

NATIONAL ASSOCIATION OF REALTORS®
Code of Ethics Video Series

Case Interpretations Related to Article 3

Note: The following information is reprinted from the current NATIONAL ASSOCIATION OF REALTORS® *Code of Ethics and Arbitration Manual*.

Case #3-1: Rules of MLS May Not Circumvent Code (Revised Case #22-1 May, 1988. Transferred to Article 3 November, 1994.)

REALTOR® A complained to his Board of REALTORS® that procedures in the Board's Multiple Listing Service permitted REALTORS® participating in the Service to evade their obligations under Article 3 of the Code of Ethics. His specific complaint was that, as exclusive agent of Client B, he had filed the client's property in the Multiple Listing Service. Other REALTORS® participating in the Multiple Listing Service had contacted Client B directly to make appointments to show the property and to transmit offers to purchase it, without his, REALTOR® A's, knowledge or consent. When he objected to this conduct, the officers of the Multiple Listing Service had cited the MLS rule that held that placing property in the Service had the effect of listing the property with the MLS, and authorized the MLS to refer it to other Participants as subagents, who were then free to transmit offers directly to the client. REALTOR® A's complaint emphasized that his objection was primarily to the rule of the Multiple Listing Service.

The complaint was referred to the Directors of the Board of REALTORS® which asked the Chairperson of the Board's Multiple Listing Committee to attend a special Directors' meeting on the subject. At the meeting, it was pointed out that the contested rule of the Multiple Listing Service, which had not been submitted to the Board of Directors for approval, was in conflict with Article 3 of the Code of Ethics, and with the nature and purpose of the MLS itself, since the MLS did not provide brokerage services and could not function as an agent of sellers. The Multiple Listing Service was directed to rescind all procedural rules that permitted the Service or any of its Participants to intrude upon the agency status of any REALTOR® holding an exclusive listing.

Case #3-2: Assumed Consent for Direct Contact (Reaffirmed Case #22-2 May, 1988. Transferred to Article 3 November, 1994. Transferred to Article 16 as Case #16-18, November, 2001.)

Case #3-3: Arbitrary Refusal to Cooperate (Revised Case #22-3 May, 1988. Transferred to Article 3 November, 1994. Deleted November, 2001.)

Case #3-4: Cooperation Not Mandatory (Reaffirmed Case #22-4 May, 1988. Transferred to Article 3 November, 1994.)

Client A called on REALTOR® B to list a small commercial property. In stipulating the price at which he wished to list the property, Client A explained that he was aware that it was a relatively low price, but he wanted a quick sale and, he added, a higher price could benefit very little at that time because of certain tax considerations. He told REALTOR® B that a number of prospective buyers had spoken to him about the property within the past year. He gave their names to REALTOR® B and said he felt sure that among them there would be a ready buyer at the price. He told REALTOR® B that he wanted the property submitted to them first.

The next day, REALTOR® C, who had unsuccessfully solicited the listing and learned that the property was listed exclusively with REALTOR® B, called REALTOR® B to ask that he be accepted as a cooperating broker. REALTOR® B told REALTOR® C that because of unusual circumstances the best service to his client did not require cooperation; that a prospective buyer was at that time seriously considering the property; and that under the circumstances he preferred not to invite cooperation.

REALTOR® C complained to the Board of REALTORS® charging REALTOR® B with a violation of Article 3 by refusing to cooperate. Pursuant to the complaint a hearing was scheduled before a Hearing Panel of the Board's Professional Standards Committee.

During the hearing, REALTOR® B outlined fully the circumstances under which the property had been listed by him, and maintained that the interest of Client A would not be advanced by acceptance of cooperation by REALTOR® C.

The panel concluded that REALTOR® B's reasons for not accepting cooperation in this instance were valid and that his action did not constitute a violation of Article 3.

Case #3-5: Refusal to Extend Cooperation in Sale of New Homes (Reaffirmed Case #22-5 May, 1988. Transferred to Article 3 November, 1994. Revised November, 2001.)

REALTOR® A, who operated a brokerage business in many areas of the city, was also a home builder. For the homes he built, he maintained a separate sales force and consistently refused to permit other REALTORS® to show his new homes.

This practice came to the attention of an officer of the Board of REALTORS® who made a complaint which was referred to the Professional Standards Committee by the Grievance Committee.

At the hearing, the Hearing Panel asked REALTOR® A to answer charges that his policy violated Article 3 of the Code of Ethics.

