

BEFORE THE
DEPARTMENT OF BUSINESS OVERSIGHT
STATE OF CALIFORNIA

In the Matter of:

THE COMMISSIONER OF BUSINESS
OVERSIGHT,

Complainant,

v.

CATHERINE PHELAN and SUSAN RAMOS,

Respondents.

Case No. 10555

OAH No. 2018120217

ORDER OF DECISION

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted with technical changes pursuant to Government Code Section 11517, subdivision (c)(2)(C), by the Department of Business Oversight as its Decision in the above-entitled matter.

This Decision shall become effective on June 1, 2019

IT IS SO ORDERED this 2nd day of May, 2019


JAN LYNN OWEN
Commissioner of Business Oversight



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PROPOSED DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on January 16-17, 2019, in Los Angeles. The record was closed and the matter submitted for decision at the conclusion of the hearing.

Joanne Ross, Senior Counsel, and Timothy L. LeBas, Senior Counsel, represented Jan Lynn Owen, the Commissioner of Business Oversight (complainant).

Jennifer Felten, Esq., represented respondents Catherine Phelan and Susan Ramos, who were present both hearing days.

SUMMARY

Complainant issued a Desist and Refrain Order against respondents for allegedly violating the Financial Code by engaging in unlicensed escrow activity and circulating documents indicating they were in the escrow business. Respondents admit they engaged in unlicensed escrow activity, but contend they fall within a statutory exemption allowing licensed real estate brokers to do so in limited circumstances: They deny publically advertising their escrow services. Because complainant established by a preponderance of the evidence all of the alleged violations, and respondents failed to establish the exemption in question applies to them, the Desist and Refrain Order is affirmed.

FACTUAL FINDINGS

Parties and Jurisdiction

1. On October 29, 2018, the Desist and Refrain Order (Order) was issued on behalf of complainant in her official capacity as the Commissioner of Business Oversight (Commissioner). On November 26 and 30, 2018, the Order was served on respondents.

2. Respondents timely submitted a request for a hearing to challenge the Order. The hearing in this matter was timely scheduled and completed pursuant to applicable law.

Respondents' Background Information

3. At all relevant times, respondents were California residents who conducted business at 6550 Van Buren Boulevard, Suite C, Riverside, California 92503.

4. Since December 17, 1999, respondent Phelan has held a license issued by the Department of Real Estate (DRE) to engage in business as a real estate broker in California.

5. Since February 6, 2014, respondent Ramos has held a license issued by DRE to engage in business as a real estate broker in California.

6. For four years in the late 1980s, respondent Phelan worked as an escrow officer for Détente Escrow. From 1989 to 1996, she was the owner/manager of A to Z Escrow, Inc. After respondent Phelan left A to Z Escrow, Inc., its license was revoked by the Department of Corporations, effective August 1, 1997.¹ Respondent Phelan has not worked in an authorized capacity for a licensed escrow corporation since she left A to Z Escrow, Inc.

7. Respondent Ramos has never worked for a licensed escrow corporation.

8. Neither respondent is currently licensed by the Department as an escrow agent.

Prior Action Against Respondent Phelan

9. In 2008, the Department received a complaint alleging respondent Phelan was engaged in unlicensed escrow activity. (Ex. C 15, p. 1.)

10. A. During the Department's investigation of the matter, an attorney representing respondent Phelan advised she had engaged in unlicensed escrow activity, but asserted her activity fell within an exemption available to licensed real estate brokers pursuant to Financial Code section 17006. (Ex. C 15, p. 1.)

¹ The Department of Corporations was subsequently reorganized with the Department of Finance and renamed the Department of Business Oversight, and herein will be referred to as "the Department."

B. The Department concluded its investigation. It sent a letter to respondent Phelan dated February 24, 2010, which stated, "We caution you to only engage in escrow activities that are performed under direct supervision if you wish to rely upon this exemption to the licensing requirements." (*Ibid.*) The letter also asserted, "If you arrange escrows in California for more than one business, you must become licensed under the California Escrow Law." (*Ibid.*) The Department took no further action.

