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

In the Matter of	)	
	)	
LORI SCHOOLEY	)	OAH No. 09-0622-REC
	)	Agency Case No. 3000-06-018
	)	

DECISION

I. INTRODUCTION

This is a civil disciplinary proceeding to address alleged misconduct by Lori Schooley of Fairbanks, Alaska, who holds Real Estate Broker License No. 15430. The Division of Corporations, Business and Professional Licensing ("Division") filed a five-count accusation against Ms. Schooley.

In this case, 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.[1] The Division must prove each required element of each violation by a preponderance of the evidence.[2] The burden of proof for affirmative defenses falls on Ms. Schooley.

A. Motions and Hearing

In advance of the hearing, both parties moved for summary adjudication on parts of the accusation. Summary adjudication was granted to the Division (subject to ratification by the Real Estate Commission) on Count III. On Count IV, summary adjudication was granted to Ms. Schooley (subject to ratification by the Real Estate Commission) on the Division's main theory; the ALJ kept one potential legal theory of Count IV open in the motion ruling, but the Division later stipulated in writing that it was not pursuing that theory, and so the count was in fact fully resolved prior to hearing. With respect to the other counts, certain legal issues were resolved in the motion rulings but the counts were not fully adjudicated. A hearing was held on Counts I, II, and V in March and April of 2010.

---

1 AS 44.62.460(e)(1).

2 *See id.*

This decision represents a complete resolution of all five counts following the hearing. To the extent that some matters had been addressed through motion rulings prior to the hearing, those rulings have been incorporated in the text of this decision.

B. Evidence Received

At the hearing, the Division presented testimony from a variety of fact witnesses and expert testimony from associate broker Charles Sandberg. Ms. Schooley offered factual testimony from herself and expert testimony from broker Jerry Royse. Exhibits were admitted as follows:

Exhibit	Disposition
Division 1, 2, 4, 6	Admitted subject to hearsay limitation in AS 44.62.460(d)
Division 3	Objection sustained;[3] excluded
Division 5, 7 – 11, 14 – 16, 22	Admitted without objection or limitation
Division 12, 13, 17 – 20	Admitted without limitation over relevance objection
Division 21	Admitted only for collateral estoppel/res judicata effect; factual findings may not otherwise be treated as evidence for any factual issue in this case
Respondent A	Admitted without objection or limitation
Respondent B to G	Withdrawn
Respondent H	Admitted, but only with respect to counts or matters still at issue at the time of the hearing (*e.g.,* not admitted as to Count III)

C. 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.

Some citations in the footnotes to the testimony of Ms. Schooley refer to her testimony in the related case of *In re Bartos*, OAH No. 08-0054-REC (Alaska Real Estate Commission). These citations are followed with the identifier "in *Bartos*." The transcript of this testimony is found at Division Exhibit 22.

II. OVERALL FACTUAL BACKGROUND

At all relevant times, Lori Schooley has been a real estate broker licensed in Alaska. Henry S. "Hank" Bartos has likewise been a licensed broker.

[3] This objection was taken under advisement at the end of the hearing and is first ruled upon now.

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.[4] Lori Schooley, his primary business associate in recent years, was a minority shareholder and the treasurer of that corporation.[5] 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.[6] Mr. Bartos worked from the Fairbanks office and was the broker-in-charge.[7] Ms. Schooley worked 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.[8]

In late 2005, after the conduct at issue in all counts of this case except Count II had been completed, Bartos and Schooley organized Gold Standard Real Estate Services, LLC as a successor to Hank Bartos Realty, Inc.[9] Bartos held a 70 percent interest in this holding company, with Schooley holding the remainder.[10]

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. The registered name of the new office was Coldwell Banker Gold Country.[11]

On April 5, 2004 the broker in charge of the Coldwell Banker office resigned.[12] Lori Schooley replaced her as the registered broker of record for Coldwell Banker Gold Country, remaining in that capacity until late 2006 or afterward.[13]

III. MS. SCHOOLEY'S GLOBAL DEFENSES

A. Statute of Limitations

Ms. Schooley sought dismissal of all counts on the basis of the statute of limitations in AS 09.10.070. That statute, when read in conjunction with the umbrella limitations statute, AS 09.10.010, sets a two year limit on "civil actions" to impose a penalty to the state and certain

---

4 Ex. 19; cross-exam of Schooley in *Bartos* (included in Division's exhibit binder).
5 *Id.*
6 Ex. 15; cross-exam of Schooley in *Bartos*.
7 *See* Ex. 15 at REC 1908.
8 Direct exam of Schooley in *Bartos*.
9 Ex. 20.
10 *Id*.
11 Ex. 16 at REC 2005.
12 Ex. 16 at REC 1993.
13 Ex. 16 at REC 2008, 2020.

other matters.[14] In its recent order in *In re Linda Garrison*, OAH No. 09-0289-REC,[15] this Commission endorsed the view that no statute of limitations (including AS 09.10.070[16] and AS 09.10.120(a)) applies to this type of administrative proceeding, because this kind of proceeding is not a "civil action." For the reasons discussed in that order, Ms. Schooley's statute of limitations defense is rejected.[17]

B. Laches

The second way that long-delayed enforcement can be blocked is through the defense of laches. Ms. Schooley has sought dismissal of all the counts on the basis of this defense. Because it is an affirmative defense, laches must be proved by the person asserting it; in other words, Ms. Schooley carries the burden of proof on this issue.[18]

The essence of laches is that a long delay can so undermine a person's ability to mount a defense, or so turn the tables on someone who reasonably expected to be free of legal interference, that it is unfair, after a certain point, to allow a case to proceed. The person asserting laches—here, Ms. Schooley—must prove two principal elements: unreasonable delay and resulting prejudice. "Prejudice," in the laches context, means showing one of two special types of harm: (1) degradation or loss of evidence that harms the ability to mount a defense, or (2) a change in position by the defendant (such as spending more money on a challenged project) that the defendant would not have taken if the legal action had been initiated in a timely way.[19]

These two elements are evaluated on a sliding scale, such that the longer the delay, the "lesser degree of prejudice . . . required."[20] The public interest can also be weighed in evaluating laches. The public interest can sometimes help to tilt the balance for enforcement, such as where it is important to protect the public from especially dangerous misconduct. On the other hand, there is a public interest in accurate results, and since long delays can greatly compromise the accuracy of the adjudication system and cause enforcement to be misdirected, the public interest factor can tip the scales against enforcement.

---

14 The phrase "civil action" appears in the companion statute, AS 09.10.010.

15 Adopted March 23, 2010.

16 The *Garrison* order does not specifically discuss AS 09.10.070, but some of the cited authorities do.

17 *See also Bradshaw v. State, Dep't of Administration*, S-13262 (Alaska, Jan. 29, 2010), slip op. at 7-8 (statutes of limitation govern only "efforts to seek judicial interference").

18 *See, e.g., Laverty v. Alaska R.R.,* 13 P.3d 725, 731 (Alaska 2000).

19 *Danjaq LLC v. Sony Corp*., 263 F.3d 942, 955 (9th Cir. 2001).

20 *Pavlik v. State, Dep't of Commuity & Reg. Affairs,* 637 P.2d 1045, 1047-8 (Alaska 1981).

In the present case, Ms. Schooley presented no cognizable evidence of prejudice of either of the types recognized for a laches defense. In a motion for summary adjudication before the hearing, she asserted that the cloud created by the long investigation had hurt her business and caused her to suffer "immeasurable stress."[21] This is not the kind of harm or prejudice at issue in a laches defense. She also offered by affidavit several generalized assertions of fading memories and unavailable witnesses.[22] While these assertions do relate to the first kind of prejudice recognized for a laches defense, they were too vague. Broad, nonspecific claims of prejudice are not adequate to sustain a laches defense in Alaska; Ms. Schooley needed, and did not supply, examples of particular people or items or memories that would be helpful but that were lost due to passage of time.[23] For this reason, her motion for summary adjudication was denied. At the hearing, she had another opportunity to prove the prejudice element of a laches defense. She made no attempt to do so.[24]

Because she has not carried her burden on the prejudice element, Ms. Schooley's laches defense is rejected.

IV. THE COUNTS OF THE ACCUSATION

This case is framed by an accusation that the Division filed on November 3, 2009. The accusation in an administrative discipline matter against a real estate broker must set out "the acts or omissions with which the respondent is charged" and "the statute and regulation that the respondent is alleged to have violated."[25] There is no basis to impose discipline after a hearing for matters that are not charged in the accusation.

