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STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST MARILYN K. KERNALL, RESPONDENT.	:	FINAL DECISION AND ORDER (Case No. LS9210021REB)

The parties to this proceeding for the purposes of Sec. 227.53, Stats., are:

Marilyn K. Kernall
570 Braund
Onalaska, WI 54650

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

Department of Regulation and Licensing
Division of Enforcement
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

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

A hearing was held in this matter before an Administrative Law Judge on March 8, 1993. The respondent, Marilyn K. Kernall, appeared personally without legal counsel. The complaint appeared by Attorney Charles J. Howden.

The Administrative Law Judge issued a Proposed Decision on May 17, 1993. Complainant's attorney submitted objections to portions of the decision on June 3, 1993.

Based on the record of this proceeding, the Real Estate Board makes the following Findings of Fact, Conclusions of Law, and Order as its Final Decision in this matter.

FINDINGS OF FACT

1. Respondent Marilyn K. Kernall is a real estate broker licensed in the state of Wisconsin. under license number 40482, and she has held that license continuously since it was originally granted on April 13, 1987

2. From early 1990 to early March, 1991, Ms. Kernall was employed as a real estate broker by Coldwell Banker Barbour Realtors in La Crosse, Wisconsin. [transcript, pp. 14, 139-140].

3. On August 20, 1990 Ms. Kernall drafted a Residential Listing Contract - Exclusive Right to Sell for property in Holman, Wisconsin owned by Joanne Carlson. [exhibit 3].

4. Ms. Carlson's property was subject to two mortgages, one to the LaCrosse Teachers Credit Union and one to the Wisconsin Housing and Economic Development Authority ("WHEDA") [tr. 30, 65-66].

5. On September 20, 1990, another Coldwell Banker real estate agent, Linda Nelson, drafted a Residential Offer to Purchase for the Carlson property on behalf of Sandra Snodgrass. Ms. Kernall presented this offer by fax to Ms. Carlson, who was then living in the state of Washington. The offer proposed a closing date of April 30, 1991 and contained the following statement:

> "This offer is subject to seller leasing premises to buyer for $400.00 per month until closing. If this does not close for some reason, the $1,000.00 earnest money will be delivered to seller as option money for taking property off the market during this length of time." [ex. 2].

6. On September 24, 1990 Ms. Carlson accepted Ms. Snodgrass's offer. [tr. 64; ex. 2]. She moved her furniture out of the house on October 24th or 25th, 1990. Ms. Snodgrass moved in approximately four days before the end of October 1990. [tr. 64-65].

7. Ms. Kernall agreed on Ms. Carlson's behalf to collect the rent paid by Ms. Snodgrass and to make payments on Ms. Carlson's mortgages, $150 to the Teachers Credit Union and $250 to WHEDA. This agreement was not reduced to writing. [tr. 29-35, 66].

8. Ms. Kernall negotiated on Ms. Carlson's behalf with an official of the LaCrosse Teachers Credit Union to make reduced payments on Ms. Carlson's mortgage. [tr. pp. 210-211].

9. Ms. Snodgrass made, and Ms. Kernall received, rent payments as follow:

> Nov. 1, 1990 - $400 for November occupancy
> Jan. 1, 1991 - $400 for January occupancy
> Jan. 2, 1991 - $400 for February occupancy
> Mar. 1, 1991 - $400 for March occupancy
> Mar. 3, 1991 - $400 for April occupancy
> [tr. 38-40, 42-44, 165-168; ex. 4].

On or about December 19, 1990 the Church of Jesus Christ of Latter-Day Saints made a payment on behalf of Sandra Snodgrass, which Ms. Kernall received, of $479.52, for December occupancy plus the few days of occupancy in October [tr. 40-42, 166-167; ex. 5]. Ms. Kernall received rent payments totalling $2,479.52. With the exception of the partial payment for October and the payment for December, both of which were paid on December 19, 1990, all payment were made on time or in advance.

10. Ms. Kernall did not maintain a trust account while she was employed by Coldwell Banker [tr. 13] and none of Ms. Snodgrass's rent payments was placed in a trust account. Ms. Kernall did not maintain a trust account bookkeeping system and she did not keep a written record of Ms. Snodgrass's payments [tr. 35].

11. Ms. Kernall made no payments on either of Ms. Carlson's mortgages prior to February 11, 1991. As a result of the non-payments, the Teachers Credit Union notified Ms. Carlson on January 16, 1991 that it would foreclose on its mortgage if the account was not brought up to date in 30 days. [ex. 13]. Ms. Carlson contacted Ms. Kernall in late January about the non-payments.

12. Ms. Kernall made mortgage payments on behalf of Ms. Carlson as follows:

Feb. 4, 1991 - $158 to WHEDA
Feb. 11, 1991 - $250 to LaCrosse Teachers Credit Union
Feb. 26, 1991 - $316 to WHEDA
Feb. 26, 1991 - $250 to LaCrosse Teachers Credit Union
[tr. 74-75; exs. 8, 9].

Ms. Kernall made payments on mortgages totalling $974. Ms. Kernall kept no records of the mortgage payments to the LaCrosse Teachers Credit Union or WHEDA.

13. On March 15, 1991 Ms. Carlson contacted Ms. Kernall and expressed her concern over the failure to make mortgage payments, and Ms. Kernall told Ms. Carlson that Ms. Snodgrass had not made her payments. [tr. pp. 71-72].

14. Ms. Carlson called Ms. Kernall on April 15, 1991 and Ms. Kernall hung up on her. [tr. p. 76].

15. On September 8, 1991 Ms. Kernall paid $875 to an attorney for Ms. Carlson [tr. 52-54; ex. 12]. On April 2, 1992 she paid an additional $300 to the attorney [tr. 79], bringing the total of all money paid out by Ms. Kernall to or for Ms. Carlson to $2,149. The balance of the $2,479.52 (=$330.52) is unaccounted for.

16. In her answer to the complaint in this proceeding, Ms. Kernall made the following statements:

- "It turned out that Snodgrass had no money, or any visual means of support."
- "Snodgrass didn't have any money, as far as I'm concerned."
- "I had no idea it would be such a mess, trying to get money from Snodgrass."
- "when Carlson said WHEDA had contacted her, stating that the account was two months late and that if it wasn't caught up, they were going to start foreclosure proceedings, I mailed them a check from my account, without collecting it from Snodgrass first."
- "I have no idea where you came up with the amount of $2,471. Snodgrass had only been in the house for four months, when I parted company with Barbour. I applied whatever I got to the loans."

[ex. 7].

CONCLUSIONS OF LAW

I. The Real Estate Board has jurisdiction in this proceeding pursuant to Sec. 452.14(3), Stats.

IV. The respondent, Marilyn K. Kernall, violated Sec. RL 24.08, Wis. Admin. Code by failing to reduce the lease and the oral property management agreement to writing. In doing so, Ms. Kernall demonstrated incompetency to act as a real estate broker in such manner as to safeguard the interests of the public, under Sec. RL 24.01(3), Wis. Admin. Code, and professional discipline is authorized under Sec. 452.14, Stats.

V. The respondent, Marilyn K. Kernall, did not violate Sec. RL 16.04, Wis. Admin. Code, which requires the use of approved forms. Ms. Kernall did not reduce the lease and the oral property management agreement to writing, in any form, a violation dealt with in the conclusion of law above; Sec. RL 16.04 would apply only if she had written the agreements on a non-approved form.

VI. The respondent, Marilyn K. Kernall, violated Sec. RL 18.03(1), Wis. Admin. Code by failing to deposit real estate trust funds in a trust account. In doing so, Ms. Kernall demonstrated incompetency to act as a real estate broker in such manner as to safeguard the interests of the public, under Sec. RL 18.14, Wis. Admin. Code, and professional discipline is authorized under Sec. 452.14, Stats.

