

PROCURING CAUSE STATEMENT

BY

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The information here is counsel's opinion of the application of the NAR Arbitration Guidelines in Appendix II to Part Ten of the Code of Ethics and Arbitration Manual. Panels should refer to the Arbitration Guidelines for any more detailed information the panel may desire.

In order to determine what portion of a commission, if any, an agent who did not obtain a sale contract and close a real estate transaction is entitled to, the arbitrators should make the following evaluation of the evidence:

1. Would the transaction have closed without the involvement of an agent other than the agent who obtained the sale contract from the buyer and closed the transaction? If so, that agent should be entitled to the entire commission - that is, his effort alone was responsible for the sale, and no other agent should share in the commission.
2. If the efforts of another agent were required in order to complete the transaction, the efforts of that second agent should be evaluated by the arbitrators, and they should look at the three basic areas of activity by a real estate agent:
 - a. Introduction of the property to the ultimate buyer;
 - b. Assistance to the buyer in various areas, such as financing, school information, inspection of the property by an engineer, follow-up visits to the property, and so forth, in such a way as to maintain the prospect's interest in the property; and
 - c. Obtaining an earnest money contract which is accepted by the owner, and closing the transaction.
3. If either of the agents is operating as a "buyer's agent" the arbitrators should determine the terms of the agency agreement, and whether that agent has or will be compensated directly by the buyer; they may take into account ethical considerations that apply to buyer's brokerage.

The arbitrators should analyze the particular facts of each case to determine the respective contribution of each of the two agents in the above areas, and make the award accordingly. The arbitrators should draw on their own experience in the real estate business.

The NAR Arbitration Guidelines caution panels not to split awards. "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.”

The basic question to be answered, however, is which of the two agents is more responsible for causing the sale, and if the transaction would have resulted only from the combined efforts of both agents, what division of the commission would fairly reflect the contribution which each of them made.

PROTOCOL GUIDELINES

More often than not, panels of the Arbitration Committee of the Association, in reviewing evidence at arbitration hearings, are faced with claims by one or both parties that the other party acted unethically. Because of some misunderstandings about the place of ethical considerations in arbitration hearings, and in an effort to eliminate the kind of activity and failure of communication between brokers which often leads to arbitrations, the Arbitration Committee suggests the following Protocol Guidelines for brokers and salespeople involved in actual or potential commission disputes. We want to emphasize that these guidelines are not binding, and that they are not a substitute for the Code of Ethics and its interpretations, for the Procuring Cause Guidelines previously issued, or for the process of handling individual complaints and individual requests for arbitrations. They are merely intended to provide some assistance in avoiding hearings, where that is possible. The Procuring Cause Guidelines and NAR's Suggested Factors for Consideration By a Hearing Panel in Arbitration are attached hereto as reference.

1. First, we want to clarify the distinction between an arbitration hearing and an ethics hearing. An ethics hearing is to be convened only after the Grievance Committee of the Association has reviewed a complaint, whether by another Association member or the public, and determined that there is reason to believe that the Code of Ethics has been violated. Such a hearing is entirely separate from the arbitration hearing.

The arbitration award is not to be made on the basis of a violation of the Code of Ethics. While the arbitration panel is not convened to determine whether there has been an ethical violation, the panel may consider the ethical conduct of the parties along with the other evidence. This is specifically authorized by the NAR Professional Standards Manual and by the Procuring

Cause Statement of our Association counsel. Factor #3 of the NAR Arbitration Guidelines states: “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.”

2. Typically, arbitration panels award the entire commission to the prevailing party. Such an award is usually appropriate, based on the evidence. In addition, it facilitates the mediation process, and participants in a mediation conference should assume that there will be an outright “winner” at a later hearing if the mediation fails. The policy of the Board of Directors of the Association is to encourage the resolution of commission disputes through the use of mediation. The mediation negotiations are confidential, and will not be revealed to an arbitration panel if the negotiations fail. The Association has a cadre of trained mediation officers (generally Past Presidents of the Association) who have expertise in resolving disputes through mediation. Each mediation officer uses their own personal approach within the general framework of the NAR Model of Mediation. The officer can also follow up later, reconvene the

discussions, and so forth, if he feels he will be able to resolve the matter. A settlement can be made at any time before the panel makes its decision. Settlement has the advantages of: (1) a refund of the filing fee to both parties; (2) saving the time and expense of a hearing; (3) in some cases, avoiding a present or future complaint being filed with the Grievance Committee for possible ethics violation; and (4) avoiding the risk of losing the entire commission to the other party.

