



Real Estate Council of Ontario

**IN THE MATTER OF A DISCIPLINE HEARING HELD PURSUANT TO THE
REAL ESTATE AND BUSINESS BROKERS ACT, 2002, S.O. 2002, c. 30, Sch. C**

BETWEEN:

REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*

- AND-

ANDREW SOBCHAK

DISCIPLINE DECISION AND REASONS FOR DECISION

APPEARANCES:

For the Registrant:

Andrew Sobczak

For the Real Estate Council of Ontario:

Jonathan Miller, counsel
Chantel Marler, paralegal

Heard in Toronto on:

April 27, 28 and 29, 2015

FINDINGS:

In violation of Sections 3, 4, 24.(1), 38, 39 and 41.(2) of the Code of Ethics.

ORDER:

Counsel for the Registrar, *REBBA 2002* to deliver written submissions to the Panel and to the Respondent on the issue of penalty and costs within 15 days of the date on which the Panel's decision and reasons are delivered.

The Respondent shall deliver to the Panel and to Counsel for the Registrar, *REBBA 2002* its written submissions on penalty and costs in response to Counsel for the Registrar, *REBBA 2002*'s submissions within 15 days of the date on which Counsel for the Registrar, *REBBA 2002*'s submissions on penalty and costs are delivered to the Respondent.

Counsel for the Registrar, *REBBA 2002* shall deliver to the Panel and to the Respondent its reply to the written submission on penalty and costs of the Respondent within 5 days of the date on which the Respondent's submissions on penalty and costs are delivered to Counsel for the Registrar, *REBBA 2002*.

Any inquiries relating to the delivery of the above-mentioned documents should be directed to the Hearings Coordinator.

COSTS AND EXPENSES: If appropriate, submissions to be made on costs and expenses with submissions on penalty.

WRITTEN REASONS:

REASONS FOR DECISION

INTRODUCTION

This hearing was held on April 27, 28 and 29, 2015, in the presence of the Respondent Andrew Sobczak (the “Respondent” and/or “Mr. Sobczak”); Jonathan Miller, counsel for the Real Estate Council of Ontario; Chantel Marler, paralegal for the Real Estate Council of Ontario; and Douglas Cunningham, independent legal counsel to the Discipline Panel.

BACKGROUND

On behalf of his brokerage, Brokerage A, Mr. Sobczak listed for sale a commercial property (a trailer park) known municipally as 1-A Street, City A (the “Property”) for the Sellers. The Sellers had granted a Power of Attorney (“POA”) in favour of their son, Seller A, permitting him to deal with the Property on their behalf, including list and sell the Property.

ALLEGATIONS BY THE REGISTRAR, REBBA 2002

In its Allegation Statement the Registrar, *REBBA 2002* alleged that Mr. Sobczak acted unprofessionally by:

- a. failing to treat the Sellers and Buyer A fairly, honestly and with integrity because he failed to present Buyer A’s initial offer on the Property to his clients, thereby breaching Section 3 of the Code of Ethics;

- b. failing to promote and protect the best interest of his clients because he did not present all written offers received on the Property, thereby breaching Section 4 of the Code of Ethics;
- c. failing to convey all written offers for the Property to his clients, thereby breaching Section 24(1) of the Code of Ethics;
- d. failing to use his best efforts to prevent an error, misrepresentation, fraud or any unethical practice because he did not forward to his clients an offer from Buyer A, thereby breaching Section 38 of the Code of Ethics;
- e. engaging in an act or omission that, having regard to all of the circumstances, would reasonably be regarded as disgraceful, dishonourable, unprofessional or unbecoming a registrant because he failed to present all written offers received on the Property and he refused to cooperate with another registrant because he did not want to share the commission payable, thereby breaching Section 39 of the Code of Ethics;
- f. causing Brokerage A to breach Sections 38 and 39 of the Code of Ethics by failing to amend the Listing Agreement to reflect his agreement to reduce his commission by \$10,000.00, thereby breaching Section 41(2) of the Code of Ethics; and
- g. causing Brokerage A to breach Sections 38 and 39 of the Code of Ethics by failing to abide by his agreement to reduce his commission by \$10,000.00, thereby breaching Section 41(2) of the Code of Ethics.

The Registrar, *REBBA 2002*, alleged that Mr. Sobczak had breached the following Sections of the Code of Ethics:

3. – Fairness, Honesty, Etc. – A registrant shall treat every person the registrant deals with in the course of a trade in real estate fairly, honestly and with integrity.

4. – Best Interests – A registrant shall promote and protect the best interests of the registrant's clients.

24.(1) – Conveying Offers – A registrant shall convey any written offer received by the registrant to the registrant's client at the earliest practicable opportunity.

38. – Error, Misrepresentation, Fraud, Etc. – A registrant shall use the registrant's best efforts to prevent error, misrepresentation, fraud or any unethical practice in respect of a trade in real estate.

39. – Unprofessional Conduct, Etc. – A registrant shall not, in the course of trading in real estate, engage in any act or omission that, having regard to all of the circumstances, would reasonably be regarded as disgraceful, dishonourable, unprofessional or unbecoming a registrant.

41.(2) – Duty to Ensure Compliance – A broker of record shall ensure that the brokerage complies with this Regulation.

EXHIBITS

1. Allegation Statement, dated June 20, 2014
2. Notice of Hearing, dated March 31, 2015
3. RECO Book of Documents, dated September 17, 2014
4. RECO Supplementary Book of Documents, dated December 31, 2014
5. Disclosure from Andrew Sobczak
6. E-mail from Seller A to Andrew Sobczak, dated August 6, 2011 at 1:03 p.m.
7. Facsimile Confirmation Sheet from Fax Company A to Andrew Sobczak re:
facsimile to Individual A and Seller A's spouse, dated August 9, 2011 at 12:40 p.m.

8. Confirmation of Co-operation and Representation, signed by the Seller A and his spouse, August 19, 2011

OPENING STATEMENT BY THE REGISTRAR, REBBA 2002

Counsel for the Registrar (the “Prosecutor”) claimed that the evidence would show that the Property included a trailer park business and that the Respondent’s brokerage had been retained as act as the listing brokerage. He added that the hearing would reveal that there had been (a) a failed transaction for the purchase of the Property, which involved a would-be buyer named Buyer A; and (b) a successful transaction where Buyer B and Buyer C were the buyers.

The Prosecutor stated that there were three main allegations against Mr. Sobczak. The first two allegations dealt with the failed transaction, specifically his failure to present a written offer for the Property he had received from another realtor, and his unwillingness to co-operate with another registrant because it would have necessitated the sharing of commission upon the sale of the Property. By contrast, the third allegation covered the successful transaction for the Property but involved Mr. Sobczak’s failure to abide by his own commitment to the Sellers to reduce his commission by \$10,000.00.

According to the Prosecutor, he would show that Mr. Sobczak never asked Buyer A if he was working with another registrant, nor did he ask him to enter into a Buyer’s Representation Agreement (“BRA”) even though Mr. Sobczak had an obvious interest in representing him. Further, by the time Buyer A had any dealings with Mr. Sobczak, he (Buyer A) had already signed a BRA with another realtor, Registrant A. The Panel was told that even though he was advised of the BRA between Buyer A and Registrant A, Mr. Sobczak maintained that Buyer A was *his* client.

The Prosecutor asserted that Mr. Sobczak became angry or upset when Buyer A submitted his offer for the Property through Registrant A (Exhibit #3, Tab 3a, p. 3) and that, in all the circumstances, the evidence would clearly show Mr. Sobczak’s lack of understanding and compliance with the Code of Ethics.

Further, Mr. Sobczak did not present Buyer A's offer to the Sellers as soon as practicable. Instead, the evidence would show that he justified his decision not to present the offer by alleging that the offer contained certain errors such that he ultimately decided it should be sent to RECO instead of being delivered to the Sellers.

With respect to RECO, the Panel would see that Mr. Sobczak sent the offer to RECO for review and that, not surprisingly, he was advised to present the offer to the Sellers (Exhibit #3, Tab 2k, p. 1)

With respect to the allegation that Mr. Sobczak did not fulfil his promise to reduce his commission by \$10,000.00, the Prosecutor advised that the evidence would show (a) that the promise had been made, and (b) that the promise was not kept by Mr. Sobczak (Exhibit #3, Tab 15, p.1)

The Prosecutor advised that six (6) witnesses would likely be called by the Registrar to present its case.

OPENING STATEMENT BY THE RESPONDENT

Mr. Sobczak began his opening statement by referring the Panel to the first listing agreement for the Property, dated July 29, 2009. He then indicated that during his dealings with the Property, he had never received a copy of the Power of Attorney from the Sellers in favour of their son, Seller A.

Mr. Sobczak indicated that he intended to go through each of the allegations in the Allegation Statement and outline his evidence on those issues. After it became evident that he was attempting to present his case during his opening remarks, Mr. Sobczak was advised that he would be given the opportunity to present his case after the Registrar had presented its case. In other words, the purpose of the opening statement was not to testify but rather to outline for the Panel in brief submissions what the evidence would likely show at the hearing.

Mr. Sobczak stated that the evidence would show that he had not refused to work with the other realtor, that is, Registrant A, and that he properly considered Buyer A to be his own client in dealings with the Property. Mr. Sobczak also submitted that the Panel would see that, contrary to the Registrar's allegations, he did co-operate with Registrant A because he sent a copy of an offer from her to RECO for the latter's review because in Mr. Sobczak's opinion, the offer contained a number of deficiencies.

WITNESSES FOR THE REGISTRAR, REBBA 2002

1. Seller A

Examination-in-chief

Seller A testified that he is the son of the Sellers of the Property who had been granted a Power of Attorney ("POA") by them to deal with property-related matters, including but not limited to the listing and sale of the Property. Seller A confirmed that Mr. Sobczak was the listing representative for the Property.

Exhibit #3, Tab 7 was identified as the second listing that was signed with Mr. Sobczak; it was executed after the original listing had expired. The second listing identified the commission payable upon the successful sale of the Property as five per cent (5%). The Sellers initiated the listing and they signed it on February 2, 2011, providing for a five per cent (5 %) commission with two percent (2%) going to any co-operating broker/salesperson.

On March 15, 2011, the Sellers granted Seller A a POA (Exhibit #3, Tab 17).

Seller A stated that most of the negotiations relating to the purchase and sale of the Property took place between him and Mr. Sobczak via e-mail and text messages, although he (Seller A) had ongoing discussions with his parents, the Sellers, on such matters.

Seller A testified that during his dealings with Mr. Sobczak, he received a phone call from a man named Buyer A inquiring why there had been no response to his offer to purchase the Property. Seller A told the Panel that he had not seen any such offer, nor had Mr. Sobczak given him a copy of same.

Seller A stated that, initially, he did not have any discussion with Buyer A about him being represented by another realtor; however, he subsequently learned that Buyer A was being represented by a realtor named Registrant A.

Seller A advised that he e-mailed Mr. Sobczak (on July 26, 2011) and indicated that he had a verbal offer from another agent who did not want to deal with Mr. Sobczak's brokerage. He stated that he was interested in accepting the "verbal offer" but that the other agent wanted him to sign a seller Customer Service Agreement in order for the offer process to continue. Seller A made it clear that he did not want to "loose [sic] this deal as they have met all [his]...conditions including price."

In response to Seller A's e-mail, Mr. Sobczak advised that all licensed realtors had an obligation to deal with the listing broker for a property and that the "agent" to whom Seller A had been talking should know better. Mr. Sobczak told Seller A that the agent had to submit an offer to him and he would present it to the Sellers. Mr. Sobczak added that if the agent tried to deal with a seller directly, the agent would be reported to RECO for breaking the rules and also be at risk of losing his/her licence.