VII. The respondent, Marilyn K. Kernall, violated Sec. RL 18.13, Wis. Admin. Code by failing to maintain a bookkeeping system for real estate trust funds. In doing so, Ms. Kernall demonstrated incompetency to act as a real estate broker in such manner as to safeguard the interests of the public, under Sec. RL 18.14, Wis. Admin. Code, and professional discipline is authorized under Sec. 452.14, Stats.

VIII. The respondent, Marilyn K. Kernall, did not violate Sec. RL 18.10, Wis Admin. Code, which prohibits the commingling of personal funds into a trust account. Ms. Kernall deposited the real estate trust funds into her personal account, a violation dealt with in conclusion of law VI; Sec. RL 18.10 would apply only if she had placed personal funds in her (non-existent) trust account.

IX. The respondent, Marilyn K. Kernall, violated Sec. 452.14(3)(h), Stats., by failing within a reasonable time to account for and remit rent payments made to her, and professional discipline is authorized under that section.

X. The respondent, Marilyn K. Kernall, did not violate Sec. RL 24.025, Wis. Admin. Code, which requires licensees to treat all parties to a transaction fairly. Ms. Kernall's actions were incompetent, as dealt with in other conclusions of law, but they did not promote the interest of one party over the interest of another.

XI. The respondent, Marilyn K. Kernall, violated Sec. RL 24.03(2)(a), Wis. Admin. Code, by providing services which she was incompetent to provide and without engaging the assistance of one who was competent. In doing so, Ms. Kernall demonstrated incompetency to act as a real estate broker in such manner as to safeguard the interests of the public, under Sec. RL 24.01(3), Wis. Admin. Code, and professional discipline is authorized under Sec. 452.14, Stats.

XII. The respondent, Marilyn K. Kernall, violated Sec. RL 24.07(1), Wis. Admin. Code, which requires disclosure of material facts, by failing to inform Ms. Carlson that she was not applying the rental payments received from Ms. Snodgrass toward the mortgages upon the property. Such concealment demonstrated incompetency to act as a real estate broker in such manner as to safeguard the interests of the public, under Sec. RL 24 01(3), Wis. Admin. Code, and professional discipline is authorized under Sec. 452.14, Stats.

XIII. The respondent, Marilyn K. Kernall, violated Sec. 452.14(k), Stats., which prohibits improper dealing, by engaging in conduct involving moral culpability tending to take unfair financial advantage of a party to a real estate transaction which was closely akin to dishonest dealing.

ORDER

NOW, THEREFORE IT IS ORDERED that the license as a real estate broker issued to the respondent, Marilyn K. Kernall, be revoked, effective ten days after this order is signed on behalf of the board.

IT IS FURTHER ORDERED that Marilyn K. Kernall pay the costs of this proceeding, as authorized by Sec. 440.22(2), Stats. and Sec. RL 2.18, Wis. Admin. Code.

Pursuant to Sec. RL 2.18, Wis. Admin. Code RL 2.18(4), the attorney for the Division of Enforcement and the Administrative Law Judge shall file supporting affidavits showing costs incurred within 15 days of the date of this decision. Respondent shall file any objections to the affidavits within 30 days of the date of this decision.

EXPLANATION OF VARIANCE

The Administrative Law Judge (ALJ) submitted a Proposed Decision finding that respondent violated several provisions of the licensing law pertaining to real estate brokers and recommending that respondent's license be revoked. Complainant's attorney does not object to the violations found to exist by the ALJ or the discipline recommended, but does disagree with several of the recommended Conclusions of Law. The board has adopted the Findings of Fact and Order recommended by the ALJ.

Each of complainant's objections is discussed below in the order in which they appear within the recommended Conclusions of Law in the Proposed Decision. (The "¶" and "¶¶" references are to the paragraph designations utilized by the ALJ for the Conclusions of Law within the Proposed Decision, which are carried over into this final decision except as noted.)

Based upon its review of the record in this case, the board has retained or altered the conclusions recommended in light of the objections filed, as discussed below.

JURISDICTION OF BOARD (¶¶I, II, III)

Complainant's attorney indicates that the reference to Sec. 15.08(5)(c), Stats., in ¶III of the recommended Conclusions of Law as a basis for the board's jurisdiction is incorrect. The statute cited pertains to the authority of examining boards. Since the Real Estate Board is not an examining board, this citation has been deleted. See, Sec. 15.07(1)(b)8, Stats.

Additionally, ¶¶I & II of the proposed conclusions reference the authority of the board to "issue" and in "issuing and controlling" real estate licenses as providing a portion of its jurisdictional basis for taking action in this proceeding. However, the authority to grant and issue a license to practice real estate does not reside in the board; but rather, the Department of Regulation and Licensing, pursuant to Sec. 452.05(1)(a), Stats.

The basis for the board's jurisdiction in this case--stated simply, but adequately--rests in its authority to take disciplinary action against holders of a real estate license pursuant to Sec. 452.14(3), Stats. Accordingly, this provision is stated as the basis for the board's jurisdiction in ¶I of the Conclusions of Law in this decision. The recommended conclusions in ¶¶II and III are deleted.

USE OF APPROVED FORM (¶V)

The ALJ found that respondent did not draft a written lease between the seller and buyer. The failure to put the lease in writing constituted a violation of Sec. RL 24.08, Wis. Admin. Code.

Complainant's attorney argues, however, that this conduct additionally violated Sec. RL 16.04(1), Wis. Admin. Code which states that licensees "shall use approved forms". A specific lease form was mandated for use by real estate licensees at the time of the transaction in this case

However, the board does not believe a violation of the "approved forms" rule occurred here. The underlying purpose of Chapter RL 16 (entitled, "APPROVED FORMS AND LEGAL ADVICE"), is to set forth requirements which will assure that licensees do not engage in the unauthorized practice of law, as defined within State ex rel. Reynolds v. Dinger, 14 Wis.2d 193 (1961). Accordingly, the rule required a licensee to utilize a specific form when preparing a house lease.

But here, respondent did not draft any lease agreement, and therefore did not perform the legal function of contract drafting in this regard. Accordingly, although the board considers respondent to have violated RL 24.08 through her failure to reduce the lease to writing, she did not breach RL 16.04(1), which is primarily directed at prohibiting the use of unapproved legal forms.

COMMINGLING PERSONAL FUNDS IN TRUST ACCOUNT (¶VIII)

Respondent failed to deposit $2,479.52 in rent money into a trust account. Rather, she deposited the rents into a personal account. The failure to use a trust account was appropriately found to be a violation of Sec. RL 18.03(1), Wis. Admin. Code.

Complainant alleges that respondent's conduct also constituted improper commingling of personal and trust funds under Sec. RL 18.10, Wis. Admin. Code, which provides in part as follows:

> "A broker shall deposit only real estate trust funds in the broker's real estate trust account and shall not commingle the broker's personal funds or other funds in the trust account. . . ."

The rule prohibits a licensee from depositing personal funds (for other than administrative costs purposes) into a trust account. The rule is directed at preventing a trust account from being considered a part of a licensee's personal assets for purposes such as the execution of civil judgments against a licensee or as the licensee's personal property in bankruptcy It cannot be found that the respondent jeopardized the purity of a real estate trust account in this case, since one was not used.

FAIR TREATMENT OF ALL PARTIES (¶X)

It is also argued that the record in this proceeding supports a finding that respondent violated Sec. RL 24.025, Wis. Admin. Code, which provides as follows:

> "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."

