

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS  
ON REFERRAL BY THE REAL ESTATE COMMISSION**

In the Matter of: )  
 )  
ERWIN MOSER, )  
 )  
Respondent. ) OAH No. 04-0294-REC  
 ) Commission Case No. 3000-03-003  
\_\_\_\_\_ )

**PROPOSED DECISION**

**I. Introduction**

This case is a disciplinary action before the Real Estate Commission against real estate broker Erwin N. Moser. The accusation issued by the division of occupational licensing contains one count, alleging that Moser violated real estate licensing laws by giving false evidence to renew his broker license in 2002. Moser requested a hearing. The case was transferred to the Office of Administrative Hearings<sup>1</sup> and a hearing was held in conformance with the Administrative Procedure Act.<sup>2</sup> This document is the proposed decision for the Real Estate Commission under AS 44.62.500. Based on the evidence, it is recommended that discipline be imposed against Moser including suspension of his broker license for 60 days, imposition of a \$2,000 fine payable before his license may return to active status, attendance at a two credit hour ethics continuing education course approved in advance by the commission, and probationary status for one year after his license returns to active status.

**II. Facts**

Division investigator Margo Mandel, Jamie Moyer and Erwin Moser testified as witnesses under oath and subject to cross-examination at the hearing. The division’s exhibits 1, 2 and 3 and Moser’s exhibit “A” were admitted as evidence. References are made in the fact findings to the audiocassette tapes comprising the record made at the hearing, which are not transcribed. The following findings are based on the record in this case.

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<sup>1</sup> The Office of Administrative Hearings (OAH) was created in 2004. See AS 44.64.010. Under a transitional provision relating to transfer of employees, the hearing officer for the Department of Commerce, Community and Economic Development was transferred to OAH.

<sup>2</sup> See AS 44.62.330 – .640.

1. Erwin N. (Wynn)<sup>3</sup> Moser was licensed as a real estate salesman in Alaska on February 18, 1983. He thereafter renewed his license every two years. Moser changed his license status and was licensed on January 20, 1998, as a real estate broker. He renewed his broker license for the time period from February 1, 2000, through January 31, 2002. By application dated January 21, 2002, filed with the division, Moser sought to renew his broker license for the period February 1, 2002, through January 31, 2004. Question 5 of the application asks “Have you had a lawsuit filed against you alleging dishonesty, fraud, misrepresentation, or conversion of trust funds?” Moser answered “no.” Moser is the broker and president at a real estate brokerage he owns named Statewide Real Estate Services. Statewide shared office space with real estate broker Cloyd Moser who operated his own brokerage, Alaska Associated Realty, Inc., out of the same suite. Erwin Moser was an officer in Alaska Associated Realty and he had a long history of involvement with the business, having been employed by the company as far back as 1983. Erwin also was a salesperson for Cloyd Moser who was the broker for M2 Investments during 1995-96. M2 Investments operated out of the same office location as Statewide Real Estate Services did in 2002 and currently does. (Direct exam of Mandel, tape 1A; Direct and cross-exam of Moyer, tape 1B; Direct and cross-exam of E. Moser, tape 1B; Exh. 1, pp. 127, 164, 194-282)

2. Moser’s “no” response to question 5 in the 2002 application was false. At the time Moser filed his renewal application, he was named as a defendant in a civil lawsuit a year and one-half earlier in Case No. 3AN-00-10014 CI (hereinafter referred to as “the Cole case”), a case filed in the superior court at Anchorage on August 30, 2000.<sup>4</sup> In the Cole case, Jamie Moyer, who runs the office of Alaska Associated Realty, was alleged to have notarized forged signatures of Madeleine Cole.<sup>5</sup> At the time of the lawsuit, Moser was a partner in the partnership Modeb

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<sup>3</sup> Moser is known by the nickname “Wynn.” Exhibits at the hearing which include licensing documents sometimes refer to him as Wynn Moser. Moser’s father, Cloyd Moser is also mentioned in exhibits. Throughout this decision, the use of the last name Moser in reference to an individual means Erwin Moser.

<sup>4</sup> See attached Appendix “A.” The complaint alleges that

[b]etween September 1998 and June 2000 forty-seven parcels of real estate in Alaska were transferred between Madeleine Cole, Cloyd Moser, Erwin Moser, Modeb Investments, Kiana Investments, Gimerc, Ltd., Kenneth McPherson, Iston Investments, Ltd., Gold Admiral, Ltd. and others. The initial purchases of the properties were accomplished through funds owned by Madeleine Cole, by means of fraudulently forged checks drawn on the bank account of Madeleine Cole at Alaska USA Federal Credit Union or otherwise from funds owned by Madeleine Cole or her estate.

(Exh. 1, pp. 52, 61, 124)

<sup>5</sup> According to the complaint, Madeleine Cole died December 23, 1998. Moyer was alleged to have notarized Cole’s forged signature for the benefit of other defendants on December 21, 1998.

Investments and an officer in the corporation Alaska Associated Realty, Inc. (Direct exam of Mandel, tape 1A; Direct and cross-exam of Moyer, tape 1B; Direct and cross-exam of E. Moser, tape 1B; Exh. 1, pp. 51-87, 164).

