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Roth & Taplin, Inc.

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Complainant:

Represented by Gerald M. Scanlan

Division of Enforcement

Department of Regulation & Licensing

Madison, WI 53708-8935

This proceeding was commenced by the filing of a Notice of Hearing on November 11, 1999. A hearing was held in this matter on July 10, and 13, 2000. Attorney Gerald M. Scanlan appeared on behalf of the Division of Enforcement. Attorney sfsdDaniel Leep appeared on behalf of respondent Micheal R. Roth. Roth & Taplin, Inc., did not file an answer or appear at the hearing and thereupon a motion by the Division of Enforcement to enter a default was granted.

Based upon the record herein, the Administrative Law Judge recommends that the Real Estate Board adopt as its final decision in this matter the following Findings of Fact, Conclusions of Law and Order.

#### FINDINGS OF FACT

1. Michael R. Roth ("Roth"), date of birth 12/25/60 is licensed in the State of Wisconsin as a real estate broker, license number 90-23405. The license was initially granted on February 29, 1980.
2. At all relevant times mentioned in the complaint Roth was a real estate broker, secretary and 50% shareholder of the real estate firm Roth & Taplan Inc., ("RTI") license number 91-8235.
3. Mark M. Koenig ("Koenig"), date of birth 10/16/53 is licensed in the State of Wisconsin as a real estate broker, license number 90-25032. The license was initially granted on March 6, 1981.
4. At all relevant times mentioned in the complaint Koenig was a real estate broker, president, treasurer and 50% shareholder of the real estate firm Roth & Taplan Inc., license number 91-8235.
5. RTI's license, number 91-8253 expired December 31, 1998.

6. At all times relevant to the complaint, RTI maintained a real estate trust account (#7136) ("trust account") and business account (#7128) ("business account") at Lincoln State Bank, 2266 South 13<sup>th</sup> Street, Milwaukee, WI 53215.
7. As of December, 1996, RTI's trust account was in deficit in the amount of \$212,000.00.
8. On or about January 14, 1997 Roth deposited \$212,000.00 into the trust account to correct the December, 1996 deficit.
9. By stipulation of the parties, RTI's July, 1996 trust account statement of account shows overdraft checks in the amount of \$43,740.00, transfers from the business account to the trust account in the amount of \$60,000.00, and transfers from the trust account to the business account in the amount of \$147,085.23.
10. By stipulation of the parties, RTI's August, 1996 trust account statement of account shows overdraft checks in the amount of \$26,000.00, and transfers from the trust account to the business account in the amount of \$58,000.00.
11. By stipulation of the parties, RTI's September, 1996 trust account statement of account shows overdraft checks in the amount of \$1,500.00, transfers from the trust account to the business account in the amount of \$126,651.30 and transfer of \$5,000.00 to unknown account number 8647.
12. By stipulation of the parties, RTI's October, 1996 trust account statement of account shows overdraft checks in the amount of \$5,000.00, transfers from the trust account to the business account in the amount of \$35,038.00, and transfer of \$1,000.00 to unknown account number 8647 for the month of November.
13. RTI had in its employ an unlicensed real estate salesperson, Richard B. Dolan, ("Dolan") from January 1, 1995 to September 5, 1996.
14. Dolan's real estate salespersons license, number 39890, had expired as of January 1, 1995.
15. Dolan engaged in real estate practice involving nineteen real estate transactions while employed by RTI and while his real estate salesperson's license was expired.
16. The branch office of RTI where Dolan was employed was located at RTI's South Ridge office in Greendale.
17. John Dominski, a licensed real estate broker, was the branch manager at RTI's South Ridge office in Greendale during the time Dolan was engaged in real estate practice involving nineteen real estate transactions.
18. RTI designated supervisory authority in writing to John Dominski as the branch manager at RTI's South Ridge office.
19. John Dominski failed to determine that Dolan was properly licensed at the beginning of the biennial licensure period beginning January 1, 1995.
20. RTI delegated to Koenig its responsibility to manage RTI's trust account's transactions and recordkeeping.
21. RTI delegated to Koenig its responsibility to prepare monthly account reconciliations, trial balances and validations for the months of July 1996, through November 1996.
22. RTI delegated to Koenig as president and general manager, RTI's responsibility for the direction and control of business affairs and regulatory compliance of RTI.
23. Roth did not participate in committing any of the acts alleged in the complaint.
24. Upon discovery of the trust account deficit, Roth acted reasonably and promptly to restore the trust account balance.
25. Upon discovery of the trust account deficit, Roth acted reasonably and promptly by causing Koenig to resign as an officer and director RTI on November 22, 1996 .

#### CONCLUSIONS OF LAW

1. The board has jurisdiction of this matter pursuant to Sec. 452.14, Stats.
2. Michael R. Roth has not violated any of the charged provisions in the complaint of Chapter 452 Wis. Stats., or the Wisconsin Administrative Code.
3. RTI has violated Wis. Adm. Code sections RL 17.07, 17.08 (1), (2), 17.10 (2)(a); 18.09 (1); 18.10; 18.13 (3),

(4) and 24.15.

4. RTI is subject to discipline pursuant to Sec. 452.14 (4), Stats.

### ORDER

1. NOW THEREFORE, IT IS ORDERED, that the complaint against Michael R. Roth be and hereby is, dismissed.

2. IT IS FURTHER ORDERED, that the complaint against the real estate firm Roth & Taplin, Inc., be and hereby is dismissed.

### Introduction

The main focus of the litigation of this case is and has been directed at Michael R. Roth. Pursuant to stipulation and by a Final Decision and Order dated January 27, 2000, Mark M. Koenig, agreed to a three year suspension, forfeiture and costs to be assessed against him based upon the allegations contained in the complaint. Koenig neither admitted nor denied the allegations stated in the complaint but agreed that there existed evidence that supported the findings made in the Final Decision and Order. At issue is RTI's handling of its trust account recordkeeping and fund disbursement as well as the employment of an unlicensed salesperson. RTI's trust account monthly account reconciliations, trial balances and validations were not prepared for the months of July, 1996 through November, 1996. Improper disbursements also were made from RTI's trust account to its business account resulting from both the oral requests of Koenig, and pursuant to an alleged sweep agreement between RTI and Lincoln State Bank. (The custodian of the trust account) The sweep agreement has not been located and there exists an unresolved conflict as to the sweep agreement's terms and which RTI accounts were implicated, as well as the validity of Roth's purported signature.

### Opinion

The burden of proof in disciplinary proceedings before the department or any examining board, affiliated credentialing board or board in the department is a preponderance of the evidence. s. 440.20(3), Stats. That burden has not been met by the State to show a violation by Roth.

Roth has also established a defense to the imposition of discipline, namely, that Koenig was validly delegated the management of RTI's business, regulatory and trust account affairs.

The theory of liability asserted against Roth is deemed the "corporate responsibility theory" ("CRT"), or alternatively the "overlay".

The State asserted the following theories of liability for Roth:

1. The CRT uses the status of a licensed individual as an owner or officer of a real estate business entity to place a general duty of supervision and responsibility upon that individual for the acts of the entity or employees of the entity. The desired result of the CRT is to impute liability to the individual for wrongs chargeable to the business entity or others. In this case the State argues that, even if a valid delegation to Koenig existed, Roth as a co-owner and officer of RTI is responsible for RTI's and Koenig's malfeasance because his general duty of control and responsibility for corporate activities.

2. As a fallback argument, the State argues that even if a valid delegation to Koenig existed, Roth knew or should have known of Koenig's malfeasance and taken steps on behalf of RTI to stop and correct them. Although not articulated fully by the State, this fallback argument is not based upon the CRT per se, but rather a broker's general duty to protect the public. The State failed to meet its burden to show Roth knew or should have known of Koenig's malfeasance and taken steps on behalf of RTI to stop and correct them

3. Finally, the State argued that any claimed delegation to Koenig was invalid because it was not in writing. The rationale advanced by the State was that a combined reading of Wis. Adm. Code sections RL 17.08 (1) and RL 17.09 (1) required a delegation to Koenig to be in writing, and therefore any "delegation in fact", not in writing, was void. The State claimed no delegation in writing existed in this case, thus the CRT would make Roth liable because there remained an undelegated duty upon all officers of RTI to review and control RTI's trust account and business practices. This argument fails because a delegation to a licensed business representative of the type in this case does not fall under sections RL 17.08 (1) and RL 17.09 (1). Even were it to do so, a sufficient writing existed with Koenig's designation as the responsible broker in a residential franchise agreement between Coldwell Banker and RTI. (Ex. 60)

The State presented no evidence that Roth participated in any of the wrongs alleged in the complaint. The State's own expert, Scott Minter, acknowledged that but for the application of the CRT, Roth is blameless. After reviewing the record Minter also found as a fact the delegation by RTI to Koenig to manage the trust account affairs of RTI, but still opined liability would attach to Roth via the CRT in part because such a delegation was not in writing.

The State attempts to define the CRT theory thus;

"...What is clear is that Koenig generally performed the function of general manager of Roth & Taplin Inc. while Roth primarily worked as a salesperson. This however, does not affect Roth's **responsibility and authority**. The evidence shows that Roth and Koenig both generally did the work they felt comfortable with. It appears that neither of them felt comfortable with the handling of trust accounts, or employee licensure, and basically let these matters slide. This they cannot do. Roth was in fact **a responsible officer** at all times with the **authority** to ensure that statutory and regulatory rules were being complied with. He was on notice that Roth & Taplin Inc. was in financial difficulty yet made no effort to ensure that the trust account monies were being properly handled. He also made no effort to ensure that the trust account monies were being properly handled. He also made no effort to ensure that his employee, John Dominski, was properly trained in his duties as branch manager and thus is responsible for Richard Dolan's unlicensed activity. Again there was **no adequate delegation** of duties to support Roth's contention that all his responsibility in this area were shifted to Koenig and/or Dominski. **Further, it must be stressed that the disciplinary proceedings at hand are not based solely on Roth's mere ownership interest** or broker association with Roth & Taplin Inc. as alleged in the motion. **Rather, the disciplinary action in (sic) based on Roth's responsibilities as a broker/owner who had the inherent authority to ensure compliance with the law and also the authority to correct violations.** Roth either intentionally or negligently chose to ignore those responsibilities after being made aware of financial and personnel problems with the corporation." (Complainant's Reply Brief to MSJ, p. 8) (Emphasis added.)

The State argues Roth's liability based upon his "responsibility and authority", or a general duty of an "broker/owner", who, "had the inherent authority to ensure compliance with the law and also the authority to correct violations." The State thus invents a new administrative classification under the Wisconsin real estate law, the "responsible officer".

The following statutes and rules frame a CRT analysis:

*"'Broker-employer" means a sole proprietor or business entity that employs another broker or salesperson to provide services to the broker." Wis. Adm. Code section RL 17.02 (3)*

*"'Business entity" means any organization or enterprise, other than a sole proprietorship, which is operated for profit...including a[n]...corporation." s. 452.01 (3j), Stats.*

*"'business representative" means a[n] ...officer, owner...of a business entity." s. 452.01 (3k), Stats.*

*"'(2) BUSINESS ENTITIES. (a) A license may be issued to a business entity if the business entity has at least one business representative licensed as a broker. The license issued to the business entity entitles each business representative of the business entity who is a licensed broker to act as a broker on behalf of the business entity." s. 452.12 (2) (a), Stats.*

*"'(3) BROKER'S LIABILITY FOR ACTS OF EMPLOYEES. (a) Each broker is responsible for the acts of any broker...employed by the broker." s. 452.12 (3) (a), Stats.*

Section 452.12 (3) (b), Stats.