The Division has the burden of proof to establish, by a preponderance of the evidence, each factual element required to establish a violation under one of the counts of the accusation.[26] A preponderance of the evidence is evidence establishing that a fact is more probable than not.[27]

A. Count I (Alleged Role as Licensed Assistant to Bartos)

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

---

21 Affidavit of Lori Schooley in Support of Supplement to Motion for Summary Adjudication (Jan. 10, 2010), ¶¶ 8-11.

22 *Id*. at ¶¶ 5-7.

23 *See Wilson v. State,* 756 P.2d 307, 311 (Alaska App. 1988).

24 Her counsel also did not argue laches in his final argument.

25 AS 44.62.360, made applicable by AS 44.62.330(11).

26 AS 44.62.460(e)(1).

27 *State v. King*, 1994 WL 16196208, *1 n.1 (Alaska App. 1991).

broker at Coldwell Banker in April of 2004. (As will be discussed in part IV-A-2-(a), 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 existed in two transactions—one involving 389 Kendrick Court and one involving a condominium at Sprucewood Court—and that Ms. Schooley's role in those transactions placed her in violation of five different legal provisions.

1. Facts

(a) Sprucewood Court Transaction

Lori Schooley registered as broker of the Coldwell Banker Gold Country office on April 7, 2004.[28] The Division proved that on one occasion in August of 2004, Lori Schooley filled in for Hank Bartos on a transaction involving a condominium at Sprucewood Court. Her substitution lasted only a short time, while Bartos was out of town at a dog show. She met with the client and wrote up and presented an offer on Bartos's behalf, and she did so; he then completed the rest of the transaction.[29] Coldwell Banker was already the listing office in the transaction. There is no evidence that Schooley shared in the Century 21 commission for the transaction.[30]

(b) Kendrick Court Transaction

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 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.[31]

389 Kendrick Court was a Cendant Corporation relocation property. Cendant was then the owner of the master franchises for both Century 21 and Coldwell Banker.[32] Cendant relocation properties required unique procedures and paperwork, for which Schooley had special

---

[28] Ex. 16 at REC 2008.

[29] Cross-exam of Schooley; Ex. 10. This is the Sprucewood Court transaction, discussed at more length in connection with Count III.

[30] Depending how commissions were distributed, there could have been some indirect benefit to Schooley from a Century 21 commission, in that she was a minority shareholder in the company that owned the Century 21 franchise. The Division did not explore this issue at the Schooley hearing.

[31] Cross-exam of Schooley in *Bartos*.

[32] Direct exam of Schooley in *Bartos*.

training.[33] Cendant knew her and wanted to work with her.[34] 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.[35]

Schooley was extensively involved in the transaction, working closely with Cendant over a period of several months,[36] making herself available to discuss a pending offer,[37] presenting a counteroffer,[38] reviewing a settlement statement,[39] and taking other steps.[40] In correspondence with Cendant, Century 21 staff referred to her as Hank Bartos's "assistant."[41] Her work was not limited to occasions when Bartos was absent or unavailable.[42]

It is a close question whether the role was compensated. Schooley was not separately paid for this work, but she did draw a salary from Hank Bartos Realty, Inc., of which Bartos was president. Given the lengthy and systematic nature of her work on the transaction, it is more likely than not, based on the overall context, that Ms. Schooley performed this work as one of the work duties covered by her salary rather than as a favor to Bartos. Bartos and Schooley made a business decision that on this particular area of work Ms. Schooley should continue to function, for all practical purposes, as a Century 21 licensee.

2. Analysis

The Division has pursued this count under five different legal theories. As will be seen, two of them apply and the others are wide of the mark. They are addressed individually below.

---

33 *Id*.; redirect exam of Schooley in *Bartos*.

34 Cross-exam of Schooley in *Bartos*.

35 Ex. 12 at REC 1360-61.

36 Ex. 12.

37 Ex. 12 at REC 1378; cross-exam of Schooley in *Bartos*. When testifying on cross-exam in the present case, Ms. Schooley said she believed Hank Bartos was unavailable when she took this step. This testimony was not credible because on REC 1378 she provides a telephone contact for Bartos.

38 *Id.* at REC 1375.

39 *Id*. at REC 1329.

40 At times it is difficult to tell exactly what Schooley did and what others did, because she apparently permitted a number of people to use her Broker Center log-in and generate messages in her name. In *Bartos*, a finding of fact was made that Schooley had stated on one occasion that "I [Schooley] will be happy to reassign this property to another agent within Century 21 Gold Rush." *Id*. at REC 1360. It now appears that this promise was entered by Noelle Childress under Schooley's log-in, and a close review of the context suggests that Childress was making the promise on Bartos's behalf, not Schooley's (the third possibility, that Childress was speaking on her own behalf, seems unlikely in light of Childress's junior position). The new evidence regarding the use of the log-in comes from the direct and cross-exam of Schooley in this case.

41 Ex. 12 at REC 1368. Schooley denied on cross-exam that the word "assistant" in the 07/08/2004 entry refers to her. In fact, the context of the entry makes it clear that the word is indeed used to refer to her.

42 *See, e.g.*, Ex. 12 at REC 1378.

(a) 12 AAC 64.075(a)

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.[43] 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."[44]

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 Division contends that Schooley's licensed assistant role violated 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." Thus, there are two elements that must be established to show a violation of this regulation:

FIRST, that Schooley was employed by Bartos in connection with Kendrick Court, AND

SECOND, that *at least one of two* prerequisites had not been attended to, *viz*,

> the employing broker had not signed and delivered to the Commission a notice of employment, OR

> the license certificate had not been delivered to the employing broker.

The Division has established the first element. In *In re Bartos*, the Commission held:

> 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, 5th ed.), as the meaning most in keeping with the purpose of that statute and that regulation.[45]

---

[43] *See* AS 08.88.398.

[44] *See id.;* 12 AAC 64.140(b) ("unlicensed assistant" may not be assigned duties "for which a license is required").

[45] *In re Bartos,* OAH No. 08-0054-REC, Decision and Order at 40 (adopted June 18, 2009).

The Commission thus rejected an interpretation of the word "employed" that would have required a compensated or paid arrangement.[46] This reasoning carries over to 12 AAC 64.075(a); Schooley's brief *ad hoc* substitution in the Sprucewood Court transaction, though perhaps uncompensated, is nonetheless employment for purposes of the regulation. Her longer term role in the Kendrick Court transaction, which probably was compensated, meets any reading of the regulation.

The Division has also established the second element. Testimony from Nancy Harris showed that the Division maintained a complete file of notices received from Mr. Bartos and that Mr. Bartos had not submitted the required notice of employment to the Commission.[47]

Accordingly, the Kendrick Court and Sprucewood Court transactions each represented violations of 12 AAC 64.075(a) as the Commission has recently interpreted that provision.

(b) AS 08.88.321(b)

AS 08.88.321(b) requires that "the license certificate of each licensee working in the broker's principal office shall be displayed in that office." Since Schooley was performing activities requiring licensure in and for Bartos's Century 21 brokerage, it follows that her license should have been hung there when she was doing that work. It was not.[48] This violation is essentially another facet of the 12 AAC 64.075(a) violations discussed above.

(c) AS 08.88.291(a)

The Accusation alleges that the conduct at issue in this count violated the first sentence of AS 08.88.291(a), which provides that 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." In the context of the above facts, this provision placed an obligation on Bartos as Schooley's "employing broker." In the *Bartos* enforcement action, the Commission indeed found that Schooley was "employed at" the Century 21 office and that Bartos therefore violated this provision. The provision does not place an obligation on the employees, however; it is only addressed to the employing broker, in this case,

---

[46] *See id.* at 11 (ALJ had recommended a narrower interpretation of "employed," limiting the term to paid assistance).

[47] Direct exam of Harris.

[48] Cross-exam of Schooley.

Hank Bartos. Ms. Schooley's role in the Kendrick Court and Sprucewood Court transactions did not represent a violation of this particular provision by Ms. Schooley.

(d) AS 08.88.398

Another provision the Division relies on in Count I is AS 08.88.398. In *Bartos*, the Commission held:

> 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 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.

In light of this holding, AS 08.88.398 cannot support a violation in this context, and that aspect of the Division's first count was dismissed prior to the hearing.

(e) AS 08.88.171(a)

The Accusation also alleges that the conduct described in this count violated a sentence of AS 08.88.171(a) that, at the time in question, read as follows:

> If the broker stops being an owner of a real estate business or stops being employed as a real estate broker by a foreign or domestic corporation, partnership, limited partnership, or limited liability company, the broker's license is suspended from the time the broker stops until (1) the broker again become an owner of a real estate business or is again employed as a real estate broker by a foreign or domestic corporation, partnership, limited partnership, or limited liability company; or (2) the broker is employed by another broker as an associate broker, in which case the real estate broker license shall be returned to the commission by the broker, and the commission shall issue the broker an associate real estate broker license.

