

## 2019 Professional Standards Workshop



### Change to Standard of Practice 1-7

When acting as listing brokers, REALTORS® shall continue to submit to the seller/landlord all offers and counter-offers until closing or execution of a lease unless the seller/landlord has waived this obligation in writing. Upon the written request of a cooperating broker who submits an offer to the listing broker, the listing broker shall provide a written affirmation to the cooperating broker stating that the offer has been submitted to the seller/landlord, or a written notification that the seller/landlord has waived the obligation to have the offer presented. REALTORS® shall not be obligated to continue to market the property after an offer has been accepted by the seller/landlord. REALTORS® shall recommend that sellers/landlords obtain the advice of legal counsel prior to acceptance of a subsequent offer except where the acceptance is contingent on the termination of the pre-existing purchase contract or lease.

### Changes to the Code of Ethics and Arbitration Manual (COEAM) for 2019

**Clarify guidance to REALTORS® and Associations on the rights and role of Realtor Principals in an ethics hearing.**

Sections 13(d)

**No change to:**

- Realtor principal may be joined by review of Grievance or Hearing Panel
- If added after hearing begins, Realtor principal has right to have hearing reheard from the beginning
  - With same hearing panel
  - With new panel
- Findings of violation can be same or different for member and principal
- Sanctions may be same or different

**Respondent:**

*In any proceeding where the Realtor® principal is not joined in the complaint as a respondent, the respondent's Realtor® principal ~~nonetheless retains~~ has the right to be present during the proceeding without providing notice or may be required by the Hearing Panel to attend the hearing. At the request of the respondent, †The Realtor® principal may make opening and closing statements on behalf of the respondent, examine and cross-examine parties and witnesses, introduce affidavits, documents, and other admissible relevant evidence, consult with or testify on behalf of the respondent, and respond directly to questions from the Hearing Panel. In all instances, the respondent's Realtor® principal shall receive copies of the complaint and response, be provided with notice of the hearing, may be called by the parties or the Hearing Panel as a witness, and shall receive copies of the Hearing Panel's decision and recommendation for sanction, if any. If an appeal is required, the respondent's*

- Where Realtor principal is not joined in the complaint
  - Respondent's Realtor principal has the right to be present during the hearing, or
  - May be required by the Hearing Panel to attend
- The Realtor principal may:
  - Make opening and closing statements
  - Examine and cross-examine parties and witnesses
  - Introduce affidavits, documents and evidence
  - Consult with or testify on behalf of the respondent
  - Respond directly to questions from Hearing Panel
- In all instances - Respondent's principal shall
  - Receive copies of the complaint and response
  - Be provided with notice of hearing
  - May be called by parties or Panel as witness
  - Shall receive copies of decision

**Complainant:**

*In any proceeding where a Realtor® principal is not joined in the complaint as a co-complainant, the complainant may, at their sole discretion, allow their Realtor® principal to receive documentation related to the complaint and participate in the hearing as a witness or as counsel (consistent with Part One, Section 4 of this Manual).*

### **Policy Statement 45: Publishing names of Code of Ethics violators**

(changes in underline italics)

**These revisions offer Associations an option that allows for more frequent publication of Code of Ethics violators, and authorizes inclusion of a photograph. More frequent publication of Code of Ethics violators and inclusion of the violator's photograph can provide an increased deterrent to unethical behavior.**

Associations may, as a matter of local discretion, adopt *one of the following options* authorizing the publication of the names of ethics violators, subject to the following qualifications:

#### **Publication Option #1**

- Publications can only occur after a second violation occurs within three (3) years.
- *Ethics citation discipline is not included in the violation count unless the association has affirmatively authorized publication within their citation policy.*
- Publications only in official Association communication
- Name of the firm cannot be published
- Publications must be consistent and uniform – must do same for all
- Only Violators name, article violated, discipline imposed is published, unless
  - Violators name is similar to another members name – then
  - State license number or office address – or both – can be published
- At least one of the violations must be on conduct which occurs after adoption of procedures

*Associations may adopt Publication Option #1 and may increase the timeframe with which publication occurs for certain discipline, the content of the publication to include photos or a description of the violation(s), or any combination thereof, only to the extent that is permissible under Publication Option #2. Any program that exceeds the scope of Publication Option #1, as defined above, must include local or state association legal counsel review of the decision, discipline, and information to be published.*

Publication Option #2:

- Publication can occur in all instances in which violators are disciplined with a letter of reprimand, a fine (ethics citation fines are not included in publications unless the association has affirmatively adopted policy to include them), a suspension, and/or an expulsion.
- Prior to publication, local or state association legal counsel must review the decision, discipline, and information to be published.
- Publication can only be made in an official communication vehicle intended primarily for members of the Association(s) in which the violator holds (held) membership. Where the official communication vehicle is electronic or internet-based, access must be limited to Association members.
- The name of the firm the violator is (or was) licensed with cannot be published.
- Publication must be consistent and uniform. This means that publication may not occur selectively but must be used in each instance where the discipline imposed meets the Association's publication criteria.
- Other than the violator's name and a photo of the violator, the only additional information that may be published is the Article(s) violated, a description of the violation(s) with all names redacted except for the name of the violator, and the discipline imposed, except that in cases where the violator's name is similar to another member's name, the violator's license number or office address (or both) may also be published.
- Publication must be based on conduct which occurs after the adoption of the Association's publication procedures.

**REALTOR® Dispute Resolution**

If REALTORS® cannot settle disagreements between/among themselves, two options are available to them – (1) informal dispute resolution and (2) formal filing of an ethics complaint and/or an arbitration request.

**Informal Dispute Resolution – Ombudsman Program - Voluntary**

- REALTORS®, staff, and others may act as ombudsmen.
- Parties may decline to use ombudsmen services
- Ethics complaints resolved through an ombudsman are considered dismissed.

