



## 2012 Summary of Key Professional Standards Changes

This summary highlights substantive issues and changes, but is not all-inclusive. For more complete information about the changes see the NAR website at <http://ow.ly/885IQ>.

### **Changes to the Code of Ethics and Standards of Practice** (underscoring indicates additions, strikeouts indicate deletions)

- Standard of Practice 1-16 (new)

REALTORS® shall not access or use, or permit or enable others to access or use, listed or managed property on terms or conditions other than those authorized by the owner or seller. (Adopted 1/12)

- Article 15 (amended)

REALTORS® shall not knowingly or recklessly make false or misleading statements about ~~competitors~~ other real estate professionals, their businesses, or their business practices. (Amended 1/12)

- Standard of Practice 15-2 (amended)

The obligation to refrain from making false or misleading statements about ~~competitors~~ other real estate professionals, ~~competitors<sup>2</sup> their~~ businesses, and ~~competitors<sup>2</sup> their~~ business practices includes the duty to not knowingly or recklessly publish, repeat, retransmit, or republish false or misleading statements made by others. This duty applies whether false or misleading statements are repeated in person, in writing, by technological means (e.g., the Internet), or by any other means. (Amended 1/12)

- Standard of Practice 15-3 (amended)

The obligation to refrain from making false or misleading statements about ~~competitors~~ other real estate professionals, ~~competitors<sup>2</sup> their~~ businesses, and ~~competitors<sup>2</sup> their~~ business practices includes the duty to publish a clarification about or to remove statements made by others on electronic media the REALTOR® controls once the REALTOR® knows the statement is false or misleading. (Amended 1/12)

- Article 17 (amended)

In the event of contractual disputes or specific non-contractual disputes as defined in Standard of Practice 17-4 between REALTORS® (principals) associated with different firms, arising out of their relationship as REALTORS®, the REALTORS® shall mediate the dispute if the Board requires its members to mediate. If the dispute is not resolved through mediation, or if mediation is not required, REALTORS® shall submit the dispute to arbitration in accordance with the ~~regulations~~ policies of their Board of ~~Boards~~ rather than litigate the matter.

In the event clients of REALTORS® wish to mediate or arbitrate contractual disputes arising out of real estate transactions, REALTORS® shall mediate or arbitrate those disputes in accordance with the ~~policies, regulations~~ of their Board, provided the clients agree to be bound by ~~the decision~~ any resulting agreement or award.

The obligation to participate in mediation and arbitration contemplated by this Article includes the obligation of REALTORS® (principals) to cause their firms to mediate and arbitrate and be bound by any resulting agreement or award (Amended 1/12)

- Standard of Practice 17-2 (amended)

Article 17 does not require REALTORS® to mediate in those circumstances when all parties to the dispute advise the Board in writing that they choose not to mediate through the Board's facilities. The fact that all parties decline to participate in mediation does not relieve REALTORS® of the duty to arbitrate.

Article 17 does not require REALTORS® to arbitrate in those circumstances when all parties to the dispute advise the Board in writing that they choose not to arbitrate before the Board. (Amended 1/12)

### **Changes to the Code of Ethics and Arbitration Manual**

(underscoring indicates additions, strikeouts indicate deletions)

- Numerous areas of the Manual were revised given the change to Article 17. They include:
  1. Areas of the Code of Ethics and Arbitration Manual Requiring Board/Association Action
  2. Sections 24 and 49, Initial Action by Directors
  3. Form #E-19 and #A-19, Sample Format of Agreement Between \_\_\_\_\_ and \_\_\_\_\_ Boards of REALTORS to Establish Multi-Board (or Regional) Professional Standards Enforcement Procedures
  4. Professional Standards Policy Statement 1, Article 17, Code of Ethics
  5. Section 43, Arbitrable Issues and Appropriate Parties
  6. Section 44, Duty and Privilege to Arbitrate
  7. Appendix I to Part Ten, Arbitrable Issues
  8. Appendix VI to Part Ten, Arbitration Hearing Checklist
  9. Appendix VI to Part Ten, Mediation as a Service of Member Boards
  10. Part Eleven, Interboard Arbitration Procedures
  11. Part Fourteen – State Association Professional Standards Committee
  12. Professional Standards Policy Statement #5, Failure to Submit to Arbitration

