5/26

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant

v.
ROY L. BEACH,
Respondent

Case NO.: 86,952
[TFB Case No.: 95-31,031(09A)]

INITIAL BRIEF

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STATEMENT OF THE CASE

The Florida Bar filed a complaint against the undersigned (Index page 3) alleging that the I was guilty of acts contrary to honesty and justice, that I had engaged in conduct involving dishonesty, fraud, deceit or misrepresentation and that I had engaged in conduct prejudicial to the administration of justice. [I shall refer to pleadings according to their page number on the Index to Record prepared by the Referee. I shall refer to exhibits as either Bar's Exhibit ____ or Respondent's Exhibit ____. I shall refer to the transcript before the Referee as T.I. ____/ _____ with the first blank designating the volume of the transcript and the second blank designating the pages.) The Bar contended that I was guilty of those acts by virtue of my participation in fraudulently promoting a business venture I was involved in. It was alleged in the initial complaint that I had violated several acts of the Florida Insurance Code by making knowing misrepresentations to the Florida public concerning a program which involved insurance. The Bar relied heavily upon the Findings of Fact and a Final Order entered in an administrative hearing by the Department of Insurance for the State of Florida (hereinafter "the Dept."). I filed an answer denying the allegations of wrongdoing (Index page 4) and an evidentiary hearing was held before a Referee. Written closing arguments were submitted by the Bar and myself (Index pages 17 and 18) and the Referee filed a Memorandum Report (Index

page 19). I asked for a reconsideration or clarification on certain points determined by the Referee (Index page 21) and submitted addition written argument (Index page 22). The Bar submitted a proposed report (Index page 23) and I took exception to it and asked for leave to supplement my earlier submitted written argument based upon the Bar's proposal (Index page 24). The Referee entered a final report (Index page 29) and I filed a petition with this Court seeking review of the Referee's findings and conclusions of law.

STATEMENT OF FACTS

The undersigned and three other individuals, Robert King, Ken King, (no relation) and Leroy Preston, formed a corporation called American Family Benefits Group, Inc. (hereinafter AFBG). AFBG offered memberships in a start up program to people which included non-qualifying mortgages and car leases, discounts on long distance telephone service, discounts off of certain catalogs, and an insurance program. The program was set up as a multi-level marketing program wherein a person could sell a membership to someone and then receive a certain portion of any proceeds derived by AFBG when the new member used any of the program benefits. You could build a "downline" and receive payment for the efforts of those under you in much the same way as Amway pays it's sales representatives. The sales rep would only make money if the new member took advantage of any

of the membership benefits offered by AFBG. The sales rep did not get any part of the membership fee charged by AFBG. AFBG was in "pre-launch" which is the multi-level marketing term applied to a new multi-level marketing company which is still lining up it's products, marketing representatives, marketing procedures and guidelines, etc. (T.I. II 262, 277, 278, 292, 293-294, 392-402).

The benefit which caught the most attention was AFBG's proposed usage of a life insurance policy. The new member would agree to allow AFBG to take out $350,000.00 of life insurance on himself with the new member being the owner of the policy and designating the beneficiary thereof. He would then allow AFBG to assign $280,000.00 worth of death benefits to guarantee the repayment of a loan taken out by AFBG. The balance of the death benefits would have gone to his chosen beneficiaries. This loan would have been $84,000.00. From this loan, AFBG would have taken out an annuity which would have guaranteed payment of the premiums on the insurance for the next twenty years when the loan was due to be paid off. The balance of the loan would then have paid compensation to the sales rep who signed up the new member, any "upline" compensation to be paid, buy a CD for the insured member and provide AFBG with money with which to invest in mutual funds and other money market vehicles. The income from the investments would have generated the revenue needed to retire the loan at it's due date. If the insured should die before the due date, the insurance company would have paid

off the loan from the death benefits with any unused portion going to the insured's chosen beneficiaries. Once the loan was paid off, the amount remaining in the annuity would have generated enough income to make the premium payments on a reduced amount of life insurance equal to the amount not needed to pay off the loan. The insured at all times retained the sole right to name the beneficiary. **AFBG** was never mentioned as a beneficiary. **All** insurance applications were to be handled strictly by licensed insurance agents and all commissions paid by the insurance companies were to be paid to the agents in accordance with any contract between the carrier and the agent. AFBG was not to share in any insurance commissions or premiums in any way. **(T.I. III 392-402).**

The Florida Department of Insurance filed a Cease and Desist Order against AFBG contending that it's operations were in violation of Florida's Insurance Code. A trial was held before an administrative hearing officer and an order was entered against **AFBG** and it's principals finding that they had engaged in making wilfull misrepresentations concerning insurance. The attorney who handled the case for the Department filed the complaint against the undersigned.