**Informal Dispute Resolution – Mediation Program – May be mandatory**

Mediation is the preferred dispute resolution tool of the REALTOR® organization

- Disputing parties meet with a mediator appointed by the association.

- Parties explain their issues and positions and have an opportunity to ask each other questions.
- Mediators use a wide variety of techniques to move the parties toward a mutually acceptable resolution.
- If an agreement is reached, then the parties put the agreement into a signed document expressing the terms, and no arbitration hearing is held.

### Mediation compared with arbitration

Mediation	Arbitration
Low cost	Moderate cost
Little delay	Moderate delay
Maximum range of solutions	Win/lose
Parties control the outcome	Arbitrators control the outcome
Maintains/improves relationships	May harm relationships

### The Ethics Citation Program

The Citation Program allows a party – Realtor or member of the public – to file a complaint against a Realtor under specific articles of the Code. The Complainant will have to provide the Citation Hearing Panel with sufficient evidence to, without a reasonable doubt, show that the Respondent is in violation since there is not hearing and no opportunity to provide additional evidence.

#### Includes

- Failure to disclose dual agency
- Failure to submit all offers
- Unauthorized access to listed property
- Failure to communicate change in compensation
- Failure to disclose variable rate, it's differential
- Failure to disclose existence of accepted offers
- Misrepresenting available of listed property
- Failure to disclose Realtor's ownership or interest
- Failure to present true picture in advertising
- Not using brokerage name in ads
- Falsely claiming to have 'sold' a property
- Not disclosing firm name and state of licensure on website
- Using designations you do not have
- Failure to cooperate in pro standards proceedings
- Conditioning submission of buyers offer on listing brokerage paying more compensation

## Formal Dispute Resolution – Mandatory

	<u>Ethics</u>	<u>Arbitration</u>
<b>Basic Issue</b>	Conduct	Monetary dispute
<b>Who Can File?</b>	REALTOR® or public	REALTOR® - must be between Broker/ Principals associated with different firms
<b>Grievance Committee</b>	Acts as screening committee – like a grand jury – comprised of members of the local association appointed by President	
<b>Timely Filing</b>	Must be filed within 180 days of closing or from when violation could have been reasonably known.	Must be filed within 180 days of closing
<b>Key Question</b>	If the allegations were taken as true on their face, is it possible that a violation of the Code occurred?	If the allegations were taken as true on their face, is it arbitrable – is there some basis on which an award could be based?
<b>Options</b>	Dismiss Send to Pro Standards Amend and send forward	Dismiss Send to Pro Standards
<b>Pro Standards Committee</b>	Provide a hearing that gives due process to all parties	
<b>Look in file for prior violations</b>	Yes	No
<b>Discipline</b>	Yes Letter of Warning Letter of Reprimand Education Fine not to exceed \$15,000 Probation for one year or less Suspension for not less than 30 days nor more than one year Expulsion from membership for period of one to three years Suspension or termination of MLS privileges	No
<b>Award money</b>	No	Yes – only amount requested

## The Role of the Grievance Committee

### Committee's Role

1. Initially reviews and screens ethics complaints and arbitration requests
2. Does not conduct hearings
3. Does not determine if a violation has occurred or if monies are owed
4. Does not mediate or arbitrate business disputes
5. Grievance's job to decide whether it should go forward. Do not send it forward if there is no grounds to do so and 'let the hearing panel decide'. If there is nothing there it should not go forward.

### Grievance Committee's Options

1. Amend the complaint and forward for a hearing
2. Forward the complaint as submitted by the complainant for a hearing
3. Dismiss the complaint

### Grievance Committee Issues

1. Do not use the Committee as a 'club' to send issues forward because you don't like the way someone does business.
2. Don't try the case – just decide if it should go forward.
3. Do not automatically send all complaints from the public on to a hearing – some have no merit.
4. Recuse or abstain if either party:
  - Is a member of your office or company
  - Is related to you in any way
  - Possibly if it is a sister company in your franchise
  - You are in a transaction with them
5. No bullying – stand your ground against the bully!

### Appealing the Grievance Committee's Decision

1. Complainant may appeal the deletion of an Article to the Board of Directors within 20 days after date of notice of the committee's decision
2. Complainant may appeal dismissal of the complaint within 20 days after date of notice
3. Parties do not have the right to attend the appeal hearing
4. No additional information may be added; directors or panel review only what grievance committee considered

## Grievance Committee Checklist – Ethics Complaint

Complainant \_\_\_\_\_ Respondent \_\_\_\_\_  
 Case File \_\_\_\_\_ Reviewed By \_\_\_\_\_ Date \_\_\_\_\_

**Yes No**

- |                          |                          |  |
|--------------------------|--------------------------|--|
| <input type="checkbox"/> | <input type="checkbox"/> | 1. Is the complaint acceptable in form as received by the Committee?   |
| <input type="checkbox"/> | <input type="checkbox"/> | 2. Are all necessary parties named in the complaint?   |
| <input type="checkbox"/> | <input type="checkbox"/> | 3. Was the complaint filed within 180 days of the time that the alleged offense and facts relating to it could have been known by the complainant in the exercise of reasonable diligence? |
| <input type="checkbox"/> | <input type="checkbox"/> | 4. Is the respondent named in the complaint a member of the Board, and was the respondent a member of any Board at the time of the alleged offense?  |
| <input type="checkbox"/> | <input type="checkbox"/> | 5. Is litigation or any government agency investigation or other action pending related to the same transaction?   |
| <input type="checkbox"/> | <input type="checkbox"/> | 6. Is there any reason to conclude that the Board would be unable to provide an impartial Hearing Panel?   |
| <input type="checkbox"/> | <input type="checkbox"/> | 7. Are the specific Articles cited in the complaint appropriate in light of the facts provided?  |
| <input type="checkbox"/> | <input type="checkbox"/> | 8. Should additional articles be cited? Which? _____   |
| <input type="checkbox"/> | <input type="checkbox"/> | 9. Should certain Standards of Practice be cited in support of the Articles charged? Which? _____  |
| <input type="checkbox"/> | <input type="checkbox"/> | 10. Are an inappropriate Articles cited? Which? _____  |
| <input type="checkbox"/> | <input type="checkbox"/> | 11. If the facts alleged in the complaint were taken as true on their face, is it possible that a violation of the Code of Ethics occurred?  |

If all of the relevant questions have been answered to the satisfaction of the Grievance Committee, and the facts given appear to indicate a possible violation of the Code of Ethics, The Grievance Committee shall refer the complaint to the Professional Standards Committee for a hearing by an Ethics Hearing Panel.

