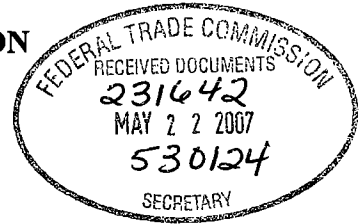


ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of

REALCOMP II LTD.,

a corporation.

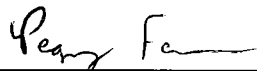
Docket No. 9320

Public

**COMPLAINT COUNSEL'S MOTION IN LIMINE REQUESTING AN
ORDER TO PRECLUDE LAY OPINION TESTIMONY REGARDING
CERTAIN HYPOTHETICAL LEGAL ISSUES**

Respondent Realcomp II Ltd. ("Realcomp") has proffered Karen Kage, Robert Taylor, Douglas Hardy and Douglas Whitehouse to testify to, among other areas, the hypothetical application of contract law to certain disputes between brokers, without adequate foundation or qualifications as an expert in legal issues. Complaint Counsel respectfully submits this Motion *in limine* to preclude Ms. Kage, Mr. Taylor, Mr. Hardy, Mr. Whitehouse, and any other Respondent witnesses, from testifying as to lay opinions, either live or by deposition, for the justification of the Realcomp Policies regarding the possible outcome of a procuring cause dispute under an Exclusive Agency contract, or any other opinions as to which they do not have personal knowledge or are not qualified as experts in legal issues.

Respectfully Submitted,



Sean P. Gates

Peggy Bayer Femenella

Joel Christie

Linda Holleran

Christopher Renner

Counsel Supporting the Complaint

Bureau of Competition

Federal Trade Commission

Washington, D.C. 20580

(202) 326-3711

Facsimile (202) 326-3496

Dated: May 18, 2007

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of
REALCOMP II LTD.,
a corporation.

Docket No. 9320

Public

**MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL'S MOTION IN LIMINE
REQUESTING AN ORDER TO PRECLUDE LAY OPINION TESTIMONY
REGARDING CERTAIN HYPOTHETICAL LEGAL ISSUES**

Sean Gates
Peggy Bayer Femenella
Joel Christie
Linda Holleran
Christopher Renner

Counsel Supporting the Complaint

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Complaint Counsel respectfully submit this memorandum of law in support of their Motion *in limine* for an Order precluding the introduction by Respondent Realcomp II Ltd. (“Realcomp” or “Respondent”) of deposition or trial testimony by certain lay witnesses relating to the application of contract law to certain hypothetical disputes between brokers. Such testimony, purportedly providing a justification for Realcomp’s Website and Search Function Policies (together, the “Policies”), would be without adequate factual foundation or qualification of the witnesses as experts in legal issues.

I. INTRODUCTION AND BACKGROUND

Respondent filed its Preliminary Witness List and Expert Witness List on January 26, 2007, and its Deposition Designations and Final Proposed Witness List on May 15, 2007. These filings make it clear that Respondent intends to defend the Policies by introducing testimony of certain of its fact witnesses regarding the application of contract law to certain hypothetical disputes between brokers.

Realcomp seeks to offer testimony regarding the application of legal principles to a hypothetical dispute involving a listing broker that uses an Exclusive Agency¹ contract and a cooperating broker that procures a buyer for the property.² The hypothetical dispute arises if the

¹ An Exclusive Agency Listing is a listing agreement under which the listing broker acts as an exclusive agent of the property owner or principal in the sale of a property, but also reserves to the property owner or principal a right to sell the property without assistance of the listing broker, in which case the listing broker is paid a reduced or no commission when the property is sold. Answer at ¶ 9.

In contrast, an Exclusive Right to Sell Listing is the traditional listing agreement, under which the property owner appoints a real estate broker as his or her exclusive agent for a designated period of time, to sell the property on the owner’s stated terms, and agrees to pay the listing broker a commission when the property is sold, whether by the efforts of the broker, the owner or another broker. Answer at ¶ 8.

² Realcomp Final Proposed Witness List at 3-4; [REDACTED]; Taylor Dep. at 92:4-92:8.

buyer of the property closes the sale without involving the cooperating broker. Such a situation, Realcomp argues, could conceivably give rise to an arbitration dispute concerning whether the cooperating broker was the “procuring cause” for the sale, and therefore entitled to receive a commission. Realcomp seeks to offer testimony from its “fact” witnesses that under this hypothetical, and using their view of the law, the listing broker would be excused from paying the offer of compensation to the cooperating broker if the listing broker did not receive a commission. Realcomp apparently offers this hypothetical result as justification for its Policies disfavoring Exclusive Agency listings.

Specifically, Respondent listed Karen Kage, Douglas Whitehouse, Douglas Hardy, and Robert Taylor as “fact” witnesses. Realcomp’s Final Proposed Witness List (“Witness List”) at 1-4. Realcomp’s filings show that it seeks to offer opinion testimony of these witnesses regarding a hypothetical legal problem that it claims justifies the Policies:

- Mr. Taylor may “offer testimony concerning the arbitration process concerning the issue of procuring cause and the limitations of that process as not being applicable when no commission is being paid.” Witness List at 4-5.
- Mr. Whitehouse and Mr. Hardy are expected to explain how the “proposed relief will set up a system by which prospective purchasers, through promotion and advertisements paid for by Realcomp members, would essentially be placed in a position of dealing directly with homeowners who, for purposes of transaction, would akin to a for sale by owner, negotiating and handling the sale of their residential property directly with prospective purchasers with no commission to be paid to any cooperating broker.” Witness List at 2-4.
- Ms. Kage is expected to testify about Realcomp’s “efficiency justifications and the harm that would be caused by Complainant’s Counsel’s proposed relief.” Witness List at 1-2. Ms. Kage’s investigational hearing testimony shows that these “justifications” include the hypothetical legal dispute described above. [REDACTED]

The witnesses’ sworn deposition testimony, however, shows that none of them have

personal knowledge of any actual instance of this having occurred, and are simply offering their opinions on a hypothetical problem. In addition to being purely speculative, the testimony also clearly is based on the witnesses' views concerning the application of legal principles. None of these witnesses have been qualified as experts in this matter and none of these witnesses are even lawyers. As lay witnesses, they cannot offer opinions on legal issues. The Court should therefore issue an Order precluding any testimony at the hearing of this matter or by deposition, regarding the possible outcome of a procuring cause dispute involving a listing under an Exclusive Agency contract.³

II. ARGUMENT

A. Legal Standard

The Scheduling Order in this case specifically provides, “[w]itnesses shall not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.... [and] witnesses not properly designated as expert witnesses shall not provide opinions beyond what is allowed” by F.R.E. 701. Scheduling Order ¶¶ 20-21; Fed. R. Evid. 602, 701, 702. Under Rule 701, a witness not testifying as an expert may give an opinion only if it is “(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” Fed. R. Evid. 701. The proponent of lay opinion testimony has the burden of establishing that the testimony meets these foundational requirements. *United States v. Garcia*, 291 F.3d 127, 140

³ Attached to the accompanying Declaration of Peggy Bayer Femenella are the documents and portions of deposition testimony Complaint Counsel refers to in this memorandum.

(2d Cir. 2002).

Witnesses not designated as experts are limited to testifying to opinions which are rationally based on their own actual perception. *Indemnity Ins. Co. v. Am. Eurocopter*, 227 F.R.D. 421, 424 (D.N.C. 2005). As noted in the Advisory Committee Notes to Rule 701, “Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing.” Moreover, lay witnesses may not answer hypothetical questions or assume facts not in evidence in their testimony. *Teen-Ed, Inc. v. Kimball Int’l, Inc.*, 620 F.2d 399, 403-404 (3d Cir. 1980); *Hartzell Mfg. v. American Chem. Technologies*, 899 F. Supp. 405, 408 (D. Minn. 1995) (“[a] lay witness’s opinion testimony must be based upon his or her personal perceptions and, unavoidably, those perceptions must be of a type that are admissible in evidence”). Lay opinion testimony may not be based on inadmissible hearsay. *K.W. Plastics v. U.S. Can Co.*, 131 F. Supp. 2d 1265, 1273 (M.D. Al. 2001).

A. The Witnesses Lack Personal Knowledge of this Hypothetical Problem.

As non-expert witnesses, Realcomp’s witnesses must be able to testify from actual personal knowledge. *Indemnity Ins. Co.*, 227 F.R.D. at 424; F.R.E. 701; *see also* Complaint Counsel’s Memorandum in Support of Its Motion in Limine Barring Certain Lay Opinion Testimony Regarding Supposed Justifications for Realcomp’s Rules at 3-4. Ms. Kage, Mr. Taylor, Mr. Hardy, and Mr. Whitehouse, however, admitted that they have no personal knowledge of any actual procuring cause disputes involving an Exclusive Agency Listing:⁴

⁴ Not only do Realcomp’s witnesses lack any personal knowledge of any procuring cause dispute involving an Exclusive Agency agreement, Messrs. Hardy, Whitehouse, and Taylor admitted that they did not even know the reasons why the Realcomp Policies were adopted. None was a member of the Realcomp Board of Governors at the

- Ms. Kage, CEO of Realcomp, has no first hand knowledge of procuring cause issues or any issues regarding a Cooperating Broker not getting paid, because Realcomp does not directly deal with grievance and arbitration issues, and does not receive any reports or information regarding these proceedings. [REDACTED]; Kage Dep. at 37:24-38:5; CX 33 at 6 (Realcomp “does not hold hearings for procuring cause, as this is conducted at the Board or Association of Realtor’s level.”).
- Mr. Whitehouse has no first hand knowledge of any disputes or problems involving Exclusive Agency Listings:

Q. Okay. So going back in your experience, you know, prior to 2000 even, tell me of all the problems [with Exclusive Agency Listings] that you can tell me of from firsthand knowledge.

A. From first hand experiencing a problem myself?

Q. Yes.

A. I can't. I can only tell you secondhand.

Whitehouse Dep. at 111:1-111:5.

- Mr. Whitehouse, who serves on the Metropolitan Consolidated Association of Realtors arbitration committee, generally does not even know what type of listing contract is involved in a procuring cause dispute. Whitehouse Dep. at 7:12-8:16.
- All of the arbitrations involving procuring cause issues that Mr. Taylor can remember involved Exclusive Right to Sell Listings. Taylor Dep. at 111:12-111:15.

Moreover, not a single deponent in this matter could point to an arbitration that did involve an Exclusive Agency Listing. *See, e.g.*, Baczkowski Dep. at 126:24-127:17 (Listing contract type plays no role in arbitration hearings); Nowak Dep. at 19:1-19:9 (None of the NOCBOR arbitrations involved Exclusive Agency, Limited Service or MLS Entry Only Listings.); Nead Dep. at 141:6-141:19 (Listing agreement is not an issue in procuring cause disputes for WWOCAR.); Tucholski Dep. at 38:9-38:12 (DABOR has no records of procuring

time the Realcomp Policies were adopted. None had any role in the adoption of the Realcomp Policies. And none knows why the Realcomp Policies were adopted in the first place. Hardy Dep. at 100:13-100:16; Whitehouse Dep. at 105:6-105:8, 105:23-106:5; Taylor Dep. at 102:2-102:5.

cause disputes involving discount or flat fee brokers).

B. Commission Determinations Are an Issue of Contract Law.

Even if Respondent's witnesses had personal knowledge regarding commission disputes involving an Exclusive Agency Listing, the opinions they offer are based on their own views of the application of contract law. These witnesses, who have no expertise in the law, should be precluded from testifying on legal issues.

Whether or not a cooperating broker is the procuring cause of sale and entitled to the offer of compensation laid out in the Realcomp MLS, is a question of basic contract law: Was there an offer, acceptance and performance justifying compensation to the cooperating broker? The offer of compensation to a cooperating broker is clearly laid out pursuant to the rules of the Realcomp MLS, which require every listing to include an offer of compensation:

The Listing Participant shall specify, on each listing filed with the MLS, the compensation offered to MLS participants, for their services with respect to the sale/lease of the real estate covered by such listing. Such offers are unconditional except that entitlement to compensation is determined by the Cooperating Broker's performance as the procuring cause of sale (or lease) or as otherwise provided for in this rule.

CX 100 at RC1346.

Cooperating brokers accept the specified offer of compensation when they bring the buyer to the table, and the specific performance of the contract is the act of procuring the buyer for the transaction, therefore considered the procuring cause of the transaction. Procuring cause is defined as "the interplay of factors which together demonstrate that the unbroken efforts of a specific broker were responsible for the buyer making the decision to consummate the sale on terms which the seller found acceptable." CX 86 at 1; Hardy Dep. at 44:12-45:3. Basically,

procuring cause comes down to the fact that “the sale would not have occurred but for the broker’s efforts.” CX 86 at 1. So, if the cooperating broker brings in the buyer, that broker has accepted the listing broker’s offer of compensation laid out in the MLS, and has earned the stated commission by being the procuring cause of sale.

The issue of performance under the contract also involves application of established legal principles to particular facts. In Michigan, where Realcomp is located, there have been numerous cases over the last 120 years where the courts determined whether a broker was entitled to a commission.⁵ Michigan courts have frequently held that the test of a broker’s right to a commission was “whether or not he was the procuring or the producing cause of the sale...” *Advance Realty Co.*, 83 N.W.2d at 344-345; *see also Amend v. 485 Properties, LLC*, 443 F.3d 799, 800 (11th Cir. 2006) (Procuring cause must be established to collect a contractually-based commission where the broker worked on, but did not close the deal.); *Ditzik v. Schaffer Lumber Co.*, 360 N.W.2d 876, 880-81 (Mich. Ct. App. 1984); *Craib*, 6233 N.W.2d at 676-678. (In order for a real estate broker to receive a commission on a broker’s contract, he must show performance of the terms of the contract); *Hubbard*, 108 N.W. 735-736. For example, in *Ditzik*, the Michigan Court of Appeals addressed and resolved the issue of whether or not a real estate broker satisfied the performance portion of the contract and was therefore entitled to a commission regarding the sale of a lumber yard. 360 N.W.2d at 881.

⁵ See, e.g., *Craib v. Comm. on Nat’l Missions of the Presbytery of Detroit of the United Presbyterian Church*, 233 N.W.2d 674, 676-678 (Mich. Ct. App. 1975); *Advance Realty Co. v. Spanos*, 83 N.W.2d 342, 344-345 (Mich. 1957); *Hubbard, Merwin & Farmer v. Leiter*, 108 N.W. 735 (Mich. 1906).

Whether a broker is excused from obligations under the contract is also an issue of law.⁶ For example, the Sixth Circuit has addressed the very hypothetical Realcomp poses. Specifically, the Sixth Circuit has addressed the issue of whether a cooperating broker was entitled to a commission when the listing broker was not paid by the seller. *Reisenfeld & Co. v. Network Group, Inc.*, 277 F.3d 856, 859-863 (6th Cir. 2002). The Court in *Reisenfeld* held that under a quasi-contract theory, the cooperating broker was entitled to a commission from the seller even though the listing broker was not paid by the seller, and remanded the case back to the district court to determine how much of a commission the cooperating broker should receive. *Id.* at 862. This decision by the Sixth Circuit flatly contradicts the basic legal view held by the lay witnesses here – it holds that a cooperating broker was still entitled to the offer of compensation even though the listing broker was not paid.

The fact that, under Realcomp MLS Rules and Regulations, Realcomp members must first submit their procuring cause disputes for arbitration, does not change the dispute into something other than an application of legal principles. *See, e.g.*, [REDACTED]; CX 100 at 8. A Realcomp member must file a grievance or arbitration with one of the Realcomp Shareholder Boards, to address procuring cause issues.⁷ The Realcomp Shareholder Boards, who are all affiliated with the National Association of Realtors (“NAR”),⁸ are required to follow the NAR Code of Ethics and Arbitration Manual. CX 94 at NARFTC0000224-263. However, even

⁶ CX 100 at RC1346 (The listing broker’s obligation to pay the procuring cause cooperating broker the offer of compensation may be excused if it is “impossible or financially infeasible” for the listing broker to collect some or all of the commission.).

⁷ *Id.*; CX 100 at RC1344.

⁸ *See, e.g.*, [REDACTED]; Williams Dep. at 57:25 - 58:2; Baczkowski Dep. at 14:5 - 14:16.

though Realcomp members need to go through arbitration first, NAR relies on case law and state statutes to determine whether or not a broker is the procuring cause of a sale and entitled to the offered commission. *See, e.g.*, CX 86.

Under the NAR arbitration rules, “all arbitration hearings must be conducted in a manner consistent with state law.... [and it is necessary to know] case law governing arbitration and to conform the Board’s arbitration procedures to the law.” CX 94 at NARFTC0000265. Moreover, if a party refuses to abide by the arbitration award, the award recipient can seek “judicial enforcement of the award by a local court of competent jurisdiction and to request reimbursement of legal fees incurred in seeking enforcement.” *Id.* at NARFTC0000268. These arbitrations must correctly apply the law, and an arbitration award can be vacated by the courts for an “error in law.” *See, e.g., Saveski v. Tiseo Architects, Inc.*, 682 N.W.2d 542, 544 (Mich. Ct. App. 2004)(“Arbitrators exceed their power when they act ... in contravention of controlling principles of law.”); *DAIIE v. Gavin*, 331 N.W.2d 48, 55 (Mich. 1982) (If arbitrators have been lead to the wrong conclusion through an error in law, the decision will be set aside (citation omitted)).

C. No Lay Opinions Are Allowed Regarding Issues of Law.

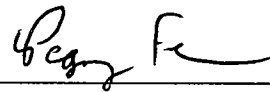
The case law is clear that lay opinion testimony should be excluded when it contains legal conclusions. *Torres v. County of Oakland*, 758 F.2d 147, 150 (6th Cir. 1985) (“The problem with testimony containing a legal conclusion is in conveying the witness’ unexpressed, and perhaps erroneous, legal standards....”); *FAA v. Landy*, 705 F.2d 624, 632 (2nd Cir. 1983); *see also United States v. Baskes*, 649 F.2d 471, 478 (7th Cir. 1980). For example, in *Baskes*, the Court held it was proper to exclude lay witness testimony “as to the legal implications of what occurred.” *Baskes*, 649 F.2d at 478; *see also United States v. Hearst*, 563 F.2d 1331, 1351 (9th

Cir. 1977) (testimony admissible because the “average layman would understand those terms and ascribe to them essentially the same meaning intended”). Numerous courts have even held expert testimony on issues of law, giving a legal conclusion or discussing the legal implications of evidence, to be inadmissible. *See, e.g., Estate of Sowell v. United States*, 198 F.3d 169, 171-72 (5th Cir. 1999); *United States v. Simpson*, 7 F.3d 186, 188 (10th Cir. 1993); *Estes v. Moore*, 993 F.2d 161, 163 (8th Cir. 1993).

III. CONCLUSION

These witnesses have no personal knowledge concerning any instance of a hypothetical dispute of the kind at issue. They have not been listed as experts on Respondent’s Expert Witness List, and none of these witnesses are lawyers. Their views are based on issues of law that are readily determinable without their lay views. For all these reasons, these witnesses, and any others that Realcomp tries to put forth for the same purpose, should be precluded from testifying on this proposed justification for the Policies.

Respectfully submitted,



Peggy Bayer Femenella
Complaint Counsel

May 18, 2007

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

**In the Matter of
REALCOMP II LTD.,
a corporation.**

Docket No. 9320

Public

[PROPOSED] ORDER

On May 18, 2007 Complaint Counsel moved *in limine* to limit the trial and deposition testimony of Karen Kage, Robert Taylor, Douglas Whitehouse, Douglas Hardy, and other “fact” witnesses listed by Respondent to factual, rather than lay opinion testimony regarding certain hypothetical legal issues.

Accordingly, upon due consideration of the parties’ submissions, it is hereby

ORDERED that Karen Kage, Robert Taylor, Douglas Whitehouse, Douglas Hardy, and any other Respondent witnesses, are precluded from testifying as to lay opinions, either live or by deposition, for the justification of the Realcomp Policies regarding the possible outcome of a procuring cause dispute under an Exclusive Agency contract, or any other opinions as to which they do not have personal knowledge or are not qualified as experts in legal issues.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date:

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of

REALCOMP II LTD.,

a corporation.

Docket No. 9320

Public

DECLARATION OF PEGGY BAYER FEMENELLA

I, Peggy Bayer Femenella, make the following statement:

1. I am an Attorney in the Bureau of Competition of the Federal Trade Commission. I serve as Complaint Counsel in this matter.
2. Pursuant to Paragraph 5 of the Scheduling Order, I conferred with Steve Lasher, counsel for Realcomp on May 17, 2007, in an effort in good faith to resolve the issues raised by this Motion, and we have been unable to reach an agreement.
3. Pursuant to Pursuant to Rule 3.24(a)(2) and 3.24(a)(3) of the Commission's Rules of Practice, 16 C.F.R. §§3.24(a)(2) and 3.24(a)(3), I submit this declaration solely to bring before the Court documents and deposition transcripts relevant to Complaint Counsel's Motion in Limine and Memorandum in Support of Motion in Limine Requesting an Order to Preclude Lay Opinion Testimony Regarding Certain Hypothetical Legal Issues.
4. The materials submitted to the Court in the Appendix to the Memorandum in Support of Complaint Counsel's Motion in Limine Requesting an Order to Preclude Lay Opinion Testimony Regarding Certain Hypothetical Legal Issues are true and correct copies of the following:

CX Number	Document Title	Document Date
CX 33	Respondent's Responses and Objections to Petitioner's First Set of Interrogatories and Attachments	1/11/07
CX 86	Procuring Cause Factors, National Association of Realtors Legal Affairs Article	

CX Number	Document Title	Document Date
CX 100	Realcomp II Ltd., Rules & Regulations, Revised October, 2006	10/06
Tab 1	Realcomp's Final Proposed Witness List	5/15/07
Tab 2	Deposition Transcript excerpts of Robert Taylor	3/14/07
Tab 3	Deposition Transcript excerpts of Karen Kage	02/20/07
Tab 4	REDACTED	
Tab 5	Deposition Transcript excerpts of Douglas Whitehouse	02/22/07
Tab 6	Deposition Transcript excerpts of Douglas Hardy	2/21/07
Tab 7	Deposition Transcript excerpts of Walt Baczkowski	1/29/07
Tab 8	Deposition Transcript excerpts of Martin Nowak	1/30/07
Tab 9	Deposition Transcript excerpts of Alissa Nead	1/2/07
Tab 10	Deposition Transcript excerpts of Ryan Tucholski	1/23/07
Tab 11	Realcomp's Answer to the Complaint	11/20/06
Tab 12	Deposition Transcript excerpts of Carl Williams	1/17/07
Tab 13	Excerpts from CX 94: NAR Code of Ethics and Arbitration Manual, Pages NARFTC0000222 - NARFTC0000269	2006

I declare under penalty of perjury that the foregoing is true and correct. (28 U.S.C. § 1746).

Executed on May 18, 2007.



 Peggy Bayer Femenella

CERTIFICATE OF SERVICE

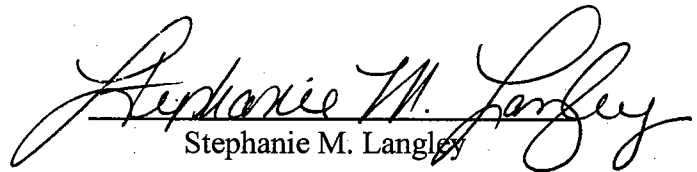
This is to certify that on May 22, 2007, I caused a copy of the attached **PUBLIC VERSION** of Complaint Counsel's Motion *In Limine* Requesting an Order to Preclude Lay Opinion Testimony Regarding Certain Hypothetical Legal Issues, the Memorandum in Support of the Motion *In Limine*, Proposed Order, a Declaration of Peggy Bayer Femenella and Exhibits, to be served upon the following persons:

by hand delivery to:

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

and by electronic transmission and overnight courier to:

Scott Mandel, Esq.
Foster, Swift, Collins & Smith P.C.
313 South Washington Square
Lansing, MI 48933-2193


Stephanie M. Langley

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of:

REALCOMP II LTD.,

Docket No. 9320

Respondent.

**RESPONDENT'S RESPONSES AND OBJECTIONS TO PETITIONER'S
FIRST SET OF INTERROGATORIES**

Respondent Realcomp II Ltd. ("Realcomp"), through its attorneys, Foster, Swift, Collins & Smith, P.C., pursuant to the Federal Trade Commission Rules of Practice ("FTC Rules"), 16 C.F.R. § 3.35, hereby responds and objects to Petitioner's First Set of Interrogatories, stating as follows:

GENERAL OBJECTIONS

Realcomp II Ltd. ("Realcomp") asserts the following general objections to each interrogatory, and each such general objection is hereby incorporated into Realcomp's response to each interrogatory as if fully set forth therein:

1. Realcomp objects to the interrogatories because and to the extent that they seek interrogatory responses that are protected from discovery under the attorney-client privilege or the work-product doctrine, or which fall within any other privilege, immunity, protection, statute, regulation, rule or restriction.
2. Realcomp objects to the interrogatories because and to the extent that they seek interrogatory responses containing confidential or proprietary information. Realcomp will only provide such interrogatory responses subject to the terms of the protective order.
3. Realcomp objects to the interrogatories because and to the extent that they are vague and ambiguous therefore requiring Realcomp, to the best of its ability, to make a subjective determination as to what interrogatory responses are being sought.
4. Realcomp objects to the interrogatories because and to the extent that they are overly broad, unduly burdensome, redundant, harassing, oppressive or seek interrogatory responses not reasonably calculated to lead to the discovery of admissible evidence, as well as to the extent it would impose an unjust burden on Realcomp to respond in the form of an excessive expenditure of time and/or money. This objection includes all interrogatories, asking Realcomp in Answers to Interrogatories to set forth "all facts," "all the reasons," "all reasons," or the like, as such matters cannot be set forth in the form of Answers to Interrogatories without undue burden and expense.

5. Realcomp objects to the interrogatories because and to the extent that they request responses that are not in the Realcomp's actual possession, custody or control.

6. No objection, response, or limitation, or lack thereof, made in these general objections or the specific responses shall be deemed: (i) an admission by Realcomp as to the existence or non-existence of any document; or (ii) a waiver of Realcomp's right to assert such objection or limitation at any future time in connection with the interrogatories or otherwise. In responding to the interrogatory, Realcomp neither waives nor intends to waive, but expressly reserves, any and all objections to relevance, competence, susceptibility to discovery, materiality or admissibility of any information provided.

7. Realcomp's responses and objections to the interrogatories are not intended to be and shall not be deemed an admission of the matters stated, implied or assumed by or in the interrogatories.

8. Realcomp objects to Petitioner's use of terminology which is not properly defined for purposes of these inquiries. Such undefined terms include, but are not limited to, active listing information, Real Estate advertising sites, unbundled services, and the like.

9. Realcomp reserves the right to supplement or modify its responses and objections to the interrogatories, if and while, it discovers any additional responsive information, or as is otherwise appropriate under applicable rules.

10. Realcomp incorporates by reference the objections it has previously filed to these interrogatories and does not waive those objections by responding to these interrogatories.

INTERROGATORIES

Interrogatory No. 1

State the number of Realcomp members (on a yearly basis) who have authorized the display of their active listing information by other Realcomp members pursuant to Realcomp's IDX Rules and Regulations.

Response:

Realcomp objects to Interrogatory No. 1 on the grounds that the inquiry is vague in that the terms "active listing information" and "IDX Rules and Regulations" are undefined.

Notwithstanding this Objection, Realcomp states that it does not document or retain activation dates for Realcomp members. Realcomp can only provide the current number of offices (and the current number of agents in those offices) that have authorized their listing data to be included in IDX. This information is reflected in the chart below, as of January 3, 2007.

1/3/2007	Authorized Data To be in IDX	Total In Realcomp	% Authorizing Data for IDX
Offices	1,028	2,395	43%
Agents	11,989	14,568	82%

Interrogatory No. 2

State the number of Realcomp members (on a yearly basis) who have participated in Realcomp's IDX through either the FTP download or framing option pursuant to Realcomp's IDX Rules and Regulations.

Response:

Realcomp objects to Interrogatory No. 2 on the grounds that the inquiry is vague in that the term "IDX Rules and Regulations" is undefined.

Notwithstanding this Objection, Realcomp states that it does not document or retain activation dates for Realcomp members. Realcomp can only provide the current number of offices (and current number of agents in those offices) that have authorized their listing data to be included in IDX. This information is reflected in the chart below, as of January 3, 2007.

1/3/2007	Number of Participating Via IDX Framing or FTP	Total In Realcomp	% Framing or FTP
Offices	369	2,395	15%
Agents	8,656	14,568	59%

Interrogatory No. 3

State the number of Realcomp members (on a yearly basis) who have authorized Realcomp to provide their active listing information to Realtor.com.

Response:

Realcomp objects to Interrogatory No. 3 as vague as to what constitutes "their active listing information to Realtor.com."

Notwithstanding this Objection, Realcomp references the Responses to Interrogatory Nos. 1 and 2. Realcomp also references the attached spreadsheet, but notes that it changed its data extraction process several years ago, and accordingly, can only provide the requested information beginning in 2002.

Interrogatory No. 4

State the number of Realcomp members (on a yearly basis) who have authorized Realcomp to provide their active listing information to MoveInMichigan.com.

Response:

Realcomp objects to Interrogatory No. 4 as vague as to what constitutes "their active listing information to MoveInMichigan.com."

Notwithstanding this Objection, Realcomp references the Responses to Interrogatory Nos. 1 and 2. Realcomp also references the attached spreadsheet, but notes that it changed its data extraction process several years ago, and accordingly, can only provide the requested information beginning in 2002.

Interrogatory No. 5

State all facts supporting Respondent's contention in its Answer that "the challenged conduct at issue in the Complaint has significant pro-competitive efficiencies that outweigh any alleged anti-competitive effects."

Response:

In summary and without limitation, the purpose of a multiple listing service is to provide a means by which authorized participants make blanket unilateral offers of compensation to other authorized participants, and a mechanism for enhancing cooperation among participants. Realcomp's primary source of income is derived from REALTOR® subscription fees, and this income is utilized to maintain and update the service.

Consumers purchasing and selling homes have a wide variety of options available to them. Sellers can list their property with a REALTOR®, and negotiate a fee for the services they select. Alternatively, they can choose from a variety of other products in the marketplace or attempt to sell the property independently without the assistance of any real estate sales assistance products or personnel. Buyers and sellers have access to numerous websites that are just as popular, if not more popular, than Realcomp's. Buyers and sellers also have access to non-electronic media such as newspapers, fliers, yard signs, and the like.

In the case of an Exclusive Agency Listing, the seller has chosen to enter into an agreement giving them the option of independently locating a buyer, with no commissions to be tendered to their listing broker (or the selling broker since there is generally no selling broker). When an Exclusive Agency listing is posted on public websites, it can be reviewed by all potential buyers. If a potential buyer independently locates a home that is an Exclusive Agency and MLS Entry Only Listing, the listing office would typically direct the potential purchaser to contact the seller directly. Once an independent buyer has contacted the seller directly, it is highly probable that if the purchase is consummated, no REALTOR® would receive commission for the sale. If the interested buyer had been working with a REALTOR® prior to independently locating the property, the buyer's agent likely would not receive any compensation after potentially investing considerable time with the buyer. This thwarts the choices available in the market to persons wishing to purchase homes as it takes away the incentive for buyer agents to work with persons interested in purchasing a home. The challenged conduct has pro-competitive efficiencies as it promotes a greater sharing of information and effort, affords buyers, including first-time and minority buyers, with more opportunities, and affords both parties in the transaction the

advantage of having professional real estate professionals with incentives to assist them in their efforts to buy and sell a house. This also avoids the result of persons being given a "free ride" by not following the Rule at issue but, nevertheless, seeking all of the promotion afforded to members who agree to follow the Rule.

Interrogatory No. 6

State all facts supporting Respondent's contention in its Answer that "Respondent lacks market power as a significant amount of sales in the described market are from persons or entities other than Respondent and there is competition in that market."

Response:

Preliminary review of available data suggests that of the total residential properties sold in Realcomp's market area, approximately 40% of the homes were listed on the Realcomp MLS. Realcomp is currently in the process of collecting and compiling data to support this contention.

Interrogatory No. 7

Identify all websites that Respondent contends allow real estate brokers in Southeast Michigan whose listings are not displayed on Realcomp Websites to effectively compete with brokers whose listing are displayed on Realcomp Websites.

Response:

Realcomp objects to Interrogatory No. 7 as overly broad, vague and unduly burdensome in that it asks Realcomp to identify "all websites" responsive to the inquiry. Realcomp further objects on the grounds that the Internet has an expansive amount of data, and it is impossible to identify all such websites.

Notwithstanding this Objection, Realcomp references the attached list of websites, which is a representative sample of the expansive amount of information requested in Interrogatory No. 7.

Interrogatory No. 8

Identify all members (past or present) of the Realcomp Board of Governors who voted against the Web Site Rule and/or Search Function Rule.

Response:

Realcomp lacks the information necessary to respond to Interrogatory No. 8, as it does not document how individual members of the Board of Governors vote on motions, nor which individuals "move for" or "second" any such motion.

Interrogatory No. 9

Identify each instance in which a Realcomp member procuring cause cooperating broker did not receive a commission on the sale of a home because the listing was an Exclusive Agency, Limited Services, or MLS Entry Only listing.

Response:

Realcomp objects to Interrogatory No. 9 on the grounds that it is unduly vague and unclear what is meant by "a Realcomp member procuring cause cooperating broker."

Notwithstanding this Objection, Realcomp states that it lacks the information necessary to respond to Interrogatory No. 9, as it does not hold hearings for procuring cause, as this is conducted at the Board or Association of REALTOR®'s level.

Interrogatory No. 10

Identify all persons involved in creating the documents submitted to the Federal Trade Commission under Commission Rule 3.31(b) regarding Initial Disclosures and describe their involvement.

Response:

Karen Kage, CEO of Realcomp, gathered and analyzed the information for the Initial Disclosures. Ken Franklin, Director of Technology for Realcomp, conducted the necessary database searches and electronic information retrieval, including statistics on the number of REALTORS® participating in IDX, REALTOR.com and MoveInMichigan.com.

Interrogatory No. 11

Describe in detail all the reasons for Realcomp's Web Site Rule.

Response:

See response to Interrogatory No. 5.

Interrogatory No. 12

Describe in detail all the reasons for Realcomp's Search Function Rule.

Response:

Prior to implementing the Search Function Rule, Realcomp received several inquiries seeking clarification on how an agent could determine the listing type for listed properties.

In many Exclusive Agency listings, the listing agent is only providing limited services to the seller. Potential sellers' agents need to understand the scope of services the listing agent is providing to the sellers prior to initiating efforts to show or sell the property. The National Association of Realtors ("NAR") Code of Ethics prohibits an agent from soliciting or working directly with a seller that is under contract with another agent, but this rule excludes any services that the listing broker is not providing to the seller. It also helped to make sure that the agents searching the databases were aware of this listing type prior to scheduling an appointment. Simply, in many of the Exclusive Agency Agreements, the listing agent is providing limited services as requested by the seller. The selling agent needs to know in advance the sellers' relationship with their agent.

Even though each entry includes a listing type, Realcomp received requests to better distinguish between the types of listings. In response, Realcomp added listing type fields to the search screen to facilitate retrieval of this information.

Realcomp also determined that nearly all of the listings in the MLS were comprised under the Exclusive Right to Sell (ERTS) or "Unknown" listing type. Since an overwhelming majority of the listings were in one of these two categories, Realcomp decided to default the search to include these two types. This helps to ensure that the agents searching the database were aware of the listing type prior to taking any action for the reasons stated above.

Interrogatory No. 13

Describe in detail all the reasons for Realcomp's rule that Exclusive Agency, Limited Services and MLS Entry Only listings will not be distributed to any Real Estate advertising sites.

Response:

Realcomp objects to Interrogatory No. 13 on the grounds that the term "Real Estate advertising sites" is undefined.

Notwithstanding this Objection, Realcomp references its response to Interrogatory No. 5. Realcomp further states that it assists its broker subscribers, that have their listings included on a Realcomp Website, by providing the broker with a feed of all of their listings so that they can include the information on any web site of their choosing. In this case, Realcomp includes all properties regardless of the listing type to ensure that the broker has access to all of his or her information.

Interrogatory No. 14

State (on a yearly basis) the number of searches conducted on the Realcomp MLS using the Listing Type default search of ERTS and Incomplete (or Unknown) listing types.

Response:

Realcomp objects to Interrogatory No. 14 as vague as to what constitutes the "Listing Type default search of ERTS and Incomplete (or Unknown) listing types."

Notwithstanding this Objection, Realcomp states that it lacks the information necessary to respond to Interrogatory No. 14 because it does not document or log the types of searches conducted on Realcomp Online.

Interrogatory No. 15

State (on a yearly basis) the number of searches conducted on the Realcomp MLS using the Listing Type search that included EA, LS, or MEO listing types.

Response:

Realcomp states that it lacks the information necessary to respond to Interrogatory No. 15 because it does not document or log the types of searches conducted on Realcomp Online.

Interrogatory No. 16

Describe in detail the benefits to home sellers and buyers of the Website Rule.

Response:

Realcomp states that individual sellers and buyers derive different and unique benefits from the Website Rule. That being said, it is Realcomp's position that the Website Rules enhances the ability for agents to offer a menu of services to consumers. The Website Rule offers one such level of services consumers can purchase from a listing agent. See also response to Interrogatory No. 5.

Interrogatory No. 17

Describe in detail the benefits to home sellers and buyers of the Search Function Rule.

Response:

Realcomp states that individual sellers and buyers derive different and unique benefits from the Search Function Rule. That being said, it is Realcomp's position that the Search Function Rule enhances the opportunity for potential selling brokers to offer services to consumers that were not purchased from the listing agent for any variety of reasons. For instance, a listing agent may not offer certain services that selling agent offers, and the buyer is able to purchase those specific services from the selling agent.

Interrogatory No. 18

Describe in detail the benefits to home sellers and buyers of Realcomp's rule that Exclusive Agency, Limited Services and MLS Entry Only listings will not be distributed to any Real Estate advertising sites.

Response:

Realcomp objects to Interrogatory No. 18 on the grounds that the term "Real Estate advertising sites" is undefined.

Notwithstanding this Objection, Realcomp references the response the Interrogatory No. 16. See also Response to Interrogatory No. 5.

REALCOMP II LTD.

Dated: January 11, 2007

By: Karen Kage, CEO
Karen Kage, CEO

FOSTER, SWIFT, COLLINS & SMITH, P.C.
Attorneys for Respondent

Dated: January 10, 2007

By: 

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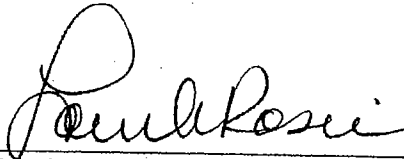
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CERTIFICATE OF SERVICE

This is to certify that on January 11, 2007, I caused a copy of the attached Respondent's Objections to Petitioner's First Set of Interrogatories in Docket No. 9320, to be served upon the following persons by Electronic Transmission and Overnight Courier:

Sean P. Gates
Deputy Assistant Director
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Counsel for Claimant.



Lorri A. Rosier

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www.thishouseforsale.com

www.virtualfsbo.com

www.yoursalebyowner.com

http://base.google.com/base/s2?a_n0=housing&a_y0=9&hl=en&gl=US

www.zillow.com

REALTOR.com Participation

YEAR	Number of Offices ¹ Activated for REALTOR.com Participation Annually	Number of Offices Participating With REALTOR.com and Still Active in Realcomp on 1/3/2007	Number of Agents in Offices Activated for REALTOR.com Participation Annually	Number of Agents in REALTOR.com Participating Offices and Still Active in Realcomp on 1/3/2007
2002	n/a ³	n/a ³	n/a ³	n/a ³
2003	1386	869	n/a ²	8541
2004	356	242	n/a ²	1727
2005	375	257	n/a ²	1495
2006	407	355	n/a ²	1421
TOTAL	2524	1723	n/a ²	13184

NOTES:

- 1 If an office changed ID they may be counted twice or more in these counts.
- 2 This number is unattainable because the number of agents active with an office changes over time.
- 3 Our data extract method changed in 2003 to the current method.

MoveInMichigan.com Participation

YEAR	Number of Offices ¹ Activated for REALTOR.com Participation Annually	Number of Offices Participating With REALTOR.com and Still Active in Realcomp on 1/3/2007	Number of Agents in Offices Activated for REALTOR.com Participation Annually	Number of Agents in REALTOR.com Participating Offices and Still Active in Realcomp on 1/3/2007
2002	1056	293	n/a ²	4697
2003	843	144	n/a ²	1540
2004	406	283	n/a ²	2812
2005	540	427	n/a ²	2390
2006	381	352	n/a ²	1334
TOTAL	3226	1499	n/a ²	12773

NOTES:

- 1 If an office changed ID they may be counted twice or more in these counts.
- 2 This number is unattainable because the number of agents active with an office changes over time.

PROCURING CAUSE FACTORS

Whether a broker is the procuring cause of a sale must be factually determined on a case-by-case basis. Many factors can impact a determination of procuring cause, but no one factor is by itself determinative. Procuring cause is in fact the interplay of factors which together demonstrate that the unbroken efforts of a specific broker were responsible for the buyer making the decision to consummate the sale on terms which the seller found acceptable. In other words, a broker who is the procuring cause of a sale is a sine qua non of the sale -- the sale would not have occurred but for the broker's efforts.