Respondents' Conduct from 2014 to 2017

11. Respondent Phelan believed she could rely on an exemption in Financial Code section 17006 allowing licensed real estate brokers to perform unlicensed escrow activity in limited instances. In her mind, as long as she was affiliated with another licensed real estate broker (or broker) who was representing one or both of the parties to a real estate transaction, and the parties had chosen that broker to perform the escrow, respondent Phelan could perform the actual escrow duties for the representing broker without having a license issued by the Department, provided she otherwise complied with the Real Estate Law contained in Business and Professions Code section 10000 et seq.

12. Respondent Phelan testified that over time an increasing number of brokers asked her to handle escrows on their transactions. Respondent Phelan would meet with the brokers, explain what she could do, and have them execute a written independent contractor agreement. So long as all DRE rules and regulations were followed, respondent Phelan told the employing brokers she was legally able to perform the escrow work.

13. Respondent Ramos has been in the real estate business for 18 years. She has never worked for an escrow company. She met respondent Phelan in approximately 2008 when the real estate market slowed due to the recession. After getting her broker license in 2014, respondent Ramos began working with respondent Phelan in performing escrow services for other brokers. She still does some real estate sales work on her own, and in some of those transactions she personally handles the escrow when the parties agree.

14. In early 2017, the Department received information from DRE that showed respondents were involved in escrow activity in California for several licensed brokers. DRE also alerted the Department that respondent Phelan had used language in her LinkedIn page concerning her escrow activity.

15. Based on this information, the Department issued subpoenas to 11 brokers for whom it believed respondents had prepared escrows.

16. In response to the subpoenas, the 11 brokers prepared for the Department lists of hundreds of escrow transactions that were performed by respondents from early 2014 through the end of 2017. The subpoena responses showed that respondents performed over 437 escrow transactions for the 11 brokers during overlapping time periods from 2014 through 2017.

17. Respondents entered independent contractor agreements with all 11 brokers, in which the parties agreed, in part, that respondents would:

Provide escrow service, including but not limited to the opening of escrow, title services, the processing, execution and settlement of all terms and conditions in connection with the duties of escrow personnel. Provide monthly book keeping and bank reconciliation of the escrow trust account. . . .

(See, e.g., ex. C 13, p. 191.)

18. Respondents engaged in the escrow activity described in their independent contractor agreements recited above for each of the 11 brokers. In all cases, the brokers represented one or both of the parties to the real estate transaction. However, in none of the cases did respondents engage in activity requiring a real estate license. Respondents' activities for the 11 brokers solely involved escrow activity.

19. As a result of these independent contractor agreements, respondents also obtained signing authority on the brokers' escrow trust accounts, and used that authority to receive money for escrow to deposit into the account or deliver to third parties, such as title companies. Respondents signed checks for payment from the escrow trust accounts to third parties, as well as directed and controlled payments made to the escrow trust accounts.

20. Respondents engaged in all of their escrow activity for the 11 brokers from their above-described business office in Riverside. That location is many miles away from the 11 brokers with whom they contracted. Respondents advised DRE they were affiliated with the 11 brokers as "broker-associates," becoming what is known to the DRE as "satellite offices" of all 11 brokers. The broker-associate form required by DRE contains no language referring to escrow activity, but rather only acts requiring a real estate license. Respondents used each broker's letterhead and name, but with respondents' address underneath it. The brokers rarely visited respondents' office, and respondents rarely visited the brokers' offices, if ever. The brokers were not physically present when respondents engaged in their escrow activities.

21. Respondents maintained the brokers' escrow files on their own premises and in many cases the brokers did not get on-line access to the files while the transaction was pending. In some cases, the brokers saw the documents for review after they were created by respondents. In all cases, the escrow documents were returned to the brokers after the transactions were completed.

22. Six of the 11 brokers testified at hearing: Matthew Svendsen, Ken Hawkins, Evie Johns, Rony Sosa, Donald Curran, and Kimberley Robinson. Generally, the brokers dictated terms of the real estate transaction; respondents thereafter created escrow documents and performed all the required escrow work. The brokers periodically reviewed the paperwork, usually after it all was completed, but a few brokers reviewed the papers as they

were created. The brokers who testified uniformly agreed they had no escrow experience and so they relied completely on respondents to successfully open and close an escrow.

