STATE OF WASHINGTON
DEPARTMENT OF LICENSING
BUSINESS AND PROFESSIONS DIVISION

In the Matter of the License to Practice as a Managing Real Estate Broker/Real Estate Firm of: Michael Hellickson, License # 17267, Tara Hellickson, License #2063, and Hellickson.com, Inc., License #7905, *Respondents.*	No. 2010-06-0027-00REA RESPONDENTS' PETITION FOR REVIEW OF INITIAL ORDER

Pursuant to RCW 34.05.464, Respondents Michael Hellickson, Tara Hellickson, and Hellickson.com, Inc. hereby seek review by the Director of the Findings of Fact, Conclusions of Law and Initial Order ["Initial Order"] issued on May 11, 2011, by Administrative Law Judge Terry A. Schuh.

EXCEPTIONS TO INITIAL ORDER

Introduction

Michael Hellickson is an innovator and a leader in his field (residential short sales). Innovators become targets for competitors and regulators, who often do not understand or lag behind a rapidly-changing environment. The real estate market has been extremely volatile over

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the past few years. Until recently, real estate professionals could estimate market value fairly closely and predict market trends fairly accurately. Today, it is nearly impossible to predict how much a home will sell for or how long it will take to sell it.

Short sales present additional and unique challenges for all concerned. Homeowners usually are distressed emotionally, as well as financially. They often "check-out" mentally and try to avoid dealing with their unpleasant circumstances. They often are difficult to reach and do not return calls or messages – even to consider offers. And, because the homeowners usually have no economic interest in the outcome, they have no incentive to make repairs recommended by the buyers' inspector or required by the buyers' lender. Lienholders also are difficult to deal with. They often do not respond timely to offers and communications and seem to take forever to approve short sales. In addition, the lienholders' guidelines and personnel change frequently. The homeowners may be getting close to an approval of a short sale, then have the file assigned to a new person with the lienholder or have new guidelines adopted, which may result in having to start the process over!

Double jeopardy

The ALJ erred in concluding that Respondents violated several statutes based on the same conduct, thereby exposing them to multiple punishments for a single offense. By concluding that the same act by Respondents violated more than one statute and then considering the number of violations as justifying the most severe sanction available (revocation of Respondents' licenses), the ALJ improperly has imposed multiple punishments for the same offense.

"A professional license revocation proceeding has been determined to be 'quasi-criminal' in nature and, accordingly, entitled to the protections of due process." *Matter of Johnston,* 99

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Wn.2d 466, 474, 663 P.2d 457 (1983).

"The double jeopardy clauses of the United States and Washington State Constitutions protect a defendant from multiple convictions for the same crime." *State v. Carter*, 156 Wn.App. 561, 565, 234 P.3d 275 (2010). "The right to be free from double jeopardy . . . is the constitutional guarantee protecting a defendant against multiple punishments for the same offense. U.S. CONST. amend. V; Wash. CONST. art I, § 9; *Noltie,* 116 Wn.2d at 848, 809 P.2d 190. Here, [the defendant] asserts that the jury instructions allowed the jury to base a conviction on more than one identical count on a single underlying event, thereby exposing him to multiple punishments for a single offense. This contention implicates his right to be free from double jeopardy." *State v. Borsheim*, 140 Wn.App. 357, 366, 165 P.3d 417 (2007). "[A] conviction on each charged count must be based on a separate and distinct underlying incident and that proof of any one incident cannot support a finding of guilt on more than one count." *Id*. at 365.

Here, in all six instances where the ALJ affirmed the revocations of Respondents' licenses, the ALJ found violations of multiple statutes based on the same conduct (§§5.24, 5.56, 5.65, 5.70, 5.88 and 5.104). The Department must elect the statute it contends Respondents violated with respect to each alleged act and Respondents may be found in violation of one and only statute for each alleged act. Double jeopardy is an error of constitutional magnitude. *State v. Bobic*, 140 Wn.2d 250, 996 P.2d 610 (2000).

Complaints filed with NWMLS (§§4.65 and 4.129).

The ALJ erred in admitting and considering evidence of complaints filed by competitors of Respondents with the Northwest Multiple Listing Service ["NWMLS"]. Under well-established case law in Washington, NWMLS rules are irrelevant and inadmissible.

There is no connection between NWMLS rules and the real estate licensing law.

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NWMLS enforces only its own rules and not the real estate licensing law. NWMLS rules do not have the force of law and DOL has no authority to enforce them. Conduct violating NWMLS rules does not necessarily violate the real estate licensing law. NWMLS rules, for example, address: a member's obligation to input listings by the first business day following the taking of a new listing, verification and correction of information published in the MLS, mandatory use of MLS form listing agreements, what types of properties are eligible for publication in the MLS, the republication, use or distribution of data published in the MLS, restrictions on the showing or sale of properties listed in the MLS, arbitration of commission disputes between members, solicitation of other members' listings, rejection of certain listings, selling office commissions and selling bonuses, commission disbursement procedures, keyboxes, forms published by MLS, capital contributions by members, subscription agreements, membership dues and collections, passwords, notices of sale and changes, procedures for "bump" notices, division of forfeited earnest money, "for sale" signs and "sold" strips, business cards, ownership of database, rules governing committee meetings, and MLS trademarks.

Obviously, the primary goal of MLS rules is to protect itself and other members. Testimony of Justin Haag. The purpose of the real estate licensing law, on the other hand, is to protect the public. *Nuttall v. Dowell*, 31 Wn.App. 98, 639 P.2d 832 (1982).

By analogy, a violation of the Rules of Professional Conduct cannot be used as evidence of attorney malpractice in a civil action. *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992); *See also, Davis v. Findley*, 262 Ga. 612, 422 S.E.2d 859 (1992).

> "Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are

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> invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty."

MODEL RULES OF PROFESSIONAL CONDUCT, SCOPE (1992).

Likewise, "nothing in RCW 18.85 [the real estate licensing law] establishes a private cause of action for damages arising out of conduct listed in RCW 18.85.230. By its terms, that provision of the statute does nothing more than establish grounds upon which the director of DOL may discipline persons covered by the Act." *Woodhouse v. RE/MAX Northwest REALTORS®*, 75 Wn.App. 312, 316, 878 P.2d 464 (1994).

In *Burien Motors, Inc. v. Balch*, 9 Wn.App. 573, 513 P.2d 582 (1973), a real estate broker was held liable for failing to verify the status of a pending zoning change essential to the lessee's intended use of the property. The trial court considered evidence that the REALTORS® Code of Ethics required the broker "to check city or county zoning regulations applicable to real property to be sold or leased and to endeavor to keep informed concerning information substantially affecting those interests." The broker "contends the court erred in receiving evidence of certain provisions of the Code of Ethics of the Seattle-King County Real Estate Board. The Code of Ethics is in substance similar to the applicable law. Assuming arguendo the court erred in the respect claimed, the error is harmless." 9 Wn.App. at 579. The court implicitly recognized that admission of the Code of Ethics was error, but because the Code provision was "in substance similar to the applicable law," the error was harmless.

Unlike NMWLS rules, as described above, the Code of Ethics of the National Association of REALTORS® prescribes the duties of its members owed to clients and the public

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generally. The ALJ made no finding that NWMLS rules are similar in substance to the real estate licensing law. As discussed above, NWMLS rules and the licensing law promote entirely different purposes and address totally different subject matters.

"Every court that has examined this question has concluded that the Code of Professional Responsibility does not, *per se*, give rise to a third party cause of action for damages." *Beattie v. Firnschild*, 152 Mich.App. 785, 394 N.W.2d 107 (1986). Washington law goes farther and holds that the Rules of Professional Code are inadmissible in a civil action and may not even be considered by the finder of fact.

> "At least one jurisdiction has held that a violation of a professional rule creates a rebuttable presumption of negligence. Other jurisdictions have held that professional rules are inadmissible in a legal malpractice claim. [citing *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992)] The majority of jurisdictions, however, hold that the violation of professional rules of responsibility does not create a private right of action, but is relevant to the standard of care."

Mainor v. Nault, 101 P.3d 308, 320 (Nev. 2004).

Washington does not follow the majority rule, which allows the Rules of Professional Conduct to be used as evidence of the standard of care. In Washington, the Rules are inadmissible in a civil action. *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992).

The inadmissibility of MLS rules is even more compelling than the Rules of Professional Conduct because (1) all attorneys must be members of the Washington State Bar Association and are bound by the Rules of Professional Conduct, whereas membership in NWMLS is voluntary and not a condition of a real estate broker's license, and (2) the Rules of Professional Conduct prescribe the duties of an attorney owed to clients and the public, whereas NWMLS rules address only responsibilities of members to the MLS and other members.

Likewise, evidence of disciplinary actions taken against Respondents by NWMLS is

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irrelevant and inadmissible. If NWMLS rules are not admissible on the issue of standard of care, then it follows that a violation of NWMLS rules does not constitute a violation of the real estate licensing law. NWMLS rules do not have the force of law. NWMLS rules serve different purposes than the real estate licensing law. NWMLS disciplinary panels consist of competitors of the respondent – not unbiased and disinterested judges. NWMLS disciplinary panels are not bound by the rules of evidence. There is no right to judicial review of NWMLS disciplinary actions.