3. The 87-page complaint in the case contains twenty-six counts alleging that certain property and assets owned by Madeleine Cole were wrongfully taken or dissipated by the defendants, or with the cooperation of the defendants, prior to and after Madeleine Cole's death. Twelve of the counts seek recovery from Erwin Moser as follows.

Fourth and Fifth Claims – Allegations of fraud involving transfer of interests in real property transactions against Moser as a partner of Modeb Investments, a partnership also consisting of his father Cloyd Moser and Kiana Investments, Inc.

Ninth Claim – Allegations of fraud by Moser involving transfers of interests in real property.

Twelfth Claim – Allegations of fraud by Moser involving transfer of interests in real property.

Thirteenth Claim – Allegations seeking damages from Moser personally involving fraudulent transfer of interests in real property.

Nineteenth Claim – Allegations seeking constructive trust based on Moser fraudulently obtaining title to real property.

Twenty-first Claim – Allegations seeking a rescission remedy based on Moser's involvement as a partner in Modeb Investments regarding conversion and fraudulent transfers of interests in real property.

Twenty-second Claim – Allegations seeking damages from Moser as a partner in Modeb Investments regarding conversion and fraudulent transfers of interests in real property.

Twenty-third Claim – Allegations seeking an accounting from Moser based upon fraudulent conduct involving the transfer of real property.

Twenty-fourth Claim – Allegations seeking injunctive relief against Moser based upon fraudulent conduct involving the transfer of real property.

Twenty-fifth Claim – Allegations seeking the remedies of restitution and rescission from Moser based upon conversion and "fraudulently forged checks and the certified checks."

Twenty-sixth Claim – Allegations seeking punitive damages from Moser and other defendants "in defrauding Madeleine Cole and/or the Estate of Madeleine Cole and/or

participating in a fraudulent scheme to convert the cash assets of Madeleine Cole to their own uses and purposes.”

(Cross-exam of E. Moser, tape 1B; Exh. 1, p. 35; Exhs. 2, 3)

4. The attorney for plaintiffs in the Cole case contacted the division after filing the lawsuit and brought the litigation to the attention of the agency. Representatives of the division met with the attorney and commenced an investigation of Erwin Moser’s conduct as a broker. By letter dated February 6, 2003, division investigator Margo Mandel proposed to Moser that he surrender his license and the investigation would be closed. Moser refused. He entered a Settlement and Mutual Release Agreement in the lawsuit on March 10, 2003, through which he was released from all liability in the case without any admission of wrongdoing. The settlement agreement admits that Alaska Associated Realty, Inc. brokered and closed a real estate transaction addressed by claims in the lawsuit. (Direct and cross-exam of Mandel, tape 1A; Cross-exam of E. Moser, tape 1B; Exh. 1, pp. 179-93; Exh. “A”)

5. Moser’s attorney negotiated a settlement of the disciplinary matter, subject to approval by the Real Estate Commission. By Memorandum of Agreement signed by Moser on July 20, 2004, and the division’s chief investigator on July 22, 2004, the parties agreed that Case No. 3AN-00-10014 CI “contained allegations of dishonesty and fraud” against Moser and that he should be subject to discipline consisting of a \$2,000 fine and a reprimand placed in his license file. The commission rejected the proposed MOA on September 14, 2004. On November 12, 2004, the division issued an accusation seeking discipline in this case. Moser requested a hearing. The division filed a Motion for Partial Summary Judgment in this case seeking a ruling that Moser violated disciplinary laws as alleged in the accusation. Moser opposed the motion. The motion was denied and an evidentiary hearing took place on April 21, 2005. (Direct exam of Mandel, tape 1A; Direct exam of E. Moser, tape 1B; Exhs. 1, 2, 3, “A”)

### **III. Discussion**

#### **A. Licensing Violations**

The accusation in this case alleges five licensing violations as enumerated below. Moser’s defense rested on an assertion that he negligently or innocently provided false evidence about the Cole case when renewing his license in 2002. Moser argued that he had no intent to deceive and without that element there is no basis for discipline against his broker license. The division argued that even a good faith mistake is no excuse for providing false evidence in a

license application and that, moreover, Moser intentionally misled the Real Estate Commission about Case No. 3AN-00-10014 CI in any event.

1. AS 08.88.071(a)(3)(B) – This statute provides that the Real Estate Commission has authority after a hearing to impose discipline under AS 08.01.075 on a licensee who “procures a license by deceiving the commission.” The elements for knowing misrepresentation or deceit include “a false representation of fact, scienter, intention to induce reliance, justifiable reliance, and damages.”<sup>6</sup> The scienter element requires that the individual knew the falsity of the representation.<sup>7</sup> Intent is a question of fact that may be proven by inference through circumstantial evidence.<sup>8</sup>

In applying these elements, it is not disputed that Moser’s 2002 renewal application contained a false representation of fact on whether he had a lawsuit filed against him “alleging dishonesty, fraud, misrepresentation, conversion of funds.” Moser intended that his application provide a basis for the Real Estate Commission to renew his broker license. In this case, the false response at issue bears on litigation that involved applicant’s “dishonesty, fraud, misrepresentation, [and] conversion of trust funds [from question 5].” This was not peripheral information, but highly relevant to the commission’s determination to renew Moser’s license. The fact that Moser was sued in the Cole case was material to processing his license application, whether allegations of the lawsuit were true or not.