This language is not a prohibition that one can "violate," and the suspension it imposes is not a disciplinary suspension. In any event, the evidence is clear that Lori Schooley never stopped being an owner of a real estate business during 2004-2005, and so the provision does not apply to her situation.

(f) Summary Regarding Count I

Ms. Schooley's role in the Kendrick Court and Sprucewood Court transactions was contrary to 12 AAC 64.075(a) and AS 08.88.321(b) as the Commission has interpreted the language in those provisions.

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 Lori Schooley's responsibility for this arrangement placed her in violation of five statutes and regulations.

1. 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.[49] Nonetheless, beginning in December of 2005 and continuing for the ensuing year, she performed property management duties for the Century 21 franchise.[50] The Coldwell Banker franchise did no property management work; all property management work Ms. Childress did was Century 21 work.[51]

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.[52] 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.[53] Either before or quite soon after she took over, Bartos and Schooley made a business decision to phase out the property management work. During the phase-out period, the work consumed about ten hours per week of Ms. Childress's time.[54] At least some of the work that Ms. Childress did on these Century 21 properties was work requiring a real estate license.[55]

---

[49] Ex. 9. *See also* Ex. 4 at REC 801 (Childress under Schooley's supervision "at all times" while performing property management work).

[50] Cross-exam of Schooley in *Bartos*; *see also* Ex. 4 at 801

[51] Direct testimony of Schooley; cross-exam of Schooley in *Bartos*.

[52] *E.g.*, direct testimony of Schooley; cross-exam of Schooley in *Bartos.*

[53] *Id*.; Ex. 6 at REC 926 (used to explain Schooley testimony only).

[54] Redirect exam of Schooley in *Bartos*.

[55] A license is required to collect rent, collect property management fees, or practice "property management," a defined term that includes such activities as marketing and leasing rental property. AS 08.88.161(3), (5); AS 08.88.990(7) [as of 2005]. That Ms. Childress performed at least some such activities is inferred from the general

2. Analysis

The Division has suggested five legal provisions that, in its view, Ms. Schooley violated by her involvement in the property management arrangement.

(a) 12 AAC 64.550(a)

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."[56] 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.[57] 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 Lori Schooley, and therefore the question is whether Ms. Schooley's conduct in this arrangement, as opposed to that of Noelle Childress, was contrary to 12 AAC 64.550(a). The first question is whether that regulation applies to Schooley at all, since she 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."[58] 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 Lori Schooley was subject to the regulation's restrictions.

Lori Schooley caused the property management activities contracted to a different office, Century 21 Gold Rush, to be managed by Noelle Childress at the Coldwell Banker office. Had

---

testimony of Ms. Schooley about property management duties in both proceedings and her admission at Ex. 4, REC 800, as well as from Ex. 14 at 1802 and Ex. 13 at 1735 (description of property manager duties at Century 21 and Coldwell Banker offices), as these items are further explained in Ex. 6 at 926 (needed a licensee in position) and Ex. 4 at 801.

[56] 12 AAC 64.550(a).

[57] *See* Ex. 26 at REC 2008, 2017-8; Ex. 28; 12 AAC 64.112.

[58] AS 08.88.990(10) [cited as of 2005-2006; now renumbered AS 08.88.990(12)].

Childress managed them in the name of Coldwell Banker, there might be no violation of this regulation by Schooley. But Childress managed them in the name of Century 21, which was not the "registered name of the real estate company with which" Ms. Schooley was affiliated. Thus, in her supervisory role, Schooley indirectly conducted property management activity in the registered name of a real estate company other than the one with which she was affiliated. Hence, the circumstances proved by the Division represent a violation of 12 AAC 64.550 by Ms. Schooley.

(b) 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." The Commission has already found that Hank Bartos violated this provision through his use of Noelle Childress for his property management work. This case is about a different broker occupying a different role in the arrangement, however, and it requires a slightly different analysis.

Subparagraph (6), the provision the Division alleges that Ms. Schooley 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's sole explanation of how Ms. Schooley may have violated this provision is its assertion that she is subject to discipline under 12 AAC 64.110(e)(6) "because she did not remove Childress as being 'employed' by her during the time Childress was in fact working for Century 21."[59] There are two problems with this theory. Most fundamentally, it overlooks the extensive evidence that Ms. Childress was working for the Coldwell Banker office *at the same time* that she was doing the Century 21 property management work. In other words, she was doing a mixture of work, some for one franchise and some for the other.[60] If this is so, it would be factually correct for Ms. Schooley to list Childress as a licensee employed by the Coldwell Banker office. Second, 12 AAC 64.110(e)(6) has no requirement about removal of licensees from the registration form when they become temporarily or permanently inactive in their work for that office. Thus, the Division has fallen far short of proving a violation of this particular regulation *by Ms. Schooley*. That the

[59] Supplemental Motion at 8.

[60] No finding is made here that this is a permissible arrangement under the many legal provisions that may apply to it. The ALJ addresses only Ms. Schooley's liability under the theories articulated by the Division.

arrangement was illegal, and that it could give rise to significant discipline against the non-reporting broker, Bartos, has already been decided in another case.

(c) AS 08.88.291(a)

The Division says that Ms. Schooley violated AS 08.88.291(a), a lengthy provision covering several subjects, "by failing to inform the Commission that Childress was performing property management duties for Century 21."[61] The Division did not initially say what aspect of AS 08.88.291(a) Ms. Schooley allegedly violated, but after some motion practice the Division did, in its prehearing brief, narrow the allegation down to the first sentence of that provision.

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." Ms. Schooley's real estate office was the Coldwell Banker office. She appears to have correctly designated Ms. Childress as a licensee working for her at that office. The Commission has found that Mr. Bartos violated this sentence by failing to list Ms. Childress for *his* office, but it does not follow that Ms. Schooley, who was not the broker for the Century 21 office, would likewise be in violation of this particular provision.

The Division protests that so interpreting § 291(a) results in a broker being able to intentionally misrepresent to the Commission (and to the public) the licensees employed by the broker, because "[e]very time Childress performed property management duties for the Century 21 franchise, she was no longer 'employed' at Coldwell Banker."[62] This is wrong on two levels. First, when an arrangement is illegal for all three people participating in it—in this case, for Childress and Bartos under this legal provision and for Schooley under a different legal provision—the arrangement is illegal. Recognizing that it does not happen to be a violation of a particular statute by one of the three necessary participants does not make people "able" to pursue such arrangements with impunity. Second, the Division's reasoning is like saying that a part-time realtor who does hairdressing on the side is "no longer employed" by her broker on every day of the week that she does the other occupation. It is not sensible to say that Childress was "no longer employed" by Schooley every time she picked up the phone to do a property

---

61 *Id*. at 7.

62 Division's Hearing Brief at 12.

management duty and to accuse Schooley of "misrepresentation" for maintaining her on the Coldwell Banker registration. It may have been entirely illegal for Childress and Bartos to do what they were doing, but it was illegal precisely *because* Childress was still employed at Coldwell Banker, and Schooley committed no misrepresentation by so reporting.

(d) 12 AAC 64.075(a)

This is a regulation that was found in *Bartos* to be aimed solely at licensees who have employing brokers, not aimed at brokers. In motion practice regarding this count prior to the hearing, the Division conceded that the Commission's interpretation of this regulation in *Bartos* was inconsistent with liability for Schooley under the Count II facts, and this aspect of Count II was therefore dismissed.

(e) 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." Ms. Childress was working in the Coldwell Banker office during the relevant period, and her license certificate was displayed there.[63] That is the end of the matter.

(f) Summary Regarding Count II

Ms. Schooley's role in directing Noelle Childress to perform property management work in the name of a different office was contrary to 12 AAC 64.550(a).

C. Count III (Sprucewood Court Disclosures)[64]

1. Nature of Summary Adjudication

Prior to the scheduled hearing in this matter, the Division moved for summary adjudication on Count III. Summary adjudication in an administrative proceeding is the equivalent of summary judgment in a court proceeding.[65] It is a means of resolving disputes without a hearing when the central underlying facts are not in contention, but only the legal implications of those facts. If facts that are undisputed establish that one side or the other must

---

[63] Cross-exam of Schooley.