This interpretation is consistent with the Uniform Regulation of Business and Professions Act. "At the disciplinary hearing a certified copy of a final holding of any court of competent jurisdiction is conclusive evidence of the conduct of the license holder or applicant upon which a conviction or the final holding is based." RCW 18.235.130(1). A NWMLS disciplinary panel is not a "court of competent jurisdiction." If the legislature had intended to allow disciplinary actions by trade associations as evidence in an adjudicative proceeding, it could have done so. "As a general rule, the expression of one thing in a constitution or statute excludes all others." *State ex rel. Port of Seattle v. Dep't of Pub. Serv.*, 1 Wn.2d 102, 95 P.2d 1007 (1939).

Therefore, evidence of disciplinary actions taken by NWMLS against Respondents is irrelevant and inadmissible in this matter and should not have been considered by the ALJ.

The Department relied heavily on NWMLS rules as a basis for its contention that Respondents failed to exercise reasonable skill and care in recommending prices to their clients. As discussed above, NWMLS rules are irrelevant and inadmissible and cannot be considered on the issue of standard of care of a real estate broker in a professional licensing hearing. However, even if the rules were relevant and admissible, the rules do not say what the Department urges. Prior to its amendment on July 15, 2009, NWMLS Rule 1(e) provided as follows:

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> "Prompt Verification and Correction. It is the responsibility of the listing member to carefully review a new or changed listing and any notification as to a change in status of a listing in the online system and to immediately input corrections of any errors. NWMLS has no responsibility for the completeness or accuracy of any listing, change to listing and change in status of a listing, even if NWMLS inputs the listing or change, and the listing member must verify that the listing or change was input accurately."

Ex. O.

Obviously, this rule relates to the listing member's responsibility to verify the accuracy of information concerning property characteristics, commission and status published in the MLS. The amendment to Rule 1(e) added the following sentence at the end of the rule:

> "The listing member must verify that the information contained in the listing is accurate and entered in good faith."

Ex. P, p. 4.

This amendment added little to the rule and does not stand for the proposition advanced by NWMLS that "the list price must be published in good faith and in an amount that reflects a price that the seller is willing to compensate a selling agent for procuring a buyer." Ex. P, p. 1.

Even if NWMLS rules were relevant and admissible, NWMLS Rule 1(e) does not apply to this case. At best, Rule 1(e) is vague and ambiguous, and cannot serve as the basis for disciplinary action against Respondents.

General versus specific statutes (§5.3).

The ALJ erred in applying general statutes to subject matters covered by more specific statutes. The ALJ has misconstrued Respondents' position. Respondents do *not* argue that Chapter 18.235 RCW, the Uniform Regulation of Business and Professions Act ["URBPA"], does not apply to real estate brokers. Rather, Respondents argue that where the real estate licensing law (Chapter 18.85 RCW) and URBPA *cover the same subject matter*, the real estate

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licensing law prevails, as it is specific to real estate brokerage, while URBPA governs 30 different businesses and professions regulated by the Department. For example, both the real estate licensing law and URBPA cover advertising, but the real estate licensing law requires inducement and knowledge of falsity in order to establish a violation, whereas the URBPA does not specifically require inducement or knowledge. Likewise, both the real estate licensing law and URBPA cover misrepresentation, but the real estate licensing law requires materiality, reliance and knowledge of falsity in order to establish a violation, whereas the URBPA does not specifically require materiality, reliance or knowledge. When the conduct allegedly violates more than one statute addressing the same subject matter, only the more specific statute applies and Respondents cannot be charged with violating the more general statute. When the specific statute contains elements not contained in the general statute, the additional elements must be proven.

> "It is a well established rule of statutory construction that 'where a special statute punishes the same conduct which is punished under a general statute, the special statute applies and the accused can be charged only under that statute.' *State v. Cann*, 92 Wn.2d 193, 197, 595 P.2d 912 (1979). It is not relevant that the special statute may contain additional elements not contained in the general statute; *i.e*., notice.

State v. Shriner, 101 Wn.2d 576, 580, 681 P.2d 237 (1984).

> "In *State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982), the issue was whether a defendant who failed to return to jail while on a work release program could be charged under the general escape statute, or whether he had to be charged under the specific statute prohibiting failure to return to a work release facility. The latter statute carried a lesser penalty and also placed a higher standard on the State on the issue of intent. This court held that only the specific statute could be charged, saying:
>
> > 'General principles of statutory construction dictate this result. First, we have consistently applied the rule that when two statutes are concurrent, the specific statute prevails over the general.

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. . .

> 'This rule is consistent with general principles of statutory construction. See 2A C. SANDS, STATUTORY CONSTRUCTION § 51.05 (4th ed. 1973).
>
> 'In the case before us, both statutes are clearly applicable. The general statute, RCW 9A.76.110, forbids escape from work release programs as well as prisons, since the definition of a detention includes a work release facility. RCW 9A.76.010. *State v. Yallup*, 25 Wn.App. 603, 606, 608 P.2d 651 (1980). RCW 72.65.070, on the other hand, deals specifically with escape from work release. RCW 72.65.070, as the more specific statute, thus preempts prosecutions under RCW 9A.76.110 of those defendants whose crime is failure to return to a work release facility.

"*Danforth*, at 257-58, 643 P.2d 882.

"*Danforth* also addressed the question of additional elements required to obtain a conviction under the special escape from work release statute:

> 'Second, we are of the opinion that the specific requirement that the defendant's conduct be willful under RCW 72.65.070 recognizes a valid legislative distinction between going over a prison wall and not returning to a specified place of custody. The first situation requires a purposeful act; the second may occur without intent to escape. It is easy to visualize situations where a work release inmate failed to return because of a sudden illness, breakdown of a vehicle, *etc*. This explains the requirement of willful action.
>
> 'Finally, this interpretation of the two statutes is necessary to give effect to RCW 72.65.070. RCW 72.65.070 differs significantly from the general escape statute in that the prosecutor must prove the failure to return was willful. Under RCW 9A.76.110, however, a conviction will be sustained if the State demonstrates that the defendant 'knew that his actions would result in leaving confinement without permission.' *State v. Descoteaux*, 94 Wn.2d 31, 35, 614 P.2d 179 (1980).'

"Given the choice, a prosecutor will presumably elect to prosecute under the general escape statute because of its lack of a mental intent requirement. Consequently, the result of allowing prosecution under RCW 9A.76.110 is the complete repeal of RCW 72.65.070. This result is an impermissible potential usurpation of the legislative function by prosecutors.

"In summary, sound principles of statutory interpretation and respect for legislative enactments require that we hold that the petitioners were improperly charged under the general escape statute. *Danforth*, at 258-59, 643 P.2d 882.

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> "The result in *Danforth* was held to be mandated both by the special/general rule and by the need to give effect to the special statute. Because the general statute has a lesser mental state element, this court recognized that prosecutors would presumably always elect to charge under it and thus avoid the need to prove the 'willful' element in the special statute. Thus, unless the special statute supersedes the general, the special statute would effectively be repealed."

State v. Shriner, 101 Wn.2d 576, 581-83, 681 P.2d 237 (1984).

Deference to Department's interpretation of the law (§5.5).

The ALJ erred in giving deference to the Department's interpretation of the law. RCW 34.05.461(5) provides that "[w]here it bears on the issues presented, the agency's experience, technical competency, and specialized knowledge may be used in the evaluation of evidence." However, short sales are a "relatively new phenomenon" (RP 1158:23), such that "the industry has gone through a learning curve in terms of how to deal with those kinds of transactions" (RP 1159:12-13). Both supervisors for the Department who testified admitted having no experience or training in short sales. RP 1209:22-24 (Karen Jarvis); RP 1370:7-11 (Jerry McDonald). The complaints against Respondents were "comparatively unique." §4.11. Thus, the Department has no "experience, technical competency [or] specialized knowledge" regarding short sales and the ALJ erred in giving deference to the Department's interpretation of the licensing law as applied to Respondents' business.

In addition, where the case turns on the interpretation of a statute, the usual deference afforded the agency's interpretation of the law does not apply.

> "Interpretation of a statute is solely a question of law and within the conventional competence of the court. *State ex rel. Graham v. Northshore Sch. Dist.* 417, 99 Wn.2d 232, 242, 662 P.2d 38 (1983). Where the only question is the interpretation of a statute, resort to the administrative agency is unnecessary since it has no special competence over the controversy. *Northshore*, at 242, 662 P.2d 38. This conclusion reflects a well recognized exception to the doctrine of primary jurisdiction. *Northshore*, at 242, 662 P.2d 38 (citing *Great N. Ry. v. Merchants Elevator Co.*, 259 U.S. 285, 42 S.Ct. 477, 66 L.Ed. 943 (1922)).

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> "At issue is interpretation of 'primarily' as used in RCW 9.46.113. Neither party advocates attributing to the term something other than its usual and ordinary meaning. Such explication is within the competence of this court and does not require deference to a specialized administrative body."

American Legion Post No. 32 v. City of Walla Walla, 116 Wn.2d 1, 5-6, 802 P.2d 784 (1991).

