

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

In the Matter of )

HENRY S. BARTOS )

OAH No. 08-0054-REC )

Board Case No. 3000-04-012 )

**DECISION AND ORDER**

**I. Introduction**

This is a civil disciplinary proceeding to address alleged misconduct by Henry S. “Hank” Bartos of Fairbanks, Alaska, who holds Real Estate Broker License No. 11409. After a hearing addressing a six-count Accusation, violations of real estate law have been proven with respect to two transactions. The violations support sanctions against Mr. Bartos consisting of a reprimand, a civil fine, and a requirement for remedial training.

**A. Procedural History**

The Department of Commerce, Community & Economic Development’s Division of Corporations, Business and Professional Licensing (“Division”) commenced this proceeding by an Accusation issued January 24, 2008. The matter was referred to the Office of Administrative Hearings to conduct a hearing and prepare a recommended decision.

The Chief Administrative Law Judge assigned the case to Administrative Law Judge James T. Stanley. The parties stipulated that the matter would not be heard, nor a recommended decision issued, within the 120-day period normally allowed under AS 44.64.060(d).<sup>1</sup> Mr. Stanley scheduled a hearing in Fairbanks for July of 2008, subsequently delayed at the request of Mr. Bartos to the latter part of August.

Mr. Stanley conducted a four-day hearing, with testimony from sixteen witnesses and approximately 3000 pages of exhibits taken into evidence. Mr. Stanley subsequently resigned from state employment. He was not able to prepare a proposed decision before his employment ended.

---

<sup>1</sup> As required to make such a stipulation effective (*see* AS 44.64.060(d)), the Chief Administrative Law Judge concurred.

On January 26, 2009 the Chief Administrative Law Judge assigned the undersigned to complete the case. A telephonic status conference was held on February 13, 2009 to explore with the parties the best way to move forward. Counsel for both sides requested that the undersigned not consult with Mr. Stanley to learn his subjective impressions from the hearing, and this request has been honored.<sup>2</sup>

Counsel for Mr. Bartos requested that all non-telephonic witnesses be heard again in the presence of the new administrative law judge, essentially starting the hearing anew. Counsel for the Division requested that no new testimony be taken and that all credibility judgments be made based on the recorded testimony alone. After listening to the recording and reviewing all of the evidence, I grant the Division's request and deny Mr. Bartos's request.<sup>3</sup>

## **B. Evidence and Citations**

This case encompasses conduct that spans several years. The period straddles significant changes in Alaska's real estate laws. All references in this decision to statutes and regulations, unless otherwise specified, are to the statutes and regulations in effect at the time of the conduct alleged to be illegal in the particular count in question.

All of the proffered exhibits (Division 1-30 and Bartos A-X) were admitted. Objections to Division 5-8, 11, 12, 14-16, 22, and part of 10 were overruled at the hearing; the balance came in without objection.

This is a case governed by the Administrative Procedure Act, AS 44.62.330 – 640.<sup>4</sup> In such cases, relevant hearsay evidence is generally admissible, but it can only be used “to

---

<sup>2</sup> Apart from casual remarks about the length of the hearing and the fact that the testimony was conflicting, Mr. Stanley did not speak to me about the evidence prior to reassignment nor afterward. I have not seen Mr. Stanley's notes from the hearing. Mr. Stanley left no draft decision.

<sup>3</sup> The recording, while of low quality at times due to electronic interference, is clear enough that I could, with some effort and repeat listening, hear every word of all testimony of all witnesses. I believe the recorded testimony and its relationship to the exhibits gives me a substantial basis on which to make the necessary credibility judgments.

I note that use of a recording by a replacement hearing officer has been deemed sufficient to accord due process to the parties in cases where the person who originally heard the evidence is no longer available. *See Chocknok v. State, CFEC*, 696 P.2d 669, 676 n.10 (Alaska 1985). Taking further live testimony would impose enormous expense on both sides, and would run the risk of losing accuracy in situations where witnesses would, by virtue of prior rehearsal, be able to better anticipate cross-examination.

I note that it is only Mr. Bartos who desired additional live testimony, and that for the only two allegations on which I am inclined to find against Mr. Bartos I have essentially accepted his testimony, and that of his fact witnesses, at face value. Conversely, while I am inclined to make an important credibility judgment against the Division on the critical Count VI, the Division has made the election not to seek a further opportunity to offer evidence on that count.

<sup>4</sup> AS 44.62.330(a)(11) makes the act applicable to this case.

supplement or explain direct evidence;” it is “not sufficient by itself to support a finding unless it would be admissible over objection in a civil action.”<sup>5</sup> In some cases heard by this office, there is a stipulation or order prior to the hearing that specifies how this restriction will be administered, such as a requirement that hearsay that is not flagged by means of an objection will not be subject to the restriction. There was no arrangement of that kind in this case, and the result is that a number of items in the record, regardless of whether their hearsay nature was addressed in the hearing, are usable only in a supplementary or explanatory role. This is true of the interview transcripts offered by the Division, as well as the expert reports submitted by both sides.

### **C. Burden of Proof**

This is a disciplinary proceeding in which the Division seeks sanctions against an individual who already holds a license. The Administrative Procedure Act places the burden of proof on the Division in such a case.<sup>6</sup> The Division must prove each required element of each violation by a preponderance of the evidence.<sup>7</sup>

## **II. Overall Factual Background**

Henry S. “Hank” Bartos started working in the real estate business in 1987.<sup>8</sup> He passed the examination for a broker’s license in 1995 and became a broker shortly thereafter.<sup>9</sup> He remained a licensed broker in good standing at all times through the events at issue in this case.<sup>10</sup>

The events of interest in this case begin in 2002. At that time, Hank Bartos was president and majority shareholder in Hank Bartos Realty, Inc., an Alaska corporation.<sup>11</sup> Lori Schooley, his primary business associate in recent years, was a minority shareholder and the treasurer of that corporation.<sup>12</sup> Hank Bartos Realty, Inc. owned a franchise that did business as Century 21 Gold Rush, which had a main office in central Fairbanks and a branch in North Pole.<sup>13</sup> Mr. Bartos worked from the Fairbanks office and was the broker-in-charge.<sup>14</sup> Ms. Schooley worked

---

<sup>5</sup> AS 44.62.460(d).

<sup>6</sup> AS 44.62.460(e)(1).

<sup>7</sup> *See id.*

<sup>8</sup> Direct exam of Bartos.

<sup>9</sup> Ex. 10 at REC 470, 476.

<sup>10</sup> Ex. 10.

<sup>11</sup> Ex. 29; direct and cross-exam of Bartos; cross-exam of Schooley.

<sup>12</sup> *Id.*; Ex. 4 at REC 175.

<sup>13</sup> Ex. 25; cross-exam of Schooley.

<sup>14</sup> *See* Ex. 25 at REC 1908.

in the same office as an associate broker and as franchise-wide office manager. As office manager, her duties included financial management of the overall enterprise.<sup>15</sup>

For a short time beginning in August of 2003, the Century 21 franchise operated a second branch on the west side of Fairbanks.<sup>16</sup> Although there was some testimony about them at the hearing, the North Pole and west side branches are not relevant to any of the counts of the Accusation.

In 2003 Hank Bartos Realty, Inc. acquired a new franchise to open a Coldwell Banker office in Fairbanks. Coldwell Banker is a different real estate brand from Century 21, although both national master franchises were owned at that time by a single entity, Cendant Corporation. There is some precedent in Alaska for a single local entity or person to own two real estate franchises operating under different names.<sup>17</sup> The acquisition of a different brand occurred with knowledge of Cendant Corporation and of the Division (then called the Division of Occupational Licensing).<sup>18</sup> The Coldwell Banker office opened in early January of 2004, with Lee O'Hare as the supervising broker.<sup>19</sup> Its registered name was Coldwell Banker Gold Country.<sup>20</sup>

The Century 21 and Coldwell Banker offices held joint sales meetings. As is the case in MLS (Multiple Listing Service) meetings attended by licensees from many real estate offices, there is a potential for client confidences to be divulged during such multi-office meetings, and some participants were concerned about this possibility.<sup>21</sup> On the other hand, the joint sales meetings had the potential to be of great benefit to clients by getting the word out about properties on the market, and these Century 21-Coldwell Banker meetings began at a time when MLS was not as active as it might be in accomplishing that function.<sup>22</sup>

Financial management of the Coldwell Banker office, such as payment of commission checks and operation of a central trust account, fell under the overall office manager duties of Lori Schooley, the treasurer of the holding company.<sup>23</sup> Coldwell Banker transaction files were

---

<sup>15</sup> *E.g.*, direct exam of Schooley.

<sup>16</sup> Direct exam of Shuster.

<sup>17</sup> Direct exam of Royse.

<sup>18</sup> *E.g.*, Ex 25 at REC 1931.

<sup>19</sup> Direct exam of O'Hare.

<sup>20</sup> Ex. 26 at REC 2005.

<sup>21</sup> *E.g.*, direct exam of O'Hare and Burrows. Although there was a great deal of testimony at the hearing about the joint sales meetings, no count of the Accusation addresses that issue and the Division has not isolated any specific allegation of misconduct during the meetings.

<sup>22</sup> Cross-exam of Schooley.

<sup>23</sup> *E.g.*, testimony of Schooley and O'Hare.

duplicated and held both at Coldwell Banker and at a common storage site with Century 21,<sup>24</sup> although there is no evidence that Century 21 licensees had access to Coldwell Banker files or vice versa.

On April 5, 2004 Lee O’Hare resigned as broker at the Coldwell Banker office.<sup>25</sup> Lori Schooley registered as broker of record for Coldwell Banker Gold Country in her stead, remaining in that capacity until 2006.<sup>26</sup>

When he began to contemplate operating a Coldwell Banker franchise, it was Hank Bartos’s plan to operate it through a limited liability company called Gold Standard Real Estate Services, LLC. Both he and Schooley seem to have begun to think of Hank Bartos Realty, Inc. as “Gold Standard” by 2004. The actual process of setting up the LLC was unhurried, however, and it was not organized until August of 2005. It apparently took over the franchises of the previous holding company within the next year or two. Ownership percentages in the new holding company were essentially unchanged, with Bartos holding a 70% interest and Schooley the remainder.<sup>27</sup>

### **III. The Counts of the Accusation**

#### **A. Count I (Role of Lori Schooley)**

The first count of the accusation is premised on the allegation that Lori Schooley continued to function as Hank Bartos’s “licensed assistant” at Century 21 after she became the broker at Coldwell Banker in April of 2004. (As will be discussed in part III-A-2, a “licensed assistant” is a real estate licensee who acts as a subordinate assisting another licensee with transactions by performing duties for which a license is required.) The division contends that such an arrangement would place Bartos, as the broker of the Century 21 office, in violation of five legal requirements.

#### ***I. Facts***

Lori Schooley registered as broker of the Coldwell Banker Gold Country office on April 7, 2004.<sup>28</sup> She remained in that capacity until late 2006 or early 2007. There is no dispute that, concurrently with her work as broker at Coldwell Banker, she continued as the administrative

---

<sup>24</sup> Direct and cross-exam of O’Hare; direct exam of Schooley.

<sup>25</sup> Ex. 26 at REC 1993.

<sup>26</sup> Ex. 26 at REC 2008, 2020.

<sup>27</sup> Ex. 25, 26, 30; direct exam of Bartos; testimony of Schooley (whole paragraph).