[64] The discussion in the text relates to the main set of allegations in Count III. Count III also contained a stray sentence that appeared to raise an independent allegation about a website. The website allegation was handled, and rejected, as a separate claim in *Bartos.* In this case, the Division has expressly conceded that the sentence is "merely illustrative" and should not be treated as a purported independent basis for discipline. Division's Opposition to Motion for Summary Adjudication at 5-6. This concession is accepted, and the website allegation will not be adjudicated in this decision.

[65] *See, e.g., Schikora v. State, Dept. of Revenue,* 7 P.3d 938, 940-41, 946 (Alaska 2000).

prevail, the evidentiary hearing is not required.[66] Thus, if the Division presented by motion admissible evidence sufficient to support a finding in its favor on each required element of a violation, and there was no contrary evidence in the record at that time creating a dispute of material fact on any of those elements, the violation would be established and there would be no need to proceed to a hearing on that particular violation.

A dispute of material fact is not created by a party merely asserting, in argument, that one exists. If the moving party has laid out a set of facts and supported them with evidence, the party resisting summary adjudication must likewise support any competing version of the facts with evidence.[67]

2. *Ms. Schooley's Election Not to Submit Evidence*

In this case, the Division submitted a motion for summary adjudication supported by documents and testimony collected during the prior, related proceeding, *In re Bartos*. Ms. Schooley's counsel initially filed a two-page opposition to the motion that included no competing evidence, apart from a brief affidavit confined to the affirmative defense of laches. Concerned that her counsel had misunderstood the potential effect of submitting no evidence, the administrative law judge (ALJ) gave Ms. Schooley a second opportunity to oppose the motion, expressly drawing the attention of her counsel to the regulation governing motions of this type, 2 AAC 64.250(b).[68] Ms. Schooley then filed a second opposition, electing not to attach or refer to any evidence.

In her second opposition, Ms. Schooley asserted that she was not represented by counsel in the *Bartos* proceeding and that not all facts relevant to her own conduct were revealed in the testimony and other evidence taken in that case. She asserted, through counsel, that she "is entitled to the opportunity to present her own defense to the counts levied against her."[69] In this assertion she was absolutely correct. Her opportunity "to present her own defense" was in her opposition to the motion. If testimony she gave in *Bartos* was incomplete or wrong, for example, she could submit an affidavit adding to or correcting her own testimony. She chose to do nothing of this kind. Accordingly, the record for the motion consisted only of the items the Division chose to submit. If, at the time a motion becomes ripe for decision, the record before

---

[66] *See Smith v. State of Alaska*, 790 P.2d 1352, 1353 (Alaska 1990); 2 Davis & Pierce, *Administrative Law Treatise* § 9.5 at 54 (3d ed. 1994).

[67] *See* 2 AAC 64.250(b).

[68] Order Setting Deadline for Evidentiary Submission by Ms. Schooley (Feb. 5, 2010).

[69] Second Response to Supplemental Motion for Partial Summary Judgment, at 6.

the ALJ reveals no dispute about a factual matter, that fact is "undisputed" for purposes of summary adjudication.

3. Laches

A special word is in order regarding Ms. Schooley's affirmative defenses. As to one of those defenses, laches, Ms. Schooley, as noted above, submitted a small amount of evidence. Had she supplied cognizable evidence on each element of laches, summary adjudication would likely have been precluded, and a hearing on Count III would have been required. However, as discussed in Part III-B above, the evidence Ms. Schooley presented with her opposition to the motion for summary adjudication was legally insufficient to make out a laches defense.

4. 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 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 Earnest Money Receipt and 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.[70] 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 Receipt and Purchase Agreement while she was "filling in" for Mr. Bartos when he was out of town.[71] Bartos handled the rest of the transaction on his own.[72]

The second page of the Earnest Money Receipt and Purchase Agreement was entitled "Consensual Dual Agency Agreement."[73] 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

---

70 Ex. 10 (Ex. 20 to the summary adjudication motion) at REC 1113.
71 ALJ exam of Schooley in *Bartos*.
72 Cross-exam of Schooley in *Bartos*.
73 Ex. 10 (Ex. 20 to the summary adjudication motion) at REC 1112.

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):
>
> ☐ 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.[74] 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.[75]

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.[76] 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.

---

74 ALJ questioning of Schooley in *Bartos*.

75 Cross-exam of Schooley in *Bartos*.

76 Ex. 10 (Ex. 20 to the summary adjudication motion) at REC 1128.

5. Analysis

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

(i) that Schooley participated in a dual agency relationship with the buyer and seller but failed to disclose the dual agency;

(ii) that Schooley 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.

Disclosure of dual agency. In the Sprucewood Court transaction, Lori Schooley had authority to act and sign on behalf of the selling broker, Hank Bartos.[77] In so acting in his stead, she was doing more than the ministerial task of simply signing a document Bartos had prepared. 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.[78] 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 dual agency representation and obtains written consent to the dual agency representation from both principals."[79]

Ms. Schooley did make a timely written dual agency disclosure at the outset of this transaction, albeit one that expressly mentioned only Bartos, not herself. 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" was left blank.

---

77 Direct and ALJ exam of Schooley in *Bartos*.

78 The statute "applies only to acts that occur before January 1, 2005." AS 08.88.396(f).

79 AS 08.88.396(c).

Ms. Schooley has explained the missing consent from St. Pierre by speculating that "maybe Bill [Burrows] forgot" to get the signature.[80] 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 Schooley was acting in the dual agency role.

It should be noted that the April 28, 2004 "Agency Disclosure" that St. Pierre and Burrows signed does not suffice as a written consent by St. Pierre.[81] 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 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 Ms. Schooley.

Conflict of interest. Alaska Statute 08.88.391 is the provision the Division alleges Ms. Schooley 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.

---

[80] Cross-exam of Schooley in *Bartos*.

[81] *See* Ex. 10 (Ex. 20 to the summary adjudication motion) at REC 1128, discussed above.

The Division relies on subparagraph (4): that Schooley was receiving "compensation from someone other than a party to the contract or another party having a financial interest in the transaction."[82]

The Real Estate Commission has consistently read this subparagraph (4) 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.[83] 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, Schooley filled a dual agency role, and she received compensation in the transaction as a whole (albeit not for the particular work she was doing as Bartos's substitute) from St. Pierre through the Coldwell Banker commission, and so she had a conflict with respect to Viale.

Conflicts of interest are not prohibited, but they must be disclosed.[84] 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."[85]

Ms. Schooley did make a written disclosure relating to her dual agency contemporaneously with the initial substantive contact, but the disclosure was self-contradictory and therefore defective. Accordingly, she had an undisclosed conflict of interest. Therefore, in addition to being a violation of AS 08.88.396 as discussed previously, the Sprucewood Court transaction represented a violation of AS 08.88.391 by Ms. Schooley.[86]

---

[82] Supplemental Motion at 10.

[83] *Bartos,* Decision & Order at 22-23 (discussing an alternative reading that has not been followed). The interpretation in *Bartos* is also 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).

[84] 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.

[85] Former AS 08.88.391(a) [1998-2004].

[86] The Real Estate Commission imposed no sanction on Henry Bartos for his parallel violation of AS 08.88.391 in connection with this transaction. Only the violation of AS 08.88.396 was sanctioned.

D. Count IV (Rex Lane)

Count IV is very similar to Count III. It focuses on a second transaction likewise involving Burrows, Schooley, and Bartos, but with crucial distinctions as to the nature of the disclosures offered to the clients. What is most important for the ruling below is that Count IV in this case is essentially identical to Count IV in *In re Bartos*. The transaction is the same, and Bartos and Schooley had parallel, coequal roles, one on one side of the transaction and the other on the other.

In *Bartos,* the Commission made detailed findings of fact about the Rex Lane transaction, found that the disclosures were adequate, and found no violation of any law or regulation by Mr. Bartos. Prior to the hearing in this case, Ms. Schooley moved for summary adjudication on the basis of "issue preclusion," arguing that the Division should be bound by the determinations the Commission had already made about this transaction.

1. Factual Background

In Bartos, the Commission made factual findings, reprinted in the block quotation below, about the Rex Lane transaction.[87] The manner in which these findings may carry over to the present case will be discussed in the next section.

> 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.
>
> Ms. Gappa wrote the offer that became the Purchase Agreement. The second page of the Purchase Agreement was entitled "Consensual Dual Agency Agreement." 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.

[87] The footnotes to the quoted passage, which cited various sources in the *Bartos* record, have been omitted.

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 likely than not that she told the buyers the reason she was asking them to sign the agreement. They signed voluntarily. 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. 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. Both the buyer and the sellers obtained the deal they expected from the transaction; no financial adjustments were made at their expense.