SUMMARY OF ARGUMENT

The Referee erroneously concluded that I had engaged in acts contrary to honesty and justice because of a reckless disregard for the truth relating to statements I made involving AFBG. There is no clear and convincing evidence which would support such a conclusion. The uncontradicted evidence shows that I had conducted myself based upon statements made to me by professionals in the fields of insurance and investments.

The Referee also erred when he determined that I had violated several sections of the Insurance Code. One section of the code which I am accused of violating required a finding of a rebate of a premium. I had asked for reconsideration of that point in a motion to the Referee and the Report of the Referee states that my motion was granted in part and the language in the Memorandum Report which held that I had violated the statute regarding giving rebates of premiums was not in the final report signed by the Referee and thus it is clear that the Referee agreed with my arguments concerning that point.

A finding that I had violated the section of Florida Statutes prohibiting offering free insurance was erroneous. A finding that I had violated other parts of the Insurance Code was also error because those statutes all required the making of knowing misrepresentations. The Referee had found an absence of clear and convincing evidence that I had made any wilfull misrepresentations precludes a finding that I had made any knowing misrepresentations. Both wilfull and knowing

misrepresentations require the same intent.

The Referee also erred when he found me guilty of conduct contrary to honesty and justice because of a reckless disregard for the truth when the pleadings against me, as well as the evidence and the argument of opposing counsel, all were geared to a showing that I had made intention, knowing misrepresentations to the Florida public. That was the issue argued and that was the issue which the parties tried to prove or disprove. Finding me guilty by virtue of acts which were not alleged, which were not argued, and which I did not know to present evidence contrary to deprives me of due process, was improper, and should be reversed.

The Referee erred when he determined that, as a matter of law, an act which shows a reckless disregard for the truth is also an act contrary to honesty and justice. An act contrary to honesty and justice requires some showing of intentional wrongdoing on the part of the actor. There must be evidence that the acting party intended to be dishonest or unjust before those actions rise to the level of an ethics violation. The Referee found a lack of clear and convincing evidence to support a finding of a wilfull misrepresentation by me and that finding precludes a determination that I had engaged in an act contrary to honesty or justice. A reckless disregard for the truth does not supply that element.

I. THE REFEREE'S CONCLUSION THAT THE RESPONDENT HAD ENGAGED IN AN ACT CONTRARY TO HONESTY AND JUSTICE BECAUSE OF A RECKLESS DISREGARD **FOR THE TRUTH IS ERRONEOUS NOT SUPPORTED BY CLEAR** AND CONVINCING EVIDENCE **AND** SHOULD BE REVERSED.

The Bar had contended that the I was guilty of acts contrary to honesty and justice by virtue of my participation in fraudulently promoting a business venture I was involved in. It was alleged in the initial complaint that the Respondent had violated several acts of the Florida Insurance Code by making knowing misrepresentations to the Florida public concerning a program which involved insurance. The Bar relied heavily upon the Findings of Fact and a Final Order entered in an administrative hearing by the Department of Insurance for the State of Florida (hereinafter "the Dept."). The Referee, after reviewing the evidence presented to him and the transcript of the administrative hearing, correctly concluded that there was a lack of evidence supporting a finding, by clear and convincing evidence, that the total package offered by AFBG depended on the insurance portion of the package for financial viability. Such a finding had been made by the administrative hearing officer and was used by him to help justify his conclusion that AFBG and the Respondent had violated Florida's Insurance Code. The administrative hearing officer had concluded that AFBG and it's principals (including the undersigned) had made knowing

misrepresentations about insurance to the general public. The Referee, however, correctly concluded that the evidence presented at the administrative hearing and at the trial before him did not show, by clear and convincing evidence, that the I had made any KNOWING misrepresentation concerning the program. A knowing misrepresentation was a vital element of the charges brought against AFBG and it's principals. The Referee did, however, conclude that the evidence showed the I guilty of acts contrary to honesty and justice by my reckless disregard for the truth. This conclusion is error and should be reversed by this Court.