- New Professional Standards Policy Statement #58, Circumstances Under Which Disputes May be Mediated if REALTORS Voluntarily Agree:

While mediation can only be mandated under the circumstances expressly established in Article 17 of the Code of Ethics, boards and associations may, at their discretion, offer mediation, and REALTORS® may voluntarily participate in mediation, where disputing parties voluntarily request mediation. The circumstances under which voluntary mediation may occur include:

- 1) disputes between REALTORS® associated with different firms where no arbitration request has been filed.
- 2) disputes between REALTORS® and their clients where no arbitration request has been filed.
- 3) disputes between REALTORS® who are or were affiliated with the same firm when the dispute arose.
- 4) disputes between REALTORS® and non-member brokers.
- 5) disputes between REALTORS® and their customers.

- Section 13, Power to Take Disciplinary Action, was amended through the addition of the following new paragraph:

If after review of an ethics complaint by the Grievance Committee and referral of the complaint for hearing, it is subsequently discovered that civil litigation or regulatory or administrative proceedings related to the same transaction or event are pending, the Hearing Panel Chair, in consultation with association legal counsel, will determine whether the hearing will proceed or, alternatively, whether the complaint will be held in abeyance pending resolution of the litigation or regulatory or administrative proceedings. If, after review of an ethics complaint by the Grievance Committee and referral of the complaint for hearing, it is discovered that criminal proceedings related to the same transaction or event are pending, the complaint will be held in abeyance pending conclusion of the criminal proceedings.

- Section 19, Grievance Committee's Review of an Ethics Complaint, was amended to include the following:

D. Criminal or civil litigation or regulatory/administrative proceedings coming to light after an ethics complaint has been referred to an ethics Hearing Panel

If after review of an ethics complaint by the Grievance Committee and referral of the complaint for hearing, it is subsequently discovered that civil litigation or regulatory or administrative proceedings related to the same transaction or event are pending, the Hearing Panel Chair, in consultation with association legal counsel, will determine whether the hearing will proceed or, alternatively, whether the complaint will be held in abeyance pending resolution of the litigation or regulatory or administrative proceedings. If, after review of an ethics complaint by the Grievance Committee and referral of the complaint for hearing, it is discovered that criminal proceedings related to the same transaction or event are pending, the complaint will be held in abeyance pending conclusion of the criminal proceedings.

- Section 20 (a), Initiating an Ethics Hearing, was amended as follows:

Any person, whether a member or not, having reason to believe that a member is guilty of any conduct subject to disciplinary action, may file a complaint in writing with the Secretary, dated and signed by complainant, stating the facts on which it is based (Form #E-1, Complaint, **Part Six**), provided that the complaint is filed within one hundred eighty (180) days after the facts constituting the matter complained of could have been known in the exercise of reasonable diligence or within one hundred eighty (180) days after the conclusion of the transaction, whichever is later. (Revised 5/06)

The procedures for processing complaints alleging violations of an Association's bylaws prohibiting harassment are available on-line at REALTOR.org, and those procedures do not involve an Association's Grievance Committee, Professional Standards Committee, or Board of Directors. (Revised 11/11)

Suspension of filing deadlines: If the Board's informal dispute resolution processes (e.g., ombudsman, mediation, etc.) are invoked or initiated by a complainant (or potential complainant) with respect to conduct that becomes the subject of a subsequent ethics complaint, the one hundred eighty (180) day filing deadline shall be suspended beginning with the date of the complainant's (or potential complainant's) request for informal dispute resolution service or assistance and shall resume when the informal dispute resolution procedures are concluded or terminated. Questions about when informal dispute resolution began or ended will be determined by the Board President or the President's designee. (Adopted 11/00)

- Section 23 (b), Action of the Board of Directors, was amended as follows:

(b) If no appeal is filed, the Directors will adopt the Hearing Panel's recommendation and issue its order accordingly, unless:

- (1) the Directors, if concerned with a possible procedural deficiency, may refer the decision back to the Professional Standards Committee for a new hearing and recommendation by a different Hearing Panel; or
- (2) if the Directors are concerned with the appropriateness of the recommendation of sanction, the Directors may impose alternative discipline that does not exceed that recommended by the Hearing Panel, or may refer the decision back to the original Hearing Panel for further consideration and recommendation accompanied by the Directors' concerns regarding the proposed discipline; or
- (3) if the Directors conclude the findings of fact do not support a possible violation of the Code of Ethics, the complaint will be dismissed.

