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STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST PAUL D. KURTH, RESPONDENT.	: : : : :	FINAL DECISION AND ORDER LS9107252REB

The State of Wisconsin, Real Estate Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Real Estate Board.

The rights of a party aggrieved by this Decision to petition the Board for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 23RD day of JANUARY, 1992.

Peter J. Schils

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST PAUL D. KURTH, RESPONDENT.	: : : : :	PROPOSED DECISION Case No. LS-9107252-REB (87 REB 300)

PARTIES

The parties in this matter under sec. 227.44, Wis. Stats. and sec. RL 2.036, Wis. Adm. Code, and for purposes of review under sec. 227.53, Wis. Stats. are:

Paul D. Kurth
7910 West North Avenue #2
Wauwatosa, WI 53213

Real Estate Board
1400 East Washington Ave.
P.O. Box 8935
Madison, WI 53708

Division of Enforcement
Department of Regulation and Licensing
P.O. Box 8935
Madison, WI 53708

POSTURE OF CASE

A. This case was initiated by the filing of a complaint with the Real Estate Board on July 25, 1991. A disciplinary proceeding (hearing) was scheduled for October 7, 1991. Notice of Hearing was prepared by the Division of Enforcement of the Department of Regulation and Licensing and sent by certified mail on July 25, 1991 to Mr. Kurth, who received it on July 27, 1991.

B. When Mr. Kurth failed to file an answer to the complaint as required within twenty days, the attorney for the Division of Enforcement, Charles Howden, filed a Motion for Default on August 21, 1991. Mr. Kurth responded by letter to that motion and a prehearing conference was held by phone on August 27, 1991. Following that prehearing conference, Mr. Kurth filed an answer containing specific admissions and denials of the facts alleged in the complaint.

C. All time limits and notice and service requirements having been met, the disciplinary proceeding was held as scheduled on October 7, 1991. Mr. Kurth appeared in person. The Real Estate Board was represented by Attorney Charles Howden of the Department's Division of Enforcement. Although most of the items contained in the Complaint had been admitted by Mr. Kurth in his Answer, the testimony in the hearing covered the same ground, and where evidence differed, testimony was used as the basis for this Proposed Decision. The hearing transcript was received on November 12, 1991.

FINDINGS OF FACT

1. Respondent Paul D. Kurth, who lives at 7910 W. North Avenue #2 in Wauwatosa, WI, is and was at all times relevant to the facts set forth herein a real estate broker licensed to practice in the State of Wisconsin using license #36879, which was originally granted on February 14, 1986. At the time of the events in this complaint, Mr. Kurth was affiliated with Merrill Lynch Realty of Waukesha, Wisconsin.

2. By residential listing contract dated January 17, 1987, Katherine Procopis granted Merrill Lynch through Mr. Kurth an exclusive right to sell her property located at 2415 N. 114th St., Wauwatosa, Wisconsin. The listing price was $101,900.

3. At the time of listing, Mr. Kurth was aware that Ms. Procopis' property was the subject of a foreclosure action, and was to be sold at a sheriff's sale on February 16, 1987. Mr. Kurth may or may not have known that the total value of liens on the Procopis property exceeded $100,000, but he was aware that the total was close to that figure, perhaps $93,000.

4. Mr. Kurth told Ms. Procopis that it would not be necessary to inform prospective buyers of the foreclosure action and the pending sheriff's sale, at least until there was an accepted offer.

5. On February 8, 1987, Michael A. Seramur, a real estate broker affiliated with Ogden and Company, Inc. of Milwaukee, Wisconsin, drafted and submitted an offer to purchase the Procopis property on behalf of David and Mary Pat Foley; this offer was not accepted.

6. On February 9, 1987, Mr. Kurth drafted a counter-offer on behalf of Ms. Procopis to which Mr. Seramur drafted a counter-offer on behalf of the Foleys; neither of these was accepted.

7. On February 10, Mr. Kurth drafted another counter-offer on behalf of Ms. Procopis, incorporating some of the terms and conditions of the original offer, and adding and changing some terms, to provide in pertinent part:

(a) A purchase price of $89,900.

