

BEFORE THE DIRECTOR
OF THE DEPARTMENT OF CONSUMER AFFAIRS
BUREAU OF SECURITY AND INVESTIGATIVE SERVICES
STATE OF CALIFORNIA

In the Matter of the Accusation)
Against:)
Charles R. Martin)
17671 Irvine Blvd. Suite 113)
Tustin, CA 92780)
Private Investigator No. PI 13135)
Respondent.)
_____)

No. IA 1996 8777

OAH No. L2003030213

The attached Proposed Decision of the Administrative Law Judge is hereby
adopted by the Director of Consumer Affairs as the Decision in the above-entitled matter.

This Decision shall become effective on June 7, 2004

IT IS SO ORDERED May 7, 2004

By Denise Brown
DENISE BROWN
Deputy Director
Department of Consumer Affairs

BEFORE THE
DEPARTMENT OF CONSUMER AFFAIRS
BUREAU OF SECURITY AND INVESTIGATIVE SERVICES
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

CHARLES R. MARTIN,
Private Investigator License no. 13135

Respondent.

Case No. IA 1996 8777

OAH No. L2003030213

PROPOSED DECISION

This matter came on regularly for hearing on October 6, 7, 8 and 9, 2003 at Santa Ana, California before David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California. Respondent Charles R. Martin was present and was represented by Ron Talmo, attorney at law. Complainant Sherrie Moffet-Bell, Program Manager of the Bureau of Security and Investigation Services within the Department of Consumer Affairs of the State of California ("Bureau") was represented by Deputy Attorney General Timothy L. Newlove.

Oral and documentary evidence was received. Upon agreement of the parties, the record was held open for receipt of closing briefs. Complainant's Closing Brief was received January 13, 2004, and marked Exhibit 87 for identification. Respondent's Closing Brief was received February 4, 2004, and marked Exhibit C for identification. Complainant indicated that no reply brief would be filed. The record was closed and the matter was submitted for decision.

Ruling: During the hearing, Respondent's objection that Exhibit 42 was irrelevant was taken under submission. This exhibit consists of 15 faxes received by Peter Pelland. The faxes prior to February 16, 2001 (the date Respondent claims he removed Pelland's fax number from the Fax.com database) are not the subject of this hearing, and are irrelevant. Ultimately, as noted in Finding 50, there was no evidence that the faxes after February 16, 2001 are connected to Respondent or Fax.com. These faxes are also irrelevant. The objection is sustained, and Exhibit 42 is not received in evidence.

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FACTUAL FINDINGS

The Administrative Law Judge finds the following facts:

1. The Second Amended Accusation was brought by Sherrie Moffet-Bell solely in her capacity as the Program Manager of the Bureau of Security and Investigation Services within the Department of Consumer Affairs of the State of California.

2. On September 22, 1988, the Bureau of Security and Investigation Services issued Private Investigator License No. PI 13135 to Respondent Charles R. Martin. The license is in full force and effect and will expire on September 30, 2004, unless renewed.

3. Complainant seeks revocation of Respondent's license based on the allegations of the Second Amended Accusation. None of the alleged acts are directly related to actions for which a license is required. However, as noted below in the section titled "Applicable Law," a licensee may be disciplined for acts or statements amounting to dishonesty, fraud or deceit.

The Bureau alleges that Respondent is liable for acts or statements occurring during 14 incidents, 13 of which relate to Respondent's actions while employed by Fax.com, a company that sends advertising faxes for its clients. In these 13 incidents, recipients of the faxes brought legal actions, in which Respondent was involved, alleging that the faxes were unwanted and unsolicited. The allegations against Respondent do not include that Respondent was responsible for sending these faxes; rather, the allegations are that Respondent was responsible for dishonest acts or statements in the course of his involvement in the legal actions.

In those prior legal actions, as well as in the present hearing, certain business practices of Fax.com were at issue. Therefore, some general information about the company, its practices, and the legal actions follows.

4. The Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), is a federal law concerned with the use of facsimile transmissions. The TCPA was enacted to "protect the privacy interest of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile machines and automatic dialers." *International Science & Technology Inst. v. Inacom* (4th Cir. 1997) 106 F.3d 1146, 1150.

5. The TCPA prohibits the use of "any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C). Some of the exceptions to this prohibition are express permission from, or an established business relationship with, the receiver of the fax.

6. The TCPA created a private right of action by providing that “a person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State . . . an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation.” 47 U.S.C. § 227(b)(3).

7. The TCPA requires that all facsimile advertisements display in a margin at the top or bottom of each page, or on the first page of a fax transmission, the following information: the date and time of transmission; the name of the individual, business or other entity that sent the fax; and the telephone number of either the sending machine or the individual, business or other entity responsible for sending the fax. 47 U.S.C. § 227(d)(1)(B); 47 C.F.R. § 68.318.

8. Fax.com, Inc. was a Delaware corporation doing business from offices located at 120 Columbia, Suite 500, Aliso Viejo, California. Fax.com was in the business of sending facsimile advertisements on behalf of client companies to fax recipients.

9. In December, 2000 and May, 2001, the Federal Communications Commission (“FCC”) issued Citations to Fax.com for violations of the TCPA. On August 7, 2002, the FCC issued a Notice of Apparent Liability for Forfeiture, in which the FCC found that Fax.com engaged in a pervasive and egregious pattern of deception in the course of its fax broadcasting business, and proposed a total fine of \$5,379,000.

10. Respondent was an employee of Fax.com, acting as the Vice-President of the Compliance Unit. Respondent’s job responsibilities at Fax.com included defending clients and/or the company against TCPA lawsuits filed by persons who received allegedly unwanted and unsolicited facsimiles sent by Fax.com. In many lawsuits, Respondent successfully asserted that there was no jurisdiction, and/or that the recipient had given permission or there was a business relationship allowing the faxes.

11. Darrell Smiley was employed at Fax.com as a Customer Service Supervisor. Smiley worked with Respondent in defending Fax.com clients and/or Fax.com against TCPA lawsuits filed by persons who received allegedly unwanted and unsolicited facsimiles sent by Fax.com. Respondent and Smiley were also long-time friends.

12. Respondent and Smiley testified to certain business practices at Fax.com that are relevant to the legal actions discussed below.

Among the business activities of Respondent and Smiley were phone contacts with people who called Fax.com. Incoming calls could lead to information being “captured”; *i.e.*, a computer could identify the name and phone number of someone calling in and a printout could be generated also indicating the date, time and duration of the call. This was known as a “Black List Report.”

When Respondent or Smiley spoke with people who called Fax.com to add or remove their fax numbers from the database, they would enter information in a "FaxID Problem Sheet." These sheets typically had room for information from 5 calls. In each space could be included handwritten notes of, for example, the date, caller's name, phone number, fax number, and space for additional information. Usually, handwritten notes would indicate whether a number was to be added or removed and, occasionally, other information such as whether a caller asked for information on Fax.com's services and rates.

If a caller asked Respondent or Smiley to add a fax number to the database, they would notify the technical department to do so. Or a caller could use an automated method to call in to have a number added. After a number was added, Respondent or Smiley could obtain computer verification of the addition by an "IVR¹ Fax # Addition" report, which was generated by the computer and indicated the date, time and number added to the database.

