



# ETHICALLY SPEAKING



*...living the Code of Ethics at NOMAR*

## 3rd Quarter 2010

The total number of ethics complaints filed so far this year is 13, the yearly average. Requests for arbitration stand at 4, just below than the average of 5.

Of the ethics complaints filed: 1 was withdrawn, 2 were past the 180 day filing limit and dismissed, and 2 were found “not in violation”. 5 are on their way to a Professional Standards Hearing Panel. In the 3 cases where a violation was found (Articles 1, 3, 9, and 11) discipline includes a Letter of Reprimand, 4 to 8 hours of CE, and fines. A \$500 administrative processing fee also is owed by any member found in violation.

Nell Carmichael  
Professional Standards Administrator

(link to 2010 Code of Ethics <http://www.nomar.org/Ethics/2010%20Code%20of%20Ethics.pdf> )

The first complaint has to do with Article 9, a favorite violation...

### **Decision of Ethics Hearing Panel of the Professional Standards Committee**

The respondent has been a REALTOR for more than 30 years. This is the first complaint against him. He is alleged to have violated Article 9 by failing to protect the interests of his clients, Mr.& Mrs. Seller. The complaint alleges that the respondent failed to provide a cancellation agreement in clear and understandable language and also failed to provide a fully executed copy to his clients, the complainants herein.

The facts reveal that the respondent represented the complainants as a listing agent. During the listing period, and about one month prior to its expiration, Mr. Seller sought a release from the listing in order to pursue the possibility of renting the property through the military “Federal City” project.

Respondent acquiesced in the request for cancelation and brought a “**Cancellation of Marketing Agreement**” to be executed by them. The complainants signed, but the respondent did not take the signed agreement with him to be later executed by his broker and then returned to the complainants. The complainant made a photo copy of the incomplete agreement and simply placed it in their desk drawer.

Mr. Seller testified that the agreement was not explained to him. He admits to having read the first two paragraphs, but not the third paragraph (exhibit C-7) which provides that if the property is relisted within six months it must be relisted with the respondent’s company.

Approximately two months thereafter, the prospects for renting the property seemed dim, and the complainants decided to list with a different broker, not knowing of the provisions contained in the third paragraph of the cancellation agreement.

Soon thereafter the complainants negotiated an acceptable agreement to sell. By coincidence the cooperating agent was from the same office as the respondent, and respondent upon learning that the property was listed with another broker called Mr. Seller to say that he now owed the first listing broker a 6% commission pursuant to the cancellation agreement.

Their conversation led Mr. Seller to review the entire language of the cancellation agreement and then led him to attempt to contact respondent's manager "to discuss this conundrum". In spite of numerous attempts, including hand delivery of a letter to the respondent's manager, no discussions occurred. The record does contain a statement by the respondent's manager that she returned Mr. Seller's call and left a message on his answering machine.

Although his pending sale did not close the circumstances caused understandable anxiety and anxiousness to the complainants as they tried to resolve the issue of potential commissions owed to the respondent and his broker. The complainants felt that any such commissions were undeserving and unfair.

The respondent testified that he did explain all of the provisions of the agreement. He agrees that his conversation with Mr. Seller only lasted ten minutes, further stated that ten minutes was more than ample to explain the agreement in its entirety. He further testified that the cancellation agreement was the standard agreement used by his firm. He is not the author of the agreement and must use it as instructed by his office manager and broker. He also testified and sought to explain that the complainants were not provided with a copy of the fully executed agreement, as in accordance with company policy the agreement would have to be reviewed and signed by his manager, then management or staff would get a copy to the complainants. The respondent offered no explanation as to when his signature was placed on the cancellation agreement retained by his company or why his signature does not appear on the copy retained by the complainant. The evidence also clearly shows that the manager did not sign the agreement, nor was there a fully executed copy given to the complainants.

Under these circumstances, the Panel finds by clear and convincing evidence that the respondent violated the duty he owed under Article 9 by failing to provide a completed copy of the agreement. Furthermore, if others in his company failed to follow through with company procedures in getting the fully executed document back to the complainants that would not excuse respondent's conduct as he is the primary responsible party under Article 9.

The regrettable fact is that the document was never returned to the complainants. Had it been returned or had some discussion taken place with the complainants much of the anguish suffered by them might have been avoided, or at least diminished.

Under these circumstances, a letter warning the respondent to avoid similar actions and conduct is warranted and appropriate, and accordingly, the panel directs that an official letter of warning be issued to the respondent for a violation of Article 9.

[Here's a complaint re Article 15, filed in response to a Request for Arbitration that was filed by this respondent...](#)

Respondent, Agent A, introduced a client to a property, took measurements, negotiated and wrote a contract and counter-offer, and generally undertook the representation of a potential buyer.

However, for reasons not altogether clear from the record, the client sought the services of complainant, Broker B.

Respondent, upon learning of the involvement of Broker B felt that Broker B's entry into the transaction was unfair to her and concluded that she had been procuring cause. These circumstances resulted in a dispute between Agent A and Broker B.

The record contains some evidence that a referral fee was discussed. The issue here is an ethics violation and not procuring cause.

