

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF REAL ESTATE, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 07-4403PL  
 )  
JAMES K. JONES, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes,<sup>1</sup> before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH), on December 20, 2007, by video teleconference at sites in West Palm Beach and Tallahassee, Florida.

APPEARANCES

For Petitioner: Patrick J. Cunningham, Esquire  
Department of Business and  
Professional Regulation  
Division of Real Estate  
400 West Robinson Street, Suite N-801  
Orlando, Florida 32801

For Respondent: Randall M. Shochet, Esquire  
6308 Grand Cypress Circle  
Lake Worth, Florida 33463

STATEMENT OF THE ISSUE

Whether Respondent committed the violations alleged in the Administrative Complaint issued against him and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On April 26, 2007, Petitioner issued a two-count Administrative Complaint against Respondent containing the following "[e]ssential [a]lllegations of [m]aterial [f]act":

1. Petitioner is a state government licensing and regulatory agency charged with the responsibility and duty to prosecute Administrative Complaints pursuant to the laws of the State of Florida, in particular Section 20.165 and Chapters 120, 455 and 475, of the Florida Statutes and the rules promulgated thereto.
2. Respondent is and was at all times material hereto a licensed Florida real estate broker, issued license number 392077 in accordance with Chapter 475 of the Florida Statutes.
3. The last license issued was as a broker with Doctor's Choice Companies, Inc., 223 Shorewood Way, Jupiter, Florida 33458.
4. At all times material Respondent knew or should have known that Dr. [J]erry Pyser is not now, nor was at any time material herein, registered as [a] licensed real estate sales associate or broker in the state of Florida.
5. Respondent published or caused to be published advertisements for the sales of businesses. A copy of the advertisement[s] is attached hereto and incorporated herein as Administrative Complaint Exhibit 1.

6. Respondent published that Buyers contact Pysen for the purchase of the businesses advertised for sale.

Count I of the Administrative Complaint alleged that, "[b]ased upon the foregoing [essential allegations of material fact], Respondent is guilty of aiding, assisting, procuring, employing, or advising any unlicensed person or entity to practice a profession contrary to Chapter 455, 475 or the rules of the Petitioner in violation of Section 455.227(1)(j), Florida Statutes." Count II of the Administrative Complaint alleged that, "[b]ased upon the foregoing [essential allegations of material fact], Respondent is guilty of having advertised property or services in a manner which [was] fraudulent, false, deceptive or misleading in form or content in violation of Rule 61J2-10.025 of the Florida Administrative Code and Section 475.25(1)(c), Florida Statutes."

On or about May 18, 2007, Respondent, through his attorney, filed a Petition for Formal Administrative Hearing. In his petition, Respondent "dispute[d] the factual allegations contained in paragraphs 4, 5, and 6 of the Administrative Complaint" and argued that "Counts I and II [of the Administrative Complaint were] without basis in fact." On September 24, 2007, the matter was referred to DOAH to conduct the hearing Respondent had requested.

As noted above, the hearing was held on December 20, 2007. Three witnesses testified at the hearing: Dawn Luchik, Gregory Auerbach, and Respondent. In addition to these three witnesses' testimony, nine exhibits (Petitioner's Exhibits A, B, C, D, F, and G, and Respondent's Exhibits A, B, and D) were offered and received into evidence.

At the conclusion of the evidentiary portion of the hearing, the undersigned announced, on the record, that the deadline for the filing of proposed recommended orders was 14 days from the date of the filing of the hearing transcript with DOAH.

The hearing Transcript (consisting of one volume) was filed with DOAH on January 14, 2008.

On January 23, 2008, Respondent filed an unopposed motion requesting an extension of the deadline for filing proposed recommended orders. By order issued that same date, the motion was granted and the proposed recommended order filing deadline was extended to February 4, 2008.

Petitioner and Respondent filed their Proposed Recommended Orders on January 29, 2008, and February 4, 2008, respectively.

#### FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. Respondent is now, and has been at all times material

to the instant case, a licensed real estate broker in the State of Florida, holding license number BK-392077. He has held a Florida real estate license for approximately the past 20 years. At no time during this period has any disciplinary action been taken against him.

2. Since July 13, 2000, Respondent has been the qualifying broker for Doctor's Choice Companies, Inc. (DCC), which he owns.

3. DCC specializes in dental practice sales and purchases and related services.

4. As the owner of DCC, Respondent is responsible for its advertising. The DCC advertisements he has "published or caused to be published" include those listing dental practices for sale.

5. Respondent's Exhibit B is a copy of a one-page DCC advertisement that Respondent had published in the November 2006 edition of Today's FDA, a journal of the Florida Dental Association.<sup>2</sup>

6. At the top of advertisement appeared the following:

Doctors Choice Companies, Inc.