13. There was evidence of other ways in which Fax.com added fax numbers to its database. It gathered numbers from its website and purchased lists from providers. It used automated machines which gather numbers. In one instance, this was described as "a special piece of automated dialing equipment to dial thousands of telephone numbers in Washington in order to determine and record if the connection was to a fax machine." Exhibit 19, ¶ 2.6, pages 2-3. In another instance, a computer using this type of program, in different locations throughout the United States, was referred to as a "war dialer." Exhibit 12, exhibit D thereto, pages 28-29. A witness at the hearing, Michael Worsham, an attorney, testified that he had taken a deposition of the chief technology officer of Fax.com, wherein the computers and programs were referred to as fax casters. They gathered the numbers by calling blocks of telephone numbers in certain prefixes, which correlated to geographic areas. The same fax casters were used to send the advertising faxes of Fax.com clients.

Wayne Strang vs. T.N.A. Travel, Inc.

14. T.N.A. Travel, Inc. dba Holiday Marketing ("T.N.A. Travel") was a California corporation doing business from Sacramento, California. At an undetermined time, T.N.A. Travel retained Fax.com to send facsimile advertisements on its behalf.

15. On May 11, 2000, Fax.com sent a facsimile advertisement for T.N.A. Travel to Wayne Strang, a resident of Torrance, California.

16. Based upon Strang's contention that the facsimile was unsolicited, on May 25, 2000, Strang brought suit against T.N.A. Travel under the TCPA in the Superior Court of California, County of Los Angeles, South Bay Judicial District, Small Claims Case No. SBA 00S02035. On August 17, 2000, the case was tried. This case was decided in favor of T.N.A. Travel.

¹ "IVR" denotes "interactive voice recognition."

17. Respondent appeared and testified. Complainant contends that Respondent falsely told the judge that Strang had telephoned Fax.com and agreed to accept one facsimile per week.

18. Strang testified at the hearing that: he had a phone conversation with Respondent in May 2000; he denied any conversations with Respondent wherein he agreed to accept one fax per week; Respondent's testimony at the small claims trial included that, in the same conversation, they had discussed a missing children's program at Fax.com; and Strang denied any discussion of this subject.

Further, Strang testified at the hearing that Respondent's testimony at the small claims trial included that a business relationship had been established when Strang sent an e-mail to Fax.com on 5/5/00. This e-mail asks for information on the fax program and rates. However, the e-mail does not indicate any fax number for Strang, and Strang used the name Samuels. Fax.com could not have known from the e-mail that there was a fax number to be used. Further, although Fax.com's records confirm that Strang made a phone call to Fax.com on 5/8/00 that lasted 1.4 minutes, it does not confirm Respondent's version of the call. Rather, Fax.com's own records show that Strang requested removal of his number at that time.² Therefore, neither the fax of 5/5/00 nor the phone call are evidence of an established business relationship with Strang or express permission from Strang sufficient to permit Fax.com to send this fax.

Under the circumstances, including testimony depicting subject matter in a phone call that the caller believably denies, Respondent's testimony at hearing that the call included a request to receive faxes is not credible. This evidence is entitled to little weight, other than the fact that Respondent would present it in an attempt to defeat the small claims action and retain his license in this proceeding.

Wayne Strang vs. American Benefit Mortgage, Inc.

19. American Benefit Mortgage, Inc. was a California corporation doing business from Aliso Viejo, California, in a suite of offices adjacent to Fax.com. At an undetermined time, American Benefit Mortgage retained Fax.com to send facsimile advertisements on behalf of American Benefit Mortgage.

20. On November 16, 2000, Fax.com sent a facsimile advertisement for American Benefit Mortgage to Strang at his new fax number.

21. Based upon Strang's contention that the facsimile was unsolicited, on December 26, 2000, Strang brought suit against American Benefit Mortgage under the TCPA in the Superior Court of California, County of Los Angeles, South Bay Judicial District, Small Claims Court Case No. 00S04850.

² In Exhibit 53, page 6, the first item related to Strang's call and clearly indicates the number is to be removed.

22. On February 26, 2001, in the Strang v. American Benefit Mortgage proceeding, Respondent signed a Representative Appearance Declaration representing that he was the Compliance Manager of American Benefit Mortgage. On April 3, 2001, in the same case, Respondent signed a Representative Appearance representing that he was the Manager of Human Resources and an officer at American Benefit Mortgage. Complainant contends that both declarations were false and that Respondent was not an employee or duly appointed or elected officer or director of American Benefit Mortgage.

23. It was established that, for a period of time in 2001, Respondent was employed by American Benefit Mortgage.

24. On April 3, 2001, the Strang v. American Benefit Mortgage case was tried. Respondent appeared and defended American Benefit Mortgage. Smiley of Fax.com appeared and testified on behalf of American Benefit Mortgage.

25. Complainant contends that the following testimony was false and documentary evidence presented by Respondent was fabricated: (a) Respondent told the judge that in October, 2000, a person named Kim telephoned Fax.com, talked with Smiley and requested that Strang's fax number be placed in the Fax.com database; (b) Respondent submitted a document entitled "Problem Worksheet" showing that on 10-23-00 Kim contacted Fax.com and requested addition of Strang's fax number to the Fax.com database; (c) Respondent conspired with Smiley, who testified that he personally talked with a person named Kim on October 23, 2000, and that Kim requested Fax.com to add a fax number belonging to Strang to its database; (d) Respondent told the judge that he had asked Strang about Kim, and that Strang had stated that he was associated with Kim; (e) Respondent told the judge that he was a full time employee of American Benefit Mortgage; and (f) when Strang attempted to introduce a Declaration of Charles Kennedy to support his case, Respondent told the judge that Kennedy was under criminal investigation for fraud.

26. It was established that the testimony was false (except for Respondent's employment by American Benefit Mortgage) and the document was falsified. Strang testified at hearing and denied asking Respondent to add his number to the Fax.com database. The references to Kim were not based in fact. Kennedy was not under criminal investigation; rather, Respondent believed that Kennedy had taken criminal actions and had reported it to authorities. Under the circumstances, including a document depicting a phone call request to add a fax number to the database that Strang disproved, Respondent's testimony at hearing that the call was received is not credible, and the document prepared was fabricated. This evidence is entitled to little weight, other than the fact that Respondent would present it in an attempt to defeat the small claims action and retain his license in this proceeding.

27. On April 3, 2001, the court in *Strang vs. American Benefit Mortgage* entered a judgment for \$1,000 in favor of Strang. On May 1, 2000, Respondent submitted a Notice of Appeal from the judgment. On June 29, 2001, a trial de novo was conducted in the case; Respondent defended American Benefit Mortgage, and Smiley appeared to testify. In the trial de novo, Respondent made the same false statements and presented the same false evidence described in Findings 25(a), (b) and (c) above. The trial de novo was decided in favor of American Benefit Mortgage.

Charles Kennedy vs. Colorjet, Inc.

28. Colorjet, Inc. was a California corporation doing business from Redondo Beach, California. At an undetermined time, Colorjet retained Fax.com to send facsimile advertisements on behalf of Colorjet.

29. On September 5, 2000, Fax.com sent an unsolicited facsimile advertisement for Colorjet to Charles Kennedy, a resident of Union City, California.

30. Based upon receipt of the facsimile which he claims was unsolicited, on October 24, 2000, Kennedy brought suit against Colorjet under the TCPA in the Superior Court of California, County of Alameda, Fremont Hall of Justice, Case No. 2000096031. On January 9, 2001, the case was tried. Respondent appeared and defended Colorjet. On January 10, 2001, judgment for defendant was entered in the case.

