FILED
MAR 30 2006
DEPARTMENT OF REAL ESTATE
By

DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

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In the Matter of the Accusation of	No. H-31960 LA
RORY REED POSIN,	L-2005080164
Respondent.	

DECISION

The Proposed Decision dated February 22, 2006, of the Administrative Law Judge of the Office of Administrative Hearings, is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

This Decision shall become effective at 12 o'clock noon on March 30, 2006.

IT IS SO ORDERED March 30, 2006.

JEFF DAVI
Real Estate Commissioner

BY: John R. Liberator
Chief Deputy Commissioner

BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA

In the Matter of the Accusation of **RORY REED POSIN,** **Respondent.**	**Case No. H-31960 LA** **OAH No. L2005080164**

PROPOSED DECISION

This matter came on regularly for hearing on January 18, 2006 and February 2, 2006, in Los Angeles, California, before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California.

Janice A. Waddell (Complainant) was represented by James R. Peel, Staff Counsel.

Rory Reed Posin (Respondent) was present and was represented by Frank M. Buda and Mary E. Work, Attorneys at Law.

During the hearing, Complainant amended the Accusation by striking Paragraph VIII.

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision.

FACTUAL FINDINGS

The Administrative Law Judge makes the following Factual Findings:

1. The Accusation was made by Janice A. Waddell, who is a Deputy Real Estate Commissioner of the State of California, acting in her official capacity.

2. At all relevant times, Respondent was licensed as a real estate salesperson by the Department of Real Estate (Department). He has been licensed by the Department since June 12, 1989. Respondent's real estate salesperson license will expire on August 13, 2009, unless renewed.

3. A real estate salesperson for over 17 years specializing in residential sales, Respondent has consistently been a top producer, steadily increasing his volume of business to become one of the top five percent of all agents internationally. He has spent his entire career working in the local area where he was raised and continues to reside. He has represented over 1,000 sellers and 1,300 buyers. He attributes his success to "taking care of people," and emphasizing "integrity, honesty and following through." Respondent is presently employed at Sotheby's International Realty[1] in Beverly Hills, California. Sotheby's President, Alan Long, described Respondent in glowing terms as a "straightforward, stand-up type of person" and "a consummate professional." At least 80 percent of Respondent's real estate practice consists of referrals and repeat business. Respondent has never been the subject of any other discipline by the Department. He is not aware of any client complaints having been lodged against him. He has never had a dispute with another real estate salesperson or broker that was brought before the Multiple Listing Service Board.

4. In April 2003, one of Respondent's repeat clients was Fountainhead Industries, Inc. (Fountainhead Industries), a company run by father and son, Harold and Michael Klein[2]. Fountainhead Industries, Inc. purchases older homes either for remodel or demolition and rebuilding. The modeled/rebuilt homes are then sold. Harold and Michael Klein are sophisticated and knowledgeable regarding residential real estate sales, having purchased and sold between 30 and 40 homes during the past decade[3]. Respondent served as Fountainhead Industries' agent on 25 to 35 of those transactions. The transaction involved in the instant case was the only one which resulted in a cancellation of escrow or a price re-negotiation.

5. In and around April of 2003, it was Respondent's custom and practice, when representing a buyer, to accept a deposit check from his client when the client made an offer on a home. He would deposit the check into escrow upon acceptance of the offer. The only exception to that custom and practice was Fountainhead Industries. Harold and Michael Klein preferred to use the same escrow company (Brentwood Escrow) for each of their escrows, and they preferred to place the deposit checks into escrow directly rather than giving it to their agent.

6. On April 1, 2003, Michael Klein, on behalf of Fountainhead Industries, made an offer purchase a home located at 2724 Anchor Avenue in Los Angeles (Anchor house). The proposed purchase price was $750,000 with a deposit of $22,500.00. The escrow company was to be Brentwood Escrow. It was the intent of Harold and Michael Klein to remodel the Anchor house and resell it.

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[1] During the relevant time period, Respondent was employed at DBL Realtors. That company has since been purchased by Sotheby's International Realty.

