July 2005

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Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

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WISCONSIN REALTORS® ASSOCIATION

MLS and Professional Standards - 2005 Update

A higher level of consumer awareness and sophistication – based largely on consumer Internet use – and increased competition within the real estate industry have created an environment that inspires REALTORS® to be more creative and offer clients and customers the highest levels of service possible at competitive prices.

An invaluable component in this process is the publication of listings on the MLS, as brokers seek to reach the largest possible audience of potential cooperative brokers and potential buyers. Not unexpectedly, the offering and payment of cooperative commissions plays an important role as listing brokers seek the best possible offer for their clients. As a consequence, new issues relating to MLS offers of cooperation and compensation, and the payment of commissions, have arisen as a by-product of this high level of sales activity and competition.

As REALTORS® strive to provide the best service for consumers and successfully sell properties in this bustling marketplace, issues concerning ethics, use of REALTOR® marks, and even local association membership arise on a daily basis. The rules governing these fundamental underpinnings lay the groundwork for successful real estate practice.

This *Legal Update* discusses current issues concerning the MLS, arbitration, ethics, use of member marks and local REALTOR® associations. Legal Hotline questions and answers are included to illustrate the hot professional standards issues in Wisconsin. The *Update* concludes with a review of the new professional standards developments from the National Association of REALTORS® (NAR) for 2005.

MLS

The Multiple Listing Service (MLS) of a REALTOR® association is a means by which MLS Participants make unilateral offers of cooperation and compensation to other MLS Participants, acting as subagents, buyer agents, or in other agency or non-agency capacities defined by law. When a broker submits listing information to the MLS, it is for the clearly defined, limited purpose of disseminating that information to other MLS participants to find a buyer. Submission of listings to the MLS alone does not give other brokers the authority to advertise the listings.

Cooperative Compensation

In filing a property with the MLS, the Participant makes a blanket unilateral offer of compensation to the other MLS Participants and must specify the compensation being offered to the other MLS Participants on each listing filed. Cooperating Participants have the right to know what their compensation will be prior to beginning their sales efforts.

"The compensation specified on listings published by the MLS shall be shown in one of the following forms:

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1. by showing a percentage of the gross selling price 2. by showing a definite dollar amount" (per Statement 7.23 from the NAR *Handbook on Multiple Listing Policy)*. The complete text of Statement 7.23 and the rest of the *Handbook* can be found on NAR's Web site at www.realtor.org/MemPolWeb.nsf/pages/2004MLSHandbookParts7to9?OpenDocument.

The listing broker retains the right to determine the amount of compensation offered to subagents, buyer agents, or brokers acting in other capacities, and may offer the same amount or a different amount of compensation, for example, to buyer's brokers as opposed to subagents. This doesn't prevent the listing broker from offering any MLS Participant compensation that is different from the compensation he or she offers in the MLS, provided that the listing broker informs the other broker, in writing, in advance of their producing an offer to purchase. A listing broker's superseding offer of compensation to an MLS Participant must be expressed as either a percentage of the gross sales price or as a flat dollar amount.

Legal Hotline Q & A – MLS Offers of Compensation

Commissions Paid on Gross Sales Price

How are commissions paid when there are seller concessions? Is the commission paid on the gross sale price or net sale price (sale price minus concessions/credits)? Are there national guidelines, MLS regional guidelines or state guidelines on this issue?

The commission is based on the gross sales price unless the brokers have expressly agreed otherwise. Pursuant to Statement 7.23 – "Information Specifying the Compensation on Each Listing Filed with a Multiple Listing Service of a Board of REALTORS®," found in NAR's *Handbook On Multiple Listing Policy* (www.realtor.org/mempolweb.nsf/pages/2004MLSHandbook), offers of compensation must be based upon a percentage of the gross sales price or a specific dollar amount. This is a national MLS rule imposed by NAR.

If another arrangement were contemplated, an agreement would have to be entered into between the brokers (*i.e.*, a standing policy letter or compensation agreement for the individual transaction). For more information about offers of compensation, please refer to *Legal Update 02.01* online at www.wra.org/LU0201.

Unilateral Modification of Compensation Prohibited

A company received a memo from an MLS participating broker indicating that they will always pay a 2.4 percent co-broke/success fee on the sold properties. However, that 2.4 percent will be based on the sale price, minus any amount the seller is asked to pay out on the buyer's behalf. The company received funds short of the 2.4 percent of the sale price on two closings based on this logic from two other companies. Is this legal?

Pursuant to MLS policy, an MLS Participant may unilaterally modify only the percentage or dollar amount of commission offered in the MLS. To modify any other terms and conditions of the MLS offer of compensation, like the amount upon which the percent is determined, a bilateral agreement must be made between MLS Participants. See *Legal Update 02.01*, online at www.wra.org/LU0201, for more information regarding MLS offers of compensation and unilateral and bilateral policy agreements.

Disclosure of Compensation Policy to Seller/Clients

A listing broker, for example, wants to offer a minimal amount of compensation to cooperating brokers. It is the listing broker's duty to disclose to the client all information known by the broker that is material to the transaction

under Wis. Stat. § 452.133(2). In this case, if the minimal offer of compensation will have a material effect on the marketability of the property, then the seller should be made aware of this potential negative impact.

In addition, the REALTOR® Code of Ethics in Standard of Practice (SOP) 1-12 requires REALTORS® to fully discuss the company's cooperation compensation with any prospective sellers before taking a listing:

When entering into listing contracts, REALTORS® must advise sellers/landlords of:

1) The REALTOR®'s company policies regarding cooperation and the amount(s) of compensation that will be offered to subagents, buyer/tenant agents, and/or brokers acting in legally recognized non-agency capacities;

2) The fact that buyer/tenant agents or brokers, even if compensated by listing brokers, or by sellers/landlords, may represent the interests of buyers/tenants; and

3) Any potential for listing brokers to act as disclosed dual agents, for example buyer/tenant agents (adopted 1/93, Renumbered 1/98, Amended 1/03).

Brokers should disclose their MLS compensation splits, tell the owner if they have policy letter compensation agreements with various brokers, and indicate that the owner may see a copy of the policy letters upon request. Brokers should consider disclosing the compensation offered in their policy letters if it is substantially different from their MLS compensation or if the primary means of offering compensation in the market area is by policy letter. This requirement dramatically changes the prior concept long-observed in Wisconsin that a listing broker was not required to disclose his or her compensation policies to sellers or others.