31. Complainant contends that the following testimony was false and documentary evidence presented by Respondent was fabricated: (a) Respondent stated that he was an officer and salaried employee of Colorjet; (b) Respondent stated that Kennedy telephoned Colorjet on July 13, 2000, spoke with Respondent, and requested addition of his fax number to the Colorjet database; (c) Respondent stated that when Kennedy called Colorjet on July 13, 2000, he gave Respondent his driver's license number; (d) Respondent presented a document entitled "FaxID Problem Sheet" showing that Kennedy had called Colorjet on July 13, 2000, and provided both his phone number and fax number; (e) Respondent presented a document entitled "Fax.com Black List Report" showing that Kennedy had telephoned Colorjet on July 13, 2000, requested addition to the Colorjet database, and that the call lasted 18.3 minutes.

32. It was established that, for a period of time in 2001, Respondent was employed by Colorjet. The remainder of the testimony was false and the "FaxID Problem Sheet" document was falsified. The "Fax.com Black List Report" does not indicate the nature of the call (e.g., whether to add a number), merely the date, time, number and duration. The defense contention that Kennedy called to request addition to the Colorjet database was not proven.

Kennedy testified at hearing and denied asking Respondent to add his number to the Fax.com database or giving his driver's license number to Respondent. Under the circumstances, including a document depicting a phone call request to add a number to the database that the caller believably denies, Respondent's testimony at hearing that the call included a request to add a number to the database is not credible, and the document prepared was fabricated. This evidence is entitled to little weight, other than the fact that Respondent would present it in an attempt to defeat the small claims action and retain his license in this proceeding.

Charles Kennedy vs. Bridge Cellular, Inc.

33. Bridge Cellular, Inc. was a California corporation doing business from San Jose, California. At an undetermined time, Bridge Cellular retained Fax.com to send facsimile advertisements on behalf of Bridge Cellular.

34. On October 13, 2000, Fax.com sent a facsimile advertisement for Bridge Cellular to Kennedy.

35. Based upon receipt of the facsimile which he claims was unsolicited, on October 31, 2000, Kennedy brought suit against Bridge Cellular under the TCPA in the Superior Court of California, County of Alameda, Fremont Hall of Justice, Case No. 2000096265. The case was tried on February 6, 2001. Respondent appeared and testified on behalf of Bridge Cellular. On February 16, 2001, judgment for defendant was entered.

36. Complainant contends that the following testimony was false and documentary evidence presented by Respondent was fabricated: (a) Respondent stated that Kennedy telephoned Fax.com on July 13, 2000, spoke with Respondent, and requested addition of his fax number to the Fax.com database; (b) Respondent stated that when Kennedy called Fax.com on July 13, 2000, he gave Respondent his driver's license number; (c) Respondent presented the same FaxID Problem Sheet described in Finding 31(d) above; and (d) Respondent presented the same Fax.com Black List Report described in Finding 31(e) above, for the purpose of showing that Kennedy had called Fax.com and requested addition of his fax number to the database maintained by Fax.com.

37. As noted in Finding 32 above, the testimony was false and the documents were fabricated.

Charles Kennedy vs. Advanced Cellular Communications

38. Advanced Cellular Communications, Inc. ("Advanced Cellular") was a California corporation doing business from Long Beach, California. At an undetermined time, Advanced Cellular retained Fax.com to send facsimile advertisements on behalf of Advanced Cellular.

39. On October 5, 2000, Fax.com sent a facsimile advertisement for Advanced Cellular to Kennedy.

40. Based upon receipt of the facsimile which he claims was unsolicited, on November 13, 2000, Kennedy brought suit against Advanced Cellular under the TCPA in the Superior Court of California, County of Alameda, Fremont Hall of Justice, Case No. 2000097187. The case was tried on March 13, 2001. Respondent appeared and testified on behalf of Advanced Cellular. On March 23, 2001, judgment was granted for plaintiff in the amount of \$500

41. Complainant contends that Respondent made the same false statements and presented the same fabricated evidence described in Finding 31(b), (c) and (d) above.

42. On April 23, 2001, Advanced Cellular submitted a Notice of Appeal from the judgment. On July 27, 2001, a trial de novo was conducted in the case. Josh McNally, an officer of Advanced Cellular, appeared to press the appeal. During the trial de novo, McNally presented the same false evidence described in Findings 31(b), (c) and (d) above. On July 27, 2001, judgment in the trial de novo was entered in favor of defendant Advanced Cellular.

Peter Pelland vs. Colorjet, Inc.

43. On August 18, October 10 and November 14, 2000, Fax.com sent facsimile advertisements for Colorjet to Peter Pelland, a resident of Haydenville, Massachusetts.

44. On January 23, 2001, Pelland sent a letter to Colorjet demanding payment of \$1,500 under the TCPA for sending facsimile advertisements he claimed were unsolicited.

45. On February 16, 2001, Respondent telephoned Pelland. Complainant contends that Respondent falsely stated that he was from Colorjet, falsely stated that Pelland had requested receipt of the facsimile advertisements, and threatened to bring a harassment civil lawsuit against Pelland if he brought suit under the TCPA in Massachusetts.

46. There was no evidence that, in the phone call of February 16, 2001, Respondent stated that he was from Colorjet. Although Respondent indicated that there might be a countersuit, this is not an act of dishonesty, deceit or fraud.

During the phone call, Respondent stated there were records indicating that Pelland had requested receipt of the facsimile advertisements. Respondent later presented such records at a small claims hearing. Respondent's statement in this regard was not false.

47. Based upon claims that the facsimile advertisements were unsolicited, on March 15, 2001, Pelland brought suit against Colorjet under the TCPA in the Trial Court of Massachusetts, District Court Department, Northhampton Division, Small Claims Sessions.

On June 13, 2001, the case was tried, and judgment was entered for defendant Colorjet. Respondent appeared and defended Colorjet. Smiley appeared and testified on behalf of Colorjet.

48. Complainant contends that the following testimony was false and documentary evidence presented by Respondent was fabricated: (a) Respondent claimed he was a Human Resources Manager for Colorjet, that he worked for Colorjet, and that his former company was Fax.com; (b) Respondent told the magistrate that Pelland telephoned Fax.com on May 31, 2000 and October 4, 2000, and, through an automated telephone system, requested the addition of his fax number to the Fax.com database; (c) Respondent conspired with Smiley who presented fabricated company records showing that Pelland had telephoned Fax.com on May 31, 2000 and October 4, 2000, and requested the addition of his fax number to the Fax.com database; and (d) Respondent informed the magistrate that, as of February 16, 2001, Pelland's fax number had been removed from the database maintained by Fax.com.

49. It was established that, for a period of time in 2001, Respondent was employed in the human resources department of Colorjet. Respondent's testimony in the small claims case that he "worked for that company before," referring to Fax.com, is not a clear act of dishonesty, deceit or fraud. Respondent had worked, and continued to work, for Fax.com. Any falsity in the statement would flow from the implication that he no longer works for Fax.com; however, it cannot be concluded that this statement was dishonest.

50. Pelland testified to receiving numerous faxes after February 16, 2001, the date Respondent wrote that his fax number was removed from the database. However, there was no evidence that these faxes, found in Exhibit 42, are connected with Respondent or Fax.com. Therefore, it was not established that Respondent's statement that Pelland's fax number had been removed from the database as of February 16, 2001, was false.

51. The remaining testimony and documents that Pelland telephoned Fax.com to add his fax number to the database was false and fabricated. Pelland testified believably at hearing and denied asking Respondent for his number to be added to the Fax.com database. Under the circumstances, including documents depicting phone calls that the caller believably denies, Respondent's testimony at hearing that he received the calls is not credible, and the documents prepared depicting the calls were fabricated. This evidence is entitled to little weight, other than the fact that Respondent would present it in an attempt to defeat the small claims action and retain his license in this proceeding.