Scienter is the final element for determining if Moser engaged in deceit. Under applicable law, if he did not know the falsity or untrue character of his misrepresentation, then there is no deceit.<sup>9</sup> Moser and Moyer testified that Moyer prepared the application for Moser to sign. Moyer checked the box in response to question 5. Moser stated that his incorrect answer was merely the result of an innocent mistake. The scienter element for Moser’s conduct hinges on credibility determinations involving Moyer and Moser.

Credibility determinations involving whether testimony is worthy of belief may be made based in part upon the following considerations. If testimony of a witness on a material issue is willfully false and given with an intention to deceive, other portions of a witness’ testimony may

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<sup>6</sup> See Barber v. National Bank of Alaska, 815 P.2d 857, 862 (Alaska 1991).

<sup>7</sup> See City of Fairbanks v. Amoco Chemical Co., 952 P.2d 1173, 1176 (Alaska 1998).

<sup>8</sup> See Gabaig v. Gabaig, 717 P.2d 835, 838 (Alaska 1986); Dargue v. Chaput, 88 N.W.2d 148, 155 (Neb. 1958). See also City of Fairbanks, 952 P.2d at 1179 (evidence of scienter is “usually circumstantial”).

<sup>9</sup> See City of Fairbanks, 952 P.2d at 1176 n.4 (citing Bubbel v. Wien Air Alaska Inc., 682 P.2d 374, 381 (Alaska 1984)).

be disregarded.<sup>10</sup> Uncredible testimony is not made more credible or more trustworthy by any number of repetitions.<sup>11</sup>

### Erwin Moser

Moser was concerned about the Cole case and about this disciplinary proceeding catching the attention of the real estate industry as well as the public.<sup>12</sup> Defendants in the case included Erwin's father Cloyd Moser, a long-time broker, Erwin Moser his son who also was a broker, and Jamie Moyer, who was employed by Erwin keeping his business books and "running the real estate company". Twelve of 26 counts in the Cole case were against Moser. Six of the counts were against Moyer. Moser was sued in his capacity as a real estate broker and as a partner in Modeb Investments. The complaint was filed on August 30, 2000. An injunction was granted against defendants.<sup>13</sup> Moser and Moyer were represented in the case by an attorney. They filed an answer to the complaint through their attorney responding to the specific allegations against them.<sup>14</sup> Three years after the case was filed, Moser and Moyer were dismissed from the lawsuit after a settlement was reached. Shortly thereafter, the Cole estate was awarded \$4.3 million in damages after a trial in what remained of the case.

The lawsuit was not the type of proceeding that anyone involved would reasonably forget about, whether blameless or culpable. However, that essentially is Moser and Moyer's position in this disciplinary proceeding. They repeatedly testified to the effect that the "no" answer to question 5 on Moser's 2002 application was an oversight. In addition to the unlikelihood of them overlooking the lawsuit in connection with the 2002 renewal application, the following factors are germane to determining the scienter element.

Moser was asked on direct exam by his attorney regarding January 2002, "at that time what was the extent of your involvement in the Alaska Trust Company [Cole case] suit in terms of what you did or didn't do?" Moser emphatically responded "zero." He thereafter assuredly denied that he had hired any lawyer in the suit, that he had gone to any meetings with his father (Cloyd) or anybody else about the case, that he had been deposed in the case, that he had attended any court proceedings in the suit, that he had read any of the court file, and that he had ever had any direct professional dealings with Madeleine or Elisabeth Cole.

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<sup>10</sup> See Oksotaruk v. State of Alaska, 611 P.2d 521, 526 (Alaska 1980) ("A witness willfully false in one part of his testimony may be distrusted in other parts.").

<sup>11</sup> See Nitz v. State of Alaska, 720 P.2d 55, 61 (Alaska App. 1986).

<sup>12</sup> Direct exam of E. Moser, tape 1B; Exh. 2, p. 15. Moser acknowledged the need to protect his name in the profession.

<sup>13</sup> Exh. 1, pp. 36, 51.

<sup>14</sup> Exh. 1, pp. 138-170 (attached Appendix "B").

It unreasonably stretches belief to accept Moser's testimony that he had "zero involvement" in the lawsuit. Moser has been a real estate licensee for twenty-three years, and he has a strong incentive to avoid disciplinary sanctions that may have a pecuniary effect. Moser testified that he has been involved in over 1,100 real estate transactions since 1996. He was part owner of some of the real property parcels at issue in the Cole case. Even after testifying to zero involvement, he provided more equivocal testimony. When asked if his father kept the progress of the case to himself, Moser replied "we had little or none" regarding communication with his father and "he tried to leave me out of it." (emphasis added)

In contrast, the answer to the complaint in the Cole case admits that Erwin and Cloyd Moser are both officers in Alaska Associated Realty, Inc., a corporate defendant in the lawsuit.<sup>15</sup> Seven counts in the complaint allege wrongdoing involving this corporation. The Mosers also shared office space, operating out of the same suite that Alaska Associated Realty, Inc. and M2 Investments had used previously.