Legal Hotline Q & A – Disclosure of Compensation Policies

Disclosure of Compensation Splits with Cooperating Brokers

If a broker does not belong to any MLS, does that broker still need to disclose to his or her seller how he or she will offer compensation splits? Also, where on the listing agreement does the listing broker disclose the cooperative compensation splits?

SOP 1-12 requires brokers to disclose their cooperation policies and the compensation amounts offered to cooperating brokers – this is not limited to MLS compensation. The disclosure does not have to be in the listing contract – in fact, it does not have to be in writing, although that is the prudent practice. Cooperative compensation policies may be described in a separate memo or an addendum to the listing contract.

When a broker competes with another real estate agency for a listing contract, are licensees allowed to tell the seller that another real estate agency compensates cooperating brokers at a lower percentage split than the broker's company? In several situations it has been apparent that the seller does not understand the MLS offer of compensation. Can the broker tell the seller that the broker's office offers a higher rate of compensation to MLS members than the company they are competing with?

Listing commissions and offers of compensation are a matter of internal office policy and may be made on a case-by-case basis. SOP 1-12 requires, in part, that REALTORS® advise the seller of the company's cooperation and compensation policies when entering into a listing contract. As part of the listing presentation, the broker may suggest that sellers consider and compare services, as well as cooperative compensation, when selecting a listing broker. The Code of Ethics, as well as anti-trust law, prohibits the broker from discussing the fees or commissions offered by competitors or discussing competitor's business practices in a manner that is reckless, false, or misleading.

MLS Participation Rules

NAR's model MLS rules provide, "Listings Subject to Rules and Regulations of the Service: Any listing taken on a contract to be filed with the Multiple Listing Service is subject to the rules and regulations of the Service upon signature of the seller(s)." Clearly, the local MLS has the power and authority to maintain rules and regulations for the administration of the MLS. Equally clear is the fact that listings submitted to the MLS are subject to all MLS rules and that listings that do not comply with the rules can be rejected.

Legal Hotline Q & A – MLS Sets And Enforces Its Own Rules

MLS Membership Fees

Re: MLS fees. A new office has applied for MLS membership. The MLS rules provide that application fees are set at $300 plus $100 per agent. The application was received but the new company did not pay per the fees policy. The applicant is claiming that because the agents were already members of the MLS they are not required to pay the additional fees. How to proceed?

The application and payment of fees must be made in accordance with MLS rules and regulations. Per NAR's model MLS rules, each office has one broker designated as the MLS Participant. Each agent licensed with that Participant is not technically a member of the MLS but has access rights through the membership of the MLS Participant. The new member fees assessed to a new MLS Participant will be based on the standards set forth in the local MLS rules. Regardless of whether any of the agents previously had access with

another MLS Participant, the fee structure applies unless the rules make such an exception. If the applicant has not completed the application in accordance with the rules, the MLS will make a determination whether or not to suspend services in light of the apparent failure to pay fees as required.

MLS is a voluntary membership organization – location does not determine eligibility

A broker wants to open a branch office in an area serviced by a different MLS. The MLS says the broker will have to pay MLS fees for all agents in the entire company, not just those in the new branch office. Is that correct?

A broker may apply for MLS membership in more than one MLS without having to join the respective local association or board. Regardless of the location of the main office or branch offices, the Designated REALTOR® may belong to any MLS, provided that the fees are paid and the rules and regulations are followed. In order for the agents in the new branch office to access the second MLS, however, their Designated REALTOR® must be a Participant in that MLS.

According to the MLS Policy Statement 7.42, MLS fees are determined by the total number of real estate licensees who are licensed with the MLS Participant and who work in any offices located within the jurisdiction of the association that owns or operates that MLS. A MLS may, at its discretion, waive fees for those licensees that the Participant certifies will not be using the MLS information.

Licensed Personal Assistants

Must a licensee working as a licensed personal assistant pay for MLS dues because he is a licensee?

According to the *MLS Policy Handbook*, the number of real estate licensees licensed with the MLS Participant determines MLS fees. If the licensed assistant has his or her license held with the broker/MLS Participant, the MLS fees will be billed accordingly, regardless of the services performed by the licensee or his or her job description.

Access to MLS Comparable and Sold Information

A real estate broker is also an appraiser. He performs appraisal work as an employee of a mortgage company. To perform appraisal reviews, he needs access to MLS. How can he obtain access to the MLS data for his use as the mortgage company's in-house appraiser? Can he, as an employee with appraisal and real estate credentials, apply for REALTOR® membership for the mortgage company?" Do the MLS rules allow or prohibit an MLS Participant to use MLS data in his capacity as an employee of a non-member mortgage company? Given that MLS participation may require REALTOR® membership, how can the mortgage company obtain MLS data to use for the review of appraisals?"

The MLS rules do not allow the appraiser to use the MLS data in his capacity as an employee of a non-member mortgage company. The mortgage company does not appear to qualify for REALTOR® membership and neither he nor the mortgage company qualify for MLS participatory rights. Only qualified REALTOR® principals can be MLS Participants. Affiliate members, however, may purchase or lease comparable information, sold information and statistical reports generated by the MLS. This would appear to be the appropriate solution, that the mortgage company become an affiliate member of the local association and thus become eligible to purchase comparable and statistical information and statistical reports.

NAR's *Handbook on Multiple Listing Policy* is available online at www.realtor.org/MemPolWeb.nsf/0/8bc409e34650358d86256f73005e3f1b?OpenDocument.

MLS Pending Rule

A Board has a rule that once an offer is accepted, it must be listed as "pending" on the MLS within 48 hours or the agent must pay a $50 fine. A broker works with sellers/clients who have indicated in the original listing contract that they do not want the listing designated as "pending" until all contingencies have been met. Would the MLS rule apply in that case?

NAR has indicated that a listing that directs the listing broker to violate the MLS rules is not eligible for listing on the MLS. It is suggested that the seller be advised when the listing is taken that the inclusion of that provision is lawful, but that it will disqualify the listing for publishing in the MLS.

For example, if a seller insists that an exclusive agency listing be entered into MLS characterized as an exclusive right to sell listing, or a seller requires that a price other than the listed price (as established in the listing agreement) be published in MLS, that would put the listing broker in violation of the MLS rules. The same holds true for a listing that includes a direction that the listing broker not transfer the listing to an "under contract" or "pending closing" category at the appropriate time. Other participants have a right to rely on the accuracy of information (including information related to the current status of a listing) in MLS compilations. The instructions of clients do not justify listing brokers committing violations of reasonable MLS rules or making affirmative misrepresentations.

