



Getting Ready for the Hearing!

Tips for Hearing Panel Members
and
2010 Professional Standards Updates

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Tips for Hearing Panel Members

When you become a member of a Hearing Panel, you take on a serious responsibility not only to the complainant and respondent, but also to your Association and to REALTORS® everywhere. To meet this responsibility, you should be prepared for the hearing. Preparing for the hearing includes being familiar with the case itself, and being thoroughly aware of the appropriate procedures. Use this guide before a hearing to prepare yourself to do a great job for the parties and for all REALTORS®.

The information in this guide is based on the Code of Ethics and the Code of Ethics and Arbitration Manual (CEAM) of the National Association of REALTORS® for the year 2010. Because changes to the Code and the CEAM occur every year, this guide should not be used after December 31, 2010.

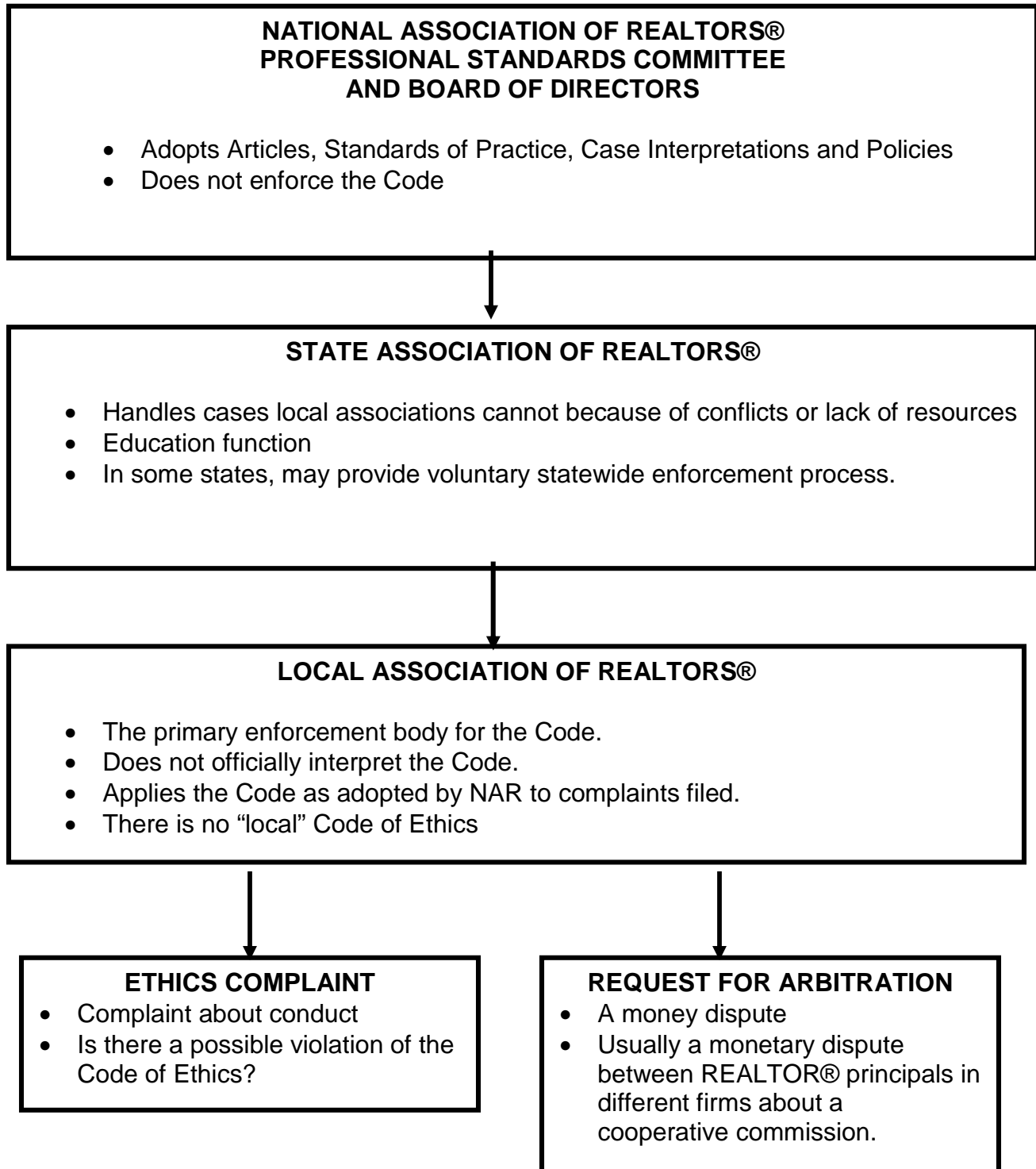
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Overview of the Enforcement Process

While Hearing Panel Members will likely have some experience in the Professional Standards enforcement process (usually as Grievance Committee members), it is always helpful to have reminders about the overall enforcement process.

On the next two pages you will find graphic representations of the roles of the various associations (national, state and local) in the enforcement process, the “two stage” process of an ethics complaint and the “three stage” process of a request for arbitration.

Overview of the Enforcement Process



Ethics Complaints - The "Two Stage" Process

STAGE 1: The Grievance Committee

- A "screening" committee
- Similar to a grand jury.
- But NOT the "ethics cops"

STAGE 2: The Professional Standards Committee

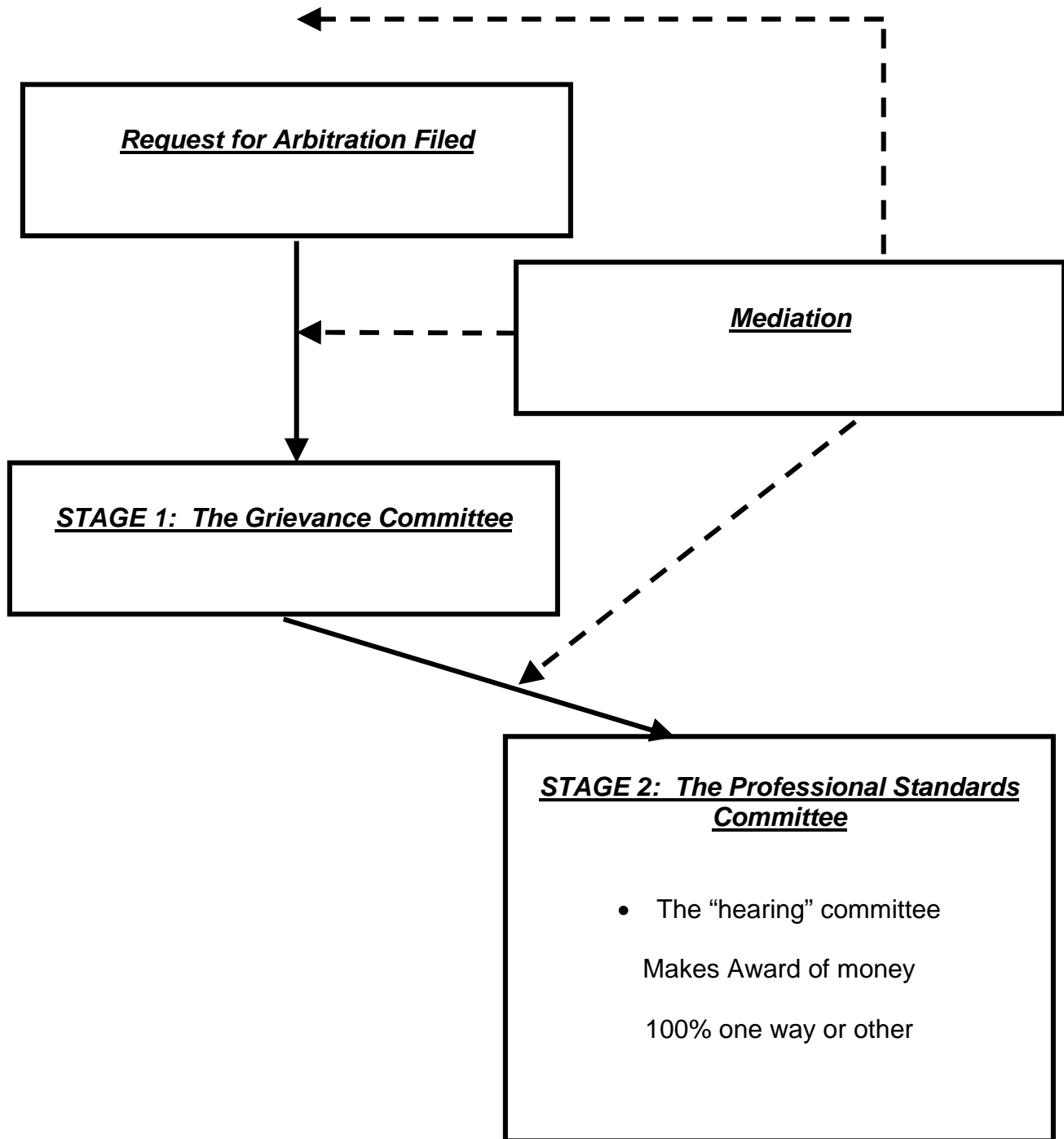
- The "hearing" committee
- Similar to a trial court jury.

Is there a violation of the Code?

Disciplinary recommendation

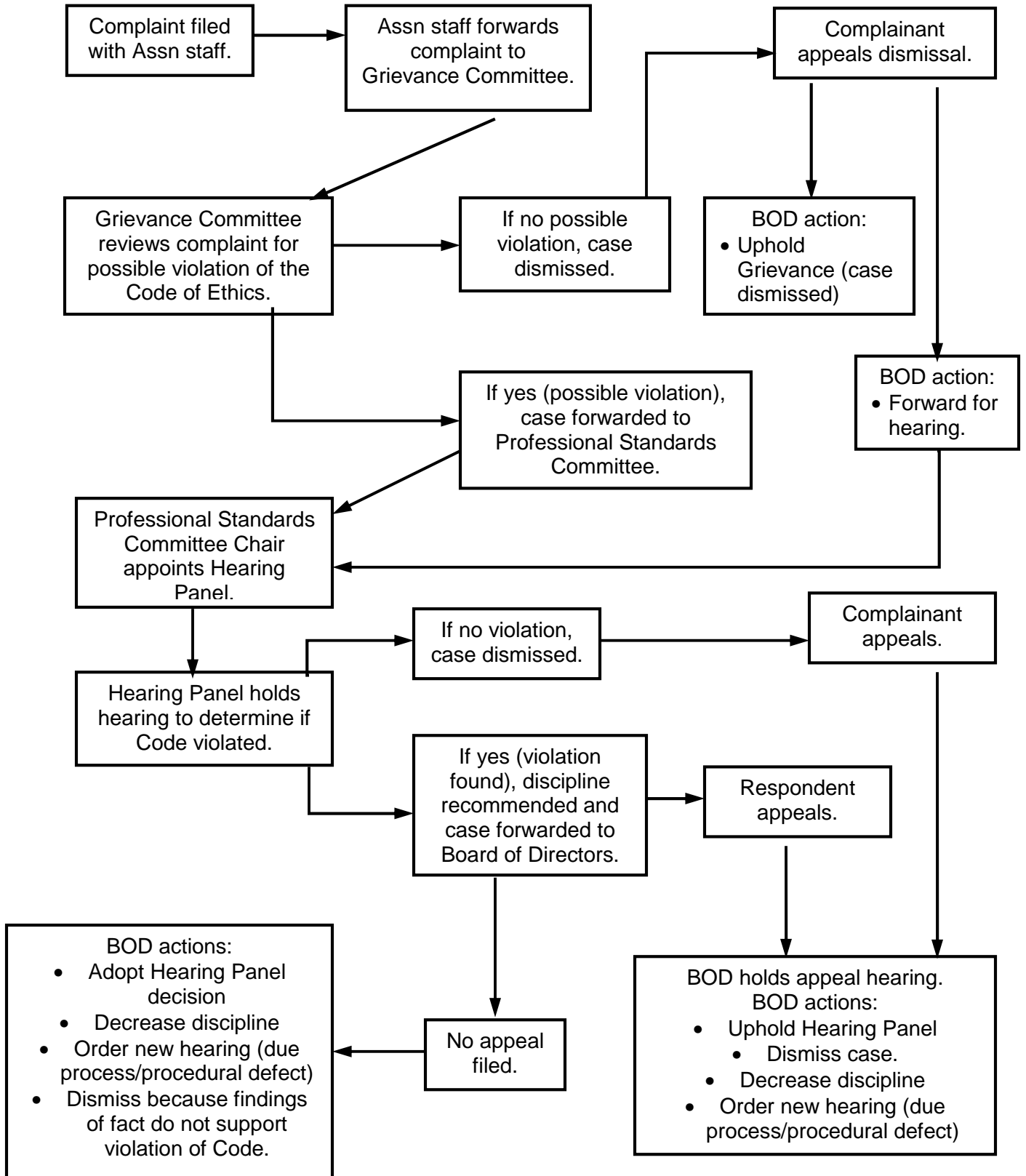
FINAL STAGE: Board of Directors (all ethics cases)

Arbitration Cases - The "Three Stage" Process

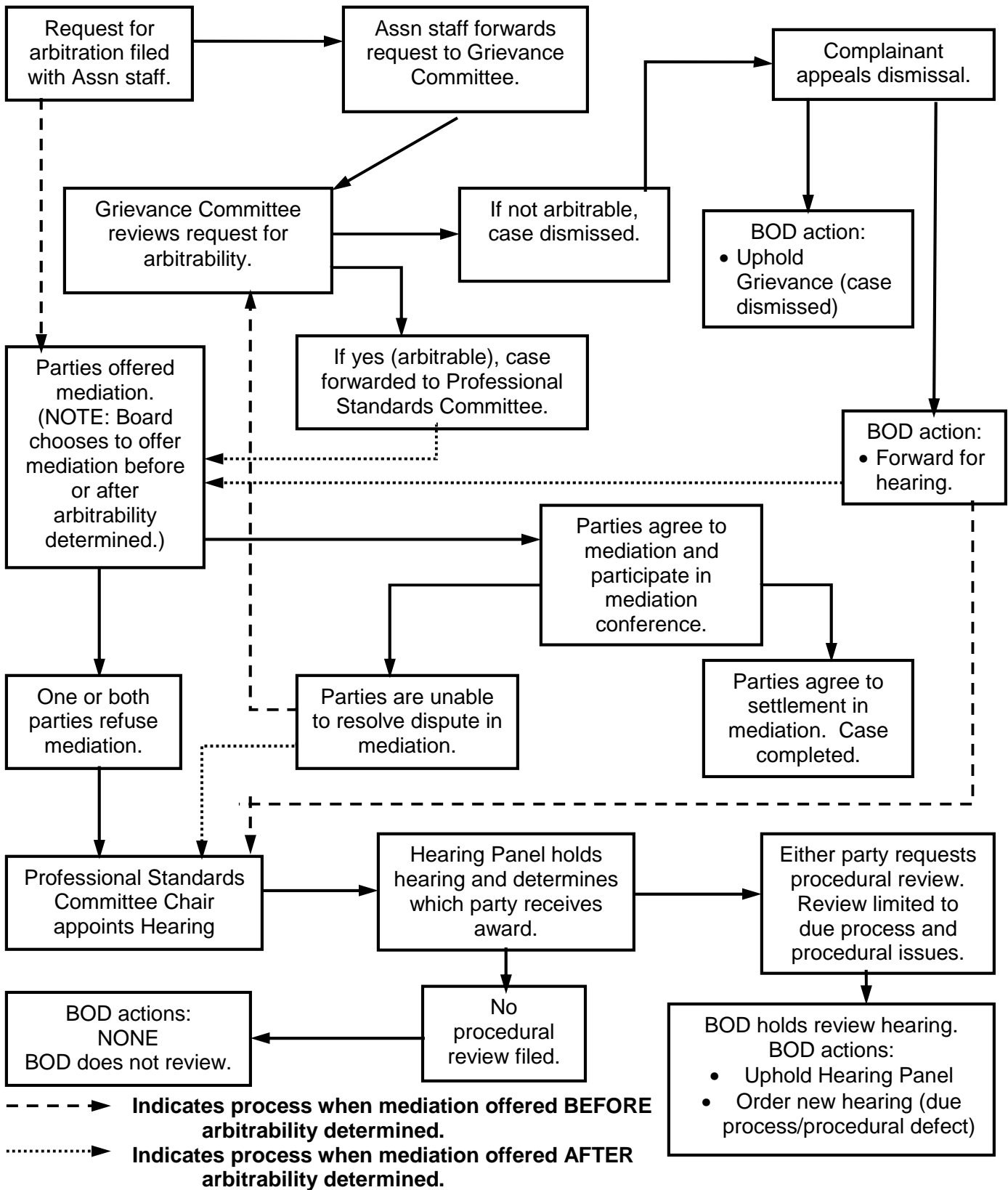


FINAL STAGE: Board of Directors (does not review at all except when a Request for Procedural Review ("appeal") is filed.)