3. There are cases in which the award will be split by the arbitration panel. The Procuring Cause Statement sets out the basic areas of activity by a real estate agent, to supply guidance to arbitration panels in apportioning commissions between agents in situations in which more than one agent was required in order to close the transaction. It is not always a simple matter of weighing the respective contributions of two agents and dividing the commission accordingly. Such a weighing process assumes that the behavior of both agents was ethical, and may always be influenced by the particular facts and circumstances of the case. In a situation in which both agents acted appropriately, and the work of both was required, then the panel should “weigh” the respective contributions.

To illustrate, suppose that Agent A had been showing properties to a customer, “Buyer,” for some time, and introduced Buyer to the subject property. After Buyer had seen the property twice with Agent A and was considering making an offer, a personality dispute arose between Agent A and Buyer, and Buyer decided to switch to Agent B. Upon learning the history of the situation, Broker B contacted Broker A, Broker A agreed to step aside and allow Broker B's agent to prepare the contract. Agent B produced a contract which was accepted by the owner, and followed through in the usual manner, resulting in a closed sale and a commission. The panel will want to consider all of the facts and circumstances in the case, including whether the

personality conflict rose to the level of estrangement of the buyer by Agent A. If the panel finds that Agent A estranged the buyer, the panel should probably not award any part of the commission to Agent A as Agent A's "chain of events" was broken. However, if Agent A's conduct did not rise to the level of an estrangement of the buyer, and the panel finds that the sale would not have occurred without the combined efforts of both agents, the arbitration panel may divide the commission between the two brokers, with the actual division depending upon the panel's view of the fairest way to award the efforts of each. This might depend upon the relative time spent, any difficulties encountered in obtaining financing, and the many other peculiarities which will be presented in any particular case.

If an arbitration panel believes that the second agent obtained the contract in an unethical manner, however, the result does not have to be the same. To illustrate, suppose the facts are the same, except that the customer, Buyer, was induced by Agent B to switch to Agent B, by Agent B's false claims that Agent A is incompetent or unlicensed, or that Agent B would allow Agent A to participate in the commission when he had no intention to do so, or the like. Under these circumstances, the panel might decide that, in spite of the efforts of Agent B to obtain the contract and close the deal, Agent A was entitled to a larger share of the commission, or even the entire commission.

Although the existence of a buyer's agency agreement is not, by itself, conclusive (and the broker with such an agreement may be left to pursue a direct claim against his buyer), the other agency's awareness of that agreement is important (see Standard of Practice 16-9, requiring a "reasonable effort" to determine whether the client is subject to an agreement). An agent cannot simply rely on an exclusive agency agreement to earn a commission - for example, a panel may determine that an agent, after signing a six-month exclusive contract, did little to help

the buyer find a property, and that a second agent, not initially aware of the exclusive contract, produced a sale. If the panel believes that the second agent made a reasonable effort to find out whether the prospect was “working with an agent,” it may reward that agent part or all of the commission, notwithstanding the buyer’s agency agreement. Remember these agreements are not registered in the MLS or otherwise readily available to other agents. Note that the second paragraph of Standard of Practice 16-13 requires the second agent to ask whether the buyer has an exclusive agreement with another agent before the second agent provides “substantive services.” Remember that an agent’s failure to ask the question may be taken into account by the panel but should not be relied on by the panel as the sole reason for awarding or denying a commission to one party or the other.

4. Most commission disputes involve a claim by the agent who did not obtain the sale contract that he is entitled to compensation for his role in the transaction. In order to minimize the possibilities for this type of dispute, the Committee makes the following recommendations:

A. The agent showing property to a prospective buyer should educate the buyer as to how that agent will be compensated, and make an appropriate disclosure to all parties regarding the payment of his commission, as now required by law. When the agent is to be a subagent of the seller, it is important that his customer (the buyer) learn that the agent is paid by participation in a commission paid by the seller when a sale is consummated, and that the agent can show the customer any properties, including other brokers' listings and new construction. The agent cannot “control” the behavior of his prospective buyer, and cannot force the prospective buyer to write a contract through him, but he can take steps to prevent a naive buyer

from getting involved in circumstances which push the initial agent out of the picture, when that is not the customer's desire.

When the agent is operating as a “buyer's agent,” as opposed to a subagent of the seller, he will already have a written contract of employment with the buyer which sets out the compensation he is to receive. If the contract is “exclusive” it will entitle the agent to a commission on any property purchased by the buyer during the term of the contract. A “non-exclusive” contract requires that the agent be responsible for finding the property for the buyer. In either event, there is still potential for commission disputes with other agents, especially when the buyer's agent is looking first to the listing agent for his compensation. Again, education of the buyer is important, so that he does not use the services of two agents on the same property. A buyer who has signed an exclusive buyer's agency contract with Agent A, but then uses Agent B to buy a property, may subject himself to a claim for commission by Agent A under the buyer's agency contract if Agent A does not prevail in arbitration.