Dental Practice Sales and Purchase

"Over 100 Statewide Opportunities"

"LOCAL AGENTS - EXPERT SERVICE"

MAIN OFFICE (EAST COAST) - (561)746-2102

SOUTHEAST, FL - (954)257-3059  
NORTH, FL - (407)310-4829  
NAPLES/SARASOTA, FL - (954)830-3147  
CENTRAL, FL - (407)291-9311  
WESTCOAST, FL - (727)323-3589  
DADE/KEYS, FL - (305)904-1682

7. This was followed by twelve photographs of twelve different individuals: Respondent, Dr. Tony Cruz, Morcie Smith, Dr. Pyser, Mary Ann Serkin, Dr. Marshall Berger, Mary Lou Johnson, Curtis Johnson, Dr. Jack Saxonhouse, Dr. James Vandenberghe, John Lytle, and Sandy Harris. The photographs were arranged in three rows of four across. Directly under each photograph was the name of the person depicted; his or her title or function (in Respondent's case, "Lic. Real Estate Broker" and "President"; in Dr. Pyser's case, "Licensed Consultant"; in Ms. Harris' case, "Associate Placement"; and in the case of the others, "Licensed Agent"); and, except in Respondent's case, the geographic area he or she covered (in Dr. Cruz's, as well as Mr. Lytle's, case, "Dade County/Keys, FL" ; in Mr. Smith's, as well as Dr. Vandenberghe's, case, "West Coast, FL"; in Dr. Pyser's case, "Naples/Sarasota, FL"; in Ms. Serkin's case, "North, FL"; in Dr. Berger's case, "Southeast, FL"; in Ms. Johnson's, as well as Mr. Johnson's, case, "Central, FL"; in Dr. Saxonhouse's case, "Palm Beach County"; and, in Ms. Harris' case, "Statewide").

8. The following text was at the bottom of this one-page advertisement:

FOR INFORMATION ON OPPORTUNITIES - CALL OR  
VISIT OUR WEBSITE [www.doctorschoicel.net](http://www.doctorschoicel.net)

- Practice Sales and Purchases
- Pre-Retirement Strategy
- Practice Appraisals
- Associate Placement (Buy-In's)
- Commercial Property Sales/Leasing
- Investment Real Estate

To the immediate right of this text were five telephone numbers ((727)254-9707, (561)746-2102, (407)257-9841, (305)904-1682, and (954)257-3059). To the right of these telephone numbers was the DCC logo.

9. Dr. Jerry Pyser is a licensed dentist with whom Respondent has had a 15 to 20-year business relationship.

10. Dr. Pyser does not now, nor did he at any time material to the instant case, hold a Florida real estate license of any kind.

11. At no time material to the instant case did Respondent believe that Dr. Pyser held such a license.

12. Gregory Auerbach is a Florida-licensed real estate sales associate. He and his father, Stuart Auerbach, are associated with Professional Transitions, Inc. (PTI), which is a competitor of DCC's.

13. There is "bad blood" between Respondent and Stuart Auerbach and their respective companies.

14. In November 2006, Gregory Auerbach represented PTI at a meeting of dental professionals held in Gainesville, Florida. DCC was also represented at the meeting.

15. On a table at the meeting site, Mr. Auerbach observed Respondent's Exhibit B, along with the second page of another DCC promotional document (Petitioner's Exhibit A2), which contained various dental practice listings.

16. At the top of Petitioner's Exhibit A2 was a Gainesville listing, followed by a St. Augustine listing. The remaining listings were grouped under the following headings: "DADE COUNTY- Call Dr. Tony Cruz- (305)904-1682/Kenny Jones- (561)746-2102"; "WEST COAST- Morcie Smith- (727)254-9707/Dr. Jerry Pyser- Naples to Sarasota (954)830-3147"; and "SPECIALTY- Call Kenny Jones (561)746-2102." Beneath these three categories of listings was the following:

ASSOCIATE PLACEMENT OPPORTUNITIES -  
POSITIONS AVAILABLE NOW!!

Need a Job or Need an Associate. Call Sandy Harris (561)746-2102 or Go to our website at [www.doctorschoicel.net](http://www.doctorschoicel.net) and click on the Dental Associate Placement Link.

PLUMBED (BUILTOUT) SETUP SPACE'S [SIC] -  
Call for Statewide Locations!