When reviewing the factors listed below, it is important to note that the occurrence of any particular factor in a fact situation does not necessarily mean that procuring cause does or does not exist. This is because it is the interplay of factors that is so important in recognizing procuring cause, not the presence of any one factor alone. A specific factor can, in fact, cut either way, depending on its importance compared to the other factors in the case and depending on when it occurs in the timeline of the case.

Procuring cause factors may be grouped, for organizational purposes, into nine different categories. These categories are:

- The nature and status of the transaction
- The nature, status and terms of the listing agreement or offer to compensate
- The roles and relationships of the parties
- The initial contact with the purchaser
- The conduct of the broker* or agent
- Continuity and breaks in continuity
- The conduct of the buyer
- The conduct of the seller
- Other information

In the analysis that follows, specific procuring cause factors are grouped by the above categories. In addition, where there is supporting case law, citations and brief explanations are provided to offer examples of the interplay of that factor with other factors and to suggest outcomes. Please note that much of the case law does not resolve disputes between brokers, but between sellers and brokers. Likewise, most of the cases involve open listings rather than exclusive listings. Nevertheless, these cases focus on two issues which are relevant to fact situations involving exclusive listings and broker-broker disputes -- that is, what has the broker been promised (by either the seller or the listing broker) and what must the broker do to attain his promised commission.

PROPOSED Procuring Cause Factors:

I. The Nature and Status of the Transaction

- A. What was the nature of the transaction?
- B. Is or was the matter the subject of litigation?

II. The Nature, Status and Terms of the Listing Agreement or Offer to Compensate

- A. What was the nature of the listing or other agreement: exclusive right to sell, exclusive agency, open or some other form of agreement?
- B. Was the agreement in writing?
- C. Was the agreement in effect at the time the sales contract was executed?
- D. Was the property listed subject to a management agreement?
- E. Is the claimant a party to whom the listing broker's offer of compensation was extended?
- F. If an offer of cooperation and compensation was made, how was it communicated?
- G. Were the broker's actions in accordance with the terms and conditions of the agreement or offer of cooperation and compensation (if any)?

The nature, status and terms of the listing agreement or offer to compensate are the starting points for any procuring cause analysis. For the broker to be the procuring cause, however, the agreement need not be exclusive. Farm Credit Bank of St. Louis v. Miller, 872 S.W.2d 376 (Ark. 1994); Hennessy v. Schmidt, 384 F.Supp. 1073 (N.D. Ill. 1974); Atkinson v. S.L. Nusbaum & Co., 59 S.E.2d 857 (Va. App. 1950). Neither must the agreement be written. Christo v. Ramada Inns, Inc., 609 F.2d 1058 (3d Cir. 1979); Ahrens v. Haskin, 299 S.W.2d 87 (Ark. 1957); Feeley v. Mullikin, 269 P.2d 828 (Wa. 1954); Wilson v. Sewell, 171 P.2d 647 (N.M. 1946). The critical questions are whether the agreement was in effect at the time the sales contract was executed and whether the claiming broker was a party to whom the agreement extended. Farnsworth Samuel Limited v. Grant, 470 So.2d 253 (La.App. 1985); Winograd, Inc. v. The Prudential Insurance Company of America, 476 N.Y.S.2d 854, aff'd. 472 N.E.2d 46 (1984); Mohamed v. Robbins, 531 P.2d 928 (Ariz. App. 1975); Hampton Park Corporation v. T.D. Burgess Company, Inc., 311 A.2d 35 (Md. App. 1973); Wright v. Jaegeris, 427 S.W.2d 276 (Mo. App. 1968).

For instance, in Winograd, one broker supplied information about the subject space to a second broker who finalized the transaction. 476 N.Y.S.2d at 856. Neither activity was dispositive. Id. The second broker, not the first, was the procuring cause because the listing agreement did not extend to the first broker. Id.

In Mohamed, the extension clause of an exclusive listing agreement was a key factor in establishing that the broker was the procuring cause. 531 P.2d at 930. Here the broker made contact with an appropriate representative of the ultimate purchaser during the period of the listing agreement, initiated negotiations with him and followed up after the listing agreement expired. Id. The broker took no part, however, in the final negotiations. Id. Nevertheless, the broker was the procuring cause of the ultimate sale because the listing agreement provided that a commission would be due the broker if the property was sold to any person whom the broker had negotiated with prior to the expiration of the listing. Id.

1. Were all conditions of the agreement met?

Where a condition precedent to the payment of commission is not met, the broker is not the procuring cause -- even though he has produced a buyer/lessee who is otherwise ready, willing and able and even though the seller/lessor has acted in bad faith. The Quadrant Corporation v. Spake, 504 P.2d 1162 (Wash. App. 1973). In Quadrant, the agreement provided that the broker would get a commission if he produced a lessee who would agree to the terms acceptable to the lessor and if the lessor was able to secure construction financing necessary to make improvements to the property. Id. With regard to the financing, the broker found lenders willing to take loan applications from the lessor, but the lessor refused to sign said applications. Id. at 1164. The court held that the lessor's refusal was in bad faith and constituted a breach of his agreement with the broker. Id. Nevertheless, the broker was not the procuring cause because it was factually unlikely that the lessor would have been approved for the loans and thus unlikely that the condition precedent to the payment of the broker's commission could have been met. Id. at 1166.

2. Did the final terms of the sale meet those specified in the agreement?

For a broker to be the procuring cause of a sale, the final agreed-upon price need not be the same as that specified in the listing agreement. Follman Properties Company v. Daly, 790 F.2d 57 (8th Cir. 1986); Fanning v. Maggi et al., 126 N.Y.S.2d 551 (1953); Wilson v. Sewell, 171 P.2d 647 (N.M. 1946). Courts recognize that the buyer and seller will negotiate and that the seller's agreement to a lesser price than originally asked for should not negate the broker's efforts. Wilson, 171 P.2d at 649.

It is not, however, sufficient for the broker to bring the parties to agreement only

as to price. Kaelin v. Warner 267 N.E.2d 86 (N.Y. App. 1971). There must be agreement as to all essential terms for the broker to be entitled to receive the commission specified in the listing agreement. Id. For instance, in Kaelin, the listing agreement required the broker to procure a buyer at a sale price of \$100,500, "with terms to be arranged." Id. at 87. The broker procured an offer of \$100,500, but the parties could not agree as to the terms normally required for a real estate transaction, including payment terms and closing date. Id. Since there was no agreement as to all essential terms, the broker did not earn his commission. Id. at 88.

In In re Fox' Will, a broker who introduced the parties and showed the property to the buyer first was not the procuring cause where it was another broker who was able to bring the buyer to the terms specified in the listing agreement. 126 N.Y.S. 158 (1953).

III. Roles and Relationships of the Parties

- A. Who was the listing agent?**
- B. Who was the cooperating broker or brokers?**
- C. Are all appropriate parties to the matter joined?**
- D. Were any of the parties acting as subagents? As buyer brokers? In some other capacity?**
- E. Did any of the cooperating brokers have an agreement, written or otherwise, to act as agent or in some other capacity on behalf of any of the parties?**
- F. Were any of the brokers (including the listing broker) acting as a principal in the transaction?**
- G. What were the brokers' relationships with respect to the seller, the purchaser, the listing broker, and any other cooperating brokers involved in the transaction?**

In most instances, the broker's relationship with the parties is a straightforward one that does not in itself raise questions as to whether or not the broker is the procuring cause of a sale. At other times, however, the relationship is less straightforward and courts have had to ask additional questions in order to determine procuring cause:

- 1. Was the party to whom the property was ultimately sold represented by a party with whom the broker had previously dealt?**

Knight v. Hicks, 505 S.W.2d 638 (Tex. App. 1974) demonstrates this kind of relationship and its effect on determining procuring cause. In Knight, the broker introduced Herschel Johnson to the seller and showed him the seller's property. Id. at 641. The broker also initiated negotiations between the parties, but was not able to finalize them. Ultimately, Mr. Johnson's son purchased the property from the seller. Id. Even though the broker had never shown the son the property or negotiated with him, the broker was the procuring cause of the sale because the parties had understood from the beginning that Mr. Johnson had been interested in the property on behalf of his son. Id. at 642.

2. Is the primary shareholder of the ultimate buyer-corporation a party with whom the broker had previously dealt?

O'Brien v. Morgan, 104 A.2d 411 (D.C. App. 1954) offers a good example of the kinds of complex relationships that can occur and the kinds of procuring cause questions that are raised when dealing with corporations. O'Brien is a case involving the sale of interstate motor carrier operating rights, rather than real estate; the principles, however, are applicable to the sale of real property as well. In O'Brien, the broker initiated negotiations between the seller and the Shoe City Corporation, the sole owner of which was a Mr. Lyons. Id. at 412. Ultimately, the negotiations broke down, though through no fault of the broker. Id. Later, a sale was finalized between the seller and Quinn Freight Lines, Inc., the controlling shareholder of which was also Mr. Lyons. Id. The court held that the broker was indeed the procuring cause of the sale to Quinn Freight Lines because his prior efforts with regard to the ultimate decision-maker had been sufficient. Id. at 413.

3. Was a prior prospect a vital link to the ultimate buyer?

Strout Realty, Inc. v. Haverstock, 555 A.2d 210 (Pa. 1989) shows how a broker's efforts with regard to one prospect may make her the procuring cause of a sale to a different prospect -- if the first prospect is the chief conduit to the ultimate buyer. In Strout, the broker first showed the seller's property to a Reverend Shafer and reached the point of discussing price and financing with him. Id. at 211. The Reverend then brought Stewardship Consultants, Inc. into the picture and the seller ultimately and directly negotiated a sale of the same property with this corporation. Id. The court held that because Reverend Shafer had conveyed critical information given to him by the broker to the corporation, the sale would not have occurred but for the introduction of the property to Reverend Shafer by the broker. Id. at 214. The broker, therefore, was the procuring cause of the sale to the corporation. Id.

IV. Initial Contact with the Purchaser

A. Who first introduced the ultimate purchaser or tenant to the property?

A broker who makes the initial contact with the purchaser does not automatically become the procuring cause of an ensuing sale. Mohamed, 531 P.2d at 931. When and how the initial contact was made can, however, be important factors in determining procuring cause. United Farm Agency of Alabama, Inc. v. Green, 466 So.2d 118 (Ala. 1988); Mehlberg v. Redlin 96 N.W.2d 399 (S.D. 1959); Wilson v. Sewell, 171 P.2d 647 (N.M. 1946). Thus, the following factors must be considered:

B. When was the first introduction made?

1. Did the ultimate buyer find the property on his own?

Hampton Park demonstrates that where a decisionmaker/buyer discovers the subject property, arrives at his decision and negotiates the terms through means which are independent of the claiming broker's efforts, the claiming broker is not the procuring cause. 311 A.2d at 35. In this case, after negotiations arranged by the broker had broken down between the owner and one representative of the Post Office, another representative of the Post Office, who had learned of the property through his own investigations, independently negotiated a sale with the owner. Id. at 39. The claiming broker was not the procuring cause because his introduction of the property was not "the foundation" on which the sale was ultimately made. Id. at 41.

2. Was the introduction made when the buyer had an immediate need for that specific property?

Mehlberg v. Redlin establishes how important it can be for a broker to introduce a prospective buyer to the right property at the right time. 96 N.W.2d 399 (S.D. 1959). In Mehlberg, the broker told a pastor about a property which was suitable for a parsonage at the time a church was in immediate need of a parsonage. Id. at 400. The broker, however, did not show the property to the officers of the church; rather the officers viewed the property on their own from the outside, sought out the seller and negotiated a sale directly with him. Id. The court held that the broker was nevertheless the procuring cause of the sale because he had brought the parties together at a propitious moment. Id. at 402.

3. Did the buyer know about the property before the broker contacted him? Did he know it was for sale?

In Farnsworth Samuel Limited v. Grant, the buyer lived across the street from the subject property. 470 So.2d 253 (La.App. 4th Cir. 1985). Yet he did not know it was listed for sale until the broker informed him. Id. The broker initiated negotiations between the parties, but was not able to consummate the deal. Id. Subsequently, the buyer and seller entered into direct negotiations with each other.

Id. Curiously, the difference between the original bid submitted via the broker and the price agreed upon by the parties in their direct negotiations equaled the broker's commission. Id. at 254. The court held that the broker was the procuring cause, listing a number of factors it considered in making its decision: "whether the prospect who ultimately purchased the property knew about the property before being contacted by the broker; the relative success or failure of the negotiations conducted by the broker, including the continuity or discontinuity of the original and final negotiations; the length of time elapsing between the broker's negotiations and the final sales agreement; development of a new, different, or independent motive for the prospect to purchase; whether or not the broker abandoned efforts to negotiate the transaction with a particular prospect; and finally, the good or bad faith of the principal and the broker." Id.

4. Were there previous dealings between the buyer and the seller?

A broker may be the procuring cause of a sale even if there were previous dealings between the buyer and the seller. Mohamed, 531 P.2d at 931; Chamness v. Marquis, 383 P.2d 886 (Wash. 1963). In Chamness, the prospective buyer had previously had direct, but unsuccessful dealings with the seller. Id. The broker then made substantial contributions by showing the property to the prospective buyer several times, re-initiating negotiations and attempting to secure financing. Id. at 887. Even though the buyer and seller ultimately came to terms on their own, the broker was the procuring cause because his efforts were the foundation for the final, successful negotiations between the parties. Id. at 888.

C. How was the first introduction made?

1. Was the introduction made to a different representative of the buyer?

A broker may be the procuring cause of a sale even if she introduced the property to one individual and negotiated final terms with another, so long as both individuals represented the same buyer and so long as the individual making the ultimate decision to buy did not arrive at his decision independent of the broker's efforts. Arthur H. Richland Company v. Morse, 169 F. Supp. 544 (Md.), aff'd, 272 F.2d 183 (4th Cir. 1959). Cf. Hampton Park, 311 A.2d at 35 (where ultimate decision-maker had found property through his own investigations and did not avail himself of any of broker's efforts).

2. Was the "introduction" merely a mention that the property was listed?

Merely alerting a buyer to the fact that a property is available does not usually constitute procuring cause. United Farm Agency of Alabama, Inc. v. Green, 466 So.2d 118 (Ala. 1988); Greene v. Hellman, 412 N.E.2d 1301 (N.Y. App. 1980). But See Mehlberg, 96 N.W.2d at 402 (where broker brought specific property to

the attention of prospective buyer when buyer had an immediate need for that specific property, the broker was the procuring cause). For instance, in United Farm, the sellers had two properties listed with the broker. Id. at 119. The broker showed one property to the prospective buyers; he merely mentioned to the prospects that the second property was listed. Id. Shortly thereafter and without the involvement of the broker in the negotiations, the prospects purchased both properties directly from the sellers. Id. at 120. The court held that the broker was the procuring cause as to the first property. Id. With regard to the second property, however, he was not the procuring cause because he had done nothing more than mention that it was listed. Id. at 121.

3. What property was first introduced?

In Doyal & Associates, Inc. v. Wilma Southeast, Inc., the broker represented the buyer bank. 322 S.E. 2d 24, 25 (Ga. App. 1985). He showed one property and made appropriate follow-up efforts. Id. The bank and the owner of the first property, however, eventually and directly finalized a sale of another property, which the broker had never shown the bank. Id. The broker was not the procuring cause just because he had introduced the parties. Id. The broker needed to prove that negotiations had been pending on the second property. Id.

V. CONDUCT OF THE BROKER

- A. Were all disclosures mandated by law or the Code of Ethics complied with?**
- B. Was there faithful exercise of agency on the broker's part, or was there any breach or failure to meet the duties owed to a principal?**

A broker who breaches his duty to his principal is not entitled to his commission. Haymes v. Rogers, 222 P.2d 789 (Ariz. 1950). In Haymes, the broker was alleged to have breached his duty to the seller by telling the prospective buyer how much another party had bid and what he could get the seller's property for. Id. Subsequently, the buyer and seller finalized the transaction directly with one another, bypassing the broker. Id. In determining whether the broker was nevertheless the procuring cause, the court left it to the jury to decide whether the allegation that the broker had breached his duty to his principal was true. Id. However, it noted that if such a breach was found to have occurred, the broker would not be entitled to his commission. Id. at 790.

- C. If more than one cooperating broker was involved, was either (or both) aware of the other's role in the transaction?**

Although it is often overshadowed by other factors, the awareness by one broker of the recent efforts of another is a factor to be considered in determining

procuring cause. Wright, 427 S.W.2d at 276; Atkinson, 59 S.E.2d at 860. Where one broker is aware of another's continuing efforts and in bad faith interferes with the transaction, he will not be the procuring cause. Wright, 427 S.W.2d at 276. However, where one broker, aware that another broker's efforts have broken down, steps in and finalizes a sale, his efforts are legitimate, and he will be the procuring cause of the sale. Atkinson, 59 S.E.2d at 860.

- D. 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?**

A broker may cause a buyer to seek the services of another broker either through estrangement or abandonment. Levy Wolf Real Estate Brokerage, Inc. v. Lizza Industries, Inc., 500 N.Y.S.2d 37 (1986). In Levy Wolf, one broker did little more than bring the subject property to the attention of the prospective buyer and unsuccessfully try to set up a meeting between the parties. Id. at 38. He then in essence abandoned his efforts. Id. The prospect thus sought out the services of a second broker, who did background research and made inquiries and proposals that ultimately resulted in a sale. Id. The second broker was the procuring cause. Id.

- E. 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?**

See Marathon Realty Corporation v. Gavin, 398 N.W.2d 689 (Neb. 1987); Atkinson, supra V.C.

- 1. Did the broker make preparations to show the property to buyer?**

Courts examine the preparatory efforts a broker makes. Farm Credit Bank, 872 S.W.2d at 378 (broker sent brochure, made aerial photographs); United Farm, 466 So.2d at 119 (broker took pictures of house); Hampton Park, (broker prepared description, report).

- 2. Did the broker make continued efforts after showing the property?**

Likewise, courts consider the continued efforts a broker makes. Farm Credit Bank, 872 S.W.2d at 378 (broker who made fifty to sixty follow-up phone calls was procuring cause); Flamingo Realty, Inc. v. Midwest Development, Inc., 879 P.2d 69 (Nev. 1994), cert. denied, 115 S.Ct. 1999 (1995)(broker who made continued efforts to secure joint venturer that was prerequisite to sale was procuring cause; Levy Wolf, 500 N.Y.S.2d at 38 (broker who abandoned efforts

was not procuring cause).

3. Did the broker remove an impediment to the sale?

A broker's efforts in removing an impediment to the sale will be considered in determining procuring cause. C. Myers & Simpson Company v. Feese Real Estate, Inc., 705 S.W.2d 600 (Mo. App. 1986). For example, in Myers, one broker showed the property to the buyer first; however, another broker was responsible for satisfying a prerequisite of the buyer's, the removal of outdoor advertising signs from the property. Id. at 602. The court held that the second broker was the procuring cause. Id.

4. Did the broker make a proposal upon which the final transaction was based?

A broker's proposal may be critical in determining procuring cause. Hennessey, 348 F. Supp. at 1073. In Hennessey, the broker introduced the parties, sent numerous letters to the buyers and made numerous phone calls to the buyers. Id. at 1075. However, he did not participate in the negotiations, he did not assist in the preparation of the final papers and he did not even attend the closing. Id. He nevertheless was the procuring cause because his proposal was the one which the parties adopted in finalizing the transaction. Id.

5. Did the broker motivate the buyer to purchase?

Courts may even consider various motivational strategies a broker may employ to bring the buyer to the decision to purchase. Richland, 169 F. Supp. at 551. For instance, in Richland, the broker motivated the buyer by letting him know that he had introduced another serious prospect to the seller. Id. The court believed that this was one of several important factors in the buyer's ultimate decision to purchase and that the broker was thus the procuring cause of the sale. Id.

F. How do the efforts of one broker compare to the efforts of another?

"When more than one broker competes for a single commission, these factors have to be carefully examined by comparing each broker's activities to the activities of the other brokers involved and by evaluating them in light of the general guidelines." A.N. Associates, Inc. v. Quotron Systems, Inc., 159 Misc.2d 515 (C.C. N.Y. 1993).

1. What was the relative amount of effort by one broker compared to another?

See Levy Wolf, supra V.D., (broker who made greater efforts was procuring cause).

2. What was the relative success or failure of negotiations conducted by one broker compared to the other?

See Farnsworth, *supra* IV.B.3., (listing factors relevant to procuring cause: "the relative success or failure of the negotiations conducted by the broker...").

- G. If more than one cooperating broker was involved, how and when did the second cooperating broker enter the transaction?

See Feeley, *infra* VIII.A.3 (second broker entered transaction only after seller acted in bad faith).

VI. CONTINUITY AND BREAKS IN CONTINUITY

- A. What was the length of time between the broker's efforts and the final sales agreement?

A short lapse of time between a broker's efforts with regard to a particular buyer and the finalization of an agreement with that buyer is indicative that the finalization is the result of the unbroken efforts of the broker. United Farm, 466 So.2d at 120. Thus, in United Farm, where the broker had made considerable preparatory efforts, introduced the parties, and shown the property to the buyer, the court found the short lapse of time between the broker's efforts and the buyer's purchase directly from the seller significant. *Id.* See also Farnsworth, 470 So.2d at 254; Seckendorff v. Halsey, Stuart & Co., 182 N.E. 14 (N.Y. App. 1932).

- B. Did the original introduction of the purchaser or tenant to the property start an uninterrupted series of events leading to the sale (or to any other intended objective of the transaction), or was the series of events hindered or interrupted in any way?

1. Did the buyer terminate the relationship with the broker? Was such termination in good faith?

A buyer or lessee's good faith termination of his relationship with a broker will defeat that broker's claim of procuring cause, provided the termination occurs before successful negotiations are achieved. Aegis Property Services Corp. v. Hotel Empire Corp., 484 N.Y.S.2d 555 (1985). In Aegis, one broker introduced the parties and showed the space to a potential lessee. *Id.* After the broker followed up with the lessee, but before negotiations were successful, the prospect terminated its relationship with the broker, refusing to authorize the broker to negotiate on its behalf. *Id.* at 558. The prospect subsequently retained the services of another broker, who was able to successfully negotiate a lease. *Id.*

The court found there to be no bad faith on the part of lessee; its termination of the first broker was not motivated by a desire to escape payment of a commission. Id. at 559. The court reasoned that absent bad faith, a prospect's termination of a broker's efforts is absolute, and held that the second broker, not the first, was the procuring cause of the transaction. Id.

2. Did negotiations break down?

Hecht Realty, Inc. v. Whisnant demonstrates that the breakdown of negotiations is a significant factor in determining procuring cause. 255 S.E.2d 647 (N.C. App. 1979). In Hecht, the broker introduced the parties and showed the subject property to the ultimate buyers. Id. Later, after the broker's exclusive listing agreement had expired, the prospects decided they wanted the property and made an offer. Id. The sellers made changes to the contract, but the prospects refused to accept the counteroffer. Id. Negotiations broke down and the broker was not able to finalize a transaction. Id. Later, a second broker was able to re-initiate negotiations and ultimately finalize a sale. Id. The court held that the second broker was the procuring cause of the sale. Id. at 648. See also Christo v. Ramada Inns, Inc., 609 F.2d at 1058.

C. If there was an interruption or break in the original series of events, how was it caused, and by whom?

1. Did the seller change the listing agreement from an open listing to an exclusive listing agreement with another broker?

An example of this situation is Belleau v. Hopewell, 411 A.2d 456 (N.H. 1980). Here, a broker had a non-exclusive listing agreement. Id. at 458. After he had shown the property to a prospective buyer and had made continued efforts, the seller gave an exclusive agreement to another broker, unbeknownst to the first broker. Id. The buyer then sought the services of the second broker who finalized the transaction. Id. The new, exclusive agreement did not break the continuity of the first broker's efforts, and, the court held, the first broker was the procuring cause of the sale. Id. at 460.

2. Was there the development of a new, different or independent motive behind the purchase?

See Farnsworth supra IV.B.3., (listing factors relevant to procuring cause: "development of a new, different, or independent motive for the prospect to purchase").

3. Was there interference in the series of events from any outside or intervening cause or party?

See VIII. CONDUCT OF THE SELLER

- D. Did the broker making 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?

See Levy Wolf, *supra* V.D.

- E. 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?

See Nestle, *infra* VIII.A.4; Levy Wolf, *supra* V.D., Aegis, *supra* VI.B.1.

VII. Conduct of Buyer

- A. Did the buyer make the decision to buy independent of the broker's efforts/information?

See Hampton Park, *supra* IV.B.1.

- B. Did the buyer negotiate without any aid from the broker?

See Hampton Park, *supra* IV.B.1.

- C. Did the buyer seek to freeze out the broker?

Neither the buyer nor the seller may act in bad faith so as to deprive a broker of his commission which he has otherwise rightfully earned. Sanders et al. v. Devereux, 189 A.2d 604 (Md. App. 1963). Sanders demonstrates how a buyer may attempt, for her own gain, to freeze out a particular broker. *Id.* In this case, a broker introduced the parties, showed the property, followed up and brought the negotiations to a point where success seemed likely. *Id.* One of the buyers, a broker herself, then conspired with the seller to temporarily take the property off the market, place it back on the market shortly thereafter, and consummate a sale so that she and a broker with whom her agency had a business association would receive the commission. *Id.* at 605. In holding that the first broker was the procuring cause of the subsequent sale, the court asserted: "Although it is not sufficient that the broker has merely planted the seed from which the harvest was reaped, on the other hand the owner [or buyer] cannot take advantage of a broker's services and make the sale himself, or through another broker, so as to deprive the broker of his commission when he has introduced a prospective buyer to the seller and

negotiations have progressed to a point where success seems imminent." Id. at 607.

1. Did the buyer seek another broker in order to get a lower price?

A buyer may not freeze out a broker who has sufficiently performed by seeking the services of a broker whom she believes may be able to get a lower price on the subject property. Wright, 427 S.W.2d at 276. In Wright, a broker introduced the buyers to the seller, showed them the property and properly followed up with them. Id. at 278. The buyers, however, believed that another broker, with whom they had a long-time acquaintance, could get them the property at a lower price. Id. at 279. They thus contacted the second broker and finalized the sale via him. Id. The court held that they could not circumvent the first broker and thereby deprive him of his commission in this way. Id. at 281.

2. Did the buyer express the desire not to deal with the broker and refuse to negotiate through him?

A buyer may decide not to negotiate through a broker and unless the broker has an exclusive right to sell agreement, the broker will not be the procuring cause of a subsequent sale. Walker v. David Davies Inc., 296 N.E.2d 691 (Oh. App. 1973). In Walker, the broker had no direct negotiations with the buyer; in fact the buyer expressed a desire not to deal through the broker. Id. at 695. Thus, the court held that the broker was not the procuring cause even though he had incurred expense and spent time trying to sell the property. Id.

3. Did the contract provide that no brokers or certain brokers had been involved?

Buyer and seller may contractually provide that no broker was involved in their transaction. However, where there is evidence that the parties have not been truthful and that a broker has performed sufficiently so that he is the procuring cause, the broker will be entitled to the commission. Risser v. Hirshhorn, 199 F.2d 917 (2nd Cir. 1952).

D. Did the buyer divulge to the seller that a certain broker had brought him to the transaction?

Where a broker has been instrumental in bringing the buyer to the subject property, the buyer must reveal this to the seller. Risser, 199 F.2d at 917. Indeed, even where the buyer fails to divulge this information to the seller, the seller is responsible for paying a commission to the broker if the seller could have ascertained by reasonable diligence that the broker's role was sufficient. Id. For instance, the buyer in Risser discovered the subject property when he was given a brochure the broker had prepared and forwarded to an associate of the buyer's. Id. at 918. Because the buyer at first wished to remain anonymous, the broker

reported to the seller that the associate was interested in the property; he did not mention the ultimate buyer himself. *Id.* The buyer, however, eventually negotiated directly with the seller and the two inserted a statement in the contract which asserted that no broker had been involved in the transaction. *Id.* at 919. The court determined that the purpose of this provision was to avoid paying the broker a commission. *Id.* The court noted that the buyer had a duty to divulge the broker's role to the seller and that even if he failed to do so, the seller would be liable for the broker's commission if the seller could have ascertained the broker's role by reasonable diligence. *Id.* at 920.

VIII. CONDUCT OF THE SELLER

A. Did the Seller act in bad faith to deprive the broker of his commission?

The following scenarios demonstrate that courts will not allow the bad faith of the seller to negate the efforts of a broker who would otherwise be the procuring cause of a sale. In most instances, the same would prove true if it were the listing broker who acted in bad faith to deprive a subagent or cooperating broker of her commission.

1. Was there bad faith evident from the fact that the difference between the original bid submitted and the final sales price equalled the broker's commission?

See Farnsworth, *supra* IV.B.3.

2. Was there bad faith evident from the fact that a sale to a third party was a straw transaction which was designed to avoid paying commission?

Farm Credit Bank demonstrates that courts will not allow straw transactions to deprive a broker of her commission. 872 S.W. at 379. In Farm Credit the brokers registered both the U.S. Fish and Wildlife Service and the Nature Conservancy with the seller bank under their non-exclusive listing agreement. *Id.* at 378. The brokers made extensive efforts to interest the Fish and Wildlife Service in the subject property. *Id.* They wrote letters, made fifty or sixty telephone calls, had aerial photographs made, advised the agency of the flood plain and kept the agency informed as to potential buyers. *Id.* Although the agency wanted to acquire the property, it did not have such an appropriation in its budget that year. *Id.* Ultimately, however, a sale was consummated to a corporation which had been set up to resell the land to the Nature Conservancy which resold the land to the Fish and Wildlife Service when it could afford to make the purchase. *Id.* at 379. The court refused to let such straw transactions deprive the brokers of the commission they had earned. *Id.* See also Flamingo Realty, 879 P.2d at 70 (where seller sold property to corporation which in turn

immediately sold property to broker's prospect).

3. **Was there bad faith evident from the fact that the seller told the broker he wouldn't sell under certain conditions, but did so via another broker?**

In Feeley v. Mullikin, the broker introduced the buyers to the seller, showed them the property, initiated negotiations and properly followed up. 269 P.2d at 828-29. When he attempted to finalize the sale, however, the seller told him that he had decided not to sell the property before June 1. Id. On May 1, nevertheless, a sale was consummated between the buyers and the seller via another broker who accepted a lesser commission than that stated in the first broker's listing agreement. Id. The court held that the seller had acted in bad faith by attempting to deprive the first broker of his earned commission. Id. at 831. The first broker, not the second, was the procuring cause. Id.

4. **Did the owner freeze out the broker to avoid a commission dispute?**

Where a broker showed the property and would have finalized negotiations but for the interference of the owner, he is the procuring cause of the transaction -- even though another broker did in fact finalize the negotiations. Nestle Company, Inc. v. J.H. Ewing & Sons, 265 S.E.2d 61 (Ga. App. 1980). In June of 1976, agents from J.H. Ewing & Sons brokerage showed the subject property to the potential lessee, Scripto, whom they represented. Id. at 63. Scripto, however, was not interested in the property at that time. Id. Subsequently, in August of 1977, a second brokerage, Coldwell Banker, showed the same property to Scripto. Id. Less than six weeks later, one of the Ewing agents informed the lessor, Nestle, that Scripto was now a "hot prospect" and initiated negotiations which appeared to be moving towards completion. Id. at 64. Nestle, realizing that a commission dispute was imminent, stopped the Ewing agent from going further and placed the transaction in the hands of Coldwell Banker. Id. The court held that Ewing was the procuring cause. . . that Nestle should not have interfered with Ewing's imminently successful negotiations. Id.

5. **Did the seller freeze out the broker to avoid paying a commission at all?**

Even where there is a non-exclusive listing agreement, a seller may not avoid paying a deserved commission by negotiating directly with a buyer. Richland, 169 F. Supp. at 549-50. In Richland, the broker did everything possible -- he introduced the parties, began negotiations and followed up. Id. at 546-47. The seller, however, froze him out of important meetings and finalizing negotiations. Id. at 548. The court nevertheless held that the broker was the procuring cause, saying: ". . . it is not requisite, where the [broker's] evidence is otherwise sufficient, that the broker should have been present at the final consummation of

the sale, or to have directly and immediately have been the final negotiator therefor. Thus, where the broker has introduced to the seller a prospective interested buyer and negotiations have progressed to a point where success seems imminent, the broker cannot be deprived of his commissions because the seller in effect bypasses the broker by direct negotiations with the buyer, in effect freezing the broker out of the case." Id. at 549-50.

B. Did the seller not authorize the broker to accept an amount the seller ultimately accepted?

A seller may not deny a broker his commission where the broker could have finalized the transaction but for the seller's refusal to authorize the broker to settle for an amount that he himself ultimately accepted. Ahrens, 299 S.W.2d at 48. In Ahrens, the broker introduced the parties, showed the property and began negotiations. Id. at 47. He was prepared to pursue the transaction to its conclusion; however, the seller refused to authorize him to offer the property at the price that the seller in later direct negotiations accepted. Id. at 48. The court held that the broker was nevertheless the procuring cause. Id.

IX. 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?

NON-CONCLUSIONS:

As the cases summarized above demonstrate, there are a great number of factors to consider when determining procuring cause. However, it is just as important to remember that no automatic conclusions should be drawn from the presence or absence of any one factor. Procuring cause is not always achieved by introducing the parties. It is not always achieved by finalizing the transaction. No preconceived formula or rule should be used to determine procuring cause. Rather each factor should be weighed in conjunction with the other factors relevant to the case. In short, arbitration panels must remember that the above factors are simply considerations, not conclusions.

Realcomp II Ltd. Rules and Regulations

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TABLE OF CONTENTS
Regional MLS Rules and Regulations

DEFINITIONS	1
LISTING PROCEDURES	2
SELLING PROCEDURES	5
REFUSAL TO SELL	7
PROHIBITIONS	7
DIVISION OF COMMISSIONS	8
SERVICE CHARGES	10
COMPLIANCE WITH MLS RULES	10
MEETINGS	11
ENFORCEMENT OF RULES AND DISPUTES	11
MLS FINES	12
CONFIDENTIALITY	15
MLS COMPILATIONS AND COPYRIGHTS	15
USE OF COPYRIGHTED MLS COMPILATIONS	16
USE OF MLS INFORMATION	17
CHANGES IN MLS RULES AND REGULATIONS	17
ARBITRATION OF DISPUTES	17
STANDARDS OF CONDUCT	18
ORIENTATION	21
IDX RULES AND REGULATIONS	22

Definitions

- COMPENSATION**- Compensation shall mean the fee, commission or payment (sometimes "fee" and sometimes "fee/commission") paid to a Cooperating Participant as a result of his/her involvement in the closing of a sale/lease of property listed with the MLS.
- COOPERATING PARTICIPANTS/LISTING PARTICIPANTS** - Cooperating Participants/Listing Participants are the Participants who are serviced by the MLS under an operative Subscription/Service or Data Sharing Agreement from which they derive benefits and under which they have various obligations and duties to others and to the MLS; and out of which they seek to derive compensation from their roles in the prospective sale/lease of real estate.
- BROKER LOAD** - For the purpose of these Rules and Regulations, where there are provisions relating to the submission of documents to the Service, the document may be loaded by the office within the time constraints provided.
- FAX** - For the purpose of these Rules and Regulations, where there are provisions relating to the submission of documents to the Service, the document may be sent by facsimile within the time constraints provided.
- LISTING** - The written agreement including the Profile Form which establishes an agency relationship between a Participant as an agent and a seller/lessor of real estate (the principal) for the sale/lease of said real estate by Participant either with or without the involvement of Cooperating Participants. The agreement is sometimes known or referred to as an "agency agreement"; "right to sell agreement" or "listing agreement".
- LISTING DATE** - The date that the listing is signed by the seller/lessor and accepted by the Listing Participant (by the Broker or authorized Agent).
- PARTICIPANT** - A REALTOR® eligible to receive MLS.
- PROFILE FORM** - The document which must be submitted to the MLS setting forth the information concerning the listed property. The Profile Form includes the data sheet which is a part of the Listing Agreement and such other data or certifications as may be required by the MLS from time to time. This information and data is for input into the multi list computerized database.
- SANCTIONS/FINES** - All schedules relating to possible fines and/or sanctions will be implemented in accordance with the policies and procedures included in 9.1.

REALCOMP II LTD REGIONAL MLS RULES & REGULATIONS

For Interpretation of these MLS Rules & Regulations, the following shall apply:

1. Multiple Listing Service shall be referred to as the MLS provided by Realcomp II Ltd.
2. Wherever time of mailing of notice is referred to or required, postmark, fax date and time stamp or date and time of entry in the case of Broker Load shall constitute compliance.
3. A business day for purposes of these Rules and Regulations is defined as every day of the calendar year.
4. Fineable items are indicated by referencing (Sec.9.3).
5. Index of Symbols (Sec.5.5).

LISTING PROCEDURES

Section 1.0

The Profile Form portion of listings of real or personal property within the jurisdiction of the Realcomp II Ltd. defined as the State of Michigan shall be delivered to the MLS office or entered into the MLS computer 48 hours after all necessary signatures have been obtained. Listings containing excluded, exempt parties and buy out corporations will be accepted by the MLS and shall be clearly identified in the Exclusive Listing by the appropriate symbol (Sec. 5.5). The owner of the listed property is the client of the Listing Participant and not of all members of the MLS or of the MLS (Sec. 9.3).

The MLS shall accept Exclusive Listings, (which are sometimes known or identified as an Exclusive Right to Sell or an Exclusive Agency Agreement) and may accept other forms of agreement which make it possible for the Listing Participant to offer cooperation and compensation to the other Cooperating Participants of the MLS. In those instances where the seller's/lessor's written authorization is required, the Listing Participant must obtain such authorization.

An Agreement with a Seller/Lessor to exclude or exempt prospects (including buy-out corporations) from full or partial commission entitlement by the Cooperating Participants shall be accepted by the MLS providing all other mandatory listing criteria are met.

Any listing taken out of the defined jurisdiction will be accepted by the MLS for dissemination.

~~Net listings and open listings will not be accepted by the MLS. The service may not accept net listings because they are deemed unethical and, in most states, illegal. Open listings are not accepted except where required by law because the inherent nature of an open listing is such as to usually not include the authority to cooperate and compensate other brokers and inherently provides a disincentive for cooperation. (Added 2006)~~

~~The exclusive right-to-sell listing is the conventional form of listing submitted to the multiple listing service in that the seller authorizes the listing broker to cooperate with and to compensate other brokers. (Added 2006)~~

Section 1.1

Any listing taken on a contract to be filed with the MLS is subject to the rules and regulations of the Service upon signature of the seller(s)/lessor(s). This rule also applies to listings which are sold prior to submission to the MLS.

Section 1.2 The approved Profile Form when filed with the MLS by the Listing Participant shall be complete and correct in every detail as specified on the keyword portion of the Profile Form. (Sec. 9.3)

Section 1.2.1 **EXCLUSIVE AGENCY LISTINGS:** authorizes the listing broker, as exclusive agent, to offer cooperation and compensation on a blanket unilateral basis, but also reserves the general right of the seller to sell the property on an unlimited or restrictive basis. (In other words, the seller will pay the agent's commission if the agent brings in the buyer, but if the seller brings in their own buyer, the seller is not obligated to pay a commission) and will be identified by the marking the "Exclusive Agency" box on the Profile Form.

Section 1.2.2 **LIMITED SERVICE:** a listing agreement under which the listing broker will NOT provide one, or more, of the following services:

- (a) Arrange appointments for cooperating brokers to show listed property to potential purchasers but instead gives cooperating brokers authority to make such appointments directly with the seller(s);
- (b) Accept and present to the seller(s) offers to purchase procured by cooperating brokers but instead gives cooperating brokers authority to present offers to purchase directly to the seller(s);
- (c) Advise the seller(s) as to the merits of offers to purchase;
- (d) Assist the seller(s) in developing, communicating, or presenting counteroffers; or
- (e) Participate on the seller(s) behalf in negotiations leading to the sale of listed property.

Limited Service listings will be identified by marking the "Limited Service" box on the Profile Form so potential cooperating brokers will be aware of the extent of the services the listing broker will provide to the seller(s), and any potential for cooperating brokers being asked to provide some or all of these services to listing brokers' clients, prior to initiating efforts to show or sell the property.

Section 1.2.3 **MLS ENTRY-ONLY:** listing where the listing is entered into the MLS system, but NONE of the services mentioned previously are provided by the listing broker.

MLS Entry Only listings will be identified by marking the "MLS Entry Only" box on the Profile Form so potential cooperating brokers will be aware of the extent of the services the listing broker will provide to the seller(s), and any potential for cooperating brokers being asked to provide some or all of these services to listing brokers' clients, prior to initiating efforts to show or sell the property.

Exclusive Agency, Limited Service and MLS Entry Only listings will not be distributed to any Real Estate Internet advertising sites.

Section 1.3 If the seller/lessor refuses to permit the listing to be disseminated by the MLS, the Listing Participant may then take the listing as an office exclusive and such listing shall be filed with the MLS, but not disseminated to the other Participants. Filing of the Profile Form in this instance should be accompanied by the certification signed by the seller/lessor that the Listing shall not be disseminated by the MLS. (Sec. 9.3)

Any new listing submitted to the MLS that includes a "do not show until" clause must include this information in the remarks section of the profile form if applicable. In addition, written authorization from seller must be included stating "no shows until". This

letter must include the date that showings will begin and this date must be within two (2) weeks of the date that the listing goes into the MLS. (amended 2006).

