

## Summary of Key Professional Standards Changes \*\* to be effective January 1, 2017 \*\*

### 1. Change procedures for ethics cases where respondent resigns or is terminated before final action (5/16)

#### **Amend Section 20(e), Initiating an Ethics Hearing, Code of Ethics and Arbitration Manual.**

(e) If an ethics respondent resigns or otherwise causes membership in the Board to terminate after an ethics complaint is filed but before final action is taken by the Board of Directors, ~~the hearing process shall suspend and~~ the Professional Standards Administrator shall cause the complaint to be forwarded to any other Board in which the respondent continues to hold membership. If the respondent does not hold membership in another Board, or if the Professional Standards Administrator is unable to determine if the respondent holds membership in another Board, the complaint shall ~~be held in abeyance until such time as the respondent rejoins the Board or it can be determined that the respondent holds membership in another Board~~ continue to be processed until the decision of the association with respect to disposition of the complaint is final consistent with Section 20, Initiating an Ethics Hearing, or Section 23, Action of the Board of Directors, Code of Ethics and Arbitration Manual.\* If an ethics respondent resigns or otherwise causes membership in all Boards to terminate before an ethics complaint is filed alleging unethical conduct occurred while the respondent was a REALTOR®, the complaint, once filed, shall be processed until the decision of the association with respect to disposition of the complaint is final consistent with Section 20, Initiating an Ethics Hearing, or Section 23, Action of the Board of Directors, Code of Ethics and Arbitration Manual.\* In any instance where an ethics hearing is held subsequent to an ethics respondent's resignation or membership termination, any discipline ratified by the Board of Directors shall be held in abeyance until such time as the respondent rejoins an association of REALTORS®. In any instance where a complaint is transferred to another Board, the complainant shall be so advised. (Adopted 5/88)

\*Failure of the respondent to attend will not prevent a hearing from being held.

(Note: If approved, similar changes will be made to other relevant sections of the Code of Ethics and Arbitration Manual and the NAR Model Bylaws for Local Member Boards.)

**Rationale:** Current policy says that where a respondent resigns or is terminated prior to the completion of an ethics case, the case is held in abeyance until membership is resumed. If someone were to drop membership for several years then rejoin, that lapse in time could make it very difficult to hold a fair hearing for both parties. Witnesses may have moved on, testimony becomes less clear, etc.

This change allows the association to continue the hearing process even after membership terminates in order to provide better due process for complainants (and respondents) by holding a hearing while the memories of a situation are still fresh. But since the association loses the ability to enforce sanctions once someone's membership ends, any sanction imposed by a hearing panel must be held in abeyance until such time as the individual rejoins the association.

### 2. Board review of ethics decisions - procedures when Board panel suggests an increase in sanctions, and when hearing panel does not include consequences of non-compliance in final decision (5/16 & 11/16)

#### **Amend Section 23(b), Action of the Board of Directors, Code of Ethics and Arbitration Manual:**

(b) If no appeal is filed, the Directors will adopt the Hearing Panel's recommendation and issue its order accordingly (at its next regularly scheduled meeting or a special meeting designated for that purpose, but no later than thirty [30] days after the date the Hearing Panel's decision was transmitted to the parties), unless: (Revised 11/14)

(1) the Directors, if concerned with a possible procedural deficiency, refer the decision back to the Professional Standards Committee for a new hearing and recommendation by a different Hearing Panel; or

(2) the Directors are concerned with the appropriateness of the recommendation of sanction, in which case 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. ***(Hearing Panels are not required to accept the Directors' recommendation to increase discipline.*** In instances where the Hearing Panel increases discipline, the respondent(s) will have an additional twenty (20) days from the date the Hearing Panel's revised decision has been transmitted to appeal the revised discipline); or

(3) the consequences for noncompliance with discipline are not specified, in which case the Directors must refer the decision back to the original Hearing Panel for determination of the consequences for noncompliance (in such instances, the respondent(s) will have an additional twenty (20) days from the date the Hearing Panel's revised decision has been transmitted to appeal only the severity of the consequences for noncompliance); or  
(3) 4) the Directors conclude the findings of fact do not support a violation of the Code of Ethics, in which case the complaint will be dismissed.