Respondents' Promotional Activity

23. Respondent Phelan used her LinkedIn page to advertise her escrow services to brokers. (Ex. C 17, p. 269.) In her LinkedIn materials, respondent Phelan wrote "OWN YOUR OWN ESCROW DEPARTMENT" and "Let our 30 years of experience expand your income." In fact, Mr. Svendsen, one of the 11 brokers, testified he became aware of respondent Phelan's escrow services through LinkedIn.

24. Respondent Phelan also provided her resume to prospective brokers, which claimed "thirty-five years as an Escrow Officer/Manager." (Ex. R 3.)

25. In May 2017, a Department employee searching the internet for information on respondent Phelan found a website containing respondent Phelan's name, address, telephone number, and the text "Escrow Services Earn \$100 at closing using our in-house escrow." (Ex. C 12, p. 139.)

26. The subpoena responses from the 11 brokers also showed respondents used words indicating they were in the escrow business. These included e-mail addresses such as escrowdivision@aol.com, escrowdivision@yahoo.com, susan@escrowdivisions.com, and escrow@escrowdivisions.com. In addition, respondents used "Escrow Division" with their business address and personal names on escrow related documents.

Facts Based on Respondents' Additional Evidence

27. The Department has taken no prior action against either respondent, other than the 2010 warning letter sent to respondent Phelan described above. Respondents have no disciplinary record with the DRE.

28. All six of the brokers who testified in this matter agreed respondents performed the escrow activity in question competently and without incident.

29. DRE audited all six of the brokers who testified in this matter, including their escrow activity. No evidence was presented indicating DRE found any irregularity or violation of the Real Estate Law concerning the escrow activity.

30. Kathleen Partin, Special Administrator of the Department's Escrow Section, testified that the Department may also audit a DRE-licensed broker if it suspects the broker has been engaged in escrow activity in violation of the Escrow Law, located at Financial Code section 17000 et seq.

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31. A. Respondents deny advertising their escrow services to the public. They both testified that they will not perform escrow activities for anyone other than themselves or a broker representing a party in a real estate transaction who hires them under the conditions described above.

B. Respondent Phelan testified Evie Johns, Rony Sosa, and Kimberley Robinson were either referred to her or she knew them already when they first retained her for escrow work.

C. However, respondent Phelan could not remember how she met Ken Hawkins or Matt Svendsen. Therefore, respondent Phelan failed to controvert Mr. Svendsen's testimony that he found her through LinkedIn. In addition, respondent Phelan admitted that, in the past, she had circulated the resume and published the LinkedIn page described above, which both contained offers to perform escrow services.

32. At no time did any of the brokers for whom respondents provided escrow services act in collaboration or collectively with each other. Instead, each broker individually hired respondents and only worked with respondents on transactions in which their respective brokerage was representing one or both parties to the transaction. Each brokerage maintained separate records of all transactions and maintained independent records and accounts of all their escrow transactions. Respondents had no ownership interest in any of the brokerages.

33. Pursuant to California Code of Regulations, title 10, section 2726, as licensed real estate brokers, respondents were authorized to work for multiple real estate brokers simultaneously as long as the activities being performed were permitted under the broker-associate agreement signed by them and their employing brokers. As discussed above, respondents entered into such arrangements with all 11 brokers involved in this case.

34. A. Respondents presented the expert testimony of Peter K. Solecki, an attorney who specializes in real estate law. Mr. Solecki is familiar with the Escrow Law and escrow activity as it relates to real estate transactions.

B. Mr. Solecki believes broker interest in performing escrows for their own real estate transactions is increasing in popularity because the profits in real estate are now "razor thin"; adding escrow as a service generates additional revenue for brokers. This opinion was generally supported by the brokers who testified in this matter and is credited.