In such matters, advice of Board legal counsel should be requested and considered. (Revised 05/11)

- Section 24 and 49, Initial Action by Directors, were amended as follows:

If the complainant alleges that a member has improperly refused to submit a dispute to arbitration (or mediation if required by the Board), the complaint shall not be referred to the Grievance Committee or a Hearing Panel, but shall be brought before the Board of Directors at the next regular meeting or at a special meeting called by the President for that purpose. The procedures for notices, time of notice, and hearing prescribed for matters before a Hearing Panel shall apply. The sole question of fact for the Directors to decide will be whether the respondent has failed to submit an arbitrable matter to arbitration or mediation in violation of Article 17. (Revised 11/11)

There can be no charge that there has been a refusal to arbitrate (or mediate if required by the Board) until the Grievance Committee determines the matter is arbitrable and of a mandatory nature and the respondent fails to submit to arbitration or mediation before the Board. (Revised 11/11)

Upon determination that the member has refused to arbitrate or mediate a properly arbitrable matter, the Board of Directors may direct the implementation of appropriate sanction and should, if it has reason to believe that the imposition of sanction will become the basis of litigation and a claim for damages consequent to such sanction, delay the effective date of implementing the sanction to a date following receipt by the Board of a judicial decision in a petition for declaratory relief filed by the Board to confirm the propriety of its action. (Revised 11/11)

On the other hand, if the complaint against the member is that, having properly submitted a dispute to arbitration or mediation, the member has refused to abide by the award or the resulting agreement, such refusal should not be referred to the Grievance Committee as a violation of the Code of Ethics unless it reflects an established pattern or practice of noncompliance with the commitment to arbitrate or mediate. A refusal to abide by an award in arbitration or any resulting agreement in mediation should be enforced in the manner set forth in **Part Ten**, Section 56, Arbitration of Disputes Enforcement. (Revised 11/11)

- Appendix I to Part Four, Rationale for the Board of Directors Reviewing and Ratifying Ethics Decisions, was substantially amended to try to clarify the role of the Board in reviewing hearing panel decisions.
- Appendix X to Part Four, Before You File and Ethics Complaint was amended to clarify that any complainant may file a complaint citing any of the Articles of the Code (i.e., a member of the public is not restricted to filing only under the Articles listed under the Duties to the Public).
- Chairperson's Procedural Guides for ethics and arbitration were amended to clarify that locals should consider having all hearing panel decisions reviewed by counsel before becoming final.
- Chairperson's Procedural Guides for conducting appeals (ethics) or procedural reviews (arbitration) were amended to clarify that panel members have the right to ask questions during the proceeding.
- Form #E-5.1, Grievance Committee Report Form, amended to include the Articles of the Code of Ethics that were originally charged and clarify that the reason for any dismissal of an Article, the entire ethics complaint, or an arbitration request should be articulated.

- Appendix I to Part Ten, Arbitrable Issues, was amended to add the following:

### **Non-Arbitrable Issues**

As stated above, an arbitrable issue includes a contractual question arising out of a transaction between parties to a contract, in addition to certain specified non-contractual issues set forth in Standard of Practice 17-4. Arbitration proceedings should be limited to these issues, and Boards of REALTORS® should not arbitrate other types of claims.

Examples of nonarbitrable issues include:

- tortious interference with business relationships
- tortious interference with a contractual relationship
- economic duress
- intentional infliction of emotional distress
- other tort claims, such as libel/slander
- employment claims, other than commission disputes
- fraud/misrepresentation claims
- property claims, both real and personal

In addition, Section 53 of the Code of Ethics and Arbitration Manual limits the award in an arbitration proceeding to the amount in dispute and so an arbitration award will not include punitive damages, attorney's fees, or interest, unless the agreement between the parties specifically provides for such damages and the award is permitted by state law.