"'The process of applying the law to the facts . . . is a question of law and is subject to *de novo* review.' *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993)]; see also *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 329-30, 646 P.2d 113 (1982) (explaining that mixed questions of law and fact, also known as problems of application of law to facts, are subject to *de novo* review, meaning the court must determine the correct law independent of the agency's decision and then apply the law to established facts *de novo*). *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 588, 90 P.3d 659 (2004).

Definition of "real estate transaction" (§5.6).

The ALJ erred in applying a general dictionary definition of "transaction" for purposes of Chapter 18.85 RCW, instead of the specific statutory definition of "real estate transaction" found in RCW 18.86.010(12).

"Transaction" and "real estate transaction" are not the same things. Most transactions are not required to be evidenced by a written agreement. However, *real estate* transactions are required to be in writing. The dictionary definition of "transaction" is not specific to *real estate* transactions. The real estate licensing law is concerned with *real estate* transactions – not transactions in general. RCW 18.86.010(12) provides as follows:

> "'Real estate transaction' or 'transaction' means an actual or prospective transaction involving a purchase, sale, option, or exchange of any interest in real property or a business opportunity, or a lease or rental of real property. For purposes of this chapter, *a prospective transaction does not exist until a written offer has been signed by at least one of the parties*." (Emphasis added.)

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RCW 18.86.010(12) creates a bright line for determining when a "real estate transaction" exists for purposes of triggering duties of a real estate broker. For example, RCW 18.86.040(1)(a) imposes on a seller's agent the duty "[t]o be loyal to the seller by taking no action that is adverse or detrimental to the seller's interest *in a transaction*." (Emphasis added.) It would be grossly unfair to real estate brokers to apply different definitions of "real estate transaction" for purposes of Chapters 18.85 and 18.86 RCW. Because Chapter 18.86 RCW (the real estate licensing law) and Chapter 18.86 RCW (the law of real estate agency) are closely related and both govern the conduct of real estate brokers, the same definition of "real estate transaction" should apply to both statutes.

The ALJ's interpretation also violates fundamental rules of statutory construction. The term used in RCW 18.85.230(23) is "real estate transaction" – not "transaction." In applying a dictionary definition of "transaction," the ALJ has completely ignored the words "real estate" in RCW 18.85.230(23).

> "Another well-settled principle of statutory construction is that 'each word of a statute is to be accorded meaning.' . . . '[T]he drafters of legislation ... are presumed to have used no superfluous words and we must accord meaning, if possible, to every word in a statute.' . . . '[W]e may not delete language from an unambiguous statute: statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.'" (Citations omitted.)

State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005).

Finally, since "real estate transaction" is not defined in Chapter 18.85 RCW, any doubt as to its meaning must be resolved in favor of Respondents.

"Since [the real estate licensing law] is penal in nature and in derogation of the common law, it must be strictly construed." *Grammer v. Skagit Valley Lumber Co.*, 162 Wash. 677, 299 P. 376 (1931); *Main v. Taggares*, 8 Wn. App. 6, 504 P.2d 309, 74 A.L.R.3d 630 (1972).

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"[F]undamental fairness requires that a penal statute be literally and strictly construed in favor of the accused." *State v. Hornaday*, 105 Wn.2d 120, 713 P.2d 71 (1986). "Every doubt should be resolved in [the respondent's] favor, and only upon a clear preponderance of the evidence that the acts charged have been done . . . should disciplinary action be taken." *In Re Haglund*, 81 Wn.2d 118, 500 P.2d 84 (1972).

Accordingly, RCW 18.85.230(23) applies only to "conduct in a real estate transaction" where a written offer has been signed by at least one party.

Use of the term "negligence" (§5.7).

The ALJ erred in ignoring the elements of negligence – duty, breach, damages and proximate cause – in applying RCW 18.235.130(4). "Negligence" is a legal term with a specific meaning. RCW 18.235.130(4) does not say "negligent conduct" – it says "negligence." By using a term with a well-established and commonly understood meaning, the legislature intended the technical meaning of the term. *Hickethier v. Department of Licensing*, 244 P.3d 1010 (Div. 3, 2011), is not on point. In *Hickethier*, the broker breached a duty owed to the broker's client that proximately caused damages to the client. All elements of negligence were proved.

Here, the ALJ improperly expanded Respondents' duty to persons who were never clients of Respondents and to whom Respondents never rendered any real estate brokerage services – namely, other brokers and lienholders. As discussed below, a real estate broker's duties are not without limits.

The Department's reliance on the general negligence or malpractice standard in RCW 18.235.130(4) also is misplaced. "Negligence" requires a duty owed to the complaining party.

> "Negligent conduct consists of (1) the existence of a duty owed to the complaining party; (2) a breach thereof; and (3) a resulting injury; and (4) a proximate cause between the breach of duty and the resulting injury."

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Bowman v. Two, 104 Wn.2d 181, 185-86, 704 P.2d 140 (1985).

> "The general rule is that only an attorney's client may file a claim for legal malpractice. *Trask v. Butler*, 123 Wn.2d 835, 840, 872 P.2d 1080 (1994).
>
> . . .
>
> "In the absence of an express lawyer-client relationship, Washington courts use a multi-factor balancing test set forth in *Trask*. To establish whether the lawyer owes the plaintiff a duty of care in a particular transaction, the court must determine:
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> 1. The extent to which the transaction was intended to benefit the plaintiff;
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> 2. The foreseeability of harm to the plaintiff;
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> 3. The degree of certainty that the plaintiff suffered injury;
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> 4. The closeness of the connection between the defendant's conduct and the injury;
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> 5. The policy of preventing future harm; and
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> 6. The extent to which the profession would be unduly burdened by a finding of liability.
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> "*Trask*, 123 Wn.2d at 843, 872 P.2d 1080. The threshold question is whether the nonclient plaintiff is an intended beneficiary of the transaction. If not, there is no further inquiry."

In re Guardianship of Karan, 110 Wn.App. 76, 81-82, 38 P.3d 396 (2002).

> "An 'intended beneficiary' of the transaction under *Trask* means just that the transaction must have been intended to benefit the plaintiff, it is not enough that the plaintiff may be an incidental beneficiary of the transaction." *Strait v. Kennedy*, 103 Wn.App. 626, 631, 13 P.3d 671 (2000).
>
> "The multi-factor balancing test also requires that we evaluate public policy before finding a duty to a third party. 1 R. MALLEN & J. SMITH LEGAL MALPRACTICE § 7.9 (3d ed. 1989). The policy considerations against finding a duty to a nonclient are the strongest where doing so would detract from the attorney's ethical obligations to the client. 1 R. MALLEN & J. SMITH § 7.11. This occurs where a duty to a nonclient creates a risk of divided loyalties because of a conflicting interest or of a breach of confidence. 1 R. MALLEN & J. SMITH § 7.11. A conflict of interest arises in estate matters whenever the interest of the personal representative is not harmonious with the interest of an heir. Because estate proceedings may be adversarial, we conclude that policy considerations also

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> disfavor the finding of a duty to estate beneficiaries. *See Neal*, 194 Ill.App.3d at 488, 141 Ill.Dec. 517, 551 N.E.2d 704 (an obstacle with extending attorney liability in probate situations is that the personal representative and the estate beneficiaries are often adversaries); 1 R. MALLEN & J. SMITH § 7.11 (the beneficiary test does not apply in an adversarial context); see also *Bowman v. John Doe*, 104 Wn.2d 181, 188-89, 704 P.2d 140 (1985) (in no instance has a court found liability to a third party adversary)."

Trask v. Butler, 123 Wn.2d 835, 844, 872 P.2d 1080 (1994).

Thus, Respondents cannot be negligent as to a nonclient, unless the nonclient meets the "intended beneficiary" test under *Trask*. Otherwise, real estate brokers "would be exposed to liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Alejandre v. Bull*, 159 Wn.2d 674, 683, 153 P.3d 864 (2007) (quoting Justice Cardozo in *Ultramares Corp. v. Touche, Niven & Co.*, 255 N.Y. 170, 179, 174 N.E. 441, 74 A.L.R. 1139 (1931)).

Here, even if RCW 18.235.130(4) applied, Respondents cannot be "negligent" as to lienholders, buyers or other agents, because they were neither clients of Respondents nor intended beneficiaries of their services. Under either statute, RCW 18.235.130(4) ("incompetence, negligence or malpractice") or RCW 18.86.030(1)(a) (failure "to exercise reasonable skill and care"), Respondents owed no duty to lienholders, buyers or other agents. Under the clear and express language of the statute, the duty to exercise reasonable skill and care is owed only to "parties to whom the licensee renders real estate brokerage services." RCW 18.86.030(1)(a).

30-day sale program (§§5.8-5.24).

The ALJ erred in finding and concluding that Respondents violated the real estate licensing law by advertising that they would purchase a home listed with them if it did not sell within 30 days. The ALJ held that Respondents' 30-day sale program violates RCW

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18.85.230(2), RCW 18.86.030(1)(b) and RCW 18.235.130(3) and (11), which provide as follows:

> "In addition to the unprofessional conduct described in RCW 18.235.130,[1] the director may take disciplinary action against any person engaged in the business or acting in the capacity of a real estate broker, associate real estate broker, or real estate salesperson, regardless of whether the transaction was for his or her own account or in his or her capacity as broker, associate real estate broker, or real estate salesperson, and may impose any of the sanctions specified in RCW 18.235.110 for any holder or applicant who is guilty of:
>
> . . .
>
> "(2) Making, printing, publishing, distributing, or causing, authorizing, or knowingly permitting the making, printing, publication or distribution of false statements, descriptions or promises of such character as to reasonably induce any person to act thereon, if the statements, descriptions, or promises purport to be made or to be performed by either the licensee or his or her principal and the licensee then knew or, by the exercise of reasonable care and inquiry, could have known, of the falsity of the statements, descriptions or promises;

RCW 18.85.230.

