Preparing Your Case

Six Steps for a Successful Commission Arbitration Outcome

You would have been paid the entire commission had the other REALTOR® not parachuted into the transaction at the last minute. Normally, you would let it go but not this time. This kind of thing has happened one too many times for that. You put a lot of time into the transaction, a lot of money is on the line and this time you are going to fight. You discuss it with your broker, she agrees you have been wronged and she suggests taking the other brokerage firm to arbitration (since the arbitration itself can only be between the brokerage firms). After all, one of the benefits of being a REALTOR® is that as a condition of membership, all REALTORS® are required to resolve commission disputes amongst themselves through arbitration. You file the paperwork and are encouraged to consider mediation with the other party. While the dispute almost resolved through mediation, there are two issues that just cannot be resolved and the mediation is ultimately unsuccessful. A date for the arbitration is eventually set. While you were gung-ho about going to arbitration at the time you filed your arbitration request, now you are a little nervous. You start thinking, what if I become tongue-tied and cannot explain why I should get the commission? What if the other side presents a better case? What if I am made to look foolish at the arbitration?

This article will discuss how REALTORS® can best present their cases in REALTOR® arbitrations following the rules set forth in NAR's Code of Ethics and Arbitration Manual ("Manual"). While it is not a guarantee that you will win, it will hopefully make you be better prepared for the arbitration and help you feel more confident during your presentation.

1. THE PROCESS

A commission arbitration is in many ways like a mini trial. It is more informal than a judicial proceeding, the rules of evidence do not apply but it is a trial nevertheless. In arbitrations conducted by GAR, there is a judge consisting of a five-person panel of REALTORS®. One of them serves as the chair of the panel. Each party gets to make an opening statement, introduce evidence, cross-examine the other party's witnesses and make a closing statement. The arbitration is conducted in accordance with written procedures and a script set forth in the Manual, which the panel is obligated to follow. After the chair of the panel reads a statement explaining the process, the complainant has the opportunity to make an opening statement. The defendant then makes his or her opening statement. The complainant then presents his or her case through witnesses and the presentation of documentary evidence such as e-mails, contracts, letters and signed or sworn statements of witnesses who could not attend the hearing. The defendant has the right to cross-examine the witnesses testifying for the complainant. When the complainant is done presenting the case, the defendant then presents his or her defense. This time the plaintiff can cross-examine the defendant's witnesses. Once this is done, each party has the opportunity to make a closing argument. After reading some closing remarks and asking some final questions, the chair of the panel concludes the hearing and the panel adjourns to make its decision. Unlike in an ethics hearing where there are findings of fact, in an arbitration there is no explanation given as to how or why any particular decision was reached. Instead, the award simply states who gets what portion of the disputed commission.

Whether you have been to an arbitration before or not, the complaining party (or the "complainant") and the defendant are well advised to read the Manual carefully before the arbitration actually begins. In this way, both parties will be familiar with the procedures as they

unfold. While each party is entitled to have legal representation at an arbitration, it is not required.

2. SETTING THE STAGE

What kind of impression should you try to make in the arbitration? While there may be different answers to this question, those REALTORS® who manage to come across as credible, reasonable and professional have a significant advantage over those who do not. How these traits are conveyed is a function of how you dress, act and present your side of the case during the arbitration. Let's look at each of them in greater detail.

a. Attire. An arbitration hearing is not the place to wear shorts, flip-flops and your new Hawaiian shirt. The panel members are volunteering their time to resolve your dispute. You should dress in a way that shows you are respectful of the tribunal and the time they are taking to help you. This means you should dress how you would if you were going to a church on Sunday or to some other formal event.
b. Your Demeanor. In arbitration, you want to be on your best behavior. You should introduce yourself to all of the panel members and shake hands with them and with the opposing party or parties. You want to send a message that this is a business dispute rather than a grudge match between the parties and that you have no personal animosity toward the other party. Even if you have known the panel members since grade school, you should address them formally or "Mr. Smith" or "Ms. Jones". This is a subtle acknowledgment that they are acting in a special capacity at the arbitration and that you are not expecting your friendship with them to interfere with the important job they have to do as members of the arbitration panel. Most importantly, during the hearing, you want to remain likeable and in control. Panel members are human. Having good manners and a pleasant disposition is always the best way to make a good impression.
c. Your Presentation. To come across as credible, reasonable and professional at the arbitration hearing, each party should strive to:

    i. Look people in the eye when you talk.
    ii. Talk slowly and clearly.
    iii. Be concise and organized in your presentation.
    iv. Stick to the facts and avoid exaggeration.
    v. Avoid personal attacks on the other party to the dispute.
    vi. Never interrupt the other party when they are presenting or make distracting facial gestures like vigorously shaking your head sideways in disagreement with what they are saying. You will have your chance to rebut what they say later, but give them a fair opportunity to present their case.
    vii. Do not argue with the panel members. So, for example, if the panel rules against you on whether or not to consider a particular piece of evidence, move on and do not necessarily conclude that the panel is against you. It is the panel's job to be impartial and not everything in the hearing is going to go your way.

3. THE OPENING STATEMENT

The opening statement that each party has a right to make is the first opportunity for you to be heard by the panel. Ideally, it should be a sympathetic overview of the presenting party's case which frames the issues in a light favorable to that party. Since the panel should already

be familiar with the nature of the dispute and the panel will hear the details during the main presentation of the case, the opening statement should be brief. Consider letting your broker make the opening statement. The broker is often viewed as more authoritative, experienced and objective and his or her statements are sometimes given greater credence than those of the agent. Let's look at the sample opening statement below to see if it achieves these goals.

> "*Members of the panel, I want to first thank you for taking the time out of your busy schedules to help resolve this commission dispute. This case is about who was the procuring cause in a real estate transaction in which my agent, Sally Smith, was the listing agent. Sally is an experienced agent, has worked in my office for seven years and is a single mother of two. She met the buyers at an open house at the property and worked with them as customers until they announced during their third visit to the house that they wanted to buy it and were going to make an offer. With this statement, the question of who was the procuring cause of the sale became settled. It was only after this occurred that Jenny Jones arrived on the scene and announced that she was representing the buyers and would be writing the contract. Buyers are always entitled to representation. However, the broker representing the buyer is not entitled to share in the listing broker's commission unless that broker is the procuring cause of the sale. Since Jenny was not the procuring cause of the sale, she should not now be sharing in the commission that Sally worked so hard to earn. Thank you*."

This opening statement above: 1) immediately tells the panel what the dispute is about; 2) quickly explains the listing agent's side of the story; 3) suggests to the panel the test for resolving the dispute; and 4) identifies the key facts that should result in the listing agent winning the case. At the same time, the panel is acknowledged and thanked for their service and the listing agent is cast in a sympathetic light. There were no personal attacks made against the other agent.

4. THE PRESENTATION OF THE CASE.

Both sides in a REALTOR® arbitration are given wide latitude in how they present their cases. The rules of evidence do not apply and most panels are inclined to allow evidence to be considered that would not normally be admissible in a court of law. So, for example, letters and statements from persons who are not present at the arbitration are normally allowed in. The presentation of the case is the place for each party to be as detailed as possible. My recommendation is for the broker to be something of a master of ceremonies and guide the various witnesses through their presentations in the case. The broker may want to start by telling the panel who will be speaking and how long the overall presentation will likely last. Setting realistic expectations with the panel on the length of the arbitration will help prevent them from growing impatient and allow them to better plan their day. So, for example, the broker might say something like the following:

> "*My goal is to present our case as quickly and efficiently as possible. To help move things along, I am going to ask Sally some questions, the answers to which will allow her to quickly explain the nature of this dispute. After that, I am going to ask the sellers to testify since they heard the buyers verbally state that they wanted to buy the house and were going to make an offer. To*

make it easier to understand this case, I am also providing you with this timeline of the key events in the transaction for your use and a list of the people involved in the transaction. I am hoping that we can present our case in about 40 minutes."