Pierpont Interior vs. Advanced Cellular

52. On November 1, 2000, Fax.com sent a facsimile advertisement for Advanced Cellular to Sonia Tanio, a resident of Cuyahoga County, Ohio.

53. On November 1, 2000, December 21, 2000, and February 15, 2001, Fax.com sent facsimile advertisements for Advanced Cellular to Norberto Juan, a resident of Cuyahoga County, Ohio.

54. Based upon claims that the facsimiles were unsolicited, Tanio and Juan brought a TCPA lawsuit entitled *Pierpont Interior v. Advanced Cellular Communications* in the State of Ohio, Cuyahoga County Common Pleas Court, Case No. 42331, Arbitration Case No. 70149. On March 18, 2002, the case was tried before three arbitrators. Respondent appeared and testified at the arbitration hearing. The arbitration hearing resulted in an award of \$1,000 to Tanio and an award of \$1,500 to Juan.

55. Complainant contends that the following testimony was false and documentary evidence presented by Respondent was fabricated: (a) Respondent stated that Tanio called Fax.com on April 19, 2000, and requested the addition of her fax number to the Fax.com database; (b) the document entitled "FaxID Problem Sheet" showing that "Sonya" called Fax.com on April 19, 2000, and requested the addition of her fax number to the Fax.com database; (c) Respondent stated that Norberto Juan called Fax.com on May 3, 2000, and requested the addition of his fax number to the Fax.com database; and (d) the document entitled "FaxID Problem Sheet" showing that "Dr. Norberto" called Fax.com on May 3, 2000, and requested the addition of his fax number to the Fax.com.

56. It was established that the testimony was false and the documents were fabricated. Tanio testified at hearing and Juan's declaration was received in evidence. Both deny calling, speaking to Respondent, or asking for their numbers to be added to the Fax.com database. Under the circumstances, including documents depicting phone calls that the callers believably deny, Respondent's testimony at hearing that he received the calls is not credible, and the documents he prepared were fabricated. This evidence is entitled to little weight, other than the fact that Respondent would present it in an attempt to defeat the small claims action and retain his license in this proceeding.

James Kinder vs. Enex Marketing

57. Enex Marketing was a California Corporation doing business from Vista, California. At an undetermined time, Enex Marketing retained Fax.com to send facsimile advertisements.

58. On January 11, 2001, Fax.com sent a facsimile advertisement for Enex Marketing to James Kinder, a resident of San Diego County, California.

59. Based upon a claim that the facsimile was unsolicited, on May 1, 2001, Kinder brought suit against Enex Marketing under the TCPA in the Superior Court of California, County of San Diego, Central Division, Small Claims Case No. 114952. The case was tried on June 22, 2001. Respondent appeared and defended Enex Marketing. Smiley appeared and testified on behalf of defendant. The case was decided in favor of Enex Marketing.

Complainant alleges that, during the trial, Respondent made statements and presented evidence that was false: (a) Respondent told the judge that he was a regular employee of Enex Marketing; (b) Respondent stated that on May 10, 2000, Kinder telephoned Fax.com and requested the addition of his fax number to the Fax.com database; and (c) Respondent conspired with Smiley who presented fabricated records, including a FaxID Problem Sheet and a IVR Fax # Additions, indicating that Kinder called Fax.com on May 10, 2000, and requested the addition of fax numbers to the Fax.com database.

60. It was established that, for a period of time in 2001 and 2002, Respondent was employed by Global Wireless, the parent company of Enex Marketing. The small claims judge accepted evidence of the employment and permitted Respondent to appear on behalf of Enex Marketing. It was not established that Respondent's statement of employment by Enex Marketing was false.

61. Kinder had called Fax.com on May 10, 2000 to find out who was sending faxes to him. He gave his phone number and fax number during his call. By his own language, he used the "ruse" of posing as a prospective client who might want advertising faxed to others. Kinder testified that he did not ask for his number to be removed from the database. While this may not amount to an affirmative request to add his number to the database to receive faxes in the future, it may amount to the establishment of a business relationship so as to permit Fax.com to add his number to the database to receive faxes in the future.

Under the circumstances, including the documents showing that Kinder called and gave his numbers to Fax.com, that he did not ask for numbers to be removed, that he may have established a business relationship as a result of his call, and that Fax.com added his numbers to the database, it was not proven that Fax.com's documents concerning the call were false.

William Adler vs. Advanced Wireless
Cellular Communications

62. In May 2001, Advanced Cellular changed the name of the corporation to Advanced Wireless Cellular Communications, Inc. ("Advanced Wireless").

63. On April 4, May 3 and May 4, 2001, Fax.com sent facsimile advertisements for Advanced Wireless to William Adler, a resident of Washington, D.C.

64. On July 2, 2001, Michael C. Worsham, attorney at law, on behalf of Adler, sent a letter to Advanced Wireless. The letter informed Advanced Wireless about Adler's receipt of the facsimile advertisements, and that they were unsolicited, and requested a settlement payment of \$5,000.

65. Respondent, acting from the Compliance Department of Fax.com, responded by letter dated July 16, 2001, which stated in part: "Please be aware that it is not our intent to send unsolicited facsimile messages to any business or consumer who does not wish to receive them or with whom our clients have no relationship."

66. Complainant alleges that this statement is false because Respondent knew "that the business of Fax.com involves the sending of unwanted and unsolicited facsimile advertisements to fax numbers across the nation." Second Amended Accusation, ¶ 60.

What Complainant proved was that several people and businesses claimed that Fax.com sent unsolicited faxes, and some won, and others lost, small claims and other suits based on those claims. It was also proven that there were many incidents in which Fax.com did, in fact, send unwanted and unsolicited facsimile advertisements to fax numbers across the nation. What Complainant did not prove, however, is that it was Fax.com's intent to send such faxes as a standard business practice. Without such proof, it was not established that the statement in Respondent's letter, that Fax.com did not intend to send unsolicited facsimile messages, was false.

67. Based upon the receipt of the unsolicited facsimiles, on August 3, 2001, Adler brought suit against Advanced Wireless under the TCPA in the Superior Court of the District of Columbia, Civil Division, Small Claims and Conciliation Branch, Case No. SC 1294401. Attorney Michael C. Worsham represented Adler in this action.

68. There was no evidence submitted to support the allegation that, on August 23, 2000, Respondent telephoned Attorney Worsham and falsely stated that he worked for Advanced Wireless.

69. In October 2001, the Adler v. Advanced Wireless case was tried. Smiley appeared and testified on behalf of Advanced Wireless. Complainant alleges that Respondent conspired with Smiley to make false statements and present false evidence at the trial, including: (a) falsely stating Adler had called Fax.com on May 8, 2000, to request adding his fax number in the Fax.com database, and also provided his telephone number; (b) presenting a fabricated document entitled "Problem Sheet" to show that "Bill" called Fax.com on 5-8-00 and provided both his phone number and fax number; and (c) presenting a fabricated document entitled "IVR Fax # Additions" to show the addition of Adler's fax number to the database maintained by Fax.com.

Although it was established that Smiley made the statement at trial, it was not established that the statement was false or that Respondent conspired with Smiley to make the statement. Although it was established that Smiley presented the documents at trial, it was not established that the documents were fabricated or that Respondent conspired with Smiley to fabricate the documents.

William Adler vs. Imak Wireless Networks, Inc.

70. IMAK Wireless Networks, Inc. ("IMAK Wireless") was a Delaware corporation doing business from Orlando, Florida. At an undetermined time, IMAK Wireless retained Fax.com to send facsimile advertisements.

