WISCONSIN DEPARTMENT OF REGULATION & LICENSING

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FILE COPY

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST	:	FINAL DECISION AND ORDER
	:	Case No. LS9104192REB
JENNIFER A. OLSON, RESPONDENT.	:	

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

Jennifer A. Olson
1401 Woodland Court
Hudson, WI 54016

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

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

POSTURE OF CASE

A. This case was initiated by the filing of a complaint with the Real Estate Board on April 19, 1991. A disciplinary proceeding (hearing) was scheduled for June 10, 1991. Notice of Hearing was prepared by the Division of Enforcement of the Department of Regulation and Licensing and sent by certified mail on April 19, 1991 to Ms. Olson in care of her attorney, Wm. Pharis Horton, Three South Pinckney, P.O. Box 5621, Madison, WI 53703, who received it on April 23, 1991.

B. Ms. Olson and her attorney signed and filed a stipulation in lieu of an answer, admitting paragraphs 1-25 and 27-33 of the complaint (corresponding to findings of fact 1-25 and 26-32 below, with the exception that facts 10, 11, 15, 21-24 and 29 in the Proposed Decision were changed slightly to reflect more fully the exhibits and Ms. Olson's testimony). The stipulation stated that the hearing would be limited to the issues of (1) what, if any, violations of law or rule were committed, and (2) what, if any, discipline should be imposed.

C. All time limits and notice and service requirements having been met, the disciplinary proceeding was held as scheduled on June 10, 1991. Ms. Olson appeared in person, and by her attorney. The Real Estate Board was represented by Attorney Richard Castelnuovo of the Department's Division of Enforcement. The stipulated facts and the exhibits and testimony of the disciplinary proceeding formed the basis for the Proposed Decision.

D. The administrative law judge issued the Proposed Decision on August 27, 1991. Thereafter, complainant's attorney filed objections to the decision and respondent's attorney submitted a reply to the objections. The matter was reviewed by the Real Estate Board at its meeting on October 24, 1991.

Based upon the entire record in this case, the Real Estate Board makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Respondent Jennifer A. Olson, 1401 Woodland Court, Hudson, 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 pursuant to license #23183, which was originally granted on January 14, 1980.

2. Gerald W. Schlief was at all times relevant to the events set forth herein a real estate salesperson licensed to practice in the State of Wisconsin.

3. At all times relevant to the events set forth herein, Ms. Olson and Mr. Schlief were affiliated with or employed by Century 21 Bertelsen-Cudd ("C21").

Mooney/Bugni Transaction

4. Ms. Olson entered into a residential listing contract ("Listing Contract"), dated July 3, 1987, under which Susan and Richard Mooney ("Mooneys") granted C21 the exclusive right to sell their property located at Route 3, Troy, WI ("Troy property").

5. Mr. Schlief drafted and submitted an offer to purchase ("Offer" - exhibit #101) dated August 31, 1987, on the Troy property from Douglas and Renae Bugni ("Bugnis") in the amount of $57,000, with closing on or before October 15, 1987.

6. Ms. Olson negotiated a counter-offer ("Counter-Offer" - exhibit #102) dated August 31, 1987, increasing the purchase price to $58,000.

7. As a part of the negotiation of the Counter-Offer, the signature of Richard Mooney was obtained.

8. Susan Mooney did not sign the Counter-Offer.

9. The Bugnis accepted the Counter-Offer on September 2, 1987.

10. An initial laboratory test was performed on the water from the well serving the Troy property, and a laboratory report dated October 1, 1987 (exhibit #105), disclosed that the water was bacteriologically unsafe, at a coliform level of 1/100 ml, and contained nitrate levels above those considered safe for human consumption, at a level of 11 ppm.

11. A second laboratory report dated October 8, 1987 (exhibit #106), found that the well water was bacteriologically safe at a coliform level of 0/100 ml, but that it still contained an unsafe nitrate level, 13 ppm.

12. Ms. Olson drafted an amendment to the contract of sale dated October 16, 1987, ("October 16, 1987 Amendment" - exhibit #103) to provide that the Mooneys would install and pay for a water purification system to alleviate the unsafe nitrate level.

13. The signatures of both Douglas and Renae Bugni as buyers and Richard Mooney as seller were obtained on the October 16, 1987 Amendment.

14. Susan Mooney did not sign the October 16, 1987 Amendment.

15. Following the installation of a water purification system, the well water was tested again to determine whether the purification system had resolved the nitrate problem, and a third laboratory report dated October 28, 1987 ("Third Laboratory Report" - exhibit #107) showed a safe level of nitrates, 1 ppm, but showed a coliform reading of 56/100 ml and indicated that the water was bacteriologically unsafe.

16. The water for the first two tests had been taken from the outside faucet while the water for the third test was taken from the kitchen faucet.

17. A second amendment to the contract of sale dated October 30, 1987, ("October 30, 1987 Amendment" - exhibit #104) was prepared to extend the period during which financing contingency could be satisfied, and to extend the date for closing to on or before November 9, 1987.

18. The signatures of Richard Mooney as seller and Renae Bugni as buyer were obtained on the October 30, 1987 Amendment.

19. Susan Mooney and Douglas Bugni did not sign the October 30, 1987 Amendment.

20. Prior to the closing, Ms. Olson learned from county zoning officials that the installation of a filter to remove nitrates could affect bacteriological findings as follows: If the water test performed prior to installation showed a safe level of bacteria, the test after installation might show an unsafe level of bacteria, and any subsequent test could show a safe level of bacteria again.

21. On the basis of the information she learned, Ms. Olson formed a belief that the bacteriological finding and conclusion in the Third Laboratory Report represented a false positive.

22. At the November 9, 1987 closing, Ms. Olson provided the Bugnis with a copy of the Third Laboratory Report (exhibit #108) from which the conclusion that the water was bacteriologically unsafe had been whited out; Ms. Olson provided the lender with a copy of the Third Laboratory Report (exhibit #2) from which both the finding of the bacteriological test and the conclusion that the water was bacteriologically unsafe had been blacked out (transcript, pp. 26-29).

23. At no time on or before the date of closing did Ms. Olson disclose to the Bugnis that the Third Laboratory Report included a conclusion that the water was bacteriologically unsafe, nor did she disclose to the lender that the Third Laboratory Report included a bacteriological test or the results of that test.

24. The fact that a test on the well water at the Troy property indicated that it was bacteriologically unsafe, even though Ms. Olson had reason to believe this result was inaccurate, should have been disclosed and explained to the Bugnis and the lender.

25. Ms. Olson ordered and paid for a fourth laboratory test after the closing, and the report dated December 21, 1987 (exhibit #109) indicated the well water both bacteriologically safe and free from unsafe nitrate levels.

Vanasse/Babbitt Transaction

26. Ms. Olson entered into a residential listing contract dated June 7, 1989, under which James and Ruth Vanasse ("Vanasses") granted C21 the exclusive right to sell their property located at 467 McCutcheon Road, Hudson, WI ("Hudson Property").

27. Ms. Olson drafted and presented an offer to purchase ("Babbitt Offer" - exhibit #3) the Hudson property dated August 24, 1989, on behalf of Peggy Audley and Christopher Babbitt ("Babbitts").