2. Issue Preclusion

For reasons of consistency and administrative economy, there are rules of adjudication designed to keep parties from taking multiple "bites at the apple"—from litigating the same matters over and over again at the same level in the hope of obtaining a better result. These rules do not apply to Ms. Schooley in this case, because this is her first bite at the apple: it is the first time she has had an opportunity to litigate. Thus, for example, if the Commission has already found a certain fact adverse to Ms. Schooley to be true in *Bartos*, the Division still must prove that fact again in this case, and Ms. Schooley is free, if she wishes, to bring in new evidence and try to persuade the Commission to reach a different conclusion. The concept of due process requires that she be given her day in court. For findings adverse to the Division's case, however, a different rule applies because the Division is now on its second bite at the apple.

The doctrine of issue preclusion, as explained by the Alaska Supreme Court, is designed to "prevent[] a party from pursuing an issue in a second action that is "identical to [one] decided

in the first action."[88] The prior "action" can include an administrative determination.[89] There are four basic requirements before issue preclusion is imposed. First, "the party against whom preclusion would work must have been a party, or in privity with a party, to the first action."[90] That requirement is met here because the Division was the prosecuting party in both *Bartos* and this case. Second, "the issue to be precluded from relitigation must be identical to the issue decided in the first action."[91] The second element is met because the Division alleged the same set of facts and the same violation—that the common ownership of Coldwell Banker and Century 21 was not properly disclosed. Third, "the first action must have resolved the issue by final judgment on the merits."[92] *Bartos* was resolved by a final order of the Commission that closed the case entirely.[93] Fourth, "the determination of the issue must have been essential to the final judgment."[94] The *Bartos* ruling on Count IV required the Commission to evaluate the adequacy of disclosures under all the circumstances, and there has been no suggestion that anything the Commission examined was unnecessary to its decision.

In responding to the motion for summary adjudication, the Division did not quarrel with the fact that the two Counts IV are perfectly parallel, and did not respond to the legal principles of issue preclusion.[95] Instead, it pointed out that it had registered its disagreement with the outcome of Count IV in *Bartos* and indicated that it would like to argue the matter to the Commission again, noting that the Commission had found the Rex Lane and Sprucewood Court transactions to be "similar."[96] Arguing the matter again is exactly what issue preclusion is supposed to prevent, however. Moreover, the Division's contention that the Rex Lane transaction should be treated like the Sprucewood Court transaction merely because the two were "similar" is adequately addressed in the *Bartos* decision at pages 24 ("In contrast to the Sprucewood Court agreement . . .") and 25 (". . . no parallel to the situation at Sprucewood Court . . .").

---

88 *Beegan v. State, Dep't of Transp. & Pub. Fac.*, 195 P.3d 134, 138 (Alaska 2008) (quoting prior authority).

89 *See, e.g., Johnson v. Alaska State Dep't of Fish & Game*, 836 P.2d 896, 906 (Alaska 1991).

90 *Id*.

91 *Id.*

92 *Id.*

93 Although pendency of an appeal usually does not prevent the application of issue preclusion, it is notable that the Commission's resolution of Count IV in *Bartos* is not on appeal; the pending Superior Court appeal relates to other counts.

94 *Johnson*, 836 P.2d at 906.

95 Division's Opposition to Motion for Summary Adjudication, at 5-6.

96 *Id.* at 6.

3. Possible Additional Theory Not Litigated in Bartos.

In ruling on the motion for summary adjudication, the ALJ thought he discerned a possible additional theory in Count IV against Schooley that was not addressed in the Commission's resolution of Count IV in the *Bartos* matter. That possible theory was that Schooley intervened in the Rex Lane transaction as a licensed assistant for Bartos after having previously participated as a supervising broker to Burrows, and that this shift to a different side of the transaction required additional disclosure. The ALJ kept Count IV open for the hearing insofar as the Division might wish to pursue this additional angle. In its prehearing brief, however, the Division stated unequivocally that it was "not alleging that Schooley intervened in the Rex Lane transaction as a licensed assistant for Bartos."[97] With that clarification, Count IV is fully resolved by issue preclusion and Ms. Schooley is entitled to dismissal.

E. Count V (Policies and Procedures Manual)

Count V, which had no parallel in the *Bartos* proceeding, focuses on the Coldwell Banker policies and procedures manual placed in effect on January 1, 2005. The Division alleges that it violated the 2005 version of AS 08.88.685(a), which required such a manual for the first time, and also constituted the circulation of a false statement in violation of AS 08.88.071(a)(3)(D).

1. General Background

In the 2004 legislative session, the legislature enacted a law requiring brokers to "adopt a written policy that identifies and describes the relationships in which the broker and the real estate licensees who work for the broker may engage with a seller, buyer, lessor, or lessee."[98] This requirement was given an effective date of January 1, 2005. The legislature also instructed the Real Estate Commission to "adopt regulations that establish . . . guidelines to assist a broker to adopt the written policy."[99]

The Commission adopted a regulation in response to this mandate on November 10, 2004, obtaining approval from the Lieutenant Governor on November 29, 2004. Notice of the adoption was published on December 30, 2004.[100] Some sort of unofficial notice of the final regulation seems to have been issued, but it may not have been ample; the testimony at the

---

97 Division's Hearing Brief at 16.

98 § 6 ch 105 SLA 2004.

99 *Id*.

100 Public Notice: Adopted Regulations Dealing with Broker's Written Policy, Consumer Pamphlet, Waiver of Right to Be Represented, Supervision, and Property Disclosure Form (Dec. 30, 2004).

hearing indicated that members of the profession had sixteen days' notice of the exact requirements for the policy.[101] During that window, real estate educator Jerry Royse sold adaptations of a stock policies and procedures manual he prepared to 200 brokerages across the state. Century 21 Gold Rush and Coldwell Banker Gold Country were among his customers.[102] Apart from running a "find and replace" search to substitute the name of the purchasing brokerage, Royse did not customize manuals for his customers.[103]

The Coldwell Banker manual at issue in this case was transparently an adaptation of a Century 21 manual; that is, the Royse template was first adapted for Century 21 Gold Rush and then the resulting adaptation was further modified for the Coldwell Banker office.[104] Indeed, the resulting Coldwell Banker document retained the Century 21 footer on every page, and some text applicable only to Century 21 remained in the manual.

2. Analysis of Specific Allegations

(a) Alleged Violation of Requirement for a Policy

It is important to bear in mind exactly what the law required in 2005 regarding a policies and procedures manual. By statute, a brokerage had only to maintain "a written policy" covering "the relationships in which the broker and the real estate licensees who work for the broker may engage with a seller, buyer, lessor, or lessee."[105] The legislature had directed the Commission to adopt guidelines for this single requirement, and in response to that directive the Commission had further elucidated it as follows:

> A broker shall adopt a written policy manual that addresses guidelines and procedures
>
> (1) to determine the designated licensee
>
> (2) that establish a policy for when the broker becomes a designated licensee;
>
> (3) for neutral licensees;
>
> (4) for a single real estate licensee representing one party in a transaction while providing specific assistance to an unrepresented party in the same transaction; and

---

101 Cross-exam of Royse.
102 Direct testimony of Royse.
103 Cross-exam of Royse.
104 Compare Ex. 13, 14.
105 § 6 ch 105 SLA 2004.

(5) for maintaining confidentiality within the office for all transactions.[106]

At the hearing, the Division's expert identified subdivision (2) as the only one of these five elements that the Coldwell Banker manual did not meet.[107]

On pages 40 and 41, the manual contains the following statement under the headline "Designated Licensee is Broker":

> A broker who represents and provides specific assistance to a person in a transaction when another licensee, who is working for that broker, represents and provides specific assistance for another person in that same transaction is a designated licensee. If the other licensee has a question regarding the transaction, the broker may assign another senior licensee in the brokerage or a broker outside the company if necessary to give any assistance or advice that the licensee may require.[108]

The provision seems to be part of the uniform template that Royse provided to 200 brokerages in late 2004.[109] Elsewhere in the manual is a discussion of the general concept of "designated licensee," including an indication (albeit not very clearly written) that the designated licensee and the other licensee within the same firm should maintain confidentiality from each other of their respective clients' confidences.[110]

The Division asks the Commission to find that this portion of the manual represents a sanctionable violation of the then-existing limited statutory requirement for a written policy about relationships with clients, as elaborated in the Commission's regulation to include a specific requirement for "a policy" regarding "when the broker becomes a designated licensee." Several circumstances counsel against doing so. First, all of the evidence at the hearing indicated that the language the Division now finds fault with is template language used by 200 brokerages, and yet, in the five years since it began appearing in manuals, the Division has never pursued enforcement against any other brokerage (not even that of Bartos himself) for using this template. Second, uncontroverted testimony at the hearing indicated that the manuals were developed in a hectic sixteen-day period between announcement of the Commission's requirements and their effective date.[111] The Division has established only that the Coldwell

---

106 12 AAC 64.117. The Division's Accusation, Hearing Brief, and expert report (Ex. 7) identify no specific violation; the expert testimony seems to be the first time this level of specificity was reached in the Division's analysis.