C. According to Mr. Solecki, most brokers have no understanding of escrow practices and therefore they must rely on others to perform that function if the parties to a real estate transaction agree one of the representing brokers will do the escrow. This opinion was supported by the various brokers who testified in this matter and is credited.

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D. Mr. Solecki also opined brokers' inferior knowledge of the Escrow Law limits their ability to supervise the people performing the escrow work on their transactions. This opinion was not supported by the evidence. While the brokers who testified do not have such expertise, that does not mean none do. For example, respondent Ramos testified she does the escrow work on her own real estate sales transactions and is competent to do so. Moreover, it is interesting to note that Mr. Svendsen replaced respondents in Fall 2017 with an employee who formerly worked as an escrow officer, and Mr. Curran had his wife (who was formerly an escrow officer) perform his escrow work before retaining respondents. That evidence suggests there are different ways in which a broker can either perform the escrow activities personally or develop an in-house knowledge to do so without having to rely entirely on independent third parties or contractors, like respondents.

E. Mr. Solecki testified that most brokers have multiple branch offices, and that some have no physical office at all but only a virtual office on-line. For this reason, he opined direct supervision over sales agents and affiliated broker-associates is difficult. Mr. Solecki's testimony here was vague and not supported with sufficient evidence. In any event, the way a broker organizes his or her office does not, as a matter of law, reduce his or her responsibility for supervising employees or independent contractors. This opinion was not credited.

35. During the hearing, respondents presented several resources from DRE concerning brokers' involvement in unlicensed escrow activity. (Exs. R 6 - R 11.) The materials in question were general without specific coverage of the precise factual scenario presented in this case. The only exception is DRE's Winter 2017 *Real Estate Bulletin*, which provided, in part, "A real estate broker cannot advertise in any manner that would tend to . . . advertise that he or she conducts escrows under the exemption of the FC [Financial Code] section 17006 (a)(4) without specifying in the advertisement that such services are only in connection with the broker's real estate brokerage business." The language in that bulletin clearly advises that a broker cannot advertise that she performs escrow services alone, without linking that service as incidental to actions otherwise requiring a broker license.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. In this administrative matter not involving discipline of a professional license, the burden is on complainant to establish cause to support the Order by a preponderance of the evidence. (*Owen v. Sands* (2009) 176 Cal.App.4th 985, 992.)

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Jurisdiction to Issue the Desist and Refrain Order

2. Financial Code section 17403² provides:

(a) No person subject to this division shall issue, circulate, or publish any advertisement by any means of communication, or make use of or circulate any letterheads, billheads, blank notes, blank receipts, blank escrow instructions, certificates, circulars, or any written, printed, partially written or printed paper containing any fictitious or corporate name or other words indicating that the person is in the escrow business, unless the person is a licensed escrow agent.

(b) If, in the opinion of the commissioner, any person has violated this section, the commissioner may order that person to desist and refrain from that violation. If, within 30 days after the order is served, a request for hearing is filed in writing and the hearing is not held within 60 days thereafter, the order is rescinded.

3. Section 17416 provides:

Whenever in the opinion of the commissioner any person, except as named in Section 17006, is engaged, either actually or through subterfuge, in the business of receiving escrows for deposit or delivery as defined in this division, without a license from the commissioner the commissioner may order that person to desist and to refrain from engaging in that business. If, within 30 days after such an order is served, a request for a hearing is filed in writing and the hearing is not held within 60 days thereafter, the order is rescinded.

4. In this case, the Commissioner has opined that respondents have violated sections 17403 and 17416 by circulating documents advertising that they were in the escrow business and engaging in unlicensed escrow activity without a valid exemption. The Commissioner had the authority under sections 17403 and 17416 to issue the Order against respondents. (Factual Findings 1-8.)

Unlicensed Escrow Activity

5. A. The Commissioner is the only authority in California who may issue licenses under the Escrow Law. (§ 17400.)

² Further undesignated statutory references are to the Financial Code.

B. Pursuant to section 17200, “It shall be unlawful for any person to engage in business as an escrow agent within this state except by means of a corporation duly organized for that purpose licensed by the commissioner as an escrow agent.”