In the same e-mail, Mr. Sobczak advised Seller A to wait until he could bring Seller A an offer from a couple who had recently sold their home and who were prepared to make a cash offer with no financing for the Property. He also stated that yet another couple he knew was also talking about making an offer.

Seller A testified that he felt that Mr. Sobczak was trying to steer him away from dealing with Buyer A.

Documents filed at the hearing show that Mr. Sobczak submitted a complaint to RECO against Registrant A, on July 26, 2011, after he had communicated with Seller A. In his e-mail to RECO, Mr. Sobczak stated that he was making a formal complaint against Registrant A for “making an offer directly to vendors after 2 showings she did of a commercial property I am listing on MLS.” Mr. Sobczak stated that he showed the would-be buyer, Buyer A, the Property in late January 2011 and that Registrant A requested financials for the business on the Property in early February 2011. He stated that it was obvious to him that *his* client was switching agents because he had shown the Property to Buyer A previously.

Mr. Sobczak advised that he understood that Registrant A had signed a BRA with Buyer A and he complained to RECO “so much for client loyalty.” In the end, Mr. Sobczak reiterated that his complaint was based on Registrant A making an offer directly to the Sellers of the Property even though he had listed the Property. He forwarded a copy of Seller A’s e-mail to him, dated July 26, 2011, to support his complaint. He requested RECO to advise Registrant A immediately about his complaint before he started legal action against her brokerage.

Although RECO acknowledged receipt of Mr. Sobczak’s e-mail complaint, he was requested to complete all necessary complaint documents used by RECO in its complaint process.

On August 2, 2011, Registrant A forwarded a written offer on behalf of Buyer A to Mr. Sobczak. However, even by August 6, 2011, no copy of that offer had been forwarded to Seller A for his review. The documents from the hearing indicate that Mr. Sobczak sent a lengthy e-mail to RECO on August 3, 2011, along with a copy of the offer from Buyer A (delivered through Registrant’s office), outlining what he believed were many “technical and legal defects” in the offer. He also told RECO that “you let me know if I should present such offer to my clients (the sellers) ... [because] I can see a potential legal lawsuit coming soon after closing if this deal comes through as structured.”

On August 6, 2011, Seller A wrote to Mr. Sobczak inquiring whether a (counter) offer involving a buyer (other than Buyer A) had been accepted. Mr. Sobczak responded by advising Seller A “No, he got pissed off he told me that you took so much time to sign back. He bought another resort in Municipality A he said, “Thank you...Enjoy your day!”

After receiving that communication, Seller A asked Mr. Sobczak to confirm whether he had another offer to present to him. It was in response to that e-mail that Mr. Sobczak stated that he had sent the offer [from Registrant’s office] to RECO “for review...[because it had] too many defects technical and legal.”

After receiving this information, Seller A made it clear to Mr. Sobczak that he still wanted to see the offer. That request was being made four (4) days after the offer had been sent to Mr. Sobczak by Registrant A.

Seller A told the Panel that he was in negotiations with Buyer A and was close to completing an agreement and that he and Buyer A were communicating directly with each other almost daily.

Seller A was directed to the Agreement of Purchase and Sale (“APS”) between the Sellers and Buyer A (Exhibit #3, Tab N, p.2). Seller A confirmed that that offer did not result in a deal between his parents and Buyer A. He added that Mr. Sobczak in fact “rejoiced” that a deal was not concluded because he indicated that there were many other offers that he himself could bring for the Property.

Seller A confirmed that the Property was eventually sold to a couple named Buyer B and Buyer C. However, because of his experience with Mr. Sobczak relating to the offer from Buyer A, Seller A stated that Mr. Sobczak was, to the extent possible, excluded from negotiations with the Buyer B and Buyer C. Mr. Sobczak was only asked to do the paperwork to make a transaction happen.

After an offer from the Buyer B and Buyer C had been accepted conditional upon a home inspection, an inspection was carried out. When the inspection revealed certain deficiencies, an Amendment to the APS was proposed by Buyer B and Buyer C to reduce the purchase price for the Property from \$880,000.00 to \$850,000.00. Because of that proposal, further discussions occurred between Mr. Sobczak, Buyer B and Buyer C, and Seller A. To ensure a transaction could take place, Seller A stated that his parents agreed to reduce the purchase price by \$20,000.00, Buyer B and Buyer C agreed to forgo their demand for a flat \$30,000.00 reduction, and Mr. Sobczak agreed that he would reduce the commission payable to him (on the double-ended transaction) by \$10,000.00. Thus, everyone would be agreeing to give something up in order to realize the actual purchase and sale of the Property.

Seller A advised the Panel that, based on his discussion with and the commitment of Mr. Sobczak to reduce his commission by \$10,000.00, he (Seller A) drafted a clause to confirm the commission reduction. That clause read as follows: "REAL ESTATE AGENT HAS AGREED TO REDUCE REAL ESTATE COMMISSION FEES BY TEN THOUSAND DOLLARS (\$10,000.00)."

Seller A said that Mr. Sobczak agreed to the commission reduction and that he (Seller A) and Buyer B and Buyer C had signed the Amendment to the APS incorporating the clause confirming the commission reduction. However, subsequent to his discussions with Buyer B and Buyer C and Mr. Sobczak, Seller A was told by Buyer B and Buyer C that the hand-written clause regarding the commission reduction had been crossed out by Mr. Sobczak. In fact, when the parties were provided with a copy of the signed Amendment to the APS, the handwritten clause which had been included by Seller A had been struck out and the following typed clause had been added by Mr. Sobczak: "The Listing Broker does not agree to this clause reducing the commission".

The Sellers did not ultimately receive the \$10,000.00 commission reduction from Mr. Sobczak. Seller A confirmed, however, that the deal with the Buyer B and Buyer C still closed.

Cross-examination

Seller A confirmed that he eventually received Buyer A's offer but that he did not have a copy of the offer by August 6, 2011, as confirmed by his e-mail to Mr. Sobczak. It was not until several days thereafter that he received a copy of the offer. Seller A also advised that he had never seen the list of the alleged deficiencies which Mr. Sobczak had prepared (and sent to RECO) relating to the August 2, 2011 offer from Buyer A.

Seller A stated that he began dealing with Buyer A directly in July 2011. With respect to the POA from his parents (the Sellers) he advised that he could not recall when he first told Mr. Sobczak about the POA.

With respect to Registrant A, Seller A testified that she *never* contacted him directly; he did, however, have direct contact with Buyer A.

So far as Buyer B was concerned, Seller A had direct contact with him as well. Buyer B was also privy to the conversation with Mr. Sobczak where he had agreed to reduce his commission. Seller A reiterated that Mr. Sobczak had agreed to reduce his commission by \$10,000.00 and that he had, in fact, said at the time that "if that is what it takes to do a deal then okay".

According to Seller A, everything relating to the proposed sale of the Property was discussed between him and his parents. Even though he held a POA on behalf of the Sellers, Seller A stated that he did not sign paperwork relating to the sale of the Property; rather his parents did so. He also did not pursue any legal claim against Mr. Sobczak for the \$10,000.00 commission reduction because he did not want to put his parents through any post-transaction litigation.

He also emphasized that he did not want his parents to have to have any direct contact with Mr. Sobczak because Mr. Sobczak was "too abrasive".

Re-direct by the Prosecutor

Seller A confirmed that he did not receive a copy of Buyer A's offer from Registrant A. By August 6, 2011, he had still not received the offer (dated August 2, 2011) that Registrant A had sent to Mr. Sobczak.

2. Buyer A

Examination-in-chief

Buyer A advised that he lives in City B and that he located the Property through website A. He indicated that he first contacted Mr. Sobczak based on the website information and that Registrant A was already his real estate representative when he did so. Mr. Sobczak answered Buyer A's questions about the Property by e-mail. Mr. Sobczak first showed Buyer A the Property in January 2011 and he testified that Mr. Sobczak never asked him about a BRA or whether he was working with a real estate representative. Buyer A confirmed that he signed a confidentially agreement presented to him by Mr. Sobczak which related to financial information for the trailer park business on the Property.

Buyer A was directed to Exhibit #3, Tab 3D, which was a Working with a Realtor® form that Buyer A had signed for Registrant A. Buyer A indicated that Mr. Sobczak never asked him to sign a Working with a Realtor® form nor did he address such matters with him. Buyer A stated that he understood that Mr. Sobczak was working for the Sellers of the Property.

Buyer A was directed to Exhibit #3, Tab 3B, which is the BRA between Brokerage B, the brokerage for whom Registrant A worked and him. Buyer A testified that Mr. Sobczak never asked him to sign a BRA with his own brokerage.

Buyer A was directed to Exhibit #3, Tab 3A, an e-mail between Mr. Sobczak and Buyer A. In the e-mail, Buyer A indicated that he was trying to get the matter to move forward in late January 2011 but that Mr. Sobczak actually e-mailed him in early February 2011

and stated “Hi Buyer A, I would appreciate if you don’t send agents my way. You asked for info on this property, you got it, you asked to see the property, I showed it to you. Either way you look at it, you engaged me as your agent, I spent time and put effort in, technically (ask RECO) you are my client....”

In his e-mail (dated February 4, 2011), Mr. Sobczak also stated that he would prepare an offer for Buyer A if he provided the details; he also claimed he could get Buyer A a “better deal” for the Property than any other agent.

Buyer A wanted to proceed but he intended to do so with Registrant A as his representative. He advised that he made it clear to Mr. Sobczak that he was working with Registrant A and that such had been the case for years. Buyer A also wanted to explore financing relating to the business on the Property but that Registrant A was not getting cooperation from Mr. Sobczak. That is why he (Buyer A) contacted Seller A directly to discuss issues relating to the Property, including any potential offers.

Buyer A was directed to the complaint made by Mr. Sobczak to RECO against Registrant A (Exhibit #3, Tab 2) in late July 2011. Buyer A indicated that there were errors in the complaint. One significant error was that, contrary to Mr. Sobczak’s allegations to RECO, Registrant A was not sending offers to Seller A or dealing with him directly; it was Buyer A who was speaking directly to Seller A and he had made a verbal offer to Seller A. Buyer A indicated that he did so because he understood that Mr. Sobczak was not interested in forwarding to Seller A the written offer that Registrant A had sent to Mr. Sobczak.

Certain offers and documents were put to Buyer A, including an offer sent on August 18, 2011 that contained conditions. Buyer A advised that no transaction for the Property was finalized partly because the more he looked at the Property the more problems he found. He ultimately decided that there were other properties on the market that interested him. During August 2011, Mr. Sobczak’s role in dealing with offers to the Sellers was limited; Buyer A was having direct contact with Seller A.

Reference was made to Exhibit 3, Tab 3(J), which was a letter from Buyer A to RECO concerning Mr. Sobczak's complaint about Registrant A allegedly having had direct contact with Seller A. In that letter, Buyer A advised that on two occasions when an offer had been sent by Registrant A to Mr. Sobczak, he refused to present the offers to the Sellers. He also stated that Mr. Sobczak was reluctant to cooperate with Registrant A and that complications had arisen during his dealings for the Property because of Mr. Sobczak's unwillingness to accept the fact that he (Buyer A) was not Mr. Sobczak's client. Buyer A asserted that at no time did he ever agree that Mr. Sobczak would represent him.

