

WISCONSIN DEPARTMENT OF REGULATION & LICENSING



Wisconsin Department of Regulation & Licensing Access to the Public Records of the Reports of Decisions

This Reports of Decisions document was retrieved from the Wisconsin Department of Regulation & Licensing website. These records are open to public view under Wisconsin's Open Records law, sections 19.31-19.39 Wisconsin Statutes.

Please read this agreement prior to viewing the Decision:

- The Reports of Decisions is designed to contain copies of all orders issued by credentialing authorities within the Department of Regulation and Licensing from November, 1998 to the present. In addition, many but not all orders for the time period between 1977 and November, 1998 are posted. Not all orders issued by a credentialing authority constitute a formal disciplinary action.
- Reports of Decisions contains information as it exists at a specific point in time in the Department of Regulation and Licensing data base. Because this data base changes constantly, the Department is not responsible for subsequent entries that update, correct or delete data. The Department is not responsible for notifying prior requesters of updates, modifications, corrections or deletions. All users have the responsibility to determine whether information obtained from this site is still accurate, current and complete.
- There may be discrepancies between the online copies and the original document. Original documents should be consulted as the definitive representation of the order's content. Copies of original orders may be obtained by mailing requests to the Department of Regulation and Licensing, PO Box 8935, Madison, WI 53708-8935. The Department charges copying fees. *All requests must cite the case number, the date of the order, and respondent's name as it appears on the order.*
- Reported decisions may have an appeal pending, and discipline may be stayed during the appeal. Information about the current status of a credential issued by the Department of Regulation and Licensing is shown on the Department's Web Site under "License Lookup." The status of an appeal may be found on court access websites at: <http://ccap.courts.state.wi.us/InternetCourtAccess> and <http://www.courts.state.wi.us/wscca>.
- Records not open to public inspection by statute are not contained on this website.

By viewing this document, you have read the above and agree to the use of the Reports of Decisions subject to the above terms, and that you understand the limitations of this on-line database.

Correcting information on the DRL website: An individual who believes that information on the website is inaccurate may contact the webmaster at web@drl.state.wi.gov

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF DISCIPLINARY
PROCEEDINGS AGAINST

DONALD H. MUELLER

FINAL DECISION AND ORDER

RESPONDENT.

LS9901111REB

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

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto with the CONCLUSIONS OF LAW corrected as described below, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Real Estate Board.

IT IS FURTHER ORDERED That Conclusions of Law No. 2 and No. 4 in the Proposed Decision annexed hereto be amended to correct typographical errors and that the CONCLUSIONS OF LAW as amended shall state as follows:

CONCLUSIONS OF LAW

1. The Real Estate Board has jurisdiction in this matter pursuant to sec. 452.14, Stats.
2. In having failed to deposit the earnest money funds held by him into an interest bearing common trust account, respondent has violated sec. 452.13(2)(c), Stats., and sec RL 18.031(3)(a), Code.
3. In having failed to notify the seller in this transaction of his long-term relationship with Ms. Woelffer and of their intent to be cohabitants of the condominium until being purchased, respondent acted on his own behalf without prior written consent of all parties to the transaction, in violation of sec. RL 24.05(2), Code.
4. In having failed to notify either Ms. Reilly or Ms. Luell that respondent and Ms. Woelffer had been shown the property twice during the period when Ms. Luell had an exclusive listing contract on the property, respondent has failed to provide brokerage services to all parties to the transaction honestly, fairly and in good faith, in violation of sec. 452.133(1)(a), Stats.

IT IS FURTHER ORDERED That the suspension for a period of 90 days as ordered herein shall commence on the tenth day following the signing of this order as indicated below.