[2] Harold Klein's two daughters also work in this family business.

[3] Harold Klein was licensed as an attorney in 1964 and as a real estate broker in approximately 1986.

7. Respondent prepared a California Residential Purchase Agreement and Joint Escrow Instructions (purchase agreement) by using a template on his computer. As was customary, the template appeared on his computer screen bearing the last purchase agreement he had prepared on behalf of a client. Respondent then deleted that information and typed in the information appropriate for Fountainhead Industries' offer. However, instead of indicating on the purchase agreement that Fountainhead Industries would place the deposit check into escrow, Respondent missed that entry, leaving the information from the prior offer in place. Thus Section 2(A) on page 1 of the purchase agreement read, "Initial Deposit: Buyer has given a deposit in the amount of $22,500.00 to the agent submitting the offer . . ., by personal check which shall be held uncashed until Acceptance and then deposited within 3 business days after Acceptance . . ., with Escrow Holder . . . ." Respondent did not notice his mistake before he submitted the purchase agreement to the sellers. Thus, despite the language in Section 2(A) of the purchase agreement, Respondent never had possession of a deposit check from Fountainhead Industries.

8. Four counter-offers were exchanged between the parties before they agreed to the terms of purchase on April 7, 2003. The final sales price was $775,000.00. At the behest of the sellers, escrow was to be held at American Investors Escrow rather than Brentwood Escrow, and inspection contingencies were to be removed by 5:00 p.m. on Wednesday, April 9, 2003. The inspection contingencies required active removal by letter or other writing executed by the buyers. Silence would not suffice to remove those contingencies.

9. Fountainhead Industries did not place the deposit check into escrow.

10. On or about April 11, 2003, a walk-through inspection took place. Present for the inspection were the sellers (husband and wife), the sellers' agent, Bruce Mitchell, Harold Klein, Michael Klein, and Respondent's office administrator and assistant, Christian Bonk. Respondent was not present at the inspection. During the inspection, Mr. Mitchell asked Mr. Bonk about the deposit check and inquired as to when it would be in escrow. Mr. Bonk referred him to Harold and Michael Klein, whom he understood were responsible for the deposit check. Harold Klein told the sellers that he would be placing the deposit check directly into escrow. He did not tell anyone that Respondent had the check.

11. On the same day, the sellers signed a Real Estate Disclosure Statement. It disclosed, among other things, the presence of mold in the Anchor house behind the washer/dryer area, in the kitchen, and in the bathrooms. Michael Klein signed the document on the same date, acknowledging its receipt.

12. Over the next several days, Mr. Mitchell made several inquiries to Respondent concerning the deposit check. Respondent was initially unable to reach his clients, but assured Mr. Mitchell that he was certain his clients' failure to place the deposit into escrow was an oversight and told Mr. Mitchell "that's not the way [Mr. Klein] does business."

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13. On April 22, 2003, Michael Klein wrote a letter to Respondent which stated:

We are writing to update you on the status of the purchase of the above-mentioned property. As you know, we met last week with your associate, Kristian (*sic*) Bonk, and toured the property for purposes of review and inspection. We found that the property itself is conducive to our use, and we were enthusiastic about our potential purchase of the property.

Subsequently, we received all of the disclosures from the seller which brought to light certain items not evident from our physical inspection. The items include a review of the termite report which indicates extensive termite infestation throughout the home. This infestation will require both fumigation and substantial repair work to bring the property to a usable condition.

In addition, and of great concern to us, is the existence of mold in several areas of the home. As you know, the existence of mold in a property today is of great concern to buyers. We know of a situation in our area where a home approximately five-years-old was found to have mold in the walls. The owner made a claim for the mold condition which resulted in an agreement to have the home completely demolished, with a settlement in the amount of eight million dollars ($8,000,000.00) for the home and damages.

We are additionally very concerned about our exposure to the mold. Please keep in mind that although the mold may be confined visibly to a few areas, the spores may have infected the entire home.