Cross-examination of Buyer A by Mr. Sobczak

On cross-examination, Mr. Sobczak asked Buyer A whether he (Sobczak) ever tried to force him into signing a BRA. Buyer A confirmed that he was never forced to do so, while making it clear that he never believed that Mr. Sobczak was working for him. He stated that he always understood Mr. Sobczak to be working for the Sellers of the Property.

Mr. Sobczak questioned why Buyer A had contacted him for a showing on January 24, 2011 when he had a signed BRA with Brokerage B as of January 21, 2011. Buyer A indicated that his intention was always to work with Registrant A and Brokerage B. Further, upon Mr. Sobczak suggesting to Buyer A that he was providing real estate services to him because he (Sobczak) had provided Buyer A with financial statements for the business on the Property, Buyer A testified that he never considered Sobczak to be working for him.

As for Mr. Sobczak's list of alleged deficiencies in the offer that Registrant A had prepared, Buyer A advised that he had never previously seen the actual list of deficiencies but that he had been made aware of some of the items therein. Buyer A

also stated that he was deeply involved in helping Registrant A prepare the second and third offers that were submitted to the Sellers of the Property.

3. Registrant A

Examination-in-chief

Registrant A has been a salesperson registered Brokerage B since 2003. She was acting as the sales representative for Buyer A in his attempted purchase of the Property.

Concerning Tab 3B, Exhibit #3, Registrant A confirmed that it was the BRA between Brokerage B and Buyer A in effect from January 21, 2011 until September 29, 2011. Further, throughout his interest in the Property, Buyer A dealt with her.

Although Buyer A had some direct contact with Mr. Sobczak to obtain information relating to the Property, Registrant A made a request to Mr. Sobczak to view the Property. She also testified that, despite her representations to Mr. Sobczak that she was acting for Buyer A, Mr. Sobczak insisted repeatedly that Buyer A was *his* client.

In an e-mail from Mr. Sobczak to Buyer A on February 4, 2011, Mr. Sobczak even cautioned Buyer A *not* to send agents his way. He wrote:

Hi Buyer A, I would appreciate if you don't send agents my way. You asked for info on the property, you got it you asked to see this property, I showed it to you you asked for financial statements, I am working on it for you either way you look at it, you engaged me as your agent, I spent time and put effort in, technically (ask RECO) you are my client...so, just give me details for you [sic] offer and I will prepare it for you and I will get you better deal on this property than any other agent can get you, they don't know the property and the owners...I am still waiting for the profit and loss balance sheet statements you asked for, the owners son is away on vacation and that's what delaying it...Thank you..Enjoy your day!

In fact, even after Registrant A e-mailed Mr. Sobczak on February 8, 2011, advising that she had a BRA with Buyer A, Mr. Sobczak responded by asserting that Buyer A was his client. According to Registrant A, Mr. Sobczak went so far as to claim that Buyer A was lying about working with Registrant A and Sobczak advised that Buyer A never mentioned to him during their initial interaction that he was working with another agent.

On February 8, 2011, Registrant A wrote to Mr. Sobczak:

Hi Andrew, I am in my office today and just pulled out Buyer A's file. He has been looking for property with me starting January 10 2008. I do have a Buyer Representation Agreement sign this January 2011 [sic]. I can fax you a copy if you would like? I would like to show Buyer A's wife the property on Friday Feb 11 at around 1:30? Can you set this up for me?

In response, Mr. Sobczak insisted that Buyer A was *his* client. He responded to Registrant A on February 8, 2011 by e-mail:

So he [Buyer A] breached it asking me to show him this property I am listing. Either way you at [sic] he is my client. Thank you...Enjoy your day!

After Registrant A replied to Mr. Sobczak and advised that, according to Buyer A, he had never asked to see the Property but rather it had been Mr. Sobczak who had offered to show it to Buyer A, Mr. Sobczak wrote the following to Registrant A on February 8, 2011:

That is a lie. How could I force anybody to come and see the property? He did not tell me he had an agent. So now he is my client meaning I am the one to prepare an offer for him. Thank you...Enjoy your day!

Given Mr. Sobczak's position and conduct, Registrant A sent an e-mail to her Broker of Record requesting him to get involved in the situation. The Broker of Record subsequently requested Mr. Sobczak to contact Brokerage B for a conference call. Registrant A testified that she wanted to clear up any controversy relating to Buyer A being her client.

Registrant A and her Broker each requested a showing of the Property on February 11, 2011. However, once again, Mr. Sobczak was adamant in claiming that Buyer A was *his* client. In doing so, Mr. Sobczak also purported to dictate the terms under which any compensation would be paid in a successful transaction for the Property. The Broker of Record for Brokerage B, wrote to Mr. Sobczak on February 9, 2011:

Andrew, I ask that you take time to review REBBA 2002 with regards to Agency. Buyer A wants to be represented by Registrant A, and has signed a Buyer Representation Agreement with Brokerage B. Regardless whether you showed him the property or not, he has chosen to be represented by Registrant A and is under no obligation to deal with you.

We have requested a showing for Friday, and look forward to conformation [sic].

Further, the property is listed through the MLS system and shows a co-operating Brokerage commission of 2% which is what you are obligated to pay, unless agreed upon by both Real Estate Companies.

Again, I ask that you review REBBA 2002 or inquire with RECCO [sic] directly to clarify such an obvious misunderstanding of Agency and the Code of Ethics on your part.

In response to the Broker of Record's communication, Mr. Sobczak wrote this e-mail the same day:

[N]ope, all you CAN get is referral fee 25% of selling commission which is at 2.0% and I am not going to repeat it again[.]

According to Registrant A, Mr. Sobczak remained adamant that until she agreed to accept his compensation arrangements based on a “referral fee”, he was not going to cooperate in showing Buyer A the Property again. For various reasons, including Mr. Sobczak’s conduct, Registrant A suggested to Buyer A that they should let things “settle down” and review matters relating to the Property in a few months. Buyer A appears to have been in agreement with that suggestion.

Registrant A testified that she never spoke directly with the Sellers of the Property, although she had certain communications with their son, Seller A, after she was advised by Seller A that the listing for the Property had expired.

In July 2011, Buyer A signed a Working with a Commercial Realtor form which Registrant A had provided to him; an offer for the Property was subsequently prepared by Registrant A with input from her broker of record and from Buyer A himself. That offer was sent to Mr. Sobczak for presentation to the Sellers. However, based on information that she had received from Seller A, the son of the Sellers and the person who had been handling matters on behalf of his parents, Registrant A learned that Mr. Sobczak had not presented the offer to the Sellers or to Seller A by early August 2011.

In or about the same time, Registrant A learned that Mr. Sobczak had filed a complaint against her with RECO. On August 3, 2011, after Registrant A had written to Mr. Sobczak asking “Where is my offer?” Mr. Sobczak sent a short e-mail to Registrant A advising that he was “going to RECO for review due to legal and technical defects...long list of them actually. Thank you...Enjoy your day! Life is ten percent what you make it, and ninety percent how you take it!” Based on his own e-mail to Registrant A, it appears that Mr. Sobczak had still not presented the offer he received from her earlier.

According to Registrant A, she never received any confirmation that Mr. Sobczak presented to the Sellers the offer which she had provided to Mr. Sobczak.

In early August 2011, Registrant A became aware of a complaint to RECO against her which Mr. Sobczak had filed. In an e-mail to RECO on August 3, 2011, Mr. Sobczak asserted that Registrant A did not know what she was doing and that she needed to be instructed as to how to conduct her business and conform to RECO rules.

Further, Mr. Sobczak forwarded a copy of the offer which Registrant A had prepared and sent to him and he provided RECO with a long list of alleged “defects” in that offer. He also requested that RECO let him “know if ... [he] should present such offer to... [his] clients (the sellers)... [and that he]...can see potential legal lawsuit coming soon after closing if this deal comes through as structured.”

On August 8, 2011, after Buyer A had submitted a revised offer directly to Seller A, Mr. Sobczak wrote to Registrant A as follows:

I am not signing any co-operating agreement; I told you before all I can pay is 25% referral fee of selling portion of commission which is 2.0% as per MLS listing. I explained it several times before that I consider Buyer A [Buyer A] my client since he asked for financials [sic] statements and he got them from me and I showed him the property in Jan 2011 again, I am not signing co-operating agreement with your brokerage, all I can do is a referral agreement

The remainder of Mr. Sobczak’s e-mail was devoted to him outlining alleged “defects” in the revised offer. At the end of his e-mail, Mr. Sobczak chastised Registrant A for sending a particular form to him by stating “YOU CAN’T use [this form] with the sellers, the property IS listed on MLS with my brokerage...you just don’t know what you are doing !....talk to your broker first before you e-mail me another offer!”

Registrant A advised that she prepared two additional offers for submission to the Sellers, one on August 12, 2011 and another on August 18, 2011.

On August 16, 2011, Registrant A provided RECO with a detailed responding letter to answer the complaint that Mr. Sobczak had lodged against her. In doing so, she submitted a detailed chronology of events for RECO's benefit covering the period January 2011 to mid-August 2011.

Registrant A testified that the offer sent to Mr. Sobczak on August 18, 2011 was subsequently accepted by the Sellers. Upon speaking to her broker of record about Mr. Sobczak, Registrant A stated that she was told not to worry about the commission issue that Mr. Sobczak had raised repeatedly. Instead, she should concentrate on delivering an offer and getting it accepted, with any disputed commission issues being resolved later. In the end, the transaction did not close because Buyer A and his wife found too many problems with the Property and they relied on provisions in the APS to avoid the transaction.

Registrant A told the Panel that she never met Mr. Sobczak and she never spoke to him on the telephone. However, based on the e-mail communications she had with him, she did not find him to be "user friendly".

Cross-examination of Registrant A by Mr. Sobczak

On cross-examination, Registrant A confirmed that Buyer A never told her in late January 2011 that he would be visiting the Property. With respect to the listing agreement, Registrant A said that Seller A, the son of the Sellers, had advised her in July 2011 that the listing agreement had expired and that is why she had sent certain documents (e.g. a Seller Customer Service Agreement) to him directly. She stated that, during that time, she could not find any listing for the Property on the MLS. The listing

agreement, a copy of which was provided in RECO's Book of Documents at the hearing, states that the listing was to expire on July 25, 2012.

Concerning the second offer which she sent to Mr. Sobczak on August 12, 2011, Registrant A stated that her broker of record had assisted her in preparing that document. Even so, in response to that offer, Mr. Sobczak had prepared another, albeit shorter, list of alleged deficiencies.

Re-examination of Registrant A by the Prosecutor

On re-examination, Registrant A testified that it was Seller A who had asked her in late July 2011 to provide him with an offer for the Property. She also stated that she could not reach Mr. Sobczak by telephone.

4. Broker of Record

Examination-in-chief

The Broker of Record testified that he is the broker of record for Brokerage B, which employed Registrant A, and that he had 26 years of experience as a realtor.

Registrant A contacted the Broker of Record about difficulties she was having with Mr. Sobczak relating to the potential purchase of the Property by Buyer A. Buyer A had a signed BRA with Brokerage B. The Broker of Record stated that during Buyer A's interest in the Property, he spoke to Buyer A several times, in particular about the financial and accounting advice he should be obtaining (because of the trailer park business on the Property).

Based on documents presented at the hearing, the Broker of Record confirmed the BRA between Brokerage B and the Buyer A.

The Broker of Record indicated that he tried to speak to Mr. Sobczak on the telephone about the situation, but that Mr. Sobczak hung up on him. The Broker of Record

followed up with an e-mail to Mr. Sobczak and suggested that Mr. Sobczak review REBBA 2002 and the Code of Ethics.