The Grievance Committee has determined that the disposition of this complaint is:

- Dismiss the complaint as unworthy of further consideration
- Refer the complaint back to the Complainant for arbitration rather than an ethics complaint.
- Refer the complaint to the Liaison to arrange a hearing by an Ethics Hearing Panel of the Professional Standards Committee.

\_\_\_\_\_  
 Signature of the Grievance Committee Chairman



**#1: Disclosure of Multiple Offers**

REALTOR Justin had a listing in the MLS offering co-op compensation of %X. REALTOR Megan brought him an offer. Sue asked Bob if there were multiple offers and Bob responded with "I'm not at liberty to disclose". Sue's buyer did not get the property.

Megan's buyer went to Justin's seller's open house. He introduced himself as the 'other buyer' for the seller's property and the seller chatted a bit and told the buyer that he hoped there were no hard feelings and that the only reason they took the other offer was because it was Justin's buyer and they saved themselves 2% on the commission.

Megan and the buyers combined to file a complaint against Justin citing Article 1, SOP 1-15 as supporting information and Article 3, SOP 3-4 as supporting information.

**Send to Hearing?**

Yes

No

**#2: Disclosure of Multiple Offers and Contents of Offer**

REALTOR Ashley had the Sellers home listed. REALTORS Ryan and Amber both had offers on her listing. Ryan was representing an investor and Amber represented a young couple buying their first home. Ryan's buyer's offer was for slightly more than Amber's buyers offer. Ashley told Amber she was in a multiple offer and also told her how much the other offer was for, to give her buyers a chance at getting the property. Amber's buyers got the house.

After the closing Ryan (and his buyer) filed a complaint against Ashley alleging a violation of Article 1. He was never told he was in a multiple offer and Ashley should not have disclosed to the other buyers how much his offer was for.

**Send to Hearing?**

Yes

No

**#3: Present All Offers**

REALTOR® Kate sent an offer to REALTOR® Jeff on Friday night. She called him on Sunday and asked whether his seller had accepted it. Jeff informed her that he never saw her offer and that his seller had sold their home to another buyer on Saturday night. Kate has filed a complaint against Jeff citing Article 1, Standard of Practice 1-6.

**Send to Hearing?**

**Yes**

**No**

## **The Hearing**

### **Hearing Panel Issues**

1. Return all calls to staff for scheduling of hearings.
2. Recuse yourself if you cannot – or should not – serve on a panel.  
 Members are automatically disqualified from serving on a Hearing Panel (or Board of Directors on appeal) for the following reasons:
  - only one person connected with any firm, partnership, or corporation per panel
  - a member is related by blood or marriage to one of the parties
  - a member is an employer, partner, or employee of one of the parties
  - a member is party to the hearing
  - a member is party to or a witness for any other pending case involving the parties
3. Arrive on time for the hearing and leave adequate time in your schedule for the hearing.
4. Read all information sent to you in advance and be prepared when you arrive.
5. Keep an open mind about the information you hear. Don't prejudge.
6. Don't have any communication about the case with any party before or after the hearing.
7. Don't have any communication about the case with other panel members before or after.
8. Don't 'research' the case before the hearing by gathering additional information.
9. Be impartial and neutral until you are ready to decide the case in executive session
10. Dress appropriately. This is not a place for jeans – sweats – or 'play clothes'.
11. Give the parties your full attention. Give respectful eye contact.
12. Put away your cell phones. Stop looking at your watch.
13. Address the parties neutrally. Do not use surname for one and first name for the other.
14. Don't 'talk down' or preach to the parties or witnesses.
15. Don't use leading questions or re-ask a question continuously in order to reach a conclusion.

16. Give each party every opportunity to present their case. Do not interrupt.
17. If new evidence is admitted into the record – be sure the other side has adequate time to read it.
18. It's not your job to make someone's case. It is the complainant's job to make theirs. Do not assist any party by asking 'helpful' questions.
19. Don't insert ethics or license law issues into arbitration cases. A violation of license law or ethics is a separate issue from the determination of procuring cause.
20. Don't argue with your fellow panelists during the hearing.
21. Watch your body language – rolling your eyes, nodding your head, snickering, is showing partiality.
22. If you take a recess, refrain from discussing the case with anyone. Be polite – but refrain from having conversation with any of the parties during recesses.
23. Make sure that witnesses are excused after testifying and that they are in the hearing room only during the time of their testimony.
24. Chairmen should call a recess any time they feel the hearing needs to 'get back on track'.
25. Panel members should ask the Chair for a recess if they feel the hearing needs to 'get back on track'.
26. During Executive Session – only rule based on evidence brought out during the hearing – not on what you think might have happened.
27. In an Ethics hearing – after determining a respondent is in violation – be sure to ask to see the respondents file.
28. Remember that you cannot ask for more evidence or testimony once you are in Executive Session. Be sure you have all your questions answered and have all the information you need to make an informed decision.
29. The parties can come to an agreement and halt the hearing any time prior to the Panel rendering their decision – if they do – let them!