Confidential Accepted Offers

The MLS rules require brokers to disclose and enter pending offers.

However, one broker believes that another broker's clients are signing amendments to their listing contracts directing that the existence of accepted offers be held confidential in order to circumvent this MLS rule. Can they do this?

Under SOP 3-6, Wisconsin REALTORS® must disclose the existence of accepted offers to brokers seeking cooperation unless the seller has indicated that this information is confidential per Wis. Stat. § 452.133(1)(d). Any confidentiality directive should be in writing in the listing contract (or an addendum or amendment thereto) or on a copy of an agency disclosure form. The broker is obligated to follow the wishes of the seller/client.

However, it must also be considered that REALTORS®, acting as potential cooperating brokers and relying on SOP 3-6, will assume there are no accepted offers when the listing broker makes no disclosure. To ensure that cooperating brokers and other potential purchasers are not misled by a listing broker's failure to make the disclosure mandated by the SOP, NAR has suggested that listing brokers should advise all cooperating brokers and buyers that they were under instructions from their seller/client to treat the existence of accepted offers as confidential and that no information about offers (accepted or otherwise) would be forthcoming. This would honor the seller's instruction, while preventing other brokers and potential purchasers from being deceived.

Reliance Upon Agent Sales Data

An agent recently left a real estate company and started her own company. When looking in the MLS, she discovered that her previous MLS statistics have disappeared and that her sales appear under the code number of her prior Designated Broker. Is this legal?

This change in the sales data records apparently happened due to the computer programming used by the MLS, not because of anything done by any person. When a member leaves a company and goes to (or forms) another company, in effect that member ceases to exist for MLS purposes as an agent of the first company – the identification number associated with the agent's activity for that company is eliminated. The agent's transactions have to go somewhere, and apparently the thinking is that they should stay with that Participant/company, so the agent's transaction data is transferred to the Designated Broker's identification number. The agent is given a new identification number with the new company.

This process of reallocating sales data does not happen in all MLSs. The agent may wish to discuss her concerns with the MLS. Perhaps the MLS could consider including some sort of disclaimer explaining what may happen with respect to the historical sales data of individual agents as they move to different companies.

Anyone using this statistical information for any advertising purposes is bound by Article 12 of the Code of Ethics. The agent's prior Designated Broker, for instance, cannot use the overstated data for his personal sales history because he knows it is inaccurate – he cannot reasonably rely upon the MLS data in this regard. Likewise, other brokers in the MLS may also be expected to recognize that the data is implausible and may be in violation of Article 12 if they blindly use the data without at least questioning it.

Regional Marketplace

The audience for MLS listings is growing due to the use of consumer technology, high consumer reliance on the Internet, and agreements forged between the multiple listing services.

MLS Cross-Regional Service Agreements

A REALTOR® who is a member of the Multiple Listing Service, Inc. (Metro MLS) made an offer on a property listed in the Kenosha MLS. When she called to show the property, she was asked if she was a member of the Kenosha MLS and she said yes. The listing broker does not pay the same amount of commission to licensees who are not part of the Kenosha MLS. The listing broker has contacted her MLS and found the licensee is not a member of their MLS. How should she be paid?

The Kenosha MLS, the La Crosse MLS and the Sheboygan MLS each have a signed service agreement with the Milwaukee MLS. As part of these contracts, each MLS has agreed that the listings that are posted on the combined Milwaukee/Kenosha/La Crosse/Sheboygan system all include a full offer of cooperation and compensation to all participants within the system. Thus, the listing broker's offer of cooperation and compensation is valid not only to the participants in the Kenosha MLS, but also to the participants in the Milwaukee, Sheboygan and La Crosse MLSs.

A Milwaukee broker wanted to write an offer on a Madison broker's listing and the Madison broker offered a 2.5 percent referral fee instead of the cooperative compensation of 3 percent shown on the South Central Wisconsin MLS. The broker said now the South Central Wisconsin MLS (SCWMLS) cooperates with the Milwaukee Metro MLS and that he was entitled to the entire 3 percent. Is this true?

Yes, in 1993 the SCWMLS and the Multiple Listing Service, Inc. (Metro MLS) entered into a reciprocal agreement to allow members of the SCWMLS to view the Metro listing database and to allow Members of the Metro MLS to view the SCWMLS database. This agreement related to

cooperation only and not compensation. The Metro MLS database contains listings in Milwaukee, Waukesha, Ozaukee, Washington, Racine, Kenosha, Walworth, Sheboygan, Calumet, Manitowoc, Fond du Lac, La Crosse and Jefferson counties. The SCWMLS database contains listings in Dane, Columbia, Sauk, Rock, Green, and Dodge Counties, as well as parts of Iowa, Jefferson, Lafayette, Grant, Crawford, Richland, Vernon, Juneau, Adams, Marquette and Green Lake counties. This service is limited to retrieving MLS data and does not include the ability to place listings on the other MLS. However, pursuant to the new agreement forged between the Metro MLS and the SCWMLS in 2004, the offer of compensation shown in the MLS listing will be considered made to all members of the SCWMLS and Metro MLS.

Another company listed a property on the Madison-area MLS (SCWMLS) and offered a co-broke commission of 3 percent. The same company (same geographical location, same listing agents) also participates in the Metro MLS in Milwaukee and they listed the same property there, but the offered co-broke commission is only 2.4 percent. An agent saw the listing in the SCWMLS and has a printout from the day she showed the property to the buyer, who now has an accepted offer. Which co-broker payment should the agent receive?

The listing company has the legal right to offer different compensation in the different MLS listings. In the described situation, both the listing office and the cooperating office participate in two MLSs. There are no known standing rules indicating how to decide which compensation rate supersedes the other. The cooperating office should endeavor to establish which offer of compensation is being accepted verbally, when speaking to the listing office, and in writing, by furnishing a copy of the MLS printout with the date on it to the listing agent. The cooperating office may also wish to document this position by using e-mails, memoranda or letters, which confirm with the listing office the compensation offer that the cooperating broker has accepted. In other words, the cooperating broker should do everything possible to determine the terms of compensation before accepting the offer of cooperation. If the listing broker fails to pay the 3 percent, the cooperating broker may file arbitration against the listing office to seek the remaining 0.6 percent. The burden of proving the offered compensation rate that was accepted will fall on the cooperating office.