---

Email: [Info@doctorschoicel.net](mailto:Info@doctorschoicel.net)  
Website: [www.doctorschoicel.net](http://www.doctorschoicel.net)  
We Buy - Sell - Lease Medical - Dental -  
Veterinary Properties  
Last Revised: 11/6/2006  
Page 2[<sup>3</sup>]



17. Respondent's Exhibit B and Petitioner's Exhibit A2, particularly when read together, were misleading in that they conveyed the impression that Dr. Pyser was licensed to engage in activities relating to the sale and purchase of dental practices in Florida (as a point of contact), when, in fact, as Respondent was aware, Dr. Pyser had no such license. Prospective purchasers reading these "flyers" would have been reasonable, but in error, in believing that, if they were to contact Dr. Pyser, they would be dealing with a person possessing a Florida real estate license.

18. Mr. Auerbach picked up these two DCC "flyers" (Respondent's Exhibit B and Petitioner's Exhibit A2) from the table on which they were laying and took them with him when he left the meeting.<sup>4</sup>

19. He subsequently sent them, along with four pages from DCC's public website that he had printed (Petitioner's Exhibit A3-6),<sup>5</sup> to Petitioner.

20. The matter was investigated by Dawn Luchik, one of Petitioner's investigators. Ms. Luchik spent 11 hours (at a Petitioner-assigned hourly rate of \$33.00) conducting her investigation.<sup>6</sup>

21. Following the completion of Ms. Luchik's investigation, Petitioner issued the Administrative Complaint against Respondent described above.

## CONCLUSIONS OF LAW

22. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to Chapter 120, Florida Statutes.

23. The Florida Real Estate Commission (Commission) is statutorily empowered to take disciplinary action against Florida-licensed real estate brokers based upon any of the grounds enumerated in Sections 455.227(1) and 475.25(1), Florida Statutes.

24. Such disciplinary action may include one or more of the following penalties: license revocation; license suspension<sup>7</sup>; imposition of an administrative fine not to exceed \$5,000.00 for each count or separate offense<sup>8</sup>; issuance of a reprimand; and placement of the licensee on probation<sup>9</sup>. §§ 455.227(2) and 475.25(1), Fla. Stat. In addition, the Commission "may assess costs related to the investigation and prosecution of the case excluding costs associated with an attorney's time." § 455.227(3)(a), Fla. Stat.

25. The Commission may take such action only after the licensee has been given reasonable written notice of the charges and an adequate opportunity to request a proceeding pursuant to Sections 120.569 and 120.57, Florida Statutes. See § 120.60(5), Fla. Stat.

26. An evidentiary hearing must be held if requested by the licensee when there are disputed issues of material fact. See §§ 120.569(1) and 120.57(1), Fla. Stat.

27. At the hearing, Petitioner bears the burden of proving that the licensee engaged in the conduct, and thereby committed the violations, alleged in the charging instrument. Clear and convincing evidence of the licensee's guilt must be presented for Petitioner to meet its burden of proof. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652, 655 (Fla. 5th DCA 1998)("The Department had the burden of proving fraud, misrepresentation or concealment by clear and convincing evidence, in order to justify revocation of Walker's license."); and § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute . . . .").

28. Clear and convincing evidence is an "intermediate standard," "requir[ing] more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). For proof to be considered "'clear and convincing' . . .

the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." In re Davey, 645 So. 2d 398, 404 (Fla. 1994)(citing with approval, Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); see also In re Adoption of Baby E. A. W., 658 So. 2d 961, 967 (Fla. 1995)("The evidence [in order to be clear and convincing] must be sufficient to convince the trier of fact without hesitancy."). "Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corporation, Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

29. In determining whether Petitioner has met its burden of proof, it is necessary to evaluate its evidentiary presentation in light of the specific allegations of wrongdoing made in the charging instrument. Due process prohibits the Commission from taking disciplinary action against a licensee based on conduct not specifically alleged in the charging instrument, unless those matters have been tried by consent. See Shore Village Property Owners' Association, Inc. v.

Department of Environmental Protection, 824 So. 2d 208, 210 (Fla. 4th DCA 2002); Aldrete v. Department of Health, Board of Medicine, 879 So. 2d 1244, 1246 (Fla. 1st DCA 2004); and Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

30. Furthermore, "the conduct proved must legally fall within the statute or rule claimed [in the charging instrument] to have been violated." Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992). In deciding whether "the statute or rule claimed [in the charging instrument] to have been violated" was in fact violated, as alleged by Petitioner, if there is any reasonable doubt, that doubt must be resolved in favor of the licensee. See Djokic v. Department of Business and Professional Regulation, Division of Real Estate, 875 So. 2d 693, 695 (Fla. 4th DCA 2004); Whitaker v. Department of Insurance and Treasurer, 680 So. 2d 528, 531 (Fla. 1st DCA 1996); Elmariah v. Department of Professional Regulation, Board of Medicine, 574 So. 2d 164, 165 (Fla. 1st DCA 1990); and Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