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**HEARING PANEL FINDINGS** \_\_\_\_\_

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**HEARING PANEL FINDINGS** \_\_\_\_\_**Reaching a Decision** \_\_\_\_\_**1. Review each article charged**

Determine and review the related Standards of Practice and/or Case Interpretations

**2. Determine the facts**

What happened? What are the facts determined by the evidence brought forth in Testimony and written documents by clear, strong and convincing proof, not by what you think happened.

**REMEMBER – THE BURDEN OF PROOF IS THE COMPLAINANTS, NOT THE RESPONDENT’S AND NOT THE PANEL’S.**

**3. Standard of proof**

The standard of proof on which an ethics hearing decision is based shall be “clear, strong, and convincing” Clear, strong and convincing shall be defined as that measure or degree of proof which will produce a firm belief or conviction as to the allegations sought to be established.

**Note:** the standard of proof in an arbitration hearing is ‘preponderance of the evidence’ – more evidence points in one direction than the other – not as overwhelming as above.

**4. Compare the facts to the charge**

Are the actions charged by the Complainant factual based on the evidence?

**5. Analyze the facts’ relationship to the Code**

If the actions charged by the Complainant are proven, are these specific actions related to the Article, any related Standard of Practice or any related Case Interpretation?

*IF NOT – THERE CANNOT BE A VIOLATION*

Remember, there is no standard answer to be applied universally or no precedent other than what’s in the Code, Standards or Cases. Each case must be considered separately. Make no subjective opinions. Base your decision on the facts, not what you think MAY have happened. Be familiar with the related Articles, Standards and Case Interpretations.

**Executive Session Issues**

1. Up to association procedure whether association counsel/staff remain
2. No new information solicited or received from parties
3. No witnesses called or recalled
4. No ability to amend complaint
5. Majority of hearing panel to sign decision
6. Dissenting opinions, if used, transmitted to parties and board of directors, along with decision

Any reference to dissenting opinions was removed in 2018. This would not preclude an association locally from adopting policy to allow dissenting opinions.

**Discussion: Pros and cons of dissenting opinions**

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7. A possible antitrust situation could arise if at any time sanctions are given because of any reason other than those mentioned above. Care should be given that the business practices or other non-relevant issues are being used to determine sanctions or violations.

## Disciplinary Guidelines

### Code enforcement achieves a number of important goals:

- Where REALTORS® have been wrongly or mistakenly charged it provides personal and professional vindication
- Where violations are determined, it educates members about their obligations
- Serves as a deterrent to future violations

Determining that a violation has occurred is only part of the Hearing Panel's job. Equally important is crafting discipline commensurate with the offense. Panels will want to consider:

Violation due to lack of familiarity with Code, inexperience, oversight or unintentional mistake?	Primary purpose of discipline should be educational
Violation due to knowing disregard for Code and its duties?	Greater emphasis should be on 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?
  - Was a client customer, member of the public, or another REALTOR® harmed?
3. Was the violation inadvertent or unintentional - or – 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 discipline?
7. Did the violator acknowledge the violation – express remorse or realize their error?
8. Are there other factors that ought to be considered?

## Progressive Discipline

### First Violation – Or first within last three years

Violation relatively minor  
Little harm to others  
Ignorance or  
misunderstanding of Code

- Letter of warning
- Fine of \$500 or less
- Attendance at relevant education session
- Any combination of the above

Violation relatively serious  
Some harm / injury caused  
Disregard for Code's  
obligations

- Letter of reprimand
- Fine of \$2,000 or less
- Attendance at relevant education session(s)
- Any combination of the above

Violation very serious  
Substantial harm to others  
Knowing disregard of Code

- Fine of \$2,000 or less
- Attendance at relevant education session(s)
- Probation for 3 months or less

### Repeat Violation within last three years

Violation relatively minor  
Little harm to others  
Ignorance or  
misunderstanding of Code

- Fine of \$2000 or less
- Attendance at relevant education session(s)
- Probation of 3 months or less

Violation relatively serious  
Some harm or injury caused  
Disregard for Code's  
obligations

- Fine of \$10,000 or less
- Attendance at relevant education session(s)
- Probation of 6 months or less
- Suspension for 3 months or less
- Any combination of the above

Violation very serious  
Substantial harm to others  
Knowing disregard of Code

- Fine of \$15,000 or less
- Attendance at relevant education session(s)
- Suspension for 6 months or less
- Any combination of the above



## Writing the Decision

### Findings of Fact

- ✘ Make your findings of fact and basis for decision clear and concise to avoid confusion.
- ✘ State the background (who's who)
- ✘ State what happened
- ✘ Show clear, strong, and convincing proof
- ✘ State facts clearly and concisely
- ✘ Put them in sequential order
- ✘ Write them so they would make sense to an impartial uninvolved party
- ✘ They should explain why you reached the stated conclusion

### REMINDER: FINDINGS OF FACT ARE FOR ETHICS ONLY – NOT ARBITRATION

### Conclusions

- ✘ Must be based on the findings of fact
- ✘ Should state which Respondent(s) are in violation or are not in violation
- ✘ Should state which Article(s) were violated
- ✘ Should reiterate the actions shown by your findings which led to a violation
- ✘ Should reiterate the basis of the Article(s) violated

Example: Because Realtor® A contacted the seller directly without first contacting the listing broker, Realtor® A violated Article 16 as supported by Standard of Practice 16-4.

### Common Problems in Writing Ethics Decisions

- ✘ Facts not relevant to the issue are included
- ✘ Written "facts" are based on assumptions, not clear, strong and convincing evidence
- ✘ Conclusions are written as part of the facts
- ✘ "Testimony showed" and other unnecessary words used to make something a "fact."
- ✘ Facts don't make sense when read later
- ✘ The conclusion is not supported by the facts
- ✘ The conclusion does not relate to the Article(s) charged
- ✘ The discipline is inappropriate

**What does the National Association recommend be included in the “Findings of Fact” section of sample form #E-11?**

The purpose of the “Findings of Fact” section of Form #E-11 is to provide a clear and concise statement of the facts that led the Hearing Panel to reach its conclusion.