C. An “escrow agent” is any person engaged in the business of receiving escrows for deposit or delivery. (§ 17004.) Section 17003 defines an escrow as where a thing of value, such as money to buy a home, is deposited with a third party (not a buyer or seller in the transaction) to hold until the happening of a specified event or the performance of a prescribed condition.

D. Based on the above, respondents were engaged in unlicensed escrow activity relative to their work for the 11 brokers involved in this case. It was established that they were in the business of receiving escrows for deposit or delivery without a license from the Commissioner, which would make them subject to a desist and refrain order pursuant to section 17416.

6. A. However, respondents contend they are not subject to such an order because they fall within the exemption specified in section 17006, subdivision (a)(4). Pursuant to section 17006.5, “the burden of proving an exemption or an exception from a definition is upon the person claiming it.” In this case, respondents bear the burden of establishing by a preponderance of the evidence that the exemption applies to them.

B. The exemption of section 17006, subdivision (a)(4) (or the subdivision (a)(4) exemption), covers “[a]ny broker licensed by the Real Estate Commissioner while performing acts in the course of or incidental to a real estate transaction in which the broker is an agent or a party to the transaction and in which the broker is performing an act for which a real estate license is required.”

C. Section 17006, subdivision (b), limits application of the subdivision (a)(4) exemption: “The exemptions provided for in paragraphs (2) and (4) of subdivision (a) are personal to the persons listed, and those persons shall not delegate any duties other than duties performed under the direct supervision of those persons. Notwithstanding the provisions of this subdivision, the exemptions provided for in paragraphs (2) and (4) of subdivision (a) are not available for any arrangement entered into for the purpose of performing escrows for more than one business.”

D. As discussed in more detail below, respondents argue that more than one reasonable interpretation of subdivision (b) is available. For that reason, extrinsic aids may be used to assist in the interpretation of this statute. (*In re C.H.* (2011) 53 Cal.4th 94, 100.) Legislative history, including committee reports, can be used for this purpose. (*Martinez v. Regents of University of California* (2010) 50 Cal.4th 1277, 1292.) As shown by the legislative history of section 17006, subdivision (b), the Legislature’s intent was to prevent a broker from claiming the exemption to perform escrow services for several businesses. For example, the Assembly Banking, Finance and Public Indebtedness Committee analysis on AB 2583 (ex. C 9A, p. 84) provides the following explanation of subdivision (b):

What happens in the case of these escrow cooperatives is that an individual or association will approach real estate brokers and offer to handle their escrow services by setting up a co-op company for that purpose. Many of these people are not licensed and operate under the exemption in Financial Code section 17006 which allows real estate brokers to perform escrow functions that are “incidental” to their real estate transactions. By disallowing the extension of the exemption provided real estate brokers to associations or combinations with other persons formed for the purpose of performing escrows, and by not allowing real estate brokers (or attorneys) to delegate duties (except as specified), such unlicensed co-ops would be effectively outlawed.

7. A. In this case, the subdivision (a)(4) exemption is not available to respondents because, pursuant to subdivision (b) of the same statute, the exemption may not be used for any arrangement entered into for the purpose of performing escrows for more than one business.

B. Here, respondents, who are both licensed brokers, entered into an arrangement with each other to perform escrows for at least 11 other businesses, i.e., the brokers who hired them to do so. From another perspective, respondents entered into arrangements with 11 other brokers for the same purpose, a difference without a real distinction. Either way, respondents’ arrangements resulted in their creating an independent escrow company providing escrow services on hundreds of real estate transactions handled by at least 11 other brokers. As indicated by the legislative history, this is literally the type of activity the Legislature deemed to be “effectively outlawed” by subdivision (b). Put more bluntly, respondents were literally involved in an “arrangement entered into for the purpose of performing escrows for more than one business”; the other businesses being those operated by the 11 other brokers. It is worth noting that this interpretation is consistent with the position taken by the Department in its 2010 warning letter to respondent Phelan, where it advised her that she would need to be licensed under the Escrow Law in order to perform escrow services for more than one business. (Factual Findings 1-35.)