107 ALJ exam of Sandberg (Anchorage Dig. File 1 at 2:14:00 to 2:18:30).

108 Ex. 14 at REC 1838.

109 *See* Ex. 13 at REC 1771 (identical provision in Century 21 manual).

110 Ex. 14 at REC 1846.

111 Cross-exam of Royse.

Banker manual in the record was the one put in place after those sixteen days;[112] the Division offered no evidence that the manual remained in effect for any particular length of time or that it remained unedited or unimproved indefinitely. Third, the passage at issue is indeed "a policy" on the required subject. The regulation, as written, does not mandate a comprehensive treatment of the subject.

The Division appears to suggest that there was something unique about Ms. Schooley's role and the common ownership with the Century 21 franchise that necessitated a more extensive treatment of the policy "for when the broker becomes a designated licensee." It is not clear why this would be. Ms. Schooley was "the broker" for this office, and, when she became a designated licensee opposite one of her other licensees, confidences would have to be preserved and special lines of consultation established just as they would within any other office. The common ownership with Century 21 does not particularly implicate subdivision (2) of the regulation. Hank Bartos was not "the broker" to which subdivision (2) is addressed. The common ownership with Century 21 probably does implicate subdivision (5) of the regulation, but the Division's expert has expressly stipulated that the manual did not violate subdivision (5).

(b) Alleged Misrepresentation

The Division also asserts that the manual constituted a violation of AS 08.88.071(a)(3)(D), which prohibits licensees from knowingly "publishing, distributing, or circulating" false information "concerning the licensee's business." The focus of this allegation is the page of the manual offering "SOME FACTS ABOUT OUR FIRM AND OUR BROKER."[113] This page contains no mention of Lori Schooley. Instead, it devotes seven of its eight paragraphs to a biography of Hank Bartos. The text identifies Bartos only as the "owner" of the Coldwell Banker franchise—a more or less true statement, since Bartos was the majority shareholder in the corporation that owned the franchise. However, a reader who was not otherwise informed would certainly conclude from this page, based on the title, that Bartos was the broker of the Coldwell Banker office as well. This was untrue. On the other hand, the manual did elsewhere identify Lori Schooley as the Coldwell Banker broker.[114]

---

[112] The only evidence to date the manual is the "revised" date appearing in its footer. No testimony was elicited on this subject.

[113] Ex. 14 at REC 1799.

[114] *Id.* at REC 1819.

Another error on the same page of the manual is that it says "[O]ur office locations are in the Graehl Business Center and on Geist Road in Fairbanks, and Forbes Square in North Pole." Again, this is wrong; as the manual correctly notes elsewhere, Coldwell Banker had just one office, located on Airport Way.[115]

The legal question is whether the Division has proven that Lori Schooley knowingly published, distributed, or circulated wrong information in connection with the erroneous page of the manual. The Division's theory in this connection is primarily grounded in the fact that, in those days, AS 08.88.685(a) provided that "[t]he broker shall make the written policy available to . . . members of the public;" thus, the Division concludes that putting erroneous information in a policy manual represents publishing it to the public. This theory was not borne out at the hearing. First, the expert testimony uniformly showed that it is very atypical, if not unheard of, for a member of the public to make a request under AS 08.88.685(a). Certainly, no evidence was elicited that any member of the public had ever asked for, or viewed, any part of the Coldwell Banker manual at issue. Moreover, AS 08.88.685(a) does not require the whole manual to be available on request. The statute covers only the policy about realtor-client relationships, of which the erroneous page was not a part.

At a deeper level, the Division's position trivializes an important statute. It is safe to assume that when the legislature prohibited licensees from knowingly "publishing, distributing, or circulating" false information "concerning the licensee's business," it was not seeking to remedy the problem of careless editing of essentially internal documents. Instead, it was undoubtedly trying to protect the public from fraud and false advertising. Here, we have a manual that contains the correct information in one place but—because of sloppy editing of the template from Century 21— that conveys wrong information on another page. There is no evidence that it was ever shown to the public. There is no evidence that Lori Schooley was aware of the editing error. In these circumstances, no violation of AS 08.88.685(a) has been proven.

This count is not made more compelling by the fact that the erroneous page of the manual may have been seen by licensees within the Coldwell Banker office. First, the Division did not elicit any testimony that this took place, and neither the statute nor the implementing regulation actually requires that the manual be shown to licensees. There is therefore a failure of proof on a

---

[115] *Id.* at REC 1818.

key link to any such theory. Second, it is inconceivable that real estate professionals in the office would actually have been misled by the manual page suggesting that Hank Bartos was the broker of the Coldwell Banker office and providing the wrong address for the firm's office. The Coldwell Banker licensees would know who was the employing broker designated on their license cards, and would know where their office was located. [116]

(c) Summary Regarding Count V

No violation of any applicable law has been proven in connection with the January 1, 2005 Coldwell Banker Gold Country Policies and Procedures Manual.

V. DISCIPLINE

The Division has proven violations in connection with Count I (acting as licensed assistant to Bartos), Count II (directing Childress to perform property management in the name of another real estate office), and Count III (undisclosed conflict and dual agency for Sprucewood Court).

In assessing discipline for violations of the statutes and regulations it administers, the Commission is required to "seek consistency."[117] There is a direct parallel to the *Bartos* case, where the Commission imposed discipline on another broker for the conduct in Counts I – III. Apart from *Bartos*, 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, and two prior settlements involving conduct akin to Counts I-II are covered in the discussion of those counts. Some less closely analogous prior discipline cases are discussed in the footnotes.

A. Counts I and II

In Count I, the Division established that Hank Bartos "employed" Ms. Schooley in two transactions. Under the Commission's interpretation of its statutes and regulations as first expressed in *Bartos*, this could not occur without a transfer of Ms. Schooley's license to the Century 21 brokerage. The single violation found in Count II involved the direction of a subordinate to conduct property management activities in the name of another brokerage. *At the core of both Counts I and II is a single underlying principle: that real estate licensees should*

---

116 *Cf., e.g.,* direct exam of Burrows (licensee acutely aware of who his employing broker was).

117 AS 08.01.075(f).

only do business for, and in the name of, the brokerage to which they are registered with the Commission.

In general, this is a type of violation for which the Commission has authority to revoke or suspend a license.[118] The Commission may also impose any other disciplinary sanction or combination of sanctions, including censure or reprimand, license limitations or conditions, requirements for education or peer review, probation, or a fine.[119] Fines are limited to $5000.[120]

The Commission has recently adopted disciplinary consent agreements with two licensees who conducted real estate business through something other than their registered office. *In re Sorenson*[121] involved a licensed saleperson who was also the owner of the registered brokerage for which she worked, Unlimited Properties. She was found to be actively marketing real estate under the trade name "All Dream Properties," which had never been registered as a brokerage. The Commission staff initially simply warned her to stop, but she continued to do business under the unregistered name. As the Consent Agreement summarized her violations:

> Ms. Sorenson established and operated an unregistered brokerage, All Dream Properties, which her broker reported he had no knowledge of. She then continued to operate under the All Dream Properties name after being advised by both her broker and the Division that she was not in compliance with statutory requirements, all of which is in violation of AS 08.88.071(a)(3)(D), AS 08.88.291, AS 08.88.305, 12 AAC 64.110, 12 AAC 64.112 and 12 AAC 64.130(11) [&] (18).[122]

The Commission fined Ms. Sorenson $3500 with $2500 suspended (for a net payment of $1000), reprimanded her "for opening and operating an unregistered brokerage," and imposed six months of probation. In *In re Donaldson*,[123] Ms. Sorenson's broker was sanctioned for his role in the same misconduct, which amounted to lack of supervision of his licensee, and for his failure, even when alerted to the problem, to check on the status of the unregistered brokerage. He was fined

---

118 12 AAC 64.130(9) [both present version and version in effect in 2005-2006] (Commission may suspend or revoke for "failing to disclose the name of the broker or company under whom the licensee is licensed") & (11) (may suspend of revoke for "acting in violation of the provisions of AS 08.88").