The Ethics Enforcement Process



The Arbitration Process



The Hearing Panel **(Ethics or Arbitration)**

- The panel must have an odd number of members, minimum three, preferably five.
- If a REALTOR®-Associate or REALTOR® (non-principal) is a party, at least one panel member must be a REALTOR®-Associate or REALTOR® (non-principal).
- A member of a panel may be challenged by either the complainant or respondent. There are several “automatic” reasons for disqualification of a panel member. Those include:
 - ÷ The panel member is related to a party by blood or marriage.
 - ÷ The panel member is the employer of a party, a partner of a party or a business associate of a party.
 - ÷ The panel member is a party to this hearing or party/witness in another pending case with the same other party.
- The parties may also object to or challenge a panel member on the basis of the party’s belief that the panel member is biased against them or will not be an impartial panel member.
- The Association sends the parties a list of all members of the Professional Standards Committee, along with a “challenge form.” If a party wants to challenge a panel member, they insert the names of the members challenged and the reason why they challenge the member on the “challenge form” and return it to the Association. The Chair of the Professional Standards Committee rules on the challenges submitted.
- The Hearing Panel is drawn from the members of the Professional Standards Committee not challenged or otherwise disqualified.
- Remember, it’s up to you to disqualify yourself if you don’t feel that you can make an impartial judgment in the case. But, also remember that just knowing the party or having worked with the party in the past doesn’t necessarily mean you can’t be objective and make an impartial decision in the case.

Procedures at the Hearing

- After appropriate notices, the hearing is scheduled.

Amendment of Complaint – Ethics Hearing

- At or before an ethics hearing, the complaint can be amended to add Articles not cited by the Grievance Committee.
- After the Grievance Committee forwards the ethics complaint, but before the hearing, complainant may file an amended complaint. The hearing panel may disallow the filing of the amended complaint. This amended complaint may not simply re-insert Articles that were dismissed by the Grievance Committee.
- During the hearing, the complaint may be amended by either the complainant or the Hearing Panel. If this happens, the respondent can:
 - ÷ Proceed with the hearing.
 - ÷ Postpone the hearing not less than 15 days nor more than 30 days in the future.
 - ÷ Postpone the hearing and start the new hearing from the beginning with a new hearing panel.
- A complainant can withdraw their complaint at any time before the ethics hearing starts. If a complainant withdraws after the Grievance Committee has reviewed it, the complaint is sent back to the Grievance Committee. However, the Grievance Committee can proceed on their own as the complainant *only* if the Grievance Committee decides that a potential violation of the public trust has occurred. The public trust is defined in Article IV, Section 2 of the NAR Bylaws as one of the following:
 1. Demonstrated misappropriation of client or customer funds or property.
 2. Willful discrimination.
 3. Fraud resulting in substantial economic harm.
- If a complainant who is a member of the public does not appear at the hearing, the complaint is referred back to Grievance Committee to determine whether the Grievance Committee will substitute as complainant.
- If a REALTOR® complainant does not appear at the hearing, the REALTOR® complainant is advised that refusal to participate without a satisfactory reason may subject the REALTOR® complainant to a charge of a violation of Article 14 of the Code.

Order of Procedure

- The order of procedure for the hearing is cited below. The key issue is throughout the hearing is to provide due process. Part Five, CEAM, Order of Procedure, is as follows:

"Due process procedure: The hearing will proceed as follows:

- (1) Opening statement by Chairperson—cite authority to hear case and explain reason for hearing.
- (2) The complaint will be read into the record.
- (3) The testimony of all parties and witnesses will be sworn or affirmed. All witnesses will be excused from the hearing except while testifying.
- (4) The parties will be given an opportunity to present evidence and testimony in their behalf and they may call witnesses.
- (5) The parties and their legal counsel will be afforded an opportunity to examine and cross-examine all witnesses and parties.
- (6) The panel members may ask questions at any time during the proceedings.
- (7) The Chairperson may exclude any questions which he or she deems irrelevant or argumentative.
- (8) Each side may make a closing statement. The complainant will make the first closing statement and the respondent will make the final closing statement
- (9) Adjournment of hearing.
- (10) The Hearing Panel will go into executive session to decide the case."

- The actual scripts for conducting the hearing is contained in Part Five, CEAM: "Chairperson's Procedural Guide: Conduct of an Ethics Hearing." The Chairperson's Procedural Guide to an Arbitration Hearing is included in these materials.

Attendance at Hearing – Section 6, CEAM

- The persons who can attend the hearing are limited to those stated in the CEAM:

"Attendance at any hearing is limited to the parties and the parties' respective counsel and/or witnesses (witnesses are excused from the hearing except during their testimony); the Hearing Panel members (including alternates); Board staff and/or counsel, as deemed necessary; any court reporter, as requested; and, in any ethics proceeding, the REALTOR® principal, consistent with Part Two, Section 13(d) of this Manual. (Adopted 4/93)"
- This list is **exclusive**. For example, all of the following are **not** allowed to attend a hearing: "observers"; Grievance Committee members; team members, partners, spouses or assistants of the respondent or complainant (unless they are named in the complaint); additional brokers or managers in the firm other than the named broker or the designated REALTOR® of the respondent. The designated REALTOR® can name someone to appear in his/her place.
- In an ethics hearing only, the respondent may have REALTOR® counsel present as well as legal counsel.

Standards of Evidence and Proof; Burden of Proof

- The standard for the admission of evidence is relevance. Panels do not follow the rules of evidence of courts. If the evidence is relevant to the subject matter of the hearing, it should be admitted.
- The standard of proof in a hearing depends on the type of hearing that is being held.
- In an arbitration case, the standard of proof is a "preponderance" of the evidence. This means the greater weight of the evidence. Another way to describe this standard is that it is the "more likely than not" standard. Mathematically, it might be thought of as the "51% Rule"; i.e., if "51%" of the evidence is in favor of party A, then the award should be given to party A.
- In an ethics case, the standard of proof is "clear, strong and convincing" evidence. This is a higher standard than "preponderance." This standard is described as the proof "which will produce a firm belief or conviction" about the allegations of unethical conduct. This is not as high as "beyond a reasonable doubt," the standard used in criminal courts.
- The burden of proof is on the complainant to meet the standard of proof that applies in the case.

Conduct at the Hearing by Panel Members

- "Etiquette" at the Hearing includes the following:
- Panel members must maintain complete neutrality, impartiality and lack of bias.
- You should be very careful about things like body language, facial expressions and tone of voice to maintain a neutral stance.
- Be careful of the way you ask questions. Avoid questions that begin with "why" because these can often sound accusatory. For example, "Why didn't you just call the other agent?" "Why would you have done that?"
- Avoid leading questions. Leading questions are ones that call for a conclusion and leave the questioned person with nothing but "yes" or "no" as the answer. These can also sound accusatory. Leading questions often start out with "Isn't it true that ..." or a similar phrase.
- Watch when you ask questions. While the CEAM allows panelists to ask questions at any time, communicate with your Chair before the hearing about his/her preference of questions for panel members. Often, a Chair prefers to have cross examination from the opposing party before asking panel members if they have questions.
- Remember that the burden of proof of the case is on the **complainant**. Don't "jump in" to help a struggling complainant to make their case. While the truth is the objective, it is not the panel's job to "dig out" every possible fact. This could appear partial or biased toward the struggling party. Essentially, the panel should listen and take in the evidence presented, ask any clarifying questions necessary, and then decide the case on the basis of what was presented, regardless of whether it is a "good" or "bad" presentation.

Witnesses

- Witnesses are present in the hearing room only at the beginning of the hearing to be sworn and then during their testimony.
- The designated REALTOR® (principal) may remain in the hearing room throughout the hearing even if not joined in the complaint.
- Counsel, whether legal counsel or REALTOR® counsel, may not be called as witness unless their testimony is essential for due process.

Hearing Records – Section 6, CEAM

- The Association must either tape record the hearing or use a court reporter.
- The tape recording can be used only for purposes of appeal or procedural review and not for other proceedings, including ethics hearings.

Decisions in Ethics Hearings

Executive Session

- The decision in an ethics case must contain the following elements:
 1. Must be in writing
 2. Must have findings of fact.
 3. Must have a decision as to each Article charged.
 4. Should contain Hearing Panel's recommendation for discipline, if any.
 5. Form #E-11 in the CEAM is typically used.

Authorized Discipline (and administrative processing fees)

- The recommendation for discipline may contain one or more of the following types of discipline:
 1. Letter of Warning
 2. Letter of Reprimand
 3. Education
 4. Fine not to exceed \$5,000
 5. Probation for one year or less
 6. Suspension for not less than 30 days nor more than one year
 7. Expulsion from membership for period of one to three years
 8. Suspension or termination of MLS privileges.
- In addition, an administrative processing fee (if found in violation) not to exceed \$500 ("Court Costs") may be assessed. This fee can be assessed ONLY as policy of Association in every case where there has been a violation of the Code and NOT on a selective basis. The administrative processing fee is NOT discipline.

Disciplinary “Theory” 101

- When recommending discipline, the “punishment should fit the crime.”
- Discipline should be “progressive” over time and events. A person who has never been found in violation of the Code and whose conduct in the present case is of an “infractionary” nature should not be given a severe sanction such as a large fine or suspension. Likely, a letter or warning or reprimand will suffice. On the other hand, a member who has been found in violation of the Code several times in the recent past and/or whose case has serious breaches of the Code, should be given more than the lighter sanctions of warning or reprimand.
- The panel should review a member’s file **AFTER** the panel has found a violation of the Code. That review of the file will assist the panel in determining the “progressive” nature of discipline.
- The NAR CEAM has excellent guidance in its “Sanctioning Guidelines” contained in Appendix VII to Part Four, CEAM. The Sanctioning Guidelines are included below.

Exercise – Disciplinary Actions and Sanctioning Scenarios

Instructions: Review each of the situations below in which the REALTOR® has been found in violation of the Code. What discipline/sanctions would you think appropriate in each situation? Review the NAR Sanctioning Guidelines (follows the exercise) before completing this exercise. Authorized sanctions are on the previous page.

1. REALTOR® Bob is found in violation of Article 16 because he advertised a listing in the local paper that had expired. The listing expired on a Friday, March 1 and the property was advertised on the Sunday, March 3. Bob’s secretary placed the ad on Wednesday, February 27 and merely overlooked the expiration date. This is the first violation of the Code for Bob in the 10 years he has been a member.

What discipline would you recommend for Bob?

2. REALTOR® Sue was found in violation of Articles 2 and 12 of the Code. Sue failed to disclose to the buyer that she knew the roof of the property sold leaked, even though the seller had not admitted the roof leak on the seller disclosure statement. Sue has no previous violations of the Code in the 2 years she has been a member.

What discipline would you recommend for Sue?

3. REALTOR® Alice was found in violation of Article 8 of the Code. It was determined that Alice borrowed escrow account funds for her personal use. She replaced the escrow account funds within 1 week of having borrowed them. Alice had a previous violation of the Code 3 years ago related to a violation of Article 2.

What discipline would you recommend for Alice?

NOTE: Guidance as to the “appropriate” sanctions is at the end of these materials.

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Appendix VII to Part Four
Sanctioning Guidelines

The Code of Ethics is designed to establish a public and professional consensus against which the practice and conduct of REALTORS® and REALTOR-ASSOCIATE®s may be judged. REALTORS® and REALTOR-ASSOCIATE®s in joining a Board signify their intention to abide by the Code and thereby enhance the public and professional image of themselves and all other REALTORS®. Adherence to the Code is the first great bond between REALTORS® and REALTOR-ASSOCIATE®s throughout the country, and is an obligation voluntarily accepted by them to ensure high standards of professional conduct to serve the interests of their clients and customers (from the Introduction to the Code of Ethics and Arbitration Manual, NATIONAL ASSOCIATION OF REALTORS®, 2005 edition).

Local Boards of REALTORS®, supported by the state and National Associations, have the awesome responsibility of fostering awareness, understanding, and appreciation for the duties and obligations the Code imposes on those who accept it as their guide to professionalism. A corollary duty of Boards is to receive and resolve complaints alleging potentially unethical conduct by REALTORS®.

The REALTOR® organization is firmly committed to comprehensive education of REALTORS® and the public about the Code and the protections it affords, and also to vigorous, fair, and uniform enforcement when complaints are brought against members. The Code of Ethics and Arbitration Manual (Manual) details policies and procedures governing enforcement efforts.

Code enforcement achieves a number of goals. Where REALTORS® are wrongly or mistakenly charged with unethical conduct, the hearing process provides personal and professional vindication. Where violations are determined, the hearing process educates members about their professional obligations and serves as a meaningful deterrent to future violations. The Introduction goes on to point out that the ethics hearing process “. . . is educational in that it raises the consciousness of members to the meaning and significance of the Code” and that “many ethics violations occur inadvertently or through ignorance, and the hearing procedure serves as an effective educational tool.”

Allegations of unethical conduct are often understandably viewed by respondents as threats to their professional and personal reputations. This can result not only in the mounting of vigorous defenses but also, at times, to threats of legal challenge should a violation be determined and discipline imposed. Given that membership confers valuable rights, Boards need to strictly adhere to their established procedures when considering potential ethics violations. This caution ensures that the rights of the parties will be observed and that legal exposure of Boards will be minimized.

At the same time, well-founded caution should not be confused with reservation, reluctance, or hesitancy. The Code’s duties become aspirations at best, and potentially meaningless, if not enforced, and enforced with vigor and determination.

Fundamental to fair and consistent Code enforcement is reasonable and judicious use of discipline, as both an educational device and as punishment. The Manual authorizes a wide variety of sanctions that may be imposed for ethics violations and for violations of other membership duties. These range from simple letters of warning to expulsion from REALTOR® membership. Between these extremes are mandatory attendance at remedial educational sessions, fines, probation, and suspension. These sanctions, and the circumstances under which they may be imposed, are discussed in detail in the Manual.

The National Association does not recommend specific discipline for certain offenses, or for violations of particular Articles of the Code. This is in deference to the wisdom and autonomy of Hearing Panels privy to the details of complaints coming before them; in recognition of the fact that no two complaints are identical; and in view of the fact that the details of each hearing, including the experience of respondents, their history of prior violations, and mitigating or extenuating circumstances, may all come into play in determining an appropriate penalty. At the same time, there are key points to be considered with respect to discipline.

- Discipline that can be imposed is strictly limited to those forms authorized in the Manual.