- Section 1.4 All Profile Forms submitted to the MLS must be valid and shall be serviced by the Listing Participant's office.
- Section 1.5 Listings may be withdrawn from the MLS by the Listing Participant before the expiration date of the listing provided notice is filed with the MLS including a copy of the agreement between the seller/lessor and the Listing Participant which authorizes the withdrawal. This withdrawal right shall not be used to circumvent or avoid the obligation to pay a share of the fee/commission/compensation to a Cooperating Participant.
- Sellers/lessors do not have the unilateral right to require an MLS to withdraw a listing without the listing participant's concurrence. However, when seller(s)/lessor(s) can document that his exclusive relationship with the listing participant has been terminated, the MLS may remove the listing at the request of the seller/lessor.
- Section 1.6 Any change in the Listing, including but not limited to the listed price, terms, possession, right of first refusal, or other "continue to market" contingencies shall be made only when authorized in writing by the seller/lessor and shall be filed within 48 hours with the MLS. (Sec. 9.3)
- Section 1.7 All listed properties which are to be sold or which may be sold separately must be identified and submitted individually on the Profile Form. When part of a listed property has been sold, proper notification shall be given to the MLS within forty-eight (48) hours. (Sec. 9.3)
- Section 1.8 The MLS shall not fix, control, recommend, suggest, or maintain commission rates or fees for services to be rendered by Participants. Further, the MLS shall not fix, control, recommend, suggest, or maintain the division of commissions or fees between Cooperating Participants or between Participants and non-participant(s).
- Section 1.9 Profile Forms filed with the MLS shall bear a definite expiration date.
- Section 1.10 Any listing filed with the MLS automatically expires at midnight on the expiration date specified in the listing agreement unless renewed in writing and filed with the MLS by Participant prior to expiration date.
- If notice of renewal or extension is received after the listing has been removed from the compilation of current listings, a new or revised profile form is required and the extension or renewal will be published in the same manner as a new listing.
- Section 1.11 Any contingency or conditions of any term in a listing shall be specified and noticed to the Participants.
- Section 1.12 **LISTING OF SUSPENDED PARTICIPANTS:** When a Participant is suspended from the MLS for failing to abide by his/her membership duties (i.e., violation of the Code of Ethics, Board/Association Bylaws, Realcomp II Ltd Bylaws, MLS Rules and Regulations, or other membership obligations except failure to pay appropriate dues, fees or charges), all listings currently filed with the MLS by the suspended Participant

shall, at the Participant's option, be retained by the MLS until sold, withdrawn or expired and shall not be renewed or extended by the MLS beyond the termination date of the listing agreement in effect when the suspension became effective. If a Participant has been suspended from its parent Board/Association (except where MLS participation without Board/Association membership is mandated by law or the MLS (or both)) for failure to pay appropriate dues, fees or charges, the MLS shall not be obligated to provide MLS services, including continued inclusion of the suspended Participant's listings in the MLS compilation of the current listing information. Prior to any removal of a suspended Participant's listings from the MLS, the suspended Participant must be advised in writing of the intended suspension. The suspended Participant shall promptly advise his/her clients affected by the suspension of such suspension.

Section 1.13

LISTINGS OF EXPELLED PARTICIPANTS: When a Participant is expelled from the MLS for failing to comply with membership duties (i.e., violation of the Code of Ethics, Board/Association Bylaws, Realcomp II Ltd Bylaws, MLS Rules and Regulations, or other membership obligations except failure to pay appropriate dues, fees or charges), all listings currently filed with the MLS shall, at the expelled Participant's option, be retained by the MLS until sold, withdrawn, or expired, and shall not be renewed or extended by the MLS beyond the termination date of the listing agreement in effect when the expulsion became effective. If a Participant has been expelled from the Board/Association to which he/she belonged; (except where MLS participation without Board/Association membership is permitted by law) or MLS (or both) for failure to pay appropriate dues, fees, or charges, the MLS is not obligated to provide MLS services, including continued inclusion of the expelled Participant's listings in the MLS compilation of current listing information. Prior to any removal of an expelled Participant's listing(s) from the MLS, the expelled Participant must be advised in writing of the intended expulsion. The expelled Participant shall promptly advise his/her clients affected by the expulsion of such expulsion.

Section 1.14

LISTINGS OF RESIGNED PARTICIPANTS: When a Participant resigns from the MLS, the MLS is not obligated to provide services, including continued inclusion of the resigned Participant's listings in the MLS compilation of current listing information. Prior to any removal of a resigned Participant's listings from the MLS, the resigned Participant must be advised in writing of the intended removal. The resigned Participant shall promptly advise his/her clients affected of such resignation.

SELLING PROCEDURES

Section 2.0

Appointments for showing and negotiations with the seller/lessor for the purchase/lease of listed property filed with the MLS shall be conducted through the Listing Broker except under the following circumstances: (a) the Listing Broker gives the Cooperating Broker specific authority to show and/or negotiate directly or (b) after reasonable effort, the Cooperating Broker cannot contact the Listing Broker or his representative. However, the Listing Broker, at his option, may preclude such direct negotiations by Cooperating Brokers.

Section 2.1

Listing Participant must make arrangements to present offers and transmit all documents as soon as possible or give the Cooperating Participant a satisfactory reason for not doing so and shall also provide reasonable alternatives to resolve any such delay.

- Section 2.2 The Listing Participant shall submit to the seller/lessor all written offers until closing unless precluded by law, government rule, regulation, or agreed otherwise in writing between the seller/lessor and the listing participant. Unless the subsequent offer is contingent upon the termination of an existing contract, the Listing Participant shall recommend that the seller/lessor obtain the advice of legal counsel prior to acceptance of the subsequent offer.
- ~~Participants representing buyers or tenants shall submit to the buyer or tenant all offers and counter-offers until acceptance, and shall recommend that the buyers and tenants obtain legal advice where there is a question about whether a pre-existing contract has been terminated. (Added 2006)~~
- Section 2.3 The Cooperating Participant (subagent or buyer agent) or his representative shall have the right to participate in the presentation to the seller or lessor of any offer he secures to purchase or lease. This right does not create a right to be present during any subsequent discussion(s) (including a conversation which evaluates the offer immediately following the presentation) between the Listing Participant and the seller or lessor with respect to the presented offer. However, if the seller or lessor gives written instructions to the Listing Participant that the Cooperating Participant shall not be present when an offer secured by the Cooperating Participant is presented, the Cooperating Participant has the right to a copy of the seller's written instructions. None of the foregoing diminishes the Listing Participant's right to control the establishment of appointments for such presentations.
- Section 2.4 The Listing Broker or his representative has the right to participate in the presentation of any counter-offer made by the seller or lessor. He does not have the right to be present at any discussion or evaluation of a counter-offer by the purchaser or lessee (except when the Cooperating Broker is a subagent). However, if the purchaser or lessee gives written instructions to the Cooperating Broker that the Listing Broker not be present when a counter-offer is presented, the Listing Broker has the right to a copy of the purchaser's or lessee's written instructions.
- Section 2.5 Any pending sale which is canceled shall be reported immediately (within 24 hours) to the MLS by the listing office. (Sec. 9.3)
- Section 2.6 The Listing Participant shall submit, within 5 business days after receipt of a completed Contract of Sale, a Status Change form of the "Pending Sale" to the MLS including pending sale date, selling office I.D.#, selling agent I.D.#, and selling agent name. (Sec. 9.3)
- Section 2.7 The Listing Participant shall submit a Status Change form with all required sold data to the MLS including price, terms and date closed to the MLS within 5 business days after closing. (Sec. 9.3)
- An Affidavit of Sale or Memorandum of Land Contract in recordable form which does not state the sale price must be reported to the MLS with the report to indicate whether the sale price is, or is not, to be withheld from publication. Participants and the MLS shall abide by written directions issued at or prior to closing by a Seller or Buyer not to publish the sales price.
- Section 2.8 The listing broker shall report to the MLS within twenty-four (24) hours that a contingency on file with the MLS has been fulfilled or renewed, or the agreement cancelled.

Section 2.9 A listing shall not be advertised by any Participant other than the listing broker without the prior consent of the listing broker.

Section 2.10 Listing brokers, in response to inquiries from buyers or cooperating brokers, shall, with the seller's approval, disclose the existence of offers on the property. Where disclosure is authorized, the listing broker shall also disclose whether offers were obtained by the listing licensee, by another licensee in the listing firm, or by a cooperating broker. (Added 2006)

Section 2.11 Listing brokers shall not misrepresent the availability of access to show or inspect listed property. (Added 2006)

REFUSAL TO SELL

Section 3.0 If the seller/lessor of any listed property filed with the MLS refuses to accept a written offer satisfying the terms and conditions stated in the listing, such fact shall be immediately transmitted to the MLS and to all Participants.

PROHIBITIONS

Section 4.0 Information provided by the MLS to the Participant shall be considered privileged information by the MLS. Such information shall be confidential and shall not be made available to non-participants except as permitted by these MLS rules and applicable law.

Section 4.1 Off market listings are intended for the sole use of REALTORS® and may not be provided to home buyers or home sellers except where included in a Comparable Market Analysis. (REVISED 2003)

Section 4.2 Only the "For Sale/Lease" sign of the Listing Participant may be placed on a property.

Section 4.3 Prior to closing, only the "Sold" sign of the Listing Participant may be placed on a property, unless the Listing Participant authorizes the Cooperating (selling) Participant to post such a sign.

Section 4.4 Participants shall not solicit a listing on a currently listed property filed with the MLS unless such solicitation is consistent with Article 16 of the REALTORS® Code of Ethics, its Standards of Practice and its Case Interpretations. Upon showing a property, anything other than leaving a business card will be interpreted as solicitation.

REFERENCE: (This Section is to be construed in a manner consistent with Article 16 of the Code of Ethics and particularly Standard of Practice 16-4. This section is intended to encourage sellers/lessors to permit their properties to be filed with the MLS by protecting them from being solicited, prior to expiration of the listing, by brokers and salespersons seeking the listing upon its expiration.

Without such protection, a seller/lessor could receive hundreds of calls, communications, and visits from brokers and salespersons who have been made aware through MLS filing of the date the listing will expire and desire to substitute themselves for the present broker.

This Section is also intended to encourage brokers to participate in the MLS by assuring them that other Participants will not attempt to persuade the seller/lessor to breach the listing agreement or to interfere with their attempts to market the property. Absent the

protection afforded by this Section, Listing Participants should be most reluctant to generally disclose the identity of the seller/lessor or the availability of the property to other brokers.

This Section does not preclude solicitation of listings under the circumstances otherwise recognized by the Standards of Practice related to Article 16 of the Code of Ethics.)

DIVISION OF COMMISSIONS

Section 5.0 The Listing Participant shall specify, on each listing filed with the MLS, the compensation offered to MLS participants, for their services with respect to the sale/lease of the real estate covered by such listing. Such offers are unconditional except that entitlement to compensation is determined by the Cooperating Broker's performance as the procuring cause of sale (or lease) or as otherwise provided for in this rule. The Listing Participant's obligation to compensate any Cooperating Participant as 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.

In filing a property with the MLS, the Listing Participant is making blanket unilateral offers of compensation to the other potential MLS Cooperating Participants, and shall therefore specify on each listing filed with the MLS, the compensation being offered to the other potential MLS Cooperating Participants. Specifying the compensation on each listing is necessary because the Cooperating Participants have the right to know what his/her compensation shall be prior to his/her endeavor to sell.

The Listing Participant retains the right to determine the amount of compensation offered to other Participants (acting as subagents, buyer agents, or in other agency or nonagency capacities defined by law) which may be the same or different.

This Section 5.0 shall not preclude the Listing Participant from offering any Cooperating Participant compensation other than the compensation indicated on the listing published by MLS provided that the Listing Participant informs the other potential Cooperating Participants in writing in advance of their producing an offer to purchase, and provided further that the modification to the specified compensation is not the result of any agreement among all or any other participants in the MLS. Any superseding offer of compensation must be expressed as either a percentage of the gross sales price or as a flat dollar amount. The MLS may not require the Listing Participant to disclose the amount of total negotiated commission on the listing which has been submitted to the MLS. The MLS shall not disclose the total commission negotiated between the seller/lessor and the Listing Participant.

The compensation information to be published shall clearly inform all Participants as to the compensation they will receive in cooperative transactions unless advised otherwise

by the Listing Participant in writing in advance of their producing an offer to purchase. The compensation specified on listings published by the MLS shall be shown in one of the following forms:

1. By showing a percentage of the gross selling price.
2. By showing a definite dollar amount.

The Listing Participant may, from time to time, adjust the prospective compensation being offered to other MLS participants with respect to any listing which is still open and valid by advance written notice to the MLS which information shall be promptly added to the MLS published data with respect to the relevant listing.

The MLS shall make no rule on the division of commissions between Participants and non-participants. This prerogative shall remain solely within the lawfully exercised discretion of the Listing Participant.

Multiple Listing Services, at their discretion, may adopt rules and procedures enabling Listing Participants to communicate to potential Cooperating Participants that gross commissions established in listing contracts are subject to court approval or to lender approval; and that compensation payable to Cooperating Participants may be reduced if the gross commission established in the listing contract is reduced by a court or by a lender. In such instances, the fact that the gross commission is subject to court or to lender approval and either the potential reduction in compensation payable to Cooperating Participants or the method by which the potential reduction in compensation will be calculated must be clearly communicated to potential cooperating brokers prior to the time they produce an offer that ultimately results in a successful transaction.

~~Nothing in these MLS rules precludes a listing participant and a cooperating participant, as a matter of mutual agreement, from modifying the cooperative compensation to be paid in the event of a successful transaction. (Added 2006)~~

Section 5.1

If a Participant or any licensee (or licensed or certified appraiser) affiliated with a Participant has any ownership interest in a property, the listing of which is to be disseminated through the MLS, that person shall disclose that interest when the listing is filed with the MLS and such information shall be disseminated to all MLS Participants.

Section 5.2

If a Participant or any licensee (including licensed and certified appraisers) affiliated with a Participant wishes to acquire any interest in property listed with another Participant, such contemplated interest shall be disclosed, in writing, to the Listing Participant not later than the time an offer to purchase is submitted to the Listing Broker.

Section 5.3

The existence of a dual or variable rate commission arrangement (i.e., one in which the seller/lessor agrees to pay a specified commission if the property is sold/leased by the Listing Broker without assistance and a different commission if the sale/lease results through the efforts of a Cooperating Broker; or one in which the seller/lessor agrees to pay a specified commission if the property is sold/leased by the Listing Broker either with or without the assistance of a Cooperating Broker and a different commission if the sale/lease results through the efforts of a seller/lessor) shall be disclosed by the Listing Broker by a key, code, or symbol as required by the MLS. (Sec. 5.5) The Listing Broker shall, in response to inquiries from potential Cooperating Brokers, disclose the differential that would result in either a cooperative transaction or, alternatively, in a sale/lease that results through the efforts of the seller/lessor. If the Cooperating Broker is

a buyer/tenant representative, the buyer/tenant representative must disclose such information to their client before the client makes an offer to purchase or lease.

Section 5.4 The offer of bonus compensation shall be disclosed by the applicable symbol required by the MLS or displayed in the "Remarks" portion of the existence of offered bonus compensation shall be disclosed by the applicable symbol required by the MLS or displayed in the "Remarks" portion of the Profile form. (Sec. 5.5)

Section 5.5 **COMPENSATION ARRANGEMENTS**

"B"	Bonus	"D"	Dual
"V"	Variable	"E"	Exclusion

DEFINITIONS:

BONUS = Bonus (over and above compensation offered) is being offered to the selling Participant.

AP&T: Bonus based on Accepted Price and Terms
FP&T: Bonus based on Full Listing Price and Terms

DUAL = One in which the seller/lessor agrees to pay a specified commission if the property is sold/leased by the Listing Broker without assistance and a different commission if the sale /lease results through the efforts of a Cooperating Participant, or one in which the seller/lessor agrees to pay a specified commission if the property is sold/leased by the Listing Participant either with or without the assistance of a Cooperating Participant and a different commission if sale/lease results through the efforts of seller/lessor.

VARIABLE = One percentage of compensation is offered on a portion of the final selling price and a different percentage(s) is offered on the remaining portion.

EXCLUSION = Certain parties (which may include buy-out corporations) are excluded from the listing. No compensation if sold to one of these parties.

SERVICE CHARGES

Section 6.0 The Participant shall be responsible for MLS fees and charges to the extent such responsibility is mandated in Subscription/Service Agreement.

COMPLIANCE WITH MLS RULES

Section 7.0 The following action may be taken for noncompliance with the rules:

(a) For failure to pay any service charge or fee within one (1) month of the statement date, and provided that at least ten (10) days written notice has been given, the MLS shall be suspended until service charges or fees then owing are paid in full unless special forbearance is granted to the defaulting Participant by the Realcomp II Ltd Board of Governors.

(b) For failure to comply with any other rule, the provisions of Sections 9 and 9.1 shall apply.

MEETINGS

Section 8.0 The meetings of the Participants of the Service or the Board of Governors of the Multiple Listing Service for the transaction of business of the Service shall be held in accordance with the provisions of the bylaws of the Service.

ENFORCEMENT OF RULES AND DISPUTES

Section 9.0 The Board of Governors of Realcomp II Ltd or a committee empowered by the Board shall give consideration to all written complaints having to do with violations of the Rules and Regulations.

Section 9.1 If the alleged offense is a violation of the Rules and Regulations of the MLS and does not involve a charge of alleged unethical conduct or request for arbitration, it may be administratively considered and determined by the Board of Governors of the MLS or a committee appointed by the Board. If a violation is determined, the Board of Governors or a committee appointed by the Board may direct the imposition of sanction, provided the recipient of such sanction may request a hearing before the Professional Standards Committee of the appropriate Shareholder Board/Association in accordance with the Bylaws and Rules and Regulations of the Shareholder Board/Association of REALTORS® within twenty (20) days following receipt of the Governors' decision.

If, rather than conducting an administrative review, the MLS has a procedure established to conduct hearings, any appeal of the decision of the hearing may be appealed to the Board of Governors of the MLS within twenty (20) days of the tribunal's decision. Alleged violations involving unethical conduct shall be referred to the Professional Standards Committee of the Board of REALTORS® for processing in accordance with the professional standards procedures of the Board. If the charge alleges a refusal to arbitrate, such charge shall be referred directly to the Board of Directors of the Board of REALTORS®.

Section 9.2 **Complaints of Unethical Conduct:** All other complaints of unethical conduct shall be referred by the Board of Governors of the MLS to the applicable Shareholder Board/Association of REALTORS® for appropriate action in accordance with the professional standards procedures established in the Board's bylaws.

**REALCOMP II LTD. MLS
SUMMARY OF MLS FINES**

<u>SEC.</u>	<u>VIOLATION</u>	<u>FINES</u>
Rules and Regulations:		
1.0	Failure to submit listing profile form	\$75.00
1.0	Late Listing	\$37.50
1.3	Failure to submit office exclusive or "Do not publish" listing	\$25.00
1.3	New listing submitted to the MLS must include the "do not show until" clause in the remarks section of the profile sheet if applicable. In addition, written authorization from seller must be included stating "no shows until".	\$50.00
1.2	Incomplete/Incorrect listing (Each field of missing information is fineable by the following amount:)	\$10.00
1.7, 1.11 & 2.5	Failure to disclose contingency and/or changes	\$75.00
1.7 & 2.7	Late sold	\$37.50
2.6	Late pending	\$37.50
5.3	Dual or variable commission arrangements not identified	\$50.00
10.0	Failure to maintain confidentiality	1st occurrence - \$5,000 2nd occurrence - \$10,000

REALCOMP II LTD. MLS - SUMMARY OF MLS FINES

SEC. VIOLATION

FINES

Policy Handbook:

- | | | | | | | | | | | | | |
|-------------------|--|----------|------------------|--|-------------------|-----------|------------------|---|-------------------|--|------------------|--|
| 7D | Submission of a listing change without an authorized signature in conflict with MLS Rules and Regulations | \$100.00 | | | | | | | | | | |
| 7Q | Site condo and Coop listings that are not designated as such on the listing profile
\$50.00 | \$50.00 | | | | | | | | | | |
| 7R | Vacant land build jobs not identified as such | \$25.00 | | | | | | | | | | |
| 7T | <p>All square footage below grade shall be listed in the Lower Level Finished Square Feet section of the profile form only, and not included in the approximate above grade square footage. Incorrectly identified square feet or failure to respond to written request regarding square feet identification will result in the following fines. Occurrences are tallied by agent during each rolling 12-month period. (REVISED 2006)</p> <table border="0" style="width: 100%;"> <tr> <td style="width: 50%;">First Occurrence</td> <td style="width: 50%;">\$50.00</td> </tr> <tr> <td>Second Occurrence</td> <td>\$100.00</td> </tr> <tr> <td>Third Occurrence</td> <td>\$150.00</td> </tr> <tr> <td>Fourth Occurrence</td> <td>\$250.00 and suspension of broker load privileges for a 12-month period.</td> </tr> </table> <p>Finished areas in lower levels of any house which are at least five feet above grade level on all sides and are finished to the same quality level as all other areas of the house including heating, electrical and plumbing systems may be included in both the room count and approximate above grade square footage areas of the profile form. Failure to adhere to the above is finable per occurrence.</p> | | First Occurrence | \$50.00 | Second Occurrence | \$100.00 | Third Occurrence | \$150.00 | Fourth Occurrence | \$250.00 and suspension of broker load privileges for a 12-month period. | | |
| First Occurrence | \$50.00 | | | | | | | | | | | |
| Second Occurrence | \$100.00 | | | | | | | | | | | |
| Third Occurrence | \$150.00 | | | | | | | | | | | |
| Fourth Occurrence | \$250.00 and suspension of broker load privileges for a 12-month period. | | | | | | | | | | | |
| 7X | <p>Inclusion of personal information in listing, photo or virtual tour</p> <table border="0" style="width: 100%;"> <tr> <td style="width: 50%;">First Occurrence</td> <td style="width: 50%;">\$50.00</td> </tr> <tr> <td>Second Occurrence</td> <td>\$100.00</td> </tr> <tr> <td>Third Occurrence</td> <td>\$250.00 and suspension of broker load privileges</td> </tr> </table> <p>Occurrences are tallied by agent during each rolling 12-month period. (REVISED 2006)</p> | | First Occurrence | \$50.00 | Second Occurrence | \$100.00 | Third Occurrence | \$250.00 and suspension of broker load privileges | | | | |
| First Occurrence | \$50.00 | | | | | | | | | | | |
| Second Occurrence | \$100.00 | | | | | | | | | | | |
| Third Occurrence | \$250.00 and suspension of broker load privileges | | | | | | | | | | | |
| 7AB | <p>Failure to indicate MLS Only, Limited Service or Exclusive Agency</p> <table border="0" style="width: 100%;"> <tr> <td style="width: 50%;">First Occurrence</td> <td style="width: 50%;">\$250.00 (Listing will be updated with the proper flag and removed from any public sites.)</td> </tr> <tr> <td>Second Occurrence</td> <td>\$1000.00</td> </tr> <tr> <td>Third Occurrence</td> <td>\$2500.00</td> </tr> <tr> <td>Fourth Occurrence</td> <td>will result in 45 day suspension from service for the entire office</td> </tr> <tr> <td>Fifth Occurrence</td> <td>will result in dismissal from service.</td> </tr> </table> <p>Occurrences are tallied by office during each rolling 12-month period. (REVISED 2006)</p> | | First Occurrence | \$250.00 (Listing will be updated with the proper flag and removed from any public sites.) | Second Occurrence | \$1000.00 | Third Occurrence | \$2500.00 | Fourth Occurrence | will result in 45 day suspension from service for the entire office | Fifth Occurrence | will result in dismissal from service. |
| First Occurrence | \$250.00 (Listing will be updated with the proper flag and removed from any public sites.) | | | | | | | | | | | |
| Second Occurrence | \$1000.00 | | | | | | | | | | | |
| Third Occurrence | \$2500.00 | | | | | | | | | | | |
| Fourth Occurrence | will result in 45 day suspension from service for the entire office | | | | | | | | | | | |
| Fifth Occurrence | will result in dismissal from service. | | | | | | | | | | | |
| 8C | Failure to include selling office and agent license number or name on Pending Report | \$25.00 | | | | | | | | | | |
| 8E | <p>Falsely reporting the Listing Office/Agent as the Selling Office/Agent</p> <table border="0" style="width: 100%;"> <tr> <td style="width: 50%;">First Occurrence</td> <td style="width: 50%;">Warning</td> </tr> <tr> <td>Second Occurrence</td> <td>\$50.00</td> </tr> <tr> <td>Third Occurrence</td> <td>\$250.00</td> </tr> <tr> <td>Fourth Occurrence</td> <td>\$500.00</td> </tr> <tr> <td>Fifth Occurrence</td> <td>\$1000.00</td> </tr> </table> <p>For each subsequent occurrence during a two year period, which begins with the first occurrence, the fine amount would double from the previous fine.</p> | | First Occurrence | Warning | Second Occurrence | \$50.00 | Third Occurrence | \$250.00 | Fourth Occurrence | \$500.00 | Fifth Occurrence | \$1000.00 |
| First Occurrence | Warning | | | | | | | | | | | |
| Second Occurrence | \$50.00 | | | | | | | | | | | |
| Third Occurrence | \$250.00 | | | | | | | | | | | |
| Fourth Occurrence | \$500.00 | | | | | | | | | | | |
| Fifth Occurrence | \$1000.00 | | | | | | | | | | | |

9C Failure to remove "caravan tour" from tour list within one hour prior to the scheduled inspection
\$25.00

11B1 Incomplete listings that undergo a status change while still being designated as "incomplete"
\$75.00

The fine schedule published above may be revised from time to time by the Realcomp II Ltd. Board of
Governors.

Attachment-A

CONFIDENTIALITY

- Section 10.0 **CONFIDENTIALITY OF MLS INFORMATION:** Any information provided by the MLS to the Participants shall be considered official information of the MLS. Such information shall be considered confidential and exclusively for the use of Participants and real estate licensees affiliated with such Participants and those Participants who are licensed or certified by an appropriate state regulatory agency to engage in the appraisal of real property and licensed or certified appraisers affiliated with such Participants.
- Section 10.1 **MLS NOT RESPONSIBLE FOR ACCURACY OF INFORMATION:** The information published and disseminated by the MLS is the language communicated and filed by the Listing Participant with the MLS without change by the MLS. The MLS does not verify such information and disclaims any responsibility for its accuracy. Further, each Listing Participant shall review their respective listings for transpositional errors at their earliest convenience and report such errors to the MLS for corrections. Each Participant agrees to hold the MLS harmless against any liability arising from any inaccuracy or inadequacy of the information such Participant provides or such information as is entered into the MLS by Realcomp II Ltd. or the Listing Participant.
- Section 10.2 **ACCESS TO COMPARABLE AND STATISTICAL INFORMATION:** Board/Association Members who are actively engaged in real estate brokerage, management, mortgage financing, appraising, land development or building, but who do not participate in the MLS, are nonetheless entitled to receive, by purchase or lease, all information other than current listing information which is generated wholly or in part by the MLS including "comparable" information, "sold" information, and statistical reports. This information is provided for the exclusive use of Board/Association Members and individuals affiliated with Board/Association Members who are also engaged in the real estate business and may not be transmitted, retransmitted or provided in any manner to any unauthorized individual, office, or firm.
- Section 10.3 The applicable laws of confidentiality and copyright shall govern and override any provisions of these rules which contradict such laws.

OWNERSHIP OF MLS COMPILATIONS* AND COPYRIGHTS

- Section 11.0 By the act of submission of any property listing data to the MLS, the Listing Participant represents that he/she has been authorized to grant and also thereby does grant authority without fee for the MLS to include the property listing data in its copyrighted MLS compilation and also in any statistical report on "Comparables".
- Section 11.1 All right, title, and interest in each copy of every Multiple Listing Compilation created and copyrighted by the MLS and Shareholder Boards/Associations and in the copyrights therein, shall at all times remain vested in the Shareholder Boards/Associations which are the Shareholders of Realcomp II Ltd. which operates the MLS.
- Section 11.2 Each participant shall be entitled to lease from Realcomp II Ltd. a number of copies of each MLS compilation sufficient to provide the participant and each person affiliated as a licensee (including licensed and certified appraisers) with such participant with one copy of such compilation. The participant shall pay for each such copy the rental fee set by the

MLS. Participants shall acquire by such lease only the right to use the MLS compilation in accordance with the rules. (Added 2006)

**The term "MLS compilation" as used in Sections 11 and 12 herein, shall be construed to include any format in which property listing data is collected and disseminated to the Participants, including but not limited to bound book, loose-leaf binder, computer database, card file, or any other format whatsoever.*

USE OF COPYRIGHTED MLS COMPILATIONS

Section 12.0 **DISTRIBUTION:** Participants (or individuals affiliated with Participants) who are licensed or certified by an appropriate state regulatory agency to engage in the appraisal of real property shall at all times maintain control over and responsibility for each copy of any MLS compilation furnished to them by MLS, and shall not distribute any such copies to persons other than persons who are affiliated with such Participant as licensees except as permitted in Section 12.1, 12.2 and Section 13.0 below.

Section 12.1 **DISPLAY:** Participants and those individuals affiliated as licensees with such Participants shall be permitted to display the MLS compilation data to prospective sellers/lessors or purchasers only in conjunction with their ordinary business activities of attempting to obtain listings or to locate buyers for the properties described in said MLS compilation.

Section 12.2 **REPRODUCTION:** Participants or their affiliated licensees shall not reproduce any MLS compilation or any portion thereof except under the following circumstances: Participants or their affiliated licensees may reproduce from the MLS compilation, and distribute to prospective sellers/lessors or purchasers only, a reasonable* number of single copies or property listing data contained in the MLS compilation which relate to any properties in which the prospective sellers/lessors or purchaser are or may, in the judgment of the participant or their affiliated licensees, be interested. Reproductions made in accordance with this rule shall be prepared in such a fashion that the property listing data of properties other than that in which the prospective purchaser has expressed interest, or in which the Participant or the affiliated licensees are seeking to promote interest, does not appear on such reproduction.

Nothing contained herein shall be construed to preclude any Participant from utilizing, displaying, distributing or reproducing property listing sheets or other compilations of data pertaining exclusively to properties currently listed for sale with the Participant.

Any MLS information, whether provided in written or printed form, provided electronically, or provided in any other form or format, is provided for the exclusive use of the Participant and those licensees affiliated with the Participant who are authorized to have access to such information. Such information may not be transmitted, retransmitted, or provided in any manner to any unauthorized individual, office, or firm.

None of the foregoing shall be construed to prevent any individual legitimately in possession of current listing information, sold information, comparables, or statistical information from utilizing such information to support an estimate of value on a particular property for a particular client. However, only such information that a Board or Board owned Multiple Listing Service has deemed to be nonconfidential and necessary to support the estimate of value may be reproduced and attached to the

report as supporting documentation. Any other use of such information is unauthorized and prohibited by these rules and regulations.

**It is intended that the Participant be permitted to provide prospective purchasers with listing data relating to properties which the prospective purchaser has a bona fide interest in purchasing or in which the Participant is seeking to promote interest. The term reasonable, as used herein, should therefore be construed to permit only limited reproduction of property listing data intended to facilitate the prospective purchaser's decision-making process in the consideration of a purchase. Factors which shall be considered in deciding whether the reproductions made are consistent with this intent and thus reasonable in number shall include, but are not limited to, the total number of listings in the MLS compilation, how closely the types of properties contained in such listings accord with the prospective purchaser's expressed desires and ability to purchase, whether the reproductions were made on a selective basis, and whether the type of properties contained in the property listing data is consistent with a normal itinerary of properties which would be shown to a prospective purchaser.*

USE OF MLS INFORMATION

Section 13.0 **LIMITATIONS ON USE OF MLS INFORMATION:** Use of information from the MLS compilation of current listing information, from the Shareholder Board or Association "Statistical Reports" or from any "sold" or "comparable" report of the Boards, Associations or MLS for public mass media advertising by an MLS Participant or in other public representations may not be prohibited.

However, any advertisement or other forms of public representations based in whole or in part on information supplied by the Shareholder Boards/Associations and/or their members or MLS must clearly demonstrate the period of time over which such claims are based and must include the following Notice:

Based on information from the Board/Association of REALTORS® (alternatively, from the Realcomp II Ltd. MLS) for the period (date) through (date).

Off market listings are intended for the sole use of REALTORS® and may not be provided to home buyers or home sellers except where included in a comparable market analysis.

CHANGES IN MLS RULES AND REGULATIONS

Section 14.0 Amendment to these Rules and Regulations shall be subject to the procedures outlined in the Bylaws of the Realcomp II Ltd which operates the MLS.

Section 14.1 Any duly adopted amendments to these Rules and Regulations shall be provided to subscribing Shareholder Boards/Associations (Master Participants in the Subscription/Service Agreement) and their affiliated Participants upon adoption.

ARBITRATION OF DISPUTES

Section 15.0 By becoming and remaining a Participant, each Participant agrees to arbitrate disputes involving contractual issues and questions, and specific non-contractual issues and questions defined in Standard of Practice 17-4 of the Code of Ethics with MLS Participants in different firms arising out of their relationships as MLS

Participants, subject to the following qualifications.

(a) If all disputants are members of the same Board of REALTORS® or have their principal place of business within the same Board's territorial jurisdiction, they shall arbitrate pursuant to the procedures of that Board/Association of REALTORS®.

(b) If the disputants are members of different Boards of REALTORS® or if their principal place of business is located within the territorial jurisdiction of different Boards of REALTORS®, they remain obligated to arbitrate in accordance with the procedures of the Michigan Association of REALTORS®.

Interboard Arbitration Procedures: Arbitration shall be conducted in accordance with any existing interboard agreement or, alternatively, in accordance with the Interboard Arbitration Procedures in the Code of Ethics and Arbitration Manual of the National Association of REALTORS®. Nothing herein shall preclude Participants from agreeing to arbitrate the dispute before a particular Board/Association of REALTORS®.

STANDARDS OF CONDUCT

- Section 16.0 Standards of Conduct for MLS Participants:
- Section 16.1 MLS Participants shall not engage in any practice or take any action inconsistent with exclusive representation or exclusive brokerage relationship agreements that other MLS Participants have with clients.
- Section 16.2 Signs giving notice of property for sale, rent, lease, or exchange shall not be placed on property without consent of the seller/landlord.
- Section 16.3 MLS Participants acting as subagents or as buyer/tenant representatives or brokers shall not attempt to extend a listing broker's offer of cooperation and/or compensation to other brokers without the consent of the listing broker.
- Section 16.4 MLS Participants shall not solicit a listing currently listed exclusively with another broker. However, if the listing broker, when asked by the MLS Participant, refuses to disclose the expiration date and nature of such listing (i.e., an exclusive right to sell, an exclusive agency, open listing, or other form of contractual agreement between the listing broker and the client) the MLS Participant may contact the owner to secure such information and may discuss the terms upon which the MLS Participant might take a future listing or, alternatively, may take a listing to become effective upon expiration of any existing exclusive listing.
- Section 16.5 MLS Participants shall not solicit buyer/tenant agreements from buyers/tenants who are subject to exclusive buyer/tenant agreements. However, if asked by an MLS Participant, the broker refuses to disclose the expiration date of the exclusive buyer/tenant agreement, the MLS Participant may contact the buyer/tenant to secure such information and may discuss the terms upon which the MLS Participant might enter into a future buyer/tenant agreement or, alternatively, may enter into a buyer/tenant agreement to become effective upon the expiration of any existing exclusive buyer/tenant agreement.

- Section 16.6 MLS Participants shall not use information obtained from listing brokers through offers to cooperate made through multiple listing services or through other offers of cooperation to refer listing brokers' clients to other brokers or to create buyer/tenant relationships with listing brokers' clients, unless such use is authorized by listing brokers.
- Section 16.7 The fact that an agreement has been entered into with an MLS Participant shall not preclude or inhibit any other MLS Participant from entering into a similar agreement after the expiration of the prior agreement.
- Section 16.8 The fact that a prospect has retained an MLS Participant as an exclusive representative agent or exclusive broker in one or more past transactions does not preclude other MLS Participants from seeking such former client's future business.
- Section 16.9 MLS Participants are free to enter into contractual relationships or to negotiate with seller/landlords, buyers/tenants or others who are not subject to an exclusive agreement but shall not knowingly obligate them to pay more than one commission except with their informed consent.
- Section 16.10 When MLS Participants are contacted by the client of another MLS Participant regarding the creation of an exclusive relationship to provide the same type of service, and MLS Participants have not directly or indirectly initiated such discussions, they may discuss the terms upon which they might enter into a future agreement or, alternatively, may enter into an agreement which becomes effective upon expiration of any existing exclusive agreement.
- Section 16.11 In cooperative transactions, MLS Participants shall compensate cooperating MLS Participants (principal brokers) and shall not compensate nor offer to compensate, directly or indirectly, any of the sales licensees employed by or affiliated with other MLS Participants without the prior express knowledge and consent of the cooperating broker.
- Section 16.12 MLS Participants are not precluded from making general announcements to prospects describing their services and the terms of their availability even though some recipients may have entered into agency agreements or other exclusive relationships with another MLS Participant. A general telephone canvass, general mailing, or distribution addressed to all prospects in a given geographical area or in a given profession, business, club, or organization, or other classification or group is deemed "general" for purposes of this rule.

The following types of solicitations are prohibited:

Telephone or personal solicitations of property owners who have been identified by a real estate sign, multiple listing compilation, or other information service as having exclusively listed their property with another MLS Participant; and mail or other forms of written solicitations of prospects whose properties are exclusively listed with another MLS Participant when such solicitations are not part of a general mailing but are directed specifically to property owners identified through compilations of current listings, "for sale" or "for rent" signs, or other sources of information intended to foster cooperation with MLS Participants.

- Section 16.13 MLS Participants, prior to entering into a representation agreement, have an affirmative obligation to make reasonable efforts to determine whether the prospect is subject to a current, valid exclusive agreement to provide the same type of real estate service.
- Section 16.14 MLS Participants, acting as buyer or tenant representatives or brokers, shall disclose that relationship to the seller/landlord's representative or broker at first contact and shall provide written confirmation of that disclosure to the seller/landlord's representative or broker not later than execution of a purchase agreement or lease.
- Section 16.15 On unlisted property, MLS Participants acting as buyer/tenant representatives or brokers shall disclose that relationship to the seller/landlord at first contact for that buyer/tenant and shall provide written confirmation of such disclosure to the seller/landlord not later than execution of any purchase or lease agreement.
- MLS Participants shall make any request for anticipated compensation from the seller/landlord at first contact.
- Section 16.16 MLS Participants, acting as representatives or brokers of sellers/landlords or as subagents of listing brokers, shall disclose that relationship to buyers/tenants as soon as practicable, and shall provide written confirmation of such disclosure to buyers/tenants not later than execution of any purchase or lease agreement.
- Section 16.17 MLS Participants are not precluded from contacting the client of another broker for the purpose of offering to provide, or entering into a contract to provide, a different type of real estate service unrelated to the type of service currently being provided (e.g., property management as opposed to brokerage) or from offering the same type of service for property not subject to other brokers' exclusive agreements. However, information received through a Multiple Listing Service or any other offer of cooperation may not be used to target clients of other MLS Participants to whom such offers to provide services may be made.
- Section 16.18 MLS Participants, acting as subagents or buyer/tenant representatives or brokers, shall not use the terms of an offer to purchase/lease to attempt to modify the listing broker's offer of compensation to subagents or buyer/tenant representatives, or brokers, or make the submission of an executed offer to purchase/lease contingent on the listing broker's agreement to modify the offer of compensation.
- Section 16.19 All dealings concerning property exclusively listed or with buyer/tenants who are subject to an exclusive agreement shall be carried on with the client's representative or broker and not with the client, except with the consent of the client's representative or broker or except where such dealings are initiated by the client.
- Before providing substantive services (such as writing a purchase offer or presenting a CMA) to prospects, MLS Participants shall ask prospects whether they are a party to any exclusive representation agreement. MLS Participants shall not knowingly provide substantive services concerning a prospective transaction to prospects who are parties to exclusive representation agreements, except with the consent of the prospects' exclusive representatives or at the direction of prospects. (Adopted 1/03)
- Section 16.20 Participants, users, and subscribers, prior to or after terminating their relationship with their current firm, shall not induce clients of their current firm to cancel exclusive contractual agreements between the client and that firm. This does not

preclude Participants from establishing agreements with their associated licensees governing assignability of exclusive agreements.

Section 16.21 These rules are not intended to prohibit ethical, albeit aggressive or innovative business practices, and do not prohibit disagreements with other MLS Participants involving commission, fees, compensation, or other forms of payment or expenses.

Section 16.22 MLS Participants shall not knowingly or recklessly make false or misleading statements about competitors, their businesses, or their business practices.

ORIENTATION

Section 17.0 Any applicant for MLS participation and any licensee affiliated with an MLS participant who has access to and use of MLS generated information shall complete an orientation program of no more than eight (8) classroom hours devoted to the MLS Rules and Regulations and computer training related to MLS information entry and retrieval and the operation of the MLS within thirty (30) days after access has been provided.

