuster of Ms. Fuentes. Consequently, the funds he received were in a fiduciary capacity. Respondent breached his fiduciary responsibility to Ms. Fuentes by depositing the first draw in the Online Salvage operating account without the knowledge or consent of Ms. Fuentes. That breach is exacerbated by the fact that Respondent had an undisclosed financial interest in Online Salvage and by the fact that Respondent, Ms. Martinez, and Mr. Schaparo could write checks out of that account.

25. There was no evidence at the final hearing to show that Mr. Monroe or Sunshine Contractor purchased any construction supplies or paid any subcontractor to do any work on the Fuentes property. Ms. Fuentes never met Mr. Monroe and

there was insufficient evidence to establish that Mr. Monroe ever visited the job site or pulled any permits for the job.

26. Respondent, Ms. Martinez, and Mr. Schaparo wrote checks out of the Online Salvage operating account to board-up the premises, to demolish damaged areas and clean the premises, to prepare engineering drawings, and to purchase construction materials.

27. In September of 1997, Ms. Fuentes discovered that what little work was done to her home had been done without a permit and did not meet building code. On October 9, 1997, the City of South Miami issued a Notice of Violation which stopped further repair work because no permits had been obtained.

28. On November 14, 1997, Ms. Fuentes filed a civil complaint against Respondent, Reliance Adjusters, Sunshine Contractor, and Carlos Schaparo seeking damages, fees, and costs based on the facts that underpin the allegations of Count I. That suit was still pending at the time of the final hearing.

29. Following the filing of the civil complaint, Respondent was instructed by his attorney not to discuss the facts that underpin Count I. Until the civil action was filed, Respondent had been cooperating with Petitioner's investigators in the instant proceeding. After the civil action was filed, Respondent declined to cooperate further with Petitioner's investigators in the instant proceeding.

30. On June 13, 1997, a fire damaged the home of Mr. Arthur Lee, Sr., in Miami, Florida. Mr. Lee, Sr., was elderly and blind at the time of the fire, and he died prior to the final hearing. Mr. Lee, Sr., lived in the house with his son and daughter, Arthur Lee, Jr., and Paulette Lee.⁷

31. Respondent appeared at the Lee's residence on the day after the fire, and Respondent discussed with Mr. Lee, Sr., and his family the role of a public insurance adjuster and the reasons they should permit him, through his company, to represent them as their adjuster. According to Mr. Lee, Jr., on June 14, 1997, Respondent told him, his father, and his sisters, Patricia and Paulette, that he had contractors and that he was going to take care of all the work for ten percent of what was obtained from the insurance company. Respondent told them that he would repair the house and pay all their housing and living expenses in the amount of \$550 per month until the house was rebuilt plus the costs of storing the undamaged contents of the dwelling. According to Mr. Lee, Jr., Respondent further represented that the house would be ready no later than December of 1997.

32. On June 14, 1997, Respondent, on behalf of Reliance Adjusters, and Arthur Lee, Jr., on behalf of his father, executed a contract whereby Reliance Adjusters was appointed to adjust the Lee loss. This form contract was identical in all

material respects to the contract Respondent and Reliance Adjusters had signed with Ms. Fuentes. This written contract did not reflect the representations that Respondent made to the Lee family regarding the construction timeline or the expenses Respondent would pay.

33. On or about June 18, 1997, Respondent returned to the Lee home and brought Mr. Schaparo with him. Respondent introduced Mr. Schaparo to the Lee family by telling them that Mr. Schaparo was a licensed contractor and that he would be doing the repair work. Respondent's representations were false. Respondent knew that Mr. Schaparo was not a licensed contractor and he knew or should have known that Mr. Schaparo purported to represent Sunshine Contractor.

34. Respondent failed to disclose to the Lee family that they had a choice in who they could use as a contractor.

35. Respondent failed to disclose to the Lee family any financial interest or business relationship that he had in Online Salvage, A Insurance Restoration, his business relationship to Carlos Schaparo, and his wife's business relationship and financial interests with Mr. Schaparo.