28. In pertinent part, the Babbitt Offer provided:

> This offer is contingent upon Buyers having an option to purchase said property under the following terms:
>
> 1. Buyers shall pay a total of $2250.00 on Sept. 1, 1989 for a nine month option on said property. Option money shall apply toward purchase price at closing or if option is not exercised, Buyer shall forfeit option money, one half shall go to seller and remaining half shall remain in Brokers Trust Account. If option is not exercised by Buyers, the option money in Brokers Trust Account shall be paid to Broker for services rendered.

29. The Babbitt Offer, which was drafted on a WB-11 form, did not provide that the parties would enter a WB-24 or other agreement to carry out grant of option. The option to purchase which was included in the Babbitt Offer did not include the following language which appears on the WB-24 form:

> This option must be exercised in writing on or before ..., 19..., by the mailing of a notice by certified mail, receipt requested, or by commercial delivery service, exercising option and addressed to Seller at ... or by personal delivery of the notice.

30. The Vanasses accepted the Babbitt Offer, their acceptance being dated August 28, 1989.

31. The parties treated the accepted Babbitt Offer as a valid option to purchase without executing a WB-24 form.

32. On August 30, 1989, option money in the amount of $2,225 paid by the Babbitts was deposited in the C21 real estate trust account.

33. No attempt was ever made to exercise the option (transcript, p. 14).

CONCLUSIONS OF LAW

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

2. 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.

3. The Respondent violated sec. RL 24.07, Wis. Adm. Code, in the Mooney/Bugni transaction, by failing to disclose a material fact, the third coliform test result and its interpretation, to all interested parties.

4. The Respondent violated secs. RL 16.04 and 24.08, Wis Adm. Code and sec. 452.1(3)(i), Wis. Stats. in the Vanasse/Babbitt transaction by her improper use of the offer form to effectuate a grant of option in lieu of the more specific approved form, and by her failure to reduce to writing essential terms pertaining to an option agreement, specifically the method of exercise of the option;

5. The Respondent violated sec. RL 24.08, Wis. Adm. Code and sec. 452.14(3)(i), Wis. Stats. in the Mooney/Bugni transaction by failing to obtain signatures of the parties to contract documents.

ORDER

NOW, THEREFORE, IT IS ORDERED that the license of Jennifer A. Olson to practice as a real estate broker be suspended for thirty (30) days, said suspension to commence sixty (60) after the date of this Final Decision and Order.

IT IS FURTHER ORDERED that respondent shall successfully complete ten (10) hours of real estate related education covering (a) Contracts, (b) Approved Forms, (c) Business Ethics and specifically disclosure requirements, and (d) other related matters, and submit proof thereof in the form of verification from the institution providing the education to the board by no later than nine (9) months from the date of this Final Decision and Order. None of the education completed pursuant to this requirement may be used to satisfy any continuing education requirements that are or may be instituted by the department or board.

IT IS FURTHER ORDERED that if respondent fails to comply with the above education requirements within nine (9) months, her license shall be suspended until compliance is complete.

EXPLANATION OF VARIANCE

The Real Estate Board has accepted the Findings of Fact and Conclusions of Law proposed by the administrative law judge. It also agrees that Ms. Olson should be required to obtain real estate related education in the future as a part of the discipline to be applied in this proceeding. However, it has not accepted that portion of the recommended Order which would have imposed a series of reprimands upon Ms. Olsen. Rather, the board has determined that a thirty day suspension of her real estate broker's license is both an appropriate and necessary sanction under the circumstances of this case.

There are three violations of the licensing law which were established in this matter. Two of those concern the use of approved forms and the information which must be contained within them. As noted by the parties and the administrative law judge, those two violations standing alone are arguably of a technical nature. The third infraction, involving the failure to disclose material facts, is the focal point around which the disciplinary arguments have been made and is the primary basis upon which this disciplinary decision rests.

The disclosure issue revolves around laboratory reports regarding the concerned property's well water. The first test, dated October 1, 1987, showed the water bacteriologically unsafe, with a coliform level of 1/100 ml, and an unacceptably high 11 ppm nitrate level. The second report, dated October 8, 1987, indicated a safe bacteria reading but a still unacceptable nitrate level of 13 ppm. Thus, a third test was obtained. This report of October 28, 1987 indicated a safe level of nitrates, but an unsafe bacteria count at a coliform reading of 56/100 ml.

Upon receiving the third unsatisfactory laboratory report, Ms. Olson contacted county zoning officials. She was informed that the bacteria finding on the third report might be a "false positive." It is at this point Ms. Olson made a critical decision. Rather than submit the third report in its unaltered entirety to the buyer and the lender either prior to or at the closing on November 9, 1987, she decided to "white-out" the unsafe conclusion from the copy of the report given to the buyers, and to take similar steps regarding both the report's conclusion and the fact that the bacteria test had even been taken from the copy provided the lender. By her actions, Ms. Olson failed to disclose a material fact; that being, the existence of a report providing the results of a laboratory test indicating that the water on the premises had been found to be at bacteriologically unsafe levels.

Despite her conceded unprofessional conduct in altering the report, respondent contends that her actions were taken with the best of motives. Ms. Olson states she believed that the third test was in error and she apparently did not want to unnecessarily imperil the closing of the transaction based upon what ultimately would be found a "false positive". In fact, a fourth test taken on December 21, 1987 did result in a finding that the water was bacteriologically safe and below unsafe nitrate levels.

However, even assuming that respondent's motives may have been altruistic in origin and the third test results incorrect as she surmised, her conscious alteration of documents in pursuit of her goal still requires that something more than a reprimand be imposed in this case. In essence, respondent imposed her judgment upon the parties through the falsification of documents. The board agrees with complainant's argument in this regard, as set forth in the written objections:

> "Document falsification strikes at the heart of the real estate practice. Above and beyond her motives, the Board must respond to the method she adopted. Whatever Olson felt was needed, she should never have considered destroying the integrity of documents. Without public confidence in the integrity and accuracy of transaction documents, the real estate business could not properly function. In considering the appropriate discipline, the Board should give substantial weight to the fact that Olson saw document falsification as the solution to the dilemma of furnishing the parties with information she (believed was inaccurate)."

The act of consciously and willfully altering documents to avoid disclosing adverse information to interested parties is a seriously unprofessional approach to problem solving. Clearly, the adverse result contained within the third laboratory report in this case was a matter to be disclosed, discussed and acted upon among the interested parties to the transaction, and certainly not within the province of the licensee to conceal.

In order to assure the rehabilitation of Ms. Olson from similar misconduct in the future and deter other licensees from considering such actions, thereby protecting the public, it is the board's opinion that a suspension must be imposed in this case. See, State v. Aldrich, 71 Wis. 2d 206, 209 (1976). A reprimand would not adequately address and promote these functions of discipline nor adequately express the requirement, and the public's legitimate expectation and right, that documents not be altered in order to conceal material information.

Dated: October 31, 1991.