When Moser was asked during direct examination if he consulted his attorney who handled the settlement of the Cole case and this disciplinary matter about his 2004 license renewal application, he responded "Umm, [pause] I don't remember." In contrast, later evidence at the hearing established that Moser's attorney prepared an addendum to the 2004 application on his word processor for Moser.<sup>16</sup> This was an important document, as Moser intended it to explain the circumstances of the Cole case to the Real Estate Commission for the first time. More likely than not, Moser would have remembered who prepared this document bearing on his continued livelihood in the real estate industry.

Moser denied that he ever spoke with his original attorney in the Cole case, Brent Wadsworth, in preparing an answer to the complaint. There was no direct evidence at the hearing to establish communication between Moser and Wadsworth.<sup>17</sup> Moser's denial that he spoke with Wadsworth is dubious at best, however, considering the complexity and importance of the Cole case, particularly as it relates to Moser's potential liability, his professional reputation, and his ability to continue to make a living as a real estate broker. Also, given the requirements of Civil Rule 11 and the obligations it imposes on attorneys, it is doubtful that Wadsworth would file an answer to the Cole case complaint, a lengthy document with twelve counts against Erwin Moser, without consulting with his client Erwin Moser.

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<sup>15</sup> Exh. 1, pp. 127, 164. Moser was employed by the company in 1983. (Exh. 1, p. 281)

<sup>16</sup> Re-direct examination of E. Moser, tape 2A; Exh. 1, p. 35. During his re-direct examination, Moser stated that a false representation in the addendum made to the Real Estate Commission, which he signed, was his attorney's fault.

In an affidavit filed in this disciplinary proceeding, Moser made a statement that bears on his credibility. He signed the affidavit in support of his opposition to the division's Motion for Partial Summary Judgment under oath on March 29, 2005. In the affidavit, Moser represented that he "had no motive to conceal the existence of the Alaska Trust Company [Cole] lawsuit." In contrast, the record in this case has many references to his strong concerns about his reputation as a broker in the community and the adverse financial consequences that might befall him and his brokerage if he were subject to discipline by the Real Estate Commission.

Moser also made a misrepresentation in the addendum he submitted to the Real Estate Commission in connection with his 2004 license renewal. As part of his application, Moser certified that the information in the addendum was correct.<sup>18</sup> The addendum includes a footnote denying that he was a partner in Modeb Investments. Moser was a general partner in Modeb.<sup>19</sup> He also was an officer in Alaska Associated Realty, Inc. (along with his father), and he was identified in the lawsuit as an officer of the corporation. He did not reference this corporate capacity in the addendum or in his testimony at the hearing.<sup>20</sup> These misrepresentations bear on Moser's credibility, along with previously identified concerns.

#### Jamie Moyer

Moyer also had some credibility issues with her testimony. She has a very close personal and working relationship with Moser. Moyer has resided with him since 1994. She is an employee of his brokerage and testified "I take care of just about everything." She testified that "[I] prepare tax documents" and "I take care of all the accounts, trust accounts, operating accounts." In 2002, Statewide Real Estate Services had Moser as its president, secretary and treasurer, and Moyer as its vice president.<sup>21</sup> She had an obvious interest in protecting Moser from discipline that might adversely affect her personal relationship with him, the success of the brokerage and, consequently, her income.

If Moyer had simply checked the wrong box in one instance, her testimony on this issue might be more believable. However, she prepared 2002 license renewal applications for three

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<sup>17</sup> Other than the answer to the complaint, there are no statements by attorney Wadsworth in the hearing record.

<sup>18</sup> Exh. 1, p. 32.

<sup>19</sup> The settlement agreement in the lawsuit does not identify Moser as an officer or former officer of the corporation. (Exh. 1, pp. 179-93) The agreement refers to Alaska Associated Realty, Inc. as Cloyd Moser's firm ["his firm"]. (Exh. 1, p. 185) It is noted, however, that page 15 of the settlement agreement was not entered in evidence, and neither party referenced this omission at the hearing. The missing page appears to be a signature page. Moyer testified that the corporation was "Cloyd Moser's business." (Direct exam of Moyer, tape 1B)

<sup>20</sup> Exh. 1, pp. 54, 140.

<sup>21</sup> Exh. 1, p. 197.



individuals – Moser, his father and herself.<sup>22</sup> All three were defendants in the Cole case. In all three applications she checked the “no” box in response to question 5. Moyer was a licensed associate broker in Alaska. At the hearing, she characterized the fraudulent notarization allegation in the complaint as “a notary issue, not a real estate license issue.”

When asked if she discussed any issues with Moser in connection with his 2002 renewal application, Moyer responded “no.” Moser testified “absolutely not” when asked if he had any discussion with Moyer in preparing the application. However, Moser admitted “I handed her the certificates” for continuing education requirements. More likely than not, discussion at some point, even briefly, would have taken place regarding the continuing education certificates.

Although Moyer was consistently composed and appeared well prepared for questioning throughout her direct examination, one exception is notable. When asked if she knew about the Cole case at the time she prepared Moser’s renewal application on January 21, 2002, she responded “You know, if there was a lawsuit I wasn’t conscious of there, [sic] it being a lawsuit against us.” At this moment in her testimony, for the only time during her testimony, Moyer’s face became flushed. It is improbable that she would not have known of this lawsuit at the time given the stakes in the litigation, the fact that she was a defendant, and the fact that the case was a year and a half old.