For example, the findings of fact for a violation of Article 12 could read as follows: “REALTOR® B was charged with a violation of Article 12. Evidence provided during the hearing showed that his firm had a listing on 123 Pleasant Drive, and that he ran an ad on October 4 for the property which did not disclose the name of his firm. Consequently, the Hearing Panel finds him in violation of Article 12 as interpreted by Standard of Practice 12-5.”

Conversely, if a violation was not found, the “Findings of Fact” could read: “REALTOR® B was charged with a violation of Article 12. Evidence provided during the hearing showed that his firm had a listing on 123 Pleasant Drive, and that the advertisement he ran for that property on October 4 disclosed the name of his firm. Consequently, the Hearing Panel finds him not in violation of Article 12 as interpreted by Standard of Practice 12-5.”

**Arbitration Decision**

The decision of the Hearing Panel in an arbitration proceeding shall be reduced to writing by the panel (setting forth only the amount of the award) and be signed by the Arbitrators or a majority of them, and a copy shall be furnished to each of the parties to the arbitration. A copy also shall be filed with the Professional Standards Administrator of the Board.

There is no findings-of-fact given in an arbitration.

## The Arbitration Process

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### Procuring Cause

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.*

**"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.*

## Grievance Committee Checklist – Arbitration Request

Complainant \_\_\_\_\_ Respondent \_\_\_\_\_

Case File \_\_\_\_\_ Reviewed By \_\_\_\_\_ Date \_\_\_\_\_

- | Yes                      | No                       |   |
|--------------------------|--------------------------|---|
| <input type="checkbox"/> | <input type="checkbox"/> | 1. Is the request for arbitration acceptable in the form as received by the Committee?  |
| <input type="checkbox"/> | <input type="checkbox"/> | 2. Are all necessary parties named in the request for arbitration?  |
| <input type="checkbox"/> | <input type="checkbox"/> | 3. Has the Listing Office been named?   |
| <input type="checkbox"/> | <input type="checkbox"/> | 4. Should the Listing Office be named?  |
| <input type="checkbox"/> | <input type="checkbox"/> | 5. Was the request filed within 180 days after the closing or within 180 days after the facts constituting the arbitrable matter could have been known in the exercise of reasonable diligence, whichever is later? |
| <input type="checkbox"/> | <input type="checkbox"/> | 6. Are the parties members in good standing or otherwise entitled to invoke arbitration through the Board's facilities?   |
| <input type="checkbox"/> | <input type="checkbox"/> | 7. Were they Members at the time the facts giving rise to the dispute occurred?   |
| <input type="checkbox"/> | <input type="checkbox"/> | 8. Is litigation pending in connection with the same transaction?   |
| <input type="checkbox"/> | <input type="checkbox"/> | 9. Is there any reason to conclude that the Board would be unable to provide an impartial Hearing Panel?  |
| <input type="checkbox"/> | <input type="checkbox"/> | 10. If the facts alleged in the request for arbitration were taken as true on their face, would arbitration be appropriate in light of the facts provided?  |
| <input type="checkbox"/> | <input type="checkbox"/> | 11. If an arbitrable issue exists, are the parties required to arbitrate? or  |
| <input type="checkbox"/> | <input type="checkbox"/> | 12. Is this a voluntary arbitration?  |
| <input type="checkbox"/> | <input type="checkbox"/> | 13. Is the amount in dispute too small or too large for the Board to arbitrate?   |
| <input type="checkbox"/> | <input type="checkbox"/> | 14. Is the matter too legally complex, involving issues that the arbitrators may not be able to address in a knowledgeable way?   |
| <input type="checkbox"/> | <input type="checkbox"/> | 15. Is there a sufficient number of knowledgeable arbitrators available?  |

If all of the relevant questions have been considered, and a majority of the Grievance Committee conclude that the matter is properly arbitrable by the Board, the Grievance Committee shall send the request for arbitration to the Chairman of the Professional Standards Committee for arbitration by an Arbitration Hearing Panel.

The Grievance Committee has determined that the proper disposition of this complaint is:

- Dismiss the complaint as unworthy of further consideration.
- Refer the complaint back to the Complainant as appropriate for an ethics complaint rather than arbitration.
- Refer the complaint to the Liaison to arrange a hearing by an Arbitration hearing Panel of the Professional Standards Committee.
- Request further information from:
  - The Complainant
  - The Respondent

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Signature of Grievance Committee Chairman

**#1: No Compensation Paid to Co-Op Broker**

I am filing an arbitration against Broker Sue who is a member of the Sunny Day Board of REALTORS®. I sold her listing at 234 Dog Leg Drive in Summerville on January 5<sup>th</sup>. It closed on February 15<sup>th</sup> and she didn't pay me. Here's what happened.

My buyer, Steve Francis, emailed me with a few houses he had found on REALTOR®.com. Sue's Dog Leg Drive property was one of them. Before I drove all that way to show her listing I needed to call her about it because I'm not in her MLS I didn't have any information on it other than what was on REALTOR®.com. She gave me the information I needed and I picked up a key and showed the property and sold it that same day.

I don't know what her problem is. She refused to give me the commission and I expect our association to help me get it.

**Send to Hearing?**

**Yes**

**No**

**#2: No Commission Paid – Again**

Broker A listed 567 Cinderella Circle. Broker B sold the property and went to the closing where he was not paid. The sellers, the Charmings, did not have enough equity to pay the commissions.

Broker B has filed for arbitration alleging that Broker A owes the compensation regardless of whether he was paid by the sellers. Broker A has said he does not have to pay since he didn't get paid.