STATE OF WISCONSIN
REAL ESTATE BOARD

Peter Schils

Peter Schils, Chairman

BDLS2-957

NOTICE OF APPEAL INFORMATION

(Notice of Rights for Rehearing or 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 October 31, 1991.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be a prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the rehearing sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3) (c). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

(2) The filing of a petition for rehearing shall not suspend or delay the effective date of the order, and the order shall take effect on the date fixed by the agency and shall continue in effect unless the petition is granted or until the order is superseded, modified, or set aside as provided by law.

(3) Rehearing will be granted only on the basis of:

(a) Some material error of law

(b) Some material error of fact.

(c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.

(4) Copies of petitions for rehearing shall be served on all parties of record. Parties may file replies to the petition.

(5) The agency may order a rehearing or enter an order with reference to the petition without a hearing, and shall dispose of the petition within 30 days after it is filed. If the agency does not enter an order disposing of the petition within the 30-day period, the petition shall be deemed to have been denied as of the expiration of the 30-day period.

(6) Upon granting a rehearing, the agency shall set the matter for further proceedings as soon as practicable. Proceedings upon rehearing shall conform as nearly may be to the proceedings in an original hearing except as the agency may otherwise direct. If in the agency's judgment, after such rehearing it appears that the original decision, order or determination is in any respect unlawful or unreasonable, the agency may reverse, change, modify or suspend the same accordingly. Any decision, order or determination made after such rehearing reversing, changing, modifying or suspending the original determination shall have the same force and effect as an original decision, order or determination.

227.52 Judicial review; decisions reviewable. Administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter, except for the decisions of the department of revenue other than decisions relating to alcohol beverage permits issued under ch. 125, decisions of the department of employe trust funds, the commissioner of banking, the commissioner of credit unions, the commissioner of savings and loan, the board of state canvassers and those decisions of the department of industry, labor and human relations which are subject to review, prior to any judicial review, by the labor and industry review commission, and except as otherwise provided by law.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) 1. Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. If the agency whose decision is sought to be reviewed is the tax appeals commission, the banking review board or the consumer credit review board, the credit union review board or the savings and loan review board, the petition shall be served upon both the agency whose decision is sought to be reviewed and the corresponding named respondent, as specified under par. (b) 1 to 4.

2. Unless a rehearing is requested under s. 227 49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency.

3. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59 (6) (b), 182.70 (6) and 182.71 (5) (g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified. The petition may be amended, by leave of court, though the time for serving the same has expired. The petition shall be entitled in the name of the person serving it as petitioner and the name of the agency whose decision is sought to be reviewed as respondent, except that in petitions for review of decisions of the following agencies, the latter agency specified shall be the named respondent:

1. The tax appeals commission, the department of revenue

2. The banking review board or the consumer credit review board, the commissioner of banking.

3. The credit union review board, the commissioner of credit unions.

4. The savings and loan review board, the commissioner of savings and loan, except if the petitioner is the commissioner of savings and loan, the prevailing parties before the savings and loan review board shall be the named respondents.

(c) A copy of the petition shall be served personally or by certified mail or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon each party who appeared before the agency in the proceeding in which the decision sought to be reviewed was made or upon the party's attorney of record. A court may not dismiss the proceeding for review solely because of a failure to serve a copy of the petition upon a party or the party's attorney of record unless the petitioner fails to serve a person listed as a party for purposes of review in the agency's decision under s. 227.47 or the person's attorney of record.

(d) The agency (except in the case of the tax appeals commission and the banking review board, the consumer credit review board, the credit union review board, and the savings and loan review board) and all parties to the proceeding before it, shall have the right to participate in the proceedings for review. The court may permit other interested persons to intervene. Any person petitioning the court to intervene shall serve a copy of the petition on each party who appeared before the agency and any additional parties to the judicial review at least 5 days prior to the date set for hearing on the petition.

(2) Every person served with the petition for review as provided in this section and who desires to participate in the proceedings for review thereby instituted shall serve upon the petitioner, within 20 days after service of the petition upon such person, a notice of appearance clearly stating the person's position with reference to each material allegation in the petition and to the affirmance, vacation or modification of the order or decision under review. Such notice, other than by the named respondent, shall also be served on the named respondent and the attorney general, and shall be filed, together with proof of required service thereof, with the clerk of the reviewing court within 10 days after such service Service of all subsequent papers or notices in such proceeding need be made only upon the petitioner and such other persons as have served and filed the notice as provided in this subsection or have been permitted to intervene in said proceeding, as parties thereto, by order of the reviewing court.

BEFORE THE STATE OF WISCONSIN
REAL ESTATE BOARD

IN THE MATTER OF	:	
DISCIPLINARY PROCEEDINGS AGAINST	:	NOTICE OF FILING
	:	PROPOSED DECISION
JENNIFER A. OLSON,	:	LS9104192REB
RESPONDENT,	:	

TO: Wm. Pharis Horton
Three South Pinckney
P.O. Box 5621
Madison, WI 53703
Certified P 568 984 415

Richard Castelnuovo
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 Bureau of Direct Licensing and Real Estate 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, Room 281, Department of Regulation and Licensing, 1400 East Washington Avenue, P.O. Box 8935, Madison, Wisconsin 53708, on or before September 13, 1991. 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 27th day of August, 1991.

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-9104192-REB
JENNIFER A. OLSON,	:	
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:

Jennifer A. Olson
1401 Woodland Court
Hudson, WI 54016

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 April 19, 1991. A disciplinary proceeding (hearing) was scheduled for June 10, 1991. Notice of Hearing was prepared by the Division of Enforcement of the Department of Regulation and Licensing and sent by certified mail on April 19, 1991 to Ms. Olson in care of her attorney, Wm. Pharis Horton, Three South Pinckney, P.O. Box 5621, Madison, WI 53703, who received it on April 23, 1991.

B. Ms. Olson and her attorney signed and filed a stipulation in lieu of an answer, admitting paragraphs 1-25 and 27-33 of the complaint (corresponding to findings of fact 1-25 and 26-32 below, with the exception that facts 10, 11, 15, 21-24 and 29 in this proposed decision have been changed slightly to reflect more fully the exhibits and Ms. Olson's testimony). The stipulation stated that the hearing would be limited to the issues of (1) what, if any, violations of law or rule were committed, and (2) what, if any, discipline should be imposed.

C. All time limits and notice and service requirements having been met, the disciplinary proceeding was held as scheduled on June 10, 1991. Ms. Olson appeared in person, and by her attorney. The Real Estate Board was represented by Attorney Richard Castelnuovo of the Department's Division of Enforcement. The stipulated facts and the exhibits and testimony of the disciplinary proceeding form the basis for this Proposed Decision.

FINDINGS OF FACT

1. Respondent Jennifer A. Olson, 1401 Woodland Court, Hudson, 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 pursuant to license #23183, which was originally granted on January 14, 1980.

2. Gerald W. Schlief was at all times relevant to the events set forth herein a real estate salesperson licensed to practice in the State of Wisconsin.

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Mooney/Bugni transaction

4. Ms. Olson entered into a residential listing contract ("Listing Contract"), dated July 3, 1987, under which Susan and Richard Mooney ("Mooneys") granted C21 the exclusive right to sell their property located at Route 3, Troy, WI ("Troy property").

5. Mr. Schlief drafted and submitted an offer to purchase ("Offer" - exhibit #101) dated August 31, 1987, on the Troy property from Douglas and Renae Bugni ("Bugnis") in the amount of $57,000, with closing on or before October 15, 1987.

6. Ms. Olson negotiated a counter-offer ("Counter-Offer" - exhibit #102) dated August 31, 1987, increasing the purchase price to $58,000.

7. As a part of the negotiation of the Counter-Offer, the signature of Richard Mooney was obtained.

8. Susan Mooney did not sign the Counter-Offer.

9. The Bugnis accepted the Counter-Offer on September 2, 1987.

10. An initial laboratory test was performed on the water from the well serving the Troy property, and a laboratory report dated October 1, 1987 (exhibit #105), disclosed that the water was bacteriologically unsafe, at a coliform level of 1/100 ml, and contained nitrate levels above those considered safe for human consumption, at a level of 11 ppm.

11. A second laboratory report dated October 8, 1987 (exhibit #106), found that the well water was bacteriologically safe at a coliform level of 0/100 ml, but that it still contained an unsafe nitrate level, 13 ppm.

12. Ms. Olson drafted an amendment to the contract of sale dated October 16, 1987, ("October 16, 1987 Amendment" - exhibit #103) to provide that the Mooneys would install and pay for a water purification system to alleviate the unsafe nitrate level.

13. The signatures of both Douglas and Renae Bugni as buyers and Richard Mooney as seller were obtained on the October 16, 1987 Amendment.

14. Susan Mooney did not sign the October 16, 1987 Amendment.

15. Following the installation of a water purification system, the well water was tested again to determine whether the purification system had resolved the nitrate problem, and a third laboratory report dated October 28, 1987 ("Third Laboratory Report" - exhibit #107) showed a safe level of nitrates, 1 ppm, but showed a coliform reading of 56/100 ml and indicated that the water was bacteriologically unsafe.

16. The water for the first two tests had been taken from the outside faucet while the water for the third test was taken from the kitchen faucet.

17. A second amendment to the contract of sale dated October 30, 1987, ("October 30, 1987 Amendment" - exhibit #104) was prepared to extend the period during which financing contingency could be satisfied, and to extend the date for closing to on or before November 9, 1987.

18. The signatures of Richard Mooney as seller and Renae Bugni as buyer were obtained on the October 30, 1987 Amendment.

19. Susan Mooney and Douglas Bugni did not sign the October 30, 1987 Amendment.

20. Prior to the closing, Ms. Olson learned from county zoning officials that the installation of a filter to remove nitrates could affect bacteriological findings as follows: If the water test performed prior to installation showed a safe level of bacteria, the test after installation might show an unsafe level of bacteria, and any subsequent test could show a safe level of bacteria again.

21. On the basis of the information she learned, Ms. Olson formed a belief that the bacteriological finding and conclusion in the Third Laboratory Report represented a false positive.

22. At the November 9, 1987 closing, Ms. Olson provided the Bugnis with a copy of the Third Laboratory Report (exhibit #108) from which the conclusion that the water was bacteriologically unsafe had been whited out; Ms. Olson provided the lender with a copy of the Third Laboratory Report (exhibit #2) from which both the finding of the bacteriological test and the conclusion that the water was bacteriologically unsafe had been blacked out (transcript, pp. 26-29).

23. At no time on or before the date of closing did Ms. Olson disclose to the Bugnis that the Third Laboratory Report included a conclusion that the water was bacteriologically unsafe, nor did she disclose to the lender that the Third Laboratory Report included a bacteriological test or the results of that test.

24. The fact that a test on the well water at the Troy property indicated that it was bacteriologically unsafe, even though Ms. Olson had reason to believe this result was inaccurate, should have been disclosed and explained to the Bugnis and the lender.

25. Ms. Olson ordered and paid for a fourth laboratory test after the closing, and the report dated December 21, 1987 (exhibit #109) indicated the well water both bacteriologically safe and free from unsafe nitrate levels.

Vanasse/Babbitt transaction

26. Ms. Olson entered into a residential listing contract dated June 7, 1989, under which James and Ruth Vanasse ("Vanasses") granted C21 the exclusive right to sell their property located at 467 McCutcheon Road, Hudson, WI ("Hudson Property").

27. Ms. Olson drafted and presented an offer to purchase ("Babbitt Offer" - exhibit #3) the Hudson property dated August 24, 1989, on behalf of Peggy Audley and Christopher Babbitt ("Babbitts").

28. In pertinent part, the Babbitt Offer provided:

> This offer is contingent upon Buyers having an option to purchase said property under the following terms:
>
> 1. Buyers shall pay a total of $2250.00 on Sept. 1, 1989 for a nine month option on said property. Option money shall apply toward purchase price at closing or if option is not exercised, Buyer shall forfeit option money, one half shall go to seller and remaining half shall remain in Brokers Trust Account. If option is not exercised by Buyers, the option money in Brokers Trust Account shall be paid to Broker for services rendered.

29. The Babbitt Offer, which was drafted on a WB-11 form, did not provide that the parties would enter a WB-24 or other agreement to carry out grant of option. The option to purchase which was included in the Babbitt Offer did not include the following language which appears on the WB-24 form:

> This option must be exercised in writing on or before ..., 19..., by the mailing of a notice by certified mail, receipt requested, or by commercial delivery service, exercising option and addressed to Seller at ... or by personal delivery of the notice.

30. The Vanasses accepted the Babbitt Offer, their acceptance being dated August 28, 1989.

31. The parties treated the accepted Babbitt Offer as a valid option to purchase without executing a WB-24 form.

32. On August 30, 1989, option money in the amount of $2,225 paid by the Babbitts was deposited in the C21 real estate trust account.

33. No attempt was ever made to exercise the option (transcript, p. 14).

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 Respondent violated sec. RL 24.07, Wis. Adm. Code, in the Mooney/Bugni transaction, by failing to disclose a material fact, the third coliform test result and its interpretation, to all interested parties.

IV. The Respondent violated secs. RL 16.04 and 24.08, Wis Adm. Code and sec. 452.1(3)(i), Wis. Stats. in the Vanasse/Babbitt transaction by her improper use of the offer form to effectuate a grant of option in lieu of the more specific approved form, and by her failure to reduce to writing essential terms pertaining to an option agreement, specifically the method of exercise of the option;

V. The Respondent violated sec. RL 24.08, Wis. Adm. Code and sec. 452.14(3)(i), Wis. Stats. in the Mooney/Bugni transaction by failing to obtain signatures of the parties to contract documents.

ORDER

NOW, THEREFORE, IT IS ORDERED that

(1) under sec. 452.14(3), Wis. Stats., the Respondent be reprimanded for her failure to disclose a material fact;

(2) under sec. 452.14(3), Wis. Stats., the Respondent be reprimanded for her failure to use the most appropriate approved form, and for failing to reduce to writing an essential term of an option contract agreed upon by the parties;

(3) under sec. 452.14(3), Wis. Stats., the Respondent be reprimanded for her failure to obtain signatures of the parties to contract documents, and

(4) under sec. 452.14(4m)(2), Wis. Stats., and as a condition of continued licensure, the Respondent must complete eight (8) hours of real estate-related education, part of which must relate to one or more of the issues involved in this hearing, for example, offer and acceptance, disclosure, or closing. The Respondent must submit proof of successful completion to the Board within nine months of the date of this order. None of the education completed pursuant to this condition may be used to satisfy any other Board-ordered education requirements.

IT IS FURTHER ORDERED that if Respondent fails to comply with the above education requirement within nine months, her license shall be suspended until compliance is complete.

OPINION

Ms. Olson has been charged with three offenses arising out of two separate transactions: one failure to obtain essential signatures, one failure to disclose a material fact, and one combining a failure to reduce essential terms of an agreement to writing with a misuse of an offer form to effectuate an option to purchase. A common feature is that all three alleged offenses left a door open to legal dispute (although none of them resulted in litigation), whereas even the potential for legal problems could have been eliminated had Ms. Olson been more scrupulous in her observance of the duties imposed by the applicable rules. Another common feature is that all three alleged offenses demonstrate a stronger inclination to move transactions toward closing than to observe the time-consuming and inconvenient details required by the rules.

The most serious of the three allegations is that in the Mooney/Bugni transaction Ms. Olson misrepresented or otherwise failed to disclose to all interested parties a material adverse factor (the bacteriological test result and interpretation contained in the third lab report). The other two allegations represent valid concerns about her professional knowledge and practice, but they pale in significance when compared to the main allegation. Indeed, as Mr. Castelnuovo acknowledged, the other allegations alone would probably not have risen to the level of formal disciplinary proceedings (transcript, p. 54). Those other charges will therefore be discussed after an analysis of the most serious charge.

THE MISREPRESENTATION/FAILURE TO DISCLOSE

First, there are two matters of definition to address and dispose of. One is which version of sec. RL 24, Wis. Admin. Code applies and whether it makes any difference, and the other is whether there is any important distinction between "material" and "adverse" facts.

The Applicable Version of RL 24

The version of RL 24 which applies to the charge in this case is the one in effect in November 1987 (see note 1). The version used in the complaint

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1. The November 1987 version reads in relevant part as follows:

> RL 24.07 Disclosure. Licensees shall avoid exaggeration, misrepresentation or concealment of material facts. Licensees have an affirmative obligation to discover adverse factors that a reasonably competent and diligent investigation would disclose and to disclose any adverse factors to the buyer or the seller or other interested parties.

was in effect from July 1, 1988 to October 1, 1990 (see note 2). And a third version has been in effect since October 1, 1990 (see note 3). Although the three versions differ slightly, the differences do not affect the issues facing the Board, since each version prohibits misrepresentation of material facts and imposes a duty to disclose adverse facts/factors. No distinction will be made among the three, and the version current in November 1987 will be used.

"Material" and "adverse"

Because all three versions of RL 24 use two different phrases, one prohibiting misrepresentation of material facts, and the other imposing a duty to disclose adverse facts or factors, the rule implies a distinction between the two. Presumably, there can be adverse facts which are immaterial, such as weeds in the garden, and material facts which are not adverse to either party, such as a beautiful view, but for the purpose of this case, the distinction is unimportant. The distinction was not argued by counsel, and I shall simply adopt and use the following definition to cover the type of fact which Ms. Olson had a duty to disclose:

> 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 .... Ollerman v. O'Rourke Co., Inc., 94 Wis.2d 17, 42, 288 N.W.2d 95 (1980).

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2. The version in effect from July 1, 1988 to October 1, 1990 reads as follows:

> 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 material factors that a reasonably competent and diligent investigation would disclose and to disclose any adverse factors to the buyer or the seller or other interested parties. This provision is not limited to the condition of the property, but includes other facts about a transaction which are material.
> ...
> (2)(d) Disclosure. A licensee shall disclose any adverse factors discovered through the inspection or otherwise to all interested parties.

3. The current version reads as follows:

> 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, such as (list omitted).

The Facts: What did Ms. Olson do?

With those two non-issues out of the way, the first question to be addressed is what exactly Ms. Olson did, and with what motivation. Facts 15 and 20-24 regarding the Mooney/Bugni transaction establish the following: A first test on the water from the well serving the Troy property disclosed unsafe bacteria and nitrate levels (1/100 ml and 11 ppm, respectively). A second test reported a safe level of bacteria (0/100 ml), but approximately the same unsafe nitrate level (13 ppm). A water purification system was installed and the well water was tested again. The third test showed a safe level of nitrates (1 ppm), but reported a bacteria level which was unsafe and much higher than shown in the original test (56/100 ml). Ms. Olson whited out the interpretation that the water was "Bacteriologically UNSAFE" from the copy of the report she provided to the purchasers at closing. She also altered a second copy of the report by blacking out both the conclusion and the test result ("56/100 ml") before providing it to the lender (transcript, pp. 11-12, 23-34).

This information standing alone would lead directly to the conclusion that Ms. Olson consciously concealed a material fact adverse to the purchaser. This conclusion would be especially inevitable since the only logical explanation for providing two different altered copies to two distinct parties is the one offered by Mr. Castelnuovo, that Ms. Olson deleted the information which she knew would be interpretable by each party. If such Machiavellian actions were taken to mislead both the buyer and the lender, they would easily justify serious discipline, suspension or even revocation.

However, Ms. Olson gave an explanation of the motivation for her action which changes its character significantly. She was generally a credible witness regarding this issue (despite her poor memory of two areas, the call to the zoning office and the two separate altered reports), and her testimony was consistent with the stipulated facts. Those facts were that prior to closing, Ms. Olson or her trusted secretary - the distinction is actually unimportant - contacted county zoning officials to inquire about the elevated bacteriological result, and she was informed that the bacteriological test result could be a false positive (transcript, p. 12). She was informed that the county office staff had seen instances where the installation of a filter to remove nitrates caused an elevated bacteriological reading, with subsequent tests showing a safe level of bacteria again (transcript, pp. 32-33, 43-44). The fact that the third test was completely out of line with the two earlier readings (56 rather than 0 or 1) lends credence to the probability that she interpreted it as a false result. Also, her credibility was ultimately enhanced by what appeared at the time to be an area of weakness, her belated recollection that her secretary had made the call to the zoning office. Although at the time of questioning, her faulty memory gave the appearance of an imperfection in her testimony, the transcript (pp. 43-46) reveals that she came up with this additional information in response to a question that jogged her memory, and not because she needed to fabricate an answer to a difficult question. Thus, even though at the time it showed that her memory was fallible, it ultimately made her a more credible witness.

I find as a fact that Ms. Olson formed the belief that the test result was a false positive. Thus, when Ms. Olson proceeded to closing without informing the parties of the test result, her motivation was not to mislead the parties by concealing a material fact, but to avoid misleading them by a false report.

The Legal Standard: What does RL 24.07 require?

The main question to be answered is whether Ms. Olson's motivation excuses her actions. Mr. Horton argued that Ms. Olson is not subject to discipline because she acted in good faith, in that a false fact is a fallacy rather than a fact, and she was under no obligation to disclose a fallacy. This is ingenious, and it may well reflect Ms. Olson's thought processes, but it is not sufficient by itself to satisfy the requirements of RL 24.07. Indeed, a simple reading of RL 24.07 fails to provide a simple answer, because the situation is complex, and Ms. Olson's action must be disaggregated, or broken down for analysis. First, her action contains both objective and subjective elements. By objective, I mean the facts she was working with (the test plus the explanation she received plus the explanation's source plus the source's reliability). These objective facts are not the main issue here. Rather, this disciplinary decision focuses on the subjective element, which in itself includes two distinct aspects: (1) her motivation in concealing what she thought was a false positive test result, and (2) her judgment that the test result was a false positive. Mr. Horton's argument falls short because it focuses only on her motivation, and overlooks the fact that in assessing the test result she used poor judgment and made a bad decision regarding a potentially important fact.

Motivation involves the concept of "good faith", which in simple terms means an honest belief or a lack of fraudulent intent. I have found that Ms. Olson did act in good faith; she had no intention to conceal a material fact. Mr. Castelnuovo argued that good faith is irrelevant, relying primarily on the case of Williams v. Rank & Son Buick, Inc., 44 Wis.2d 239, 170 N.W.2d 807 (1969). Not only is the Williams case not precedent, it provides very little guidance. In Williams, the court addressed the issue in passing, cited another case for the proposition that bad faith is immaterial, and then went on to find that the statement in question had been made with fraudulent intent anyway. Id. at 243-4. Further, the issue of good faith was peripheral to the main issue in the Williams case, so the entire discussion of good faith is dicta. However, going back to the case cited by the Williams court, First Nat. Bank v. Hackett, 159 Wis. 113, 149 N.W. 703 (1914), the court there did say "... it does not follow that because the action is for fraud it must be shown, in order to make the representations actionable, that they were made with fraudulent intent." Id. at 119. Although this was a ruling by the court on an issue before it (i.e. it was not dicta), it is frankly incomprehensible to me, especially in light of myriad cases since 1914 which reaffirm that intent is an element of fraud (see note 4). In addition, due to the vintage

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4. See, e.g., Insurance Company of North America v. Universal Mortgage Corporation of Wisconsin, 82 Wis.2d 170, 175, 262 N.W.2d 92 (1978), where the court says "The elements of a fraud claim are false representation, intent to defraud, and reliance upon the representation resulting in damage."

of the case and the tenuous tie between civil actions for fraud and disciplinary actions, I see no requirement to follow its ruling (though see note 5 for another approach). I therefore decline to adopt Mr. Castelnuovo's position that good faith is irrelevant. It is relevant to some degree to the question of whether a violation occurred, and it is very relevant to the question of what discipline is appropriate, as will be discussed below.

On the other hand, as indicated above, I also decline to adopt Mr. Horton's position, that Ms. Olson's good faith is controlling, and should insulate her completely from disciplinary action. This is because a good faith action can still contain a serious flaw, such as ignorance or disregard of rules, or laziness in uncovering facts, or sloppiness in preparing documents. If this is shown, a Board has jurisdiction to discipline such a licensee for incompetence. In this case, Ms. Olson's good faith motivation was based on her judgment regarding the test result, but her judgment was sufficiently flawed to merit discipline.

Ms. Olson made a bad decision, and in so doing, she violated RL 24.07. The available facts are insufficient to establish whether her decision was the result of any of the particular flaws mentioned above. She does not seem to have simply disregarded the rules requiring disclosure, because she did inquire about the test result, but she does seem to have been unaware of the rule's stringency. At the very least, she seems to have deluded herself about the test result, convincing herself too easily that it was unimportant, probably out of a desire to save herself and the parties the trouble, cost, and delay of another test. An inference can also be made that she was lazy or sloppy in uncovering facts. Her reliance on an answer by someone in a county office to a question over the phone was unreasonable and unjustified. There was no evidence that the source of the information regarding the false positive was competent to render a sufficiently reliable opinion, and the facts available to Ms. Olson were simply insufficient to rule out the possibility that the water was bacteriologically unsafe. A reading of 56/100 ml might well indicate a false positive, but there was no guarantee that it did not mask another true reading of 1/100 ml.

The decision was simply not hers. If she had guessed wrong, the transaction would have been at risk, and it could have caused a legal

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5. Another approach to the issue of intent seems to be developing in a line of cases, of which one example is Consolidated Papers, Inc. v. Dorr-Oliver, Inc., 153 Wis.2d 589, 451 N.W.2d 456 (1989). The court there discusses "negligent misrepresentation" and "strict responsibility for misrepresentation," saying that to prove either, a claimant must "show that the defendant made a representation of fact, that the representation was untrue, and that the plaintiff believed the representation and relied upon it to his or her detriment." Id. at 593. These legal constructs do not apply to Ms. Olson's action because her action does not meet the second and third criteria, but if she had been wrong, and the test had concealed a reading of 1/100 ml, she might have been vulnerable to a civil action in "negligent misrepresentation" or "strict responsibility for misrepresentation."

dispute. The purpose of RL 24.07 is to insure that the parties to a real estate transaction will be allowed to make informed decisions regarding every material aspect of that transaction, including the significance of all but the most clearly unimportant facts. Even though the third test was to check the nitrate level rather than the coliform level, the test result which showed up on the test report was potentially too serious to allow the broker to use her own judgment. The parties had a right to be informed of the test result as well as of Ms. Olson's inquiries. In fact, even though she would have stood on more solid ground by having received a written opinion from an identified expert in the zoning office regarding this particular test, that would still not have justified non-disclosure. The objective data should have been given to the parties for their decision. They might well have analyzed the objective facts the same way Ms. Olson did, or they might well have insisted on a fourth test, but that decision belonged to them. (The fact that the fourth test, performed after closing, showed a safe coliform level was lucky for Ms. Olson, and indicates that the county office knew what it was talking about, but it does not alter her responsibility to disclose.)

Disclosure is such a vital responsibility of a broker that all questionable decisions should be resolved in favor of disclosure. This is not to say that the broker's only safe approach is to avoid making any decisions. Any professional must exercise discretion and make decisions. And as in any profession, the line may not always be clear. That would be especially true if the question was whether the broker should have <u>discovered</u> and disclosed something, but in this case, a potentially adverse fact came directly to Ms. Olson's attention and she chose not to disclose it. Instead, Ms. Olson glossed over it and substituted her subjective analysis that it was unimportant. She chose to facilitate the closing of the transaction at the expense of the inconvenient niceties of the rule, probably because disclosure might have led to a request by the buyers for another test, entailing delay, paperwork, and inconvenience. Her failure to disclose all of the objective information brings her within the language of the rule which prohibits a "failure to disclose a material fact". By her actions, Ms. Olson showed an insufficient understanding of the vital requirement of disclosure, and she must be held accountable for her poor judgment.

<u>Discipline: What is appropriate?</u>

Although Ms. Olson's good faith does not sufficiently excuse her actions to avoid discipline completely, it does affect what discipline is appropriate. She may have been hasty or sloppy, or relied unjustifiably on the county official's opinion, or deluded herself into thinking that the parties would not want to know about the test result, but she did not misrepresent or conceal anything that she believed to be an adverse or material fact. Many disciplinary proceedings involve actions which are breaches of honesty, morality or ethics as well as violations of professional rules. As this analysis shows, Ms. Olson's action was not in that category. She did violate a rule which sets a very high standard for the good of the profession, and therefore she must be found to have made an incompetent decision, but her action does not deserve the label "misrepresentation"; it was a failure to disclose, more accurately characterized as a conscious bad decision not to disclose.

Mr. Castelnuovo argued that a case of misrepresentation calls for a license suspension, both by Board precedent (see note 6) and because of the inherent severity of the offense. However, it is simply not true that this Board has imposed a suspension in every proven case of misrepresentation (see note 7), and in legal terms, Ms. Olson is not as culpable as licensees in many other cases, because she lacked "scienter" ("guilty knowledge" or "mental state embracing intent to deceive, manipulate or defraud"), and her action differs significantly from that of a licensee who conceals what he or she knows to be an adverse factor.

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6. Board actions mentioned by Mr. Castelnuovo in his Proposed Decision were:
In the Matter of Disciplinary Proceedings against Northern Wisconsin Land Co. and Robert V. Stuchal, 79 REB 92, 3-11-81 after hearing;
In the Matter of Disciplinary Proceedings against Paul Bass, 88 REB 273, 1-25-90 by stipulation;
In the Matter of Disciplinary Proceedings against Gary Skon, 89 REB 351, 7-26-90 by stipulation;
In the Matter of Disciplinary Proceedings against Patricia and Roger Pulver, 87 REB 270, 8-23-90 by stipulation;
In the Matter of Disciplinary Proceedings against Richard W. Smith and Elva Seegert, 89 REB 423, 12-6-90 by stipulation;
In the Matter of Disciplinary Proceedings against Michael Eagan, 88 REB 89, 1-24-91 by stipulation;
In the Matter of Disciplinary Proceedings against Irving Eder, LS-8911011-REB, 1-24-91 after hearing;
In the Matter of Disciplinary Proceedings against James Thomas, ... REB ..., 1-24-91 after hearing;

7. The following Board decisions, from 1990 and 1991 alone, involve non-disclosure of material facts, but did not result in suspensions:
In the Matter of Disciplinary Proceedings against Art Anderson Realty, Inc., Robert E. Anderson, A. Charles Anderson, and Marigen E. Anderson, 87 REB 301, reprimand and education by stipulation, 7-25-91.
In the Matter of Disciplinary Proceedings against Leonard J. Meyer, 89 REB 388, 5-23-91, forfeiture, education, and costs by stipulation.
In the Matter of Disciplinary Proceedings against Theodore A. See and Jacquelyn D. See, 88 REB 166, reprimand and costs by stipulation, 1-24-91.
In the Matter of Disciplinary Proceedings against John L. Pagels and Nancy J. Harris, 88 REB 430, reprimand after settlement conference, 10-25-90.
In the Matter of Disciplinary Proceedings against Paul K. Moye, 88 REB 52, reprimand by stipulation, 6-28-90.
In the Matter of Disciplinary Proceedings against Patricia M. August, 88 REB 273, reprimand by stipulation, 3-22-90.
In the Matter of Disciplinary Proceedings against Gary M. Oleksyn, 85 REB 433, reprimand by stipulation, 3-22-90.
In the Matter of Disciplinary Proceedings against Leonard C. Bacon, d/b/a Century 21 - Bacon Realty Corp., a/k/a Len Bacon Realty, Jeffrey A. Jones, and James W. Nolan, ... REB ..., 1-25-90: reprimand after hearing.

Rather than automatically meriting a suspension, Ms. Olson's action should be evaluated in terms of the accepted purposes of discipline. These 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). Those purposes are (1) to rehabilitate the offender, (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. The term "rehabilitation" is somewhat ambiguous, as it has recently come to have only a positive tone, implying only education, training and therapy. However, in my reading of the cases, especially Corry, the term covers both positive and negative experiences which will deter the offender from similar behavior in the future, and although imposing punishment is specifically disavowed as a purpose of discipline, rehabilitation includes appreciating the adverse consequences of unprofessional conduct.

With regard to rehabilitation, the goal of this disciplinary proceeding is to avoid having Ms. Olson make similar bad decisions in the future regarding disclosure (or using the most specific form, or reducing the complete agreement to writing, or obtaining all signatures - see below). The appropriate remedy is twofold: education and awareness. Education is necessary so that she will be thoroughly versed in all requirements. To this end, it would be appropriate to order a certain amount of training. I have proposed eight hours. Under the current version of sec. 452.01(4), Wis. Stats., effective 5-11-90, this can be ordered directly, rather than as a limitation on a license. Awareness is also important so that she will be conscious of the adverse consequences of unprofessional conduct, which may cause her to pause, to take the extra time, and to go the extra mile to do things right. Mr. Horton is undoubtedly correct when he says that there is nothing like the educational effect of a Board investigation and hearing, and it may be safe to assume that even if she receives only a reprimand, Ms. Olson is now much more aware of the consequences of sloppy procedure.

With regard to the goal of deterring other licensees from similar bad judgments, the decision in this case must clearly inform other licensees that they should never substitute their judgment for that of the parties and, when there is any doubt at all, that disclosure is required. For that purpose, the order in this case should adequately reflect the Board's concern, and although a suspension would certainly convey that message even more clearly, a formal reprimand should be sufficient in the context of this entire case, for which I recommend that Ms. Olson receive three separate reprimands.

The goal of protecting the public will be achieved if both Ms. Olson and others are highly aware of the critical need for disclosure, and this purpose will be adequately served by the reprimand and training requirement above.

The issue of discipline in this case is compounded by the other two actions discussed below, which though less serious than her failure to disclose show a similar pattern of electing expedience over thoroughness. As stated at the outset of this opinion, the other two alleged violations would probably not have been issued as formal charges without the misrepresentation charge, but since they have risen to be presented in a disciplinary hearing, they must be considered on their own merits. Ms. Olson may have viewed all of her actions innocently as trying to accommodate buyers and sellers by bringing transactions to completion speedily, but there is quite a bit of self-interest involved as well in closing real estate transactions, and all of the actions in this disciplinary proceeding show a similar pattern. Ms. Olson seems to have been too readily disposed to ignore the little details which take time to do properly, but which are designed to avoid legal problems in the future.

THE FAILURE TO USE THE APPROPRIATE FORM

Facts 26-29 regarding the Vanasse/Babbitt transaction establish the following: On August 24, 1989, Ms. Olson drafted an offer to purchase on a standard WB-11 form on behalf of the Babbitts in this transaction. Ms. Olson added the language of an option to purchase to the WB-11 form in the space provided for contingencies. However, the added language did not contain all the provisions which are contained on the Option to Purchase form, WB-24; specifically, it omitted the method of exercise of the option (transcript, pp. 50-53):

> This option must be exercised in writing on or before ..., 19.., by the mailing of a notice by certified mail, receipt requested, or by commercial delivery service, exercising option and addressed to Seller at ... or by personal delivery of the notice.

The applicable rules, under the umbrella charge of sec. 452.14(3)(i), Wis. Stats. are 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.

and sec. RL 16.04, Wis. Admin. Code, When to utilize approved forms:

> (1) ... a licensee shall use approved forms when acting as an agent or a principal in a real estate transaction.

Was the use of an approved form enough to satisfy the rule, or should Ms. Olson have used the most specific form available for an option to purchase? Mr. Horton argued that some flexibility exists in the use of the pre-approved forms, and that the WB-11 was readily adaptable to the purpose. He is right,

but only up to a point. The Dinger case cited by both parties strongly implies that, as part of a limited practice of law, real estate licensees have the obligation to use the most appropriate form:

> It is apparent to us and, we think, to everyone who engages in conveyancing real estate, that blank spaces are left in the forms for the use of the conveyancer (in this case, the broker), to insert language appropriate to the particular situation and the desires of the parties. To complete the form the broker must evaluate the information given him by one or both parties to the transaction and from that information he must select which one of the 60 approved standard forms is most suitable to carry out the purpose of his client. The broker must then determine whether or not additional provisions should be written into the blank spaces, and if addition is necesssary what terms shall be used.

State ex rel. Reynolds v. Dinger, 14 Wis.2d 193, 199 109 N.W.2d 685 (1961). This does not say that the language of one form may never be inserted into a blank on another, but the phrase "most suitable" lends support to the presumption that if a suitable form exists, proper real estate practice requires its use rather than a substitute's. Even though Ms. Olson did not use the most suitable form, the WB-24, she did treat the option to purchase as a form of contingency, and inserted it at an appropriate location on the WB-11. Such an action might be acceptable if done scrupulously, but that question need not be decided here. Because she left out a material term, she clearly did not use the forms appropriately, thereby violating RL 16.04.

The reason for using pre-approved forms is to cover all the bases and use language which will keep the parties out of the legal thicket. Substituting one form for another runs the risk of overlooking and omitting some of that language. In this case, Ms. Olson took a shortcut and abbreviated the language from the WB-24, leaving out a potentially important term. As stated earlier, she may have been motivated by a desire to avoid unnecessary details for the parties (and incidentally for herself), but she could have exposed both parties to a legal dispute had the Babbitts attempted to exercise the option in a way which the Vanasses rejected. As in the Mooney/Bugni transaction, Ms. Olson was lucky; there was no attempt to exercise the option (transcript, p. 14) and no dispute over what constituted exercise, but it is the duty of a broker to avoid court intervention, by making sure the parties know what they are agreeing to, and setting down that agreement in writing. Her action in this instance was not far over the line, but it was over. With regard to the alleged violation of RL 24.08, the term omitted by Ms. Olson was perhaps not part of the agreement between the parties, but only because she failed to bring it to their attention, and while the law may supply terms which are absent from a contract, those terms may not be what the parties intended or would have anticipated. Because the full agreement between the parties was not sufficiently reduced to writing, Ms. Olson also violated RL 24.08.

THE FAILURE TO OBTAIN NECESSARY SIGNATURES

Facts 6-9, 12-14, and 17-19 regarding the Mooney/Bugni transaction establish the following: On August 31, 1987, Ms. Olson prepared a counter-offer on behalf of the Mooneys in this transaction. Richard Mooney signed the counter-offer. On October 16, 1987, Ms. Olson drafted an amendment to the contract of sale, which was signed by Douglas and Renae Bugni as buyers and Richard Mooney as seller. On October 30, 1987, Ms. Olson prepared a second amendment to the contract of sale. Richard Mooney signed as seller and Renae Bugni signed as buyer. Susan Mooney was out of town during this period, and Ms. Olson discussed the counter-offer and amendments with her by phone, but failed to have her sign any of the three documents. In addition, Douglas Bugni did not sign the October 30th amendment (transcript, pp. 7-10, 19-22).

The applicable rule, again under the umbrella charge of sec. 452.14(3)(i), Wis. Stats., is 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.

There was no evidence to dispute Ms. Olson's testimony that she talked to Susan Mooney by phone regarding each of the documents in question, and no evidence that Ms. Mooney did not agree fully with the counter-offer and the two amendments. Nor was there any evidence that Douglas Bugni did not agree with the language of the October 30th amendment. There was therefore no showing that Ms. Olson failed to express the exact agreement of the parties in writing, as required by the letter of RL 24.08.

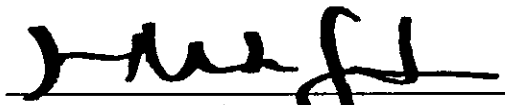
However, the charge is that she violated RL 24.08 by "failing to obtain essential signatures of the parties to contract documents." This language appears nowhere in the rule; in fact, the rule says nothing about signatures. At one point, Ms. Olson testified that she would be unable to state whether the contract was binding on Susan Mooney without her signature (transcript, p. 20). Although she was responding to a question on cross-examination and being very cautious not to render a potentially damaging legal opinion, her statement and the fact that RL 24.08 makes no mention of signatures raises a concern over whether she understood the requirement. The Board might consider clarifying RL 24.08 by incorporating the requirement that all negotiating and contract documents be signed by all parties. However, Ms. Olson's action was clearly a violation of a broker's obligations under RL 24.08, and if she did not understand this, she should have. The requirement that real estate negotiating and contract documents must bear the parties' signatures flows from the Statute of Frauds, which is embodied in sections 706.01 and 706.02 of the Wisconsin Statutes. Sec. 706.02(1)(e), Wis. Stats. requires a contract to convey property to be signed by all parties.

Some exceptions to the Statute of Frauds exist, especially in sec. 706.04, Wis. Stats., but enforcing a contract through an exception to sec. 706.02(1)(e) would require court action. The logic behind the Board's interpretation of RL 24.08, which is present in all three parts of this decision, is that the broker's responsibility is to conduct the transaction at every step in such a way as to avoid the potential for legal misunderstandings or problems. By proceeding without signatures, Ms. Olson once again demonstrated a tendency to skirt the strict and inconvenient requirements of her profession's rules in order to facilitate the transaction. And as with the Vanasse/Babbitt transaction and the bacteriological test, she was lucky. The Mooney/Bugni transaction was completed and the non-signing parties did not dispute the documents in question. But Ms. Olson must realize that facilitating what she perceives to be her clients' interests can easily become undue haste, sloppiness and carelessness, and that she and her clients run the risk of serious problems if she doesn't cover all the bases.

Discipline for the Secondary Charges

If each of the latter two offenses had been considered in isolation, they might have been handled informally, and even if taken to disciplinary hearings, they might have merited no more than private letters of warning. However, in the light of each other and the primary charge, they cumulatively demonstrate a troubling pattern of oversights. I have recommended a separate reprimand for each action. Although issuing separate reprimands for each of multiple violations is not a common disciplinary outcome, this Board followed a similar approach on at least one recent occasion. In In the Matter of Disciplinary Proceedings Against Mark R. Cummisford, 88-REB-103, by stipulation May 23, 1991, the Board imposed a forfeiture of $500 for each of three separate violations. A single reprimand would be insufficient to convey to the rest of the professional community the Board's concern over the pattern of oversights and poor judgments shown by Ms. Olson.

Dated August 27, 1991.



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

BDLS2-496