<sup>28</sup> Ex. 26 at REC 2008.

office manager for all of the offices owned by Hank Bartos Realty, Inc., overseeing the staff support in those offices and writing checks for office disbursements.<sup>29</sup> It is also undisputed that she continued to administer the business of the holding company, Hank Bartos Realty, Inc., of which she was the treasurer.<sup>30</sup> She was paid a salary for this work.<sup>31</sup> The disputed factual question is whether Ms. Schooley *also* functioned as a “licensed assistant” to Mr. Bartos in connection with the transactions of Century 21 Gold Rush. There were several discrete elements of the Division’s case addressed to this issue. They will be numbered so they can be referred to easily in later discussion.

(1) *Check and business card, May 2004.* The Division proved that on May 3, 2004 (shortly after she had assumed the Coldwell Banker duties), Lori Schooley wrote a check on the general account bearing a Century 21 logo to pay a former Century 21 salesperson for a commission earned on a Century 21 transaction.<sup>32</sup> The Division proved that on that occasion Ms. Schooley included with the check a business card showing herself as a Century 21 “sales associate.”<sup>33</sup>

(2) *Write up offer, August 2004.* The Division proved that on one occasion in August of 2004, Hank Bartos agreed with a Century 21 client upon an offer that the client wished to present, but was unable to get together with the client before going out of town for a short time. He asked Schooley to meet with the client and write up and present the offer on his behalf, and she did so; he then completed the rest of the transaction.<sup>34</sup> Coldwell Banker was already the listing office in the transaction.

(3) *Occasional substitute broker.* The Division proved that Ms. Schooley infrequently filled in as supervising broker at Century 21 when Bartos was out of town for short periods, primarily on occasional weekends in the summer when Bartos liked to attend dog shows.<sup>35</sup>

(4) *Kendrick Court transaction, 2005.* The Division proved that Ms. Schooley became involved in a mid-2005 transaction involving 389 Kendrick Court in Fairbanks, even though Coldwell Banker Gold Country was neither the listing nor selling office for the property. She

---

<sup>29</sup> Direct and cross-exam of Schooley; direct and ALJ exam of Richardson. All checks for all offices were apparently written on a consolidated account.

<sup>30</sup> *Id.*

<sup>31</sup> ALJ exam of Schooley upon recall.

<sup>32</sup> Direct exam of Shuster; Ex. 13 at REC 739.

<sup>33</sup> *Id.*

<sup>34</sup> Cross-exam of Bartos; Ex. 20. This is the Sprucewood Court transaction, discussed at more length in connection with Count III.

<sup>35</sup> Cross-exam of Bartos; ALJ exam of Schooley.

acted on behalf of Century 21 Gold Rush, the listing office. The Kendrick Court property was one that had come into the Century 21 inventory before Schooley went to Coldwell Banker, and so she was familiar with it.<sup>36</sup>

389 Kendrick Court was a Cendant Corporation relocation property. These were properties for which Cendant, then the owner of the master franchises for both Century 21 and Coldwell Banker, had a contractual commitment (typically to an employer such as Alyeska Pipeline) to relocate the owner, market the property, and buy the property if it did not sell.<sup>37</sup> Cendant relocation properties required unique procedures and paperwork, for which Schooley had special training.<sup>38</sup> Cendant knew her and wanted to work with her.<sup>39</sup> 389 Kendrick Court had permafrost problems and seems to have been a difficult property to market, and Cendant appears to have been a disgruntled client.<sup>40</sup>

Schooley was extensively involved in the transaction, working closely with Cendant over a period of several months,<sup>41</sup> making herself available to discuss a pending offer,<sup>42</sup> and even stating on one occasion that “I [Schooley] will be happy to reassign this property to another agent within Century 21 Gold Rush.”<sup>43</sup> In correspondence with Cendant, Century 21 staff referred to her as Hank Bartos’s “assistant.”<sup>44</sup>

(5) *Commission sharing.* Perhaps the most arresting item of proof offered by the Division on the “licensed assistant” issue was a transcript of sworn testimony Hank Bartos gave in a deposition on September 27, 2005.<sup>45</sup> On that occasion, Bartos testified as follows:

- Q. (by Mr. Wallace) You make any money as a broker for Century 21 Gold Rush?  
A. No.  
Q. Have you ever?  
A. Yes. From time to time.  
Q. When is the last time you made any money as a broker for Century 21 Gold Rush?

---

<sup>36</sup> Cross-exam of Schooley.

<sup>37</sup> Direct exam of Schooley and Sandberg.

<sup>38</sup> *Id.*; redirect exam of Schooley.

<sup>39</sup> Cross-exam of Schooley.

<sup>40</sup> Ex. 22 at REC 1360-61.

<sup>41</sup> Ex. 22.

<sup>42</sup> Ex. 22 at REC 1378; cross-exam of Schooley.

<sup>43</sup> Ex. 22 at REC 1360.

<sup>44</sup> Ex. 22 at REC 1368.

<sup>45</sup> Ex. 4. The testimony was given in a deposition connected with *Packard v. Bartos*, No. 4FA-04-1389 CI (Fairbanks Superior Court), a lawsuit related to the matters addressed in Count VI.

A. Again, I don't understand the question. You know, the way I get paid is when I do a transaction, I don't pay any cost to the agency. My advertising fees and everything else is paid by the agency.

If a transaction that I'm involved in closes, then I get a – you know, whatever that commission split is, split with Schooley on a 70/30 basis.

Q. Is Lori Schooley a broker?

A. Yes.

\* \* \*

Q. . . . Does Lori Schooley get paid, make any money as a broker for Century 21 Gold Rush?

A. She gets paid a 30 percent of transactions that I do, and she gets paid a monthly stipend for the number of hours that she puts in. She's also the supervising broker at Coldwell Banker. And since we couldn't pay her, we gave her 30 percent of the business.

Q. But the business itself doesn't make any money, right?

A. Well, that's – that's – that's the facts. Hopefully, it won't always be that way, but that's – that's the way it is in this competitive market. You'll find that most real estate brokers in this town don't make a lot of money.<sup>46</sup>

Read literally, this testimony seems to indicate that Ms. Schooley shared directly in Hank Bartos's Century 21 commissions in 2005, a year when she was the broker at Coldwell Banker. At the hearing in this case, Bartos flatly denied that this was so:

Q. (by Mr. Auth) [Quotes deposition testimony] Is that correct?

A. Well it depends on how you're looking at it. As a Century 21 broker, if I had been in a transaction and she assisted on it, she would get paid 30 percent of my transactions. But when she became the broker over at Coldwell Banker, that ceased. She – she was not my assistant anymore and she didn't get paid anything for transactions.

Q. Well this deposition was taken at the time when Schooley was the broker at Coldwell Banker, correct? September 27, 2005, correct?

A. Yes. But, she was not my assistant, and – she got paid a salary for being the broker then. She didn't get 30 percent, you know, of my commissions. She got 30 percent ownership in the company, that was her compensation. But she got the short end of that stick because the company has never made a profit.

Q. But you say in the answer, in the present tense, she gets paid a 30 percent of transactions that I do. That's what you said in the deposition. Correct?

A. When she was -- was my assistant.

---

<sup>46</sup> Ex. 4 at REC 174-5. As an admission, the deposition testimony is not hearsay and is not subject to the restriction on hearsay in AS 44.62.460(d).



- Q. That's not what you say there. You're speaking in the present tense.
- A. Well, I think you need to look at the big picture and what the big question was. It – I didn't read it, hear it that way. She got 30 percent of the company because I couldn't pay her what she was worth. She was not my assistant, she was not getting 30 percent of my transactions. I -- I don't know what I need to do to make that any clearer.<sup>47</sup>

The Division did not ask Lori Schooley, the financial person for Hank Bartos Realty, Inc., about whether or in what way she shared in Century 21 commissions after she went to Coldwell Banker. It did not use Commission subpoena power or other means to obtain financial records that would put the question to rest. Although the question is close, I find that the Division did not prove that Lori Schooley shared in Hank Bartos's Century 21 commissions after she became broker at Coldwell Banker, except insofar as she received indirect benefit as a shareholder in the holding company.

## 2. *Analysis*

The Division contends that Lori Schooley served as Hank Bartos's "licensed assistant" at Century 21 after she became broker at Coldwell Banker. Alaska real estate law refers to "licensed assistants," but does not define the term.<sup>48</sup> From the context, the term denotes a person who, in a subordinate role, assists another person who also holds a real estate license with transactions by performing duties "for which a license is required."<sup>49</sup>

The Division proved items (1) through (4) above, failing to prove item (5). Items (1) through (3) cannot fairly be said to place Lori Schooley in the role of Hank Bartos's licensed assistant. Item (1) showed only that Schooley, the treasurer of Hank Bartos Realty, Inc., wrote the checks for all of the affiliated entities, including Century 21 Gold Rush—not an activity requiring a license—and that on one occasion only a few weeks after her move, she used an outdated business card. Item (2), although it presented problems that will be addressed in another count, fundamentally put her in the role of a fellow broker filling in for Bartos while he was out of town, not in the role of a licensed assistant. Item (3) placed her in the traditional role of a broker watching another broker's office during a brief absence. There was uncontroverted testimony at the hearing that this is a common arrangement,<sup>50</sup> and it is one that the

---

<sup>47</sup> Cross-exam of Bartos (hearing audio file 4 at 1:57:08 – 1:59:23).

<sup>48</sup> See AS 08.88.398.

<sup>49</sup> See *id.*; 12 AAC 64.140(b) ("unlicensed assistant" may not be assigned duties "for which a license is required").

<sup>50</sup> Direct exam of Royse.

Commission's regulations appear to contemplate;<sup>51</sup> in any event, the arrangement did not make Schooley a licensed assistant.

Item (4) did place Schooley in the licensed assistant role, albeit in only a single transaction. In the Kendrick Court transaction Schooley functioned as, and was held out as, Hank Bartos's "assistant" as she performed functions, including some requiring licensure, over the course of several months. Bartos was not unavailable during this entire period and she was not serving as his substitute. The remainder of this discussion will focus on the legality of the licensed assistant arrangement proven in item 4.

The Division contends that Schooley's licensed assistant role violated a long list of statutes and regulations, taken up one at a time below:

*Violation of AS 08.88.398.* This is the only provision of law directly addressing licensed assistants. It allows a salesperson or associate broker to "act as a licensed assistant to a real estate licensee other than the broker who employs the salesperson or associate broker" if four conditions are met, including that the employment arrangement be "in writing" and that it be "approved in writing by the broker of the licensee who employs the assistant."<sup>52</sup> The Division apparently alleges that Schooley's arrangement with Bartos violated AS 08.88.398 because it did not comply with these two of the four conditions.<sup>53</sup>

The problems with this legal theory are several. First, the Division did not inquire whether Schooley and Bartos's employment arrangement, if any, was in writing, and did not prove that it was not. Second, the Division also did not prove that Hank Bartos's broker—who would be Hank Bartos himself—did not approve the arrangement in writing. Third and most fundamentally, AS 08.88.398 only regulates the circumstances under which associate brokers and salespeople can act as licensed assistants; it speaks to the consensual arrangement between supervising brokers that must accompany such an arrangement. Lori Schooley was neither an associate broker nor a salesperson, but rather was a broker in her own right. AS 08.88.398 does not address or regulate the circumstance where a broker acts as licensed assistant to another

---

<sup>51</sup> 12 AAC 64.077 refers to "the broker or an associate broker designated by the registered broker to supervise transactions or licensees during the broker of record's absence." This regulation requires notification of the Commission *if* this designated broker is to "sign for the broker of record on a license application," but it does not otherwise require Commission involvement in such temporary coverage arrangements.

<sup>52</sup> AS 08.88.398(1) and (2).