I was a principal in AFBG, which was a proposed multi-level program offering membership benefits to those who chose to join it's program. The program offered a variety of benefits, but the single most exciting benefit, and the one which attracted the most attention, was the proposed insurance benefit and it's related compensation package. The Dept. had argued, and the Bar adopted the argument, that the AFBG program was a fraud because it centered around a loan which was to be secured by a lien against the face amount of an insurance policy. [Since the Bar adopted the arguments of the Dept. in contending that I had engaged in unethical conduct, I shall refer to any arguments made by the Dept. as having been made by the Bar unless otherwise specified.] The Bar contended that the only part of an insurance policy that had any value to a lender was the cash value of the policy and not the face amount of the policy and thus the insurance program advanced by AFBG (and by extension

myself) was not feasible and the offering of the program to the public was a fraud upon the public.

What was the "truth" that I had "reckless disregard" of so as to support the Referee's determination of a violation? It all boils down to paragraph 10C of the Report of the Referee. The Referee found that there never was a bank ready and willing to fund the loans against the face amount of the policies in question. Be also found that claiming that policies were available was false and misleading and that no funding was possible because the policies had no cash value.

The finding that there never was an insurance company ready and willing to write the policies in question and that I recklessly disregarded this "truth" mandates that I ignore the representations of two insurance people involved with AFBG (Leroy Preston, who was a principal of AFBG and an independent insurance agent authorized to sell Massachusetts General [hereinafter Mass. General] policies and Gene Lindsey who owns his own insurance agency and who routinely sold Mass. General policies in the course of his business.). BOTH of those individuals told me that we could use Mass. General policies in our proposed program. They further told me that a highly influential individual, Tom Malone, had been fully briefed by them on our proposal and he was highly enthusiastic about the program. (Mr. Malone was, and probably still is, the owner of an insurance agency which routinely sold more Mass. General life insurance policies than any other agency.) Mr. Malone was reported to

have made a special trip out west to the company's home office to confer about the program with a Vice-President of Mass. General. The existence of the conversation between Mr. Malone and this vice-president was confirmed in writing in the form of a letter to Mr. Malone asking for more information about AFBG. (This letter is part of Bar's Exhibit 9.) All three of these insurance agents knew the full details of the AFBG proposal (including the usage of the face amount of the policy, not the cash value, as the security for the loan) and, according to my conversations with Mr. Preston and Mr. Lindsey, all three of them, together with the vice-president, were eager to start using Mass. General policies as proposed by AFBG. (T.I. III 419-421.). None of these individuals, all of whom made money off of the sale of Mass. General policies, ever gave me any indication that there would be a problem using Mass General. It was only after receiving a letter from an attorney for Mass. General that AFBG found out that there was any kind of problem. (Bar's Exhibit IO). This occurred in December, 1993. Mr. Preston and Mr. Lindsey immediately started to look for another carrier.

The Referee, by his finding that I had "recklessly disregarded the truth", made a finding that I should have disbelieved these gentlemen, called them liars and should not have repeated what they told me even though they were the insurance professionals who made their living off of selling life insurance and I was only an attorney who, according to the findings set forth in paragraph 1 of the Findings of Fact,

had briefly been a licensed insurance agent over a decade before and who claimed no special expertise in insurance.

The Referee's finding that I had "reckless disregard" of the fact that no loans against the face amount of a policy because of a lack of cash value mandates that I should have ignored the opinions of Mr. Preston, Mr. Lindsey, and Mr. Ken King, all of whom at some time or other, had paid their rent by the sale of life insurance policies. (Mr. Preston and Mr. Lindsey were, at that time, fully licensed insurance salesmen while Mr. Ken King had been a licensed insurance agent in another state but was not licensed in Florida). Mr. Malone never voiced any concern about using the face amount of a policy to secure a loan and neither did the vice-president he had spoken with. With the exception of Ken King, ALL of those gentles derived income from the sale of insurance policies. If they knew of a problem with our concept of getting a loan against the face amount of the policy instead of the cash value, they never made that known to me. Instead they all sought the furtherance of the program so as to put money in their pocket. Does it make any sense to conclude that these individuals, who would have made NO money if the program was not possible, would have invested their time, efforts, and even money in advancing the AFBG proposal if they believed that the loan as proposed was not feasible? If insurance professionals believed the program would work and they told me that they believed it would work, why should I disregard what they tell me, assume that they do

not know their profession and conclude that a loan cannot be obtained against the face amount of a policy?