REALTOR® A's defense was that Article 3 requires REALTORS® to cooperate with other brokers "except when cooperation is not in the client's best interest." He contended that in selling his own new homes there was no client; that he was not acting in the capacity of a broker, but as owner-seller; and that, under the circumstances, Article 3 did not apply to his marketing the houses he built.

The Hearing Panel concluded REALTOR® A's defense was valid; that he was a principal; that Article 3 permitted him, as the builder-owner, to decide what marketing procedure would be in his best interest; and that although other REALTORS® might disagree with his decision, he was not in violation of Article 3.

Case #3-6: Arbitrary Refusal to Extend Cooperation (Reaffirmed Case #22-6 May, 1988. Transferred to Article 3 November, 1994. Deleted November, 2001.)

Case #3-7: Time at Which Modification to Offer of Compensation is Communicated is a Determining Factor (Revised Case #22-7 May, 1988. Transferred to Article 3 November, 1994. Cross-reference Case #2-14. Revised November, 2001.)

REALTOR® A listed Seller X's home and filed the listing with the MLS. The property data sheet indicated the compensation REALTOR® A was offering to the other Participants if they were successful in finding a buyer for Seller X's home.

During the next few weeks, REALTOR® A authorized several Participants of the Multiple Listing Service, including REALTOR® C, to show Seller X's home to potential buyers. Although several showings were made, no offers to purchase were forthcoming. REALTOR® A and Seller X, in discussing possible means of making the property more salable, agreed to reduce the listed price. REALTOR® A also agreed to lower his commission. REALTOR® A changed his compensation offer in the MLs and then called the MLS Participants who had shown Seller X's property to advise them that he was modifying his offer of compensation to cooperating brokers. Upon receiving the call, REALTOR® C responded that he was working with Prospect Z who appeared to be very interested in purchasing the property and who would probably make an offer to purchase in the next day or two. REALTOR® C indicated that he would expect to receive the compensation that had been published originally in the MLS and not the reduced amount now being offered to him, since he had already shown the property to Prospect Z and expected an offer to purchase would be made shortly. REALTOR® A responded that since Prospect Z had not signed an offer to purchase, the modified offer of compensation would be applicable.

The following day, REALTOR® C wrote an offer to purchase for Prospect Z. The offer was submitted to the Seller by REALTOR® A and was accepted. At the closing, REALTOR® A gave REALTOR® C a check for services in an amount reflecting the modified offer communicated to REALTOR® C by phone. REALTOR® C refused to accept the check indicating that he felt REALTOR® A's actions were in violation of the Code of Ethics. REALTOR® C filed a complaint with the Board's Grievance Committee alleging violation of Articles 2 and 3 on the part of REALTOR® A citing Standard of Practice 3-2 in support of the charge.

During the hearing, REALTOR® C stated that REALTOR® A's modification of the compensation constituted a misrepresentation through concealment of pertinent facts since he had not provided REALTOR® C with specific written notification of the modification prior to the time REALTOR® C began his efforts to interest the purchaser in the listed property. REALTOR® A defended his

actions by indicating that timely notice of the modification of compensation offered had been provided to REALTOR[®] C by telephone prior to REALTOR[®] C obtaining a signed offer to purchase. REALTOR[®] A also indicated that his modified offer of compensation had been bulletined to all Participants through the MLS. REALTOR[®] A also noted that in accordance with Standard of Practice 3-2, the modified compensation offer had been communicated to REALTOR[®] C prior to the time the purchaser signed an offer to purchase. REALTOR[®] A also commented that had REALTOR[®] C produced the signed offer to purchase prior to REALTOR[®] A communicating the modified offer, then REALTOR[®] A would have willingly paid the amount originally offered.

Based on the evidence presented to it, the Hearing Panel concluded that REALTOR[®] A had acted in accordance with the obligation expressed in Standard of Practice 3-2 and consequently was not in violation of Articles 2 or 3.

Case #3-8: REALTOR[®]'s Obligation to Disclose Dual Commission Arrangements (Deleted Case #9-25 May, 1988. Revised and reinstated November, 1988 and subsequently revised May, 1989. Reaffirmed April, 1991. Transferred to Article 3 November, 1994. Revised November, 2001.)