- Discipline should be commensurate with the offense. Unintentional or inadvertent violations should result in penalties designed to educate respondents as to the conduct expected of them as REALTORS®. Only authorized forms of discipline may be utilized.
- Discipline should be progressive. The disciplinary emphasis on violations by new members or by longstanding members with no history of unethical conduct should be primarily educational. Repeated or subsequent violations should be addressed with more serious forms of discipline including substantial fines, suspension, and termination of membership. (See the section of this Appendix entitled “Progressive Discipline” for a more detailed discussion of progressive discipline).
- A “gray area” can exist with respect to “first time violations” that are clearly not the result of ignorance or mistake but rather demonstrate flagrant disregard for the Code’s obligations. While the educational aspect of Code enforcement cannot be disregarded, the fact that the Code exists to protect the public must also be seriously considered in determining commensurate discipline.
- Mitigating or extenuating circumstances should be considered in determining appropriate discipline. The fact that a respondent recognized or acknowledged inappropriate or unethical conduct, or took steps to remediate or minimize harm or injury that may have resulted from the respondent’s conduct, should be considered in determining appropriate discipline.
- Respondents’ records of earlier violations (or, conversely, the fact that they have not violated the Code in the past) can be considered in determining appropriate discipline. Hearing Panels cannot consider past violations in deciding whether the conduct currently complained of violated the Code.

Crafting appropriate, meaningful discipline can challenge panels that have concluded that the Code has been violated. This discussion is offered as guidance, rather than as a hard and fast template, to assist panels in meeting their key role in ensuring the Code’s viability and vitality through vigorous and evenhanded enforcement. Suggested guidelines that can be modified locally so long as the discipline proposed is consistent with the permissible forms authorized in the National Association’s Code of Ethics and Arbitration Manual, can be found in the section of this Appendix entitled “Disciplinary Guidelines.”

Progressive Discipline

Discipline imposed for violations of the Code of Ethics or for violations of other membership duties should be progressive, that is discipline should increase incrementally for subsequent violations. The disciplinary emphasis where first time violations occur should be primarily educational. Repeated or subsequent violations should result in more serious forms of discipline being utilized, including substantial fines, suspension, and termination of membership. At the same time, a gray area can exist where a first time violation is not attributable to ignorance or oversight but rather to blatant disregard for the Code and its obligations. While the educational emphasis of Code enforcement cannot be disregarded, the fact that the Code exists to protect the public must be carefully considered in determining appropriate discipline. Two contrasting examples are provided to illustrate these points.

Example 1: REALTOR® A, who had recently earned her real estate license, was found to have violated Article 12 for advertising a listed property without disclosing her status as either a REALTOR® or as a real estate licensee. At the hearing, REALTOR® A acknowledged her oversight and it was clear to the Hearing Panel that the violation was inadvertent and unintentional. The panel concluded that a letter of reprimand and attendance at a three (3) hour Code of Ethics update session was appropriate.

Two months later, REALTOR® A was charged with a nearly identical violation. After concluding that she had, in fact, violated Article 12, the Hearing Panel was given access to REALTOR® A’s files to see whether REALTOR® A had previously violated the Code so that appropriate discipline could be recommended. It was the conclusion of the Hearing Panel that a second violation of the same Article, occurring just months after the first violation, warranted more serious discipline. REALTOR® A was fined \$250 and required to attend a full day ethics education program. (Revised 5/03)

Three months later, REALTOR® A was again found to have violated Article 12. The Hearing Panel was then given access to REALTOR® A’s file and, upon learning of the two (2) prior violations in less than a year, recommended a \$1,000 fine. (Revised 5/03)

Example 2: REALTOR® B, who had recently received his real estate license, was found to have violated Article 4 for failing to disclose to his seller-client that the purchaser that REALTOR® B had procured was, in fact, REALTOR® B's wife. In determining appropriate discipline, the Hearing Panel considered REALTOR® B's limited experience in the real estate business and the fact that this was the first time that REALTOR® B had been found in violation of the Code. The Hearing Panel also considered that REALTOR® B's failure to disclose had not been inadvertent or unintentional and that REALTOR® B had knowingly concealed from his client a key fact that might have influenced the client's decision to accept the offer from REALTOR® B's wife. Based on the seriousness of the violation and REALTOR® B's conscious disregard for his disclosure obligation, the Hearing Panel recommended a \$2,500 fine and retaking the ethics orientation required for new members. (Revised 5/03)

Disciplinary Guidelines

Code enforcement achieves a number of important goals. Where REALTORS® have been wrongly or mistakenly charged with unethical conduct, the hearing process provides personal and professional vindication. Where violations are determined, the hearing process and resulting discipline educates members about their professional obligations and serves as a meaningful deterrent to future violations.

Determining that a violation of one or more Articles has occurred is only a part of a Hearing Panel's job. Equally important is crafting discipline commensurate with the offense. Panels will want to consider that many violations occur due to lack of familiarity with the Code and its obligations, inexperience, oversight, or as unintentional mistakes. In such cases, the primary purpose of discipline should be educational to ensure that similar violations do not occur in the future. In other cases, violations can occur because of knowing disregard for the Code and its duties. In such cases, greater emphasis will be placed on the punitive nature of discipline.

Factors Hearing Panels should consider in determining appropriate discipline include, but are not necessarily limited to:

- (1) The nature of the violation.
- (2) Harm caused by the violation. Was the violation a minor mistake causing little or no harm or, alternatively, was a client, customer, member of the public, or another REALTOR® harmed?
- (3) Was the violation inadvertent or unintentional or, conversely, was it the result of knowing disregard for the Code's obligations?
- (4) How much real estate experience did the violator have? Did he, or should he, have known better?
- (5) Has the violator been found in violation of the Code previously? How often? How recently? Is the current violation related or similar to earlier violations?
- (6) Are there mitigating or extenuating circumstances that should be considered in determining appropriate discipline?
- (7) Did the violator acknowledge the violation? Did the violator express remorse or contrition?
- (8) Are there other factors that ought to be considered?

With these questions in mind, panels can be guided by (but are not bound by) the following guidelines which may be modified locally at the discretion of each local Board.

First violation example #1 (or first violation within three [3] years):

- violation considered relatively minor, or
- little or no harm or injury caused to others, or
- violation resulted from ignorance or misunderstanding

Possible discipline:

- letter of warning
- fine of \$200 or less
- attendance at relevant education session
- any combination of the above

First violation example #2 (or first violation within three [3] years):

- violation considered relatively serious, or
- some harm or injury caused to others, or
- violation resulted from disregard for the Code's obligations

Possible discipline:

- letter of reprimand
- fine of \$1,000 or less
- attendance at relevant education session(s)
- any combination of the above

First violation example #3 (or first violation within three [3] years):

- violation considered very serious, or
- substantial harm or injury caused to others, or
- violation resulted from knowing disregard of the Code's obligations

Possible discipline:

- letter of reprimand
- fine of \$2,000 or less
- attendance at relevant education session(s)
- probation*
- suspension for ninety (90) days or less
- any combination of the above

Repeat violations example #1 (within three [3] years):

- current violation considered relatively minor, or
- little or no harm or injury caused to others, or
- violation resulted from ignorance or misunderstanding

Possible discipline:

- attendance at relevant education session(s) or course
- fine of \$1,000 or less
- probation for three (3) months or less*

**Section 1, Definitions Relating to Ethics, establishes that "Probation" means that another form of discipline recommended by the Hearing Panel will be held in abeyance for a stipulated period of time which may not exceed one (1) year. Any subsequent finding of a violation of the Code of Ethics during the probationary period may, at the discretion of the Board of Directors, result in the imposition of the suspended discipline. Absent any subsequent findings of a violation during the probationary period, both the probationary status and the suspended discipline shall be considered fulfilled, and the record shall reflect the fulfillment. (Revised 5/03)*

Repeat violations example #2 (within three [3] years):

- current violation considered relatively serious, or
- some harm or injury caused to others, or
- violation resulted from disregard for the Code's obligation

Possible discipline:

- attendance at relevant education session(s) or course
- fine of \$2,000 or less*
- probation for six (6) months or less**
- suspension for three (3) months or less*
- any combination of the above

Repeat violations example #3 (within three [3] years):

- violation considered very serious, or
- substantial harm or injury caused to others, or
- violation resulted from knowing disregard for the Code's obligation

Possible discipline:

- attendance at relevant education session(s) or course
- fine of \$3,500 or less*
- probation for one (1) year or less**
- suspension for six (6) months or less
- any combination of the above

Important Note: These are not sentencing rules or requirements, but rather simply suggestions to guide Hearing Panels in determining appropriate discipline based both on the current violation and the violator's previous record of ethical conduct.

(Revised 5/03)

**More serious forms of discipline (including fines of up to \$5,000, suspension from membership for up to one [1] year, or termination of membership for up to three [3] years) may be appropriate in cases of very serious violations or in cases of repeated violations. (Revised 5/02)*

***Section 1, Definitions Relating to Ethics, established that "Probation" means that another form of discipline recommended by the Hearing Panel will be held in abeyance for a stipulated period of time which may not exceed one (1) year. Any subsequent finding of a violation of the Code of Ethics during the probationary period may, at the discretion of the Board of Directors, result in the imposition of the suspended discipline. Absent any subsequent findings of a violation during the probationary period, both the probationary status and the suspended discipline shall be considered fulfilled, and the record shall reflect the fulfillment. (Revised 5/03)*

Arbitration and Procuring Cause

Arbitrators Decision - Executive Session

- After the hearing, the parties are dismissed and the panel goes into executive session to reach a conclusion and make an award.
- There are no predetermined rules as to a particular decision. Panel should be guided by the CEAM “Arbitration Guidelines” (discussed below).
- Form of Award
 1. Includes ONLY the amount awarded.
 2. Does NOT include findings of fact or rationale.
 3. Cannot be greater than amount requested.
 4. Cannot include “punitive” awards or damages.
 5. Must be signed by the arbitrators or at least a majority of the arbitrators.
 6. Dissenting panel members may NOT file dissenting opinion and may NOT discuss the award with any of the parties.
 7. Note the difference in an ethics hearing where dissenting panel members MAY file dissenting opinions.

Procuring Cause

General Legal Definition: *Black’s Law Dictionary, Fifth Edition:*

- “The proximate cause; the cause originating a series of events which, without a break in their continuity, result in the accomplishment of the prime object. The inducing cause; the direct or proximate cause. Substantially synonymous with “efficient cause.”
- Within this definition, the second phrase aptly summarizes the basic concept of procuring cause: “the cause originating a series of events which, without a break in their continuity, result in the accomplishment of the prime object.” In the REALTOR® system, the “prime object” is a sale or lease of property.

“Arbitration Guidelines (Suggested Factors for Consideration by a Hearing Panel in Arbitration)”, Appendix II to Part Ten of the CEAM

- The NAR CEAM covers procuring cause extensively in the Arbitration Guidelines.
- The Guidelines set out six “Factors” for panels to consider, as follows:

1. Factor #1: No predetermined rule of entitlement

Associations may not have a predetermined rule of entitlement to commission in a procuring cause case, whether written, unwritten or simply “understood.” For example, before approximately 1970, some associations declared by “policy” that the “Threshold Rule” (first person to show the property) was the determining factor in a procuring cause dispute. Today, an Association may not have such a rule.

2. Factor #2: Arbitrability and appropriate parties

This factor discusses what disputes are appropriate for arbitration and the necessary parties. Since the Grievance Committee generally disposes of these issues, it is unlikely that issues about these matters will come up at a hearing.

3. Factor #3: Relevance and admissibility

This factor confirms the standard for admission of evidence as previously discussed.

4. Factor #4: Communication and contact – abandonment and estrangement

Abandonment and estrangement are two critical issues often brought up in procuring cause cases. They will be discussed in more detail below.

5. Factor #5: Conformity with state law

This factor deals with the basic nature of arbitration matters as relying on underlying state law, primarily the concepts of the Uniform Arbitration Act as adopted in various states.

6. Factor #6: Consideration of the entire course of events (“The Questions”)

This factor is related to Factor #1. Not only is there no predetermined rule of entitlement in a procuring cause case, the panel is directed to look at all of the facts and circumstances in the case and **NOT** decide the case on the basis of any one factor. To that end, the Arbitration Guidelines include a detailed series of questions that the panel can ask and consider in its disposition of the case.

You should review the Arbitration Guidelines before you sit as a panel member in an arbitration case. They are attached to these Tips.

Summary of General Procuring Cause Concepts

- Uninterrupted series of events
 - ÷ The concept of the “uninterrupted series of events” might be likened to an “unbroken chain of events.” A chain has links. Think of the basic nature of procuring cause as a chain in which no links have been broken.
 - ÷ Links in the chain might be broken in a number of ways. If a link is broken, then the person starting the chain in which the link was broken will not be the procuring cause of the sale. Two of the important ways a link may be broken are abandonment and estrangement.

- Abandonment
 - ÷ Abandonment is characterized by some lack of contact by the agent with the buyer for some period of time. The panel decides whether the conduct constitutes abandonment. There is no set period of time of lack of contact that is considered abandonment. The panel decides whether the lack of contact by the agent for the period of time in the case before them constitutes abandonment.

- Estrangement
 - ÷ Estrangement has a very specific focus. If a buyer says only that he/she “prefers” to work with Agent A rather than Agent B, this statement of “preference,” is not automatically conclusive proof of estrangement. While a buyer may choose to work with any agent, the buyer’s choice of agent is not necessarily determinative of which person claiming the commission is to be paid.
 - ÷ Estrangement focuses on the conduct or lack of conduct of Agent B that “caused the purchaser to terminate the relationship.” The key question is “what did Agent B do or fail to do that pushed the buyer to Agent A?”

Common Misconceptions about Procuring Cause

- Through the years, several misconceptions about procuring cause have developed and often continue to be cited as the “rule” in deciding these cases. Remember, no one rule determines the case. The following three misconceptions are sometimes cited by parties in an arbitration hearing as being the “trump card” for their position. They are **NOT** a “trump card!”

- The Threshold Rule

This “rule” might be loosely defined as bringing the buyer “across the threshold” of the property. It also might be known as the “first showing rule.” Parties who are not familiar with the procuring cause guidelines will sometimes overemphasize who showed the property first as being dispositive of the case. Alternatively, parties sometimes argue that, because the opposing party didn’t show the property, the opposing party should not be entitled to the commission. While showing is an important fact, whether a party did or did not show the property, and/or whether a party was first to show the property, are not the deciding facts in the case.

- The Contract Rule

This “rule” argues that the person who writes the successful offer to purchase automatically is entitled to the commission. Like the Threshold Rule, such is not the case.

- The Agency Rule

The “Agency Rule” is usually presented as the person who has an agency agreement (usually exclusive) with the buyer is entitled to the commission. While an important fact to be considered, the existence of an agency agreement with the buyer is one of many facts to be considered. It is possible that a buyer’s agent may not be entitled to the commission in dispute in the procuring cause arbitration and still be paid a commission under the terms of the agency agreement that has been entered into by the buyer.

“It should also be considered that questions of representation and entitlement to compensation are separate issues.”

“Agency relationships, in and of themselves, do not determine entitlement to compensation. The agency relationship with the client and entitlement to compensation are separate issues.”

- *Code of Ethics and Arbitration Manual, Appendix II to Part Ten, Arbitration Guidelines*

Agency and Procuring Cause are two different issues and generally deal with two different contracts involved in the transaction.

The two different contracts involved when discussing agency and procuring cause are typically as follows:

The Buyer Representation Agreement: The parties to this agreement are the buyer and Buyer's Broker/Agent.

The "Cooperative Compensation Contract": This contract is based on the Listing Broker's offer of compensation in the MLS. That offer that a listing broker makes can be paraphrased as "I, Listing Broker, promise to pay you, cooperating brokers in my MLS, the offered cooperative compensation if you become the procuring cause of the sale." The parties to the "Cooperative Compensation Contract" are the Listing Broker and Cooperating Broker(s)

Parties are different in the two different contracts.

The contract at issue in an arbitration case is the cooperative compensation contract, not the Buyer Representation Agreement.

Thus, the Buyer Representation Agreement does not and cannot control the result of the Cooperative Compensation Contract dispute because the parties in the two contracts are different parties.

How Many Procuring Causes are there??