In such matters, advice of Board legal counsel should be requested and considered. (Revised 11/14)

**Rationale:** When reviewing an ethics decision, if a Board panel believes the sanction is too low it is permitted to refer the case back to the hearing panel to consider a stricter sanction. This decision, by its nature, occurs after the parties have had the opportunity to review the decision and decide whether to appeal. Section (b)(2) now clarifies that if the sanction is increased the parties have a second opportunity to appeal - though the appeal is limited to the increased sanction alone. This section was further amended in November 2016 (***see bold italic text***) to clarify that even if the Directors recommend and increased sanction the hearing panel is not obligated to accept that recommendation.

NAR has been asked in the past whether a Board panel can add a 'what-if' provision to a decision in order to clarify what will happen if the respondent fails to comply with the discipline that was imposed, or in the alternative, if it can refer the decision back to the hearing panel for this addition. Section (b)(3) now says that the panel may refer the decision back to the hearing panel for this addition if desired, but that respondents will then have an additional 20 days to appeal any additions. NOTE: To avoid this issue, panels are encourage to include this sort of language in every decision from the start.

### **3. Withdrawal of ethics complaint prior to adjournment of hearing** (5/16)

#### **Amend Section 21(e), Action of the Board of Directors, Code of Ethics and Arbitration Manual:**

(e) Complainants may withdraw their complaints at any time prior to ~~the start of an adjournment of the ethics hearing.~~ However, if complainant withdraws the complaint after transmission of the Grievance Committee's decision to forward the complaint to a hearing and prior to adjournment of the ethics hearing, the complainant may not resubmit the complaint on the same matter. If complainant withdraws the complaint before transmission of the Grievance Committee's decision to forward the complaint to a hearing, the complainant may resubmit the complaint on the same matter so long as it is filed within the 180-day filing deadline as defined in this Manual. If a complaint is withdrawn by the complainant after the Grievance Committee determines the complaint requires a hearing, it will be referred back to the Grievance Committee to determine whether a potential violation of the public trust (as defined in Article IV, Section 2 of the National Association's Bylaws) may have occurred. Only where the Grievance Committee determines a potential violation of the public trust may have occurred may the Grievance Committee proceed as the complainant. ~~A complaint so withdrawn shall not be deemed a final determination on the merits.~~ (Amended 5/04)

(Note: If approved, similar changes will be made to other relevant sections of the Code of Ethics and Arbitration Manual.)

**Rationale:** Current rules state that an ethics complainant can withdraw their case at any time prior to the start of a hearing. This revision allows ethics complainants to withdraw at any time until adjournment of an ethics hearing, which is consistent with arbitration rules stating that the parties can settle "at any time" and arbitration script changes which remind parties that they are able to settle a case even during an ongoing hearing.

The overall policy goal is to encourage parties to work through their issues to their own satisfaction without a final hearing panel decision. To offset possible misuse of the process, this original proposal was amended to include the first underlined sentence, which states that a case withdrawn after Grievance determination cannot be refiled by the complainant. It is recommended that any settlement by the parties include language that requires withdrawal of the complaint, but that the complainant be warned such dismissal will be final.

#### **4. Expedited timelines in ethics cases** (5/16)

##### **Amend Sections 20(l), 21(a) and 21(b), Ethics Hearing, Code of Ethics and Arbitration Manual:**

###### Section 20

(l) If the respondent does not acknowledge the conduct alleged in the complaint or waive the right to a hearing, or does not respond within ten (10) days from transmittal of the complaint, a hearing shall be scheduled in the manner provided for in Section 21, Ethics Hearing, beginning with the ~~twenty (20)~~ five (5) day deadline for the Professional Standards Committee chair to select a hearing date. (Revised 11/14)