Arbitration

Arbitration is an informal hearing in front of a neutral third party, the arbitrator, who discovers the facts of the dispute through testimony and documents and then renders a final determination of the dispute, called an arbitration award. REALTORS®' obligation to arbitrate disputes is found in Article 17 of the Code of Ethics: "In the event of contractual disputes or specific non-contractual dispute as defined in SOP 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." The full text of the *Code of Ethics and Arbitration Manual* (CEAM) may be viewed at www.realtor.org/2003ceam.nsf/pages/downloadceam (NAR password protected).

Most broker-to-broker arbitrations are commission disputes, and most are decided by determining which broker was the procuring cause of the successful transaction. There are no hard-and-fast rules that determine procuring cause, because every transaction is different. As the *NAR Code of Ethics and Arbitration Manual* explains, only through a full analysis of the incidents and actions of the parties can the hearing panel decide who's the procuring cause of a sale.

No Predetermined Rule

There can be no predetermined rule of entitlement established by any REALTOR® association to determine procuring cause. Instead, the hearing panels, which resolve commission disputes between brokers, must consider each case on its own merits and consider the entire course of events. The first showing of the property, the writing of the successful offer, or the existence of a buyer agency relationship are not, in themselves, exclusive determiners of procuring cause or entitlement to commission.

For example, a buyer might have entered into a buyer's agency agreement with a buyer's agent who didn't provide any service. The buyer receives services from the listing agent or the seller and buys the property. The mere existence of the buyer agency relationship does not mean that the buyer's broker is automatically the procuring cause, especially when the listing broker has actually done the work and procured the buyer. The buyer's broker, however, may be entitled to a fee from the buyer based on the terms of their agreement.

The key concepts of procuring cause are found in this definition from *Black's Law Dictionary*, Fifth Edition: "The proximate cause; the cause originating a series of events which, without break in their continuity, result in the accomplishment of the prime object." For further discussion of procuring cause, see *Legal Update 02.04*, "What is Procuring Cause?" online at www.wra.org/LU0204.

Buyer Agency Does Not Automatically Determine Entitlement to Commission

An agent showed a couple a property they had originally asked about, and one other property on the same lake listed by another broker. The couple was more interested in the second property. The gentleman said that he was interested and would consider making an offer on the home. The gentleman later said they had decided not to make a move at present. A month later the agent found out that the couple had closed on the property, having written the offer through an agent from out of the area who had been paid the selling side of the commission. The listing agent believes that the first agent was procuring cause and the agent who wrote the offer had never shown the house or even seen the house. He said that the first agent definitely had procuring cause, but that procuring cause was not an issue because he had a buyer's agency contract. Is this analysis correct?

The issue in this question is procuring cause: who caused the buyer to make the offer that resulted in the sale of the property? There is no one act which determines procuring cause – the fact of the buyer agency does not automatically decide the issue. It can only be answered by a full, knowledgeable consideration of all the facts of the case. If the brokers cannot negotiate an acceptable settlement, the dispute should be submitted to local board arbitration.

Arbitration hearing 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 buyer. Did the first agent actively maintain ongoing contact with the buyer, or, did the broker's inactivity, or perceived inactivity, cause the buyer to reasonably conclude that the broker had lost interest or disengaged from the transaction (abandonment). In other instances, a buyer, despite reasonable efforts by the broker to maintain ongoing contact, may seek assistance from another broker. The panel will want to consider why the buyer stopped working with the first agent and whether the agent engaged in conduct which caused the buyer to terminate the relationship (estrangement). This can be caused, among other things, by words or actions. Panels will want to consider whether such conduct 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.

The first agent's remedy would be to bring arbitration against the listing broker pursuant to SOP 17-4.

Standard of Practice 17-4: Arbitrable Commission Disputes

SOP 17-4 describes certain non-contractual disputes that REALTORS® must submit to arbitration. If the seller paid commission to a cooperating broker in accordance with the terms of the offer to purchase, the listing broker reduced the amount of the commission due from the seller, and a second cooperating broker appears on the scene and claims to be procuring cause, the two cooperating brokers may arbitrate for the selling side commission. (One was paid indirectly through the seller, and the other wants direct payment from the listing broker.) Previously, SOP 17-4 did not permit the listing broker to play the role of the second cooperating broker and arbitrate against the first cooperating broker for the selling side commission. The new SOP 17-4 (5) permits arbitration in such situations to determine if the cooperating broker paid by the seller or the listing broker is procuring cause.

Cooperating Broker May Dispute Buyer's Broker's Fee

The listing agent and her husband are the sellers. Company A submitted an offer to purchase as a buyer's agent. In the offer to purchase, the buyer asked the sellers to pay the buyer's broker's fee to the buyer's broker at closing on behalf of the buyer (and the buyer's broker notifies the listing broker that they are waiving the compensation offered via the MLS). This offer is accepted and the listing broker and the sellers amend the listing contract to reduce the commission by the amount the seller has agreed to pay to the buyer's broker. The listing broker is contacted by another broker who says that he was the procuring cause – he identified the property to the buyer and showed it to the buyer first. The transaction will close in a few weeks. Does SOP 17-4(2) apply if this matter goes to arbitration?

SOP 17-4(2) provides that non-contractual disputes that are subject to Article 17 arbitration include situations "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."

If the other broker, who claims to be procuring cause, takes the listing broker to arbitration, the listing broker

may name the buyer's broker as a third-party respondent and the hearing panel will determine whether the other broker is procuring cause.

Arbitration Timing

How long does a broker have the right to make a procuring cause claim? A broker has a dispute with another company and the transaction closed months ago. The cooperating broker filed for arbitration before the 180 days was up. The local association has not set up any hearing and has not contacted the other company yet. Is the broker still able to arbitrate this matter?

The 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. It is the filing that must be within the 180 days, not the processing of the request for arbitration. The respondent will be notified at such time as the review panel meets and determines there is an arbitrable matter or mediation is offered. This may not be within the 180 days.

Proper Parties for Arbitration

Arbitration was filed by one cooperating broker against the other cooperating broker according to SOP 17-4. The facts and circumstances contained in the complaint showed that the listing broker still held the commission. Can this be arbitrated?

The review panel must determine if the cooperating broker is the proper party to the arbitration. Although Article 17 allows for arbitration between cooperating brokers both seeking the commission, one of the parties must have the commission. If the listing broker retains the commission, the listing broker should also be named as a respondent in the arbitration request or otherwise agree to be bound by the award of the arbitrators.

