

2012 Summary of Key Professional Standards Changes

This summary highlights substantive issues and changes, but is not all-inclusive. For complete information detailing all changes see the 2011 Professional Standards Committee Actions for Midyear and the Annual Convention on the Board Policy and Programs website (<http://realtor.org/mempolweb.nsf/comnameweb>; search on "Professional Standards Committee Actions"). Also review the shaded portions of the 2012 *Code of Ethics and Arbitration Manual* which highlights all changes.

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'~~ their businesses, and ~~competitors'~~ 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'~~ their businesses, and ~~competitors'~~ 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 as follows:

A. Initial action upon receipt of an ethics complaint

Upon receipt of an ethics complaint from the Board Secretary, the Chairperson of the Grievance Committee shall review the complaint and any evidence and documentation attached. The Chairperson may assign one or more members of the Grievance Committee to review the complaint and to make any necessary evaluation. The member(s) may, if necessary, gather additional information on the matters complained of if additional information appears necessary to make a knowledgeable disposition of the complaint. The complaint shall be provided to the assigned members by the Board Secretary upon instruction from the Chairperson. (Amended 4/94)

The reviewer(s), if appointed, shall complete the assignment promptly and prepare a report and recommendation for the Grievance Committee. After reviewing the report, the Chairperson shall schedule a meeting of the Grievance Committee and may instruct the Secretary to provide members of the Grievance Committee with copies of the case file including the reviewer's report, if any. At the option of the Board, such file may be sent to the Grievance Committee members prior to the meeting or may be distributed at the meeting. (Amended 4/94)

B. Consideration of an ethics complaint by the Grievance Committee

In reviewing an ethics complaint, the Grievance Committee shall consider the following:

- (1) *Is the ethics complaint acceptable in form as received by the Committee? If not in proper form, the Chairperson may request that the Elected Secretary or the Executive Officer contact the complainant to advise that the complaint must be submitted in proper form.*

NOTE: If deemed appropriate by the Chairperson, a member of the Grievance Committee may be assigned to contact the complainant and to provide procedural assistance to amend the complaint or resubmit a new complaint in proper form and with proper content. The Grievance Committee member providing such assistance shall ensure that only procedural assistance is provided to the complainant, and that the complainant understands that the member is not representing the complainant.

- (2) Are all necessary parties named in the complaint?*
 - (3) Was the complaint filed within one hundred eighty (180) days of the time that the alleged offense and facts relating to it could have been known by the complainant in the exercise of reasonable diligence or within one hundred eighty (180) days after the conclusion of the transaction or event, whichever is later? (Revised 5/06)*
 - (4) Is the respondent named in the complaint a member of the Board, and was the respondent a member of any Board at the time of the alleged offense?*
 - (5) Is litigation or any government agency investigation or other action pending related to the same transaction or event?*
- (a) If criminal litigation is pending related to the same transaction or event, the Grievance Committee shall cease its considerations and instruct the Board Secretary to hold the file pending until such time as the criminal litigation is concluded. A report shall be made to the Board President. (Revised 11/96)*
- (b) If civil litigation is pending related to the same transaction or event, the Grievance Committee shall instruct the Board Secretary to have Board legal counsel review the complaint filed and advise if any hearing should proceed (presuming the matter would otherwise warrant a hearing), with counsel considering the following:*
- (1) similarity of factors giving rise to pending litigation or regulatory or administrative proceeding and the ethics complaint*
 - (2) degree to which resolution of the pending civil litigation or regulatory or administrative proceeding could make consideration of the ethics complaint unnecessary*
 - (3) degree to which pending litigation or regulatory or administrative proceeding would delay prompt disposition of the ethics complaint*
 - (4) the nature of the alleged violation and the extent to which it could impact on cooperation with other Board Members*
 - (5) the assurance of Board legal counsel that consideration of an ethics complaint would not deprive the respondent of due process*
 - (6) Is there any reason to conclude that the Board would be unable to provide an impartial Hearing Panel?*
 - (7) Are the specific Articles cited in the complaint appropriate in light of the facts provided? Should additional Articles be cited? Should certain Standards of Practice be cited in support of the Articles charged? Are any inappropriate Articles cited?*
 - (8) If the facts alleged in the complaint were taken as true on their face, is it possible that a violation of the Code of Ethics occurred?*

If all relevant questions have been answered to the satisfaction of the Grievance Committee, and the facts given appear to indicate a possible violation of the Code of Ethics, the Grievance Committee shall refer the complaint to the Professional Standards Committee for a hearing by an ethics Hearing Panel.