IDX RULES AND REGULATIONS (REVISED 2006)

- Section 18 **IDX Defined:** IDX affords MLS Participants the option of authorizing display of their active listings on other Participants' Internet Web sites.
- Section 18.1 **Authorization:** Participants' consent for display of their active listings by other Participants pursuant to these rules and regulations must be established in writing. If a Participant withholds consent on a blanket basis to permit the display of that Participant's listings, that Participant may not download or frame the aggregated MLS data of other Participants. ~~Even where participants have given blanket authority for other participants to display their listings on IDX sites, such consent may be withdrawn on a listing-by-listing basis as instructed by the seller. (Amended 2006)~~
- Section 18.2 **Participation:** Participation in IDX is available to all MLS Participants who are REALTORS® who are engaged in real estate brokerage and who consent to display of their listings by other Participants. This requirement can be met by maintaining an office or Internet presence from which Participants are available to represent real estate sellers, buyers or both.
- ~~Section 18.2.1 Participants must notify the MLS of their intention to establish an IDX site and must make their site directly accessible to the MLS for purposes of monitoring/ensuring compliance with applicable rules and policies. (Added 2006)~~
- ~~Section 18.2.2 Listings or property addresses of sellers who have directed their listing brokers to withhold their listing or property address from display on the Internet (including, but not limited to, publicly accessible Web sites or VOWs) shall not be accessible via IDX sites. Notwithstanding this prohibition, listing brokers may display on their IDX sites or their other Web site(s) the listing or property address of consenting sellers. (Added 2006)~~
- ~~Section 18.2.3 Except as provided in these rules, an IDX site or a participant or user operating an IDX site may not distribute, provide, or make any portion of the MLS database available to any person or entity. (Added 2006)~~
- ~~Section 18.2.4 When displaying listing content, a participant's or user's IDX site must clearly identify the name of the brokerage firm under which they operate in a readily visible color and typeface. (Added 2006)~~
- Section 18.3 **Display:** Display of listing information pursuant to IDX is subject to the following rules:
- Section 18.3.1 The right to display other Participants' listings pursuant to IDX shall be limited to a Participant's office(s) holding participatory rights in Realcomp.
- Section 18.3.2 An Internet republication of another Participants listing shall correspond to the publication display requirements defined in the Default IDX Extract Field List available for download from Realcomp's FTP site. This list specifies the fields available in the daily IDX FTP download and identifies those that are mandatory for display in a summary view, mandatory for display in a detail view. Display of all other fields is prohibited.
- Section 18.3.3 Participants need not display the entire IDX Database but may choose to display only listings in a particular price range, geographical area or property type. This option is available only to those that choose to receive the data via the FTP site.

- Section 18.3.4 Participants shall not modify or manipulate information relating to other participants' listings. (This is not a limitation on site design but refers to changes to actual listing data.) MLS data may be augmented with additional data not otherwise prohibited from display so long as the source of the additional data is clearly identified. This requirement does not restrict the format of MLS data display or display of fewer than all of the available listings or fewer authorized data fields. (Amended 2006)
- Section 18.3.5 A summary display must include the required text data about the property and the logo of the listing broker or the Realcomp approved logo, and may include a photo of the property and links for additional information. If the Participant has chosen to provide links for additional information, i.e., a detailed view of a listing, then a detail view must be available for every listing on that Participant's Web site. A Participant may, however, display more fields for their own listings in the detail view as defined in the Default IDX Extract Field List available for download from Realcomp's FTP site. If the Participant has chosen not to provide links for additional information, then the Listing Office Name must be displayed in the summary display for every listing.
- Section 18.3.6 Search results producing a detailed display of another Participant's listing shall include that Participant's office name, the Realcomp approved logo, and the Realcomp copyright notice immediately following the property information. The Participant's name, Realcomp approved logo, and copyright notice shall be at least as large as the largest type size used to display the listing data. Each detail listing display must include "Provided through IDX through Realcomp II Ltd. Courtesy of ABC Realty" "Copyright 2005 Realcomp II Ltd. Shareholders".
- Section 18.3.7 Listing information downloaded and/or otherwise displayed pursuant to IDX shall be limited to properties listed on an exclusive right to sell basis.
- Section 18.3.8 Any search result identifying another Participant's listing in the summary format shall bear the Realcomp approved icon or be present adjacent to the property information to identify the listing as a Realcomp listing.
- Section 18.3.9 The Realcomp approved logo and an explanation of those properties marked with the logo are provided courtesy of Realcomp. The term "IDX" must appear on the first page where any listing data is displayed.
- Section 18.3.10 The Participant choosing to access the IDX Database through the FTP download option shall update the information on its Internet Web site at least weekly.
- Section 18.3.11 Participants (and their affiliated licensees, if applicable) shall indicate on their Web sites that IDX information is provided exclusively for consumers' personal, non-commercial use and may not be used for any purpose other than to identify prospective properties consumers may be interested in purchasing.
- Section 18.3.12 The data consumers can retrieve or download in response to any inquiry shall be limited to 250 listings per search.
- Section 18.3.13 The right to display other participants' listings pursuant to IDX shall be limited to a participant's office(s) holding participatory rights in this MLS. (Added 2006)

- Section 18.3.14 The IDX Database may be co-mingled with any other MLS listings on the Participant's Internet Web site. Non-MLS listings shall not be co-mingled with MLS listings on the Participant's Internet Web site.
- ~~Section 18.3.15 Display of expired, withdrawn, and pending listings is prohibited. (Added 2006)~~
- Section 18.3.16 The IDX display will include a link to a virtual tour if available on the property. The virtual tour must be a non-branded version in order to be linked through IDX. A Participant participating in Realcomp's IDX FTP program may display branded virtual tours for their own listings.
- Section 18.3.17 A summary display of another Participant's listing may not include any contact information or branding of the IDXP who owns the Web site or any of its agents.
- Section 18.3.18 A detailed display of another Participant's listing may not include any contact information or branding of the Participant who owns the Web site or any of its agents within the body of the listing data. The body is defined as the rectangular space whose borders are delimited by the utmost extent in each direction of the listing text and photo data.
- Section 18.3.19 Any result identifying another Participant's listing shall include the disclaimer "The accuracy of all information, regardless of source, is not guaranteed or warranted. All information should be independently verified." In practice, all Brokers will want to display this disclaimer on their own listings as well, unless their legal counsel advises otherwise.
- Section 18.3.20 A Participant displaying the IDX Database or any portion thereof shall make reasonable efforts to avoid "scraping" of the data by third parties or displaying of that data on any other Web site. Reasonable efforts shall include but not be limited to:
- i. Monitoring the Web site for signs that a third party is "scraping" data and
 - ii. Prominently posting notice that "Any use of search facilities of data on the site, other than by a consumer looking to purchase real estate, is prohibited."
 - iii. ~~IDX operators must maintain an audit trail of consumer activity on the IDX site and make that information available to the MLS if the MLS believes that the IDX site has caused or permitted a breach in the security of the data or a violation of the MLS rules related to use by consumers. (Added 2006)~~
- Section 18.4 No portion of the IDX database shall be used or provided to a third party for any purpose other than those expressly provided for in these rules.
- Section 18.5 In order to participate in IDX, a site must be marketed and branded as a brokerage site and must be controlled by a Participant. If a Participant chooses to display the IDX data for each branch office that also participates in Realcomp by using a separate Web site, they may do so only by framing the Participant's corporate site. If brokers choose to use a third party to build their Web sites, they may, as long as the Web sites are most prominently identified as belonging to the brokerage firm. It's acceptable for the third party company to have a notice at the bottom of every page that says "Powered by (Vendor Name)". But, the Vendor Name must not brand any of these Web sites in such a way as to suggest that they control it. For example, a big banner across the top of the page with Realestate.com's name is a problem, even if it identifies the brokerage underneath.

- Section 18.6 IDX is available to Participants that are full subscribers to Realcomp's services. An office will be provided with a maximum of two IDX data feeds at the request of the broker. A Participant may make framing of the IDX database available to individual non-principal brokers and sales licensees through the Participant's Web site.
- Section 18.7 Agents may frame their broker's IDX site or may frame Realcomp's IDX framing site with that broker's permission. An Agent shall not create their own IDX site with the raw IDX data downloaded from Realcomp's FTP site nor may they use the raw IDX data downloaded by their broker as that agent IDX site would then not be under the control of the Participant.
- Section 18.8 A Participant must make changes to its behavior or to its Internet site necessary to cure a violation of Realcomp's rules within five business days of notice from Realcomp of the violation. Any Participant found to be in violation of the MLS/IDX Rules and Regulations faces the following sanctions:
- i. 1st offense - Written warning requiring for immediate remedy to offense;
 - ii. 2nd offense - \$2,500 fine along with written notice requiring immediate remedy to offense;
 - iii. 3rd offense - \$5,000 fine along with written notice requiring immediate remedy to offense;
 - iv. 4th offense - Thirty (30) day suspension of MLS privileges for entire office along with written notice warning of termination of MLS privileges should offense be found again;
 - v. 5th offense - Termination of MLS privileges.
- Section 18.9 Any Participant using a third party to develop/design its Web site will have a written agreement with Realcomp and that third party in the form prescribed by Realcomp.

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

In the Matter of)	Docket No. 9320
REALCOMP II LTD.,)	Chief Administrative Law Judge
Respondent.)	Stephen J. McGuire

RESPONDENT REALCOMP II, LTD.'S FINAL PROPOSED WITNESS LIST

Respondent Realcomp II Ltd. ("Realcomp"), through its attorneys, Foster, Swift, Collins & Smith, P.C., hereby submits Realcomp's Final Proposed Witness List of witnesses it may call during its case in chief:

RESPONDENT WITNESSES

1. **Karen Kage
c/o Realcomp**

It is anticipated that Ms. Kage will provide an overview of Realcomp, explaining its purpose and function and the need for cooperation and compensation. Ms. Kage is also expected to offer an overview of real estate practices, the Southeastern Michigan real estate market, the rationale for the rules at issue, their efficiency justifications and the harm that would be caused by Complainant's Counsel's proposed relief. Ms. Kage is also expected to explain Realcomp's Rules at issue in this case, in particular the Search Function Rule and the Website Policy Rules. Ms. Kage is also expected to testify about means available for non-exclusive right to sell (ERTS) agents, hereafter referred to as Exclusive Agents (EA), ability to compete in Southeastern Michigan and alternatives available to them, including other internet websites; other MLSs and local boards; and use of internet data exchange (IDX). Ms. Kage is expected to offer testimony concerning the relationship of EAs and ERTS agents with respect to days on market and listing price to selling price comparisons showing that EA listings are not being harmed by Realcomp's rules. Ms. Kage is further expected to offer testimony concerning data and information that have been produced and made available in this case. Ms. Kage is also expected to offer testimony concerning the housing market and economy in Southeastern Michigan. Ms. Kage is expected to explain Realcomp's data sharing arrangements with other Multiple

Listing Services (MLS) and local boards, including the Ann Arbor Board. Ms. Kage may also offer testimony concerning matters upon which she has previously been deposed and concerning all documents and exhibits that Realcomp has produced in this case.

2. **Kelly Sweeney**
Weir Manuel, REALTORS®
298 S. Old Woodward Avenue
Birmingham, MI 48009

Mr. Sweeney is expected to offer testimony concerning the importance of the Realcomp Rules at issue as they relate to the underpinnings of the MLS of cooperation and compensation. It is expected that Mr. Sweeney will explain the concern with forwarding EA listings and treating them in the manner sought by Complainant's Counsel as that would be requiring Realcomp members to pay for and promote a means and method that will undercut their own business activity and be inconsistent with cooperation and compensation. Mr. Sweeney is expected to explain how Complainant's Counsel's proposed relief will set up a system by which prospective purchasers, through promotion and advertisements paid for by Realcomp members, would essentially be placed in a position of dealing directly with homeowners who, for purposes of transaction, would be akin to a for sale by owner, negotiating and handling the sale of their residential property directly with prospective purchasers with no commission to be paid to any cooperating broker. Mr. Sweeney is also expected to offer testimony concerning the residential real estate market in Michigan and how that compares to other markets. Mr. Sweeney is also expected to offer testimony concerning exclusive agents and the problems they pose not only for exclusive right to sell agents but also the public. Mr. Sweeney is also expected to offer testimony about IDX feeds and the broker's own position if they are forwarded EA listings by Realcomp as well as the ability of EAs to forward their own listings, use alternate websites and compete in Southeastern Michigan. Mr. Sweeney is also expected to offer testimony concerning MiRealSource and its availability to EAs. Mr. Sweeney is also expected to offer testimony about MiRealSource. Mr. Sweeney is also expected to offer testimony consistent with the deposition testimony taken in this case and all exhibits from his deposition.

3. **Douglas C. Whitehouse**
Hannett-Wilson-Whitehouse, LLC
880 S. Old Woodward, Suite 200
Birmingham, MI 48009

Mr. Whitehouse is expected to offer testimony concerning the importance of the Realcomp Rules at issue as they relate to the underpinnings of the MLS of cooperation and compensation. It is expected that Mr. Whitehouse will explain the

concern with forwarding EA listings and treating them in the manner sought by Complainant's Counsel as that would be requiring Realcomp members to pay for and promote the means and method that will undercut their own business activity and be inconsistent with cooperation and compensation. Mr. Whitehouse is expected to explain how the proposed relief would set up a system where prospective purchasers, through promotion and advertisements paid by Realcomp members, would be placed in a position of dealing directly with homeowners who, for purposes of transaction at issue would be akin to being in the position of a for sale by owner, negotiating and handling the sale of their residential property directly with prospective purchasers with no commission to be paid to any cooperating broker. Mr. Whitehouse is also expected to offer testimony concerning the residential real estate market in Southeastern Michigan and how that compares to other markets. Mr. Whitehouse is also expected to offer testimony concerning exclusive agents and the problems they pose not only for ERTS agents but also the public. Mr. Whitehouse is also expected to offer testimony about IDX feeds and the broker's own position if they are forwarded EA listings by Realcomp as well as the ability of EAs to forward their own listings, use alternate websites and compete in Southeastern Michigan. Mr. Whitehouse is also expected to offer testimony concerning MiRealSource and its availability to EAs. Mr. Whitehouse is also expected to offer testimony concerning the efficiencies of Realcomp's search default function. Mr. Whitehouse is also expected to offer testimony consistent with the deposition testimony taken in this case and all exhibits from his deposition.

4. Douglas H. Hardy
Century 21 Today-Farmington Hills
28544 Orchard Lake
Farmington Hills, MI 48334

Mr. Hardy is expected to offer testimony concerning the importance of the Realcomp Rules at issue as they relate to the underpinnings of the MLS of cooperation and compensation. It is expected that Mr. Hardy will explain the concern with forwarding EA listing and treating them in the manner sought by Complainant's Counsel as that would be requiring Realcomp members to pay for and promote the means and method that will undercut their own business activity and be inconsistent with cooperation and compensation. Mr. Hardy is expected to explain how the proposed relief will set up a system by which prospective purchasers, through promotion and advertisements paid for by Realcomp members, would akin to be dealing directly with homeowners, who for purposes of transaction at issue, would be akin to a for sale by owner, negotiating and handling the sale of their residential property directly with prospective purchasers with no commission to be paid to any cooperating broker. Mr. Hardy is also expected to offer testimony concerning the residential real estate market in Southeastern Michigan and how that compares to other markets. Mr. Hardy is also expected to offer testimony concerning exclusive agents and the problems they pose not only for ERTS agents but also the public. Mr.

Hardy is also expected to offer testimony about IDX feeds and the broker's own position if they were to be forwarded EA listings by Realcomp as well as the ability of EAs to forward their own listings, use alternate websites and compete in Southeastern Michigan. Mr. Hardy is also expected to offer testimony concerning MiRealSource and its availability to EAs. Mr. Hardy is also expected to offer testimony about the residential real estate market and economy in Southeastern Michigan. Mr. Hardy is also expected to offer testimony consistent with the deposition testimony taken in this case and all exhibits from his deposition.

5. **David M. Eisenstadt, Ph.D. (Expert Witness)**
Principal
Microeconomic Consulting and Research Associates, Inc.
1155 Connecticut Avenue, N.W.
Suite 900
Washington, D.C. 20036
202-467-2500

Dr. Eisenstadt is an economist who has been retained by Realcomp to serve as an expert economist in this case. Dr. Eisenstadt is expected to offer testimony consistent with the opinions and matters set forth in his expert report. Dr. Eisenstadt is also expected to offer testimony in response to the report of FTC's expert, Darrell Williams, Ph.D. and the data and studies relied upon by Dr. Williams in that report which were received by Dr. Eisenstadt after his report was prepared. Those additional opinions and matters will be disclosed after Dr. Eisenstadt has had the opportunity to review the additional material provided to him by Complainant's Counsel as recently as May 3, 2007. Dr. Eisenstadt is expected to offer testimony concerning his analysis of data from 10 MLSs and in rebuttal to paragraphs 86-90, Appendices C-E, and Exhibit 26 of Dr. Williams' Expert Report of April 3, 2007 and the matters set forth in Dr. Eisenstadt's Supplemental Expert Report, which is to be submitted on or before May 31, 2007. Dr. Eisenstadt is also expected to offer testimony consistent with his depositions in this case and all documents and materials he has relied upon in support of his expert report.

6. **Robert Taylor, Jr.**
Weir Manuel, REALTORS®
298 S. Old Woodward
Birmingham, MI 48009

It is expected that Mr. Taylor's testimony will be presented by deposition. It is expected that Mr. Taylor's deposition testimony will be about the search default function and the ease by which a person can set that to search for all listings and that he, himself, does that. Mr. Taylor may also offer testimony concerning the arbitration process concerning the issue of procuring cause and the limitations of that process as not being applicable when no commission is being paid.

7. Walt Baczkowski

It is expected that Mr. Baczkowski's testimony will be presented by deposition. It is expected that Mr. Baczkowski's testimony will be that the search default rule of Realcomp does not necessarily make it more difficult for persons using this to view all listings or listings of EAs. Mr. Baczkowski's deposition testimony is also expected to be that broker's own websites can have EA listings on it and all a broker has to do is put a feed from that source to their site and that this is easy to do.

8. Marty Nowak

It is expected that Mr. Nowak's testimony will be presented by deposition. That testimony is expected to be that avoiding Realcomp's search default is very simple. It is also expected that Mr. Nowak's testimony will be that public websites at issue are owned by the brokers and they should not have to market what they will not be paid for. Mr. Nowak is expected to explain that EAs are actually seeking to put for sale by owners on websites.

9. Dale Smith

It is expected that Mr. Smith's testimony will be presented by deposition. That testimony is expected to concern Mr. Smith's description of Southeastern Michigan residential real estate market as being unique due to its economy and that this, in turn, has made the market very competitive. Mr. Smith's testimony is also expected to concern Michigan brokers negotiating everything with respect to services and listings.

10. Dreu Adams

It is expected that Mr. Adams' testimony will be presented by deposition. The expected testimony concerns Mr. Adams' acknowledgment that it is very difficult to do business in Southeastern Michigan for all real estate agents as they are generally down 20%, with everyone struggling. Mr. Adams is also expected to explain how Realcomp's rules at issue in this case have actually benefitted consumers with respect to his own business as he is providing additional services at a lower price.

11. Virginia Bratt

It is expected that Ms. Bratt's testimony will be offered by deposition. That testimony is expected to concern her description of MiRealSource; that agents, including EA agents, can compete in Southeastern Michigan by only belonging to MiRealSource; MiRealSource's former rules and the change in their rules as a result of its entry into a consent judgment; the reason or at least part of the reason that MiRealSource entered into that consent judgment was its concern with avoiding the

expense of litigating this matter; the \$50 per listing charge MiRealSource has for guest listing fees; charges MiRealSource has for persons who wish to become a member; MiRealSource's growth throughout Southeastern Michigan and areas of expansion; problems with including EA listings and real examples of where realtors were not compensated where EA listings were transmitted; the residential real estate market in Southeastern Michigan; realtors using MiRealSource alone and not Realcomp to do business in Southeastern Michigan; alternatives to Realcomp for realtors in Southeastern Michigan; and regarding MiRealSource's broker data sharing and how that is the same thing as the IDX.

12. Dave Elya

It is expected that Mr. Elya's testimony will be offered by deposition. That testimony will concern his having listings in Realcomp and MiRealSource by choice.

13. Robert Goldberg/National Association of Realtor ("NAR")

It is expected that Mr. Goldberg's testimony will be by deposition. That testimony is expected to concern the considerable competition faced by Realtor.com, including from Google, in residential real estate and search engine optimization. Mr. Goldberg's testimony is also expected to concern the proliferation of websites available for residential real estate; options available to EAs and the declining share of Realtor.com of the market. Mr. Goldberg's testimony is also expected to concern rankings of websites effectiveness; results of a survey of members showing that 85% of their members say that less than 10% of their sales are driven by Realtor.com and that he does not know of any statistics that backup a claim that Realtor.com facilitates an actual transaction. Mr. Goldberg is expected to explain that Realtor.com does not have a corner of the market and that it does not have unique benefits. He is expected to explain that competition to Realtor.com has dramatically increased and that Realtor.com's utilization is trending downward. Mr. Goldberg is expected to offer testimony showing that it is fairly simple for persons even on an individual basis to put listings on the website and to maintain their own website and that search engine optimization permits the smaller broker to compete with larger brokers on the web.

14. Robert D. Gleason

SKBK Sothebys International Real Estate
348 E. Maple
Birmingham, MI 48009

Mr. Gleason is expected to offer testimony by deposition. That testimony is expected to describe the concern with Realcomp members paying to promote and sell EA listings in the manner sought by Complainant's Counsel. Mr. Gleason is also expected to explain how making EA listings available on the public websites as

advocated for by Complainant's Counsel, ultimately leads to things such as the addresses for those listings being available and promotes these properties for sale without compensation to a cooperating broker. He will explain that these listings, paid for by realtors, would go directly to the public so that the seller can deal directly with the purchaser, thereby fostering sales with no assurance of compensation to Realcomp members who are being asked to pay for this promotion.

15. Dan Mulvihill

It is expected that the testimony of Mr. Mulvihill will be presented by deposition. Mr. Mulvihill's testimony will be about the Internet not having much of an effect on actual sales.

16. Gerald Burke

It is expected that the testimony of Mr. Burke will be presented by deposition. Mr. Burke's testimony will concern Realcomp's search default rule, the rationale for its adoption, that the majority of people want this and the ease of viewing the remaining listings.

17. Gary Moody

Realcomp anticipates that, unless called as a witness by the FTC, Mr. Moody's testimony will be presented by deposition. That deposition will concern Mr. Moody's EA business in Southeastern Michigan; its success and growth; website optimization and alternative means available for promoting listings on the internet.

18. Albert Hepp

Realcomp anticipates that, unless called as a witness by the FTC, Mr. Hepp's testimony will be presented by deposition. That deposition will concern Mr. Hepp and his Company's ability to do business in Southeastern Michigan and its growth, as an exclusive agent, since 2004.

19. Jeff Kermath

Realcomp anticipates that, unless called as a witness by the FTC, Mr. Kermath's testimony will be presented by deposition. That deposition is expected to concern Mr. Kermath's acknowledgment that his exclusive agency business in Southeastern Michigan has grown and his representation to the public that he and his company have achieved great success with exclusive agent but better with exclusive right to sell and the availability of certain websites.

20. Craig Mincy

Realcomp anticipates that, unless called as a witness by the FTC, Mr. Mincy's testimony will be presented by deposition. Mr. Mincy's testimony is expected to be that his listings, both exclusive agent and ERTS, have increased by 30% from 2005 to 2006. Mr. Mincy's testimony is also expected to be that there is no difference in the time that listings stay on the market, whether they be exclusive agent or ERTS. Mr. Mincy's testimony is also expected to be that 80% of the residential real estate properties sell as a result of the MLS and 10% as a result of being in Realtor.com. Mr. Mincy's testimony will also concern the availability of other websites.

21. Cliff Neirsbach/NAR

Mr. Neirsbach's testimony is expected to be introduced by deposition. Mr. Neirsbach is expected to explain NAR's Rules relating to the IDX and allowing individual brokers to make decisions of limitations of who they would send IDX feeds. Brokers can do this on an objective basis, including the type of agency and thereby excluding EA listings. Mr. Neirsbach is also expected to offer testimony that NAR made changes in its rules so as to avoid litigation expense. Mr. Neirsbach is also expected to offer testimony about there being competition in the real estate field and that he knows of nothing in Michigan, including Southeastern Michigan, to suggest otherwise. Mr. Neirsbach is also expected to offer testimony that the MLS allows smaller brokers to compete with larger brokers and that is good for consumers.

**22. Robert Greenspan
c/o Move, Inc.**

Mr. Greenspan's testimony is expected to be offered by deposition. That deposition is expected to be that Realtor.com no longer has a competitive advantage as content is everywhere today. Mr. Greenspan's testimony will also concern RX137 and his agreement with the statements contained therein. Mr. Greenspan's testimony will also concern the rules and operating agreement concerning placing listings on Realtor.com and individual brokers being able to do that under the operating agreement.

**23. Phil Dawley
c/o Movie, Inc.**

Mr. Dawley's testimony is expected to be offered by deposition. That testimony will concern his description of CX601 showing that Realtor.com feeds from a number of MLSs or other local board in or around Southeastern Michigan and that these are, in addition to Realcomp, are: MiRealSource, Ann Arbor Board of Realtors, Flint Board of Realtors and Shiawassee. Mr. Dawley's testimony will also concern individual brokers submitting their listings directly to Realtor.com. Mr. Dawley is also

expected to offer testimony about Realtor.com experiencing increased competition from large search engines such as Yahoo and Google and smaller startups such as Trulia and Zillo.

**24. Wayne Aronson
c/o YourIgloo**

Mr. Aronson's testimony is expected to be offered by deposition in the event that he is not called as a witness by the Complainant's Counsel or his transcript is used by Complainant's Counsel. That testimony is expected to concern Mr. Aronson's ranking of the effectiveness of various means of internet sites for residential real estate listings; the availability of Downriver MLS and MiRealSource to place EA listings into Realtor.com and his company's continuing to do business, notwithstanding his denial of the same, as a result of his referring listings to EAs in Michigan such as Gary Moody and Shannon Scott.

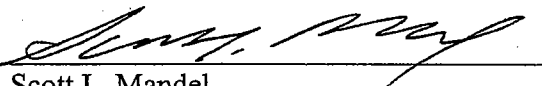
25. Anita Groggins

Ms. Groggins' testimony is expected to be by deposition. It is expected that in the event that Complainant's Counsel calls Ms. Groggins as a witness or seeks to introduce portions of her testimony, Realcomp will seek to introduce Ms. Groggins' testimony about how she can easily negotiate Realcomp's search function default to search for all listings and that persons familiar with computers and the Internet can easily negotiate that as it just requires a couple of clicks on "search all" or check in the box for additional listings.

Foster, Swift, Collins & Smith, P.C.
Attorneys for Respondent

Dated: May 15, 2007

By:



Scott L. Mandel
Steven H. Lasher


CERTIFICATE OF SERVICE

This is to certify that on May 15, 2007, I caused a copy of the attached Respondent's Final Proposed Witness List to be served upon the following persons by Electronic Transmission and overnight delivery:

Sean P. Gates, Esq.
601 New Jersey Ave., N.W.
Rm. NJ-6219
Washington, DC 20001

And two courtesy copies of same hand delivered to:

Hon. Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580



Lorri A. Rosier

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FEDERAL TRADE COMMISSION

MATTER NO. D09320

TITLE REALCOMP, II, LTD.

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32300 NORTHWESTERN HIGHWAY
FARMINGTON HILLS, MICHIGAN

DATE MARCH 14, 2007

PAGES 1 THROUGH 151

TESTIMONY OF ROBERT TAYLOR

CONTAINS RESTRICTED CONFIDENTIAL PORTIONS

FOR THE RECORD, INC.
10760 DEMARR ROAD
WHITE PLAINS, MD 20695
(301)870-8025

1 into this?

2 A. Well, an exclusive agency listing regardless of who
3 sells it, the listing agent gets a commission and the
4 selling agent gets a commission. In an exclusive
5 agency listing, I could do all the things of procuring
6 cause. If the buyer buys it directly from the seller,
7 I have no case because I have no agent in a procuring
8 cause situation to go after the commission for.

9 Q. Okay. Let me understand that.

10 When you say I, you're referring to you
11 representing a buyer?

12 A. Yes.

13 Q. Okay. And then you're saying the situation is that
14 the buyer goes directly to the seller?

15 A. Correct.

16 Q. And even though you're the procuring cause, you don't
17 have a listing agent to go after for the offer of
18 compensation?

19 A. No.

20 Q. Okay. And that's your understanding of how the
21 Realcomp rules work right now?

22 A. Professional standards -- I'm trying to -- arbitration
23 guidelines clearly indicate that we can only arbitrate
24 commissions that are paid. If the commission is not
25 paid, I have no agent to collect it from.

- 1 and of those meetings which ones I attended.
- 2 Q. Okay. So you can't tell me for sure what, if any,
3 reasons the Realcomp board of governors have as a body
4 for the rules?
- 5 A. Not etched in my mind.
- 6 Q. Okay. What you can tell me is your understanding,
7 your personal opinions of why the rules should be?
- 8 A. Yes.
- 9 Q. So if I wanted to know, if I wanted to go find out
10 about this arbitration rule that you were talking
11 about earlier where if there's no commission paid what
12 the definition of a commission is and things like that
13 in the NAR policy, where would I go?
- 14 A. National Association of Realtors I would imagine.
- 15 Q. Any particular documents?
- 16 A. Probably the arbitration procedures manual.
- 17 Q. So what are you relying on for your understanding of
18 the arbitration rules?
- 19 A. Discussion that's taken place of procuring cause
20 hearings.
- 21 Q. Okay. Have you been an arbitrator at procuring cause
22 hearings?
- 23 A. Yes.
- 24 Q. Okay. For how long?
- 25 A. 32 years.

1 works, I would go to the guidelines of the National
2 Association of Realtors?

3 A. I would think.

4 Q. That would be the source?

5 A. It would seem to me.

6 Q. And that would be the authority and the guide that you
7 would -- you would have to follow?

8 A. That's my understanding.

9 Q. And that's what you tried to follow in these
10 particular arbitrations?

11 A. Yes.

12 Q. And just to be clear, these arbitrations, at least the
13 ones you remember, involved exclusive right-to-sell
14 contracts?

15 A. Yes.

16 Q. Okay.

17 A. Yes, my apologies for intimating they were exclusive
18 agency.

19 Q. All this arbitration stuff is confusing.

20 A. To us inside as well as outside the industry.

21 Q. Okay. So on the Realcomp board of governors it's your
22 role then to protect the interests of your members;
23 right?

24 A. It's my job to do what's in the best interest of the
25 corporation.

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FARMINGTON HILLS, MICHIGAN

DATE FEBRUARY 20, 2007

PAGES 1 THROUGH 215

TESTIMONY OF KAREN KAGE

CONTAINS RESTRICTED AND CONFIDENTIAL PORTIONS

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(301)870-8025**

1 The second point talks about the blanket
2 unilateral offer of compensation, and this is what we
3 talked about before, that every member has to enter
4 something for the compensation field, correct?

5 A. Yes.

6 Q. And that's to allow cooperating brokers to know what
7 they would get if they were the procuring cause of
8 sale?

9 A. Correct.

10 Q. And your point here is that outside of the MLS other
11 business models do not include, necessarily include a
12 unilateral offer of compensation, correct?

13 A. Other advertising options.

14 Q. Right.

15 A. Correct.

16 Q. And that's why -- that's one of the benefits of the
17 MLS is that it does?

18 A. Yes.

19 Q. And it says here you take very seriously this
20 important responsibility to protect compensation.

21 A. Yes.

22 Q. And you still take that very seriously?

23 A. Yes.

24 Q. And so the MLS, the Realcomp MLS has rules in place to
25 protect compensation when a selling agent is the

1 procuring cause of a sale?

2 A. We have methods by which that can be protected.

3 That's not handled by us.

4 Q. It's handled by the shareholder boards?

5 A. Correct.

6 Q. But the Realcomp rules tell the members what the
7 methods are to go -- to protect their compensation if
8 they're the procuring cause?

9 A. Yes.

10 MARKED BY THE REPORTER:

11 DEPOSITION EXHIBIT NUMBER CX 221

12 10:16 a.m.

13 BY MS. FEMENELLA:

14 Q. I'm showing you CX 221 and it is a Realty Times
15 article entitled, "Today's MLS, the Realtor's New Best
16 Friend," by Karen Kage. I assume that's you as the
17 author?

18 A. Yes.

19 Q. So you wrote this article?

20 A. Yes.

21 Q. And you wanted it to be truthful and accurate?

22 A. Yes.

23 Q. If you could go down to the third paragraph from the
24 bottom where it starts, "this rush to technology."

25 A. Yes.

REDACTED

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DATE FEBRUARY 22, 2007

PAGES 1 THROUGH 154

TESTIMONY OF DOUGLAS WHITEHOUSE

CONTAINS RESTRICTED AND CONFIDENTIAL PORTIONS

**FOR THE RECORD, INC.
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(301)870-8025**

CX421-01

1 Q. Okay. Which committees have you served on at MCAR?

2 A. Professional standards, arbitration.

3 Q. So the professional standards and arbitration
4 committees, when did you serve on those committees?

5 A. I presently serve on them.

6 Q. And when did you start?

7 A. Oh geez, I've served on committees off and on there
8 for many, many years, since the board -- since MCAR
9 became a board.

10 Q. Since 2000 have you been on --

11 A. Professional standards and arbitration.

12 Q. And as a member of the committee for the professional
13 standards for the arbitration panels, have you dealt
14 with procuring cause disputes?

15 A. Yes.

16 Q. In those procuring cause disputes, do you know what
17 the underlying agreement is between the listing agent
18 and the seller?

19 A. You mean what type of listing they take them?

20 Q. Yes.

21 A. Generally that's not -- in the cases I've served on,
22 that hasn't been an issue, but I would say that maybe
23 on one or two of them I knew what it was.

24 Q. Generally it's not an issue in a procuring cause
25 dispute?

1 A. No. It's an issue between two brokers, who is
2 entitled to the selling commission.

3 Q. As part of the procuring cause arbitration process
4 then, you don't go and find out what the agreement is
5 between the seller and the listing agent?

6 A. Not necessarily, not unless it's a question of
7 somebody stepping on somebody else's listing or
8 something like that.

9 Q. Have you dealt with procuring cause disputes where the
10 buyer has represented to the seller that they were
11 unrepresented?

12 A. No.

13 Q. Procuring cause disputes that you've been involved in
14 are between two brokers who claim to be entitled to
15 the offer of compensation?

16 A. Correct.

17 Q. Are you a member -- have you been a member since 2000
18 of any other board?

19 A. I've served as a director of the Michigan Association
20 of Realtors and president of the Michigan Association
21 of Realtors, and all of the executive chairs in
22 between.

23 Q. Can you tell me what is the relationship between a
24 board such as MCAR and the Michigan Association of
25 Realtors, which I'll refer to as MAR?

- 1 basis.
- 2 A. Correct.
- 3 Q. So those two rules have to do with the distribution of
4 listings on to the Internet, right?
- 5 A. Correct.
- 6 Q. Now, you weren't on the Board of Governors when
7 Realcomp implemented these two rules, were you?
- 8 A. No, I was not.
- 9 Q. Do you know when they implemented these two rules?
- 10 A. No.
- 11 Q. When did you first become aware of the two rules?
- 12 A. I couldn't give you a date. I really --
- 13 Q. Did you know about them before you got the letter from
14 Karen Kage?
- 15 A. I would say so.
- 16 Q. How long before that?
- 17 A. I honestly don't know.
- 18 Q. Did you know about them in 2005?
- 19 A. I would say so but I don't remember a date.
- 20 Q. Did the Realcomp Board of Governors consult you at all
21 regarding passing these rules?
- 22 A. No.
- 23 Q. So you don't have any firsthand knowledge of why it
24 was that the Realcomp Board of Governors passed these
25 rules?

1 A. No, I don't have any information on why they made the
2 decision. I have my own opinion but --

3 Q. You have your opinion but you don't know exactly why
4 they did?

5 A. No, I do not.

6 Q. On the third bullet point it says, additionally, the
7 fact that the listing type search criteria on Realcomp
8 Online automatically defaults to exclusive
9 right-to-sell and unknown.

10 Do you understand that to be one of the
11 rules that's subject to the FTC litigation, right?

12 A. Yes.

13 Q. And you were not on the Realcomp Board of Governors
14 when they passed that rule?

15 A. No.

16 Q. They didn't consult you when they passed that rule?

17 A. No.

18 Q. You don't know why it was that they passed that rule
19 originally?

20 A. No.

21 Q. When did you first learn about that rule if you
22 remember?

23 A. Again, I don't recall a date. It would have been some
24 time ago but I don't recall a date.

25 Q. Were you aware of these three rules prior to the FTC

- 1 Q. Okay. So going back in your experience, you know,
2 prior to 2000 even, tell me of all the problems that
3 you can tell me of from firsthand knowledge.
- 4 A. From firsthand experiencing a problem myself?
- 5 Q. Yes.
- 6 A. I can't. I can only tell you secondhand.
- 7 Q. So you only have secondhand knowledge of any problems
8 that the publication of exclusive agency listings on
9 to Internet sites causes?
- 10 A. Correct. I have not experienced that myself in my
11 sale.
- 12 Q. The secondhand knowledge is what, you've heard from
13 what sources?
- 14 A. From other agents around the country.
- 15 Q. So this is not in Michigan but from other agents in
16 other MLSs?
- 17 A. From other agents in other MLSs.
- 18 Q. So you have heard from, what, stories have been told
19 to you?
- 20 A. Correct.
- 21 Q. And from whom have you heard these stories?
- 22 A. Agents all over the country.
- 23 Q. Agents all over the country?
- 24 A. Yeah.
- 25 Q. Can you give me the names?

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DATE FEBRUARY 21, 2007

PAGES 1 THROUGH 142

TESTIMONY OF DOUGLAS HARDY

CONTAINS RESTRICTED AND CONFIDENTIAL PORTIONS

FOR THE RECORD, INC.
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(301)870-8025

CX43-01

1 Q. Right. But the offer of compensation regardless of
2 who's responsible for paying it is due to the
3 cooperating broker so long as they're the procuring
4 cause of sale, is that right?

5 A. I think that's right.

6 Q. And what do you understand the procuring cause to
7 mean?

8 A. It's another one of those vague terms, like
9 transaction coordinator.

10 Q. Okay.

11 A. I would ramble.

12 Q. Let me give you a sentence and see if you agree with
13 it. Procuring cause depends on a number of factors
14 which together demonstrate that the unbroken efforts
15 of a specific broker were responsible for the buyer
16 making the decision to consummate the sale on terms
17 which a seller found acceptable.

18 Is that -- does that jibe with your --

19 A. It's sounds like a good definition.

20 Q. So you would agree with that, that that is probably a
21 good definition of procuring cause?

22 A. Would you mind reading it again?

23 Q. Sure. A procuring cause depends on the interplay of
24 factors which together demonstrate that the unbroken
25 efforts of a specific broker were responsible for the

1 buyer making the decision to consummate the sale on
2 terms which the seller found acceptable.

3 A. Yeah, I would agree with that.

4 Q. So if a cooperating broker or someone representing a
5 buyer simply informed a buyer, potential buyer of the
6 availability of a home for sale, that's all they did,
7 wouldn't be a procuring cause, would they?

8 A. I think it would be.

9 Q. You think they would be? Okay.

10 Would you agree with me that the National
11 Association of Realtors has defined procuring cause
12 factors?

13 A. I have not seen their definition, unless that was it.

14 Q. Do you know whether or not the National Association of
15 Realtors has defined procuring cause?

16 A. I know procuring cause comes up in a number of inter
17 board arguments.

18 Q. Have you been involved in any of those inter board
19 arguments?

20 A. Yes.

21 Q. And the -- so in these arbitrations, the arbitrators
22 have to determine whether or not a buyer's agent was
23 the procuring cause for sale, right?

24 A. And I have never seen a uniform standard applied to
25 procuring cause in the industry.

1 Q. From the Realcomp MLS, right?

2 Now, were you -- you were not at the
3 meeting, the Realcomp Board of Governors meeting at
4 which that policy was first decided, right?

5 A. It's my understanding that it was done before I was on
6 the board.

7 Q. Okay. So it was done before you were on the board and
8 so you weren't at the meeting where it was actually
9 voted on, right?

10 A. No, sir. If it was before my term on the board, I
11 wasn't there, and I think it was before my term on the
12 board.

13 Q. Mr. Hardy, you can't tell me then based on firsthand
14 knowledge at least why it was the board adopted those
15 rules, right?

16 A. No, sir.

17 Q. Now, you can't tell me whether or not at the time it
18 was adopted Realcomp was -- had some kind of problems
19 because of different types of listings other than
20 exclusive right-to-sell going to public Internet
21 sites, can you?

22 A. I just don't know.

23 Q. Now, do you know -- have you been told what the reason
24 is for the rule?

25 A. No, sir.

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DATE JANUARY 29, 2007

PAGES 1 THROUGH 131

TESTIMONY OF WALTER BACZKOWSKI

**FOR THE RECORD, INC.
10760 DEMARR ROAD
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(301)870-8025**

CX405-01

1 A. Regardless. It doesn't matter what business model,
2 type they have. It's open to all members.

3 Q. You mentioned that you're in charge of the
4 professional standards, ethics and arbitrations.

5 Are those three separate things that you're
6 in charge of?

7 A. The professional standards department is charged with
8 enforcing the code of ethics and also resolving
9 business disputes between members.