*"(b) If a broker maintains any branch offices in this State, each branch office must be under the direct full-time supervision of a broker. The broker maintaining the branch office shall be responsible for the acts and conduct of all brokers, salespersons...employed at the branch office." s. 452.12 (3) (b), Stats.*

I. The CRT cannot override a valid delegation of duties by a business entity (RTI) acting as a broker-employer to impose liability on a non delegate business representative (Roth) where the delegate (Koenig) fails to carry out delegated duties and the non delegate business representative does not know or have reason to know of the delegate's actions.

Where the State uses a legal theory like the CRT to attempt to pierce through statutory and administrative rule definitions care must be taken that the legal theory used does not thwart the intent of the definitions so pierced.

A. The State's claimed foundations of the CRT are unpersuasive

1. Sec. 452.12 (2), Stats.

*"(2) BUSINESS ENTITIES. (a) A license may be issued to a business entity if the business entity has at least one business representative licensed as a broker. The license issued to the business entity entitles each business representative of the business entity who is a licensed broker to act as a broker on behalf of the business entity."*

Read in concert with the business liability section 452.14 (4), it is plain that along with the privilege to do business granted by section 452.12 (2), a business entity will also have liability imputed to it by the acts of its business representative.

Under the CRT as applied by the State, these sections are read backwards to hold:

a. Any broker regardless of fault who is an owner/officer of a business entity may have liability imputed to

him/her based upon the acts of another broker employed by the business entity.

b. Any broker regardless of fault who is an owner/officer of a business entity may have liability imputed to him/her based upon the wrongful acts of the business entity.

The State called Scott C. Minter<sup>1</sup> as an expert witness to explain the CRT.

Mr. Minter discussed the role of section 452.12 (2) (a), Stats., as follows:

Direct Examination

Q. Did you also review a copy of the complaint and the answer in this case?

A. Yes, I did.

Q. Have you had a chance to -- an opportunity to review the administrative code and statutes that are involved?

A. Yes, I have.

Q. Based upon your review of the facts as you understand them after your review, were you able to form an opinion to a reasonable degree of real estate certainty as to whether the respondent Mr. Roth's conduct in this matter met the minimal standards of a real estate professional as to trust accounts?

A. Yes, I have.

**Q. And what would that opinion be?**

**A. That Mr. Roth, as a licensee of the department, violated the various provisions of the administrative code set forth in the complaint involving trust account of Roth and Taplin.**

Q. In regards to Mr. Koenig, there's been some testimony that this function has been delegated to him; do you recall that from reading the material?

A. Yes, I do.

Q. Does that have any impact on your opinion?

**A. The -- the rules allow for a delegation of supervision to a -- from an employing broker to another broker. But it really -- in this case, it's my view that Mr. Roth retained responsibility under the -- the rules for the trust account activities of the firm.**

**Q. And why would he retain responsibility?**

**A. Well, first of all the -- Mr. -- well, Roth and Taplin was a -- was licensed by the State as a real estate entity. It was a corporation. As a real estate en -- as a licensed real estate entity, the -- the owners and officers of the entity are permitted to act on behalf of the corporation as a broker if the officer or the owner is a licensed broker. So both Mr. Roth and Mr.**

**Koenig were brokers and had the authority under the statutes and the -- to act as a real estate broker on behalf of the corporation.**

Q. Are you aware of any authority under the rules as to delegation of responsibility from broker to broker?

**A. There is a provision in the administrative code that says that a delegation of supervisory responsibilities must be in writing. And in this case, it's my knowledge that there was no written delegation of-- of duties.**

**Q. Are you aware in this case that Mr. Roth was working primarily as a salesperson in this case, is that correct?**

**A. Yes, that's correct.**

**Q. And Mr. Koenig was primarily a general manager, is that correct?**

**A. Yes, that's correct.**

**Q. Does that have any impact on your -- on your opinion?**

**A. No, it doesn't. They were both officers and owners of the entity, and, in my view, shared legal responsibility for actions of the corporation.** (RT, Hearing Day One, pp. 209-211) (emphasis added)

Mr. Minter thus reads the applicable statutes to create a "shared legal responsibility for actions of the corporation."

Cross Examination

Q. All right. Now, based on your review of all the records -- and by the way, just so it's clear for the court, that included a wide range of investigative reports done by the department through its investigators, correct?

A. Yes.

Q. All right. And that included witness interview summaries from people such as Mr. Koenig and Mr. Roth, correct?

A. Yes.

Q. A wide range of interviews with various employees of Roth and Taplin, Inc., or at least who were employees at the relevant time frame?

A. Yes.

Q. Included Ann Wilkerson, people like that?

A. Yes.

Q. And essentially a wide range of documents constituting the department's file?

A. Yes.

Q. All right. Including bank statements?

A. Yes.

Q. All right. Now, in reviewing that -- as I understand it, you were able to reach certain -- you were able to make certain observations that you then used to -- used as a predicate for your ultimate opinions, is that fair as a general statement; you came back with a --

A. Okay. Yes.

Q. -- version of the facts that you felt you understood?

A. Yes.

**Q. All right. As I understand it, when you went through the materials you agreed that the record that you saw indicated that Mark Koenig was the designated person by Roth and Taplin, Inc., responsible to handle the trust account by the company, correct?**

**A. Yes.** (RT, Hearing Day One pp. 216-218)

Minter's review of the facts lead him to the conclusion that Koenig was designated by RTI to be responsible to handle the trust account of RTI.

**Q. And when we talked about the overlay analysis, your reference to Chapter 452 that you apply, is that contained in section 452.12?**

A. Yes.

Q. All right. So when you mention I rely on a section of the statutes, **this is that statute -452.12(2), correct?**

**A. Correct.**

Q. All right. And this is a section under sub 2 that indicates the department may issue a license to a business entity if the business entity has at least one business representative licensed as a broker, correct?

A. That's correct.

Q. So in this case, that means the department was entitled to issue a license to RTI because either Mr. Koenig or Mr. Roth had a broker's license?

A. That's correct.



**Q. All right. And the next sentence indicates that the license to the entity entitles the business representatives to act as a broker, correct?**

**A. Yes, that's right.**

**Q. And it's this section that you believe constitutes a basis for imputation of liability that by terms of the regulations would flow to RTI upon Mr. Roth, correct?**

**A. That's correct.**

**Q. And that's your legal opinion as to this section, correct?**

**A. Yes.**

Q. All right. And if upon determination of the application of the law to this case, if it were determined that the -- this section doesn't provide for the imputation of liability that you believe it does, there would be no violations on the part of Mr. Roth for any of the sections we've looked at, correct?

**A. Yes, that's correct. Well, there's still common law responsibilities -- I'm sorry -- set forth in -- in the Nolan case as well as the -- the U.S. versus Parks case that is contained in Mr. Scanlan's brief, I believe. (RT, Day One pp. 251 In. 13-25, 252, 253 In. 1-2)**

Minter reads s. 452.12 (2), Stats., in reverse, to impose liability on Roth, although he admits that the statute does not state that such liability is imputed.

A. I believe the statute impose -- I mean, says that a broker who is an owner or officer of a corporation is entitled to represent that corporation as a broker.

Q. All right. This is a permissive statute indicating that once there's a license issued, the broker may act in certain respects, correct?

A. Correct.

**Q. All right. Would you agree with me this statute section sub 2 that you rely upon on its terms does not say that liability that's imposed upon the business entity, as that term's used in this case, is imputed legally to any broker owner by virtue of that affiliation; would you agree with that?**

**A. Yes.** (RT, Day One pp. 253 In 21-25, 254 In1-9)

Mr. Minter admits that s. 452.12 (2), Stats. does not provide imputation of liability from RTI to Roth for the acts of Koenig, but fails to provide a reason for his contrary reading of the statute.

2. United States v. Park, 421 US 658 (1975) (Stewart, J., Marshall, Powell, JJ., dissenting)

In *Park* the Supreme Court considered the validity of jury instructions in a criminal case brought against a corporate officer for his company's violations of the Federal Food Drug, and Cosmetic Act, as amended, (the "Act"). Acme Markets, Inc. was charged criminally for adulteration of food within the meaning of 21 USC sections 342 (a) (3) and (4), which constituted a violation of 21 USC sections 331(k). Acme pleaded guilty. The sole remaining defendant was Acme's president and chief executive officer, who pleaded not guilty.

At issue in *Park* was whether a defendant under the Act could be criminally convicted based solely upon his status as president of a corporation absent committing some act of commission or omission as an essential element of the crime. The Court of Appeals had previously reversed the trial court and found the trial court jury instructions deficient because they did not contain an instruction for "wrongful action", which might be "gross negligence and inattention in discharging...corporate duties and obligations or any of a host of other acts of commission or omission which would 'cause' the contamination of food" (citation). *Id* at 666-67.

The *Park* Court, in reversing the Court of Appeals held,

"...it is equally clear that the Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of the facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so." *Id.* at 674-75.

The *Park* holding thus allowed placing liability on a person based upon a showing of status and authority to prevent or correct a violation of the Act.

Generally, Minter described the *Park* case as providing that an officer of a corporation with authority to act in the corporation's behalf could be held liable for the corporation's violations of law where the officer had a legally duty to perform an act on behalf of the corporation under that law. (RT, Day One, page 269 In 19-25,270, 271 In 4-

While Minter's use of *Park* may be generally correct it fails to provide any basis to determine the types and limits of duties that arise for owners/officers of business entities under the regulatory scheme for Wisconsin real estate transactions at issue in this case.

Contrary to Mr. Minter and the State's reasoning, *Park* does not provide wholesale general support for the CRT in Wisconsin real estate law. The Act at issue in *Park* reveals that its liability scheme was wholly different from Wisconsin real estate law.

The Act:

"10. Sections 303(a) and (b) of the Act, 21 USC sections 333(a) and (b) [21 USCS sections 333(a) and (b)], provide:

'(a) **Any person** who violates a provision of section 331 of this title shall be imprisoned for not more than one year or fined not more than \$1,000, or both.'..." *Id.* at 667, fn 10.

The Act's criminal liability provisions applied to "any person" who committed a violation. Therefore, a responsible corporate officer could rightly be charged and convicted under the Act for the acts of the business entity. To the contrary none of the Wisconsin statutes and administrative rules related to Wisconsin real estate law cited in this matter are so broadly defined.

Wisconsin real estate law is a narrowly drawn regulatory scheme, far from contemplating a broadly defined application to all 'persons' as in the Act considered in *Park*. Minter fails to reconcile *Park* with Wis. Adm. Code Chapter 17, which explicitly creates rights, and responsibilities related to supervision and delegation of Wisconsin real estate practices. One must be cautious in adopting *Park's* holding founded upon specific criminal provisions of the Act and thereafter transferring it to an unrelated scheme of law which places different constraints on a regulated party's action.

### 3. Nolan v. Wisconsin R.E. Brokers' Board, 3 Wis. 2d 510, (1958)

*Nolan* involved misrepresentations and other breaches of duty related to a real estate sales transaction. The wrongdoings were committed by employee salespersons of what is modernly known as a "business entity", corporation. The real estate board attempted to hold the president and sole shareholder liable for the salespersons' wrongful acts under former s. 136.07 (3), Stats., which provided:

" Each broker shall be responsible for the acts of any and all of his salesmen while acting as his agents."