31. In those cases where the proof is sufficient to establish that the licensee committed the violation(s) alleged in the charging instrument and that therefore disciplinary action is warranted, it is necessary, in determining what

disciplinary action should be taken against the licensee, to consult the Commission's "disciplinary guidelines," as they existed at the time of the violation(s). See Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231, 1233 (Fla. 5th DCA 1999)("An administrative agency is bound by its own rules . . . creat[ing] guidelines for disciplinary penalties."); and Orasan v. Agency for Health Care Administration, Board of Medicine, 668 So. 2d 1062, 1063 (Fla. 1st DCA 1996)("[T]he case was properly decided under the disciplinary guidelines in effect at the time of the alleged violations."); see also State v. Jenkins, 469 So. 2d 733, 734 (Fla. 1985)("[A]gency rules and regulations, duly promulgated under the authority of law, have the effect of law."); Buffa v. Singletary, 652 So. 2d 885, 886 (Fla. 1st DCA 1995)("An agency must comply with its own rules."); and Williams v. Department of Transportation, 531 So. 2d 994, 996 (Fla. 1st DCA 1988)(agency is required to comply with its disciplinary guidelines in taking disciplinary action against its employees).

32. The Commission's "disciplinary guidelines" are set forth in Florida Administrative Code Rule 61J2-24.001. At all times material to the instant case, they provided, in pertinent part, as follows:

- (1) Pursuant to Section 455.2273, F.S., the Commission sets forth below a range of disciplinary guidelines from which

disciplinary penalties will be imposed upon licensees guilty of violating Chapter 455 or 475, F.S. The purpose of the disciplinary guidelines is to give notice to licensees of the range of penalties which normally will be imposed for each count during a formal or an informal hearing. For purposes of this rule, the order of penalties, ranging from lowest to highest, is: reprimand, fine, probation, suspension, and revocation or denial. Pursuant to Section 475.25(1), F.S., combinations of these penalties are permissible by law. Nothing in this rule shall preclude any discipline imposed upon a licensee pursuant to a stipulation or settlement agreement, nor shall the range of penalties set forth in this rule preclude the Probable Cause Panel from issuing a letter of guidance.

\* \* \*

(3) The penalties are as listed unless aggravating or mitigating circumstances apply pursuant to subsection (4). The verbal identification of offenses is descriptive only; the full language of each statutory provision cited must be consulted in order to determine the conduct included.

\* \* \*

(d) Section 475.25(1)(c), F.S. False, deceptive or misleading advertising. The usual action of the Commission shall be to impose a penalty of an administrative fine of \$1,000 to a 1 year suspension.

\* \* \*

(f) 475.25(1)(e) Violated any . . . provision under Chapter[] . . . 455, F.S.- The usual action of the Commission shall be to impose a penalty from an 8 year suspension to revocation and an administrative fine of \$1,000.[<sup>10</sup>]

\* \* \*

(4)(a) When either the Petitioner or Respondent is able to demonstrate aggravating or mitigating circumstances . . . to a Division of Administrative Hearings [Administrative Law Judge] in a Section 120.57(1), F.S., hearing by clear and convincing evidence, the . . . [Administrative Law Judge] shall be entitled to deviate from the above guidelines in . . . recommending discipline, . . . upon a licensee. . . .

(b) Aggravating or mitigating circumstances may include, but are not limited to, the following:

1. The degree of harm to the consumer or public.
2. The number of counts in the Administrative Complaint.
3. The disciplinary history of the licensee.
4. The status of the licensee at the time the offense was committed.
5. The degree of financial hardship incurred by a licensee as a result of the imposition of a fine or suspension of the license.
6. Violation of the provision of Chapter 475, F.S., wherein a letter of guidance as provided in Section 455.225(3), F.S., previously has been issued to the licensee.

\* \* \*

33. The Administrative Complaint issued in the instant case alleges that Respondent violated Section 455.227(1)(j), Florida Statutes (Count I), as well as Section 475.25(1)(c),



Florida Statutes, and Florida Administrative Code Rule 61J2-10.025 (Count II), by "publish[ing] or caus[ing] to be published advertisements for the sales of businesses" that instructed "that Buyers contact [Dr.] Pyser for the purchase of the businesses advertised for sale," when Respondent "knew or should have known" that Dr. Pyser was not a "licensed real estate sales associate or broker in the state of Florida."

34. At all times material to the instant case, Section 455.227(1)(j), Florida Statutes, has authorized the Commission to take disciplinary action against a Florida-licensed real estate broker for "[a]iding, assisting, procuring, employing, or advising any unlicensed person or entity to practice a profession contrary to [Chapter 455, Florida Statutes], the chapter regulating [real estate brokers and sales associates, Chapter 475, Florida Statutes], or the rules of the [Commission]."