(b) A closing date on or before May 29, 1987.

(c) Earnest money in the amount of $1,000 to be paid within two days of the acceptance of the offer.

(d) Notice to the Foleys that their offer was considered a secondary offer subject to the release of a primary offer.

(e) The offer was contingent upon the Foleys obtaining a written commitment for a conventional first mortgage loan for not less than $72,250, or waiving the contingency, within sixty days of the date of acceptance of the offer.

(f) The offer was contingent upon the Foleys selling their property at 1912 N. 119th St., Wauwatosa, Wisconsin under certain conditions, including the following:

(i.) If the Foleys refused to accept an offer for their property of $72,000, inclusive of commission, this contingency would be considered waived.

(ii.) Ms. Procopis could keep her property on the market and solicit other offers.

(iii.) If the Foleys' offer became the primary offer,

(aa.) The Foleys would be required to list their property with a broker within seven days of the date their offer became primary, and

(bb.) Ms. Procopis could give the Foleys notice of any acceptable subsequent offer, at which time the Foleys would be required to waive this contingency within 24 hours or void the contract.

8. On February 11, 1987 Mr. Seramur drafted an acceptance of Ms. Procopis' counter-offer of February 10th on behalf of the Foleys.

9. On February 13, 1987 Mr. Kurth notified the Foleys that their offer had become primary, that a secondary offer had been received, and that if the Foleys wished to proceed with the purchase of the property they would have to waive the sale contingency within 24 hours.

10. By amendment to the contract of sale, dated February 13, 1987, the Foleys waived the sale contingency.

11. Up to this point in the negotiations, Mr. Kurth did not inform Mr. Seramur or the Foleys of the foreclosure action or the impending sheriff's sale of the Procopis property, or the fact that the property was subject to liens totalling approximately $100,000. By this time, Mr. Kurth was aware that the liens totalled that much.

12. Also on February 13, 1987, which was a Friday, Mr. Kurth contacted Rudolph John Mudroch, attorney for Elm Grove Savings and Loan Association in the foreclosure action against Ms. Procopis' property, who had previously told Mr. Kurth that the sheriff's sale could be stayed under certain circumstances. Mr. Kurth informed Mr. Mudroch of the nature of the Foleys' offer, and asked him to stay the sheriff's sale scheduled for February 16th, the following Monday. Mr. Mudroch informed Mr. Kurth that it would not be stayed.

13. After speaking to Mr. Mudroch, Mr. Kurth contacted Mr. Seramur and informed him of the foreclosure action and the sheriff's sale.

14. Seramur received the $1,000 earnest money payment from the Foleys, but on the advice of attorney John Gehringer and because of the information received regarding the foreclosure and sheriff's sale, he did not forward it to the listing broker, Merrill Lynch.

15. The Procopis property was sold at a sheriff's sale on February 16, 1987, and the sale was confirmed by court action on March 2, 1987.

16. After February 13, 1987, Mr. Kurth took no further actions on the Procopis/Foley transaction, except to call attorney Mudroch on or about February 17, 1987 to determine whether the court action had approved the sheriff's sale, and then on March 23, 1987, to notify Mr. Seramur that Ms. Procopis was unable to convey merchantable title to the property in question, and that therefore the transaction was terminated.

17. On April 16, 1987 attorney John Gehringer, acting for the Foleys, demanded the return of their $1,000 earnest money from Mr. Kurth.

18. On June 2, 1987, the $1,000 earnest money was returned by Ogden and Company, Inc. to the Foleys through Mr. Gehringer.

CONCLUSIONS OF LAW

I. The Real Estate Board has personal jurisdiction over the Respondent, based on fact #1 above and paragraph A above under "Posture of Case".

II. The Real Estate Board has jurisdiction over the subject-matter of this complaint, under sec. 15.08(5)(c), Wis. Stats, sec. 452.14, Wis. Stats, and ch. RL 24, Wis. Admin. Code.

III. The existence of a foreclosure judgment against the Procopis property, with a sheriff's sale scheduled for February 16, 1987, was a material and potentially adverse fact which should have been disclosed to the purchasers.