119 AS 08.88.071(a)(3); AS 08.01.075.

120 AS 08.01.075(a)(8).

121 No. 3004-09-008 (Alaska Real Estate Commission, Memorandum of Agreement adopted Feb. 3, 2010).

122 Consent Agreement at 3-4.

123 No. 3000-09-014 (Alaska Real Estate Commission, Memorandum of Agreement adopted Dec. 10, 2009).

$5000 with $2500 suspended (for a net payment of $2500), reprimanded for "abdicating your broker supervision responsibilities," and put on license probation for a year.[124]

Ms. Schooley's conduct was less serious than the Donaldson/Sorenson conduct in several ways. First, there was no use of a wholly unregistered brokerage identity, defeating Real Estate Commission oversight. Instead, the Childress activities under Count II were conducted in the name of an established, registered brokerage with a broker (Bartos) who knew of, and had been involved in, the property management arrangements at issue. Likewise, the work done for Bartos under Count I was done in the name of an established brokerage whose broker was directly involved in the transactions. There was little risk of a failure of accountability.[125] Second, Ms. Schooley, in contrast to Ms. Sorenson, was never given a specific warning and did not proceed in defiance of a warning. Third, Ms. Schooley was not setting up a new, illegal business. Instead, her violations came about (i) during a phase-out of the property management business, with a few properties that had been retained temporarily to avoid inconveniencing clients serving in Iraq and (ii) in stepping into single transactions under special circumstances. They were thus self-limiting violations, not the seed for an expandable illicit enterprise.

With those distinctions acknowledged, the *Donaldson* and *Sorenson* cases show that the Commission does insist that licensees operate only in the name of their registered brokerage.[126] Let us now turn to the three specific violations covered by Counts I and II. As will be seen, it is not possible to impose a sanction for one of the three matters, but the other two merit levying a fine and requiring remedial education.

1. Sprucewood Court Transaction

In the Sprucewood Court transaction, Ms. Schooley stepped into a transaction for another broker for a single weekend while that broker was out of town. The testimony of the realtors at the hearing—including the Division's witnesses—reflects that this kind of *ad hoc* substitution for

---

[124] Sixteen years ago, the Commission entered into a Memorandum of Agreement with another broker for doing business under the name of the wrong brokerage, in violation of AS 08.88.291. *In re Lancaster*, No. 3000-93-74 (adopted Jan. 13, 1994). The agreed penalty was $1000 plus extra education. Because the case involved unusual circumstances that are not well described in the agreement, it is of limited value as a benchmark for future cases.

[125] *Cf.* direct testimony of Royse (Bartos still accountable).

[126] For the less serious offense of simply failing to list one's registered business name in marketing real estate, the Commission has imposed relatively small fines. Examples are *In re Ace,* No. 3000-95-08 (Memorandum of Agreement, approved April 28, 1995) ($250); *In re Stiltner*, No. 3000-95-33 (Memorandum of Agreement, approved Oct. 12, 1995) ($1000 with $500 suspended, plus education, all of which was a combined penalty encompassing three trust account violations as well).

an absent fellow broker has been very common in Alaska.[127] Witness Jerry Royse, a Commission-approved instructor in this area, was adamant that this kind of arrangement is not one broker "employing" another and is entirely legal. The Division's expert witness, Charles Sandberg, likewise opined that it is permissible for a broker to do this for another broker ("there's some latitude for brokers for a short period of time"), although he contended that such a substitution was made legal by 12 AAC 64.077(c). (In fact, his reading of that regulation was incorrect: it authorizes only signatures on license applications; moreover, a mere regulation could not override the statutory requirements the Commission has found to exist.)[128] The bottom line is that professionals the Commission itself has entrusted with educating realtors about matters such as this have thought brokers from different brokerages could substitute for one another as a courtesy when one of them is ill or otherwise unavailable. It has not generally been thought that these short-term, *ad hoc* substitutions represented one broker "employing" another, so that the substituting broker had to formally transfer his license to the brokerage of the ill or unavailable brokerage.

In *Bartos*, at the Division's urging, the Commission explicitly stated that this kind of substitution represents the employment of one broker by the other, and therefore is only legal if there has been a formal transfer of the substitute broker's license.[129] The Commission's interpretation is a permissible reading of the statute, and the profession should anticipate that the Division and the Commission will henceforth apply it rigorously and may impose—on any brokers who do not comply—the same level of discipline the Division has advocated for Bartos and Schooley. The question in this case, however, is whether that discipline can be applied retroactively, to conduct that occurred before the Commission made its public ruling in *Bartos*.

Since the *Bartos* opinion was written, the Alaska Supreme Court has issued its groundbreaking opinion in *Alaska Public Offices Commission [APOC] v. Stevens,*[130] which affects the analysis of the penalty that can be imposed in these circumstances. The Supreme

---

127 Re-cross of O'Hare; direct testimony of Sandberg; direct testimony of Royse.

128 As an alterative to Sandberg's problematic use of 12 AAC 64.077(c), the Division has suggested that short-term substitutions may be legal between brokerages, but only if the unavailable broker has no associate brokers he or she could rely on. This may well be a sensible rule, but the Division has made it up from whole cloth—there is nothing presently in the statutes or regulations to support making this distinction. If a short-term, unpaid substitute is "employed" by the ill or absent broker, that employment relationship exists regardless of whether associate brokers are available or not.

129 The Commission's holding on this point is found in its modifications 1 and 2 to the ALJ's proposed decision, which appear on page 40 of the overall document.

130 205 P.3d 321 (Alaska 2009).

Court extended the rule of lenity to the civil context, holding that "people should not be required to guess" whether their conduct falls within or outside an ambiguous prohibition when they may be subject to "serious civil penalties."[131] The "serious civil penalty" at issue in *APOC v. Stevens* was only $630, and thus was somewhat smaller than the fines often imposed in real estate discipline cases.

APOC v. Stevens involved an agency's interpretation of the word "income" in a statute. The Supreme Court found that the word could be interpreted more than one way, but also found that the agency's interpretation—which was adverse to Stevens—was "reasonable." However, the court noted that the agency had been able to offer "no evidence that it had ever made its interpretation explicit" prior to applying it to Stevens.[132] Accordingly, the court left the agency's interpretation undisturbed but reversed the imposition of a civil penalty.[133]

This case is in the same posture. The Commission has already acknowledged in *Bartos* that "the word 'employed' has several definitions."[134] The Division has been unable to point to any regulation, policy statement, or other announcement by the Commission of which interpretation it would apply, prior to the published decision in *Bartos*. The evidence shows that most brokers, including the Division's own witnesses, thought the word would not be interpreted to encompass using is fellow broker as a substitute while sick or unavailable for a day or two. That misimpression has now been corrected, but under the Supreme Court's reasoning, the clarified interpretation may not be applied to impose discipline on conduct that occurred prior to the time of the clarification.

2. Kendrick Court Transaction

A different situation is presented by the Kendrick Court arrangement, in which Lori Schooley provided long-term assistance to Mr. Bartos on a transaction, covering times when he was not absent and acting in a manner indistinguishable from a licensee in his office. This work did not fit the pattern of short-term broker-to-broker substitutions that the witnesses testified have widely been thought legal. As compensated work, the assistance on Kendrick Court fell within any reading of the word "employment" in 12 AAC 64.075(a). Ms. Schooley ought to

---

131 205 P.3d at 325-6.
132 *Id*. at 325.
133 *Id*. at 326.
134 Decision and Order at 40 (Commission's modification).

have known that she could not do licensed work for Century 21 under these circumstances while she was a broker at Coldwell Banker.

With that said, Ms. Schooley's violation in this instance was almost innocuous. Her client in the matter was Cendant Corporation, the holder of both the Century 21 and Coldwell Banker master franchises, an entity fully aware of her licensing status and her role in both offices. There is not the remotest chance that Cendant would have been compromised or misled by Ms. Schooley's crossover work. On the other side of the transaction she facilitated were buyers represented by licensed broker Douglas Welton, who would likewise have known Ms. Schooley's correct affiliation.

For his parallel role in this technical violation and for a second violation, the Commission has previously fined Hank Bartos a total of $1000.[135] An appropriate fine for Ms. Schooley's single technical violation (half the number sanctioned in *Bartos*) is $500. In Bartos, the Commission also required the respondent to complete six hours of education. The Kendrick Court violation and the Childress violation discussed below indicate that Ms. Schooley would likewise benefit from a refresher course on the legal structure of real estate businesses, including instruction on the topic of ensuring that all business activities are properly licensed and are conducted under the appropriate license.