The theory of liability advanced by the board was in the nature of strict liability based on a person's mere status in a corporation as an officer and sole shareholder. The Court rejected this basis to attach liability to the president/sole shareholder under s. 136.07 (3), Stats., noting,

"No reason of public policy has been advanced which would justify the expedient of piercing the corporate veil in the instant proceeding where there was neither participation in the wrongdoing nor any laxity of supervision traceable to Horning [president/sole shareholder]." <sup>2</sup> *Id.* at 543-44.[emphasis added]

*Nolan* only stands for the proposition that to hold a licensed owner/officer of a real estate business entity liable for acts of employees, the owner/officer must either participate in the wrong or be guilty of a "laxity of supervision". The Court did not further define what this duty of supervision was, what it required or from what rule or statute it was derived.

The statute at issue in *Nolan*, as noted by the Court, merely codified the general common law duty and rule that a principal is liable for the acts of the principal's agents. *Id.* at 543. Of paramount importance in support of its holding the Court specifically noted,

"The difficulty with basing the suspension of Horning's broker's license on sec. 136.07 (3), Stats., is that Elko and Nolan were not employed by him as his salesmen, but by the Wauwatosa Realty Company, a corporation." *Id.*

This underpinning of the *Nolan* case applies here. Koenig was not employed by Roth, and lacking that, some other means to create a duty for Roth to be responsible for Koenig's actions must exist. It is certain that no general duty of supervision existed in *Nolan*, because the *Nolan* court didn't impose one between owners and employees, nor between co-owners. *Nolan* merely recognized that an existing duty breached, of supervision or otherwise, creates liability. However, *Nolan* did not create any specific duty of an owner to supervise anybody. *Nolan* actually rejects the CRT as advanced by the State.

Subsequent to *Nolan* extensive modification of the Wisconsin Real Estate Code and enabling statutes has occurred. Currently, explicit and extensive rules are set forth defining and regulating the broker-employer's duty to supervise and the ability to delegate as contained in Wis. Adm. Code. Chapter 17. Whereas at the time *Nolan* was decided little statutory or rule guidance existed regarding the duty of delegation and supervision, currently

that duty is extensively and explicitly regulated.

Therefore, *Nolan* must always be read in light of current duties existing in Wisconsin real estate law. *Nolan* created and imposed no duty, it merely recognized one means of piercing the corporate veil.

*Nolan* can't be used to create a general implied duty of supervision to be placed upon Roth for Koenig's acts, because Koenig never acted in the capacity of an agent or employee of Roth. Koenig was an agent and employee of the broker-employer, RTI. Koenig owed his fiduciary duties to RTI.

#### B. A valid delegation to Koenig existed

A large portion of the present hearing was directed toward litigation over whether the trust account, business management and regulatory compliance duties of RTI were properly delegated to Koenig by RTI and what degree of supervisory duty RTI and Roth had, if any over Koenig's activities.

The State has confused two different types of delegation:

Type One: Direct delegation to act, which occurred here, arose when RTI delegated to Koenig as a licensed business representative the duty to undertake the proper keeping of RTI's trust account, business and regulatory matters on behalf of RTI.

Type Two: Delegation to supervise other licensed persons' acts, contemplated by Wis. Adm. Code sections 17.08 and 17.09, pertains to the delegation of the broker-employer's duty to supervise licensed employees.

Not recognizing the distinction between the two types of delegation resulted in the State combining sections 17.08 and 17.09, and thereafter applying them to Koenig as a supposed Type Two delegate.

The State's expert, Minter, found a delegation-in-fact to exist from RTI to Koenig. Notwithstanding a delegation-in-fact, the State then argued that Koenig was not properly delegated the trust account duties of RTI because such a delegation under RL 17.08 (1) was not in writing as required by RL 17.09 (1). Neither Minter nor the State recognized or drew any distinction between Type One and Type Two delegations, and it appears that both wrongly considered the Type Two framework to apply in this case. Such an analysis misses the mark because even if one were to allow the State to blend sections RL 17.08 and 17.09, Koenig was a Type One delegate, not a Type Two.

Wis. Adm. Code section RL 17.09 (1) does not support the State's proposition that RTI's business management and trust account delegation to Koenig was required to be in writing. Section RL 17.09 (1) contains only the requirement of a writing for delegated supervision of licensed employees working in the principal office.

*RL 17.09 Supervision of principal offices. (1) A broker-employer shall either personally supervise licensed employes working in the principal office or delegate the supervisory responsibility in writing to any license broker.*

Section RL 17.08 (1) addresses generally the broker-employer's duty to supervise the activities of the brokers it employs. Supervision includes without limitation trust account records, and by reasonable extension management of the trust account activities.

***"RL 17.08 Supervision of employes. (1) A broker-employer shall supervise the activities of any broker or salesperson employed by the broker-employer. Supervision includes but is not limited to reviewing all listing contracts, offers to purchase, trust account records and other documents related to transactions. A broker-employer may delegate this responsibility to other brokers. Broker-employers shall provide all licensed employes with a written statement of procedures under which the office and employes shall operate with respect to handling leases, listing contracts, offers to purchase and other documents relating to transactions.***

***(2) A broker-employer shall be responsible for the preparation, custody, safety and correctness of all entries on real estate forms, closing statements and other records even though another person may be assigned these duties by the broker-employer" Wis. Adm. Code section RL 17.08 (1), (2)***

A broker-employer that is a corporate business entity can only ever "supervise" through persons it delegates, however, in this instance it was Koenig himself who was to personally undertake the duty of meeting RTI's responsibilities. Koenig, as a business representative broker, is not required to be supervised because as a business representative he is not considered an employee for purposes of either section 17.08 (1) or 17.09 (1).

Wis. Adm. Code section RL 17.025 states:

"Applicability. For the purposes of this chapter, a business representative is not an employe of the business entity."

Therefore, by their terms, when Wis. Adm. Code sections RL 17.08 (1) and 17.09 (1) speak of "supervision" of "licensed employees", a business representative broker is not considered "employed" given the RL 17.025 exclusion. No duty to supervise a business representative exists for a direct delegation to perform duties. Sections RL 17.08 and 17.09 don't apply to a Type One delegation to a licensed business representative.

This means that if a Type One delegation to perform acts such as trust account disbursements and recordkeeping is made to a business representative broker, the "supervision" involved is essentially self supervision.

By contrast, the practical effect of the State's misapplication of sections RL 17.08 (1) and 17.09 (1) would require that RTI delegate in writing to Koenig the responsibility as a business representative to supervise himself in the handling of the trust account. The result is that Koenig would be required as president of RTI to direct a memo to himself (a writing), telling himself to supervise himself. Presumably, in the course of this supervision of himself if he discovers that he is wrongly transferring funds to and from the trust account, then he must report himself to his supervisor, which of course, is himself. This result arising from the reading urged by the State requires Koenig and RTI to perform a frivolous act.

The inclusion of section RL 17.025, avoids this absurd result for delegations to licensed business representatives who perform an act on behalf of the broker-employer.

When *Nolan* is read against the backdrop of chapter RL 17 it is apparent that no general duty of supervision exists of or between business representatives of the corporate business entity (broker-employer). *Nolan* never created duties of supervision. To the contrary, *Nolan* was silent as to the source and limits of such a duty. Current Wis. Adm. Code chapter 17, however, is not silent. Roth did not have any duty to supervise Koenig. RTI did not have a duty to supervise Koenig. Koenig did not have any duty to supervise Koenig.

Ann Wilkerson, the bookkeeper, was not a licensed employee of RTI, so no supervisory responsibility needed to be placed in writing for Koenig's authority over her under RL 17.09 (1) either. In any event, the State never charged RTI with a violation of RL 17.09 (1) and the trust account duties were otherwise validly delegated to Koenig. Therefore, it was Koenig's sole responsibility to carry out those duties, even were he to utilize persons such as Ann Wilkerson to assist him.

### C. Corporate Responsibility Theory Summary

The State's version of the CRT or "overlay" is not a valid legal theory of liability as applied to these facts.

To be accurate to the State's CRT theory, subsumed in its argument is a kernel of the correct standard to impose liability on Roth, which is the recognition that depending upon the circumstances, a licensed business representative, as an owner or officer of a business entity, may be potentially liable for the acts of the business entity, otherwise the business entity becomes an unintended shield for misconduct.

A fundamental axiom of law is that one who derives benefits from the law must also bear responsibility imposed by the law. This axiom is tacitly acknowledged by *Nolan*, and explicitly recognized by s. 452.14 (4), Stats., providing for discipline of a business entity based upon wrongful acts of a business representative. However, in all cases respecting discipline of licensed business representatives, the law requires chargeable conduct.

Utilizing the general principle of *Nolan*, to pierce the corporate veil of a business entity to reach a licensed business representative, that licensed business representative must either participate in the wrongful act, or commit some other related act of non-feasance for a duty imposed by law. Thus, licensed business representative liability actually rests upon application of s. 452.14 (3) (i), Stats., which provides as a basis for discipline:

*(i) Demonstrates incompetency to act as a broker, salesperson or time-share salesperson in a manner which safeguards the interest of the public.*

The licensed business representative who chooses to practice his or her profession through the statutorily allowed business entity form, derives benefits from using that business form. Therefore, the legal responsibility for the licensed business representative is to insure that the business form as used does not harm the interests of the public. One such example of harm is mismanagement of the business entity's trust account.

The extent of the licensed business representative's duty is set by law. A direct wrongful act such as committed by Koenig, certainly suffices. However, where the law allows a delegation of trust account responsibility, and the delegation is to a licensed business representative, other fellow licensed business representatives must be allowed to rely on that delegation. Otherwise the delegation and the rule allowing it become meaningless. Roth could only incur liability here if he knew or had reason to know that RTI's trust account was being mismanaged by Koenig, and failed to stop it and/or correct it. Then and only then would a duty to act arise under s. 452.14 (3) (i), Stats.

The duty imposed upon a licensed business representative is to not stand idly by while a fellow business representative commits a wrong. To do so is incompetency as defined by s. 452.14 (3) (i), Stats., because since a licensed business representative cannot do a wrong to harm the public he or she must also act to prevent his or her business entity from committing that same wrong in the business representative's stead.

The prosecution of Roth went forward without facts to show either that Roth had knowledge of or participated in Koenig's mismanagement of RTI's trust account, or that Roth reasonably should have known Koenig was mismanaging RTI's trust account.

Misreading the authority of a business entity acting as a broker-employer to delegate trust account management to a business representative, the State argued both an implied strict liability nondelegability and general fault based standard to impose liability on Roth,

"I think that the – the statutes and the case law makes clear that Mr. Roth is a responsible officer for insuring that rules are being complied with. He cannot call himself a salesperson and

ignore those responsibilities. He cannot decide to perform certain functions and not perform

responsibilities to insure that things are being done properly." (RT Hearing Day 2, p. 556, ln 11-18)

In the final analysis, it is not clear what theory the State has attempted to use to place liability on Roth. It is unknown whether the State's theory is the CRT; with or without a delegation; and whether or not that delegation needed to be in writing. Depending upon the stage of the hearing a differing analysis appeared to be applied by the State.

What remains is the factual finding that RTI validly delegated its trust account management and business management duties to Koenig. Roth is not liable for the wrongs alleged in the complaint because he did not know they occurred and reasonably should not have known they occurred. Upon discovery Roth acted promptly to rectify the wrongs by replenishing the trust account, and removing Koenig from management of the corporation.