**Send to Hearing?**

**Yes**

**No**

**Hearing Panels? Decisions?**

**Procuring Cause Case Study**

- 264 Twisted Trail is listed by Linda Lister and she was holding an open house there when it was shown to Brenda Buyer by Sally Salesperson.
- Six weeks later, Brenda Buyer e-mailed Linda about another property she had listed. At that time, Brenda mentioned that she thought she had met Linda a few weeks ago at one of her listings.
- Linda asked Brenda if she was still working with Sally, or with any other agents, and Brenda responded that although she had looked at homes with a few other agents, no one was representing her in any way and that specifically she had not spoken to Sally in at least three or four weeks.
- Linda not only showed Brenda the home she inquired about but a few others as well. After seeing the others, Brenda asked Linda to show her Twisted Trail again. Linda did – Brenda wanted it – an offer was written which was accepted by the seller.
- Shortly after closing, Linda received a call from Sally asking for the compensation since she had first introduced Brenda to the property. Linda refused to pay, Sally requested arbitration.

**You Decide:****What if:**

1. Brenda Buyer had only called to see the Twisted Trail property again and it was the following morning?
2. Sally had a signed Buyers' Agency Agreement with Brenda?
3. Sally had kept in constant contact with Brenda?
4. Sally had not accompanied Brenda to the open house? Sally had given Brenda his business card to present to Linda (which he did) and the offer had been written that day, on the spot by Linda?

## **Appeals – Procedural Reviews – Ratification**

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### **Ethics Hearing Appeal**

- All appeals must be in writing and must be accompanied by a deposit with the President in the sum of \$\_\_\_\_\_ (not to exceed \$500).
- The respondents appeal should clearly indicate the bases on which the Hearing Panel's decision and/or recommendation for discipline is being challenged.
  - (1) misapplication or misinterpretation of an Article(s) of the Code of Ethics;
  - (2) procedural deficiency or any lack of procedural due process;
  - (3) the discipline recommended by the Hearing Panel—and set forth in reasonable detail the facts and evidence to support the bases cited.
- The complainant may appeal based only on alleged procedural deficiencies or other lack of procedural due process that may have deprived him of the opportunity for a full and fair hearing.
- The written request for appeal shall be reviewed within ten (10) days after the appeal was transmitted to the Association by the Board President or the President's designee only for the purpose of determining whether the appeal states any legitimate basis for consideration by the Board of Directors.
- If determined to be insufficient, it shall be returned to the appellant accompanied by an explanation and a request for additional detail to be received by the Board within ten (10) days of notice.
- This initial administrative review is not a decision on the merits of the appeal request but is only intended to ensure compliance with the requirement that an appeal clearly set forth all bases that will be presented to the Board of Directors for their consideration.
- All requests for appeals received by the Board must be considered by the Board of Directors, and only those bases and issues raised in the written request for appeal may be raised by the appellant in any hearing before the Board of Directors.

### **Arbitration Procedural Review**

- A written request for procedural review of the arbitration hearing procedures must be filed with the President within twenty (20) days after the award has been transmitted to the parties and be accompanied by a deposit in the sum of \$\_\_\_\_\_ (not to exceed \$500).
- The request for procedural review should cite the alleged procedural deficiencies or other irregularities the party believes constitute a deprivation of due process (e.g., fraud, coercion, bias, prejudice, evident partiality, etc.) on the part of Hearing Panel members or others acting on behalf of the Board.



- The request for procedural review shall be reviewed within ten (10) days of receipt of the request by the Board President or the President's designee only for the purpose of determining whether the request states any legitimate basis for consideration by the Board of Directors.
- If determined to be insufficient, it shall be returned to the requester accompanied by an explanation and a request for additional detail to be received by the Board within ten (10) days of notice.
- This initial administrative review is not a decision on the merits of the request for procedural review but is intended only to ensure compliance with the requirement that the request cite the alleged procedural deficiency or irregularity on which the request is based and which will be presented to the Board of Directors for its consideration.
- All requests for procedural review received by the Board must be considered by the Board of Directors, and only the bases raised in the written request for procedural review may be raised during the review before the Directors.
- The Professional Standards Administrator shall within one (1) day of receipt of the request or within one (1) day of receipt of additional detail, if provided or the date that the period to provide additional detail has elapsed, send a copy to the other party, notify all parties of the time and place of the review hearing by the Directors at least ten (10) days in advance, and bring the matter before the Directors for review at their next regular meeting or at a special meeting called by the Professional Standards Administrator for that purpose, but not later than thirty (30) days after the date of receipt of the procedural review.
- The Professional Standards Administrator shall provide to the Directors, in advance, a copy of the request for procedural review or the amended request for procedural review, if any, and the President's correspondence, if any. The Directors shall be advised that the information provided is confidential and not to be discussed with others at any time.
- The request for procedural review may be heard by a panel of Directors appointed by the President for that purpose (or, alternatively, by the Board's Executive Committee). Five (5) Directors or a quorum of the Board of Directors, whichever is less, shall constitute such panel, which shall act on behalf of the Board of Directors. The decision of the panel (or Executive Committee) shall be final and binding and shall not be subject to further review by the Board of Directors.
- At the procedural review hearing, the party filing the request will have an opportunity to explain the bases on which the party is requesting that the award of the arbitrators be overturned. The Chairperson of the arbitration panel (or the Chairperson's designee) will have an opportunity to respond to the allegations. The other party shall have the opportunity to present to the Directors reasons why the arbitration Hearing Panel's award should not be overturned.
- The Board of Directors shall not hear an appeal with respect to the merits of an arbitration award, and shall not, on appeal, review such evidence offered with respect to the merits of that award, except as such evidence may bear upon a claim of deprivation of due process.