The Broker of Record acknowledged Mr. Sobczak's e-mails indicating that he (Sobczak) was only willing to pay a referral fee of 25% of the selling commission and stating that until Registrant A acknowledged such a commission arrangement, he (Sobczak) would not schedule any showings of the Property for her.

The Prosecutor reviewed a number of documents with the Broker of Record, some of which had never been executed. The Broker of Record advised that he understood Buyer A had been communicating directly with Seller A concerning the Property, especially in or about July 2011. Although Registrant A sent a Seller Customer Service Agreement to Seller A (when she erroneously believed the Property was no longer listed), it was never executed.

The Broker of Record also made clear that the expectation of a 2.0% commission for his brokerage if a successful transaction for the Property had been concluded was consistent with the terms of the original listing agreement for the Property.

He also testified that three offers were prepared for Buyer A to try to obtain the Property. The first offer, dated August 2, 2011, was ultimately not accepted by the Sellers. The Broker of Record stated that he believed that Mr. Sobczak never presented that offer to the Sellers.

The second offer for the Property was dated August 12, 2011. It was sent by Registrant A to Mr. Sobczak by fax. The Broker of Record advised that, by mid-August 2011, Buyer A's lawyer had become more involved in providing advice on certain clauses in the offers. The second offer, however, was not accepted by the Sellers.

The third offer was dated August 18, 2011. The Broker of Record confirmed that he told Registrant A to forget about the commission issues that remained unresolved in

mid-August 2011; rather, her focus should be on representing Buyer A's best interests, with commission issues being dealt with later on. The Broker of Record stated that, in his view, his brokerage had an obligation to act in a manner where it did not put its interests ahead of Buyer A's interest in securing the Property.

Although the third offer was accepted by the Sellers, the transaction did not ultimately close. The Broker of Record testified that he understood the Property was sold to a Buyer B and Buyer C, persons whom he had actually known for a long time. He also understood that the Buyer B and Buyer C had not been working with Mr. Sobczak in a multiple representation situation.

Cross-examination of Broker of Record by Mr. Sobczak

On cross-examination, the Broker of Record advised that about 90% of the deals in which his brokerage is involved are residential transactions, with the remaining 10% being commercial.

The Broker of Record advised that he was aware of the list of alleged deficiencies in the offer that Mr. Sobczak had prepared in response to the offer Registrant A had delivered on August 2, 2011. The Broker of Record was asked whether he looked to see whether there were problems with the first and second offers for the Property, including whether there were dates missing from those documents.

In doing so, Mr. Sobczak offered his understanding of the application of the *Bulk Sales Act* to a proposed purchase of the Property, and he questioned the Broker of Record about what he did or did not do to educate Registrant A as a salesperson and to prepare offers.

The Broker of Record acknowledged that it was his responsibility, as a broker, to ensure that Registrant A complied with all legal requirements and he indicated that he believed he discharged that obligation in the circumstances.

The Broker of Record also advised that he never spoke to Registrant A about the execution of the BRA between her and Buyer A.

5. Buyer B

Examination-in-chief

Buyer B confirmed that he became the owner of the Property as of May 3, 2012. He first met Mr. Sobczak in 2008, when they previously worked on a deal which did not close. Mr. Sobczak sent Buyer B e-mail regarding the Property in July 2011. Buyer B subsequently contacted Mr. Sobczak in or about the Fall of 2011 and advised that he wanted to see the Property.

When referred to RECO's Book of Documents, Buyer B confirmed a copy of the APS between him and the Sellers, dated September 30, 2011. Buyer B also advised that the transaction relating to the Property closed successfully following a number of amendments to the APS and that Mr. Sobczak represented both sides in the transaction.

Buyer B advised that an inspection of the Property was completed, revealing that a cemetery encroached on the Property. As a result of that problem, Mr. Sobczak advised Buyer B to contact the Sellers directly.

Mr. Sobczak told Buyer B that his deposit cheque for the Property had been returned because of insufficient funds and therefore the deal would be 'null and void'. After doing his own investigation, Buyer B said that he concluded that Mr. Sobczak had made errors; thereafter, Buyer B lost confidence in Mr. Sobczak and believed he could no longer trust him with his funds.

With respect to the APS for the Property, Buyer B confirmed that the Agreement was executed by all parties by October 3, 2011, with a closing date of May 3, 2012.

Throughout his dealings with Mr. Sobczak, Buyer B stated that he had difficulty obtaining information from Mr. Sobczak, who appeared to be frustrated with the Sellers. After being directed to an Amendment to the APS in RECO's Book of Documents, Buyer B confirmed that the Amendment was executed on November 8, 2011 and that it related to a number of issues involving the Property.

Buyer B once again stated that Mr. Sobczak was of no assistance and that he (Buyer B) had to obtain most of the information regarding the proposed amendments.

Concerning the purchase price for the Property, Buyer B stated that he requested a \$30,000.00 reduction in the purchase price after discovering several deficiencies in the Property after an inspection. Buyer B indicated that 'someone' [whom Buyer B did not identify at the hearing] suggested that everyone, that is, Mr. Sobczak, the Sellers and Buyer B and Buyer C, each provide \$10,000.00 toward the transaction to satisfy the request for the \$30,000.00 reduction.

In fact, Buyer B testified that he understood that he, the Sellers of the Property, and Mr. Sobczak, had agreed to split the \$30,000.00 difference relating to deficiencies in the Property three ways, with each of them assuming responsibility for \$10,000.00.

For Mr. Sobczak it would mean a reduction in his overall commission of \$10,000.00. However, when the arrangement was to be reduced to writing as an amendment to the APS for the Property, Mr. Sobczak refused to sign the commission reduction clause, claiming that the amendment did not involve him but rather the Sellers and the buyers.

Buyer B testified that his wife and Mr. Sobczak got into a heated discussion after Mr. Sobczak disclosed that he was not going to reduce his commission by \$10,000.00. In fact, Buyer B stated that Mr. Sobczak told them during his dealings with them that he had another "cash offer" for the Property without any conditions and that, as a result, he was not going to agree to reduce his commission in order for the Buyer B and Buyer C and the Sellers to finalize their deal.

Buyer B confirmed that he (Buyer B) refused to sign the clause in the November 8, 2011 amendment for the \$10,000.00 commission reduction because it was not directed to him and it was a proposed change involving the Sellers and Mr. Sobczak.

Cross-examination of Buyer B by Mr. Sobczak

Buyer B stated that he could not remember who had initially told him about the proposed reduced commission to finalize a deal with the Sellers of the Property. He reiterated that the reduced commission clause in the written amendment dated November 8, 2011 had nothing to do with him; accordingly, he did not sign it.

Buyer B stated that he initially received a copy of the written amendment to the APS in which the handwritten clause for the \$10,000.00 commission reduction was intact. However, he subsequently received another version where the clause had been struck out and the typed clause "The Listing Broker does not agree to this clause reducing the commission" had been added. Buyer B confirmed that all copies of the APS came from Mr. Sobczak's fax machine.

Buyer B stated that he understood that his wife had a telephone conversation with Mr. Sobczak concerning the \$10,000.00 commission reduction and that she had advised Mr. Sobczak that it was "bad business" for him to renege on the \$10,000.00 commission reduction.

According to Buyer B, his wife told him that Mr. Sobczak advised that the \$10,000.00 commission reduction was no longer going to be part of the deal between the Buyer B and Buyer C and the Sellers because he had a "cash offer" for the Property for full price from another potential buyer with no commission reduction. Buyer B told the Panel that Mr. Sobczak subsequently advised him that the proposed cash offer for the Property from another person was likely a hoax because the person who had initially contacted about that offer never got back to him.

6. Buyer C

Examination-in-chief of Buyer C by Mr. Sobczak

Buyer C confirmed that they purchased the Property in May 2012. She confirmed that Mr. Sobczak was in a multiple representation situation because he was representing both the Sellers and the Buyer B and Buyer C (as buyers). She also confirmed that she and her husband had had previous dealings with Mr. Sobczak for another property which they never ended up purchasing.

Concerning the issue of a commission reduction, Buyer C advised that she initially learned from Seller A, the son of the Sellers, that there would be a commission reduction from Mr. Sobczak to finalize the transaction for the Property. She advised the Panel that after the Property had been inspected, she and her husband believed that they would have to spend approximately \$30,000.00 to deal with various deficiencies at the Property.

After that issue had been raised with the Sellers, Seller A advised her that Mr. Sobczak had agreed to reduce his commission by \$10,000.00 to help finalize a deal. In fact, Buyer C stated that she had received a copy of the APS containing a proposed amendment with the *intact* handwritten clause providing for the \$10,000.00 commission reduction.

Thereafter, Buyer C received a second version of the proposed amendment to the APS in which the commission reduction clause had been crossed out with the typed clause having been inserted below the handwriting making it clear that Mr. Sobczak did not agree to any commission reduction.

Buyer C testified that she received a telephone call from Mr. Sobczak in which he stated that he was *not* going to honour the proposed commission reduction because he had another offer for the Property for *full price* with no commission reduction. Buyer C

advised that she cannot recall whether she learned directly from Mr. Sobczak before the phone call that he had initially agreed to reduce his commission by \$10,000.00. However, she made it clear that Mr. Sobczak confirmed to her directly that he was not going to abide by the commitment he had made.

Buyer C stated that Mr. Sobczak was *not* helpful in obtaining information for the proposed transaction. However, all copies of the APS and any proposed amendments were faxed to her from Mr. Sobczak's fax machine.

Consistent with Buyer B's evidence, Buyer C advised that when Mr. Sobczak told her that he was not going to honour his commitment to reduce his commission by \$10,000.00, she told him that it was "bad business" on his part. In response, Mr. Sobczak advised that it was no longer going to be part of any proposed transaction involving the Buyer B and Buyer C because he had, as an alternative, a cash offer for the Property from another (unidentified) person for full price with no commission reduction.

Cross-examination of Buyer C by Mr. Sobczak

On cross-examination by Mr. Sobczak, Buyer C advised that she initially learned from Seller A that a commission reduction on Mr. Sobczak's part would be part of the transaction to ensure that it closed.

Buyer C also stated that when Mr. Sobczak told her that he was not going to reduce his commission to help finalize the transaction, he sought her assistance in getting her husband to agree with Sobczak's changed position on any commission reduction.

Buyer C reiterated directly to Mr. Sobczak that he had told her there was another offer for the Property for full price without any commission reduction. In response, Mr. Sobczak suggested that the *other* offer was simply a verbal offer that was never ultimately reduced to writing.

When asked where she had obtained a copy of the proposed amendment to the APS containing an *intact* version of the handwriting clause confirming the \$10,000.00 commission reduction, Buyer C said that she could not recall who sent her that version of the clause.

WITNESSES FOR THE RESPONDENT

1. Andrew Sobczak

Examination-in-chief

Mr. Sobczak took the stand and went through each Section of the Allegation Statement (Exhibit #1). He stated in summary form that the listing for the Property commenced on July 29, 2009 for an initial price of \$949,000.00; that he showed Buyer A the Property; that he provided him with financial statements for the business on the Property; and that he had him sign a Confidentiality Agreement concerning such information.

Mr. Sobczak testified that since Buyer A did not mention to him that he was working with another registrant, he considered Buyer A to be *his* client, especially after providing him with financial statements for the business on the Property. At the hearing, Mr. Sobczak actually testified that only a “mentally challenged” person would ask one realtor for financial statements relating to a business on a property and ask another realtor to actually show him the property.