Moyer also gave equivocal answers regarding her knowledge of the lawsuit. She testified “I was not clearly aware” (emphasis added) of the lawsuit. When asked if she ever had any personal conversations with Erwin Moser about the Cole case and her status as defendant, Moyer replied “Umm. [pause] I don’t remember any in depth conversations about it.” (emphasis added) When asked during cross-examination if she was represented by attorney Brent Wadsworth, Moyer responded “I don’t know if he was ever representing me” and “I never had any conversations with Brent Wadsworth.” “If he filed briefs on my behalf – unbeknownst to me. [sic]” Yet, Wadsworth prepared a lengthy and detailed answer to the complaint representing her on September 20, 2000. Later, during her cross-examination at the hearing, when Wadsworth’s signature on the answer to the complaint was brought to Moyer’s attention and she was asked if she knew that he was representing her, Moyer responded “apparently he was, yes.” Moyer admitted to copying documents for Wadsworth in connection with the lawsuit, but evidence in

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<sup>22</sup> To avoid a disciplinary proceeding as a result of the Cole case and of Moyer’s failure to address the suit in her 2002 renewal application, Moyer forfeited her real estate associate broker license by allowing it to lapse on January 31, 2004, and agreeing with the commission not to seek re-licensure. (Cross-exam of Mandel, tape 1A; Cross-exam of Moyer, tape 1B)

this case did not establish when she did so. Moyer's testimony that she "expected I'd be called as a witness" in the lawsuit also contradicts her assertion that she was not aware of the lawsuit. Additionally, Moyer testified that she gave a deposition in the lawsuit, although it was not established at the hearing when the deposition took place.<sup>23</sup> These statements by Moyer allow an inference that more likely than not she was aware of the lawsuit when she completed Moser's 2002 renewal application.

To summarize, Moyer's testimony that there was a lack of discussion between she and Moser about the lawsuit is not believable. She also was not truthful in testifying about her unawareness of the Cole case at the time she completed Moser's 2002 license application.

Given all of the above considerations, Moyer and Moser did not present as credible witnesses regarding their professed states of mind concerning the "no" response to question 5 in Moser's January 21, 2002, renewal application. Moyer did not just say she forgot about the lawsuit when checking the box for question 5, she took the position that she did not know about the suit. Her "no" answer to question 5 in the application more likely than not was an intentional act, as opposed to an oversight. This conclusion allows greater skepticism of Moser's credibility regarding his state of mind in determining whether he obtained a 2002 renewal license by deceiving the commission in response to question 5.

Based on the evidence and the preceding discussion, the administrative law judge concludes that the scienter element of deceit is met. Moser's "no" answer to question 5 was a deliberate misrepresentation of the fact that he was a defendant in the Cole case. He obtained a license by deceiving the commission in violation of AS 08.88.071(a)(3)(B).

2. AS 08.88.401(f)(2) – This statute provides that a person may not give false evidence to the commission or to a representative of the commission in an attempt to obtain a license. Scienter is not required to establish this statutory violation. However, scienter for deceit was established as addressed in the prior discussion. Substantial evidence exists in this case to establish that Moser gave false evidence in obtaining renewal of his 2002 broker license. In answering "no" to question 5, Moser falsely represented that he never had a lawsuit filed against him alleging dishonesty, fraud, misrepresentation or conversion of trust funds.

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<sup>23</sup> Because Moyer gave a deposition in the Cole case, she likely would have been in communication with the defendants' attorney at that time. There was no evidence to indicate the date Wadsworth ceased to represent defendants. Neither Wadsworth nor Cloyd Moser, who paid his fees, provided a statement in this case. (Affidavit of Erwin "Wynn" Moser, p. 2)

3. 12 AAC 64.130(1) – This regulation states that “acting or failing to act as specified in AS 08.88.071(a)(3)” are grounds for revocation or suspension of a license. Moser violated AS 08.88.071(a)(3)(B) (“procures a license by deceiving the commission”) as previously discussed. That violation provides a basis for concluding there is a violation of 12 AAC 64.130(1).

4. 12 AAC 64.130(11) – This catchall regulation states that “acting in violation of the provisions of AS 08.88” provides a basis for revocation or suspension of a license. Because Moser violated AS 08.88.071(a)(3)(B) as previously discussed, he is subject to discipline through revocation or suspension under 12 AAC 64.130(11).

5. 12 AAC 64.160(a) – This regulation states

Making any false or fraudulent representation or material misstatement on an application for a license, renewal, examination, or any additional material requested by the commission under 12 AAC 64.060(b) is grounds for revocation, suspension, or denial of a license.

Under this provision, even an innocent “false representation” or “material misstatement” meets the regulation’s standard for disciplinary sanctions. The division established by evidence in this case that it met these two bases for discipline under 12 AAC 64.160(a). Moser admitted that he made an innocent mistake in answering “no” to question 5 in his 2002 renewal application. The determination of whether there is a “fraudulent representation” involves application of the same elements as apply to deceit.<sup>24</sup> Since Moser engaged in deceit under AS 08.88.071(a)(3)(B), it follows that Moser made a fraudulent representation under 12 AAC 64.160(a) when responding “no” to question 5 of his 2002 license renewal application.