The Referee concluded that there never was a bank ready and able to fund the proposed loans. Lining up the financing was not my responsibility. This was the responsibility of Mr. Robert King (no relation to Ken King). Assisting him were numerous individuals. I personally had spoken to Ms. Lois Kjeldgaard and Mr. Frank Ortiz. All of these individuals had a history of dealing in financial matters and investments, All of them knew the full details of the program. (Robert King was also a principal of AFBG). All of them believed that they could obtain financing for the insurance loans. Robert King was instrumental in finding a bank to service our proposed mortgage program (Respondents Exhibit 3) and Ms, Kjeldgaard lined up a joint venture agreement concerning our proposed car leasing program. (Respondents Exhibit 2) Robert King worked on the program without pay. Ms. Kjeldgaard had requested some money from us, but we had declined her request because we had no funds to provide her. Despite this she still continued trying to find financing for us. If individuals who routinely dealt in the world of finance and investments told me that they could find financing for our insurance program (knowing full well that the program called for a loan against the face amount of a policy and not the cash value of the policy and knowing full well that they would not get any money unless they were successful) why should I disbelieve them? Again they were the professionals,

not I. They knew their business, not I. Who I am to call them ignorant of their profession?

The only evidence adduced at the hearing before the Referee concerning the obtaining of a loan against the face amount of a policy came from Toby Luke who had testified in the administrative hearing. A Ms. Zeigler also testified before the administrative hearing officer but not before the Referee. A copy of the transcript of the administrative hearing was supplied to the Referee by the Respondent. This evidence does not rise to the level of clear and convincing evidence as set forth in my Written Closing Argument. (Index to Record, page 18,) Ms. Luke testified that her knowledge that a lending institution would only loan against the cash value of a policy came as a result of her 18+ years experience, and, to her knowledge, was limited to a handful of people who worked with her. There was absolutely no testimony that this specialized information was ever made known to me or to the people in the insurance field that I dealt with or that anybody other than her co-workers knew of this information. She had not spoken personally to any bank nor did she know of any one who had. She did not cite to any books or treatise to support her opinion. She did not cite to any state statute. Ms. Zeigler testified that only the cash value of a policy would support a loan, but again she had not spoken to any lender to verify her belief; a belief which she had gotten from a book whose name she could not remember and from an unnamed colleague. Again my Written

Closing Arguments sets forth the case law concerning expert testimony and why Ms. Zeigler's testimony is not competent evidence of anything, let alone clear and convincing evidence. It is respectfully requested that reference be made to that written argument for the case law concerning expert testimony.

By making a finding that I had recklessly disregarded the truth about the financing of the proposed program, the Referee is saying that I should have ignored the input from four insurance agents, three individuals who regularly dealt in finance and investments, and my own legal research (which reveled a prohibition against INSURANCE COMPANIES, not banks, etc. loaning against anything other than the cash value of a life insurance policy. See F.S. §626.321.). My failure to ignore seven other people and my own legal research (not to mention the thousands of others who believed the program could work; many of whom were insurance agents themselves) was a reckless disregard of the truth. The Referee is saying that I should have distrusted these people even though they gave me no cause to distrust them and even though there was no evidence presented to the Referee, or the administrative hearing officer, which would have shown that I should have distrusted them.

If someone were to ask three different attorneys for a legal opinion and get the same answer from each attorney, should that person disregard what he has been told? Should he be guilty of a "reckless disregard for the truth" should some other experts in the field later tell him that the attorneys were wrong? Here

I had multiple individuals in two different fields of endeavors telling me that the proposed program would work. These people had never lied to me before. They had never given me any cause to doubt their knowledge of their respective professions. There certainly was no evidence presented to the Referee or the administrative hearing officer that they had lied to me or that they were otherwise untrustworthy. Arguably they were wrong. But how does that show a "reckless disregard for the truth" on my part? I did not have one person telling me the program was sound. I had several. I did not have someone who had lied to and mislead me before telling me this. I did not have uneducated and inexperienced people telling me this. I had professionals in the two fields telling me that this program would work. I had people who would make no money off of a failed program, telling me that the program would work and who invested time, effort and money, into making it work (without getting paid to do so). If professionals in the fields believed the program was sound and had no doubt that a loan could have been obtained against the face amount of a policy, then who am I to disregard what they have told me? Why is my believing them a "reckless disregard for the truth"?