> "Regardless of whether the licensee is an agent, a licensee owes to all parties to whom the licensee renders real estate brokerage services the following duties, which may not be waived:
>
> . . .
>
> (b) To deal honestly and in good faith.

RCW 18.86.030(1).

> "The following conduct, acts, or conditions constitute unprofessional conduct for any license holder or applicant under the jurisdiction of this chapter:
>
> . . .
>
> "(3) Advertising that is false, deceptive, or misleading;
>
> . . .
>
> "(11) Misrepresentation in any aspect of the conduct of the business or profession."

[1] Uniform Regulation of Business and Professions Act

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RCW 18.235.130.

Both Chapter 18.85 RCW (Real Estate Licensing Law) and Chapter 18.235 RCW (Uniform Regulation of Business and Professions Act ["URBPA"]) prohibit false advertising and misrepresentation. Under the rules discussed above, the more specific statute governs. RCW 18.85.230(2) requires "false statements, descriptions or promises of such character as to *reasonably induce* any person to act thereon." In other words, the Real Estate Licensing Law by its own terms requires *reliance*, *Nuttall v. Dowell*, 31 Wn.App. 98, 639 P.2d 832 (1982) (reliance is essential element of violation of RCW 18.85.230), whereas the URBPA prohibits "advertising that is false, deceptive, or misleading" (RCW 18.235.130(3)) and "misrepresentation in any aspect of the conduct of the business or profession" (RCW 18.235.130(11)). Because advertising is covered by RCW 18.85.230(2) and misrepresentation is covered by RCW 18.85.230(3), Respondents cannot also be charged with violating RCW 18.235.130(3) or (11). The more specific statutes prevail, including the requirement to prove materiality, inducement, reliance and knowledge. To apply the URBPA to subject matters covered by the real estate licensing law would be to ignore the more specific statute.

However, even if RCW 18.235.130(11) (misrepresentation) applied, reliance is still required, as reliance is an essential element of any misrepresentation claim. *Borish v. Russell*, 155 Wn.App. 892, 230 P.3d 646 (2010).

And, even if RCW 18.235.130(3) (false, deceptive, or misleading advertising) applied, reliance is required. Although URBPA does not define "deceptive or misleading," by analogy to the Consumer Protection Act, advertising is deceptive only if it has the "potential to deceive a substantial portion of the purchasing public." *Jackson v. Harkey*, 41 Wn.App. 472, 479, 704 P.2d 687 (1985) (misrepresentation that new home was covered by third-party warranty did not

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violate Consumer Protection Act).

Here, the ALJ did not find that Respondents refused to purchase any homes eligible under the program. The only consumers who even testified about Respondents' 30-day sale program were Daniel Streight, Heather Smith and Richard Smith. Mr. Streight testified that he asked Michael Hellickson about the 30-day sale program and Mr. Hellickson told Mr. Streight that the program did not apply to him. Heather Smith testified that the 90-day [sic] sale program did not influence her to list her houses with Respondents. Richard Smith testified that the 30-day sale program did not affect his decision to list with Respondents. The Department offered no evidence whatsoever – let alone clear and convincing evidence – that any consumers relied upon or were mislead by the 30-day sale program. To the contrary, the evidence showed that short sales were not eligible for Respondents' 30-day sale program, because lienholders would not consent to a short sale to a real estate broker at a "wholesale" price. There is nothing false, deceptive or misleading about Respondents' 30-day sale program.

Even the sellers who testified that they discussed the 30-day sale program with Mr. Hellickson admitted that the parties never discussed, much less agreed upon, a price. There cannot be an agreement to purchase a house without a price! The only evidence of a seller asking for a price involved Carrie Pugh. Respondents gave Ms. Pugh a price, but she rejected it and chose not to list with Respondents. There is nothing deceptive about that.

Contrary to the ALJ's holding, there is no legal requirement that restrictions applicable to Respondents' 30-day sale program be posted on their web site or be published in their newsletter. Obviously, Respondents hoped that prospective clients would call them to ask about their services. The purpose of any advertising by a real estate broker is to generate calls and personal appointments. If that is a "hook," then most advertising is a hook! The newsletter

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specifically states, "Some restrictions apply. Please call 206-300-1000 for more information." Ex. 107, p. 13. The Department offered no evidence that any consumers were actually harmed by Respondents' 30-day sale program.

Respondents' 30-day sale program did not mislead or deceive anyone. First, none of the Department's witnesses testified that they contacted Respondents in response to an advertisement to buy their house. For example, Kathleen Streight completed a questionnaire on a web site; Richard Smith was referred by Heather and Stephen Smith; William Cody saw Michael Hellickson on "The Dave Ramsey Show;" and Tim Phillips found Respondents on a web site. They were not "lured" into Respondents' office, and then sold a more expensive product or service. The few sellers who asked about the 30-day sale program were told that it did not apply to short sales. The one seller who asked for a price at which Respondents would purchase her home was given a price, rejected it and declined to use Respondents' services at all! There was no evidence of deception or misrepresentation.

Listing homes at "artificially reduced" prices (§§5.35-5.56).

The ALJ erred in finding and concluding that Respondents violated the real estate licensing law by listing homes at "artificially reduced" prices. The ALJ inconsistently concluded that "Respondents received signed, pre-authorized price-reduction schedules from their clients" (§4.79) and did not misrepresent the contents of listing agreements (§4.95), yet concluded that Respondents' pre-approved price reduction marketing approach somehow violates the Real Estate Licensing Law by resulting in "artificially reduced" prices. There are several reasons why the ALJ is wrong. First, if the price reductions were authorized by Respondents' clients, then the prices could not be "artificially reduced" or "arbitrary" (§4.66). Sellers – not brokers – set the asking prices. Second, prices are not "artificially reduced" or "arbitrary" if the property has been

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tested on the market at a higher price and did not sell. Characterizing the price reductions as "artificial" suggests there is a "true" price. Value is not "true" or "false." Only a willing buyer and seller can determine market value. Assuming adequate exposure on the market, the homes would have sold, if the asking prices had been close to market value. Market value is impossible to predict in this market. The Department's own experts acknowledged that the real estate market over the past few years has been volatile and values have been difficult to predict. Ultimately, the market determines value. The true test of value is the price that a ready, willing and able buyer will pay for the property. In short sales, sellers often face other financial problems, including foreclosure or bankruptcy, that create a greater urgency. Third, the requirement for lienholder consent complicates the process and creates additional challenges: lienholders' requirements vary, lienholders are difficult to communicate with, lienholders will not process short sale applications until the short sale packet is complete, lienholders want verification that the market has been tested, etc. Fourth, many short sale sellers avoid dealing with the issue. They mentally "check-out" and are difficult to contact or are indecisive (*e.g.*, the Streights kept changing their minds about seeking a loan modification or short sale). Obtaining the clients' advance approval to scheduled price reductions enabled Respondents to reduce the asking prices without having to locate sellers for approval of each and every price reduction. If sellers did not like Respondents' scheduled price reduction approach, they could have listed with other brokers. However, by signing the price-reduction schedules, they authorized Respondents to reduce the price without any further analysis or approval.

Short sales are different than typical retail sales and cannot be handled in the same why. The Department is out of touch with current trends and practices. Doing things *differently* is not the same as doing things *negligently*. The Department's expert witnesses testified that reasonable

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skill and care require a broker to perform additional market research before recommending a price reduction. However, neither of the Department's experts use a pre-approved price reduction agreement, such that these experts lacked any foundation to testify as to Respondents' practices. Their testimony is based on the traditional approach of recommending price reductions on an ad hoc basis *without pre-approved price reductions authorized by the sellers*. The Department's own expert witness testified that the standard of care does *not* require a broker to have a conversation with the seller about a previously-approved price reduction. RP 503:16-21. Respondents' approach does not require additional analysis – if the home has not sold, then the price needs to be reduced. There is no other alternative, because most short sale sellers are unwilling or unable to make improvements or repairs to the home, as they have nothing to gain by putting more money into a house that already is "underwater."

No one knows in advance what price lienholders will approve – that is part of the problem with short sales. Lienholders will not commit to a discounted payoff, until the market has been tested at a higher price, and, in some cases, only after several offers have been generated. Respondents' approach of having the homeowners pre-approve scheduled price reductions is designed to anticipate the lienholders' requirement to test the market at a higher price. However, because most homeowners in short sales have limited time before foreclosure, the price reductions must be fairly quick and substantial in order to generate offers.

Respondents' approach to short sales is innovative and successful, but it is different from traditional practices. There is nothing harmful to the public about Respondents' pre-approved price reduction marketing approach. Sellers can list the homes at whatever price they want and they can agree to pre-approved price reductions at specified intervals. The Department has no business interfering with private contracts between brokers and competent adults. Nothing in the

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Real Estate Licensing Law prohibits this legitimate practice.