<sup>53</sup> Accusation at 3.

broker. This does not mean that it is always permissible for brokers to enter into such an arrangement, but any illegality does not flow from AS 08.88.398.

*Violation of AS 08.88.291.* Closer to the mark is the Division's reliance on the basic requirements found in AS 08.88.291(a). That provision required Hank Bartos, as the registrant of the Century 21 Gold Rush office, to "inform the commission of . . . the names of the real estate licensees who are employed at each office." When Bartos permitted Schooley to function as a licensed assistant with respect to the Kendrick Court transaction, he did not amend his registration to indicate that she was doing the work of the Century 21 office,<sup>54</sup> creating a potential problem with this requirement. However, it has not been established that he *employed* Lori Schooley in connection with this work, and the reporting requirement in AS 08.88.291(a) relates to licensees "employed" at each office. As used in AS 08.88, "employ" ordinarily seems to denote to hire for compensation.<sup>55</sup> It has only been established that Lori Schooley was compensated for her work as a broker at Coldwell Banker and for her office management duties. Her *ad hoc* assistance on the troublesome and unusual Kendrick Court transaction may have been uncompensated, and thus may have been performed simply as one broker assisting another as a courtesy. A single transaction conducted on that basis would not violate AS 08.88.291(a).

*Violation of AS 08.88.321(b).* This statute requires that the "license certificate of each licensee working in the broker's principal office shall be displayed in that office." The Division has specifically alleged that Bartos violated this provision in connection with Schooley's role. However, the Division did not seek, and did not obtain, any testimony about whether Schooley's license was displayed at Century 21.<sup>56</sup> Insofar as we can tell, moreover, Schooley did most or virtually all of the Kendrick Court work from the Coldwell Banker office.<sup>57</sup> The Division made no effort to prove otherwise.

*Violation of 12 AAC 64.075(a).* This regulation prohibits an individual from being involved in "activities requiring licensure under AS 08.88 until the individual's employing broker signs and delivers to the commission a notice of employment of the individual and the individual's license certificate is delivered to the broker by the licensee or the commission." The

---

<sup>54</sup> See Ex. 25.

<sup>55</sup> No variant on the word "employ" is defined in the chapter, but the word is used in at least one context that clearly involves compensation: AS 08.88.398(3) (licensed assistant may only be employed if person assisted takes responsibility for "wages and appropriate taxes").

<sup>56</sup> It might be quite reasonable to speculate that it was not, but in the absence of any evidence, no finding can be made. It is the Division's responsibility to establish each element of every violation it alleges.

<sup>57</sup> Ex. 22 at REC 1342, 1352, 1355, 1372-4.

prohibition is directed at individuals who have “employing brokers.” Thus, if Schooley was indeed employed by Bartos in connection with Kendrick Court, there might conceivably be a violation by Schooley. The regulation is not directed at the employing broker, and therefore there could not be a violation of this particular regulation by Bartos.

*Violation of 12 AAC 64.110(e)(6).* 12 AAC 64.110(e) requires brokers, “before operating any office or branch office, [to] register the office or branch office with the commission on a form provided by and approved by the commission.” Subparagraph (6), the provision the Division alleges that Mr. Bartos violated, requires the broker to place on that form the “name and license number of all licensees employed by the broker at the office.” As noted above, the Division did not prove that Ms. Schooley was “employed” at the Century 21 office.

*Summary regarding Count I:* In connection with the conduct at issue in Count I, the Division has not shown that, in the single proven instance where Lori Schooley acted as Hank Bartos’s licensed assistant, her role represented a violation of any existing legal stricture that applied to Hank Bartos.

**B. Count II (Role of Noelle Childress)**

Count II focuses on an arrangement by which a real estate salesperson at the Coldwell Banker office conducted Century 21’s property management business for a time. The Division contends that Hank Bartos’s responsibility for this arrangement placed him in violation of six statutes and regulations.

***I. Facts***

From early 2005 until approximately December of 2006, Noelle Childress was a licensed real estate salesperson who hung her license at Coldwell Banker Gold Country, under the supervision of Lori Schooley. Nonetheless, beginning in December of 2005 and continuing for the ensuing year, she performed all property management duties for the Century 21 franchise.<sup>58</sup> The work included attempting to rent real property and collection of rents from tenants of real property.<sup>59</sup> The Coldwell Banker franchise did no property management work; all property management work Ms. Childress did was Century 21 work.<sup>60</sup>

---

<sup>58</sup> Ex. 14 at 801; Ex. 16; cross-exam of Bartos and Schooley.

<sup>59</sup> ALJ exam of Bartos; Ex. 13 at 726.

<sup>60</sup> Cross-exam of Schooley; *see also* Ex. 13 at REC 726 (Century 21 ads for rental properties listing Childress as the contact).

It is undisputed that Ms. Childress physically performed this work at and from the Coldwell Banker office, not at or from the Century 21 office.<sup>61</sup> She began doing the work when Century 21 lost its property manager and no licensees in that office wanted to take over the task, with the expectation that it would be a temporary arrangement.<sup>62</sup> Either before or quite soon after she took over, Bartos and Schooley made a business decision to phase out the property management work. Century 21 divested most of the property management business, retaining about ten properties that either belonged to Hank Bartos or belonged to Stryker Brigade personnel deployed to Iraq, whom Bartos and Schooley did not wish to burden with the task of finding a new property manager.<sup>63</sup> The phase-out was prolonged somewhat by the extension of the Stryker deployment,<sup>64</sup> and was not complete by the end of 2006.<sup>65</sup> During the phase-out period, the work consumed about ten hours per week of Ms. Childress's time.<sup>66</sup>

Although the question was never explored directly at the hearing, one must infer that Ms. Childress did the Century 21 property management work at Hank Bartos's behest. The direct instruction to Ms. Childress to do so came from Lori Schooley and a person named Mike Cooper.<sup>67</sup> However, in his testimony Mr. Bartos referred to the arrangement as something "we did" as a "joint venture" between the brokerages because "I" [Bartos] did not wish to leave a soldier in Iraq without a manager.<sup>68</sup> Moreover, as the broker of the Century 21 office, Mr. Bartos would have had ultimate control over the handling of the Century 21 property management contracts.

## 2. *Analysis*

The Division has suggested six legal provisions that, in its view, Bartos violated by his involvement in the property management arrangement. They are addressed one at a time below.

*Violation of AS 12.64.550(a).* The work Noelle Childress did for Century 21 from December 2005 to December 2006, which included attempting to rent real property and collection of rents from real property for others, involved property management real estate

---

<sup>61</sup> *E.g.*, cross-exam of Schooley

<sup>62</sup> Ex. 16 at 926; cross-exam of Schooley.

<sup>63</sup> Re-direct exam of Schooley; cross-exam, re-direct exam, and ALJ exam of Bartos.

<sup>64</sup> *Id.*

<sup>65</sup> Ex. 16 at 926.

<sup>66</sup> Redirect exam of Schooley.

<sup>67</sup> Ex. 16 at 926.

<sup>68</sup> Cross-exam of Bartos.

transactions for which a real estate license is required.<sup>69</sup> Since 1994, a Board regulation, 12 AAC 64.550, has required that “[a] licensee engaged in property management shall conduct property management activity in the registered name of the real estate company with which the licensee is affiliated.”<sup>70</sup> There are no exceptions to this requirement for short-term assignments, part-time work, winding down a business, or any other circumstance (these circumstances may affect how much discipline, if any, should be imposed, but they do not bear on the underlying legality of the conduct). In 2005-2006, the “registered name” of the real estate company with which Noelle Childress was affiliated was Coldwell Banker Gold Country.<sup>71</sup> Accordingly, Noelle Childress was prohibited by regulation from doing Century 21’s property management work—and working in name of Century 21—while she hung her license at Coldwell Banker.

In this discipline case the sole respondent is Hank Bartos, and therefore the question is whether Mr. Bartos’s conduct in this arrangement, as opposed to that of Noelle Childress, was contrary to 12 AAC 64.550. The first question is whether that regulation applies to Bartos at all, since he is a broker and would not in common parlance be referred to as a real estate “licensee,” and the regulation only restricts “licensees.” In the real estate statutes and their implementing regulations, the term “licensee” encompasses brokers “unless the context clearly excludes brokers.”<sup>72</sup> The context of 12 AAC 64.550, the regulation requiring licensees to “conduct property management activity in the registered name of the real estate company with which the licensee is affiliated” does not clearly exclude brokers, and therefore Hank Bartos was subject to the regulation’s restrictions.

It does not follow, however, that Mr. Bartos violated the regulation. Hank Bartos caused the property management activities contracted to his office, Century 21 Gold Rush, to be managed by Noelle Childress at the Coldwell Banker office. Had Childress managed them in the name of Coldwell Banker, there might be a violation of this regulation by Bartos (and none by Childress). But Childress managed them in the name of Century 21, which was in fact the “registered name of the real estate company with which” Bartos was affiliated. Thus, *Bartos* did not, directly or indirectly, conduct property management activity in the registered name of any

---

<sup>69</sup> See AS 08.88.161; AS 08.88.900(a); AS 08.88.990(11) [cited as of 2005-2006; now renumbered AS 08.88.990(13)].

<sup>70</sup> 12 AAC 64.550(a).

<sup>71</sup> See Ex. 26 at REC 2008, 2017-8; Ex. 28; 12 AAC 64.112.

<sup>72</sup> AS 08.88.990(10) [cited as of 2005-2006; now renumbered AS 08.88.990(12)].

real estate company other than the one with which he was affiliated. Hence, the circumstances proved by the Division do not represent a violation of 12 AAC 64.550 by Mr. Bartos.

*Violation of 12 AAC 64.550(b).* This subsection provides, in relevant part, that “[a] licensee may not conduct property management activity for another person without a prior written property management contract.” No evidence was presented at the hearing to show that any properties were managed without prior written property management contracts.

*Violation of 12 AAC 64.075(a).* This regulation prohibits an individual from being involved in “activities requiring licensure under AS 08.88 until the individual’s employing broker signs and delivers to the commission a notice of employment of the individual and the individual’s license certificate is delivered to the broker by the licensee or the commission.” The prohibition is directed at individuals who have “employing brokers.” Noelle Childress was such an individual, but Hank Bartos was not.

*Violation of 12 AAC 64.110(e)(6).* 12 AAC 64.110(e) requires brokers, “before operating any office or branch office, [to] register the office or branch office with the commission on a form provided by and approved by the commission.” Subparagraph (6), the provision the Division alleges that Mr. Bartos violated, requires the broker to place on that form the “name and license number of all licensees employed by the broker at the office.” The Division has not explained how Bartos may have violated this provision. To be sure, in registering the Century 21 office at which he was broker, he did not list Ms. Childress as a licensee employed by him at that office. But Ms. Childress was not a licensee employed by him, nor was she at that office. This circumstance forms part of the reason that her activity was illegal—for her—under 12 AAC 64.550(a), but there was no violation of 12 AAC 64.110(e)(6) by Bartos when he accurately failed to list her as a licensee employed by him at the Century 21 office.

*Violation of AS 08.88.321(b).* This statute requires that the “license certificate of each licensee working in the broker’s principal office shall be displayed in that office.” It is undisputed that Ms. Childress, during the relevant period, was working in the Coldwell Banker office. There is no evidence that her license certificate was not displayed there.

*Violation of AS 08.88.291(a).* The first sentence of AS 08.88.291(a) reads: “A person licensed as a real estate broker shall, by registering with the commission, inform the commission of the person’s principal office and of any branch offices of the person’s real estate business and include in the information the names of the real estate licensees who are employed at each

office.” Hank Bartos appears to have done this during the relevant period,<sup>73</sup> or if he did not, any failure was not related to the Childress work at issue in Count II.