36. As a result of Respondent's steering the Lee family to Mr. Schaparo as the contractor to repair their home, Mr. Lee, Jr., signed a work authorization with Mr. Schaparo on June 18, 1997, on a form identical in all material respects to the form

Mr. Schaparo had Ms. Fuentes sign. The general contractor identified by the work authorization was Sunshine Contractor. Mr. Schaparo signed the work authorization as "Salesperson/Representative" of Sunshine Contractor.

37. On or after August 25, 1997, Fireman's Fund issued a claim check to Arthur Lee and Reliance Adjusters in the amount of \$43,317.90. Respondent took the claim check to Mr. Lee's home and had Mr. Lee, Jr., endorse over the check. Respondent then took the claim check from Mr. Lee and deposited the Lee's \$43,317.90 into the Reliance Adjusters' operating account at First Union Bank. Respondent received these funds in his capacity as agent, representative, and public adjuster of the Lees. Consequently, he received the funds in a fiduciary capacity.

38. For approximately eight months, Respondent and Mr. Schaparo wrote checks to the Lee family for living expenses and storage costs from the Reliance Adjusters checking account and from the A Insurance Restoration checking account, respectively.

39. All of the Lee's furniture that was taken from the fire damaged home then placed in a rented storage unit was lost as a result of Respondent's failure to continue to pay as promised for storage of the furniture until the Lee's home was rebuilt.

40. Respondent and Mr. Schaparo attempted to have Miguel Jiminez, an architect and general contractor, replace Sunshine Contractor as the general contractor on the job following Mr. Monroe's death. Shortly thereafter, the whereabouts of Mr. Schaparo became unknown, and no additional work was done on the Lee's house.⁸

41. Respondent kept his full fee for adjusting the Lee home. As of the final hearing, the Lee home had not been rebuilt and the insurance money had not been returned to the Lee family. No accounting of the insurance check in the amount of \$43,317.90, paid August 25, 1997, was presented at the final hearing.

42. On or after February 23, 1998, Respondent placed advertisements, in the form of a flyer, on homes in Kissimmee, Florida, that had been destroyed or incurred damage as a result of severe tornadoes.

43. The owners of the property did not give permission to Respondent to place the advertisements on their property. Respondent placed and had others place the advertisements on homes that were not occupied at the time.

44. The flyer used by Respondent was misleading and deceptive. The flyer consisted of nine lines of print. The largest and darkest print appeared on the first and seventh lines. The third and fourth lines were also of dark print. The

telephone number appearing on the sixth line was also in dark print. The following appeared on the first line of the flyer in large, dark, bold print: "NOTICE: OWNER." The following appeared as the second line of the flyer: "THIS PROPERTY SHOULD BE HANDLED BY." The following appeared as the third line of the flyer: "RELIANCE ADJUSTERS, INC." The following appeared as the fourth line of the flyer: "PUBLIC INSURANCE ADJUSTERS." The following appeared as the fifth and sixth lines of the flyer: "Any person wishing to contact us regarding this loss must call us at 1.800.579.6637." The following appeared as the seventh line of the flyer in large, dark, bold print: "NO TRESPASSING." The following appeared as the eighth line of the flyer: "Oscar Martinez Fl. Public Adjusters Lic #:261656160." The following, in the extreme right hand corner of the flyer in small print, appeared as the ninth line of the flyer: "Advertisement."

45. The flyer, attached to a damaged home, would have misled other public insurance adjusters to wrongfully believe that Respondent and/or Reliance Adjusters represented the homeowner and no one should trespass on the property or deal directly with the owner of the property. The flyer would have reasonably dissuaded other public adjusters from soliciting business from the homeowner because they would think that

Respondent, through Reliance Adjusters, had already obtained that homeowner's adjusting business.

