



## MD Ethics Supplemental Information

### **.01 Relations to the Public.**

A. The licensee shall remain informed of matters affecting real estate in the community, the State, and the nation.

B. The licensee shall be informed on current market conditions in order to be in a position to advise clients as to the fair market price.

C. The licensee shall protect the public against fraud, misrepresentation, or unethical practices in the real estate field. The licensee shall endeavor to eliminate in the community any practices which could be damaging to the public or to the dignity and integrity of the real estate profession. The licensee shall assist the commission charged with regulating the practices of brokers, associate brokers, and salespersons in this State.

D. The licensee shall make a reasonable effort to ascertain all material facts concerning every property for the licensee accepts the agency, in order to fulfill the obligation to avoid error, exaggeration, misrepresentation, or concealment of material facts.

E. The licensee, acting as agent, may not discriminate in the sale, rental, leasing, trading, or transferring of property to any person or group of persons because of race, color, creed, religion, national origin, sex, handicap, or familial status.

F. The licensee may not be a party to the naming of a false consideration in any document.

G. Advertisement.

(1) The licensee in advertising shall be especially careful to present a true picture. A broker may not advertise without disclosing the broker's name or the company name as it appears on the license. A broker may not permit associate brokers or salespersons to use individual names unless the connection with the broker is obvious in the advertisement.

(2) Effective October 1, 2004, an associate broker or salesperson may not use an individual telephone number or email address in an advertisement, as defined in Business Occupations and Professions Article, §17-527.2(a)(3), Annotated Code of Maryland, unless the identified telephone number of the broker or branch office manager also appears in the advertisement.

H. For the protection of all parties with whom the licensee deals, the licensee shall see to it that financial obligations and commitments regarding real estate transactions are in writing, expressing the exact agreement of the parties, and that copies of these agreements are placed in the hands of all parties involved within a reasonable time after the agreements are executed.

I. All real estate documents shall be signed by a licensee in the licensee's own name, and may not be signed in the name of a group or team.

**.02 Relations to the Client.**

A. In accepting employment as an agent, the licensee shall protect and promote the interests of the client. This obligation of absolute fidelity to the client's interest is primary, but it does not relieve the licensee from the statutory obligations towards the other parties to the transaction.

B. In justice to those who place their interests in the licensee's care, the licensee shall endeavor always to be informed regarding laws, proposed legislation, governmental orders, and other essential information and public policies which affect those interests.

C. A licensee may not accept compensation from more than one party to a transaction without the full knowledge of all the parties.

**D. Disclosure Requirement.**

(1) The licensee may not acquire an interest in, or purchase, personally, for any member of the licensee's immediate family, for the licensee's firm, for any member of the firm, or for any entity in which the licensee has any ownership interest, property listed with the licensee or the licensee's firm without making the licensee's true position known to the listing owner. In selling or leasing property in which the licensee, the licensee's firm, or any member of the licensee's immediate family or the licensee's firm has an ownership interest, the licensee shall reveal that interest in writing to all parties to the transaction.

(2) A licensee who provides real estate brokerage services in a group or team shall have the same disclosure requirement of §D(1) of this regulation with regard to unlicensed members of the group or team as the licensee has with regard to members of the licensee's firm.

E. When acting as agent in the management of property, the licensee may not accept any commission, rebate, or profit on expenditures made for an owner without the owner's knowledge and consent.

**F. Competitive Market Analysis.**

(1) A licensee may prepare a competitive market analysis of a specific property for a client, prospective client, or customer. The analysis shall include the following statement printed conspicuously and without change on the first page:

**COMPETITIVE MARKET ANALYSIS DISCLOSURE**

This analysis is not an appraisal. It is intended only for the purpose of assisting buyers or sellers or prospective buyers or sellers in deciding the listing, offering, or sale price of the real property.

(2) If a licensee includes a property in which the licensee has an interest as one of the comparables, that fact shall be disclosed to the client, prospective client, or customer.

G. The licensee may not submit or advertise property without authority. In any offering, the price quoted may not be other than that agreed upon with the owners as the offering price.

H. If more than one formal written offer on a specific property is made before the owner has accepted an offer, all formal written offers presented to the licensee, whether by a prospective purchaser or another broker, shall be transmitted to the owner for a decision.

I. Unexcused failure to ensure that a prospective purchaser has the real property disclosure statement or disclaimer statement in hand before the submission of an offer to purchase may be considered a violation of the licensee's obligation to protect and promote the interests of the licensee's client when this failure could result in a contract becoming void or voidable.