- The short answer to this question is "one."
- The question and answer is intended to focus on the fact that arbitration hearing panels should not generally split awards between the parties. In general, the panel should award the commission on an "all or nothing" basis.
- The CEAM does permit a panel to split an award between the parties if the panel decides that the transaction would have occurred only because of the efforts of both parties.

Code Violations, License Law Violations and Procuring Cause

An issue that arises in arbitration hearings is whether possible violations of the Code of Ethics, the license law, the agency disclosure laws/rules of a state or other violations of law can be used in determining entitlement to the commission.

Factor #3 of the Arbitration Guidelines states:

“Arbitration Hearing Panels are called on to resolve contractual questions, not to determine whether the law or the Code of Ethics has been violated. An otherwise substantiated award cannot be withheld solely on the basis that the Hearing Panel looks with disfavor on the potential recipient’s manner of doing business or even that the panel believes that unethical conduct may have occurred. . . . At the same time, evidence or testimony is not inadmissible simply because it relates to potentially unethical conduct. While an award (or failure to make a deserved award) cannot be used to “punish” a perceived “wrongdoer”, it is equally true that Hearing Panels are entitled to (and fairness requires that they) consider all relevant evidence and testimony so that they will have a clear understanding of what transpired before determining entitlement to any award.”

A panel member should NOT make a decision to award the commission to a party based primarily on the fact that the other party potentially violated the Code. An example of this is a potential violation of Article 16, Standard of Practice 16-13. Standard of Practice 16-13 requires that, before providing a substantive service such as writing a purchase offer, the REALTOR® must ask the prospect whether the prospect has an exclusive representation agreement with another REALTOR®. Assume a panel member votes to award a commission to REALTOR® B on the basis of this logic: “REALTOR® A forgot to ask whether the buyer had a buyer agency agreement with another REALTOR® and therefore I will not award the commission to REALTOR® A but give it to REALTOR® B.” This reasoning is flawed. The panel member should NOT refuse to award the commission to REALTOR® A primarily on the basis of REALTOR® A’s failure to ask “the question.”

A similar situation arises with agency disclosure rules. For example, assume REALTOR® A forgot to give a disclosure about dual agency that is required law. It is incorrect for a panel member to vote to refuse to award the commission to REALTOR® A primarily because they failed to give a proper agency disclosure. However, it is possible that REALTOR® A’s failure to give a proper agency disclosure may have caused the prospect to terminate their relationship with REALTOR® A and seek out REALTOR® B, with whom they wrote a purchase offer. If this is the case, REALTOR® A’s conduct might be seen as an estrangement of the prospect and thus the panel member may decide not to award the commission to REALTOR® A because of the estrangement and NOT because of the potential violation of the agency disclosure laws/regulations.

The Panel Member's Quiz

- T F 1. Actions of a hearing panel could form the basis for an antitrust lawsuit against the association.
- T F 2. A hearing panel member may ask questions at any time.
- T F 3. A hearing is held on the basis of a complaint citing Articles 1 and 9 of the Code. During the executive session, the hearing panel decides that Article 2 was also violated and adds Article 2 to the complaint. The hearing panel has authority to add Article 2 under these circumstances.
- T F 4. If there is an objection by a party to the introduction of evidence, the hearing panel rules on whether the evidence should be allowed.
- T F 5. A hearing panel should meet in advance of the hearing to go over the case so that all panel members are properly prepared.
- T F 6. The use of leading questions is an acceptable method for a panel member to conduct cross-examination.
- T F 7. If a complainant who is a member of the public appears not to be addressing one or more of the Articles cited in the complaint, the chair of the hearing panel should ask the respondent the appropriate questions to address the Article.
- T F 8. In an executive session, a hearing panel decides they need to see the HUD1 closing statement for the transaction involved in the complaint. Because it was not in the documentation they had received in advance or at the hearing, the chair of the hearing panel calls the title company closing agent and asks that a copy of the closing statement be faxed to the panel. Is this action acceptable?
- T F 9. A hearing panel in an arbitration case may refer potential violations of the Code that it learns of in the hearing to the Grievance Committee to process as an ethics complaint.
- T F 10. If a hearing panel member receives a call from the non-prevailing party in an arbitration case who requests information about the reasons for the panel's decision, the hearing panel member can objectively answer the questions of the party calling.

Note: Answers to Quiz are on at the end of these materials.

Panel Member Do's and Don'ts

DO's:

- Ⓟ **DO** Arrive on time for the hearing.
- Ⓟ **DO** Read any information given to you in advance and be prepared for the hearing.
- Ⓟ **DO** Make sure the surroundings are appropriate, neutral and confidential. (Make sure there is balance between the parties and panel in setting up the seating arrangements. Keep the door closed during the hearing. Allow only authorized persons in the room during the hearing.
- Ⓟ **DO** Dress in appropriate business attire for your area.
- Ⓟ **DO** Show appropriate courtesy and respect for the parties and your fellow panelists.
- Ⓟ **DO** Disclose any conflicts of interest that might arise before or during the hearing.
- Ⓟ **DO** Keep an open mind about the information you hear.
- Ⓟ **DO** Be a great listener.
- Ⓟ **DO** Give your full attention to the person talking.
- Ⓟ **DO** Be impartial and neutral until you are ready to decide the case in the executive session.
- Ⓟ **DO** Give each party every opportunity to be fully and fairly heard.
- Ⓟ **DO** Give each party their "day in court."
- Ⓟ **DO** Address the parties in the same way. Use surnames for both or first names for both. Do not use a surname for one party and a first name for the other.
- Ⓟ **DO** Maintain appropriate decorum. The hearing is like court. Don't eat, drink or smoke. Don't read newspapers, magazines or work on other documents or files. Give your full attention to the proceedings at hand.
- Ⓟ **DO** Make sure that witnesses are excused after being sworn in and that they are in the hearing room only during the time of their testimony.

Panel Member Do's and Don'ts

DON'Ts:

- Ⓟ **DON'T** Have any communication about the case with either party before or after the hearing.
- Ⓟ **DON'T** Have any communication about the case with any other panel member before the hearing.
- Ⓟ **DON'T** "Research" a case before the hearing by gathering any additional information other than what has been sent to you.
- Ⓟ **DON'T** Pre-judge a case when reading any materials sent to you before the hearing.
- Ⓟ **DON'T** Show bias or prejudice by your body language (such as nodding your head; giving approving or disapproving facial expressions.)
- Ⓟ **DON'T** Use leading questions to reach a conclusion.
- Ⓟ **DON'T** Assist a struggling party in making his/her point or his/her case by asking "helpful" questions.
- Ⓟ **DON'T** Go beyond the general inquiries of the parties in your asking questions. Remember, it is the job of the **complainant** to prove his/her case – **not you!!**
- Ⓟ **DON'T** Insert ethics issues into arbitration cases. Arbitration is about procuring cause and who is to receive the award. It's not about whether the Code was violated in the course of determining who gets the money.
- Ⓟ **DON'T** Wear any identifying pins or badges, including company name badges or designation pins, other than a REALTOR® pin.
- Ⓟ **DON'T** Badger parties or witnesses. Accept the answer given and move on to the next question.
- Ⓟ **DON'T** Ever belittle, demean or shame a party or witness. This can happen by your words or by your tone of voice. Always be careful to keep your words and tone of voice as neutral as possible.

SUMMARY OF KEY CHANGES FOR 2010

NOTE: The REALTOR® Code of Ethics and the *Code of Ethics and Arbitration Manual* are copyrighted by the National Association of REALTORS®. The quotations below are from the minutes of the Professional Standards Committee of the National Association of REALTORS® as later adopted by the NAR Board of Directors. Bruce Aydt has compiled these excerpts and written any introductory or explanatory comments that are included here.

Changes to the Code of Ethics and Standards of Practice

#1 – Amendment to Article 11

That Article 11 of the Code of Ethics be amended as follows (underscoring indicates additions):

The services which REALTORS® provide to their clients and customers shall conform to the standards of practice and competence which are reasonably expected in the specific real estate disciplines in which they engage; specifically, residential real estate brokerage, real property management, commercial and industrial real estate brokerage, land brokerage, real estate appraisal, real estate counseling, real estate syndication, real estate auction, and international real estate.

REALTORS® shall not undertake to provide specialized professional services concerning a type of property or service that is outside their field of competence unless they engage the assistance of one who is competent on such types of property or service, or unless the facts are fully disclosed to the client. Any persons engaged to provide such assistance shall be so identified to the client and their contribution to the assignment should be set forth.

Comments:

This change to Article 11 adds “land brokerage” to the specified disciplines of real estate. Article 11 is about competence in the “discipline” of real estate in which the REALTOR® engages. After a proposal from the REALTORS® Land Institute, the Professional Standards Committee, Board of Directors and NAR Delegate Body added the discipline of “land brokerage” to the listed disciplines of real estate under Article 11. The belief expressed was that “land brokerage,” whether a residential or commercial development or the sale of farm or ranch land, had unique characteristics that distinguished it from a garden variety sale of a home or lease of a space in a strip shopping center.

#2- New Standard of Practice 3-9

That a new Standard of Practice related to Article 3 be adopted reading as follows:

REALTORS® shall not provide access to listed property on terms other than those established by the owner or the listing broker.

Comments:

This is a new Standard of Practice under Article 3 and was adopted following discussion of a proposal and concerns expressed by the Illinois Association of REALTORS®. This is intended to make a violation of the Code any practices such as giving a buyer access to listed property without being accompanied to the property because the REALTOR® gave the prospect the code to a combination lockbox or otherwise. It is also possible that providing unauthorized access by means of giving the prospect an electronic box code or key may violate the common lockbox rules of an Association or MLS. But, even if not covered by other rules, this practice is now a violation of the Code under this new Standard of Practice 3-9.

#3 – Amendment to Standard of Practice 3-2

That Standard of Practice 3-2 be amended as follows (underscoring indicates additions, strikeouts indicate deletions):

~~REALTORS® shall, with respect to offers of compensation to another REALTOR®, timely communicate~~ To be effective, any change of in compensation offered for cooperative services must be communicated to the other REALTOR® prior to the time ~~such that~~ REALTOR® ~~produces~~ submits an offer to purchase/lease the property.

Comments:

Standard of Practice 3-2 is amended to clarify the language at the beginning of the Standard and to be more specific about the time beyond which a listing broker may not unilaterally change the offer of compensation. Standard of Practice 3-2 has always been intended to be a “marker” for hearing panels in arbitration cases to determine after what time a listing broker may not unilaterally change an offer of compensation to cooperating brokers. The previous language used the word “produces” an offer to purchase. The word “submits” replaces the word “produces” because the Professional Standards Committee believed that the word “submits” is a more concrete event that can be seen by both brokers in the transaction. In addition, “submits” is used in several other Standards of Practice in the Code, such as Standards of Practice 1-6 and 1-7. A common way to communicate changes in cooperative compensation in a residential transaction is via the MLS system in which the property listing appears and of which the cooperating broker is a member.

#4 – Amendment to Standard of Practice 11-1

That Standard of Practice 11-1 be amended as follows (underscoring indicates additions):

Standard of Practice 11-1

When REALTORS® prepare opinions of real property value or price, other than in pursuit of a listing or to assist a potential purchaser in formulating a purchase offer, such opinions shall include the following unless the party requesting the opinion requires a specific type of report or different data set:

- 1) identification of the subject property*
- 2) date prepared*
- 3) defined value or price*
- 4) limiting conditions, including statements of purpose(s) and intended user(s)*
- 5) any present or contemplated interest, including the possibility of representing the seller/landlord or buyers/tenants*
- 6) basis for the opinion, including applicable market data*
- 7) if the opinion is not an appraisal, a statement to that effect.*

Comments:

The addition to this Standard of Practice comes as a result of recommendations from the Broker Price Opinion Work Group of the National Association that met and made recommendations in June, 2009. Standard of Practice 11-1 previously required the statement of seven qualifications when a REALTOR® gives an opinion of price or value when not in pursuit of a listing or in assisting a purchaser in formulating a purchase offer. The amendment to the Standard of Practice expands the events under which the REALTOR® is not required to use or state the seven qualifications by not requiring the qualifications if the party requesting the opinion requires a specific type of report or different data set. It was commonly reported that asset management companies dealing in foreclosed property may request broker price opinions from REALTORS® without possibility of getting a listing and requesting that the BPO be given to them on their specific form/report. Under these circumstances, it was felt that requiring that the REALTOR® add the seven qualifications was not necessary.

#5 – Amendment to Standard of Practice 12-5

That Standard of Practice 12-5 be amended as follows (underscoring indicates additions):

REALTORS® shall not advertise nor permit any person employed by or affiliated with them to advertise real estate services or listed property in any medium (e.g., electronically, print, radio, television, etc.) without disclosing the name of that REALTOR®'s firm in a reasonable and readily apparent manner.

Comments:

The addition of the phrase “real estate services or” to the existing Standard of Practice 12-5 was intended to make sure that the Code required that any advertising of real estate matters by a REALTOR® contain the name of the REALTOR®'s firm in a reasonable and readily apparent manner. While many state license laws cover this point, not all license laws are clear on this point. The Code did not previously require the firm name in advertising of a REALTOR® of a general nature not involving a listing except on their website under Standard of Practice 12-9. Now, with this amendment, all real estate related advertising, regardless of medium or content, must contain the REALTOR®'s firm name in a reasonable and readily apparent manner.

#6 – Amendment to Standard of Practice 15-2

That Standard of Practice 15-2 be amended as follows (underscoring indicates additions):

The obligation to refrain from making false or misleading statements about competitors, competitors' businesses and competitors' business practices includes the duty to not knowingly or recklessly publish, repeat, retransmit, or republish false or misleading statements made by others. This duty applies whether false or misleading statements are repeated in person, in writing, by technological means (e.g., the Internet), or by any other means. (Adopted 1/07)

Comments:

See comments under new Standard of Practice 15-3.

#7- New Standard of Practice 15-3

That a new Standard of Practice related to Article 15 be adopted reading as follows:

The obligation to refrain from making false or misleading statements about competitors, competitors' businesses and competitors' business practices includes the duty to publish a clarification about or to remove statements made by others on electronic media the REALTOR® controls once the REALTOR® knows the statement is false or misleading.

Comments:

Both the clarifications to Standard of Practice 15-2 and this new Standard of Practice 15-3 deal with a REALTOR®'s obligation to correct false or misleading statements made by persons other than the REALTOR® in media that the REALTOR® controls. The example used in developing this Standard of Practice dealt with a REALTOR®'s blog. If REALTOR® A writes a blog, and another person makes false or misleading comments on REALTOR® A's blog about REALTOR® B, REALTOR® A has an obligation to publish a clarification about or remove the statements made by the other person about REALTOR® B once REALTOR® A knows the statement is false or misleading. Simply put, a REALTOR® has an obligation to make sure false or misleading statements about another REALTOR® are not allowed to be present on their blog without at least a clarification (once they know the statements are false or misleading).

#8 – Amendment to Standard of Practice 16-20

That Standard of Practice 16-20 be amended as follows (underscoring indicates additions, strikeout indicates deletions):

REALTORS®, prior to or after ~~terminating~~ their relationship with their current firm is terminated, shall not induce clients of their current firm to cancel exclusive contractual agreements between the client and that firm. This does not preclude REALTORS® (principals) from establishing agreements with their associated licensees governing assignability of exclusive agreements. (Adopted 1/98)

Comments:

This is a technical clarification that intends to clarify that the Standard of Practice applies no matter how the association with the previous broker is terminated, whether by the previous broker or voluntarily by the licensee transferring their license.

New Case Interpretation

#9 – New Case Interpretation illustrating Standard of Practice 12-7

That a new case interpretation illustrating and explaining Standard of Practice 12-7 be adopted reading as follows:

REALTOR[®] Q was a non-principal broker licensed with ABC, REALTORS[®]. REALTOR[®] Q specialized in buyer representation. A prominent feature on her website carried the headline “I sold these – and I can help you buy or sell, too!”. Under the headline was a list of over a hundred street addresses of properties for which REALTOR[®] Q had found buyers.

