



GUIDE TO REQUESTS FOR MEDIATION/ARBITRATION UNDER ARTICLE 17 OF THE NAR CODE OF ETHICS

This summary is for informational purposes only and is not a substitute for the provisions in the NAR Code of Ethics and Arbitration Manual as adapted by the Minnesota Association of REALTORS® ("Manual"). For further details, please see the Manual. If you desire legal advice, please consult an attorney.

The term "Board" as used herein refers to the Minnesota REALTORS®.

Duty and Privilege to Arbitrate

Article 17

In the event of contractual disputes or specific non-contractual disputes 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 mediate the dispute if the Board requires its members to mediate. If the dispute is not resolved through mediation, or if mediation is not required, REALTORS® shall submit the dispute to arbitration in accordance with the policies of the Board rather than litigate the matter.

In the event clients of REALTORS® wish to mediate or arbitrate contractual disputes arising out of real estate transactions, REALTORS® shall mediate or arbitrate those disputes in accordance with the policies of the Board, provided the clients agree to be bound by any resulting agreement or award.

The obligation to participate in mediation and arbitration contemplated by this Article includes the obligation of REALTORS® (principals) to cause their firms to mediate and arbitrate and be bound by any resulting agreement or award. (Amended 1/12)

By becoming and remaining a member and by signing or having signed the agreement to abide by the bylaws of the Association, **every member, where consistent with applicable law, binds himself or herself and agrees to submit to arbitration (and to mediation if required) by the Association's facilities all disputes as defined by Article 17 of the Code of Ethics** and, as set forth in the provisions of the Manual, all disputes with any other member, as defined, under the following conditions.

In addition, REALTOR® principals who participate in a Association's MLS where they do not hold Association membership, or nonmember brokers and nonmember licensed or certified appraisers who participate in the Association's MLS, having signed the agreement to abide by the Association's Multiple Listing Service rules and regulations

binds himself or herself and agrees to submit to arbitration by the Association'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 11/11)*

Request for Arbitration

To make a request for Arbitration, please complete and submit Form #A-1, Request and Agreement to Arbitrate to the Board within 180 days after the closing of the transaction, if any, or within 180 days after the facts constituting the arbitrable matter could have been known in the exercise of reasonable diligence, whichever is later.

Mediation

Participation in mediation procedures offered by the Board is voluntary. Although no party to an arbitrable matter is required to submit to mediation, and mediation cannot and is not intended to be a substitute for the arbitration procedures, mediation can be a useful tool in resolving the conflicts that arise involving Association Members and their clients and customers. Mediation is available in instances where arbitration would be provided. Upon receipt of a request for arbitration, parties will be advised of their option to participate in mediation. If the parties agree, the matter will be referred to a Mediation Officer and a mutually convenient time and location for mediation will be established.

If the mediation attempt is unsuccessful, or if either of the parties wishes to discontinue the mediation process for any reason, then mediation will be terminated and the request for arbitration will be referred to a Grievance Review Panel for review.

To request mediation, please complete and submit a *Request and Agreement to Arbitrate* form to the Board.

Mandatory types of arbitration

- (1) Every REALTOR® of the Association 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 Association'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 5/01)*

- (2) A REALTOR® other than a principal or a REALTOR ASSOCIATE® shall have the right to invoke the arbitration facilities of the Association in a business dispute with a REALTOR® or REALTORASSOCIATE® in another firm or with their firm (or both), whether in the same or a different Association, 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 proceedings and to participate but are not considered to be parties. *(Amended 5/01)*
- (3) A client of a REALTOR® principal may invoke the facilities of the Association 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 Association will arbitrate the dispute subject to the Association'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 5/01)*

Voluntary types of arbitration

- (4) 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 Association, provided each party voluntarily agrees to the arbitration in writing and the Association 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)*
- (5) A REALTOR® principal may invoke the arbitration facilities of the Association 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 Association 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 may invoke the arbitration facilities of the Association of REALTORS® in cases where they believe they have an arbitrable dispute with a REALTOR®. Under these circumstances, REALTORS® are not required to agree to or participate in arbitration. *(Revised 11/12)*
- (6) Business disputes between a REALTOR® principal and a customer of the REALTOR® principal may be arbitrated by the Association 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)*

Arbitrable Issues and Appropriate Parties

Arbitrable Issue

The terms “dispute” and “arbitrable matter”, as used in Article 17, 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.

Appropriate Parties

A REALTOR® seeking to invoke arbitration could name a REALTOR® (principal¹) 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 complaints with additional REALTORS® (principals) or the firm (or both) named as complainants. In such cases both claims would be consolidated by the Grievance Review Panel 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?

¹ “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)

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.

Grievance Review Panel

Upon receipt of a request for arbitration, the Professional Standards Administrator shall make a preliminary review of the request to determine if the request is in acceptable form.

Any request that is not in acceptable form shall be returned to the complainant accompanied by the initial conclusions. The complainant shall be advised that they are free to refile an amended request in proper form.

The 180-day filing deadline will continue to run when a request is not properly filed.

If the request is acceptable, the Professional Standards Administrator shall, in a timely manner, appoint three members of the Professional Standards Committee to serve on the Grievance Review Panel to review the arbitration request and any evidence and documentation attached.

The Grievance Review Panel is to make only such preliminary evaluation as is necessary to determine if, taken the request as true on its face, a hearing is to be warranted. The reviewers 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.

Consideration by the Grievance Review Panel of a request for arbitration:

(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 Professional Standards Administrator, 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 Review Panel 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 Review Panel 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 or advocating on behalf of the complainant.

(2) Are all necessary parties named in the request for arbitration?

(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?

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

(5) Is litigation concerning an otherwise arbitrable matter 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 Association and request for arbitration, or unless the court refers the matter to the Association for arbitration.

(6) Is there any reason to conclude that the Association 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 Association 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?

Arbitration Hearing Panel:

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

The majority of arbitration hearings conducted by 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. However, the ability of a cooperating broker to file an arbitration request against either the listing broker or directly against another cooperating broker who was paid by the listing broker is premised on the offer made by the listing broker applying to the cooperating broker filing the arbitration request. (i.e. If a listing broker offers cooperating compensation only to a buyer's representative, a cooperating broker acting as a facilitator would have no contractual basis on which to file an arbitration request.)

Procuring Cause

For purposes of arbitration conducted by 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.”

Factors for Consideration by a Hearing Panel in Arbitration

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 Review Panel, 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 Review Panel. This is based on the premise that the fundamental right and primary responsibility to bring potentially unethical conduct to the attention of the Grievance Review Panel 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 Association legal counsel should be followed.

Factor #6. Consideration of the entire course of events

The standard of proof in Association-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. (See Manual for full listing of questions.) Here are a few:

- Nature and status of the transaction
- Nature, status, and terms of the listing agreement
- Nature, status, and terms of buyer representation agreements
- Nature, status, and terms of the offer to compensate
- Roles and relationships of the parties
- Initial contact with the purchaser
- Conduct of the brokers
- Continuity and breaks in continuity (abandonment and estrangement)
- Conduct of the buyer
- Conduct of the seller
- Leasing transactions
- Other information