The second sentence of AS 08.88.291(a) reads: “A real estate licensee may do real estate business only through a principal office or from a branch office registered by the broker by whom the licensee is employed.” By doing real estate business “through” the Century 21 office, Noelle Childress may have violated this provision. The provision is a prohibition that only addresses licensees. Although, as noted above, the term “licensees” in AS 08.88 ordinarily encompasses brokers, it does not encompass brokers if “the context clearly excludes brokers.”<sup>74</sup> With respect to this particular sentence of § 291(a), the context clearly excludes brokers because the sentence is about licensees “employed” by a “broker.” Thus, the sentence does not apply to Hank Bartos, a broker.

The final sentence of AS 08.88.291(a) reads: “Failure of a real estate broker to maintain a place of business or to inform the commission of its location and the names and addresses of all real estate licensees employed at each location by the broker is grounds for the suspension or revocation of the broker’s license.” This sentence applies to Bartos, but he appears to have complied with it during the relevant period.<sup>75</sup>

*Summary regarding Count II:* In connection with the conduct at issue in Count II, the Division appears to have proved impermissible activity by Noelle Childress.<sup>76</sup> It has not, however, shown that any of the conduct represented a violation of any existing legal stricture that applied to Hank Bartos. It may be regrettable that Mr. Bartos would place one of Ms. Schooley’s licensees in a position where the licensee would be out of compliance with the laws that applied to the licensee, but there does not seem to have been a statute or regulation on the books in 2005-2006 that would expose Mr. Bartos to discipline for doing so.

### **C. Count III, First Allegation (Website)**

Count III is almost entirely devoted to a 2004 transaction regarding Sprucewood Court No. 13 in Fairbanks. That transaction is addressed in Part III-D below. A sentence early in the count raises a different issue, however: it alleges that “the website for Coldwell Banker at one

---

<sup>73</sup> Ex. 25; *see especially* Ex. 25 at 1931 (indicating full disclosure to the commission staff; staff subsequently permitted registration on multiple forms).

<sup>74</sup> AS 08.88.990(10) [cited as of 2005-2006; now renumbered AS 08.88.990(12)].

<sup>75</sup> Ex. 25.

<sup>76</sup> Ms. Childress, who was not a party to this proceeding, would not be bound by findings made in this proceeding and may contest them in any proceeding to which she is a party.



time identified Bartos as the ‘owner/broker,’ even though he was the broker of Century 21 only.” This is said to be an example of treating Coldwell Banker and Century 21 “as one company with several branches.”<sup>77</sup>

### ***1. Facts***

At some point prior to May of 2006, the Coldwell Banker Gold Country website listed “Hank Bartos” as “Owner/Broker.”<sup>78</sup> It also listed Lori Schooley as “Managing Broker.”<sup>79</sup> The site displayed the Coldwell Banker name and logo, but apparently did not contain any reference to Century 21.

There is no evidence regarding how long the website persisted in this form; the evidence establishes only that it appeared this way at one unspecified instant in time. There is no evidence regarding who caused the website to display Mr. Bartos as “Owner/Broker,” or regarding whether Mr. Bartos was aware of what was on the website. The Division neither sought nor obtained any testimony on these matters during the hearing.

### ***2. Analysis***

A real estate licensee may not “falsely claim to be licensed and authorized to practice under this chapter.”<sup>80</sup> Mr. Bartos, though licensed, was not authorized to practice as the broker of the Coldwell Banker office. Therefore, the claim on the Coldwell Banker website was false. The evidence does not establish, however, that it was Mr. Bartos who made the claim.

A real estate licensee may not advertise real estate “without including in the advertisement the broker’s business name registered with the department.”<sup>81</sup> If the Coldwell Banker website advertised real estate (it seems reasonable to speculate that it did, but there is no evidence of that fact in the record), then it did so without including Mr. Bartos’s business name that was registered with the department. The evidence does not establish, however, that Mr. Bartos was responsible for placing this advertisement.

Because of the lack of evidence connecting Mr. Bartos to the appearance of the Coldwell Banker website at the one, perhaps fleeting, moment in time when it displayed his name, no violation has been established.

---

<sup>77</sup> Accusation at 5.

<sup>78</sup> Ex. 13 at 732; cross-exam of Schuster.

<sup>79</sup> *Id.* at 733.

<sup>80</sup> AS 08.88.401(h)(5) [as of 2004 and thereafter].

<sup>81</sup> 12 AAC 64.130(8) [as of 1998 and thereafter].

**D. Count III, Second Allegation (Sprucewood Court)**

***1. Facts***

In the summer of 2004, Coldwell Banker Gold Country was the listing office for a condominium unit at Sprucewood Court in Fairbanks. Bill Burrows was the listing agent. The testimony at the hearing gave a detailed history of the listing, but only the following facts are relevant to the violations alleged in the Accusation.

The seller was William St. Pierre. After entertaining prior offers from prospective buyers Nancy Viale and Eric Morman, St. Pierre eventually accepted a second offer from Viale. The executed Purchase Agreement listed Coldwell Banker Gold Country as the listing office and Bill Burrows as listing agent; it listed Century 21 Gold Rush as the selling office and “Lori Schooley/Hank Bartos” on the line for selling agent.<sup>82</sup> Schooley, of course, was also the associate broker in charge of Mr. Burrows’s office.

Ms. Schooley wrote the offer that became the Earnest Money Agreement and Purchase Agreement while she was “filling in” for Mr. Bartos when he was out of town.<sup>83</sup> She did so at Hank Bartos’s express request; he asked, “Would you in my stead have this offer signed and presented.”<sup>84</sup> Bartos handled the rest of the transaction on his own.<sup>85</sup>

The second page of the Earnest Money Agreement and Purchase Agreement was entitled “Consensual Dual Agency Agreement.”<sup>86</sup> It provided that “The Buyer and Seller hereby give their consent to dual agency . . . . One company, C-21 Gold Rush/Coldwellbanker, will be representing the interests of both parties to this agreement.” There was a boldface line, “I hereby consent to Consensual Dual Agency as described above,” below which Viale signed as buyer and “L. Schooley for Hank Bartos” signed as her “agent.” No one signed on behalf of the seller on the signature line under the consent language, but St. Pierre entered his initials at the bottom of the document.

Lower down on the page there was a section beginning, “THE FOLLOWING AGENCY IS HEREBY CONFIRMED”. It recited:

As of 8-16-2004 the agent(s), Hank Bartos, of Century 21 Gold Rush  
is/are the agent(s) of (check one):

---

<sup>82</sup> Ex. 20 at REC 1113.

<sup>83</sup> ALJ exam of Schooley.

<sup>84</sup> Cross-exam of Bartos.

<sup>85</sup> Cross-exam of Schooley.

<sup>86</sup> Ex. 20 at REC 1112.

- The SELLER, exclusively
- The BUYER, exclusively
- SELLER AND BUYER (DUAL AGENCY)

Two boxes were marked. As shown above, the marks were machine-made rather than handwritten exes. Viale and “L Schooley for Hank Bartos” signed on the buyer and selling agent lines below this disclosure; the seller and listing agent lines were unsigned. As noted previously, St. Pierre initialed the bottom of the page.

This document was prepared by Ms. Schooley when she was representing the buyer in Hank Bartos’s stead.<sup>87</sup> She checked the two boxes deliberately, apparently using the first to capture her view of the role of the Century 21 office and the second because of the “umbrella” (her word) role of the holding company.<sup>88</sup> Coldwell Banker agent Burrows acknowledged at the hearing that the document was confusing.<sup>89</sup> He did not spend much time reviewing it since this was a second offer from Viale and since he would have assumed his broker knew how to fill the form out correctly.<sup>90</sup>

The file did contain a document with St. Pierre’s full signature that related to dual agency. This was an “Agency Disclosure” that St. Pierre and Burrows signed at the time of listing.<sup>91</sup> It described three kinds of agency—agent of the seller, agent of the buyer, and dual agency—and then had the following “Acknowledgement of Agency Disclosure:”

\_\_\_\_\_ of Coldwell Banker Gold Country will be working with me as (check one):

- a seller’s agent, exclusively
- a buyer’s agent, exclusively
- a dual agent, provided the other principal party agrees in writing.

The blank was not filled in. The ex was handwritten on this document. St. Pierre and Burrows were the only signatories. The signatures were dated April 28, 2004. At that time, the Century 21 office was not involved with the property; its involvement came later, when Viale entered the picture as a potential buyer.

<sup>87</sup> ALJ questioning of Schooley.

<sup>88</sup> Cross-exam of Schooley.

<sup>89</sup> Redirect exam of Burrows. Ms. Schooley would not acknowledge at the hearing that the document is confusing.

<sup>90</sup> *Id.*

<sup>91</sup> Ex. 20 at REC 1128.

The seller, William St. Pierre, was an experienced buyer and seller of real estate. He expressly discussed with Mr. Burrows the fact that “one company” was representing both buyer and seller in the final transaction, and he can be expected to have understood the dual agency role.<sup>92</sup> The buyer, Nancy Viale, had previously dealt with Ms. Schooley in an express dual agency situation (an earlier offer Viale had submitted on Sprucewood Court without Century 21 involvement) and she understood both Ms. Schooley’s position as Burrows’ supervisor and the fact that Century 21 and Coldwell Banker were co-owned.<sup>93</sup>

## 2. *Analysis*

Count III alleges the following illegal conduct by Bartos regarding the Sprucewood Court transaction:

- (i) that Bartos had a conflict of interest because \$2100 went to Coldwell Banker and \$2100 to Century 21 in the transaction, and they failed to disclose that conflict;
- (ii) that Bartos participated in a dual agency relationship with the buyer and seller but failed to disclose the dual agency.

For reasons that will become apparent, these two allegations will be evaluated in reverse order.

*Disclosure of dual agency.* In the Sprucewood Court transaction, Hank Bartos purported to be representing the buyer, and he delegated the initial stage of the transaction to Lori Schooley. The evidence is uncontroverted that he had given her authority to act and sign on his behalf.<sup>94</sup> Accordingly, he is responsible for her conduct. In so acting in his stead, she was doing more than the ministerial task of simply signing a document Bartos had prepared based on his authorization. She was developing the document herself, meaning that she was performing skilled professional services on behalf of Ms. Viale.

Since Lori Schooley was also Mr. Burrows’s supervising broker, and Burrows represented the seller, she was on both sides of the transaction, and a dual agency existed. Alaska Statute 08.88.396 governed such relationships at the time of the Sprucewood Court transaction.<sup>95</sup> That statute permitted a licensee to represent both the prospective seller and prospective buyer “only after the licensee informs both the seller . . . and the buyer . . . of the

---

<sup>92</sup> Cross-exam of Burrows.

<sup>93</sup> Direct and cross-exam of Schooley.

<sup>94</sup> Direct and ALJ exam of Schooley; cross-exam of Bartos.

<sup>95</sup> The statute “applies only to acts that occur before January 1, 2005.” AS 08.88.396(f).

dual agency representation and obtains written consent to the dual agency representation from both principals.”<sup>96</sup>

Ms. Schooley, on Mr. Bartos’s behalf, did make a timely written dual agency disclosure at the outset of this transaction. It claimed, however, both that Mr. Bartos was representing “the buyer, exclusively” and “seller and buyer (dual agency).” These are contradictory statements, and they render the disclosure defective. Moreover, Ms. Schooley did not obtain, as the statute requires, “written consent to the dual agency representation from both principals.” She obtained a signature only from the buyer. The seller’s signature line under the sentence “I hereby consent to Consensual Dual Agency as described above” has been left blank.