10 Q. And the code of ethics that you're referring to, is
11 that the National Association of Realtors code of
12 ethics?

13 A. It is the National Association of Realtors code of
14 ethics, yes.

15 Q. So that does mean is MCAR an affiliate of NAR?

16 A. Yes.

17 Q. And how long -- do you know how long MCAR has been an
18 affiliate of NAR?

19 A. MCAR has only been in existence since 2001, but prior
20 to that they have been the subject of mergers between
21 about five other real estate associations, so the
22 preceding associations have always been with the
23 national association probably since the 1930s.

24 Q. What body of associations ultimately made up MCAR?

25 A. There was the Rochester Association of Realtors, the

1 employment of a broker, which procurement of a
2 purchaser on the owner's terms and conditions, ready
3 willing and able to buy the property.

4 Q. You sound like you've had to say that lots of times.

5 Okay. So it's basically the person --

6 A. It's a whole course of events. It's not just whose
7 name is on the purchase contract. It's not just who
8 showed the property first. It's not just that this
9 was my uncle's sister's brother's cousin. It doesn't
10 matter. It has to be the whole course of events that
11 is presented to the panel that they will make that
12 determination based on that information.

13 Q. Okay. So basically the panel is going to hear an
14 entire factual background of selling agent A did all
15 this work, selling agent B did this work, and then
16 determined who should actually --

17 A. Then the panel -- the procedure in an arbitration
18 hearing allows the complainant to state their case,
19 allows the defendant to state their case, allows each
20 to ask each other questions, and the panel is allowed
21 to ask any questions at any time to make sure they're
22 getting all the facts out of them, and they will make
23 the determination based on that.

24 Q. Does the type of listing contract play any role in an
25 arbitration?

1 A. No.

2 Q. Why not?

3 A. It doesn't have any bearing. What we're looking at in
4 an arbitration hearing -- well, let me take that back.

5 If for whatever reason the dispute is based
6 on who should get the listing portion or the
7 commission, it would be based on the listing
8 agreement. 90 percent of the -- 99 percent of the
9 cases that come forward are based on the selling side,
10 and if you're basing it on the selling side you know
11 what compensation is to be paid, and they're just
12 determining who is going to get that.

13 So whether it's an exclusive agency or
14 exclusive right-to-sell or some other type, all that
15 matters is what is the compensation that was to be
16 paid, what is the defined compensation that we're
17 disputing.

18 Q. Okay. And the compensation is defined by what a
19 listing agent inputted into the MLS?

20 A. Typically, it's what the listing agent has inputted
21 into the MLS and anything else that might have been
22 negotiated during the course of the sale.

23 So the listing agent might have put
24 something in the MLS that that then during the course
25 of the sale to make it work, they all decide that

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FEDERAL TRADE COMMISSION

MATTER NO. D09320

TITLE REALCOMP, II, LTD.

PLACE FOSTER SWIFT COLLINS & SMITH, P.C.
32300 NORTHWESTERN HIGHWAY
FARMINGTON HILLS, MICHIGAN

DATE JANUARY 30, 2007

PAGES 1 THROUGH 64

TESTIMONY OF MARTIN M. NOWAK

FOR THE RECORD, INC.
10760 DEMARR ROAD
WHITE PLAINS, MD 20695
(301)870-8025

CX415-01

1 Q. Okay. So none of the areas that you've been involved
2 in for NOCBOR involved exclusive agency listings?

3 A. I can't recall that they have.

4 Q. Okay. And you don't recall any hearings in NOCBOR
5 involving limited service listings?

6 A. No, I do not recall any.

7 Q. And you don't recall any arbitrations in NOCBOR
8 involving MLS entry only listings?

9 A. No.

10 Q. Now you're also a member of the NOCBOR technology
11 committee?

12 A. Yes, ma'am.

13 Q. And what is your role in the technology committee?

14 A. At this point I'm just a member of the e-committee.

15 Q. And what does the committee look at?

16 A. We look at modern technology, and how it might help
17 the agents who are members of NOCBOR earn a living.

18 Q. You say modern technology. Do you focus at all on the
19 public real estate Web sites?

20 A. No.

21 Q. Are you looking at more the MLS technology that can
22 help your members?

23 A. Typically, we leave that to the MLS. What we're
24 looking at is, as an example, voice-over-Internet
25 protocol. We research that. We research new PCs,

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FEDERAL TRADE COMMISSION

DOCKET NO. 9320

TITLE REALCOMP II, LTD.

PLACE FOSTER SWIFT COLLINS & SMITH, P.C.
313 SOUTH WASHINGTON SQUARE
LANSING, MICHIGAN

DATE JANUARY 22, 2007

PAGES 1 THROUGH 149

TESTIMONY OF ALISSA NEAD

FOR THE RECORD, INC.
10760 DEMARR ROAD
WHITE PLAINS, MD 20695
(301)870-8025

CX42-01

1 Limited Service broker?

2 A. Oh, God, I don't remember. I've had too many to know.

3 I don't know -- in the hearing that doesn't come up
4 what their, you know, what their relationship with the
5 seller was.

6 Q. Let me understand. So in the hearings on procuring
7 cause issues, whether or not the broker is a Limited
8 Services -- has a Limited Service contract with the
9 seller, or an Exclusive Right to sell Full Service
10 agreement with the seller doesn't come up?

11 A. No. Generally speaking, the listing broker's not even
12 there.

13 Q. Okay. Really. Because the issue is whether or not the
14 selling agent is procuring cause?

15 A. Yes, it's two other agents.

16 Q. Okay. And so really the listing agent doesn't have a
17 lot to say about whether or not another agent is
18 procuring cause?

19 A. Right.

20 Q. Because they don't know what happened with the buyer?

21 A. Right.

22 Q. Okay. But the arbitration panel, nonetheless, can
23 determine that an agent is the procuring cause is
24 entitled to part of the commission, the offer of
25 compensation that the listing agent had offered?

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DOCKET NO. 9320

TITLE REALCOMP II, LTD.

PLACE FOSTER SWIFT COLLINS & SMITH, P.C.
313 SOUTH WASHINGTON SQUARE
LANSING, MICHIGAN

DATE JANUARY 23, 2007

PAGES 1 THROUGH 47

TESTIMONY OF RYAN TUCHOLSKI

FOR THE RECORD, INC.
10760 DEMARR ROAD
WHITE PLAINS, MD 20695
(301)870-8025

- 1 Q. It's my understanding there have not been formal
2 procedures involving these complaints yet?
- 3 A. No.
- 4 Q. No, that's incorrect?
- 5 A. No, you are correct, sorry.
- 6 Q. In those stack of complaints, are there any complaints
7 about discount or flat fee brokers?
- 8 A. No. There are none.
- 9 Q. So Dearborn doesn't have any records of procuring cause
10 disputes involving discount or flat fee brokers; is
11 that correct?
- 12 A. That's correct.
- 13 Q. Or procuring cause disputes arising out of transactions
14 where the listing agreement was the exclusive agent, or
15 MLS Entry Only Listing; is that correct?
- 16 A. That's correct.
- 17 Q. And similarly, you don't have any records of ethics
18 complaints involving flat fee or discount brokers; is
19 that correct?
- 20 A. That's correct.
- 21 Q. And is it also correct that Dearborn has no records of
22 any ethics complaint involving Exclusive Agency,
23 Limited Service or MLS Entry Only Listings?
- 24 A. There are no complaints.
- 25 Q. Thank you.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATE LAW JUDGES

_____)
_____)
In the Matter of _____)
_____)
REALCOMP II LTD., _____)
_____)
Respondent. _____)
_____)

Docket No. 9320

Chief Administrative Law Judge
Stephen J. McGuire

REALCOMP II LTD.'S ANSWER TO COMPLAINT

Respondent Realcomp II Ltd., through its attorneys, Foster, Swift, Collins & Smith, P.C., pursuant to the Federal Trade Commission Rules of Practice ("FTC Rules"), 16 C.F.R. § 3.12, in answer to Petitioner's Complaint, states as follows:

NATURE OF THE CASE

This paragraph is a characterization of the Complaint to which no responsive pleading is required. To the extent that an answer is required, Respondent refers to its answer to the specific allegations of the Complaint as set forth below. Respondent denies as untrue that the policies at issue lack any pro-competitive justification. Respondent denies that the alleged Rules constitute an anti-competitive concerted refusal to deal. Respondent denies that the alleged Rules violate the anti-trust laws.

RESPONDENT AND ITS MEMBERS

PARAGRAPH 1. Respondent Realcomp II Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business at 28555 Orchard Lake Road, Suite 200, Farmington Hills, Michigan 48334. Respondent is owned by several realtor boards and associations. The members of Respondent are real estate brokers doing business in Southeastern Michigan.

ANSWER 1. In response to Paragraph 1 of the Complaint, Respondent admits the allegations set forth in the first two sentences of that paragraph. Respondent denies that its members are limited to real estate brokers doing business in Southeastern Michigan for the reason that its members include REALTORS® doing business outside of Southeastern Michigan.

PARAGRAPH 2. Respondent is organized for the purpose of serving its members' interests, including their economic interests, by promoting, fostering, and advancing the real estate brokerage services industry in Southeastern Michigan. One of the primary functions of Respondent is the operation of the Realcomp Multiple Listing Service.

ANSWER 2. In response to Paragraph 2 of the Complaint, Respondent admits the allegations contained in the first sentence. In response to the second sentence, Respondent states that operation of the Realcomp Multiple Listing Service is the primary function of Respondent as opposed to being one of the primary functions. In response to the remaining allegations contained in this paragraph, Respondent admits the same with the further response that the information on listings on a multiple listing service (MLS) is also used for appraisals.

PARAGRAPH 3. The Realcomp shareholder Boards are affiliated with the National Association of Realtors ("NAR"), thereby requiring Realcomp to abide by the NAR rules. Realcomp has more than 14,500 real estate professionals as members. All of the Realcomp members hold either an active real estate license or an active appraiser license and are active in the real estate profession.

ANSWER 3. In response to Paragraph 3 of the Complaint, Respondent admits that it is affiliated with the National Association of Realtors ("NAR"). Respondent denies that this thereby requires Realcomp to abide by the NAR Rules for the reason that Respondent's own governing documents speak to that requirement. In response to the remaining allegations contained in this paragraph, Respondent admits the same with the exception that Respondent does not have sufficient knowledge or information to form a belief as to the truth or falsity of the allegation that all of its members are active in the real estate profession.

PARAGRAPH 4. The large majority of residential real estate brokerage professional in Southeastern Michigan are members of Realcomp. These professionals compete with one another to provide residential real estate brokerage services to consumers.

ANSWER 4. In response to Paragraph 4 of the Complaint, Respondent states that it is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in the first sentence of that paragraph. Respondent admits the allegation contained in the second sentence to that paragraph.

PARAGRAPH 5. Realcomp services the territory within Southeastern Michigan, including Livingston County, Oakland County, Macomb County, St. Clair County and Wayne County. ("Realcomp Service Area").

ANSWER 5. In response to Paragraph 5 of the Complaint, Respondent admits the same.

JURISDICTION

PARAGRAPH 6. The acts and practices of Respondent, including the acts and practices alleged herein, have been or are in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, and Respondent is subject to the jurisdiction of the Federal Trade Commission. Among other things, the aforesaid acts and practices:

(A) Affect the purchase and sale of real estate by persons moving into and out of Southeastern Michigan; and

(B) Affect the transmission of real estate listing information to public real estate web sites that are intended for a national audience, including Realtor.com.

ANSWER 6. In response to Paragraph 6 of the Complaint, Respondent admits the same.

THE CHALLENGED CONDUCT

PARAGRAPH 7. Respondent has restrained competition in the provision of residential real estate brokerage services by combining or conspiring with its members or others, or by acting as a combination of its members or others, to hinder unreasonably the ability of real estate brokers in Southeastern Michigan to offer residential real estate brokerage services on terms other than those contained in the traditional form of listing agreement known as an Exclusive Right to Sell Listing.

ANSWER 7. In response to Paragraph 7 of the Complaint, Respondent denies the allegations contained therein for the reason same are untrue.

PARAGRAPH 8. An Exclusive Right to Sell Listing is a listing agreement under which the property owner or principal appoints a real estate broker as his or her exclusive agent for a designated period of time, to sell the property on the owner's stated terms, and agrees to pay the broker a commission when the property is sold, whether by the listing broker, the owner or another broker. An Exclusive Right to Sell Listing is the form of listing agreement traditionally used by listing brokers to provide full-service residential real estate brokerage services.

ANSWER 8. In response to Paragraph 8 of the Complaint, Respondent admits the allegations contained therein.

PARAGRAPH 9. An alternative form of listing agreement to an Exclusive Right to Sell Listing is an Exclusive Agency Listing. An Exclusive Agency Listing is a listing agreement under which the listing broker acts as an exclusive agent of the property owner or principal in the sale of a property, but reserves to the property owner or principal a right to sell the property without further assistance of the listing broker, in which case the listing broker is paid a reduced or no commission when the property is sold.

ANSWER 9. In response to paragraph 9 of the Complaint, Respondent admits the allegations contained therein.

PARAGRAPH 10. Exclusive Agency Listings are a means by which listing brokers can offer lower-cost, Unbundled Real Estate Services to consumers. Unbundled Real Estate Brokerage Services are lawful arrangements pursuant to which a listing broker will cause the property offered for sale to be listed on the MLS, but the listing broker will not provide some or all of the additional services offered by traditional real estate brokers, or will only offer such additional services as may be chosen from a menu of services for a fee.

ANSWER 10. In response to paragraph 10 of the Complaint, Respondent states that the term "unbundled real estate services" is not defined and is not a term commonly used in the industry and; therefore, Respondent states it is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph; therefore, Respondent neither admits nor denies the same.

PARAGRAPH 11. Brokers offering Unbundled Real Estate Brokerage Services often provide home sellers with exposure of their listing through the MLS for a flat fee or reduced commission that is small compared to the full commission prices commonly charged by traditional brokers, often by entering into Exclusive Agency Listings that reserve to the home seller the right to sell the property without owing more to the listing broker

ANSWER 11. In response to paragraph 11 of the Complaint, Respondent states it is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained therein; therefore, neither admits nor denies the same.

PARAGRAPH 12. To be listed in the MLS, a home seller must enter into a listing agreement with a listing real estate broker that is a member of the MLS. The compensation paid by the home seller to the listing broker is determined by negotiation between the home seller and the listing broker. Whatever type of listing agreement is entered into between the home seller and the listing real estate broker, the MLS rules require that the home seller must offer to pay a commission to a cooperating real estate broker, known as a selling broker, who successfully secures a buyer for the property. If the home seller fails to pay a commission to a selling broker who secures a buyer for the property, the selling broker may recover the commission due from the listing agent, under rules and procedures established by the MLS.

ANSWER 12. In response to paragraph 12 of the Complaint, Respondent admits the allegations contained in first three sentences of that paragraph. In response to the fourth and final sentence of paragraph 12, Respondent denies the same in the form and matter alleged for the reason that the commission is paid by the listing broker as opposed to by the seller and this is not under the rules and procedures established by the MLS.

PARAGRAPH 13. In 2001, Realcomp adopted and approved a rule that stated: "Listing information downloaded and/or otherwise displayed pursuant to IDX shall be limited to properties listed on an exclusive right to sell basis" (the "Web Site Policy").

ANSWER 13. In response to paragraph 13 of the Complaint, Respondent admits the allegations contained therein.

PARAGRAPH 14. The Web Site Policy prevents information concerning certain lawful residential property listings provided to Realcomp, including "Exclusive Agency Listings," from being transmitted to real estate web sites, based on the contractual relationship between the home seller and the real estate agent the seller employs to promote the property.

ANSWER 14. In response to paragraph 14 of the Complaint, Respondent denies the allegations contained therein for the reason same are untrue.

PARAGRAPH 15. The Web Site Policy specifically prevents information concerning Exclusive Agency Listings from being published on web sites otherwise approved by Realcomp to receive information concerning Realcomp MLS listings (collectively, "Approved Web Sites"). Such web sites include (1) the NAR-

operated "Realtor.com" web site; (2) the Realcomp-owned "Moveinmichigan.com" web site; and (3) Realcomp-member web sites.

ANSWER 15. In response to paragraph 15 of the Complaint, Respondent denies that "Realtor.com" is a NAR-operated website and denies the allegations contained therein as they pertain to Realcomp-member websites. Respondent admits the remainder of the allegations contained in this paragraph.

PARAGRAPH 16. In or about the fall of 2003, Respondent changed the Realcomp MLS search screen to default to Exclusive Right to Sell Listings ("Search Function Policy"). In order to view any other listing types, including Exclusive Agency Listings, Realcomp members have to select the additional listing types in the search screen.

ANSWER 16. In response to Paragraph 16 of the Complaint, Respondent admits the same. In further answer to this paragraph, Respondent states that the default described in this paragraph defaults not only to exclusive right to sell listings but also to unknown.

REALCOMP HAS MARKET POWER

PARAGRAPH 17. The provision of residential real estate brokerage services to sellers and buyers of real property in the Southeastern Michigan and/or the Realcomp Service Area is a relevant market.

ANSWER 17. In response to Paragraph 17 of the Complaint, Respondent states that the allegations contained therein are conclusions of law, not allegations of fact, and; therefore, neither admit nor deny the same.

PARAGRAPH 18. The publication and sharing of information relating to residential real estate listings for the purpose of brokering residential real estate transactions is a key input to the provision of real estate brokerage services, and represents a relevant input market. Publication of listings through the Realcomp MLS is generally considered by sellers, buyers and their brokers to be the fastest and most effective means of obtaining the broadest market exposure for property in the Realcomp Service Area.

ANSWER 18. In response to Paragraph 18 of the Complaint, Respondent admits the allegations contained in the first sentence of that paragraph with the exception of the allegation that this represents a relevant input market for the reason that this is a conclusion of law, not an allegation of fact and Respondent is without sufficient knowledge to form a belief as to whether this is a "key input." Respondent states that it is without sufficient knowledge or information to form a belief as

to the truth or falsity of the allegations contained in this paragraph; therefore, neither admits nor denies the same.

PARAGRAPH 19. Participation in Realcomp is a service that is necessary for the provision of effective residential real estate brokerage services to sellers and buyers of real property in the Realcomp Service Area. Participation significantly increases the opportunities of brokerage firms to enter into listing agreements with residential property owners, and significantly reduces the costs of obtaining up-to-date and comprehensive information on listings and sales. The realization of these opportunities and efficiencies is important for brokers to compete effectively in the provision of residential real estate brokerage services in the Realcomp Service Area.

ANSWER 19. In response to Paragraph 19 of the Complaint, Respondent denies as untrue the allegations contained in the first sentence of that paragraph. In response to the remaining allegations contained in that paragraph, Respondent states that it is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph; therefore, neither admits nor denies the same.

PARAGRAPH 20. Access to the Approved Web Sites is a service that is necessary for the provision of effective residential real estate brokerage services in the Realcomp Service Area. Home buyers regularly use the Approved Web Sites to assist in their search for homes. The Approved Web Sites are the web sites most commonly used by home buyers in their home search. Many home buyers find the home that they ultimately purchase by searching on one or more Approved Web Sites.

ANSWER 20. In response to Paragraph 20 of the Complaint, Respondent denies as untrue the allegations contained in the first sentence of that paragraph. In response to the allegations contained in the remaining allegations contained in that paragraph, Respondent states that it is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph; therefore, neither admits nor denies the same.

PARAGRAPH 21. The most efficient, and at least in some cases the only, means for Realcomp members to have their listed properties visible to the public on the Approved Web Sites is by having Realcomp transmit those listings.

ANSWER 21. In response to Paragraph 21 of the Complaint, Respondent states that it is without sufficient knowledge or information to form a belief as to the truth or falsity of these allegations and; therefore, neither admits nor denies the same.

PARAGRAPH 22. By virtue of industry-wide participation and control over the ability of real estate brokers to participate in the Realcomp MLS and the ability of home sellers to publicize their homes for sale on Approved Web Sites, Realcomp has market power in the Realcomp Service Area.

ANSWER 22. In response to Paragraph 22 of the Complaint, Respondent states that the allegations contained therein are conclusions of law, not allegations of law and; therefore, neither admits nor denies the same.

THE REALCOMP POLICIES HAVE NO EFFICIENCY BENEFIT

PARAGRAPH 23. There are no cognizable and plausible efficiency justifications for the conduct that constitutes the violation alleged in this Complaint. Such conduct is not reasonably ancillary to the legitimate and beneficial objectives of the MLS.

ANSWER 23. In response to Paragraph 23 of the Complaint, Respondent denies the allegations contained therein for the reason same are untrue.

VIOLATION

PARAGRAPH 24. In adopting the policies and engaging in the acts and practices described herein, Realcomp has combined or conspired with its members or others, or acted as a combination or conspiracy of its members or others, to restrain trade in the provision of residential real estate brokerage services within Southeastern Michigan and/or the Realcomp Service Area.

ANSWER 24. In response to Paragraph 24 of the Complaint, Respondent denies the allegations contained therein for the reason same are untrue.

PARAGRAPH 25. The acts and practices of Realcomp described herein constitute an agreement that only listings based exclusively on traditional contract terms as dictated by Realcomp will be forwarded by the Realcomp MLS to be shown to the general public on Approved websites, and thereby eliminate certain forms of competition. The acts and practices have no cognizable and plausible efficiency justifications and are inherently suspect restraints of trade.

ANSWER 25. In response to Paragraph 25 of the Complaint, Respondent denies the allegations contained therein for the reason same are untrue.

PARAGRAPH 26. The acts and practices of Realcomp described herein constitute a concerted refusal to deal by competitors, except on specified terms, with respect to services that are necessary for the provision of effective residential real estate brokerage services. As such, the acts and practices are inherently suspect restraints of trade that have no cognizable and plausible efficiency justifications.

ANSWER 26. In response to Paragraph 26 of the Complaint, Respondent denies the allegations contained therein for the reason same are untrue.

PARAGRAPH 27. The purposes, capacities, tendencies, or effects of the policies, acts, or practices of Realcomp and its members as described herein have been and are unreasonably to restrain competition among brokers, and to injure consumers, in the market for provision of residential real estate brokerage services within Southeastern Michigan and/or the Realcomp Service Area.

ANSWER 27. In response to Paragraph 27 of the Complaint, Respondent denies the allegations contained therein for the reason same are untrue.

PARAGRAPH 28. The policies, acts, practices, and combinations or conspiracies described herein constitute unfair methods of competition in or affecting interstate commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

ANSWER 28. In response to Paragraph 28 of the Complaint, Respondent denies the allegations contained therein for the reason same are untrue.

WHEREFORE, Respondent states that the Commission is not entitled to the relief requested.

RESPONDENT REALCOMP II LTD.'S AFFIRMATIVE DEFENSES

Respondent Realcomp II, Ltd., through its attorneys, Foster, Swift, Collins & Smith, P.C., hereby submits the following Affirmative Defenses, reserving the right to raise additional defenses if and when they are deemed appropriate as the case progresses.

1. The Complaint, in whole or in part, fails to state a claim upon which relief can be granted.

2. The Complaint fails to comply with the requirements of Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), because the issuance of the Complaint and the relief sought are not in the public interest.

3. The challenged conduct at issue in the Complaint has significant pro-competitive efficiencies that outweigh any alleged anti-competitive effects.

4. Respondent lacks market power as a significant amount of sales in the described market are from persons or entities other than Respondent and there is competition in that market.

WHEREFORE, Respondent prays that a Judgment dismissing the Complaint with prejudice and awarding costs and such other relief as deemed just and proper.

Date: November 20, 2006

Respectfully Submitted,

FOSTER, SWIFT, COLLINS & SMITH, P.C.

By:



Steven H. Lasher (P28785)

Scott L. Mandel (P33453)

Kirsten M. McNelly (P56979)

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FEDERAL TRADE COMMISSION

DOCKET NO. 9320

TITLE REALCOMP II, LTD.

PLACE FOSTER SWIFT COLLINS & SMITH, P.C.
313 SOUTH WASHINGTON SQUARE
LANSING, MICHIGAN

DATE JANUARY 17, 2007

PAGES 1 THROUGH 69

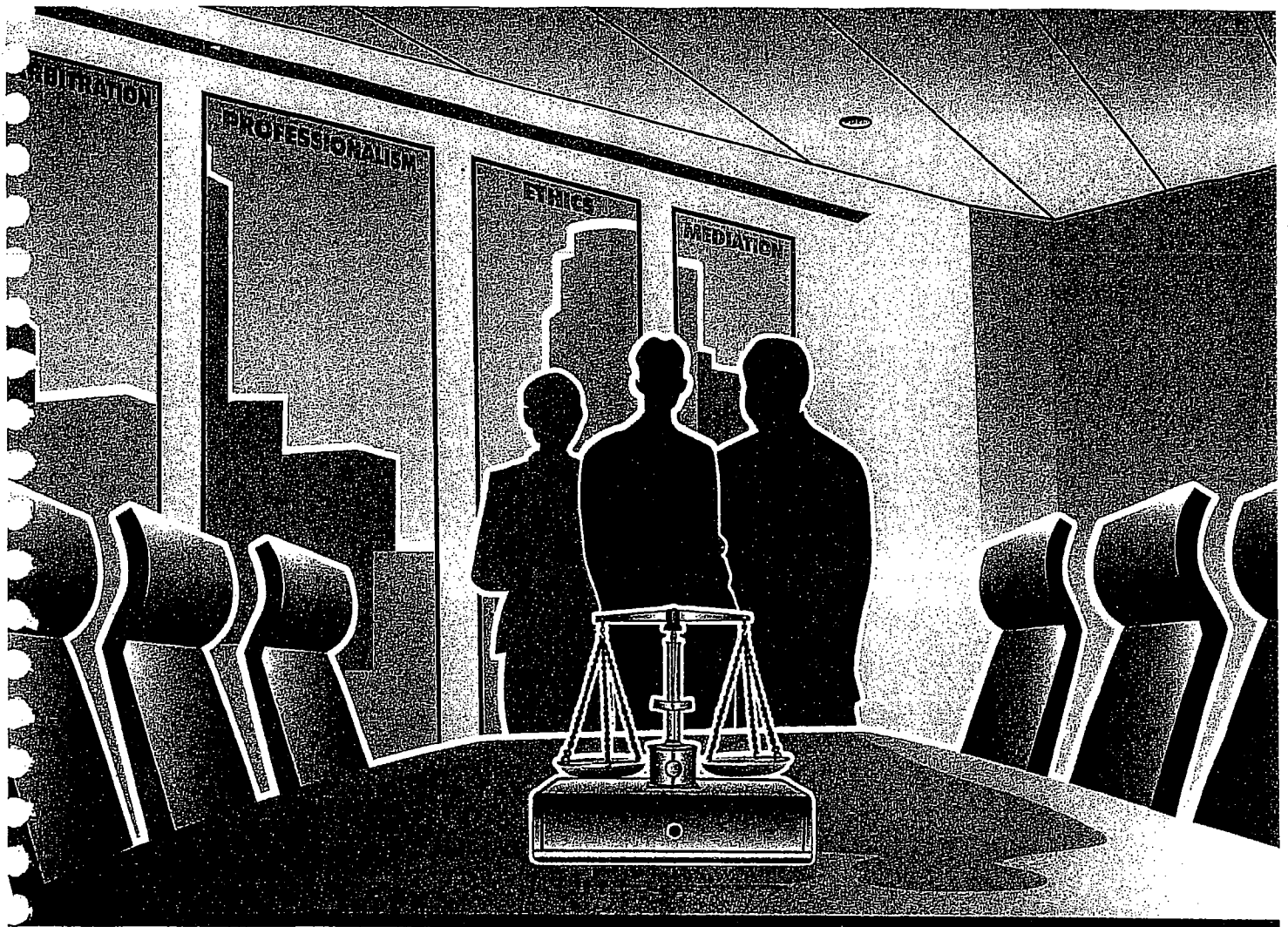
TESTIMONY OF CARL WILLIAMS

FOR THE RECORD, INC.
10760 DEMARR ROAD
WHITE PLAINS, MD 20695
(301)870-8025

CX44-01

- 1 Q. The discussion indicates the board of governors had
2 reviewed a request to disallow those three listing
3 types, Exclusive Agency, Limited Service and MLS, Entry
4 Only listings, part of the MLS database. Do you recall
5 those discussions?
- 6 A. No, I don't.
- 7 Q. Do you know who made that request to disallow those
8 three types of listing agreements from the Realcomp
9 database?
- 10 A. No, I don't.
- 11 Q. Do you know anything about the reasons that that
12 request was made?
- 13 A. No, I don't.
- 14 Q. Did you ever discuss with anyone the requirement from
15 NAR, the National Association of Realtors, that those
16 types of listings be allowed in the MLS?
- 17 A. I'm sure I had a discussion. I just don't remember.
- 18 Q. Earlier we talked about you going to the NAR
19 conventions, the annual conventions and getting a NAR
20 magazine, things of that nature. From those sources of
21 information, did you ever become aware of the fact that
22 NAR required those types of listings to be included in
23 an MLS database?
- 24 A. No.
- 25 Q. And the Detroit Association of Realtors, or DAR, is an

- 1 affiliate of NAR currently; is that right?
- 2 A. I guess affiliate's a good word. I don't know.
- 3 Q. Do you know if they're a member of NAR? I don't know
- 4 what the correct terminology is.
- 5 A. I don't know. You pay one. You pay to DAR, and you're
- 6 a member of DAR, Michigan Association, and National
- 7 Association. So however that works out, I don't know.
- 8 Q. So it's your understanding that once you pay a fee to
- 9 become a member of DAR that that translates into
- 10 membership in MAR and NAR?
- 11 A. That's correct.
- 12 Q. I think we had talked about IDX earlier, IDX policies.
- 13 Are you aware that NAR amended its IDX policies in
- 14 November of 2006?
- 15 A. Am I aware, yes.
- 16 Q. And how did you become aware of that?
- 17 A. I think people that came back from the convention
- 18 started talking about it. I didn't go to the last
- 19 convention.
- 20 Q. Do you recall what was said during those discussions?
- 21 A. Other than they changed their policies about -- no, not
- 22 really.
- 23 Q. Was there anything said in those discussions about the
- 24 effect of the change in NAR's policies on how Realcomp
- 25 might operate?



Code of Ethics and Arbitration Manual 2006



NATIONAL ASSOCIATION
OF REALTORS®

The Voice for Real Estate

CX94-01
NARFTC 000088

Real Strength.
Real Advantages.

ARBITRATION

Statements of Professional Standards Policy	
Applicable to Arbitration Proceedings	119
Part Seven — General Provisions Relating to Arbitration	127
Section 26 — Definitions Relating to Arbitration	127
Section 27 — Qualification for Tribunal	127
Section 28 — Duty to Give Evidence	128
Section 29 — Right of Counsel to Appear	128
Section 30 — Witnesses	129
Section 31 — Conduct of Hearing	129
Section 32 — Notices	130
Section 33 — Interpretations of Bylaws	130
Section 34 — Waiver	130
Section 35 — Communication and Clerical	130
Section 36 — Attempt to Influence Tribunal	130
Part Eight — Membership Duties and Enforcement	131
Section 37 — Duties of Membership	131
Section 38 — Selection and Appointment of the Grievance Committee	131
Section 39 — Selection and Appointment of the Professional Standards Committee	131
Part Nine — The Grievance Committee	133
Section 40 — Authority	133
Section 41 — Function	133
Section 42 — Grievance Committee's Review and Analysis of a Request for Arbitration	133
Part Ten — Arbitration of Disputes	135
Section 43 — Arbitrable Issues	135
Section 44 — Duty and Privilege to Arbitrate	136
Section 45 — Board's Right to Decline Arbitration	137
Section 46 — Duty to Arbitrate Before State Association	137
Section 47 — Manner of Invoking Arbitration	138
Section 48 — Submission to Arbitration	139
Section 49 — Initial Action by Directors	140
Section 50 — Preliminary Judicial Determination Prior to Imposition of Discipline	141
Section 51 — Arbitration Hearing	141
Section 52 — Settlement	141
Section 53 — The Award	141
Section 54 — Costs of Arbitration	142
Section 55 — Request for Procedural Review	142
Section 56 — Enforcement	143
Appendix I to Part Ten — Arbitrable Issues	144
Appendix II to Part Ten — Arbitration Guidelines	147
Arbitration Worksheet	155
Appendix III to Part Ten — Rationale of Declaratory Relief and of Judicial Enforcement in Matters of Arbitration	159
Appendix IV to Part Ten — Arbitration Hearing Checklist with Administrative Time Frames	160
Appendix V to Part Ten — Mediation as a Service of Member Boards	165

Part Eleven — Interboard Arbitration Procedures	179
Part Twelve — Conduct of an Arbitration Hearing	183
Outline of Procedure for Conduct of an Arbitration Hearing	183
Outline of Procedure for an Arbitration Hearing Involving a Request and a Counter-Request	184
Chairperson's Procedural Guide: Conduct of an Arbitration Hearing ...	186
Chairperson's Procedural Guide: Conduct of an Interboard Arbitration Hearing	189
Chairperson's Procedural Guide: Conduct of a Procedural Review Hearing (Arbitration)	192
Chairperson's Procedural Guide: Conduct of a Procedural Review Hearing (Interboard Arbitration) ...	195
Part Thirteen — Specimen Forms for Arbitration	199
Form #A-1 — Request and Agreement to Arbitrate	200
Form #A-2 — Request and Agreement to Arbitrate (Nonmember)	202
Form #A-3 — Notice to Respondent	204
Form #A-4 — Response and Agreement to Arbitrate	205
Form #A-5 — Grievance Committee Request for Information	207
Form #A-6 — Response to Grievance Committee Request for Information	208
Form #A-7 — Notice of Right to Challenge Tribunal Members	209
Form #A-8 — Challenge to Qualifications by Parties to Arbitration Proceeding	210
Form #A-9 — Official Notice of Hearing	211
Form #A-10 — Outline of Procedure for Arbitration Hearing	212
Form #A-10a — Outline of Procedure for Arbitration Hearing Involving a Request and a Counter-Request	213
Form #A-11 — Certificate of Qualification	215
Form #A-12 — Award of Arbitrators	216
Form #A-13 — Request for Procedural Review	217
Form #A-14 — Official Notice of Procedural Review	218
Form #A-14a — Decision of the Procedural Review Hearing Tribunal	219
Form #A-15 — Checklist of Professional Standards Concerns	220
Form #A-16 — Seating Arrangements for Hearings	222
Form #A-17 — Mediation Resolution Agreement	223
Form #A-18 — Arbitration Activity Report	224
Form #A-19 — Sample Agreement to Establish Multi-Board (or Regional) Professional Standards Enforcement Procedures	225
Form #A-20 — Appeal of Grievance Committee Dismissal or Classification of Arbitration Request	228
Form #A-21 — Action of the Appeal Hearing Tribunal (Arbitration Request)	229

Statements of Professional Standards Policy Applicable to Arbitration Proceedings

*Approved by the Professional Standards Committee and the Board of Directors
of the NATIONAL ASSOCIATION OF REALTORS®*

1. Article 17, Code of Ethics

"In the event of contractual disputes or specific non-contractual dispute as defined in Standard of Practice 17-4 between REALTORS® (principals) associated with different firms, arising out of their relationship as REALTORS®, the REALTORS® shall submit the dispute to arbitration in accordance with the regulations of their Board or Boards rather than litigate the matter.

In the event clients of REALTORS® wish to arbitrate contractual disputes arising out of real estate transactions, REALTORS® shall arbitrate those disputes in accordance with the regulations of their Board, provided the clients agree to be bound by the decision.

The obligation to participate in arbitration contemplated by this Article includes the obligation of REALTORS® (principals) to cause their firms to arbitrate and be bound by any award." (Amended 1/01)

2. Circumstances under which REALTORS® must submit to arbitration*

- (a) Every REALTOR® of the Board who is a REALTOR® principal, every REALTOR® principal who participates in a Board's MLS where they do not hold Board membership and every nonmember broker or licensed or certified appraiser who is a Participant in the Board's MLS shall have the right to invoke the Board's arbitration facilities in any dispute arising out of the real estate business with a REALTOR® principal in another real estate firm or with that firm (or both), or nonmember broker/appraiser or their firm (or both) who is a Participant in the Board's MLS. (Revised 05/01)
- (b) A REALTOR® other than a principal or a REALTOR-ASSOCIATE® shall have the right to invoke the arbitration facilities of the Board in a business dispute with a REALTOR® or REALTOR-ASSOCIATE® in another firm or with their firm (or both), whether in the same or a different Board, provided the REALTOR® principal with whom he is associated joins in the arbitration request, and requests arbitration with the REALTOR® principal of the other firm or with their firm (or both). Arbitration in such cases shall be between the REALTOR® principals or their firms (or both). REALTOR® nonprincipals and REALTOR-ASSOCIATE®s who invoke arbitration in this manner, or who are affiliated with a respondent and have a vested financial interest in the outcome, have the right to be present throughout the

*Refer to Part Ten, Section 44 of this Manual.

proceedings and to participate but are not considered to be parties. (Amended 05/01)

- (c) A client of a REALTOR® principal may invoke the facilities of the Board in a business dispute with a REALTOR® principal or the REALTOR®'s firm (or both) arising out of an agency relationship, provided the client agrees to be bound by the arbitration. In the event of such request and agreement the Board will arbitrate the dispute subject to the Board's right to decline arbitration based on the amount involved or the legal complexity of the dispute. A REALTOR® principal may also invoke arbitration against his client but no arbitration may be held without the client's voluntary agreement to arbitrate and to be bound by the decision. (Revised 05/01)

3. Circumstances under which arbitration is contingent upon the REALTOR®'s voluntary participation*

- (a) REALTORS® and REALTOR-ASSOCIATE®s who are or were affiliated with the same firm shall have the right to invoke the arbitration facilities of the Board, provided each party voluntarily agrees to the arbitration in writing and the Board finds the matter properly subject to arbitration. This privilege as stated applies to disputes arising when the parties are or were affiliated with the same firm, irrespective of the time request is made for such arbitration. (Amended 11/95)
- (b) A REALTOR® principal may invoke the arbitration facilities of the Board in a dispute arising out of the real estate business with a nonmember broker, provided each party agrees in writing to the arbitration and provided the Board finds the matter properly subject to arbitration. However, it shall be optional with the member as to whether he will submit to a claim to arbitration by a nonmember broker who is not an MLS Participant. A nonmember broker who is not an MLS Participant or nonmember salesperson shall not be entitled to invoke the arbitration facilities of the Board of REALTORS®. (Revised 11/95)
- (c) Business disputes between a REALTOR® principal and a customer of the REALTOR® principal may be arbitrated by the Board if a written contractual relationship has been created by a REALTOR® principal between a customer and a client and provided all parties to the dispute (i.e., the customer and the REALTOR®) agree in writing to arbitrate the dispute. (Amended 11/95)

*Refer to Part Ten, Section 44 of this Manual.

4. Board's right to release parties from their obligation to arbitrate

If either the Grievance Committee or the arbitration panel determines that because of the amount involved or the legal complexity of the dispute the dispute should not be arbitrated, the arbitration shall automatically terminate unless either of the parties to the dispute appeals the decision to terminate the proceedings to the Board of Directors within twenty (20) days of the date of notice that the Grievance Committee or the arbitration panel declined to continue the proceeding. The Hearing Panel can also dismiss the arbitration request if the Hearing Panel concludes the matter is not arbitrable. In the event of such an appeal, the Grievance Committee or the arbitration panel shall report its conclusions to the Board of Directors and, if the Board of Directors concurs, the arbitration shall terminate and the parties shall be relieved of their obligation to arbitrate. In this event, or in the event of no appeal, any deposits made by the parties shall be returned to them. However, if the Board of Directors decides that the arbitration should proceed, the matter shall be remanded to the Grievance Committee or the arbitration panel for further proceedings. (Revised 11/95)

5. Failure to submit to arbitration

If the complaint against a REALTOR® principal is that he has improperly refused to submit a dispute to arbitration, the complaint shall not be referred to the Grievance Committee or a Hearing Panel but shall be brought before the Board of Directors at the next regular meeting or at a special meeting called by the President for that purpose. The procedures for notices, time of notice, and hearing prescribed for matters before a Hearing Panel shall apply. The sole question of fact for the Directors to decide will be whether the respondent has failed to submit an arbitrable matter to arbitration. Upon determination that the member has refused to arbitrate a properly arbitrable matter, the Board of Directors may direct the implementation of appropriate sanction and should, if it has reason to believe that the imposition of sanction will become the basis of litigation and a claim for damages consequent to such sanction, delay the effective date of implementing the sanction to a date following receipt by the Board of a judicial decision in a petition for declaratory relief filed by the Board to confirm the propriety of its action. (Revised 11/95)

6. Failure to abide by an award rendered by a Hearing Panel

If the complaint against the REALTOR® principal is that, having properly submitted a dispute to arbitration, he has refused to abide by an award, such refusal should not be referred to the Grievance Committee as a violation of the Code of Ethics unless such refusal reflects an established pattern or practice of noncompliance with the commitment to arbitrate. A refusal to abide by an award in arbitration should be enforced in the manner set forth in Part Ten, Arbitration of Disputes, Section 56, Enforcement. (Revised 11/95)

7. No predetermination of any award in an arbitrable matter (Interpretation No. 31, Article I, Section 2, Bylaws, NATIONAL ASSOCIATION OF REALTORS®)

"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."