Why is using a question and answer format - with the broker asking the questions and the agent answering them - a good way to get all of the key facts out on the table quickly? The answer is that most people are not good at telling long stories. They tend to ramble and sometimes forget to mention key facts. A question and answer format gives some structure to the presentation and allows the story to be told in smaller, more manageable pieces. If the agent forgets to say something important, the broker can prompt the agent with a follow up question. The same is true in any other presentation of a case in court. While it is important not to sound rehearsed, practicing a bit will help make for a more professional presentation. Creating a visual timeline for the panel's use and giving them a cast of characters makes it easier for the panel to quickly grasp what happened in the transaction and who did what. If there is a key piece of evidence, such as a letter or statement, consider having it magnified and put on a board for the panel to see throughout the hearing so that it serves as a constant reminder of the strongest point in your case.

5. CROSS-EXAMINATION.

Each party is allowed to cross-examine the other party's witnesses. Most parties in REALTOR® arbitrations do not use attorneys to present their cases. Each side should have realistic expectations of what a cross-examination is likely to accomplish. There will not likely be any Perry Mason moments where the other party will break down and admit that he or she parachuted into the transaction and is not entitled to a commission. Similarly, using cross-examination to be argumentative almost always backfires. So, for example, it would be terrible to say something like "Ms. Jones, you parachuted into this transaction just to try to get a commission you weren't entitled to. Isn't that right?"

The goals of a cross-examination should be to identify inconsistencies in a witness's testimony and focus on the weak points in the other party's case that they may be trying to gloss over. Questions should be asked in a way to try to illicit short or yes or no answers from the witness. While in a judicial proceeding the party conducting the cross-examination can cut off a witness whose answer goes beyond the scope of the question, in REALTOR® arbitrations, most panel chairs will allow a witness to say whatever is on his or her mind. In focusing on inconsistencies, let's say that the buyer signed a registration book at an open house stating that he or she was not working with another agent. If the buyer is now testifying that he or she had been working with another agent all along, it would be appropriate to ask the buyer the following question.

Broker: *Mr. Buyer, you have testified today that you were working with Ms. Jones as a buyer agent since before you ever visited the property at 123 Huckleberry Lane. Is that correct?*

Witness: *Yes, that's right.*

Broker: *But, it is also true that when you first visited the property, you signed a registration book stating that you were not working with a real estate agent or broker. Is that not true?*

There is a tendency on the part of people inexperienced with conducting a cross-examination to make the mistake of asking the witness to explain the inconsistency or to browbeat them with the inconsistency. It is usually enough to highlight the inconsistency and let the panel draw its own logical conclusions from the inconsistency.

6. CLOSING.

Each side gets to make a closing argument before the conclusion of the arbitration. Rather than rehashing everything that was said before, a good closing should be a summary statement. The panel has already heard the testimony and seen the evidence. Hearing it again tends to make most panel members impatient and cause the arbitration to end with a thud rather than a crescendo.

REALTORS® should remember that the panel members, like all human beings, have limited attention spans and most already have formed their initial conclusions on who deserves the commission. With this context, REALTORS® should consider following the rule of three and highlight the three most important reasons why the panel should rule in their favor. While emphasizing just three key points may seem difficult, it is much more likely that the panel will remember these three things as they start to deliberate than for them to lose focus and hear nothing if you plow through the entire case once again. The closing is also a good time to remind the panel of inconsistencies or weaknesses in the other party's case and the conclusions they should draw from them.

As a REALTOR®, you are required to arbitrate all disputes over commissions with other REALTORS®. While the number of times REALTORS® end up in an arbitration is usually limited, hopefully this article will leave you better prepared when you do.

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