Agent-Broker Arbitration is Voluntary

Does the Code of Ethics require an agent REALTOR® to arbitrate for commission from the broker/owner rather than filing a small claims action? An agent left the company and is filing a claim for commission in small claims court for a commission that was not paid. Isn't the agent required to go through the arbitration process?

No. Arbitration between agents and brokers for commission according to the independent contractor agreement is voluntary. Although both the broker and former agent may elect to use REALTOR® arbitration, an in-house commission dispute is not a mandatory arbitration.

Inter-Board Arbitration of Compensation Agreement

A buyer's agent sold a property in northern Wisconsin. The buyer's agent has a letter from the listing broker stating that the buyer's agent would be paid 2 percent at closing. When the buyer's agent got to closing, the listing broker did not pay the buyer's agent because they did not think she procured the buyer. The buyer's agent would like to arbitrate. Since it is a different board, what is the procedure for arbitration?

The buyer's agent's expectation of compensation from the listing broker is based upon the written agreement entered into by the brokers. Procuring cause is the standard used to determine entitlement to commission in the MLS, and will not apply in this dispute unless the compensation agreement specified that the standard to be applied is procuring cause. Refer to *Legal Update 02.01*, available online at www.wra.org/LU0201 for more information regarding non-MLS offers of compensation.

If the brokers are unable to negotiate a resolution regarding the commission, the buyer's agent may file a request for arbitration. Because the brokers are in different associations, she may have discretion as to where to file. Generally the arbitration is filed with the respondent's local association. However, if the buyer's agent's association and the respondent's association have an inter-board arbitration agreement, she may file for the arbitration at her local association. The buyer's agent should discuss the situation with the local association professional standards administrators for additional information.

Standard of Practice 17-4(5)

A new paragraph (5) under SOP 17-4, adopted in January 2005, provides that disputes arising where a buyer's agent is compensated by a represented seller; the listing broker reduces the commission payable by the seller; and a dispute subsequently arises about whether the listing broker or the buyer's agent was the procuring cause of the successful transaction, are now arbitrable. The arbitration shall be between the buyer's broker and the listing broker, and the amount in dispute shall be the amount by which the listing broker reduced the commission owed by the seller.

SOP 17-4(5) Scenario

An agent met with people who had an interest in buying a home at a new home site listed by his company and showed them the home. The next day an agent from a competing company called and showed the buyers the property and wrote the offer as a buyer's agent. The transaction closed and the seller paid the buyer's agent's fee, pursuant to the terms of the offer. When a buyer's broker writes in the offer that he rejects the MLS offer of compensa-

tion and asks for the seller to pay a 3 percent buyer agency fee at closing, how is this properly handled? Can the first agent do anything to get paid as procuring cause?

Article 17 of the Code of Ethics allows for certain non-contractual disputes to be arbitrated. Until recently, if the seller agreed in the offer to pay the buyer's broker the 3 percent commission, and the listing broker decreased the listing commission by the same 3 percent, the listing broker would not be able to later arbitrate for the 3 percent. However beginning in 2005, this would be a situation subject to arbitration under the newly adopted SOP 17-4(5). The listing broker may bring arbitration against the buyer's broker.

Ethics

"The term REALTOR® has come to connote competency, fairness, and high integrity resulting from adherence to a lofty ideal of moral conduct in business relations. No inducement of profit and no instruction from clients ever can justify departure from this ideal" (from the Preamble to the REALTOR® Code of Ethics). Despite stiff competition in the marketplace, REALTORS® are sworn to abide by these high standards and participate in enforcement actions as necessary.

Avoiding Double Listings

The MLS sometimes has a listing that is extended after another broker takes a listing so there are two listings for the same property in the MLS. The first broker knows of the second broker's listing and convinces the seller to extend the listing, which then overlaps the second listing. What Code of Ethics or legal issues arise when two brokers have simultaneous exclusive right to sell listings?

Article 16 of the Code of Ethics prohibits REALTORS® from engaging in any practice or taking any action inconsistent with exclusive representation that another REALTOR® has with a client. SOP 16-9 creates an affirmative obligation to make reasonable efforts to determine if the client is subject to a current, valid exclusive agreement. Provided the first broker knows of the second broker's listing and proceeds to extend his listing to overlap the second broker's listing, it appears to be a violation of Article 16.

SOPs 16-6 and 16-8 specifically provide that a REALTOR®, when contacted by the client of another broker, may discuss terms upon which they may enter into a future agreement. The REALTOR® is not precluded from entering into a listing with a client that takes effect after the expiration of the first listing, provided that the client, and not the REALTOR®, initiated the contact.

Finally SOP 16-14 provides that REALTORS® may enter into a contractual relationship with a client not subject to an exclusive agreement, but the REALTOR® shall not obligate the client to pay more than one commission without informed consent.

Leaving Business Cards After Showings

If a REALTOR® shows a house and leaves her business card, can she write comments on the back of her card regarding the property? Can she send a thank you card to the owners?

This practice raises the longstanding policy debate over whether leaving a business card following a showing is allowed under agency principles or is evidence of unethical solicitation. There is no per se statutory prohibition against leaving business cards when showing another broker's listings. Depending on the marketplace, leaving business cards is a courtesy to the listing broker and the seller. Some validate the practice as a subagent of the seller, letting the seller know there has been a showing and sharing the buyer's comments regarding the property.

However, REALTORS® should be aware that some brokers will see leaving business cards as an implied solicitation of the listing. SOP 16-4 reads, in part, "REALTORS® shall not solicit a listing which is currently listed exclusively with another broker." Additionally, Article 16 of the Code of Ethics states, "REALTORS® shall not engage in any practice or take any action inconsistent with the agency or other exclusive relationship recognized by law that other REALTORS® have with clients" (amended 1/98). Finally, the position on this practice may vary from market to market, so a licensee should review the local MLS rules and regulations, which may address the practice of leaving cards.

Withdrawn Listings

A seller called an agent out of the blue to list his house. He said it had been listed with another agent, but he was not working with her anymore. The second agent checked the property status in the MLS, and found that the listing was shown as withdrawn. The agent asked the seller about his previous listing and the seller said that he'd been released from that contract. The second agent went ahead and listed the property, but now the first agent is accusing the second agent of violating the Code of Ethics. Is that correct?

