2018 IL App (2d) 170832-U
No. 2-17-0832
Order filed November 13, 2018
Modified upon denial of rehearing December 19, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PETER J. CURIELLI, Plaintiff-Appellee, v. THE DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION, BRYAN A. SCHNEIDER, SECRETARY, Defendant-Appellant.	)	Appeal from the Circuit Court of Lake County. No. 16-MR-450 Honorable Mitchell L. Hoffman, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The agency's determination that plaintiff acted as both a real estate broker and an attorney in the same transaction, in violation of section 20-20(34) of the Real Estate License Act of 2000, was not clearly erroneous, and the trial court erred in determining otherwise. We modify the agency's discipline, but otherwise affirm its decision.

¶ 2 Plaintiff, Peter J. Curielli, a real estate managing broker and attorney, sought administrative review of a final decision of the Secretary of the Department of Financial and Professional Regulation (Secretary), indefinitely suspending, for a period of no less than one

year, his real estate license and imposing a $9,500 fine, on the basis that he acted as both a broker and attorney in connection with a real estate transaction. 225 ILCS 454/20-20(34) (West 2016). The trial court reversed the Secretary's decision. The Department appeals. We reverse the trial court, modify the Secretary's discipline to eliminate the indefinite suspension, and otherwise affirm the agency's decision.

¶ 3 I. BACKGROUND

¶ 4 On January 9, 2014, the Department filed a one-count complaint against plaintiff, alleging that, on or about February 11, 2013, in connection with a transaction for property located at 5521 South Oak Park Avenue in Chicago, plaintiff acted as both a real estate broker and an attorney and that such conduct violated section 20-20(34) of the Real Estate License Act of 2000 (Act) (225 ILCS 454/20-20(34) (West 2014), which listed as grounds for discipline: "[w]hen a licensee is also an attorney, acting as the attorney for either the buyer or the seller in the same transaction in which the licensee is acting or has acted as a broker or salesperson."[1]

¶ 5 Two months earlier, on November 13, 2013, the Department had scheduled an informal conference with plaintiff to determine whether the matter could be resolved without a hearing. On November 25, 2013, the Department offered to settle the case through a non-disciplinary order (which is not a public discipline and does not appear on the Department's website), if plaintiff completed a 12-hour broker management continuing education course. Plaintiff declined the offer (but later alleged, as discussed below, that there was a subsequent, renewed offer) and, instead, filed, in the trial court, a declaratory judgment complaint against the Department, alleging that section 20-20(34) was unconstitutional. He claimed that: (1) the statue

[1] Public Act 99-227, § 955, effective August 3, 2015, amended the statute, substituting "managing broker or broker" for "broker or salesperson."

violated the special legislation clause of the Illinois Constitution because it gave special treatment to non-attorney real estate brokers who performed other services; (2) the legislature usurped the supreme court's power to regulate attorneys' conduct and granted to the agency power to determine what constitutes the practice of law (a facial separation-of-powers challenge to the statute); and (3) the statute violated the equal protection clause because it prevented plaintiff from acting as an attorney and broker in the same transaction. The trial court dismissed plaintiff's complaint with prejudice (735 ILCS 5/2-615 (West 2012)), and plaintiff appealed. The First District affirmed. *Curielli v. Quinn*, 2015 IL App (1st) 143511 (*Curielli I*).

¶ 6 After the Department filed its complaint, plaintiff, on February 6, 2014, moved to dismiss, alleging that the complaint was too broad, violating a Department rule that required a complaint to "include a clear statement of the acts or omissions alleged to violate a statute." 68 Ill. Admin. Code § 1110.20 (2016). On May 21, 2014, the Administrative Law Judge (ALJ) denied the motion, noting that administrative complaints need only reasonably apprise a party of the case against him or her and that the Department's complaint contained a clear statement of facts, reasonably apprised plaintiff of the case against him, and, the ALJ further noted, plaintiff was entitled to discovery materials from the Department, from which he could intelligibly prepare a defense.

¶ 7 On October 14, 2014, plaintiff, *pro se*, moved again to dismiss, alleging, in part, that the statute's use of the term "the attorney," as opposed to "an attorney," the latter of which was alleged in the complaint, reflected that the statute addressed the one attorney for either the buyer or seller. See 225 ILCS 454/20-20(34) (West 2014) ("[w]hen a licensee is also *an* attorney, acting as *the* attorney for either the buyer or the seller in the same transaction in which the

licensee is acting or has acted as a broker or salesperson") (Emphasis added.) On October 24, 2014, the ALJ denied the motion.

¶ 8 A. Hearing

¶ 9 The hearing occurred on July 28, and 29, 2015. The Department called three witnesses: Natalie Grisco, the sellers' broker, Michael Laird, the sellers' attorney on the transaction, and Mary Robinson, the Department's expert witness. Plaintiff, who represented himself, called four witnesses: Mark and Dawn Ertler, the buyers whom he represented in the transaction, John Peter Curielli, plaintiff's father and an attorney and owner of the Law Offices of John Peter Curielli (John), and Catherine Curielli, plaintiff's mother and a paralegal at the family firm.

¶ 10 Plaintiff began working on the subject transaction in about August or September 2012, and the closing occurred in February 2013. On February 6, 2013, Dawn emailed Melanie Moore at Navy Federal, the Ertlers' lender, asking if Navy Federal could do a dry closing, where all of the paperwork was signed but the funds were held in escrow for 48 hours while a survey was conducted on the property. On Friday, February 8, 2013, an unfunded/dry closing on the property took place at Fidelity. The keys to the property did not issue to the Ertlers that day. Rather, the final closing on the sale took place on Monday, February 11, 2013.

¶ 11 The agency and trial court ultimately focused on two emails plaintiff sent during the transaction. The emails pertained to the HUD-1 settlement statement (HUD-1 form), which was used at the time in certain mortgage loans to provide, both before and at closing, mandatory disclosures. See *Weatherman v. Gary-Wheaton Bank of Fox Valley, N.A.*, 186 Ill. 2d 472, 480-81 (1999).

¶ 12 The first email, dated February 5, 2013, at 3:58:46 and 9:59:27 p.m. (and at 3:59 p.m. with additional comments), from Peter@Curielli.com, was sent to Amanda French at Fidelity

National Title, who prepared the title commitment and preliminary HUD-1 form, and carbon-copied Laird, Johnny Rawson at Navy Federal, and Dawn. It concerned the tax proration on the preliminary HUD-1. Plaintiff wrote:

"Dear Ms. French,

Here are the problems I see with the Preliminary HUD:

1) Taxes are still prorated at 100% vs 110% which the contract calls for:

a) Line 211 should be $644.47 (16.52/per day for 39[ ] days)

b) Line 213 should be $6,031.56

2) Line 805 Credit Report Good Faith Estimate was 22.00 HUD-1 is 222.00 (Either this is a typo or not proper, because the net change is 49.832% increase, when only a 10% change is allowed).

3) Line 808 Pest Control of $85 (Is not a buyer's Charge, should have been POC, by seller[s]) (See Contract).

4) Line 1103 $1,570.00 should be a seller[s'] charge not a buyer[s'] charge.

5) Line 1304 Buyer's Attorney to Law Offices of John Peter Curielli, P.C. not Peter Curielli.

6) I am copying buyer[s] on this email, so they can determine if the rest of the lender's fees are correct, I think buyers are supposed to be getting a $2,500 credit from Navy Federal, which I do not see.

Thanks,

Peter J. Curielli"

¶ 13 After plaintiff's signature, which is in cursive font in some versions in the record, there appears an image of the allegorical justice, with "Law Offices of John Peter Curielli, P.C."

afterwards. Below this image is the firm's signature block, identifying plaintiff as "Peter J. Curielli [line image] Esq. CPA, Real Estate Broker." Below this information are two confidentiality notices.

¶ 14 The second email, dated February 6, 2013, at 4:01:27 p.m., concerned the revised HUD-1 form and was sent to Laird (from Peter@Curielli.com) and carbon-copied Grisco, Dawn, and another recipient. Plaintiff wrote:

"Dear Mr. Laird,

We have been told repeatedly that this is a short sale, and the implication is that there are a separate set of rules for short sales. I respectfully disagree with this position. We have a legally-binding contract, and the only reference to a short sale is in the addendum. Said addendum does not change the terms of the contract which we need to cover prior to closing namely:

1) Base[d] on your tax proration, the credit for the 2012 tax bill is $5,483.24. Dividing this number by 365 days[,] we come out with 15.0225 per day. Multiplying that by 39 days[,] it comes to $585.88. The credit you gave on the HUD is $565.70[,] which is a difference of $20.18.

2) The contract legally binds the seller[s] to provide a Plat[ ] of Survey dated not more than 6 months prior to closing, which shall be visibly staked or flagged. Said survey is due no later than Thursday[,] February 7, 2013[,] for our review. (See section 17 of the contract).

3) It is my understanding that seller[s'] realtor will provide my clients with a check for $2,000 at the time of closing specifically for the missing snow blower, lawn mower, and patio set, which is listed under paragraph (3) line 29 of the contract to be

transferred to buyer by Bill of Sale. We of course expect all other items listed under section 3 Fixtures and Personal Property to [be] present on the premises as of closing.

4) Please email a copy of the deed no later than Thursday noon in order that I may confirm that it matches our lender's requirements.

Thanks,

Peter J. Curielli"

Plaintiff did *not* use any signature block on this email.

¶ 15 1. Natalie Grisco

¶ 16 Natalie Grisco, a managing broker at First Rate Realty and the sellers' broker in the subject transaction, testified that the transaction was a short sale. In a short sale, a contract is signed and then submitted to the bank, which essentially determines the price. After this point, the negotiations are conducted by the attorneys.

¶ 17 Laird, the sellers' attorney, carbon-copied Grisco on emails sent during the negotiations. Prior to the time the contract was signed, plaintiff's emails contained a Niche Realty signature line, a house logo, and language that Niche was acting as the broker (*i.e.*, "d/b/a real estate broker"). After the contact was signed Grisco believed, based on the emails, that plaintiff negotiated on the buyers' behalf. John signed none of the emails she reviewed, and no emails had any indication on them that they were written by John.

¶ 18 The closing occurred at Fidelity National Title in Oak Lawn. This was Grisco's first contact with plaintiff. From the sellers' side, Grisco and Laird attended. (Traditionally, the attorney and broker both attend for the sellers.) For the buyers, the Ertlers and plaintiff attended, and during part, but not the extent, of the closing, John was present via conference call. According to Grisco, the closing did not go smoothly and was very loud and argumentative. It

was a dry closing, which, again, means that the necessary funds to complete the transaction were not available. Also, the keys would not be issued. Problems included incorrect loan paperwork, which prompted the call to John. "They were arguing about *** legal things ***. [Plaintiff] got very upset and swore at Mike Laird." The closing took about a couple of hours, and the call to John lasted "[q]uite a few minutes." Another problem with the closing was that plaintiff's commission was listed as 1.5% on the commission statement Grisco prepared, instead of the 2.5% specified on the original listing agreement. Grisco explained that she mistakenly believed that brokers can change their commission up until the contract date, as opposed to the showing date. Grisco gave plaintiff his full commission after plaintiff noted the error at closing.

¶ 19 During cross-examination, plaintiff, who represented himself, attempted to question Grisco about signage at her office and her contact with his clients. In response to an objection to the questioning, plaintiff explained that this information reflected that Grisco was not professional and went to her credibility. Before the ALJ ruled on the objection, plaintiff moved on to other questions. Also, during his opening statement, plaintiff had described how he had filed a complaint against Grisco with the local realtors' association for her initial error in reducing his commission. He suggested that Grisco had prompted the Department to bring the present complaint in retaliation for his filing. "Perhaps Ms. Grisco is still bittered [*sic*] by having to file bankruptcy in 2010."

¶ 20 Grisco further testified that she was at the closing in the closing room for a short period. On re-direct, she testified that attorneys are always at closings, though brokers are not always present.

¶ 21 2. Michael Laird

¶ 22 Michael Laird, the sellers' attorney, testified that the transaction was a short sale, which means that the home is sold for less than what the sellers owe the bank. The sellers' bank, Wells Fargo in this case, had to approve the transaction because they were losing money. Attorneys have additional duties in short sales, including obtaining lender approval, which can involve submission of tax returns, pay stubs, and bank statements. Also, due to rampant fraud, federal regulations govern these sales. Typically, Laird gets involved in a transaction when he receives the signed contract. Next, he reviews the contract, orders title, and starts on the short-sale approval process.

¶ 23 There were several issues during the transaction at issue, including disputes over personal property, whether a survey should have been approved, whether the property could be conveyed to the buyers' trust (as opposed to them individually), whether the HUD-1 form was approved and whether a preliminary HUD-1 form was correct, credit for repairs, pest inspection, the closing date, appraisal, and re-examining the home after a rainstorm. Further, the closing had to occur by February 12, 2013. As to the issue with conveying the property to a trust, short sale lenders want to know who is buying a property because they are concerned about fraud and the property "being flipped back to the original mortgage holders." In other words, they want arm's-length transactions.

¶ 24 Prior to the closing, Laird communicated with plaintiff and he spoke to John on only one occasion (in January) concerning a simple issue. Leading up to the closing, Laird had some concerns. Plaintiff had emailed the title company, seeking certain costs taken out of the HUD-1 form and other changes. Wells Fargo had previously approved the HUD-1 form; thus, closing would be delayed because, if changes needed to be made, the parties would have to re-submit the form to the bank.

¶ 25 Laird contacted the title company to schedule the closing and, for the first time in his career, requested separate rooms because he did not want to be in the same room as plaintiff. Plaintiff, in his view, showed a lack of professionalism. There was tension throughout the transaction. The closing took several hours; more than two. "Tempers were starting to flare before [this] point[, *i.e.*, early February 2013]." "I'll never forget it." In one of his responses, Laird refused to make certain changes to the HUD form because it would constitute a federal offense. At one point during the closing, Laird walked out after plaintiff asked him " 'You want to spank me now?' " Laird stated that he "could not believe I heard something like that in a closing."