Ms. Schooley explains the missing consent from St. Pierre by speculating that “maybe Bill [Burrows] forgot” to get the signature.<sup>97</sup> It was not fundamentally Burrows’s responsibility to get the signature, however. The statute requires the licensee who will have the dual agency role to “obtain[.]” the needed consent, and it was the Schooley/Bartos combination who were acting in the dual agency role.

Counsel for Mr. Bartos appears to suggest that the April 28, 2004 “Agency Disclosure” that St. Pierre and Burrows signed suffices as a written consent by St. Pierre.<sup>98</sup> That document, though not completely filled out and thus perhaps of no value at all, was at most only a consent for Burrows and Coldwell Banker to assume a dual agency role in certain circumstances. It did nothing to authorize Century 21, Hank Bartos, or Lori Schooley as Hank Bartos’s designated representative (and thus acting for Century 21), to assume a dual agency role.

The Sprucewood Court transaction represented a violation of AS 08.88.396 by Mr. Bartos.<sup>99</sup>

---

<sup>96</sup> AS 08.88.396(c).

<sup>97</sup> Cross-exam of Schooley.

<sup>98</sup> *See* Ex. 20 at REC 1128, discussed above.

<sup>99</sup> This conclusion and the one regarding AS 08.88.391 that follows immediately below were reached without reliance on the testimony of either side’s expert witness at the hearing. The Division’s expert provided little analysis of this transaction, and seemed not to have read one of the controlling statutes carefully. Mr. Bartos’s expert gave a blanket opinion that Bartos and Schooley had acted correctly in the transaction, and then admitted on cross-examination that he had not reviewed the transaction documents before rendering the opinion. Reviewing the fully-executed Earnest Money Agreement and Purchase Agreement (Ex. 20 at REC 1111 to 1119) on the stand, he vehemently maintained that it was merely the buyer’s offer, repeatedly overlooking the seller’s initials on every page and the seller’s signature on REC 1118. The opinion of such an expert is not helpful in an adjudicative proceeding.

*Conflict of interest.* Alaska Statute 08.88.391 is the provision the Division alleges Mr. Bartos violated by failing to disclose a conflict of interest. At the time of the transaction, AS 08.88.391(c) defined a “conflict of interest” as follows:

In this section, “conflict of interest” is when a licensee

- (1) has a present ownership or leasehold interest in the property that is the subject of a transaction;
- (2) is whole or part owner of a business interest in the property being marketed or considered for purchase or lease;
- (3) represents a relative, as defined in AS 08.88.900(a), or a person with whom the licensee has a financial relationship if the relative or person has a present financial interest in the property being marketed or considered for purchase or lease;
- (4) receives compensation from someone other than a party to the contract or another party having a financial interest in the transaction;
- (5) receives compensation for community association management while simultaneously engaged as a property manager for a unit within the community association.

There is no evidence that Hank Bartos had an ownership or leasehold interest in the subject property, so subparagraph (1) does not apply. There is no evidence that he had a business interest in the property, so subparagraph (2) does not apply. It has not been shown that he represented a relative or person with whom he had a financial relationship in the sense contemplated by subparagraph (3). There is no evidence that he received compensation for community association management, so subparagraph (5) does not apply. Insofar as the Division has articulated a theory to make section 391 applicable to Mr. Bartos in this transaction, it seems to rely on subparagraph (4): that he was receiving “compensation from someone other than a party to the contract or another party having a financial interest in the transaction.”<sup>100</sup>

Because of ambiguous wording around the disjunctive “or,” subparagraph (4) can be read in two alternative ways. It can be read to provide that a conflict of interest occurs when a licensee either (i) receives compensation from someone other than a party to the contract or (ii) receives compensation from another party having a financial interest in the transaction. Alternatively, it can be read to provide that a conflict of interest occurs when a licensee (i) receives compensation from someone other than a party to the contract or (ii) receives

---

<sup>100</sup> Ex. 17 at 7 (Division’s expert report, relied on here solely as a statement of position); cross-exam of Sandberg.

compensation from someone other than another party having a financial interest in the transaction.<sup>101</sup> The Real Estate Commission has consistently read this subparagraph (4) by the first interpretation, such that a licensee has a disclosable conflict whenever the licensee receives compensation from a party having a financial interest in the transaction who is different from the licensee's principal.<sup>102</sup> This gives the conflict of interest statute substantial overlap with the dual agency statute, and any dual agency involving compensation to one party's licensee from the other party to the transaction represents a conflict of interest for that licensee. In this case, Bartos/Schooley filled a dual agency role, and they received compensation from St. Pierre through the Coldwell Banker commission, and so they had a conflict with respect to Viale.

Conflicts of interest are not prohibited, but they must be disclosed.<sup>103</sup> At the time of the Sprucewood Court transaction, the statute required that the licensee "disclose that conflict of interest at the time of initial substantive contact with the principals or agents of the principals and confirm the conflict of interest in writing to the principals or agents of the principals involved in the transaction as soon as possible after the initial substantive contact."<sup>104</sup>

Ms. Schooley did make a written disclosure relating to her dual agency contemporaneously with the initial substantive contact, but the disclosure is self-contradictory and therefore defective. Accordingly, she had an undisclosed conflict of interest while acting on behalf of Hank Bartos. Because she was acting as Bartos's delegee in the transaction, the conflict is his conflict as well.<sup>105</sup>

The Sprucewood Court transaction represented a violation of AS 08.88.391 by Mr. Bartos.

#### **E. Count IV (Rex Lane)**

Count IV is very similar to the main allegation in Count III. It focuses on a second transaction likewise involving Burrows, Schooley, and Bartos.

---

<sup>101</sup> The Division's expert appeared to acknowledge this ambiguity. Cross-exam of Sandberg.

<sup>102</sup> This interpretation is implicit in *In re Mehner*, No. 3002-02-005 (Alaska Real Estate Commission, adopted March 4, 2004), Amended [Decision] at 35-36 (dual agency created a conflict of interest under § 391); *In re Yoon*, No. 3004-95-011 (Alaska Real Estate Commission, adopted Sept. 10, 2003), [Decision] at 22; and *Moore v. Yoon*, No. S97-009 (Alaska Real Estate Commission, adopted June 25, 1998), [Decision] at 55. The 1998 decision is of limited value because it predated the current definition of "conflict of interest" in § 391. It was affirmed in *Yoon v. Alaska Real Estate Comm.*, 17 P.3d 779 (Alaska 2001).

<sup>103</sup> The current language of AS 08.88.391(a) limits disclosure to "persons adversely affected by the conflict." The version of § 391(a) in effect in 2004 was not limited in this way.

<sup>104</sup> Former AS 08.88.391(a) [1998-2004].

<sup>105</sup> Note that the role of a delegee places her in a different capacity from Noelle Childress in Count II, whose violation could not be imputed or transferred to Bartos.

***I. Facts***

In late 2004, Coldwell Banker Gold Country served as the listing office for a residential property at 722 Rex Lane in Fairbanks. Bill Burrows was again the listing agent. As in the case of Sprucewood Court, the testimony at the hearing gave a detailed history of the listing and an associated commission dispute between Mr. Burrows and Ms. Schooley, but only the following facts are relevant to the violations alleged in the Accusation.

The sellers were Charles and Elizabeth Slocum, and the buyer was Loretta Overway. Ms. Overway came to the transaction represented by Amy Gappa of Century 21 Gold Rush, whose supervising broker was Hank Bartos. The executed Purchase Agreement listed Coldwell Banker Gold Country as the listing office and Bill Burrows as listing agent; it listed Century 21 Gold Rush as the selling office and Amy Gappa as the selling agent.<sup>106</sup>

Ms. Gappa wrote the offer that became the Purchase Agreement. The second page of the Purchase Agreement was entitled “Consensual Dual Agency Agreement.”<sup>107</sup> It provided that “The Buyer and Seller hereby give their consent to dual agency . . . . One company, Century 21/Coldwell Banker, will be representing the interests of both parties to this agreement.” There was a boldface line, “I hereby consent to Consensual Dual Agency as described above,” below which all three principals and both agents signed.

Lower down on the page there was a section beginning, “THE FOLLOWING AGENCY IS HEREBY CONFIRMED”. It recited:

As of 11/16/2004 the agent(s), Amy Gappa/Bill Burrows, of Century 21 Gold Rush is/are the agent(s) of (check one):

- The SELLER, exclusively
- The BUYER, exclusively
- SELLER AND BUYER (DUAL AGENCY)

In contrast to the Sprucewood Court agreement, only one box was marked. As shown above, the marks were machine-made rather than handwritten exes. All principals and both agents signed on the appropriate lines below this disclosure.

Ms. Gappa presented the dual agency agreement to her client, Ms. Overway, because of Hank Bartos’s ownership interest in both real estate offices involved in the transaction. Although she does not have a detailed recollection of the surrounding discussions, it is more

---

<sup>106</sup> Ex. 21 at REC 1154.

<sup>107</sup> *Id.* at REC 1153.



likely than not that she told the buyers the reason she was asking them to sign the agreement. They signed voluntarily.<sup>108</sup> There was no testimony at the hearing regarding how the agreement was explained to the Slocums.

There was a dispute in connection with the closing of the Rex Lane transaction, the fundamental nature of which is disputed.<sup>109</sup> The dispute was eventually resolved by reducing the Coldwell Banker commission by the amount in dispute, and the reduction was then deducted from Mr. Burrows's share of that commission.<sup>110</sup> Both the buyer and the sellers obtained the deal they expected from the transaction; no financial adjustments were made at their expense.<sup>111</sup>

## 2. *Analysis*

Considerable testimony was taken at the hearing to establish or refute the notion that licensee Bill Burrows was treated unfairly by Bartos and Schooley in connection with the Rex Lane commission. Neither in the Accusation nor elsewhere, however, has it been contended that this alleged unfairness, which did not affect any of the principals to the transaction, is a basis for discipline under the real estate statutes and regulations. The Accusation instead alleges, as in the case of Sprucewood Court, that Bartos had an undisclosed dual agency role and an undisclosed conflict of interest in connection with the Rex Lane transaction.

The Rex Lane transaction had no parallel to the situation at Sprucewood Court in which Ms. Schooley, on behalf of Mr. Bartos, wrote an offer for the buyer while simultaneously supervising the seller's agent. The dual agency role allegedly played by Bartos in the Rex Lane transaction related only to the common ownership of the Century 21 and Coldwell Banker offices. Insofar as this circumstance alone created a dual agency, it was disclosed and consented to in a document signed by all three principals. The document did not have the fundamental internal contradiction and missing signatures that the same document had in the Sprucewood Court transaction. Moreover, insofar as the Division elicited testimony on the subject, the disclosure and consent document seems to have been adequately explained to the principals. The

---

<sup>108</sup> Cross-exam and ALJ exam of Gappa.

<sup>109</sup> Mr. Burrows, a Division witness, alleges that it was a mistake by Ms. Gappa in drafting the contract such that an additional \$2400 was due above what had been intended. Other witnesses allege that it was a mistake by Burrows in advertising that the property was in a fire service area when in fact it was not, so that the fire insurance premium due at closing was higher than expected. The eventual resolution involved a commission adjustment. The actual evidence of the amount of the adjustment, Division Exhibit 21 at 1146-7, is illegible. If one accepts the Division's allegations in Count IV, the adjustment appears to have been \$2810, a figure that does not perfectly match the Burrows explanation. It is possible that both explanations played a role.

<sup>110</sup> Direct exams of Burrows, Schooley, and Gappa.