Mr. Sobczak acknowledged sending a list of alleged deficiencies to RECO relating to the offer which had been received from Registrant A on behalf of Buyer A. He asserted that Buyer A’s offer was sent to Seller A the day after he (Sobczak) received it, while indicating to Buyer A that he had sent a copy of the offer to RECO for its review and comments.

Further, Mr. Sobczak did not send Registrant A an acknowledgment of receipt of the offer she had submitted for Buyer A; rather, he e-mailed her a list of the deficiencies he

claimed were evident in the offer itself. Mr. Sobczak testified that he actually recommended that Registrant A get advice from a lawyer and her own broker of record.

Despite his earlier statements, Mr. Sobczak admitted that he did not upon receiving it send a copy of the offer from Registrant A to Seller A until a few days later. It was the third offer from Registrant A that was finally accepted by the Sellers, although it never resulted in a successful sale of the Property to Buyer A.

Mr. Sobczak acknowledged that all offers for the Property had to go through the listing brokerage. He also stated clearly that he had refused to co-operate with Registrant A (because he believed that Buyer A was his client) but that he had nevertheless offered her a 25% referral fee in the event that Buyer A purchased the Property.

As far as any commission reduction was concerned, Mr. Sobczak stated that he had *never* agreed or committed himself to any commission reduction in the transaction involving the Buyer B and Buyer C. As a result, he crossed out the handwritten clause regarding the \$10,000.00 commission reduction on the proposed amendment to the APS. He also admitted adding the typed clause to make it clear that he was *not* consenting to any commission reduction.

Mr. Sobczak testified that the issue of him taking a reduction in commission to finalize a transaction between the Buyer B and Buyer C and the Sellers was a *miscommunication*. He claimed that Seller A had tried to get a reduction and that Seller A was never his client even though he was the son of the Sellers. Mr. Sobczak added that Seller A could never produce any POA from his parents upon request. No change to the listing agreement as it related to commission was ever made.

Admitting that he had added the typewritten wording to the handwritten commission reduction clause, Mr. Sobczak denied that he had asked Buyer A to initial the typed changes to that clause.

Mr. Sobczak told the Panel that, in his view, he did not breach any Sections of the *Code of Ethics*. Instead, he summarized his conduct in his dealings with Registrant A, Buyer A, and the as follows:

1. He always treated them fairly and honestly and he did so while believing that Buyer A was also his client;
2. He denied that he had failed to provide a copy of offers from Registrant A to Seller A in a timely manner and stated that any delay was minor;
3. He asserted that he used his best efforts to prevent error by advising Registrant A to get help from a lawyer and her own broker in order to present a proper offer;
4. He claimed that he was prepared to co-operate with Registrant A if she provided him with a copy of a BRA signed by Buyer A but that he was not obliged to pay her more than a referral fee in any successful transaction; and
5. He never agreed to any reduction in his commission in dealing with the Buyer B and Buyer B as would-be purchasers and he never received any request from the Sellers asking for any such reduction.

At the end of his testimony in chief, Mr. Sobczak stated emphatically that he had done nothing wrong, he had never lied to anyone, and he could not afford to pay any monetary penalty if he should be found in violation of any Sections in the *Code of Ethics*.

Cross-examination of Mr. Sobczak by the Prosecutor

Mr. Sobczak confirmed his status as a registrant since 2003 and added that he became a broker of record in 2005. Concerning his real estate practice, Mr. Sobczak indicated that he 'double-ends' most deals with a few exceptions. He also stated that he seldom gets a BRA signed by his clients, claiming that he tries to get them to sign such

agreements but he finds that most would-be buyers do not want to be tied to one agent. With respect to the Buyer B and Buyer C, they did not enter into a written BRA with him.

So far as his dealings with Buyer A were concerned, Mr. Sobczak confirmed that he did not advise Buyer A about agency relationships because he found him to be “experienced”.

Still, he considered Buyer A to be *his* client in his dealings with the Property. With respect to the Sellers, Mr. Sobczak admitted to the Panel that he did not request consent from the Sellers to act in a multiple representation situation.

Mr. Sobczak indicated that the level of service provided in any real estate transaction is determined by whether a person is a customer or a client. He indicated that it was ‘common sense’ that if he showed a property to a person that they must be a client. Mr. Sobczak indicated that his usual practice in requesting commission is 5% with 2% to a cooperating brokerage. He added that when he was told that Registrant A had a BRA with Buyer A, he *agreed* to pay her 2% commission on a successful transaction.

When he was shown Exhibit #3, Tab 3A, page 3 (February 11, 2011), Mr. Sobczak insisted that Buyer A was his client at that time. When shown other documents, including Exhibit #3, Tab 3H (August 8, 2011), which he received subsequent to Registrant A submitting an offer for the Property on behalf of Buyer A and making it clear that Buyer A was her client, Mr. Sobczak still insisted that he would only pay a referral fee to Registrant A.

At the hearing, Mr. Sobczak reiterated that he believed that Buyer A was indeed his client and he acknowledged again that he never sat with him to explain agency or different forms of representation to him.

In fact, he questioned why he would do that given that Buyer A was his client. When asked about Buyer A's wife, Mr. Sobczak advised that he considered her to be his client as well because she came to the Property with Buyer A.

When asked whether he had ever sought permission from the Sellers to act for both parties in the transaction, Mr. Sobczak declined to answer "yes" or "no". Instead, he claimed the issue simply did not arise because there was no offer at the material time. On the heels of that statement, however, Mr. Sobczak stated that if a person requests a realtor to show him a property, it follows that the person is looking to the realtor to provide him with services.

Mr. Sobczak explained the commission structure under the listing agreement. The total commission payable was 5%, with 3% going to the listing realtor, and 2% going to the co-operating realtor. He testified that he was initially offering Registrant A a referral fee of 25% of the 2.0 % commission.

But Mr. Sobczak testified that as soon as Registrant A told him that she had a BRA with Buyer A he abandoned his position that she was only entitled to a referral fee and, instead, he told Registrant A that she would be entitled to a 2.0% commission on any successful transaction.

When the Prosecutor requested Mr. Sobczak to show the Panel any documents where he had advised Registrant A of that alleged position, he claimed that he had a "verbal understanding" with Registrant A to that effect.

Despite such testimony, the Prosecutor took Mr. Sobczak through a number of documents and written communications which contradicted what Mr. Sobczak had said about his "verbal" commission arrangements with Registrant A.

When shown his February 4, 2011 e-mail to Buyer A, Mr. Sobczak agreed that he was taking the position that Buyer A was his client. On February 8, 2011, Registrant A

wrote to Mr. Sobczak and advised that she had had a BRA with Buyer A since January 2011; she also *offered* to fax a copy of same to Mr. Sobczak.

However, long after he had been advised by Registrant A in writing that she had a BRA, Mr. Sobczak was telling Registrant A in an e-mail on August 8, 2011 that Buyer A was still his client and that he was only prepared to offer Registrant A a referral fee for any successful transaction for the Property. In fact, Mr. Sobczak's language was emphatic. He wrote to Registrant A:

I am not signing any co-operating agreement; I told you before all I can pay is 25% referral fee of selling portion of commission which is 2.0% as per MLS listing. I explained it several times before that I consider Buyer A [Buyer A] my client since he asked for financials statements [sic] and he got them from me and I showed him the property in Jan 2011 again, I am not signing co-operating agreement with your brokerage, all I can do is a referral agreement.

In his August 8, 2011 e-mail to Registrant A, there is no mention whatsoever of any agreement on Mr. Sobczak's part that he was prepared to pay the co-operating realtor commission of 2% to Registrant A.

Mr. Sobczak also acknowledged sending an e-mail to Registrant A, dated February 9, 2011 in which he stated:

I am trying to bring it to your attention AGAIN that you will receive only referral fee, not the whole selling commission until you acknowledge that, I am not setting up any showings for you!

When questioned about his February 9, 2011 e-mail, Mr. Sobczak stated that he believed that it was drafted with the best interests of the Sellers in mind.

When presented with a copy of the APS (the first offer submitted by Registrant A, which was open for acceptance until August 3, 2011), Mr. Sobczak agreed that he sent that offer to RECO for direction even though the offer had, on its own terms, already expired and he had not yet sent it to his own clients, the Sellers.

In fact, in an e-mail to RECO, dated August 8, 2011, Mr. Sobczak advised that he would *not* be presenting the offer to the sellers for the reasons which he had explained earlier and that he hated to repeat himself.

On further cross-examination, however, Mr. Sobczak suggested that, in contradiction to his own e-mail to RECO, he had *already* sent the offer from Registrant A to the Sellers by e-mail on August 6, 2011. But he acknowledged that he could *not* produce a copy of any such e-mail. Earlier in his testimony, Mr. Sobczak had stated that he sent the offer to the Sellers on August 9, 2011 by fax.

In an e-mail from RECO to Mr. Sobczak on August 9, 2011, he was specifically warned that he had to comply with *REBBA, 2002* and that he could not “opt out of the Act”.

After acknowledging RECO’s e-mail, Mr. Sobczak testified that the offer which had been sent by Registrant A had certain defects and that he was not in a position to change anything on the offer except for the proposed purchase price. When asked how the Sellers could make any comments on the offer if he had not presented it to them for their review, Mr. Sobczak stated that he sent it to the Sellers on August 9, 2011, that is, a number of days after he had sent it to RECO.

In contradiction to his testimony that he had sent a copy of the offer to the Sellers by e-mail on August 6, 2011, Mr. Sobczak asserted that he felt he was justified in *not* sending the offer to the Sellers because there were simply too many legal and technical defects in the offer; that was the reason he sent it to RECO. In fact, Mr. Sobczak advised that he felt justified in not having the Sellers even look at the offer.

Mr. Sobczak further testified that his conduct in sending the offer to RECO was motivated by his desire to avoid a lawsuit in the event that the Sellers might accept the offer with all of the defects he believed were contained therein.

Mr. Sobczak told the Panel that the Sellers instructed him to look to their son, Seller A, because he was looking after all the offers for them. In fact, according to Mr. Sobczak, the Sellers told him to do “whatever Seller A says”.

The documentation in the Book of Documents showed that whenever documents needed to be signed the Sellers signed them based on the dealings that had transpired between their son and Mr. Sobczak.

Nevertheless, when it came to reducing the commission in a transaction for the Property, Mr. Sobczak decided *not* to take any instructions or entertain any requests from Seller A.

Concerning the handwritten clause providing for a \$10,000.00 commission reduction which was part of a proposed amendment between the Buyer B and Buyer C and the Sellers, Mr. Sobczak stated that Seller A had prepared that clause but that he (Sobczak) had crossed it out. Mr. Sobczak typed out the clause making it clear that the listing broker did not agree to any reduction in commission.

When the issue of Seller A’s and Buyer C’s evidence that Sobczak had agreed to a \$10,000.00 commission reduction was put before him, Mr. Sobczak raised the issue of the POA that Seller A had received from his parents. In fact, Mr. Sobczak testified that he had spoken to his own lawyer and that his lawyer had advised him that the POA was *not* valid and that it had been *backdated*.

Upon questioning from the Prosecutor, Mr. Sobczak admitted that he had told Buyer C that there was another offer for the Property during the period when the issue of the commission dispute had been raised by Buyer C.

When asked to provide details about the other offer, Mr. Sobczak said he never got anything in writing and it was just “talking” on the part of the other interested party. When asked to identify the other interested party, Mr. Sobczak would only say that it

was a “developer” who had not seen the Property at all. Further, he stated that the offer was verbal but he had felt compelled in the circumstances to tell the Buyer B and Buyer C and the Sellers about it.

