

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF REAL ESTATE, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 06-0150PL  
 )  
WILLIAM HENRY THOMAS, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case before Lawrence P. Stevenson, Administrative Law Judge of the Division of Administrative Hearings, on October 18, 2007, in Port Charlotte, Florida.

APPEARANCES

For Petitioner: Patrick J. Cunningham, Esquire  
Department of Business and  
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For Respondent: Nevin A. Weiner, Esquire  
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STATEMENT OF THE ISSUE

The issue in this case is whether the Respondent, William Henry Thomas, committed the violations alleged in a two-count

Administrative Complaint issued by the Petitioner, Department of Business and Professional Regulation, Division of Real Estate, on July 26, 2005, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

Petitioner issued a two-count Administrative Complaint on July 26, 2005, against Respondent, alleging in Count I that Respondent "is guilty of having been convicted or found guilty of, or entered a plea of nolo contendere to, regardless of adjudication, a crime which involves moral turpitude or fraudulent or dishonest dealing in violation of Subsection 475.25(1)(f), Florida Statutes." Petitioner alleged, in part, the following factual basis for the charge:

On or about December 20, 2002, Respondent pled nolo contender [sic] to the charge of possession of child pornography, a third degree felony in the state of Florida . . .  
On or about December 20, 2002, Respondent was adjudicated guilty of the charge of possession of child pornography, a third degree felony in the state of Florida and sentenced to five (5) years sex offender probation . . .<sup>[1]</sup>

Count II of the Administrative Complaint alleged that Respondent "is guilty of not having informed the Florida Real Estate Commission in writing within 30 days of having pled guilty or having been convicted of a felony and, therefore, is in violation of Subsection 475.25(1)(p), Florida Statutes." As a factual basis for this charge, Petitioner attached a letter to

the Administrative Complaint addressed to Petitioner from Respondent, dated March 14, 2003, and received by Petitioner on March 21, 2003, informing Petitioner of Respondent's plea of nolo contendere to a third degree felony.

Respondent timely filed an election of rights requesting a formal hearing to contest the factual allegations of the Administrative Complaint. On January 12, 2006, the case was referred to the Division of Administrative Hearings (DOAH) for assignment of an administrative law judge to conduct a formal administrative hearing. The case was originally set for hearing on March 30 and 31, 2006.

On March 14, 2006, Petitioner filed a Motion for Summary Final Order, which was denied after a telephonic hearing on March 27, 2006. On March 30, 2006, Respondent filed an uncontested motion to abate the proceedings pending the outcome of Respondent's motions and appeals pending in the Florida criminal courts. By Order dated March 30, 2006, the pending hearing was continued and the case placed in abeyance. The parties were required to file periodic status reports during the abeyance period, which was extended four times while Respondent's criminal appeals were pending. The hearing was ultimately scheduled for October 17 and 18, 2007, and was held on October 18, 2007.

At the final hearing, Petitioner presented the testimony of David Guerdan, an investigation supervisor for Petitioner, and of Douglas Skelly, a probation officer for the Department of Corrections. Petitioner's Exhibits 1 through 4 were admitted into evidence. Respondent testified in his own behalf and presented the testimony of his wife, Margaret Thomas; Frank Vargo, pastor of Freedom Bible Church in Port Charlotte; Scott Brenner, a real estate broker and Respondent's employer; Susan Pintz, a sales associate and Respondent's co-worker; and Robert Hackett, a real estate agent and friend of Respondent. Respondent's Exhibits 1 through 18 were admitted into evidence.

A Transcript of the hearing was filed with the Division of Administrative Hearings on January 3, 2008. At the hearing, the parties agreed that their proposed recommended orders would be filed within 30 days after the filing of the transcript. Both parties timely filed their Proposed Recommended Orders, which have been fully considered in entering this Recommended Order.

All references to Florida Statutes and the Florida Administrative Code in this Recommended Order are to the versions applicable at the time of the Administrative Complaint, unless otherwise indicated.

#### FINDINGS OF FACT

1. Petitioner, the Department of Business and Professional Regulation, Division of Real Estate (hereinafter referred to as

the "Department"), is the state agency charged with the duty to prosecute administrative complaints pursuant to Section 20.125, and Chapters 120, 455, and 475, Florida Statutes.