For personal and professional reasons, REALTOR[®] Q chose to leave the ABC firm to affiliate with XYZ, REALTORS[®]. As she transitioned to her new firm, REALTOR[®] Q was careful to disclose the name of her new firm in a readily apparent manner on her website. Her website also continued to display the list of properties she had found buyers for during her time with the ABC firm.

REALTOR[®] Q's parting with ABC had been amicable, so she was surprised to receive a complaint brought by her former principal broker, REALTOR[®] C, alleging a violation of Article 12, as interpreted by Standard of Practice 12-7, based on her website's display of sales made while REALTOR[®] Q had been affiliated with ABC.

At the hearing, REALTOR[®] C, the complainant, noted that Standard of Practice 12-7 provides, in part, “Only REALTORS[®] who participated in the transaction as the listing broker or cooperating broker (selling broker) may claim to have ‘sold’ the property.” “It was ABC, REALTORS[®],” REALTOR[®] C added, “that was the selling broker in these transactions, not our former sales associate REALTOR[®] Q. Her advertising our sales under the umbrella of her new firm, XYZ, REALTORS[®], is confusing at best, and potentially misleading to consumers who may get the impression the XYZ firm was involved in these transactions when that's not the case.”

REALTOR[®] Q defended herself and her website arguing that the fact that she had found the buyers for each of the properties listed on her website was still true, and that the only thing that had changed was her firm affiliation. “If it was true when I was licensed with ABC, then it's still true even though I'm now licensed with XYZ,” she reasoned.

The hearing panel agreed that REALTOR[®] Q had, in fact, sold the properties, albeit while licensed with ABC. The ad, however, suggested that the sales were made while the REALTOR[®] Q was licensed with XYZ, which was not the case. Consequently REALTOR[®] Q was found in violation of Article 12.

Comments: See next page.

Comments to Case Interpretation:

This Case Interpretation begins to address issues of how and when a sales associate who has left a firm can claim that he/she has “sold” a property. Standard of Practice 12-7 states “Only REALTORS® who participated in the transaction as the listing broker or cooperating broker (selling broker) may claim to have “sold” the property. Prior to closing, a cooperating broker may post a “sold” sign only with the consent of the listing broker. (*Amended 1/96*)” In addition, Standard of Practice 1-2 states, in part, “ ...“broker” means a real estate licensee (including brokers **and sales associates**) acting as an agent or in a legally recognized non-agency capacity.” (Emphasis added.) Thus, a sales associate is considered a listing “broker” or cooperating “broker” as that term is used in Standard of Practice 12-7 and is entitled to claim to have “sold” a property if they were the listing sales associate or the cooperating sales associate. However, in the facts presented in the Case Interpretation, the sales associate’s advertising claiming to have “sold” a list of properties under the banner/name of the broker to whom they transferred left the impression that the sales of the properties were accomplished when part of the new firm, which was, in fact, not true. So, the case interpretation concludes that there is a violation of Article 12 of the Code. The Professional Standards Committee is considering additional case interpretations to clarify how this type of advertising could be done within Article 12.

Changes to the Code of Ethics and Arbitration Manual

#10 - Amendments to Sections 7(a) and 32(a), Notices

That Sections 7(a) and 32(a), Notices, *Code of Ethics and Arbitration Manual*, be amended as follows (underscoring indicates additions, strikeouts indicate deletions):

Any notice required to be given or paper required to be served or filed may be personally handed to the party to be notified, ~~or sent by registered or certified mail addressed to the party's last known mailing address,~~ or sent to the party by email. ~~If mailed,~~ Any notice required to be given or paper required to be served or filed shall be deemed given, served, or filed when handed to the party, mailed to the party, or sent to the party by email, unless otherwise specified in this Manual. Notices sent by email shall include the association's request that delivery be acknowledged by the intended recipient within twenty-four (24) hours by return email. If receipt of the notice has not been acknowledged by the intended recipient within twenty-four (24) hours, the recipient will be contacted by telephone to confirm receipt and the recipient's confirmation will be noted in the file. If receipt of notices sent by email cannot be confirmed, the notices will be resent via registered or certified mail.

Comments:

This section allows for notices by email and sets out specific procedures to be followed in the event that the association chooses to send out notices by email.

#11 - Amendments to Section 23 (e), Action of the Board of Directors

That Section 23(e), Action of the Board of Directors, *Code of Ethics and Arbitration Manual*, be amended as follows (underscoring indicates additions):

(e) At the hearing before the Directors, the Chairperson of the Hearing Panel (or the Chairperson's designee) shall present a transcript of the case or, if there is no transcript, shall summarize the case. Either party shall be entitled to offer corrections to the summary. Either party may present to the Directors reasons why the Hearing Panel's recommendation should be followed or not, but no new evidence shall be received (except such new evidence as may bear upon a claim of deprivation of due process), and the appeal shall be determined on the transcript or summary. (Amended 11/93)

Comments:

This is a clarification that the Chairperson of a Hearing Panel may appoint a designee to present the transcript or summary of the case at an appeal hearing.

#12 - Amendments to Section 23 (j), Action of the Board of Directors, Confidentiality of Ethics Decisions

That Section 23 (j), Action of the Board of Directors, *Code of Ethics and Arbitration Manual*, be amended as follows (underscoring indicates additions):

- (j) *Upon final action by the Directors, the President shall disseminate to the complainant, the respondent, the Board of Directors, the Chairperson and members of the Hearing Panel, Board legal counsel, the President of any other Board in which the respondent holds membership, and any governmental agency as directed by the Board of Directors such notice of the action as the President deems appropriate under the circumstances ~~to effectuate the discipline prescribed,~~ provided, however, that the nature, form, content, and extent of the notice shall be specifically approved by Board legal counsel prior to dissemination. Board Members, other than those specified, shall be notified only in respect to suspension or expulsion of membership of the Board Member unless the optional procedures established at the end of this Section have been adopted locally or unless notification is required to ensure compliance with the Board's bylaws (e.g. where a petition for removal of an officer or director must state the reason(s) an officer or director is deemed disqualified from further service.). (Revised 2/99)*

Final ethics decisions holding REALTORS® in violation of the Code of Ethics must be forwarded to the state real estate licensing authority in instances where there is reason to believe that the public trust may have been violated. The "public trust," as used in this context, refers to demonstrated misappropriation of client or customer funds or property, willful discrimination, or fraud resulting in substantial economic harm. (Adopted 11/99)

Comments:

This is a clarification to the confidentiality provisions of the CEAM that allows for disclosure of an ethics hearing decision when necessary to assure compliance with an Association's bylaws, such as in the case where the association's bylaws require that a petition for removal of an officer or director provide the reason for disqualification from service.

Changes to the Handbook on Multiple Listing Policy

NOTE: These changes to the *Handbook on Multiple Listing Policy* are included here because they may affect decisions of hearing panels in arbitration cases. They deal with offers of compensation made via MLS systems.

Short Sales Disclosures

It was moved, seconded and carried:

Motion #1:

That MLS Policy Statement 7.23, Note 3, be amended effective upon approval by the Board of Directors (underscoring indicates additions, strikeouts indicates deletions):

Note 3: Multiple listing services must give participants the ability to disclose to other participants any potential for a short sale. As used in MLS rules, short sales are defined as a transaction where title transfers, where the sales price is insufficient to pay the total of all liens and costs of sale, and where the seller does not bring sufficient liquid assets to the closing to cure all deficiencies. Multiple listing services may, as a matter of local discretion, require participants to disclose short sales when participants know a transaction is a potential short sale. In any instance where a participant discloses a potential short sale, they ~~must also~~ may, as a matter of local discretion, be permitted to communicate to other participants how any reduction in the gross commission established in the listing contract by the lender as a condition of approving the sale will be apportioned between the listing and cooperating participants. All confidential disclosures and confidential information related to short sales, if allowed by local rules, must be communicated through dedicated fields or confidential "remarks" available only to participants and subscribers. (Amended 5/08)

(NOTE: This recommendation was subsequently approved at the May 16, 2009 meeting of the Board of Directors and became effective upon approval.)

It was moved, seconded and carried:

Motion #2:

That Section 5, Note 6, model MLS rules (all types), be amended as follows effective upon approval by the Board of Directors (underscoring indicates additions, strikeouts indicate deletions):

Note 6: Multiple listing services must give participants the ability to disclose to other participants any potential for a short sale. As used in these rules, short sales are defined as a transaction where title transfers, where the sale price is insufficient to pay the total of all liens and costs of sale, and where the seller does not bring sufficient liquid assets to the closing to cure all deficiencies. Multiple listing services may, as a matter of local discretion, require participants to disclose potential short sales when participants know a transaction is a potential short sale. In any instance where a participant discloses a potential short sale, they ~~must~~ may, as a matter of local discretion, also be permitted to communicate to other participants how any reduction in the gross commission established in the listing contract required by the lender as a condition of approving the sale will be apportioned between listing and cooperating participants. All confidential disclosures and confidential information related to short sales, if allowed by local rules, must be communicated through dedicated fields or confidential "remarks" available only to participants and subscribers (Adopted 5/08)

(NOTE: This recommendation was subsequently approved at the May 16, 2009 meeting of the Board of Directors and became effective upon approval.)

Comments:

These amendments change the previous motions of the Directors from November, 2008 that required an MLS to allow participants to publish the method of allocation of any lender required reduction of commissions to cooperating brokers. This change makes these provisions discretionary and optional on the part of the MLS.

Under the current provisions, at the discretion of the MLS, the MLS may allow participants to communicate how any lender required reduction in commission will be allocated between the listing and cooperating broker.

Importantly, this provision does NOT provide that the listing broker may publish the "percentage" split of the total commission received by the listing broker but only how the reduction will be allocated.

Section 5.0.1, Disclosing Potential Short Sales, model MLS Rules (all types) / Definition of “short sale”

It was moved, seconded and carried:

Motion:

That Section 5.0.1, Disclosing Potential Short Sales, model MLS rules and regulations (all types), *Handbook on Multiple Listing Policy*, be amended effective upon approval by the Board of Directors (underscoring indicates additions):

Note: Select one of the following two options.

Option #1: Multiple listing services that permit, but do not require, participants to disclose potential short sales should adopt the following rule.

Participants may, but are not required to, disclose potential short sales (defined as a transaction where title transfers, where the sale price is insufficient to pay the total of all liens and costs of sale and where the seller does not bring sufficient liquid assets to the closing to cure all deficiencies) to other participants and subscribers. When disclosed, participants may, at their discretion, advise other participants whether and how any reduction in the gross commission established in the listing contract, required by the lender as a condition of approving the sale, will be apportioned between listing and cooperating participants. (Adopted 5/08)

Option #2: Alternatively, multiple listing services that require participants to disclose potential short sales should adopt the following rule.

Participants must disclose potential short sales (defined as a transaction where title transfers, where the sale price is insufficient to pay the total of all liens and costs of sale and where the seller does not bring sufficient liquid assets to the closing to cure all deficiencies) when reasonably known to the listing participants. When disclosed, participants may, at their discretion, advise other participants whether and how any reduction in the gross commission established in the listing agreement, required by the lender as a condition of approving the sale, will be apportioned between listing and cooperating participants. (Adopted 5/08)

For Options #1 or #2: As a matter of local discretion, MLSs may, but shall not be required to, adopt the following rule:

When disclosed, participants may, at their discretion, advise other participants whether and how any reduction in the gross commission established in the listing contract, required by the lender as a condition of approving the sale, will be apportioned between listing and cooperating participants.

Appendices

National Association of REALTORS® Code of Ethics and Arbitration Manual
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**Chairperson's Procedural Guide:
Conduct of an Arbitration Hearing**

_____ Board of REALTORS®

State of _____

(Ask the recording Secretary to make sure that the names of all parties present for the hearing have been added to this Guide and that all the appropriate blanks have been completed.)

(Ask all parties [including witnesses] to come into the hearing room.)

Display: Board Banner and the American Flag

Seating arrangements: See Part Thirteen, Form #A-16 of this Manual for recommended seating arrangements.

Start promptly: Rap gavel to open meeting.

Chairperson's opening statement and conduct of hearing: Ladies and gentlemen, I now call this hearing to order. The Professional Standards Committee is charged with holding appropriate hearings for the _____ Board of REALTORS® in accordance with the procedures as set forth in the Board's bylaws in matters concerning alleged unethical conduct of a Board Member or Members, or in the arbitration of a business dispute arising out of the real estate business and as defined in the bylaws of the Board. The body meeting here is an impartial panel of the Professional Standards Committee that has been selected and called here today to ascertain the truth in the particular matter at hand, which is an arbitration proceeding, and to render a decision on the testimony and evidence presented. It is to be noted that an ethics proceeding is to be clearly distinguished from an arbitration proceeding and should be treated as a completely separate matter. The particular matter to be considered by this panel at this time is an arbitration proceeding.

The Professional Standards Committee is a body duly constituted under the authority of the bylaws of the _____ Board of REALTORS® and has been duly appointed by the Board President and approved by the Board of Directors. At this time, I would like to introduce members of this panel.

(1) My name is _____, and I will serve as Chairperson of this panel.

(2) The other members of this panel are:

_____, _____,
_____, and _____.

(3) Present at this hearing is _____, the complainant, and his/her sales associate(s), _____.

(If the complainant is accompanied by an attorney and/or witnesses, they should be introduced at this time.)

_____, _____,
_____, and _____.

(If the complainant is represented by legal counsel, and/or accompanied by witnesses, confirm that the respondent was notified in advance. If not, ask if there is an objection. If none, have the respondent sign a statement to that effect.)

(4) Also present at this hearing is _____,
the respondent, and his/her sales associate(s), _____.

(If the respondent is accompanied by an attorney and/or witnesses, they should be introduced at this time.)

_____, _____,
_____, and _____.

(If the respondent is represented by legal counsel, and/or accompanied by witnesses, confirm that the complainant was notified in advance. If not, ask if there is an objection. If none, have complainant sign a statement to that effect.)

(5) Also present at this hearing is _____,
the recording secretary for the _____
Board of REALTORS[®], and (if appropriate) _____, the court reporter present to transcribe these proceedings.

(Or, alternatively: This hearing is being mechanically recorded.)

(If an attorney representing the Board is present, he/she should be introduced at this time.)

_____.

The parties are specifically advised that any recording or transcription that may be made of these proceedings can only be used for purpose of procedural review, and any other use, including use in other ethics or arbitration hearings, is expressly prohibited.

Basis of hearing: This hearing is to arbitrate a business dispute arising out of the real estate business in accordance with the request of _____, that he/she be awarded a commission or part of a commission on the sale of _____. The request for arbitration is as follows:

(Read the amount and nature of the dispute into the record.)

Any prior offers of settlement or proposed resolutions of the case, during mediation or otherwise, will not be considered by the Hearing Panel.

This panel is not governed by the technical rules of evidence which may apply in courts. This panel will seek to determine all ascertainable and relevant facts pertaining to the matter under consideration to arrive at a peer judgment and decision by the panel that is fair to all of the parties. The panel is governed and directed by the bylaws of the _____ Board of REALTORS® and the Code of Ethics of the NATIONAL ASSOCIATION OF REALTORS®. The panel determines its own rules of evidence and its own procedures to be followed with objectives of equity and due process. The following has been generally accepted and ruled on by this panel as to the procedures to be followed during this hearing.

(1) All parties or their representatives to these proceedings will be allowed a full opportunity to be heard on matters relevant to the issue. The panel may rule at any time during this hearing on the relevance of testimony being given or questions being directed to any party or his/her representative or to witnesses providing testimony. All parties and witnesses will be asked to swear or affirm that testimony given is the truth to the best of their knowledge.

(If legal counsel is not present, proceed to 3.)