Failing to provide copies of listing agreements (§§5.59-5.65).

The ALJ erred in concluding that Respondents violated *both* RCW 18.85.230(18) *and* 18.85.230(23). This is another example of the ALJ applying a general statute to conduct covered by a specific statute. As discussed above, under the right to be free from double jeopardy, the same conduct cannot serve as a basis for two violations of the real estate licensing law.

RCW 18.85.230(18) provides specifically that "[f]ailing to furnish a copy of any listing, sale, lease or other contract relevant to a real estate transaction to all signatories thereof at the time of execution" is grounds for disciplinary action. RCW 18.85.230(23) provides generally that "[a]ny conduct in a real estate transaction which demonstrates bad faith, dishonesty, untrustworthiness, or incompetency" is grounds for disciplinary action. Obviously, RCW 18.85.230(18) is directly on point and more specific than RCW 18.85.230(23). Respondents cannot be in violation of both statutes for the same conduct (*i.e.*, failing to provide copies of listing agreements to clients). Therefore, RCW 18.85.230(23) does not apply and must be set aside.

In addition, the ALJ has misread RCW 18.85.230(23), which authorizes the Department to take disciplinary action for "any conduct *in a real estate transaction* which demonstrates bad faith, dishonesty, untrustworthiness, or incompetency." (Emphasis added.) RCW 18.85.230(23) applies only to conduct "in a real estate transaction." A listing agreement does not involve a real estate transaction. A "real estate transaction" does not exist until "a written offer has been signed by at least one of the parties." RCW 18.86.010(12). The statute says what it says. The Department cannot make up the law as it goes. The "bad faith, dishonesty, untrustworthiness, or incompetency" prohibited under RCW 18.85.230(23) applies only to "conduct in a real estate

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transaction." The ALJ made no finding of such conduct. Respondents cannot be disciplined for something the law does not prohibit.

Most importantly, the ALJ erred in finding that Respondents failed to provide copies of listing agreements to sellers. The evidence presented by the Department on this issue was equivocal and unpersuasive (Daniel Streight believes he got a copy of the listing, but doesn't recall, RP 92:19-24; Heather Smith said she got a copy of the listing agreement "a few months later," RP 170:16-22; Richard Smith didn't recall whether he received a copy of the listing agreement, RP 234:16-18; William Cody said "not to my knowledge," RP 285:14-15; Tim Phillips doesn't think he got a copy of the listing agreement, RP 428:13-16; Lori Bennett didn't receive or request a copy of listing agreement, RP 956:1-5; and Jennifer Salo said she got a copy of the listing agreement, RP 1342:5-6). This evidence does not satisfy the requirement that the fact in issue is "highly probable," such that this charge should be dismissed.

Negligent and dilatory communication (§§5.66-5.70).

The ALJ erred in applying the general incompetence statutes where Respondents complied with the specific statute governing communications. The ALJ found that "negligent and dilatory communication" violates RCW 18.85.230(23) and RCW 18.235.130(4). RCW 18.85.230(23) prohibits "conduct in a real estate transaction which demonstrates bad faith, dishonesty, untrustworthiness, or incompetency," and RCW 18.235.130(4) defines as unprofessional conduct "[i]ncompetence, negligence, or malpractice that results in harm or damage to another or that creates an unreasonable risk of harm or damage to another." Both of these statutes are general. However, the real estate licensing law contains a statute specifically addressing communication that requires real estate brokers "[t]o present all written offers, written notices and other written *communications* to and from either party in a timely manner."

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RCW 18.86.030(1)(c). This statute is specific to communication. The Department did not charge Respondents with violating RCW 18.86.030(1)(c), because there is no evidence that Respondents failed to present any *written* communications. The Department argued that RCW 18.86.030(1)(c) does not apply. To the contrary, Respondents cannot be guilty of violating the general statutes addressing incompetence and negligence (RCW 18.85.230(23) and RCW 18.235.130(4)), since they fully complied with the statute specifically addressing communication (RCW 18.86.030(1)(c)).

> "As a general rule, the expression of one thing in a constitution or statute excludes all others. So specific provisions, relating to particular subjects, must govern in relation to that subject, as against general provisions in other parts of the law which might otherwise be broad enough to include it. Where a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others and the natural inference follows that it is not intended to be general."

State ex rel. Port of Seattle v. Dep't of Pub. Serv., 1 Wn.2d 102, 95 P.2d 1007 (1939).

RCW 18.86.030(1)(c), by its terms, is limited to *written* communications – it does not encompass *oral* communications. To read RCW 18.85.230(23) and RCW 18.235.130(4) as covering oral communications would be to render meaningless the clear, express and specific language of RCW 18.86.030(1)(c).

There are good reasons why the duty to convey offers, notices and communications is limited to those that are *in writing*. The purchase of a home is the most significant transaction most consumers engage in. Requiring offers, notices and communications to be in writing serves to reduce misunderstandings and "he said, she said" disputes. Indeed, the statute of frauds, RCW 19.36.010 and RCW 64.04.020, requires agreements affecting real property to be in writing. The Department cannot avoid this limitation simply by saying it was not charged. The statute constitutes an affirmative defense: if the communications allegedly not conveyed were not in

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writing, then the licensee had no duty to convey them. Returning phone calls might be a "courtesy to the client," as Alison Ybarra characterized it, or "what a client expects," as Jerry McDonald suggested, but it is not a legal requirement of the Real Estate Licensing Law.

Two of the sellers (Kathleen Streight and Heather Smith) testified that they expected to be notified when price reductions occurred. Mr. Hellickson and Mr. Workman testified, however, that Mr. Hellickson told sellers not to expect phone calls from him, unless it was important. Both of these sellers admitted agreeing to the pre-approved price reductions (although Kathleen Streight testified she thought the price would be reduced at intervals of $20,000, rather than $25,000), so notification was not required and would serve no purpose.

RCW 18.86.030(1)(c) also is specific to "parties" to a transaction to whom the licensee renders real estate brokerage services. The "parties" to a real estate transaction are the buyers and sellers – not the lienholders or other agents. Respondents cannot be disciplined for "dilatory or negligent" communication with lienholders or other agents, or for failing to present communications to or from either party in a timely manner, unless those communications were *written* communications.

The only charge relating to presentation of *written* offers involved the Streights. Monika Peltz of Wells Fargo Financial testified that the offers she received were dated a month-and-a-half to two months earlier. There are several explanations for this situation. First, the packet was submitted to Wells Fargo earlier, but Wells Fargo lost or misplaced the packet. This is evidenced by Ex 160, a 41-page fax transmittal from Julia McCain of The Short Sale Company to Wells Fargo dated February 13, 2009, concerning the Streight home and stating "Short sale packet, customer service says they didn't get it…" This fax corroborates Mr. Hellickson's testimony that the packet was previously provided to Wells Fargo and they lost or misplaced it! Second, Mr.

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Hellickson testified that because the Streights were "on the fence" about whether to seek a loan modification or do a short sale, the Streights frequently were unresponsive to requests for information. Third, as both Mr. Hellickson and Ms. Peltz testified, lienholders will not process short sale applications, unless and until the short sale packet is complete, including hardship letter, financial statement, tax returns, bank statements, pay stubs, disclosure authorization, etc. There is no advantage to submitting a purchase and sale agreement to the lienholder without the completed packet. To the contrary, the purchase and sale agreement is likely to get lost in the shuffle, if not submitted with a completed short sale packet. This is yet another example of DOL being out of touch with current practices and procedures for short sales. In any event, the Streights ultimately decided to do a loan modification, rather than a short sale, such that they were not harmed by any alleged delay in presenting offers to the lienholder.

As discussed above, communication with homeowners and lienholders is one of the biggest challenges in short sales. Lienholders are back-logged with files and sometimes take months to respond to an offer! Homeowners mentally "check-out" and do not return phone calls or messages. It can be a very frustrating process for all parties concerned. And, Respondents do not get paid unless and until the short sale is approved and closed. What incentive would they have to thwart the process?

Request for prequalification by preferred lenders (§§5.71-5.88)

The ALJ erred in concluding that advising sellers to sign an addendum requesting that the buyers pre-qualify through one of Respondents' preferred lenders was a failure to exercise reasonable skill and care. Although the forms were revised and the lenders were changed from time-to-time, common to all such forms were provisions that (a) buyers simply were *requested* to pre-qualify through a preferred lender, and (b) buyers were *not required* to obtain their loans

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from a preferred lender. See, for example, Ex 12, p. 5; Ex. 21, p. 23; Ex. 48, p. 37; Ex. 108, p. 45; Ex. 127, p. 19; Ex. 132, p. 5; Ex. 197, p. 52; Ex. 205, p. 26. In addition, buyers paid *no fees* to be pre-qualified by a preferred lender. The practice of requesting pre-qualification of a borrower by a lender preferred by the seller or broker is permitted under federal law (RESPA), so long as the buyers are *not required* to obtain their loans from the preferred lender and buyers pay *no fee* for pre-qualification. 24 CFR §3500.2. The seller or broker may even *require* such pre-qualification from a lender with whom the seller or broker has an affiliated business arrangement.