Explanation of Correction of Variance

The Real Estate Board has accepted the Findings of Fact, Conclusions of Law and Order recommended by the Administrative Law Judge in his Proposed Decision, and agrees with the reasoning set forth detailing the necessity for taking such action in this case. The only change is the final order is to correct typographical errors in the proposed decision. Paragraph 2. of the Conclusions of Law is amended to correct the citation to sec. RL 18.031(3)(a) Code. Paragraph 4. is corrected to reference a violation of sec. 452.133(1)(a), Stats. in accordance with the proposed decision of the Administrative Law Judge on page 10, where :Conclusions of Law #4 is quoted.

Affidavits of Costs

The Division of Enforcement and Administrative Law Judge are hereby directed to file their affidavits of costs with the Department General Counsel within 15 days of this decision. The Department General Counsel shall mail a copy thereof to respondent or his or her representative.

Appeal Information

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

Dated this 9th day of February 2000.

State of Wisconsin

Real Estate Board

by Cletus J. Hansen, Administrator,

Division of Business Licensure and

Regulation

STATE OF WISCONSIN

BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF

DISCIPLINARY PROCEEDINGS AGAINST

DONALD H. MUELLER

LS9901111REB

Respondent

PROPOSED DECISION

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

Donald H. Mueller
13350 Bluemound Road, Unit 3
Elm Grove, WI 53122

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

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

A Class II hearing was held in the above-captioned matter on July 12 and July 21, 1999, at 1400 East Washington Avenue, Madison, Wisconsin. Respondent Donald H. Mueller appeared personally and without legal counsel; the Division of Enforcement appeared by Attorney Colleen M. Baird. Ms. Baird filed Complainant's Closing

Argument on August 8, 1999. Mr. Mueller was given two extensions of the deadline for filing his closing argument, with the last of these extending the deadline to October 8, 1999. The Order extending the deadline dated September 30, 1999, stated that any closing argument filed after October 8, 1999, would be disregarded. Respondent had failed to file a closing argument as of the date hereof.

Based upon the entire record in this case, the administrative law judge recommends that the Real Estate Board adopt as its final decision in the matter the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Donald H. Mueller (respondent), residing at 13350 Bluemound Road, Unit 3, Elm Grove, Wisconsin, is licensed as a real estate broker in Wisconsin by license #16350, granted on March 15, 1977.
2. On January 29, 1996, Jane E. Reilly and Jeffrey C. Glock, husband and wife, owned the condominium in which respondent now resides. Legal title to the condominium unit was held in Ms. Reilly's name.
3. On January 29, 1996, Ms. Reilly entered into an exclusive condominium listing contract with Jan Luell, a Wisconsin licensed real estate salesperson and broker. The listing contract expired on June 30, 1996.
4. During the period of the listing contract, respondent and his companion of many years, Nancy Woelffer, attended an open house at the Reilly condominium. Both respondent and Ms. Woelffer signed the register at the open house, and Ms. Woelffer stayed on after the open house and had a conversation with Ms. Luell.
5. Subsequent to the open house, respondent called Ms. Luell and arranged for an individual showing of the property. In his conversation with Ms. Luell, respondent disclosed to Ms. Luell that he was a broker and acted as Ms. Woelffer's accountant, and inquired as to the possibility that Ms. Luell would share the commission with him if Ms. Woelffer bought the property. Because respondent was not a member of the Multiple Listing Service, Ms. Luell did not consider herself obligated to share the commission with respondent, but she agreed to pay respondent two percent of the commission in order to expedite the sale of the property.
6. After the individual showing of the property, Ms. Luell followed up with telephone calls on two occasions, at which times respondent and Ms. Woelffer indicated that they were not interested in the property.
7. Under the listing contract, Ms. Luell would be entitled to a commission if she procured the ultimate buyer of the property, even though the listing contract had expired. She provided to Ms. Reilly an extension list of such "protected buyers," but because respondent and Ms. Woelffer had expressed disinterest in the property, she did not include Ms. Woelffer on the extension list. Notwithstanding Ms. Luell's failure to include Ms. Woelffer on the exclusion list, she was the procuring broker in the ultimate sale of the property to Ms. Woelffer.
8. On or about May 19, 1996, respondent called Ms. Reilly and inquired whether the condominium unit was still for sale, whether it was listed with a broker, and when the listing contract was due to expire. He also inquired as to the extension list of protected buyers. Respondent indicated that he was not interested in working with another broker or splitting a commission, and that he would put together a cash deal for the purchase of the property. Because Ms. Reilly had just moved and did not have immediate access to the listing contract, she was unable to tell respondent when the listing contract was due to expire. She told respondent that she would look for it in the near future, however she did not call respondent back.
9. On or about July 7, 1996, respondent again called Ms. Reilly and told her that he had a buyer's agency agreement with a potential cash buyer. He indicated that there would be no contingencies, and that he could provide \$10,000 in earnest money with the offer to purchase. Respondent again asked as to the exception list, and asked Ms. Reilly to bring it along when they met. Respondent did not disclose that the buyer and he cohabited or that they intended to be cohabitants in the Reilly condominium if purchased by Ms. Woelffer, and Ms. Reilly assumed the relationship between respondent and Ms. Woelffer was a professional relationship. Respondent also did not disclose that he and Ms. Woelffer had previously viewed the property on two occasions at a time when Jan Luell held an exclusive listing contract for its sale.
10. Respondent, Ms. Woelffer and Ms. Reilly met at the condominium unit on or about July 13, 1996. At that time, respondent showed Ms. Reilly the disclosure of real estate agency form executed by him and Ms. Woelffer, and had Ms. Reilly sign it as seller. Respondent at that time provided an Offer to Purchase on behalf of Ms. Woelffer. Lines 127, 128 and 129 of the standard contract read as follows:

Earnest money, if held by a broker, shall be held in the trust account of the broker drafting the Offer prior to the acceptance of the Offer and in the trust account of the listing broker (buyer's agent if the property is not listed) after acceptance until applied to purchase price or otherwise disbursed as provided in the Offer.

Respondent had modified this language, by striking through the standard language and adding handwritten language, to read as follows:

Earnest money, if held by a broker, shall be held in trust in original form (cashiers checks) by the broker drafting the Offer prior to the acceptance of the Offer and in the trust of the broker after acceptance until applied to purchase price or otherwise disbursed as provided in the Offer.

11. The earnest money was tendered in the form of two cashiers checks in the amounts of \$100 and \$9900. The checks were made payable to "Nancy Woelffer and Donald H. Mueller real Estate trust Account," and were endorsed payable to Ms. Reilly and Mr. Glock. Respondent's endorsement read "Pay to the order of Jeffrey Glock and Jane E. Reilly.

/s/ Donald H Mueller Trustee, Donald H. Mueller Broker's Trust Account, Donald Mueller Trustee." The checks were not deposited in a real estate trust account, but were rather held by respondent in a lockbox in his office.

12. The closing on the property took place on July 31, 1996. The cashiers checks comprising the earnest money were brought to the closing by respondent and Ms. Woelffer. Paul Poehlman, attorney for Ms. Reilly, expressed his concern to Ms. Reilly that because of the manner in which the cashiers checks had been presented, they would not be negotiable at the bank upon which they had been drawn. Ms. Reilly asked Mr. Poehlman to nonetheless proceed with the closing.

13. Prior to the closing, Mr. Poehlman had prepared the paperwork and the closing statement for the closing, and notified Ms. Reilly as to the contents of the closing statement. Pursuant to Mr. Poehlman's instructions, Ms. Reilly then notified respondent of the amount to bring to the closing in the form of a certified check in the amount of \$103,947.63, made payable either to Ms. Reilly or to the Poehlman law firm. Instead, respondent appeared with a number of checks made out to different payees, for amounts which were both inaccurate and different from the amounts shown on the closing statement. Additionally, rather than turning those checks over to the seller, respondent insisted that he would personally make the various required disbursements. Mr. Poehlman indicated to respondent that the suggested procedure was unacceptable, and ultimately accepted the checks from respondent.