6. Delegation Defense – Moser’s assertion that he made an innocent mistake when completing the application and did not pay attention to the incorrect response raised the following legal issue as a defense: May a license applicant who certifies “the information in this application to be true and correct” avoid responsibility for providing false information to the Real Estate Commission because someone else prepared the application for him? There are no published cases in Alaska on point or addressing the issue in the broader context of license applications in general.

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<sup>24</sup> See City of Fairbanks, 952 P.2d at 1176.

An individual may not escape responsibility for false representations in an application by delegating preparation of an application to another individual. The applicant's obligation to provide accurate information to a licensing authority is non-delegable.

An applicant's personal accountability is indicated by the certification above a signature or by requiring the signature to be sworn. The Real Estate Commission's regulation at 12 AAC 64.160(a) also evidences this responsibility by prohibiting an applicant from making a false representation or material misstatement when seeking a license. The review of documents is a central task of a real estate broker, an individual who acts in a supervisory capacity.<sup>25</sup> Moreover, as a practical matter, the licensing agency (division) may not have the resources to investigate all of the representations in thousands of new and renewal applications it receives each year prior to granting or denying licenses. According to the hearing record in this case, license application questions seeking information about litigation involving an applicant have been part of the licensing process since at least 1983.<sup>26</sup> Additionally, AS 08.88.071(a)(3)(B) addresses a violation contingent on an individual having already procured a license. Laws for other professional licensing bodies make an applicant similarly accountable for information submitted.<sup>27</sup> Finally, to allow Moser's defense that Moyer should bear the blame for the incorrect response to question 5 would substantially emasculate the requirement of personal accountability for the contents of a license application under AS 08.88.401(f)(2) and 12 AAC 64.160(a). An applicant for a real estate license in Alaska, therefore, has an unavoidable personal legal obligation to truthfully answer questions in a license application.

The administrative law judge concludes that an applicant may not avoid personal responsibility for information in a license application based on the fact that another individual completed the application by delegation.

#### B. Sanctions

The Real Estate Commission has a variety of disciplinary sanction options under AS 08.01.075, including license revocation, suspension, probation, censure, reprimand, imposition of license conditions or educational requirements, and civil fine. These sanctions may be imposed singly or in combination, in the commission's discretion. AS 08.01.075(f) is a

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<sup>25</sup> See 12 AAC 64.065; 12 AAC 64.110.

<sup>26</sup> Exh. 1, pp. 239, 246, 253, 251, 259, 257, 265, 271, 280-81.

<sup>27</sup> See, e.g., AS 08.04.450(1) (accountants); AS 08.64.326(a)(1) (physicians); AS 08.87.200(5) (real estate appraisers).

constraint on the exercise of disciplinary discretion. The provision requires the commission to be consistent in applying disciplinary sanctions.<sup>28</sup>

There are no published cases in Alaska addressing facts similar to Moser's disciplinary case (broker renewal application with lawsuit not divulged). In the case In re Beaumaster, the Real Estate Commission revoked a license after the individual was convicted of a felony involving moral turpitude and misrepresented the status of his real estate license.<sup>29</sup> In Matter of Jackson, the commission recently denied a salesperson license to an individual based on AS 08.88.401(f)(2) for not fully revealing his criminal past in a license application by not identifying two felony convictions.<sup>30</sup>

While not binding on the commission, in a State Medical Board case, Matter of Marascalco, the board rejected a physician's assertion that he was absolved from responsibility for misrepresentations about his continuing education in his license application made by delegation.<sup>31</sup>

Regulatory bodies in jurisdictions outside Alaska also have disciplined real estate licenses based on applicants providing false information in license applications.<sup>32</sup> In Wanless v. Louisiana Real Estate Board, the Louisiana board revoked a real estate broker's license for falsely denying he was involved in any lawsuits involving litigation over real estate. The court affirmed the board's action, concluding that the question "[h]ave you had any suits over real estate filed against you during the past year?" was unambiguous and that the licensee had been named in a suit over the sale of real estate.<sup>33</sup> In Walker v. Florida Dept. of Business and Professional Regulation, the Florida Real Estate Commission revoked a real estate salesperson's license for obtaining a license by means of fraud, misrepresentation and concealment. On appeal, the court affirmed the commission's disciplinary action and held that undisputed circumstantial evidence was sufficient to support a finding that the salesperson's acts were intentional.<sup>34</sup>

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<sup>28</sup> The commission must explain a significant departure from prior decisions involving similar facts. See AS 08.01.075(f).

<sup>29</sup> See Beaumaster, Case No. RE-89L-42 (7/12/89 Order).

<sup>30</sup> See Jackson, Case No. 3054-04-001 (3/14 /05 Order).

<sup>31</sup> See Marascalco, Case No. 2800-98-036 (6/23/99 Order).