2. Respondent William Henry Thomas is a licensed Florida real estate agent. Mr. Thomas's license number is 590454.

3. At the time of the hearing, Mr. Thomas was listed as a sales associate affiliated with Brenner Realty, Inc. ("Brenner Realty"), license number CQ 1014108, a brokerage corporation located at 9400 Gladiolus Drive, Suite 290, Fort Myers, Florida 33908.

4. Mr. Thomas has been actively licensed in Florida since August 17, 1992. No prior disciplinary action has been brought against Mr. Thomas.

5. On December 20, 2002, Mr. Thomas entered a plea of nolo contendere to two counts of possession of child pornography pursuant to Subsection 827.071(5), Florida Statutes. Mr. Thomas was adjudicated guilty and sentenced to five years of sex offender probation for each count, the sentences to run consecutively. Mr. Thomas was also ordered to attend sex offender treatment and counseling, and not to attend "any nudist colonies" during the period of his probation.<sup>2</sup>

6. The official transcript of Mr. Thomas' plea proceeding was entered into the record of this case. During that

proceeding, assistant state attorney John L. Burns described the facts that the state would have shown at trial as follows:

Judge, what we show is that through the testimony of various agents from the Federal Bureau of Investigation . . . that [an] Internet computer investigation began nationwide that eventually through their investigation turned up several people, some in Texas, across the country, but eventually a portion of the investigation was linked to this defendant.<sup>[3]</sup>

And that we would show on several occasions Mr. Thomas had in his possession— what he would do is, he would take from news groups depictions that would be deemed child pornography, and while he would not download them to his computer, he would save the pictures on what's called [an] ISP server, such as Yahoo, or Hotmail, which would allow him to access those pictures via his computer at any time. He was able to receive, send, or distribute those photographs through the Internet by posting those photographs from one news group to another news group.

7. At the court's behest, Mr. Burns made the standard plea inquiries of Mr. Thomas, who answered that he could read, write and understand the English language; that he was not currently under the influence of any drugs, alcohol or intoxicants; that he was not suffering from mental illness; that he had no physical disabilities that would prevent him from understanding his plea; that he in fact heard and understood the terms of his plea; that he desired to enter the plea; that he had the opportunity to ask his attorney questions about the plea; that

his attorney satisfactorily answered those questions; that he was giving up the right to a jury trial and to appeal his adjudication; that he had not been threatened or coerced in any manner to enter the plea; that he had been given no promises in exchange for his plea, aside from the agreement stated in open court; and that he was fully satisfied with the services of his attorney.

8. Despite his statements in open court, Mr. Thomas testified in the instant proceeding that his plea was in essence coerced by his then-attorney. Mr. Thomas testified that FBI agents arrived at his front door on February 26, 2002. They had no warrant and asked to come inside and talk. Mr. Thomas let them in and talked with them for an hour about message boards. The agents asked whether Mr. Thomas was familiar with the "Candyman" internet site. Mr. Thomas admitted using message boards, but told the agents he had never heard of the "Candyman" site. The agents asked if they could examine Mr. Thomas' computer. Believing he had no choice, Mr. Thomas allowed the agents to search his computer. His computer was never seized by law enforcement authorities, and no search warrant was ever issued against Mr. Thomas.

9. Mr. Thomas testified that he was never a member of the Candyman group and never knowingly received images from its members. He stated that the Yahoo e-mail address and internet

service provider ("ISP") that the FBI attributed to him were incorrect, and that his own Yahoo account was set up to automatically block e-mail and spam. Mr. Thomas testified that his lawyer never obtained adequate discovery from the FBI and that he was never allowed to see the two photographs that he was alleged to have had in his possession.<sup>4</sup>

10. Mr. Thomas testified that his lawyer convinced him that pleading to the charges in state court and accepting probation was the only way to avoid federal prosecution and a possible prison sentence. Mr. Thomas was convinced that the FBI would not hesitate to provide false testimony in order to obtain his conviction in a federal trial. Further, during the time the prosecution was pending, Mr. Thomas' wife was diagnosed with diabetes and hospitalized. She suffered pronounced weight loss and was emotionally distraught at the thought of Mr. Thomas going to prison. In light of all these circumstances, Mr. Thomas decided to accept the plea offer.