14. Also at the closing, there was a prolonged discussion regarding respondent's assertion that there was a special sewer assessment that did not appear on the closing statement, and respondent refused to accept the special assessment letter from the Village of Elm Grove indicating that there was no outstanding unpaid special assessment against the property. After calling the Elm Grove Village Treasurer, the parties finally agreed to a provision that respondent added to the Closing Statement, which states "Seller agrees that if sewer etc. proration is not for 1996 rather than 1995 (or after 8/1/96) ie: payment is made in advance for 1996, then seller will reimburse for incorrect proration."

15. Following the closing, Ms. Reilly attempted to cash the earnest money cashiers checks at Firststar Bank where they had been drawn. The bank refused to honor the checks as endorsed. Ms. Reilly attempted to contact Ms. Woelffer repeatedly through the day, finally speaking with her that evening. Ms. Woelffer provided a new certified check in the amount of the earnest money the following day.

CONCLUSIONS OF LAW

1. The real estate board has jurisdiction in this matter pursuant to sec. 452.14, Stats.
2. In having failed to deposit the earnest money funds held by him into an interest bearing common trust account, respondent has violated sec. 452.13(2)(c), Stats., and sec 18.031(3)(a), Code.
3. In having failed to notify the seller in this transaction of his long-term relationship with Ms. Woelffer and of their intent to be cohabitants of the condominium unit being purchased, respondent acted on his own behalf without the prior written consent of all parties to the transaction, in violation of sec. RL 24.05(2), Code.
4. In having failed to notify either Ms. Reilly or Ms. Luell that respondent and Ms. Woelffer had been shown the property twice during the period when Ms. Luell had an exclusive listing contract on the property, respondent has failed to provide brokerage services to all parties to the transaction honestly, fairly and in good faith.

ORDER

NOW, THEREFORE, IT IS ORDERED that the license of Donald H. Mueller to practice as a real estate broker in the State of Wisconsin be, and hereby is, suspended for a period of 90 days.

IT IS FURTHER ORDERED that, pursuant to sec. 440.22, Stats. the costs of this proceeding shall be assessed against the respondent.

OPINION

Conclusion of Law #2, above, states as follows:

In having failed to deposit the earnest money funds held by him into an interest bearing common trust account, respondent has violated sec. 452.13(2)(c), Stats., and sec 18.031(3)(a), Code.

Mr. Mueller does not deny that he failed to deposit the earnest money funds tendered by Ms. Woelffer into a real estate trust account, as required by sec. 452.14(2)(c), Stats., and sec. RL 18.031, Code, which read in relevant part as follows:

(2) Interest-bearing common trust account. (a) A broker who holds client funds shall establish an interest-bearing common trust account in a depository institution.

* * * *

(c) A broker shall deposit all client funds in the interest-bearing common trust account.

RL 18.031 Deposits and types of accounts. (1) TIME OF DEPOSIT. A broker shall deposit all real estate trust funds received by the broker or broker's salespersons or time-share salespersons in a real estate trust account within 48 hours of receipt of the trust funds.

* * * *

(3) INTEREST-BEARING ACCOUNTS. (a) Client funds shall be deposited in an interest-bearing common trust account and the department of administration shall be the beneficial owner of the interest accruing to the account, minus any service charges. At no time may the broker remove or use the interest earned on such accounts.