46. The middle name of Respondent does not appear on the sticker advertisement.

47. The official Florida Department of Insurance records contain the name "Oscar Gerard Martinez, Jr.", for Respondent.

48. The typeface for the name of Respondent in the advertisement is smaller than the main body of the text.

49. Carol Sheridan, an investigator for Petitioner, conducted an investigation of Respondent's business on March 11, 1998. Ms. Sheridan went to Respondent's home at 10111 Southwest 134th Place, Miami, Florida, to conduct the investigation because that was the location that Respondent had listed with Petitioner as being his business address. Approximately six months prior to Ms. Sheridan's visit, Respondent had moved his office out of his residence to an office located at 12265 Southwest 132nd Court, Miami, Florida. Respondent did not timely notify Petitioner of his new business address.

50. Respondent's license has been the subject of prior administrative action. In Case No. 94-L-133-C&S, Petitioner placed Respondent on probation for a year and fined him \$500.00. In Case No. 09568-94-A, Petitioner suspended Respondent's license for 90 days, placed him on probation for two years, fined him in the amount of \$1,000, and assessed costs against

him in the amount of \$2,000. Respondent was fined \$500.00 in Case No. 150035-95-A.

51. Respondent's previous discipline included advertising violations, pressuring and taking advantage of the elderly during a time of emotional distress, and misrepresentation.

CONCLUSIONS OF LAW

52. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

53. Petitioner has the burden of proving by clear and convincing evidence the allegations against Respondent. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112 (Fla. 1st DCA 1989); and Inquiry Concerning a Judge, 645 So. 2d 398 (Fla. 1994). The following statement has been repeatedly cited in discussions of the clear and convincing evidence standard:

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of [sic] conviction, without hesitancy, as to

the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

54. Section 626.611, Florida Statutes, provides grounds for the mandatory suspension or revocation of an insurance license, in pertinent part, as follows:

The department shall deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, title agency, solicitor, adjuster, customer representative, service representative, or managing general agent, and it shall suspend or revoke the eligibility to hold a license or appointment of any such person, if it finds that as to the applicant, licensee, or appointee any one or more of the following applicable grounds exist:

* * *

(7) Demonstrated lack of fitness or trustworthiness to engage in the business of insurance.

(8) Demonstrated lack of reasonably adequate knowledge and technical competence to engage in the transactions authorized by the license or appointment.

(9) Fraudulent or dishonest practices in the conduct of business under the license or appointment.

* * *

(13) Willful failure to comply with, or willful violation of, any proper order or rule of the department or willful violation of any provision of this code.

55. Section 626.621, Florida Statutes, provides the following grounds for the discretionary suspension or revocation of an insurance license in pertinent part, as follows:

The department may, in its discretion, deny an application for, suspend, revoke, or refuse to renew or continue the license or appointment of any applicant, agent, solicitor, adjuster, customer representative, service representative, or managing general agent, and it may suspend or revoke the eligibility to hold a license or appointment of any such person, if it finds that as to the applicant, licensee, or appointee any one or more of the following applicable grounds exist under circumstances for which such denial, suspension, revocation, or refusal is not mandatory under s. 626.611:

* * *

(2) Violation of any provision of this code or of any other law applicable to the business of insurance in the course of dealing under the license or appointment.

(3) Violation of any lawful order or rule of the department.

56. Section 626.878, Florida Statutes, provides as follows:

An adjuster shall subscribe to the code of ethics specified in the rules of the department.

57. Rule 4-220.201, Florida Administrative Code, provides a code of ethics, in pertinent part, as follows:

(4) Code of Ethics. The work of adjusting insurance claims engages the public trust. An adjuster must put the duty for fair and honest treatment of the claimant above the adjuster's own interests, in every instance. The following are standards of conduct that define ethical behavior.

(a) An adjuster shall disclose all financial interest in any direct or indirect

aspect of an adjusting transaction. For example: an adjuster shall not directly or indirectly refer or steer any claimant needing repairs or other services in connection with a loss to any person with whom the adjuster has an undisclosed financial interest, or which person will or is reasonably anticipated to provide the adjuster any direct or indirect compensation for the referral or for any resulting business.

(b) An adjuster shall treat all claimants equally. An adjuster shall not provide favored treatment to any claimant. An adjuster shall adjust all claims strictly in accordance with the insurance contract.