71. On April 26, 2001, Fax.com sent a facsimile advertisement for IMAK Wireless to William Adler. Thereafter, attorney Michael C. Worsham, on behalf of Adler, contacted IMAK Wireless concerning the unsolicited facsimile.

72. On August 3, 2001 and August 14, 2001, Respondent, acting from the Compliance Department of Fax.com, responded to attorney Worsham's letter to IMAK Wireless. Respondent's letter stated, in part: "Please be aware that it is not our intent to send unsolicited facsimile messages to any business or consumer who does not wish to receive them or with whom our clients have no relationship." Complainant alleges that this statement is false because Respondent knew "that the business of Fax.com involves the sending of unwanted and unsolicited facsimile advertisements to fax numbers across the nation." Second Amended Accusation, ¶ 65.

What Complainant proved was that several people and businesses claimed that Fax.com sent unsolicited faxes, and some won, and others lost, small claims and other suits based on those claims. It was also proven that there were many incidents in which Fax.com did, in fact, send unwanted and unsolicited facsimile advertisements to fax numbers across the nation. What Complainant did not prove, however, is that it was Fax.com's intent to send such faxes as a standard business practice. Without such proof, it was not established that the statement in Respondent's letter, that Fax.com did not intend to send unsolicited facsimile messages, was false.

73. Based upon the receipt of the facsimile he claims was unsolicited, on August 31, 2001, Adler brought suit against IMAK Wireless and Fax.com under the TCPA in the Superior Court of the District of Columbia, Civil Division, Small Claims and Conciliation Branch, Case No. SC 14719-01. Attorney Worsham represented Adler in this action. The suit was later amended to add the Guatemala Human Rights Commission as plaintiff.

74. As part of the IMAK Wireless case, plaintiff Adler propounded written interrogatories and a document request to defendant Fax.com. On December 27, 2001, defendant Fax.com provided answers to the interrogatories and responses to the document request. Respondent signed the answers to interrogatories under penalty of perjury.

Complainant contends that an interrogatory answer and two responses to document requests contain false evidence:

a. Interrogatory No. 1 asked for "the specific factual basis on which Fax.com, Inc. alleges that it had either 'prior express invitation or permission' or an 'established

business relationship' within the meaning of [the TCPA]." Fax.com's response to Interrogatory No. 1 stated that Smiley received a telephone call on May 8, 2000 from a male adult identified as "Bill" who was interested in the services provided to businesses by Fax.com and requested that his fax number [Adler's fax Number] be put into the Fax.com database.

b. Document Request No. 1 asked for the "IVR Fax # Additions" Sheet relating to the addition of Adler's fax number to the Fax.com, Inc. database on May 8, 2000. Fax.com attached a document entitled "IVR Fax # Additions" which shows the addition of Adler's fax number to their database.

c. Document Request No. 3 asked for the "Fax ID Problem Sheets" for May 8, 2000 relating to the entry of Adler's fax number into the Fax.com database. Fax.com provided a document entitled "Problem Sheet" which shows that "Bill" called on 5-8-00 and provided both his phone number and fax number.

75. On January 6, 2003, an Order was issued in Case No. SC-14719-01. The Order specifically notes that defendants Fax.com and IMAK Wireless stipulated, *inter alia*, that "Defendants caused to be sent an unsolicited advertisement to the telephone facsimile machine of Plaintiff William Alder on April 26, 2001," and that "Defendants did not have the prior express invitation or permission, or a business relationship with either Plaintiff, permitting Defendants to send any advertisements to Plaintiffs' telephone numbers."

Even in light of these stipulations, Respondent's verification of interrogatory answers and responses to document requests are not proven to be "false." Rather, the discovery responses and the order/stipulation contain contradictory information. Fax.com's willingness to make these stipulations may have been a strategic decision for any number of reasons other than a belief that its discovery responses were false; *i.e.*, as testified to by Adler's attorney, Worsham, it could have been to avoid motions and discovery proceedings; or it may have been a *quid pro quo* for other parts of the stipulation, such as the limitation on damages or the agreement that witnesses need not testify at trial; and/or it may have prevented other lawsuits concerning additional faxes mentioned in the stipulation.

Therefore, it cannot be said that the stipulation demonstrates the discovery responses were knowingly false. Nor was there other evidence to establish that the discovery responses were false.

Reginald Robinson vs. Fax.Com

76. From June 8, 2001 to August 10, 2001, Fax.com sent eight (8) facsimile advertisements to Reginald Robinson, a resident of Fort Washington, Maryland.

77. Robinson claimed that the faxes were unsolicited and filed suit on June 22, 2001 against Fax.com under the TCPA in the District Court of Maryland for Prince George's County. On October 1, 2001, Robinson filed a Second Amended Complaint in this action.

78. In that case, Robinson propounded written interrogatories to defendant Fax.com. On September 28, 2001, defendant Fax.com provided answers to the interrogatories, signed by Respondent under penalty of perjury. The answer to interrogatory no. 1 includes expected testimony from Respondent and/or Smiley that Robinson called Fax.com's database on May 29, 2001 and entered both his telephone and facsimile numbers into the database.

Complainant contends that this information is false, and Respondent knew it was false.

79. At the trial of Robinson v. Fax.com on October 18, 2001, Respondent testified that Robinson called Fax.com on May 29, 2001, discussed the company's services with Respondent, and requested addition of his fax and telephone numbers to the database maintained by Fax.com. He also testified that he telephoned Robinson on June 19, 2001, and requested a copy of a letter that Robinson had sent to Fax.com dated June 19, 2001, and that the letter was allegedly water damaged. Complainant contends that this testimony was false.

Further, at the trial Respondent presented as evidence a document entitled "Worksheet" which purported to show that Robinson called Fax.com on 5/29/01 and requested addition of his fax number. Respondent also presented a document entitled "IVR Fax # Additions" which purported to show the addition of Robinson's fax number to the database maintained by Fax.com. Complainant contends these documents were fabricated with the knowledge and contrivance of Respondent.

80. At the small claims trial, Respondent testified and was cross-examined by Robinson. Robinson testified and was cross-examined by counsel for Fax.com. The judge commented favorably on Respondent's credibility and considered the evidence submitted. At the trial's conclusion, the judge gave judgment to defendant Fax.com.

81. At the present hearing, there was little additional evidence submitted. Robinson's declaration repeats his denial that he phoned Fax.com on May 29, 2001 to add his fax number to the database.

82. It was not established by the evidence that Respondent was dishonest in his interrogatory answer or testimony that Robinson called Fax.com to add his fax number to the database, or that the worksheet or other document was fabricated.

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Robert Braver vs. Fax.com

83. Sento Training Corp. ("Sento") was a company that retained Fax.com to send facsimile advertisements on its behalf. In November 1999, Fax.com sent allegedly unsolicited facsimile advertisements for Sento to Robert Braver, a resident of Norman, Oklahoma.

84. Braver is in the computer software business. He also manages websites devoted to disseminating information about the TCPA to people who want to pursue legal action against companies sending unsolicited faxes.

85. Based upon receipt of the facsimiles he claims were unsolicited, on February 11, 2000, Braver brought suit against Sento and Fax.com under the TCPA in the District Court, Cleveland County, State of Oklahoma. On May 30, 2000 a default judgment was entered for Braver in the sum of \$6,000, plus court costs of \$79.