For this reason, we view the home as a tear-down, rather than as a remodel home. We are prepared to proceed in the purchase of the home from the current seller, but at a reduced price to allow for the issues detailed above. We hope the current seller will take this into consideration.

Please advise the seller that although we have not yet deposited funds into escrow, we are prepared to do so immediately upon reaching a mutual agreement. We are also prepared to close escrow in a very short time.

We enjoyed very much meeting with the seller and hope to reach a mutual agreement with the seller in the purchase of the Anchor home.

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14. On April 23, 2003, the sellers signed a Notice to Buyer to Perform, requiring Fountainhead Industries to remove all contingencies and place the initial deposit into escrow within the following 24 hours. The following day, Respondent wrote to Bruce Mitchell, informing him that the buyers disapproved the physical inspection contingency and were canceling the escrow. On April 28, 2003, the sellers wrote to Fountainhead Industries advising that they were canceling the escrow.[4]

15. Respondent did not become aware of the mistake he had made in Section 2(A) of the purchase agreement, concerning possession of the deposit check, until some time after his clients cancelled the transaction. Aside from that entry on the purchase agreement, Respondent never represented to anyone that he was in possession of the deposit check.

16. At some time after Fountainhead Industries cancelled the escrow, the sellers objected to Respondent's failure to have possession of the deposit check, because it had deprived them of liquidated damages as described in Section 16 of the purchase agreement. That provision stated in pertinent part: "If Buyer fails to complete this purchase because of Buyer's default, Seller shall retain as liquidated damages, the deposit actually paid[5]."

17. Even though it had been the responsibility of Fountainhead Industries to place the deposit into escrow, in approximately September of 2004, Respondent retained the services of attorney Mary Work and gave Ms. Work his check for $22,500. He asked her to place the check into her client trust account and invite the sellers to participate in mediation pursuant to Section 17(A) of the purchase agreement. That section contained a standard agreement between the parties indicating that they would mediate "any dispute or claim arising between them out of this Agreement, or any resulting transaction, before resorting to arbitration or court action." Ms. Work subsequently made that offer to the buyers' attorney and further indicated that Respondent was willing to pay all costs for the first three hours of the mediation. The buyers' attorney wrote back to Ms. Work advising her that the offer of mediation was declined. At the administrative hearing, Robert Jacobs, one of the sellers, testified that he may yet be interested in mediation, but that he has not had time to pursue it. That testimony is of dubious credibility given the passage of 16 months since Ms. Work made the offer to mediate. Nonetheless, Respondent's check for $22,500.00 remained in Ms. Work's client trust account as of the time of the administrative hearing, and Respondent is still willing to mediate the issue.

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[4] Whether the sellers were aware that the buyers had already cancelled the escrow when the sellers wrote the letter of April 28, 2003, was not disclosed by the evidence.

[5] It is uncertain that the sellers would have been entitled to the $22,500.00 deposit as liquidated damages since the reason for the buyers' cancellation was their disapproval of the inspection contingency. However, by striking Paragraph VIII from the Accusation, Complainant removed the issue of financial damages to the seller. Thus, the issue of whether the sellers could have recovered liquidated damages was not before the Administrative Law Judge; it was not litigated during the administrative hearing; and no ruling is made thereon.

18. On a date after April 28, 2003[6], the Department audited some of Respondent's files. The deposit checks for each of the audited files had been given to Respondent and placed into his trust account pending the acceptance of an offer. No errors were found during the audit of those files.

19. Since April of 2003, Respondent has changed his practice regarding his acceptance of deposit checks. He no longer receives and holds any deposit checks. Instead, upon acceptance of an offer, he has his client deposit the check or wire the deposit funds directly into escrow, and he indicates that procedure on his purchase agreement forms. Thus, Respondent's deposit policy is now uniform and is more in keeping with the custom and practice of Fountainhead Industries.

20. Respondent is sincerely remorseful for his error on the purchase agreement. Although he has always tried to be careful about the accuracy of the documents he prepares, he now views those documents with even greater scrutiny than before to ensure that no other inaccurate documents leave his office.