Complainant's attorney contends that since respondent breached various fiduciary duties owed to her principal-seller in the transaction (including those of disclosure and accounting), the ALJ should have found a violation of this rule.

The first sentence of the rule requires that a licensee act as a agent for a principal in real estate transactions. Respondent met this requirement by establishing such a legal relationship with the seller. The crux of the rule, as contained in its second sentence, is that a licensee must treat all parties to a real estate transaction fairly--the duties owed to the principal under agency law notwithstanding.

The rule is not intended to function as a conduit by which breaches of fiduciary duties owed a principal are presented in a disciplinary context. As demonstrated in this case, violations of such duties are codified as appropriate for disciplinary purposes in other provisions of the code and the respondent has been found to have violated relevant sections. However, it does not appear that she illegitimately promoted the interests of her seller to the detriment of the buyer, such as would warrant a finding that she violated RL 24.025

DISCLOSURE OF MATERIAL FACTS (¶XII)

Complainant's attorney objects to the finding in ¶XII that respondent's conduct did not constitute a violation of Sec. RL 24.07(1), Wis. Admin. Code. This rule states in part:

> "Licensees shall not exaggerate, misrepresent or conceal material facts in the practice of real estate."

The offer to purchase provided for the buyer to lease the property from the buyer until closing Respondent agreed to collect the rent and make the payments due upon two mortgages on the property. However, respondent failed to disclose to the seller that she was not applying the rental payments to the mortgages. This concealment was clearly material (i.e., important), as it reasonably led the seller to believe that respondent was carrying out the agreed upon duties under the oral property management agreement, which in turn led to threatened foreclosure.

Accordingly, ¶XII of the Conclusions of Law has been modified to render a finding that respondent's concealment of the non-application of the rental payments to the mortgages constituted a violation of RL 24.07(1).

IMPROPER, FRAUDULENT OR DISHONEST DEALING (¶XIII)

Complainant's attorney argued that a finding of a violation of Sec. 452.14(3)(k), Stats. should be made under the facts of this case. That statute permits the imposition of discipline upon a finding that a licensee has:

> "Been guilty of any other conduct, whether of the same or a different character from that specified herein, which constitutes improper, fraudulent or dishonest dealing."

It is argued that the misappropriation of funds, as well as respondent's falsely informing the seller that the rental payments were not being made by the buyer, constituted "improper conduct", within the meaning of the statute. The board agrees.

The Wisconsin Supreme Court had the occasion to construe the meaning of the term, "improper", in Lewis Realty v. Wisconsin Real Estate Brokers' Board, 6 Wis.2d 99 (1959). Noting that the statute referred to improper conduct in direct conjunction with fraud and dishonesty, the Court stated, at p. 108:

> "The word 'improper' has a more-comprehensive meaning than either 'fraudulent' or 'dishonest.' Conduct which violates the moral code and takes an unfair financial advantage of another person with whom the actor deals, is a constituent part of both 'fraudulent dealing' and 'dishonest dealing.' . . . We consider it necessary that the words 'improper dealing' as used in sec. 136.08(2)(k) [now, Sec. 452.14(3)(k), Stats.] be restricted to conduct which involves moral culpability and which tends to take an unfair financial advantage of the person with whom the actor is dealing. In other words, it must be closely akin to dishonest dealing."

Accordingly, in order to find that respondent's conduct was improper, as interpreted by the Wisconsin Supreme Court for the purposes of finding a violation of Sec. 452.14(3)(k), Stats., the record must show that respondent's actions involved "moral culpability which tended to take an unfair financial advantage" of a party to the transaction, and "closely akin to dishonest dealing."

The ALJ's view of respondent's conduct is stated as follows on p. 12 of the Proposed Decision:

> "The most likely, and most generous, interpretation of all the evidence is that Ms. Kernall's personal finances were in such disarray, and her bookkeeping so inept, that she lost track of the rent payments that were made to her. She simply lost track of the payments, and ended up believing they were never made. She formed the opinion that Ms. Snodgrass was insolvent because by the second week in December she had not received the payment for that month nor the partial payment for October, and because this payment was ultimately made by Ms. Snodgrass's church. She never bothered to reconsider that opinion, despite the fact that every other payment was on time or early. Ms. Kernall even created the fiction that Ms. Snodgrass never paid her all of the rent due, perhaps because she looked at her personal account and found no money there. This led to her maintaining, from that time until now, to Ms. Carlson and to Mr. Howden and ultimately to this tribunal and the board, that she never received all the payments from Ms. Snodgrass, that she had paid out all that she received, and that she even made a mortgage payment out of her own account before Ms. Snodgrass made her payment, all of which are untrue. The interpretation that Ms. Kernall was confused, in over her head, and incompetent, is generous because the only other interpretation is that she has been dishonest in her dealings with Ms. Carlson and the board."

Consistent with this factual interpretation is an additional finding that respondent's actions not only demonstrated incompetency, but a reckless and wanton disregard of her professional responsibilities. It is not reasonably conceivable for the respondent's conduct to have been based solely upon an ignorance of the professional obligations to deposit rental payments into a trust account, keep accurate records of receipts and disbursements of the monies of others, and either make required mortgage payments for a principal or inform the principal of the inability to do so. Respondent's conduct was closely akin to dishonest dealing within the meaning of the statute.

In the board's opinion, such conduct had the impact of taking an "unfair financial advantage" of the seller in manner closely akin to dishonesty within the meaning of "improper dealing", as used in Sec. 452.14(3)(k), Stats. ¶XIII of the Conclusions of Law has been modified to make such a finding.

Dated: July 31, 1993.

STATE OF WISCONSIN
REAL ESTATE BOARD

Peter J. Schils
Chairman

BDLS2-3033

NOTICE OF APPEAL INFORMATION

(Notice of Rights for Rehearing r Judicial Review, the times allowed for each, 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 court 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 August 4, 1993.

STATE OF WISCONSIN
BEFORE THE DEPARTMENT OF REGULATION AND LICENSING

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST MARILYN K. KERNALL, RESPONDENT.	: : : : :	AFFIDAVIT OF COSTS OF OFFICE OF BOARD LEGAL SERVICES Case No. LS-9210021-REB

John N. Schweitzer affirms the following before a notary public for use in this action, subject to the penalties for perjury in sec. 946.31, Wis. Stats.:

1. I am an attorney licensed to practice law in the State of Wisconsin, and am employed by the Wisconsin Department of Regulation and Licensing, Office of Board Legal Services.

2. In the course of my employment, I was assigned as the administrative law judge in the above-captioned matter.

3. The costs of the proceeding for the Office of Board Legal Services are set out below:

   a. Administrative Law Judge Expense - John N. Schweitzer

Telephone conferences, 11/9/92 through 3/5/93 2 1/4 hrs. @ $23.80/hour	= $53.55
Conduct hearing, 3/8/93 and 3/9/93; 7 1/4 hrs.	= $172.55
Read, research, and write proposed decision 4/21/93 through 5/17/93; 15 3/4 hrs.	= $374.85

   b. Reporter Expense

Attend hearing, 3/8/93	= $125.00
Transcribe 3/8/93 and 3/9/93 hearings, 227 pages	= $749.10

Total costs for Office of Board Legal Services = $1,475.05

John N. Schweitzer
Administrative Law Judge

Sworn to and signed before me this 6th day of August, 1993.

Donald R. Kittel, Notary Public, State of Wisconsin.

My commission is permanent.

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS AGAINST	:	AFFIDAVIT OF COSTS
	:	91 REB 368
MARILYN K. KERNALL, RESPONDENT.	:	

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Charles J. Howden, being duly sworn, deposes and states as follows:

1. That I am an attorney licensed in the state of Wisconsin and is employed by the Wisconsin Department of Regulation and Licensing, Division of Enforcement.