## II. RTI validly delegated the trust account management, business management and regulatory compliance duties of RTI to Koenig.

Upon RTI's delegation Koenig was free to manage RTI's trust account management, business management and regulatory compliance without supervision by Roth. The State's expert, Minter, found such a delegation to exist. This fact finder also independently finds the testimony and documentary evidence to support this conclusion. It is conceded by the State's expert, Minter, that Roth did not participate in the wrongs alleged. Presumably, Minter's conclusion as to Roth's non-liability absent the CRT also includes the implicit finding that Roth had no reason to have knowledge of any of the wrongs either. This fact finder independently finds the testimony and documentary evidence to explicitly support this conclusion.

### Testimony of Ann Wilkerson

Ms. Wilkerson was a credible witness. She was hired for the position of office bookkeeper by Mark Koenig to work for RTI in mid 1992. Her duties were to do all the closings, commission checks and accounts payable. Monthly she prepared the receivables, check registers, pending reports, pending deals, and closed deals with the commission checks, for RTI's accountant, Jay Lindseth, however, did not prepare any trust account materials for him. The reconciled bank accounts and the profit and loss statements were returned from the account in what was believed to be three envelopes and given to Koenig. Roth never asked to see the monthly reconciliations and statements, to her knowledge.

The former bookkeeper trained Wilkerson for the bookkeeping requirements for trust accounts. As of 1996 RTI had seven offices and Wilkerson was still responsible for balancing the trust account. RTI used the Real Easy accounting system. During the time that Koenig was involved with RTI, she never compared trust account information with the monthly bank statements, and never prepared monthly trial balances or trust account reconciliations.

Typically, she would gather documents for the general account and the commission account for the accountant and take those to him, and then she would balance the trust account. She acknowledged that she later learned the acts she performed in balancing the trust account were not what was required by RL Chapter 18.

Mike Roth never asked her to see bank statements, trial balances or reconciliations and never asked her if they were being done. As the bookkeeper, she in fact had minimal contact with Roth even though she worked in the same office. Typically, Roth was described as always busy doing his phone calls and then he would leave for the day on listing appointments.

Wilkerson's contact with Mark Koenig, however, was daily and Koenig was in the office until the summer or fall of 1996 when he would sometimes work half days in the morning. He also became sporadic regarding when he would show up for work. While Koenig was gone, no one took over his duties that she was aware.

Typically, Wilkerson wrote the checks for RTI and Koenig signed them. The Real Easy accounting system did not provide a daily balance and RTI did have a problem making sure there was enough money to pay bills. Wilkerson would issue trust account and business account checks for payment and provide them to Koenig to pay as he saw fit.

For the entire time she worked for RTI, until April of 1997 Wilkerson reported to and was supervised by Koenig. She was never supervised by Roth. Wilkerson understood Koenig to be the general manager of RTI and the person solely responsible for management of the day to day business affairs of RTI, including its financial matters. She did not consider that Roth was involved with the financial management of RTI while she was there and did not provide Roth with financial information on a periodic basis. She never was sure how much money was in RTI's account but she never mentioned this to Roth. She claimed that she would pick up the financial documents prepared by the accountant and would give everything to Koenig. She was also certain that she was to report to Koenig. Roth also did not supervise the other workers in the office. In her opinion, Roth was involved exclusively in the listing and sales of properties for RTI.

The typical procedure for handling the finance records was for Wilkerson to take the statements for RTI's operating account and commission account to the accountant, not the statement for the trust account. She would go to the bank to make deposits for RTI and Koenig was described as always back looking at the deposits.

Regarding the trust account Wilkerson would routinely do a reconciliation between the bank statement for the trust account and the open account that existed on RTI's computer system. This was her effort to balance the trust account on a monthly basis.

When she noticed transfers from the trust account occurring she went to Koenig to inform him. The first time Koenig was informed of a trust account transfer he claimed that it was a bank error and told her to "hold it". After, additional transfers were appearing on almost a monthly basis. Wilkerson once again brought this to the attention of Koenig who never had an answer for her. She considered that he was skirting around the issue and he indicated he would check into it. Wilkerson came to the conclusion that Koenig himself was transferring money from the trust account based upon her review of the bank statements that referenced telephone transfers authorized by Koenig.

The transfers from the trust account occurred until November of 1996. At times the bank would contact her directly about the need to replenish the operating account. To her knowledge the bank always wished to speak with Koenig, not Roth.

Ultimately, Wilkerson became aware that the bank requested from RTI a sweep agreement for authority to transfer money into the operating account. Wilkerson had discussions with Koenig who indicated RTI needed to have one. Wilkerson took to the bank a sweep agreement given to her by Koenig. The sweep agreement contained Koenig's signature and a signature purporting to be Roth's. She never saw Roth sign the sweep agreement but her opinion is that the signature was not Roth's. She formed this opinion based upon actual familiarity with Roth's signature on sales documents over four and one half years estimated at over one thousand times. Wilkerson never informed Roth regarding the existence of the sweep agreement.

Koenig was not involved to any significant degree in the sale of homes and was paid primarily through the payroll account. Wilkerson was aware that Koenig was going through divorce proceedings in 1996 and that his father had died in roughly June of 1996. She still considered that at that time Koenig was able to carry out his duties for RTI.

#### Discussion of Wilkerson testimony

Koenig hiring Wilkerson is the initial evidence that Koenig was responsible for the business aspects of RTI. The exercise of discretion to pay monies from the trust account and business account creates a key inference that Koenig was delegated responsibility for the entire business operations of RTI.

Ann Wilkerson's testimony is important because it provides the framework for the evaluation of the remaining testimony. Wilkerson regretted not explicitly saying anything to Roth about Koenig's activities. Such regret is telling because even during the time that trust account mismanagement was occurring, the structure of the management of RTI did not provide any prompting or urging for Wilkerson to deal with other than Koenig. This action supports her credibility and the later testimony of Roth that the business activities of RTI including its financial affairs were solely managed by Koenig. It was not even conceivable to Wilkerson as the employee intimately involved with financial matters to deal with anyone else aside from Koenig.

Also significant is that RTI's accountant never received trust account materials for processing. This is further evidence that Koenig was managing the trust account independently. This evidence is critical because when profit and loss statements were later returned to RTI from the accountant, at whatever point Roth were to see them no trust account information would be included for review.

#### Testimony of Michael R. Roth

RTI was started by Roth's grandfather in 1929. Roth first met Koenig in 1982 when both were working as salespersons at Stefaniak Realty. In approximately 1984 or 1985 Roth, Koenig and Robert Roth (Roth's father) reformed RTI and became one-third owners of the corporation.

When recalling the reformation of RTI, Roth stated:

So as time went on, two years later, he started to encourage me, why don't you come over and work with me. I really didn't want to run a company, so at the time, based on the encouragement of both of them, I said the only way I would consider doing this, I explained to my dad, is if Mark Koenig came over as a partner, because Mark was a good friend of mine at the time, and he was -- he was willing and able to manage the operation. My only interest was selling real estate because I was good at listing and selling homes. So our understanding was that Mark would run the management of the company, my dad would take care of the recruiting of new agents, and I would be the salesperson. (RT Hearing Day 1, p. 70)

Koenig's role in the business management of RTI was reiterated throughout the course of Roth's testimony. (RT Hearing Day 2, p. 446-47) Roth was a salesperson, and the RTI sales evidence presented demonstrates conclusively that Roth was extremely successful at selling. (Ex. 53, 54, 56) Roth also paid the wages for his own sales team, not RTI. (RT Hearing, Day 2, page 451-52)

Even after Robert Roth left RTI the basic framework of Roth selling and Koenig managing did not change. Until Koenig was removed from RTI in 1996 for trust account mismanagement, Koenig was always designated as president of RTI on the corporation's annual report filed with the Department of Financial Institutions. Koenig was also designated as treasurer during the time that trust account mismanagement was occurring in 1995 and 1996. (Ex. 20, 21) Roth was alternatively designated as secretary and/or treasurer. (Ex. 16 [89/90-secretary/treasurer], 17 [90/91-secretary/treasurer], 18 [92-secretary], 19 [93/94-treasurer], 20 [94/95-secretary], 21 [95/96-secretary], 22 [97-treasurer])

A. No. I mean there was nothing in writing, but there was a clear understanding on what roles each of us would play, and that was from the beginning. Mark was to manage the company, my dad would be involved in recruiting and some of the business aspect, and I was basically there to get -- get our name out in the community, because without listings and sales the company isn't going to be able to grow.

Q. So that was back since 1984?

A. Correct. (RT Hearing Day 1, p. 71 ln 10-17)

As of 1994 when Roth's father retired from the business, the working roles of Koenig and Roth remained the same:

Q. All right. There comes a time when your dad retires in 1994 time frame and you and Mark are the sole owners, correct?

A. Right.

Q. And then there's the second acquisition of offices on the Northshore which are four more offices sometime in roughly September of 1995, correct?

A. Correct.

Q. All right. And at the point -- at that point you now increase salespeople affiliated with the office to a point of in excess of 150 people, correct?

A. Right.

Q. All right. Now all along the way is it -- was it understood and discussed between you and Mr. Koenig that you would continue to be strictly sales and a lister and Mark would be the person responsible for day to day management?

A. Absolutely, yeah. (RT Hearing Day 2, p. 448, ln. 12-25; p. 449, ln. 1-4)

Koenig was responsible for the trust account, Roth for sales:

Q. All right. Let's make sure we're clear on the trust account. Is your recollection consistent with that of your father, that when you first began the business the trust account was initially handled by your father who had already maintained it?

A. Correct.

Q. And there came a time in connection with the purchase of the first Coldwell Banker offices that that got transitioned to Mr. Koenig?

A. Right.

Q. And do you remember the computer program being implemented around that time also?

A. Right, 'cause Mark -- Mark hired somebody called Craig Tollefson and he was going to implement this plan using this Real Easy software and I said -- you know, they -- they brought it up, I said fine, you guys are in charge of it.

Q. Okay. And to your knowledge, Mark was the person responsible although using other people to --

A. Mm-hmm.

Q. -- maintain the trust account on and after sometime in 1990?

A. Right, yeah. Mark took over the responsibility mainly because at that time my dad had to move out of the main office and manage the Brookfield office and because of the need for more hours and recruiting and managing that office, he could not then maintain or put in the time to maintain the trust account.

Q. Until the time came in late November of 1996, who was the person then that you understood was responsible for the trust account?

A. Mark Koenig. (RT Hearing Day 2, p. 449, ln. 11-25; p. 450, ln. 1-17)

The evidence is clear, credible and reasonable, namely, Roth is telling the truth when he states that he performed sales duties, and RTI's business and financial management duties were delegated to Koenig. Roth was paid on commission for his sales work, Koenig was paid a salary of 95 to 100 thousand dollars per year for his work regardless of sales. (RT Hearing, Day 2, page 450-51) (Ex. 56- as a licensed broker, Koenig could additionally earn a sales commission when he had occasion to list or sell a property, however, had no commissions in calendar year 1996) Roth characterized Koenig's lack of sales as based upon the fact he was so busy managing the day to day affairs of RTI that he didn't have time to pursue sales. (RT, Hearing Day 2, p. 484, ln. 23-25; p. 485 ln. 1-2) Without Roth aggressively selling, Koenig would have had no RTI business affairs to manage, nor salary to receive.