Although SOP 16-4 says that an agent cannot solicit the exclusive listing of another REALTOR®, that isn't what happened here. Instead, without either directly or indirectly initiating the discussion, the seller contacted the second agent. In such a case, SOP 16-6 permits a REALTOR® to discuss a listing with the seller. "When REALTORS® are contacted by the client of another REALTOR® regarding the creation of an exclusive relationship

... they may discuss the terms in which they may enter into an agreement."

The second agent was right to check the status of the listing in the MLS. Because the agent found that it had been "withdrawn" rather than "expired," there was a question about whether the previous listing was still in effect. The terms "withdrawn and withdrawal" are often confusing for brokers and consumers alike. Some may interpret the term to mean that the listing contract is still in effect, but that the property is being temporarily withdrawn from the MLS and other active marketing due to remodeling, illness, a long vacation, etc. Others will interpret these terms to mean that the listing contract is completely canceled and the seller may list with another broker.

SOP 16-9 requires that before entering into an exclusive agreement with a party, a REALTOR® must make reasonable efforts to determine whether the party is subject to an existing exclusive agreement with another broker. By asking about the previous listing and learning that the seller had been released, the second agent arguably fulfilled her ethical obligation. REALTORS®, however, should be careful about relying upon the word of sellers because sometimes they are not clear about what has happened. It's a good idea to ask to see the seller's written release from the first listing if the seller is willing to share it, or if all else fails, ask the first agent about the status of the listing.

Personal Transactions

A broker sold his own home, independent of his company. Can the buyer file an ethics compliant against him?

REALTORS® are subject to disciplinary action under the Code of Ethics only with respect to real estate activities and transactions. Non-real estate related issues cannot be the subject of ethics complaints. However, the activity of a REALTOR® in his individual transaction is subject to the Code of Ethics under SOP 1-1.

Broker Not an Automatic Respondent

Is a broker automatically a party to the ethics complaint?

No, the ethics procedures do not allow for a broker to be automatically joined as a respondent in an ethics complaint against another REALTOR® licensed with that principal. The broker retains the right to be present during the proceedings.

Ethics Timing

How long does a person have to file an ethics complaint?

An ethics complaint must be filed within 180 days after the facts constituting the matter complained of could have been known in the exercise of reasonable diligence.

Ethics Complaint Against Salesperson Assessment Agent

The listing broker believes that the cooperating agent violated the Code of Ethics. Although the cooperating broker is a REALTOR®, the agent is a salesperson assessment agent. Can a complaint be filed against the agent since the licensee in question is not a REALTOR® member?

An ethics complaint cannot be filed against the agent with salesperson assessment status, but an ethics complaint may be filed naming her REALTOR® broker. According to the *Code of Ethics and Arbitration Manual*, disciplinary action may be taken against the broker responsible for the salesperson assessment agent. The manual provides for disciplinary action against the responsible broker for any act of any persons who are not themselves REALTORS®, but who are employed by or affiliated with a REALTOR® and provide real estate-related services within the scope of their or another's license. Lack of knowledge by the REALTOR® of such person's conduct may mitigate the discipline imposed.

Member Marks

NAR is the proud owner of numerous marks including the terms REALTOR®, REALTOR-ASSOCIATE®, REALTORS®, the REALTOR® Logo and the Block "R" mark (which may be referred to collectively as the "Marks"). The Marks identify members of NAR and distinguish them from non-members. The public has come to recognize those who use the Marks as providers of real estate-related services consistent with a strict Code of Ethics and the highest standards of professionalism. The *Membership Marks Manual* explains the simple but essential policies and guidelines that have been adopted by the NAR to govern and protect the usage of its Marks.

REALTOR® Does Not Mean Real Estate Broker

A broker has been advised that use of the "Reggie the REALTOR®" tag line is not permissible under the NAR member marks policy. Why must the broker stop using this? Is the word REALTOR® copyrighted or trademark protected?

The term REALTOR® is to be used to specifically designate a member of the National Association of REALTORS®, not simply a real estate broker. It is important to not use this term in a manner so as to confuse the public and make them think that the term "REALTOR®" is synonymous with "real estate broker" or "real estate agent." All real estate licensees are not REALTORS® and the manner in which the broker is using "REALTOR®" would appear to contribute to that confusion among the public. "REALTOR®" is a registered trade name.

Use in Company Name

A broker has just started a company. In using the term "REALTOR®" in the company name, must the REALTOR "R" be included on signs or any other advertising?

The following information regarding use in a company name has been reproduced from the National Association of REALTORS® *Membership Marks Manual*:

The terms REALTOR® and REALTORS® may be used in connection with, but not as part of, a corporate or business name provided such terms are separated from the business name by appropriate symbols or punctuation.

Proper Form

J.J. Jones, REALTORS®

S.S. Smith -- REALTORS®

Separating punctuation should be used even when the term appears on a separate line immediately below the firm name.

Proper Form

J.J. Jones and Company,

REALTORS®

S.S. Smith, Inc.,

REALTORS®

The terms REALTOR® or REALTORS® may not be registered by any Member or Member's firm as part of a business logo. It is also impermissible for a firm to incorporate under or register an assumed business name which includes either of these terms.

Refer to the *Membership Marks Manual* for additional guidance on the proper use of the term REALTOR® and the corresponding marks: www.realtor.org/letterlw.nsf/pages/trademarkmanual.

Local REALTOR® Associations

Membership in a local association automatically extends an agent's membership to the state association and national association.

Jurisdiction

A member from Minnesota is interested in joining the Greater Northwoods MLS. Can a REALTOR® with a primary membership in another state association be a part of the local MLS?

Historically board and MLS membership was dependent upon the licensees' place of business. However, in the 1990's under NAR Board of Choice policy, REALTORS® may apply for and be granted board and MLS membership away from the physical location of their offices. Board of Choice has also been extended to cross state lines as well. More information about membership and Board of Choice is available at the NAR web site at www.realtor.org/MemPolWeb.nsf/pages/BOCASL?OpenDocument&Login.

Licensed Assistants

Does a licensed assistant need to belong to the board of REALTORS®?

Check with the local board to see what their rules provide. If all licensed sales staff, including licensed personal assistants, do not apply for local board membership and pay their fees, the broker/company will have to pay an additional fee for each non-member licensee affiliated with the company.

Salesperson Assessment Agents

Can the association charge new member fees to licensees that do not apply for REALTOR® membership? Can salesperson assessment agents have access to the MLS?