Although Mr. Sobczak asserted that he was cooperating with Registrant A in August 2011 when she was submitting offers on behalf of Buyer A, he admitted that he did not sign documentation acknowledging that she was a cooperating realtor who would be entitled to a 2% commission on a successful transaction. With respect to the offer for the Property from Registrant A, dated August 18, 2011, Mr. Sobczak agreed that he declined to sign the Commission Trust Agreement portion of that offer.

Re-direct on the part of Mr. Sobczak

Mr. Sobczak emphasized the list of deficiencies he had prepared in response to offers prepared by Registrant A for Buyer A.

Panel questions to Mr. Sobczak

In response to certain Panel questions, Mr. Sobczak stated that he could not remember all of the details but that as soon as he learned that Registrant A had a BRA with Buyer A, he cooperated with her on commission issues and that he “backed down” from only offering her a referral fee.

With respect to Mr. Sobczak sending a copy of the initial offer from Registrant A to RECO, he claimed that he wanted an “expert opinion” on deficiencies in that offer. Further, he later retained a lawyer to assist in dealing with some of the issues that had arisen, including the alleged commission dispute with Registrant A. Reference was made to an e-mail from his lawyer in Exhibit 3, Tab 4, which deals in part with the alleged reduction in commission when the Buyer B and Buyer C were attempting to purchase the Property.

In that e-mail, Mr. Sobczak's lawyer wrote in part:

Mr. Sobczak has never agreed to the reduction in his commission, Seller A [Seller A] is driving a hard bargain after his parents signed the listing agreement. Now, in order to protect the deal for all involved (I wonder whether the Sellers are prepared to run the business this summer, or contemplated the defence of a law suit by the purchaser, for example), Mr. Sobczak is now ready to negotiate a reduction. However, his precondition is that Seller A withdraws the RECO complaint against Mr. Sobczak which would have to be confirmed by RECO in writing to Mr. Sobczak directly, the second condition is the provisions of the above noted affidavits. I think the negotiated settlement in the circumstances will benefit everybody.

Mr. Sobczak told the Panel that he had never previously held up an offer for alleged deficiencies and that he always wanted the Sellers to decide on any change for any sign-back.

He asserted that it was not his job to make changes to an offer because that is an issue for negotiation between the sellers and the buyers.

SUBMISSIONS FOR THE REGISTRAR, REBBA 2002

The Prosecutor submitted as follows after the parties had put in their respective cases:

1. Mr. Sobczak had clearly refused to cooperate with Registrant A by insisting unreasonably that Buyer A was his client;
2. Further, Mr. Sobczak should have presented to the Sellers in early August 2011 the offer from Buyer A as soon as practicable, but he failed to do so; and
3. Mr. Sobczak made a promise to reduce his commission in the transaction involving the Buyer B and Buyer C by \$10,000.00 but he reneged on his commitment.

The Prosecutor stated that Mr. Sobczak displayed a poor understanding of agency and he was motivated solely to maximize his own personal gain in any proposed transaction for the Property. While Mr. Sobczak claimed that Buyer A as his client, he never discussed or explained agency relationships with Buyer A, as required under Section 10 of the Code of Ethics.

In the face of clear evidence from Registrant A, and her indication that she had entered in to a BRA with Buyer A, Mr. Sobczak continued to assert that Buyer A was *his* client. The implication of that insistence was that Mr. Sobczak was not willing to pay Registrant A a 2% commission. According to the Prosecutor, Buyer A appeared to understand the concept of agency better than Mr. Sobczak.

The Prosecutor emphasized that, on February 6, 2011, Registrant A advised Mr. Sobczak that she had an executed BRA with Buyer A and that she was requesting a showing of the Property (Exhibit #3, Tab 3A, p. 6).

On February 9, 2011, Mr. Sobczak advised Registrant A in writing that he would only pay her a referral fee and that unless she agreed to that term, he would not permit her to show the Property to Buyer A (Exhibit #3, Tab 3A, p. 11).

On August 8, 2011, six months after Registrant A had advised the Respondent that she had a BRA and she would produce a copy if Mr. Sobczak wanted to see it, Mr. Sobczak was still insisting that he would only pay her a referral fee in any successful transaction (Exhibit #3, Tab 3h).

In short, the Prosecutor submitted that Mr. Sobczak was never willing to cooperate with Registrant A. Further, when her Broker of Record attempted to assist in the matter, Mr. Sobczak remained uncooperative (Exhibit #3, Tab 3A, p. 10).

In fact, the evidence indicated that Mr. Sobczak hung up on the Broker of Record. After the Broker of Record tried to explain the requirements outlined in *REBBA 2002* and the

Code of Ethics, Mr. Sobczak's stance remained the same: he would only offer a referral fee to Registrant A.

The Prosecutor asserted that Mr. Sobczak's evidence that he agreed to cooperate with Registrant A after he learned she had a BRA with Buyer A was simply unbelievable, especially in light of all of Mr. Sobczak's e-mails.

In addition, Mr. Sobczak's position as the alleged realtor for Buyer A was untenable. Mr. Sobczak's assertion of a realtor-client relationship was founded on the idea that Buyer A had to be *his* client simply because he (Sobczak) had done more for Buyer A than he would have done for someone who was just a customer.

It was submitted that Mr. Sobczak's failure to cooperate with Registrant A showed a deficient understanding of agency for someone who had been a realtor and broker of record for many years.

The Prosecutor also emphasized that the documentation and testimony at the hearing confirmed that Mr. Sobczak did *not* convey the first offer from Registrant A to the Sellers at the earliest practicable opportunity.

On August 3, 2011, Registrant A sent an e-mail to Mr. Sobczak inquiring as to the status of her client's offer. Instead of answering that simple inquiry, Mr. Sobczak responded that it was "going to RECO for review due to legal and technical defects".

Seller A also subsequently confirmed that he had not yet seen a copy of the first offer (Exhibit #3, Tab 3G, p. 1). This was extremely frustrating for Buyer A because his offer for the Property had not yet been presented to the Sellers.

On August 6, 2011 at 12:57 p.m., Seller A sent an e-mail to Mr. Sobczak inquiring whether he (Mr. Sobczak) had "another offer to present" to him. Mr. Sobczak

responded two minutes later stating that he sent “it to RECO for review”. A few minutes later, Seller A responded that he “still [would] like to see it” (Exhibit #6).

Seller A testified that he never received a response from Mr. Sobczak or a copy of the first offer. However, on August 9, 2011, Mr. Sobczak faxed a copy of the offer to the Sellers (Exhibit #7). That was seven days after he had received the offer from Registrant A.

Mr. Sobczak had many opportunities to send the first offer to the Sellers.

Based on the testimony of Buyer A and Seller A, they felt that Mr. Sobczak had been more harmful than helpful in trying to do a transaction involving the Property. They ended up negotiating directly and relegating Mr. Sobczak to an ancillary role.

With respect to RECO, it was submitted that Mr. Sobczak should have known that RECO had no obligation to get involved in any ongoing transaction relating to the Property and that its role was not to vet offers from would-be buyers.

Mr. Sobczak should have sent the offer to his clients, the Sellers, even if he did not like the offer. The Prosecutor emphasized that it is not up to the listing representative to decide whether he likes an offer or not. Mr. Sobczak could have easily counselled the Sellers to change the offer and sign it back; instead, Mr. Sobczak decided not to send it to his own clients until well after the offer had expired on its own terms

Mr. Sobczak did not demonstrate that the offer was so fundamentally flawed that it relieved him of the obligation to present the offer. The Prosecutor emphasized that a realtor goes down a slippery slope when he or she starts intervening and deciding when and when not to present an offer.

The Prosecutor emphasized that Seller A was adamant in testifying that Mr. Sobczak verbally agreed to the \$10,000.00 reduction in commission and that Mr. Sobczak

advised that it did not need to be in writing. However, Seller A inserted the hand-written clause in the proposed amendment to the APS (Exhibit #3, Tab 15), which stated “REAL ESTATE AGENT HAS AGREED TO REDUCE REAL ESTATE FEES BY TEN THOUSAND DOLLARS (\$10,000.00)”.

After receiving information on deficiencies relating to the Property, Buyer B and Buyer C requested a \$30,000.00 reduction in the purchase price in order to proceed with the transaction.

Seller A said that Mr. Sobczak agreed to a \$10,000.00 reduction. Buyer C was similarly confident that Mr. Sobczak had agreed to lower his commission, that is, until he advised her that he was not going to honour the promised reduction because of another firm but verbal offer to purchase the Property. Although Mr. Sobczak denied that he had agreed to reduce his commission, the Prosecutor argued that the testimony to the contrary of Seller A and Buyer C was both credible and convincing.

Further, it was clear that Mr. Sobczak had second thoughts and that he decided that he wanted to retain all of his commission. It was submitted that, at the hearing, Mr. Sobczak had suggested that even if there was an agreement to reduce his commission by \$10,000.00, Seller A had no authority to enter into that kind of agreement because he was not the Seller of the Property and he had no authority in any transaction.

Yet Mr. Sobczak himself confirmed that the Sellers had told him (Mr. Sobczak) to deal with their son, Seller A. Mr. Sobczak’s behaviour was therefore self-serving, unethical and unprofessional.

Counsel for RECO summarized that Allegations A, B, C and D (Exhibit #1) related to the failure to deliver the offer from Buyer A to the Sellers (or to Seller A). It was not fair for the Sellers to be sent the offer many days after Mr. Sobczak had received it. Similarly,

it was not fair for Buyer A that his offer was not presented in a timely and proper manner.

Mr. Sobczak had an obligation to send offers to his clients, the Sellers, even if he did not like the particular language in the offer itself. Mr. Sobczak should have sent the offer to the Sellers at the earliest practicable opportunity and certainly before it expired on its own terms Mr. Sobczak did not use his best efforts; instead, he sent the offer to RECO expecting that agency to review it and offer comments.

The Prosecutor drew the Panel's attention to Allegation E (Exhibit #1). Mr. Sobczak refused to cooperate with Registrant A simply because he did not want to share the commission with another realtor. It was submitted that Mr. Sobczak's actions in this regard had been unprofessional and unbecoming a registrant, especially in his dealings with the Broker of Record on whom Mr. Sobczak hung up during their phone call. The Prosecutor further stated that Mr. Sobczak's actions were dishonourable and disgraceful since he was only interested in acquiring all of the commission payable (less a small referral fee) in a successful transaction. In short, Mr. Sobczak never co-operated with Registrant A.

The final Allegation F (Exhibit #1) stated that Mr. Sobczak had caused his brokerage to breach the Code of Ethics. The Prosecutor claimed that this allegation had been proven. Mr. Sobczak did not have proper procedures in place to ensure that all commitments were reduced to writing between the relevant parties. Seller A (on behalf of his parents, the Sellers) and Buyer A both felt that they were poorly represented in the transaction. The Prosecutor stated that Mr. Sobczak breached his obligations under the Code of Ethics given that he reneged on his promise to reduce his commission. It was emphasized that he should have honoured his promise.

SUBMISSIONS FOR THE RESPONDENT

In response, Mr. Sobczak stated that he did not have anything to add to his testimony.

CODE OF ETHICS

The Registrant is governed by the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c.30, Schedule C ("*REBBA 2002*").

This Discipline Committee is established to hear and determine these issues, in accordance with the prescribed Regulations. The Discipline Committee must determine if the Registrant has failed to comply with the Code of Ethics established by the Minister in accordance with Section 21 of the *REBBA 2002*.