### **.03 Relations to Fellow Licensees.**

A. The agency of a licensee who holds an exclusive listing, shall be respected.

B. The licensee shall cooperate with other brokers on property listed by the licensee exclusively whenever it is in the interest of the client, and share commissions on a previously agreed basis. Negotiations concerning property listed exclusively with one broker shall be carried on solely with the listing broker.

C. Signs giving notice of property for sale, rent, lease, or exchange may not be placed on any property without the owner's prior consent.

### **§ 17-530 .**

Article - Business Occupations and Professions

(a) (1) In this section the following words have the meanings indicated.

(2) "Buyer's agent" means a licensed real estate broker, licensed associate real estate broker, or licensed real estate salesperson who represents a prospective buyer or lessee in the acquisition of real estate for sale or for lease.

(3) "Cooperating agent" means a licensed real estate broker, licensed associate real estate broker, or licensed real estate salesperson who:

(i) is not affiliated with or is not acting as the listing real estate broker for a property; and

(ii) assists a prospective buyer or lessee as a subagent of the listing real estate broker, in the acquisition of real estate for sale or for lease.

(4) "Intra-company agent" means a licensed associate real estate broker or licensed real estate salesperson who has been designated by the real estate broker who the

associate real estate broker or licensed real estate salesperson is affiliated with to act as a dual agent on behalf of a seller or lessor or buyer or lessee in the purchase, sale, or lease of real estate that is listed with the real estate broker.

(5) "Dual agent" means a licensed real estate broker, licensed associate real estate broker, or licensed real estate salesperson who acts as an agent for both the seller and the buyer or the lessor and the lessee in the same real estate transaction.

(6) "Seller's agent" means a licensed real estate broker, licensed associate real estate broker, or licensed real estate salesperson who:

(i) is affiliated with or acts as the listing broker for real estate; and

(ii) assists a prospective buyer or lessee in the acquisition of real estate for sale or for lease.

(b) (1) A licensee who participates in a residential real estate transaction as a seller's agent, buyer's agent, or as a cooperating agent shall disclose in writing that the licensee represents the seller or lessor or the buyer or lessee.

(2) The disclosure shall occur not later than the first scheduled face-to-face contact with the seller or lessor or the buyer or lessee.

(3) (i) In any residential real estate transaction involving a cooperating agent as defined in this section, it shall be the obligation of the cooperating agent to make the written disclosure to the buyer or lessee required under this section.

(ii) In any residential real estate transaction that does not involve a cooperating agent as defined in this section, it shall be the obligation of the seller's agent, as defined in this section, to make the written disclosure to the buyer or lessee required under this section.

(4) In any residential real estate transaction involving a buyer's agent, it shall be the obligation of the buyer's agent to make the written disclosure to the seller or lessor or the agent of the seller or lessor as required under this section.

(5) The written disclosure shall explain:

(i) the differences between a seller's agent, buyer's agent, cooperating agent, dual agent, and intra-company agent;

(ii) the duties of a licensee to exercise reasonable care and diligence and maintain confidentiality;

(iii) that a licensee who assists a buyer or lessee in locating residential real estate for purchase or lease and is neither affiliated with nor acting as the listing real estate broker for any real estate shown or located, is presumed to be acting as a buyer's agent on

behalf of the prospective buyer or lessee, unless either the licensee or the prospective buyer or lessee expressly declines to have the licensee act as a buyer's agent;

(iv) that regardless of whom a licensee represents in a real estate transaction, the licensee has a duty to treat each party fairly, promptly present each written offer and counteroffer, respond truthfully to each question, disclose all material facts that are known or should be known relating to a property, and offer each property without discrimination;

(v) that a licensee is qualified to advise only on real estate matters and that legal or tax advice should be obtained from a licensed attorney or accountant;

(vi) the need for an agreement with a seller's agent, buyer's agent, or dual agent to be in writing and to include the duties and obligations of the agent, how and by whom the agent will be compensated, and any fee-sharing arrangements with other agents;

(vii) the duty of a buyer's agent to assist in the:

1. evaluation of a property, including the provision of a market analysis of the property; and

2. preparation of an offer on a property and to negotiate in the best interests of the buyer;

(viii) the possibility that a dual agency may arise in a real estate transaction and the options that would become available to the buyer and seller or lessee and lessor; and

(ix) that any complaints concerning a licensee may be filed with the State Real Estate Commission.

## **Predatory Lending**

A term for a variety of lending practices that **strip wealth or income from borrowers**. Predatory loans typically are much more expensive than justified by the risk associated with the loan. Characteristics of predatory loans may include, but are not limited to, **excessive or hidden fees, charges for unnecessary products, high interest rates, terms designed to trap borrowers in debt, and refinances that do not provide any net benefit to the borrower**.