LEGAL CONCLUSIONS

Pursuant to the foregoing Factual Findings, the Administrative Law Judge makes the following Legal Conclusions:

1. Cause exists for the revocation or suspension of Respondent's real estate salesperson license pursuant to Business and Professions Code[7] section 10176, subdivision (a), for making a substantial misrepresentation, as set forth in Findings 4 through 15, inclusive.

2. Section 10176, subdivision (a) permits the Department to suspend or revoke a licensee's real estate license if, while performing or attempting to perform any act within the scope of Chapter 3 of the Real Estate Law (Bus. & Prof. Code §10130, et seq.), he/she makes any substantial misrepresentation. Nothing in the statute indicates that the substantial misrepresentation must be made intentionally or knowingly.

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[6] The precise date of the audit was not disclosed by the evidence.

[7] All statutory references are to the Business and Professions Code unless otherwise indicated.

3. Respondent made a mistake. He indicated on a purchase agreement that he was holding a check for $22,500 as a deposit on a home his clients were offering to purchase, when in fact, he did not the check in his possession. Complainant does not allege that Respondent acted knowingly or intentionally for some ignoble purpose; and the evidence established that Respondent's act was not motivated by evil intent, but was merely negligent. In fact, Respondent had nothing to gain and everything to lose by his misrepresentation. Nonetheless, no one disputes that the misrepresentation was substantial. Thus, despite his lack of motive for misrepresenting the information about the deposit, Respondent has subjected his real estate salesperson license to discipline.

4. In *Camacho v. Youde* (1979) 95 Cal.App.3d 161, 164, the court stated:

> [T]he objective of an administrative proceeding relating to a possible license suspension is to protect the public; to determine whether a licensee has exercised his privilege in derogation of the public interest. "Such proceedings are not for the primary purpose of punishing an individual." [Citation.]

5. Administrative disciplinary proceedings are frequently employed to protect the public from "unscrupulous and irresponsible persons." (*Clerici v. Department of Motor Vehicles* (1990) 224 Cal.App.3d 1015, 1029.) However, public protection also requires the discipline of licensees who are well-intended but not competent to properly carry out their duties.

> Disciplinary procedures provided for in the Business and Professions Code, such as section 10177, subdivision (d), are to protect the public not only from conniving real estate salesmen but also from the uninformed, negligent, or unknowledgeable salesman. (*Handeland v. Department of Real Estate* (1976) 58 Cal.App.3d 513, 518.)

6. However, the evidence did not establish that Respondent is an "uninformed, negligent, or unknowledgeable salesman," only that he made a single negligent error. In other words, he is not a negligent person, only a human one.

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7. To impose a revocation or suspension of Respondent's license under the facts of this case would be to create a standard of perfection on the Department's licensees. That is not a standard imposed even on this State's physicians and surgeons. A physician is required only to possess that degree of learning and skill ordinarily possessed by other physicians in the same locality, and that he/she exercise ordinary care in applying that learning and skill to the treatment of his/her patient. (*Lawless v. Calaway* (1944) 24 Cal.2d 81, 86; *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 998; [35 Cal.Rptr.2d 685].) In fact, even an error in judgment, in the absence of negligence, will not render a physician responsible for an untoward consequence suffered by his/her patient. (*Huffman v. Lindquist* (1951) 37 Cal.2d 465, 475.) Although a physician is subject to discipline for a single act of gross negligence[8] (section 2234, subdivision (b)), he/she is not subject to discipline for a single act of simple negligence[9] (section 2234, subdivision (c); *Zabetian v. Medical Board* (2000) 80 Cal.App.4th 462 [94 Cal.Rptr.2d 917]). To impose a higher standard on a real estate salesperson than that imposed on a physician and surgeon defies both logic and reason, and is patently unfair.

8. The evidence established that Respondent has had an extraordinary career over 17 years and thousands of transactions without any license discipline or even a client complaint. To impose harsh discipline on him for a single oversight of missing an entry on a computer screen would be a disservice, rather than a protection, to the public, which relies on qualified and competent professionals such as Respondent.