- The Directors shall transmit their decision within five (5) days from the date of the procedural review hearing. This decision may be to adopt the award of the arbitrators or to overturn the award based on a substantial procedural error in the arbitration hearing process that resulted in a denial of due process or on a determination that the member was otherwise deprived of due process.
- If the Directors determine that a substantial procedural error occurred or a member was otherwise deprived of due process, the Directors shall invalidate the original arbitration award and direct that the matter be referred to the Professional Standards Committee for a hearing on the merits before a different Hearing Panel, or, alternatively, the Directors may release the parties from their obligation to arbitrate if the Directors conclude that the Board will be unable to impanel an impartial Hearing Panel.
- After all procedural remedies provided for in the Board's procedures have been exhausted, a member is not precluded from asserting any legal rights to which he is entitled. Assertion of such legal rights in the courts does not violate Article 17 of the Code of Ethics.

### **Section 23. Action of the Board of Directors**

Within twenty (20) days after the Hearing Panel's final decision has been transmitted, the complainant or the respondent may file an appeal with the President.\*\*\*

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\*\*\*Appeal is provided only from decisions rendered in hearings of alleged unethical conduct, and not from the decision of an arbitration panel. However, the Board of Directors reserves the right to review procedures of any ethics or arbitration hearing to ensure compliance with the governing documents of the Board and to rule thereon; and in arbitration hearings, a limited form of appeal is provided only in respect of alleged irregularities related to the arbitration as are alleged to have deprived the party of due process.

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- If no appeal is filed, the Directors will adopt the Hearing Panel's recommendation and issue its order accordingly (at its next regularly scheduled meeting or a special meeting designated for that purpose, but no later than thirty [30] days after the date the Hearing Panel's decision was transmitted to the parties), unless:
    - (1) the Directors, if concerned with a possible procedural deficiency, refer the decision back to the Professional Standards Committee for a new hearing and recommendation by a different Hearing Panel; or
    - (2) the Directors are concerned with the appropriateness of the recommendation of sanction, in which case the Directors may impose alternative discipline that does not exceed that recommended by the Hearing Panel, or may refer the decision back to the original Hearing Panel for further consideration and recommendation accompanied by the Directors' concerns regarding the proposed discipline
      - Hearing Panels are not required to accept the Directors' recommendation to increase discipline.
      - In instances where the Hearing Panel increases discipline, the respondent(s) will have an additional twenty (20) days from the date the Hearing Panel's revised decision has been transmitted to appeal the revised discipline).

- Upon final action by the Directors, the President shall disseminate notice of action with the nature, form, content and extent of notice approved by the Association legal counsel, to
  - Complainant
  - Respondent
  - Chairperson and hearing panel
  - Association legal counsel
  - President of any other Association in which the respondent holds membership
  - Any governmental agency as directed by the BOD (see below)
- Association members – other than those specified – shall not be notified except with respect to suspension or expulsion of membership or unless
  - one of the publication options in Section 45
  - Notification is required to ensure compliance with Association bylaws
- Final ethics decision holding Realtors in violation must be forwarded to the state in instances where there is reason to believe the public trust may have been violated.
  - Misappropriation of client or customer funds or property
  - Willful discrimination
  - Fraud resulting in substantial economic harm

Associations are encouraged to publish periodic Code Enforcement Activity Reports

- Number of complaints
  - Articles charged
  - Number of complaints dismissed by Grievance
  - Number of violation of specific articles
  - Number of complaints and articles where violations are found
  - Sanctions imposed
- Arbitration report
    - Number of arbitration requests received
    - Number dismissed without hearing
    - Number of mediations and arbitrations held
  - No Code Enforcement Reports shall include the names of individuals or firms

## Questions and Answers

These are from the Code of Ethics and Arbitration Manual (COEAM). Numbers here reflect the number of the question in the manual.

**1. Can the Board of Directors direct a Grievance Committee to always solicit responses in ethics and arbitration proceedings?**

No. Only if the Grievance Committee is in need of additional information which the complainant cannot provide pertaining to the questions in Section 19, Grievance Committee's Review of an Ethics Complainant, or Section 42, Grievance Committee's Review and Analysis of a Request for Arbitration, may the Grievance Committee solicit a response. *(Revised 11/15)*

**2. A respondent in an ethics hearing has notified the Board that she will be represented by legal counsel. Is it appropriate for her counsel to take an active role in the hearing?**

Every party to an ethics or arbitration hearing has the right to be represented by legal counsel. Counsel may take an active role in presenting the opening and closing statements, the party's claim/defense, and the cross-examination of the other party and the other party's witnesses. Regardless of how actively counsel participates in a hearing, it is important to remember that no REALTOR® may refuse to answer questions directly put to him or her (though the party may confer with counsel prior to answering), and at no time must a Hearing Panel countenance any attempt by counsel to harass, intimidate, coerce, or confuse the panel or any party to the proceeding.

**3. A salesperson is the respondent in an ethics complaint. The respondent asks that his principal broker (who is also a REALTOR®) serve as his counsel during the hearing. Is this permitted?**

Yes. As used in the *Code of Ethics and Arbitration Manual*, the term "counsel" refers to an attorney at law or to a REALTOR® of the parties' choosing (or both) in an ethics proceeding. However, it would be inappropriate for anyone other than a licensed attorney to act as counsel for a party to an arbitration proceeding.

**9. Must our Board grant a postponement each time one is requested? Or, if one party receives a postponement, is the other party automatically entitled to a postponement if requested?**

A Board is under no obligation to grant a postponement, much less honor repeated requests for postponement. However, extenuating circumstances should be considered in determining if a requested continuance will be granted. Parties' requests for continuances shall only be granted when all parties mutually agree to a subsequent specified date, or when the hearing panel chair determines that denying the continuance would deny the requestor a fair hearing. *(Revised 11/14)*

**16. Who can amend an ethics complaint, and when can it be amended?**

Before an ethics complaint is referred to the Professional Standards Committee for hearing, it may be amended either by the complainant or by the Grievance Committee. If the Grievance Committee dismisses an Article(s) cited by the complainant, the complainant may appeal that dismissal to the Board of Directors.