<sup>111</sup> *Id.*

Division has not met its burden of proving that Mr. Bartos had an undisclosed or unconsented dual agency in connection with the Rex Lane transaction.

If there was a dual agency for Rex Lane, it may have created a conflict of interest that would likewise require disclosure. If so, disclosure took place. Because the disclosure occurred “at the time of initial substantive contact with the principals or agents of the principals,” it was timely under AS 08.88.391(a). The Division has not met its burden of demonstrating an undisclosed conflict of interest in connection with the Rex Lane transaction.

**F. Count V (Constitution Drive--Inadequate Supervision)**

Count V is the first of two counts devoted to a 2002 transaction and its aftermath. The distinguishing feature of the transaction was that the files of the real estate offices involved proved not to contain copies of an AS 34.70.010 disclosure statement that ought to have been present.

***1. Facts***

In 2002, Ed King of Century 21 Gold Rush assisted Dale and Nadia Packard in their search for a home to purchase. The Packards were first-time homebuyers without business sophistication.<sup>112</sup> On September 20, 2002, King wrote and placed an essentially full-price offer on behalf of Dale Packard (only) on a residence at 804 Constitution Drive in Fairbanks, acting as agent for Mr. Packard exclusively.<sup>113</sup> The sellers accepted the offer and it became the fully executed Earnest Money Receipt and Purchase Agreement for the property.<sup>114</sup> The transaction closed in late October of 2002.<sup>115</sup>

Prior to marketing the Constitution Drive property, the sellers prepared an AS 34.70.010 disclosure statement.<sup>116</sup> On the disclosure, the sellers indicated that they were aware of “flooding, drainage, or grading problems,” and they included a description of the problems and of the corrective action they had taken.<sup>117</sup> The statement was probably available at the house when the Packards viewed it prior to the submission of Mr. Packard’s offer.<sup>118</sup>

---

<sup>112</sup> Direct exam of Dale Packard; Ex. B.

<sup>113</sup> Ex. 3 at REC 090-91.

<sup>114</sup> Ex. 3 at REC 089-096.

<sup>115</sup> Ex. 3.

<sup>116</sup> Direct exam of Harshman.

<sup>117</sup> Ex. 3 at REC 086, 088.

<sup>118</sup> *Id.*

There is no direct evidence that Mr. Packard received the disclosure before the transaction closed. He reports that when King showed him the house, King mentioned that the listing packet (which presumably contained the disclosure) was on the kitchen table, but that he did not know what a listing packet was and did not take one.<sup>119</sup> In any event, if Packard received the disclosure at any point prior to closing, his agent (King) did not make him appreciate its significance and Mr. Packard did not retain a copy.<sup>120</sup>

When the transaction closed and thereafter, neither the listing nor selling agent had possession of a copy of the disclosure bearing a signature or initials of the buyer.<sup>121</sup> The Century 21 file was closed out and went to archives lacking any copy at all of the disclosure; not even a copy without the buyer's signature was in the file.<sup>122</sup> Nonetheless, the disclosure was expressly referenced in the Earnest Money Receipt and Purchase Agreement drafted by King and incorporated as part of the agreement.<sup>123</sup> Accordingly, by lacking a copy of the disclosure the Century 21 Gold Rush file lacked the complete Earnest Money Receipt and Purchase Agreement.

If a disclosure form had existed bearing the signature of not only the sellers but the buyer as well, it would ordinarily have become part of the file of both the listing office<sup>124</sup> and the selling office.<sup>125</sup> Because neither the selling nor listing office files contained such a document, I infer that no such document existed.<sup>126</sup>

At the time of the Constitution Drive transaction, it was the practice of Century 21 Gold Rush to place a checklist in each transaction file. The checklist was the front page of the file. The agent conducting the transaction filled out the checklist, marking items off as the file was assembled. The components in a file were supposed to be assembled behind the checklist in a certain order.<sup>127</sup>

There was a system to have brokers check behind the salespeople who completed the checklists and assembled the files, consisting of two components. The first component was review by Hank Bartos, who was the supervising broker, sometimes with supplemental review

---

<sup>119</sup> Cross-exam of Packard.

<sup>120</sup> Inference from direct and cross-exam testimony of Packard and from Packard's actions in 2004.

<sup>121</sup> *E.g.*, direct exam of Harshman.

<sup>122</sup> *E.g.*, direct exam of Bartos.

<sup>123</sup> Ex. 3 at REC 096.

<sup>124</sup> Cross-exam of Harshman.

<sup>125</sup> *See, e.g.*, Ex. 3 at REC 162 (Century 21's standard checklist for files).

<sup>126</sup> *Cf.* Alaska R. Evid. 803(7) commentary. Also supporting this inference, but of much less significance, is the fact that Mr. Packard does not remember signing a disclosure form. Direct exam of Packard.

<sup>127</sup> Cross-exam of Bartos (primary source for whole paragraph).

by a staff person designated by him such as Krystal Richardson, the receptionist. With an experienced agent—King, the agent handling Constitution Drive, was considered an experienced agent—file checking might consist of a periodic “spot check.” Bartos admits that he “didn’t like checking files,” and a review by him, if it occurred, might consist only of seeing if items were checked on the checklist and a “thumb through” of the file. If he found errors in a file, he would fine the salesperson \$100. He had an arrangement with Richardson whereby if she was given a file to review and she found an error, she would receive \$50 of the \$100 fine levied.<sup>128</sup> In 2002, the first component of the broker review process occurred post-closing.<sup>129</sup>

The second component in 2002 was a review by Lori Schooley, then an associate broker. She would review the file at the time of distribution of commissions and would not issue a check without reviewing the file. Her review was also post-closing.<sup>130</sup>

No witness at the hearing could recall what kind of review, if any, the Constitution Drive file received. This is natural in light of the passage of time and the large number of transactions that go through an office such as Century 21 Gold Rush. When it was retrieved in 2004, the file contained the standard checklist, with a check next to “AS 34.70 signed by Buyer and Seller” and another check next to “AS 34.70 State Disclosure,”<sup>131</sup> even though there was no disclosure in the file.

## 2. *Analysis*

At the time of the Constitution Drive transaction, the Commission’s regulation on broker supervision of licensees, 12 AAC 64.125, read as follows:

- (a) Failure of a broker or associate broker to adequately supervise the activities of licensees for whom they are responsible is grounds for disciplinary action against the
  - (1) employing broker;
  - (2) licensee designated by the broker to manage a branch office; or
  - (3) broker or associate broker designated by the broker of record to supervise transactions or licensees during the broker of record’s absence.
- (b) Adequate supervision of a licensee includes

---

<sup>128</sup> *Id.* (primary source for whole paragraph to this point). Bartos’s testimony at the hearing was equivocal as to whether he reviewed all or merely most files. In 2005, he testified that he reviewed “most of them.” Ex. 4 at REC 180.

<sup>129</sup> Cross-exam of Bartos.

<sup>130</sup> *E.g.*, Ex. 4 at 180.

<sup>131</sup> Ex. 3 at REC 162.

- (1) reviewing and approving all real estate agreements; and
- (2) communicating office policies to affiliated licensees.
- (c) Repealed 7/16/94.
- (d) Repealed 7/16/94.
- (e) A broker or associate broker may use computer, modem, or facsimile communications to review and approve documents of licensees for whom they are responsible. All transaction records must be maintained in the real estate office where the supervised licensee is registered with the commission.<sup>132</sup>

At that time, therefore, a supervising broker was required to review and approve all real estate agreements. In light of the overall purpose of the real estate licensing statutes and regulations to protect consumers, the only reasonable interpretation of this regulation is to infer that the required review and approval must occur while the transaction is active and any problems can readily be rectified, not after the transaction has closed and recorded.

The missing disclosure form was an expressly referenced part of the Earnest Money Receipt and Purchase Agreement for 804 Constitution Drive. Had Hank Bartos, the supervising broker, reviewed that agreement, he would have noted that the disclosure was missing. Since he did not note that the disclosure was missing and let the transaction close, it is likely that he did not review the Earnest Money Receipt and Purchase Agreement. His failure to do so was a violation of 12 AAC 64.125 as it existed in 2002.

**G. Count VI (Constitution Drive—Forgery)**

Subsequent to the Constitution Drive transaction, serious problems developed with the home, which made the contents of the disclosure important to determining potential liability. The Division alleges that when Century 21 Gold Rush was asked for a copy of the disclosure, Hank Bartos obtained a copy from the listing broker and forged Mr. Packard's signature and initials on the document before giving the document to Mr. Packard.

***1. Undisputed Facts***

On Easter Sunday of 2004, the Packards had a severe flooding problem at their home. They called their insurance company. An adjuster came to the house and mentioned that the house was sinking. He suggested that they consult an attorney, and they did so shortly thereafter. The attorney asked them for the AS 34.70 disclosure statement. Once they learned what a

---

<sup>132</sup> Former 12 AAC 64.125 [1994 – 2004]. Subparagraph (b)(1) was substantially amended effective January 1, 2005.

disclosure statement was, they were not able to find it among their papers. On advice of the attorney, Mr. Packard requested a copy from Century 21 Gold Rush, which had represented him in the purchase.<sup>133</sup>

Ed King had left Century 21 by this time, so the request was handled by Bartos. Century 21 had no copy of the disclosure in its file when the file was initially retrieved from archives.<sup>134</sup> Bartos requested and obtained a copy from the listing broker on April 21, 2004.<sup>135</sup> That copy had only the sellers' signatures and initials. Bartos apparently made efforts to obtain a completely executed copy from other sources—the title company and lender—as well, but without success.<sup>136</sup>

Three days after Packard's request, a copy of the disclosure was supplied to him at Century 21 Gold Rush.<sup>137</sup> Hank Bartos and the Century 21 relocation director, Audra McGhee, were present when he received the document.<sup>138</sup> The document, which was a photocopy, appeared to bear Packard's signature on the last page and his initials on each page.

Audra McGhee was terminated from her relocation director position two days after the document was provided.<sup>139</sup> About three weeks later, in cooperation with an attorney representing Packard, Audra McGhee accused Hank Bartos of forging Packard's signature and initials on the document by using a copier to transfer them from another source.<sup>140</sup> There is presently no dispute that the document was in fact a forgery.<sup>141</sup>

Some background regarding McGhee's role in the office helps to put later events in context. Audra McGhee had met Hank Bartos in the fall of 2003 when she was looking for a house. She wound up renting a house from Bartos. She wanted a part-time job, and he gave her one as a receptionist and relocation director, starting about the first of the year in 2004. Her role in assisting Bartos grew, she began to handle some of his calendaring and providing other assistance, and, eventually, she moved her desk into the same office with him. The expansion of

---

<sup>133</sup> Direct exam of Packard. Although he does not so indicate in his testimony now, Mr. Packard was apparently simultaneously seeking the document from the listing broker. Direct exam of Harshman.

<sup>134</sup> Direct exam of Bartos.

<sup>135</sup> Ex. 3 at REC 071.

<sup>136</sup> Direct exam of Bartos.

<sup>137</sup> Direct exam of Packard. By Packard's testimony the date would be Thursday, April 22, 2004.

<sup>138</sup> Direct and cross-exam of Packard.

<sup>139</sup> *E.g.*, cross-exam of Schooley. McGhee, who was in the process of obtaining her real estate license, was offered the opportunity to continue as a licensee. Nonetheless, the separation from the relocation position does not seem to have been cordial. *Id.*; direct exam of McGhee.

<sup>140</sup> Ex. 3 at REC 0063-65.