¶ 26 On the sellers' side, only Laird and Grisco were present. Brokers are not required to be present at closings, nor are the sellers. Laird's clients had pre-signed the documents. On the buyers' side, the Ertlers and plaintiff were present. Buyers typically bring their *attorney* to closing.

¶ 27 Laird could not recall John being conferenced in during the closing, nor could he recall speaking to him during the closing. Laird did not negotiate the closing with John; he negotiated with plaintiff. At no point during the transaction, in Laird's conversations with plaintiff, did plaintiff at any point state that he was speaking for John. Laird believed that plaintiff was the attorney doing all of the work for the buyers. When a decision needed to be made on contract terms or closing terms, it appears to Laird that plaintiff was making the decisions. Laird did not see the Niche logo on any communications.

¶ 28 On cross-examination, Laird testified that, on October 1, 2012, he sent one fax to John during the transaction because, early on, he believed that John was the attorney on the deal. "I never heard from him since the one time." Based on conversations and emails with plaintiff,

Laird believed that everything was coming from plaintiff, not John. He conceded, however, that, occasionally, in his office, when an email is generated, a signature auto-populates and is not corrected. Laird also testified that Terri Ledesma, his secretary, responds to some emails on his behalf.

¶ 29 When plaintiff asked Laird if it was possible that the emails that contained plaintiff's law office signature could have been directed from John, Laird replied, "Anything is possible." After plaintiff stated, "Okay, thank you," Laird continued, "I could win the lottery tonight, too."

¶ 30 Laird conceded that, on February 11, 2013, he sent a fax to John, explaining that he did so because John was the attorney listed on the contract. Laird also conceded that he spent limited time in the closing room. Typically, Laird deals directly with the buyer's attorney. He does not negotiate with someone who is not the buyers' attorney, and at no point during the transaction did plaintiff inform Laird that he was not the buyers' attorney. Further, at no point did plaintiff state that he *was* the attorney. However, plaintiff's actions led Laird to believe that plaintiff was the buyers' attorney. If John was on a conference call in the closing room, Laird was not aware of it at the time.

¶ 31 3. Mary Robinson

¶ 32 Mary Robinson, an attorney whose practice focuses on legal ethics and professional responsibility, testified as follows. She previously worked, for 15 years, at the ARDC as the administrator, *i.e.*, the chief prosecuting attorney. She is on the editorial board for the ABA/BNA Manual on Professional Responsibility and has served on the ABA committee that writes opinions on ethics and professional responsibility. Robinson has also taught professional responsibility at Northern Illinois School of Law and Northwestern University Law School.

¶ 33 At the ARDC, Robinson had experience in determining what constitutes the practice of law, which was an issue that arose in many cases there. Typically, the question was whether a lawyer who was suspended or disbarred was doing work that constituted the practice of law. At that time, the ARDC did not have authority over unauthorized-practice cases that involved non-lawyers. Robinson has been deposed about 30 times and testified at trials about five or six times. Over plaintiff's relevance objection, the ALJ allowed Robinson to testify as an expert in the field of legal ethics.

¶ 34 Robinson explained that several factors are considered in the determination of whether someone is acting as a lawyer. The major focus is on the nature of the work that is being done and the extent to which it requires a lawyer's training and exercise of legal judgment. "How that person holds themselves out is also a factor, but the primary focus is on what they are doing."

¶ 35 Robinson reviewed documents in this case and primarily focused on the emails. She opined that the nature of the recitations and arguments made in plaintiff's emails constituted the practice of law. Most of the emails contained a signature line that listed the law office. The content of the emails did not reflect that they were written on someone else's behalf. "They came from [plaintiff], and they were signed by [plaintiff]. At the base of it all, he was identified as the attorney." In this transaction, plaintiff acted as an attorney and engaged in the practice of law.

¶ 36 On cross-examination, plaintiff attempted to elicit testimony concerning the ethics of Grisco's actions, and the ALJ sustained an objection to the questioning. He also attempted to elicit testimony concerning the ethics of plea bargaining, specifically, by arguing that the Department had improperly revoked a settlement offer in the matter, an issue plaintiff argued he attempted to raise in a pre-hearing conference. The Department objected, arguing that plaintiff

was again attempting to divert attention to the actions of others, rather than his conduct. The ALJ sustained the objection.

¶ 37 Robinson continued, testifying that she was familiar with case law that defines the boundaries between lawyers and brokers in the real estate area. Also, she is aware that, in some states, lawyers do not participate in real estate transactions, but, in Illinois, the supreme court does not "consider that a good alternative."

¶ 38 Addressing the emails, Robinson testified that, even if the signature line was automatically generated and it was an error in not removing it and the emails were sent at another attorney's direction, there would still be ethical issues. If an attorney directs a broker to send emails on his or her behalf, that would raise ethical concerns.

¶ 39 On re-direct, Robinson testified that, where an attorney is acting as both broker and attorney, the client's interests could be harmed. The attorney may not be as forceful in telling the client what their legal interests are when that attorney could be looking at the prospect of a commission. In terms of emails being sent on others' behalf, a lawyer's employee, properly supervised, can act as an agent of the attorney. An administrative assistant does not have the same conflict as a licensed attorney who is also acting as the broker in the transaction when it comes to sending emails on another's behalf.

¶ 40 She opined that the two emails at issue, dated February 5, and 6, 2013, reflect that plaintiff was acting as an attorney: "in particular, a number of representations and arguments about what the contract that had been executed in this case, what that contract provided and how it limited the choice of options, you know, and to what extent it was binding and how that impacted some of these issues." Further, Robinson opined, even if the signature line read, "Peter Curielli, licensed managing broker," plaintiff was practicing law because the context of the

emails is the essence. There is no indication in the emails that they contained John's words. The only place his name appeared was in the name of the firm. Even if that were the case, plaintiff was still acting as the attorney because he sent them over his name.

¶ 41 Robinson further opined that the way that a person is perceived by others is "highly relevant" into the determination of whether they are engaged in the practice of law. Laird's testimony that he believed plaintiff was acting as an attorney "confirmed the obvious" to Robinson as to whether or not plaintiff acted as an attorney. Plaintiff is an attorney, he sent emails identifying himself as an attorney; more importantly, the content of the emails addressed the interpretation of contract terms.

¶ 42 The February 5, 2013, email addressed the HUD-1 form. Robinson opined that "[t]he tax proration is an implementation [*sic*] of a contract provision. I interpret that as the practice of law, because it is saying—it is essentially saying, 'You prorated it at this rate, but the contract calls for a different rate, and this is how it should be done.' " In another portion of the email, it directs where the attorneys fees are to go. Robinson opined that a broker cannot tell someone who gets the fees; the attorney has the authority to direct that. That direction constituted the practice of law. The second email, sent February 6, 2013, contains a statement that the contract requires a survey. It also contains paragraphs about plaintiff's position on what the contract requires and whether an addendum changed the contract. "Each of these, to me, is an interpretation of a legal document, an argument about the significance of that document and how that should impact the handling of this transaction."

¶ 43 4. Dawn Ertler

¶ 44 Dawn Ertler, one of the buyers of the subject property, testified on plaintiff's behalf as follows. She has known plaintiff, John, and Catherine for 10 years, both socially and

professionally. The firm has handled about 10 legal matters for Dawn, including a trust and real estate matters. Plaintiff has represented Dawn as her realtor on about four or five earlier transactions. John acted as attorney on each of them, and plaintiff was the broker.

¶ 45 Addressing the subject property, Dawn testified that plaintiff was her realtor and John was her attorney. At no point did Dawn believe that anyone other than John was her attorney.

¶ 46 Dawn explained that, before the closing, she had her inspector conduct a second inspection because there was water damage that was not discovered the first time. There were emails concerning the second home inspection and the inspector's estimate of repair costs. Dawn stated that she never received a credit at closing for the repair costs. As to exhibit No. 28, an email from Dawn to plaintiff, Dawn noted that the real estate commission was not broken out in the HUD-1 form. Dawn reviewed all of the HUD-1 forms and noticed that there was a problem with the tax proration. Dawn did not believe that, because she was discussing the HUD-1 form with plaintiff, that plaintiff was her attorney. Rather, plaintiff was the point person for her communications with John. Exhibit No. 30, dated February 5, 2013, consists of an email from plaintiff to Dawn, concerning problems that Dawn had identified with the HUD-1 form. She sought changes to the form. One issue was the fact that the Ertler Trust was not listed as the buyer.

¶ 47 Another issue that arose during the transaction was that the sellers did not want to pay for a termite inspection. When they ultimately agreed to do so, there was a problem with the inspector's license. Additionally, the dry closing was prompted in part by the fact that the sellers were not providing a survey. In an email, Dawn communicated her frustration that the contract was not being met. "Every time we requested something that was in the contract, there was no response." She wanted to sue the owners for breach of contract, but to continue with the closing.

¶ 48 At the closing, on Friday, February 8, 2013, the Erlters were present in person and John was present via telephone. The sellers' representatives were in a separate room. At one point, Laird and Grisco entered the Ertlers' room. When Dawn asked Laird who he was, Laird responded, " 'It don't matter.' " The closing was not completed that day because it was a dry closing. It closed the following Monday, February 11. The Ertlers returned to the title company that day to sign the final HUD-1 form.

¶ 49 On cross-examination, Dawn testified that she is not aware of the duties of a broker and a lawyer in a real estate transaction. On re-direct, Dawn stated that with respect to most correspondence concerning the transaction, she spoke to Mark, who is an attorney.

¶ 50 4. Mark Ertler

¶ 51 Mark Ertler, Dawn's husband, testified that he is an attorney, working in the forensic science unit of the Cook County State's Attorney's office. The Erlters considered John to be their family attorney and plaintiff their realtor. Plaintiff has never been the Ertlers' attorney. During the subject transaction, John was their attorney and plaintiff was their realtor. At no point during the transaction, including emails, did Mark believe that plaintiff was his attorney.

¶ 52 After executing the contract, Mark learned that certain items that were part of the contract were missing from the house. Also, there was the inspection issue, the family trust issue, and there were multiple delays in scheduling the closing. At the closing, Grisco and Laird did not want to be in the same room as the Ertlers. John was present on speaker phone. When Laird entered the room and one of the Ertlers asked him who he was, Laird shouted, "It don't matter," and he turned away. Laird also made a statement in the nature of, "You're from the neighborhood, and you know how things work down here." Mark believed that Laird was "expressing his either inability or unwillingness to communicate with" plaintiff.

¶ 53 Eventually, Laird and Grisco left the closing room. Laird "was clearly very agitated. I do recall him, as he was walking out the door, saying, 'Wait until I see the—wait until [plaintiff] see[s] the complaint I write against [him].' " As some point, the Department contacted Mark. He told the interviewer that John was his attorney on the transaction and plaintiff was his realtor.

¶ 54 On cross-examination, Mark testified that, "[g]enerally speaking," he is aware of the duties of a broker versus an attorney in a real estate transaction. However, he is not certain who prepares the HUD-1 form or negotiates the HUD-1 form with the other side's attorney. In this transaction, he was unaware who negotiated the HUD-1 with the sellers' side.

¶ 55 Mark's view that plaintiff was the broker and John was his attorney is based on his discussions with both of them that that was the role that each was playing with the transaction. "My understanding is that each had involvement in different regards." When items were not present in the home that were part of the contract, Mark spoke with both plaintiff and John at different times about it. Mark further testified that he recalled a conversation where they discussed that plaintiff was not acting as both an attorney and a broker. Mark did not believe there were any conflicts, the Ertlers "were clear on what role each played, and there was absolutely no issue on our end with how things were handled."

¶ 56 Mark further testified that it was clear that the two brokers and Laird "were not very happy with one another. So it was not a pleasant or calm environment." After Laird refused to identify himself to the Ertlers, Mark replied, " 'I have a lot of money on the table. It do matter. Who are you?' " Laird, according to Mark, still did not identify himself. Mark did not recall a spanking comment from plaintiff or plaintiff calling Laird an asshole. Both sides "clearly, were not very happy with one another" and "everybody in the room raised their voices at certain points."

¶ 57 John was on the phone "for quite some time during the overall process." Mark believes that John spoke with Laird via speaker phone.

¶ 58 5. Catherine Curielli

¶ 59 Catherine Curielli, plaintiff's mother and John's wife, testified that she is a paralegal at the Law Offices of John Peter Curielli, where she has worked for 40 years. She has known the Ertlers for about 10 years, socially and as clients. The firm has handled about six or seven matters for the Ertlers, including real estate and estate planning.

¶ 60 Plaintiff was the Erlter's broker, and John was their attorney on all real estate matters. As to the subject transaction, the Ertlers could not have been confused as to who was their attorney.

¶ 61 Emails that Catherine sends out automatically populate with her electronic signature and include the firm's name. She identified exhibit No. 24 as a January 29, 2013, email she wrote to Mark, carbon copied to Dawn and plaintiff, to notify them that the closing was canceled and had to be re-scheduled for February 6. Catherine's electronic signature is in the email. She sent the email on John's behalf, but his name and signature are nowhere on the email. Exhibit No. 27, an email from the title company, stating that it was going to be sending the HUD-1 form, also contains Catherine's response, asking it to add the attorney fees. John determined the amount of the fees, and Catherine wrote the email on his behalf and at his direction.

¶ 62 The email chain containing the subject emails from plaintiff are examples of what Catherine would write at John's direction. She is a proficient typist, and John is not because he never took typing classes. Plaintiff is much more proficient at typing than John, but not as much as Catherine. It is more efficient for Catherine or plaintiff to type on John's behalf.