<sup>32</sup> See Walker v. Florida Dept. of Business and Professional Regulation, 705 So.2d 652 (Fla. Ct. App. 1998) (false representation in renewal application that licensee completed CE requirements); Georgia Real Estate Commission v. Syfan, 383 S.E.2d 605 (Ga. Ct. App. 1989) (licensee falsely certified in application that he had never been disciplined); Wanless v. Louisiana Real Estate Board, 147 So.2d 395 (La. 1962) (licensee failure to disclose lawsuit in renewal application).

<sup>33</sup> See Wanless, 147 So.2d at 404.

<sup>34</sup> See Walker, 705 So.2d at 654.

By comparison to the commission's other decisions and to persuasive (non-binding) precedents, revocation is too harsh a sanction based on the facts in this case; but a suspension is appropriate for Moser. The provisions of 12 AAC 64.130(1) expressly provide for suspension as a sanction when a licensee has violated AS 08.88.071(a)(3). Moser's suspension should be for 60 days, based on the seriousness of his misrepresentation (e.g., lawsuit directly bearing on his real estate activities) and the factual circumstances of the misrepresentation including those addressed in the credibility determinations.<sup>35</sup> Any one of the violations in this case justifies the suspension. In addition, a civil fine is warranted in the amount of \$2,000.<sup>36</sup> Because it is apparent that Moser did not sufficiently appreciate the importance of providing accurate information to the Real Estate Commission in the licensing process,<sup>37</sup> he should be required to attend a continuing education class covering general ethics for at least two hours, with the course selected approved in advance by the commission. A probationary period of one year should also apply to Moser after he returns to active status as a broker.

Moser's conduct in this case demonstrates untrustworthiness. The proposed disciplinary sanctions are necessary to protect the public and to preserve the integrity of the licensing laws administered by the Real Estate Commission. These sanctions will serve to deter Moser and other licensees from similar conduct in the future. The sanctions bear a direct relation to the government's regulatory goal of protecting the public.<sup>38</sup>

Moser argued that he should not be punished by the commission and that a suspension in this case is disproportionate to the error on the application. He expressed concern that a suspension will injure his reputation in the community and additionally could have a much greater financial effect on his business than would a fine.<sup>39</sup> His argument and concerns are premised on an innocent mistake, not deceit. Based on the information he provided in this proceeding, he is probably correct about the financial effect of a suspension. Discipline imposed against a licensee by the Real Estate Commission is not punishment though, as it furthers the regulatory goal of protecting the public from unfit practitioners.<sup>40</sup> Moreover, adverse financial

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<sup>35</sup> Untruthfulness occurring in a disciplinary proceeding may be considered in fashioning discipline. In the attorney discipline case Reinstatement of Wiederholt, the Alaska Supreme Court recognized that dishonesty by a licensee in the course of a disciplinary proceeding may be considered in denying reinstatement after revocation. See Wiederholt, 89 P.2d 771, 789 (Alaska 2003).

<sup>36</sup> Not all of the violations in this case justify a fine though. Violations of 12 AAC 64.130 are limited to revocation or suspension.

<sup>37</sup> See AS 08.88.401(f)(2); 12 AAC 64.160(a), (b).

<sup>38</sup> See Wendte v. State of Alaska, 70 P.3d 1089, 1094 (Alaska 2003).

<sup>39</sup> He also argued that a \$2,000 fine was unjust.

<sup>40</sup> See Wendte, 70 P.3d at 1094.

circumstances resulting from a licensee's discipline are not controlling factors to mitigate sanctions in this case.<sup>41</sup> Real estate brokers are engaged in a vocation that requires reliability and honesty.<sup>42</sup> Protecting the public interest is a paramount consideration.<sup>43</sup>

Moser also argued as considerations for mitigation that he previously disclosed to the commission in his license applications a 1988 lawsuit naming him as a defendant and a personal bankruptcy proceeding from which he received discharge in 1990.<sup>44</sup> These disclosures do not excuse his false answer to question 5 in his 2002 license renewal application.

Finally, in arguing the appropriateness of sanctions in this case, Moser focused on the fact that he reached a settlement with the division, and the agreed terms did not include a suspension. The agreement was, by its terms, subject to approval by the Real Estate Commission, and the commission rejected the memorandum of agreement. At that time, although no accusation had been filed yet, rejection of the settlement was within the commission's authority and the exercise of its discretion as final decisionmaker in disciplinary matters under AS 08.88.<sup>45</sup>

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<sup>41</sup> See Matter of Hanlon, \_\_\_ P.3d \_\_\_, Supreme Ct. Case No. S-11351, pp. 15-17 (Alaska, April 15, 2005) (effect of three-year suspension on attorney's career, personal reputation, and family not mitigating factors).

<sup>42</sup> See, e.g., Ranquist v. Stackler, 370 N.E.2d 1198, 1204-06 (Ill. App. 1977) (suspension of real estate salesperson license for demonstrating untrustworthiness); Missouri Real Estate Commission v. McCormick, 778 S.W.2d 303, 307-08 (Mo. Ct. App. 1989) (real estate broker disciplined based upon untrustworthy business dealings); Roman v. Lobe, 152 N.E. 461, 462-63 (N.Y. 1926) (Cardozo) ("The real estate broker is brought by his calling into a relation of trust and confidence. Constant are the opportunities by concealment and collusion to extract illicit gains. We know from our judicial records that the opportunities have not been lost."). See also Wendte, 70 P.3d at 1093 (real estate appraisers must be reliable and honest). See also Exh. 1, p. 195 ("Have you had a lawsuit filed against you alleging dishonesty . . . ?").