35. At all times material to the instant case, Chapter 475, Florida Statutes, has included a provision (found in Section 475.42(1)(a), Florida Statutes) prohibiting a person from "operat[ing] as a broker or sales associate without being the holder of a valid and current active license therefore."

36. At all times material to the instant case, the terms "broker" and "sales associate," as used in Section 475.42, Florida Statutes, and elsewhere in Chapter 475, Florida

Statutes, have been defined in Section 475.01(1)(a) and (j), Florida Statutes, respectively, as follows:

(a) "Broker" means a person who, for another, and for a compensation or valuable consideration directly or indirectly paid or promised, expressly or impliedly, or with an intent to collect or receive a compensation or valuable consideration therefor, appraises, auctions, sells, exchanges, buys, rents, or offers, attempts or agrees to appraise, auction, or negotiate the sale, exchange, purchase, or rental of business enterprises or business opportunities or any real property or any interest in or concerning the same, including mineral rights or leases, or who advertises or holds out to the public by any oral or printed solicitation or representation that she or he is engaged in the business of appraising, auctioning, buying, selling, exchanging, leasing, or renting business enterprises or business opportunities or real property of others or interests therein, including mineral rights, or who takes any part in the procuring of sellers, purchasers, lessors, or lessees of business enterprises or business opportunities or the real property of another, or leases, or interest therein, including mineral rights, or who directs or assists in the procuring of prospects or in the negotiation or closing of any transaction which does, or is calculated to, result in a sale, exchange, or leasing thereof, and who receives, expects, or is promised any compensation or valuable consideration, directly or indirectly therefor; and all persons who advertise rental property information or lists. A broker renders a professional service and is a professional within the meaning of s. 95.11(4)(a). Where the term "appraise" or "appraising" appears in the definition of the term "broker," it specifically excludes those appraisal services which must be performed only by a state-licensed or state-

certified appraiser, and those appraisal services which may be performed by a registered trainee appraiser as defined in part II. The term "broker" also includes any person who is a general partner, officer, or director of a partnership or corporation which acts as a broker. The term "broker" also includes any person or entity who undertakes to list or sell one or more timeshare periods per year in one or more timeshare plans on behalf of any number of persons, except as provided in ss. 475.011 and 721.20.

\* \* \*

(j) "Sales associate" means a person who performs any act specified in the definition of "broker," but who performs such act under the direction, control, or management of another person. A sales associate renders a professional service and is a professional within the meaning of s. 95.11(4)(a).

37. To establish that Respondent violated Section 455.227(1)(j), Florida Statutes, as alleged in Count I of the Administrative Complaint, it was necessary for Petitioner to prove by clear and convincing evidence that Dr. Pyser actually engaged in the unlicensed practice (as a real estate broker or sales associate) that, according to the Administrative Complaint, Respondent allegedly facilitated by his advertising. See Florida Engineers Management Corporation v. The Pool People, Inc., Nos. 05-0382 and 06-1581PL, 2006 Fla. Div. Adm. Hear. LEXIS 554 \*33-34 (Fla. DOAH November 29, 2006)(Recommended Order)("The specific allegations of wrongdoing contained in Count Two of the Administrative Complaint filed in DOAH Case No.

06-1581PL are that, in connection with the Shelby Homes Project, Mr. Huang violated Section 455.227(1)(j), Florida Statutes, and, thereby, also Section 471.033(1)(a), Florida Statutes, 'by aiding and assisting an unlicensed entity, The Pool People, Inc., to practice engineering.' To prove that Mr. Huang committed such wrongdoing, the FEMC first had to establish by clear and convincing evidence that The Pool People, the 'unlicensed entity' Mr. Huang allegedly 'aided and assisted,' engaged in the practice of engineering (for which it needed to have a certificate of authorization from the FEMC)."). Petitioner failed to make such a clear and convincing showing. Accordingly, Count I of the Administrative Complaint must be dismissed.

38. At all times material to the instant case, Section 475.25(1)(c), Florida Statutes, has authorized the Commission to take disciplinary action against a Florida-licensed real estate broker who "[h]as advertised property or services in a manner which is fraudulent, false, deceptive, or misleading in form or content," and it has further provided that "[t]he [C]ommission may adopt rules defining methods of advertising that violate this paragraph."

39. The Commission has exercised this rulemaking authority and adopted Florida Administrative Code Rule 61J2-10.025, which, at all times material to the instant case, provided as follows:

(1) All advertising must be in a manner in which reasonable persons would know they are dealing with a real estate licensee. All real estate advertisements must include the licensed name and phone number<sup>[11]</sup> of the brokerage firm. No real estate advertisement placed or caused to be placed by a licensee shall be fraudulent, false, deceptive or misleading.