C. Respondents argue subdivision (b) does not prevent application of the subdivision (a)(4) exemption because the 11 other brokers were not involved in a cooperative arrangement among themselves or otherwise collaborated with each other. While factually true, the sole focus of the argument on only the 11 other brokers is myopic. Subdivision (b) bars application of the subdivision (a)(4) exemption “for any arrangement entered into for the purpose of performing escrows for more than one business.” That is exactly what respondents did, i.e., set up an arrangement among themselves for purposes of performing escrows for more than one business. There is no language in subdivision (b) that would limit its reach only to the 11 brokers who performed the actual real estate transaction work but exclude the brokers (respondents) who performed the unlicensed escrow work on those

transactions. Subdivision (b) is broad enough to cover “any arrangement” for purposes of performing unlicensed escrow activity for “more than one business.”

8. A. Another impediment created by subdivision (b) is that respondents failed to establish that the subdivision (a)(4) exemption may be applied to them derivatively through the 11 brokers in question.

B. It must be remembered that the subdivision (a)(4) exemption expressly applies to a licensed broker “while performing acts in the course of or incidental to a real estate transaction . . . in which the broker is performing an act for which a real estate license is required.” This language heavily suggests the exemption in this case only applies to the 11 brokers in question, who performed the real estate work requiring a license, and not to respondents, who performed no duties requiring a real estate license.

C. As noted above, section 17006, subdivision (b), provides that the “exemptions provided for in . . . subdivision (a) are personal to the persons listed. . . .” Since respondents argue the statute still applies to someone not engaged in licensed real estate work, and thus are offering a competing interpretation of the statute, legislative history may be used in this analysis. The legislative history of section 17006, subdivision (b), is instructive on this point. The Assembly Banking, Finance and Public Indebtedness Committee analysis of AB 2583 dated April 7, 1992 (ex. C 9A, p. 83) states that “personal to the persons listed” means the exemption may not be extended to third parties. Likewise, the Senate Committee on Banking, Commerce and International Trade, in its committee analysis dated June 24, 1992 (ex. C 9B, p. 99), indicates the exemption of subdivision (a)(4) “is personal to those exempted and may not be transferred to others.” (Emphasis in original.)

D. In this case, the subdivision (a)(4) exemption would apply to the 11 brokers who transacted the real estate deals in question and hired respondents to perform the “incidental” escrow work. The exemption is personal to them. Respondents, who did not perform any activity requiring a broker license, should not also be able to claim the exemption, as there is no indication in the statute or legislative history supporting the notion that the exemption is available for use by multiple brokers on the same transaction, especially brokers not performing activities requiring a broker license.

9. A. Even assuming, *arguendo*, that the subdivision (a)(4) exemption is available to both the employing brokers and derivatively to respondents, another problem is that respondents failed to establish that their escrow services were performed under the direct supervision of the 11 brokers in question.

B. As noted above, section 17006, subdivision (b), provides that the person claiming the subdivision (a)(4) exemption “shall not delegate any duties other than duties performed under the direct supervision of those persons.” In this case, the 11 brokers who hired respondents to perform the escrow work would be “those persons” able to claim the exemption. Under respondents’ theory, the 11 brokers were permitted to delegate their escrow work to respondents, and respondents therefore are able to claim the exemption

derivatively through them, so long as the 11 employing brokers directly supervised respondents when they performed the escrow activity.

C1. The issue here therefore turns on the meaning of “direct supervision,” which is not otherwise defined in the relevant statutes or the Escrow Law. Both parties provided definitions of this term from other sources, none of which are on point. However, the sources discussed below are more persuasive and from more authoritative sources, and therefore are given more credit. This is because those sources define “direct supervision” of a licensee over licensed assistants or non-licensed staff performing activity normally requiring a license, which approximates the situation posed in this case.