11. Mr. Thomas testified that, while it seemed expedient at the time, accepting the plea offer only caused him more distress. He had a long talk with his wife, during which he told her he could not live with the fact that he had admitted guilt to a crime he did not commit. In January 2003, Mr. Thomas retained his current counsel and set about attempting to set the plea aside and vacate his conviction, via various motions filed



during January and February 2003. The motions were ultimately denied by court order dated February 21, 2003. Mr. Thomas received a final order of probation on March 10, 2003.

12. In a letter dated March 14, 2003, Mr. Thomas informed the Florida Real Estate Commission of his nolo contendere plea to the charge of possession of child pornography, a third degree felony. The letter was received by the Department on March 21, 2003. Mr. Thomas conceded that the letter was sent more than 30 days after he entered his plea. Mr. Thomas testified that for a time after he entered his plea, he was unaware of the 30-day reporting requirement. After he learned about the requirement, he still hesitated because he believed that his plea was not final while his motions to set the plea aside and vacate his conviction were pending before the court. Mr. Thomas did notify the Florida Real Estate Commission within 30 days of the court order denying his motions.

13. The evidence indicates that Mr. Thomas did not attempt to conceal his conviction from the local real estate community in Port Charlotte. He immediately informed his broker at Century 21 of his conviction. Mr. Thomas left Century 21 in March 2003 after it became uncomfortable to work there, due to his employer's misguided concern that Century 21 would be listed on Mr. Thomas' entry on the Florida Department of Law Enforcement's sex offender web page. Mr. Thomas began

interviewing with other brokerages, and informed them of his conviction. These facts lend added credibility to Mr. Thomas' contention that he would have reported his conviction to the Florida Real Estate Commission within 30 days had he been fully cognizant of the requirement to do so.

14. Under the terms of his probation, Mr. Thomas had to allow his probation officer to conduct periodic "walk-throughs" of his home and to perform annually a complete search of the home. During the annual search performed on April 27, 2004, the probation officer found a box containing more than 200 "naturist" publications that included photographs of adults and children in the nude. The box was stored in a closet, out of plain sight. The probation officer, Douglas Skelly, testified that it was obvious the box had not been recently looked through. Though the photographs did not depict sexual activity, Mr. Skelly stated that the materials constituted a violation of Mr. Thomas' sex offender probation and reported the alleged violation to the court.

15. Mr. Thomas testified that the box of naturist publications had been stored in the closet since before his arrest and that he had simply forgotten they were there. On September 23, 2004, the court accepted Mr. Thomas' plea of guilty to two counts of probation violation. However, rather

than revoking or extending Mr. Thomas' probation, the court actually reduced it from ten to seven years.

16. Mr. Skelly verified that, aside from the incident with the naturist publications, Mr. Thomas has complied with every requirement of his sex offender probation.

17. Frank Vargo is the pastor of Freedom Bible Church, a 300 member church that Mr. Thomas has attended for six years. Pastor Vargo testified that Mr. Thomas told him about his history, and that Pastor Vargo kept an eye on Mr. Thomas while getting to know him. Pastor Vargo is convinced that Mr. Thomas is a good person and noted that Mr. Thomas "faithfully" attends church and is a frequent volunteer. Pastor Vargo has heard nothing negative about Mr. Thomas. He has recommended Mr. Thomas to persons needing a real estate agent, and would not hesitate to do so in the future.

18. Scott Brenner is a Florida licensed real estate broker and the owner of Brenner Realty, with which Mr. Thomas has been licensed for about three and one-half years. Mr. Brenner has been aware of Mr. Thomas' legal situation since hiring him. He described Mr. Thomas as possessing a high degree of professionalism, integrity, and an earnest desire to represent his clients. Mr. Brenner has no qualms about Mr. Thomas' having access to the lockbox that allows a real estate agent to enter a house for sale. He has received no complaints about Mr. Thomas.

19. Fellow realtors Susan Pintz and Robert Hackett testified on behalf of Mr. Thomas. They both spoke highly of his professional capabilities and personal qualities. Ms. Pintz stated that Mr. Thomas has always acted with honesty and integrity. Mr. Hackett, who has known Mr. Thomas and his family for 15 years, was grateful to Mr. Thomas for helping him pass the real estate licensing exam and became good friends with him. Mr. Hackett testified that he has never seen Mr. Thomas do anything dishonest, unethical, or inappropriate in his business or personal dealings.