Explanation of Official Interpretation No. 31: "In essence, this is a specific Interpretation of the general rule established in Interpretation No. 6 that a Board may not have a rule which restricts or limits the REALTOR® in the conduct of his business unless it concerns ethical practice. Thus, a rule of a Board or Multiple Listing Service which would determine a protection period in reference to a prospective purchaser is an inequitable limitation. Further, the 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."*

8. Holding of disputed funds by the Board of Directors

Member Boards shall not make a requirement that disputed funds be deposited with the Board by the respondent in an arbitration matter prior to an arbitration hearing, as it is beyond the legitimate authority of the Board or its Professional Standards Committee. However, this does not relieve REALTORS® of their responsibility to be prepared to abide by any determination made by the Board's arbitration panel and to satisfy any award in a prompt manner. (Revised 11/87)

9. Arbitration under circumstances other than those described in Section 44

A Member Board may provide arbitration procedures only in those instances described in Part Ten, Section 44, Duty and Privilege to Arbitrate, in this Manual.

10. Determining jurisdiction for the conduct of arbitration hearings

Absent an interboard arbitration agreement directing otherwise, the following factors determine the appropriate Board to conduct arbitration hearings in instances where parties hold membership in more than one Board or MLS: (Revised 11/02)

- Where all parties hold REALTOR® membership or hold MLS participatory rights under the universal access to services component of Board of Choice in only one Board, that Board shall conduct arbitration.

*In connection with this National Association policy, refer to Part Ten, Appendix II, Arbitration Guidelines, in this Manual.

- Where all parties hold REALTOR® membership or hold MLS participatory rights under the universal access to services component of Board of Choice in the same two (or more) Boards, arbitration will be conducted by the Board in which the property giving rise to the dispute is located. If the property is not within the jurisdiction of those Boards, the Board in which the arbitration request is filed will conduct arbitration.
- Where all parties do not hold membership in the same Board, and do not have MLS participatory rights under the universal access to services component of Board of Choice through the same Board, complainants may, at their discretion, invoke interboard arbitration or, alternatively, file arbitration requests with any Board in which the respondent holds REALTOR® membership or holds MLS participatory rights under the universal access to services component of Board of Choice. Pursuant to this provision, Boards must provide arbitration services in circumstances where it is determined by the Grievance Committee that an arbitrable dispute exists and the dispute is subject to mandatory arbitration. *(Revised 11/00)*

12. Adoption of Code of Ethics or Standards of Practice by Member Boards and State Associations

A local Board or State Association shall not adopt any set of rules, regulations, policies, and practices which purport to be in lieu of, in addition to, or an extension of the Code of Ethics and Standards of Practice of the NATIONAL ASSOCIATION OF REALTORS®. *(Amended 11/89)*

13. Articles and publications on the Code of Ethics

The National Association reserves the exclusive right to interpret the Code, its applications, and its proper enforcement to Member Boards and Board Members.

The National Association does not endorse or recommend any article or publication concerning ethics which is not published by the National Association or its institutes, societies, and councils and authorized by the National Association.

15. Arbitration between Board Members who are or were affiliated with the same firm

No Member Board may require REALTORS® and REALTOR-ASSOCIATE®s affiliated with the same firm to arbitrate disputes between themselves unless both parties voluntarily agree to arbitration in writing, and provided the Board finds the matter properly subject to arbitration.

18. Local Member Board requests for the conduct of ethics and arbitration hearings by the State Association

A local Board, prior to referring an ethics complaint or arbitration request for review to the State Association, should

exhaust all efforts to impanel an impartial panel to conduct either the original hearing or the appeal or procedural review. These efforts may include the appointment of knowledgeable members of the Board on an ad hoc basis to serve either on a Hearing Panel or on behalf of the Board of Directors. If, after making all reasonable efforts, the Board still cannot impanel an impartial tribunal, the Board may refer the matter to the State Association, and the State Association may delegate to another Board or a regional enforcement facility the authority to hear the case on behalf of the State Association. No Board or regional enforcement facility, however, may be required to accept this delegation of authority. If no other entity is amenable to conducting the review, the State Association shall be responsible for conducting the hearing. State Associations may, at their discretion, require that the President or Association Executive of the Board referring an ethics complaint or arbitration request certify that all reasonable efforts to impanel an impartial panel had been made, and may further require that those efforts be documented. *(Amended 11/03)*

In instances where a local Member Board determines by resolution of its Board of Directors that it is incapable of providing an impartial panel for the conduct of an ethics or arbitration hearing (or appeal or procedural review hearing), the complaint or the request for arbitration (and the ethics appeal or procedural review request, if any) may be referred by the Board President to the State Association of REALTORS® for a hearing. With regard to requests for arbitration, in the event the State Association declines to conduct the arbitration or to delegate its authority to another Board or regional enforcement facility, the parties shall be relieved of their obligation to arbitrate as established in Article 17 of the Code of Ethics. With regard to alleged violations of the Code of Ethics, such allegations may be received and considered by the State Association and (1) dismissed as unworthy of further consideration, (2) heard by a Hearing Panel of the State Association's Professional Standards Committee, or (3) referred to another Board or regional enforcement facility. If referred for a hearing to the State Association's Professional Standards Committee or to another local Board or regional enforcement facility, a Hearing Panel will be appointed to conduct the hearing and forward the determination and sanction, if any, to the local Member Board. The Board of Directors of the local Member Board shall then implement the decision of the Hearing Panel in strict accordance with its terms and conditions. Any requests for appeal or procedural review should be considered by an appropriate body of the State Association or "deputized" local Board or regional enforcement facility in accordance with the relevant established professional standards procedures. *(Amended 11/93)*

19. Confidentiality of determinations rendered in ethics and arbitration hearings

The allegations, findings, and decisions rendered in ethics and arbitration hearings are confidential and should not be reported or published by the Board, any member of a tribunal, or any

party under any circumstances except those established in the *Code of Ethics and Arbitration Manual* of the National Association as from time to time amended. (Revised 11/91)

20. Statement of policy related to Article 17 of the Code of Ethics

Article 17 is not to be construed as precluding a REALTOR® who is a defendant in litigation from joining a cooperating agent and/or subagent in the litigation.

21. Adoption of the Code of Ethics and Arbitration Manual by Member Boards

Member Boards and State Associations are not required to adopt the Code of Ethics and Arbitration Manual verbatim, but no Member Board may adopt or follow any procedures inconsistent with the precepts enunciated in the *Code of Ethics and Arbitration Manual* of the National Association as from time to time amended.

22. Board and State Association publications or audiovisual programs concerning the Code of Ethics and its enforcement

Any articles, audiovisual programs, or any type of publication related to the Code of Ethics, its interpretation, or its enforcement that have not been prepared by or approved by the Professional Standards Committee of the National Association must be prefaced by a statement indicating that the contents reflect the understanding and opinions of the author(s) and do not represent an official expression of policy by the National Association. To the extent that any article, audiovisual program, or publication prepared by any individual or organization other than the National Association varies in any degree from the Code of Ethics, its interpretation, or its enforcement procedures as approved by the Professional Standards Committee of the National Association, the policies of the National Association shall take precedence.

No article, audiovisual program, or other publication may be designated as an official expression of policy concerning the Code of Ethics, its interpretation, or its enforcement without the express written approval of the National Association.

Local Boards and State Associations are encouraged to consider preparation of such articles, audiovisual programs, or other publications and are requested to submit them to the Professional Standards Committee or its staff representatives for review and approval prior to publication.

23. Disputes arising out of circumstances occurring prior to the time a REALTOR is elected to board membership

While REALTORS® are encouraged to resolve all disputes through the arbitration facilities of their Board or Boards, the intent of Article 17 is that only disputes arising from facts

occurring after each of the parties has become a REALTOR® are subject to mandatory arbitration under Article 17 of the Code of Ethics.

24. Formulation of Multi-Board or Regional Grievance or Professional Standards Committees for Code enforcement in areas where Boards have limited membership

Member Boards are authorized to enter into collective agreements by which the Boards would share the responsibility for enforcement of the Code of Ethics, including the conduct of arbitration hearings, on a joint basis.*

25. Expenses related to conduct of hearings by Multi-Board or regional Grievance or Professional Standards Committees

Expenses related to the conduct of hearings by a multi-Board or regional Grievance Committee or Professional Standards Committee shall be as established by written agreement between the signatory Boards. The expenses of such hearings shall be borne by the signatory Boards and shall not be supported by fees charged to the members other than as otherwise authorized by the *Code of Ethics and Arbitration Manual*. (Revised 11/98)

26. Burdens and standards of proof in arbitration and ethics hearings

In any ethics hearing or other hearing convened to consider alleged violations of membership duties and in any arbitration hearing, the ultimate burden of proving that the Code of Ethics or other membership duty has been violated, or that an arbitration award should be issued to the requesting party, is at all times on complainants and parties requesting arbitration.

The standard of proof on which an arbitration hearing decision is based shall be a "preponderance of the evidence." Preponderance of the evidence shall be defined as evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the facts sought to be proved are more probable than not.

"Clear, strong, and convincing" shall be the standard of proof by which alleged violations of all membership duties, including violations of the Code of Ethics, are determined. 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. (Revised 2/92)

*A sample format agreement approved by the Professional Standards Committee to establish a collective agreement is included as Specimen Forms #E-19 in Part Six and #A-19 in Part Thirteen of this Manual.

Appeals of ethics Hearing Panel decisions based on an alleged misapplication or misinterpretation of an Article(s) of the Code of Ethics shall be determined based on the correctness of the Hearing Panel's decision.

Appeals of ethics Hearing Panel decisions based on an alleged procedural deficiency or failure of due process, and procedural review of arbitration hearing procedures shall be determined based on whether the effect of the deficiency was to deny the appellant a fair hearing.

Appeal panels may modify discipline proposed by Hearing Panels only in instances where the discipline proposed is not authorized or where the appeal panel concludes that the Hearing Panel abused its discretion. *(Adopted 11/99)*

27. Consolidation of arbitration claims arising out of the same transaction

When reviewing requests for arbitration, Grievance Committees should try to ensure that all appropriate parties are named as complainants or respondents. If it appears that there may be related claims involving other parties arising out of the same facts, the Grievance Committee may suggest to either the complainant or respondent (or both) that they may wish to request arbitration with additional respondents or third-party respondents so that all related claims may be resolved through a single arbitration hearing. Upon motion by either the complainant or the respondent, an arbitration request may be amended to include any additional appropriate parties, or separate arbitration requests may be filed naming additional parties, so that all related claims arising out of the same transaction can be resolved at the same time. *(Revised 11/92)*

28. Participation in litigation rather than arbitration

In instances where a REALTOR® is a party to litigation involving an otherwise arbitrable matter and none of the parties invokes the Board's arbitration facility prior to or during the course of litigation, any member involved in the litigation may not thereafter be charged with failing or refusing to arbitrate. *(Revised 11/92)*

30. Participation in voluntary arbitration

Article 17 is not to be construed as precluding a REALTOR® from instituting litigation or causing a dispute to be brought before an alternative dispute-resolving forum other than the Board of REALTORS® under those circumstances where submission of the dispute to the Board would be voluntary. *(Adopted 5/88)*

31. "Cooperation" defined

The obligation to cooperate, established in Article 3 of the Code of Ethics, relates to a REALTOR®'s obligation to share information on listed property and to make property available

to other brokers for showing to prospective purchasers when it is in the best interest of the seller. An offer of cooperation does not necessarily include an offer to compensate a cooperating broker. Compensation in a cooperative transaction results from either a blanket offer of subagency made through MLS or otherwise, or offers to compensate buyer agents, or, alternatively, individual offers made to subagents or to buyer agents, or other arrangements as negotiated between listing and cooperating brokers prior to the time an offer to purchase is produced. *(Adopted 11/88)*

33. Use of panels in place of the Board of Directors

Any matter brought before the Board of Directors may be considered 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 a 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.

In appointing such a panel, the President should consider the following recommended criteria:

- number of years as a REALTOR®
- number of years in the real estate business
- primary and secondary fields of real estate endeavor/expertise
- participation in post-licensing real estate education
- training in the Code of Ethics
- position in firm (principal, nonprincipal)
- size of firm
- common sense
- open-mindedness
- familiarity with state(s) laws and regulations
- receptiveness to instruction/training
- other relevant professional or procedural training

Panel members should be mature, experienced, knowledgeable persons of judicial temperament. *(Revised 11/95)*

35. Separation of ethics complaint and arbitration request

When an ethics complaint and an arbitration request are filed at the same time arising out of the same facts and circumstances, the arbitration hearing shall be held first and the ethics hearing shall be conducted by a different Hearing Panel after the conclusion of the arbitration hearing. *(Adopted 11/93)*

38. Hearing Panels to be conversant with applicable state law under board of choice across state lines

Where membership is provided under board of choice across state lines, Hearing Panels must be conversant with and apply

the relevant state's laws and regulations in determining how the Code of Ethics will be interpreted/ applied in instances where the underlying transaction occurred out of state and involved a respondent licensed in that state. (Adopted 11/95)

39. Awards escrowed under board of choice across state lines

Where one or more parties to an arbitrable issue have obtained membership under board of choice across state lines, awards rendered shall be escrowed by the Board that conducted arbitration in a manner consistent with the procedures in Section 53 (c-f), The Award, *Code of Ethics and Arbitration Manual*. (Adopted 11/95)

40. Cooperative enforcement agreements

To ensure fair, impartial and knowledgeable enforcement of the Code of Ethics (including arbitration) there must be adequately large groups of knowledgeable, trained REALTORS® and REALTOR-ASSOCIATE®s from which the necessary committees and tribunals can be appointed. To this end, Boards and Associations are encouraged to immediately begin efforts to enter into cooperative enforcement agreements to ensure Boards and/or Associations have an aggregate total of at least two hundred (200) primary REALTOR® and/or REALTOR-ASSOCIATE® members from which to compose Hearing Panels. It is recommended but not required that representation/participation in any multi-board regional cooperative enforcement agreement be on a pro-rata basis. These standards shall become mandatory effective January 1, 1997. Effective January 1, 2001 the minimum aggregate number of primary members is two hundred seventy-five (275); and effective January 1, 2002 the minimum aggregate number of primary members is three hundred fifty (350). This requirement will not apply in instances where, in the opinion of the state association, unique geographical considerations (e.g., islands, remote locale, etc.), logistical difficulties or other impediments make participation prohibitive. Effective January 1, 2001, all Boards regardless of size (except Commercial Overlay Boards) must participate with at least one other Board (which may be the state association) in a cooperative enforcement agreement. (Revised 11/99)

41. Arbitration Guidelines to parties

Boards conducting arbitration are required to provide all parties and panel members with the Arbitration Guidelines prior to commencement of any arbitration hearing. (Adopted 11/96)

42. Previously dismissed ethics complaints/ arbitration requests

If an ethics complaint or arbitration request is received and reviewed by a Board's Grievance Committee or Board of Directors and is dismissed as not warranting a hearing, the respondent(s) shall not subsequently become subject to the

same (or substantially similar) ethics complaint or arbitration request in the same or another Board. (Adopted 5/97)

Dismissal of an arbitration request by a Board of REALTORS® because the dispute is not arbitrable based on Article 17 or other grounds established in the *Code of Ethics and Arbitration Manual*, does not prohibit REALTORS® from exercising other remedies that may be available to them, including litigation. (Adopted 5/99)

43. Duty to arbitrate personal

The privilege to invoke arbitration and the duty to arbitrate is personal. Although any REALTOR® principal may invoke the arbitration facilities of a Board and be required to arbitrate, REALTOR® principals may not delegate this privilege or obligation. (Adopted 11/98)

44. Effective dates of the Code of Ethics and Standards of Practice and the Code of Ethics and Arbitration Manual.

All changes to the Code of Ethics and Standards of Practice carry an annual effective date of January 1 of the year following their approval by the Board of Directors of the National Association and, where necessary, by the Delegate Body. (Adopted 11/89)

To ensure consistent, uniform enforcement of the Code of Ethics nationwide, all changes in professional standards policy normally incorporated into the National Association's *Code of Ethics and Arbitration Manual* should become effective only upon publication in a new edition of the *Code of Ethics and Arbitration Manual*. (Adopted 11/89)

All new and amended Case Interpretations become effective upon approval by the National Association's Professional Standards Committee and publication on REALTOR.org. (Adopted 5/98)

46. Duty to arbitrate after membership lapses or is terminated

The duty to submit to arbitration continues in effect after membership lapses or is terminated provided that the dispute arose prior to the time the respondent's membership lapsed or was terminated. (Adopted 5/99)

50. Separate subcommittees for ethics, arbitration, and mediation

Boards and Associations are strongly encouraged to meet their professional standards enforcement responsibility (ethics adjudication and dispute resolution) through subcommittees specifically delegated responsibility for arbitration, mediation, and for the conduct of hearings to resolve ethics complaints and alleged violations of other membership duties. (Adopted 11/99)

51. Mediators used by Boards

Mediators used by Boards and Associations to resolve contractual disputes and noncontractual disputes defined in Standard of Practice 17-4 may be REALTORS®, Board/Association staff, or others whose services a Board/Association chooses to utilize. (Adopted 11/99)

52. Boards to provide mediation

Effective January 1, 2002, the duty of local Boards and Associations to provide mediation services established in Article IV, Section 2 of the Bylaws of the NATIONAL ASSOCIATION OF REALTORS® can be met through provision of mediation services by local Boards and Associations; through multi-Board/regional cooperative enforcement agreements; or through agreement/arrangement with the state association. (Adopted 11/99)

53. Dispute resolution fees not to exceed maximum arbitration fee

Effective January 1, 2002, the fees charged for Board/Association dispute resolution services, i.e., mediation and arbitration, may not exceed the maximum arbitration filing fees authorized in the *Code of Ethics and Arbitration Manual* of the NATIONAL ASSOCIATION OF REALTORS®. Boards/Associations may, as a matter of local option, retain part or all of the filing fees paid, irrespective of whether disputes are resolved through mediation or arbitration. (Adopted 11/99)

54. Personal safety in professional standards proceedings

Boards and Associations should take reasonable steps to ensure the personal safety of parties, panelists, witnesses, staff, and others participating in professional standards proceedings. In instances where, in the opinion of the presiding committee or Hearing Panel Chair, there is an unacceptable risk posed to the safety of any participant, the proceedings will be recessed so the Chair can consult with staff, Board or Association elected leadership, or Board or Association counsel to identify and take steps to ensure the safety of all participants and to permit the proceedings to resume.

If after consulting with staff, Board or Association counsel, and any other appropriate party or agency (including law enforcement authorities), and after taking reasonable steps to attempt to resume the proceeding while ensuring the safety of all participants, the Board of Directors concludes it will be unduly difficult or impossible to ensure the safety of all participants, the proceedings will be postponed indefinitely and resumed only when the Board of Directors (or its successor) concludes that the proceedings can be safely resumed. Where proceedings are postponed indefinitely by action of the Board of Directors, a memorandum detailing the circumstances shall be appended to the case file and maintained on a permanent basis. The Board of Directors may, at their discretion, share any

or all information including the complaint, response, or other documentation or information in their possession with appropriate law enforcement or other government agencies. (Adopted 5/00)

55. Transmitting devices

Cellular phones, two-way radios and other transmitting devices may not be operated during ethics hearings, arbitration hearings, appeal hearings, and procedural review hearings absent specific, advance authorization from the panel chair. (Adopted 11/04)

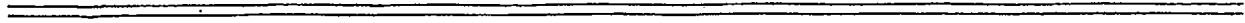
56. "Remote" testimony

The policies and procedures established in the National Association's *Code of Ethics and Arbitration Manual* contemplate that except in extreme circumstances parties and their witnesses will participate in ethics and arbitration hearings in the physical presence of Hearing Panels and the respective parties.

"Extreme circumstances" in which parties and witnesses to ethics and arbitration hearings may be permitted to participate in those hearings by teleconference or videoconference at the discretion of the Hearing Panel chair are defined as circumstances where (1) postponement or rescheduling of the hearing to permit their participation is not feasible and (2) failure to accept such testimony or permit such participation would deny a party a fair hearing.

The costs of "remote" testimony shall be the responsibility of the party requesting the opportunity to participate or offer testimony by teleconference or videoconference.

Counsel is permitted to participate in ethics or arbitration hearings only in the physical presence of Hearing Panels. (Adopted 11/04)



Part Seven—Arbitration General Provisions

Section 26. Definitions Relating to Arbitration

As used herein,

- (a) "Agent" means a real estate licensee (including brokers and sales associates) acting in an agency relationship as defined by state law or regulation. *(Revised 4/98)*
- (b) "Board" means this organization, either the _____ (local) Board/ Association of REALTORS® or the _____ (state) Association of REALTORS®.
- (c) "Broker" means a real estate licensee (including brokers and sales associates) acting as an agent or in a legally recognized non-agency capacity. *(Adopted 4/98)*
- (d) "Client" means the person(s) or entity(ies) with whom a REALTORS® or a REALTOR®'s firm has an agency or legally recognized non-agency relationship. *(Revised 11/97)*
- (e) "Counsel" means an attorney at law. *(Adopted 4/91)*
- (f) "Customer" means a party to a real estate transaction who receives information, services, or benefits but has no contractual relationship with the REALTORS® or the REALTOR®'s firm. *(Revised 11/97)*
- (g) "Directors" means the Board of Directors of the Board (State Association) as interpreted by Policy Statement #33. *(Revised 11/91)*
- (h) "Hearing" may refer either to an ethics hearing relating to disciplinary matters or to an arbitration hearing in which the dispute generally involves entitlement to a commission or to compensation. *(Revised 11/93)*
- (i) "Member" means REALTOR® and REALTOR-ASSOCIATE® members of this Board (State Association). REALTORS® who participate in MLS or otherwise access MLS information through any Board in which they do not hold membership are subject to the Code of Ethics in that Board. *(Amended 11/95)*
- (j) "Party" (Parties) means the complainant(s) or respondent(s) in disciplinary proceedings and in arbitration hearings referred to in Part Four and Part Ten of this Manual. *(Revised 11/91)*
- (k) "REALTOR® principal" includes licensed or certified individuals who are sole proprietors, partners in a partnership, officers or majority shareholders of a corporation, or office managers (including branch office managers) acting on behalf of principals of a real estate firm who subscribe to the Code of Ethics as a condition of

membership in a local Board, State Association, and the NATIONAL ASSOCIATION OF REALTORS®. The phrase REALTOR® principal includes those REALTORS® who participate in a Multiple Listing Service through any Board or Association in which they do not hold membership. *(Revised 5/97)*

- (l) "Secretary" means the Executive Officer of any Board. *(Revised 11/98)*
- (m) "Tribunal" means those persons serving in a given case on a Grievance Committee or a Hearing Panel of the Professional Standards Committee in either an ethics or arbitration proceeding, or a Board of Directors or appropriate body appointed by a Board of Directors to act in its behalf. No individual may participate in the deliberation of more than one tribunal on the same matter. *(Revised 5/88)*
- (n) "Unauthorized disclosure" means a report or publication under any circumstances not established in this Manual. *(Adopted 11/91)*

Section 27. Qualification for Tribunal

- (a) No more than one person licensed with any firm, partnership, or corporation may serve on the same tribunal. *(Revised 4/98)*
- (b) A person shall automatically be disqualified as a member of a tribunal in any case in which the person is (1) related by blood or marriage to either complainant or respondent; (2) an employer, partner, employee, or in any way associated in business with either complainant or respondent; (3) a party to the hearing, or a party or a witness in any other pending case involving a party to this hearing; or (4) is objected to by a party as provided in Part Seven, Section 27(f).
- (c) Before sitting in any case, each member of a tribunal (except any member of the Grievance Committee) shall sign a statement (1) that the member is not disqualified for any of the foregoing reasons, and (2) that the member knows of no other reason that might prevent him from rendering an impartial decision. (Form #A-11, Certificate of Qualification, Part Thirteen of this Manual.)
- (d) Every member of a tribunal (except a member of the Grievance Committee acting pursuant to the provisions of Part Ten, Section 47 of this Manual) shall also avoid, as far as possible, discussing the case with any person other than a member of the tribunal prior to commencement of the hearing. If the member does engage in any such discussion before the hearing, the member must disclose the fact to the parties and to the other members of the tribunal no later than at the beginning of the hearing.

- (e) All members of a tribunal shall have an obligation to maintain and protect the confidentiality of the proceedings and deliberations of the tribunal before, during, and after its determinations and recommendations. The tribunal member shall not discuss the tribunal proceedings and deliberations with any person(s) except as required by the Board of Directors or the bylaw provisions of the Board, or by law as may be required, except that a member of the Grievance Committee acting pursuant to the provisions of Part Ten, Section 47 of this Manual shall not be precluded from discussion necessary to the preliminary review.

Unauthorized disclosure includes any report or publication under any circumstances not established in this Manual. The following are circumstances where disclosure by a party to an ethics and/or arbitration proceeding is authorized:

- (1) Where the dissemination of the decision to individuals who have some knowledge of the proceeding might vindicate a member's professional reputation.
 - (2) Where there is a civil proceeding (including proceedings before the state real estate licensing authority or any other state or federal regulatory or administrative agency) involving the same facts and circumstances which gave rise to the proceeding before the Board. *(Revised 11/95)*
- (f) Any party may file with the Secretary a written request for disqualification of a member of a tribunal (Hearing Panel or Board of Directors), stating the grounds alleged as basis for disqualification (i.e., factors which would prevent a tribunal member from rendering an impartial, unbiased, and knowledgeable decision). Challenges submitted pursuant to this Section for ethics and arbitration hearings will be determined by the Professional Standards Committee Chairperson, or, if challenge to the Chairperson is made, by the Professional Standards Committee Vice Chairperson, or, if challenge to both the Chairperson and Vice Chairperson is made, by the Board President. Challenges submitted pursuant to this Section for matters to be considered by the Board of Directors will be determined by the Board President or, if the challenge is to the Board President's qualifications, the next ranking Board officer. A party shall be deemed to have waived any grounds of disqualification of which he then has knowledge unless he files the request within ten (10) days from the date a list of names of members of the Professional Standards Committee or Board of Directors has been mailed to the party (see Part Ten, Section 51(a), Arbitration Hearing). However, any member of the tribunal may be disqualified at any time if a majority of the members of the tribunal are made aware of any grounds of automatic disqualification of a member or find any new or previously undiscovered facts which in their judgment may prevent, or appear to prevent, a member of a tribunal from rendering an impartial decision. *(Revised 11/91)*

However, none of the foregoing is to be construed to allow a challenge to the qualifications of members of a Board's or State Association's Grievance Committee, or Board of Directors (or panel of Directors or Executive Committee) convened to review any action taken by a Grievance Committee. *(Revised 11/98)*

- (g) If a member of a tribunal fails or is unable to participate in a hearing, the remaining members of the tribunal may, at their option, but only with the express consent of the parties, proceed with the hearing. Only the remaining members of the tribunal may participate in the hearing and the determination thereof. Should any member of the tribunal absent himself during the progress of the actual hearing, that individual shall likewise not participate in the deliberations nor determinations thereof. If all the parties do not agree to proceeding without the full number of the tribunal originally designated, the Chairperson of the tribunal will recess the hearing to a date on which all members of the tribunal can be present. If the Chairperson cannot at that time designate a new date, notice of a subsequent date shall be served on all parties as herein provided.

Section 28. Duty to Give Evidence

The parties to ethics and arbitration hearings are primarily responsible for production of witnesses and evidence they intend to present to the Hearing Panel. If a member, when called as a witness, refuses or is unable to appear at a scheduled hearing, the witness's failure to appear can be the basis for a charge that Article 14 has been violated if it can be shown that the witness had information or evidence relevant to the issue or issues before the Hearing Panel and that there were no extenuating circumstances that would have made the witness's appearance unduly burdensome. Questions regarding a member's obligation to appear as a witness, including questions of relevancy, shall be determined by the Chair of the Hearing Panel either before the hearing commences, if possible, or at the time of the hearing. If a question of whether a witness is required to appear is raised at a hearing and the Chair rules that the witness must appear, the party seeking to compel the appearance of the witness may request that the hearing be recessed until such time as the witness can be advised of the witness's obligation to appear, and the hearing shall be rescheduled. The burden of demonstrating the relevance of the testimony or evidence rests with the party seeking to compel the witness's appearance. *(Revised 11/93)*

If, after being so advised, a witness refuses to appear, the Chair may, at its discretion, bring a charge against the witness for failure to comply with Article 14. *(Revised 11/93)*

Section 29. Right of Counsel to Appear

Every party may be represented by legal counsel but such counsel may not testify as a witness unless the panel determines such testimony is essential to ensure due process. In the event parties do not give fifteen (15) days' notice of their intention to

have counsel to the Board and all other parties, including counsel's name, address, and phone number, the panel shall take all steps, including continuance of the matter, if necessary, to guarantee the rights of all parties to representation by counsel. The tribunal may have counsel present to advise it on issues of procedure and law. The presence of Board legal counsel during executive session is a matter of local Board discretion. The role of Board counsel during a hearing is to provide procedural and legal guidance as requested by the Chairperson or by panel members. Board counsel is not a part of the Hearing Panel and may not take an active role in the conduct of the hearing, including examination or cross-examination of the parties or their witnesses. If Board counsel believes an action or procedure is inconsistent with the Board's established procedures or may result in potential liability to the Board, counsel's concerns should be communicated to the Chairperson of the Hearing Panel and the Chairperson shall make the final decision. *(Revised 11/97)*

Section 30. Witnesses

Every party may have witnesses present at the hearing, and the tribunal may summon its own witnesses. All witnesses will be excused from the hearing after completion of their testimony and cross-examination.

Any party who intends to call witnesses at the hearing must provide the Board and all other parties with the names of these witnesses at least fifteen (15) days prior to the hearing. Failure to provide this information within the time specified will constitute a waiver of the right to call those witnesses at the hearing, unless the other party agrees to allow their testimony. *(Revised 11/88)*

In any case where all of the names of witnesses a party intends to call at the hearing have not been provided within the time specified, if the Hearing Panel believes that the testimony of that witness(es) is essential to ensure due process, his testimony may be permitted provided the other party has the right to request that the hearing be recessed and continued to a date certain not less than five (5) days later. *(Revised 11/88)*

Questions as to whether a member who has been called as a witness but who refuses to appear, or asserts that his appearance will result in an unreasonable hardship, shall be determined by the Hearing Panel Chair as soon as practical. Refusal to appear, after the Chair has determined that the member's appearance is required, may result, at the Chair's discretion, in charges that Article 14 has been violated being filed against the member. *(Adopted 11/93)*

Section 31. Conduct of Hearing

At any ethics or arbitration hearing, every party has the right to present any witnesses, to submit any evidence pertinent to the case, and to cross-examine witnesses. Witnesses giving oral testimony shall be sworn in by the Chairperson. Before permitting testimony relating to the character or general reputation of anyone, the tribunal shall satisfy itself that the

testimony has a direct bearing on the case at issue. The Board shall, and any party (may/may not), at his own expense, have a court reporter or recorder present at the hearing, or may tape record* the proceeding, and, if transcribed, shall present a copy to the Secretary.** If the Board utilizes a court reporter in lieu of tape recording, the parties may not be prohibited from making their own tape recording. (See Form #A-10, Outline of Procedure for Arbitration Hearing, Part Thirteen, and Conduct of an Arbitration Hearing, Part Twelve.) Ethics and arbitration hearings must be recorded, not appeals or limited procedural review proceedings. Boards shall prohibit parties from recording appeals or limited procedural review proceedings. *(Revised 11/92)*

The Board's tape recording or transcription shall be considered the official record of the proceeding. Copies of any tape recording or any transcript prepared from any tape recording of the hearing are to be used only for the purpose of procedural reviews.*** Any party to a hearing has the right to obtain a copy of the Board's official tape recording subject to payment of the Board's duplication costs, and any duplication will be conducted under the supervision of the Board. If the Board transcribes its official tape recording, any party to the hearing may obtain a copy of the transcript subject to paying the Board's transcription costs. If more than one party requests copies of the transcript, the Board's costs will be apportioned between or among the parties. *(Revised 11/98)*

If a party purchases a copy of the Board's official tape recording and subsequently has it transcribed at his own expense, that party must provide a copy of the transcript to the Board at no cost. After the Board has received a copy of the transcript (made from the Board's official tape recording), the Board shall make copies of the transcript available to any other party subject to their payment of the Board's duplication costs.

Attendance at any hearing is limited to the parties and the parties' respective counsel and/or witnesses (witnesses are excused from the hearing except during their testimony [except those witnesses with a vested financial interest consistent with Part Ten, Section 44(a)(2), Duty and Privilege to Arbitrate]); the Hearing Panel members (including alternates); Board staff and/or counsel, as deemed necessary; and any court reporter, as requested. *(Revised 11/98)*

*It is recommended that tapes produced by the Board be maintained in the confidential professional standards files until a date when any sanction imposed by the Board has been completed.

**Videotaping of the proceedings shall not be permitted except by advance express consent of all parties and all members of the tribunal.

***Tape recordings or transcripts from arbitration hearings may be used only by the parties for the purpose of procedural review requests, and may not be introduced into evidence at any subsequent hearing. Any other unauthorized use of the tape recordings or transcripts may be construed as a violation of Article 14, as interpreted by the applicable Standards of Practice, and as a violation of these procedures. *(Revised 11/98)*

Section 32. Notices

- (a) Any notice required to be given or paper required to be served or filed may be personally handed to the party to be notified or sent by registered or certified mail addressed to the party's last known mailing address. If mailed, any notice required to be given or paper required to be served or filed shall be deemed given, served, or filed when mailed unless otherwise specified in this Manual. *(Revised 11/91)*
- (b) Notice of hearing shall include the names of the members of the tribunal and be given not less than twenty-one (21) days beforehand. Twenty-one (21) days' notice is not required for postponed hearings (scheduled but extension granted before hearing commences) or for hearings that have commenced and been adjourned (recessed). Notice of rehearings shall be given not less than twenty-one (21) days before the rehearing. *(Revised 11/95)*

Section 33. Interpretation of Bylaws

If any provision of the bylaws or a rule or regulation relative to the procedure of a tribunal's handling of a matter is involved, the interpretation by that tribunal of the bylaws or of a rule or regulation shall be set forth as a separate finding, and the Directors, on appeal from a decision of a Hearing Panel, shall not be bound by the panel's interpretation.

Section 34. Waiver

Every member, for and in consideration of his right to invoke arbitration proceedings and to initiate complaints under the Code of Ethics as a member of the NATIONAL ASSOCIATION OF REALTORS®, hereby waives any right of action against the Board, any Board Member, or any member of a Hearing Panel or tribunal arising out of any decisions, determinations, or other action taken or rendered under these procedures in the absence of willful or wanton misconduct. Further, as a condition of continued membership, every member expressly waives any cause of action for libel, slander, or defamation that might arise from the filing or consideration of any ethics complaint or arbitration request. *(Revised 11/87)*

Section 35. Communication and Clerical

Communications shall be directed to the Secretary. The Secretary shall render all necessary assistance to the parties, shall furnish required forms, shall receive and file all documents or other papers, and shall receive all fees and disburse all monies payable to the Board.

Section 36. Attempt to Influence Tribunal

Any attempt, directly or indirectly, to influence a member of a tribunal in any matter before it, other than by giving evidence and argument in an open hearing or in writing submitted to the entire tribunal, is a breach of a duty of membership.

Part Eight— Membership Duties and Their Enforcement

Section 37. Duties of Membership

The duties of membership include the following:

- (a) to abide by the Code of Ethics of the NATIONAL ASSOCIATION OF REALTORS®
- (b) to abide by the bylaws of this Board and its rules and regulations
- (c) to submit to arbitration all disputes specified in Part Ten of this Manual by the procedure therein provided, and to abide by the arbitrators' award* (Revised 11/96)

Subject to any preliminary consideration by any administrative body of the Board or its subsidiary MLS, any allegations or charges that a member has violated any membership duty shall be referred to the Professional Standards Committee for review in conformity with the procedures established in this Manual as from time to time amended. (Revised 11/91)

Section 38. Selection and Appointment of the Grievance Committee

There will be a standing committee, known as the Grievance Committee, of at least _____ Board Members, in good standing, of whom at least a majority shall be REALTORS®. The members of the committee shall be appointed by the President, subject to confirmation by the Board of Directors, for staggered three (3) year terms. The committee shall annually select its own Chairperson and Vice Chairperson (or, alternatively, the President shall annually designate the Chairperson and Vice Chairperson of the committee).

In selecting members of the Grievance Committee, the President should consider the following recommended criteria:

- number of years as a REALTOR®
- number of years in the real estate business
- primary and secondary fields of real estate endeavor/expertise
- participation in post-licensing real estate education
- training in the Code of Ethics
- position in firm (principal, nonprincipal)
- size of firm
- common sense

*While most states recognize the enforceability of a prior agreement to arbitrate disputes, a few states prohibit an agreement to arbitrate until after the dispute has arisen and in a few instances such arbitration is not recognized at all (or at least is unenforceable by the court). Where such prohibition exists, Board (state) legal counsel should be consulted and the Manual modified accordingly. Arbitration conducted by Member Boards shall in all respects conform to the requirements of state law applicable to arbitration. If a member refuses to abide by an award in arbitration, enforcement of the award shall be accomplished only in the manner set forth in Part Four, Section 24 and Part Ten, Section 56 of this Manual.

- open-mindedness
- familiarity with state(s) laws and regulations
- receptiveness to instruction/training
- other relevant professional or procedural training

The committee should have balanced representation of REALTORS®, REALTOR-ASSOCIATE®s, men, and women, and should include representatives of various racial and ethnic groups. Committee members should be mature, experienced, knowledgeable persons of a judicial temperament. It is suggested that, to the extent practical, members of the Grievance Committee not serve simultaneously on the Professional Standards Committee or on the Board of Directors to avoid conflict with the prohibition on serving on more than one (1) tribunal in the same matter. (Revised 11/96)

Section 39. Selection and Appointment of the Professional Standards Committee

There shall be a Professional Standards Committee of at least _____ Board Members, in good standing, of whom at least a majority shall be REALTORS®, appointed by the President, subject to confirmation by the Board of Directors. Members of the Professional Standards Committee shall be selected to serve on Hearing Panels as required to hear matters of alleged unethical conduct by Board Members or to provide arbitration as requested. The committee shall annually select its own Chairperson and Vice Chairperson (or, alternatively, the President shall annually designate the Chairperson and Vice Chairperson of the committee).*

In selecting members of the Professional Standards Committee, the President should consider the following recommended criteria:

- number of years as a REALTOR®
- number of years in the real estate business
- primary and secondary fields of real estate endeavor/expertise
- participation in post-licensing real estate education
- training in the Code of Ethics
- position in firm (principal, nonprincipal)
- size of firm
- common sense
- open-mindedness
- familiarity with state(s) laws and regulations
- receptiveness to instruction/training
- other relevant professional or procedural training


*In Boards with larger memberships, it is desirable for a larger committee to be named to avoid an overload of work upon any individual which could result from the greater number of hearings in these Boards. In such Boards, an uneven number of members from the Professional Standards Committee may be appointed to constitute a Hearing Panel for each case to be heard. (Revised 11/92)

The committee should have balanced representation of REALTORS®, REALTOR-ASSOCIATE®s, men, and women, and should include representatives of various racial and ethnic groups. Committee members should be mature, experienced, knowledgeable persons of a judicial temperament. It is suggested that, to the extent practical, members of the Professional Standards Committee not serve simultaneously on the Grievance Committee or on the Board of Directors to avoid conflict with the prohibition on serving on more than one (1) tribunal in the same matter. *(Revised 11/96)*

Part Nine—The Grievance Committee in Arbitration Proceedings

Section 40. Authority

The Grievance Committee is established in Part Two, Section 15 and Part Eight, Section 38 of this Manual, which provide in part:

 There will be a standing committee, known as the Grievance Committee, of at least _____ Board Members in good standing, of whom at least a majority shall be REALTORS®. The members of the committee shall be appointed by the President, subject to confirmation by the Board of Directors, for staggered three (3) year terms. The committee shall annually select its own Chairperson and Vice Chairperson (or, alternatively, the President shall annually designate the Chairperson and Vice Chairperson of the committee).

Section 41. Function

The function of the Grievance Committee is clearly distinguishable from the function of the Professional Standards Committee. The Professional Standards Committee is similar to a court. The court adjudicates matters that come before it. The Professional Standards Committee makes decisions on matters involving ethics or arbitration.

If the function of the Professional Standards Committee is understood as similar to a court, the function of the Grievance Committee can then be understood as similar to that of the grand jury. A grand jury evaluates potentially criminal conduct to determine whether the evidence and testimony presented warrants indictment and trial.

In a similar manner, the Grievance Committee receives ethics complaints and arbitration requests to determine if, taken as true on their face, a hearing is to be warranted. The Grievance Committee makes only such preliminary evaluation as is necessary to make these decisions. While the Grievance Committee has meetings, it does not hold hearings, and it does not decide whether members have violated the Code of Ethics. The Grievance Committee does not mediate or arbitrate business disputes.