C2. For example, complainant cites to a regulation concerning licensed veterinarians, which defines “direct supervision” as when “the supervisor is physically present at the location where animal health care job tasks are to be performed and is quickly and easily available.” (Cal. Code Regs, tit. 16, § 2034, subd. (e).) For licensed dentists, “‘direct supervision’ means the supervision of dental procedures based on instructions given by a licensed dentist who is required to be physically present in the treatment facility during the performance of those procedures.” (Bus. & Prof. Code, § 1902, subd. (c).) For licensed pharmacists, “‘direct supervision and control’ means that a pharmacist is on the premises at all times and is fully aware of all activities performed by either a pharmacy technician or intern pharmacist.” (Bus. & Prof. Code, § 4023.5.) There are similar definitions for several other types of licensees, such as perfusionists and students/interns (Bus. & Prof. Code, § 2593) and respiratory care therapists and students (Bus. & Prof. Code, § 3742).

C3. Courts may assume that in enacting a statute the Legislature was aware of existing, related laws and intended to maintain a consistent body of statutes. (*Santa Clara Valley Transportation Authority v. Public Utilities Com.* (2004) 124 Cal.App.4th 346, 360.) Here, there is no reason to presume that “direct supervision” as written in section 17006, subdivision (b), should be defined differently than the same term is defined in the above-cited provisions of the Business and Professions Code, which require a licensee being on premises and fully aware of the activities performed by those to whom the tasks have been delegated. This is a sensible interpretation because, in focusing on the subdivision (a)(4) exemption being personal to the transacting broker and limiting delegation of duties related to the exemption, it is clear that “direct supervision” as used in section 17006, subdivision (b), was intended to be something more than the kind of supervision an employer would normally be required to exercise over an employee or independent contractor.

D. In this case, respondents operated out of their own business located in Riverside, which is miles away from the brokers with whom they contracted. Respondents performed all of their escrow activity from that location. The brokers rarely visited them and vice versa, meaning the brokers were not physically present when the delegated duties were performed. Respondents maintained the brokers’ escrow files on their own premises and in some cases the brokers did not have on-line access to the files but rather only got copies of them after the transactions were completed. According to the terms of the independent contractor agreements signed with all 11 brokers, respondents had virtual autonomy in their

escrow work. In most cases, the brokers dictated the terms of the transactions, and then allowed respondents near carte blanche to complete the escrows. Respondents' had free and open access to the brokers' trust accounts, as signatories on bank accounts with authority to deposit and withdraw consumer funds without first getting approval by the brokers. Those facts do not fall within the definition of direct supervision provided in the other statutes, which require the delegator's close physical proximity to the delegee and full awareness of the activities performed by the delegee. Even if the definitions of direct supervision provided in the Business and Profession Code are disregarded, it is hard to imagine that the 11 brokers' remote and delayed review of respondents' work would constitute supervision, as that term is generally understood to mean, let alone "direct supervision."

E1. Respondents' arguments that they were in fact directly supervised are not persuasive. For example, respondents' argument concerning their status as independent contractors versus the 11 brokers' employees misses the point, as neither status necessarily indicates whether they were directly supervised. The same is true concerning their argument that as licensed brokers they were required to have written contracts with the 11 brokers. The issue is not necessarily what the contracts required, but the level of supervision actually provided by the 11 brokers.

E2. Respondents' main argument, through the expert testimony of Mr. Solecki, is that direct supervision is not possible or commonly seen in today's real estate industry, because brokers know little about escrow and commonly work at different physical locations from their broker-associates or salespersons. However, the fact that most brokers do not have escrow expertise does not mean none have it. Nor is it logical to conclude that a broker with no escrow expertise can directly supervise someone to whom those duties have been delegated, which tends to show subdivision (b) should not be interpreted as loosely as respondents contend. The subdivision (a)(4) exception should be seen as just that, an exception with limited reach to those who fit the narrow parameters of it. In line with that reasoning, subdivision (b) would accommodate a situation where one of the respondents, who has escrow experience, transacts a real estate sale and also handles the incidental escrow. Or, as some of the brokers in this case have done, where a broker has an employee with escrow experience handle the escrow activity incidental to his or her real estate transaction; unlike respondents in this case, such an employee would work out of the same office, would be beholden to only one employer, and therefore would be directly supervised.