20. Margaret Thomas has been married to Mr. Thomas for 30 years. They have a 26-year-old son. She described Mr. Thomas as a good husband and father, and a fine person who is always the first to help others in times of distress. Ms. Thomas is the general manager of a hearing aid service, and testified that the family income would be cut by half if Mr. Thomas lost his real estate license. She has diabetes for which she takes insulin, and she takes other medications for a mini-stroke she has suffered. Mr. Thomas has recently had several surgeries for diverticulosis and a ruptured bowel. Ms. Thomas testified that her husband's income is critical to meeting the family's medical and other expenses.

21. The Department offered no actual evidence to establish that Mr. Thomas presents a risk to persons dealing with him in a

professional capacity. The hypothetical situation of Mr. Thomas' using his lockbox privileges to enter a house in which only children were present was mooted at the hearing. Mr. Thomas persuasively testified that such an incident has never occurred in his experience. His clientele in Port Charlotte consists mainly of retirees; he has not had a client with children in five or six years. In any event, Mr. Thomas has practiced pursuant to his license almost continuously since 1992 without incident or complaint.

#### CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto, pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2007).

23. In the Administrative Complaint, the Department seeks to impose penalties against Mr. Thomas, including suspension or revocation of his license and/or the imposition of an administrative fine. The Department, therefore, has the burden of proving the allegations of the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); and Nair v. Department of Business & Professional Regulation, 654 So. 2d 205, 207 (Fla.

1st DCA 1995). Clear and convincing evidence is the proper standard in license revocation proceedings, because they are penal in nature and implicate significant property rights. See Osbourne Stern, 670 So. 2d at 935.

24. In Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), the Court defined clear and convincing evidence as follows:

[C]lear 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 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).

25. Judge Sharp, in her dissenting opinion in Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652, 655 (Fla. 5th DCA 1998)(Sharp, J., dissenting), reviewed recent pronouncements on clear and convincing evidence:

Clear and convincing evidence requires more proof than preponderance of evidence, but less than beyond a reasonable doubt. In re Inquiry Concerning a Judge re Graziano, 696 So. 2d 744 (Fla. 1997). It is an intermediate level of proof that entails both qualitative and quantitative [sic] elements. In re Adoption of Baby E.A.W., 658 So. 2d 961, 967 (Fla. 1995), cert.

denied, 516 U.S. 1051, 116 S. Ct. 719, 133 L.Ed.2d 672 (1996). The sum total of evidence must be sufficient to convince the trier of fact without any hesitancy. Id. It must produce in the mind of the fact finder a firm belief or conviction as to the truth of the allegations sought to be established. Inquiry Concerning Davey, 645 So. 2d 398, 404 (Fla. 1994).

26. Section 475.25, Florida Statutes, provides that disciplinary action may be taken against the license of a real estate sales associate if it is found that the associate has committed certain enumerated offenses. In this matter, it has been alleged that Mr. Thomas committed the offense described in Subsection 475.25(1)(f), Florida Statutes, which provides, in pertinent part:

Has been convicted or found guilty of, or entered a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the activities of a licensed broker or sales person, or involves moral turpitude or fraudulent or dishonest dealing. The record of a conviction certified or authenticated in such form as to be admissible in evidence under the laws of the state shall be admissible as prima facie evidence of such guilt. (Emphasis added).

27. In support of the alleged statutory violation, the Department has alleged that Mr. Thomas' nolo contendere plea to possession of child pornography pursuant to Subsection 827.071(5), which the Department proved clearly and

convincingly, constitutes a plea to a crime which "involves moral turpitude."

28. Being penal in nature, Section 475.25, Florida Statutes, "must be construed strictly, in favor of the one against whom the penalty would be imposed." Munch v. Department of Professional Regulation, Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992).

29. Mr. Thomas argues that a no contest plea does not constitute an admission of guilt, is not direct evidence of his guilt, and that his conviction is not conclusive proof that the alleged incident actually occurred. Kelly v. Department of Health and Rehabilitative Services, 610 So. 2d 1375, 1377 (Fla. 2d DCA 1992)("A no contest plea . . . represents only an accused's unwillingness to contest charges against him, and does not constitute an admission of guilt and may not be used as direct evidence of guilt in a civil suit or in an administrative proceeding.").