2. That in the course of those duties, I was assigned as a prosecutor in the above-captioned matter; and

3. That set out below are the costs of the proceeding accrued to the Division of Enforcement in this matter, based upon Division of Enforcement records compiled in the regular course of agency business in the above-captioned matter.

PROSECUTING ATTORNEY EXPENSE

Date	Activity	Time Spent
12/21/91	Screening of case.	.5 hours
6/30/92	Review of file & drafting of memo	.80 hours
9/15/92	Drafting of complaint and notice after review of file	2.5 hours
11/20/92	Review of file, scheduling of depositions, drafting of subpoenas, notices and correspondence in preparation for deposition.	7.0 hours
12/14/92	Pretrial and preparation	1.0 hours
12/15/92	Travel to La Crosse and taking of depositions	8.0 hours
12/16/92	Travel to Madison and memo regarding contacts with witnesses and file.	3.8 hours
12/18/92	Work on trial preparation and correspondence	1.5 hours

1/11/93	Correspondence	.25 hours
2/15/93	Pretrial & correspondence & drafting of litigation memo and preparation for hearing.	7.0 hours
2/16/93	Drafting of correspondence and subpoenas	1.8 hours
2/17/93	Drafting of correspondence and subpoenas in preparation.	2.5 hours
2/23/93	Witness contacts, correspondence & subpoenas, Pretrial	3.0 hours
3/2/93	Phone conferences with witnesses, correspondence & subpoenas.	2.5 hours
3/3/93	Pretrial	.5 hours
3/4/93	Phone conference, Faxing correspondence, Joan Carlson.	4.5 hours
3/7/93	Preparation	3.0 hours
3/8/93	Hearing, including preparation and conferences with witnesses.	7.0 hours
5/18/93	Receipt and review of proposed decision by ALJ	2.0 hours
5/20/93	Drafting of objections.	4.0 hours
6/1/93	Receipt and review of respondent's objections	.5 hours
6/3/93	Finish objections and file objections	1.0 hours
8/6/93	Drafting of affidavit regarding costs	.8 hours
	TOTAL HOURS	65.45 hours

Total attorney expense for
65.45 hours at $30.00 per hour
(based upon average salary and benefits for
Division of Enforcement attorneys) equals: $1,963.50

INVESTIGATION EXPENSE

Date	Activity	Time Spent
11/5/91	Receive and review case file	.5 hours
11/5/91	Telephone conferences: Complainant Grace Spencer	.5 hours

12/16/91	Review complaint letter.	.5 hours
1/7/92	Review response.	.5 hours
1/21/92	Preparation case summary.	1.0 hours
1/23/92	Prepare case for Board Advisor.	1.0 hours
3/26/92	Phone conference and revise case summary.	.5 hours
3/30/92	Correspondence.	.5 hours
4/13/92	Phone conference/memo.	.3 hours
4/8/92	Review response.	.5 hours
4/24/92	Review response.	.1 hours
4/28/92	Phone conferences/memo.	.3 hours
5/19/92	Phone conference/memo.	.3 hours
6/24/92	Review response and revise summary for PIC.	2.0 hours
6/25/92	Prepare for PIC.	1.0 hours
7/7/92	Travel to La Crosse and interview witnesses.	6.0 hours
7/8/92	Interview respondent and return to Madison.	4.5 hours
7/16/92	Memos	1.0 hours
8/21/92	Correspondence	.1 hours
9/8/92	Phone conferences and memos	.5 hours
9/11/92	memo	.1 hours
	TOTAL HOURS	21.70 hours

Total investigator expense for
21.70 hours at $18.00 per hour
(based upon average salary and benefits for
Division of Enforcement investigators) equals: $390.60

COSTS OF DEPOSITIONS

1.	Depositions taken by complainant in December 1992 - (original and one copy)	
	Deposition of Grace Spencer, Marilyn Hernal and Linda Nelson	$378.00

WITNESS FEES

1.	Subpoena of Ms Copper	$ 25.00
2.	Grace Spencer travel and witness fee	$ 65.00
3.	Linda Nelson witness fee	$ 5.00

MISCELLANEOUS DISBURSEMENTS

1.	Investigator's travel to La Crosse - 280 miles @ 18.3¢	$51.24
2.	Attorney's travel to La Crosse - 280 miles @ 18.3¢	$51.24
3.	Hotel expense for investigator and attorney	$90.00
4.	Meal expense for travel	$24.75
5.	Teacher Credit Union research fee	$ 5.00
	TOTAL ASSESSABLE COSTS	$3,049.33

Charles J. Howden, Attorney

Subscribed and sworn to before me this 17th day of August, 1993.

Roger Hall

Notary Public
My Commission is Permanent.

CJH:pw
T-ELG114

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST MARILYN K. KERNALL, RESPONDENT.	: : : : :	NOTICE OF FILING PROPOSED DECISION LS9210021REB

TO: Marilyn K. Kernall
570 Braund
Onalaska, WI 54650
Certified P 992 818 948

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

PLEASE TAKE NOTICE that a Proposed Decision in the above-captioned matter has been filed with the Real Estate Board by the Administrative Law Judge, John N. Schweitzer. A copy of the Proposed Decision is attached hereto.

If you have objections to the Proposed Decision, you may file your objections in writing, briefly stating the reasons, authorities, and supporting arguments for each objection. Your objections and argument must be received at the office of the Real Estate Board, Department of Regulation and Licensing, Room 281, 1400 East Washington Avenue, P.O. Box 8935, Madison, Wisconsin 53708, on or before June 4, 1993. You must also provide a copy of your objections and argument to all other parties by the same date.

You may also file a written response to any objections to the Proposed Decision. Your response must be received at the office of the Real Estate Board no later than seven (7) days after receipt of the objections. You must also provide a copy of your response to all other parties by the same date.

The attached Proposed Decision is the Administrative Law Judge's recommendation in this case and the Order included in the Proposed Decision is not binding upon you. After reviewing the Proposed Decision, together with any objections and arguments filed, the Real Estate Board will issue a binding Final Decision and Order.

Dated at Madison, Wisconsin this 17th day of May, 1993.

John N. Schweitzer
Administrative Law Judge

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF	:	
DISCIPLINARY PROCEEDINGS AGAINST	:	PROPOSED DECISION
	:	Case No. LS-9210021-REB
MARILYN K. KERNALL,	:	(DOE case number 91 REB 368)
RESPONDENT.	:	

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:

Marilyn K. Kernall
570 Braund
Onalaska, WI 54650

Real Estate Board
1400 East Washington Ave.
Madison, WI 53708

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

PROCEDURAL HISTORY

A. This case was initiated by the filing of a complaint with the Real Estate Board on October 2, 1992. A disciplinary proceeding (hearing) was scheduled for January 12, 1993. Notice of Hearing was prepared by the Division of Enforcement of the Department of Regulation and Licensing and sent by certified mail on October 2, 1992 to Marilyn K. Kernall at the above address. This notice was returned unclaimed on October 27, 1992. The notice was sent again by certified mail to Ms. Kernall on November 5, 1992. The undersigned administrative law judge phoned Ms. Kernall on November 9, 1992, and Ms. Kernall stated that she would be available to receive it.

B. Attorney Charles Howden of the Department's Division of Enforcement prepared a Notice of Deposition for witnesses Linda Nelson and Grace Spencer and a Notice of Oral Examination and Demand for Production of Documents directed to Ms. Kernall. These were served on Ms. Kernall on December 4, 1992.