The local association cannot charge new member fees to licensees who choose not to become REALTOR® members. The local association cannot require REALTOR® membership by agents of REALTOR® principals. It is each individual broker's decision whether to require REALTOR® membership of his or her agents. Regardless of whether each licensee becomes a REALTOR® member, pursuant to NAR Bylaws, the Designated REALTOR® will be assessed fair share dues for each person licensed with the company. See NAR Bylaws Article X Section 2 Dues. (Salesperson Assessment). The concept of fair share dues is addressed in an article entitled, *The REALTORS® Dues Formula – A Fair Share*. It may be viewed at onerealtorplace.com/MemPolWeb.nsf/pages/duesformulaarticle?OpenDocument&Login.

Regardless of REALTOR® membership, agents are not individually members of the MLS. Each agent of an MLS Participant (broker-owner), whether they are a REALTOR® member or not, only has access to the MLS based upon the MLS Participant's membership in the MLS. The MLS fees, similar to the fair share dues formula, is based on the number of licensees affiliated with the MLS Participant, notwithstanding REALTOR® membership.

2005 Professional Standards Update

Changes to the Code of Ethics and Standards of Practice

Changes in the Code of Ethics in 2005 provide for demographic data distribution in non-residential transactions and additional circumstances where a contractual commission dispute is arbitrable.

Providing Demographic Data to Parties

The Law: The Fair Housing Act, § 804(c) 42 U.S.C. 3604(c) provides that, "It shall be unlawful to make, print, or publish or cause to be made, printed, or published, any notice, statement, or advertisement with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination."

To avoid violation of the Fair Housing Act, real estate licensees should not distribute materials relating to the ethnic or racial composition of a neighborhood or assist sellers to distribute information that could imply a preference, limitation or discrimination of a protected class of persons. If questioned about such data, REALTORS® should refer buyers directly to the Department of Public Instruction or other sources of demographic data.

The Article 10 SOP changes are intended to allow REALTORS® to provide demographic information in non-residential transactions under certain circumstances, which do not violate Article 10.

Revised Standard of Practice 10-1:

Except as provided in Standard of Practice 10-3, REALTORS® shall not volunteer information regarding the racial, religious or ethnic composition of any neighborhood ~~and shall not~~ nor shall they engage in any activity which may result in panic selling. ~~REALTORS® shall not print, display or circulate any statement or advertisement with respect to the selling or renting of a property that indicates any preference, limitations or discrimination based on race, color, religion, sex, handicap, familial status, or national origin.~~

Renumbered Standard of Practice 10-2:

REALTORS® shall not print, display or circulate any statement or advertisement with respect to selling or renting of a property that indicates any preference, limitations or discrimination based on race, color, religion, sex, handicap, familial status, or national origin.

New Standard of Practice 10-3:

When not involved in the sale or lease of a residence, REALTORS® may provide demographic information related to a property, transaction or professional assignment to a party if such demographic information is (a) deemed by the REALTOR® to be needed to assist with or complete, in a manner consistent with Article 10, a real estate transaction or professional assignment and (b) is obtained or derived from a recognized, reliable, independent, and impartial source. The source of such information and any additions, deletions, modifications, interpretations, or other changes shall be disclosed in reasonable detail.

Renumbered Standard of Practice 10-4:

As used in Article 10 "real estate employment practices" relates to employees and independent contractors providing real estate-related services and the administrative and clerical staff directly supporting those individuals.

Changes to the Code of Ethics and Arbitration Manual

Quadrennial Ethics Training

Quadrennial ethics training requirements continue in effect for the four-year period of 2005-2008. The WRA will work with the Department of Regulation and Licensing to incorporate quadrennial ethics training requirements in the 2007-2008 Continuing Education (CE) courses offered by the WRA. In the meantime, the free online quadrennial ethics course is available at www.realtor.org.

Professional Standards Policy Statement #45, **Publishing the Names of Code of Ethics Violators**, is amended to ensure that any publication of the names of REALTORS® violating the Code is limited to other REALTOR® members. Local associations have the discretion to adopt procedures authorizing the publication of the names of ethics violators. A REALTOR®'s name (but no company names), the Articles violated and the discipline imposed may be published after the REALTOR®'s second violation within three years. Publication may only be done in REALTOR® Board publications or communications, and if the communication is electronic or Internet-based, access must be limited to Board members. Publication must be consistent and uniform – no selective targeting of particular REALTORS®. At least one violation must have occurred after the adoption of these changes (11/2004).

New Professional Standards Policy Statement #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.

New Professional Standards Policy Statement #56, **"Remote" Testimony Permitted in Limited Cases**.

Authorizes hearing panels to accept testimony via videoconference or teleconference in extreme circumstances when the hearing panel chair deter-

mines that such testimony is essential to ensuring a fair hearing.

The parties and their witnesses normally are expected to participate at ethics and arbitration hearings in the physical presence of the hearing panels and the parties. Remote testimony via teleconference or videoconference may be permitted at the discretion of the hearing panel chair 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 person testifying by teleconference or videoconference is responsible for the costs of his or her remote testimony. Remote participation is not available to legal counsel.

Section 1 (s), **Revised Definition of Suspension of Membership**: The 30-day minimum and one-year maximum for a "Suspension of Membership" currently do not apply if the suspension is imposed for a remediable violation of a membership duty such as a failure to pay dues or fees or a failure to complete educational requirements. The provision also applies to members who fail to complete their quadrennial ethics training - they may be reinstated after the requirements are met.

Section 14 (f), Nature of Discipline, revised:

Membership of individual suspended for a stated period not less than thirty (30) days nor more than one (1) year, with automatic reinstatement of membership in good standing at the end of the specified period of suspension. ~~(decision should be written clearly articulating all intended consequences, including denial of MLS participatory or access privileges)~~. The thirty (30) day minimum and one (1) year maximum do not apply where suspension is imposed for a remediable violation of a membership duty (e.g. failure to pay dues or fees or failure to complete educational requirements). The Directors may order suspension unconditionally, or they may, at their discretion, give the disciplined member the option of paying to the Board, within such time as the Directors shall designate, an assessment in an amount fixed by the Directors, which may not exceed $5,000 and which can be utilized only once in any three (3) year period, in lieu of accepting suspension. (Balance of the paragraph remains the same.)

Sections 20 (g) and (j), **Initiating An Ethics Hearing**, are amended to allow local associations to permit or request respondents in uncontested "expedited" ethics hearings to offer information to mitigate potential discipline. Any responses provided cannot contest the facts stated in the complaint but may offer information in mitigation of any discipline that might be imposed.