(2) When the licensee's personal name appears in the advertisement, at the very least the licensee's last name must be used in the manner in which it is registered with the Commission.

(3)(a) When advertising on a site on the Internet, the brokerage firm name as required in subsection (1) above shall be placed adjacent to or immediately above or below the point of contact information. "Point of contact information" refers to any means by which to contact the brokerage firm or individual licensee including mailing address(es), physical street address(es), e-mail address(es), telephone number(s) or facsimile telephone number(s).

(b) The remaining requirements of subsections (1) and (2) apply to advertising on a site on the Internet.

40. Petitioner clearly and convincingly established, as alleged in Count II of the Administrative Complaint, that Respondent violated Section 475.25(1)(c), Florida Statutes, and Florida Administrative Code Rule 61J2-10.025, by engaging in advertising that (as Respondent knew or should have known) was misleading as to Dr. Pyser's real estate licensure status.

41. According to Florida Administrative Code Rule 61J2-24.001(3)(d), as it existed at the time of Respondent's

violation, the "usual action of the Commission" where "[f]alse, deceptive or misleading advertising" (as proscribed by Section 475.25(1)(c), Florida Statutes, and Florida Administrative Code Rule 61J2-10.025) is proven, was "to impose a penalty of an administrative fine of \$1,000 to a 1 year suspension."

42. Having considered the facts of the instant case in light of Subsection (3)(d) of Florida Administrative Code Rule 61J2-24.001 and the remaining pertinent and applicable provisions of this rule, as they existed at the time of Respondent's violation of Section 475.25(1)(c), Florida Statutes, and Florida Administrative Code Rule 61J2-10.025, it is the view of the undersigned that the Commission should discipline Respondent for these violations, by fining him in the amount of \$1,000.00.<sup>12</sup> The Commission should also order Respondent, pursuant to Section 455.227(3), Florida Statutes, to reimburse Petitioner for its reasonable investigative costs in this case. "Due process considerations require, however, that Respondent be given the opportunity to examine and question the reasonableness of such costs before any are imposed."

Department of Health, Board of Nursing v. Howard, No. 02-0397PL, 2002 Fla. Div. Adm. Hear. LEXIS 1310 \*10 (Fla. DOAH October 30 2002)(Recommended Order).<sup>13</sup>

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

RECOMMENDED that the Commission issue a Final Order dismissing Count I of the Administrative Complaint; finding Respondent guilty of the violations alleged in Count II of the Administrative Complaint; fining him \$1,000.00 for committing these violations; and ordering him to pay Petitioner's reasonable costs incurred in investigating these violations.

DONE AND ENTERED this 14th day of February, 2008, in Tallahassee, Leon County, Florida.



---

STUART M. LERNER  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675    SUNCOM 278-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 14th day of February, 2008.

ENDNOTES

<sup>1</sup> Unless otherwise noted, all references in this Recommended Order to Florida Statutes are to Florida Statutes (2007).

<sup>2</sup> Petitioner's Exhibit A1 is a poorer copy of the same advertisement. It, along with Respondent's Exhibit B, were received into evidence without objection, their authenticity having been stipulated to by the parties.

<sup>3</sup> The first page of this document, although appended to the Administrative Complaint, was not offered into evidence, and it therefore is not part of the evidentiary record in this case.

<sup>4</sup> Respondent argues in its Proposed Recommended Order that Petitioner's Exhibit A2 is an "unverified writing" of uncertain origin. While the evidentiary record is devoid of any direct evidence that DCC (and therefore Respondent) was responsible for the creation and publication of Petitioner's Exhibit A2, there is circumstantial record evidence that clearly and convincingly establishes that this exhibit is exactly what it purports to be, a "flyer" put out by DCC: this "flyer" promoted sales activities that would stand to benefit DCC; it was discovered by Mr. Auerbach at a meeting of potential participants in such activities to which DCC had sent a representative; it was found on a table together with another DCC-generated document, Respondent's Exhibit B (the authenticity of which is undisputed); and its contact information (individuals' names, their telephone numbers, and company website address) is consistent with the contact information contained in Respondent's Exhibit B. See Coday v. State, 946 So. 2d 988, 1000 (Fla. 2006)("While section 90.901 requires the authentication or identification of a document prior to its admission into evidence, the requirements of this section are satisfied by evidence sufficient to support a finding that the document in question is what its proponent claims. See § 90.901, Fla. Stat. (1997). Authentication or identification of evidence may include examination of its appearance, contents, substance, internal patterns, or other distinctive characteristics in conjunction with the circumstances."); Casamassina v. United States Life Insurance Co., 958 So. 2d 1093, 1099 (Fla. 4th DCA 2007)("There is no indication that the records at issue are not what they purport to be. '[A]uthentication or identification of evidence is required as a condition precedent to its admissibility.' 'Evidence is authenticated when prima facie evidence is introduced to prove that the proffered evidence is authentic.' Authentication by circumstantial evidence is permissible; 'evidence may be authenticated by appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances.' A court may consider