¶ 63 Plaintiff uses the firm's address for his realty business and stores his realty files there. He uses separate emails for his realty and law practices. His legal email is Peter@Curiello.com.

Catherine could not recall plaintiff's realty business email. She has no involvement with the realty business, and plaintiff never asks her to email his real estate clients.

¶ 64 6. John Peter Curielli

¶ 65 John Peter Curielli, plaintiff's father and Catherine's husband, testified that he has been practicing law for 42 years and has had a managing real estate broker's license for 45 years. He has used the broker license in one or two transactions; however, real estate has been part of his law practice for 42 years. John practices law with plaintiff. Their law offices are down the hall from each other, with Catherine's desk in between.

¶ 66 As to the subject transaction, John testified that he served in the capacity of the Ertlers' attorney. He does not believe that the Ertlers could have been confused as to who was their attorney. At the time of the transaction, John was also working on a refinancing transaction for the Ertlers. As to the subject property, the work John performed on the transaction included looking at the listing agreement, contract, riders, and proofing the closing statement, the proration to sever, the title commitment, and short sale affidavit.

¶ 67 John further testified that he dictated the February 5, 2013, 9:59 p.m., email from plaintiff to French and others. It contains, at the bottom, the firm signature block with plaintiff identified as an attorney. John testified that the signature automatically populates on the email, which concerned certain HUD-1 form corrections, including the tax proration. Addressing the tax proration, John testified that he has never known plaintiff to calculate a tax proration. John or Catherine addressed those. The email was generated at John's direction. John identified exhibit No. 31, a printout of the subject property's tax payment information from the county's website. The printout, he testified, contained his handwriting, where he had calculated the tax proration on the subject property.

¶ 68 John testified that he dictated the emails from plaintiff in exhibit No. 34, an email chain from plaintiff containing, among others, the two subject emails. "I'm a lousy typist. That is generally how I do things. I am either—sometimes you [(*i.e.*, plaintiff)] will even sit at my computer and type, or I will go out and dictate to [Catherine]." John himself types only one- or two-line emails. In this email chain, the tone changed over time. In John's view, most short sales generate bad blood.

¶ 69 The closing was originally scheduled for February 6, 2013, a day that John was in town. However, it actually occurred two days later, and John was in Florida. John participated by phone for about 45 minutes to one hour. In the closing office, John was on speaker phone; he could hear the conversations going on. At one point, he heard plaintiff tell someone to get out of the room. He tried to calm the parties down, solve issues with the lender, and instruct the title closing officer. The transaction did not close until the following week because of a funding issue. John reviewed the final HUD-1 form that the Erlters signed.

¶ 70 John charged the Ertlers $1,000 for his services. Plaintiff did not receive a percentage of the fee.

¶ 71 John further testified that he spoke to Eleni Marcos at the Department and described to her the relationship with the office and that he represented the Ertlers. He could not recall if there was a conversation about the emails. The procedures he outlined were that he often dictated emails and instructions to plaintiff or Catherine. "That's just how we operated in my office." John spoke to Marcos about 1½ years before the hearing.

¶ 72 On cross-examination, John testified that his office operates as a team for the clients' best interests. When asked what steps his office took to insure that plaintiff did not step over the line and provide legal assistance, John replied that he reviewed the issues with plaintiff.

"[Department:] You discuss legal issues with him when they arise?

[John:] I tell him what I want done.

[Department:] And then you have him relay those to the client?

[John:] Sometimes.

[Department:] Under his name?

[John:] He's relating for me."

¶ 73 The questioning turned to exhibit No. 34:

"[Department:] Could you tell me where in any of those documents there is any indication that those are your opinions, your beliefs, and not those of your son, [plaintiff]?

[John:] Not to step outside the bounds, but it looks like Mr. Laird's secretary was doing the same thing.

[Department:] Let's stick to the question. Is there any indication there?

[John:] No.

[Department:] When your wife, as your assistant, sends an E-mail on your behalf, does she sign it with your name?

[John:] Sometimes, sometimes not."

¶ 74 John could not recall if he spoke to anyone at Wells Fargo. Addressing a statement in the exhibit No. 34 email chain that " 'I just confirmed this fact with Wells Fargo,' " John testified he did not remember if he or plaintiff made that call. He acknowledged that the emails that are signed by plaintiff are written in the first person.

¶ 75 "If [the emails] related to issues pertaining to the contract or the transaction, [plaintiff] comes into my office very often during the day." John instructs him, " 'Do this, do that

[plaintiff].' " When asked if John instructed plaintiff to convey information in the first person or if plaintiff did that on his own, he replied, "I just told him to get the message. This is what we want the client to hear. I didn't tell him to put it in his name, my name, or anybody's name."

¶ 76 B. ALJ's Decision

¶ 77 On October 7, 2015, in a 29-page decision, the ALJ issued his findings, determining that plaintiff acted as a broker and attorney in the subject transaction. First, the ALJ addressed the format of plaintiff's emails. He found that, between October 2012 (shortly after plaintiff began working on the subject transaction) and January 2013, "and at most other times," plaintiff sent emails without referencing the family firm or using the firm signature block. These emails concerned *broker* matters as to the subject property and ended with "Peter J. Curielli" in cursive font, an unidentified image, and "Peter J. Curielli Esq., CPA, Real Estate Broker," following by his address, phone numbers, and email address (Peter@Curielli.com). The ALJ next noted that plaintiff also wrote emails on broker matters either ending with his name only or with no signature or closing.

¶ 78 Next, the ALJ specifically noted (and quoted) the subject emails that plaintiff wrote: (1) the February 5, 2013, email concerning the preliminary HUD-1 form, which was sent in response to French's request to "Please review" and contained the firm signature block; and (2) the February 6, 2013, email concerning the revised HUD-1 form and the language concerning the short sale that contained no signature block.

¶ 79 The ALJ next reviewed the witnesses' testimony and addressed their credibility. He essentially found the Department's witnesses credible and plaintiff's witnesses not credible as to the key issues/events. First, the ALJ found Grisco credible, noting that, on cross-examination, she had acknowledged her error in calculating plaintiff's commission. "She was not defensive or

hostile." The ALJ found no indication in her testimony to support the assertion that Grisco's testimony was based on an intent to retaliate against plaintiff. Grisco, the ALJ further found, was inconsistent in some of her testimony concerning which side wrote the initial offer, but it was a minor matter that did not affect his assessment of her credibility.

¶ 80 The ALJ also found Laird credible, specifically noting that Laird's faxes to plaintiff were consistent with his belief that plaintiff was the Ertlers' attorney. He noted that the contract listed John as the buyer's attorney. Laird did not recall John participating in the dry closing, but his lack of memory on this issue, the ALJ found, did not meaningfully affect his credibility.

¶ 81 Turning to Robinson, the ALJ found that she was credible and consistent and was not evasive or defensive. Robinson pointed out at one point that she could not opine with respect to whether one statement in an email constituted the practice of law. She testified that the supreme court's authority to define what constitutes the practice of law was not affected by the Act. The court, in her view, was tolerant of the legislature's authority to legislate in brokerage issues. The First District opinion in *Curielli I* was consistent, the ALJ noted, with Robinson's interpretation, which further confirmed her credibility.

¶ 82 As to John, the ALJ determined that he was not credible concerning plaintiff's emails and plaintiff's roles as broker, secretary, and attorney. He noted that John was evasive and defensive on these issues. John did not directly answer whether he discussed legal issues with plaintiff when they arose and whether he had plaintiff relay information under plaintiff's name. The ALJ further noted that John pointed to Laird's secretary's practices when asked if there were any indications in plaintiff's emails that the statements made therein were John's and not respondent's. Further, John did not support his claim that the Ertlers could not have been

confused as to who was their attorney, "except an indication from context that John was their attorney."

¶ 83 Next, the ALJ assigned little weight to Dawn's testimony that plaintiff was not acting as her attorney, finding that, although she believed what she said and was credible when she described events she witnessed, she was unaware of the duties of a broker and an attorney in a real estate transaction and testified that she told an investigator that John acted in the transaction as both her lawyer and broker. Similarly, the ALJ assigned little weight to Mark's testimony, finding that, although Mark believed what he said and was credible when he described events he witnessed (with the exception of Laird's parting words at the closing; in the absence of Laird filing a complaint, he found Laird's version more credible), he did not assign much weight to Mark's conclusion that only John was acting as the attorney. Further, Mark was not aware of the duties of a broker versus a lawyer regarding the HUD-1 form and did not know whether plaintiff or John pursued issues that plaintiff thought were related to the contract.

¶ 84 The ALJ also assigned little weight to Catherine's testimony concerning the email address plaintiff used for his realty work, where some of plaintiff's emails involved issues related to broker work and they all originated from Peter@Curielli.com. However, he further found that Catherine was credible as to what she observed in the office and her knowledge of the firm's procedures.

¶ 85 The ALJ also commented on plaintiff's conduct and statements during the hearing, noting that he went beyond the facts in evidence during his opening and closing statements and throughout the hearing. He declined to give weight to the statements, because they were not made under oath, not subject to cross-examination, and opening and closing statements are not evidence.

¶ 86 To further support his determination that plaintiff acted as a broker and attorney in the transaction, the ALJ pointed specifically to two emails. First, he found that plaintiff's February 5, 2013, 3:59 p.m., email, taking issue with the HUD-1 figures and directing who gets the attorney fees constituted the practice of law, and, second, his February 6, 2013, 4:01 p.m., email, concerning plaintiff's position on his clients' behalf about the contracts requirements, constituted contract construction and the practice of law. The ALJ emphasized that the foregoing constituted the practice of law based on their content, regardless of whether plaintiff identified himself in the emails as a broker and whether or not John instructed plaintiff to sent them over the firm name or any name. "The ALJ accepts the opinions of Ms. Robinson as persuasive."

¶ 87 Further, the ALJ found that there was clear and convincing evidence that none of plaintiff's emails reflected that their content contained John's words. Further, when plaintiff used the signature block identifying himself as an attorney, he did so knowingly. Plaintiff started using the firm signature block "around the time he was making legal arguments by email, and had previously used a different signature block or none." The ALJ found unreasonable that plaintiff would have mistaken or ignored the firm signature block, which was "many times longer than any other signature block" plaintiff used "and contained a large image of justice as part of it." Further, the ALJ determined that Laird's testimony "confirmed the obvious," in that the fact that he continued to negotiate with plaintiff at least up to the dry closing and testified that he would not have done so if the individual was not the buyers' attorney, was consistent with Robinson's testimony. The ALJ further found that plaintiff and John acted as counsel to the Ertlers, but plaintiff did not receive a legal fee.

¶ 88 Addressing the factors in aggravation, the ALJ listed the seriousness of the offense, the impact on the Ertlers (who were denied conflict-free service by their broker), the lack of

contrition on plaintiff's part, and the financial gain (Niche was to be paid either $7,400 or $9,400 in commission). Mitigating factors, the ALJ determined, included that fact that plaintiff had not previously been disciplined.

¶ 89 Finally, the ALJ recommended as discipline that plaintiff's license be indefinitely suspended and that he be fined $9,500. He noted that the facts in this case fell somewhere in between two prior Department decisions (discussed below). The ALJ expressed concern that plaintiff blamed his troubles on an auto-signature error and saw no conflict or harm to the real estate profession. Further, the ALJ expressed concern with plaintiff's "determination to ascribe a situation of his own making to others, as if his allegations of supposed misconduct by Laird's assistant or Grisco nullify his own."

¶ 90 C. Board's Decision

¶ 91 On November 5, 2015, the Real Estate Administration and Disciplinary Board (Board) of the Department issued its decision. It adopted the ALJ's findings of fact and his conclusions of law. It further adopted, in part, the ALJ's recommendation and recommended that plaintiff's license be indefinitely suspended and that the indefinite suspension be for a period of no less than one year and that plaintiff be fined $9,500.

¶ 92 D. Secretary's Decision

¶ 93 On December 14, 2015, plaintiff moved for rehearing. He argued that: (1) the Department did not have subject matter jurisdiction; (2) the Department erred in denying his motion to dismiss; (3) the Department erred in denying his motion for discovery sanctions; (4) plaintiff detrimentally relied on the settlement offer made by the then-chief of prosecutions for the Department's real estate division; (5) the hearing transcript contained errors; (6) the ALJ erred in overruling plaintiff's objection to Robinson's testimony; (7) the ALJ should not have

given any weight to Grisco's testimony; (8) the ALJ should have given no weight to Laird's testimony that plaintiff engaged in the practice of law; and (9) the Department erred in denying plaintiff's motion to exclude agency personnel for alleged prejudice.

¶ 94 On February 5, 2016, in a 22-page order, the Secretary denied plaintiff's motion, finding that: rehearing was not warranted; the Board's determination should be accepted; and that the discipline imposed was consistent with that imposed in prior similar cases. The Secretary rejected plaintiff's jurisdictional claim, finding that it had been addressed by the appellate court in *Curielli I*. The rulings on several motions were not erroneous, where plaintiff was properly apprised of the charges against him and where there was no surprise or unfairness with respect to the provision of discovery documents. As to the allegations concerning the settlement offer, the Secretary noted that, aside from hearsay issues with certain affidavits plaintiff proffered, evidence related to such discussions would not have been admissible in the formal hearing and was not an issue that could be considered in a motion for rehearing. As to plaintiff's argument that there were errors in the hearing transcript, the Secretary found that: plaintiff did not raise this argument when the transcript was first made available to him; could not, via self-serving and conclusory affidavits, substitute such documents for the record in this matter; the transcript showed that the ALJ was not confused by any testimony; and any errors in the transcript did not prejudice plaintiff and any corrections would not have resulted in a different outcome. As to Robinson's testimony, the Secretary found that plaintiff essentially recast his earlier constitutional argument, which, it noted, was rejected in *Curielli I*. Further, the Secretary noted that, at the hearing, plaintiff did not object to Robinson's qualifications, but to the relevance of her testimony. It also noted that the agency regulated the practice of real estate, not the unauthorized practice of law. Robinson addressed relevant factors in determining whether

someone is acting as a lawyer and opined that plaintiff's emails showed that he was practicing law. Next, turning to plaintiff's arguments concerning Grisco's and Laird's testimony, the Secretary found that the ALJ's credibility assessments were thorough and fair and took into consideration Grisco's error concerning the commission.