<sup>141</sup> Cross-exam of Bartos ("generally accepted"; "we all agree").

her role took place over the course of only a few months of employment. As her role increased, her relationship with Bartos's longtime business partner, Lori Schooley, deteriorated. Although he does not seem to have done much to prevent this situation from developing, Bartos at all times fundamentally regarded Schooley as his right-hand person; McGhee was simply a promising and hard-working recruit to him.<sup>142</sup>

## 2. *Disputed Facts and Discussion*

Century 21 Gold Rush supplied a client with a document on which someone in the real estate office had apparently forged the client's signature. The foreseeable result of doing so, in this instance, would be to mislead the client and undermine the client's potential redress against parties (including Century 21 Gold Rush) who might be liable for his purchasing the Constitution Drive home without knowledge of the disclosure's contents, only to discover later that the house still had problems that had been alluded to in the disclosure. Supplying a forged document in these circumstances would be an extraordinary breach of duty by Century 21 Gold Rush, and would subject any licensee involved to the most severe sanctions available to the Commission.<sup>143</sup>

Mr. Bartos admits that the document has been demonstrated to be a forgery, but denies that he forged it or caused it to be forged. By his account, he was puzzled when Ed King's transaction file did not contain the disclosure, particularly since it was checked off on the file checklist, and he engaged in a search to find it from outside sources, as well as having staff look for it within the office. At some point he told McGhee to "get Lori over here" to search for the missing item. The next time Bartos came in, he says McGhee told him she had the signed disclosure form, and he told her to go ahead and give it to the Packards.<sup>144</sup>

Audra McGhee offered a different account in mid-May of 2004. She reported that on the morning of April 22, 2004, as she was working at her desk in the office she shared with Hank Bartos, she noticed that he was engrossed in an activity that had him repeatedly using her tape dispenser. He was cutting paper with a pocket knife and taping the pieces to other documents. He asked if he could borrow her scissors. She asked him what he was doing and, when he did not answer, asked, "Are you forging documents?" He replied, "Yes, haven't you ever done this before?" She answered, "No," and then went to the front desk, borrowed scissors from Krystal Richardson, and brought them to Mr. Bartos. When she returned she happened to notice that the

---

<sup>142</sup> Testimony of McGhee, Bartos, Schooley, and Richardson.

<sup>143</sup> See AS 08.88.071(a)(3)(A)(iii) and (iv).

<sup>144</sup> Testimony of Bartos.

signatures he was taping were those of Dale Packard. She reported that Bartos remarked that Ed King had “screwed up” and failed to get the signatures he should have. She said she asked, “What are you going to do when the original documents are asked for?” to which Bartos replied, “I am going to shred them and say that I don’t know what happened to the originals.”<sup>145</sup> She said that Bartos then “made a new set of documents for Mr. Packard”—presumably using the copier—and that this was something she “observed.”<sup>146</sup>

Two days after this conversation allegedly occurred, Lori Schooley (in her role as office manager for all of the affiliated offices) discharged McGhee from her relocation director position.<sup>147</sup> Schooley attributes this action to problems with job performance, not getting along well in the office, and a desire not to have McGhee do the relocation work once she became licensed because of a possible conflict. She says, however, that the job performance problems were not disqualifying “for Hank,” and so McGhee was given the option to continue working for Century 21 in the capacity of an agent.<sup>148</sup> McGhee was unhappy with this turn of events and had a series of telephone conversations with Bartos about her employment situation on April 25 and 26, which she recorded. She admits that the subject of forgery “never came up” in these conversations.<sup>149</sup> However, on May 12, 2004, she wrote to Bartos:

On April 24<sup>th</sup>, two days after I confronted you about your forgery of the Packard documents, Lori Schooley terminated my employment as Relocation Director; she said she acted with your authority. The next day, in a telephone conversation with me, you confirmed that I was terminated. You told me the next day, Monday the 26<sup>th</sup>, that I could return to Century 21 only as a real estate agent . . . .

I have taken time to consider my situation and the situation in which the Packards find themselves. I have decided that I cannot accept employment as a real estate agent with you and your office. I simply am unwilling to be associated with the standards of the office and of you.<sup>150</sup>

When she wrote the letter, she was already in contact with the Packards and their attorney, and had committed her version of events to an affidavit of the same date.

---

<sup>145</sup> Ex. 3 at REC 063-65 (May 12, 2004 affidavit of Audra McGhee). As will be discussed below, her 2009 testimony was not perfectly consistent with this earlier account.

<sup>146</sup> The quotations are from Ex. 3 at REC 064. She has not specifically testified that he used the copier to make the new set of documents, but this is implied in her testimony.

<sup>147</sup> Direct exam of Schooley.

<sup>148</sup> Direct and cross-exam of Schooley.

<sup>149</sup> Cross-exam of McGhee.

<sup>150</sup> Ex. 3 at REC 068.



The McGhee account is directly questioned by Krystal Richardson, the receptionist, who likewise claims a specific memory of the day in question.<sup>151</sup> Richardson says it was unusual for people to borrow her scissors and she remembers McGhee doing so. However, she does not recall Bartos being in the office at the time, and believes she would have noticed if Bartos was using the copier, which was right by her desk. She is not sure Bartos would have known how to use the copier, because he “usually” needed help when he wanted to make copies.<sup>152</sup>

More significantly, the account has internal oddities that make it hard (though not impossible) to accept. The letter of May 12 is curious. It refers to a confrontation, and yet by McGhee’s more detailed account the confrontation consisted of her fetching the scissors to assist with the task, accompanied by a little conversation. It suggests that her termination was linked to the supposed confrontation about forgery, and yet the forgery had not “come up” in previous, recorded conversations about why she was terminated. Moreover, there are two versions of the account, the one given in 2004 and the one given at the hearing, and while both are highly detailed the details do not match in some respects.<sup>153</sup> It would be natural for McGhee to forget some details over the course of four years, but the fact that she provided the details again (rather than indicating a failure of memory), but related them differently, slightly undermines her credibility.

McGhee seems to have reacted to the termination with some bitterness. It came at a time when she had rapidly been developing a close business relationship with the chief of the organization. That individual then quite suddenly yielded to Schooley’s desire to end the close association. Some individuals might bear a grudge and develop a motive to strike back at Bartos in this situation.

As support for McGhee’s account, the Division relied on testimony from Colleen Harshman, the listing broker. Ms. Harshman related behavior by Bartos that she judged as odd: After Mr. Packard had called her multiple times about the disclosure, she asked Century 21 for a copy. The Century 21 office faxed over a copy, but it was just the one she had, with no buyer signature. She called Bartos and told him she needed a copy with the buyer’s signature. He

---

<sup>151</sup> Direct exam of Richardson. She committed the recollection to writing about eight months after the event in an affidavit connected with the Packard lawsuit mentioned above in note 45. Ex. 3.

<sup>152</sup> *Id.*

<sup>153</sup> For example, the means by which she determined it was Packard documents being altered differs between the 2004 affidavit and her 2008 testimony on cross-examination.

responded, “Well, would you send me a copy so I know what it looks like?” She sent it, and shortly thereafter got a copy back with the buyer’s signature and initials.<sup>154</sup>

Harshman’s account would be very troubling with respect to Mr. Bartos, except that it was later established that the entire exchange took place on May 17, 2004.<sup>155</sup> By May 17, Audra McGhee had already sent Bartos the letter alluding to “forgery of the Packard documents.”<sup>156</sup> The exchange with Harshman was therefore consistent with Bartos attempting to see if the copy of the disclosure he had been given by his staff was consistent with versions of that document held by others.

Likewise to bolster the McGhee account, the Division offered Mr. Packard’s testimony,<sup>157</sup> which implied that he found Bartos’s behavior unusual as well. He perceived that he was put off by Bartos when he requested the disclosure statement. While the delay may have seemed to Packard simply a stratagem to provide time to forge a replacement, however, it is consistent with Bartos simply conducting a search of multiple sources to try to locate a document that was oddly missing—which is essentially Bartos’s description of how he reacted.

Mr. Bartos’s account is not wholly without credibility issues of its own. For example, Bartos (in response to a leading question from his counsel) agreed that McGhee’s May 12 letter was to him just “a wingnut letter” and indicted that he neither understood nor paid attention to it. Yet the letter referred to a transaction in which he had just recently been looking for a particular document, and it is hard to believe he would not have surmised that she might be accusing him of forging that document. Indeed, his exchange with Harshman on May 17 suggests that he did have that concern. More broadly, in testimony on other matters in this proceeding (he offered extensive testimony on many topics), Bartos betrayed a tendency to stretch the truth on occasion,

---

<sup>154</sup> Direct exam of Harshman. Ms. Harshman, a telephonic witness, was somewhat credible, but she undermined her overall credibility by flatly denying that she had any concern that her agency might be sued by Packard during this period. Cross-exam of Harshman. Certainly, a listing office that has received a disclosure from its seller, but that cannot show that it delivered the disclosure to the buyer, has potential exposure to liability regarding matters that were in the disclosure but were not communicated to the buyer. Ms. Harshman was an experienced broker and could be expected to understand this exposure.

<sup>155</sup> Direct exam of Harshman; Ex. 3 at REC 066-67.

<sup>156</sup> Ex. 3 at REC 068.

<sup>157</sup> At times, Packard’s testimony was troubling as well. For example, he described with a wealth of detail how he had caught a glimpse of Audra McGhee as an observer behind an obstruction when he met with Bartos to receive the documents, but Bartos had not introduced them. When cross-examined, he had to admit that on a previous occasion he had said they were introduced. Direct and cross-exam of Packard.

or perhaps to lapse into being a raconteur, providing glib answers without being careful about perfect accuracy.<sup>158</sup>

On balance, however, the Division has not carried its burden of convincing me that the core of McGhee's account is more credible than the core of Bartos's. Accordingly, I cannot find that Hank Bartos forged Dale Packard's signature and initials on the Constitution Drive disclosure statement, and therefore no violation by Mr. Bartos has been proven with respect to Count VI.

#### **IV. Sanction**

The Division has proven violations in connection with Count III (undisclosed conflict and dual agency for Sprucewood Court) and Count V (inadequate supervision for Constitution Drive). They are wholly independent of one another and will be addressed separately below.

In assessing discipline for violations of the statutes and regulations it administers, the Commission is required to "seek consistency."<sup>159</sup> One prior decision and one prior settlement approval of this Commission involving conduct with some parallels to Count III are discussed in the section relating to that count. So far as the undersigned is aware, this Commission has not considered any other discipline cases involving facts at all similar to those presented here, and neither party has cited any comparable cases.

##### **A. Count III**

The two violations found in Count III were failure to properly disclose a dual agency relationship and failure to properly disclose a conflict of interest. The conflict and the dual agency were simply different features of the same error; that is, there was a single wrongful act that was illegal in two ways.

Both violations were violations of provisions of AS 08.88, and therefore for each of them the Commission has authority to impose the sanction of revocation or suspension of the license.<sup>160</sup> The Commission also has authority to impose any other disciplinary sanction or

---

<sup>158</sup> Examples would be his testimony about obtaining Royse's prior blessing for his business model (Royse testimony on cross-exam established that this was an exaggeration) and some of his varying characterizations of his broker review process and of the roles over time of the two holding companies.

<sup>159</sup> AS 08.01.075(f).