Mr. Mueller attempts to explain his failure to follow this mandate as follows:

I believe what happened was that I got the [Offer to Purchase], helped the lady fill out lines which were in my handwriting after she told me that she had purchased checks, and the check were as -- as shown on Exhibit 5, and she had gotten them without telling me to -- the -- pay to the order of Nancy Woelffer and Donald H. Mueller Real Estate Broker Trust Account. And she produced them for me, and at the time, the endorsements were already on the back of each of them, Pay to the Order of Jeffrey Glock and Janie Reilly, and her signature and Nancy Woelffer's signature underneath them. And she mentioned that Jane Reilly is the one who told her to put the two names on the backs of the checks. And I believe I recollect saying something to Nancy Woelffer that I thought the property was only in the name of Janie Reilly, but I -- I really can't remember at this date. She also told me that since we were living together, and Jane Reilly and Jeffrey Glock were living together, that she didn't think, and I didn't think either, that the money should be sitting in my trust account where only I could take it out, and she told me that. She thought it might be inappropriate for both her and -- for the benefit of her and for the benefit of Jane Reilly, so therefore she handed me these endorsed checks and asked me to make them also payable to Jeffrey Glock and Jane Reilly, and sign my name as the trustee of the broker's trust account, and that I was supposed to hold them under the deal that they had. As they were en -- so endorsed with the endorsement of both of the payees on the checks on Exhibit 5, I kept them in a box which I've had for 20 or 30 years, fireproof little box, and held them for the closing of the -- of the deal. I felt that there should be no concern about it since the endorsements of each of the payees would leave them in a position to be endorsed by Mr. Glock and Ms. Reilly when they would take possession of them. At the time, I was thinking about several rules of the Real Estate Board. I didn't know them by number but I knew that there were such regulations. Generally you don't hold escrow money in escrow, but I recall that they actually [were] non-depositable items because they were already endorsed payable to somebody else. It was my recollection that the expert in the state of Wisconsin took that position when I learned the -- learned the principle I just mentioned. His name was Howard Hall, the professor -- a professor of law at the University of Wisconsin Law School. At this point I couldn't deposit the items because they were payable to someone else, and the pay -- the endorsees, the people who were to get the documents, didn't have them so they couldn't do anything with them until they were turned over at the closing. I took the understanding that what I was doing was escrowing some documents. At one time I recall being taught by Mr. Hall that such a document was the same as a negotiable instrument, and it seemed to me that if that was the case, they were the same as promissory notes, and that I could hold them under what I now would call RL or Regulations of the Board 18.11. I took the position that under 18.06 we in effect had an escrow agreement in the contract on Line 127 of Exhibit 4, and with the understanding of the parties, I was the one who entered in the interlineation and the striking out because what I had at that point was basically two negotiable instruments which I couldn't do anything with myself except keep them in a secure place until they would be used and turned over to the sellers. (Tr. pp. 270-273)

Ms. Woelffer's testimony more or less confirms the account given by respondent:

Q. (by Mr. Mueller) With regard to the checks which I believe you have seen, the \$100 check, the \$900 -- \$9,900 check -- the judge has just handed you copies, ma'am. And you see the front and the back.

A. Uh-huh.

Q. You purchased those checks; is that correct?

A. That's right. From my account at Firststar Bank.

Q. Did I send you over there to buy them, or how did you happen to buy them?

A. I believe we discussed it, and you recommended that I put them in two separate checks, and I went over and purchased them.

Q. Did I tell you how to put the names, the payees in there, with your name and the trust account both in there?

A. I believe I did that on my own.

Q. Can you tell the judge, the court, what you were thinking about and why you would do that?

A. Well, I guess I did not want just my name on the check. I thought since you were representing me that your name should be on there, and I knew you had a trust account, so that's what I did.

Q. Did you --

A. I was the remitter and, as I say, I didn't want it just made out to me. And I didn't want it just put into your account, because I know funds that are put into broker's trusts account collect interest that goes to the state, and I didn't want that occurring here because I wasn't quite sure -- well, I -- let's -- and I had read some of the legal matters, or some of the statutes, and -- anyway, that was my decision.

Q. Did I ever tell you at any time that if it was just my name that I could sign my name and disburse the money or do whatever with it if it was in my trust account?