9. To impose license revocation or suspension in this case would be unduly harsh and punitive, even though section 10176, subdivision (a) provides for such discipline. Respondent's wrongdoing may be more appropriately dealt with by means of a public reproval than by license revocation or suspension.

10. Respondent made a simple error on a computer screen in April of 2003. Once that error was made, he could have done little to rectify the situation, even if he had known about it, because it was his clients who controlled the deposit check, and his clients refused to place the deposit into escrow.

11. Respondent has demonstrated sincere remorse for his error. He has taken steps to mitigate any damage that may have occurred by placing the $25,000 in question into his attorney's client trust account, offering the sellers the opportunity to mediate the dispute, and offering to pay for the first three hours of mediation. That opportunity was rejected by the same individuals who claim to have been aggrieved by Respondent's error. Respondent has taken additional steps to ensure against a repetition of the same or similar error.

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[8] Gross negligence has been defined as an extreme departure from the ordinary standard of care or the "want of even scant care." (*Gore v. Board of Medical Quality Assurance* (1970) 110 Cal.App.3d 184, 195-198.)

[9] A simple deviation from the standard of care.

12. Respondent is a conscientious and responsible real estate salesperson. The public is in no need of the kind of protection from him that a license revocation or suspension would afford. However, his error must be acknowledged. A public reproval is appropriate for that purpose.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Respondent is reproved under the provisions of Business and Professions Code section 495 for the conduct specified in Legal Conclusion No. 1. Placement of this Decision in the Department's public files shall be deemed publication of the reproval.

DATED: February 22, 2006

H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings

JAMES R. PEEL, Counsel (SBN 47055)
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FILED
MAY 26 2005
DEPARTMENT OF REAL ESTATE

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

* * *

In the Matter of the Accusation of RORY REED POSIN, Respondent.	No. H-31960 LA A C C U S A T I O N

The Complainant, Janice A. Waddell, a Deputy Real Estate Commissioner of the State of California, for cause of Accusation against RORY REED POSIN, alleges as follows:

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The Complainant, Janice A. Waddell, acting in her official capacity as a Deputy Real Estate Commissioner of the State of California, makes this Accusation against RORY REED POSIN.

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II

RORY REED POSIN (hereinafter referred to as "Respondent") is presently licensed and/or has license rights under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code) (hereinafter Code).

III

At all times herein mentioned, Respondent was licensed by the Department of Real Estate of the State of California as a real estate salesperson employed by Dalton, Brown & Long, Inc.

IV

On or about April 1, 2003, while performing acts requiring a real estate license, for or in expectation of compensation, Respondent negotiated the sale of 2724 Anchor Avenue, Los Angeles, California from the sellers Robert Jacobs and Ann Gentry to the buyer Fountainhead Industries.

V

During the course of the transaction, Respondent represented to the sellers that the buyer had made an earnest money deposit of $22,500 as part of its offer to purchase the property.

VI

The representation by Respondent was false in that at no time had the buyer provided Respondent with an earnest money deposit.

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VII

Had the sellers known the true facts in this matter they would not have agreed to sell their property to the buyer.

VIII

The sellers were financially damaged in this matter in that their property was off the market for a considerable period of time and they were unable to obtain the earnest money deposit as liquidated damages as set forth in the purchase contract.

IX

The conduct of Respondent, as alleged above, subjects his real estate license and license rights to suspension or revocation pursuant to Section 10176(a) of the Code.

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WHEREFORE, Complainant prays that a hearing be conducted on the allegations of this Accusation and that upon proof thereof, a decision be rendered imposing disciplinary action against all licenses and license rights of Respondent RORY REED POSIN under the Real Estate Law (Part 1 of Division 4 of the Business and Professions Code) and for such other and further relief as may be proper under other applicable provisions of law.

Dated at Los Angeles, California

this 23 May 2005

Deputy Real Estate Commissioner

cc: Rory Reed Posin
Sotheby's Int'l Realty Inc.
Janice A. Waddell
Sacto