* * *

(h) An adjuster shall exercise extraordinary care when dealing with elderly clients, to assure that they are not disadvantaged in their claims transactions by failing memory or impaired cognitive processes.

* * *

(l) An adjuster shall not attempt to negotiate with or obtain any statement from a claimant or witness at a time that the claimant or witness is, or would reasonably be expected to be, in shock or serious mental or emotional distress as a result of physical, mental, or emotional trauma associated with a loss. Further, the adjuster shall not conclude a settlement when such settlement would be disadvantageous or to the detriment of a claimant who is in the traumatic or distressed state described above.

(m) An adjuster shall not knowingly fail to advise a claimant of their claim rights in accordance with the terms and conditions of the contract and of the applicable laws of this state. An adjuster shall exercise care not to engage in the unlicensed

practice of law as prescribed by the Florida Bar.

* * *

(5) Public Adjusters, Other Ethical Constraints. In addition to considerations set out above for adjusters, the following ethical considerations are specific to public adjusters.

* * *

(c) The public adjuster shall ensure that if a contractor, architect, engineer, or other licensed professional is used in formulating estimates or otherwise participates in the adjustment of the claim, the professional must be licensed by the Florida Department of Business and Professional Regulation.

* * *

(f) A public adjuster shall not accept referrals of business from any person with whom the public adjuster may conduct business where there is any form or manner of agreement to compensate the person, whether directly or indirectly, for referring business to the public adjuster. Except as between licensed public adjusters, or licensed public adjusters and members of the Florida Bar, no public adjuster may compensate any person, whether directly or indirectly, for the principal purpose of referring business to the public adjuster.

58. Rule 4-220.051(7)(c), Florida Administrative Code, provides as follows:

(1) Purpose and Scope. This rule sets forth Department policy as to certain matters generally affecting public adjusters. Procedures regarding application for licensure are not dealt with in this

rule. Ethical provisions are not dealt with in this rule.

* * *

(4) Advertising.

(a) As with all forms of advertising concerning the business of insurance, public adjusters shall not falsely inform or advertise as set forth in Section 626.9541(1)(b), Florida Statutes, as well as any other section within the Insurance Code which relates to advertising.

* * *

(c) Advertisements to Show Licensee's Full Name. Any advertisement by a resident public adjuster shall state the full name as specified in Department records of the public adjuster who has caused the advertisement to appear. . . .

1. Print Advertisements. In print advertisements the public adjuster's full name as specified in Department records shall be in typeface no smaller than the typeface of the main body of text in the advertisement. Print advertisements include newspapers, magazines, flyers, brochures, business cards, adhesive and magnetic publication, and similar printed materials. . . .

59. Petitioner established by clear and convincing evidence that Respondent violated the code of ethics set forth in Rule 4-220.201, Florida Administrative Code, as alleged in Count I of the Administrative Complaint by failing to advise Ms. Fuentes of his indirect financial interest in Online Salvage. Respondent's failure to adhere to the code of ethics violated Section 626.878, Florida Statutes, thereby violating

Section 626.621(2) and (3), Florida Statutes. In addition, Petitioner established by clear and convincing evidence that Respondent breached his fiduciary duty to Ms. Fuentes by placing the first draw from the insurance proceeds in the Online Salvage operating account. That breach of duty constituted a violation of Section 626.611(7), Florida Statutes. Petitioner also established by clear and convincing evidence that Respondent deliberately misled Ms. Fuentes into assuming that Mr. Schaparo was a contractor, thereby violating the provisions of Section 626.611(9), Florida Statutes.

60. Petitioner established by clear and convincing evidence that Respondent failed to make disclosures required by the code of ethics as alleged in Count II. Respondent's failure to adhere to the code of ethics violated Section 626.878, Florida Statutes, thereby violating Section 626.621(2) and (3), Florida Statutes. Petitioner also established by clear and convincing evidence that Respondent misrepresented Mr. Schaparo's status to the Lees. That misrepresentation violated the provisions of Section 626.611(9), Florida Statutes.

