

**PROCURING CAUSE  
GUIDELINES AND CONSIDERATIONS  
BY AN ARBITRATION HEARING PANEL**

In conjunction with the National Association of REALTORS® the Minnesota Association of REALTORS® requires its members to arbitrate professional disputes that arise out of their relationship as REALTORS®. Article 17 of the REALTORS® Code of Ethics supplies the basis for arbitration: “In the event of contractual disputes or specific non-contractual disputes as defined in Standards of Practice 17-4 between REALTORS® 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.”

A number of cases brought to the committee include a claim or counterclaim where one or both of the parties stated that they thought the case involved the “threshold law,” “threshold policy,” “threshold guideline,” or some such language. The use of the term “threshold” goes back to the time when the local Boards and Associations had a guideline that, while not absolute, served as a guide in deciding claims involving who was entitled to the selling portion of the commission.

The Minnesota Association of REALTORS® has adopted the recommendations of the National Association that a number of factors need to be considered by an Arbitration Hearing Panel with each arbitration heard. As a result of these recommendations, a Hearing Panel will consider various factors.

For purposes of arbitration conducted by the Minnesota Association of REALTORS®, **procuring cause shall be defined as the uninterrupted series of events that led a buyer to make an affirmative decision to purchase the property.** Agency relationships, in and of themselves, do not determine entitlement of a coop sales commission. An agency relationship with a client and entitlement to cooperative compensation are two separate and distinct issues. A client relationship, or lack of one, is a factor that should be considered in accordance within these established guidelines to assist panel members in determining procuring cause and which party is entitled to the sales commission.

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.**

Each real estate transaction is unique. It is impossible to develop a comprehensive list of questions that Hearing Panel members should use in every proceeding. Not every factor will be applicable in each claim for commission. These guidelines were established to guide Hearing Panel members as to facts, issues and relevant questions that may assist them to reach fair, equitable and reasoned decisions.

**No Predetermined Rules or Regulation:** The Hearing Panel will avoid any assumption or presumption of entitlement to any award on the basis of any predetermined rule or regulation of the Board of REALTORS®, and shall make its determination in each case on the merits of all ascertainable and relevant facts.

**Arbitration Hearing and Award Separated From Ethics Hearing:** A Hearing in Arbitration as to entitlement to any award shall be held separately from any Ethics Hearing. Any award in arbitration shall be granted on the basis of judgment by the Hearing Panel as to authorized agency performed which was the actual “Procuring Cause”. An award in arbitration shall not be made on the basis of alleged or determined violation of the Code of Ethics as a basis for its finding.

**Award to Conform With State Law:** 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.

**Consideration of the Whole Course of Conduct:** In a dispute as to the entitlement to an award, the Hearing Panel must weigh the whole course of conduct of the parties, their relationship, and their understandings in order to determine the extent to which the acts of each of the parties produced or contributed to the transactions from which the dispute arises. In making its determination, the Hearing Panel shall be entitled to make reasonable inferences from the evidence and the evidence shall be sufficient to support such inferences. The issues to be arbitrated shall be those framed by the complaint, response and other pleadings of the parties. No other issue shall be considered by the Hearing Panel in making its determination.

The separation of arbitration proceedings from proceedings under the Code of Ethics should not be construed as precluding consideration by the Hearing Panel of all factors, including the propriety of the conduct of the parties, relevant to the dispute which is the subject of the arbitration.

The Hearing Panel is to avoid any preconceived or predetermined notions as to the appropriate award in arbitration that is to be made. Members of the Panel will disregard, as required by the Interpretation - 31, Official Interpretation of Article I, Section 2., Bylaws of the 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.”

Each member of such panel is conscious of the obligation to fairly and impartially seek to ascertain and understand all pertinent facts or factors which are relevant to the dispute before the Panel.

The members are also conscious that they are seeking to render a reasoned and reasonable peer judgment in a business dispute arising out of a real estate transaction,

and that the purpose and function of the hearing in arbitration neither includes determination nor conclusion as to alleged or possible violation of the Code of Ethics.

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, an Arbitration Hearing Panel shall make no referrals or 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.

The following are guidelines for Hearing Panel members. Panel members can, if they choose, ask questions based on the guidelines, and use the guidelines as points of discussion in executive session. These guidelines are a methodology of analysis, and a process by which panel members and arbitration principals can examine relevant facts involved in the dispute. They are not rules, and they must not be looked at as pre-determiners of a Hearing Panel's decision.

These guideline questions are not listed in order of importance. Depending upon the facts of a dispute, Hearing Panels may decide that one or more questions may be irrelevant to the issue at hand, or that one or more questions are key to their decision. All panel members are urged not to focus exclusively on any one aspect of the dispute, or on any single guideline question. These guideline questions can help Hearing Panel members evaluate the dispute within the full context of the transaction. Hearing Panel members are not required to ask, or limited to, these guideline questions.

**#1. WHAT DID EACH PARTY DO TO EARN A BROKERAGE FEE?**

This question is intended to convey to the panel members and to the parties to the dispute that each party has an equal burden of proof when claiming a commission; and that it is the actions of each party, not the status of either party (i.e. Listing agent; Open House agent; Buyer's agent, etc.) which are paramount. It is for the parties to cite what they did and why. It is for the Hearing Panel to decide the value and effect of those actions.