(2) A party may be represented by legal counsel. However, no party may refuse to directly respond to requests for information or questions addressed to him/her by members of the panel except on grounds of self-incrimination or other grounds which the panel deems appropriate. In this connection, the panel need not accept the statements of counsel as being the statements of his/her client if the panel desires direct testimony. Counsel is present to advise and consult with his/her client, and to speak for him/her subject to appropriate rulings or determinations by the panel. This panel will countenance no effort by any party or by counsel to any party to harass, intimidate, coerce, or confuse the panel members or any party to the proceedings.

(3) The panel may rule at any time on the admissibility of evidence. As Chairperson, I will act as keeper of the evidence introduced at this hearing and mark each with an exhibit identification number or letter and date.

(4) The members of this panel are authorized, individually, to ask questions as they deem pertinent and significant at any time during this hearing. To preserve order, I will rule on questions or testimony by the parties or their representatives, or by witnesses in these proceedings. If deemed necessary, I will consult with the members of the panel and with Board counsel concerning such rulings.

(5) At this time, I request that all persons present in the room who expect to testify at this hearing stand and be sworn or make appropriate affirmation in lieu of being sworn.

(The Chairperson should determine if any of the parties prefer affirmation in lieu of being sworn.)

Swearing: Raise your right hand and, following the question I will pose, answer in the affirmative if you do so swear . . . “Do you swear that the statements you are about to make at this hearing are the truth, the whole truth, and nothing but the truth so help you God?” Let the record show that all parties have answered in the affirmative.

(And/or if needed)

Affirmation: Raise your right hand and, following the question I will pose, answer in the affirmative if you do so affirm . . . “Do you affirm that the testimony you are about to give in this proceeding shall be the truth, the whole truth, and nothing but the truth?” Let the record show that _____ has/have answered in the affirmative.

(At this time, the Chairperson should excuse any witnesses and ask them to wait outside until called, and ask the remaining parties to be seated.)

Outline of procedure for hearing: Both the complainant and the respondent were mailed a copy of the Outline of Procedure for an Arbitration Hearing (Part Thirteen, Form #A-10 of this Manual). Did each of you receive the Outline?

(If yes) Let the record show that both the complainant and respondent have stated that they did receive the Outline.

(If no, the party should be given a copy of the Outline and the Chairperson should determine whether that party has any objections to proceeding.)

Do you have any questions concerning the Outline of Procedure?

(If none) Let the record show that neither the complainant nor the respondent have any questions concerning the Outline of Procedure for an Arbitration Hearing.

We shall now proceed with the hearing.

Presentation by complainant: The complainant will now state his/her case and present any evidence or witnesses that he/she may desire.

Cross-examination by respondent

Questions from panel members

Presentation by respondent: The respondent will now state his/her case and present any evidence or witnesses that he/she may desire.

Cross-examination by complainant

Questions from panel members

Closing statement by complainant: At this time, both the complainant and the respondent will be given an opportunity to make a summary or closing statement if they so desire. The complainant's closing statement will be heard first.

Closing statement by respondent

Closing statement by Panel Chairperson: Do each of you feel that this hearing has been conducted fairly?

(If yes) Let the record show that both the complainant and the respondent have indicated that they feel this hearing has been conducted fairly.

Have each of you had an adequate opportunity to testify, present evidence and witnesses, and conduct cross-examination?

(If yes) Let the record show that both the complainant and the respondent have indicated that they have had an adequate opportunity to testify, present evidence and witnesses, and conduct cross-examination.

(If any party answers "no," ask him/her to state any concern.)

Confidential nature of hearing: Before we adjourn the hearing of this panel, all persons present are advised that the award of this panel is considered confidential. It will be available only to members of this panel, to the parties, to counsel and staff as required or as otherwise specified in the Code of Ethics and Arbitration Manual. Upon final action by the Hearing Panel in an arbitration proceeding, the decision, when signed by the members of the Hearing Panel (or a majority of them), shall be served upon the parties to the dispute. The parties will be notified of the decision within the required time after this hearing is adjourned. You are reminded that any recording or transcription that may be made of these proceedings can only be used for the purpose of procedural review, and any other use, including use in other ethics or arbitration hearings, is expressly prohibited.

Adjournment: There being no further business to be considered in this hearing, this portion of the hearing stands adjourned.

Proceeding following hearing—executive session: (After adjournment, the panel will remain in executive session and determine the award. The panel will follow explicitly the procedure set forth in the Code of Ethics and Arbitration Manual as to opportunity for procedural review. Board counsel should review all decisions of any hearing conducted by a Professional Standards Hearing Panel involving the resolution of business disputes, as established in the bylaws. Such review should occur prior to any action of the panel becoming final or effective. This will serve to protect the Board by minimizing vulnerability to litigation.) (Revised 11/91)

(Revised 11/01)

Appendix II to Part Ten
Arbitration Guidelines
(Suggested Factors for Consideration by a Hearing Panel in Arbitration)

A key element in the practice of real estate is the contract. Experienced practitioners quickly become conversant with the elements of contract formation. Inquiry, invitation, offer, counteroffer, contingency, waiver, acceptance, rejection, execution, breach, rescission, reformation, and other words of art become integral parts of the broker's vocabulary.

Given the significant degree to which Article 3's mandate for cooperation—coupled with everyday practicality, feasibility, and expediency—make cooperative transactions facts of life, it quickly becomes apparent that in virtually every real estate transaction there are actually several contracts which come into play. Setting aside ancillary but still important contracts for things such as mortgages, appraisals, inspections, title insurance, etc., in a typical residential transaction (and the same will be true in many commercial transactions as well) there are at least three (and often four) contracts involved, and each, while established independently of the others, soon appears to be inextricably intertwined with the others.

First, there is the listing contract between the seller and the listing broker. This contract creates the relationship between these parties, establishes the duties of each and the terms under which the listing broker will be deemed to have earned a commission, and frequently will authorize the listing broker to cooperate with or compensate (or both) cooperating brokers who may be subagents, buyer agents, or acting in some other capacity.

Second, there is the contract between the listing broker and cooperating brokers. While this may be created through an offer published through a multiple listing service or through some other method of formalized cooperative effort, it need not be. Unlike the bilateral listing contract (where generally the seller agrees to pay a commission in return for the listing broker's production of a ready, willing, and able purchaser), the contract between the listing broker and the cooperating broker is unilateral in nature. This simply means that the listing broker determines the terms and conditions of the offer to potential cooperating brokers (and this offer may vary as to different potential cooperating brokers or as to cooperating brokers in different categories). This type of contract differs from a bilateral contract also in that there is no contract formed between the listing broker and the potential cooperating brokers upon receipt of the listing broker's offer. The contract is formed only when accepted by the cooperating broker, and acceptance occurs only through performance as the procuring cause of the successful transaction. (Revised 11/97)

Third, there is the purchase contract—sometimes referred to as the purchase and sale agreement. This bilateral contract between the seller and the buyer establishes their respective promises and obligations to each other, which may also impact on third parties. The fact that someone other than the seller or buyer is referenced in the purchase contract does not make him/her a party to that contract, though it may create rights or entitlements which may be enforceable against a party (the buyer or seller).

Fourth, there may be a buyer-broker agreement in effect between the purchaser and a broker. Similar in many ways to the listing contract, this bilateral contract establishes the duties of the purchaser and the broker as well as the terms and conditions of the broker's compensation.

These contracts are similar in that they are created through offer and acceptance. They vary in that acceptance of a bilateral contract is through a reciprocal promise (e.g., the purchaser's promise to pay the agreed price in return for the seller's promise to convey good title), while acceptance of a unilateral contract is through performance (e.g., in producing or procuring a ready, willing, and able purchaser).

Each of these contracts is subject to similar hazards in formation and afterward. The maker's (offeror's) offer in any of these scenarios may be accepted or rejected. The intended recipient of the offer (or offeree) may counteroffer. There may be questions as to whether a contract was formed—e.g., was there an offer, was it accepted, was the acceptance on the terms and conditions specified by the maker of the offer—or was the “acceptance” actually a counteroffer (which, by definition, rejects the first offer). A contract, once formed, may be breached. These and other questions of contract formation arise on a daily basis. There are several methods by which contractual questions (or “issues” or “disputes”) are resolved. These include civil lawsuits, arbitration, and mediation.

Another key contract is the one entered into when a real estate professional joins a local Board of REALTORS® and becomes a REALTOR®. In return for the many benefits of membership, a REALTOR® promises to abide by the duties of membership including strict adherence to the Code of Ethics. Among the Code's duties is the obligation to arbitrate, established in Article 17. Article 17 is interpreted through four Standards of Practice among which is Standard of Practice 17-4 which enumerates four situations under which REALTORS® agree to arbitrate specified non-contractual disputes. (Adopted 11/96)

Boards and Associations of REALTORS® provide arbitration to resolve contractual issues and questions and specific non-contractual issues and questions that arise between members, between members and their clients, and, in some cases, between parties to a transaction brought about through the efforts of REALTORS®. Disputes arising out of any of the four above-referenced contractual relationships may be arbitrated, and the rules and procedures of Boards and Associations of REALTORS® require that certain types of disputes must be arbitrated if either party so requests. (Information on “mandatory” and “voluntary” arbitration is found elsewhere in the Code of Ethics and Arbitration Manual.) (Revised 11/96)

While issues between REALTORS® and their clients—e.g., listing broker/seller (or landlord) or buyer broker/buyer (or tenant)—are subject to mandatory arbitration (subject to the client's agreement to arbitrate), and issues between sellers and buyers may be arbitrated at their mutual agreement, in many cases such issues are resolved in the courts or in other alternative dispute resolution forums (which may also be administered by Boards or Associations of REALTORS®). The majority of arbitration hearings conducted by Boards and Associations involve questions of contracts between REALTORS®, most frequently between listing and cooperating brokers, or between two or more cooperating brokers. These generally involve questions of procuring cause, where the panel is called on to determine which of the contesting parties is entitled to the funds in dispute. While awards are generally for the full amount in question (which may be required by state law), in exceptional cases, awards may be split between the parties (again, except where prohibited by state law). Split awards are the exception rather than the rule and should be utilized only when Hearing Panels determine that the transaction would have resulted only through the combined efforts of both parties. It should also be considered that questions of representation and entitlement to compensation are separate issues. (Revised 11/98)

In the mid-1970s, the NATIONAL ASSOCIATION OF REALTORS® established the Arbitration Guidelines to assist Boards and Associations in reaching fair and equitable decisions in arbitration; to prevent the establishment of any one, single rule or standard by which arbitrable issues would be decided; and to ensure that arbitrable questions would be decided by knowledgeable panels taking into careful consideration all relevant facts and circumstances.

The Arbitration Guidelines have served the industry well for nearly two decades. But, as broker-to-broker cooperation has increasingly involved contracts between listing brokers and buyer brokers and between listing brokers and brokers acting in nonagency capacities, the time came to update the Guidelines so they remained relevant and useful. It is to this end that the following is intended.

Procuring Cause

As discussed earlier, one type of contract frequently entered into by REALTORS® is the listing contract between sellers and listing brokers. Procuring cause disputes between sellers and listing brokers are often decided in court. The reasoning relied on by the courts in resolving such claims is articulated in Black's Law Dictionary, Fifth Edition, definition of procuring cause:

The proximate cause; the cause originating a series of events which, without break in their continuity, result in the accomplishment of the prime object. The inducing cause; the direct or proximate cause. Substantially synonymous with “efficient cause.”

A broker will be regarded as the “procuring cause” of a sale, so as to be entitled to commission, if his efforts are the foundation on which the negotiations resulting in a sale are begun. A cause originating a series of events which, without break in their continuity, result in accomplishment of prime objective of the employment of the broker who is producing a purchaser ready, willing, and able to buy real estate on the owner’s terms. *Mohamed v. Robbins*, 23 Ariz. App. 195, 531 p.2d 928, 930.

See also Producing cause; Proximate cause.

Disputes concerning the contracts between listing brokers and cooperating brokers, however, are addressed by the National Association’s Arbitration Guidelines promulgated pursuant to Article 17 of the Code of Ethics. While guidance can be taken from judicial determinations of disputes between sellers and listing brokers, procuring cause disputes between listing and cooperating brokers, or between two cooperating brokers, can be resolved based on similar though not identical principles. While a number of definitions of procuring cause exist, and a myriad of factors may ultimately enter into any determination of procuring cause, for purposes of arbitration conducted by Boards and Associations of REALTORS[®], procuring cause in broker to broker disputes can be readily understood as the uninterrupted series of causal events which results in the successful transaction. Or, in other words, what “caused” the successful transaction to come about. “Successful transaction,” as used in these Arbitration Guidelines, is defined as “a sale that closes or a lease that is executed.” Many REALTORS[®], Executive Officers, lawyers, and others have tried, albeit unsuccessfully, to develop a single, comprehensive template that could be used in all procuring cause disputes to determine entitlement to the sought-after award without the need for a comprehensive analysis of all relevant details of the underlying transaction. Such efforts, while well-intentioned, were doomed to failure in view of the fact that there is no “typical” real estate transaction any more than there is “typical” real estate or a “typical” REALTOR[®]. In light of the unique nature of real property and real estate transactions, and acknowledging that fair and equitable decisions could be reached only with a comprehensive understanding of the events that led to the transaction, the National Association’s Board of Directors, in 1973, adopted Official Interpretation 31 of Article I, Section 2 of the Bylaws. Subsequently amended in 1977, Interpretation 31 establishes that:

A Board rule or a rule of a Multiple Listing Service owned by, operated by, or affiliated with a Board, which establishes, limits or restricts the REALTOR[®] in his relations with a potential purchaser, affecting recognition periods or purporting to predetermine entitlement to any award in arbitration, is an inequitable limitation on its membership.

The explanation of Interpretation 31 goes on to provide, in part:

. . . [T]he Board or its MLS may not establish a rule or regulation which purports to predetermine entitlement to any awards in a real estate transaction. If controversy arises as to entitlement to any awards, it shall be determined by a hearing in arbitration on the merits of all ascertainable facts in the context of the specific case of controversy.

It is not uncommon for procuring cause disputes to arise out of offers by listing brokers to compensate cooperating brokers made through a multiple listing service. A multiple listing service is defined as a facility for the orderly correlation and dissemination of listing information among Participants so that they may better serve their clients and customers and the public; is a means by which authorized Participants make blanket unilateral offers of compensation to other Participants (acting as subagents, buyer agents, or in other agency or nonagency capacities defined by law); is a means by which information is accumulated and disseminated to enable authorized Participants to prepare appraisals and other valuations of real property; and is a means by which Participants engaging in real estate appraisal contribute to common databases. Entitlement to compensation is determined by the cooperating broker’s performance as procuring cause of the sale (or lease).

While offers of compensation made by listing brokers to cooperating brokers through MLS are unconditional,* the definition of MLS and the offers of compensation made through the MLS provide that a listing broker's obligation to compensate a cooperating broker who was the procuring cause of sale (or lease) may be excused if it is determined through arbitration that, through no fault of the listing broker and in the exercise of good faith and reasonable care, it was impossible or financially unfeasible for the listing broker to collect a commission pursuant to the listing agreement. In such instances, entitlement to cooperative compensation offered through MLS would be a question to be determined by an arbitration Hearing Panel based on all relevant facts and circumstances including, but not limited to, why it was impossible or financially unfeasible for the listing broker to collect some or all of the commission established in the listing agreement; at what point in the transaction did the listing broker know (or should have known) that some or all of the commission established in the listing agreement might not be paid; and how promptly had the listing broker communicated to cooperating brokers that the commission established in the listing agreement might not be paid. (Revised 11/98)

**Compensation is unconditional except where local MLS rules permit listing brokers to reserve the right to reduce compensation offers to cooperating brokers in the event that the commission established in a listing contract is reduced by court action or by actions of a lender. Refer to Multiple Listing Policy Statement 7.23, Information Specifying the Compensation on Each Listing Filed with a Multiple Listing Service of a Board of REALTORS®, Handbook on Multiple Listing Policy. (Adopted 11/98)*

Factors for Consideration by Arbitration Hearing Panels

The following factors are recommended for consideration by Hearing Panels convened to arbitrate disputes between brokers, or between brokers and their clients or their customers. This list is not all-inclusive nor can it be. Not every factor will be applicable in every instance. The purpose is to guide panels as to facts, issues, and relevant questions that may aid them in reaching fair, equitable, and reasoned decisions.