61. Petitioner established by clear and convincing evidence that Respondent posted a flyer that did not comply with the requirements of Rule 4-220.051(7)(c), Florida Administrative Code, as alleged in Count III. Moreover, the flyer was a misleading advertisement, which violates Section 626.9541(1)(b),

Florida Statutes, and Rule 4-220.051(4)(a), Florida Administrative Code. Respondent's failure to comply with a statute and rules pertaining to advertising violated Section 626.621(2) and (3), Florida Statutes.

62. Petitioner established by clear and convincing evidence that Respondent moved his office without notifying Petitioner within 30 days as required by Section 626.551, Florida Statutes. Respondent's failure to comply with that statute violated Section 626.621(2), Florida Statutes.

63. Chapter 4-231, Florida Administrative Code, provides penalty guidelines pertinent to this proceeding. Rule 4-231.040, Florida Administrative Code, provides, in pertinent part, the following method for calculating the penalty for a count in an administrative complaint containing multiple violations of Sections 626.611 and 626.621, Florida Statutes, and the method for assessing the total penalty:

(a) The Department is authorized to find that multiple grounds exist under sections 626.611 and 626.621, Florida Statutes, for disciplinary action against the licensee based upon a single count in an administrative complaint based upon a single act of misconduct by a licensee. However, for the purpose of this rule chapter, only the violation specifying the highest stated penalty will be considered for that count. The highest stated penalty thus established for each count is referred to as the "penalty per count".

(b) The requirement for a single highest stated penalty for each count in an

administrative complaint shall be applicable regardless of the number or nature of the violations established in a single count of an administrative complaint.

(2) Total Penalty. Each penalty per count shall be added together, and the sum shall be referred to as the "total penalty".

(3) Final Penalty. The final penalty which will be imposed against a licensee under these rules shall be the total penalty, as adjusted to take into consideration any aggravating or mitigating factors; provided, however, the Department shall convert the total penalty to an administrative fine and probation in the absence of a violation of section 626.611, Florida Statutes, if warranted upon the Department's consideration of the factors set forth in rule subsection 4-231.160(1).

64. The highest penalty for the violations found in Count I is for the violation of Section 626.611(9), Florida Statutes. The recommended penalty for that violation, as set forth in Rule 4-231.080(7), Florida Administrative Code, is the suspension of Respondent's license for nine months.

65. The highest penalty for the violations found in Count II is for the violation of Section 626.611(9), Florida Statutes. The recommended penalty for that violation, as set forth in Rule 4-231.080(9), Florida Administrative Code, is the suspension of Respondent's license for nine months.

66. The highest penalty for the violations found in Count III is for the violation of Section 626.621(2) or Section 626.621(3), Florida Statutes, by failing to adhere to the code of ethics set forth in duly-adopted rules. The

recommended penalty for either violation, as set forth in Rule 4-231.090(2) and (3), Florida Administrative Code, is the suspension of Respondent's license for three months.

67. The highest penalty for the violations found in Count IV is for the violation of Section 626.621(2), Florida Statutes, by failing to comply with Section 626.551, Florida Statutes. The recommended penalty for that violation, as set forth in Rule 4-231.090(2), Florida Administrative Code, is a suspension of Respondent's license for three months.

68. Rule 4-231.160, Florida Statutes, provides the following aggravating and mitigating factors to be considered in determining the penalties to be imposed against a licensee:

The Department shall consider the following aggravating and mitigating factors and apply them to the total penalty in reaching the final penalty assessed against a licensee under this rule chapter. After consideration and application of these factors, the Department shall, if warranted by the Department's consideration of the factors, either decrease or increase the penalty to any penalty authorized by law.

- (1) For penalties other than those assessed under rule 4-231.150:
 - (a) willfulness of licensee's conduct;
 - (b) degree of actual injury to victim;
 - (c) degree of potential injury to victim;
 - (d) age or capacity of victim;
 - (e) timely restitution;
 - (f) motivation of agent;
 - (g) financial gain or loss to agent;
 - (h) cooperation with the Department;
 - (i) vicarious or personal responsibility;
 - (j) related criminal charge; disposition;

- (k) existence of secondary violations in counts;
- (l) previous disciplinary orders or prior warning by the Department; and
- (m) other relevant factors.