IV. The existence of liens and mortgages on the Procopis property exceeding the net selling price was a material and potentially adverse fact which should have been disclosed to the purchasers.

V. In the Procopis/Foley transaction which is the subject of this disciplinary complaint, the Respondent violated sec. RL 24.07 (1), Wis. Adm. Code by failing to disclose a material fact; he also violated sec. RL 24.025, Wis. Admin. Code by not treating all parties to a transaction fairly. By violating these two administrative rules, his conduct fell below minimum standards of conduct for real estate licensees under sec. RL 24.01 (2), Wis. Admin. Code, and demonstrated incompetency to act as a broker under sec. RL 24.01 (3), Wis. Admin. Code.

VI. The Respondent was not responsible for the failure of Mr. Seramur and Ogden and Company, Inc. to transfer the earnest money payment to Merrill Lynch, and he was not responsible for the failure to return the payment until June 2, 1987. Therefore, he did not violate sec. RL 18.08, Wis. Admin. Code.

ORDER

NOW, THEREFORE, IT IS ORDERED that

(1) under sec. 452.14(3), Wis. Stats., the Respondent's license to practice as a real estate broker in the state of Wisconsin be suspended for 60 days, effective the date this order is signed on behalf of the Board;

(2) under sec. 452.14(4m)(b), Wis. Stats., and as a condition of continued licensure, the Respondent must successfully complete eight hours of real estate-related education, part of which must relate to the issue of disclosure, and none of which may be used to satisfy other Board-ordered education requirements; and

(3) under sec. 440.22, Wis. Stats., the Respondent pay the costs incurred by the Board and the Department in the prosecution of this action.

IT IS FURTHER ORDERED that within nine months of the date of this order, the Respondent must submit proof of compliance with the above education requirement to the Board, and pay the assessed costs in full, and if he fails to do either, his license shall then be suspended until compliance is complete.

OPINION

Mr. Kurth's Alleged Failure to Disclose.

In January of 1987 the Respondent, Paul D. Kurth, signed a listing contract with Katherine Procopis to market her property, even though she informed him that the property had already been foreclosed and a sheriff's sale was scheduled for February 16, 1987. The impending sale was the reason the listing contract ran only through February 16, 1987. At that time Mr. Kurth advised Ms. Procopis that there was no requirement that potential buyers be informed of the foreclosure. (Mr. Kurth characterized his advice to Ms. Procopis as telling her that the decision to inform potential buyers was hers and that he would abide by whatever she decided; however, this difference in wording fails to mask the fact that he effectively authorized non-disclosure.)

Mr. Kurth did research the situation by contacting attorney Rudolph John Mudroch, who was acting as attorney for the Elm Grove Savings and Loan Association in its foreclosure action against Ms. Procopis' property, to determine whether the sheriff's sale could be avoided if Ms. Procopis managed to sell her house. Mr. Mudroch, testifying from notes in his file, stated that he has no memory of any such preliminary call from Mr. Kurth. However, the logic of Mr. Kurth's actions as well as his testimony, and Mr. Mudroch's limited basis for remembering this situation, make Mr. Kurth the more credible witness on this point. It is possible that Mr. Kurth asked a question in general terms without referring to the Procopis property, and that Mr. Mudroch filed no note in the Procopis file regarding the conversation. From Mr. Mudroch, Mr. Kurth found out that the sale could be stayed in the proper circumstance, i.e. the receipt of a bona fide non-contingent offer to purchase the property. Mr. Kurth therefore had a reasonable basis for believing that the sheriff's sale might be avoided.

In addition, Mr. Kurth did research the liens on the property. From his testimony, it seems most likely that the total value of the mortgages and liens on the property of which he was aware at the time the listing contract

was signed was approximately $93,000. The contract specified a listing amount of $101,900. Subtracting a 6% commission from this would have left a return to the seller of approximately $95,800, seemingly enough to cover Ms. Procopis' indebtedness on the property, with a little to spare. This would be consistent with Ms. Procopis' testimony that Mr. Kurth led her to believe that she would receive something from the sale.