3. Property Management Work

Ms. Schooley's final violation in the area of mixing business between two brokerages was her direction of a subordinate, Noelle Childress, to conduct property management activities in the name of Century 21 Gold Rush. For Mr. Bartos's parallel role in the same improper arrangement, the Commission imposed a $2500 fine and required six hours of remedial education. In *Donaldson*, the Commission levied a net fine of $2500 and imposed license probation for conduct that was in the same class of misconduct, but more serious.

If applied without the addition of license probation (discussed under part C below), the combination of a $2500 fine and corrective education is less onerous, on balance, than the

---

[135] The *Bartos* fine on this count, although small, represented a decision by the Commission to take these matters more seriously than it had in the past. In *In re LaRose*, No. 3000-91-29 (Memorandum of Agreement adopted March 18, 1992), the Commission had addressed a similar situation in which one broker had, on two occasions, permitted another broker to hold himself out as the first broker's licensee. The violation was not disputed. The only discipline imposed was a reprimand. *See also In re Gross*, No. 3000-89-61 (Alaska Real Estate Commission, Memorandum of Agreement adopted July 18, 1991) (imposing only a reprimand on the other broker involved in the *LaRose* matter; however, the allegations in *Gross* were disputed).

penalties imposed on the supervising broker in the more serious *Donaldson* matter and is equal to the fine imposed for the same conduct in *Bartos*.[136] It is therefore in the appropriate range for Ms. Schooley's misconduct on Count II. The corrective education overlaps with that already described for the Kendrick Court violation.

B. 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.[137] The Commission also has authority to impose any other disciplinary sanction or combination of sanctions, including censure or reprimand, license limitations or conditions, requirements for education or peer review, probation, or a fine.[138] As noted previously, fines are limited to $5000.[139]

The misconduct proved in Count III was at the low end of seriousness for conduct of its type. As has been discussed in the *Bartos* decision, 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.

---

136 Another way of looking at the Childress violation is that it is similar to letting an unlicensed person, such as a receptionist, perform some of the licensed work of a brokerage. This analogy is apt because Ms. Childress was, in effect, not licensed to do Century 21 work. In *In re Jerry Royse*, No. 3000-91-34 (Memorandum of Agreement adopted July 7, 1994), the Commission addressed just that situation—the use of an unlicensed receptionist to perform property management duties. The commission required a $1000 fine and 15 hours of education. However, an unspecified portion of this penalty was attributable to a separate, wholly unrelated violation. For this reason, and for the reason that the factual background is much clearer, the more recent *Donaldson* case is a better benchmark.

137 12 AAC 64.130(11) [both present version and version in effect in 2004] (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 2004].

138 AS 08.88.071(a)(3); AS 08.01.075.

139 AS 08.01.075(a)(8).

In the 2004 discipline case entitled *In re Mehner*,[140] 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 the absence of 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,"[141] imposed a year of probation, required remedial education on dual agency and conflict of interest, and levied a fine of $20,000.[142] Because of the mix of violations, it is difficult to determine how much of the discipline was attributable to the violation of the dual agency disclosure requirement.

A counterpoint to *Mehner* is the Commission's recent action in *In re Enoch*.[143] *Enoch* was a memorandum of agreement, or settlement, approved by the Commission, and therefore carries less weight than a contested decision, but such memoranda provide a sense of how the Commission has weighed violations in the past. 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.[144] 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."[145]

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

---

140 Case No. 3002-02-005 (Real Estate Commission, adopted March 4, 2004).

141 *Id.* at 60.

142 *Id*. at 61.

143 Case No. 3004-07-010 (Alaska Real Estate Commission, Memorandum and Order adopted Feb. 1, 2008). In the *Bartos* matter, the Division stated in its Proposal for Action to the Commission that it "would be improper" for the Commission to consider *Enoch* when it adjudicates the penalty in a contested matter, because memoranda of agreement are settlements and are not cognizable as prior "decisions." Since the Division made that argument, the Alaska Supreme Court has issued a decision in *State, Board of Dental Examiners v. Ness*, No. S-13129 (Jan. 28, 2010), which makes it clear that not only *may* the Commission consider the settlements it has approved in the past; it *must* do so.

144 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).

145 *Enoch*, *supra*, MOA at 5.

the additional element, present in *Enoch*, of mishandling earnest money. On the other hand, the probation imposed in *Enoch* enhances the penalty imposed beyond its monetary face value.

Finally, the imposition of a sanction for Count III should be informed by the Commission's choice of a sanction in *Bartos* in connection with the same misconduct. In that case, the Commission imposed a civil fine of $1000 and issued a reprimand for the failure to disclose dual agency. The Commission expressly determined that no fine or reprimand should be imposed for the failure to disclose a conflict of interest, in light of the murkiness of the law in this area at the time of the violation. The Commission required six hours of remedial education.

The sanction imposed in *Bartos* for this 2004 transaction was quite light, but it was in keeping with *Enoch*. No party has articulated a reason to depart upward or downward from the Bartos sanction in connection with Ms. Schooley's violation on this transaction. An appropriate sanction for Count III would therefore be a civil fine of $1000 and a requirement of at least six 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.

C. Collective Sanction

When this Commission imposes discipline short of license revocation, it uniformly includes a reprimand to make it clear what conduct the licensee needs to improve. That procedure should be followed here, using reprimand language that covers the sanctionable violations.

In *Bartos*, the Commission departed from the recommended decision to add the following further global sanction:

> 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.

This case does not call for these added, global sanctions. First, as the Division's counsel stated in closing argument, Ms. Schooley bears less overall responsibility for these violations than Hank Bartos. The violations stemmed from the business choice to house different brokerages under the holding company Hank Bartos Realty, Inc., and the Division points out that it was Bartos's idea to use this structure and that Schooley's actions were Bartos's "behest." Second, the number of violations is smaller. The most serious of the Bartos violations—the failure of supervision in the Constitution Drive transaction that may have resulted in very significant harm

to clients and that reflected poorly on the profession in the public eye—is completely absent from the case against Ms. Schooley.

Additional factors counsel against probation, in particular. The Division has had several years of intensive focus on Mr. Bartos and Ms. Schooley. In the case of Mr. Bartos, there was a concern about possible forgery (ultimately unproven) that may have justified the level of scrutiny applied. In the case of Ms. Schooley, the matters at issue have been of a more technical nature. It would appear that no possible transgression has been too small or unlikely; all have been pursued with dogged determination.[146] In the four to six years since the events at issue took place, Ms. Schooley has functioned under a cloud of potential civil prosecution that may be equivalent to probation. She has not had additional violations. Probation would extend the preoccupation with Ms. Schooley's business, perhaps in a way that would be unproductive for the staff.

VI. CONCLUSION AND ORDER

The Division proved violations of applicable law in connection with Counts I, II, and III of the Accusation, as detailed above. No sanction may be imposed for the violation under Count I relating to the Sprucewood Court transaction. Upon adoption of this Decision, the Commission imposes the following disciplinary sanctions against licensed broker Lori Schooley with respect to the remainder of Count I as well as Counts II and III:

A. CIVIL FINE

Respondent shall pay a fine of $500 with respect to Count I, a fine of $2500 with respect to Count II, and a fine of $1000 with respect to Count III, for a total civil penalty of $4000. The payment shall be in cash, certified check, or money order payable to "State of Alaska," delivered to counsel for the Division of 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, Lori Schooley, for failing to ensure that you and your licensee provided professional real**

[146] Count IV is a particularly troubling example of this phenomenon, having been prosecuted even after the Commission had unequivocally rejected it in a prior case. The Division refused to withdraw the count, forcing Ms. Schooley to incur additional attorney fees in moving to dismiss it.

estate services only through your registered brokerage and for failing to disclose dual agency as required by law.

C. ADDITIONAL EDUCATION

In addition to the continuing education/competency requirements under Alaska law for her license, Respondent shall within 12 months of adoption of this Decision and Order attend and satisfactorily complete (i) no less than six 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, and (ii) no less than six hours of education dealing with the legal structure of real estate businesses that includes significant instruction on the topic of ensuring that all business activities are properly licensed and are conducted under the appropriate license. The course curricula 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 26th day of April, 2010.

Signed
Christopher Kennedy
Deputy Chief Administrative Law Judge

Adoption

The Alaska Real Estate Commission adopts this decision as final under the authority of AS 44.64.060(e)(1). 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 this decision.

DATED this 17th day of June, 2010.

By: *Signed*
Signature
Bradford Cole
Name
Chairman
Title

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