C. A prehearing conference was held by telephone on December 14, 1992, at which the time for Ms. Kernall's answer was extended to December 21, 1992 and the hearing was rescheduled to March 8, 1993.

D. Ms. Kernall mailed two copies of her answer, postmarked December 22, 1992, to the undersigned, who was on vacation until January 11, 1993, at which time one copy was delivered to Mr. Howden. In the meantime, on January 7, 1993 Mr. Howden filed a Motion for Default Judgment, which was later withdrawn.

E. A prehearing conference was held on February 15, 1993 to address Mr. Howden's request to reschedule the case; the request was denied. Another prehearing conference was held on February 23, 1993 at which witnesses were identified and discussed, including the possibility of telephone testimony. A final prehearing conference was held on March 3, 1993 to discuss witnesses and documents. Ms. Kernall indicated that she planned to request copies of deposit records and cancelled checks from her bank. On Friday, March 5th, Ms. Kernall informed the undersigned that the documents would not be available for the hearing on Monday the 8th. In a brief telephone conference with both parties, Ms. Kernall's request to reschedule the hearing was denied, with the understanding that the record of the hearing might be held open to allow her time to submit copies of such documents, and that the need to investigate, examine or cross-examine based on the documents would then also need to be addressed.

F. All time limits and notice and service requirements having been met, the disciplinary proceeding was held as rescheduled on March 8, 1993. Ms. Kernall appeared in person, without legal representation. The Real Estate Board was represented by Attorney Howden. The hearing was recorded.

G. The issue of the deposit records and cancelled checks was not addressed at the hearing, and on the following day, the undersigned contacted Mr. Howden and Ms. Kernall by telephone. The record of the hearing was re-opened, and Ms. Kernall was given until March 30, 1993 to submit copies of any deposit records related to rents received from Sandra Snodgrass, copies of any cancelled checks showing payments to WHEDA or the Teachers Credit Union, and/or a copy of any rental agreement related to the transaction which was the subject of the disciplinary complaint. It was agreed that upon receipt of any such documents, Mr. Howden would have the right to request further investigation or cross-examination, or to re-open the hearing as he deemed appropriate. No additional documents were submitted by March 30, 1993. On April 7, 1993 Ms. Kernall wrote a letter stating that no documents would be coming, and commenting

upon testimony in the hearing; with Mr. Howden's acquiescence, this letter was allowed into the record as additional closing argument and the record was closed.

H. A transcript of the hearing was prepared and delivered on April 13, 1993. The testimony and exhibits entered into evidence at the hearing form the basis for this Proposed Decision.

APPLICABLE STATUTES AND RULES

Sec. RL 16.04, Wis. Admin Code; When to utilize approved forms. ... a licensee shall use approved forms when acting as an agent or a principal in a real estate transaction. ...

Sec. RL 18.02, Wis. Admin Code; Definitions. As used in this chapter, unless the context otherwise specifically requires:

...

(3) "Real estate trust funds" means:

(a) Cash, checks, share drafts, drafts or notes received by a broker or a broker's salesperson on behalf of a principal or any other person while performing as a licensed real estate broker or salesperson, including:

...

(4) Rental application deposits and rents.

...

Sec. RL 18.03, Wis. Admin. Code; General requirements. (1) TRUST ACCOUNT DEPOSITS.

...

(b) A broker shall deposit all real estate trust funds received by the broker or the broker's salespersons in a real estate trust account within 24 hours of receipt of such trust funds. ...

. .

Sec. RL 18.10, Wis. Admin. Code; Commingling prohibited. A broker shall deposit only real estate trust funds in the broker's real estate trust account and shall not commingle the broker's personal funds or other funds in the trust account ...

Sec. RL 18.13, Wis. Admin. Code; Bookkeeping system. Each broker shall maintain and be responsible for a bookkeeping system in the broker's office consisting of at least the following:

(1) CASH JOURNAL. ...

(2) LEDGER. ...

...

Sec. RL 18.14, Wis. Admin. Code; Violation of rules. A broker who fails to comply with the rules in this chapter shall be considered to have demonstrated incompetency to act as a real estate broker in a manner as to safeguard the interests of the public, as specified in s. 452.14(3), Stats.

Sec. RL 24.01, Wis. Admin. Code; Authority and intent.

...

(3) If a licensee violates rules in this chapter, the licensee has demonstrated incompetency to act as a broker, salesperson or cemetery salesperson in such manner as to safeguard the interests of the public under s. 452.14(3)(i), Stats. ...

...

Sec. RL 24.025, Wis. Admin. Code; 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.

Sec. RL 24.03, Wis. Admin. Code; Competent services.

...

(2) COMPETENCE REQUIRED. (a) Licensees shall not provide services which the licensee is not competent to provide unless the licensee engages the assistance of one who is competent. ...

...

Sec. RL 24.07, Wis. Admin. Code; Disclosure. (1) DISCLOSURE OF MATERIAL FACTS. Licensees shall not exaggerate, misrepresent or conceal material facts in the practice of real estate. ...

Sec. RL 24.08, Wis. Admin. Code; Agreements to be in writing. Licensees shall put in writing all listing contracts, guaranteed sales agreements, buyer agency agreements, offers to purchase, property management agreements, option contracts, financial obligations and any other commitments regarding transactions, expressing the exact agreement of the parties.

Sec. 452.14, Wis. Stats.; Investigation and discipline of licensees.

...

(3) Disciplinary proceedings shall be conducted by the board according to the rules adopted under s. 440.03(1). The board may revoke, suspend or limit any broker's, salesperson's or time-share salesperson's license or registration, or reprimand the holder of the license or registration, if it finds that the holder of the license or registration has:

...

(h) Failed, within a reasonable time, to account for or remit any moneys coming into the broker's salesperson's or time-share salesperson's possession which belong to another person;

(i) Demonstrated incompetency to act as a broker, salesperson or time-share salesperson in a manner which safeguards the interests of the public;

...

(k) Been guilty of any other conduct, whether of the same or a different character from that specified herein, which constitutes improper, fraudulent or dishonest dealing;

...

FINDINGS OF FACT

1. Respondent Marilyn K. Kernall is a real estate broker licensed in the state of Wisconsin, under license number 40482, and she has held that license continuously since it was originally granted on April 13, 1987.

2. From early 1990 to early March, 1991, Ms. Kernall was employed as a real estate broker by Coldwell Banker Barbour Realtors in La Crosse, Wisconsin. [transcript, pp. 14, 139-140].

3. On August 20, 1990 Ms. Kernall drafted a Residential Listing Contract - Exclusive Right to Sell for property in Holman, Wisconsin owned by Joanne Carlson. [exhibit 3].

4. Ms. Carlson's property was subject to two mortgages, one to the LaCrosse Teachers Credit Union and one to the Wisconsin Housing and Economic Development Authority ("WHEDA") [tr. 30, 65-66].

5. On September 20, 1990, another Coldwell Banker real estate agent, Linda Nelson, drafted a Residential Offer to Purchase for the Carlson property on behalf of Sandra Snodgrass. Ms Kernall presented this offer by fax to Ms. Carlson, who was then living in the state of Washington. The offer proposed a closing date of April 30, 1991 and contained the following statement:

> "This offer is subject to seller leasing premises to buyer for $400.00 per month until closing. If this does not close for some reason, the $1,000.00 earnest money will be delivered to seller as option money for taking property off the market during this length of time."

[ex. 2].

6. On September 24, 1990 Ms. Carlson accepted Ms. Snodgrass's offer. [tr. 64; ex. 2]. She moved her furniture out of the house on October 24th or 25th, 1990. Ms. Snodgrass moved in approximately four days before the end of October 1990. [tr. 64-65].