86. In January 2002, Braver telephoned Respondent at Fax.com for the purpose of discussing collection of the \$6,000 default judgment and his receipt of other faxes. It was not proven that, during the course of this phone conversation, Respondent threatened to bring a civil harassment lawsuit against Braver if he attempted to enforce the default judgment in California. Rather, Respondent indicated that Fax.com intended to bring suit against people he believed had agreed to receive faxes yet later sued, claiming that the faxes were unsolicited.

It was not proven that Respondent threatened to produce false evidence showing that Braver had requested addition of his fax number to the database maintained by Fax.com in order to support a harassment lawsuit.

87. Complainant alleged that Respondent "routinely threatens persons who have received unsolicited facsimile advertisements sent by Fax.com and who have brought or intend to bring TCPA actions against Fax.com with harassment lawsuits supported by false evidence as a method of discouraging such suits or obtaining a dismissal of such suits." [Second Amended Accusation, ¶ 79.] It is alleged that such threats were received by Lawrence Markey (resident of California), Mike Malloy (resident of Texas), Nomy LaPurga (resident of Ohio), and David Phelan (resident of Maryland).

After Phelan wrote to a Fax.com client demanding payment for an unsolicited fax, Respondent replied by letter dated 5/21/02, wherein Respondent wrote that "the telephone number you entered into our database has been removed," and that an action might be filed by Fax.com in California if Phelan pursued suit in Maryland.

Malloy had a similar exchange of letters with Respondent and Smiley, and Markey received a similar letter. (Markey was the subject of separate allegations, discussed more fully below.)

These statements in these letters do not amount to a threat to file "harassment lawsuits supported by false evidence," as alleged by Complainant. There was insufficient evidence to determine whether, as alleged by Phelan and Malloy, that the faxes were unsolicited, or whether, as alleged by Respondent and Smiley, the fax numbers had been entered into the Fax.com database. Therefore, it cannot be stated that there was any threat to file harassment lawsuits supported by false evidence. Such a reading is not supported by the language of the letters.

Lawrence Markey vs. Fax.com

88. Lawrence Markey, a resident of Redondo Beach, California, contends that Fax.com sent him an unsolicited facsimile advertisement for Internet Marketing Solutions, Inc. on October 16, 2001. On May 16, 2002, Markey brought suit against Fax.com under the TCPA in the Superior Court of California, County of Los Angeles, South Bay Judicial District, Small Claims Court No. SBA 02S01806.

89. On July 1, 2002, based upon a default by Fax.com, a Judgment and Notice of Entry of Judgment was entered in favor of Markey in Case No. SBA 02S01806. Judgment was for \$2,500 in principal and \$28 in costs.

90. On November 8, 2002, Fax.com filed a Motion to Vacate Judgment in Case No. SBA 02S01806. On December 3, 2002, the Motion to Vacate was heard by the Honorable Mark McGhee, Judge Pro Tem. Respondent appeared on behalf of Fax.com. The Motion to Vacate Judgment was denied.

91. Respondent telephoned Markey and left the following message on his phone voice mail:

Mr. Markey, this is Charles Martin. I'm V.P. of Fax.com. I thought I would give you a fair warning what we're gonna do. You filed a case against our company. I was out of town at the time, on another thing, another case. We didn't make it, you got a judgment. I have a choice to set the judgment aside and moving on with the case, wherein you won't win in court, you will lose. However, I can just simply do that and then simply at the same time, file a motion to . . . a violation down here. On what we've done on a couple of cases, in Superior Court, and we'll go to court down here on some of these things that you're filing. As you well know, the TCPA does not apply in L.A. If it's applied in L.A., uh . . . you will go up in front of anybody that knows what they're talking about. Judges have pretty much dismissed it. Ann Kough has decided that case already and it's up on an appeal right now, but that's still the decision of the L.A. courts. I'll give you 72 hours to dismiss the case and give me a call, let me know that you've done that, voluntarily, and then you can go on about suing whoever you want, I could care less. But if you don't, I'm gonna take a couple guys and we'll go down to the

courthouse and we'll find out everybody you're suing, and we'll give them a call, the defendants in the cases, and we'll start helping them represent themselves in courts against you. Uh, it's just that simple. So, you can do what you want, but not against Fax.com or Cambridge Homes. It's that simple. Take it for whatever you want. I suggest that you also talk to Wayne Strang. Anyway, that's the last time I'm gonna call you. If I don't hear something in the next 72 hours, I'll just take it that you don't want to do it. I'll set the motion aside. We'll go through the process and find out who the defendants are in your cases in the future - you and Wayne Strang - and we'll enlighten them. So, please give me a call at 949-916-6530. I'm just looking for a voluntary compliance to dismiss the case. Do it or don't do it, just give me a call.

Markey testified he received this message on July 15, 2002, the same day he appeared in small claims court on another TCPA matter against a Fax.com client. Respondent testified that he left the message the day after the hearing on the motion to vacate judgment on December 3, 2002.

92. Markey's testimony on this point is believed, and Respondent's is discredited. Under the totality of the circumstances in evidence, the content and timing of the phone call more logically relate to events as they existed in July 2002, and not in December 2002. Logically, how could Markey have played a taped message for a small claims judge on December 3, 2003 when, according to Respondent, the message was not left until the next day, December 4, 2003?

93. It is alleged that Respondent falsely informed the judge that Fax.com had no knowledge of Case No. SBA 02S01806 until on or about October 22, 2002, when Markey served documents on Fax.com. relating to the judgment in the matter. This allegation was proven by the evidence.

94. It is alleged that, when Markey played a tape of the phone message in small claims court in December 2002, Respondent falsely stated to the judge that the voice on the tape was not his voice. This was not proven by the evidence. The evidence established that, likely due to a mechanical problem, the tape playback was at a high rate of speed and the voice sounded "like a chipmunk," as described by Smiley, who was also present in court that day. Neither Respondent nor Smiley recognized the voice as being that of Respondent. At the hearing herein, the tape was played at normal speed and they both recognized it as Respondent's voice. However, the evidence does not establish that Respondent was "false" in stating to the small claims judge that the chipmunk-like voice was not his voice.

Civil Harassment Suit

95. On January 6, 2003, Michael Sarver and Margaret Quick-Sarver, husband and wife, entered into an agreement with Tony Zweigle, whereby Zweigle agreed to provide a custom water sculpture in exchange for payment of \$16,242. During the course of the

contract, Sarver and Quick-Sarver grew fearful of Zweigle and his brother, and Quick-Sarver filed a civil action for a restraining order in the Orange County Superior Court. On April 7, 2003, a hearing was held on the restraining order. Respondent appeared and testified at that hearing. It is alleged that Respondent made three false statements during his testimony at the hearing.

96. a. Respondent stated that he was present on March 2, 2003 while Zweigle was on a speaker phone with Quick-Sarver and overheard Quick-Sarver say something like: "If I don't get my water piece and I don't get it now, you won't like what I do to you and your brother."

b. Respondent stated that he was present on March 3, 2003 while Zweigle was on a speaker phone with Quick-Sarver and overheard Quick-Sarver raise her voice and say that she wanted the sculpture now and didn't want to be cheated.

c. Respondent stated that during the same phone conversation on March 3, 2003, Sarver took the phone from his wife and made terrorist threats against T.Z., including the threat that "I will bury you in the desert" and the threat that "I will put a bullet in your head."

97. Quick-Sarver and Sarver testified at hearing, as well as Antonia Rios, a long-time business associate of Quick-Sarver, who was present when various calls were made. Sarver also submitted his telephone bills for February and March 2003.