Mr. Kurth's motivation in taking the listing was two-fold:

(1) His expressed motive was to help Ms. Procopis avoid the financial embarrassment of having a foreclosure on her record, which might affect her ability to obtain credit in the future. This seems to have been more his concern than Ms. Procopis', however, as she testified that she would not have bothered to try to sell her property unless she received something from the sale, largely because she was recovering from surgery and keeping the house open was an inconvenience. She also stated that Mr. Kurth was a "take-charge" type of person in whom she had confidence, and she left the sale in his hands.

(2) His other motive, unexpressed but obvious, was to obtain the listing and to earn a $6,000 commission. No evidence was offered regarding Mr. Kurth's finances or his experience up to that time as a real estate broker, but it is safe to assume that in the first year of his career with Merrill Lynch, every listing would be especially important to him professionally as well as financially. This requires that all of his actions be evaluated in terms of self-interest as well as the interests of the parties to the transaction.

Mr. Kurth defended his decision not to disclose (or in his terms, to advise Ms. Procopis that disclosure was not necessary) on three grounds:

(1) Definitions. Mr. Kurth stated that he read and still reads the word "material" in sec. RL 24.07, Wis. Admin. Code (see note 1) as meaning "physical" rather than "important" (transcript, pp. 154, 162), and since Ms. Procopis' financial situation was not a tangible defect in the property, it did not have to be disclosed. There is a logical basis for this interpretation (see note 2), and most of the occurrences of the word "material" in sec. RL 24.07, Wis. Admin. Code would make sense if read this

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Note 1: **RL 24.07 Disclosure.** (1) Disclosure of material facts. Licensees shall not exaggerate, misrepresent, or conceal material facts in the practice of real estate. Licensees have an affirmative obligation to discover those material facts that a reasonably competent and diligent inspection or investigation would reveal and to disclose any adverse facts material to the transaction in writing and in a timely manner to the buyer, seller or other interested parties. This provision is not limited to the condition of the property, but includes other material facts about a transaction which are discoverable, as follows: (subsections omitted).

Note 2: For example, Webster's Seventh New Collegiate Dictionary provides these two definitions among others: "1a. relating to, derived from, or consisting of matter: physical", and "2a. having real importance or great consequence".

way, but it seems an unnatural and narrow way to read the section (see note 3), and it is not persuasive, especially in light of one unmistakable use of the word "material" in its other meaning (see line 6 of note 1). In addition, Mr. Kurth declared that he interpreted the word "adverse" to mean factors such as planned street improvements (transcript, p. 155). There is also a logical basis for this interpretation, in sec. RL 24.02 (1), Wis. Admin. Code (see note 4), but the weakness in Mr. Kurth's position is the phrase "includes, but is not limited to", which requires a broker to interpret the word "adverse" as extending beyond the examples given, to its normal common-sense meaning (see note 5), and none of its everyday meanings even suggests "external". Mr. Kurth appears to have looked at the requirements of sec. RL 24.07, Wis. Admin. Code and purposely interpreted them in as narrow a fashion as possible. One indication that Ms. Procopis' indebtedness was both material and adverse to the buyers, which Mr. Kurth could easily have foreseen if he hadn't been blinded by an overly-optimistic view of what he could accomplish, is that the financial situation might prevent the sale from taking place, as it ultimately did.

(2) The fiduciary relationship. Mr. Kurth stated that he considered Ms. Procopis' personal financial situation to be within the fiduciary relationship he had with her, presumably meaning that he would not discuss this with others, and that he considered any mortgages and liens on the property to be aspects of her personal financial situation. There is some logic to this argument because, as Mr. Kurth stated, clearing the seller's mortgage and any liens is a routine part of any real estate transaction, and -- disregarding for a moment the question of the foreclosure and sheriff's sale -- the figures and other information available to Mr. Kurth at the time the contract was signed provided a reasonable basis for a belief that Ms. Procopis could provide a clear title to the property at closing. Even though this position has some merit when considered by itself, nevertheless, <u>two factors clearly required him to disclose the situation to potential buyers</u>: <u>one of those factors -- the foreclosure and sheriff's sale -- was present from the outset</u>.