REALTORS[®] A and B were members of the same Board and Participants in the Multiple Listing Service. REALTOR[®] A, cooperating with REALTOR[®] B on REALTOR[®] B's listing, presented an offer to purchase signed by buyers offering the listed price, and a check for earnest money. The only contingency was a mortgage contingency, and REALTOR[®] A shared with REALTOR[®] B qualifying information about the buyers indicating there should be no problem securing a mortgage. The following day, REALTOR[®] B returned the offer to REALTOR[®] A with "REJECTED" written on it and initialed by the seller, and explained that the seller had accepted another offer secured by one of REALTOR[®] B's sales associates. REALTOR[®] A inquired about the seller's reason for rejecting the full price offer with only a mortgage contingency, and what had caused the seller to accept the other offer. REALTOR[®] B responded that he did not know, but with equal offers, he supposed the seller would favor the offer secured by the listing broker.

Later, REALTOR[®] A met the seller at a social event. The seller thanked him for his efforts in connection with the recent sale of the seller's home. The seller hoped REALTOR[®] A understood there was nothing personal in his decision, adding that the money he saved through his "special agreement" with REALTOR[®] B had been the deciding factor. When REALTOR[®] A asked about the "special agreement," the seller explained he had signed a listing agreement for the sale of his property which authorized the submission of the listing to the Multiple Listing Service and specified a certain amount of compensation. However, the seller stated that he had also signed an addendum to the listing agreement specifying that if REALTOR[®] B sold the listing through his own office, a percentage of the agreed compensation would be discounted to the seller's credit, resulting in a lower commission payable by the seller.

REALTOR[®] A filed a written complaint with the Board of REALTORS[®] against REALTOR[®] B, alleging a violation of Article 3. After its review of the complaint, the Grievance Committee requested that an ethics hearing be arranged.

REALTOR[®] A, in restating his complaint to the Hearing Panel, said that REALTOR[®] B's failure to disclose the actual terms and conditions of the compensation offered through the Board MLS resulted in concealment and misrepresentation of pertinent facts to REALTOR[®] A and to the prospective buyers served by REALTOR[®] A who had, in good faith, offered to purchase the property at the listed price with only a mortgage contingency. REALTOR[®] A told the Hearing Panel that if he had known the facts which were not disclosed by REALTOR[®] B, he could have fully and accurately informed the buyers who could have taken those facts into consideration when making their offer. As it was, said REALTOR[®] A, the buyers acting in good faith were deceived by facts unknown to them because they were unknown to REALTOR[®] A. Further, REALTOR[®] A said that REALTOR[®] B's failure to fully disclose the true terms and conditions relating to compensation made it impossible to have a responsible relationship with REALTOR[®] B and make proper value judgments as to accepting the offer of compensation.

REALTOR[®] B stated that it was his business what he charged and the Board or MLS could not regulate his charges for his services. If he wished to establish a dual commission charge by agreement with his client, that was his right, and there was no need or right of the Board or MLS to interfere.

The Hearing Panel agreed that it was REALTOR[®] B's right to establish his fees and charges as he saw fit, and that the Board or MLS could not and would not interfere. However, the Hearing Panel noted that his complete freedom to establish charges for his services did not relieve him of his obligation to fully disclose the real terms and conditions of the compensation offered to the other Participants of the Multiple Listing Service, and did not justify his failure to disclose the dual commission arrangement. In the case of a dual commission arrangement, the listing broker must disclose not only the existence of the "special arrangement" but also must disclose, in response to an inquiry from a potential cooperating broker, the differential that would result in the total commission in a cooperative transaction. The Hearing Panel concluded that by submitting a listing to the MLS indicating that he was offering a certain amount of compensation to cooperating brokers while other relevant terms and conditions were not disclosed to the other MLS Participants, he had concealed and misrepresented real facts and was in violation of Article 3 of the Code of Ethics.

Case #3-9: REALTOR[®]'s Obligation to Disclose True Nature of Listing Agreement (Adopted as Case #9-32 April, 1992. Transferred to Article 3 November, 1994.)

REALTOR[®] A listed the home of Seller X and filed the listing with the Board's MLS categorizing it as an exclusive right to sell listing. REALTOR[®] A did not disclose that there was a dual rate commission arrangement on this listing, even though the listing contract provided that, should the seller be the procuring cause of sale, the listing broker would receive a commission of \$500.00, an amount intended to compensate REALTOR[®] A for his marketing costs.

REALTOR[®] B, a cooperating broker, showed the property several times. Eventually, REALTOR[®] B brought a signed purchase agreement to REALTOR[®] A. REALTOR[®] A returned the purchase agreement the next day, informing REALTOR[®] B that the seller had rejected the offer. Several

weeks later, REALTOR[®] B learned that the property had been sold, and that the buyer was Seller X's nephew.