98. The phone bills depict outgoing calls to Zweigle's cell phone, which Quick-Sarver testified was the number she always used to contact him or leave a message. Of significance, the bills include a 4 minute call at 6:23 p.m. on Sunday, 3/2/03 and a 1 minute call at 9:46 p.m. on Monday, 3/3/03. Quick-Sarver testified the Sunday call was to express frustration that the sculpture was not complete, and skepticism mixed with hope that it would get completed. Quick-Sarver testified the Monday call was to get the name of the artist actually doing part of the sculpture.

Although Quick-Sarver testified that she called the artist the following day, the phone bill indicates that call was on Saturday, March 8.

99. Respondent testified in the civil harassment hearing on 4/7/03 that he overheard a call at Zweigle's house by a woman who called herself Marge on Sunday, 3/2 at about 6 or 7 p.m.; that Marge was extremely upset; and that Marge said something like: "If I don't get my water piece and I don't get it now, you won't like what I do to you and your brother."

Respondent also testified in the civil harassment hearing on 4/7/03 that he overheard a call at Zweigle's house by the same woman Monday, 3/3 at about 7 or 7:30 p.m.; that Marge was upset, angry, raised her voice and said that she wanted the sculpture now and didn't want to be cheated. Then a man came on the phone and said, paraphrasing: "I will bury you in the desert" and the threat that "I will put a bullet in your head."

100. The phone bills also depict: a 1 minute phone call to Zweigle at 6:26 p.m. on Saturday, 3/15/03; a 1 minute phone call to Zweigle at 11:13 a.m. on Sunday, 3/16/03; and a 5 minute phone call to Zweigle at 11:52 a.m. on Sunday, 3/16/03. Quick-Sarver testified that the purpose of the calls was to ask for her money back, as the artist had told her he wasn't working on anything for her and didn't trust Zweigle. Quick-Sarver also testified that Zweigle called her on 3/16, asking to work things out, and that her husband took the phone and said that Zweigle should stop calling his wife a liar and "It's over." Sarver said that he hung up when Zweigle screamed at him.

101. Antonia Rios has worked with Quick-Sarver for about 8 years and they often worked at Quick-Sarver's home. She was present and overheard Quick-Sarver's end of the conversation on 3/2/03. She testified that Quick-Sarver was calm, and inquired about an issue where she wanted the product or her money back. Rios did not hear the statement attributed to Quick-Sarver by Respondent. Sarver also testified that he was present at the time, and his testimony comports with that of Quick-Sarver and Rios.

Rios was also present and overheard Quick-Sarver's end of the conversation on 3/17/03. She testified that Quick-Sarver was getting frustrated and that her husband took the phone and said: "Quit calling my wife a liar. It's over." She heard no use of profanity or threats. Sarver denies using any threats and denies making the statements attributed to him by Respondent.

102. The statements attributed to Respondent at the civil harassment hearing are false. On balance, there was more credibility to the versions of events depicted by Quick-Sarver, Sarver and Rios than to that version stated by Respondent, under oath. The bias, interest or motive of Respondent in these proceedings to revoke his license substantially outweigh any bias, interest or motive of Quick-Sarver, Sarver and Rios to give false testimony at the present hearing.

Credibility

103. Various factors listed in Evidence Code § 780 assist in making determinations of the credibility of witnesses, such as: the character of the testimony; the existence of bias, interest or other motive; and the existence or nonexistence of any facts testified to. In many instances during the hearing, the evidence was in the nature of "he said, she said"; *i.e.*, a witness would testify to facts supporting the claims of dishonesty, and then Respondent and/or Smiley would testify to a different set of facts to disprove the claim. However, the testimony of one witness who is entitled to full credit is sufficient for proof of any fact. Evidence Code § 411. Rarely was there an independent source of evidence to break the tie.

However, some tie-breakers were presented. In the Markey matter, Respondent and Smiley both testified that a taped phone message was played in the small claims hearing. The hearing occurred on December 3, 2002. Yet Respondent testified that

he did not leave the message until December 4, 2002. This was not merely a mistake in recollection. Rather, it was an affirmative effort by Respondent to recast the facts and present a false scenario during the administrative hearing. See Findings 91, 92 and 94.

Another tie-breaker is the instance where Strang said he called to remove his number, Fax.com's paperwork says that he called to remove his number, but Respondent testified in small claims court that Strang called to ask to receive faxes. See Findings 17 and 18. A further tie-breaker was the testimony of Antonia Rios. See Findings 101 and 102.

104. Further, much of the documentation presented at the small claims trials was capable of being manipulated by Respondent or Smiley. If there was an incoming call with information captured onto a Black List Report, they could create a Problem Sheet indicating the call was to add a number, and the technical department would add the number, automatically generating a confirming IVR Fax# Addition sheet.

105. In the vacuum of each single small claims case, the pattern of deception may not have been discernible to each court. In fact, one judge was moved to comment that Respondent appeared more credible than the plaintiff because, among other things, Respondent seemed relaxed and matter of fact, and the judge noted he was impressed because Respondent made notes of the call. See Transcript of Robinson trial, Exhibit 12, Exhibit D thereto, page 117. In other places, Respondent urged the position that each plaintiff pursued his case for monetary gain, or suggested that plaintiffs had actually called to add their numbers and then sued claiming the faxes were unsolicited.

However, the weight of the evidence herein includes the perspective of seeing all of these underlying cases at once. Respondent's control of the note-taking process is a reason for suspicion of the notes, not a basis for added credibility. That Respondent and Smiley could produce records of a phone contact that they could characterize as a request to add a number, and then produce proof that the number was added, demonstrates their ability to manipulate the evidence. See Findings 12, 17, 18, 103, and 104.

Nor was it established, as claimed by Respondent, that the plaintiffs in the TCPA lawsuits were motivated by a desire to make money. Rather, the amounts of damages claimed were usually relatively modest. Further, by the time this administrative matter was heard, there was no monetary gain that they could expect; yet 7 of those plaintiffs, 2 lawyers, and 3 witnesses regarding the civil harassment matter came to testify. Many demonstrated a sincerely-held belief that their privacy was of demonstrable importance to them, and they felt that they had been wronged, from the initial receipt of unsolicited faxes through the small claims process that was often affected by false or fabricated evidence.

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106. On balance, Respondent's versions of events were often not believable. Nevertheless, there were several instances wherein no cause for discipline was established. Some times, this was because the Complainant brought allegations that was not proven by the evidence. The evidence simply didn't point to the conclusion urged by Complainant. Or, the Complainant urged a narrow conclusion to be reached from a set of facts, whereas the facts themselves permitted a broader conclusion to be made, one that did not establish a basis for discipline against Respondent.

In several instances, therefore, the conclusion that there was no cause for discipline is based on a failure of Complainant to prove, by a preponderance of the evidence, a basis for discipline, and not because Respondent's version of events was believed.

Applicable Law

107. The acts which require a license as a private investigator are described in Business and Professions Code § 7521, and include, under subsection (e), securing evidence to be used in court.

108. Under Business and Professions Code § 7512.2, the Director of the Department of Consumer affairs shall enforce the provisions of the Private Investigator Act which appears at Business and Professions Code § 7512 et seq.

109. Under Business and Professions Code § 7561.1, the Director may suspend or revoke a license issued under the Private Investigator Act for violations set forth therein.

110. Business and Professions Code § 7561.1(l) provides that the Director may deny, suspend or revoke a license issued under the Private Investigator Act if he or she determines that the licensee has committed any act which is a ground for denial of an application for a license under the Act.

111. Business and Professions Code § 7538(b) provides that the Director may deny an application for a license under the Private Investigator Act if the applicant has committed any act constituting dishonesty or fraud. Business and Professions Code § 7538(c) further provides that the Director may deny an application for a license under the Act if the applicant has committed any act or crime constituting grounds for denial of licensure under Business and Professions Code § 480.