Roth did not review monthly bank statements:

Q. I want to direct your attention now to the beginning of 1996, and ask you, who were the officers of Roth and Taplin, Inc. at that time?

A. 1996, it was just Mark Koenig and myself.

Q. You have equal interest in the firm?

A. Correct.

Q. Did you ever review any bank statements that came in on a monthly basis?

A. No.

Q. Did you ever ask to see them?

A. No.

Q. Did you ever ask to see trial balances on a monthly basis?

A. No.

Q. How about reconciliations?

A. No.

Q. Were you aware that they were required on a monthly basis?

A. Correct.

Q. Now, who was doing the outside bookkeeping? You indicated that there was someone who you sent some of this material to.

A. John Schubert at -- this is back in 1984.

Q. Okay. Was that eventually sent to an individual by the name of Jay Lindseth?



A. Yes, correct.

Q. Okay. And do you know what was sent to him?

A. He was sent all of the information regarding, you know, the income and expenses so he could do the profit-and-loss statements for the company.

Q. Do you know if he was sent any trust account information?

A. I don't believe so.

Q. Did you ever have contact with Mr. Lindseth?

Roth met RTI's accountant on only one occasion. Usually Roth's father or Koenig would meet with the accountant:

A. Not very often. We had one face-to-face meeting the end of 1995, but more often than not, Mark or my dad would talk to him.

Q. What was the substance of your face-to-face meeting you had in 1995?

A. We wanted to meet and discuss how we could cut expenses in the company.

Q. And this was in 1995?

A. Correct, the end of '95.

Q. Why did you have that meeting then?

A. Be -- because the profit-and-loss statement didn't show as much of a profit, and Mark thought it would be a good idea that we'd meet and brainstorm ideas how we could cut expenses.

Q. At that time, did he go over any of the forms that he filled out or any of the compilations that he -- he worked with as an accountant?

A. Meaning the profit-and-loss statements?

Q. Correct.

A. Yes.

Q. Did you understand that?...

A. What was your question again?

Q. When you went -- when you met with Mr. Lindseth, did he explain what his compilations were to you? Did you understand them?

A. I understood parts of it.

Q. Okay. But you understood in 1995, though, that there was at least not enough profit coming in or not enough --

A. Correct.

Q. -- money coming in? Now, Roth and Taplin, Inc. apparently grew substantially at some time; is that correct?

A. Right.

Q. As far as number of offices and --

A. Uh-huh.

Q. -- number of people? How -- how large did it become?

A. Well, in -- after the acquisition of the Coldwell Banker Premier offices, we had -- we had actually three offices at that time, and then we took on four more, so we had seven, but then we initially shut one of those four down, so it went from seven to six quite quickly. (RT Hearing Day 1, p. 72 ln.3-25, 73, 74 ln. 1-7, 18-25, 75 1-15)

The delegation to Koenig for management of all of RTI's business and financial affairs is consistent with the actual role Koenig played in the business guidance of the company. Koenig developed and structured a franchise

agreement between Coldwell Banker and RTI. Roth trusted Koenig pertaining to the financial management of RTI:

Q. Were you actively involved in this acquisition?

A. No. Mark Koenig brought the idea to me, and I initially said I wasn't interested unless he could show me on paper that it would make a profit and that it would make -- make our bottom line, you know -- you know, more money. So he came -- he sought out the -- the transition, brought it to me, and I said, well, you're going to have to go to the accountant and make sure that this makes sense.

Q. So you were satisfied in 1995, I believe, that it made sense?

A. As per his figures with the accountant. And he also spoke to Coldwell Banker. They were willing to be involved in the transaction and fund it. And there was also a title company that was involved in it.

Q. And did you check on this acquisition, how this acquisition was doing then?

A. What do you mean by that?

Q. Well, after 1995, you were concerned about its financial feasibility. Did you continue to be concerned?

A. Correct. Correct. I mean -- I mean I -- of course I -- I was given infor -- information from Mark that everything was going fine.

Q. What kind of information?

A. Just we'd talk about sales at the different offices, how many sales they were getting every month, how many listings.

Q. Did you ever ask to see a trial balance?

A. For -- for what, the trust account?

Q. For the trust account.

A. No.

Q. Did you ever ask to see if reconciliations had been done?

A. No.

Q. Did you ever review any bank statements?

A. No.

Q. Why not?

A. It wasn't -- I delegated that to Mark. Mark was -- I trusted Mark. Mark was like a brother to me. I -- everything was taken care of by Mark, and he did a good of it up until '95 or '96.

Q. Was any of this delegation in writing?

A. No. We had a clear understanding.

Q. Since 1984?

A. Yep. (RT Hearing Day 1, p. 75 ln. 16-25, 76, 77, 1-10)\_

Roth states that he never asked to see trust account records because the duty to produce and maintain them was delegated to Koenig. Indeed, paragraph 2.4 of the franchise agreement between Coldwell Banker and RTI explicitly designates Koenig as the "Responsible Broker" for purposes of applicable law. (Ex. 60) This is consistent with Roth's testimony that Koenig developed RTI's expansion plans, and worked with RTI's accountant to predict the future financial expectations of the proposed business arrangement with Coldwell Banker. (Ex. 35) Roth's involvement with the finances of RTI were limited to quarterly review of financial information given to him by Koenig after preparation by the accountant. (RT Hearing Day 1, p. 80 ln. 15-23)

It is therefore credible when Roth states that management of RTI's trust account was delegated to Koenig. After all, it is logical for this to be so, as Koenig was managing the full financial business activities of RTI, and developing business expansion plans with RTI's accountant. No evidence shows Roth's involvement in any of these financial matters including the managing of RTI's trust account.

The State has attempted by innuendo to argue that Roth knew RTI was having financial difficulties in late 1996

and therefore had an amorphous duty to do something. That "something" is the stumbling block to the State's argument.

The State really never answers its own question as to what this "something" is and this is the critical breakdown of its case. Roth had no legal duty to supervise Koenig. RTI delegated financial management to Koenig. Therefore, if Koenig was mismanaging the trust account, and hiding it from Roth, Roth has not violated any statute or rule at the point where he reasonably has no knowledge of the mismanagement.

Even if Roth was aware that RTI was having financial difficulties, it doesn't follow to argue that such difficulties create a duty for Roth to distrust and question Koenig in the management of the trust account. With hindsight, the State appears to argue that when financial difficulties occur, a licensee will normally and naturally be prone to violate the law. Therefore, by extension, all involved business representatives then have a duty to supervise each other to prevent moral and legal failings by each other. However, this is not the law. To the contrary, a corporate officer can generally rely upon the representations of fellow officers.

Section 180.0826, Stats., provides in part:

**180.0826 Reliance by directors or officers.** Unless the director or officer has knowledge that makes reliance unwarranted, a director or officer, in discharging his or her duties to the corporation, may rely on information, opinions, reports or statements, valuation reports any of which may be written or oral, formal or informal, including financial statements, valuation reports and other financial data, if prepared or presented by any of the following:

(1) An officer or employe of the corporation whom the director or officer believes in good faith to be reliable and competent in the matters presented.

The cash flow projections for RTI (Ex. 35) for the time period January 1, 1996- December 31,1998 were prepared at the request of Koenig, with information supplied by Koenig. (RT Hearing Day 1, p. 116).

Roth also was never told that profit projections were not going to be met:

Q. And did you have some discussion with Mr. Koenig where he presented you with Exhibit 35 in an effort to explain why it made financial sense for you and the company to move forward with the acquisition of the Northshore offices?

A. Yes. I told Mark I wouldn't do it unless he came up with numbers that would make sense.

Q. And what -- how did you understand -- what did you understand the numbers on Exhibit 35 to tell you in connection with how the operations would be or the success of the operations would be if you acquired those offices?

A. That we'd have a \$310,000 profit in '96. \$350,000 profit in 1997 and \$370,000 in 1998.

Q. Okay. Prior to any information you received on and after mid-November of 1996, did anyone ever tell you that those projections somehow were not being met?

A. No.

Q. And I think Mr. Lindseth already testified that he didn't have any discussions with you in 1996 to explain any financial documents he was providing the firm. Is that your recollection as well?

A. That's correct.

Q. And to your knowledge, how many times did you even meet with Mr. Lindseth, for any reason, as he was your CPA?

A. One.

Q. And when was that time again just to clarify

that.

A. It was I believe mid-'95.

Q. All right. Between September of 1995, when Mr. Koenig presented Exhibit 35 to you, and the end of November of 1996, did Mr. Koenig ever approach you and tell you as your partner that there were some problems with the projections and the company just wasn't going to have the success that he projected it would have?

A. No. (RT, Hearing Day 2, p. 464-66)

Roth had no training in reviewing financial statements and they didn't mean a lot to him, and therefore he relied on Koenig:

Q. Let's talk about financial information. Over time, did you periodically receive financial statements of some sort for the company?

A. Yeah, over a period of time. We would get -- we were supposed to get them monthly although normally the year-ends would get there like the middle of the year.

Q. All right. Would you from time to time get some kind of a monthly statement also?

A. We would, sure.

Q. All right. Was it your practice to always meet to discuss the monthly statements or -- or not?

A. No, we wouldn't discuss the monthly statements. I'd meet with Mark maybe once a year to go over the year-end statement.

Q. Okay. Do you have -- did you have any special training or expertise in reviewing financial statements that you did receive?

A. No.

Q. Did they mean a lot to you?

A. No. I mean I -- as long as the bottom line was positive that's all I cared about.

Q. Did you rely upon the judgment of Mr. Koenig in terms of understanding how the company was going?

A. Absolutely.

Q. And you knew that there was an accountant CPA who also advised the company?

A. Right. (RT Hearing, Day, p. 462-462)

The State has presented no evidence that Roth had knowledge that proper trust account records were not being kept, or that improper transfers were being made. The evidence presented at the hearing established that RTI was subjected to a previous trust account procedures audit by the division of enforcement and found to be conforming to Wisconsin law. At that time, the duties and responsibilities of Roth at RTI were the same as during the time period embraced by the present complaint, namely no involvement with trust account matters.

Roth knew of a department audit of the trust account in 1992, and that RTI was found to be in compliance, thus Roth had a reasonable basis to conclude that absent contrary information, the trust account was continuing to be handled properly:

Q. All right. Were you aware at the time that the trust account was being handled that there had been any audits done as we at least have seen reflected in part in Exhibit 45 today?

A. Yeah, I recall the audit that my dad spoke of in '92, you know, when they had the computer and that was at, I believe our location either 111th and National or when we switched from 92nd and Lincoln to 100 and Nash -- 111th and National.

Q. And did you understand that as a result of that audit there -- the State had viewed the trust account system as being in order and following the appropriate rules?

A. Yes, that's correct.

Q. And were you aware of that in general at or around the time frame that the audit had occurred?

A. Yes, that's correct. (RT Hearing Day 2, p. 452, ln. 10-25; p. 453, ln. 1)

Roth was thus entitled to rely on Koenig's lack of any representation that RTI's trust account management was not continuing to be carried out properly.

The first knowledge Roth had of RTI's trust account problems were in November, 1996 when Roth was informed by two salespeople that their commission checks had bounced. (RT Hearing, Day 2, p. 453-454) The way in which Roth discovered the trust account mismanagement is significant because the discovery came in connection with sales commissions, not other ministerial functions of corporate governance. This is consistent with Roth's testimony that he was involved strictly in sales for RTI.