30. Mr. Thomas' reliance on Kelly is unavailing because of the different statutes applicable in that case and this. In Kelly, the appellant had pled no contest to a charge of child abuse, and sought to have his name expunged from the Child Abuse Registry as a confirmed perpetrator. The court noted that the expunction statute, then in force,<sup>5</sup> placed the burden on the Department of Health and Rehabilitative Services to "prove by a



preponderance of the evidence that the alleged perpetrator committed the abuse." The court further noted that the statute "does not provide that a conviction of child abuse will be deemed conclusive proof that such abuse actually took place. Nor is it provided anywhere in Chapter 415 that an alleged perpetrator's name will be entered into the abuse registry simply upon a conviction of child abuse." Kelly, 610 So. 2d at 1377-78. In light of the statutory requirements that the actual abuse be proven and that conviction did not constitute such proof, the court held that appellant's no contest plea and conviction were insufficient to support his placement on the abuse registry. Id. at 1378.

31. In contrast, Subsection 475.25(1)(f), Florida Statutes, does not require the Department to prove that Mr. Thomas actually possessed child pornography. Subsection 475.25(1)(f), Florida Statutes, defines the plea itself as the offense for which disciplinary action may be taken against the license, without regard to the underlying crime.

32. Mr. Thomas pled nolo contendere to and was adjudicated guilty of violating Subsection 827.071(5), Florida Statutes. At the time of Mr. Thomas' adjudication, Subsection 827.071(5) provided:

It is unlawful for any person to knowingly possess a photograph, motion picture, exhibition, show, representation, or other

presentation which, in whole or in part, he or she knows to include any sexual conduct by a child. The possession of each such photograph, motion picture, exhibition, show, representation, or presentation is a separate offense. Whoever violates this subsection is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

33. Mr. Thomas argues that the offense in question does not necessarily involve moral turpitude. Department of Professional Regulation, Division of Real Estate v. Rosenberg, Case No. 89-5858 (DOAH May 7, 1990), involved disciplinary proceedings against a real estate broker who had pled guilty to several offenses involving the possession and distribution of child pornography. Though Rosenberg is factually distinguishable from the instant case, its conclusions regarding Subsection 827.071(5), Florida Statutes,<sup>6</sup> and moral turpitude are persuasive and adopted as the rule of this case:

13. The case of State ex rel. Tullidge v. Hollingsworth, 146 So. 666 (Fla. 1933), defines "moral turpitude" as follows:

Moral turpitude involves the idea of inherent baseness or depravity in the private social relations or duties owed by man to man or man to society.

\* \* \*

It has also been defined as anything done contrary to justice, honesty, principle or good morals . . .

14. As stated previously, Counts I through IV of the Information charged the Respondent

with unlawful and knowing possession of four motion pictures containing sexual conduct by children. Although there are no Florida cases which describe the possession of such materials as "moral turpitude," Section 827.071(5), Florida Statutes, makes it clear that knowing possession of such materials is a crime. If individuals do not attempt to procure such materials, it is reasonable to conclude that fewer children will be subjected to such exploitation and mistreatment. Adults owe a duty to children not to debauch them by placing them in pornographic films. The support of the child pornography market is morally despicable or abhorrent, and meets Florida's definition of "moral turpitude." (Emphasis added).

34. The Department has proved clearly and convincingly that Mr. Thomas violated Subsection 475.25(1)(f), Florida Statutes, as alleged in the Administrative Complaint.

35. The second count of the Administrative Complaint alleged that Mr. Thomas committed the offense described in Subsection 475.25(1)(p), Florida Statutes, which provides, in pertinent part:

Has failed to inform the commission in writing within 30 days after pleading guilty or nolo contendere to, or being convicted or found guilty of, any felony.

36. Mr. Thomas entered his plea on December 20, 2002. He wrote a letter to inform the Florida Real Estate Commission of his plea on March 14, 2003. The Department received the letter on March 21, 2003. Mr. Thomas contended that his failure to report was unintentional, based on his lack of actual knowledge

of Subsection 475.25(1)(p), Florida Statutes. Alternately, Mr. Thomas contended that there was no requirement to inform the commission while his motions to set aside the plea and void his conviction were pending. Neither contention is supportable under the plain language of the statute. Thus, the Department has proved clearly and convincingly that Mr. Thomas violated Subsection 475.25(1)(p), Florida Statutes.

37. A range of disciplinary guidelines for violations of Chapter 475, Florida Statutes, has been adopted in Florida Administrative Code Rule 61J2-24.001.