After referral to the Professional Standards Committee, the complaint may be amended by the complainant. The respondent should then be provided with a copy of the amended complaint and be given an opportunity to file an amended response.

An ethics complaint may also be amended by either the complainant, or upon action of the Hearing Panel during the hearing to add previously uncited Articles or additional respondents. If this occurs, the respondent should be given an opportunity to request a postponement to prepare a response to the amended complaint.

Arbitration requests may be amended to add or delete parties only by the complainant or respondent. During its initial review, however, the Grievance Committee may suggest that such amendments be made in order to ensure that all related claims arising out of the same transaction can be resolved at the same time. Refer to Professional Standards Policy Statement #27, *Code of Ethics and Arbitration Manual*. (Revised 05/15)

**17. Who can withdraw a complaint, and when can this be done?**

Complainants may withdraw their complaints at any time prior to adjournment of the ethics hearing. However, if complainant withdraws the complaint after transmission of the Grievance Committee's decision to forward the complaint to a hearing and prior to adjournment of the ethics hearing, the complainant may not resubmit the complaint on the same matter. If complainant withdraws the complaint before transmission of the Grievance Committee's decision to forward the complaint to a hearing, the complainant may resubmit the complaint on the same matter so long as it is filed within the 180-day filing deadline as defined in this Manual. If a complaint is withdrawn by the complainant after the Grievance Committee determines the complaint requires a hearing, it will be referred back to the Grievance Committee to determine whether a potential violation of the public trust (as defined in Article IV, Section 2 of the National Association's Bylaws) may have occurred. Only where the Grievance Committee determines a potential violation of the public trust may have occurred may the Grievance Committee proceed as the complainant. (*Amended 5/16*)

**18. An ethics complaint has been filed with our Board alleging a violation of an MLS regulation. How should we process this complaint?**

If the alleged offense is a violation of an MLS rule or regulation and does not involve a charge of unethical conduct or request for arbitration, it may be administratively considered and determined by the Multiple Listing Service Committee, and if a violation is determined, that committee may direct the imposition of a sanction. The recipient of such a sanction, however, may then request a hearing before the Professional Standards Committee within twenty (20) days following receipt of the Multiple Listing Service Committee's decision. Any alleged violation of an MLS rule or regulation that includes charges of unethical conduct should be forwarded to the Grievance Committee for review and possible referral to the Professional Standards Committee. Refer to Section 7.1, Handbook on Multiple Listing Policy.

**19. Is there a policy that would allow ethics complaints that involve several REALTORS® to be consolidated into one ethics hearing?**

Professional Standards Policy Statement #34 provides:

Consolidation of Ethics Complaints Arising Out of the Same Transaction. In the interest of maximizing the resources of Boards and Associations, Grievance Committees should use all reasonable efforts to ensure that all ethics complaints arising out of the same transaction or event are consolidated and scheduled for hearing in a single hearing. Respondents to ethics complaints do not have the right to a separate hearing unless they can demonstrate that consolidation of complaints would prevent them from receiving a fair hearing.

**23. A member found in violation has asked for an extension in order to complete the discipline imposed. Can such an extension be granted?**

Yes, at the discretion of the Board of Directors.

**26. Can a Board consolidate an ethics complaint and arbitration request filed by the same complainant against the same respondent?**

Such an arbitration request and ethics complaint cannot be consolidated in one proceeding, and the member filing them must be so advised. If the complainant still wished to pursue both the arbitration request and the charge of alleged unethical conduct, the two matters must be handled separately. In such cases, the arbitration should be held first to avoid prejudice to the arbitration by reason of any finding as to violation of the Code of Ethics. When the ethics hearing is held at a later time, it should be before a different Hearing Panel and individuals having served on the arbitration panel may not serve on the ethics Hearing Panel.

**29. If either an ethics complaint or arbitration request is dismissed, in whole or in part, what information should be included in the dismissal notice?**

A notice of dismissal shall specify the reason(s) for dismissing (e.g., the matter is not timely filed, or the allegations, if taken as true, do not appear to support a possible violation of the Article(s) cited, or there is no contractual dispute [or specific noncontractual dispute consistent with Standard of Practice 17-4] between the parties named in arbitration). Any notice of dismissal shall also inform the complainant of their opportunity to appeal the dismissal, and should inform the complainant that although the complaint/arbitration request and attachments cannot be revised, modified, or supplemented, the complainant may explain in writing why the complainant disagrees with the conclusion that the matter be dismissed. *(Revised 5/07)*

**30. If a REALTOR® principal resigns or otherwise causes his or her REALTOR® membership to terminate and there is a current arbitration request pending against him or her, can a complainant amend an arbitration request to name the new REALTOR® principal?**

The new REALTOR® principal may only be required to arbitrate if the new REALTOR® principal was a REALTOR® principal of that firm at the time the dispute arose. The complainant can name any REALTOR® principal of the firm at the time the dispute arose and the arbitration can proceed. If the original respondent simply moved from Company A and re-affiliated as a REALTOR® nonprincipal with Company B, the arbitration could proceed against the original respondent because the duty to arbitrate is personal.

**31. Can the sample forms contained in the *Code of Ethics and Arbitration Manual* be amended/changed?**

Yes, however, amended forms should not be used until they are first reviewed by counsel to ensure that they conform to state law and to any special requirements established by the Board.

**35. How should probation be used by a hearing panel that finds a violation of the Code of Ethics?**

Probation should be used if a hearing panel wants to hold a form of discipline (e.g., a fine) in abeyance during the probationary period not to 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 finding of a violation during the probationary period, both the probationary status and suspended discipline will be considered fulfilled. Conversely, if the hearing panel wants the respondent to comply with discipline, the hearing panel should not place the respondent on probation. (*Adopted 11/14*)