7. Ms. Kernall agreed on Ms. Carlson's behalf to collect the rent paid by Ms. Snodgrass and to make payments on Ms. Carlson's mortgages, $150 to the Teachers Credit Union and $250 to WHEDA. This agreement was not reduced to writing. [tr. 29-35, 66].

8. Ms. Kernall negotiated on Ms. Carlson's behalf with an official of the LaCrosse Teachers Credit Union to make reduced payments on Ms. Carlson's mortgage. [tr. pp. 210-211]

9. Ms. Snodgrass made, and Ms. Kernall received, rent payments as follow:

Nov. 1, 1990 - $400 for November occupancy
Jan. 1, 1991 - $400 for January occupancy
Jan. 2, 1991 - $400 for February occupancy
Mar. 1, 1991 - $400 for March occupancy
Mar. 3, 1991 - $400 for April occupancy

[tr. 38-40, 42-44, 165-168; ex. 4]. On or about December 19, 1990 the Church of Jesus Christ of Latter-Day Saints made a payment on behalf of Sandra Snodgrass, which Ms. Kernall received, of $479.52, for December occupancy plus the few days of occupancy in October [tr. 40-42, 166-167; ex. 5]. Ms. Kernall received rent payments totalling $2,479.52. **With the exception of the partial payment for October and the payment for December, both of which were paid on December 19, 1990, all payments were made on time or in advance.**

10. Ms. Kernall did not maintain a trust account while she was employed by Coldwell Banker [tr. 13] and none of Ms. Snodgrass's rent payments was placed in a trust account. Ms. Kernall did not maintain a trust account bookkeeping system and she did not keep a written record of Ms. Snodgrass's payments [tr. 35].

11. Ms. Kernall made no payments on either of Ms. Carlson's mortgages prior to February 11, 1991. As a result of the non-payments, the Teachers Credit Union notified Ms. Carlson on January 16, 1991 that it would foreclose on its mortgage if the account was not brought up to date in 30 days. [ex. 13]. Ms. Carlson contacted Ms. Kernall in late January about the non-payments.

12. Ms. Kernall made mortgage payments on behalf of Ms. Carlson as follows:

Feb. 4, 1991 - $158 to WHEDA
Feb. 11, 1991 - $250 to LaCrosse Teachers Credit Union
Feb. 26, 1991 - $316 to WHEDA
Feb. 26, 1991 - $250 to LaCrosse Teachers Credit Union

[tr. 74-75; exs. 8, 9]. Ms. Kernall made payments on mortgages totalling $974. Ms. Kernall kept no records of the mortgage payments to the LaCrosse Teachers Credit Union or WHEDA.

13. On March 15, 1991 Ms. Carlson contacted Ms. Kernall and expressed her concern over the failure to make mortgage payments, and Ms. Kernall told Ms. Carlson that Ms. Snodgrass had not made her payments. [tr. pp. 71-72].

14. Ms. Carlson called Ms. Kernall on April 15, 1991 and Ms. Kernall hung up on her. [tr. p. 76].

15. On September 8, 1991 Ms. Kernall paid $875 to an attorney for Ms. Carlson [tr. 52-54; ex. 12]. On April 2, 1992 she paid an additional $300 to the attorney [tr. 79], bringing the total of all money paid out by Ms. Kernall to or for Ms. Carlson to $2,149. The balance of the $2,479.52 (=$330.52) is unaccounted for.

16. In her answer to the complaint in this proceeding, Ms. Kernall made the following statements:

- "It turned out that Snodgrass had no money, or any visual means of support."
- "Snodgrass didn't have any money, as far as I'm concerned."
- "I had no idea it would be such a mess, trying to get money from Snodgrass."
- "when Carlson said WHEDA had contacted her, stating that the account was two months late and that if it wasn't caught up, they were going to start forclosure proceedings, I mailed them a check from my account, without collecting it from Snodgrass first."
- "I have no idea where you came up with the amount of $2,471. Snodgrass had only been in the house for four months, when I parted company with Barbour. I applied whatever I got to the loans."

[ex. 7]

CONCLUSIONS OF LAW

I **The Real Estate Board has personal jurisdiction over the Respondent, based on her holding a credential issued by the board.** Also, Respondent received timely notice of the complaint and hearing in this matter.

II. The Real Estate Board is the legal authority responsible for issuing and controlling credentials for real estate brokers, under chapter 452, Wis. Stats. **The Real Estate Board has jurisdiction over Ms Kernall's license.**

III. **The Real Estate Board has jurisdiction over the subject-matter of this complaint**, under sec. 15.08(5)(c), Wis. Stats. and sec. 452.14, Wis. Stats., based on the filing of a complaint alleging unprofessional conduct.

IV. **The respondent, Marilyn K. Kernall, violated sec. RL 24.08, Wis. Admin. Code by failing to reduce the oral property management agreement to writing.** In doing so, Ms. Kernall demonstrated incompetency to act as a real estate broker in such manner as to safeguard the interests of the public, under sec. RL 24.01(3), Wis. Admin. Code, and professional discipline is authorized under sec. 452.14, Wis. Stats.

V. **The respondent, Marilyn K. Kernall, did not violate sec. RL 16.04, Wis. Admin. Code, which requires the use of approved forms.** Ms. Kernall did not reduce the oral property management agreement to writing in any form, a violation dealt with in the conclusion of law above; sec. RL 16.04 would apply only if she had written the agreement on a non-approved form.

VI. **The respondent, Marilyn K. Kernall, violated sec. RL 18.03(1), Wis. Admin. Code by failing to deposit real estate trust funds in a trust account.** In doing so, Ms. Kernall demonstrated incompetency to act as a real estate broker in such manner as to safeguard the interests of the public, under sec. RL 18.14, Wis. Admin. Code, and professional discipline is authorized under sec. 452.14, Wis. Stats.

VII. **The respondent, Marilyn K. Kernall, violated sec. RL 18.13, Wis. Admin. Code by failing to maintain a bookkeeping system for real estate trust funds.** In doing so, Ms. Kernall demonstrated incompetency to act as a real estate broker in such manner as to safeguard the interests of the public, under sec. RL 18.14, Wis. Admin. Code, and professional discipline is authorized under sec. 452.14, Wis. Stats.

VIII. **The respondent, Marilyn K. Kernall, did not violate sec. RL 18.10, Wis. Admin. Code, which prohibits the commingling of personal funds into a trust account.** Ms. Kernall deposited the real estate trust funds into her personal account, a violation dealt with in conclusion of law VI; sec. RL 18.10 would apply only if she had placed personal funds in her (non-existent) trust account.

IX. **The respondent, Marilyn K. Kernall, violated sec. 452.14(3)(h), Wis. Stats. by failing within a reasonable time to account for and remit rent payments made to her**, and professional discipline is authorized under that section.

X. **The respondent, Marilyn K. Kernall, did not violate sec. RL 24.025, Wis. Admin. Code, which requires licensees to treat all parties to a transaction fairly.** Ms. Kernall's actions were incompetent, as dealt with in other conclusions of law, but they did not promote the interest of one party over the interest of another.

XI. **The respondent, Marilyn K. Kernall, violated sec. RL 24.03(2)(a), Wis. Admin. Code, by providing services which she was incompetent to provide and without engaging the assistance of one who was competent.** In doing so, Ms. Kernall demonstrated incompetency to act as a real estate broker in such manner as to safeguard the interests of the public, under sec. RL 24.01(3), Wis. Admin. Code, and professional discipline is authorized under sec. 452.14, Wis. Stats.