circumstances of discovery in determining prima facie authenticity.")(citations omitted); State v. Love, 691 So. 2d 620, 621 (Fla. 5th DCA 1997)("In order to set forth a prima facie case of authenticity, the proponent of the evidence can utilize both direct and circumstantial evidence. Evidence may be authenticated by appearance, contents, substance, internal patterns, or other distinctive characteristics taken in conjunction with the circumstances.")(citation omitted); United States v. Fraser, 448 F.3d 833, 839 (6th Cir. 2006)("The district court made a proper preliminary determination that Kahari [the defendant] wrote *The Birth of a Criminal*. The district court found that the book 'has the picture of the defendant on the cover, lists the defendant as the author, has a copyright date of 2002, a listed international standard book number 2972571302 on Amazon.com and is published by Gutter Publications. The book is further authenticated by the defendant's website . . . . The defendant is listed as the founder of Gutter Magazine under a title on the internet of 'about us.'"); United States v. Maldonado-Rivera, 922 F.2d 934, 958 (2d Cir. 1990)("There was no abuse of discretion here in the ruling that the communicate was sufficiently shown to be a document written by one or more of the coconspirators. The communicate's appearance, contents, substance, timing, and provenance, together with other evidence, all suggested that it was such a document. First, there was strong evidence that the communicate was in fact a Los Macheteros document. It bore a Los Macheteros logo that was indistinguishable from the Los Macheteros logo that appeared on other documents whose authenticity was not challenged. It claimed responsibility for the Wells Fargo robbery, which was consistent with Segarra's telling Cox that the robbery had been a Los Macheteros operation. And the proposition that the communicate was a Los Macheteros document was consistent with other evidence that Los Macheteros frequently sought publicity for their acts. . . . The inference that the communicate was a coconspirator document was further supported by the fact that a copy was found at the home of a codefendant . . . . Defendants' challenges to the authenticity of the communicate, such as their argument that the 'logo could have been constructed by someone outside the Macheteros organization' (Segarra-Ramirez-Camacho brief on appeal at 61), go more to the weight of the evidence than to its admissibility. The district court did not err in ruling that the document's contents and the surrounding circumstances provided a rational basis for concluding that the document was what the government claimed it was, i.e., the statement of a coconspirator."); Settles v. United States, 570 A.2d 307, 309

(D.C. 1990)("Proof of the authenticity of the writing need not be established by direct testimony but may be established by the nature and contents of the writing combined with the location of its discovery."); People v. Munoz, 70 Ill. App. 3d 76, 84 (Ill. App. Ct. 1979)("In the case at bar, direct proof of authorship was not offered; but authentication by circumstantial evidence is uniformly recognized as permissible."); Broward County School Board v. Menke, Nos. 04-3835 and 05-4189PL, 2007 Fla. Div. Adm. Hear. LEXIS 449 \*34-35 (Fla. DOAH August 13, 2007)(Recommended Order)("The identity of the author of the website material is clear because the printouts contained in Exhibit SB2 are rife with photographs of Respondent and comments about Respondent."); and Department of Professional Regulation, Board of Medicine v. Sternberg, No. 91-5044, 1993 Fla. Div. Adm. Hear. LEXIS 5888 \*20-21 n.1 (Fla. DOAH January 20, 1993)(Recommended Order)("Even circumstantial evidence can be clear and convincing. As Henry David Thoreau noted in his Journal of November 11, 1850, 'Some circumstantial evidence is very strong, as when you find a trout in the milk.'"). Furthermore, when Respondent took the stand at hearing, he did not deny that this "flyer" was produced by his company. When asked whether or not it was an "advertisement[] of Doctors Choice," he answered, "It could be but I can't say for certain." He later added, "It has a familiarity about it," lending further support to the view that this was a genuine, not a bogus, DCC advertisement.