F1. To be clear, respondents present a sympathetic situation. Unlike many cases involving desist and refrain orders, respondents are not scofflaws who flagrantly disregarded the law and injured others in their pursuit of financial benefit. They were previously given legal advice that their unlicensed escrow activity was permissible under an exemption of the Escrow Law, and the arguments they advanced in this case were more than colorable. They have no prior disciplinary record with either DRE or the Department. The brokers who testified in this matter all agreed respondents performed their services competently and without incident, and those brokers' escrow activities were audited by DRE with no violations found. However, those mitigating facts cannot vitiate respondents' violation of section 17416 as a matter of law.

F2. In addition, respondents' construction of the subdivision (a)(4) exemption would lead to less than desirable public policy ramifications. For example, under respondents' construction, DRE would be the main licensing and auditing entity relied upon to oversee unlicensed escrow activity, even though the Department is the only authority allowed to license escrow corporations and managers, and has superior expertise in regulating escrow activity. More concerning, respondents' construction would encourage and facilitate more brokers to take on unlicensed escrow activity. This is problematic because, by respondents' estimation, most brokers have no experience with escrow activity. Moreover, escrow officers are supposed to be independent of the parties to a transaction, but one wonders how that is possible when the escrow provider is a broker who represents one or both of the parties, or is herself a party.

Promotional Activities

10. A. As explained above, section 17403, subdivision (a), prohibits any person "subject to this division" from issuing, circulating, or publishing "any advertisement by any means of communication . . . indicating that the person is in the escrow business, unless the person is a licensed escrow agent."

B. Section 17005.4 defines a "person subject to this division" as "any person undertaking the performance of escrow agent services. Unless specifically exempted, as in Section 17006, however, this definition shall not be used to exclude anyone." As discussed above, respondents engaged in escrow agent services and are not subject to the exemption of section 17006. They are therefore subject to section 17403.

C. In this case, respondents advertised, by different means of communication, that they were in the escrow business, but they were not licensed at the times they did so. For example, respondent Phelan used her LinkedIn page to advertise her escrow services to brokers. She also provided her resumé to prospective brokers, which touted her experience as an escrow officer and manager. She also advertised over the internet her availability to perform escrow services. Finally, respondents jointly used e-mail addresses promoting their escrow services, which they used in performing escrow activity, and used the term "Escrow Division" on escrow related documents they created for escrow activity. It was therefore established that respondents violated section 17403. (Factual Findings 1-35.)

D. Respondents' argument that they did not violate section 17403 because they do not accept escrow work from the general public is not persuasive. A person without an escrow license violates section 17403 by advertising she is willing to perform escrow work, regardless of the intended recipient of the advertisement. In any event, it is clear that Mr. Svendsen hired respondent Phelan as a result of her LinkedIn page. Also, the DRE material presented by respondents does not support their position, in that the Fall 2017 bulletin clearly advises brokers that they may not advertise escrow services alone without linking that work with activity requiring a broker license, which respondents did not do in their promotional materials presented in this case.

Overall Conclusion

11. Based on the above, it was established by a preponderance of the evidence that cause exists pursuant to sections 17403 and 17416 for the Commissioner to have issued to respondents the Desist and Refrain Order dated October 29, 2018. Therefore, cause exists to affirm that order. (Factual Findings 1-35; Legal Conclusions 1-10.)

ORDER

The Commissioner of Business Oversight's Desist and Refrain Order dated October 29, 2018 is affirmed.

DATED: February 14, 2019



ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings

ERRATA SHEET

(Changes to Proposed Decision – Phelan-Ramos)

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- 1) On page 2 of the Proposed Decision under Factual Findings, Footnote Number 1, line 2, delete “Finance” and insert “Financial Institutions”.

- 2) On page 8 of the Proposed Decision, Paragraph Number 5 of the Legal Conclusions, line 2, delete “17400” and insert “17200”.

- 3) On page 14 of the Proposed Decision, Paragraph Number 10.D of the Legal Conclusions, line 6, delete “Fall” and insert “Winter”.