A. I believe I had heard something like that, yes.

Q. And were you avoiding that also?

A. I believe I was, yes.

Q. And later on, on that check, both those checks, when you endorsed them on the back, as I see the back of each of the checks it's endorsed, "Pay to the order of" -- first -- for the first endorsement, it's, "Pay to the order of Jeffrey Glock and Jane E. Reilly." Do you recollect signing that? "Signed Nancy Woelffer." Do you recollect that's -- that -- the first endorsement on the back of each one?

A. Yes. And this was decided at the -- in the kitchen of the condo on Saturday, July 13th. We came with these checks. And after we discussed it and went through the offer to purchase and the adjustments were made, this is what was decided, the way to do it.

Q. Who helped decide to do that?

A. I believe it was Jane Reilly. Might have been her husband as well, but I know Jane was the one who voiced her opinion the most.

Q. She wanted Jeffrey Glock's name on there; is that correct?

A. That's correct. I assume because he was going to get some of the check.

Q. And then you look at the second endorsement, "Pay to the order of Jeffrey Glock and Jane E. Reilly," signed, a signature sign, "S," "Donald H. Mueller, trustee, Donald H. Mueller Broker's Trust Account" and then my name underneath it, "Donald H. Mueller, trustee." You approved that also; is that correct?

A. Uh-huh.

Q. Because it was still payable to both of them and they'd both have to sign the check, right?

A. That's correct.

Q. Because Jane Reilly wanted you to make the check payable to both of them; is that correct?

A. That's correct. (Tr., pp. 206-210)

It may well be that it was Ms. Woelffer who decided the form that the earnest money checks would take and who the payees would be. It may also be that respondent was reluctant to attempt to persuade Ms. Woelffer, whose demeanor and bearing at hearing evinced a strong-willed personality, that it would be necessary to

exchange the checks for checks properly drawn. Nonetheless, the law is clear that real estate brokers must deposit client funds into a real estate trust account, and respondent's failure to insist upon receipt of such funds in a form that permitted them to be so deposited, and instead keeping the checks in his own lock box, is a clear violation of the cited rules.

Conclusion of Law #3 states:

In having failed to notify the seller in this transaction of his long-term relationship with Ms. Woelffer and of their intent to be cohabitants of the condominium unit being purchased, respondent acted on his own behalf without the prior written consent of all parties to the transaction, in violation of sec. RL 24.05(2), Code.

Respondent readily admits that he and Nancy Woelffer have been companions for many years. And he does not deny that he failed to notify Jane Reilly of that fact and of the fact that he intended to share the condominium with Ms. Woelffer:

Q. (by Ms. Baird) You didn't disclose to Reilly and her husband that you and your client, the buyer, were cohabitants; did you?

A. (by Mr. Mueller) And neither did she disclose to me.

Q. Why did you not make that disclosure?

A. I've never heard of a rule which would require it, and I got the impression that she knew that we were living together.

Q. How would she get that impression, sir, if you didn't make such a disclosure?

A. Because we dealt -- we just acted like we were. People often say we act like we're married, but --

Q. Did you disclose to Ms. Reilly, the seller, that you in fact were going to be living in the premises that you were obtaining to purchase from her?

A. When I went through, I told the broker there that we were -- we were looking for a place to live in, yeah.

Q. You told the broker. What about Ms. Reilly? You dealt directly with Ms. Reilly. The sale was through Ms. Reilly.

A. I told Ms. -- Ms. Reilly's agent who apparently was selling the house previously. Frankly, I -- I would have assumed that that broker would have listed both of us together on the exceptions list, but never did. We had conversations with the broker and -- I mean, when I'm holding the lady's hand when you're talking to a broker, I mean, you sort of assume that -- and when you come together and you leave in the same car and everything else, and I'm holding the lady's hand as I look through the house when we were there, I -- I was quite surprised that the broker didn't list us as an exception. And --

* * * *

Q. But the fact remains you did not disclose yourself-interest in the property to the sellers when you directly negotiated with them. Isn't it true?