- Appendix III to Part Ten, Rationale of Declaratory Relief and of Judicial Enforcement in Matters of Arbitration, was amended as follows:

**Refusal to Abide by an Award in Arbitration:** However, in respect to a member agreeing and submitting to arbitration but then refusing to abide by the award, the Board should not, in the first instance of such refusal by a member, initiate a disciplinary proceeding except where an association has adopted procedures requiring non-prevailing parties to pay awards or deposit an equivalent amount with the association within a specified time (see Section 53(c)-(f). Rather, the Board should encourage the award recipient to seek enforcement of the award in the courts, and suggest that a request be made for payment of legal costs incurred in seeking judicial enforcement. (Revised 11/11)

- Administrative Time Frames – Arbitration Proceedings; Form #A-10, Outline of Procedure for Arbitration Hearing: and Form #A-10a, Outline of Procedure for Arbitration Hearing involving a Request and a Counter-Request were revised to ensure all parties to an arbitration proceeding should be provided with the Arbitration Guidelines and Arbitration Worksheet found in Appendix II to Part Ten, Arbitration Guidelines (Suggested Factors for Consideration by a Hearing Panel in Arbitration).

- Appendix VI to Part Ten, Mediation as a Service of Member Boards, was amended to clarify that it is a matter of local discretion whether Boards will require their members to mediate, and that Boards may offer disputing parties an opportunity to mediate prior to an arbitration request being filed. Additionally, whether a Board chooses Option 1 (grievance committee must refer matter for hearing before mediation is offered), Option 2 (mediation is offered prior to grievance committee's review of the arbitration request), or Option 3 (mediation is offered without an arbitration request being filed), there can be no allegation of a violation of Article 17 if a party refuses to mediate until an arbitration request is filed, the Grievance Committee refers the arbitration request for hearing on a mandatory basis, and the member refuses to mediate.

## New Case Interpretations – Interpretations of the Code of Ethics

- **New Case Interpretation #16-19:** Continued Contact With Potential Seller Who Enters Into an Exclusive Listing With Another REALTOR, was adopted as follows:

After a decades-long career as a noted researcher and teacher, Professor Y decided to sell his home near the university campus in anticipation of his retirement to the northwoods. Having lived in the home for over thirty years and realizing that the proceeds from its sale would constitute a significant part of his retirement funds, Professor Y made appointments with several potential listing brokers, including REALTOR® P and REALTOR® Q. During each appointment, Professor Y asked extensive questions hoping to get a clear idea of his property's market value and each broker's proposed marketing strategies.

REALTOR® Q was familiar with Professor Y's home, having grown up on the same block and having gone to elementary and high school with Professor Y's children. Consequently, REALTOR® Q was not surprised when she received a call asking for a meeting to discuss a possible listing of Professor Y's home. The appointment had gone well and REALTOR® Q was confident she would get the listing. To her surprise, just three days later the property came onto the market listed with REALTOR® P. REALTOR® Q was taken aback and spent considerable time pondering what she had done or said – or failed to do or say – that had led Professor Y to choose to list with REALTOR® P. Several times she was tempted to call Professor Y and ask why she hadn't been chosen, but she never made that call.

Several weeks later Professor Y's son and daughter-in-law hosted a retirement party for Professor Y. Their friend REALTOR® Q was among the invited guests. At the party, Professor Y approached REALTOR® Q and, after exchanging pleasantries, commented, "You're probably wondering why I didn't list my home with you." "The thought crossed my mind," admitted REALTOR® Q, "but you made a good choice with REALTOR® P. I'm certain he'll do a fine job and get a fair price for you." Then, since Professor Y had raised the issue, REALTOR® Q asked, "Why didn't you give me the listing?" Professor Y explained that while he thought highly of REALTOR® Q, he had been very impressed with REALTOR® P's marketing strategies, and his choice was a business decision and not one influenced by friendships. REALTOR® Q accepted Professor Y's explanation and their conversation turned to other topics. A month later, REALTOR® Q was surprised to receive notice from the local association of REALTORS® advising she had been named in an ethics complaint alleging that her conversation with Professor Y, after Professor Y had listed his home with REALTOR® P, had violated Article 16 of the Code of Ethics.

At the hearing, REALTOR® Q had acknowledged she had been surprised – and disappointed – when Professor Y listed his home with REALTOR® P instead of with her. She also acknowledged she discussed Professor Y's choice of listing broker with him at the party. In her defense, she called Professor Y as a witness. Professor Y testified that he had in fact told REALTOR® P, his listing broker, about his conversation with REALTOR® Q, adding that he had no idea that REALTOR® P would file an ethics complaint. He also noted he – and not REALTOR® Q – had raised the subject of why he had chosen to list with REALTOR® P. "REALTOR® Q is a longtime friend of my family and I felt I owed her an explanation about why I listed with REALTOR® P instead of with her."