Factor #1. No predetermined rule of entitlement

Every arbitration hearing is considered in light of all of the relevant facts and circumstances as presented by the parties and their witnesses. "Rules of thumb," prior decisions by other panels in other matters, and other predeterminants are to be disregarded.

Procuring cause shall be the primary determining factor in entitlement to compensation. Agency relationships, in and of themselves, do not determine entitlement to compensation. The agency relationship with the client and entitlement to compensation are separate issues. A relationship with the client, or lack of one, should only be considered in accordance with the guidelines established to assist panel members in determining procuring cause. (Adopted 4/95)

Factor #2. Arbitrability and appropriate parties

While primarily the responsibility of the Grievance Committee, arbitration Hearing Panels may consider questions of whether an arbitrable issue actually exists and whether the parties named are appropriate to arbitration. A detailed discussion of these questions can be found in Appendix I to Part Ten, Arbitrable Issues.

Factor #3. Relevance and admissibility

Frequently, Hearing Panels are asked to rule on questions of admissibility and relevancy. While state law, if applicable, controls, the general rule is that anything the Hearing Panel believes may assist it in reaching a fair, equitable, and knowledgeable decision is admissible.

Arbitration Hearing Panels are called on to resolve contractual questions, not to determine whether the law or the Code of Ethics has been violated. An otherwise substantiated award cannot be withheld solely on the basis that the Hearing Panel looks with disfavor on the potential recipient's manner of doing business or even that the panel believes that unethical conduct may have occurred. To prevent any appearance of bias, arbitration Hearing Panels and procedural review panels shall make no referrals of ethical concerns to the Grievance Committee. This is based on the premise that the fundamental right and primary responsibility to bring potentially unethical conduct to the attention of the Grievance Committee rests with the parties and others with firsthand knowledge. At the same time, evidence or testimony is not inadmissible simply because it relates to potentially unethical conduct. While an award (or failure to make a deserved award) cannot be used to "punish" a perceived "wrongdoer", it is equally true that Hearing Panels are entitled to (and fairness requires that they) consider all relevant evidence and testimony so that they will have a clear understanding of what transpired before determining entitlement to any award. (Amended 11/96)

Factor #4. Communication and contact—abandonment and estrangement

Many arbitrable disputes will turn on the relationship (or lack thereof) between a broker (often a cooperating broker) and a prospective purchaser. Panels will consider whether, under the circumstances and in accord with local custom and practice, the broker made reasonable efforts to develop and maintain an ongoing relationship with the purchaser. Panels will want to determine, in cases where two cooperating brokers have competing claims against a listing broker, whether the first cooperating broker actively maintained ongoing contact with the purchaser or, alternatively, whether the broker's inactivity, or perceived inactivity, may have caused the purchaser to reasonably conclude that the broker had lost interest or disengaged from the transaction (abandonment). In other instances, a purchaser, despite reasonable efforts by the broker to maintain ongoing contact, may seek assistance from another broker. The panel will want to consider why the purchaser was estranged from the first broker. In still other instances, there may be no question that there was an ongoing relationship between the broker and purchaser; the issue then becomes whether the broker's conduct or, alternatively, the broker's failure to act when necessary, caused the purchaser to terminate the relationship (estrangement). This can be caused, among other things, by words or actions or lack of words or actions when called for. Panels will want to consider whether such conduct, or lack thereof, caused a break in the series of events leading to the transaction and whether the successful transaction was actually brought about through the initiation of a separate, subsequent series of events by the second cooperating broker. (Revised 11/99)

Factor #5. Conformity with state law

The procedures by which arbitration requests are received, hearings are conducted, and awards are made must be in strict conformity with the law. In such matters, the advice of Board legal counsel should be followed.

Factor #6. Consideration of the entire course of events

The standard of proof in Board-conducted arbitration is a preponderance of the evidence, and the initial burden of proof rests with the party requesting arbitration (see Professional Standards Policy Statement 26). This does not, however, preclude panel members from asking questions of the parties or witnesses to confirm their understanding of testimony presented or to ensure that panel members have a clear understanding of the events that led to the transaction and to the request for arbitration. Since each transaction is unique, it is impossible to develop a comprehensive list of all issues or questions that panel members may want to consider in a particular hearing. Panel members are advised to consider the following, which are representative of the issues and questions frequently involved in arbitration hearings.

Nature and status of the transaction

- (1) What was the nature of the transaction? Was there a residential or commercial sale/lease?
- (2) Is or was the matter the subject of litigation involving the same parties and issues as the arbitration?

Nature, status, and terms of the listing agreement

- (1) What was the nature of the listing or other agreement: exclusive right to sell, exclusive agency, open, or some other form of agreement?
- (2) Was the listing agreement in writing? If not, is the listing agreement enforceable?
- (3) Was the listing agreement in effect at the time the sales contract was executed?
- (4) Was the property listed subject to a management agreement?
- (5) Were the broker's actions in accordance with the terms and conditions of the listing agreement?
 - (a) Were all conditions of the listing agreement met?
 - (b) Did the final terms of the sale meet those specified in the listing agreement?
 - (c) Did the transaction close? (Refer to Appendix I to Part Ten, Arbitrable Issues)
 - (d) Did the listing broker receive a commission? If not, why not? (Refer to Appendix I to Part Ten, Arbitrable Issues)

Nature, status, and terms of buyer representation agreements

- (1) What was the nature of any buyer representation agreement(s)? Was the agreement(s) exclusive or non-exclusive? What capacity(ies) was the cooperating broker(s) functioning in, e.g., agent, legally-recognized non-agent, other?
- (2) Was the buyer representation agreement(s) in writing? Is it enforceable?
- (3) What were the terms of compensation established in the buyer representation agreement(s)?
- (4) Was the buyer representative(s) a broker or firm to which an offer of compensation was made by the listing broker?
- (5) Was the buyer representative(s) actions in accordance with the terms and conditions of the buyer representation agreement(s)?
- (6) At what point in the buying process was the buyer representation relationship established? (Revised 05/03)

Nature, status, and terms of the offer to compensate

- (1) Was an offer of cooperation and compensation made in writing? If not, how was it communicated?
- (2) Is the claimant a party to whom the listing broker's offer of compensation was extended?
- (3) Were the broker's actions in accordance with the terms and conditions of the offer of cooperation and compensation (if any)? Were all conditions of the agreement met?

Roles and relationships of the parties

- (1) Who was the listing broker?
- (2) Who was the cooperating broker or brokers?
- (3) Were any of the brokers acting as subagents? As buyer brokers? In another legally recognized capacity?
- (4) Did the cooperating broker(s) have an agreement, written or otherwise, to act as agent or in another legally recognized capacity on behalf of any of the parties?
- (5) Were any of the brokers (including the listing broker) acting as a principal in the transaction?
- (6) What were the brokers' relationships with respect to the seller, the purchaser, the listing broker, and any other cooperating brokers involved in the transaction?
 - (a) Was the buyer represented by a party with whom the broker had previously dealt?
 - (b) Is the primary shareholder of the buyer-corporation a party with whom the broker had previously dealt?
 - (c) Was a prior prospect a vital link to the buyer?
- (7) Are all appropriate parties to the matter joined?
(Revised 05/03)

Initial contact with the purchaser

- (1) Who first introduced the purchaser or tenant to the property?
- (2) When was the first introduction made?
 - (a) Was the introduction made when the buyer had a specific need for that type of property?
 - (b) Was the introduction instrumental in creating the desire to purchase?
 - (c) Did the buyer know about the property before the broker contacted him? Did he know it was for sale?
 - (d) Were there previous dealings between the buyer and the seller?
 - (e) Did the buyer find the property on his own?

- (3) How was the first introduction made?
 - (a) Was the property introduced as an open house?
 - (b) What subsequent efforts were made by the broker after the open house? (Refer to Factor #1)
 - (c) Was the introduction made to a different representative of the buyer?
 - (d) Was the “introduction” merely a mention that the property was listed?
 - (e) What property was first introduced?

Conduct of the brokers

- (1) Were all required disclosures complied with?
- (2) Was there a faithful exercise of the duties a broker owes to his client/principal?
- (3) If more than one cooperating broker was involved, was either (or both) aware of the other’s role in the transaction?
- (4) Did the broker who made the initial introduction to the property engage in conduct (or fail to take some action) which caused the purchaser or tenant to utilize the services of another broker? (Refer to Factor #4)
- (5) Did the cooperating broker (or second cooperating broker) initiate a separate series of events, unrelated to and not dependent on any other broker’s efforts, which led to the successful transaction—that is, did the broker perform services which assisted the buyer in making his decision to purchase? (Refer to Factor #4)
 - (a) Did the broker make preparations to show the property to the buyer?
 - (b) Did the broker make continued efforts after showing the property?
 - (c) Did the broker remove an impediment to the sale?
 - (d) Did the broker make a proposal upon which the final transaction was based?
 - (e) Did the broker motivate the buyer to purchase?
- (6) How do the efforts of one broker compare to the efforts of another?
 - (a) What was the relative amount of effort by one broker compared to another?
 - (b) What was the relative success or failure of negotiations conducted by one broker compared to the other?
- (7) If more than one cooperating broker was involved, how and when did the second cooperating broker enter the transaction?

Continuity and breaks in continuity (abandonment and estrangement)

- (1) What was the length of time between the broker’s efforts and the final sales agreement?
- (2) Did the original introduction of the purchaser or tenant to the property start an uninterrupted series of events leading to the sale or lease, or was the series of events hindered or interrupted in any way?
 - (a) Did the buyer terminate the relationship with the broker? Why? (Refer to Factor #4)
 - (b) Did negotiations break down?
- (3) If there was an interruption or break in the original series of events, how was it caused, and by whom?
 - (a) Did the seller change the listing agreement from an open listing to an exclusive listing agreement with another broker?
 - (b) Did the purchaser’s motive for purchasing change?
 - (c) Was there interference in the series of events from any outside or intervening cause or party?
- (4) Did the broker who made the initial introduction to the property maintain contact with the purchaser or tenant, or could the broker’s inaction have reasonably been viewed by the buyer or tenant as a withdrawal from the transaction?
- (5) Was the entry of any cooperating broker into the transaction an intrusion into an existing relationship between the purchaser and another broker, or was it the result of abandonment or estrangement of the purchaser, or at the request of the purchaser?

Conduct of the buyer

- (1) Did the buyer make the decision to buy independent of the broker’s efforts/information?
- (2) Did the buyer negotiate without any aid from the broker?
- (3) Did the buyer seek to freeze out the broker?
 - (a) Did the buyer seek another broker in order to get a lower price?
 - (b) Did the buyer express the desire not to deal with the broker and refuse to negotiate through him?
 - (c) Did the contract provide that no brokers or certain brokers had been involved?

Conduct of the seller

- (1) Did the seller act in bad faith to deprive the broker of his commission?
 - (a) Was there bad faith evident from the fact that the difference between the original bid submitted and the final sales price equaled the broker's commission?
 - (b) Was there bad faith evident from the fact that a sale to a third party was a straw transaction (one in which a non-involved party posed as the buyer) which was designed to avoid paying commission?
 - (c) Did the seller freeze out the broker to avoid a commission dispute or to avoid paying a commission at all?
- (2) Was there bad faith evident from the fact that the seller told the broker he would not sell on certain terms, but did so via another broker or via the buyer directly?

Leasing transactions

- (1) Did the cooperating broker have a tenant representation agreement?
- (2) Was the cooperating broker working with the "authorized" staff member of the tenant company?
- (3) Did the cooperating broker prepare a tenant needs analysis?
- (4) Did the cooperating broker prepare a market analysis of available properties?
- (5) Did the cooperating broker prepare a tour book showing alternative properties and conduct a tour?
- (6) Did the cooperating broker show the tenant the property leased?
- (7) Did the cooperating broker issue a request for proposal on behalf of the tenant for the property leased?
- (8) Did the cooperating broker take an active part in the lease negotiations?
- (9) Did the cooperating broker obtain the tenant's signature on the lease document?
- (10) Did the tenant work with more than one broker; and if so, why? (Revised 11/96)

Other information

Is there any other information that would assist the Hearing Panel in having a full, clear understanding of the transaction giving rise to the arbitration request or in reaching a fair and equitable resolution of the matter?

These questions are typical, but not all-inclusive, of the questions that may assist Hearing Panels in understanding the issues before them. The objective of a panel is to carefully and impartially weigh and analyze the whole course of conduct of the parties and render a reasoned peer judgment with respect to the issues and questions presented and to the request for award.

Sample Fact Situation Analysis

The National Association's Professional Standards Committee has consistently taken the position that arbitration awards should not include findings of fact or rationale for the arbitrators' award. Among the reasons for this are the fact that arbitration awards are not appealable on the merits but generally only on the limited procedural bases established in the governing state arbitration statute; that the issues considered by Hearing Panels are often myriad and complex, and the reasoning for an award may be equally complex and difficult to reduce to writing; and that the inclusion of written findings of fact or rationale (or both) would conceivably result in attempts to use such detail as "precedent" in subsequent hearings which might or might not involve similar facts. The end result might be elimination of the careful consideration of the entire course of events and conduct contemplated by these procedures and establishment of local, differing arbitration "templates" or predeterminants of entitlement inconsistent with these procedures and Interpretation 31.

Weighed against these concerns, however, was the desire to provide some model or sample applications of the factors, questions, and issues set forth in these Arbitration Guidelines. The following "fact situations" and analyses are provided for informational purposes and are not intended to carry precedential weight in any hearing.

Fact Situation #1

Listing Broker L placed a listing in the MLS and offered compensation to subagents and to buyer agents. Broker Z, not a participant in the MLS, called to arrange an appointment to show the property to a prospective purchaser. There was no discussion of compensation. Broker Z presented Broker L with a signed purchase agreement, which was accepted by the seller. Subsequently, Broker Z requested arbitration with Broker L, claiming to be the procuring cause of sale.

Analysis: While Broker Z may have been the procuring cause of sale, Broker L's offer of compensation was made only to members of the MLS. Broker L never offered cooperation and compensation to Broker Z, nor did Broker Z request compensation at any time prior to instituting the arbitration request. There was no contractual relationship between them, and therefore no issue to arbitrate.

Fact Situation #2

Same as #1, except Broker Z is the buyer's agent.

Analysis: Same result, since there was no contractual relationship between Broker L and Broker Z and no issue to arbitrate.

Fact Situation #3

Broker L placed a listing in the MLS and offered compensation to subagents and to buyer agents. Broker S (a subagent) showed the property to Buyer #1 on Sunday and again on Tuesday. On Wednesday, Broker A (a subagent) wrote an offer to purchase on behalf of Buyer #1 which was presented to the seller by Broker L and which was accepted. At closing, subagency compensation is paid to Broker A. Broker S subsequently filed an arbitration request against Broker A, claiming to be the procuring cause of sale.

Analysis: Broker S's claim could have been brought against Broker A (pursuant to Standard of Practice 17-4) or against Broker L (the listing broker), who had promised to compensate the procuring cause of sale, thus arguably creating a contractual relationship between Broker L and Broker S. (Amended 11/96)

Fact Situation #4

Same as #3, except Broker S filed the arbitration request against Broker L (the listing broker).