In evaluating ethics complaints, the Grievance Committee may require a written response from the respondent(s). In such instances the respondent(s) should be provided with a copy of the ethics complaint and advised that failure to respond may be the basis for a charge of having violated Article 14 of the Code of Ethics. (See Form #E-4, Grievance Committee Request for Information [Ethics Complaint] and Form #E-5, Response to Grievance Committee Request for Information, Part Six of this Manual). In evaluating arbitration requests, the Grievance Committee may request a written response to the arbitration request from the respondent(s). (See Form #A-5, Grievance Committee Request for Information [Arbitration Request] and Form #A-6, Response to Grievance Committee Request for Information, Part Thirteen of this

Manual.) If no response is filed within the time allotted, the Grievance Committee shall make its determination as to whether an arbitration hearing should be scheduled based upon the information set forth in the arbitration request.

Section 42. Grievance Committee's Review and Analysis of a Request for Arbitration

A. Initial action upon receipt of a request for arbitration

Upon receipt of a request for arbitration, the Secretary shall refer the arbitration request to the Chairperson of the Grievance Committee. The Chairperson shall review the arbitration request and any evidence and documentation attached. The Chairperson may assign one or more members of the Grievance Committee to review the request and to make any necessary evaluation. The member(s) may, if necessary, gather additional information on the matters complained of if additional information appears necessary to make a knowledgeable disposition of the arbitration request. The request shall be provided to the assigned members by the Board Secretary upon instruction from the Chairperson. (Amended 4/94)

The reviewer(s), if appointed, shall complete the assignment promptly and prepare a report and recommendation for the Grievance Committee. After reviewing the report, the Chairperson shall schedule a meeting of the Grievance Committee and may instruct the Secretary to provide members of the Grievance Committee with copies of the case file including the reviewer's report, if any. At the option of the Board, such file may be sent to the Grievance Committee members prior to the meeting or may be distributed at the meeting. (Amended 4/94)

B. Consideration by the Grievance Committee of a request for arbitration

In reviewing a request for arbitration, the Grievance Committee shall consider the following:

- (1) Is the request for arbitration acceptable in the form as received by the committee? If not in proper form, the Chairperson may request that the Elected Secretary or the Executive Officer contact the complainant to advise that the request must be submitted in proper form.

NOTE: If deemed appropriate by the Chairperson, a member of the Grievance Committee may be assigned to contact the complainant and to provide procedural assistance to amend the request or resubmit a new request in proper form and with proper content. The Grievance Committee member providing such assistance shall ensure that only procedural assistance is provided to the complainant, and that the complainant understands that the member is not representing the complainant.

(2) Are all necessary parties named in the request for arbitration? The duty to arbitrate is an obligation of REALTOR® principals. REALTOR® principals include sole proprietors, partners in a partnership, officers or majority shareholders of a corporation, or office managers (including branch office managers) acting on behalf of principals of a real estate firm. (Revised 11/98)

(3) Was the request for arbitration 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? (Revised 4/92)

(4) Are the parties members in good standing or otherwise entitled to invoke arbitration through the Board's facilities? Were the parties members at the time the facts giving rise to the dispute occurred?

(5) Is litigation pending in connection with the same transaction?

NOTE: No arbitration shall be provided on a matter pending litigation unless the litigation is withdrawn with notice to the Board and request for arbitration, or unless the court refers the matter to the Board for arbitration.

(6) Is there any reason to conclude that the Board would be unable to provide an impartial Hearing Panel?

(7) If the facts alleged in the request for arbitration were taken as true on their face, is the matter at issue related to a real estate transaction and is it properly arbitrable, i.e., is there some basis on which an award could be based?

(8) If an arbitrable issue exists, are the parties required to arbitrate or is their participation voluntary?

(9) Is the amount in dispute too small or too large for the Board to arbitrate?

(10) Is the matter too legally complex, involving issues that the arbitrators may not be able to address in a knowledgeable way?

(11) 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 Chairperson of the Professional Standards Committee for arbitration by an arbitration Hearing Panel.

C. Appeals from the decision of the Grievance Committee related to a request for arbitration

If the Grievance Committee determines that a matter should not be arbitrated by the Board because of the amount involved or the legal complexity, or for any other valid reason specified in the Grievance Committee decision and written report, either of the parties may appeal the decision to the Board of Directors within twenty (20) days of the date of notice of the committee decision using Form #A-20, Appeal of Grievance Committee Dismissal or Classification of Arbitration Request; however, no additional information may be added or attached to the form. The Hearing Panel can also dismiss the arbitration request if the Hearing Panel concludes the matter is not arbitrable. (Amended 5/97)

Only those materials which were presented to the Grievance Committee when the Grievance Committee made its decision will be presented to the Board of Directors and considered with the appeal. The parties to the arbitration (complainant and respondent) do not have the right to appear at the appeal hearing before the Directors. In the event a request for arbitration is dismissed, any deposit submitted by the complainant shall be returned to the complainant. (Revised 11/91)

Part Ten—Arbitration of Disputes

Section 43. Arbitrable Issues and Appropriate Parties

As used in Article 17 of the Code of Ethics and in Part Ten of this Manual, the terms “dispute” and “arbitrable matter” are defined as those contractual issues and questions, and specific non-contractual issues and questions defined in Standard of Practice 17-4, including entitlement to commissions and compensation in cooperative transactions, that arise out of the business relationships between REALTORS® and between REALTORS® and their clients and customers, as specified in Part Ten, Section 44, Duty and Privilege to Arbitrate. (Revised 11/96)

A Member Board should determine through advice of legal counsel:

- (1) Whether state law permits an agreement to binding arbitration in advance of a dispute or only after the dispute occurs, or
- (2) If binding arbitration is not recognized and is thus unenforceable by state law. The Board’s arbitration procedures must conform to applicable state law.

In 2001, Article 17 was amended by the addition of the following paragraph:

The obligation to participate in arbitration contemplated by this Article includes the obligation of REALTORS® (principals) to cause their firms to arbitrate and be bound by any award.

This expansion in the scope of Article 17 does not diminish the personal responsibility of REALTORS® to participate in arbitration. While Article 17 obligates REALTORS® to “. . . cause their firms to arbitrate and be bound by any award . . .,” it does not confer REALTOR® membership status on real estate firms. Membership, and the duties membership imposes including adherence to the Code of Ethics, is still personal to every REALTOR®.

The change to Article 17 enhances the dispute resolution process by increasing the availability of arbitration—and the likelihood that awards will be enforceable and paid. In many instances, the disputes giving rise to arbitration under Article 17 relate to contracts between REALTORS® firms or between REALTORS® acting on behalf of their respective firms. Even where disputes are actually between firms, Article 17 has required that arbitration complainants and respondents be individual REALTORS® (principals), and that awards be rendered in favor of and against individual REALTORS® (principals). In some instances this requirement has resulted in unfair results or rendered the arbitration process impotent because awards were uncollectible. Examples include REALTOR® (principal) respondents leaving the association’s jurisdiction, leaving the real estate business, relinquishing their status as a principal in the firm, or being insolvent or “judgment-proof.”

The expansion of Article 17 does not require substantive changes to the way associations of REALTORS® conduct arbitration. It does, however, give both arbitration complainants and respondents greater latitude in determining who the parties are and how any resulting award will be made.

For example, a REALTOR® seeking to invoke arbitration could name a REALTOR® (principal) in another firm as the sole respondent; could name multiple REALTORS® (principals) in the other firm as respondents; could name a firm (comprised of REALTOR® principals) as the respondent; or could name both individual REALTORS® (principals) and their firm as respondents. In this way, the likelihood of the arbitration process being thwarted because a named respondent is no longer subject to an association’s jurisdiction before, during or after the arbitration process, or an award being uncollectible, is greatly reduced.

Similarly, individual REALTOR® respondents who want either additional REALTOR® principals or their firms (or both) to be parties to the dispute can file an arbitration request against the original complainant with additional REALTORS® (principals) or the firm (or both) named as complainants. In such cases both claims would be consolidated by the Grievance Committee and all claims would be resolved in a single hearing.

Common questions include:

- (1) If only an individual REALTOR® (principal) is named as the respondent in an arbitration request, can a Hearing Panel make an award against the respondent’s firm?

No. Awards can only be made against named parties in the arbitration request and agreement.

- (2) If only an individual REALTOR® (principal) is named as the complainant in an arbitration request, can a Hearing Panel make an award in favor of the complainant’s firm?

No. Awards can only be made in favor of parties named in the arbitration request and agreement.

- (3) If an award is made against an individual REALTOR® (principal), is it enforceable against the respondent’s firm?

Awards are generally enforceable against parties named in the award.

- (4) Can I name both a REALTOR® (principal) and his firm as respondents in an arbitration request?

Yes.

- (5) What is the advantage to naming both a REALTOR® (principal) and his firm as respondents in an arbitration request?

Naming a REALTOR® (principal) as respondent lets the complainant know who will appear at the hearing, and naming the firm as respondent increases the chances of collecting any resulting award.

- (6) If a REALTOR®'s firm is named as the respondent in an arbitration request and refuses to arbitrate, who can be named as respondent in a complaint alleging that Article 17 has been violated?

Any REALTOR® (principal) who holds membership locally or who enjoys MLS participatory rights through the association can be named as respondent.

- (7) If only a REALTOR®'s firm is named as respondent in an arbitration request, who is served with notices?

Any REALTOR® (principal) in the firm may be served with notices.

(Revised 5/01)

Section 44. Duty and Privilege to Arbitrate

- (a) By becoming and remaining a member and by signing or having signed the agreement to abide by the bylaws of the Board, every member, where consistent with applicable law, binds himself or herself and agrees to submit to arbitration by the Board's facilities all disputes as defined by Article 17 of the Code of Ethics and, as set forth in the provisions of this Manual, all disputes with any other member, as defined, under the following conditions. In addition, REALTOR® principals who participate in a Board's MLS where they do not hold Board membership, or nonmember brokers and nonmember licensed or certified appraisers who participate in the Board's MLS, having signed the agreement to abide by the Board's Multiple Listing Service rules and regulations binds himself or herself and agrees to submit to arbitration by the Board's facilities. The duty to submit to arbitration continues in effect even after membership lapses or is terminated, provided that the dispute arose while the respondent was a REALTOR® or an MLS Participant. (Amended 5/99)

- (1) Every REALTOR® of the Board who is a REALTOR® principal, every REALTOR® principal who participates in a Board's MLS where they do not hold Board membership and every nonmember broker or licensed or certified appraiser who is a Participant in the Board's MLS shall have the right to invoke the Board's arbitration facilities in any dispute arising out of the real estate business with a REALTOR® principal in another real estate firm or with that firm (or both), or nonmember broker/appraiser or their firm (or both) who is a Participant in the Board's MLS. (Amended 05/01)

- (2) A REALTOR® other than a principal or a REALTOR-ASSOCIATE® shall have the right to invoke the

arbitration facilities of the Board in a business dispute with a REALTOR® or REALTOR-ASSOCIATE® in another firm or with their firm (or both), whether in the same or a different Board, provided the REALTOR® principal with whom he is associated joins in the arbitration request, and requests the arbitration with the REALTOR® principal of the other firm or with their firm (or both). Arbitration in such cases shall be between the REALTOR® principals or their firms (or both). REALTOR® nonprincipals and REALTOR-ASSOCIATE®s who invoke arbitration in this manner, or who are affiliated with a respondent and have a vested financial interest, in the outcome, have the right to be present throughout the proceedings and to participate but are not considered to be parties. (Amended 05/01)

- (3) A client of a REALTOR® principal may invoke the arbitration facilities of the Board in a business dispute with a REALTOR® principal or the REALTOR®'s firm (or both) arising out of an agency relationship, provided the client agrees to be bound by the arbitration. In the event of such request and agreement the Board will arbitrate the dispute subject to the provisions of Part Ten, Section 45. A REALTOR® principal may also invoke arbitration against his client but no arbitration may be held without the client's voluntary agreement to arbitrate and to be bound by the decision. (Amended 05/01)

- (4) REALTORS® and REALTOR-ASSOCIATE®s who are or were affiliated with the same firm shall have the same right to invoke the arbitration facilities of the Board, provided each party voluntarily agrees to the arbitration in writing and the Board finds the matter properly subject to arbitration in accordance with the provisions of Part Ten, Section 45 of this Manual. This privilege as stated applies to disputes arising when the parties are or were affiliated with the same firm, irrespective of the time request is made for such arbitration. (Amended 11/95)

- (5) A REALTOR® principal may invoke the arbitration facilities of his Board with a nonmember broker, provided each party agrees in writing to the arbitration and provided the Board finds the matter properly subject to arbitration in accordance with the provisions of Part Ten, Section 45 of this Manual. However, it shall be optional with the member as to whether he will submit to a claim to arbitration with a nonmember broker who is not an MLS Participant. A nonmember broker who is not an MLS Participant or nonmember salesperson shall not be entitled to invoke the arbitration facilities of the Board of REALTORS®. (Amended 11/95)

- (6) Business disputes between a REALTOR® principal and a customer of the REALTOR® principal may be arbitrated by the Board if a written contractual relationship has

been created by a REALTOR® principal between a customer and a client and provided all parties to the dispute (i.e., the customer and the REALTOR®) agree in writing to arbitrate the dispute. (Amended 11/95)

- (b) Where mandatory arbitration is consistent with applicable state law, the Code of Ethics, Article 17, requires only that disputes arising out of the real estate business between REALTORS® "... associated with different firms ..." be arbitrated. The various provisions of this Section represent the interpretations of the Professional Standards Committee with approval of the Board of Directors of the National Association as to appropriate policy of a Member Board in the matter of providing arbitration facilities by the Board. Thus, Member Boards must provide arbitration facilities for Board Members in the types of arbitration described in the preceding paragraphs (1), (2), and (3). Member Boards may provide arbitration facilities for the additional types of arbitration described in the preceding paragraphs (4), (5), and (6). However, Member Boards shall not establish any mandatory requirement of its Board Members to arbitrate in the circumstances described in paragraphs (4), (5), and (6). No arbitration shall be initiated by the Board and no arbitration shall be undertaken by the Board unless it determines the dispute is properly arbitrable in accordance with the provisions of Part Ten, Section 45 of this Manual. (Revised 11/96)

Section 45. Board's Right to Decline Arbitration

- (a) If either the Grievance Committee or the arbitration panel selected in the manner hereinafter provided determine that because of the amount involved or the legal complexity of the dispute the dispute should not be arbitrated, the arbitration shall automatically terminate unless either of the parties to the dispute appeals the decision to terminate the proceedings to the Board of Directors in writing within twenty (20) days of the date of notice that the Grievance Committee or the arbitration panel declined to continue the proceeding using Form #A-20, Appeal of Grievance Committee Dismissal or Classification of Arbitration Request; however, no additional information may be added or attached to the form. The Hearing Panel can also dismiss the arbitration request if the Hearing Panel concludes the matter is not arbitrable. The written appeal and those materials and information which were available to the Grievance Committee or the arbitration Hearing Panel when the decision to discontinue arbitration was made will be presented to the Directors and considered with the appeal. The complainant and respondent do not have the right to appear at the hearing before the Directors. In the event of such an appeal, the Grievance Committee or the arbitration panel shall report its conclusions in writing to the Directors and, if the Directors concur, the arbitration shall terminate and the parties shall be relieved of their obligation to arbitrate. In this event, or in the case of no appeal, any deposits made by the parties shall be returned

to them. However, if the Board of Directors decides that the arbitration should proceed, the matter shall be remanded to the Grievance Committee or the arbitration panel for further proceedings. (Revised 5/97)

- (b) The President may appoint a panel of Directors, acting on behalf of the Board of Directors, to hear the appeal. Any appeal panel so appointed must be composed of at least five (5) Directors or a quorum of the Board of Directors, whichever is less. (Alternatively, the appeal may be heard by the Board's Executive Committee.) The decision of the appeal panel (or Executive Committee) is final and not subject to further review by the Board of Directors. (Revised 11/91)
- (c) If an otherwise arbitrable matter is the subject of civil litigation, arbitration shall not take place unless the litigation is withdrawn or referred to the Board of Directors by the court for arbitration in accordance with Article 17. In instances where the arbitration is mandatory (as defined in Part Ten, Section 44 of this Manual), the failure to arbitrate may result in a charge alleging violation of Article 17.
- (d) If either party to an arbitration request believes that the Grievance Committee has incorrectly classified the issue presented by the request ("mandatory" or "voluntary" arbitration situation), the party has twenty (20) days from the date of receipt of the Grievance Committee's decision to file a written appeal of the Grievance Committee's determination using Form #A-20, Appeal of Grievance Committee Dismissal or Classification of Arbitration Request; however, no additional information may be added or attached to the form. Only those materials and information which were available to the Grievance Committee when the Committee made its determination will be presented to the Directors and considered with the appeal. The complainant and respondent do not have the right to appear at the hearing before the Directors. In the event of such an appeal, the Grievance Committee must report its written conclusions to the Board of Directors. If the Directors determine that the arbitration request was incorrectly classified, they shall reclassify the request as either "mandatory" or "voluntary" arbitration and refer it to the Secretary for appropriate processing. (Revised 5/97)

Section 46. Duty to Arbitrate Before State Association

By becoming and/or remaining members of this Board, all members bind themselves and agree to submit to arbitration by the arbitration facilities of the _____ (state) Association of REALTORS® any dispute with a member of any other local Board or _____ (state) Association of REALTORS®, provided:

- (1) The dispute is a dispute as defined and for which arbitration is required by Article 17 of the Code of Ethics, and

- ① (2) The _____ (state) Association of REALTORS® has established facilities for such arbitration.*

Disputes as defined in Article 17 of the Code of Ethics requiring arbitration between members having no commonality of Board membership or MLS participation may be submitted and conducted under the procedure established in Part Eleven of this Manual, subject to such modification as may be required by applicable state law. (Revised 11/98)

The method set forth in Part Eleven may also be utilized for the conduct of arbitration between Board Members of different Boards of different states, subject to the parties' voluntary agreement in advance to accept the place, date, and time established by the arbitration panel thus chosen for a hearing, and to pay all costs of such arbitration as may be directed by the panel, and further subject to applicable state law of the respective states permitting such binding arbitration.

Section 47. Manner of Invoking Arbitration

- ① (a) Any person authorized by the provisions of Part Ten, Section 44 of this Manual may request arbitration by the Board. A request for arbitration shall be in writing (Form #A-1 or #A-2, Request and Agreement to Arbitrate, Part Thirteen, or any other appropriate form permitted by law), must be signed by the complainant, must indicate the nature of the dispute and the amount in dispute, and must be accompanied by the required deposit of \$_____.** Requests for arbitration must be 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. Boards may provide mediation even if arbitration has not been requested provided the mediation is requested 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. (Revised 11/00)

*The State Association as a Member Board of the National Association has the obligation to establish arbitration procedures and facilities consistent with applicable state law, as required by the Constitution, National Association, Article IV, and by Article 17, Code of Ethics of the National Association, for individual members of the State Association.

**This fee should not be so high as to deter parties from arbitration. This amount shall not exceed \$500. Where a party(ies) from the same firm is involved in more than one related request for arbitration, and the claims will be consolidated and resolved in a single hearing, no more than one deposit or filing fee may be required of that party(ies). When a REALTOR® requests arbitration to determine which of multiple respondents is entitled to disputed funds, or where a party makes no claim to the disputed funds, that party may not be assessed an arbitration filing fee. (Revised 11/96)

Suspension of filing deadlines: If the Board's informal dispute resolution processes (e.g., ombudsmen, mediation, etc.) are invoked or initiated by a complainant (or potential complainant) with respect to an otherwise potentially arbitrable matter that becomes the subject of a subsequent arbitration request, the one hundred eighty (180) day filing deadline shall be suspended beginning with the date of the complainant's (or potential complainant's) request for informal dispute resolution service or assistance and shall resume when the informal dispute resolution procedures are concluded or terminated. Questions about when informal dispute resolution began or ended will be determined by the Board President or the President's designee. (Adopted 11/00)

- (b) The Secretary shall promptly refer the request for arbitration to the Chairperson of the Grievance Committee for determination by the Committee within _____ days as to whether the matter is subject to arbitration. (Revised 11/98)

The function of the Grievance Committee is to make only such preliminary review and evaluation of the request for arbitration as is required to determine (1) whether the matter is properly arbitrable; (2) whether arbitration is mandatory or voluntary based upon the requirements of Part Ten, Section 44 of this Manual; and (3) whether the proper parties are named in the request for arbitration. The Grievance Committee does not hold hearings and does not determine entitlement to awards.

The Grievance Committee may request the party(ies) named as respondent(s) in the request for arbitration to provide the Grievance Committee with a written response to the request for arbitration within _____ days. (See Form #A-5, Grievance Committee Request for Information [Arbitration Request] and Form #A-6, Response to Grievance Committee Request for Information, Part Thirteen of this Manual.) If no response is filed within the time allotted, the Grievance Committee shall make its determination as to whether an arbitration hearing should be scheduled based upon the information set forth in the request for arbitration. (Revised 11/98)

- (c) If the Grievance Committee finds the matter properly subject to arbitration, the Chairperson shall refer it back to the Secretary with instructions to arrange a hearing, notifying the parties of the Grievance Committee's decision, informing the parties as to whether the arbitration is mandatory or voluntary (and, if voluntary, of the date certain by which the respondent is requested to inform the Board of his decision) and informing the parties of their ability to challenge the classification (see Section 45[d], Board's Right to Decline Arbitration). The Secretary shall notify the respondent within five (5) days of receipt of the Grievance Committee's instructions by mailing a copy of the request for arbitration, the Notice to Respondent (Arbitration) (Form #A-3), and two (2) forms for response

(Form #A-4, Response and Agreement to Arbitrate, Part Thirteen), with directions to complete and return the written response and deposit amount of \$_____ * within fifteen (15) days from the date of mailing to respondent. The Secretary shall concurrently mail to each of the parties a list of names of members of the Professional Standards Committee (see Part Seven, Section 27, (a) through (f), Qualification for Tribunal; Part Thirteen, Form #A-7, Notice of Right to Challenge Tribunal Members; and Form #A-8, Challenge to Qualifications by Parties to Panel Members). Within fifteen (15) days from the date the names are mailed to the parties, the Professional Standards Committee Chairperson shall appoint from the names not successfully challenged by either party three (3) or more arbitrators who will hear the dispute. The Chairperson shall also select one of the panel members to serve as Chairperson of the Hearing Panel. Any Hearing Panel must have an odd number of members. At least two (2) shall be REALTORS®, and in the event a REALTOR-ASSOCIATE® or REALTOR® other than a principal has invoked the arbitration through the REALTOR® principal, or is affiliated with the respondent, and has a vested interest in the outcome of the proceeding, one (1) of the arbitrators must be a REALTOR-ASSOCIATE® or REALTOR® other than a principal. It shall be a membership duty of anyone so appointed to serve as an arbitrator unless disqualified. The Professional Standards Committee Chairperson shall select the Chairperson of the Hearing Panel, who shall possess the powers of the neutral arbitrator within the meaning of the _____ arbitration statutes.** A party will be deemed to have waived all objections to any person whose name he does not challenge. If challenge to members of the Professional Standards Committee results in an insufficient number of members to constitute a panel, the President may appoint other qualified Board Members to serve as panel members. No arbitration may proceed without three (3) or more arbitrators not disqualified pursuant to Part Seven, Section 27, Qualification for Tribunal. (Revised 11/98)

If the Grievance Committee dismisses the request as being unworthy of further consideration, the decision may be appealed to the Board of Directors within twenty (20) days from the date of the Board's notification of the Grievance Committee's decision using Form #A-20, Appeal of Grievance Committee Dismissal or Classification of Arbitration Request; however, no additional information

*This fee should not be so high as to deter parties from arbitration. This amount shall not exceed \$500. Where a party(ies) from the same firm is involved in more than one related request for arbitration, and the claims will be consolidated and resolved in a single hearing, no more than one deposit or filing fee may be required of that party(ies). When a REALTOR® requests arbitration to determine which of multiple respondents is entitled to disputed funds, or where a party makes no claim to the disputed funds, that party may not be assessed an arbitration filing fee. (Revised 11/96)

**As an alternative, the Board may, as a matter of Board procedure, elect to have the Board President appoint the Chairperson of each Hearing Panel.

may be added or attached to the form.* Only those materials which were presented to the Grievance Committee when the committee made its decision will be presented to the Board of Directors and considered with the appeal, and the complainant and respondent do not have the right to appear at the hearing before the Directors. In the case of a dismissed arbitration request, the deposit shall be returned to the complainant. If the Directors determine that the arbitration request was improperly dismissed they shall refer it to the Professional Standards Committee for hearing. If the Directors determine that the request was improperly classified, they shall reclassify it appropriately. Upon determination of the Directors that the arbitration request should be referred for hearing, the Secretary shall at that time provide a copy of the response to the complainant if one had been submitted for review by the Grievance Committee. (Revised 11/98)

- (d) Boards are required to offer mediation as a preliminary, voluntary alternative to arbitration. Where mediation is offered prior to review of an arbitration request by the Grievance Committee and one or more of the parties declines or the mediation attempt is unsuccessful, the parties will not again be offered mediation. If a party requests a second opportunity to mediate, a second mediation can be scheduled at the discretion of the Association. (See Appendix V to Part Ten, Mediation as a Service of Member Boards.) (Revised 11/03)
- (e) Dismissal of an arbitration request by a Board of REALTORS® does not prohibit REALTORS® from exercising other remedies, including litigation, that may be available to them. (Adopted 5/99)

Section 48. Submission to Arbitration

- (a) Submission of a dispute to arbitration by the Board shall consist of signing and delivering to the Secretary either a request or response form provided by the Board (Form #A-1 or #A-2, Request and Agreement to Arbitrate, or Form #A-4, Response and Agreement to Arbitrate) or any other similar writing permitted by law and making the appropriate deposit of \$_____ (not to exceed \$500).** Agreements to arbitrate are irrevocable except as otherwise provided under state law. (Revised 05/01)

*Any member of a Grievance Committee who is a member of the Board of Directors shall not sit as a Director during any appeal from a decision of the Grievance Committee, nor shall such individual participate in any vote of the Directors with respect to such matters.

**Where a party(ies) from the same firm is involved in more than one related request for arbitration, and the claims will be consolidated and resolved in a single hearing, no more than one deposit or filing fee may be required of that party(ies). When a REALTOR® requests arbitration to determine which of multiple respondents is entitled to disputed funds, or where a party makes no claim to the disputed funds, that party may not be assessed an arbitration filing fee. (Revised 11/93)

NOTE: The circumstances under which Member Boards may conduct arbitration will vary based upon state arbitration statutes and case law. Member Boards should consult with Board or State Association legal counsel and select the appropriate procedure from those listed below as Options #1, #2, and #3. No arbitration hearing may be held in the absence of the complainant, and no award may be rendered without a hearing on the merits. (Revised 11/91)

In any instance where arbitration has been conducted and an award rendered under Option #2 or #3 of this Section; where the amount requested by the party initiating the arbitration has been awarded; and where the respondent has failed to make the specified deposit, it shall be the responsibility of the respondent to pay an amount equal to the deposit to the Board within ten (10) days of receipt of notice from the Board requesting payment. Where the respondent has not made the deposit and a partial award is made, the respondent shall pay to the Board an amount to be determined by the Hearing Panel that will not exceed the deposit originally made by the complainant. Failure to make such payment on a timely basis, upon receipt of a request from the Board, shall be treated in the manner specified in the Board's bylaws for failure to satisfy financial obligations to the Board. (Adopted 5/88)

Option #1

(b) Arbitration shall not proceed unless the signed Response and Agreement Form (Part Thirteen, Form #A-4) and deposit amount have been received from the respondent and the respondent appears and takes part in the hearing (Revised 11/05).

Option #2

(b) In the event the respondent fails to sign and return the Response and Agreement Form (Part Thirteen, Form #A-4), or fails or refuses to make the required deposit, arbitration may proceed, and a valid award may be rendered if the respondent appears and takes part in the hearing.

NOTE: This option may be adopted only where state law permits arbitration to proceed in the absence of signed arbitration agreements. The advice of legal counsel should be obtained to determine whether Board membership creates an enforceable obligation to arbitrate under the circumstances established in Part Ten, Section 44 of this Manual.

Option #3

(b) In the event the respondent fails or refuses to sign the Response and Agreement Form (Part Thirteen, Form #A-4), fails or refuses to make the required deposit, or fails or refuses to take part in the arbitration hearing, the arbitration hearing may be scheduled and conducted in the absence of the respondent.

NOTE: Arbitration in the absence of a respondent may take place only where permitted by state statute or case law. In such instances, the Board should ensure that all preliminary procedural steps, including the provision of adequate prior

notice, are complied with. In the event a respondent fails to appear, it is strongly recommended that an attempt be made to determine whether the failure to appear is because of the respondent's refusal to arbitrate or due to unforeseen circumstances. (Revised 11/91)

Where arbitration takes place in a respondent's absence, the respondent is still entitled to be represented by legal counsel. Counsel may make opening and closing statements; call witnesses; cross-examine witnesses called by other parties; and introduce affidavits, documents, and other admissible relevant evidence. Counsel may not testify to events and facts of which counsel has no firsthand knowledge. Hearing Panels should be instructed by the Chair that counsel's arguments do not constitute testimony. (Adopted 11/98)

Section 49. Initial Action by Directors

If the complainant alleges that a member has improperly refused to submit a dispute to arbitration, the complaint shall not be referred to the Grievance Committee or a Hearing Panel, but shall be brought before the Board of Directors at the next regular meeting or at a special meeting called by the President for that purpose. The procedures for notices, time of notice, and hearing prescribed for matters before a Hearing Panel shall apply. The sole question of fact for the Directors to decide will be whether the respondent has failed to submit an arbitrable matter to arbitration in violation of Article 17. (Revised 11/95)

There can be no charge that there has been a refusal to arbitrate until the Grievance Committee determines the matter is arbitrable and of a mandatory nature and the respondent fails to submit to arbitration before the Board. (Adopted 11/95)

Upon determination that the member has refused to arbitrate a properly arbitrable matter, the Board of Directors may direct the implementation of appropriate sanction and should, if it has reason to believe that the imposition of sanction will become the basis of litigation and a claim for damages consequent to such sanction, delay the effective date of implementing the sanction to a date following receipt by the Board of a judicial decision in a petition for declaratory relief filed by the Board to confirm the propriety of its action.

On the other hand, if the complaint against the member is that, having properly submitted a dispute to arbitration, the member has refused to abide by the award, such refusal should not be referred to the Grievance Committee as a violation of the Code of Ethics unless it reflects an established pattern or practice of noncompliance with the commitment to arbitrate. A refusal to abide by an award in arbitration should be enforced in the manner set forth in Part Ten, Section 56, Arbitration of Disputes.* (Revised 9/87)

*Refer to Appendix III to Part Ten for the rationale for use of judicial enforcement of arbitration awards when a Board Member refuses to pay an award in arbitration.

Section 50. Preliminary Judicial Determination Prior to Imposition of Discipline

- ☞ If the Board of Directors has reason to believe that the imposition of a proposed sanction will become the basis of litigation and a claim for damages, it may specify that the discipline shall become effective upon entry of the final judgment of a court of competent jurisdiction in a suit by the Board for declaratory relief declaring that the discipline proposed violates no rights of the member.*

Section 51. Arbitration Hearing

- (a) Not sooner than fifteen (15) days nor later than twenty-one (21) days after mailing notice to the respondent of the request for arbitration, the Secretary shall mail to the complainant a copy of the response and respondent's affirmative claim, if any. (Revised 11/98)

In the case of an arbitration request involving issues related to areas of the real estate business such as commercial, investment, industrial, etc., where there is an insufficient number of qualified practitioners on the Board's Professional Standards Committee to provide a representative peer panel, the Board President shall appoint other Board Members qualified in that field to serve as panel members. If the Board President is unable to identify a sufficient number of qualified members to serve on a panel, the President shall report that fact to the Directors at their next regularly scheduled meeting. If the Board of Directors concurs, the request shall be referred to the State Association pursuant to Part Fourteen of this Manual. If the State Association is unable to provide a representative peer panel, the parties shall be released from their obligation to arbitrate. (Revised 11/98)

- ☞ (b) The Secretary shall inform the parties of the date, time, and place of the hearing established by the arbitrators (or the Chairperson of the Professional Standards Committee) (Form #A-9, Official Notice of Hearing, Part Thirteen).** The arbitration request and response, if any, shall be provided to Hearing Panel members prior to the hearing. Such time period shall be _____ (as determined by the Board of Directors) and shall be adhered to for all hearings. Board's conducting arbitration must also provide all parties and panel members with the Arbitration Guidelines prior to commencement of any arbitration hearing. The parties shall be given at least twenty-one (21) days' prior notice of the hearing, but appearance at a hearing without objection by a party will constitute a waiver of any defective notice of the hearing. The arbitrators may recess the hearing from time to time as necessary and, on request of a party or upon the arbitrator's own motion, may postpone the hearing for not more than thirty (30) days, unless otherwise agreed to by the parties. (Revised 11/96)

*Refer to Rationale of Declaratory Relief Procedure provided in Appendix IV to Part Four.

**Form #A-10, Outline of Procedure for Arbitration Hearing, Part Thirteen, should accompany the notice of the hearing or be otherwise provided to the parties prior to the hearing.

- (c) Upon notice by the Secretary, the parties to the dispute shall with diligence present to the arbitrators in writing such statements and proof which they deem necessary to support their claims. Proof may be submitted in the form of affidavits or otherwise. The Hearing Panel of arbitrators may require that statements be verified by affidavits or that accuracy or authenticity of any documents or other papers submitted be verified by affidavit. At the hearing, the arbitrators shall receive any further written statements, documents, or other papers, shall hear oral testimony and determine what personal appearances shall be made by the parties, and shall regulate the holding of hearings.* The Hearing Panel may receive and consider any evidence they deem material and proper, including evidence of accountants and other experts. Each party is responsible for the expenses of expert witnesses he calls. Parties to arbitration shall be entitled to have legal counsel present at any hearing. Each party is responsible for the expenses of his respective counsel.

Section 52. Settlement

The parties to an arbitration may settle the issue between them by agreement at any time. In such event, upon notification to the Secretary, the arbitration proceedings shall be terminated and the termination shall be recorded in the file.

A portion of each party's deposit may be retained by the Board to cover the costs incurred by the Board up to the point of settlement of the dispute.

Section 53. The Award

- (a) The award of the arbitrators (Form #A-12, Award of Arbitrators, Part Thirteen) shall be made as soon as possible after the evidence is presented. The award shall be in writing and signed by the arbitrators or a majority of them, shall state only the amount of the award, and, when so signed and served on each of the parties, shall be valid and binding and shall not be subject to review or appeal. Any award rendered may not be greater than the amount in dispute, may not include punitive damages, may not include attorney's fees unless expressly provided for in the agreement giving rise to the dispute, and may not include interest unless called for in the arbitration agreement and permitted by state law. Notwithstanding the foregoing, a party to an arbitration proceeding may appeal to the Board of Directors only with respect to such alleged irregularities occurring in the conduct of the proceeding as may have deprived the party of fundamental "due process." (Revised 4/98)
- (b) After the award has been served upon each of the parties, they have twenty (20) days to request procedural review of the arbitration hearing procedure by the Board of Directors.

*Such hearings should be conducted according to Part Twelve, Conduct of an Arbitration Hearing.

If no such review is requested, the award becomes final and binding following the twenty (20) day period. However, if procedural review is requested, the award is not considered final and binding until after the Board of Directors has concluded that the hearing was conducted in a manner consistent with the Board's procedures and the parties had been afforded due process.

NOTE: Adoption of Section 53(c)-(f) is at the option of each Member Board.

- (c) If an award has been rendered, the nonprevailing party must, within ten (10) days following receipt of the award, either (1) pay the award to the party(ies) named in the award or (2) deposit the funds with the Board Secretary or Board Executive Officer to be held in a special Board escrow account maintained for this purpose. Failure to satisfy the award or to deposit the funds with the Board within this time period may be considered a violation of a membership duty and may subject the member to disciplinary action at the discretion of the Board of Directors. (Adopted 11/87)

The nonprevailing party shall have twenty (20) days following service of the award to request procedural review of the arbitration hearing procedure or to have legal counsel notify the Board Secretary or Executive Officer that a legal challenge to the validity of the award has been initiated. (Adopted 11/87)

- (d) If a request for procedural review of the arbitration procedure is received within twenty (20) days, the funds deposited with the Board shall be retained in the Board's escrow account until the review is completed. If the arbitration award is confirmed by the Board of Directors following the conduct of the limited procedural review, the nonprevailing party shall have an additional fifteen (15) days to institute an appropriate legal challenge to the validity of the arbitration award. In such case, the nonprevailing party shall also cause legal counsel to advise the Board in writing that a suit challenging the validity of the arbitration award has been filed during this additional fifteen (15) day period. After fifteen (15) days, if written notice of a suit challenging the validity of the arbitration award has not been received by the Board, the funds shall be released from escrow and paid to the prevailing party. If written notification is received during the fifteen (15) day period, the funds will be held in escrow pending the determination of the matter by a court of competent jurisdiction. (Adopted 11/87)

If the nonprevailing party does not request the Board to conduct a procedural review of the arbitration hearing process during the twenty (20) day period following service of the award, then written notification that a legal challenge has been instituted must be received within the twenty (20) days following service of the award. Failure to provide written notification that a suit challenging the

validity of the award has been filed within twenty (20) days following service of the award will result in the award being paid from the Board's escrow to the prevailing party. (Adopted 11/87)

- (e) Any failure to make the necessary deposits with the Board shall be referred to the Board of Directors for action at their next meeting or at a special meeting called for that purpose. The party failing to make the deposit on a timely basis shall be advised of the date, time, and place of the meeting and shall have an opportunity to explain why the required deposits were not made on a timely basis. The Board of Directors may, at its discretion, impose discipline or may give the party an additional period to make the required deposits. The Directors may also stipulate appropriate discipline to be automatically imposed if the party fails to make the deposit within the time established by the Directors. (Adopted 11/87)
- (f) Any interest accrued on the escrowed funds shall become the property of the party to whom the funds are ultimately released by the Board. (Adopted 11/87)

Section 54. Costs of Arbitration

The deposits of the parties shall be used by the Secretary to cover the costs of arbitration as it may be required. Any portion not used specifically to cover the costs of the arbitration shall go into the general operating funds of the Board of REALTORS®.* When a REALTOR® requests arbitration to determine which of multiple respondents is entitled to disputed funds, or where a party makes no claim to the disputed funds, that party may not be assessed an arbitration filing fee. (Revised 11/95)

NOTE: At the option of each Member Board procedures providing for alternative disposition of arbitration deposits may be adopted. These can include returning the deposit to any prevailing party or returning a portion of the deposit to each party should the award rendered be an amount other than that requested by any of the parties. In any instance where return of part or all of any party's deposit is involved, disposition of such deposits shall be determined by the arbitrators. (Adopted 11/95)

Section 55. Request for Procedural Review by Directors

- (a) 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 served on the parties and be accompanied by a deposit in the sum of \$_____ (not to exceed \$500). The request for procedural

*In cases of arbitration not mandated by the Board, and in which the Board provides arbitration as a service to the parties voluntarily seeking arbitration, the Board may recover its legal fees as it deems appropriate.

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 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. *(Amended 5/05)*

(b) When a request for procedural review (as originally filed if in proper form, or as originally filed if no amendment is submitted, or as amended even if still deemed to be lacking) is received, the Secretary shall immediately send a copy to the other party, notify all parties of the time and place of the review by the Directors at least ten (10) days in advance (including challenge Forms #A-7 and #A-8, Part Thirteen of this Manual), and bring the matter before the Directors for review at their next regular meeting or at a special meeting called by the Secretary for that purpose. The Secretary 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. *(Revised 11/91)*

(c) 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. *(Revised 11/91)*

(d) 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 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. *(Revised 11/88)*

(e) 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 render their decision promptly. 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. *(Revised 11/88)*

(f) 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.

(g) 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. The exercise of such legal rights by a member would result in judicial review similar to that set forth in Part Ten, Section 56 of this Manual. Section 56 recommends that, in instances where a member fails to comply with an award, the award recipient seek judicial enforcement, which results in judicial review, and, absent any showing of deprivation of due process, the judicial review will generally affirm the award rendered through the arbitration process and will enable the recipient to have it enforced. *(Revised 11/88)*

Section 56. Enforcement

The judgment of any competent court of record in _____ (state), state or federal, may be rendered upon the award. If a member fails to comply with an award, the recipient to whom the award has been rendered by the arbitration panel shall be advised by the Board to seek judicial enforcement and to request reimbursement of legal fees incurred in seeking enforcement. At the discretion of the Board of Directors, the Board may support the request for judicial enforcement in the court, and at its further discretion, the Board may reimburse the individual for costs incurred in seeking such judicial enforcement if the court does not grant reimbursement of legal costs to the plaintiff.

Appendix I to Part Ten

Arbitrable Issues

Article 17 of the Code of Ethics provides:

In the event of contractual disputes or specific non-contractual disputes as defined by Standard of Practice 17-4 between REALTORS® (principals) associated with different firms, arising out of their relationship as REALTORS®, the REALTORS® shall submit the dispute to arbitration in accordance with the regulations of their Board or Boards rather than litigate the matter.

In the event clients of REALTORS® wish to arbitrate contractual disputes arising out of real estate transactions, REALTORS® shall arbitrate those disputes in accordance with the regulations of their Board, provided the clients agree to be bound by the decision.