69. In considering the penalty recommendations that follow, the undersigned has considered Respondent's prior disciplinary history, the nature of the violations found herein, the lack of trustworthiness demonstrated by Respondent, and the damages suffered by Ms. Fuentes and the Lee family. Based on those considerations, the undersigned recommends that Respondent's license be revoked.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner enter a final order that adopts the Findings of Fact and Conclusions of Law contained herein. It is further RECOMMENDED that Respondent's license be revoked.

DONE AND ENTERED this 20th day of June, 2002, in Tallahassee, Leon County, Florida.

CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of June, 2002.

ENDNOTES

^{1/} The alleged misleading advertisements set forth in Count III were posted in Kissimmee, Florida, following a series of tornados. Ms. Presswood is a code enforcement officer employed by the City of Kissimmee.

^{2/} The fact that he was its registered agent does not constitute a direct or indirect financial interest in the corporation.

^{3/} As discussed in the Conclusions of Law section of this Recommended Order, Respondent had a duty to disclose that indirect financial interest to Ms. Fuentes once Online Salvage became involved in the board-up and the construction of her residence, but he failed to do so. The code of ethics for public insurance adjusters clearly requires such disclosure. See Rule 4-220.201(4)(a), Florida Administrative Code.

^{4/} Petitioner introduced evidence that Respondent had used Mr. Schaparo to prepare estimates that Respondent used in adjusting losses. That evidence has not been considered by the undersigned because the evidence does not specifically pertain to either of the jobs at issue in this proceeding and because that allegation was not pled in the First Amended Administrative Complaint.

^{5/} There is no issue that Respondent failed to negotiate an appropriate settlement with the insurance company.

^{6/} A Insurance Restoration was created after August 8, 1997, which was after Ms. Fuentes entered into the contract with Reliance Adjusters to adjust the loss and it was after she authorized Sunshine Contractors to begin the necessary repair work. Although Respondent failed to disclose his direct or indirect interest in A Insurance Restoration to Ms. Fuentes, Petitioner failed to establish that he had a duty to do so.

^{7/} Patricia Lee, Mr. Lee, Sr.'s other daughter, testified at the final hearing.

^{8/} Petitioner attempted to prove that Respondent forged the signature of Jamie Farach on an application for a building permit pertaining to the Lee job. That evidence has not been considered by the undersigned because that allegation was not pled by the First Amended Administrative Complaint.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

¹ The alleged misleading advertisements set forth in Count III were posted in Kissimmee, Florida, following a series of tornados. Ms. Presswood is a code enforcement officer employed by the City of Kissimmee.

² The fact that he was its registered agent does not constitute a direct or indirect financial interest in the corporation.

³ As discussed in the Conclusions of Law section of this Recommended Order, Respondent had a duty to disclose that indirect financial interest to Ms. Fuentes once Online Salvage became involved in the board-up and the construction, but he failed to do so. The code of ethics for public

insurance adjusters clearly requires such disclosure. See, Rule 4-220.201(4)(a), Florida Administrative Code.

⁴ Petitioner introduced evidence that Respondent had used Mr. Schaparo to prepare estimates that Respondent used in adjusting losses. That evidence has not been considered by the undersigned because the evidence does not specifically pertain to either of the jobs at issue in this proceeding and because that allegation was not pled in the First Amended Administrative Complaint.

⁵ There is no issue that Respondent failed to negotiate an appropriate settlement with the insurance company.

⁶ A Insurance Restoration was created after August 8, 1997, which was after Ms. Fuentes entered into the contract with Reliance Adjusters to adjust the loss and it was after she authorized Sunshine Contractors to begin the necessary repair work. Although Respondent failed to disclose his direct or indirect interest in A Insurance Restoration to Ms. Fuentes, Petitioner failed to establish that he had a duty to do so.

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