¶ 95 Finally, the Secretary addressed plaintiff's argument that the Department erred in denying his motion to exclude members of the Department and Board, where he had alleged that they were prejudiced against him. He based his claim on his belief that the Department had retaliated against him for challenging the constitutionality of the statute. Plaintiff pointed to the facts that: his and his father's real estate businesses had been audited in 2013; the Department failed to honor the settlement agreement; the severity of the discipline imposed on him; his records request for all Department consent orders concerning brokers who acted as attorneys was denied; the ALJ improperly assigned little weight to his witnesses' testimony; and that he had trouble obtaining a copy of the order granting his motion for an extension of time. The Secretary determined that plaintiff's retaliation claim was unfounded. First, the Secretary noted that the agency may conduct an audit of any real estate business at any time pursuant to its rules. Second, the Secretary had previously addressed the settlement offer argument. Third, as to the discipline imposed, the ALJ had recommended a discipline after he reviewed two cases and compared the underlying conduct there to that involved in this case. Plaintiff, the Secretary noted, did not *initially* suggest an appropriate sanction and only did so subsequently in his motion for rehearing. The Secretary found that the discipline recommended by the ALJ and the Board was well thought out and reasonable and did not result from a desire for retaliation. Fourth, the Secretary addressed the denial of plaintiff's records request, noting that the Department responded that it did not maintain a list of orders related to specific sections of the

Act and further noted that plaintiff was directed to the agency's website. Fifth, the Secretary found that the ALJ's assessment of plaintiff's witnesses' testimony was thorough and thoughtful and any failure to ask them clarifying questions was not reflective of any lack thereof. Further, it was plaintiff's job to prove his case. Finally, the Secretary found unavailing plaintiff's argument concerning the difficulties in obtaining a copy of an order granting his motion for an extension of time. He noted that plaintiff had admitted that he had received reasonable oral assurances from Department personnel that his motion had been granted. Accordingly, the Secretary determined that neither rehearing nor dismissal was warranted, and he denied plaintiff's motion.

¶ 96 E. Trial Court's Decision

¶ 97 On March 8, 2016, plaintiff, through counsel, sought administrative review. 225 ILCS 454/20-75 (West 2016); 735 ILCS 5/3-104 (West 2016). First, he argued that, prior to the hearing, he and the Department had reached a settlement agreement and, after plaintiff performed all requirements as to his part, the Department reneged. At the hearing, the ALJ refused to hear or consider the settlement. Second, plaintiff argued that the evidence showed a clear division between his actions as a broker and a separate attorney representing the buyers in the subject transaction. Third, he was not afforded a fair hearing, in violation of his due process and equal protection rights, where the proceeding was unfair and the statute, as applied, was unconstitutional (because it invades the supreme court's province, where only the court can regulate or discipline an attorney). Fourth, the discipline bore no reasonable relationship to the acts at issue and required plaintiff to cease practicing in an area that was a major source of income and livelihood to him. Fifth, plaintiff argued that the Department had refused to produce all records of similar proceedings and discipline imposed therein, which plaintiff had sought during discovery. The ALJ, he asserted, did not order production of the material, which denied

plaintiff the opportunity to put on a full defense. Plaintiff also sought, and obtained, an emergency stay of the Secretary's final decision.

¶ 98 On September 14, 2017, the trial court issued is decision, reversing the Secretary's ruling and rescinding the sanction imposed on plaintiff. First, addressing the standard of review, the court noted that the few facts in the case were undisputed and that the question whether plaintiff acted as both an attorney and a broker was one of law that was subject to *de novo* review.

¶ 99 Next, the trial court determined that the lay and expert testimony as to whether plaintiff was practicing law was inadmissible. Specifically, the Grisco and Laird's opinion testimony that plaintiff was practicing law and their subjective beliefs that plaintiff was acting as the Ertlers' attorney was inadmissible because a witness may not give testimony concerning a legal conclusion, which is the province of the trier of fact. Similarly, Robinson's expert opinion did "not extend into the realm of defining what conduct violates the law." Determining the legal standard, the trial court found, required statutory interpretation, which is not a matter to which expert witnesses are competent to testify. Further, experts cannot offer legal conclusions.[2]

¶ 100 Next, the trial court addressed the statute, noting that no case law has interpreted section 20-20(34) of the Act. It noted that the parties had worked with the assumption that the statute's "acting as *the* attorney for" provision means practicing law or using legal knowledge in any way throughout a real estate transaction, while also acting as a broker. The trial court determined that

[2] At this point, the trial court noted in a footnote that the evidence concerning the settlement agreement should have been admitted. It found that the ALJ mistakenly relied on the rule that excluded evidence of settlement *negotiations*, where no agreement is reached. The court noted that the rule does not apply where one seeks to prove the *existence* of an enforceable *contract* to settle. "Otherwise, a settlement agreement could never be enforced[.]"

the Act does not require such a stringent standard where the client has an attorney of record who is not the broker, but, in any event, it further found that the emails plaintiff sent did not constitute the practice of law as defined by the supreme court. The court looked at case law involving the unauthorized practice of law and noted that the ALJ had rejected the standard used in such cases (but "did not articulate any other standard that should be used, or that he did use").

¶ 101 As to the facts here, the trial court noted that there was no evidence that plaintiff drafted any instrument affecting real estate title. It found that plaintiff's emails did not constitute the practice of law under supreme court precedent. The trial court addressed four aspects of the emails. First, it addressed the February 5, 2013, 3:59 p.m., email concerning changes to the HUD-1 form, which, it noted, was merely a disclosure form, and does not affect title or require legal training to complete (because it is prepared by the title company). The tax proration issue, the ALJ had found, implemented a contract provision and constituted the practice of law. The trial court found error with this determination, noting that no case law or other precedent has concluded that "actually doing what the contract says [is] the practice of law." It further found that there was no evidence that plaintiff himself calculated the proration. The ALJ had implicitly found, the trial court noted, that plaintiff prepared and sent the email on his own. The trial court found that there was no evidence that plaintiff prepared the email on his own and discounted the subjective belief of the lay witnesses. John testified that the tax proration email was prepared by him or at his behest, that he had never known plaintiff to do a tax proration, and identified his own handwriting on a " 'scribbled version of a tax proration.' " The trial court found that "[t]here is no evidence that contradicts John's testimony." Utilizing the manifest-weight standard, the trial court determined that, because there was no competent evidence to support the ALJ's finding that plaintiff calculated the tax proration, his finding must be reversed.

¶ 102 Second, the trial court addressed the same email's direction concerning the attorney fees. It noted that the ALJ had found that directing the seller[s'] representative where the attorney wanted his check to be sent constituted the practice of law. The trial court, however, determined that the "act of relaying instructions from the attorney on a ministerial task such as mailing a check has never been held to be the practice of law, and it simply is not. There is no dispute that the check was to be payable to John Curielli, the attorney of record, not [plaintiff]."

¶ 103 Third, turning to the February 6, 2013, 4:01 p.m., email, the trial court noted that the email stated that the contract provided for the sellers to provide a plat of survey and set forth the Ertlers' understanding that the sellers' realtor would provide them a check for a missing snow blower and other items. It found that a reference to a contract provision was not the same as negotiating the terms of the contract that is already in place between the parties. "The emails do not contain legal advice to a client, but simply remind those on the other side of the transaction of the things they have agreed to do. The emails have no effect on title." The court further noted that the sending of the emails over the incorrect signature block, as the ALJ had acknowledged, did not determine whether the plaintiff engaged in the practice of law; the content of the emails controlled.

¶ 104 Next, the trial court turned to the statute, finding that use of the definite article "the" before "attorney," after using the indefinite article "an" before "attorney" reflected a legislative intent that the terms have different meanings. The legislature may have meant the attorney of record or the attorney who is paid for representation, but, the court found, at the very least, it meant to include only attorneys who take an active role in the preparation of documents and client counseling. The Erlters testified that John was their attorney and plaintiff was their broker and that they had been legal clients of John's in prior transactions. John, the court determined,

was the Ertlers' attorney and had a duty to them. That duty was not affected by a separate broker who was also trained as a lawyer but was not the attorney of record. "The use by that broker of legal knowledge in some discussions with opposing counsel does not transform him into 'the attorney for' the party." Plaintiff "h[eld] the seller[s'] feet to the fire with respect to contract terms that had already been judged in the buyers' best interests by John." There was no evidence that John did not prepare the documents at issue and render all legal advice to the Ertlers, who, the court noted, were not unsophisticated clients (further noting that Dawn asked her lender to do a dry closing and that she was knowledgeable about terms on the HUD-1 form).

¶ 105 Next, the trial court addressed the issue of whether plaintiff was operating under John's supervision when he made the statements that were deemed to constitute the practice of law. The court found that the ALJ's determination that plaintiff could not argue that he acted at John's behest when he sent certain emails was erroneous and unsupported by authority. The trial court found that there was no factual evidence to refute John's testimony that the six-page email chain was the result of his direction to plaintiff to type emails for him due to John's poor typing skills. Further, plaintiff's use of the phrase " '[w]e have a legally binding contract' " was merely hyperbole. "The standard used here was different because the statement was in fact made by an attorney. This distinction is unsupported by the law." To be effective, the court found, a broker should be able to quote the contract and to hold the other side to their agreement. "Legal fees will skyrocket if only the attorney of record can tell the opposing side, for example, that under the contract it must pay for the snow blower."

¶ 106 Finally, the trial court addressed whether plaintiff's motion to dismiss should have been granted, finding that it should have, because the complaint did not contain sufficient facts of the acts alleged to have violated the Act to allow him to intelligently prepare his defense. The

complaint, in the trial court's view, contained only the legal conclusion that plaintiff violated the statute. It failed to specify the date of any act or any particular act he allegedly committed. Further, the court noted, "the [Department] admitted at oral argument that [plaintiff] was not told until the hearing was *actually underway* exactly what acts he was charged with committing." (Emphasis in original.)

¶ 107 Thus, in summary, the trial court determined that: (1) the motion to disqualify Robinson should have been granted because her testimony related only to the legal issue in the case and was, therefore, inadmissible; (2) the acts upon which the agency found plaintiff violated the Act did not constitute the practice of law; (3) regardless of whether the acts constituted the practice of law or involved the use of legal judgment, plaintiff was not "the attorney for" the Ertlers under the Act; and (4) the motion to dismiss should have been granted for failure to adequately apprise plaintiff of the charges against him, in violation of his due process rights. The Department appeals.

¶ 108 II. ANALYSIS

¶ 109 The Department argues that: (1) plaintiff's due process rights were not violated by the Department's administrative complaint, which fairly apprised him of the allegations against him; (2) the Secretary's determination that plaintiff acted as both an attorney and broker in the same transaction was not clearly erroneous, where (a) his conduct constituted the practice of law as dictated by supreme court precedent; (b) the trial court erred in determining that the expert testimony and lay testimony (Grisco and Laird) were inappropriate to aid the Secretary in his determination; (c) the trial court erred in interpreting the statute; and (d) the trial court erred in finding that evidence of alleged settlement negotiations should have been admitted at the

hearing; and (3) the Secretary did not abuse his discretion in suspending plaintiff's license and imposing a $9,500 fine. For the following reasons, we agree with the Department.

¶ 110 A. Standards of Review

¶ 111 Final administrative decisions made by the Department pursuant to the Act are subject to judicial review under the provisions of the Administrative Review Law. 225 ILCS 25/32 (West 2016); 735 ILCS 5/3-101 *et seq.* (West 2016). The Administrative Review Law provides that this court may review "all questions of law and fact presented by the entire record," but may not consider new or additional evidence in making its determination. 735 ILCS 5/3-110 (West 2016). In reviewing a final administrative decision, we review the Secretary's decision and not the ALJ's or the trial court's determination. *Parikh v. Division of Professional Regulation of the Department of Financial & Professional Regulation*, 2014 IL App (1st) 123319, ¶ 19.

¶ 112 A. Due Process

¶ 113 First, the Department argues that plaintiff's due process rights were not violated by the administrative complaint, which, in its view, fairly apprised plaintiff of the allegations against him. For the following reasons, we agree.

¶ 114 The question whether a party was denied due process of law presents a question of law to which the court applies the *de novo* standard of review. *Wolin v. Department of Financial & Professional Regulation*, 2012 IL App (1st) 112113, ¶ 25.

¶ 115 In administrative proceedings, a complaint need not state the charges with the same refinements and selectivity as a complaint in a court of record. *Irving's Pharmacy v. Department of Registration & Education*, 75 Ill. App. 3d 652, 655 (1979). An administrative complaint need only "reasonably apprise the party of the case against him [or her] so that he [or she] will be able to intelligently prepare his [or her] defense." *Talman v. Department of Registration &*

Education, 78 Ill. App. 3d 450, 456 (1979). See, *e.g.*, *Griggs v. North Maine Fire Protection Board of Fire Commissioners*, 216 Ill. App. 3d 380, 383 (1991) (complaint was sufficient where it apprised the plaintiff of "the date, time, place, individuals involved and present, and the nature of the alleged acts of misconduct"). In determining whether the plaintiff has adequate notice of charges brought by an administrative agency, "the court may consider the discovery and other materials available to the plaintiff." *Siddiqui v. Department of Professional Regulation*, 307 Ill. App. 3d 753, 760 (1999) (although administrative complaint charging that doctor improperly allowed another individual to use his medical license did not allege specific dates that the individual saw patients, doctor's due process right to notice was not violated because he was given a list of patients and could have discovered those dates from his medical records).