The Referee's comments in his footnote 4, page 4 are mistaken. He stated that:

> "It is impossible to prove an axiom, but axioms do not require proof. Clearly if one could borrow money on an unfunded insurance policy, everyone would."

That same argument could have been used against the concept of a viatical contract 15 years ago to defeat the concept. "If any terminally ill person could assign their policy proceeds to a lender in exchange for a portion of the face amount of the policy now, then every terminally ill person would." Fifteen years ago there were no such things as viatical contracts. Now they are common place and regulated by the Insurance Commissioner. While there are likenesses between AFBG's proposal and viatical contracts, the evidence put forth about those contracts goes more to show the ever changing, vibrant nature of the insurance industry which is constantly coming up with new ways to use insurance policies to meet the needs of a changing society. Our proposal was new.

The Referee's comments that the uncertainty of the death of the insured would preclude the success of the venture ignores the evidence put forth about how AFBG planned to repay the loans. We were going to invest part of the loans proceeds in various mutual and market funds. Those funds were represented to us as having a history of earning a certain return and three years later those funds were still earning the same rate of return that we had used in our calculations in determining the feasibility of the program. (Respondent's Exhibits 5 and 6). It was the earnings on AFBG's investments that were primarily responsible for the repayment of the loans. The policies were just meant as additional security to the lender. It also ignores the fact that the uncertainty of death did not mean that the

lender would not get paid back. It only meant that there was an uncertainty about whether or not the lender would be paid back in a timely manner according to the terms of the loan agreement. There was no doubt that the policy premiums would be paid. The annuity saw to that. There was no doubt that the insured would die. Sooner or later he would. The loan was only $84,000 and the amount set aside to pay off the loan was $280,000. The lender would thus get up to $196,000 in interest if AFBG defaulted on it's loan commitment and the insured took a long time to die.

The Referee's comments about the Dept.'s views that AFBG's program could be a serious public safety issue is also wide of the mark. Florida law does not prohibit the assigning of the proceeds of a life insurance policy by the named insured. The owner of a policy needs an insurable interest in the insured at the time the policy is issued. once that criteria has been met, then there are NO limits on the assigning of the proceeds of the policy by the owner. (In our proposal the owner and the insured were to be the same individual.) If I have a life insurance policy on myself and I wish to assign it to Barnett Bank or to anybody else to guarantee the payment of a loan taken out by President Clinton or anybody else, that is my sole prerogative. No body can deny me that right. No body can force me to do so but if I wish to sign the papers making the assignment, I certainly can.

There was insufficient evidence, let alone clear and convincing evidence, to support the Referee's findings that

I had acted in a manner contrary to honesty and justice because I had recklessly disregarded the truth. His findings that I had violated the Ethics Code by acting in a manner contrary to honesty and justice by virtue of a reckless disregard for the truth should be reversed and I should be found not guilty of the alleged violation.

II. THE REFEREE ERRED WHEN HE DETERMINED THAT THE RESPONDENT WAS GUILTY OF VIOLATING SEVERAL SECTIONS OF CHAPTER 626, FLORIDA STATUTES.

The Referee also found that I had violated several sections of the Florida Insurance Code. This was error. A clear reading of the Insurance Code, §§626.9521,626.9541(1)a,b, e, h, 1, and n shows that in order to be guilty of a violation of §§626.9521, 626.9541(1)a,b, e, and 1, you have to make a knowing misrepresentation concerning insurance. The Referee found, in section 111.2 of his report, that there was a lack of clear and convincing evidence that I had engaged in any conduct involving a wilfull misrepresentation. If there is not clear and convincing evidence to support a finding that I made a wilfull misrepresentation, then there cannot be clear and convincing evidence that I made a knowing misrepresentation.

The finding that I had violated F.S. §626.9541(1)h is also in error. As pointed out in my motion for reconsideration or

clarification (Index page 21), that statute prohibits the paying, etc. of any rebate of premiums payable on a contract of insurance. That statute states that returning any part of a premium payment as an inducement to the insurance contract is an illegal rebate. It is quite clear from all of the materials presented that the money that was to be paid to anybody relating to an insurance policy would come directly from the loan obtained by AFBG and not from any premium payments made by anybody. In addition, the insured and owner of the policy did not get back any part of any premiums paid. All premiums paid went straight to the insurance carrier, not to AFBG or any of it's people. This point was raised in my motion for reconsideration because the Memorandum Report (Index page 19) had found that AFBG's compensation plan constituted an illegal rebate. The Report of Referee finally entered herein states that my motion was granted in part and the argument I had made in my motion was incorporated into the final report. Since there was no other finding of AFBG's paying an illegal rebate in the final report, then there is no finding of fact which would support a conclusion that I had violated F.S. §626.9541(1)h.