The obligation to participate in arbitration contemplated by this Article includes the obligation of REALTORS® (principals) to cause their firms to arbitrate and be bound by any award. (Revised 1/01)

Part Ten, Section 43, Arbitrable Issues, in this Manual provides in part:

As used in Article 17 of the Code of Ethics and in Part Ten of this Manual, the terms "dispute" and "arbitrable matter" refer to contractual issues and questions, and certain specific non-contractual issues and questions outlined in Standard of Practice 17-4, including entitlement to commissions and compensation in cooperative transactions, that arise out of the business relationships between REALTORS®, and between REALTORS® and their clients and customers, as specified in Part Ten, Section 44, Duty and Privilege to Arbitrate. (Revised 11/96)

Part Nine, Section 42, Grievance Committee's Review and Analysis of a Request for Arbitration, provides, in part, in subsection (b):

If the facts alleged in the request for arbitration were taken as true on their face, is the matter at issue related to a real estate transaction and is it properly arbitrable—i.e., is there some basis on which an award could be based?

Despite the guidance provided in the above-referenced sections of the *Code of Ethics and Arbitration Manual*, questions continue to arise as to what constitutes an arbitrable issue, who are the appropriate parties to arbitration requests, etc. To provide guidance to Board Grievance Committees in their review of arbitration requests, the Professional Standards Committee of the National Association provides the following information.

Arbitration by Boards of REALTORS® is a process authorized by law in virtually every state. Arbitration is an economical, efficient, and expeditious alternative to civil litigation. Jurists,

including the former U.S. Supreme Court Chief Justice Warren Burger, have endorsed arbitration as a method of reducing the litigation backlog in the civil courts.

To conduct arbitration hearings, Boards of REALTORS®, acting through their Grievance Committees and Professional Standards Committees, must have a clear understanding of what constitutes an arbitrable issue. An arbitrable issue includes a contractual question arising out of a transaction between parties to a contract in addition to certain specified non-contractual issues set forth in Standard of Practice 17-4. Many arbitrations conducted by Boards of REALTORS® involve entitlement to compensation offered by listing brokers through a multiple listing service or otherwise to cooperating brokers acting as subagents, as agents of purchasers, or in some other recognized agency or non-agency capacity. Frequently, at closing, the listing broker will be paid out of the proceeds of the sale and will direct that a disbursement be made to the cooperating broker who the listing broker believes was the procuring cause of the sale. Subsequently, another broker who may have been previously involved in the transaction will file an arbitration request claiming to have been the procuring cause of sale, and the question arises as to who is the proper respondent. (Revised 11/96)

In our example, assume that the listing broker is Broker A, the cooperating broker who was paid is Broker B, and the cooperating broker who was not paid, but who claims to be the procuring cause of sale, is Broker C. It is not unusual for arbitration requests filed by one cooperating broker to name another cooperating broker as the respondent. This is based on the assumption that the monies the listing broker paid to Broker B are unique and that the listing broker's obligation to compensate any other broker is extinguished by the payment to Broker B, irrespective of whether Broker B was the procuring cause of sale or not. However, the mere fact that the listing broker paid Broker B in error does not diminish or extinguish the listing broker's obligation to compensate Broker C if a Hearing Panel determines that Broker C was, in fact, the procuring cause of sale. (Revised 11/96)

Does this mean that a listing broker is always potentially obligated to pay multiple commissions if a property was shown by more than one cooperating broker? Not necessarily. When faced with Broker C's arbitration request, the listing broker could have initiated arbitration against Broker B, requesting that the Hearing Panel consider and resolve all of the competing claims arising from the transaction at the same time. Professional Standards Policy Statement 27, Consolidation of arbitration claims arising out of the same transaction, provides:

Upon review by the Grievance Committee, or upon motion by either the complainant or the respondent, an arbitration request may be amended to include any additional appropriate parties so that all related claims arising out of the same transaction can be resolved at the same time.

A listing broker may realize, prior to the closing of a transaction, that there may be more than one cooperating broker claiming compensation as the procuring cause of sale. In such instances, to avoid potential liability for multiple compensation claims, the listing broker, after the transaction has closed, can initiate an arbitration request naming all of the potential claimants (cooperating brokers) as respondents. In this way, all of the potential competing claims that might arise can be resolved through a single arbitration hearing. (Revised 11/96)

There is also an alternative avenue of arbitration available to REALTORS® involved in disputes arising out of cooperative real estate transactions. Standard of Practice 17-4 recognizes that in some situations where a cooperating broker claims entitlement to compensation arising out of a cooperative transaction, a listing broker will already have compensated another cooperating broker or may have reduced the commission payable under a listing contract because a cooperating broker has expressly sought and/or chosen to accept compensation from another source, e.g., the seller, the purchaser, etc. Under the circumstances specified in Standard of Practice 17-4, the cooperating brokers may arbitrate between themselves without naming the listing broker as a party. If this is done, all claims between the parties, and claims they might otherwise have against the listing broker, are extinguished by the award of the arbitrators. Similarly, Standard of Practice 17-4 also provides for arbitration between brokers in cases where two (or more) brokers each have open listings and each claims to have procured the purchaser. Since the determiner of entitlement to a commission under an open listing is generally production of the purchaser, arbitration between the two (or more) "open" listing brokers resolves their claims against the seller. This open listing scenario is to be distinguished from the situation in which two (or more) listing brokers each have exclusive listings and each claim entitlement to a commission pursuant to their respective listing agreements. Because exclusive listing agreements generally provide for payment of a commission if the listed property is sold—whether through the listing broker's efforts or not—each listing broker could have a legitimate, enforceable right to a commission from their client. Thus, Standard of Practice 17-4 does not obligate listing brokers to arbitrate between themselves when both (or all) have independent claims to commissions based on their respective exclusive listing agreements. (Amended 5/02)

In reviewing requests for arbitration, it is important that Grievance Committees not take actions that could be construed as rendering decisions on the merits. For example, a Grievance Committee should not dismiss an otherwise arbitrable claim simply because Grievance Committee members believe the respondent would undoubtedly prevail in a hearing. On the other hand, an arbitration request that cites no factual basis on which a Hearing Panel could conceivably base an award should not be referred for hearing. A party requesting arbitration must clearly articulate, in the request for arbitration, facts that demonstrate a contractual relationship between the complainant and the respondent, or a relationship described in Standard of Practice 17-4, and an issue that could be the basis on which an arbitration award could be founded. (Revised 11/96)

Another question that frequently arises with respect to arbitration requests is whether the fact that the listing broker was paid out of the proceeds of the closing is determinative of whether a dispute will be considered by a Hearing Panel. Initially, it should be noted that the Arbitration Guidelines (Appendix II to Part Ten) provide that an arbitrable issue involving procuring cause requires that there have been a "successful transaction." A "successful transaction" is defined as "a sale that closes or a lease that is executed." Some argue that if the listing broker is not paid, or if the listing broker waives entitlement to the commission established in the listing contract, then there is nothing to pay to the cooperating broker and, thus, no issue that can be arbitrated. This is an improper analysis of the issue. While the listing broker needs the consent of the seller/client to appoint subagents and to compensate subagents, buyer agents, or brokers acting in some other recognized agency or non-agency capacity, the offer to compensate such individuals, whether made through the multiple listing service or otherwise, results in a separate contractual relationship accepted through performance by the cooperating broker. Thus, if the cooperating broker performs on the terms and conditions established by the listing broker, the fact that the listing broker finds it difficult to be paid or, alternatively, waives the right to be paid, has no bearing on whether the matter can be arbitrated but may have a direct impact on the outcome. Many cooperative relationships are established through MLS and the definition of the MLS provides, in part: (Revised 11/97)

While offers of compensation made by listing brokers to cooperating brokers through MLS are unconditional, 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. (Amended 11/98)*

*Compensation is unconditional except where local MLS rules permit listing brokers to reserve the right to reduce compensation offers to cooperating brokers in the event that the commission established in a listing contract is reduced by court action or by actions of a lender. Refer to 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 foregoing are by no means all-inclusive of the consideration that must be taken into account by a Grievance Committee in determining whether a matter will be arbitrated. However, they are some of the common questions raised with respect to arbitrable issues, and this discussion is provided to assist Grievance Committees in their important role in evaluating arbitration requests. (Adopted 4/91)

Appendix II to Part Ten

Arbitration Guidelines

(Suggested Factors for Consideration by a Hearing Panel in Arbitration)

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

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

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

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

Third, there is the purchase contract—sometimes referred to as the purchase and sale agreement. This bilateral contract between the seller and the buyer establishes their respective promises and obligations to each other, which may also impact on third parties. The fact that someone other than the seller or

buyer is referenced in the purchase contract does not make him/her a party to that contract, though it may create rights or entitlements which may be enforceable against a party (the buyer or seller).

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

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

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

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

Boards and Associations of REALTORS® provide arbitration to resolve contractual issues and questions and specific non-contractual issues and questions that arise between members, between members and their clients, and, in some cases, between parties to a transaction brought about through the efforts of REALTORS®. Disputes arising out of any of the four above-referenced contractual relationships may be arbitrated, and the rules and procedures of Boards and Associations of REALTORS® require that certain types of disputes must be arbitrated if either party so requests. (Information on

"mandatory" and "voluntary" arbitration is found elsewhere in the *Code of Ethics and Arbitration Manual*.) (Revised 11/96)

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

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

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

Procuring Cause

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

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

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

See also Producing cause; Proximate cause.

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

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

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

... [T]he Board or its MLS may not establish a rule or regulation which purports to predetermine entitlement to any awards in a real estate transaction. If controversy arises

as to entitlement to any awards, it shall be determined by a hearing in arbitration on the merits of all ascertainable facts in the context of the specific case of controversy.

It is not uncommon for procuring cause disputes to arise out of offers by listing brokers to compensate cooperating brokers made through a multiple listing service. A multiple listing service is defined as a facility for the orderly correlation and dissemination of listing information among Participants so that they may better serve their clients and customers and the public; is a means by which authorized Participants make blanket unilateral offers of compensation to other Participants (acting as subagents, buyer agents, or in other agency or nonagency capacities defined by law); is a means by which information is accumulated and disseminated to enable authorized Participants to prepare appraisals and other valuations of real property; and is a means by which Participants engaging in real estate appraisal contribute to common databases. Entitlement to compensation is determined by the cooperating broker's performance as procuring cause of the sale (or lease). While offers of compensation made by listing brokers to cooperating brokers through MLS are unconditional,* the definition of MLS and the offers of compensation made through the MLS provide that a listing broker's obligation to compensate a cooperating broker who was the procuring cause of sale (or lease) may be excused if it is determined through arbitration that, through no fault of the listing broker and in the exercise of good faith and reasonable care, it was impossible or financially unfeasible for the listing broker to collect a commission pursuant to the listing agreement. In such instances, entitlement to cooperative compensation offered through MLS would be a question to be determined by an arbitration Hearing Panel based on all relevant facts and circumstances including, but not limited to, why it was impossible or financially unfeasible for the listing broker to collect some or all of the commission established in the listing agreement; at what point in the transaction did the listing broker know (or should have known) that some or all of the commission established in the listing agreement might not be paid; and how promptly had the listing broker communicated to cooperating brokers that the commission established in the listing agreement might not be paid. (Revised 11/98)

*Compensation is unconditional except where local MLS rules permit listing brokers to reserve the right to reduce compensation offers to cooperating brokers in the event that the commission established in a listing contract is reduced by court action or by actions of a lender. Refer to 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)

Factors for Consideration by Arbitration Hearing Panels

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

Factor #1. No predetermined rule of entitlement

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

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

Factor #2. Arbitrability and appropriate parties

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

Factor #3. Relevance and admissibility

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

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

perceived "wrongdoer", it is equally true that Hearing Panels are entitled to (and fairness requires that they) consider all relevant evidence and testimony so that they will have a clear understanding of what transpired before determining entitlement to any award. (*Amended 11/96*)

Factor #4. Communication and contact—abandonment and estrangement

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

Factor #5. Conformity with state law

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

Factor #6. Consideration of the entire course of events

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

Nature and status of the transaction

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

Nature, status, and terms of the listing agreement

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

Nature, status, and terms of buyer representation agreements

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

Nature, status, and terms of the offer to compensate

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

Roles and relationships of the parties

- (1) Who was the listing broker?
- (2) Who was the cooperating broker or brokers?
- (3) Were any of the brokers acting as subagents? As buyer brokers? In another legally recognized capacity?

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

Initial contact with the purchaser

- (1) Who first introduced the purchaser or tenant to the property?
- (2) When was the first introduction made?
 - (a) Was the introduction made when the buyer had a specific need for that type of property?
 - (b) Was the introduction instrumental in creating the desire to purchase?
 - (c) Did the buyer know about the property before the broker contacted him? Did he know it was for sale?
 - (d) Were there previous dealings between the buyer and the seller?
 - (e) Did the buyer find the property on his own?
- (3) How was the first introduction made?
 - (a) Was the property introduced as an open house?
 - (b) What subsequent efforts were made by the broker after the open house? *(Refer to Factor #1)*
 - (c) Was the introduction made to a different representative of the buyer?
 - (d) Was the "introduction" merely a mention that the property was listed?
 - (e) What property was first introduced?

Conduct of the brokers

- (1) Were all required disclosures complied with?
- (2) Was there a faithful exercise of the duties a broker owes to his client/principal?
- (3) If more than one cooperating broker was involved, was either (or both) aware of the other's role in the transaction?
- (4) Did the broker who made the initial introduction to the property engage in conduct (or fail to take some action) which caused the purchaser or tenant to utilize the services of another broker? *(Refer to Factor #4)*
- (5) Did the cooperating broker (or second cooperating broker) initiate a separate series of events, unrelated to and not dependent on any other broker's efforts, which led to the successful transaction—that is, did the broker perform services which assisted the buyer in making his decision to purchase? *(Refer to Factor #4)*
 - (a) Did the broker make preparations to show the property to the buyer?

- (b) Did the broker make continued efforts after showing the property?
- (c) Did the broker remove an impediment to the sale?
- (d) Did the broker make a proposal upon which the final transaction was based?
- (e) Did the broker motivate the buyer to purchase?
- (6) How do the efforts of one broker compare to the efforts of another?
 - (a) What was the relative amount of effort by one broker compared to another?
 - (b) What was the relative success or failure of negotiations conducted by one broker compared to the other?
- (7) If more than one cooperating broker was involved, how and when did the second cooperating broker enter the transaction?

Continuity and breaks in continuity (abandonment and estrangement)

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

Conduct of the buyer

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

Conduct of the seller

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

Leasing transactions

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

Other information

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

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

Sample Fact Situation Analysis

The National Association's Professional Standards Committee has consistently taken the position that arbitration awards should not include findings of fact or rationale for the

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

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

Fact Situation #1

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

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

Fact Situation #2

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

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

Fact Situation #3

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

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

Fact Situation #4

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

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

Fact Situation #5

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

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

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

Fact Situation #6

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

Analysis: The Hearing Panel will consider Broker S's initial introduction of the buyer to the property, the period of time between Broker S's last contact with the buyer and the time that Broker B wrote the offer, and the reason Buyer #1 did not ask Broker S to write the offer. Given the length of time between Broker S's last contact with the buyer, the fact that Broker S

had made no subsequent effort to contact the buyer, and the length of time that transpired before the offer was written, abandonment of the buyer may have occurred. If this is the case, the Hearing Panel may conclude that Broker B instituted a second, separate series of events that was directly responsible for the successful transaction.

Fact Situation #7

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

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

Fact Situation #8

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

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

Fact Situation #9

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

Analysis: The Hearing Panel should consider Broker S's initial introduction of the buyer to the property; Broker S's failure to clearly disclose his agency status on a timely basis;

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

Fact Situation #10

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

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

Fact Situation #11

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

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

Fact Situation #12

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

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

Arbitration Worksheet

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

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

Arbitration Worksheet
(continued)

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

Question	Answer	Favors Complainant	Favors Respondent	Favors Neither	Other
(a) Was the introduction made when the buyer/tenant had a specific need for that type of property?					
(b) Was the introduction instrumental in creating the desire to purchase/lease?					
(c) Did the buyer know about the property before the broker contacted him? Did he know it was for sale/lease?					
(d) Were there previous dealings between the buyer and the seller?					
7. What efforts subsequent to the first introduction to the property were made by the broker introducing the property that was sold or leased?					
8. If more than one cooperating broker was involved, how and when did the second cooperating broker enter the transaction?					
9. Did the broker who made the initial introduction to the property engage in conduct (or fail to take some action) which caused the purchaser or tenant to utilize the services of another broker (estrangement)?					
(a) Were agency disclosures made? When?					
(b) Was the potential for dual agency disclosed? When?					
10. Did the broker who made the initial introduction to the property maintain contact with the purchaser or tenant, or could the brokers inaction have reasonably been viewed by the buyer or tenant as a withdrawal from the transaction (abandonment)?					

Arbitration Worksheet
(continued)

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

Question	Answer	Favors Complainant	Favors Respondent	Favors Neither	Other
11. Was the entry of any cooperating broker into the transaction an intrusion into an existing relationship between the purchaser and another broker, or was it the result of abandonment or estrangement of the purchaser?					
12. Did the buyer make the decision to buy independent of the broker's efforts/information?					
13. Did the seller act in bad faith to deprive the broker of his commission?					
(a) Was there bad faith evident from the fact that the difference between the original bid submitted and the final sales price equaled the broker's commission?					
(b) Was there bad faith evident from the fact that a sale to a third party was a straw transaction (one in which a non-involved party posed as the buyer) which was designed to avoid paying commission?					
(c) Did the seller freeze out the broker to avoid a commission dispute or to avoid paying a commission at all?					
14. Did the buyer seek to freeze out the broker?					
(a) Did the buyer seek another broker in order to get a lower price?					
(b) Did the buyer express the desire not to deal with the broker and refuse to negotiate through him?					
(c) Did the contract provide that no brokers or certain brokers had been involved?					

Arbitration Worksheet
(continued)

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

Question	Answer	Favors Complainant	Favors Respondent	Favors Neither	Other
15. Did the original introduction of the purchaser or tenant to the property start an uninterrupted series of events leading to the sale or lease, or was the series of events hindered or interrupted in any way?					
16. If there was an interruption or break in the original series of events, how was it caused, and by whom?					
(a) Did the seller change the listing agreement from an open listing to an exclusive listing agreement with another broker?					
(b) Did the buyer terminate the relationship with the broker? Why?					
(c) Was there interference in the series of events from any outside or intervening cause or party?					
(d) Was there abandonment or estrangement?					
17. Did the cooperating broker (or second cooperating broker) initiate a separate series of events, unrelated to and not dependent on any other broker's efforts, which led to the successful transaction—that is, did the broker perform services which assisted the buyer in making his decision to purchase?					
(a) Did the broker make preparations to show the property to the buyer?					
(b) Did the broker make continued efforts after showing the property?					
(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?					(Adoped 11/03)

Appendix III to Part Ten

Rationale of Declaratory Relief and of Judicial Enforcement in Matters of Arbitration

With respect to arbitration awards rendered by Member Boards, it is important that the Board utilize the powers of local courts to support and enforce its arbitration awards and any Board actions contemplated in connection with arbitration by the Board. Both the Petition for Declaratory Relief and Petition for Judicial Enforcement should be employed by the Board where it will confirm the propriety of the Board's actions and will minimize legal vulnerability and liability to the Board and its members. These legal procedures, or similar legal devices available in a given state, should be employed in the following circumstances:

- (1) **Refusal to Arbitrate:** If a membership obligation to arbitrate disputes is permitted by applicable law, it is required of members in accordance with the Board's professional standards procedures. Refusal of a member to arbitrate shall be determined by a hearing by the Board of Directors as specified in Part Ten, Section 49, Initial Action of Directors.

Upon determination of the sole question of fact that a Board Member has refused to arbitrate a properly arbitrable matter, the Board of Directors may direct the implementation of appropriate sanction, and should, if it has reason to believe that the imposition of sanction will become the basis of litigation and a claim for damages consequent to such sanction, delay the effective date of implementing the sanction to a date following receipt by the Board of a judicial decision in a petition for declaratory relief filed by the Board to confirm the propriety of its action.

- (2) **Refusal to Abide by an Award in Arbitration:** However, in respect to a member agreeing and submitting to arbitration but then refusing to abide by the award, the Board should not, in the first instance of such refusal by a member, initiate a disciplinary proceeding. Rather, the Board should encourage the award recipient to seek enforcement of the award in the courts, and suggest that a request be made for payment of legal costs incurred in seeking judicial enforcement.

In such a first instance, the Board shall not initiate any disciplinary proceeding. If an individual repeatedly refuses to abide by awards in arbitration for reasons which, in the reasonable judgment of the Board, reflect a willful purpose to frustrate the intent of Article 17 rather than a purpose to ensure due process, the Board may initiate disciplinary proceedings for violation of Article 17. Such proceedings will be in addition to and not in lieu of Board support of judicial enforcement of the award by the award recipient. Again, as with declaratory judgment proceedings, some reluctance may be expressed by Member Boards and their members with respect to judicial enforcement of the award.

However, the reasons for a policy under which the primary responsibility for the enforcement of the award rests with the beneficiary of that award (with the support, financial or otherwise, of the Board) are as follows:

- First, although arising out of voluntary membership, the mandatory membership obligation imposed by the Code inherently involves some limit on a REALTOR®'s right to redress in the courts. Therefore, the policy is justified only in instances where state law recognizes the right to enter into binding arbitration agreements and only on terms consistent with state law.
- Second, in instances where binding arbitration is authorized by law, the law provides that the person against whom the arbitration award is made is entitled to certain limited defenses against efforts to enforce the award. These defenses include lack of procedural due process, refusal to allow counsel to be present at the hearing, etc. Although courts are generally reluctant to set aside awards in arbitration, they will do so in instances where the arbitration procedure is found to be defective.
- Third, efforts by the Board to use suspension or termination of membership to induce a participant in an arbitration procedure to abide by that award can be and frequently are viewed as effective foreclosure of the defenses available under the arbitration laws; that is, the member against whom the arbitration award is entered is faced with the choice of either acquiescing to an arbitration procedure which he/she deems procedurally or legally defective or suffering serious injury through the deprivation of valuable membership services.

Board action to suspend or terminate a member for failure to abide by an arbitration award creates an unnecessary risk of serious legal liability.

Thus, if a member is suspended and ultimately the member's claim of defective arbitration is upheld by the court, then the suspension was unwarranted, the denial of Board services unjustified, and the damage suffered thereby is the responsibility of the Board. On the other hand, if arbitration was valid, then a simple proceeding in court by the recipient of the arbitration award will produce a judicially enforceable award with no risk to the Board. If a Board is concerned about vindicating its arbitration procedures at a minimal cost, it may consider reimbursing the recipient of the award for any cost incurred in seeking the judicial enforcement, when such costs are not reimbursed by the court.

Appendix IV to Part Ten

Arbitration Hearing Checklist

(1) **Arbitration of disputes.** "Dispute" and "arbitrable matter" refer to those contractual issues and questions, and certain specific non-contractual issues and questions outlined in Standard of Practice 17-4, including entitlement to commissions and compensation in cooperative transactions between REALTORS® and between REALTORS® and their clients and customers. (See Part Ten, Section 43 of this Manual.) (Revised 11/96)

Requests for arbitration must be 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. Boards may provide mediation even if arbitration has not been requested provided the mediation is requested 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.

Suspension of filing deadlines: If the Board's informal dispute resolution processes (e.g., ombudsmen, mediation, etc.) are invoked or initiated by a complainant (or potential complainant) with respect to an otherwise potentially arbitrable matter that becomes the subject of a subsequent arbitration request, the one hundred eighty (180) day filing deadline shall be suspended beginning with the date of the complainant's (or potential complainant's) request for informal dispute resolution service or assistance and shall resume when the informal dispute resolution procedures are concluded or terminated. Questions about when informal dispute resolution began or ended will be determined by the Board President or the President's designee. (Revised 11/00)

(2) **Must be consistent with state law.** All arbitration hearings must be conducted in a manner consistent with state law.

(3) **Three (3) or more arbitrators necessary.** No arbitration may proceed without three (3) or more arbitrators not disqualified pursuant to the provisions of paragraphs (a) through (f) of Part Seven, Section 27 of this Manual.

(4) **Substitute arbitrator.** If an arbitrator is disqualified, the President (or other individual) shall appoint another member qualified to serve as an arbitrator.

(5) **Duty and privilege to arbitrate.** By becoming and remaining a member, and by signing or having signed the agreement to abide by the bylaws of the Board, every member, where consistent with applicable state law, binds himself or herself and agrees to submit to arbitration by the Board all disputes as defined in Part Ten, Section 44 of this Manual. Refer to Section 44 to determine the types of arbitration that are mandatory obligations upon members

where not precluded by state law, and those types that should be offered as a service of the Board but are not mandatory obligations upon members.

(6) **Conformity to state law.** Refer to Part Ten, Section 43 of this Manual for important information concerning the necessity to know the applicable state statutes or case law governing arbitration and to conform the Board's arbitration procedures to the law. Board or State Association legal counsel may advise the Board in this respect.

(7) **Board's right to decline arbitration.** The Board should be aware of its right to decline to arbitrate a dispute between members or between members and nonmembers. If either the Grievance Committee or the arbitration Hearing Panel determines that the matter should not be arbitrated because of the amount involved (too little or too much), or because of the legal complexity of the matter, the arbitration automatically terminates unless either of the parties appeals the decision to the Board of Directors within twenty (20) days of the date of the notice of the Grievance Committee's or arbitration Hearing Panel's decision using Form #A-20, Appeal of Grievance Committee Dismissal or Classification of Arbitration Request; however, no additional information may be added or attached to the form. The Hearing Panel can also dismiss the arbitration request if the Hearing Panel concludes the matter is not arbitrable. If the Board declines to arbitrate the matter, any deposits shall be returned to the parties. If the Board of Directors decides that arbitration should proceed, the matter is remanded to the Grievance Committee or arbitration Hearing Panel for further processing. (Amended 5/97)

If an appeal is filed, the President may appoint a panel to hear the appeal composed of at least five (5) Directors or a quorum of the Board of Directors, whichever is less. (Alternatively, the appeal may be heard by the Board's Executive Committee.) The decision of the appeal panel (or Executive Committee) is final and not subject to further review by the Board of Directors. (Revised 11/91)

If an otherwise arbitrable matter is the subject of civil litigation, arbitration shall not take place unless the litigation is withdrawn or referred to the Board by the court for arbitration in accordance with Article 17. In instances where the arbitration is mandatory (as defined in Part Ten, Section 44 of this Manual) the failure to arbitrate may result in a charge alleging violation of Article 17.

(8) **Duty to arbitrate before State Association.** As a member of a local Board, the Board Member is obligated to arbitrate a dispute with a member of another Board or a member who is directly a member of the State Association. (State Association bylaws have provisions of professional standards procedures as they relate to ethics and arbitration proceedings.)

(9) **Interstate arbitration.** The procedures described in Part Eleven of this Manual may be used for arbitrating disputes between REALTOR® members of Boards located in different states, subject to the parties' voluntary agreement in advance to the place, date, and time established by the arbitration Hearing Panel, and agreement to pay all costs of the arbitration as may be directed by the panel, and further subject to the applicable law of the state in which the arbitration is held.

(10) **Manner of invoking arbitration.** Any Board Member, client, or customer authorized to do so may request arbitration by the Board. The request shall be in writing, indicating the nature of the dispute and the amount in dispute, and must be accompanied by the required arbitration filing fee (deposit). The request may be on a Board form or other form permitted by law. The Secretary (or Executive Officer) shall refer the request to the Grievance Committee for determination within the time specified by the Board's professional standards procedures as to whether the matter is properly subject to arbitration, and as to whether the circumstances impose a mandatory obligation to arbitrate or arbitration is voluntary (to be conducted only if all parties voluntarily agree to arbitrate and be bound by the decision).

(11) **Dismissal of request for arbitration.** If the request for arbitration is dismissed by the Grievance Committee or the Hearing Panel, the complainant (requestor) shall be informed of the dismissal and the reasons for the dismissal, and may appeal to the Board of Directors within the time specified in the Board's procedures using Form #A-20, Appeal of Grievance Committee Dismissal or Classification of Arbitration Request; however, no additional information may be added or attached to the form. With the appeal, the Directors shall consider only the same information that was available to the Grievance Committee or Hearing Panel at the time of dismissal of the request for arbitration. The complainant and respondent do not have the right to be present at the Directors' meeting. *(Revised 5/97)*

(12) **Function of Grievance Committee.** The function of the Grievance Committee is to make only such preliminary review as is required to determine proper disposition of the request for arbitration. In reviewing a request for arbitration, the purpose of the review is to determine (1) if the requestor is authorized to invoke arbitration by the professional standards procedures in the Board's bylaws; (2) if the requested arbitration is mandated by the Board's bylaws or is voluntary on the part of the parties; (3) if the dispute described is an arbitrable matter; and (4) if the matter, either as to monetary amount (too small or too large) or as to legal complexity, is such that the Board should decline to arbitrate the matter and release the Board Members from their obligation to arbitrate, and thus free the members to seek other recourse to resolve the dispute.

(13) **Director on Grievance Committee.** A member of the Grievance Committee who is a member of the Board of Directors may not sit as a Director during an appeal to the Board of Directors of the Grievance Committee's decision to dismiss a request for arbitration, and may not vote on such appeal.

(14) **If matter referred for arbitration.** If the request for arbitration is referred for hearing, the Chairperson of the Grievance Committee shall refer it to the Secretary (or Executive Officer) with instructions to arrange an arbitration hearing. The Secretary shall notify the other party within the time specified in the Board's procedures, except that a reasonable delay does not invalidate the procedure. The Secretary shall mail a copy of the complaint to the respondent and provide forms for reply by the respondent, with directions to complete the forms, including the "Arbitration Agreement," and return them to the Secretary within the time specified in the Board's procedures.

(15) **Obligation to arbitrate.** The Board Member is obligated to arbitrate under certain circumstances if mandatory arbitration is permitted by state law. The member, by becoming and remaining a member, has entered into a prior agreement to arbitrate and acknowledges this prior agreement by signing an agreement to arbitrate and abide by the award in each case. If the applicable state law does not permit prior agreements to arbitrate, then arbitration may be voluntarily agreed to by the parties after the dispute arises.

(16) **Content of agreement to arbitrate.** The Arbitration Agreement shall acknowledge the membership duty voluntarily accepted when the party sought and received membership in the Board, and shall specify that the party does now, in accordance with the prior agreement to arbitrate, acknowledge and enter into such agreement and agree to abide by the award. The Arbitration Agreement shall be accompanied by a concise statement of the matter in dispute. Each party must sign and file the Agreement with the Secretary (or Executive Officer), along with any required deposit. The deposit may be returned to the recipient of the arbitration award. *(Amended 11/95)*

(17) **Refusal of respondent to appear and/or sign the Arbitration Agreement.** The circumstances under which Member Boards may conduct arbitration will vary based on state arbitration statutes and case law. In some states, arbitration may be conducted only if both parties sign the Arbitration Agreements, deposit the required amounts, and appear and take part in the hearing. In other states, arbitration may proceed in the absence of signed Arbitration Agreements and deposits if the parties appear and take part in the hearing. In still other states, arbitration may take place and a valid award may be rendered even if the respondent refuses to sign the Arbitration Agreement and refuses to take part in the hearing. Refer to Part Ten, Section 48(b) of this Manual for important information on the need to determine whether state law permits arbitration to proceed if the respondent refuses to appear at the hearing and/or refuses to sign the Arbitration Agreement.

(18) **Reply from respondent.** No sooner than fifteen (15) days nor later than twenty-one (21) days after mailing notice of hearing and a copy of the complaint to the respondent, the Secretary (or Executive Officer) shall mail a copy of any reply by the respondent to the complainant. A Board may ask for a response to an arbitration request but may not require one.

(19) Opportunity for challenge of possible arbitrators. When the Secretary (or Executive Officer) mails a copy of the reply, if any, from the respondent, the Secretary shall also mail to the parties a list of members of the Professional Standards Committee from whom an arbitration Hearing Panel of at least three (3) members will be appointed, and advise of their right to challenge for cause the qualification of any member to serve as an arbitrator if such list has not already been mailed to the parties with notification of the Grievance Committee's referral for hearing. Any disqualification must be filed within ten (10) days from the date the list of names was mailed to the parties. Within fifteen (15) days from the date the list of names is mailed to the parties, the arbitration Hearing Panel members shall be appointed by the Professional Standards Committee Chairperson from the members of the Professional Standards Committee who are not successfully challenged by the complainant or respondent for cause. A majority must be REALTORS®, and if a REALTOR-ASSOCIATE® or REALTOR® other than a principal has invoked the arbitration through the REALTOR® principal, or is affiliated with the respondent, and has a vested interest in the outcome of the proceeding, one (1) of the arbitrators shall be a REALTOR-ASSOCIATE® or REALTOR® other than a principal. The Chairperson shall also select one (1) of the panel members to serve as Chairperson of the Hearing Panel. *(Revised 11/98)*

If the arbitration involves issues related to areas of the real estate business such as commercial, investment, industrial, etc., and there is not a sufficient number of qualified practitioners on the Board's Professional Standards Committee to constitute a representative peer panel, the President shall appoint other Board Members qualified in that field to serve on the panel. If other qualified members cannot be identified, that fact is reported by the President to the Board of Directors, and if the Directors concur, the matter is referred to the State Association as outlined in Part Fourteen of this Manual. If the State Association cannot impanel a qualified peer panel, the complainant and respondent are released from their obligation to arbitrate. *(Revised 11/98)*

(20) Date, time, and place of hearing. The arbitration Hearing Panel will establish the date, time, and place for the arbitration hearing. Notice shall be given at least twenty-one (21) days prior to the date of hearing. (However, appearance by a party at an arbitration hearing waives the right to such notice.) The arbitration request and response, if any, shall be provided to Hearing Panel members prior to the hearing. Such time period shall be _____ (as determined by the Board of Directors) and shall be adhered to for all hearings. *(Revised 11/91)*

(21) Written statements and proof. In addition to the request for arbitration and the response to the arbitration request, the parties to the arbitration shall, upon notice of the hearing, present to the arbitrators, in writing, such statements and proof as they deem necessary to support their claims. The Hearing Panel may require statements to be verified by affidavit and/or that the accuracy or authenticity of documents or papers be verified by affidavit. In addition to written

statements and proof provided to the arbitrators prior to the hearing, the Hearing Panel may, at the hearing, receive any further written statements, documents, or other papers, and shall hear oral testimony as described in Part Ten, Section 51 of this Manual.

(22) Arbitrators to regulate hearing. The Hearing Panel determines (1) date, time, and place of hearing; (2) what appearances are to be made by the parties; (3) what evidence it will receive and consider, including the evidence of accountants and other experts; and (4) interpretations of Board bylaw provisions. Each party is responsible for the expenses of his/her expert witnesses and legal counsel. Arbitration hearings should be conducted in accordance with the Chairperson's Procedural Guide, Part Ten, Section 51 and Part Twelve of this Manual.

(23) Witnesses sworn or affirmed. Prior to testifying, all parties and witnesses shall be sworn or affirmed by the Chairperson as described in the Chairperson's Procedural Guide in Part Twelve of this Manual.

(24) Witnesses present only as necessary to hearing. Witnesses shall be present during the arbitration hearing only as necessary to receive instructions, to be sworn or affirmed, to give testimony, and to respond to cross-examination. Witnesses should be excused during other parts of the hearing.

(25) Opening statement by parties or attorneys. Each party or the party's attorney-at-law shall be given an opportunity for an opening statement which shall briefly outline the basic premise of the party's position in respect of the matter to be arbitrated.

(26) Testimony of character or general business reputation of party. No testimony may be admitted related to the character or general business reputation of any party unless such testimony has a direct bearing on the matter being heard.

(27) Testimony. The complainant may give testimony and present evidence as deemed appropriate to the arbitration by the Hearing Panel. Following presentation by the complainant, the respondent shall testify. The parties shall present to the arbitrators their oral testimony and such written statements and proof as the arbitrators may require. Proof may be by affidavit or other form acceptable to the arbitrators.

(28) Right to cross-examine. At the conclusion of testimony by each party, or by a witness, the opposing party and/or his/her counsel may cross-examine the party or witness.

(29) Arbitrators' examination of parties or witnesses. Upon completion of testimony and cross-examination of any party or witness, the arbitrators may examine the party or witness.

(30) Summary of each party. Upon completion of all testimony, each party or party's attorney may summarize the proceedings for the Hearing Panel. The complainant's summary shall be presented first, and the respondent's summary follows.

(31) **Parties excused for executive session and decision by arbitrators.** After the summary by each party, the parties shall be excused from the hearing room, and the arbitrators shall, in executive session, render their decision. The arbitrators shall be guided in the evaluation of all the evidence by the Arbitration Guidelines in Part Ten, Appendix II of this Manual.

(32) **Parties' settlement of the issue at any time.** The parties to the arbitration may settle the issue between them at any time. If they settle, they shall advise the Secretary (or Executive Officer), and the arbitration shall be terminated and so recorded in the file.

(33) **The award.** The award shall be made as soon as possible after the evidence is presented. The award shall be in writing and signed by the arbitrators or a majority of them, and shall state only the amount of the award, and when so served on each of the parties shall not be subject to review or appeal. Notwithstanding the foregoing, a party may appeal to the Board of Directors only on the basis of alleged irregularity(ies) of the proceeding as may have deprived the party of fundamental due process. The Directors shall not receive or review evidence offered as to the merits of the award, except as such evidence may bear upon a claim of deprivation of due process. After the award has been served upon each of the parties, they have twenty (20) days to request procedural review of the arbitration hearing by the Board of Directors. If no such review is requested, the award becomes final and binding following the twenty (20) day period. However, if procedural review is requested, the award is not considered final and binding until after the Board of Directors has concluded that the hearing had been conducted in a manner consistent with the Board's procedures and the parties had been afforded due process. (See Part Ten, Sections 53 and 55 of this Manual.) (*Revised 11/91*)

(34) **Escrowing of arbitration awards.** The Board may adopt procedures that require the nonprevailing party to either pay the award or deposit the amount with the Board within a specified period of time pending review of the arbitration procedure by the Board of Directors and/or a court of competent jurisdiction. Please refer to Part Ten, Section 53(c)-(f) of this Manual. (*Adopted 11/87*)

(35) **Request for procedural review.** The appeal may be heard by a panel of Directors appointed by the President or heard by the Board's Executive Committee. The request for procedural review shall be reviewed 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. Any appeal panel must be comprised of five (5) Directors or a quorum of the Board of Directors, whichever is less. The decision of the appeal panel (or Executive Committee) is final and binding and is not subject to further review by the Board of Directors. 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. (*Amended 11/94*)

(36) **If a REALTOR® refuses to arbitrate.** If a REALTOR® is charged in an ethics complaint of improperly refusing to submit a dispute to arbitration (as specified in Part Ten, Section 49 of this Manual), the complaint shall not be referred to the Grievance Committee or a Hearing Panel, but shall be brought before the Board of Directors at the next regularly scheduled meeting or at a special meeting called by the President for that purpose. The procedures for notice, time of notice, and hearing prescribed for matters before a Hearing Panel shall apply. The sole question of fact for the Directors to decide will be whether the respondent failed to submit an arbitrable matter (as defined in Part Ten, Sections 43 and 44 of this Manual) to arbitration. Upon determination that the member has refused to arbitrate a properly arbitrable matter, the Directors may direct the imposition of appropriate sanction and should, if they have reason to believe that the imposition of sanction will become the basis for litigation and a claim for damages consequent to such sanction, delay the effective date of implementing the sanction to a date following receipt by the Board of a judicial decision in a petition for declaratory relief filed by the Board to confirm the propriety of its action.

(37) **Enforcement of award.** If a party refuses to abide by an award in arbitration, such refusal should not be referred to the Grievance Committee as a violation of the Code of Ethics unless it reflects an established pattern or practice of noncompliance with the commitment to arbitrate. The award recipient should be advised by the Board to seek judicial enforcement of the award by a local court of competent jurisdiction and to request reimbursement of legal fees incurred in seeking enforcement. (Refer to Part Ten, Section 56 of this Manual.) If the court does not award reimbursement of legal fees, the Board of Directors may, at its discretion, reimburse the award recipient for legal fees incurred in seeking enforcement. (See Part Ten, Appendix III of this Manual for the rationale of judicial enforcement of awards in arbitration.)

Administrative Time Frames—Arbitration Proceedings

Situation	Time Table
Grievance	
Request filed	180 days . . .
Response required/# of days to submit	Optional/15 days from mailing request to respondent if response solicited
Appeal dismissal to Directors	20 days from mailing dismissal notice
Appeal of mandatory vs. voluntary classification	20 days from receipt of decision
Hearing	
Notification to respondent of request	5 days from receipt of Grievance Committee's instruction
Response required	15 days from mailing request to respondent
Challenge forms	10 days to challenge from date forms mailed
Panel named	15 days from mailing challenge forms
Hearing notice	21 days before hearing
Arbitration case to panel	Board option
Notice of witnesses and attorney	15 days before hearing to Board and other party
Procedural Review	
Request filed	20 days from mailing award
Preliminary review	Optional number of days
Amendment received	Within 10 days of notice
Review held by Directors	Next/special meeting giving not less than 10 days notice

(Adopted 11/98)