Other possible relationships between a buyer and real estate broker, include the agent functioning as a “transaction broker,” with significantly reduced responsibilities. In addition, an agent may have an agreement limited to one property, yet end up playing a role as to the acquisition of another property by that buyer. Again, these different relationships are an important part of the picture, but no single fact is always determinative of the outcome.

B. Many commission disputes grow out of attendance by buyers at open houses. An agent should advise buyers that in the event the buyer attends open houses, he should identify that he is using Agent A. The agent holding the open house should inquire of everyone who registers whether he is using an agent, and consider preparing a registration form that includes that question. This is true whether Agent A turns out to be a subagent or buyer's

agent. A common critical point in arbitration hearings is whether the prospect revealed that he was working with an agent, and whether he was asked. It should help the case of the agent holding the open house to show a registration sheet containing the buyer's signature but either no entry or the word "none" under the question, "Are you working with an agent - if so, please identify." The same advice applies to an agent taking calls directly from prospects while on phone duty, although there is no sign-up sheet available at the first contact.

C. When possible, an agent should preregister his customer with the agency conducting the open house, or in some other way communicate directly to the listing broker that the customer is his. In the case of buyer's agency, the agent must communicate his agency relationship in advance of the showing.

D. Just because you have shown a property to a prospective buyer does not automatically entitle you to a commission. Hearings frequently turn on the question of "abandonment" - that is, whether Agent A, after introducing the subject property to the customer, abandoned that customer in the sense of failing to follow up, keep the customer's interest alive, answer questions, encourage a second showing and so forth. In short, the job is far from done when the customer is introduced to the property. There is no hard and fast rule as to what constitutes abandonment, and no period of days to suggest as a guideline. Certainly, the customer's wishes should be respected. However, in situations where Agent A introduced the subject property, and the customer later bought it through Agent B, it will help Agent A to be able to establish that he made every reasonable effort, by telephone and written communication, and follow-ups of other appropriate kinds, to keep the customer's interest alive. Using other office personnel to fill in can also be important. Because it may be several months before Agent A needs to recall the details of his efforts at a hearing, good record-keeping is encouraged.

E. As soon as he learns that another Agent A has been working with a customer, Agent B is encouraged to contact that agent, or have his broker contact Agent A's broker. There is, naturally, some judgment involved, depending on how long ago the customer "worked with" the other agent, and whether there is a buyer's agency agreement in effect, but it is generally best to make the contact, and always a good idea when you learn that the customer has seen the particular property involved with another agent. Where the two agents fail to communicate, there is a great likelihood that Agent A will feel as though his customer was "stolen" and matters will get worse. If Agent B simply contacts Agent A and indicates that the customer wants to make a change, offers to allow Agent A to participate on some basis in the commission, and so forth, the matter will likely never reach arbitration. The longer the second broker works with the customer, the less likely he is to negotiate some reasonable split of the prospective commission.

Good business practice would encourage any agent meeting a new customer or client to determine the facts - that is, to learn from the customer whether he has been working with another agent, for how long, how recently, whether this particular property has been viewed before, the reasons for using a different broker now, and so forth. If the meeting is heading toward an exclusive agreement, Standard of Practice 16-9 requires that the agent make an inquiry. Remember that Standard of Practice 16-9 requires asking about an exclusive agreement before providing substantive services such as writing a purchase offer or presenting a CMA.

Keep in mind that we cannot control the buyer's behavior, or prevent him from changing his mind about his selection of an agent. We can, however, in the absence of an exclusive buyer's agency agreement between the buyer and his agent, prevent the buyer from completely controlling who is to receive a commission in the transaction.

Avoid “customer stealing” or “intrusion.” As we illustrated above, it is possible that the second agent can do the great majority of the “legwork” in the transaction and still be denied the commission, or a great part of it, if the panel believes that he was able to do so only by taking unfair advantage of the first agent.

The “Factors for Consideration by Arbitration Hearing Panels” in the NAR Professional Standards Manual specifically allows consideration by the panel of how the second agent or subagent entered the transaction, whether the second agent was aware of a prior introduction of the property by the first agent, whether the second agent acted inconsistently with the agency of the first agent, and whether the entry of the second agent into the transaction constituted “an intrusion upon agency” or was an “innocent exercise of agency or subagency in the interest of the client in pursuit of a customer.” There can be a very fine line, in particular circumstances, between “abandonment” and “intrusion.” Once again sound business judgment, and the Code of Ethics, would encourage any agent to inquire of the new customer whether he has been using another agency, and if so, find out why the customer is making a change, and contact the first agency at the earliest opportunity to discuss the problem if their involvement is fairly recent.