Here, Respondents simply *recommended* that sellers *request* pre-qualification of buyers through one of Respondents' preferred lenders – a perfectly lawful and prudent request. In Respondents' opinion, pre-qualification by a known lender was more reliable and provided better security for their sellers. By signing the addendum to the purchase and sale agreement, sellers accepted Respondents' recommendation and ratified it as their own request of the buyers. There was no incompetence whatsoever. Sellers could have rejected Respondents' advice, as one seller, Daniel Streight, testified he did. It is no different than a broker presenting to sellers a printed form purchase and sale agreement stating that "Seller agrees to sell," which has no binding effect on the sellers whatsoever, unless and until the sellers sign the agreement and thereby adopt the promise as their own.

In later listings, although not required by law, Respondents even used a form at the time of listing the home that contained an express provision separately initialed by the homeowner stating, "Please ask that all buyers prequalify through one of your preferred lenders." See, for example, Ex 39.

Although clearly intended as derogatory, the Department's characterization of

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Respondents' business model as "McDonald-like" [sic] is a compliment – not a criticism! McDonalds® is widely respected as producing a consistent and high-quality product due to its strict standards, systems and procedures. Like McDonalds®, Respondents use systems and scripts to maintain efficiency and quality control. Respondents run their firm as a business – many brokers do not.

Finally, the ALJ erred in finding that "[i]t is a violation of reasonable skill and care to fail to discuss with the client any addendum." §4.144. No Washington case has ever imposed on real estate brokers a duty to explain simple forms to clients. In *Cultum v. Heritage House Realtors, Inc*., 103 Wn.2d 623, 628, 694 P.2d 630 (1985), the Supreme Court held that, in drafting an inspection contingency on a blank addendum, the agent "merely inserted the desired modifications in a blank space." *Id*. at 625-26. The court imposed no duty that real estate brokers discuss with their clients additions or changes to standard forms or advise their clients to seek legal advice. Rather, the court held that a broker must advise the parties to seek legal advice only when the broker believes "there may be complicated legal issues involved." *Id*. at 630. The pre-qualification addendum recommended by Respondents does not involve any "complicated legal issues." It is in plain and simple language and easily understood by a person of average intelligence. The sellers signed the addenda, were deemed to have read and understood them, and were bound by them.

The Department has no business telling real estate brokers how to lawfully advise their clients. If the Department believes consumers must be protected from their own voluntary contracts, then the Department must seek specific legislation on the issue, and not simply charge brokers with a vague "failure to exercise reasonable skill and care." This charge has no merit whatsoever and should be dismissed.

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False Advertising (§§5.90-5.104).

The ALJ erred in concluding that Respondents engaged in false advertising by claiming that Michael Hellickson was the "#1 Agent in Washington, Oregon and Hawaii." The Department did not challenge or offer any evidence to refute Mr. Hellickson's claim that no other agent did more business than him in Washington, Oregon or Hawaii in 2009 or 2010, or that he is the leading expert on short sales in Washington, Oregon and Hawaii. Instead, the Department contends that his advertising implicitly misrepresents that he was *licensed* in Oregon or Hawaii. However, the Department offered no evidence that any consumers were mislead into believing that Mr. Hellickson was licensed in Oregon or Hawaii. "#1 Agent" is a vague statement at best. It could mean most listings, most transactions, greatest dollar volume, highest income, most respected, best qualified, most experienced, most competent, etc. A misrepresentation must be a positive, distinct and definite statement of existing fact and not merely a vague representation or opinion. *Shook v. Scott*, 56 Wn.2d 351, 353 P.2d 431 (1960).

> "'The rule is followed at the present time in practically all American jurisdictions, in respect of transactions involving both real and personal property, that one to whom a *positive, distinct, and definite representation* has been made is entitled to rely on such representation and need not make further inquiry concerning the particular facts involved. This rule is a corollary to the broad principle of a general right of reliance upon *positive* statements. Under this rule it is sufficient if the representations are of a character to induce action, and do induce it, and the only question to be considered is whether the misrepresentations actually deceived and misled the complaining party." (Emphasis added.)

Cunningham v. Studio Theatre, 38 Wn.2d 417, 424, 229 P.2d 890 (1951) (quoting 23 AM.JUR. 970, FRAUD AND DECEIT, § 161).

A statement is "false," if it is not in accord with the facts. To be deceptive, (i) a statement must have the "capacity to deceive a substantial portion of the public," and (ii) there must be a "causal relationship . . . between [the deceptive] act and [the consumer's] claimed injury."

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Robinson v. Avis Rent A Car System, Inc., 106 Wn.App. 104, 22 P.3d 818 (2001).

The uncontroverted evidence was that Michel Hellickson had more listings than any other broker in Washington, Oregon or Hawaii in 2009 and 2010. He testified that many national real estate franchises have awards for the "Top Agent in the Country." The winner of the award does not have to be licensed in every state to claim the title. The award simply means that the agent did more business than any other agent in the franchise. The ALJ inconsistently found that Michael Hellickson "never represented that he was licensed to sell in Oregon or Hawaii" (§4.160), but found that "Respondents *implied* that they were licensed to sell real estate in Oregon and Hawaii" (§4.164). False advertising under the licensing law cannot be based on an equivocal statement, which, at worst, *implied* something false. "Every doubt should be resolved in [the licensee's] favor, and only upon a clear preponderance of the evidence that the acts charged have been done . . . should disciplinary action be taken." *In Re Haglund*, 81 Wn.2d 118, 500 P.2d 84 (1972). The Department has failed to prove by clear and convincing evidence that the advertisement was false, much less that it mislead any consumers.

With respect to loan origination, there was no evidence or finding that Respondents misrepresented themselves as mortgage brokers. The only advertisement in the record specifically stated that "Michael *and his team* of experts" could help consumers obtain loans. §4.162. There is nothing in the real estate licensing law that prohibits real estate brokers from soliciting or referring business to their mortgage partners. There is no evidence or finding that Respondents ever provided mortgage services without a license.

Sanctions against Michael Hellickson (§§5.105-5.110)

The revocation of a professional license is a "severe and rare discipline" (§4.15) involving fundamental constitutional rights. The due process clause of the Fourteenth

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Amendment to the United States Constitution precludes states from depriving any person of "life, liberty, or property, without due process of law."

> "Once licenses are issued, . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases, the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.

Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971).

> "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the due process clauses of the fifth and fourteenth amendments to the United States Constitution. *Mathews v. Eldridge*, 424 U.S. 319, 332, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 557-58, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974). '[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' *Joint Anti Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168, 95 L. Ed. 817, 71 S. Ct. 624 (1951) (Frankfurter, J., *concurring*). A professional license revocation proceeding has been determined to be 'quasi criminal' in nature and, accordingly, is entitled to the protections of due process. *In re Ruffalo*, 390 U.S. 544, 551, 20 L. Ed. 2d 117, 88 S. Ct. 1222 (1968); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39, 1 L. Ed. 2d 796, 77 S. Ct. 752 (1957); *In re Kindschi*, 52 Wn.2d 8, 11-12, 319 P.2d 824 (1958)."

Matter of Johnston, 99 Wn.2d 466, 474, 663 P.2d 457 (1983).

> "Liberty denotes not only freedom from bodily restraint, but also the right of the individual to contract and to engage in any of the common occupations of life. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). In the employment context, the term 'liberty' encompasses two of the employee's most basic interests, namely, his good name and his prospects for future employment. Thus, if the government dismisses an employee on charges that call into question his good name, honor or integrity, notice and an opportunity to be heard are essential. *Board of Regents v. Roth*, supra at 408 U.S. 569, 92 S.Ct. 2705, 33 L.Ed.2d 556, and cases cited. Similarly, the government cannot, by its actions, impose a stigma or other disability upon an employee which will foreclose his freedom to pursue other employment opportunities. *Board of Regents v. Roth*, *supra*."

State ex rel. Swartout v. Civil Service Commission of City of Spokane, 25 Wn.App. 174, 182-83, 605 P.2d 796 (1980).

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> "[T]here is no question Dr. Nguyen's private interest is significantly affected. The revocation of Dr. Nguyen's license exposed him to loss of livelihood, diminished reputation, and professional dishonor, particularly where sexual misconduct is alleged. The private interest affected here is important, and Dr. Nguyen has a significant right in his medical license."

Nguyen v. Dep't of Health, 144 Wn.2d 516, 544, 29 P.3d 689 (2001).

The Department argued that vigorous enforcement of the real estate licensing law is essential to maintaining the standing of the real estate profession in the eyes of the public. However, it is equally important that state agencies promote confidence in the integrity of government in the eyes of the public by respecting the constitutional rights of individuals.

> "Under the appearance of fairness doctrine, proceedings before a quasi-judicial tribunal are valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing. *Swift v. Island Cy*., 87 Wn.2d 348, 361, 552 P.2d 175 (1976). Although this doctrine originated in the land use area, *See Smith v. Skagit Cy*., 75 Wn.2d 715, 453 P.2d 832 (1969), it has been extended to other types of quasi-judicial administrative proceedings, *See Chicago, M., ST. P. & Pac. R.R. v. State Human Rights Comm'n*, 87 Wn.2d 802, 557 P.2d 307 (1976).