¶ 116 Here, the administrative complaint alleged that plaintiff was a broker and that, *on or about* February 11, 2013, he performed broker activities in a transaction for property at 5521 South Oak Park Avenue in Chicago. Further, "in the process of negotiating the terms of sale for said subject property," plaintiff provided legal services. He acted as both an attorney and a real estate broker in the transaction, in violation of section 20-20(34) of the Act, warranting discipline. The Department sought suspension, revocation, or other discipline. Later discovery included production of the February 5, and 6, 2013, emails in which plaintiff allegedly provided legal services.

¶ 117 The Secretary, in his February 5, 2016, decision, determined that the ALJ had properly denied plaintiff's motion to dismiss the complaint and that this ruling did not deny plaintiff due process. Plaintiff had argued that the complaint failed to include a clear statement of the acts or omissions alleged to violate the Act. In rejecting plaintiff's claim, the Secretary stated that it was "reasonable to assume that [plaintiff], who is licensed to practice law ***, and is also a licensed

broker, knows and knew then what it meant to 'act as a real estate broker' and to 'act as an attorney.' " In disagreeing with the agency's ruling, the trial court took issue with the statement, noting that the meaning of the latter phrase was "hotly contested and is the central issue in this case" and found that the complaint failed to set out any particular act plaintiff committed and failed to specify a date for any alleged act. It also noted that the Department had not pointed to any discovery that was made available that corrected the problems with the complaint. Finally, the court noted that the Department had admitted at oral argument that it was not until the hearing was actually underway that plaintiff was told precisely what acts he was charged with committing.

¶ 118 Here, the Department argues that the trial court erred in concluding that plaintiff's motion to dismiss should have been granted because the complaint contained only a legal conclusion that plaintiff provided legal services and did not contain any factual allegations. The Department maintains that the complaint contained details concerning the transaction at issue, including location, time, and plaintiff's conduct in providing legal services. The Department also takes issue with the trial court's finding that the complaint did not identify a particular act alleged to have violated the Act. It contends that this is incorrect because the complaint alleged that plaintiff *engaged in negotiations* concerning the transaction that constituted legal services. To the extent that the trial court believed that the complaint needed to further allege specific activities, such as particular emails from plaintiff involving legal services, this was error. This level of specificity, it urges, is not even required in a civil court action, which demands a more exacting standard than an administrative proceeding. *Landers-Scelfo*, 356 Ill. App. 3d at 1065. Because discovery had yet to take place, the Department notes, such specificity as the trial court required was not practical. Instead, the complaint adequately alleged the ultimate fact the

Department intended to prove: that plaintiff acted as both a broker and attorney with respect to the subject transaction. The complaint and later discovery, it maintains, adequately apprised plaintiff of the allegations against him and did not violate his due process rights.

¶ 119 Plaintiff responds that the complaint set out no particular act that he allegedly committed and no date for any alleged act. He notes that the ALJ denied his motion to dismiss before any discovery was issued. Discovery was issued on November 25, 2014, seven months later.

¶ 120 We agree with the Department that plaintiff was not denied due process. The complaint alleged that the relevant acts occurred on or about February 11, 2013. Plaintiff began providing brokerage services on the property in August or September 2012 (the purchase contract was signed in September). Thus, he performed broker activities for over six months, until the transaction closed on February 11, 2013. The subject emails were written on February 5, and 6, 2013. These dates are sufficiently on or about February 11, 2013, to apprise plaintiff, in our view, of when the subject acts occurred. Further, the complaint sufficiently alleged the nature of the alleged acts of misconduct. It alleged that, in the process of negotiating the terms of the sale of the subject property, plaintiff performed legal services. *Landers-Scelfo v. Corporation Office Systems, Inc.*, 356 Ill. App. 3d 1060, 1065 (2005) ("a fact is well-pleaded if the plaintiff has clearly set out the ultimate fact he or she intends to prove"). The negotiations here appeared to have occurred primarily via emails. In our view, plaintiff could have reviewed his emails on or about February 11, 2013, and ascertained the conduct—the specific emails—to which the agency would ultimately point that reflected that he engaged in the practice of law. In sum, the complaint reasonably apprised plaintiff of the case against him.

¶ 121 C. Finding that Plaintiff Violated Act

¶ 122 1. Plaintiff's Conduct

¶ 123 Next, the Department argues that the Secretary's determination that plaintiff acted as both an attorney and broker in the same transaction was not clearly erroneous and the trial court erred in finding otherwise. For the following reasons, we agree.

¶ 124 The supreme court has explained the standards of review that apply on administrative review:

> "The proper standard of review in cases involving administrative review depends upon whether the question presented is one of fact, one of law, or a mixed question of fact and law. *Cinkus v. Village of Stickney Municipal Officers Electoral Boar*d, 228 Ill. 2d 200, 210 (2008). An administrative agency's findings and conclusions on questions of fact are considered *prima facie* true and correct. 735 ILCS 5/3-110 (West 2012). As such, an agency's factual findings are not to be reweighed by a reviewing court and are to be reversed only if they are against the manifest weight of the evidence. *Exelon Corp. v. Department of Revenue*, 234 Ill. 2d 266, 272-73 (2009). Factual determinations are against the manifest weight of the evidence if the opposite conclusion is clearly evident. *Cinkus*, 228 Ill. 2d at 210. Questions of law are reviewed under a *de novo* standard, and mixed questions of law and fact are reviewed under the clearly erroneous standard. *Exelon Corp.*, 234 Ill. 2d at 272-73. A mixed question of fact and law examines the legal effect of a given set of facts. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 391 (2001). Put another way, a mixed question asks whether the facts satisfy the statutory standard or whether the rule of law as applied to the established facts is or is not violated. *Exelon Corp.*, 234 Ill.2d at 273. An administrative decision is clearly erroneous " 'when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a

> mistake has been committed.' " *AFM Messenger Service, Inc.*, 198 Ill. 2d at 393 (quoting and adopting the definition of "clearly erroneous" from *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948))." *Beggs v. Board of Education of Murphysboro Community Unit School District No. 186*, 2016 IL 120236, ¶ 50.

"The clearly-erroneous standard applies to administrative cases involving mixed questions of law and fact, rather than a bifurcated standard, in part because of the deference given to the agency's experience and expertise in interpreting its statutes." *Lombard Public Facilities Corp. v. Department of Revenue*, 378 Ill. App. 3d 921, 928 (2008).

¶ 125 Plaintiff argues that *de novo* review is appropriate here because the rule of law in this case is in dispute, whereas mixed questions of fact and law typically present scenarios where the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard (or whether the rule of law as applied to the established facts is or is not violated). He contends that the question at issue here—the interpretation of the Act—is one of law. See *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200 201-11 (2008) ("agency's interpretation of the meaning of the language of a statute constitutes a pure question of law").

¶ 126 We disagree. The question whether a party's conduct constituted the practice of law presents a mixed question of law and fact that we review under the clearly erroneous standard. That is, the determination whether plaintiff engaged in the practice of law during the transaction at issue requires us to assess the agency's assessment of the nature of plaintiff's acts during the transaction, which involve factual determinations, and its ultimate assessment that plaintiff violated the Act, which is a legal determination. Analysis of the issue, thus, presents a mixed question of fact and law. See *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d

814, 820 (2009) (applying standard to question whether company, through its representative, participated in the authorized practice of law at an administrative hearing); *Grafner v. Department of Employment Security*, 393 Ill. App. 3d 791, 796-97 (applying standard to question whether church's nonattorney representatives engaged in unauthorized practice of law); see also *AFM Messenger Service*, 198 Ill. 2d at 392 (question whether drivers were employees and not independent contractors under unemployment insurance statute, which involved assessment of three statutory requirements of contractor status—freedom from control and direction, performance of services outside the usual course or place of business, and establishment of independent business—presented mixed question of law and fact); *City of Belvidere*, 181 Ill. 2d at 205 (labor relations board's determination that city had committed unfair labor practice when it refused to bargain with firefighters union over contracting out of paramedic services, which involved assessment of whether city's decision affected wages, hours, and other conditions of firefighters' employment, as bargaining collectively was statutorily defined, presented mixed question of law and fact); *Gruwell v. Illinois Department of Financial & Professional Regulation*, 406 Ill. App. 3d 283, 290 (2010) (applying standard to question whether the plaintiff acted as, or held herself out to be, a real estate broker, as statutorily defined, which involved assessing whether her conduct conformed to the statute's prohibitions).

¶ 127 Turning to the statute, the Act defines a broker, in part, as one who, for compensation, directly or indirectly sells or purchases real estate, and "*[n]egotiates*, offers, attempts, or agrees to negotiate the sale, exchange, purchase, rental, or leasing of real estate" and "[a]ssists or directs in the negotiation of any transaction intended to result in the sale, exchange, lease, or rental of real estate." (Emphasis added.) 225 ILCS 454/1-10 (West 2016).

¶ 128 Section 20-20(34) of the Act, at the time of the hearing, provided:

> "(a) The Department may refuse to issue or renew a license, may place on probation, suspend, or revoke any license, reprimand, or take any other disciplinary or non-disciplinary action as the Department may deem proper and impose a fine not to exceed $25,000 upon any licensee or applicant under this Act or any person who holds himself or herself out as an applicant or licensee or against a licensee in handling his or her own property, whether held by deed, option, or otherwise, for any one or any combination of the following causes:
>
> * * *
>
> (34) When a licensee is also an attorney, acting as the attorney for either the buyer or the seller in the same transaction in which the licensee is acting or has acted as a broker or salesperson." 225 ILCS 454/20-20(a)(34) (West 2014).

¶ 129 "The purpose of section 20-20(34) is to protect the general public from representation that carries the potential for a conflict of interest." *Curielli I*, 2015 IL App (1st) 143511, ¶ 24. Addressing the conflict, the First District stated:

> "an inherent conflict of interests arises in a transaction when a broker acts simultaneously as an attorney for the client, because the broker is entitled to a commission [upon completion of the transaction], whereas, an attorney, in contrast, [is obligated to protect the client's interest, whether or not the transaction is completed]. It can hardly be disputed that, frequently, the incentives prompting a broker to close the deal are not aligned with—and in fact may be in opposition to—the motivations of an attorney who has a duty to safeguard his [or her] client's interests." *Id.*

¶ 130 Case law addressing the unauthorized practice of law, which is not at issue here, provides insight into the supreme court's parameters in assessing what constitutes the practice of law. In *Downtown Disposal Services, Inc. v. City of Chicago*, 2012 IL 112040, the supreme court stated:

> "This court has the inherent power to define and regulate the practice of law in this state. *Ford Motor Credit Co. v. Sperry*, 214 Ill. 2d 371, 382 (2005). Our rules are intended to safeguard the public from individuals unqualified to practice law and to ensure the integrity of our legal system. *Id.* at 383. See also *Herman v. Prudence Mutual Casualty Co.*, 41 Ill. 2d 468, 479 (1969); *City of Chicago v. Witvoet*, 12 Ill. App. 3d 654, 655-56 (1973) (requirements for practicing law are imposed for the 'protection of litigants against the mistakes of the ignorant and the schemes of the unscrupulous and the protection of the court itself in the administration of its proceedings from those lacking the requisite skills').
>
> There is no mechanistic formula to define what is and what is not the practice of law. *In re Discipio*, 163 Ill. 2d 515, 523 (1994); *People ex rel. Chicago Bar Ass'n v. Barasch*, 406 Ill. 253, 256 (1950). Rather, we examine the character of the acts themselves to determine if the conduct is the practice of law (*Quinlan & Tyson, Inc.*, 34 Ill. 2d at 120) and each case is largely controlled by its own peculiar facts (*People ex rel. Chicago Bar Ass'n v. Tinkoff*, 399 Ill. 282, 289 (1948))." *Id.* ¶¶ 14-15.

¶ 131 The practice of law encompasses "the giving of any advice or rendering of any service requiring the use of legal knowledge." *In re Howard*, 188 Ill. 2d 423, 438 (1999). The focus of the inquiry is "whether the activity in question required legal knowledge and skill in order to apply legal principles and precedent." *In re Discipio*, 163 Ill. 2d at 523 (holding that attorney aided a disbarred lawyer in the unauthorized practice of law, where the disbarred lawyer's

completed documents that were submitted to workers' compensation agency "required a degree of legal skill and knowledge for their comprehension and completion"; an application for adjustment of claim noted that it was a legal document and asked for information concerning legal rights such as temporary total disability and petitions for immediate hearing; attorney representation agreement was intended to create attorney-client relationship and had significant legal import; both documents contained express statutory references that disbarred attorney would have been called upon to explain to clients). In *Downtown Disposal Services*, the court held that a company president, who was not an attorney, engaged in the unauthorized practice of law when he filed complaints for administrative review, even though he filled in blanks on a simple form. *Id.* ¶¶ 16, 19. "It is not the simplicity of the form that is important but the fact that an appeal was pursued on behalf of a corporation by a nonattorney." *Id.* ¶ 16.

¶ 132 In the real estate area, the supreme court held in *Chicago Bar Ass'n v. Quinlan & Tyson, Inc.*, 34 Ill. 2d 116, 121-23 (1966), that execution of an offer or preliminary contract, where it merely involved the filling in of blank forms, was properly done by a real estate broker, as was the filling in of the "usual form of earnest money contract or offer to purchase where this involves merely the supplying of simple factual data." However, the court continued, after signatures are obtained on a preliminary contract or offer to purchase (and necessary factual data are inserted), the broker:

> "has fully performed his [or her] obligation as broker. The drawing or filling in of blanks on deeds, mortgages and other legal instruments subsequently executed requires the peculiar skill of a lawyer and constitutes the practice of law. Such instruments are often muniments of title and become matters of permanent record. They are not ordinarily executed and delivered until after title has been examined and approved by the attorney

> for the purchaser. Their preparation is not incidental to the performance of brokerage services but falls outside the scope of the broker's function.
>
> ***
>
> Drafting and attending to the execution of instruments relating to real-estate titles are within the practice of law, and neither corporations nor any other persons unlicensed to practice the profession may engage therein. Nor does the fact that standardized forms are usually employed make these services an incident of the real-estate broker business. Many aspects of law practice are conducted through the use of forms, and not all of the matters handled require extensive investigation of the law. But by his [or her] training the lawyer is equipped to recognize when this is and when it is not the case. ***. Mere simplicity cannot be the basis for drawing boundaries to the practice of a profession." (Citations omitted.) *Id.* at 121-23.