38. For a violation of Subsection 475.25(1)(f), Florida Statutes, the suggested penalty range is a seven-year suspension to revocation and an administrative fine of \$1,000. Fla. Admin. Code R. 61J2-24.001(3)(g).

39. For a violation of Subsection 475.25(1)(p), Florida Statutes, the suggested penalty range is a five-year suspension to revocation. Fla. Admin. Code R. 61J2-24.001(3)(q).

40. The Department in its Proposed Recommended Order has suggested revocation of Mr. Thomas's license. This recommendation is based upon the Department's contentions that no mitigating circumstances have been proved, that he has not demonstrated rehabilitation, and that the nature of the crime of which Mr. Thomas was convicted is such that he cannot hold the public trust.

41. Florida Administrative Code Rule 61J2-24.001(4) provides for a consideration of aggravating or mitigating circumstances demonstrated by clear and convincing evidence by the petitioner or respondent in a proceeding before the Division of Administrative Hearings. If demonstrated, the disciplinary rule may deviate from the guidelines.

42. The aggravating or mitigating circumstances that may be considered include, but are not limited to, the following:

1. The degree of harm to the consumer or public.
2. The number of counts in the Administrative Complaint.
3. The disciplinary history of the licensee.
4. The status of the licensee at the time the offense was committed.
5. The degree of financial hardship incurred by a licensee as a result of the imposition of a fine or suspension of the license.

43. Despite the Department's contentions, the evidence established several mitigating circumstances that should be considered in this case:

a. There has been no harm to the consumer or the public as a result of Mr. Thomas' offenses. Mr. Thomas' offenses had no connection with the real estate profession;

b. Mr. Thomas has no prior discipline as a real estate associate in Florida;

c. Mr. Thomas' status at the time of the offense was that of an active Florida associate in good standing; and

d. Mr. Thomas and his wife, both of whom suffer serious medical problems, would incur great financial harm if his license were revoked.

44. Even assuming that Mr. Thomas actually performed the acts of which he was accused, his conduct was entirely unrelated to his real estate practice. Despite his regret at entering a plea and his continued efforts at exoneration, Mr. Thomas has complied with the terms of his probation. The Department failed to show, except by way of a strained and unsupported hypothetical, that Mr. Thomas' continued practice of the real estate profession constitutes any sort of threat to the public. Mr. Thomas has practiced his profession in the same geographic area of Florida since 1992 without so much as a complaint against him. While proving that Mr. Thomas committed the violations alleged in the Administrative Complaint, the Department has failed to justify its recommendation of license revocation.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that

A final order be entered finding that William Henry Thomas violated Subsections 475.25(1)(f) and (p), Florida Statutes, and placing his license on probation for a period of five years.

DONE AND ENTERED this 21st day of March, 2008, in Tallahassee, Leon County, Florida.



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LAWRENCE P. STEVENSON  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 21st day of March, 2008.

ENDNOTES

<sup>1/</sup> Respondent in fact pled guilty to two counts of possession of child pornography and was sentenced to five years of probation on each count, to run consecutively.

<sup>2/</sup> Mr. Thomas testified that he and his wife are "naturists," i.e., persons who enjoy recreation activities in the nude, but who do not embrace the full-time lifestyle of "nudists."

<sup>3/</sup> This nationwide investigation was called "Operation Candyman," named after the "Candyman" e-group. This Yahoo e-group allowed collectors and distributors of child pornography to use online resources to retrieve and distribute child pornography. See Federal Bureau of Investigation press release, "Operation Candyman," dated March 18, 2002.  
<http://www.fbi.gov/pressrel/pressrel02/cm031802.htm>

<sup>4/</sup> Mr. Thomas' current counsel made much of the fact that the images were never physically downloaded to Mr. Thomas' computer. However, as Mr. Burns noted in his statement of proof to the court, an ISP such as Yahoo provides remote storage service to its users, allowing them to access and distribute materials without downloading them to a local hard drive.

<sup>5/</sup> Subsection 415.504(4)(d)3., Florida Statutes (1992).

<sup>6/</sup> At the time of Rosenberg, Subsection 827.071(5) provided:

It is unlawful for any person to knowingly possess any photograph, motion picture, exhibition show, representation, or other presentation which, in whole or in part, he knows to include any sexual conduct by a child. Whoever violates this subsection is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

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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.