XII. **The respondent, Marilyn K. Kernall, did not violate sec. RL 24.07, Wis. Admin. Code, which requires disclosure of material facts.**

XIII. **The respondent, Marilyn K. Kernall, did not violate sec. 452.14(k), Wis. Stats., which prohibits improper, fraudulent or dishonest dealing.**

ORDER

THEREFORE, IT IS ORDERED that the license as a real estate broker issued to the respondent, Marilyn K. Kernall, be revoked, effective ten days after this order is signed on behalf of the board.

IT IS FURTHER ORDERED that Marilyn K. Kernall pay the costs of this proceeding, as authorized by sec. 440.22(2), Wis. Stats. and sec. RL 2.18, Wis. Admin. Code.

OPINION

The facts which led to this disciplinary complaint provide a stark example to all real estate brokers of the disastrous consequences of not following rules. Even when rules impose additional duties, they are seldom empty formalities, and their purpose is generally to avoid unnecessary complications in the long run. In particular, the pitfalls of commingling personal and business funds are vividly illustrated here. Attend and heed!

The disciplinary complaint in this matter alleges in general that the respondent, Marilyn K. Kernall, failed to properly deposit, disburse, and account for trust funds coming into her possession between October 1990 and March 1991 from Sandra Snodgrass, paid as rent for property belonging to JoAnne Carlson.

The specific charges against Ms. Kernall allege that:

1) she failed to put a rental/property management agreement in writing;
2) she did not use an approved form for the agreement;
3) she failed to place rent payments in a trust account;
4) she failed to maintain an adequate bookkeeping system;
5) she commingled personal funds with trust funds;
6) she failed to account for or remit the rents;
7) she failed to represent the interests of her principal and to treat all parties fairly;
8) she failed to provide competent services;
9) she failed to disclose material facts; and
10) she misappropriated the rents for her own use, thereby breaching her fiduciary duty and engaging in improper, dishonest or fraudulent dealing.

The charges numbered 1, 3, 4, 6, and 8 above were proven; 2, 5, 7, 9, and 10 were not.

Testimony was presented at the hearing by Ms. Kernall, JoAnne Carlson, Sandra Snodgrass, Linda Nelson, Grace Spencer, and Sherri Voigt. Ms. Carlson's testimony was especially credible because it contained frequent references to dates and details, which confirmed that she had a clear, organized, and well-documented memory of events during this period.

The situation which ultimately led to this proceeding, stated in more detail in the Findings of Fact, is that Sandra Snodgrass made an offer to purchase a home owned by Joanne Carlson and listed by the respondent, Marilyn Kernall. The closing date was set seven months in the future and a clause in the accepted Offer to Purchase gave Ms. Snodgrass the right to occupy the house prior to closing upon payment of $400/month rent.

Ms. Kernall admitted that she agreed to collect the rent from Ms. Snodgrass and make mortgage payments for Ms. Carlson. Ms. Kernall and Ms. Carlson disagreed over whether Ms. Kernall volunteered to do this or Ms. Carlson begged her to [transcript, pp. 29, 65, 196]. Regardless of who first suggested it, an arrangement was made which was essentially a property management agreement, and one of the foundational issues here is whether that agreement was ever placed in writing. Ms. Kernall testified that a written lease between Ms. Carlson and Ms. Snodgrass was drafted by another salesperson, Linda Nelson [tr. 25]. Ms. Kernall even stated that she remembers faxing the lease to Ms. Carlson for her signature [tr. 26]. Ms. Kernall stated that at one time she had a copy of the lease, but despite repeated efforts to locate it, she was unable to [tr. 26-28]. Ms. Carlson on the other hand testified that the only written agreement regarding Ms. Snodgrass's occupancy of the house, or Ms. Kernall's services, was the language in the offer to purchase [tr. 66]. Ms. Snodgrass confirmed this, saying that there was no written lease other than the clause in the offer to purchase [tr. 171]. As necessary signatories to such an agreement, they would know this fact as well as Ms. Kernall, and Ms. Carlson's well-documented testimony in particular carries more weight than Ms. Kernall's somewhat unclear memory. In addition, Ms. Nelson testified that she did not draft a lease and that she never saw a written lease [tr. 121]. I find that no written lease or property management agreement was ever prepared. This is the basis for finding that Ms. Kernall violated sec. RL 24.08, Wis. Admin. Code, which requires that all agreements be reduced to writing. (However, because no written document in any form was made, it would be stretching the interpretation of sec. RL 16.04 to find that Ms. Kernall violated that section by failing to use an approved form.)

The crucial issue here is how much Ms. Kernall received as rent money, and how much she paid out. In her answer and her testimony, Ms. Kernall stated that she had neither a trust account nor the bookkeeping system for a trust account. This is the basis for finding that Ms. Kernall violated sec. RL 18.03(1) and sec. RL 18.13, Wis. Admin. Code. (It is clear that she commingled personal and real estate trust funds, but because she placed the rent money in her personal account, rather than placing personal funds in her trust account, no finding can be made that she violated the actual language of sec. RL 18.10.) A direct result of her not having a trust account or a bookkeeping system was a total inability to keep track of rent and mortgage payments. As a result she did not make mortgage payments for Ms. Carlson on a timely basis. Ms. Kernall testified that Ms. Snodgrass had problems paying the rent regularly [tr. 36], which was untrue except for the partial payment for October and the December payment. Ms.

Kernall further stated that she only received payments totalling $2,083 from Ms. Snodgrass [tr. 35, 9-10], but the evidence presented in the hearing, especially exhibits 4 and 5, established conclusively that Ms. Kernall received a total of $2,479.52. Ms. Kernall stated "I applied whatever I got to the loans" [ex. 7], but this is also clearly untrue. Exhibits 8 and 9 show that mortgage payments made during the period in question totalled $974,[1] and that she did not make any payments at all until February 4, 1991, after Ms. Carlson informed her that the lender was about to foreclose.

Ms. Kernall made no further payments until an attorney for Ms. Carlson obtained $875 from Ms. Kernall on September 1, 1991 and $300 on April 2, 1992. Thus, from the time of Ms. Snodgrass's last payment to her on March 3, 1991 until September 1, 1991, Ms. Kernall was in possession of $1,505.52 which belonged to Ms. Carlson. And since April 2, 1992 Ms. Kernall continues to be in possession of $330.52 belonging to Ms. Carlson. This is the basis for the finding that she violated sec. 452.14(3)(h), Wis. Stats. by failing to account for or remit money belonging to another. At one point in the hearing [tr. 54], Ms. Kernall admitted that she still owes Ms Carlson $495, which is apparently a figure calculated by Ms. Carlson's attorney, but no basis for that figure is evident.

Ms. Kernall stated that this was "an extremely confusing time" and when asked to clarify whether the agreement with Ms. Carlson and Ms. Snodgrass was confusing, she stated "this isn't the only thing that I was doing in -- in my life at the time, and it was a very confusing time for me, period. This was -- this was a very difficult -- JoAnne Carlson is a difficult person to deal with, and Sandra Snodgrass was not an easy person to deal with either. And it was -- And I was in a very stressful -- it was a very stressful time in my life personally." [tr. 49]. Also, "I suppose that at a different -- any other time in my life it wouldn't have bothered me quite as much as it did then, because I was -- I was going through a pretty emotional thing myself in my life and trying to -- trying to keep my life together" [tr. 194]. She also stated that support payments were not made during this time and she was experiencing financial difficulties [tr. 212].