¶ 133 In *King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 22-23 (2005), the court held that, where a non-attorney who is not a party to a transaction prepares mortgage loan documents, the preparation (filling in of blanks and tailoring the document to fit the particular transaction) constituted the unauthorized practice of law. As relevant here, the *King* court emphasized that "it is the *character* of the acts involved that determine whether one engages in the unauthorized practice of law." (Emphasis in original.) *Id.* at 23; *cf. Lozoff v. Shore Heights,* Ltd., 66 Ill. 2d 398, 401 (1977) (out-of-state attorney approached parties and offered his professional services as to a proposed conveyance of land in Illinois; where attorney, who did not necessarily deny that he practiced law, actively participated in negotiations leading to the contract and gave legal advice, he engaged in the practice of law in Illinois; not allowed to recover attorney fees).

¶ 134 Turning to the facts here, the agency and the trial court focused on two emails plaintiff wrote during the subject transaction. On appeal, the Department primarily focuses on the latter email, which plaintiff sent on February 6, 2013, to Laird, the sellers' counsel, concerning the revised HUD-1 form. There, plaintiff wrote:

"Dear Mr. Laird,

We have been told repeatedly that this is a short sale, and the implication is that there are a separate set of rules for short sales. I respectfully disagree with this position. We have a legally-binding contract, and the only reference to a short sale is in the addendum. Said addendum does not change the terms of the contract which we need to cover prior to closing namely:

1) Base[d] on your tax proration, the credit for the 2012 tax bill is $5,483.24. Dividing this number by 365 days[,] we come out with 15.0225 per day. Multiplying that by 39 days[,] it comes to $585.88. The credit you gave on the HUD is $565.70[,] which is a difference of $20.18.

2) The contract legally binds the seller[s] to provide a Plat[ ] of Survey dated not more than 6 months prior to closing, which shall be visibly staked or flagged. Said survey is due no later than Thursday[,] February 7, 2013[,] for our review. (See section 17 of the contract).

3) It is my understanding that seller[s'] realtor will provide my clients with a check for $2,000 at the time of closing specifically for the missing snow blower, lawn mower, and patio set, which is listed under paragraph (3) line 29 of the contract to be transferred to buyer by Bill of Sale. We of course expect all other items listed under section 3 Fixtures and Personal Property to [be] present on the premises as of closing.

4) Please email a copy of the deed no later than Thursday noon in order that I may confirm that it matches our lender's requirements.

Thanks,

Peter J. Curielli"

Plaintiff did *not* use any signature block on this email.

¶ 135 The Department argues that the Secretary correctly determined that this email reflects that plaintiff acted as an attorney for the Ertlers. The email, in its view, shows that, in his communication to opposing counsel Laird, plaintiff advocated on the Ertlers' behalf as to the legal effect of the contract. It points to the statements that there are no separate rules for short sales and that the parties have a legally binding contract. The Department also notes that, addressing the addendum, plaintiff gave his interpretation of its legal effect, specifically, that it did not change the contract's terms. It also points to plaintiff's statement that the contract legally bound the sellers to provide a plat of survey and that he would review the survey. In the Department's view, plaintiff negotiated the terms of sale, including what his clients were entitled to under the contract in terms of the tax proration and the survey. In this way, he provided services to them that required his legal knowledge.

¶ 136 Plaintiff responds that he did not prepare any instrument that affected title, except for the initial purchase contract, which a broker is permitted to do. Further, plaintiff points to the trial court's finding that no authority holds that a broker practices law when he or she points out to the other side what the contract states. As to the HUD-1 form, plaintiff maintains that it does not affect title; the mortgage and deed do. He relies on the trial court's finding that the HUD-1 form is merely a disclosure form, consisting of an accounting of who owes what at the closing and does not purport to convey any legal rights or affect title. The court also noted that the form does

not require legal training to complete, as evidenced by the fact that the title company prepares it. (He also notes that, at the hearing in the trial court, the Department was unable to identify how the HUD-1 form affects title.) Plaintiff further notes the trial court's finding that the Ertlers were not unsophisticated clients and points to Dawn's February 5, 2013, 10:43 p.m. email to plaintiff concerning the HUD-1 form. There, Dawn listed the changes the Erlters sought on the form, including: changing the name of the borrower to the family trust; noting that the tax proration was 110% of the 2011, not 2012, tax bill and confirming the tax bill numbers were correct; noting a commission amount discrepancy between Wells Fargo and the HUD-1 form; noting the allocation of buyer title charges to the sellers; questioning the sellers' attorney fees; relaying Mark's reading of the contract that the survey was due to plaintiff by a certain date; and questioning a charge for paying the property taxes. Plaintiff further argues that, although a broker's statutory obligation ends when the preliminary contract is signed, the supreme court has not precluded a broker from doing anything further in a transaction. Here, the sellers accepted the contract on September 21, 2012; the short sale addendum was signed on October 8, 2012; Grisco continued to negotiate the short sale with Wells Fargo in January 2013; also that month, she met with the appraiser and arranged for the termite inspection and final walk-through. These actions, plaintiff asserts, are commonly performed by brokers in real estate transactions. As the trial court noted, legal fees would skyrocket if only the attorney of record could inform the opposing side who must pay for a snow blower under the contract.

¶ 137 We conclude that the Secretary's finding that plaintiff's February 6 email to opposing counsel reflected that he was engaged in the practice of law was not clearly erroneous. In the email, he took the position that there are no separate rules for short sales, which only an attorney can state with any authority to another attorney. *Lozoff*, 35 Ill. App. 3d at 700 (the practice of

law includes the giving of advice or the rendition of any service requiring the use of any degree of legal knowledge or skill). He also asserted, again, to another attorney, that the contract was legally binding and, apparently having reviewed it, further asserted that the only reference to a short sale was in the addendum. Next, plaintiff stated his conclusion, a legal one, that the "addendum does not change the terms of the contract[.]" These statements "required legal knowledge and skill in order to apply legal principles and precedent." *Discipio*, 163 Ill. 2d at 523. Plaintiff's argument that he was essentially relaying his sophisticated clients' desired changes to the HUD-1 form fails, because the first paragraph of his email has nothing to do with those changes. The trial court ignored this aspect of the February 6 email.

¶ 138 In *Quinlan*, the supreme court noted that execution of deeds, mortgages, and other legal instruments constitutes the practice of law because these documents "are often muniments of title[.]" *Quinlan*, 34 Ill. 2d at 122. The court did *not* state that only work on documents that affect title constitutes the practice of law. That cannot be, as a legal opinion concerning a contract constitutes legal work. *Lozoff*, 35 Ill. App. 3d at 700; c*f. People v. Harris*, 394 Ill. App. 3d 28, 34 (2009) (individual who rendered a legal opinion on a trademark issue while holding himself out as a patent attorney; constituted a representation that he was authorized to practice law).

¶ 139 Robinson's expert testimony, upon which the Secretary reasonably relied, supports our conclusion that the agency's determination was not clearly erroneous. Consistent with the case law cited above, she testified that the primary focus in assessing whether one has engaged in the practice of law is the nature of the work done and the extent to which it requires a lawyer's training and exercise of legal judgment. She opined that plaintiff's emails, sent over his name, reflected that he engaged in the practice of law. Plaintiff, in her view, made representations and

arguments about what the contract provided, how it limited the choice of options, and to what extent it was binding. Robinson opined that these statements showed that plaintiff was acting as an attorney. She further testified that plaintiff's statements concerning his position on what the contract required, whether an addendum changed the contract, and that the contract required a survey reflected "an interpretation of a legal document, an argument about the significance of that document[,] and how that should impact the handling of this transaction."

¶ 140 Turning to the earlier email, sent on February 5, 2013, to Amanda French, it concerned the tax proration on the preliminary HUD-1 form. Plaintiff wrote:

"Dear Ms. French,

Here are the problems I see with the Preliminary HUD:

1) Taxes are still prorated at 100% vs 110% which the contract calls for:

a) Line 211 should be $644.47 (16.52/per day for 39[ ] days)

b) Line 213 should be $6,031.56

2) Line 805 Credit Report Good Faith Estimate was 22.00 HUD-1 is 222.00 (Either this is a typo or not proper, because the net change is 49.832% increase, when only a 10% change is allowed).

3) Line 808 Pest Control of $85 (Is not a buyer's Charge, should have been POC, by seller[s]) (See Contract).

4) Line 1103 $1,570.00 should be a seller[s'] charge not a buyer[s'] charge.

5) Line 1304 Buyer's Attorney to Law Offices of John Peter Curielli, P.C. not Peter Curielli.

6) I am copying buyer[s] on this email, so they can determine if the rest of the lender's fees are correct, I think buyers are supposed to be getting a $2,500 credit from Navy

Federal, which I do not see.

Thanks,

Peter J. Curielli"

¶ 141 After plaintiff's signature, which was in cursive font in some versions in the record, there appears an image of the allegorical justice, with "Law Offices of John Peter Curielli, P.C." afterwards. Below this image is the firm's signature block, identifying plaintiff as "Senior Attorney, CPA, Real Estate Broker."

¶ 142 The ALJ found that plaintiff's statements concerning the HUD-1 figures and his direction as to the attorney fees constituted the practice of law.

¶ 143 Here, the Department argues that the February 6 email alone was sufficient to show that plaintiff provided legal services to the Ertlers. However, it also contends that the February 5, 2013, email showed the same. The Department points to Robinson's testimony that plaintiff was implementing a contract provision and directing where the attorney fees should go, a determination that a broker would not have the authority to make. Further, the Department notes that this email contained the firm signature block and points to the Secretary's finding that plaintiff's use of the signature block identifying himself as a senior attorney was done knowingly.

¶ 144 The Department also contends that, even if the February 5 email does not reflect that plaintiff was providing legal services to the Ertlers, it bolsters the Secretary's determination that plaintiff had provided such services—a determination that was independently supported by the February 6 email and the testimony of Robinson, Grisco, and Laird. It further maintains that the February 5 email is relevant not only for the fact that plaintiff suggested changes to the HUD-1,

but it also demonstrates his role as an attorney by directing where the attorney fees should go and by including a signature block indicating he was an attorney.

¶ 145 We agree with the Department's alternative argument that, while not determinative on its own, the February 5 email shows how plaintiff veered toward impermissible broker conduct. The firm signature block, an automated feature, is probative, but not the primary focus in any practice-of-law analysis, where the character of the work controls. *King*, 215 Ill. 2d at 23; *cf. Discipio*, 163 Ill. 2d at 527 (use of letterhead not necessary to engage in unauthorized practice of law). Robinson, pointing to Laird's testimony that he believed plaintiff was acting as an attorney in the transaction, opined that the perception of others is a "highly relevant" factor in assessing whether one engaged in the practice of law. We believe that plaintiff's use of the firm signature block was, at best, careless, but it nevertheless contributed to the impression by others that he was acting as an attorney in the transaction. The attorney fee statement is more problematic for plaintiff. Robinson opined that a broker cannot tell someone who should receive the attorney fees and that only an attorney has authority to direct that. In her view, plaintiff's direction constituted the practice of law. We cannot conclude that the agency's reliance on this evidence was clearly erroneous.

¶ 146 Next the Department addresses the trial court's assessment of John's credibility. The Department relies on the Secretary's finding that John was not credible. Specifically, that he was evasive and defensive on issues related to the emails and did not directly answer when asked if he discussed legal issues with plaintiff or directed him to relay information under plaintiff's name. When asked if the emails contained any indication that they came from him, John responded that Laird's secretary was doing the same thing. The Department argues that the trial court's reversal of the Secretary's credibility determination was erroneous in two respects. First,

there *was* evidence that John did not direct the sending of the emails, where the emails themselves contain plaintiff's name but no indication that they are from John. Also, Grisco and Laird testified that they believed the emails came from plaintiff, not John. Second, the trial court ignored the deferential standard of review and essentially sought additional evidence to support a finding that John was not credible. Without plaintiff's claim, the Department argues, there was no evidence that the emails came at John's direction. As such, the Department urges, the Secretary's finding that they came at plaintiff's direction and were not directed by John, should not be disturbed. The Department also maintains that the Secretary was not required, as the trial court erroneously determined, to support its credibility determination with additional evidence. See *Twyman v. Department of Employment Security*, 2017 IL App (1st) 162367, ¶ 40 ("[a]bsent any evidence in the record to support [the] plaintiff's claim except for his own statement," appellate court deferred to agency's credibility finding because agency heard firsthand from the witnesses).

¶ 147 Plaintiff addresses the supervision issue, relying again on the trial court's finding that, even though plaintiff is an attorney, he was entitled to argue that John directed him to send certain emails. He also relies on the court's finding that there was no evidence refuting John's testimony that he directed plaintiff to send certain emails. Plaintiff points to Laird's testimony that he sometimes had his assistant type emails at his direction. Further, plaintiff argues that it is the text of the emails, not the signature block, that controls the determination of whether one engaged in the practice of law.