112. Business and Professions Code § 480(a)(2) provides that a board, including the Bureau, may deny a license on the ground that the applicant has done any act involving dishonesty, fraud or deceit with the intent to substantially benefit himself or another, or substantially injure another. Business and Professions Code § 480(a)(3) provides that a board may deny a license on the ground that the applicant has done any act which, if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation of license. Under Business and Professions Code § 480, a board may deny a

license only if the act is substantially related to the qualifications, functions or duties of the business or profession for which application is made.

113. Under Business and Professions Code § 7561.4, the Director may suspend or revoke a license issued under the Private Investigator Act if the license holder has committed any act in the course of the licensee's business constituting dishonesty or fraud. Under section 7561.4(a), "dishonesty or fraud" constitutes knowingly making a false statement relating to evidence or information obtained in the course of employment. Under section 7561.4(c), "dishonesty or fraud" also constitutes the manufacturing of evidence.

114. The private investigator license held by Respondent is subject to discipline under Business and Professions Code § 7561.1(1), for conduct that constitutes the basis for the denial of the application for a private investigator license under the provisions of Business and Professions Code §§ 7538(b), 7538(c), 480(a)(2) and 480(a)(3), in that Respondent committed numerous acts of dishonesty and fraud in defending TCPA actions brought against Fax.Com or advertising clients of Fax.Com. and in testifying falsely in the civil harassment suit.

Respondent's conduct, in falsifying evidence, manufacturing evidence, making false statements in court proceedings, and assisting Fax.com in its illegal method of operation under the TCPA, if performed by a private investigator under his or her license, would constitute the basis for discipline under the provisions of Business and Professions Code § 7561.4. Such conduct goes to the core of the functions which require a license, *i.e.*, the securing of evidence for use in court. The integrity of a person's licensed activities is directly related to that person's integrity in performing acts that, under other circumstances, would require a license.

It is not found that Respondent needed a license for the activities he undertook in presenting evidence in the small claims cases or the civil harassment suit. However, those actions are substantially related to the qualifications, functions and duties of a private investigator and his performance of those acts included dishonesty, fraud and deceit.

Cost Recovery

115. Business and Professions Code § 125.3 provides that, in any order issued in resolution of a disciplinary proceeding before any board within the Department of Consumer Affairs, the board may request the Administrative Law Judge to direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

116. Under Business and Professions Code § 101(s), the Bureau of Security and Investigation Services was a board within the Department of Consumer Affairs of the State of California.

117. Complainant submitted evidence of the costs of investigation and enforcement of \$28,705.56 that is summarized as follows:

- a. Costs to obtain, prepare and copy records and documents;
 - i. Office technician, 2001 to 2004, 16 hours at \$34.09 per hour = \$545.44;
 - ii. Associate Governmental Program Analyst, 2001 to 2004, 55 hours at \$43.08 per hour = \$2369.40;
- b. Deputy Attorney General's costs, at \$112 per hour; 2001-2002, 92.5 hours = \$10,360; 2002-2003, 61.5 hours = \$6,888; and 2003-2004, 74.25 hours = \$8,316.

There is no more specific evidence of the activities of the office technician and program analyst. In his supporting declaration, Deputy Attorney General Timothy Newlove describes the tasks he has performed, and he attaches to the declaration a computer printout indicating, among other things, the date, type of activity performed, hours, hourly rate and dollar amount.

The costs are compiled and certified in Exhibit 4. There is an error in the costs as calculated and certified. On page 2, the final entry, before the amounts are totaled, reads: "Attorney General's costs for client communication and document retrieval = \$228.25." However, reference to the computer printout attached to the Newlove declaration reveals that this number, 228.25, represents the total number of hours expended by Newlove, and not a separate billing or cost item.

Therefore, \$228.25 should be subtracted from the total, and the correct total costs are \$28,477.31.

LEGAL CONCLUSIONS AND DISCUSSION

Based upon the foregoing factual findings, the Administrative Law Judges makes the following legal conclusions:

1. Cause exists to suspend or revoke Respondent's private investigator's license for violation of Business and Professions Code §§ 7512.2, 7561.1, 7538, 480, and 7561.4, for commission of acts constituting dishonesty or fraud, as set forth in Findings 2 through 44, 47, 48, 51 through 59, 61, 88 through 93, 95 through 102, and 103 through 106.

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2. Cause does not exist to suspend or revoke Respondent's private investigator's license for violation of Business and Professions Code §§ 7512.2, 7561.1, 7538, 480, and 7561.4, for commission of acts constituting dishonesty or fraud, as set forth in Findings 22, 23, 31, 32, 45, 46, 48, 49, 50, 59, 60, 62 through 69, 70 through 75, 76 through 82, 83 through 87, and 94.

3. Reasonable costs of investigation and enforcement in this matter total \$28,477.31. See Findings 115 to 117. Based on the nature of the evidence submitted, the costs for the time expended by the Deputy Attorney General create a rebuttable presumption that the costs are reasonable. Under Business and Professions Code § 125.3(a), "a certified copy of the actual costs, or a good faith estimate . . . signed by the entity bringing the proceeding or its designated representative shall be prima facie evidence of reasonable costs of investigation and prosecution of the case."

4. Also to be considered on the issue of costs is whether there should be any apportionment of the amount of reasonable costs due to the outcome whereby Complainant has prevailed on only some of its allegations against respondent, but not on others. On this issue, the cost recovery statute (Business and Professions Code §125.3) is silent. The theory of apportionment has been upheld in civil cases involving the recovery of attorney fees by the prevailing party, where apportionment is not covered by the applicable statute or contract clause.

For example, in *Myers Bldg. Indus., Ltd. v. Interface Technology Inc.* (1993) 13 Cal.App.4th 949, attorney fees were awarded only for the fees incurred to enforce the subcontract (which had an attorney fees clause) and not for a construction contract (which did not have such a clause). And where a party prevails on a cause based on a contract including a fee clause, as well as on a tort theory where the fees are not recoverable, the fees should be allocated between the two causes of action. *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124. Similar allocation should take place where, as here, a party prevails on some, but not all, of its claims. *Slavin v. Fink* (1994) 25 Cal.App.4th 722. Finally, although the prevailing party should only recover fees relating to its successful cause of action allowing recovery, the fees need not be apportioned when they were incurred for work that was common to other causes of action as well.

To apply all of this to the case at hand, the Bureau was not successful in establishing all of its alleged bases of discipline against respondent. More specifically, in 2 instances there were no facts elicited to support an allegation (Findings 46 and 50). In several instances, although Complainant submitted evidence to support the allegations, the evidence submitted did not establish any violation of law. See Findings 62 through 69, 70 through 75, 76 through 82 and 83 through 87. Considering the totality of the number, nature and significance of the different allegations subject to the hearing, Complainant was unsuccessful with about 25% of the case. Without more specific evidence to determine an appropriate apportionment, it is determined that the reasonable costs should be reduced by 25% (\$28,477.31- \$7,199.33), for a total award of costs of \$21,277.98.

5. The honesty and integrity of a Bureau licensee go to the core functions for which a license is required. Respondent has not demonstrated a level of honesty and integrity sufficient to retain his license at this time.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The license as a private investigator of Respondent Charles R. Martin, Private Investigator License no. 13135, is revoked. Respondent Charles R. Martin shall pay to the Bureau costs of investigation and enforcement in the amount of \$21,277.98.

DATED: April 23, 2004.



DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings