

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

MARILYN K. KERNALL,
RESPONDENT.

FINAL DECISION
AND ORDER
(Case No. LS9304122REB)

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 June 9, 1993. The respondent, Marilyn K. Kernall, did not appear, nor did anyone appear on her behalf. The complainant appeared by Attorney Charles J. Howden.

The Administrative Law Judge issued a Proposed Decision on June 16, 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. Marilyn K. Kernall, ("Kernall"), 570 Braund, Onalaska, Wisconsin 54650, 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 #40482, originally granted on April 13, 1987.

2. On or about November 25, 1991, Kernall drafted a WB-36 Exclusive Buyer Agency Contract for the signature of Prettic L. Smith.

3. This Exclusive Buyer Agency Contract created an agency agreement between Kernall and Prettic L. Smith for the time period of November 25, 1991 through midnight of March 31, 1992.

4. The specific property identified in the Exclusive Buyer Agency Contract was "1516 Bainbridge" in the Town of Campbell, County of LaCrosse, State of Wisconsin.

5. Pursuant to the Exclusive Buyer Agency contract between Kernall and Smith, Kernall was to be paid a fee equal to the greater of \$1500 or 3 percent of the agreed price in the event the purchase went to closing or on the date set for closing in the binding written agreement to convey the property.

6. On or about November 25, 1991, Kernall drafted a WB-11 Residential Offer to Purchase for the signature of Prettic L. Smith and Mary T. Smith wherein the Smiths offered to purchase the Bainbridge street property.

7. The November 25, 1991, Smith offer to purchase was not accepted by the seller of the Bainbridge Street property.

8. On or about December 5, 1991, Kernall drafted a second WB-11 Residential Offer to Purchase for the signature of Prettic L. Smith and Mary T. Smith wherein the Smiths again offered to purchase the Bainbridge Street property.

9. The second Smith offer to purchase for the Bainbridge property was not accepted by the seller of the property.

10. In conjunction with the Bainbridge Street offers to purchase, the Smiths paid to Kernall \$500 in earnest money.

11. That despite repeated demand by the Smiths to Kernall to return the \$500 earnest money, Kernall failed and refused to return the earnest money and claimed that she was entitled to the money as a fee for assisting the Smiths.

12. There was no written agreement of any kind relating to any fee to be paid by the Smiths to Kernall other than the agreement referred to as the Exclusive Buyer Agency Contract, and specifically nothing was placed in writing by Kernall authorizing retention of the earnest money by Kernall for any reason except that stated in the Exclusive Buyer Agency Contract.

13. Kernall commingled the \$500 earnest money with her personal funds.

14. On or about March 2, 1992, the Greater LaCrosse Board of Realtors, Ethics Hearing Panel, filed a Decision finding that Kernall had violated articles 9 and 20 of the Code of Ethics and Standards of Practice for the realtors, in relation to the facts set forth above.

15. On or about July 2, 1992, Investigator Jack Johnson of the Wisconsin Department of Regulation and Licensing requested information from Kernall relating to the Smiths. Kernall did not respond to this July 2, 1992 request.

16. On or about August 3, 1992, Investigator Johnson again requested information regarding this matter from Kernall. Kernall failed to respond to the August 3, 1992 request of Investigator Johnson.

17. On or about November 23, 1992, Investigator Johnson again requested information from Kernall regarding the Smith matter. Again Kernall failed to respond to Investigator Johnson's request.

18. On or about February 9, 1993, an Investigative Subpoena Duces Tecum was issued to Kernall by the State of Wisconsin Department of Regulation and Licensing for the production of documents. On or about February 22, 1993 Kernall finally responded to the Department's request for documentation regarding the Smith complaint. However, Kernall has not provided to the Department information requested relating to copies of bank statements, checks and deposits into the checking account which would track the deposit and use by Kernall of the Smith monies.

19. Kernall failed to provide the Smiths an agency disclosure form, and in both offers to purchase drafted by Kernall as stated above, Kernall failed to complete line #2 by failing to indicate whether she was representing the seller or the buyer in the transaction and did not indicate elsewhere in the offers whether she represented the buyer or the seller.

20. By virtue of a Final Decision and Order dated July 31, 1993 in Case No. LS9210021REB, the board previously revoked the real estate license of Kernall.

CONCLUSIONS OF LAW

1. The Real Estate Board has jurisdiction in this matter pursuant to ss. 452.14 and 452.15., Stats.

2. By failing to account for or remit the real estate trust funds coming into the Respondent's possession as earnest money collected from the Smiths within a reasonable time, Respondent, Marilyn K. Kernall, has violated s. 452.14(3)(h), Stats.

3. By failing to properly deposit, disburse and account for real estate trust funds coming into her possession as earnest money collected from the Smiths, Respondent has violated s. 452.14(3)(i), Stats., and ss. RL 18.03(1)(a), and 18.13, Wis. Admin. Code.

4. By failing to put in writing all commitments regarding the transactions between herself and the Smiths in respect to how she would be paid in representing them as a buyer broker to substantiate her claim that she is allowed a fee outside of the Exclusive Buyer Agency Contract referred to above, Respondent violated s. 452.14(3)(i), Stats., and s. RL 24.08, Wis. Admin. Code.

5. By breaching her fiduciary duties to the Smiths by misappropriating real estate trust funds from the Smiths, her principals in this transaction, Respondent violated ss. 452.14(3)(i) and 452.14(3)(k), Stats., and ss. 24.03, and 24.07, Wis. Admin. Code.

6. By failing to cooperate with the Department of Regulation and Licensing by failing to provide documents to the Department in a timely manner during the investigation of this complaint, Respondent has violated s. 452.14(3)(i), Stats., and s. RL 15.04 Wis. Admin. Code.

7. By failing to make proper disclosures of agency representation to the Smiths in this transaction, Respondent has violated s. 452.14(3)(i), Stats., and ss. RL 24.07(4)(a)(2) and 24.07(4)(c), Wis. Admin. Code.

ORDER

NOW, THEREFORE, IT IS ORDERED that the revocation of the real estate license of respondent, Marilyn Kernall, which was ordered by the Final Decision and Order dated July 31, 1993 in Case No. LS9210021REB, shall extend for a period of not less than two (2) years, effective the date of this decision.

IT IS FURTHER ORDERED that the assessable costs of this proceeding be imposed against the respondent, Marilyn Kernall, pursuant to s. 440.22, Stats.

EXPLANATION OF VARIANCE

Prior to considering the Proposed Decision rendered in this case, the board had determined to revoke the real estate license held by Marilyn Kernall in a separate proceeding before a different administrative law judge. See, In the Matter of Disciplinary Proceedings Against Marilyn K. Kernall, Case No. LS9210021REB, dated July 31, 1993.

In that case, the board was called upon to determine several issues subsequent to objections filed by complainant's attorney to that ALJ's Proposed Decision. As they relate to this proceeding, they were as follows:

1. Does a real estate licensee who deposits earnest money into a personal, rather than a real estate trust account, violate Sec. RL 18.10, Wis. Admin. Code; which prohibits commingling personal funds in a trust account?
2. Does a real estate licensee who fails to reduce to writing all commitments regarding the transaction, violate Secs. RL 16.04(1) and (2), Wis. Admin. Code; which requires the use of approved forms?
3. By breaching fiduciary duties owed as an agent to the principal in a real estate transaction, does a real estate licensee violate Sec. RL 24.025, Wis. Admin. Code; which requires representation of principal as agent, but obligates fair treatment to all parties?

Each of the foregoing issues were decided in the negative by the board, as matters of law regarding the specific code provisions involved. Although a real estate licensee who deposits earnest money into a personal account, fails to reduce real estate commitments to writing, or breaches duties to his or her principal does violate several provisions of the real estate licensing laws, those actions do not violate the specific ones cited above.

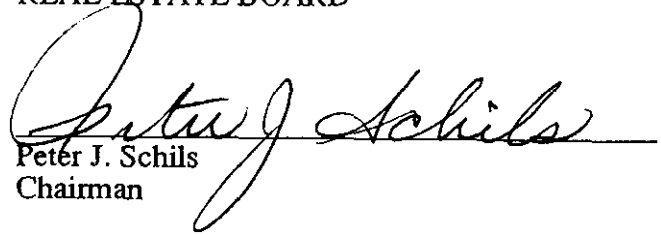
The Proposed Decision here has been modified to assure consistency with the determinations previously made in the companion case. Accordingly, Conclusion of Law #3 deletes the reference to RL 18.10 as a violation; Conclusion of Law #4 deletes that regarding RL 16.04(1) and (2); and Conclusion of Law #5 deletes the reference to RL 24.025.

It has been recommended that Ms. Kernall's license be revoked in this case. The above discussed changes in the Conclusions of Law do not detract from the appropriateness of that recommendation in light of the serious misconduct established. Nor have any objections been filed by either party.

Yet, the board cannot disregard the fact that it has revoked Ms. Kernall's license in the prior companion case. Pursuant to the authority granted under sec. 452.15, Stats., that revocation is now effective for two years.

Dated: August 26, 1993.

STATE OF WISCONSIN
REAL ESTATE BOARD


Peter J. Schils
Chairman

bdl2-3033

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 August 30, 1993.

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF DISCIPLINARY
PROCEEDINGS AGAINST

MARILYN K. KERNALL
RESPONDENT.

:
:
: AFFIDAVIT OF COSTS
: OFFICE OF BOARD LEGAL SERVICES
: LS 9304122 REB
:

STATE OF WISCONSIN
COUNTY OF DANE, ss.:

James E. Polewski, being first duly sworn on oath deposes and says that:

1. He is an attorney licensed to practice law in Wisconsin, and is employed by the Division of Legal Services and Examinations, Office of Board Legal Services, Department of Regulation and Licensing.


2. In the course of that employment, he was assigned to act as Administrative Law Judge in the captioned case, and that in the course of that assignment he expended the following time and committed the Department to payment of the following costs:

<u>Date</u>	<u>Activity</u>	<u>Time</u>
6/9/93	Preside at default hearing	20 min.
6/10/93	Review exhibits from hearing	40 min.
6/15/93	Draft proposed decision	1 hr. 30 min.
Total time:		2 hr. 30 min.

Assessable costs for ALJ, 2.5 hr. @ \$25.27, salary and benefits: \$63.18


James E. Polewski

Sworn and subscribed before me this 16th day of June, 1993.


Notary Public
My Commission is Permanent.

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF THE DISCIPLINARY
PROCEEDINGS AGAINST

MARILYN K. KERNALL,
RESPONDENT.

AFFIDAVIT OF COSTS
92 REB 135

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

<u>Date</u>	<u>Activity</u>	<u>Time Spent</u>
5/7/92	Screening of case.	.5 hours
1/11/93	Review of file & phone conference with Smith	.3 hours
2/1/93	Phone Conference with Smith	.3 hours
2/6/93	Review file for receipt of Smith documents	.1 hours
2/9/93	Draft subpoenas for Smith and Kernall and arrange service	1.0 hours
2/23/93	Phone Conference	.2 hours
2/24/93	Phone Conference	.2 hours
4/1/93	Drafting complaint	3.0 hours

4/5/93	Drafting and review	1.5 hours
4/6/93	Final drafting	.25 hours
4/8/93	Arrange for service of complaint	.25 hours
5/15/93	Review status of file, preparation of default motion	.75 hours
6/7/93	Preparation for hearing, preparation of exhibits and copying of same	2.0 hours
6/9/93	Conference with Investigator and hearing on default motion	.6 hours
8/31/93	Receipt and review of Board Decision	.5 hours
9/1/93	Preparation of affidavit of costs	.5 hours
TOTAL HOURS		<u>11.95</u> hours

Total attorney expense for

11.95 hours at \$30.00 per hour

(based upon average salary and benefits for
Division of Enforcement attorneys) equals:


\$ 358.50

MISCELLANEOUS DISBURSEMENTS

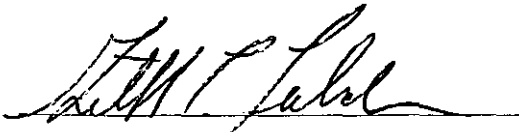
1. Service of subpoenas \$14.00

TOTAL ASSESSABLE COSTS

\$ 372.50


Charles J. Howden, Attorney

Subscribed and sworn to before me this 3rd day of September, 1993.



Notary Public
My Commission is Permanent.

CJH:csd
ATTY-CLG148

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF DISCIPLINARY
PROCEEDINGS AGAINST

MARILYN K. KERNALL,
RESPONDENT.

:
:
:
:
:

NOTICE OF FILING
PROPOSED DECISION
LS9304122REB

TO: Marilyn K. Kernall
570 Braund
Onalaska, WI 54650
Certified P 992 818 949

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, James E. Polewski. 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 July 7, 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 16th day of June, 1993.

James E. Polewski

James E. Polewski
Administrative Law Judge

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF THE DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	
	:	PROPOSED DECISION
MARILYN K. KERNALL	:	LS 9304122 REB
RESPONDENT.	:	

The parties to this action for purposes of s. 227.53, Stats., are:

Marilyn K. Kernall
570 Braund
Onalaska WI 54650

Wisconsin Real Estate Board
Department of Regulation and Licensing
P.O. Box 8935
Madison WI 53708

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

This proceeding was commenced by a notice of hearing and complaint filed on April 12, 1993. Service of the complaint was made upon Respondent on April 12, 1993, upon mailing of a copy of the notice of hearing and complaint to Respondent. No answer was received within the time set by law. Complainant Division of Enforcement filed a motion for default, and a hearing was set on the motion for June 9, 1993; service of the notice of motion and motion for default was made upon Respondent by mail on May 18, 1993. At the time and place fixed for hearing the motion on June 9, 1993, Attorney Charles Howden appeared representing the Division of Enforcement at the hearing on the motion for default. Respondent did not appear, nor did anyone appear on her behalf, nor was any document filed by Respondent or on her behalf. Respondent telephoned the Department of Regulation and Licensing after the hearing had commenced and left a message that she was suffering from a sinus problem, and would be unable to attend; the message was not delivered until after the hearing ended.

On the basis of the entire record and file in this matter, the Administrative Law Judge recommends that the Real Estate Board adopt the following Findings of Fact, Conclusions of Law and Order as its Final Decision in this matter.

FINDINGS OF FACT

1. Marilyn K. Kernall, ("Kernall"), 570 Braund, Onalaska, Wisconsin 54650, 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 #40482, originally granted on April 13, 1987.

2. On or about November 25, 1991, Kernall drafted a WB-36 Exclusive Buyer Agency Contract for the signature of Prettic L. Smith.

3. This Exclusive Buyer Agency Contract created an agency agreement between Kernall and Prettic L. Smith for the time period of November 25, 1991 through midnight of March 31, 1992.

4. The specific property identified in the Exclusive Buyer Agency Contract was "1516 Bainbridge" in the Town of Campbell, County of LaCrosse, State of Wisconsin.

5. Pursuant to the Exclusive Buyer Agency contract between Kernall and Smith, Kernall was to be paid a fee equal to the greater of \$1500 or 3 percent of the agreed price in the event the purchase went to closing or on the date set for closing in the binding written agreement to convey the property.

6. On or about November 25, 1991, Kernall drafted a WB-11 Residential Offer to Purchase for the signature of Prettic L. Smith and Mary T. Smith wherein the Smiths offered to purchase the Bainbridge street property.

7. The November 25, 1991, Smith offer to purchase was not accepted by the seller of the Bainbridge Street property.

8. On or about December 5, 1991, Kernall drafted a second WB-11 Residential Offer to Purchase for the signature of Prettic L. Smith and Mary T. Smith wherein the Smiths again offered to purchase the Bainbridge Street property.

9. The second Smith offer to purchase for the Bainbridge property was not accepted by the seller of the property.

10. In conjunction with the Bainbridge Street offers to purchase, the Smiths paid to Kernall \$500 in earnest money.

11. That despite repeated demand by the Smiths to Kernall to return the \$500 earnest money, Kernall failed and refused to return the earnest money and claimed that she was entitled to the money as a fee for assisting the Smiths.

12. There was no written agreement of any kind relating to any fee to be paid by the Smiths to Kernall other than the agreement referred to as the Exclusive Buyer Agency Contract, and specifically nothing was placed in writing by Kernall authorizing retention of the earnest money by Kernall for any reason except that stated in the Exclusive Buyer Agency Contract.

13. Kernall commingled the \$500 earnest money with her personal funds.

14. On or about March 2, 1992, the Greater LaCrosse Board of Realtors, Ethics Hearing Panel, filed a Decision finding that Kernall had violated articles 9 and 20 of the Code of Ethics and Standards of Practice for the realtors, in relation to the facts set forth above.

15. On or about July 2, 1992, Investigator Jack Johnson of the Wisconsin Department of Regulation and Licensing requested information from Kernall relating to the Smiths. Kernall did not respond to this July 2, 1992 request.

16. On or about August 3, 1992, Investigator Johnson again requested information regarding this matter from Kernall. Kernall failed to respond to the August 3, 1992 request of Investigator Johnson.

17. On or about November 23, 1992, Investigator Johnson again requested information from Kernall regarding the Smith matter. Again Kernall failed to respond to Investigator Johnson's request.

18. On or about February 9, 1993, an Investigative Subpoena Duces Tecum was issued to Kernall by the State of Wisconsin Department of Regulation and Licensing for the production of documents. On or about February 22, 1993 Kernall finally responded to the Department's request for documentation regarding the Smith complaint. However, Kernall has not provided to the Department information requested relating to copies of bank statements, checks and deposits into the checking account which would track the deposit and use by Kernall of the Smith monies.

19. Kernall failed to provide the Smiths an agency disclosure form, and in both offers to purchase drafted by Kernall as stated above, Kernall failed to complete line #2 by failing to indicate whether she was representing the seller or the buyer in the transaction and did not indicate elsewhere in the offers whether she represented the buyer or the seller.

CONCLUSIONS OF LAW

1. The Real Estate Board has jurisdiction in this matter pursuant to s. 452.14, Stats.
2. By failing to account for or remit the real estate trust funds coming into the Respondent's possession as earnest money collected from the Smiths within a reasonable time, Respondent, Marilyn K. Kernall, has violated s. 452.14(3)(h), Stats.
3. By failing to properly deposit, disburse and account for real estate trust funds coming into her possession as earnest money collected from the Smiths, Respondent has violated s. 452.14(3)(i), Stats., and ss. RL 18.03(1)(a), 18.10 and 18.13, Wis. Admin. Code.
4. By failing to put in writing all commitments regarding the transactions between herself and the Smiths in respect to how she would be paid in representing them as a buyer broker to substantiate her claim that she is allowed a fee outside of the Exclusive Buyer Agency Contract referred to above, Respondent violated s. 452.14(3)(i), Stats., and ss. RL 16.04(1) and (2), and 24.08, Wis. Admin. Code.
5. By breaching her fiduciary duties to the Smiths by misappropriating real estate trust funds from the Smiths, her principals in this transaction, Respondent violated ss. 452.14(3)(i) and 452.14(3)(k), Stats., and ss. 24.03, 24.025 and 24.07, Wis. Admin. Code.
6. By failing to cooperate with the Department of Regulation and Licensing by failing to provide documents to the Department in a timely manner during the investigation of this complaint, Respondent has violated s. 452.14(3)(i), Stats., and s. RL 15.04 Wis. Admin. Code.
7. By failing to make proper disclosures of agency representation to the Smiths in this transaction, Respondent has violated s. 452.14(3)(i), Stats., and ss. RL 24.07(4)(a)(2) and 24.07(4)(c), Wis. Admin. Code.

ORDER

NOW, THEREFORE, IT IS ORDERED that the Real Estate License previously issued to Respondent, Marilyn Kernall, be and hereby is REVOKED, effective immediately upon issuance of this Order.

IT IS FURTHER ORDERED that the assessable costs of this proceeding be imposed against Respondent Marilyn Kernall, pursuant to s. 440.22, Stats.

OPINION

Ms. Kernall did not appear for the hearing on the Division's motion for default on her failure to file an answer in this matter. Ms. Kernall did call the Department shortly after the hearing was scheduled to begin, and left a message with the receptionist that she was unable to attend. However, the phone call was the first and only contact Ms. Kernall attempted to make with regard to this proceeding and the timing of the attempt was poor.

The documents admitted into evidence in this proceeding show that Ms. Kernall accepted \$500 in earnest money from Prettic Smith for the purchase of a house she had reason to know he would not be able to purchase, because of his financial situation. Ms. Kernall apparently spent some time trying to convince people to help Mr. Smith finance the purchase of the house despite his unfavorable circumstances, and it must have been readily apparent to her that the effort she was making on Mr. Smith's behalf was highly unlikely to succeed in allowing Mr. Smith to purchase the property.

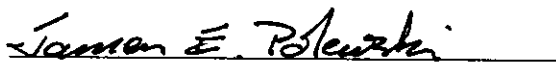
Ms. Kernall wrote to the Department during the investigation of this matter, and made it clear that she believes she is entitled to the \$500 as compensation for the efforts she made in trying to find Mr. Smith financing in spite of his generally poor financial health. There are two problems with accepting this argument; first, there is no written agreement between Mr. Smith and Ms. Kernall which would indicate that Mr. Smith had agreed to pay any compensation to her for her efforts to find him unconventional financing, and second, Ms. Kernall is a real estate broker, not a loan solicitor or mortgage banker. One might expect that a broker who stands to earn a commission on the sale of a property would do what she could to facilitate the sale, within the bounds of the law; in an appropriate case, that might include assisting a prospective purchaser to locate unusual sources of purchase money financing. Ms. Kernall apparently considers the effort something separate from the effort to bring buyer and seller together in a mutually beneficial transaction.

At the same time, however, Ms. Kernall does not point to any agreement that she would be entitled to a fee for her services, even if the seller declined to accept the proposed transaction, nor is there any indication that she represented herself to be acting as, or authorized to engage in the practice of, a loan solicitor or mortgage banker. If Ms. Kernall is to have a sound claim on the funds because of her service as a real estate professional, she should have a written agreement spelling out the details. If she were to argue that the efforts she made, and for which she believes she deserves compensation, were separate from her practice of real estate on behalf of Mr. Smith, one would think she would have authority to act as a loan solicitor or mortgage banker and a written agreement with Mr. Smith in that capacity. There is no agreement by Mr. Smith to pay Ms. Kernall for her services, other than by commission on the sale of a property she helps arrange.

It is clear from the evidence that Ms. Kernall has no sound claim on the funds she has retained in this matter, and it is clear that she has no intention of returning the funds to Mr. Smith despite his repeated request. This conduct is incompatible with the rules regulating the practice of real estate in Wisconsin.

It is also clear that Ms. Kernall was purposefully obstructing the investigation of this matter by refusing to respond to requests for information and by refusing to fully comply with the investigative subpoena which was finally served upon her. It is appropriate that she be disciplined for this conduct, as well as for the conduct which necessitated the investigation to begin with. A professional has a duty to the public, as well as to the client and the profession. Ms. Kernall failed to act in accordance with her duty to Mr. Smith; by making it more difficult for the Department and the Board to deal with that failure, she has demonstrated a disregard for the public welfare and for the good of the profession.

Dated this 16th day of June, 1993.



James E. Polewski
Administrative Law Judge

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