Right of Ethics Complainants to Withdraw an Ethics Complaint

Complainants may withdraw their complaints at any time prior to the start of an ethics hearing under the amended Section 21 (e), ***Ethics Hearing***. If a complainant withdraws a complaint after the review panel determines that a hearing is required, the complaint will be referred back to the review panel to determine whether a potential violation of the public trust (as defined in Article IV, Section 2 of NAR's bylaws) may have occurred. If so, the review panel may proceed as the complainant. A complaint withdrawn in this manner shall not be deemed a final determination on the merits.

Changes to the Interpretations of the Code of Ethics

Case #2-19: Deceptive Information in MLS Compilations (Adopted May, 2004.)

Article 2 of the Code of Ethics requires that REALTORS® avoid exaggeration, misrepresentation or concealment of pertinent facts relating to a property or transaction. In case interpretation #2-19, a listing broker enters a listing in the MLS and states in the remarks section that a buyer could help pay the mortgage with rent from the upstairs apartment. The buyer, familiar with the neighborhood, knew that the previous owner had problems with the city building department about additions to the upper apartment. Upon inquiry, the cooperating broker confirmed that the home was zoned single family. The cooperating REALTOR® filed a complaint with the local association, alleging the listing broker had published inaccurate information in the MLS. The hearing panel found the listing broker in violation of Article 2 for misrepresenting income-producing

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potential from an upstairs apartment when, in fact, the property was zoned as a single-family home.

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

Article 3 of the Code of Ethics requires brokers to cooperate with other brokers unless it is not in the client's best interest. Standard of Practice 3-6 specifically requires disclosure of accepted offers, including those with unresolved contingencies, to any broker seeking cooperation. As described in Case #3-10, when a REALTOR® failed to disclose the existence of an accepted offer that was subject to sale of the buyer's property to another broker seeking cooperation, a violation of Article 3 occurred.

To read the full text of these case interpretations, visit www.realtor.org/2003CEAM.nsf.

See the full text of the key 2005 Professional Standards Policy Changes at www.realtor.org/mempolweb.nsf/pscoe?openview.

Pathways to Professionalism Amended

Pathways to Professionalism are professional courtesies intended to be used by REALTORS® on a voluntary basis, and cannot form the basis for a professional standards complaint. The Pathways to Professionalism were revised at the end of 2004. For a copy of the new text, visit www.realtor.org/mempolweb.nsf/pages/pathways.

Attention Brokers, Owners and Managers

Don't forget to let your agents know that the cutoff date for the WRA 2005 Convention early bird pricing is August 1, 2005

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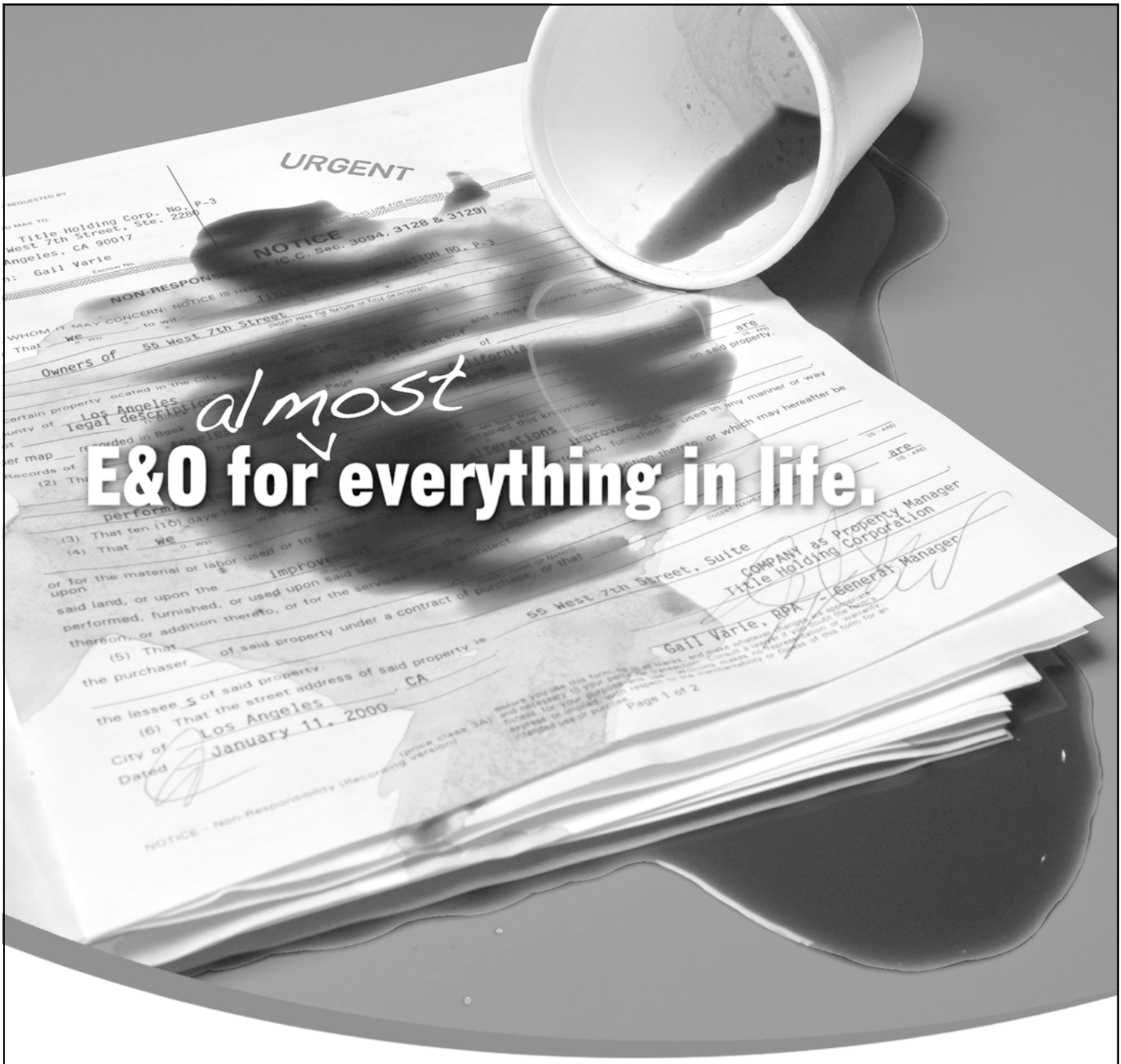

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