Analysis: This is an arbitrable matter, since Broker L promised to compensate the procuring cause of sale. Broker L, to avoid the possibility of having to pay two cooperating brokers in the same transaction, should join Broker A in arbitration so that all competing claims can be resolved in a single hearing. The Hearing Panel will consider, among other things, why Buyer #1 made the offer to purchase through Broker A instead of Broker S. If it is determined that Broker S initiated a series of events which were unbroken in their continuity and which resulted in the sale, Broker S will likely prevail.

Fact Situation #5

Same as #3, except Broker L offered compensation only to subagents. Broker B (a buyer agent) requested permission to show the property to Buyer #1, wrote an offer which was accepted, and subsequently claimed to be the procuring cause of sale.

Analysis: Since Broker L did not make an offer of compensation to buyer brokers, there was no contractual relationship between Broker L and Broker B and no arbitrable issue to resolve.

If, on the other hand, Broker L had offered compensation to buyer brokers either through MLS or otherwise and had paid Broker A, then arbitration could have been conducted between Broker B and Broker A pursuant to Standard of Practice 17-4. Alternatively, arbitration could occur between Broker B and Broker L.

Fact Situation #6

Listing Broker L placed a listing in the MLS and made an offer of compensation to subagents and to buyer agents. Broker S (a subagent) showed the property to Buyer #1, who appeared uninterested. Broker S made no effort to further contact Buyer #1. Six weeks later, Broker B (a buyer broker) wrote an offer on the property on behalf of Buyer #1, presented it to Broker L, and it was accepted. Broker S subsequently filed for arbitration against Broker L, claiming to be the procuring cause. Broker L joined Broker B in the request so that all competing claims could be resolved in one hearing.

Analysis: The Hearing Panel will consider Broker S's initial introduction of the buyer to the property, the period of time between Broker S's last contact with the buyer and the time that Broker B wrote the offer, and the reason Buyer #1 did not ask Broker S to write the offer. Given the length of time between Broker S's last contact with the buyer, the fact that Broker S had made no subsequent effort to contact the buyer, and the length of time that transpired before the offer was written, abandonment of the buyer may have occurred. If this is the case, the Hearing Panel may conclude that Broker B instituted a second, separate series of events that was directly responsible for the successful transaction.

Fact Situation #7

Same as #6, except that Broker S (a subagent) showed Buyer #1 the property several times, most recently two days before the successful offer to purchase was written by Broker B (a buyer broker). At the arbitration hearing, Buyer #1 testified she was not dissatisfied in any way with Broker S but simply decided that "I needed a buyer agent to be sure that I got the best deal."

Analysis: The Hearing Panel should consider Broker S's initial introduction of the buyer to the property; that Broker S had remained in contact with the buyer on an ongoing basis; and whether Broker S's efforts were primarily responsible for bringing about the successful transaction. Unless abandonment or estrangement can be demonstrated, resulting, for example, because of something Broker S said or did (or neglected to say or do but reasonably should have), Broker S will likely prevail. Agency relationships are not synonymous with nor determinative of procuring cause. Representation and entitlement to compensation are separate issues. (Amended 11/99)

Fact Situation #8

Similar to #6, except Buyer #1 asked Broker S for a comparative market analysis as the basis for making a purchase offer. Broker S reminded Buyer #1 that he (Broker S) had clearly disclosed his status as subagent, and that he could not counsel Buyer #1 as to the property's market value. Broker B based his claim to entitlement on the grounds that he had provided Buyer #1 with information that Broker S could not or would not provide.

Analysis: The Hearing Panel should consider Broker S's initial introduction of the buyer to the property; that Broker S had made early and timely disclosure of his status as a subagent; whether adequate alternative market information was available to enable Buyer #1 to make an informed purchase decision; and whether Broker S's inability to provide a comparative market analysis of the property had clearly broken the chain of events leading to the sale. If the panel determines that the buyer did not have cause to leave Broker S for Broker B, they may conclude that the series of events initiated by Broker S remained unbroken, and Broker S will likely prevail.

Fact Situation #9

Similar to #6, except Broker S made no disclosure of his status as subagent (or its implications) until faced with Buyer #1's request for a comparative market analysis.

Analysis: The Hearing Panel should consider Broker S's initial introduction of the buyer to the property; Broker S's failure to clearly disclose his agency status on a timely basis; whether adequate alternative market information was available to enable Buyer #1 to make an informed purchase decision; and whether Broker S's belated disclosure of his agency status (and its implications) clearly broke the chain of events leading to the sale. If the panel determines that Broker S's failure to disclose his agency status was a reasonable basis for Buyer #1's decision to engage the services of Broker B, they may conclude that the series of events initiated by Broker S had been broken, and Broker B will likely prevail.

Fact Situation #10

Listing Broker L placed a property on the market for sale or lease and offered compensation to brokers inquiring about the property. Broker A, acting as a subagent, showed the property on two separate occasions to the vice president of manufacturing for ABC Corporation. Broker B, also acting as a subagent but independent of Broker A, showed the same property to the chairman of ABC Corporation, whom he had known for more than fifteen (15) years. The chairman liked the property and instructed Broker B to draft and present a lease on behalf of ABC Corporation to Broker L, which was accepted by the owner/landlord. Subsequent to the commencement of the lease, Broker A requested arbitration with Broker L, claiming to be the procuring cause.

Analysis: This is an arbitrable matter as Broker L offered compensation to the procuring cause of the sale or lease. To avoid the possibility of having to pay two commissions, Broker L joined Broker B in arbitration so that all competing claims could be resolved in a single hearing. The Hearing Panel considered both brokers' introductions of the property to ABC Corporation. Should the Hearing Panel conclude that both brokers were acting independently and through separate series of events, the Hearing Panel may conclude that Broker B was directly responsible for the lease and should be entitled to the cooperating broker's portion of the commission. (Adopted 11/96)

Fact Situation #11

Broker A, acting as the agent for an out-of-state corporation, listed for sale or lease a 100,000 square foot industrial facility. The property was marketed offering compensation to both subagents and buyer/tenant agents. Over a period of several months, Broker A made the availability of the property known to XYZ Company and, on three (3) separate occasions, showed the property to various operational staff of XYZ Company. After the third showing, the vice president of finance asked Broker A to draft a lease for his review with the president of XYZ Company and its in-house counsel. The president, upon learning that Broker A was the listing agent for the property, instructed the vice president of finance to secure a tenant representative to ensure that XYZ Company was getting "the best deal." One week later, tenant representative Broker T presented Broker A with the same lease that Broker A had previously drafted and the president of XYZ Company had signed.

The lease was accepted by the out-of-state corporation. Upon payment of the lease commission to Broker A, Broker A denied compensation to Broker T and Broker T immediately requested arbitration claiming to be the procuring cause.

Analysis: The Hearing Panel should consider Broker A's initial introduction of XYZ Company to the property, Broker A's contact with XYZ Company on an on-going basis, and whether Broker A initiated the series of events which led to the successful lease. Given the above facts, Broker A will likely prevail. Agency relationships are not synonymous with nor determinative of procuring cause. Representation and entitlement to compensation are separate issues.

Fact Situation #12

Broker A has had a long-standing relationship with Client B, the real estate manager of a large, diversified company. Broker A has acquired or disposed of twelve (12) properties for Client B over a five (5) year period. Client B asks Broker A to locate a large warehouse property to consolidate inventories from three local plants. Broker A conducts a careful evaluation of the operational and logistical needs of the plants, prepares a report of his findings for Client B, and identifies four (4) possible properties that seem to meet most of Client B's needs. At Client B's request, he arranges and conducts inspections of each of these properties with several operations level individuals. Two (2) of the properties were listed for sale exclusively by Broker C. After the inspections, Broker A sends Broker C a written registration letter in which he identifies Client B's company and outlines his expectation to be paid half of any commission that might arise from a transaction on either of the properties. Broker C responds with a written denial of registration, but agrees to share any commission that results from a transaction procured by Broker A on either of the properties. Six (6) weeks after the inspections, Client B selects one of the properties and instructs Broker A to initiate negotiations with Broker C. After several weeks the negotiations reach an impasse. Two (2) weeks later, Broker A learns that Broker C has presented a proposal directly to Client B for the other property that was previously inspected. Broker A then contacts Broker C, and demands to be included in the negotiations. Broker C refuses, telling Broker A that he has "lost control of his prospect," and will not be recognized if a transaction takes place on the second property. The negotiations proceed, ultimately resulting in a sale of the second property. Broker A files a request for arbitration against Broker C.

Analysis: This would be an arbitrable dispute as a compensation agreement existed between Broker A and Broker C. The Hearing Panel will consider Broker A's introduction of the property to Client B, the property reports prepared by Broker A, and the time between the impasse in negotiations on the first property and the sale of the second property. If the Hearing Panel determines that Broker A initiated the series of events that led to the successful sale, Broker A will likely prevail. (Adopted 11/96)

Arbitration Worksheet

NOTE: This worksheet is intended to assist hearing panels in identifying relevant issues and facts in determining questions of entitlement to disputed funds. It is intended to supplement – and not replace – the comprehensive list of questions found in Factor #6 in the Arbitration Guidelines. These questions are not listed in order of priority and are not weighted equally.

Question	Answer	Favors Complainant	Favors Respondent	Favors Neither	Other
1. Was an offer of compensation made through the MLS or otherwise?					
2. Is the claimant a party to whom the listing broker's offer of compensation was extended?					
3. What was the nature of any buyer representation agreement(s)? Was the agreement(s) exclusive or non-exclusive? What capacity(ies) was the cooperating broker(s) functioning in, e.g. agent, legally-recognized non-agent, other?					
4. Were any of the brokers acting as subagents? As buyer brokers? In another legally recognized capacity?					
5. How was the first introduction to the property that was sold/leased made?					
(a) Did the buyer/tenant find that property on their own?					
(b) Who first introduced the purchaser or tenant to that property?					
(c) Was the introduction made to a different representative of the buyer/tenant?					

Arbitration Worksheet

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Question	Answer	Favors Complainant	Favors Respondent	Favors Neither	Other
(d) Was the “introduction” merely a mention that the property was listed?					
(e) Was the property introduced as an open house?					
(f) What subsequent efforts were made by the broker after the open house?					
(g) What property was first introduced?					
6. When was the first introduction to the property that was sold/leased made?					
(a) Was the introduction made when the buyer/tenant had a specific need for that type of property?					
(b) Was the introduction instrumental in creating the desire to purchase/lease?					
(c) Did the buyer know about the property before the broker contacted him? Did he know it was for sale/lease?					
(d) Were there previous dealings between the buyer and the seller?					

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Question	Answer	Favors Complainant	Favors Respondent	Favors Neither	Other
7. What efforts subsequent to the first introduction to the property were made by the broker introducing the property that was sold or leased?					
8. If more than one cooperating broker was involved, how and when did the second cooperating broker enter the transaction?					
9. Did the broker who made the initial introduction to the property engage in conduct (or fail to take some action) which caused the purchaser or tenant to utilize the services of another broker? (estrangement)					
(a) Were agency disclosures made? When?					
(b) Was the potential for dual agency disclosed? When?					
10. Did the broker who made the initial introduction to the property maintain contact with the purchaser or tenant, or could the broker's inaction have reasonably been viewed by the buyer or tenant as a withdrawal from the transaction? (abandonment)					

Arbitration Worksheet

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Question	Answer	Favors Complainant	Favors Respondent	Favors Neither	Other
11. Was the entry of any cooperating broker into the transaction an intrusion into an existing relationship between the purchaser and another broker, or was it the result of abandonment or estrangement of the purchaser?					
12. Did the buyer make the decision to buy independent of the broker's efforts/information?					
13. Did the seller act in bad faith to deprive the broker of his commission?					
(a) Was there bad faith evident from the fact that the difference between the original bid submitted and the final sales price equaled the broker's commission?					
(b) Was there bad faith evident from the fact that a sale to a third party was a straw transaction (one in which a non-involved party posed as the buyer) which was designed to avoid paying commission?					
(c) Did the seller freeze out the broker to avoid a commission dispute or to avoid paying a commission at all?					

Arbitration Worksheet

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Question	Answer	Favors Complainant	Favors Respondent	Favors Neither	Other
14. Did the buyer seek to freeze out the broker?					
(a) Did the buyer seek another broker in order to get a lower price?					
(b) Did the buyer express the desire not to deal with the broker and refuse to negotiate through him?					
(c) Did the contract provide that no brokers or certain brokers had been involved?					
15. Did the original introduction of the purchaser or tenant to the property start an uninterrupted series of events leading to the sale or lease, or was the series of events hindered or interrupted in any way?					
16. If there was an interruption or break in the original series of events, how was it caused, and by whom?					
(a) Did the seller change the listing agreement from an open listing to an exclusive listing agreement with another broker?					

Arbitration Worksheet

NOTE: This worksheet is intended to assist hearing panels in identifying relevant issues and facts in determining questions of entitlement to disputed funds. It is intended to supplement – and not replace – the comprehensive list of questions found in Factor #6 in the Arbitration Guidelines. These questions are not listed in order of priority and are not weighted equally.

Question	Answer	Favors Complainant	Favors Respondent	Favors Neither	Other
(b) Did the buyer terminate the relationship with the broker? Why?					
(c) Was there interference in the series of events from any outside or intervening cause or party?					
(d) Was there abandonment or estrangement?					
17. Did the cooperating broker (or second cooperating broker) initiate a separate series of events, unrelated to and not dependent on any other broker's efforts, which led to the successful transaction—that is, did the broker perform services which assisted the buyer in making his decision to purchase?					
(a) Did the broker make preparations to show the property to the buyer?					
(b) Did the broker make continued efforts after showing the property?					

Arbitration Worksheet

NOTE: This worksheet is intended to assist hearing panels in identifying relevant issues and facts in determining questions of entitlement to disputed funds. It is intended to supplement – and not replace – the comprehensive list of questions found in Factor #6 in the Arbitration Guidelines. These questions are not listed in order of priority and are not weighted equally.

Question	Answer	Favors Complainant	Favors Respondent	Favors Neither	Other
(c) Did the broker remove an impediment to the sale?					
(d) Did the broker make a proposal upon which the final transaction was based?					
(e) Did the broker motivate the buyer to purchase?					

The Panel Member's Quiz

Answer Key

1. True. When Hearing Panels make decisions, they are comprised of competitors taking combined action. To avoid antitrust problems, panels must make sure they follow due process and properly and objectively apply the Code and arbitration guidelines.
2. True. However, follow the lead of the Chair about when to ask questions.
3. False. Adding an article that was not cited in the original complaint or added by the Grievance Committee or Hearing Panel is a violation of the respondent's due process right to know the nature of the charge against them.
4. True.
5. False. Any discussion of the merits of the case by panel members before the hearing is improper. The panel may meet before the hearing to discuss procedural matters of the hearing.
6. False.
7. False. In general, it is the burden of the complainant to prove the case by clear, strong and convincing evidence.
8. False. No documents or evidence other than that actually introduced at the hearing can be used by the hearing panel after the hearing is adjourned.
9. False.
10. False. All matters are confidential.

Sanctioning Scenarios

Explanations of Scenarios

1. This scenario is intended to suggested sanctions falling under “First Violation, Example #1” in the NAR Sanctioning Guidelines. This is a relatively minor violation causing little or no harm to the public and the first violation for the respondent. Thus, the sanctions should be as suggested in “First Violation, Example #1.”
2. The sanctions in this scenario fall into the “First Violation, Example #2” or “Example #3” categories. This is a more serious issue causing relatively significant injury. Even though it is a first violation, the seriousness of the offense should generate a more severe sanction along the lines of Example 2 or Example 3.
3. This situation is an example of a serious, repeat violation. Look to “Repeat Violation, Example #2” or “Example #3” for guidance on this significant violation. In addition, as this is a mishandling of client funds, it is a mandatory reporting matter to the state real estate regulatory authority under Section 23(j) of the *Code of Ethics and Arbitration Manual*. The hearing panel should report this fact to the Board of Directors which is mandated to report to the state regulatory authority in the circumstances listed as a “breach of the public trust” in Section 23(j).