**#2. WHO HAD EFFECTIVE CONTROL OF THE BUYER?**

The selling of real estate is neither passive nor spontaneous. Rather, it requires the ability to bring together a number of elements to a point at which the buyer is willing to make an offer. The question for panel members to ask themselves is which agent (if either) created the circumstances which brought the buyer to the point of making an offer; and why did the buyer respond to that agent? Was either agent so integral to the transaction that without him/her no sale would have occurred? Did the agent make reasonable efforts to develop and maintain an ongoing relationship with the buyer? Did

the agent's inactivity or perceived inactivity cause the buyer to reasonably conclude that the agent had lost interest or disengaged from the transaction (abandonment)? Despite reasonable efforts of the agent, did the buyer seek assistance from another agent? Did the buyer estrange themselves from the first agent? Did the agent's failure to act when necessary cause the buyer to terminate the relationship (estrangement)? Did such actions or lack thereof, cause a break in the series of events leading to the purchase of the property?

**3. WHO/WHAT CAUSED THE BUYER TO MAKE THE AFFIRMATIVE DECISION TO BUY THE PROPERTY?**

At first glance it would appear that by asking this, the panel is begging the question. For if it can be answered, what else is there to decide? But this question suggests that the panel members evaluate the relative importance of varied facts, and determine whether any one factor (or either agent) was of paramount significance. For example, was the property itself an overriding factor, and the role of either agent secondary? Was there a unique or advantageous financing method involved, and, if so, which agent discussed it with the buyer? Was there a substantial objection to purchasing perceived by the buyer, and if so, which agent overcame it? Was the successful transaction actually brought about through the initiation of a separate or subsequent chain of events by either agent? Did the buyer make the decision to buy independent of either agent's efforts or information?

**#4. WHOSE/ WHAT ACTIONS LED TO THE INITIAL INSPECTION OF THE PROPERTY BY THE BUYER?**

While undue weight should not be given to the first inspection of a property by the buyer, and while the panel should specifically reject the supposition that all relevant events commence with the first inspection, still it is undeniable that the inducement of a buyer to see a property is often an intrinsic part of the buying process. Therefore, the Hearing Panel may wish to determine whether the initial viewing of the property was in response to the direct activity of either agent. Who first introduced the buyer to the property? When was the first introduction made? How was it made? Did the buyer know about the property before the agent contacted the buyer? Did the buyer find the property on his or her own? Were there previous dealings between the buyer and the seller? How was the property introduced? Was the property introduced through an Open House? What other or subsequent efforts were made by either agent after the Open House? Was the "introduction" merely a mention that the property was listed?

**#5. BEFORE, DURING, AND AFTER THE INSPECTION(S) OF THE PROPERTY BY THE BUYER, WHOSE ACTIONS AND ACTIVITIES INITIATED A SERIES OF EVENTS WHICH LED TO AN ACCEPTABLE OFFER?**

The transformation of a prospect into a buyer involves initiating and maintaining a relationship throughout the buying process. That relationship may begin at an open house; in response to a call generated by a sign or ad; at a qualifying interview; or under other innumerable circumstances. This relationship may include the buyer relying upon the agent as a source of information, counsel, and judgment. The Hearing

Panel may endeavor to determine which agent (if either) had such a relationship with the buyer which was instrumental to the sale. The Hearing Panel may also determine which agent diligently and effectively pursued the sale of the property to the buyer. What efforts were made after the introduction to the property?

**#6. WAS THE ACTION OF ANY AGENT INVOLVED IN THE DISPUTE INAPPROPRIATE INTRUSION ON THE OTHER AGENT'S PURSUIT OF A TRANSACTION?**

In contemplating the actions of each agent, the Hearing Panel may wish to determine whether those actions were an unwarranted interference calculated to interrupt a usual and customary sales process, or whether the intrusion and the series of events initiated by it led to the sale. When did the other agent enter the transaction? What was the length of time between the first agent's interactions with the buyer before the second agent's interaction with the buyer? When did the first agent become aware of the second agent's interactions with the buyer? Was an agency disclosure timely provided in accordance with law? At what point in the buying process was the buyer representation or facilitator relationship established? Was the buyer representation contract or facilitator services agreement in writing? Were all the disclosures complied with? What was the relative success or failure of negotiations conducted by one agent compared to that of the other? Did the buyer seek another agent in order to get a lower price? Did the buyer express the desire not to deal with the agent and refuse to negotiate through him or her?

**#7 AGENTS NOT PROHIBITED FROM ENTERING INTO AGREEMENTS TO CHANGE COOPERATIVE COMPENSATION**

When a dispute comes before a Hearing Panel involving an MLS offer of compensation, the panel members must decide which of the two or more agents was the procuring cause. However, when the parties enter into a written contract, they are agreeing between themselves on a specific commission or that no commission is due. In such a case, this contract is determinative, rather than the Hearing Panel pursuing its traditional procuring cause analysis. If the contract is a valid and enforceable contract, one in which the listing agent and coop agent have agreed to a different amount of compensation, or none at all, the Hearing Panel should honor and enforce that contract unless there are extenuating circumstances brought forth in a proceeding to justify the panel not enforcing the contract.

The preceding guidelines, questions or factors to be considered are typical of, but are not all inclusive of, the questions or factors considered by the panel concerning any case brought by members for hearing. The overall objective of an Arbitration Hearing Panel is to weigh carefully and impartially the whole course of conduct of the parties, and to render a reasoned and reasonable peer judgment as to the proper award in the arbitration.