However, what resulted was an ethics complaint being filed by Agent A against Broker B and a counter complaint filed by Broker B against Agent A.

Agent A has since withdrawn her complaint and, accordingly, this matter came for a hearing only on Broker B ethics complaint naming Agent A as the respondent.

The basis for this complaint is an alleged violation of Article 15 of the Code of Ethics where in Broker B alleges that Agent A knowingly or recklessly made false and misleading statements about him. In support of his complaint he relies on his testimony, the entire record, and particularly his letter of March 3, 2010, which lists nine (9) assertions which are said to be false.

During the course of the hearing "the client", Mr. Buyer, testified that there was no occasion where the respondent made false or misleading statements about Broker B. No other witnesses testified on this subject except Broker B who, according to his testimony, had only one telephone conversation with Agent A, and there is no evidence that such conversation was overheard by others.

Under these circumstances, the panel must conclude that there is insufficient evidence to conclude that the respondent violated the provisions of Article 15, as she has not made any statements against Broker B to anyone.

However, Broker B argues that Agent A's statements made in her complaint are false and misleading. An examination of the nine statements identified in the above mentioned exhibit are the basis of Broker B's belief that they are factually incorrect.

Recognizing the thrust of Broker B's argument the panel finds that whether or not: 1.) Broker B goes to church with the client, 2.) reviewed the contract, 3.) the parties negotiated on the issue of procuring cause, 4.) Mr. Buyer said that he would not buy the property without Agent A, 5.) Agent A felt a telephone call(s) were threatening, 6.) Broker B's email can be characterized as "nasty", 7.) Broker B said or felt a commercial real estate form should be used, 8.) it was said that Agent A was new to the real estate industry, would not, under these circumstances, rise to "clear and convincing" evidence necessary to support a violation of Article 15.

Only assertion #9 which alleges Agent A's belief that Broker B "knowingly coached my client into signing another contract" is relevant to this inquiry. However, as above stated, this statement by the respondent is found in her original complaint filed against Broker B, and under paragraph 19 of the Statement of

Professional Standards Policy – “the allegations, findings, and decisions rendered in ethics...hearings are confidential...”.

Agent A’s “allegations” amount to her belief of what the facts will show after a hearing, and may include those *inferences* which may be drawn by the hearing panel from such facts or conflicting evidence. While there must be some basis for her belief in making an allegation, the fact that the allegation may later be found to be incorrect does not support a “knowingly or reckless” statement under Article 15 and under all circumstances here existing.

Because of the foregoing findings, the panel dismissed the complaint against Agent A.

[This complaint has to do with Articles 1 and 11...](#)

### **Decision of Ethics Hearing Panel of the Professional Standards Committee**

The respondent, Broker A, listed the complainant’s property as a rental. In doing so she obtained the complainant’s keys for the rental property and her telephone number, but did not obtain or record the complainant’s address for communication purposes.

Later, a dispute arose between them and, after discussions, both agreed to cancel the listing. While there is much dispute over the reasons why the listing was cancelled there is no need to resolve this issue.

Here, Broker A is alleged to have violated Article 1 and Article 11 of the Code of Ethics for failing to return the complainant’s keys to her rental property.

The facts reveal that Broker A took the listing. There were several blank lines on the listing agreement to record the complainant’s address and telephone number, which Broker A said that she requested, but the complainant refused, as she did not want her telephone number and address appearing on the listing agreement. Furthermore, the listing agreement is signed by the complainant but not signed by Broker A as the broker.

After the dispute arose, Broker A recognized that she was obligated to return the keys. She attempted to do so by sending them certified mail to an incorrect address that she retrieved from her GPS. After mailing the keys Broker A did not receive a return receipt and failed to timely follow up with the post office. The evidence also reveals that approximately one or two weeks after the mailing Broker A’s post office box was closed.

This complaint followed and Broker A then learned that the keys had not been received by the complainant but had in fact been destroyed by the post office because they were not timely picked up.

Under these circumstances, the panel finds that Broker A violated Article 1 of the Code of Ethics as she failed to protect the interests of her client by making an insufficient attempt to return the keys, and by not properly following up with the post office to assure delivery.

Furthermore, Broker A violated Article 11 by not having the listing agreement duly signed by her as the broker, for not obtaining and recording in her paperwork a sufficient address to be used by her in communicating with the complainant during the time of her representation, and for not turning the keys.

While the respondent defends her action by arguing that the complainant stonewalled her attempts to return the keys by refusing to give her address, the fact remains that all of this would have and should have been avoided by Broker A, had she obtained the complainant's address upon taking the listing. Such information is essential. This information does not have to appear on the listing agreement, but should have been made part of the respondent's file. This omission on the part of Broker A is evidence that supports a violation of Article 11 as Broker A failed to conform to the standards of competence that is to be expected from a broker upon taking a listing.

**III. Recommendation for Disciplinary Action:**

- 1.) A "*Letter of Reprimand*" will be placed in her file.
- 2.) An additional 4 hour class on "*Louisiana Real Estate License Law*" is required to be successfully completed and proof thereof submitted to NOMAR between August 16, 2010 and December 31, 2010.
- 3.) Respondent is fined \$450.