### **Common Abuses:**

#### **Seven Signs of Predatory Lending**

Predatory mortgage lending involves a wide array of abusive practices. Here are brief descriptions of some of the most common.

- **Excessive Fees**
- **Abusive Prepayment Penalties**

- **Kickbacks to Brokers (Yield Spread Premiums)**
  - **Loan Flipping**
  - **Unnecessary Products**
  - **Mandatory Arbitration**
  - **Steering & Targeting**
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### **Excessive fees**

Points and fees are costs not directly reflected in interest rates. Because these costs can be financed, they are easy to disguise or downplay. On competitive loans, fees below 1% of the loan amount are typical. On predatory loans, fees totaling more than 5% of the loan amount are common.

### **Abusive prepayment penalties**

Borrowers with higher-interest subprime loans have a strong incentive to refinance as soon as their credit improves. However, up to 80% of all subprime mortgages carry a prepayment penalty -- a fee for paying off a loan early. An abusive prepayment penalty typically is effective more than three years and/or costs more than six months' interest. In the prime market, only about 2% of home loans carry prepayment penalties of any length.

>> [More about prepayment penalties...](#)

### **Kickbacks to brokers (yield spread premiums)**

When brokers deliver a loan with an inflated interest rate (i.e., higher than the rate acceptable to the lender), the lender often pays a "yield spread premium" -- a kickback for making the loan more costly to the borrower.

>> [More about yield spread premiums...](#)

### **Loan flipping**

A lender "flips" a borrower by refinancing a loan to generate fee income without providing any net tangible benefit to the borrower. Flipping can quickly drain borrower equity and increase monthly payments -- sometimes on homes that had previously been owned free of debt.

### **Unnecessary products**

Sometimes borrowers may pay more than necessary because lenders sell and finance unnecessary insurance or other products along with the loan.

### **Mandatory arbitration**

Some loan contracts require "mandatory arbitration," meaning that the borrowers are not allowed to seek legal remedies in a court if they find that their home is threatened by loans with illegal or abusive terms. Mandatory arbitration makes it much less likely that borrowers will receive fair and appropriate remedies in cases of wrongdoing.

>> [More about mandatory arbitration...](#)

### **Steering & Targeting**

Predatory lenders may steer borrowers into subprime mortgages, even when the borrowers could qualify for a mainstream loan. Vulnerable borrowers may be subjected to aggressive sales tactics and sometimes outright fraud. Fannie Mae has estimated that up to half of borrowers with subprime mortgages could have qualified for loans with better terms.

According to a government study, over half (51%) of refinance mortgages in predominantly African-American neighborhoods are subprime loans, compared to only 9% of refinances in predominantly white neighborhoods.

Resource

<http://www.ResponsibleLending.org>

### **RESPA (Real Estate Settlement Procedures Act) in general**

RESPA covers loans secured with a mortgage placed on a one-to-four family residential property. These include most purchase loans, assumptions, refinances, property improvement loans, and equity lines of credit. HUD's Office of RESPA and Interstate Land Sales is responsible for enforcing RESPA. [Back to top](#)

### **RESPA required disclosures:**

#### **At the time of loan application**

When borrowers apply for a mortgage loan, mortgage brokers and/or lenders must give the borrowers:

- a Special Information Booklet, which contains consumer information regarding various real estate settlement services. (Required for purchase transactions only) and
- a Good Faith Estimate (GFE) of settlement costs, which lists the charges the buyer is likely to pay at settlement. This is only an estimate and the actual charges may differ. If a lender requires the borrower to use a particular settlement provider, then the lender must disclose this requirement on the GFE.
- a Mortgage Servicing Disclosure Statement, which discloses to the borrower whether the lender intends to service the loan or transfer it to another lender. It also provides information about complaint resolution.

## 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,\*

[\*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 Part One, G. Commission/Cooperative Compensation Offers, Section 1, 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)*]

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)

### **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.

**The 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?

**The 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)

**REALTOR® Ethics Pathways to Professionalism  
Respect for the Public**

- Follow the “Golden Rule” – Do unto others as you would have them do unto you.
- Respond promptly to inquiries and requests for information.
- Schedule appointments and showings as far in advance as possible.
- Call if you are delayed or must cancel an appointment or showing.
- If a prospective buyer decides not to view an occupied home, promptly explain the situation to the listing broker or the occupant.
- Communicate with all parties in a timely fashion.
- When entering a property, ensure that unexpected situations, such as pets, are handled appropriately.
- Leave your business card only if not prohibited by local rules.
- Never criticize property in the presence of the occupant.
- Inform occupants when you are leaving after showings.