Roth also denies any knowledge of or signing of a sweep agreement involving RTI's trust account. (RT Hearing,

Day 2, p. 454-55) This is credible given Lincoln State Bank's failure to produce the agreement, and Wilkerson's belief that Roth did not sign the alleged agreement in question. While denying liability for the sweep account Lincoln State Bank thereafter entered an agreement with Roth to loan him \$212,000 dollars to make up the deficit in the trust account, in exchange for a release of liability in favor of the bank. (Ex. 34) This action by Roth demonstrates his credibility as to when he actually discovered the trust account problems, because he acted quickly to restore the deficient balance, thus protecting his clients.

Further evidence of Roth not having knowledge of Koenig's activities is borne out by the record following the point in time when Roth was allegedly informed of the true nature and extent of what Koenig had done. Roth immediately took steps to rectify Koenig's actions. Roth first removed Koenig from the company. Roth then took out personal loans to make good the missing trust funds. Then Roth sold RTI to pay off the personal loans, netting nothing. (RT Hearing Day 1, pp82-86) <sup>3</sup> These acts are profoundly not those of a person who has had knowledge or participation in the wrongs alleged here. Roth, upon discovery of Koenig's actions, acted swiftly to rectify Koenig's actions.

#### Testimony of Jay Lindseth

Lindseth was RTI's accountant. He never reviewed RTI's trust account procedures until asked to do so by Roth in November of 1996, which was after Koenig's actions came to light. This corroborates both Wilkerson and Roth's testimony that the accountant for RTI was not preparing trust account accountings during the time of Koenig's tenure with RTI. Thus, any financial statements or profit and loss statements prepared during Koenig's tenure with RTI would not have revealed trust account mismanagement when viewed by Roth.

Q. Did you ever have the occasion to review RTI's trust accounting procedures or bookkeeping procedures?

A. No.

Q. Did Mr. Roth in November of '96 ever ask you to do that kind of work for you?

A. Oh, yes, uh-huh.

Q. But prior to that, he did not?

A. Prior to that, no. (RT Hearing Day 1, p. 98 ln. 14-21)

Consistent with Roth's testimony, Lindseth dealt with Koenig regarding the preparation of financial documents:

Q. Okay. But if you had questions or comments from time to time, Mark Koenig was the person you would be talking to?

A. Correct.

Q. All right. You did not routinely deal at all with Michael Roth for purposes of preparing financial statements, correct?

A. No, I did not.

Q. That's correct?

A. Correct, yes. (RT Hearing Day 1, p. 106 ln. 3-12)

Q. Correct. Before we get to his request made of you for the trust account matters?

A. Correct.

Q. All right. So going back to just routine financial statements, is it fair to say that your

recollection is that you only met individually with Mike Roth on one occasion to discuss in any fashion a financial statement you prepared for RTI?

A. Correct.

Q. And that related to a time frame associated with the purchase of the Premier offices?

A. No. I believe it was -- when I met with Mike?

Q. Yes. The one --

A. The -- the --

Q. -- occasion you recall.

A. The one occasion? That was after he purchased -- him and Mark purchased the stock from his father and he wanted to go over the financial statement.

Q. Okay. And was that really what -- Mr. Koenig was also present there for that --

A. Yes.

Q. -- particular meeting? All right.

A. Yes. (RT Hearing Day 1, p. 111 ln.3-25)

Lindseth's testimony corroborates Roth's testimony that Koenig was in charge of the financial affairs of RTI and Lindseth only met one time with Roth in connection with the Coldwell Banker franchise business deal.

#### Testimony of Mark Koenig

Koenig's testimony was not credible. His memory appeared quite selective, and his demeanor was uncooperative. While all the other witness have testified consistently with each other and in specific detail about Koenig's role and activities at RTI, Koenig has difficulty recalling even the simplest of events.

Q. Okay. Did you ever work together at Roth and Taplin, Inc.?

A. Yes.

Q. And what was your position there?

A. I was a partner.

Q. And when approximately did you become a partner?

A. The end of '84.

Q. And who were the other partners at that time?

A. Bob Roth and Mike Roth. Robert Roth and Michael Roth.

Q. Were you an officer at that time of the corporation?

A. I don't remember.

Q. You don't recall who the officers were?

A. There was some change in the -- in the structure a couple of times, so I don't recall.

Q. Okay. Were you ever an officer?

A. Yes.

Q. When was that?

A. I -- I don't know when that took place.

Q. Okay. Let's direct your attention to approximately 1996. Were you an officer of Roth and Taplin at that time?

A. Yes.

Q. And what was your position?

A. I was an officer.

Q. Were you president?

A. I don't remember.

Q. Did your position have any sort of job description, if you recall?

A. Not really.

Q. How were your duties arrived at?

A. I don't remember.

Q. What was your job function at Roth and Taplin?

A. Sales and some management.

Q. And about what time frame are we talking about where you were doing some sales and general management?

A. Don't remember.

Q. Directing your attention to 1996, do you remember what your position is at Roth and Taplin at that time?

A. No. I was an officer of the corporation. What the job description was, I don't remember. It varied so much, couldn't tell you.

Q. Did your job at Roth and Taplin involve trust account bookkeeping for the firm?

A. Not directly, no.

Q. What do you mean by not directly?

A. That was done by our administrative staff.

Q. And who was that?

A. I think it was Ann Wilkerson at that point in time.

Q. How did you arrive at your job as being the manager, the general manager?

A. I don't remember.

Q. Well, how many partners were there in 1996?

A. I think Bob Roth was still involved. I don't have the records to give you the exact on that.

Q. Was Michael Roth a member of the corporation at that time?

A. Yes.

Q. Did you ever discuss with Mr. Roth various job duties that you would be performing?

A. Sure, but I don't remember the specifics.

Q. Do you ever specifically remember discussing who was going to be in charge of the bookkeeping?

A. No.

Q. Are you familiar with the requirement for monthly trust account trial balances?

A. Yes.

Q. Did you perform those duties?

A. No.

Q. Was it your obligation, to the best of your knowledge, to do that?

A. No.

Q. Whose job was that?

A. I don't know.

Q. Are you familiar with Ann Wilkerson?

A. Yes.

Q. Was it her duty?

A. At that point in time, I don't know. (RT Hearing Day 1, p. 125 ln. 14- p. 128 ln. 20)

Koenig was the president of RTI, yet claims he doesn't remember that he was president, or what his duties as president were. (Exhibits 64, 66, 67, and 69 are examples of personel and business policy directives authored or

approved by Koenig for managing the business affairs of RTI.)

After the extensive testimony by Wilkerson about her intimate daily workings with Koenig and given the extensive financial documents of RTI submitted demonstrating Koenig's active involvement, Koenig's testimony is not credible. Koenig's testimony can further be characterized as argumentative and less than forthright. Koenig claims no knowledge of what materials were sent to RTI's accountant:

Q. How did you do your bookkeeping?

A. Through the accountant and through Ann Wilkerson.

Q. And who was your accountant?

A. Jay Lindseth.

Q. What sort of accounting work did Mr. Lindseth do you for?

A. What accountants do. Don't specifically remember.

Q. Do you remember ever sending him anything?

A. No.

Q. Who would have done that?

A. That would have been done through Ann Wilkerson.

Q. Do you know if he was sent the trust account balances or the trust account information?

A. I have no idea.

Q. Do you recall receiving monthly -- monthly bank statements from the -- the bank?

A. They didn't come to me.

Q. Who did they go to?

A. They went to accounting.

Q. Did you review them?

A. No.

Q. When you were a general manager in approximately 1995 -- were you general manager at that time?

A. I don't remember. (RT Hearing Day 1, p. 129, p. 130 ln. 1-3)

Koenig was insistent that he never saw bank statements, that they went to "accounting." (ie..Ann Wilkerson). Yet he claims he was apparently able to discuss the accounts with Roth:

Q. I believe you indicated you'd receive the monthly bank statements for RTI, is that correct, for the various accounts?

A. They went to accounting. I didn't see them, no.

Q. Did you ever discuss these accounts with Mr. Roth?

A. Yeah. (RT Hearing Day 1, p. 136,lin. 10-17)

Regarding RTI's trust account management:

Q. Were you aware that the Wisconsin Administrative Code required monthly trial balances?

A. Yes.

Q. How about monthly reconciliations?

A. Yes.

Q. What did you do to insure that this was being done?

A. Obviously not enough.



Q. You didn't attempt to review them or anything then; is that correct?

A. Correct. (RT Hearing Day 1, p. 137 ln. 19-25, p. 138 lin. 1-4)

Koenig's testimony about his duties and knowledge of events is contradicted by Wilkerson. Wilkerson's testimony is backed by independent evidence indicating it is more credible. Wilkerson claims Koenig was always looking at deposits. Wilkerson noticed transfers from the trust account occurring and claims she went to Koenig to inform him. The first time Koenig was informed of a trust account transfer he claimed that it was a bank error and told her to "hold it".

Koenig, testified he couldn't remember when he found out about trust account problems and that he ultimately found out from Roth. This is not credible and flatly contradicted by the other testimony and documentary evidence:

Q. When did you first become aware of trust account problems?

A. I can't really remember.

Q. Was it prior to you signing those documents?

A. The only thing I remember sometime down the line was Roth was asking me about the trust account, and I thought he was handling it, that, but I don't remember when that was or --

Q. How do you mean you thought he was handling it?

A. I thought he was checking into it. (RT Hearing Day 1, p. 139 ln. 10-19)

A review of the Lincoln State Bank Statements for RTI's trust account reveal the following ten telephone transfers from the trust account, all authorized by Koenig over the course of one and one half years:

11/11/94, 12/28/94, 12/28/94, 1/11/95, 1/12/95, 3/09/95, 4/18/95, 5/10/95, 5/10/95, 7/05/96 (Ex. 23A)

Lincoln State Bank's records show an extensive course of action by Koenig in transferring trust account monies. Koenig as president and treasurer of RTI was fully directing all financial dealings of RTI, including the trust account. Given the extensive nature of the trust account transfers it is disingenuous for Koenig to now claim he has no memory of when he first learned of trust account problems. To the contrary, he could pick just about any time period from the end of 1994 to the end of his tenure for a "memory" to occur.

Wilkerson's testimony is validated by these bank records. The remainder of her testimony as to her interactions with Koenig in relation to the trust account and all financial dealings of RTI is therefore given great credibility. Wilkerson noted that the bank would contact her directly about the need to replenish the operating account, and to her knowledge the bank always wished to speak with Koenig, not Roth. Wilkerson's testimony is further corroborated by the fact only Koenig authorized the transfers. (Ex. 23A)

Contrary to the State's assertion, it was Koenig, not Roth who was the treasurer of RTI during this time of the trust account transfers. From 10/1/94 through 9/30/96, the annual report for RTI discloses Koenig was the treasurer. (Ex. 20, 21)<sup>4 5</sup> Koenig holding the office of treasurer is one additional factor given the remaining weight of the evidence to find that Koenig was delegated responsibility and control of RTI's trust account management.<sup>6</sup>

A key area of testimony, largely undeveloped by the State deals with the State's theory that Koenig's personal problems in mid 1996 in some manner shifted Koenig's president/treasurer/general manager duties to Roth.

