

Arbitration - Mandatory or Voluntary?

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Obligation to Arbitrate

The obligation of REALTORS® to arbitrate flows from Article 17 of the Code of Ethics. Article 17 of the Code establishes:

In the event of a contractual disputes or specific non-contractual disputes as defined in Standard 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.

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. (Amended 1/97)

The obligation to arbitrate expressed in Article 17 is further defined in Standards of Practice 17-1, 17-2, 17-3 and 17-4. Standard of Practice 17-1 provides:

The filing of litigation and the refusal to withdraw from it by REALTORS® in an arbitrable matter constitutes a refusal to arbitrate. (Adopted 2/86)

Standard of Practice 17-2 states:

Article 17 does not require REALTORS® to arbitrate in those circumstances when all parties to the dispute advise the Board in writing that they choose not to arbitrate before the Board. (Amended 1/93)

Standard of Practice 17-3 provides:

REALTORS®, when acting solely as principals in a real estate transaction, are not obligated to arbitrate disputes with other REALTORS® absent a specific written agreement to the contrary. (Adopted 1/96)

Standard of Practice 17-4 provides:

Specific non-contractual disputes that are subject to arbitration pursuant to Article 17 are:

1) Where a listing broker has compensated a cooperating broker and another cooperating broker subsequently claims to be the procuring cause of the sale or lease. In such cases the complainant may name the first cooperating broker as respondent and arbitration may proceed without the listing broker being named as a respondent. Alternatively, if the complaint is brought against the listing broker, the listing broker may name the first cooperating broker as a third-party respondent. In either instance the decision of the hearing panel as to procuring cause shall be conclusive with respect to all current or subsequent claims of the parties for compensation arising out of the underlying cooperative transaction. (Adopted 1/97)

2) Where a buyer or tenant representative is compensated by the seller or landlord, and not by the listing broker, and the listing broker, as a result, reduces the commission owed by

the seller or landlord and, subsequent to such actions, another cooperating broker claims to be the procuring cause of sale or lease. In such cases the complainant may name the first cooperating broker as respondent and arbitration may proceed without the listing broker being named as a respondent. Alternatively, if the complaint is brought against the listing broker, the listing broker may name the first cooperating broker as a third-party respondent. In either instance the decision of the hearing panel as to procuring cause shall be conclusive with respect to all current or subsequent claims of the parties for compensation arising out of the underlying cooperative transaction. (Adopted 1/97)

3) Where a buyer or tenant representative is compensated by the buyer or tenant and, as a result, the listing broker reduces the commission owed by the seller or landlord and, subsequent to such actions, another cooperating broker claims to be the procuring cause of sale or lease. In such cases the complainant may name the first cooperating broker as respondent and arbitration may proceed without the listing broker being named as a respondent. Alternatively, if the complaint is brought against the listing broker, the listing broker may name the first cooperating broker as a third-party respondent. In either instance the decision of the hearing panel as to procuring cause shall be conclusive with respect to all current or subsequent claims of the parties for compensation arising out of the underlying cooperative transaction. (Adopted 1/97)

4) Where two or more listing brokers claim entitlement to compensation pursuant to open listings with a seller or landlord who agrees to participate in arbitration (or who requests arbitration) and who agrees to be bound by the decision. In cases where one of the listing brokers has been compensated by the seller or landlord, the other listing broker, as complainant, may name the first listing broker as respondent and arbitration may proceed between the brokers. (Adopted 1/97)

As used in Article 17, the word "dispute" generally relates to good faith contractual disagreements between REALTORS® associated with different firms concerning commissions or entitlement to compensation.

While disputes may also arise as a result of unethical conduct on the part of a REALTOR® or REALTOR-ASSOCIATE®, such disputes are not properly arbitrable. Unethical conduct may never be arbitrated, nor are the consequences of such conduct negotiable.

Section 43, Code of Ethics and Arbitration Manual, provides that a "dispute" and "arbitrable matter" are defined:

...as those contractual issues and questions, and specific noncontractual 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.

A Board's Grievance Committee initially determines whether a request is "arbitrable" and, if so, whether it is properly subject to mandatory or voluntary arbitration. The parties should be informed of the classification of the dispute and be provided with an opportunity to appeal that classification (see Section 47(c), Manner of Invoking Arbitration, and Section 45(d), Boards Right to Decline Arbitration).

Mandatory Arbitration

The three circumstances under which arbitration is mandatory, set forth in Section 44, Duty and Privilege to Arbitrate, Code of Ethics and Arbitration Manual (also in Professional

Standards Policy Statement #2) follow.

Voluntary Arbitration

(May not go forward unless all parties voluntarily agree to participate and to be bound by the final decision.)

Voluntary arbitration is available to REALTOR® and REALTOR-ASSOCIATE®s affiliated with the same firm. However, this type of arbitration can be conducted only when all parties voluntarily agree to the arbitration in writing, and the Board finds the request properly arbitrable. The privilege to request this type of voluntary arbitration applies to disputes arising when the parties are or were affiliated with the same firm, regardless of the time when the request is filed. NOTE: This means that even when a sales licensee leaves a firm because of an "in-house dispute," then goes to work for a second firm and subsequently requests arbitration with the former REALTOR® principal, such arbitration is still considered to be between members of the same firm because of the relationships that existed when the dispute arose.

A REALTOR® principal may request arbitration with a nonmember broker if both parties agree to participate and to abide by the decision rendered if the Board finds the matter properly subject to arbitration. There is absolutely no obligation for a REALTOR® to arbitrate a dispute with a nonmember broker who is not an MLS Participant. The request for such arbitration must come from the REALTOR®, not from the nonmember broker or nonmember salesperson (unless the nonmember broker is a Participant in the MLS).

A dispute between a REALTOR® principal and a customer (as distinguished from a client) may be arbitrated if a written contractual agreement was created between a client and the customer, and if each party to the dispute (i.e., the customer and REALTOR®) voluntarily agrees to participate and abide by the decision rendered.

Arbitration may be conducted only under the circumstances described above (Professional Standard Policy Statement #9).

Special Notes About Mandatory Arbitration

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. (Section 49, Code of Ethics and Arbitration Manual)

When a dispute otherwise constitutes a mandatory arbitration, a REALTOR® should not be found in violation of Article 17 if, as a defendant in litigation, that REALTOR® joins the cooperating broker (subagent or buyer agent) in the litigation (Professional Standards Policy Statement #20).

Arbitration of disputes arising out of circumstances occurring prior to the time a REALTOR® is elected to Board membership cannot be mandated (Professional Standards Policy Statement #23).

A REALTOR® who participates in litigation involving an arbitrable matter, neither party having invoked the arbitration facilities of the Board, may not thereafter be charged with failing or refusing to arbitrate (Professional Standards Policy Statement #28).

Special Note About Voluntary Arbitration

When a dispute constitutes a voluntary arbitration situation, a REALTOR® is not compelled to first request arbitration and have the request denied (by the Board or the other party) before the REALTOR® may institute litigation or take the matter before another alternative non-judicial dispute resolving forum (Professional Standards Policy Statement #30).