Note 3: By way of contrast, the Wisconsin Supreme Court has provided the following definition:

> A fact is material if a reasonable purchaser would attach importance to its existence or non-existence in determining the choice of action in the transaction in question .... <u>Ollerman v. O'Rourke Co., Inc.</u>, 94 Wis.2d 17, 42, 288 N.W.2d 95 (1980).

Note 4: **RL 24.02. Definitions.** (1) "Adverse facts" includes, but is not limited to: urea-formaldehyde foam insulation, radon, exposed asbestos, underground storage tanks, disposal of toxic chemicals on the property, leaking basement, structural defects, location in a flood plain or wetland, and planned or commenced public improvements which may result in special assessment or otherwise materially affect the property.

Note 5: For example, <u>The American Heritage Dictionary, Second College Edition</u> gives the following definitions: "1. Antagonistic in design or effect; opposed: adverse criticism. 2. Contrary to one's interests or welfare; unpropitious: adverse circumstances. 3. In an opposite or opposing direction or position. 4. <u>Bot</u>. Facing the axis or main stem.

Mr. Kurth is simply wrong in his definitions of "material" and "adverse"; the foreclosure would certainly be a material fact to any buyer, and even thoughMr. Kurth hoped to manipulate the situation so as to avoid the sheriff's sale, he should have disclosed and discussed it with the buyers. He did not because disclosure would have threatened the deal. Mr. Foley stated that if he had known of the property's financial situation, he would not have made an offer on it. Mr. Kurth admitted as much, saying that disclosure would have made a difference. Concealing the foreclosure and sheriff's sale was a violation of sec. RL 24.07 (1), Wis. Admin. Code and a violation of sec. RL 24.025, Wis. Admin. Code. (See note 6.) The other factor -- Ms. Procopis' inability to satisfy all the indebtedness on the property -- arose later, but no later than February 11th. This occurred when Mr. Kurth became aware that the selling price would not cover mortgages, liens and commission, i.e. when the purchase price fell below $99,000 or when he realized that the value of mortgages and liens exceeded $95,800, whichever came first. The evidence does not establish clearly when Mr. Kurth became aware that the total indebtedness on the property exceeded $100,000, although at some point he did have this information; regardless, when the purchase price was set at $89,900 on February 11th, he must have realized that Ms. Procopis would be unable to the best of his knowledge to convey clear title to the property even if the sheriff's sale was stayed, and he should have realized that this was an adverse factor for the buyers. The only possible way in which he could have justified not disclosing such a shortfall would have been if he knew for a certainty that the difference would be covered at or before closing, and he therefore had an obligation to discuss this problem with Ms. Procopis to ascertain how the seller's indebtedness would be cleared. However, he did not tell Ms. Procopis that the money from the sale would not clear the title and pay his commission, let alone leave any for her. Nor did he present her with the total value of mortgages and liens once he determined that they exceeded $100,000, or discuss with her how she might cover the shortfall. Consciously or subconsciously, he knew that such a discussion would have threatened the deal from the seller's side. As stated earlier, Ms. Procopis was not interested in trying to sell the property unless she received something from it. At this point, Mr. Kurth's self-interest seems to have taken priority over both the buyers' and the seller's. Failing to disclose the encumbrances on the property at this time was a violation of sec. RL 24.07 (1), Wis. Admin. Code and a violation of sec. RL 24.025, Wis. Admin. Code. (See note 7.)

Note 6: **RL 24.025. Responsibilities relating to a principal and others.** Licensees shall represent the interests of the principal as an agent. The responsibility owed the principal does not exempt the licensee from the obligation to treat fairly all parties to a transaction.

Note 7: Given Mr. Kurth's defenses, that he misinterpreted the language of the rule, etc., it would be easier to find a clear violation on his part if a Board interpretation of this question had appeared during 1986, the one year in which he was licensed prior to this incident. No such interpretation occurred. However, three Board disciplinary decisions from 1984 cited by Mr. Howden (Collison, Hendrikson, & Hanson) establish that, even if mortgages and liens might be considered merely personal financial matters, disclosure is required of any problem with a mortgage, such as an arrearage of payments, a default, or a tax lien.