REALTOR® Q concluded her defense noting that while Standard of Practice 16-13 requires REALTORS® to conduct dealings related to exclusively listed property with the client's agent, there is an exception in cases where dealings are initiated by an exclusively-represented client. She pointed out that her conversation with Professor Y could fairly be characterized as a "dealing" related to Professor Y's exclusively listed home, and that her conversation with Professor Y, since it was initiated by Professor Y, did not violate Article 16 of the Code of Ethics.

The Hearing Panel concurred with REALTOR® Q's defense, and found no violation of Article 16.

- **New Case Interpretation #16-20:** Continued Contact With Potential Seller Who Enters Into an Exclusive Listing With Another REALTOR, was adopted as follows:

At the conclusion of a detailed listing presentation, REALTOR® B asked the sellers whether they had any questions. “No,” said Seller Z. “Your presentation was professional and complete and we very much appreciate your time. We have appointments with two other realty firms and after we talk to them we’ll make our decision.” REALTOR® B thanked the sellers and encouraged them to contact him with any questions they might have. “I really look forward to being your broker,” he added.

Several days later, REALTOR® B noticed that Seller Z’s property had come on the market, listed with REALTOR® A. REALTOR® B and REALTOR® A were friends, but were also quite competitive, both frequently pursuing the same potential seller-clients. “I wonder why Seller Z decided to list with REALTOR® A,” mused REALTOR® B, “it won’t matter if I just call and ask why they decided to list with my friend REALTOR® A instead of me.” REALTOR® B called the sellers and left a message on their answering machine asking for a return call at their convenience.

That evening, Seller Z returned REALTOR® B’s phone call. REALTOR® B started the conversation by thanking Seller Z and his wife for their time. “What I’d like to know is why you chose to give your listing to REALTOR® A instead of me?” he then asked. “Don’t get me wrong, REALTOR® A is a good broker and will do a good job for you. I’m not suggesting you cancel your listing with REALTOR® A but if your listing expires and REALTOR® A hasn’t sold it, I’d be pleased to talk to you about listing with me.”

Seller Z did not follow up on REALTOR® B’s offer and the following weekend at REALTOR® A’s open house Seller Z and his wife recounted REALTOR® B’s follow-up phone call. Over the next few days REALTOR® A debated filing an ethics complaint. He weighed his friendship with REALTOR® B against what he saw as his duty to bring potentially unethical conduct to the attention of the association of REALTORS®. Somewhat reluctantly, he filed an ethics complaint alleging a violation of Article 16, as interpreted by Standard of Practice 16-13.

At the hearing, REALTOR® A called Seller Z as a witness. Seller Z faithfully recounted the substance of REALTOR® B’s conversation with Seller Z and his wife, commenting that while REALTOR® B had said he was only trying to understand why he hadn’t been given the listing, it appeared to Seller Z that REALTOR® B wanted Seller Z to cancel his listing with REALTOR® A. Then REALTOR® B testified in his own defense. He acknowledged he had been aware that REALTOR® A had already exclusively listed the property when he contacted Seller Z and asked for a follow-up appointment. He defended his actions stating he was not trying to induce Seller Z to cancel the listing, he was simply trying to find out what he had said – or failed to say – that led Seller Z to list with REALTOR® A instead of with him, and wanted Seller Z and his wife to be fully aware of the services he would provide if their listing with REALTOR® A expired.

The Hearing Panel did not agree with REALTOR® B’s defense, noting that REALTOR® B’s curiosity or desire to enhance his listing presentation skills did not justify continued contact with a potential seller-client after that seller had entered into an exclusive representation agreement with another broker. REALTOR® B was found in violation of Article 16 as interpreted by Standard of Practice 16-13.

- **New Case Interpretation #16-21:** Continued Contact With Potential Seller Who Enters Into an Exclusive Listing With Another REALTOR, was adopted as follows:

REALTOR® P and Ms. Q had been members of the church choir for several years and had become social friends. One evening after choir practice Ms. Q mentioned that now that her children were grown and out of the family home, she and her husband were seriously considering downsizing. “I’m sure I can help you with that,” said REALTOR® P, “I’m going away for the weekend but I’ll get in touch with you early next week.”