Matter of Johnston, 99 Wn.2d 466, 478, 663 P.2d 457 (1983).

Here, a "reasonably prudent and disinterested observer" would not conclude that the Department treated Respondents fairly. The Department charged, convicted, sentenced and executed Hellicksons with a single blow! A "reasonably prudent and disinterested observer" could only conclude that the Department went on a "witch hunt" in retaliation for Respondents successfully asserting their Fourth Amendment rights.

The Department must take the "least restrictive agency action" necessary to protect the public. Former Governor Lowry directed that "[a]gencies should attempt to use less intrusive methods of achieving desired outcomes." Executive Order 94-07 (June 6, 1994). According to Karen Jarvis and Jerry McDonald, the Department has never revoked the license of a real estate

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broker for anything less than mishandling of trust funds or criminal activity. This is not a case involving theft of client trust funds, sexual misconduct (*Nguyen v. Dep't of Health,* 144 Wn.2d 516, 544, 29 P.3d 689 (2001) and *Morgan v. PeaceHealth, Inc*., 101 Wn.App. 750, 14 P.3d 773 (2000)), improper dispensing of prescription drugs (*Clausing v. State,* 90 Wn.App. 863, 955 P.2d 394 (1998) and *Olmstead v. Department of Health, Medical Section,* 61 Wn.App. 888, 812 P.2d 527 (1991)), or child abuse (*Islam v. State, Dept. of Early Learning*, No. 63362-7-I (Div. I, August 23, 2010) (infant injured at day care center)). If any consumers were harmed by Respondents' conduct, their damages were purely economic. There is no issue of public health or safety. Any harm to consumers can be remedied through civil lawsuits for damages. Importantly, there are no civil lawsuits pending against Respondents.

RCW 18.235.110 specifies a broad range of sanctions available to the Department, as follows:

> "(1) Upon finding unprofessional conduct, the disciplinary authority may issue an order providing for one or any combination of the following:
>
> (a) Revocation of the license for an interval of time;
>
> (b) Suspension of the license for a fixed or indefinite term;
>
> (c) Restriction or limitation of the practice;
>
> (d) Satisfactory completion of a specific program of remedial education or treatment;
>
> (e) Monitoring of the practice in a manner directed by the disciplinary authority;
>
> (f) Censure or reprimand;
>
> (g) Compliance with conditions of probation for a designated period of time;
>
> (h) Payment of a fine for each violation found by the disciplinary authority, not to exceed five thousand dollars per violation. The

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disciplinary authority must consider aggravating or mitigating circumstances in assessing any fine. Funds received must be deposited in the related program account;

(i) Denial of an initial or renewal license application for an interval of time; or

(j) Other corrective action."

RCW 18.235.110(1).

Here, the Department cannot impose any sanction, unless a violation of the Real estate Licensing Law is proved by clear and convincing evidence. Respondents do not believe that any violation has been proved or that any sanction is warranted. However, even if the reviewing officer finds a violation(s) of the Real Estate Licensing Law, the reviewing officer could issue an order:

- prohibiting Respondents from engaging in whatever specific practices the presiding officer concludes violate the Real Estate Licensing Law;
- limiting or restricting Respondents' practices;
- requiring Respondents to complete an educational program;
- allowing DOL to monitor Respondents' practice;
- as to Michael Hellickson only, instead of Tara and the entire firm; or
- imposing numerous other sanctions short of suspension or revocation.

Cooperation with DOL (§§4.9, 4.10 and 5.110).

Generally, the Department does good work. But, in this case, it appears that the Department is retaliating against Respondents for successfully asserting their Constitutional rights against warrantless and unreasonable seizures by the Department. In 2009, the Department issued a subpoena to the Northwest Multiple Listing Service purporting to require NWMLS to

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produce "Records of all disciplinary actions taken against Michael J. Hellickson and Tara Hellickson now and at all times since date of acquiring Northwest Multiple Listing Service membership." In King County Superior Court Cause No. 09-2-41204-9 SEA, Judge Catherine Shaffer quashed the subpoena and ruled that "the Subpoena constitutes a warrantless search of business records without a determination of merit or probable cause in violation of plaintiffs' constitutional rights, that the real estate licensing law does not contain adequate safeguards to protect plaintiffs' Fourth Amendment rights, and, in the alternative, the Subpoena is overly broad and unreasonable." Under Judge Shaffer's Order, the Department lacks authority to demand production of records without a warrant or determination of probable cause, yet the Department continues to make such demands and threatens disciplinary action against licensees who assert their Constitutional rights.

On December 2, 2009, Hellicksons' attorney wrote to Karen Jarvis, Program Manager of the Real Estate Division of the Department of Licensing, advising her and several Investigators of Judge Shaffer's Order and its application to several other open investigations involving Hellicksons.

On May 10, 2010, David Walker, Investigations Manager of Real Estate Investigations of the Department of Licensing, sent a letter to Hellicksons' attorney threatening Hellicksons with disciplinary action for "failure to cooperate with the Department of Licensing *as required by law*," even though Judge Shaffer previously had ruled that the Department had no authority to require production of records without a warrant. (Emphasis added.)

On February 18, 2011, David Pierce sent a letter to Respondents' attorney concerning another client that contained the following threat:

"The Department would appreciate your cooperation with this inquiry. We

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> encourage your client to cooperate with this investigation; however, *if your client chooses not to cooperate by not providing the requested documentation, the Department may pursue further administrative actions, up to and including a summary suspension of your client's license until a response is received*." (Emphasis added.)

Ex L.

Based on the above information, one can only conclude that the Department has ignored Judge Shaffer's Order with respect to other investigations and continues to disregard the Constitutional rights of Respondents and other real estate licensees. On August 23, 2010, Hellicksons filed a motion to amend their complaint to seek a declaratory judgment to prevent further violations of Respondents' constitutional rights. A week later, the Department filed the Ex Parte Order suspending Respondents' licenses. Coincidence or retaliation?

Correction of alleged violations (§5.110).

"[T]he purpose of the [real estate licensing law] is to protect the general public from negligent, unscrupulous, or dishonest real estate operators. *Nuttall v. Dowell*, 31 Wn. App. 98, 108, 639 P.2d 832 (1982)." *Williamson, Inc. v. Calibre Homes, Inc*., 147 Wn.2d 394, 401-02, 54 P.3d 1186 (2002). Notwithstanding the underlying goal of protecting the public, the emphasis of any regulatory scheme should be compliance, rather than punishment. "To the maximum extent feasible, within the limits of an agency's current budget and consistent with statutory requirements, an agency with regulatory enforcement authority shall promote voluntary compliance with state and federal law enforced by the agency and the agency's rules through the provision of technical assistance, including technical assistance visits." Executive Order 94-07 (June 6, 1994). Contrary to Governor Lowry's Executive Order, the Department never even confronted Respondents with its objections to Respondents' 30-day sale program or "#1 Agent" advertisements before suspending their licenses. RP 1221:24-1222:12. The Department's attitude

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was "shoot now, ask questions later."

The ALJ found that the Department considers "whether the licensee cooperated with the Department's investigation and whether the licensee acknowledge and attempted to correct its conduct." §5.110. However, it is obvious from the correspondence (*e.g.*, Ex L) and the testimony of the Department's own personnel that the Department's idea of "cooperation" requires licensees to waive constitutional rights. Under Judge Shaffer's order, Respondents had no obligation to produce records or provide information without a warrant. The Department cannot be permitted to place Respondents in the position of either waiving constitutional rights that had been confirmed by the superior court or facing disciplinary action for failure to cooperate.

Likewise, the inherent unfairness of disciplining Respondents more harshly for failing to "correct" their conduct when the Department did not even notify Respondents in advance of suspending their licenses that the Department objected to Respondents' 30-sale program or "#1 agent" advertisements is obvious. Yet, the 30-day sale program is one of the alleged violations that Mr. McDonald characterized as "serious." RP 1430:24-1431:2. Ms. Jarvis testified that the Department had raised an objection to another broker's 30-day sale program and that the other broker revised its program to satisfy the Department's concerns. The Department took no disciplinary action against the other broker whatsoever. RP 1224:3-18. Respondents were deprived of the same opportunity, because the Department did not even notify Respondents of its objection to the 30-day sale program. The ALJ recognized that Respondents did not fail to cooperate or acknowledge that violations were alleged, but nevertheless concluded that revocation was appropriate. §5.110. Such a leap defies logic.

Revocation is disproportionate to the violations

Mr. McDonald characterized failing to provide copies of signed listing agreements as a

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"serious" concern, yet Mr. McDonald was not aware of any other case where a broker's license was suspended or revoked for failing to provide copies of listing agreements. RP 1433:5-1434:19. In fact, neither Ms. Jarvis nor Mr. McDonald were aware of any grounds other than missing trust funds or criminal convictions that had resulted in a 10-year revocation of a real estate broker's license! RP 1435:15-19.