<sup>160</sup> 12 AAC 64.130(11) [both present version and version in effect in 2002] (Commission may suspend or revoke for "acting in violation of the provisions of AS 08.88"); AS 08.88.071(a)(3)(A)(v) and (vi) [both present version and version in effect in 2002].

combination of sanctions, including censure or reprimand, license limitations or conditions, requirements for education or peer review, probation, or a fine.<sup>161</sup> Fines are limited to \$5000.<sup>162</sup>

The misconduct proved in Count III was at the low end of seriousness for conduct of its type. It presented the following mitigating factors:

- The licensee did not wholly fail to make a written disclosure of dual agency or conflict of interest, but rather made a carelessly inadequate and defective written disclosure.
- Oral disclosure to both the buyer and the seller appears to have been generally adequate.
- There was no fraud and no attempt to gain financial advantage through the nondisclosure.
- There was no harm to the principals in the transaction.
- The misconduct was performed on Mr. Bartos's behalf by a delegee, without his prior knowledge or approval. While Bartos was responsible for what Schooley did as his stand-in, the fact that he did not write the defective disclosure himself slightly lessens concern about his own competence.

In the 2004 discipline case entitled *In re Mehner*,<sup>163</sup> this Commission addressed a much more serious failure to disclose dual agency and conflict of interest that lacked all of these mitigating factors (except perhaps deliberate fraud) and that was accompanied by substantial misrepresentations that constituted independent violations. There was considerable financial harm to a consumer directly flowing from the misconduct. The Commission imposed a 120-day suspension on account of the “numerous violations,”<sup>164</sup> imposed a year of probation, required remedial education on dual agency and conflict of interest, and levied a fine of \$20,000.<sup>165</sup> It is possible to determine that \$5,000 of the total fine was levied for the violation of the dual agency disclosure requirement<sup>166</sup> and to infer that the remedial education order sprang from that violation; it is not possible to determine how much, if any, of the suspension or probation related to it.

A counterpoint to *Mehner* is the Commission's recent action in *In re Enoch*.<sup>167</sup> *Enoch* was a memorandum of agreement, or settlement, approved by the Commission, and therefore

---

<sup>161</sup> AS 08.88.071(a)(3); AS 08.01.075.

<sup>162</sup> AS 08.01.075(a)(8).

<sup>163</sup> Case No. 3002-02-005 (Real Estate Commission, adopted March 4, 2004).

<sup>164</sup> *Id.* at 60.

<sup>165</sup> *Id.* at 61.

<sup>166</sup> *Id.* at 57.

<sup>167</sup> Case No. 3004-07-010 (Real Estate Commission, adopted Feb. 1, 2008).

carries less weight than a contested decision, but such memoranda provide a sense of how the Commission has weighed violations in the past.<sup>168</sup> The misconduct in *Enoch* was threefold: two instances of failure to disclose a conflict of interest under AS 08.88.391 and one instance of delayed deposit of earnest money. For the three violations in the aggregate, the Commission imposed a fine of \$1000 with \$750 suspended, a reprimand, one year of probation, and six hours of education on relevant topics.<sup>169</sup> In the formal reprimand language, the Commission noted the following important circumstance: “it is recognized that these violations were technical in nature with no evidence to suggest any intent to misrepresent the facts and/or the terms of the transaction.”<sup>170</sup>

The misconduct proven under Count III of this case is quite close to *Enoch* in severity—as in that case there are two dual agency/conflict disclosure violations—but this instance lacks the additional element, present in *Enoch*, of mishandling earnest money. In the interest of simplicity and finality,<sup>171</sup> it may be advisable to forego probation but to substitute additional monetary sanction for the lack of probation. An appropriate sanction for Count III would be a civil fine of \$1000, a reprimand to be placed in Mr. Bartos’s licensing file, and a requirement of at least one-half day (3 hours) of approved continuing education on ethics for real estate professionals that includes significant instruction on the topic of avoidance and disclosure of conflicts of interest.

## **B. Count V**

Count V represented a single instance of inadequate supervision of a subordinate licensee. Mr. Bartos failed to carry out a duty that the Commission had expressly assigned to him by regulation. His failure may well have had real financial consequences to a client of his office, by causing him to proceed with a transaction with insufficient information about a serious

---

<sup>168</sup> Cf. *In re Ness*, OAH No. 04-0250-DEN (Board of Dental Examiners, adopted May 2, 2006), op. at 34-36 (considering prior memoranda of agreement but noting their limitations), *aff’d in relevant part*, No. 3AN-06-8587CI (Alaska Superior Ct.) [published at <http://aws.state.ak.us/officeofadminhearings/Documents/DEN/DEN040250.pdf>].

<sup>169</sup> A decision from another jurisdiction that is in the same vein is *In re Di Censo and Sutton Group Tower Realty Inc.* (Real Estate Council of Ontario, Jan. 28, 2004) (licensee fined \$3000 in aggregate for five relatively minor violations, three of which related to inadequate disclosure of dual agency, without fraud or apparent harm to clients).

<sup>170</sup> *Enoch*, *supra*, MOA at 5.

<sup>171</sup> The Division has had several years of intensive focus on Mr. Bartos. Probation would prolong that preoccupation, perhaps in a way that would be healthy for neither the staff nor Mr. Bartos. Cf. Ex. 5-8, 11-12, 15-16.

defect in the property he was purchasing.<sup>172</sup> While only one specific failure has been proven, the failure occurred because Century 21 Gold Rush had a practice of deferring broker reviews until after closing, a practice that prevented compliance with 12 AAC 64.125 as it then existed.

The undersigned has found no Commission decisions or settlements in Alaska with facts at all similar to those in Count V. The only out-of-state case found is *In re Di Censo and Sutton Group Tower Realty Inc.*,<sup>173</sup> a Canadian decision in which a brokerage was fined \$2000 for failing to supervise a licensee to prevent errors including inadequate dual agency disclosure and for failing to maintain an adequate transaction file.<sup>174</sup> *Di Censo* does not seem to have involved any harm to the client.

At the hearing, Mr. Bartos related with some relish and pride his practice of fining licensees for each error found after the fact in their transaction files. In this case, he failed to prevent a very serious error in a transaction file by neglecting the supervisory review assigned to him by law. A substantial monetary penalty to address this omission will serve the same deterrent purpose served by Mr. Bartos's internal fining system.

The broker's share of the selling office commission received on the Constitution Drive transaction appears to have been about \$1400.<sup>175</sup> An appropriate sanction for Mr. Bartos's failure to adequately perform the broker role would be (i) a civil fine of double that amount, \$2800 and (ii) inclusion of the Count V violation in the reprimand mentioned in the preceding section.

## **V. Conclusion and Order**

The Division proved violations of applicable law in connection with Counts III and V of the Accusation, as detailed above. Upon adoption of this Decision, the Commission imposes the following disciplinary sanctions against licensed broker Henry S. Bartos:

### **A. CIVIL FINE**

Respondent shall pay a fine of \$1000 with respect to Count III and a fine of \$2800 with respect to Count V, for a total civil penalty of \$3800. The payment shall be in cash, certified check, or money order payable to "State of Alaska," delivered to counsel for the Division of

---

<sup>172</sup> See facts found under Count VI.

<sup>173</sup> *Supra* note 169.

<sup>174</sup> This is a different aspect of the case from the one discussed in note 169. Separate sanctions were ordered against the licensee and the supervising brokerage.

<sup>175</sup> See Ex. 3 at REC 159-60.

Corporations, Business and Professional Licensing within 90 days of adoption of this Decision and Order.

B. REPRIMAND

The following reprimand shall be placed in Respondent's license file in the form of this Decision and Order:

**The Real Estate Commission hereby reprimands you, Henry S. Bartos, for failing to disclose dual agency and conflict of interest as required by law. The Commission recognizes that these violations were technical in nature, without intent to misrepresent the facts or the terms of the transaction. The Commission further reprimands you for failing to provide adequate supervision of a licensee as required by law.**

C. ADDITIONAL EDUCATION

In addition to the continuing education/competency requirements under Alaska law for his license, Respondent shall within 12 months of adoption of this Decision and Order attend and satisfactorily complete no less than three hours of education dealing with ethics for real estate professionals that includes significant instruction on the topic of avoidance and disclosure of conflicts of interest. The course curriculum must be approved by the Commission's agent prior to the Respondent registering for the course or courses. After completion of the course or courses, the certificates of satisfactory completion are to be provided to the Commission's agent. All costs are the responsibility of Respondent.

Dated this 19<sup>th</sup> day of March, 2009.

Kay L. Howard for  
Christopher Kennedy  
Deputy Chief Administrative Law Judge

## Adoption as Modified

The Real Estate Commission:

- in accordance with AS 44.64.060(e)(5), rejects, modifies or amends the interpretation or application of a statute or regulation as set out below;
- in accordance with AS 44.64.060(e)(3), revises the enforcement action, determination of best interest, order, award, remedy, sanction, penalty, or other disposition of the case as set out below; and
- in accordance with AS 44.64.060, otherwise adopts the forgoing Decision and Order.

Modifications:

1. Although the Commission recognizes that the word “employed” has several definitions, the Commission interprets the word “employed” in AS 08.88.291(a) and 12 AAC 64.110(e)(6) to mean “to commission or entrust with the performance of certain acts or functions or with the management of one’s affairs” (see Black’s Law Dictionary, 5<sup>th</sup> ed.), as the meaning most in keeping with the purpose of that statute and that regulation.
2. In light of item 1, the Commission finds that, with respect to Count I, Mr. Bartos violated AS 08.88.291(a) and 12 AAC 64.110(e)(6) in connection with factual findings (2) and (4) on pages 6-7 of the Decision and Order.
3. In light of item 1, the Commission finds that, with respect to Count II, Mr. Bartos violated AS 08.88.291(a) and 12 AAC 64.110(e)(6) in his use of Noelle Childress to conduct Century 21’s property management business.
4. For the misconduct under Count I, the Commission imposes a fine of \$1000 and requires 6 hours of education as specified in item 10 below.
5. For the misconduct under Count II, the Commission notes the long duration and the deliberate nature of the improper arrangement, imposes a fine of \$2500, and requires 6 hours of education as specified in item 10 below.
6. For the misconduct under Count III, the Commission imposes a fine of \$1000 (as recommended by the administrative law judge) and requires 6 hours of education as specified in item 10 below. The sanction is imposed solely for failure to disclose dual agency. No sanction is imposed for failure to disclose conflict of interest.
7. For the misconduct under Count V, the Commission notes the serious consequences of the failure to supervise, imposes a fine of \$5000 and requires 12 hours of education as specified in item 10 below.
8. In light of the number, seriousness, and pattern of violations, the Commission imposes (a) a suspension of 60 days to commence on the effective date of this decision as provided in AS 44.62.520, and (b) license probation of one year to commence upon completion of the suspension.
9. All fines are payable in the manner set forth in part V-A of the Decision and Order.



10. The education required in items 4-7 above (a) shall be in addition to the continuing education/competency requirements under Alaska law for Mr. Bartos's license; (b) shall be completed within 12 months of the effective date of this Decision and Order; (c) shall be attended and satisfactorily completed; (d) shall be approved by the Commission's agent prior to the Respondent registering for the course or courses. It shall include no less than six hours of education dealing with ethics for real estate professionals. After completion of the course or courses, the certificates of satisfactory completion are to be provided to the Commission's agent. All costs are the responsibility of Respondent.

11. The following reprimand shall be placed in Respondent's license file in the form of this Decision and Order:

**The Real Estate Commission hereby reprimands you, Henry S. Bartos, for failing to comply with AS 08.88.291(a) and 12 AAC 64.110(e)(6), for failing to disclose dual agency as required by law, and for failing to provide adequate supervision of a licensee as required by law.**

*Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of distribution of this decision.*

DATED this 18<sup>th</sup> day of June, 2009.

ALASKA REAL ESTATE COMMISSION

By: Signed  
Signature  
Bradford Cole  
Name  
Chairman – Alaska Real Estate Commission  
Title

[This document has been modified to conform to technical standards for publication.]