It is possible to find a violation of F.S. §626.9541(1)n which prohibits free insurance offered in connection with the sell of real or personal property or services connected thereto. A knowing misrepresentation is not an element of a violation of that section. However, as submitted in my Written Closing Argument, such a violation is open to debate and, if I was wrong,

such error on my part does not rise to the level of unethical conduct on my part. Being mistaken on the applicability of a statute does not equate to an ethics violation. In addition, this mistake was not relied upon by the Referee who based his determination of an ethical violation on a "reckless disregard for the truth".

The Referee's finding that I had violated several of the sections of Chapter 626 is not supported by the facts as found by the Referee and should be stricken from the Referee's report.

III. THE REFEREE ALSO ERRED IN FINDING ME GUILTY OF AN ACT CONTRARY TO HONESTY AND JUSTICE BY A RECKLESS DISREGARD OF THE FACTS IN THAT THE COMPLAINT FILED AGAINST ME ALLEGED A WILFULL AND KNOWING MISREPRESENTATION AS THE BASIS FOR THE BAR'S CONCLUSION THAT I HAD ENGAGED IN UNETHICAL BEHAVIOR.

The Bar alleged that I had engaged in acts contrary to honesty and justice because I had wilfully made false statements in connection with AFBG's activities. (Index page 3). I answered and denied any allegations of intentional misconduct. (Index page 4). The trial was on the complaint as filed with no amendments to it. The written argument of the Bar made no mention of a "reckless disregard for the truth". (Index page 17). The Bar's proposed report made no mention of a "reckless disregard for the truth". (Index page 23.). At no time was I **ever** put

on notice that I had to defend against a theory of "reckless disregard for the truth". Opposing counsel pursued his case and presented his evidence upon a basis of intentional wrongdoing on my part. The evidence presented by myself was, of course, geared to respond to the Bar's evidence of intentional wrongdoing. No case law was submitted to the Referee on the question of "reckless disregard for the truth' and no arguments were made setting forth such as a possible basis to support a finding that I had engaged in acts contrary to honesty and justice. All cases cited by the Bar to the Referee in support of the Bar's position involved intentional misconduct on the part of the respondents therein.

I was entitled to a fair and impartial hearing on the issues as framed by the complaint against me. That complaint set forth intentional misconduct, not a reckless disregard for the truth. There were no "jury instructions" setting forth a "lesser included offense" of reckless disregard for the truth. There was no evidence which would support an amendment of the pleadings to reflect an issue tried by consent of the **parties.** The Bar said I had engaged in intentional misconduct. The Bar had to prove by clear and convincing evidence that I had engaged in the conduct complained of. Florida Bar v. Marable, 645 So.2d 438 (Fla. 1994). To find me guilty based upon a legal theory that was not complained of or advanced as a violation of the Ethics Code is clearly unfair and should be reversed.

IV. THE REFEREE ERRED IN FINDING THAT I CAN BE GUILTY OF AN ACT CONTRARY TO HONESTY AND JUSTICE BECAUSE OF A RECKLESS DISREGARD OF THE TRUTH. AN ACT CONTRARY TO HONESTY AND JUSTICE SHOULD REQUIRE AN INTENTIONAL ACT AND THE REFEREE HAS ALREADY DETERMINED THAT THERE WAS A LACK OF EVIDENCE SHOWING ANY WILFULL MISREPRESENTATIONS ON MY PART.

An act contrary to honesty is a dishonest act. A dishonest act requires an intent to act in a manner which violates a law. If it does not violate a law, it is not dishonest. An act contrary to justice is an unjust act. An unjust act requires an intent to act in a manner which creates or causes an injustice to occur.

There is no evidence which would support a finding that I had acted in a manner intended to violate a law. As pointed out above, the Referee has already determined that I made no wilfull (read intentional) misrepresentations.

There is no evidence which would support a finding that I had acted in a manner intended to cause an injustice. As pointed out above, the Referee has already determined that I made no wilfull (read intentional) misrepresentations.