It was alleged in the complaint that Ms. Kernall misappropriated funds belonging to Ms. Carlson, thereby engaging in improper, dishonest, or fraudulent dealing, and such a charge is

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[1]Ms. Kernall made three mortgage payments to WHEDA, which are reflected in exhibit 9. The amount of each payment was not made absolutely clear in the hearing. Most references in the testimony were to $150, but Ms. Kernall did say that "her payment was approximately $150" [tr. 30], and for each of the three dates, one entry of $152.84 was labeled "regular payment", and an additional entry of $5.16 was labeled "undesignated funds". The total of those two is $158, which as a round number seems most likely to have been the payment figure. Added to the two payments of $250 apiece to the Teachers Credit Union, this totals $974.

certainly understandable, given the facts. One interpretation of the evidence suggests that Ms. Kernall may have knowingly converted the rent monies to her own use in a period of financial difficulty, but the evidence falls far short of proving that, and Mr. Howden wisely refrained from making that a part of his case. The charge that she violated sec. 452.14(3)(k), Wis. Stats. was therefore not proven.

In the following paragraph I have tried to reconstruct an explanation of what occurred which, as much as possible, reconciles Ms. Kernall's testimony with that of the other witnesses because, although Ms. Kernall's memory of certain events was far less clear than that of other witnesses, she did not appear to be lying. Where her testimony is in irreconcilable conflict with that of others, I attribute the disparity to her confusion during a time of difficulty, and to a certain self-delusion at the time and since. One inescapable conclusion and a reasonable interpretation of all of the witnesses' testimony is that Ms. Kernall "got in way over her head". Ultimately, this is what leads to a finding that she violated sec. RL 24.03, which requires that a broker provide competent services. She did not, however, violate sec. RL 24.07 by failing to disclose material facts, or sec. RL 24.025 by failing to represent the interests of her principal and treat all parties fairly; only a strained interpretation of those two sections would make them applicable to this situation.

The most likely, and most generous, interpretation of all the evidence is that Ms. Kernall's personal finances were in such disarray, and her bookkeeping so inept, that she lost track of the rent payments that were made to her. She simply lost track of the payments, and ended up believing they were never made. She formed the opinion that Ms. Snodgrass was insolvent because by the second week in December she had not received the payment for that month nor the partial payment for October, and because this payment was ultimately made by Ms. Snodgrass's church. She never bothered to reconsider that opinion, despite the fact that every other payment was on time or early. Ms. Kernall even created the fiction that Ms. Snodgrass never paid her all of the rent due, perhaps because she looked at her personal account and found no money there. This led to her maintaining, from that time until now, to Ms. Carlson and to Mr. Howden and ultimately to this tribunal and the board, that she never received all the payments from Ms. Snodgrass, that she had paid out all that she received, and that she even made a mortgage payment out of her own account before Ms. Snodgrass made her payment, all of which are untrue. The interpretation that Ms. Kernall was confused, in over her head, and incompetent, is generous because the only other interpretation is that she has been dishonest in her dealings with Ms. Carlson and the board.

Discipline.

The purposes of professional discipline have been set forth in various attorney discipline cases, including Disciplinary Proc. Against Kelsay, 155 Wis.2d 480, 455 N.W.2d 871 (1990). In that case the Wisconsin Supreme Court stated "discipline for lawyer misconduct is not intended

as punishment for wrongdoing; it is for the protection of the public, the courts and the legal profession from further misconduct by the offending attorney, to deter other attorneys from engaging in similar misconduct and to foster the attorney's rehabilitation." That reasoning has been extended by regulatory agencies to disciplinary proceedings for other professions.

The most important factor in choosing discipline in this case is protection of the public. Ms. Kernall's actions in this situation were incompetent, and they put Ms. Carlson's financial situation into deep jeopardy. The record in this case does not indicate that Ms. Kernall can practice safely as a real estate broker. The board may wish to find a way to allow Ms. Kernall to earn a living in the real estate field, but for the protection of the public she cannot be allowed to practice without limitation. To protect the public, either revocation or a limited license is necessary.

The next purpose for discipline is to deter other professionals from similar actions, and discipline per se should not be necessary for that purpose. Simply reading these facts should be sufficient to deter any reader from placing him- or herself in the same situation. The only need for discipline in this regard would be to highlight this decision, to ensure that other brokers and salespersons read it.

The final factor is to protect the profession from further misconduct by this practitioner, i.e. to rehabilitate her. In my reading of the cases, the term "rehabilitation" covers both positive and negative reinforcement to deter the offender from similar behavior in the future. See, for example, State v. Corry, 51 Wis.2d 124, 186 N.W.2d 325 (1971) at 126. Thus, even though the purpose of discipline is not to impose punishment per se, appreciating the unpleasant consequences of unprofessional behavior is part of rehabilitation. Although this disciplinary proceeding has undoubtedly had some effect on Ms. Kernall, and although she states that she would never enter into a similar arrangement again, it is still far from clear that this is the only area in which she might get in over her head. To be a good real estate broker, one must know all the rules and understand the importance of adhering scrupulously to them. Ms. Kernall has not demonstrated that she understands this. In her answer, Ms. Kernall stated "The important thing was to close the sale. That was the MOST IMPORTANT THING!" Even ignoring the fact that closing the sale was important as the source of her commission, it must be emphasized that ends don't always justify means. As stated in the opening paragraph of this decision, professionals know that procedure and rules exist for good reason, to be ignored at one's peril. Mr. Howden recommended that Ms. Kernall be revoked and then required to retake the examinations before she is allowed to practice again, and that her license then be limited to practice under direct supervision. This would seem to be a reasonably safe way to address Ms. Kernall's demonstrated lack of ability, although even this cannot guarantee that she would practice what she learned. However, if Ms. Kernall's license is revoked, the board loses jurisdiction over her, and an order may not continue lying in wait for her to reapply. (Of course, if she does

reapply, the board would then be able to evaluate her as an applicant, with all of her past history, and the board could then choose to deny or grant her a license, or a license with limitations.) Given all of the above factors, the discipline in this case should be either revocation or a suspension until she retakes the examinations, with a limitation upon reinstatement that she practice under the supervision of another broker.

In the absence of any further information, and because the record at this point establishes unequivocally that the public safety is not ensured by allowing her to practice as a broker, I have recommended revocation. However, Ms. Kernall's present situation was not extensively investigated in the hearing, and it is conceivable that she is at least partially rehabilitated already. It is possible that her mistakes were due only to difficulties in her personal life at the time, and if so, the need for discipline to protect the public and to prevent further misconduct by her may be reduced. If Ms. Kernall is able in her response to address the concerns expressed here, and if she is credibly able to explain why she can practice now with more good judgment and with more control over her own finances than she showed during the period of October 1990 to March 1991, the board should consider discipline more upon the lines of a suspension with a requirement that she demonstrate her understanding of the rules governing the profession and a subsequent limitation essentially turning her broker's license into a salesperson's license.

Costs.

The assessment of costs against a disciplined professional is authorized by sec. 440.22(2), Wis. Stats. and sec. RL 2.18, Wis. Admin. Code, but neither the statute nor the rule clearly indicates the circumstances in which costs are to be imposed. One approach is routinely to impose the costs of investigating and prosecuting unprofessional conduct on the disciplined individual rather than on the profession as a whole. Another approach is to use costs as an incentive to encourage respondents to cooperate with the process, and thus to impose costs only if the respondent is uncooperative or dilatory I prefer the latter approach, and the record contains sufficient evidence of Ms. Kernall's unresponsiveness and lack of cooperation to justify an order for costs.

Another factor to be considered in the imposition of costs is the respondent's ability to pay. Ms. Kernall referred to personal financial difficulties, particularly related to unreceived child support payments, but her present financial condition was not discussed at the hearing. In her response to this proposed decision, Ms. Kernall may also take the opportunity to provide the board with a statement about her personal finances and her ability to pay the costs incurred by the department.

Dated May 17, 1993.

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