Contrary to the further argument made by Respondent, Petitioner's Exhibit A2 did not constitute hearsay evidence. This is because it was offered merely to establish its existence and contents, not to prove the truth of any representations contained in it. See Burkey v. State, 922 So. 2d 1033, 1036 (Fla. 4th DCA 2006)("The record reveals that the defendant did not offer his statement to the CI that 'I don't do that kind of stuff' to prove the matter asserted therein. Rather, the defense was trying to establish that the defendant rejected the CI's offer to buy drugs. His statement was relevant non-hearsay and should have been admitted."); Powell v. State, 908 So. 2d 1185, 1187 (Fla. 2d DCA 2005)("An out-of-court statement is not hearsay if it has been offered for a purpose other than proving the truth of its contents."); Cephas v. Department of Health and Rehabilitative Services, 719 So. 2d 7, 8 (Fla. 2d DCA 1998)("Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. See § 90.801, Fla. Stat. (1995). McMillion's telephone conversation testimony was not offered to prove the truth of the matter asserted, i.e., whether Baker worked at the WIC office. Rather, it was admitted

to prove that Cephas, as the recipient of McMillion's call, used his position as an agency employee to make false statements concerning Baker's employment. Therefore, it was not hearsay. It was a 'verbal act,' indicating that the call was made and the contents of the call."); King v. State, 684 So. 2d 1388, 1389 (Fla. 1st DCA 1996)("If testimony is offered for a purpose other than to prove the truth of the matter asserted, it is by definition not hearsay."); Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 173 n.18 (1988)("Nor would a hearsay objection have been availing. Although the question called for Rainey to testify to an out-of-court statement, that statement was not offered 'to prove the truth of the matter asserted.' Rule 801(c). Rather, it was offered simply to prove what Rainey had said about the accident six months after it happened, and to contribute to a fuller understanding of the material the defense had already placed in evidence."); and Iams Co. v. Nutro Products, Inc., No. C-3-00-566, 2004 U.S. Dist. LEXIS 15129 \*8 (S.D. Ohio July 26, 2004)("[S]tatements made by the Nutro demonstrators are not hearsay because they are not being offered to prove the truth of their content, but merely to show what that content was. Thus they do not come within the definition of hearsay."). In any event, any representations made by or attributable to Respondent (such as those contained in DCC advertising, for which Respondent was responsible) that Petitioner had offered into evidence for their truthfulness would have constituted hearsay falling within the "admissions" exception to the hearsay rule described in Section 90.803(18), Florida Statutes, and, as such, would be "sufficient in [themselves] to support a finding" in this administrative proceeding pursuant to Section 120.57(1)(c), Florida Statutes, which provides that "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

<sup>5</sup> One of these pages, Petitioner's Exhibit A5, contained the same "Westcoast" listings (with one exception) that had been advertised in Petitioner's Exhibit A2. It indicated that Dr. Pyser, whose photograph appeared on the page, could be contacted about these listings (at (954)830-3147), as could Respondent (at (561)746-2102), Morcie Smith (at (727)254-9707), Dr. Jim Vandenberghe, and Connie Quintanilla (at 561)746-2102).

<sup>6</sup> As part of her investigation, Ms. Luchik interviewed Respondent. In the written report that she completed at the conclusion of her investigation, Ms. Luchik wrote, among other

things, that Respondent had stated during his interview with her that "he [had] only distributed that one listing sheet in November 2006" and that he would "immediately remove PYSER from future advertising until PYSER [was] properly licensed with DEBAR."

<sup>7</sup> A suspension for a violation of Section 475.25(1), Florida Statutes, may not exceed ten years.

<sup>8</sup> Prior to July 1, 2006, the effective date of Chapter 2006-210, Laws of Florida, the maximum administrative fine authorized by Section 475.25(1), Florida Statutes, was \$1,000.00.

<sup>9</sup> An additional penalty that the Commission may impose for a violation of Section 455.227(1), Florida Statutes, is "restriction of practice." § 455.227(2)(c), Fla. Stat.

<sup>10</sup> Effective December 25, 2007, Subsections (3)(d) and (f) of Florida Administrative Code Rule 61J2-24.001 were amended to increase the administrative fine referred to in those subsections from \$1,000.00 to \$5,000.00.

<sup>11</sup> The words "and phone number" were removed from the rule effective February 5, 2007.

<sup>12</sup> A harsher penalty would be inappropriate, given Respondent's unblemished prior disciplinary record, the absence of any other proven violations, and the lack of any record evidence showing that Respondent's misleading advertising resulted in actual harm to any consumer.

<sup>13</sup> The prehearing stipulation that the parties jointly filed gave no indication that the reasonableness of Petitioner's claimed investigative costs would be an issue litigated at the final hearing in this case.

COPIES FURNISHED:

Patrick J. Cunningham, Esquire  
Department of Business and Professional  
Regulation, Division of Real Estate  
400 West Robinson Street, Suite N-801  
Orlando, Florida 32801

Randall M. Shochet, Esquire  
6308 Grand Cypress Circle  
Lake Worth, Florida 33463

Thomas W. O'Bryant, Jr., Director  
Department of Business and  
Professional Regulation  
Division of Real Estate  
400 West Robinson Street, Suite N-802N  
Orlando, Florida 32801

Ned Luczynski, General Counsel  
Northwood Centre  
1940 North Monroe Street  
Tallahassee, Florida 32399-0792

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