Several months later, REALTOR[®] B met Seller X at a fund-raising event. Seller X thanked her for her efforts, and told her that, under "normal circumstances," he might have seriously considered the offer she had produced. When asked why the circumstances surrounding this transaction were "unusual," Seller X responded telling her of his agreement "with REALTOR[®] A to pay a \$500.00 commission if Seller X found the buyer. And when my nephew decided to buy the house, I jumped at the chance to save some money."

When REALTOR[®] B learned of this arrangement, she filed a complaint with the Board of REALTORS[®] alleging that REALTOR[®] A had violated Article 3 of the Code of Ethics. The Executive Officer of the Board referred the complaint to the Grievance Committee, and, after its review, the Grievance Committee referred the complaint back to the Executive Officer indicating that an ethics hearing should be scheduled.

At the hearing, REALTOR[®] B, in stating her complaint to the Hearing Panel, said that REALTOR[®] A's failure to disclose the actual terms and conditions of his listing with Seller X was a misrepresentation. She explained that, had she been aware of this arrangement, she might have decided not to accept REALTOR[®] A's offer of cooperation, since it might put potential purchasers she would produce in a possibly unfair position.

REALTOR[®] A, speaking in his own defense, stated no commission differential would have resulted if the buyer had been procured by either the listing broker or a cooperating broker so whatever other arrangements he had with Seller X were personal and, as listing broker, it was his right to establish the terms and conditions of his relationship with his client.

After careful deliberation, the Hearing Panel concluded that while it was REALTOR[®] A's right to establish the terms and conditions of the listing contract, the existence of his "special" arrangement with Seller X should have been disclosed as a dual or variable rate commission, since without knowledge of it, cooperating brokers would be unable to make knowledgeable decisions regarding acceptance of the listing broker's offer to cooperate.

The Hearing Panel concluded that REALTOR A had in fact concealed and misrepresented the real facts of the transaction and was in violation of Article 3 of the Code of Ethics as interpreted by Standard of Practice 3-4.

Case #3-10: Disclose Accepted Offers with Unresolved Contingencies (Adopted May, 2004.)

REALTOR[®] A listed Seller S's house and placed the listing in the local association's MLS. Within a matter of days, REALTOR[®] X procured a full price offer from Buyer B. The offer specified that Buyer B's offer was contingent on the sale of Buyer B's current home. Seller S, anxious to sell, accepted Buyer B's offer but instructed REALTOR[®] A to continue marketing the property in hope that an offer that was not contingent on the sale of an existing home would be made.

A week later, REALTOR[®] Q, another cooperating broker working with an out-of-state transferee on a company-paid visit, contacted REALTOR[®] A to arrange a showing of Seller S's house for Buyer T. REALTOR[®] A contacted Seller S to advise him of the showing and then called REALTOR[®] Q to confirm that he and Buyer T could visit the property that evening. REALTOR[®] A said nothing about the previously-accepted purchase offer.

REALTOR[®] Q showed the property to Buyer T that evening and Buyer T signed a purchase offer for the full listed price. REALTOR[®] Q left the purchase offer at REALTOR[®] A's office.

REALTOR[®] A informed Seller S about this second offer. At Seller S's instruction, Buyer B was informed of the second offer, and Buyer B waived the contingency in his purchase offer. REALTOR[®] A then informed REALTOR[®] Q that Seller S and Buyer B intended to close on their contract and the property was not available for purchase by Buyer T.

REALTOR[®] Q, believing that REALTOR[®] A's failure to disclose the existence of the accepted offer between Seller S and Buyer B at the time REALTOR[®] Q contacted REALTOR[®] A was in violation of Article 3 of the Code of Ethics, as interpreted by Standard of Practice 3-6, filed an ethics complaint with the association of REALTORS[®].

At the hearing called to consider the complaint, REALTOR[®] A defended his actions noting that while Buyer B's offer had been accepted by Seller S, it had been contingent on the sale of Buyer B's current home. It was possible that Buyer B, if faced with a second offer, could have elected to withdraw from the contract. REALTOR[®] A argued that continuing to market the property and not making other brokers aware that the property was under contract promoted his client's best interests by continuing to attract potential buyers.

The Hearing Panel disagreed with REALTOR[®] A's justification, pointing to the specific wording of Standard of Practice 3-6 which requires disclosure of accepted offers, including those with unresolved contingencies. REALTOR[®] A was found in violation of Article 3.