(3) The seller's interest. Mr. Kurth defended his action by saying that disclosure would have undermined the seller's position, and that it was unnecessary for him to bring the indebtedness to the buyers' attention as it was on record in the courthouse. Unfortunately for Mr. Kurth, this is a damaging admission rather than a defense. His attitude reveals that he has not yet learned one of the essential lessons for real estate licensees, that the profession no longer permits an approach of caveat emptor. Although at some era prior to regulation it may have been acceptable, this is precisely the sort of sharp practice which would bring the profession into disrepute, and which professional regulation seeks to end. A broker is no longer allowed to place service to the seller (or even less to himself) above his duty to the buyer. Whether the Foleys suffered actual damage is not the issue, and it is not a necessary element in this disciplinary proceeding. Mr. Kurth made a very bad decision heavily colored by self-interest on a material and potentially adverse fact when he decided not to disclose the financial information regarding Ms. Procopis' property. In doing so he avoided his duty to the buyers, and to the extent that he placed his own interest above that of the seller, he violated the first sentence of sec. RL 24.025, Wis. Admin. Code (note 6) as well.

Mr. Kurth was charged with violating sec. RL 24.03(2)(b), Wis. Admin. Code also (see note 8), but I interpret that section as having a broader scope, imposing an affirmative duty on licensees to protect the general public from fraudulent practices which come to the licensee's attention. I therefore find that Mr. Kurth's actions were not a violation of RL 24.03(2)(b).

Mr. Kurth's Alleged Failure to Transfer Earnest Money.

Mr. Kurth was charged with a violation of sec. RL 18.08, Wis. Admin. Code (see note 9), but even though he was somewhat irresponsible in abandoning the sale after his attempts to salvage the deal failed, he was not responsible for the difficulties the Foleys had in recovering their earnest money payment, and

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Note 8: RL 24.03 **Competent services.** ...
(2) Competence required. ...
(b) Licensees shall act to protect the public against fraud, misrepresentation and unethical practices.

Note 9: RL 18.08 **Downpayments and co-brokerage.** (1) Cash downpayments. If an offer to purchase is the result of co-brokerage, the selling broker shall transfer the earnest money payment received in the form of cash from the buyer to the listing broker within 24 hours of acceptance of the offer to purchase.
(2) Downpayments by check, share draft or draft. The selling broker shall transfer to the listing broker the earnest money payment received in the form of a personal check, share draft or draft within 24 hours of acceptance of the offer to purchase, except that the selling broker may withhold transfer of the payment pending clearance from the payor's depository institution. If the check, share draft or draft clears, the broker shall transfer the earnest money to the listing broker within 24 hours of receiving evidence of clearance.

he did not violate RL 18.08. After the transaction fell through because he was unable to stay the sheriff's sale, Mr. Kurth basically dropped the deal. He made a call to Mr. Mudroch on February 17th to find out the results of the sheriff's sale, but he did not discuss what had happened with Ms. Procopis, and he did not contact the buyers or their attorney. This breakdown in communication had a number of ramifications, one of which was that Mr. Kurth was unaware of the Foley's earnest money payment. Mr Seramur testified that he made the decision not to forward the payment to the listing broker, and if anyone violated a rule with regard to earnest money, it was Mr. Seramur. All the indications from the testimony are that Mr. Kurth was unaware that the earnest money payment had been made, which means that by February 16th, he must have assumed that the transaction had fallen through from the buyer's side even before it became impossible to satisfy from the seller's side. He considered the transaction dead, and was not in a position to return or even control the Foleys' $1,000 payment.

Discipline.

Mr. Kurth violated sec. RL 24.07(1), Wis. Admin. Code by failing to disclose material and adverse facts to the buyers, and he violated sec. RL 24.025, Wis. Admin. Code by not treating the buyers fairly. Because compliance with the code is the measure of "competency" for a broker, he demonstrated incompetency to act as a broker under sec. RL 24.01(3), Wis. Admin. Code, and his conduct thereby fell below minimum standards of conduct for real estate licensees under sec. RL 24.01(2), Wis. Admin. Code. Discipline is appropriate, not as punishment, but (1) as rehabilitation, (2) to deter others in the profession from similar unprofessional conduct, and (3) to protect the public, by assuring the moral fitness and professional competency of those privileged to hold licenses. (See note 10.)