Q. I would direct your attention to approximately June of 1996. Were you undergoing any personal problems at that time?

A. Yeah, I was going through a divorce, and my father passed away.

Q. Were you having any health problems?

A. No, no, other than -- no.

Q. Did these personal problems affect your -- your office work?

A. Very much.

Q. How is that?

A. I was coming in less. I wasn't as involved. I had a nasty divorce going.

Q. Were these personal problems discussed with Mr. Roth?

A. Oh, numerous times.

Q. Did you discuss how this was going to affect your hours?

A. I told -- he knew it. His wife was talking to my soon-to-be ex-wife, so he knew exactly what was going on.

Q. What is your understanding of who was supposed to cover the job as general manager while you were gone?

A. I thought Roth was. (RT Hearing Day 1, p. 135, ln. 11-25, p. 136 ln 1-9)

The difficulty with the State's line of questioning pertaining to Koenig's personal problems is that the State inexplicably ceases its questioning. Wilkerson testified that she didn't notice or feel that Koenig was not able to carry out his duties during mid 1996. A close look at Koenig's testimony is also revealing. Koenig is about to testify as to how his personal problems affected his work hours, and the knowledge by Roth of this fact. Note, Koenig begins, "I told—he knew it." Koenig abruptly stops himself and this is key. Even at this point, a lynchpin in shifting a delegation of duties back to Roth, Koenig pulls up short. Instead he only testifies to what he believed Roth's state of mind (knowledge) was at that point, but not that he actually informed Roth that he could not perform his duties. This testimony by Koenig is speculation and is not given weight as proper evidence.

Koenig's undeveloped testimony poses a problem for the State. Wilkerson does not agree that a work issue existed deriving from Koenig's problems. The State's line of questioning assumes without proof that as a result of personal problems Koenig would, "be gone" in a way meaningful to trust account, business and regulatory compliance management. Left unquantified or qualified by the State is how much Koenig was "gone", and what "gone" means in the context of other persons' knowledge of duties left unperformed from mid 1996 till November 1996.

The State's assumption also never accounts for or addresses the fact that the seeds of RTI's trust account problems were sown prior to the beginning of Koenig's troubled time in mid 1996. The Lincoln State Bank records clearly show that Koenig for the previous year had known of and been involved in trust account mismanagement. The State's theory that Roth should have terminated any delegation to Koenig in mid 1996 based upon Koenig's personal problems is not supported because by mid 1996 the damage had essentially all occurred to RTI and the trust account. The same conclusion results for the employment of the unlicensed Dolan beginning in 1995, pre-personal problems.

Regarding Dolan acting as an unlicensed salesperson Koenig states there was a policy for the sales manager to collect licenses, and he can't recall if that policy was in writing.

Q. Are you now aware that Mr. Dolan was -- acted as a salesperson without a license --

A. Yes.

Q. -- for a period of time? What was the policy for Roth and Taplin as far as insuring licensure or re-licensure of employees?

A. The sales manager was to collect the licenses, as I recall.

Q. Did -- did Roth and Taplin have a written policy that explained that?

A. I don't recall. (RT Hearing Day 1, p. 140 ln. 13-23)

Q. All right. Just talking about that procedure for licensing, as I understand it, the salespeople when they were brought on board at Roth and Taplin were informed in some fashion that they were individually responsible for renewing their licenses on a biannual basis; fair statement?

A. Yeah.

Q. And that was something that they would be reminded of from time to time at the meetings of salespersons as well?

A. Yes.

Q. All right. And isn't it true that even the corporate office generated some type of memo at some point in time that was hung up in some of these branch offices reminding them of that very purpose?

A. I would assume so.

Q. All right. Do you have a recollection of that

A. You know, I don't have a recollection of a memo hanging up, no.

Q. Okay. Would it be -- you wouldn't be surprised to learn that someone at the administrative level generated such a memo?

A. I wouldn't be surprised at all, no.

Q. Okay. Your recollection is that whatever the policy was, however it was stated, also required the salespeople to then verify their renewal, giving that information somehow to their branch manager?

A. Yes.

Q. All right. And did you understand the branch manager to somehow communicate it back up to corporate --

A. Yes.

Q. -- to somebody?

A. That was my assumption, yeah. (RT Hearing Day 1, p. 153 ln. 16-25, 154 ln. 1-24)

#### Testimony of Scott Minter

Minter's conclusion after his factual review of the record is that Koenig was designated to be responsible to handle the trust account of RTI.

Q. All right. As I understand it, when you went through the materials you agreed that the record that you saw indicated that Mark Koenig was the designated person by Roth and Taplin, Inc., responsible to handle the trust account by the company, correct?

A. Yes. (RT Hearing Day 1, p. 218 ln. 20-25)

Q. Okay. And I think you also agreed that the record shows that RTI as a company delegated to Koenig the responsibility to supervise the activities of Ann Wilkerson, who was involved with the trust account, correct?

A. Could you repeat the question? I'm sorry.

Q. Sure. I said I think you agreed that the record that you had seen reflected that RTI, the entity, had delegated to Koenig, Mark Koenig, the responsibility to supervise the activities of Ann Wilkerson?

A. I believe I said that there was a delegation in fact, although I didn't see any written evidence of a delegation. There was no written delegation of responsibility.

Q. Right. I understand with that caveat that you didn't see it in writing; nonetheless, in looking at all the facts you looked at, did you not agree that you observed that RTI had in fact delegated to Koenig that responsibility to supervise Ms. Wilkerson?

A. Yes. (RT Hearing Day 1, p. 219, ln. 19-25; p. 220, ln. 1-13)

Minter acknowledged that without the overlay (CRT) Roth committed no violations of Wisconsin real estate law.

Q. Okay. Is it fair to say that in summary you believe it's Mr. Roth's ownership position and affiliation as an officer in the corporation that renders him responsible and liable under the sections and State statutes in question, under the overlay analysis, as opposed to the precise sections themselves?

A. Correct.

Q. All right. And if it's determined as a matter of legal decision in this case that the legal arguments that support your overlay analysis are not consistent or not accepted, not approved, that there would be no violations on the part of Mr. Roth, correct?

A. Yes, that's right. (RT Hearing Day 1 p. 266, ln. 1-22)

#### Testimony of John Dominski

Mr. Dominski was the salesmanager at the RTI South Ridge branch office in Greendale during the time that Richard Dolan worked as an unlicensed real estate salesperson. He was hired by Koenig. Twice a year the corporate West Allis, Wisconsin office for RTI faxed a memo to Dominski's branch that he would have a secretary post reminding licensed employees that they were responsible for the renewal of their license. The memo also required the salespersons needed to provide a copy of their license to the administrative office when their license

came up for renewal. Salespersons were not required to show Dominski their licenses. Other than the memo in question RTI did not have any other written policy pertaining to re-licensing of licensed employees.

Dominski did not notice that RTI was having financial difficulties in June, July or August, 1996. The point in time when Dominski noticed that Koenig was unable to perform his duties was when a salesperson's commission check bounced and a copier in the branch office was repossessed, both events occurring in November, 1996.

Dominski saw Koenig routinely at managers meetings that occurred two to three times per month where Koenig would run the meetings. Roth was not typically at those meetings. Dominski did not have any reporting responsibilities to Roth, only Koenig. Based on his observations, Dominski understood Koenig as running the day to day operations of RTI while Roth was primarily involved in sales and listing of properties. Exhibit 44 is the notice of employment for Dolan filed with the department, which Koenig signed assuming responsibility for Dolan.

#### Testimony of Karen Wenzel

Wenzel currently works for Roth on his real estate sales team. Ms. Wenzel worked in the principle office of RTI as a closing coordinator beginning 1995. She worked for a firm that supplied personnel to companies such as RTI. She was interviewed by Koenig prior to placement with RTI. In the office where Ms. Wenzel worked, her desk was located directly across from Ann Wilkerson. Koenig was Wenzel's immediate supervisor to whom she reported daily. She considered that Koenig was the boss as everybody reported to him. Koenig would run weekly staff meetings with Roth in attendance only as an agent. Koenig specifically told her that even though he and Roth were partners that Koenig ran the day to day operations of RTI. Wenzel was surprised when informed that Koenig had resigned from RTI. Seeing him on a daily basis she was of the opinion that prior to Koenig's resignation he appeared without a doubt to be able to handle the day to day operations of RTI.

#### Testimony of Jean Ann Pollnow.

Ms. Pollnow was the branch manager for Lincoln State Bank (RTI's banking institution) in 1994. Pollnow first met Koenig when she became branch manager in 1994. She was not introduced to Roth. The former branch manager introduced Koenig as the person who was involved with the banking relationship for RTI with Lincoln State Bank. She spoke with Koenig and Wilkerson in making courtesy telephone calls to RTI regarding account overdrafts. She had a specific recollection of Koenig speaking to her to request money transfers via telephone. She recalls that Koenig informed her that Roth was always out selling homes and that he (Koenig) oversaw the books. She spoke to and met Roth for the first time at the end of November, 1996 at the time Koenig was being removed from RTI authorizations with Lincoln State Bank. (Ex. 49) Pollnow's version of events and meeting for the first time with Roth is consistent with Roth's. (RT Hearing, Day 2, p. 462)

#### Testimony of Robert Roth

In approximately 1990, Robert Roth turned over the trust account management duties to Koenig. Robert Roth later divested his interest in RTI in 1994. Between 1990 and 1994 he did not have information indicating that Koenig was not properly handling RTI's trust account. He recalled an audit between 1990 and 1994 where RTI's trust account procedures and records were audited and was informed by Koenig that RTI had "passed with flying colors." Robert Roth had always considered Koenig as the general manager of RTI after the reformation of RTI.

#### Testimony of Melvin Check

Mr. Check was called as an expert witness on behalf of Roth. Check has a long and accomplished career and maintains a license to practice law, and a Wisconsin real estate brokers license. Check serves as board counsel for the Ozaukee Realtors Association. He has taught real estate and professional standards seminars for the Wisconsin Realtors Association and is an approved instructor by the Wisconsin Department of Regulation and Licensing, in addition to being selected as the 1995 WRA Instructor of the Year.

Upon review of the State's case used to support the CRT, and the proffered evidence in this case, Check was of the opinion that Koenig was delegated the authority to run the business operations of RTI, and that Roth had not violated Wisconsin real estate regulatory law.

Check's expert opinion was that the *Park* and *Nolan* cases and s. 452.12 (2), Stats. do not support the CRT and no such theory has been placed in any curriculum to be taught to agents. The curriculum he uses to teach comes from the department of regulation and licensing. He has been teaching since 1991 or 1992 and the department has not provided in its materials that owners inherently bear responsibility for any actions of any other broker pertaining to the trust account. In his opinion, that is not the standard for placing liability. (RT, Hearing Day 2, p. 522 ln. 10-25; 523; 524, ln. 1-10) He is also unaware of anyone else instructing this view of Wisconsin law.

#### Testimony of Andy Dean

Mr. Dean was a salesperson and broker working at the RTI branch office in Southridge from the early 1990's. He recalled that John Dominski was his branch manager but could not specifically recall the dates involved. Dean

currently continues to work at the Southridge office after RTI was sold to Shorewest Realty. He recalled that the license renewal procedure in the Southridge office was as follows: 1) A memo from the principal office was circulated to licensed persons and placed in their mailboxes reminding them of the need to provide copies of their licenses. 2) He would receive a reminder from the State to renew his license, 3) After renewal, he would forward a copy of his license to the management either by interoffice mail or by handing it to the branch manager at his branch office. Currently, Shorewest Realty has the same procedure pertaining to proof of renewal, with copies of licenses being transmitted via interoffice mail.