The Department presently does not have guidelines for real estate broker discipline. Although not directly on point, *Brown v. State, Dept. of Health, Dental Disciplinary Bd*, 94 Wn. App. 7, 17, 972 P.2d 101 (1998), the principles the court has adopted in deciding attorney discipline may be helpful by analogy. Washington courts have adopted the American Bar Association's *Standards for Imposing Lawyer Sanctions* (1991) ["ABA Standards"] as a guide to determine appropriate sanctions for attorneys. *In re Disciplinary Proceeding Against Romero*, 152 Wn. 2d 124, 134, 94 P.3d 939 (2004). The ABA Standards weigh: the duty owed and who it is owed to (in descending order of importance: client, public, court, profession), the lawyer's mental state (intentional, knowing, negligent), the severity of injury or potential injury (serious injury, injury, little or no injury), and any aggravating or mitigating factors.

Notwithstanding the absence of guidelines for discipline of real estate brokers, an analysis of recent disciplinary actions by the Department reveals a distinct pattern of what types of misconduct warrant different degrees of sanctions, which tend to be consistent with the ABA Standards and common sense. It is clear that five and ten- year revocations are reserved for licensees who were indicted or convicted of felonies or multiple gross misdemeanors (and usually failed to report them to the Department) or who failed to report civil judgments related to their business. (Timothy B. Morris, Aug. 2010; Ryan Vincent Driver, Jun. 2010; Carmen H Arruda, May 2010; James J. Bondsteel, May 2010; Steven Mahoney, May 2010; Ruvim

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Podgorny, Apr. 2010; Kevin Arruda, Mar. 2010; Tony Reyes, Mar. 2010; David Sobol, Mar. 2010; Steven Mahoney, Mar. 2010; Ruvim Podgorny, Feb. 2010; Robert Warner, Jan. 2010)

Only two cases where 10-year revocations were imposed did not involve criminal proceedings. One was a licensee who "failed to return" (converted) $6,000 of sellers' money after a failed sale, bought the property himself, rented it out before closing, and asked for and obtained jewelry from sellers as security for a note. (Faiyaz M. Farouk, May 2010) Another was for forgery of transactional documents, failure to run commissions through the broker, and failure to cooperate with investigation. (Diane Marriott, Mar. 2010).

All of these long-term revocations involved serious moral turpitude, fraud, or intentional mishandling of client funds. The same pattern is evident in cases involving other professionals licensed by the Department and other agencies.

A real estate broker's license was revoked for five years for converting client funds, authorizing an unlicensed person to act as a rental agent, and other breaches of duty to the client causing harm or potential for harm. *Hickethier v. Washington State Dept. of Licensing*, 159 Wn. App. 203, 210, 244 P.3d 1010 (2011). A professional engineer's license was revoked for five years based on his conviction of three counts of child molestation. *Ritter v. State, Bd. of Registration for Prof'l Engineers & Land Surveyors*, No. 40010-3-II (Div. II May 11, 2011) (split panel reversed for lack of a nexus between the misconduct and the practice of his profession, as required for a violation of RCW 18.235.130(1)). A counselor's license was suspended for three years for fraudulently misrepresenting to a court in criminal proceedings that she was a chemical dependency counselor providing treatment to the defendant, when in fact she was the defendant's mother and was neither involved in his treatment nor licensed to do so. *Johnson v. Washington State Dept. of Health*, 133 Wn. App. 403, 407, 136 P.3d 760 (2006). A

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bail bond agent and agency's license was revoked for five years for knowingly employing an unlicensed bail bond agent and intentionally refusing to remedy the misconduct. *Regan v. State Dept. of Licensing*, 130 Wn. App. 39, 60-61, 121 P.3d 731 (2005). An accountant's license was revoked for five years for converting client funds and breaching fiduciary duties to the client by executing ill-advised loans from client to himself and friends under a supposed power of attorney. *Keene v. Bd. of Accountancy*, 77 Wn. App. 849, 853, 894 P.2d 582 (1995). A dentist's license was revoked for five years (with additional conditions for reinstatement) based on 10 felony convictions based on fraudulent billing practices, combined with incompetent treatment of three patients. *Brown v. State, Dept. of Health, Dental Disciplinary Bd.*, 94 Wn. App. 7, 9-10, 972 P.2d 101 (1998).

To summarize, long-term revocations of professional licenses involve criminal acts, serious moral turpitude, fraud, theft or other intentional mishandling of client funds. Respondents were not found to have done any of these things.

Isolated incidents of misrepresentation or negligence by real estate brokers received much lower sanctions from the Department in 2010 – generally suspensions ranging from 3 months to one year. (Chou H. Yoo, Jun. 2010, failed to deliver earnest money; Thomas Platfoot, May 2010, falsified continuing education records; Jabir Muied, Apr. 2010, failed to disclose known hidden defects; Bobbi Page, Apr. 2010, failed to deliver earnest money; Thomas Nguyen, Feb. 2010, sold interest in property he didn't own; LauraLouise Hight, Jan. 2010, failed to exercise reasonable care and skill, failed to inform sellers of potential conflict of interest) These suspensions are often stayed for one to three years, usually with conditions. Appraisers' violations were generally in the nature of negligent or intentional misrepresentations in their reports. (Bryan Longmore, Jan. 2011; Morley S. Preppernau, Oct. 2010; Troy Muljat, Sep. 2010;

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Teresa Shikany, Sep. 2010; Michael Morris, Aug. 2010; Debra Lee Daniels, Apr. 2010) All received one year suspensions (stayed 3 years) and fines from $500-$1500.

Respondents were not guilty of any crimes. The ALJ specifically held they did not commit acts of moral turpitude. They did not mishandle client money. They did not engage in any fraudulent transactions.

Rather, the ALJ found that Respondents engaged in false advertising, failure to exercise reasonable skill and care, and negligence that caused a risk of harm. This misconduct, even if taken as true, does not rise nearly to the level of actions warranting long-term revocation. Their misconduct is more in line with that for which the Department has imposed short-term (3 month to one year) suspensions. The Department also should, as it has in other similar cases, stay the suspension with conditions that Respondents not engage in the sanctioned conduct and complete education courses or other positive conditions. This is especially appropriate where the Department did not afford Respondents any opportunity to address the Department's objections prior to the summary suspension of their licenses.

Sanctions against Tara Hellickson (§5.111) and Hellickson.com, Inc. (§5.112)

The ALJ erred in affirming the 10-year revocations of Tara Hellickson and Hellickson.com, Inc.'s licenses. The firm's license did not even exist until July 1, 2010, and all of the conduct alleged against Respondents occurred before July 1, 2010. The Department lacks jurisdiction over the firm as to conduct that allegedly occurred before the firm was required to be licensed. Disciplining the firm for conduct that occurred before it was required to be licensed would be like disciplining a home inspector for conduct that occurred before home inspectors were required to be licensed. The Department may not impose any sanctions against the firm for conduct that occurred before the firm was required to be licensed.

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Ms. Jarvis testified that "the Department is asking for the revocation of the firm license because Michael and Tara Hellickson have controlling interest [sic] in that firm." RP 1210:6-9. But, Ms. Jarvis admitted that, if the firm's license had not been revoked, the firm could have retained another qualified designated broker and remained in business. RP 1245:6-12. By wrongfully revoking the firm's license based on conduct that allegedly occurred before the firm was required to be licensed, the Department exceeded its authority.

As to Tara's license, the ALJ's reasoning is illogical and circular: Tara is responsible for the firm's conduct and the firm is responsible for its employees' conduct. As discussed above, under the licensing scheme that existed before July 1, 2010, the firm was not licensed and had no legal obligations whatsoever under the real estate licensing law. Because the firm had no responsibilities under the licensing law at the times relevant to this case, the firm could not do or fail to do anything under the licensing law. Therefore, Tara cannot be disciplined for the conduct of the firm.

Moreover, the ALJ's finding is not supported by substantial evidence. Ms. Jarvis testified only that "the Department took action on Tara because she is co-listing agent, and the Department would consider a co-listing agent equally responsible as the other agent." RP 1246:17-19. Yet, no witness testified and the ALJ made no findings that Tara had knowledge that she was identified on the listing agreement as the co-listing agent or that she consented to acting as co-listing agent on the relevant listing agreements. The "lack of an essential finding is presumed equivalent to a finding against the party with the burden of proof." *In re Welfare of A.B.*, 168 Wn.2d 908, 927, 232 P.3d 1104 (2010).

Finally, even if they had been proven, the omissions alleged against Tara are minor and do not justify a revocation of her license (*e.g.*, failing to return phone calls timely).

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Effective date of final order

If a suspension or revocation is imposed against any Respondents, the final order should be effective at least 14 days after entry, rather than immediately. The Director has discretion to provide that a later effective date. RCW 34.05.473(1) provides that "*Unless a later date is stated in an order* or a stay is granted, an order is effective when entered." (Emphasis added.) When the Ex Parte Order summarily suspending Respondents' licenses was entered, it created chaos for everyone involved with Respondents in listings and sales – sellers, buyers, other brokers, closing agents, lenders, inspectors, appraisers, closing agents, lienholders, contractors, the multiple listing service and others. A short delay in the effective date of the final order would benefit the public by enabling Respondents to transfer pending sales and active listings to another broker without exposing the public to any greater risk than has existed while this matter has been pending for the past eight months.

Conclusion.

Respondents have suffered irreparable harm – they have lost their business, their livelihood and their reputation, yet they have done nothing wrong. Respondents were helping homeowners in distress during difficult times. Respondents should be vindicated of all charges.

DATED May 24, 2011.

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