Section 50 of the *REBBA 2002* provides that the Minister may make Regulations establishing a Code of Ethics for the purposes of subSection 21(1).

Ontario Regulation 580/05 is the Code of Ethics pursuant to the *REBBA 2002* and is the Code of Ethics that governs these proceedings.

FINDINGS BY THE PANEL

Having carefully considered the testimony of the witnesses at the hearing, and the documentation presented by the parties, the Panel has arrived at the following conclusions for each of the Allegations in the Allegation Statement:

Allegation A – That Mr. Sobczak failed to treat the Sellers and Buyer A fairly, honestly and with integrity because he failed to present Buyer A's initial offer on the Property to the Sellers, thereby breaching Section 3 of the Code of Ethics. The same allegation (Allegation B) was made to underscore that, in failing to present all written offers received for the Property to the Sellers, Mr. Sobczak failed to promote and protect the best interest of his clients, thereby breaching Section 4 of the Code of Ethics.

Further, Allegations C and D asserted that the same failure (to present an offer to the Sellers) on Mr. Sobczak's part had resulted in a breach of Section 24(1) of the Code of Ethics and 38 of the Code respectively.

The Panel has found on a balance of probabilities that Mr. Sobczak failed to present Buyer A's initial offer on the Property in a timely manner. The Panel adopts the submissions on findings of the Registrar, including the Prosecutor's summary of the evidence, as noted above. The Prosecutor's summary of the evidence is accurate and compelling, as are the Registrar's submissions.

The Panel would add that Mr. Sobczak statements that he had agreed verbally with Registrant A to cooperate with her and pay her a 2.0% commission after she made it clear that she had an executed BRA with Buyer A was lacking in substance and credibility. That assertion was made by Mr. Sobczak for the first time at the hearing, and it was flatly contradicted by the evidence of Registrant A and the e-mails sent by Mr. Sobczak himself in early August 2011.

During his dealings with the Property, Mr. Sobczak obviously, and quite unfortunately, believed that he could dictate to other registrants and to Buyer A the nature and his extent of his relationship with them and thus his entitlement to a large commission.

On another note, the Panel notes that Mr. Sobczak testified that he felt he had an obligation to advise the Sellers as quickly as possible of any verbal offers he had received for the Property. The irony is that Mr. Sobczak's conduct with respect to written offers was quite the opposite.

Mr. Sobczak did everything possible to delay presenting Registrant A's offer to the Sellers because he wanted to avoid paying her a 2% commission in the event of a successful transaction. He challenged Registrant A's competence as a salesperson, he made critical remarks to her broker of record at the hearing about the level of training he provided to his salespersons, and he was quick to opine on various legal obligations in real estate transactions.

However, when it came to his own conduct, Mr. Sobczak failed dismally in abiding by many Sections in the Code of Ethics. His conduct appears to have been motivated by one objective only: to maximize his own commission in selling the Property while minimizing any pay-out to anyone else. His obligation to act fairly and with integrity appears to have been secondary.

The Panel also finds that Mr. Sobczak's complaint to RECO about Registrant A, and his delivery of Buyer A's offer to RECO for review were delay tactics in his dealings with Registrant A.

As an experienced registrant, Mr. Sobczak would have known that RECO is not in the business of vetting offers from would-be buyers.

The context of Mr. Sobczak's actions was his repeated and unyielding assertion (despite his own contradictory evidence at the hearing) that Buyer A was *his* client and that he would only pay a modest referral fee to Registrant A for any offer that might actually result in the sale of the Property.

Mr. Sobczak's evidence that he e-mailed a copy of Buyer A's offer to the Sellers on August 6, 2011 was not believable and it was lacking in any supporting evidence. Given the evidence presented at the hearing, it was obvious that Mr. Sobczak's chosen method of communication was to send e-mails and to avoid telephone calls.

But when he was called upon to produce an e-mail he claimed would confirm that he sent the August 2, 2011 offer to the Sellers on August 6, 2011, Mr. Sobczak could not do so.

In other testimony, Mr. Sobczak stated that he had faxed a copy of the offer to the Sellers on August 9, 2011. However, that was long after the offer expired on its own terms

The Panel finds that Seller A, Registrant A, Buyer A, and Buyer B and Buyer C were convincing in their demeanour and in the answers they gave to questions at the hearing.

By contrast, Mr. Sobczak was not as forthcoming with his answers and his answers were at times confusing and contradictory, especially when he was asked why he did not send a copy of Buyer A's offer to Seller A or the Sellers immediately upon receiving same, and in his unsupported assertions that he had agreed to co-operate with Registrant A after he learned she had a BRA with Buyer A.

Although there was no fraud in this case, the Panel finds Mr. Sobczak's conduct to have been unprofessional and unethical and that breaches of Sections 3, 4, 24(1), and 38 of the Code of Ethics were clearly established by the evidence at the hearing.

With respect to Allegation E, that Mr. Sobczak engaged in an act or omission that, having regard to all of the circumstances, would reasonably be regarded as disgraceful, dishonourable, unprofessional or unbecoming a registrant by failing to present all written offers received on the Property and refusing to cooperate with another registrant because he did not want to share the commission payable, the Panel has found that this allegation was certainly proven on a balance of probabilities.

Consistent with the Allegation Statement, the Panel has also found that Mr. Sobczak's acts and omissions resulted in a breach of Section 39 of the Code of Ethics. The Panel believes that Mr. Sobczak's conduct in the circumstances was both unprofessional and unbecoming a registrant.

The evidence relating to Mr. Sobczak's initial agreement to reduce his commission by \$10,000.00 to finalize the purchase of the Property by the Buyer B and Buyer C was convincing. Seller A and Buyer C in particular provided clear and cogent evidence that Mr. Sobczak effectively reneged on his verbal commitment to provide such a reduction after the Buyer B and Buyer C were in a position upon a property inspection to walk away from the deal if they wanted to do so.

When he was pressed about the \$10,000.00 reduction in commission, Mr. Sobczak's response to Seller A and Buyer C was to do what he had done previously in his dealings with Registrant A: he created a *ruse* to justify why he should be entitled to a full double-ended commission upon the sale of the Property.

When it came to dealing with Registrant A, Mr. Sobczak claimed quite irrationally that Buyer A was *his* client even though both Buyer A and Registrant A were the pair in an agency relationship. When he had to address the fact of Registrant A delivering a written offer to him on behalf of Buyer A, Mr. Sobczak's response was to avoid forwarding it to his own clients, the Sellers, while sending the same offer to RECO to emphasize alleged deficiencies in the offer and claim that he was trying to protect himself from a lawsuit later on.

When it came to following through with his verbal commitment to reduce his commission by \$10,000.00 to finalize a deal between the Sellers and the Buyer B and Buyer C, Mr. Sobczak reported that he would not be reducing his commission because he had a *verbal* offer for the Property for full price for cash, the implication being that he should not be reducing his commission if another transaction could be done where he could avoid any such reduction. Unfortunately, the real estate transaction was not being done principally for Mr. Sobczak's benefit, but rather for the buyers and the Sellers.

It was clear at the hearing that Mr. Sobczak had no evidence to support the existence of any alternative offer, whether verbal or written, for the Property for full price and cash. That phantom offer also appears to have been a *ruse* designed to ensure that Mr. Sobczak could, above all, maximize his commission on any transaction.

The Panel finds that the evidence presented at the hearing showed that Allegation F and G had substance; in short, they were proven on a balance of probabilities by the Registrar. Allegation F was that Mr. Sobczak had caused Brokerage A to breach Sections 38 and 39 of the Code of Ethics by failing to amend the Listing

Agreement to reflect his agreement to reduce his commission by \$10,000.00, thus resulting in a breach of Section 41(2) of the Code of Ethics. Allegation G, that Mr. Sobczak had caused his brokerage to breach Sections 38 and 39 of the Code of Ethics by failing to abide by his agreement to reduce his commission by \$10,000.00, was a variation on the same allegation relating to the commission reduction. It too was proven on a balance of probabilities.

Buyer C's evidence was compelling in that Mr. Sobczak explained to her after deleting and revising the proposed amendment to the APS relating to the commission reduction that he was not going to reduce his commission because of the existence of another offer for the Property for full price and cash. As it turned out, it was in all probability a phantom offer and it never materialized. In the interim, the Buyer B and Buyer C and the Sellers were interested in ensuring that a transaction between them closed.

By explaining to Seller A and Buyer C *why* he was not prepared to reduce his commission when the commitment had been reduced to writing by Seller A, Mr. Sobczak was, in fact, acknowledging that the promise had previously been made.

It was that the very commitment from Mr. Sobczak to reduce his commission by \$10,000.00 in a double-ended transaction that prompted Seller A to memorialize the commitment by drafting a handwritten clause for an amendment to the APS.

There was a meeting of the minds between the parties and Mr. Sobczak to make the transaction work; each was sacrificing something to bring the deal together, that is, until Mr. Sobczak resiled from his own commitment.

In this case, Mr. Sobczak did not use his best efforts to prevent misrepresentations and unethical practice and by reneging on his commitment to reduce his commission his conduct was dishonourable, unprofessional and unbecoming a registrant.

Mr. Sobczak not only breached Sections 3, 4, 24(1), 38 and 39 of the Code of Ethics, but his conduct caused his brokerage to transgress the Code. As the broker of record, Mr. Sobczak also breached Section 41(2) of the Code.

PENALTY

Counsel for the Registrar, *REBBA 2002* to deliver written submissions to the Panel and to the Respondent on the issue of penalty and costs within 15 days of the date on which the Panel's decision and reasons are delivered.

The Respondent shall deliver to the Panel and to Counsel for the Registrar, *REBBA 2002* its written submissions on penalty and costs in response to Counsel for the Registrar, *REBBA 2002*'s submissions within 15 days of the date on which Counsel for the Registrar, *REBBA 2002*'s submissions on penalty and costs are delivered to the Respondent.

Counsel for the Registrar, *REBBA 2002* shall deliver to the Panel and to the Respondent its reply to the written submission on penalty and costs of the Respondent within five (5) days of the date on which the Respondent's submissions on penalty and costs are delivered to Counsel for the Registrar, *REBBA 2002*.

If appropriate, submissions to be made on costs and expenses with submissions on penalty.

Any inquiries relating to the delivery of the above-mentioned documents should be directed to the Manager, Discipline and Appeals Hearings.

The Panel shall deliver its decision on penalty and costs after considering the written submissions of the parties.

[Released: March 3, 2017]



Real Estate Council of Ontario

**IN THE MATTER OF A DISCIPLINE HEARING HELD PURSUANT TO THE
*REAL ESTATE AND BUSINESS BROKERS ACT, 2002, S.O. 2002, c. 30, Sch. C***

BETWEEN:

REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*

- AND -

ANDREW SOBCZAK

DISCIPLINE DECISION AND REASONS FOR DECISION

The Panel held a teleconference on May 3, 2017 to discuss the written submissions by all Parties with respect to Penalty and Costs. The Panel decided as follows:

ORDER: Fine of \$15,000.000 payable to RECO within 8 months of sending this decision.

Successful completion of the Real Estate Institute of Canada “REIC 2600: “Ethics and Business Practice” classroom course and provide RECO with confirmation of successful completion within 8 months of sending this decision.

WRITTEN REASONS:

REASONS FOR DECISION
PENALTY & COSTS

INTRODUCTION

The Panel met by teleconference on May 3, 2017 at 3:00 p.m. to review the written submissions of the parties on the issue of penalty. Submissions on penalty and costs were received from both parties to this proceeding.