The proposed discipline is a 60-day suspension of Mr. Kurth's license along with a requirement that he attend at least eight hours of real estate-related education, part of which must relate to the issue of disclosure. This is intended to serve Mr. Kurth's rehabilitation by increasing both his understanding and his awareness. The education will provide an opportunity for him to investigate and better understand the specific requirements of sec. RL 24.07, Wis. Admin. Code regarding disclosure, and the suspension will increase his appreciation of the importance of those requirements. The proposed discipline is also intended for the benefit of

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Note 10: These three accepted purposes of discipline have been set forth by the Wisconsin Supreme Court in four cases involving attorneys: State v. Kelly, 39 Wis.2d 171, 158 N.W.2d 554 (1968), State v. McIntyre, 41 Wis.2d 481, 164 N.W.2d 235 (1969), State v. Corry, 51 Wis.2d 124, 186 N.W.2d 325 (1970), and State v. Aldrich, 71 Wis.2d 206, 237 N.W.2d 689 (1976). The term "rehabilitation" is somewhat ambiguous, covering some things that might normally be considered punishment. In Corry especially, the term covers both positive and negative experiences which will deter the offender from similar behavior in the future, such as appreciating the adverse consequences of unprofessional conduct.

others in the profession by a similar combination of education and deterrence. The reported decision itself will inform, or remind, licensees of the requirements of RL 24.07 and inform, or remind, them of their importance. And if the proposed discipline has the intended effect on Mr. Kurth and on other members of the profession, it will serve the third purpose of protecting the public.

Mr. Howden recommended that Mr. Kurth's license be revoked. Such an action is not justified. Mr. Howden may have been reacting to the fact that Mr. Kurth unrepentently maintained his position regarding the way in which Ms. Procopis' financial situation related to the disclosure requirement of RL 24.07, but to escalate discipline because the respondent required the Department to prove its case would in effect be punishing him for asserting his right to a hearing (what is sometimes called in another setting the "jury tariff"). There is also some indication in exhibits 17, 18 and 19 and the testimony on pp. 50-54 of the transcript, that Mr. Kurth overstated some facts in letters to Department investigators; although Mr. Kurth should be more careful with the truth, the incorrect statements do not rise to a level of dishonesty which justifies revocation. The record does not indicate that Mr. Kurth is so incompetent or so incapable of rehabilitation that he should be barred from real estate practice. The recommendation here is also consistent with the discipline imposed in the earlier cases cited by Mr. Howden (see note 11).

Note 11: The discipline imposed in the Hanson case was a 60-day suspension and an education requirement, in Collison a 30-day suspension, and in Hendrikson a 90-day suspension.

Dated November 14, 1991.

John N. Schweitzer
Administrative Law Judge
Department of Regulation and Licensing

BDLS2-827

NOTICE OF APPEAL INFORMATION

(Notice of Rights for Rehearing or Judicial Review, the times allowed for ach, and the identification of the party to be named as respondent)

The following notice is served on you as part of the final decision:

1. Rehearing.

Any person aggrieved by this order may petition for a rehearing within 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes, a copy of which is attached. The 20 day period commences the day after personal service or mailing of this decision. (The date of mailing of this decision is shown below.) The petition for rehearing should be filed with the State of Wisconsin Real Estate Board.

A petition for rehearing is not a prerequisite for appeal directly to circuit c urt through a petition for judicial review.

2. Judicial Review.

Any person aggrieved by this decision has a right to petition for judicial review of this decision as provided in section 227.53 of the Wisconsin Statutes, a copy of which is attached. The petition should be filed in circuit court and served upon the State of Wisconsin Real Estate Board

within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing of this decision is shown below.) A petition for judicial review should be served upon, and name as the respondent, the following: the State of Wisconsin Real Estate Board.

The date of mailing of this decision is January 24,1992.