¶ 148 We conclude that the agency's determination was not clearly erroneous. The ALJ specifically addressed John's testimony, finding it evasive, defensive, and not credible. Critically, the ALJ found that John did not directly answer whether he had plaintiff relay

information under plaintiff's name. John also, the ALJ found, did not answer the question whether any of the relevant emails contained any indication that the opinions contained within them were his and not plaintiff's opinions. Rather, John directed the subject to Laird's practice of having his secretary, a non-attorney, send emails on his behalf. Finally, the ALJ found that John gave no testimony to support his assertion that the Ertlers could not have been confused as to who was their attorney, "except an indication from context that John was their attorney." It is the agency's province to determine witness credibility and resolve conflicts in the evidence. *Plowman v. Department of Children & Family Services*, 2017 IL App (1st) 160860, ¶ 24. We cannot conclude that the agency erred in its assessment that, essentially, the documentary evidence—most notably the February 6 email—did not support or contradicted John's testimony that he directed plaintiff as to the email's content. Without an indication in the emails that they were sent by John, and without anything more in John's testimony to support his bare assertion that he directed the communications, the agency's assessment of the evidence stands.

¶ 149 Further, we note that Laird's and Grisco's testimony supported the agency's findings. Laird testified that he did not negotiate the closing with John; he negotiated with plaintiff. At no point during the transaction, in Laird's conversations with plaintiff, did plaintiff at any point indicate that he was speaking for John. Laird further testified that he believed that plaintiff was the attorney doing all of the work for the buyers. When a decision needed to be made on contract terms or closing terms, plaintiff appeared to be making the decisions. Similarly, Grisco testified that she believed that plaintiff negotiated on the Ertlers' behalf. No emails were signed or had any indication on them that they were written by John. She also stated that, typically, attorneys are always at closings, though brokers are not always present. The ALJ found both Laird and Grisco credible on the key issues, and we find nothing inherently incredible in their

testimony. Grisco, he noted, was not defensive and acknowledged her commission calculation error. Her testimony overall did not reflect retaliation against plaintiff. Similarly, the ALJ found Laird credible, specifically noting that his actions concerning facts to plaintiff were consistent with his stated belief that plaintiff was the Ertlers' attorney. In sum, we cannot conclude that the agency's reliance on them was unreasonable or rendered clearly erroneous its ultimate findings.

¶ 150 2. Admission of Expert and Lay Testimony

¶ 151 Next, the Department argues that the trial court erred in determining that the expert and lay testimony were not appropriate to aid the Secretary in his determination and that the Secretary's rejection of plaintiff's challenges to the testimony should stand. For the following reasons, we agree with the Department.

¶ 152 "[T]he strict rules of evidence that apply in a judicial proceeding do not apply in proceedings before an administrative agency." *Ivy v. Illinois State Police*, 263 Ill. App. 3d 12, 19 (1994). Moreover, an administrative agency's "decision regarding the admission of evidence is discretionary and should be reviewed as such." *Wilson v. Department of Professional Regulation*, 344 Ill. App. 3d 897, 909 (2003). Such decisions will not be disturbed on review absent an abuse of discretion. *Morelli v. Ward*, 315 Ill. App. 3d 492, 497 (2000).

¶ 153 Plaintiff argues that the question whether he was practicing law is a legal question, *de novo* review applies, and the lay and expert testimony, on its face, was inadmissible. Further, to the extent the assessment of whether he engaged in the practice of law involves statutory interpretation, that inquiry is also, plaintiff asserts, a legal question subject to *de novo* review. We reject his argument. The question whether plaintiff engaged in the practice of law, as we discussed above, presents a mixed question, not one of law. None of the witnesses testified as to

any statutory interpretation or other legal question. Here, the inquiry is whether their testimony was admissible, which is reviewed under a deferential standard.

¶ 154 Turning to that inquiry, expert testimony is admissible only if the expert has specialized knowledge that will "assist the trier of fact" in understanding the evidence or in determining a fact at issue. *Grant v. Petroff*, 291 Ill. App. 3d 795, 801 (1997). When determining whether proffered expert testimony assists the trier of fact, it is well settled that "expert testimony as to legal conclusions that will determine the outcome of the case is inadmissible." *Good Shepherd Manor Foundation, Inc. v. City of Momence*, 323 F.3d 557, 564 (7th Cir. 2003) (holding that expert's opinions were legal conclusions, where expert opined that city's actions violated statute and city's conduct had no legal basis). As such, experts cannot offer "legal conclusions that infringe on the [factfinder's] duties." *People v. Munoz*, 348 Ill. App. 3d 423, 440-41 (2004). However, "an expert may opine on an ultimate fact or issue as long as the other requirements for the expert testimony are met." *City of Chicago v. Concordia Evangelical Lutheran Church*, 2016 IL App (1st) 151864, ¶ 74.

¶ 155 We hold that the agency did not abuse its discretion in allowing Robinson's expert testimony on the question whether plaintiff engaged in the practice of law. The inquiry is, as we discussed above, a mixed question of fact and law. The question whether plaintiff breached his professional duty to avoid acting as both a broker and attorney in the same transaction is a fact-based inquiry that informs the agency's ultimate determination that plaintiff violated the statute. Robinson's expert testimony on this question was properly admitted.

¶ 156 Two cases upon which the Department relies, *Haebler v. Department of Financial & Professional Regulation*, 2013 IL App (1st) 111968; and *Anderson v. Department of Professional Regulation*, 348 Ill. App. 3d 554 (2004), are instructive. Both *Haebler* and

Anderson are professional disciplinary cases. In *Haebler*, the reviewing court applied the clearly-erroneous standard to the question whether a private detective violated the licensing statute by engaging in unethical, unprofessional or dishonorable conduct. *Haebler*, 2013 IL App (1st) 111968, ¶ 17. The court generally noted that an agency's determination lacks sufficient evidence where it is unsupported by expert testimony. *Id.* (citing *Obasi v. Department of Professional Regulation*, 266 Ill. App. 3d 693, 699-701 (1994) (upholding agency's finding of gross negligence by surgeon and holding that agency's legal conclusions were supported by competent evidence, including expert testimony, and were not arbitrary or unreasonable)). In *Anderson*, the reviewing court applied the clearly-erroneous standard to assess an agency determination that a doctor's actions constituted gross negligence and unprofessional conduct under the licensing statute. *Anderson*, 348 Ill. App. 3d at 560. At issue was whether the agency had presented sufficient expert testimony. The reviewing court held that there was sufficient expert testimony concerning the standard of care and that the evidence further supported the agency's determination that there was a breach of that standard of care. *Id.* at 561-62. We agree with the Department that, just as in *Anderson* and *Haebler*, Robinson opined on whether plaintiff's conduct satisfied the "statutory standard." The Secretary properly relied on this testimony in reaching his decision and, contrary to the trial court's determination, the Secretary did not rely on any of Robinson's testimony "regarding statutory interpretation."

¶ 157 Next, turning to Grisco's and Laird's testimony, the Department argues that the trial court erred in finding it inadmissible. It contends that neither witness testified to the mixed question of whether plaintiff's conduct constituted the practice of law under the Act, let alone offered an interpretation of the Act. Rather, they testified as to their impressions as to who was handling the negotiation and other legal work on the Ertlers' behalf. The trial court, the Department

maintains, cited no case law holding that the admission of such testimony was erroneous or why the Secretary's reliance on it constituted an abuse of discretion.

¶ 158 We conclude that the agency did not abuse its discretion in admitting the lay witnesses' testimony. Their testimony was limited to the impressions of plaintiff's work and did not veer into the expert's realm of what constitutes the practice of law. Further, their impressions were relevant evidence. See *In re Discipio*, 163 Ill. 2d 515, 525-26 (1994) (in attorney disciplinary proceeding, where court held that attorney aided disbarred attorney in the unauthorized practice of law, court noted that some clients believed the disbarred attorney was a licensed attorney). Robinson addressed this point, testifying that how one holds oneself out is an important, but not the central, factor in the practice-of-law analysis.

¶ 159 3. Statutory Construction

¶ 160 Next, the Department argues that the Secretary properly rejected, and the trial court erred in finding otherwise, plaintiff's argument that it was permissible for him to provide legal services to the Ertlers and act as "an attorney" to them, because section 20-20(34) of the Act prohibits only "an attorney" from acting as "the attorney" for the buyers in the same transaction. 225 ILCS 454/20-20(34) (West 2014).

¶ 161 The construction of a statute is a question of law that is reviewed *de novo*. *In re Estate of Dierkes*, 191 Ill. 2d 326, 330 (2000). In construing the meaning of a statute, our primary objective is to ascertain and give effect to the legislature's intent. In that regard, the language of the statute provides the best indication of the legislature's intent. *In re Consolidated Objections to Tax Levies of School District No. 205*, 193 Ill. 2d 490, 496 (2000). Where a statute is ambiguous, we may look to other sources to ascertain the legislature's intent. *People ex rel. Birkett v. City of Chicago*, 202 Ill. 2d 36, 46 (2002). "[A]n agency's construction of the law may

be afforded substantial weight and deference if the meaning of the terms used in a statute is doubtful or uncertain. Courts accord such deference in recognition of the fact that agencies make informed judgments on the issues based upon their experience and expertise and serve as an informed source for ascertaining the legislature's intent." *Illinois Landowners Alliance, NFP v. Illinois Commerce Comm'n*, 2017 IL 121302, ¶ 46.

¶ 162 At the time of the hearing, section 20-20(a)(34) of the Act proscribed the following: "[w]hen *a* licensee is also *an* attorney, acting as *the* attorney for either the buyer or the seller in the same transaction in which the licensee is acting or has acted as *a* broker or salesperson." (Emphases added.) 225 ILCS 454/20-20(a)(34) (West 2014).

¶ 163 The Department asserts that the statute's plain language does not contemplate the "unique" factual circumstances here: an attorney of record and another attorney also providing legal services. It urges that the trial court's presumption that the legislature used the word "the" to exempt an attorney at the same firm who is not the attorney of record from the Act's reach impermissibly strains the plain understanding of the statute. The Department further argues that, if the trial court's determination stands, an attorney who wishes to serve as both the attorney and broker in a transaction could, as plaintiff did here, work an end-run around the statute by simply having another attorney at his or her firm appear as the attorney of record. It argues that there is an inherent conflict in such a scenario. As to the facts in this case, the Department argues that it strains credulity to suggest that John should be counted upon, if necessary, to both protect the client's interests and derail his son's/business partner's potential for a broker commission. Courts, the Department argues, should avoid interpretations that lead to absurd results.

¶ 164 Plaintiff responds that the trial court, giving no deference to the agency's interpretation, correctly determined that the statute is violated when a broker, who is also an attorney, acts as

the attorney for either the buyer or seller in the same transaction. It correctly rejected the Secretary's reading that "acting as an" is synonymous with "acting as the" attorney. Plaintiff further points to the trial court's finding that the statute's goal is to ensure that a party has an attorney who is dedicated solely to protecting the party's interests, without hope of financial gain for completing the transaction. That attorney, it found, was John.

¶ 165 We conclude that the statute is not ambiguous. See *Board of Education of Springfield School District No. 186 v. Attorney General of Illinois*, 2017 IL 120343, ¶ 25 (where "the language used is susceptible to more than one equally reasonable interpretation, it is ambiguous, making construction of the language necessary and permitting resort to other aids of construction to determine legislative intent"). The only reasonable interpretation of section 20-20(34) is that a licensed broker who is also an attorney cannot act as an attorney in the same transaction in which he or she is providing broker services where another attorney at his or her firm is the attorney of record for the transaction. The trial court's and plaintiff's reading leads to absurd results that are contrary to protecting the clients' interests.

¶ 166 The legislature's intent in enacting the statute "is to evaluate the competency of persons engaged in the real estate business and to regulate this business for the protection of the public." 225 ILCS 454/1-5 (West 2016). Our reading, we believe, furthers the legislative intent of protecting the public. The First District, in *Curielli I*, stated that, "frequently, the incentives prompting a broker to close the deal are not aligned with—and in fact may be in opposition to—the motivations of an attorney who has a duty to safeguard his [or her] client's interests." *Curielli I*, 2015 IL App (1st) 143511, ¶ 24. We believe that this remains the case with respect to an attorney who is not the attorney of record. The financial interests of the broker-attorney who is not the attorney of record and another attorney at his or her firm who is the attorney of record

are intertwined and, therefore, the inherent conflict of interest that arises when a broker-attorney simultaneously wears two hats in the same real estate transaction is also present in cases where a broker-attorney is not the attorney of record. Thus, the statute necessarily must also apply to the broker-attorney in order to further the legislature's intent to protect the public and eliminate the possibility of a conflict of interest. For purposes of the statue, the article "the" means "an," and the trial court's conclusion otherwise is erroneous.

¶ 167 4. Evidence of Alleged Settlement Negotiations

¶ 168 The Department next argues that the trial court erred in finding that evidence of alleged settlement negotiations should have been admitted at the hearing. The Secretary did not, according to the Department, abuse his discretion in rejecting evidence of this alleged offer and that decision should stand. We agree.

¶ 169 The strict rules of evidence that apply in a judicial proceeding are not applicable to proceedings before an administrative agency. *MJ Ontario, Inc. v. Daley*, 371 Ill. App. 3d 140, 149 (2007). Moreover, an administrative agency's "decision regarding the admission of evidence is discretionary and should be reviewed as such." *Wilson v. Department of Professional Regulation*, 344 Ill. App. 3d 897, 909 (2003). Such decisions will not be disturbed on review absent an abuse of discretion. *Morelli v. Ward*, 315 Ill. App. 3d 492, 497 (2000).