The following Monday evening REALTOR® P called Ms. Q. After exchanging pleasantries, REALTOR® P turned the conversation toward business. “I’ve identified some comparable sales to show you and I’d like to come over and visit with you and your husband to discuss listing your home,” she said. After a lengthy pause, Ms. Q shared with REALTOR® P that her husband had been very anxious to get started and over the weekend they had visited several local real estate brokerages and had listed their home with REALTOR® B. “I hope you understand,” said Ms. Q, “my husband makes all of our business decisions and he was very impressed with REALTOR® B and his plans for selling our house.” REALTOR® P responded positively telling Ms. Q, “I know REALTOR® B. He’ll do a fine job for you. If there is ever anything I can do for you in the future, never hesitate to call me.” On that note, REALTOR® P and Ms. Q ended their conversation.

The next afternoon REALTOR® B was at the Q’s home placing his “For Sale” sign on their front lawn. Ms. Q invited REALTOR® B into the house for coffee. During their conversation, she mentioned her conversation the evening before with REALTOR® P, commenting, “I was so relieved that REALTOR® P wasn’t upset that I didn’t list with her. She was very gracious and even suggested that I should call her if she could be of assistance to us in the future.” REALTOR® B said nothing about Ms. Q’s remark, but after returning to his office filled out the paperwork necessary to file an ethics complaint against REALTOR® P, charging her with violating Article 16, as interpreted by Standard of Practice 16-13.

At the hearing convened to consider the complaint, REALTOR® B testified that REALTOR® P had directly contacted his exclusive client, Ms. Q, and after Ms. Q had shared with REALTOR® P the fact that the Q’s home had been listed by REALTOR® B, had not immediately terminated their telephone conversation. “Even worse,” said REALTOR® B, “REALTOR® P told Ms. Q that she should call her if there was ever anything she could do for her. REALTOR® P’s offer to be of assistance ‘at any time in the future’ was simply a thinly-veiled attempt to convince the Q’s to cancel their listing with me and to list with her.

REALTOR® P, testifying in her defense, noted that she did not know the Q’s property had been listed by REALTOR® B when she called Ms. Q; that when Ms. Q informed her they had listed their property with REALTOR® B she had responded courteously, professionally, and positively, assuring Ms. Q that REALTOR® B would do a good job for the Qs; and that her offer was simply to be of assistance in future real estate transactions, possibly the purchase of a new home or condominium. “Once I learned that REALTOR® B had listed the Q’s property, I ended our telephone conversation as quickly and as politely as I could,” concluded REALTOR® P, “I certainly was not trying to interfere in REALTOR® B’s exclusive contract with the Qs.”

After giving careful consideration to the testimony of both parties, the Hearing Panel concluded that REALTOR® P had not violated Article 16 as interpreted by Standard of Practice 16-13, and that her offer to be of assistance in the future was simply a polite way to end the conversation.

### **Additional Points of Interest**

1. The National Association's Professional Standards Education Seminar will be held August 23 and 24, 2012. For more information, please go to:  
<http://www.realtor.org/mempolweb.nsf/pages/2012PSSeminar>.
2. The National Association's Mediation Training Seminar will be held June 27, 28, 29, 2012 in Chicago. For more information, please go to:  
<http://www.realtor.org/mempolweb.nsf/pages2012mediationtraining>.
3. The role of legal counsel in ethics and arbitration hearings include pre-hearing concerns, post-hearing remedies (appeals and procedural reviews), training/counseling boards of directors on their role/responsibilities in Code enforcement and dispute resolution, training and supporting grievance committees and hearing panels, and best practices was discussed by the Legal Counsel Work Group. For more information about their report go to:  
<http://www.realtor.org/mempolweb.nsf/pages/AssociationLegalCounselWorkGroup6.2011>.
4. The Dispute Resolution System (DRS) is not intended to replace arbitration or mediation activities conducted by associations' Professional Standards Committees. For more information on the DRS program designed to resolve disputes between buyers, sellers, and real estate brokers/sales people not otherwise covered under Article 17 of the Code of Ethics go to:  
<http://www.realtor.org/mempolweb.nsf/pages/drs>.