###### Section 21

(a) After a complaint alleging a violation of membership duty (duties) has been referred to the Professional Standards Administrator by the Grievance Committee with instruction to arrange a hearing, the Professional Standards Administrator shall serve a copy of the complaint on each party complained of (hereafter called the respondent) and notify the respondent that the respondent may file a written reply (Forms #E-2, Notice to Respondent [Ethics], and #E-3, Reply [Ethics], **Part Six**) with the Professional Standards Administrator within fifteen (15) days of the request for response being transmitted. A Hearing Panel may accept late filing of the reply at its discretion. The Professional Standards Administrator may require the complainant to supply the necessary number of copies of the complaint and the respondent to supply the necessary number of copies of the reply, except that such requirement shall not be made of a complainant who is not a Board Member. (Revised 11/14) The Professional Standards Administrator will inform the Professional Standards Committee Chair of the referral and the Chair shall select a hearing date no later than ~~twenty (20)~~ five (5) days after the Grievance Committee's decision to forward for hearing is final. (Adopted 11/14)

(b) The Professional Standards Administrator shall provide a copy of the reply (if any) to the complainant within ~~fifteen (15)~~ five (5) days from receipt of the response. The Professional Standards Administrator shall also provide copies of the complaint and reply (if any) to the Board President and Chairperson of the Professional Standards Committee, or notify each that no reply has been filed (unless the President and/or Professional Standards Chairperson indicate that they do not wish to receive copies or be so informed). (Amended 11/14)

**Rationale:** This amendment expedites several dates for ethics hearings, consistent with parallel provisions in the arbitration section of the Code of Ethics and Arbitration Manual approved in 2014-15. Note that local associations may be able to lengthen these time frames through adoption of a local policy.

#### **5. Providing parties an opportunity to settle arbitration cases prior to panel deliberations** (11/16)

**Amend Chairperson scripts for arbitration and interboard arbitration cases.** After the notice that the proceedings are confidential, add:

**At this point, parties may be offered an additional opportunity to settle. Associations offering this opportunity may read the following:**

Before we adjourn the hearing of this panel, we would like to give both parties fifteen (15) minutes to discuss any settlement or resolution of their dispute that they would like to consider prior to the hearing panel entering executive session. The parties (and their counsel, if any) will be provided a private space to meet and discuss any resolution. If

settlement is reached, the parties will execute an agreement and the arbitration process will be terminated. If settlement is not reached, the panel will reconvene in executive session and determine the award.

**Rationale:** Parties are currently not prohibited from continuing their discussions/negotiations even after the close of a hearing, but there is no guarantee that a hearing panel won't decide the case prior to the parties reaching a negotiated settlement. This would provide the parties with a time period to conduct their negotiations without the concern that a panel decision would be reached in the meantime, and is consistent with NAR's recent changes to strongly encourage mediation and negotiation in place of arbitration hearings.

This would be a voluntary addition at the option of the association. Associations are not required to offer this additional window of time, and if they do offer it associations may select whatever time period they choose (i.e., 15 minutes would not be the required time period). Associations are cautioned that if this negotiation window is offered it should be done uniformly, and the association should discuss implementing policies regarding extensions so that parties are generally treated uniformly (e.g., what if the parties inform the administrator that they have reached a tentative agreement but want until the next day to have legal counsel review?) Associations should also be sure that parties understand a settlement at this late date would be in place of any potential panel decision, which would essentially require immediate withdrawal of the case and would remove the association from any future enforcement.

## **6. Fee disputes between listing brokers** (11/16)

### **Amend Appendix 1, Part Ten, Code of Ethics and Arbitration Manual:**

#### **Non-Arbitrable Issues that Can be Mediated as a Matter of Local Determination**

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 non-arbitrable 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
- disputes between two listing brokers where no contract exists between the parties and the dispute is not as specified in Standard of Practice 17-4(4)

**Rationale:** Fee disputes between listing brokers are not uncommon, but they do not fall under any of the categories of arbitrable issues as stated by NAR since there is no contract or overt relationship between two completing listing brokers. This change clarifies that these sorts of topics may be mediated between the parties, even if they are not actually arbitrable in the end.

#### **Other items that do not require Board approval:**

A. Section 6, Conduct of Hearing, Code of Ethics and Arbitration Manual, was amended to clarify and streamline the procedures for recording ethics and arbitration hearings.

B. New settlement/withdrawal forms were created to facilitate association notification that a complaint officially has been settled and/or withdrawn.