<sup>43</sup> The title of the Alaska Statutes regulating professional licensing (AS 08) contains many chapters that contemplate protection of the public and assuring competency of those providing the services regulated. See Allison v. State of Alaska, 583 P.2d 813, 816 (Alaska 1978).

<sup>44</sup> Exh. 1, pp. 266-67.

<sup>45</sup> See Wendte, 70 P.3d at 1090; AS 08.88.071; AS 44.62.500.

#### **IV. Conclusion**

Moser intentionally gave false evidence to the Real Estate Commission in obtaining renewal of his 2002 broker license in violation of AS 08.88.401(f)(2). His conduct provides a ground for discipline under AS 08.88.071(a)(3)(B), 12 AAC 64.160(a), 12 AAC 64.130(1) and 12 AAC 64.130(11). It is recommended that the Real Estate Commission suspend Moser's broker license for 60 days, impose a \$2,000 fine payable before his license may return to active status, require Moser to attend a 2-hour continuing education class on ethics for which his attendance is approved in advance by the commission, and place Moser on probationary status for one year after his license returns to active status.

DATED this 8<sup>th</sup> day of June, 2005.

By: Signed  
David G. Stebing  
Administrative Law Judge





IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ERWIN MOSER )  
)  
Appellant, )  
vs. )  
)  
ALASKA REAL ESTATE COMMISSION )  
)  
Appellee. )

3AN-05-9859 Civil/Appeal

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DEPARTMENT OF LAW  
OFFICE OF THE ATTORNEY GENERAL  
3<sup>RD</sup> JUDICIAL DISTRICT  
ANCHORAGE, ALASKA

OCT 04 2006

State of Alaska

Office of Administrative Hearings

**DECISION AND ORDER AFFIRMING THE REAL ESTATE COMMISSION'S  
JUNE 14, 2005 DECISION AND DENYING APPELLANT'S MOTION FOR A DE  
NOVO TRIAL**

On August 30, 2000, the estate of Madeleine Cole filed suit against Erwin Moser, alleging that he stole or dissipated \$4 million of the estate's property. On January 21, 2002, Moser filed an application for renewal of his broker license with the Division of Corporations, Business and Professional Licensing ("Division"). In that application, Moser answered "no" to the following question: "Have you had a lawsuit filed against you alleging dishonesty, fraud, misrepresentation, conversion of trust funds?" The estate's attorney contacted the Division, which then opened an investigation of Moser's conduct as a broker. Moser settled the lawsuit with the estate on March 10, 2003.

On November 12, 2004, the Division filed an Accusation against Moser. On June 8, 2005, the hearing officer prepared a proposed decision which found that Moser had violated the statutes and regulations as alleged by the Division. On June 14, the Alaska Real Estate Commission ("AREC") adopted the hearing officer's findings and suspended Moser's real estate broker license for 60 days, imposed a \$2,000 fine, required Moser to

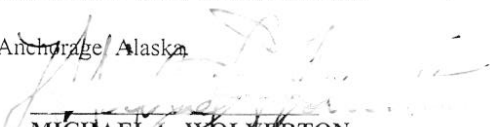
attend a two hour ethics class and placed him on probation for a year after his license suspension.

On December 15, 2005, Moser appealed the AREC decision. On January 17, 2006, the AREC filed its appellee brief. On February 14, 2006, Appellant replied. Then on March 17, Appellant Moser filed a Motion for *De Novo* Trial. Appellee opposed on March 24 and Appellant replied on March 31.

This court owes due deference to the findings of hearing officer David Stebing on factual issues, specifically including the credibility of witnesses. A review of the record indicates that the hearing officer conducted a thorough investigation and has left the court with no reason to question the officer's judgment or AREC adoption of that judgment as to whether Moser committed the acts alleged in the Accusation. Specifically, this court points to page 16 of the Appellee Brief, which enumerates nineteen facts left unchallenged by Appellant Moser; together, they make clear that Moser was aware of his involvement in the lawsuit but still indicated otherwise in his application. Moser's girlfriend filled out the applications, but Moser's knowledge of the "no" answer remains undisputed. In sum, there was substantial evidence upon which the AREC concluded that Moser violated the statutes at issue. Moser misrepresented his position to the AREC and his 60 day license suspension was a proper response.

Further, this court denies Appellant Moser's Motion for a *De Novo* Trial because justice does not require an independent review here. The hearing officer performed a complete, sufficient investigation in Moser's case. No evidence has been presented to suggest that the inquiry should be repeated. Therefore,

IT IS HEREBY ORDERED that the Real Estate Commission's June 14, 2005  
decision in this matter is AFFIRMED and the Motion for a *De Novo* Trial is DENIED.  
ENTERED this 28<sup>th</sup> day of September, 2006, at Anchorage, Alaska

  
MICHAEL L. WOLVERTON  
Superior Court Judge

I certify that on 10/2/06  
a copy of the above was mailed to:

1 - Josephson 1-17-6  
caw/secretary