When a sales agent, and not a broker, is directly involved, the sales agent should determine the facts from the customer, and then contact his own broker. Communications should then be between broker and broker, or, in multi-office situations, between managers, when that is possible. Keep in mind at all times your obligation to be honest with all parties, including seller, buyer, and other brokers and sales agents. Disputes, or potential disputes, between brokers and sales agents should not interfere with the transaction between the principals.



Form A-1

St. Louis REALTORS®
12777 Olive Blvd
St. Louis, MO 63141

Request and Agreement to Arbitrate

- (1) The undersigned, by becoming and remaining a member of St. Louis REALTORS® (or Participant in its MLS), has previously consented to arbitration through the Association under its rules and regulations.
- (2) I am informed that each Respondent named below is a member in good standing of St. Louis REALTORS® (or Participant in its MLS), or was a member of said Association of REALTORS® at the time the dispute arose.
- (3) A dispute arising out of the real estate business as defined by Article 17 of the Code of Ethics exists between me (or my firm) and the below listed Respondent (list all persons and/or firms you wish to name as respondents to this arbitration).

_____, REALTOR® principal _____
Respondent REALTOR Principal - Print Name Firm Name

_____, REALTOR® principal _____
Respondent REALTOR Principal - Print Name Firm Name

Respondent Firm Address

(NOTE: Arbitration is generally conducted between REALTOR® principals or between firms comprised of REALTOR® principals.)

- (4) There is due, unpaid and owing to me (or I retain) from the above names persons the **sum of \$**_____. My claim is predicated upon the statement attached, marked Exhibit I and incorporated by reference into this application.

The disputed funds are currently held by: _____.

- (5) I request and consent to arbitration through the Association in accordance with its Code of Ethics and Arbitration Manual (alternatively, "in accordance with the professional standards procedures set forth in the bylaws of the Association"), and I agree to abide by the arbitration award and to comply with it promptly.

In the event I do not comply with the arbitration award and it is necessary for any party to this arbitration to obtain judicial confirmation and enforcement of the arbitration award against me, I agree to pay the party obtaining such confirmation the costs and reasonable attorney's fees incurred in obtaining such confirmation and enforcement.

- (6) **I enclose my check in the sum of \$500.00 for the arbitration filing.**
- (7) I understand that I may be represented by legal counsel, and that I should give written notice no less than fifteen (15) days before the hearing of the name, address and phone number of my attorney to all parties and the Association. Failure to provide this notice may result in a continuance of the hearing, if the Hearing Panel determines that the rights of the other party require representation.
- (8) Each party must provide a list of names of witnesses that he intends to call to the hearing, to the Association and all other parties, not less than fifteen (15) days prior to the hearing. Each party shall arrange for his witnesses to be present at the time and place designated for the hearing. The following REALTOR® non-principal (or

REALTOR-ASSOCIATE non-principal) affiliated with my firm has a financial interest in the outcome of the proceeding, may be called as a witness, and has the right to be present throughout the hearing:

REALTOR/REALTOR Associate(s) - Name

- (9) I declare that this application and the allegations contained herein are true and correct to the best of my knowledge and belief and this request for arbitration is filed within one hundred eighty (180) days after the closing of the transaction, if any, or within one hundred eighty (180) days after the facts constituting the arbitrable matter could have been known in the exercise of reasonable diligence, whichever is later.
- (10) If either party to an arbitration request believes that the Grievance Committee has incorrectly classified the issue presented in the request (i.e. mandatory or voluntary), the party has (20) days from the date of receipt of the Grievance Committee's decision to file a written appeal of the decision. Only those materials that the Grievance Committee had at the time of its determination may be considered with the appeal by the Board of Directors.
- (11) Are the circumstances giving rise to this arbitration request the subject of civil litigation?
 YES NO
- (12) Important note related to arbitration conducted pursuant to Standard of Practice 17-4 (1) or (2): Where arbitration is conducted between two (or more) cooperating brokers pursuant to Standard of Practice 17-4 (1) or (2), the amount in dispute and the amount of any potential resulting award is limited to the amount paid to the respondent by the listing broker, seller or landlord and any amount credited or paid to a party to the transaction at the direction of the respondent.
- (13) Address of the property in the transaction giving rise to this arbitration request:

Property Address - including Zip Code

(14) The sale/lease closed on the following date: _____

(15) Agreements to arbitrate are irrevocable except as otherwise provided under state law.

Complainant(s)

Print REALTOR® Principal Name

Signature of

Date

Firm* Name and Address

Phone

E-mail

Print REALTOR® Principal Name

Signature of

Date

Firm* Name and Address

Phone

E-mail

*In cases where arbitration is requested in the name of a firm comprised of REALTORS® (principals), the request must be signed by at least one of the REALTOR® principals of the firm as a co-complainant.