¶ 170 In his motion for rehearing, plaintiff claimed that the agency made a renewed settlement offer. He supported his claim with his own, Mark's, and Dalia Harami's affidavits. In his affidavit, Mark averred that, in February 2015, Dan Faermark, the Department's chief of prosecutions and Mark's acquaintance, contacted Mark after he noticed his name as a potential witness in plaintiff's case. Faermark advised Mark that a previous offer that involved plaintiff taking a 12-hour broker management class, which would not result in public discipline, was still

available to plaintiff. Mark averred that he spoke to plaintiff, relating his conversation with Faermark. Subsequently, plaintiff related to Mark that he had spoken to Faermark, agreed to the proposed resolution, and informed Mark that he had taken the course. In his affidavit, plaintiff added that he contacted Faermark on or about March 15, 2015, to inquire if he required a copy of plaintiff's certificate of completion for the course, and Faermark (who had initially allegedly stated that the offer was open until the hearing) informed him that he was no longer the chief of prosecutions and that plaintiff needed to speak with his replacement, Christopher Hage. When he subsequently spoke with Hage (at an April 7, 2015, status hearing), Hage informed plaintiff that he was unaware of any settlement agreement and that any agreement *would* involve public discipline. In the third affidavit, Harami averred that, on April 7, 2015, she was present with plaintiff and they spoke to Hage. Hage told them that he was unaware of any agreement and that the only one he was willing to entertain would include public discipline. She further averred that Hage went to speak to Faermark, who was in the building at the time. When Hage returned, he reported to plaintiff and Harami that Faermark told him that he was unaware of any agreement he had make with plaintiff. Hage urged plaintiff to accept the current offer, "that he would be publically disciplined, but there would be no fine, and he should consider it a 'gift.' He said that was the only deal currently on the table," which was only good until plaintiff made his request to have subpoenas issued for his witnesses and that, if they went to a hearing, Hage would seek both a suspension and a fine.

¶ 171 The Secretary rejected plaintiff's arguments, finding that: (1) even if the negotiations had occurred, the evidence concerning them was inadmissible; and (2) the promissory estoppel doctrine was not applicable. Here, the Department argues that evidence of settlement negotiations is generally inadmissible, plaintiff failed to establish that there was any agreement,

and he did not assert that he relied to his detriment in taking a broker management class. The Department contends that plaintiff relies primarily on inadmissible hearsay statements in the affidavits. Also, the Department argues that, contrary to plaintiff's assertion, the Secretary did not refuse to hear evidence; rather, according to the Department, the Secretary considered the evidence and rejected it. As to promissory estoppel, the Department contends that taking a course does not rise to the level of injustice required for the doctrine to apply.

¶ 172 Plaintiff responds that he was not attempting to present evidence of settlement *negotiations*; rather, he sought to introduce evidence of an oral settlement *agreement*, which *is* admissible. See *Quinlan v. Stouffe*, 355 Ill. App. 3d 830, 837 (2005) (testimony whether parties formed valid oral contract and, if so, its terms, was admissible). The trial court, in his view, correctly found that evidence of such an agreement was improperly excluded. At the hearing before the court, the trial judge noted that the ALJ excluded that evidence because he believed it was inadmissible. The court asked the Department whether its rules required that any agreement be in writing, and the Department responded in the negative.

¶ 173 Turning to promissory estoppel, plaintiff asserts that the Department's former chief of prosecutions made an offer to him that, if plaintiff took a 12-hour broker management class[3] (which plaintiff, as an active licensed attorney, was otherwise not required to take), then the Department would enter an order resolving the matter without plaintiff having to admit any fault or being publicly disciplined. Plaintiff further asserts that he relied on this promise, took the class, and that the Department knew the only reason he took the class was to consummate the deal. As a result of the Department not honoring the settlement agreement, plaintiff notes that he

[3] The record contains a certificate of completion, dated March 4, 2015, stating that plaintiff successfully completed a 12-hour broker management course offered by Sure Win Inc.

had to go through a hearing, incur time and expense in drafting a motion for rehearing, file a complaint for administrative review, file an appeal, etc. He also notes that he petitioned for a temporary restraining order of the Secretary's order, which was not granted until August 10, 2016. Thus, between February and August 2016, he was deprived of his ability to use his broker's license. Plaintiff argues that it is disingenuous for the Department to state that plaintiff failed to show there was a settlement agreement when the agency refused to hear evidence on the same.

¶ 174 We reject plaintiff's arguments. They are premised on the existence of an oral agreement between him and a former Department representative. To support this argument, plaintiff attempted to rely on his own affidavit, which contained hearsay statements of the former representative, and Mark's and Harami's affidavits, which echoed certain of plaintiff's averments and contained others' hearsay statements. Generally, hearsay evidence is not admissible in an administrative proceeding. *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 828 (2009). Assuming, without deciding, that the Department could be bound by an oral settlement agreement, the Secretary did not abuse his discretion in determining that, without more, the self-serving and otherwise hearsay evidence was inadmissible.

¶ 175 As to promissory estoppel, to establish such a claim, the plaintiff must prove that: (1) defendant made an unambiguous promise to the plaintiff; (2) the plaintiff relied on such promise; (3) the plaintiff's reliance was expected and foreseeable by the defendant; and (4) the plaintiff relied on the promise to his or her detriment. *Quake Construction, Inc. v. American Airlines, Inc.*, 141 Ill. 2d 281, 309-10 (1990). Here, plaintiff's argument fails because he relies on the inadmissible affidavits to show that a promise was made to him.

¶ 176 D. Discipline

¶ 177 The Department's final argument is that the Secretary did not abuse his discretion in indefinitely suspending plaintiff's license for no less than one year and imposing a $9,500 fine. For the following reasons, we agree that the fine was properly imposed, but we conclude that the indefinite suspension was not warranted.

¶ 178 "Even if [an] administrative decision is determined to be correct ***, the discipline imposed by the agency may still be reversed if it is found to constitute an abuse of discretion." *Kazmi v. Department of Financial & Professional Regulation*, 2014 IL App (1st) 130959, ¶ 21. "A sanction will be found to be an abuse of discretion if it is arbitrary and capricious, or if the sanction is overly harsh in view of the mitigating circumstances." *Id.*

¶ 179 The Act states that the legislature's intent in enacting the statute "is to evaluate the competency of persons engaged in the real estate business and to regulate this business for the protection of the public." 225 ILCS 454/1-5 (West 2016). In fashioning its discipline, the Secretary relied on two administrative decisions: *Department of Financial & Professional Regulation v. Jurjonas*, No. 2012-3754 (April 4, 2014), and *Department of Financial & Professional Regulation v. Shelton*, No. 2010-08633 (July 14, 2011). In *Jurjonas*, the Department brought an action against an individual it alleged acted as both a real estate broker and an attorney in the sale of certain property. In a consent order, the individual's license was placed on probation for one year and he was fined $1,000 and required to take three real estate courses. In *Shelton*, the Department alleged that an individual was acting as both the real estate broker and the attorney in the purchase of certain property and aided and abetted the unlicensed practice of a real estate firm of which he was the managing broker. The individual failed to respond to the amended complaint, and an order of default was entered. Subsequently, the agency found, by default, that the individual was guilty of eight counts that would have

constituted a maximum fine of $200,000 and revocation of his license. The Board recommended an indefinite suspension and a $25,000 fine. The individual moved for rehearing after expiration of a notice period. Ultimately, the agency indefinitely suspended his license for a minimum of two years and imposed a $25,000 fine.

¶ 180 The Department maintains that the Secretary properly weighed the aggravating and mitigating factors. The Secretary acknowledged that plaintiff, in mitigation, had not been previously disciplined, but further found, in aggravation, the seriousness of the offense, the fact that the Ertlers were denied conflict-free services, plaintiff's lack of contrition, and the financial gain plaintiff received in the form of $7,400 in real estate commission. Also, the Secretary noted plaintiff's conduct at the hearing, specifically, his repeated re-direction of issues involving purported misconduct by others involved in the transaction. The Department maintains that the Secretary reviewed the prior agency decisions and properly imposed an indefinite suspension of not less than one year and a $9,500 fine. Further, the Department notes that the fine was guided by the Secretary's reasoning that it should be an amount greater than plaintiff's commission. The one-year suspension, it further notes, was guided by the Secretary's determination that plaintiff needed time to consider the severity of his conduct, where plaintiff lacked contrition and, during the hearing, did not appreciate the significance of the violation.

¶ 181 In his response, plaintiff points to the trial court's finding that plaintiff's conduct in holding the sellers' "feet to the fire" benefitted the Ertlers. He also points to the Erlters' statements that they did not feel harmed by any of plaintiff's actions and did not believe that there was any conflict of interest. Plaintiff also contends that the authority relied upon by the agency was not disclosed to him in discovery (as they were non-public cases), nor were other cases addressing the same statute (but not relied upon by the agency). The agency referred

plaintiff to its monthly disciplinary records on its website. Also, after plaintiff asked for similar cases, he was instructed to submit a "FOIA" request for them.

¶ 182 Here, plaintiff notes that the agency decided that this case fell in between *Jurjonas*, which was decided through a settlement agreement, and *Shelton*, which involved a default judgment. He argues that this constituted an abuse of discretion because *Shelton* involved *two* instances of the individual acting as both an attorney and a broker in the same transaction, as well as *six* other counts. In addition, the individual failed to attend the hearing. As to *Jurjonas*, plaintiff notes that the individual was also accused of not providing business records to the agency and that the offenses carried a possible maximum fine of $50,000 and license revocation. The ultimate settlement involved a $1,000 fine, classes, and one year of probation. Plaintiff notes that there was no public discipline or suspension. In plaintiff's view, because he was only accused of acting as a broker and engaging the practice of law in the same transaction, the facts are closer to *Jurjonas* than *Shelton*. Further, prior to the hearing, the agency made a settlement offer that required plaintiff to only take a class.

¶ 183 Plaintiff also points to several additional agency decisions. See *Office of Banks & Real Estate v. Hartz*, No. 98-01687 (July 22, 1999) (real estate broker who defrauded title company of $1.9 million while appearing to act as its agent entered into consent order wherein, in addition to having taken steps to satisfy his debt to title company, his broker license was revoked and he was issued a salesperson license that was indefinitely suspended for a minimum of three years, with other conditions); *Office of Banks & Real Estate v. Ring*, No. 1995-64336 (Jan. 7, 1998) (individual acted as both a broker and attorney in the same transaction; agency imposed three years of probation on his broker's license and six hours of continuing education during each year of the probationary period); *Office of Banks & Real Estate v. Mlade*, No. 2002-61488-1 (Aug.

22, 2002) (real estate broker whose law license was suspended for one year based, in part, on finding that he represented a client as both an attorney and real estate broker in a transaction and did not disclose his interest in a broker corporation to which the client had paid a commission entered into consent order wherein the agency placed his broker license on probation for one year and imposed certain reporting obligations during the probation period). Plaintiff notes that no fine was imposed in the cases and only one case that involved public discipline or a suspension also involved defrauding a company of almost $2 million. He argues that the Secretary abused his discretion in fashioning the discipline against plaintiff, where plaintiff has not previously been disciplined, the ALJ found that no party to the transaction beyond the Ertlers experienced any injury, the Ertlers themselves stated that they were not harmed in any way by plaintiff; the discovery the Department tendered did not include the non-public agency cases (*Shelton* and *Jurjonas*) upon which the agency relied in fashioning discipline against plaintiff; the agency failed to address the cases upon which plaintiff relies; and, even if there was no error in limiting its review to *Shelton* and *Jurjonas*, the Department abused its discretion in applying the facts to that precedent.

¶ 184 The Department replies that the one-year suspension affords plaintiff the time necessary to consider the serious conflict of interest that arises when a broker also acts as an attorney and the risk of harm that could result to the public. It also contends that the $9,500 fine is actually only a $2,100 penalty, because the remainder of that sum ($7,400) consists of the broker commission that plaintiff should never have received given his conduct in acting as both a broker and an attorney to the Ertlers. As to plaintiff's argument that there was no harm to the Ertlers, the Department contends that the mere potential for a conflict is relevant to the inquiry. Also, the Department maintains that plaintiff's conduct in his interactions with Laird reflects that the

quality of his services was affected by his competing motivations. Finally, the Department responds that the remaining consent orders upon which plaintiff relies all involved an admission of wrongdoing, which should not inform the discipline imposed here.

¶ 185 We conclude that the Secretary's imposition of the $9,500 fine did not constitute an abuse of discretion because, as the Department notes, the majority of the amount ($7,400) represents the broker commission plaintiff earned during the transaction. It was not unreasonable for the Secretary to find that plaintiff should not have reaped the gains from a transaction during which he did not provide his clients conflict-free services. The Secretary's determination was also guided by plaintiff's lack of contrition, which was a circumstance not present in any of the cited authority. During the hearing, rather than exclusively address his own actions, plaintiff repeatedly attempted to shift focus to allegedly-inappropriate conduct by others involved in the transaction. To the extent the Secretary found this aggravating factor warranted more severe discipline than if it was not otherwise present, this did not constitute an abuse of his discretion. Plaintiff's behavior reflected that he did not fully appreciate how his actions undercut the duty he owed to his clients to provide conflict-free services.

¶ 186 However, we further hold that the indefinite suspension aspect of the discipline constituted an abuse of discretion. We believe that it was unreasonable for the Secretary to impose such a discipline, where plaintiff had never previously been sanctioned by the agency and where the nature of his actions—*i.e.*, two emails in only one client transaction, where no fraud was alleged—were not so egregious as to warrant an indefinite suspension. In light of the circumstances, this aspect of the Secretary's discipline was overly harsh. We agree with plaintiff that the facts in this case are closer to *Jurjonas* (consent order placing license on one-year probation and imposing $1,000 fine and three-course requirement) than *Shelton* (eight-count

complaint, default order, indefinite suspension for a two-year minimum, and $25,000 fine), even though the circumstances here do not involve a consent order and present the additional aggravating factor of plaintiff's perceived lack of contrition. Accordingly, we modify the Secretary's determination to eliminate the indefinite suspension.

¶ 187 III. CONCLUSION

¶ 188 For the reasons stated, the judgment of the circuit court of Lake County is reversed, the Secretary's discipline is modified to eliminate the indefinite suspension, and the Secretary's decision is otherwise affirmed.

¶ 189 Reversed.