My research revealed no cases, and the Bar's counsel never cited any cases to the Referee, which would hold that someone can commit an act contrary to honesty and justice without having the intent to act in a manner contrary to honesty and justice. Every case cited by the Bar to the Referee had respondents who

committed acts intended to deceive or injure. The Referee erred as a matter of law when he determined that I had committed an act contrary to honesty and justice by my reckless disregard for the truth. That decision should be reversed and I should be found not guilty of the violation.

CONCLUSION

There was insufficient evidence put forth which would support a conclusion that I was reckless in believing what multiple professionals in the insurance and investment fields had told me regarding the viability of AFBG's insurance program. At best, my license to practice law makes me an expert in the field of law. Law is the statutes and the case law construing those statutes. NO ONE, EITHER BEFORE THE REFEREE OR THE ADMINISTRATIVE HEARING OFFICER, HAS CITED A SINGLE STATUTE WHICH MAKES IT ILLEGAL FOR A BANK OR INVESTMENT GROUP TO MAKE A LOAN AGAINST THE FACE AMOUNT OF A LIFE INSURANCE POLICY. NO ONE HAS CITED A SINGLE APPELLATE DECISION MAKING IT ILLEGAL FOR A BANK OR INVESTMENT GROUP TO MAKE A LOAN AGAINST THE FACE AMOUNT OF A LIFE INSURANCE POLICY. My field of expertise, the law, did not prohibit the proposed loan. Licensed professionals in the insurance industry told me that a loan could be had against the face amount of a policy. Professionals in the money business told me that they could get loans for AFBG secured by the face amount of a policy. There was never any evidence to show that

these individuals were untrustworthy or intentionally deceiving me (at least at the time I was making statements about AFBG). It could be argued that the evidence put forth in the administrative hearing shows their untrustworthiness, but there is nothing to show that I was aware of that at the time I made my statements about AFBG. Where is the evidence that shows that I should not have trusted people who I knew and respected? Where is the evidence that would show that these people put forth a lot of time and effort knowing that their efforts could not possibly succeed? It is not there. There is no clear and convincing evidence that would support a finding that I was not justified in believing my friends and associates.

There is no evidence that I violated any aspect of the insurance code except arguably F.S. §626.9541(1)n. There is no evidence that I knowingly violated that section of the code so as to make my conduct an ethical violation as opposed to a mistaken interpretation of the law to a set of facts.

It was not fair for the Referee to find me guilty upon a legal theory that was not plead nor argued. I was not put on notice that I would have to fight a "reckless disregard for the truth" concept. Both attorneys went into the hearing expecting to prove or disprove a charge of intentional misconduct. Intentional misconduct was alleged and intentional misconduct was what was tried. It was error to find me guilty of a rules violation based upon a legal theory neither plead, tried or argued by counsel.

The Referee erred when he determined that an act can be an act contrary to honesty and justice in the absence of some proof that the respondent acted in an intentional, dishonest or unjust manner. The rule charged requires intent to violate it and a "reckless disregard for the truth" does not equate to the intent needed to act in a manner contrary to honesty and justice.

The Referee's findings of fact are not supported by clear and convincing evidence and must be reversed. With incorrect findings of fact, the Referee's conclusions of law are clearly flawed and must be overturned. Even if his findings of fact are correct and I had a reckless disregard for the truth, such does not rise to the standard needed to justify a finding of the commission of an act contrary to honesty and justice as said rule requires intentional misconduct on the part of the offending party. The Referee's report must be rejected and the Respondent should be found not guilty of the violations alleged,

PRAYER FOR RELIEF

Wherefore the Respondent prays this Court to enter an order reversing the Referee's findings of fact and conclusions of law, determining that there is a lack of clear and convincing evidence to support the Referee's finding that I had acted in a manner showing a reckless disregard for the truth, ruling that an act which is contrary to honesty and justice requires a showing of intentional misconduct on the part of an attorney, discharging the complaint against the Respondent and granting such other relief as the Court deems fit and proper.

CERTIFICATE OF SERVICE

I hereby certify that the original and seven copies of the above has been served on Sid White, Clerk of the Supreme court, Supreme Court Building, 500 S. Duval St., Tallahassee, FL 32399-1927 by Federal Express this 1st day of May, 1997 and a copy on James W. Keeter, Bar Counsel, 880 N. Orange Ave., Suite 200, Orlando, FL 32801 and Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 this 1st day of May, 1997.

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