Panel's Decision on Penalty

In making its determination on the issue of penalty, the Panel took into account the principles and factors set out in the Appeals Committee decision in *Registrar v. Harjinder Singh Jolly*, where that Committee emphasized the importance of Panels considering nine factors in determining penalties where liability on the part of a Registrant had been found.

The Panel has been mindful of these factors in making its determinations on penalty in this case, and provides the observations below:

1. The nature and gravity of the breaches of the Code of Ethics.

The Panel found that Andrew Sobczak's conduct was very serious in nature. On a continuum of gravity, his misconduct can be placed at the more serious end of that continuum. Mr. Sobczak repeatedly advanced his own financial interests before discharging his obligations toward his own clients and customers. In doing so, he preferred his own interests over their interests. Mr. Sobczak's conduct fell well below the standard and level of competence that his clients/customers had a right to expect of him.

Given the gravity of Mr. Sobczak's behavior, the Panel believes that it should be met with appropriate sanctions to deter such behavior in the future. The Panel has accepted all the Registrar's submissions on penalty based on the evidence before it. Mr. Sobczak was the architect of his own problems. His conduct by acting improperly or, conversely, by failing to act, was demonstrated in a number of ways:

- Mr. Sobczak was not willing to pay the co-operating commission to Registrant A's brokerage,
- Nor was he willing to cooperate with Registrant A or her brokerage as evidenced by him hanging up the phone on the co-operating Broker of Record.

- Mr. Sobczak did not understand or appreciate the concept of agency relationships as it relates to real estate transactions.
- Mr. Sobczak did not present the Buyer A offer to his Sellers until after the Buyer A offer had expired.
- The Sellers' son, Seller A, and the potential buyer, Buyer A, both agreed that Mr. Sobczak was a hindrance to their proposed transaction and that Mr. Sobczak had not worked co-operatively with them to put a deal together.
- Mr. Sobczak promised the parties, to the second transaction, that he would rebate \$10,000.00 of his commission but then he decided to renege on his own promise.
- Mr. Sobczak attempted to dictate the parameters and terms of his relationships with fellow registrants and with client/consumers for the overriding purpose of obtaining a large commission.
- Mr. Sobczak did everything possible to delay presenting the offer from Registrant A's clients to the Sellers in order not to have to pay any co-operating commission. He challenged Registrant A's competence but, in doing so, he revealed his own lack of professionalism and competence.

2. The role of the offending member in the breaches.

Mr. Sobczak was the architect and actor of all the violations of the Code of Ethics that the Panel found he had committed. No blame, shared or otherwise, rested on any members of the public or fellow registrants. Everyone with whom Mr. Sobczak interacted to do trades gave him every opportunity to act responsibly and to redeem his unacceptable behaviour but with no success. What made matters worse is that Mr. Sobczak is an experienced broker of record who simply ought to have known better.

3. Whether the offending member suffered or gained as a result of the breaches.

In order to put a deal together, Mr. Sobczak promised verbally to rebate \$10,000.00 to the Sellers. There was a meeting of the minds of all parties to the

transaction and the commission reduction until Mr. Sobczak backed away from his own promise. As a result of his behavior, Mr. Sobczak ended up with \$10,000.00 more than he should have obtained at the expense of his client/customer. His unethical conduct resulted in a sizable financial gain but it stemmed from his unwillingness to act in an ethical and professional manner.

4. The impact of the breaches on the Complainant or others.

While Mr. Sobczak gained financially and as a result of his own actions, persons involved in the same transactions were negatively affected by his conduct. Not only did the Sellers not receive the \$10,000.00 rebate as promised, but they eventually had to deal with the buyers directly because of Mr. Sobczak's mishandling of the transactions. Even the Buyers had to struggle in their dealings with Mr. Sobczak. Buyer A fought to convince Mr. Sobczak that he did not want to use Mr. Sobczak as his representative because he needed to ensure his offers were actually presented to the Sellers. In the Panel's view, no consumer should have to experience such treatment from a real estate representative. Other registrants who interacted with Mr. Sobczak had difficulty dealing with him. He acted in a rude, overbearing, and dismissive manner with Registrant A. In fact, Registrant A had to struggle with Mr. Sobczak to have her client's offer presented to the Sellers. Instead of acting professionally and responsibly, Mr. Sobczak did everything he could to delay the presentation of offers from Registrant A. He unfairly and unreasonably challenged Registrant A's real estate knowledge and competence, he berated her broker of record on the telephone and then hung up on him, and he made a groundless complaint to RECO which resulted in the offer from Registrant A expiring before it was actually presented to the Sellers.

5. The need for there to be specific deterrence to protect the public.

There is a need to send a strong message to Mr. Sobczak that violating his fiduciary and ethical responsibilities and placing his financial interests above the interests of his clients/customers was and remains totally unacceptable. Mr.

Sobczak must be discouraged from treating his fellow registrants in such a disrespectful manner and from ignoring his obligations under the Code of Ethics. Since Mr. Sobczak is an experienced Broker of Record, his actions only underscored the inexcusable nature of his conduct.

The Panel's findings warrant an educational course in addition to a monetary penalty. Mr. Sobczak demonstrated a poor understanding of agency relationships and he did not explain to his client/customer the necessary agency information. He also did not understand the role of RECO in administering the Code of Ethics and in transactions given his complaint about Registrant A in the midst of a proposed transaction, alleging she was incompetent, and requesting RECO to scrutinize and comment on an offer that she had submitted to Mr. Sobczak for presentation to his client. One might well ask whether Mr. Sobczak's conduct was an abuse of the RECO complaint process; he had used it to delay having to present an offer from another salesperson to his own client in the hope that he could ultimately double-end the transaction.

6. The need for there to be general deterrence to protect the public.

An important point to consider is general deterrence to protect the public from unethical behaviour in real estate transactions. All registrants owe clients a fiduciary duty which means fulfilling obligations with the utmost faith and confidence, avoiding conflicts of interest, and not putting one's own interests ahead of one's client. When a registrant fails in this regard, RECO must call such behaviour to account and correct it. In this case, the Panel has concluded that a monetary penalty in the amount of \$15,000.00 is essential to deter others in the real estate industry, as well as Mr. Sobczak personally, from allowing the level of service and professionalism to be compromised by self-interest.

7. The need to maintain the public's confidence in the integrity of the profession.

It is necessary to protect the public confidence and encourage integrity in the real estate profession. RECO is the regulator for the industry and is charged with administering *REBBA 2002* to ensure that registrants act lawfully on behalf of the consumers in the trading real estate in Ontario. In order for RECO to be an effective regulator, public confidence must be maintained in its actions. One way of obtaining and maintaining such confidence is to impose appropriate penalties and/or mandatory education courses for improper behavior on the part of registrants. A significant and fitting penalty can demonstrate to the public that a registrant's actions were unreasonable and unacceptable. Such is the case involving Mr. Sobczak's conduct.

8. The degree to which the breaches are regarded as being outside the range of acceptable conduct.

Mr. Sobczak's misconduct fell far below the standard required and expected of registrants. The Panel summarized the degree of Mr. Sobczak's many breaches of the Code of Ethics in their reasons: in short, he "failed dismally" in abiding by multiple sections of the Code of Ethics.

9. The range of sanction in similar cases.

The Panel strives for consistency in penalties although it is not strictly bound by penalties in similar cases. Nevertheless, it is a principle of fairness that there should be some consistency as between similar fact cases. The Panel has reviewed certain other decisions. In the 2015 case of *Registrar v. Zahra Shaker-Shariat-Panahi*, and after a full hearing on the merits, the Discipline Committee found that the listing salesperson had failed to advise buyer clients that she was in a multiple representation situation and, moreover, she had failed to disclose a collateral commission agreement that would reduce the total commission payable by the sellers in any "double-ended" transaction, thus giving the registrant a competitive edge over other salespersons with buyer clients.

The listing salesperson had used her knowledge as the listing agent to help her buyer “price match” other offers. Obviously, these actions had a detrimental effect on other registrants and other would-be buyers who had made offers on the property. The undisclosed collateral commission agreement gave her own buyer a distinct and unfair advantage. The Panel finds that the unfairness and unreasonableness of the registrant’s behaviour in the Panahi case is similar to the conduct displayed by Mr. Sobczak in the sense that he put his own financial interests ahead of other persons and he showed no regard for fairness. In the Panahi case, the Discipline Committee imposed a fine of \$15,000.00 and ordered the registrant to complete the *Ethics and Business Practice* course.

The Panel has also considered the decision of *Registrar v. Steven Matthew Zahnd, Roy Balwant Singhand C21 Home Realty Inc.*, as rendered by the Appeals Committee. In that case, the appeal was dismissed and the decision of the lower Panel was upheld. The finding was that the respondents, who had represented the seller, ought to have known that a buyer that they ultimately represented was still under contract with a different brokerage. In that case, the registrants had acted unreasonably and unfairly in failing to make adequate inquiries with another brokerage; instead, they chose to rely completely on what the buyer was telling them even though they knew that the buyer had only recently been represented by another brokerage. But for a simple email or phone call to the other brokerage, a serious problem could have been avoided.

In the case of Mr. Sobczak, his conduct, quite arguably, was far more serious. In the face of communications and reasonable conduct by Registrant A and her broker of record, Mr. Sobczak persisted in disregarding Registrant A’s relationship with her own client and he purported to dictate who would be paid anything from any completed transaction. In doing so, he displayed contempt for the agency relationship that Registrant A had with her own client and believed that he could unilaterally determine that Registrant A would, at most, receive only a referral fee in

any successful transaction. As a broker of record for his own brokerage, the line of responsibility and authority for Mr. Sobczak's conduct began and ended with him.

In the *Zahnd* case, the respondent salesperson asked his broker of record for guidance but he was given inappropriate advice. The Discipline Committee found that the respondent salesperson displayed a lack of understanding about the impropriety of his conduct and his obligations in dealing with other registrants and brokerages. The Panel finds similarities between the impugned conduct in the *Zahnd* case and Mr. Sobczak's conduct toward Buyer A, Registrant A and the Broker of Record.

There was a lack of appreciation, respect for, and compliance with the requirements of agency relationships. In the *Zahnd* case, the salesperson received a penalty of \$7,500.00 and he was required to successfully complete an educational course. In addition, the broker of record and the brokerage were fined \$12,000.00 and required to complete an educational course.

On appeal in the *Zahnd* case, the Appeals Committee upheld the lower panel's decision on penalty because the registrant salesperson was a fairly new registrant but the broker of record was experienced and thus held to a higher standard warranting a greater monetary penalty.

Here, Mr. Sobczak, as an experienced registrant and Broker of Record, must bear full responsibility for his actions and he must be held to a strict standard for his misconduct. The Panel finds the decisions in the cases discussed above demonstrate that the penalty which the Registrar is seeking in Mr. Sobczak's case is entirely in line with the sanctions imposed by previous Panels.

The Real Estate and Business Brokers Act, 2002 (*REBBA 2002*) and regulations thereunder are designed to protect the public, clients, customers and registrants. The Panel has reached its decision unanimously in this case and has concluded that

the following penalties are appropriate given the evidence presented, the findings that the Panel made after a hearing on the merits, and after considering the submissions of the parties on costs.

The Panel therefore makes the following order:

1. Mr. Sobczak shall pay a monetary penalty of \$15,000.00 as provided for below;
2. Mr. Sobczak is to successfully complete the REIC course entitled, "*Ethics and Business Practice*"; and
3. Mr. Sobczak shall be given a period of eight (8) months to pay the penalty and successfully complete the course from the date that this decision is sent to him.

[Released: November 10, 2017]