Dean understood that Koenig was the president of RTI. Dean understood based upon what he saw that Koenig was the administrator of RTI and ran the day to day affairs of RTI. Koenig signed the commission checks to Dean. Koenig was not known to be actively involved in listing and sales of real estate. Dean understood that Roth's major focus was selling. He never saw Roth perform any day to day management.

Dean received two commission checks that were returned for insufficient funds in October or November of 1996. On the first occasion, he contacted Koenig and received another check. On the second occasion he spoke with Roth who apologized and indicated that such a situation was unacceptable. Dean had no indication that RTI was in any financial difficulty prior to this time and thereafter continued to work for RTI.

Dean was aware that Koenig was going through a divorce in mid 1996 and that Koenig's father had died. Dean never saw that Koenig could not carry out his job functions and seemed as normal as before the personal problems arose both in terms of mental ability and physical appearance.

### III. Applicable Statutes and Rules

**RL 17.07 Broker-employer's duty to check licensure of employes.** A broker-employer shall, prior to employing a licensee and at the beginning of each biennial licensure period, determine that each licensee employed by the broker is properly licensed. A broker-employer may not employ an unlicensed person or a person who has failed to file the notice of employment required under s. RL 17.04 or the transfer application required by s. RL 17.05 to engage in real estate practice for the broker-employer.

**RL 17.08 Supervision of employes. (1)** A broker-employer shall supervise the activities of any broker or salesperson employed by the broker-employer. Supervision includes but is not limited to reviewing all listing contracts, offers to purchase, trust account records and other documents related to transactions. A broker-employer may delegate this responsibility to other brokers. Broker-employers shall provide all licensed employes with a written statement of procedures under which the office and employes shall operate with respect to handling leases, listing contracts, offers to purchase and other documents relating to transactions.

**(2)** A broker-employer shall be responsible for the preparation, custody, safety and correctness of all entries on real estate forms, closing statements and other records even though another person may be assigned these duties by the broker-employer.

#### **RL 17.10 (2) (a)**

(2) A broker-employer shall:

(a) Designate supervisory authority to a branch office manager in writing.

#### **RL 18.09 Disbursement of trust funds.**

**(1) PROPER DISBURSEMENT.** A broker who disburses trust funds from his or her real estate trust account under the following circumstances shall not be deemed to have violated s. 452.14 (3) (i), Stats.:

(a) To the payor upon the rejection, expiration or withdrawal prior to binding acceptance of an offer to purchase, lease, exchange agreement or option on real estate or a business opportunity;

(b) As directed in a written earnest money disbursement agreement signed by all parties having an interest in the trust funds. A closing statement is a written earnest money disbursement agreement for the purposes of this subsection. An offer to purchase, lease, exchange agreement or option is not a written earnest money disbursement agreement for the purpose of this subsection.

(c) To a court having jurisdiction over a civil action involving all parties having an interest in the trust funds;

(d) As directed by order of a court;

(e) Upon a good faith decision based upon advice of an attorney not representing any party to the contract;

(f) Upon authorization granted within the contract; or

(g) As otherwise provided by law.

**RL 18.10 Commingling prohibited.** A broker shall deposit only real estate trust funds in the broker's real estate trust account and shall not commingle the broker's personal funds or other funds in the trust account except that a broker may deposit and keep a sum not to exceed \$300.00 from the broker's personal funds in any real estate trust account, which sum shall be specifically identified and deposited to cover service charges relating to the trust account. A broker shall deposit additional personal funds in the broker's real estate trust account within 10 business days following receipt of a statement or other notification from a depository institution that a service

charge has been made against the account for which insufficient personal funds are available in the account.

**RL 18.13 Bookkeeping system.** Each broker shall maintain and be responsible for a bookkeeping system in the broker's office consisting of at least the following:

**(3) ACCOUNT RECONCILIATION.** The broker or a person designated by the broker shall reconcile the real estate trust account in writing each month except in the case where there has been no activity during the month. The written reconciliation shall include the ending account statement balance, the date and amounts of the deposits in transit, the number of the check, share draft or draft and amount of checks, share drafts or drafts written but not paid by the depository institution as of the ending date shown on the account statement to be reconciled, and the reconciled account statement ending balance.

**(4) TRIAL BALANCE.** The broker shall prepare or have prepared, in conjunction with sub. (3), a written listing, "trial balance", of all open items in the real estate trust account. The list must show the names of the parties to the transaction and the amount held in trust for the parties at the time corresponding to the account reconciliation. The broker may in lieu of the names of the parties to the transaction substitute the ledger page number or other means of identification from the ledger to label the funds in the trial balance.

**(5) VALIDATION.** The broker or a person designated by the broker shall review the reconciled account statement balance, the open ledger account listing, and the journal running balance to ensure that all of these records are valid and in agreement as of the date the account statement has been reconciled.

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

**RL 24.15 Adequate funds required.** Licensees shall not issue checks upon business or trust accounts which contain insufficient funds.

**RL 24.17 Miscellaneous requirements.**

**(3) VIOLATION OF STATUTES, ADMINISTRATIVE CODE AND DISCIPLINARY ORDERS.** Licensees shall not violate any provisions or terms or conditions of, or aid or abet the violation of ch. 452, Stats., chs. RL 11 to 26 or any disciplinary order of, the real estate board.

**s. 452.14 (3) (i), Stats.**

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

**s. 452.03, Stats.**

No person may engage in or follow the business or occupation of, or advertise or hold himself or herself out as, or act temporarily or otherwise as a broker or salesperson without a license. Licenses shall be granted only persons who are competent to transact such businesses in a manner which safeguards the interests of the public, and only after satisfactory proof of the person's competence has been presented to the department.

**s. 452.12 (3) (a), Stats.**

(a) Each broker is responsible for the acts of any broker, salesperson or timeshare salesperson employed by the broker.

**s. 452.14 (3) (L), Stats.**

Violated any provision of this chapter;

**s. 452. 14 (4), Stats.**

If a broker is a business entity it shall be sufficient cause for reprimand or for the limitation, suspension or revocation of a broker's license that any business representative of the business entity, or anyone who has a financial interest in or is in any way connected with the operation of a brokerage business, has been guilty of any act or omission which would be cause for refusing a broker's license to such person as an individual.

#### IV. Violations alleged in complaint

A. Para 16a. – Wis. Adm. Code sections RL 17.08 (1), 17.08 (2), 18.13 (3), 18.13 (5) and 24.17 (3); section 452.14 (3) (i), Stats. Failure of RTI to perform trust account monthly account reconciliations, trial balances and validations for the time period July 1996 through November 1996.

B. Para 16b. – Wis. Adm. Code sections RL 18.10 and 24.17 (3); section 452.14 (3) (i), Stats. Commingling

business account funds (#7128) with trust accounts funds (#7136).

C. Para 16c - Wis. Adm. Code sections RL 18.09 (1) and 24.17 (3); section 452.14 (3) (i), Stats. Improper disbursement of trust account funds

D. Para 16d - Wis. Adm. Code section RL 24.15; section 452.14 (3) (i), Stats. Issuing checks from the RTI trust account when the account contained insufficient funds.

For the enumerated violations contained in paragraphs 16a-d, RTI is subject to discipline as a business entity for the acts and omissions of Koenig. Roth is not subject to discipline. The testimony and documentary evidence submitted and considered establishes that the trust account recordkeeping and management duties of RTI were validly delegated to Koenig. Roth did not participate in, have knowledge of or should have reasonably known that Koenig was not properly managing RTI's trust account.

E. Para 16e - Wis. Adm. Code sections 17.07, 17.08(1), 17.10(2)(a) and 24.17(3); sections 452.03, 452.12 (3)(a), 452.14(3)(i) and 452.14 (3)(L), Stats. Employment of Richard Dolan from 1/1/95 to 9/5/96 while unlicensed. Failure to adequately designate supervisory authority in writing to John Dominski. Failure to adequately train John Dominski.

Exhibit 60 (Coldwell Banker/RTI franchise agreement) designates John Dominski as the residential manager for the Greendale, Wisconsin branch office of RTI. This designation satisfies the requirements of Wis. Adm. Code section RL 17.10 (2) (a). Section RL 17.10 (2) (a) does not limit the form for the designation of such branch supervisory authority. Exhibit 60 qualitatively suffices as such a designation and no additional formal factors are required. Additionally, the designation is consistent with Dominski's knowledge that he had supervisory authority because he was hired as a manager by Koenig and acted as manager of the Greendale branch office.

The testimony and documentary evidence submitted and considered establishes that the responsibility for general business management including regulatory compliance for RTI were validly delegated to Koenig by RTI. Therefore, even if section RL 17.10 (2) (a) were found to be violated, Koenig would be subject to discipline, not Roth. RTI is also subject to discipline for the employment of an unlicensed real estate salesperson under Wis. Adm. Code section RL 17.07, and s. 452. 14 (4), Stats.

The State has failed to prove that John Dominski was not adequately trained. Additionally, the rule sections allegedly violated do not contain a training requirement. The testimony and documentary evidence submitted and considered establishes that RTI had a written policy and procedure by memo for the collection of current evidence of licensure of its employees. In addition, Exhibit 63, office and Policy Manual Guide, page 9, requires associates to provide the Broker (RTI) with evidence of license renewal no later than 5 days prior to the renewal date.

F. Para 17 - Section 452.14 (4), Stats. Broker business entity for acts of business representatives.

RTI is subject to discipline for each of the enumerated violations contained in paragraph 16 a-d of the complaint and for the violation of Wis. Adm. Code section RL 17.07 as alleged in paragraph 16e of the complaint

The final issue is the appropriate discipline for respondent, RTI, keeping in mind the nature of the charges and the pattern and practice of RTI's activities leading to this proceeding. Revocation of RTI's license has been recommended. It is well established that the objectives of professional discipline include the following: (1) to promote the rehabilitation of the licensee; (2) to protect the public; and (3) to deter other licensees from engaging in similar conduct. *State v. Aldrich*, 71 Wis. 2d 206, 209 (1976). Punishment of the licensee is not an appropriate consideration. *State v. McIntyre*. 41 Wis. 2d 481, 485 (1969).

RTI is currently a defunct corporation, its assets having been sold to Shorewest Realty. A corporation acts only through its principals, in this case Koenig and Roth. Although discipline may be vicariously imposed upon a broker business entity pursuant to s. 452.14 (4), Stats., it is not warranted in this case. Koenig has by stipulation accepted discipline from this board, and he was the actor who created potential liability on the part of RTI. However, RTI was only the conduit for Koenig's mismanagement. The discipline of Koenig provides properly directed deterrence to place licensed business representatives on notice to undertake their delegated duties seriously. Corporations cannot be rehabilitated or deterred in the sense wished by the State in that corporations only feel the effects of such discipline through their principals.

Therefore, since Roth is without liability and Koenig has been disciplined, further discipline placed on RTI would only serve to make an idle statement, or to create unknown contingent liability for Roth. Neither result is the legitimate purpose of discipline.

For similar reasons, no public protection goal is served by imposing discipline on RTI either. Roth took prompt steps to remove Koenig from the management of RTI and to correct RTI's trust account deficit. No public harm has resulted.

Dated at Madison, Wisconsin, this November 3, 2000.

STATE OF WISCONSIN

DEPARTMENT OF REGULATION & LICENSING

William Anderson Black

Administrative Law Judge