A. I didn't buy the property.

Q. Did you prepare a written disclosure, Mr. Mueller?

A. I had a Disclosure of Agency.

Q. That Disclosure of Agency does not describe that you and the buyer were in fact co-habitants long term -- isn't that correct?

THE WITNESS: I'm -- I'm going -- I'm going to ask that this line of questioning be terminated by the -- by the Court. I've never read anything that requires a broker to tell a buyer what his connection is with the party he has the contract with. By every piece of real estate I've ever seen, the broker is either a relative, a partner, a contractor or he -- he says some -- he knows the party from somewhere, and the degree of relationship varies from one end to the other.

LAW JUDGE: I take it that's a no. Why don't you proceed.

MS. BAIRD: All right. I won't belabor the point. (T., pp. 306-307)

It is not necessary to assume that Ms. Reilly would not have accepted Ms. Woelffer's Offer to Purchase to conclude that the nature of the relationship between the buyer and the buyer's ostensible agent would have been an important factor in the seller's evaluation of the transaction. More than that, the nature of the relationship, and the fact that respondent was negotiating for a residence in which he was going to reside, is a circumstance which he was required to disclose. Sec. RL 24.05(2), Code states as follows:

RL 24.05 Self-dealing. (2) Disclosure of interest. A licensee acting as an agent in a real estate or business opportunity transaction may not act in the transaction on the licensee's own behalf, on behalf of the licensee's immediate family or firm, or on behalf of any other organization or business entity in which the licensee has an interest without the prior written consent of all parties to the transaction. For the purpose of this subsection, a licensee may obtain the written consent in the offer to purchase, option, lease or other transaction contract.

There is no question but that respondent was acting on behalf of himself and his immediate family in this transaction, and that he was therefore required to acquire the written consent of the seller to do so.

Conclusion of Law #4 finds as follows:

In having failed to notify either Ms. Reilly or Ms. Luell that respondent and Ms. Woelffer had been shown the property twice during the period when Ms. Luell had an exclusive listing contract on the property, respondent has failed to provide brokerage services to all parties to the transaction honestly, fairly and in good faith, in violation of sec. 452.133(1)(a).

The evidence is clear that respondent and Ms. Woelffer visited the property on two occasions while Jan Luell held an exclusive listing contract for the property. The first time, they attended an open house; the second was an individual showing, which respondent had arranged. Ms. Luell testified that at the time respondent called to arrange the individual showing, he disclosed to her that he was a broker, and inquired whether Luell would split the commission if Woelffer bought the property. Respondent denies that he ever discussed splitting the commission with Ms. Luell, though that testimony is not credited. Ms. Luell had no motive to fabricate her testimony in that regard, while respondent had an obvious motive not to admit such self-serving conduct. He also testified that he does not recall arranging for a second showing, but Ms. Luell's testimony is also credited in that regard. That testimony was that he arranged for the second showing during the same call that he disclosed that he was a broker and discussed splitting the commission.

Inasmuch as Ms. Woelffer ultimately purchased the property, she was obviously an interested prospect. Nonetheless, when Ms. Luell followed up on the matter, she was told unequivocally that Ms. Woelffer and the respondent had no interest in the property. Their assurances in that regard were sufficiently convincing that Ms. Luell did not even add their names to the exceptions list (Exh. 2). On May 19, 1996, respondent called Ms. Reilly directly and inquired when the listing contract with Luell expired. he did not disclose at that time that Ms. Woelffer had viewed the house on two previous occasions when the property was listed. Then, on July 7, 1996, just seven days after the listing agreement expired, respondent again called Ms. Reilly and indicated that he had a potential cash buyer. He made a point of requesting that Ms. Reilly bring the exceptions list when they met to discuss the matter, and again did not reveal either that the buyer had viewed the property twice when it was listed, or that he and the potential buyer intended to be co-habitants of the property. Respondent's intent to deprive the listing broker of a commission that she earned couldn't be more clear, and Ms. Woelffer as much as admitted that intent in her testimony:

Q. Now, you offered to purchase the condominium for \$115,000; is that correct?

A. That's what we finally -- yes.

Q. It was originally listed at one twenty-six nine; is that correct?

A. I thought it said one twenty-three.

Q. Well, you offered less than the asking price, the listing price; is that correct?

A. That's correct.

Q. So basically, you got a better deal, didn't you --

A. Well, of course.

Q. -- bought it directly?

A. Of course.

Q. It is possible that you and Mr. Mueller decided this would be the best approach for you to get a price and avoid paying the broker's --

A. Of course.

Q. -- commission?

A. Yes. Goes on --

Q. And you did it purposefully?

A. -- all the time. Pardon me?

Q. You did it purposely?

A. Well, we were watching the papers.

Q. You were waiting for her listing contract to expire; isn't that what you were really waiting for?

A. Possibly.

Q. If the contract expired, she'd be out of the picture; is that correct?

A. I suppose, yes.

Q. Then you could go directly to the owner?

A. Yes, yes.

Q. -- negotiate a better deal, not have to pay six--

A. Possibly, possibly.

Q. -- not have to pay six percent commission, correct?

A. That's right.

Q. And in fact, that's what occurred, isn't it?

A. In the long run, yes, that's what occurred.

Q. But wasn't there an opportunity -- or excuse me. Didn't you actually view the condo, though, during the time that there was a listing contract?

A. Yes. So what does that have any --

Q. Are -- did you hear the testimony about procuring cause?

A. Yes. I can -- don't remember all the details.

Q. Okay.

A. But I do know that she did not submit my name or his name as a possible buyer.

Q. Did you hear her testimony as to why she didn't do that?

A. Well, I guess in her opinion it was she didn't feel we were interested.

Q. Based on your statements to her?

A. Are you implying that I was lying to her? (Tr., pp.248-252)

In acting to deprive the procuring broker of her commission, respondent without question failed to provide brokerage services to all parties to the transaction honestly, fairly and in good faith.

It is well established that the objective of licensing discipline is the protection of the public by promoting the rehabilitation of the licensee and by deterring other licensees from engaging in similar misconduct. *State v. Aldrich*, 71 Wis. 2d 206 (1976). Punishment of the licensee is not an appropriate consideration. *State v. McIntyre*, 41 Wis. 2d 481 (1968).

It is certainly understandable that Mr. Mueller would wish to save his companion of twenty years a six or seven thousand dollar commission on her new condominium. Unfortunately, he went about it in a manner that violated numerous provisions of the real estate statutes and code. We'll never know the extent to which respondent's actions in this case were his idea or the extent to which he may have been influenced by his companion. As a

licensed broker acting as Ms. Woelffer's agent, however, he must bear full responsibility for his improper actions, and the question of motivation is therefore relevant only in the context of rehabilitation. Mr. Mueller was licensed in 1977, and has therefore practiced for 22 years without previous incident. Given the total circumstances of this case, it is probably questionable whether respondent's rehabilitation is an important consideration.

Conversely, the objective of deterring this licensees and others from engaging in this or similar conduct in the future definitely calls for significant disciplinary measures. Respondent's actions wrongfully deprived Ms. Luell of a commission that she had earned, deprived the seller of the opportunity to make an informed judgment on the advisability of negotiating a sale of her residence with the respondent, and left her with earnest money checks which were not negotiable. The imposition of a three month suspension of respondent's license should convince other brokers that to engage in self-dealing in order to avoid paying a commission may well end up costing them much more than the amount initially saved.

Dated this 23rd day of November, 1999.

Respectfully submitted,

Wayne R. Austin

Administrative Law Judge