C. Appeal from the decision of the Grievance Committee related to an ethics complaint

If the Grievance Committee dismisses the complaint, the notice of dismissal shall specify the reasons for dismissing and the complainant may appeal the dismissal to the Board of Directors within twenty (20) days from receipt of the dismissal notice using Form #E-22, Appeal of Grievance Committee Dismissal of Ethics Complaint. The complaint and any attachments to the complaint cannot be revised, modified, or supplemented. The complainant may, however, explain in writing why the complainant disagrees with the Grievance Committee's conclusion that the complaint should be dismissed. If the Grievance Committee deletes an Article or Articles from an ethics complaint, the complainant may also appeal to the Board of Directors using Form #E-22, Appeal of Grievance Committee Dismissal of Ethics Complaint. The Directors (or a panel of Directors or the Executive Committee) shall consider only the information and documents considered by the Grievance Committee, together with the complainant's rationale for challenging the dismissal and render its decision, which shall be final. The parties are not present at the meeting at which the appeal is considered. (Revised 5/06)

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 amended as follows:

Role of Rationale for the Board of Directors in Reviewing and Ratifying Ethics Hearing Panel Decisions

~~The *Code of Ethics and Arbitration Manual* of the NATIONAL ASSOCIATION OF REALTORS® specifically requires that Alleged violations of the Code of Ethics be are considered by a Hearing Ppanels of the Professional Standards Committee of the Board or Association having jurisdiction. These procedures are set forth in detail in Part Four of the *Code of Ethics and Arbitration Manual*. They provides that the decision of the Hearing Ppanel will be reached made by a majority vote and will be in writing, containing findings of fact, conclusions, and any discipline proposed. Any member of a Hearing Ppanel dissenting can write a separate opinion to that will be provided to the parties and ultimately will be reviewed by the Board of Directors together with the Hearing Ppanel's decision. (Revised 11/98)~~

The ~~written~~ decisions of ethics Hearing Ppanels are ~~in reality~~ actually recommendations to the Board of Directors. They ~~can~~ also serve as the basis on which the hearing panel's decision can may be appealed, particularly with respect to a Hearing Panel's interpretation of the Code or application of the Code to the findings of fact.

Even in instances where no appeal to the decision of a Hearing Panel is filed, the procedures ~~require~~ that the Hearing Ppanel's decision must be ~~sent~~ provided to the Board of Directors for their review and ratification. The Directors are not ~~bound~~ required to adopt a Hearing Ppanel's decision, even ~~absent any appeal~~ if the decision is not appealed. The procedures establish ~~certain bases on which~~ when and how a decision can be modified, sent back to the Hearing Ppanel, or sent to a new Hearing Ppanel.

A frequent question is how the ~~Board of Directors of a local Board or Association~~ can become concerned about the adequacy of the procedures by which a hearing was conducted if no appeal is filed. Some argue ~~that~~ the Board of Directors should be required to ~~simply~~ adopt all ~~uncontested~~ decisions that aren't appealed, or, ~~alternatively,~~ that ~~uncontested~~ decisions not appealed should be final and binding without any action by the Board of Directors. ~~They point to the fact that the Directors are in a less advantageous position to make such determinations than the original Hearing Panel, which had~~ since the Directors don't have the benefit of considering the in-person testimony and evidence the hearing panel had.

Questions arise as to how the Directors can legitimately be concerned about a possible failure of due process without an appeal being filed or without listening to a tape recording or reviewing a written transcription of the entire hearing. Questions also arise regarding the severity of discipline recommended by Hearing Panels and the appropriateness of Directors' involvement suggesting that discipline be increased or decreased in severity.

There are sound, fundamental reasons for decisions (even if ~~uncontested~~ not appealed) of ~~ethics Hearing Panels~~ being reviewed and acted on by the Directors.

First, the Board of Directors, ~~as the elected representative of all Board Members,~~ has the ultimate responsibility for ensuring ~~that~~ the rights of all members are safeguarded and that the ~~Board or Association~~ is operated in a legally prudent defensible manner consistent with the ~~provisions of~~ its governing documents.

Second, it is not always possible to ensure absolute impartiality in every professional standards proceeding. At times ~~during or following the conclusion of an ethics hearing~~, certain facts may come to light ~~which calling~~ into question the impartiality of a ~~H~~hearing ~~P~~panel, or whether the parties received a fair, due process hearing. These concerns ~~can come to light~~ arise through threats of litigation made to ~~Board counsel, Board staff, or elected Board leaders~~ against the association, and. ~~While a court might direct a respondent-plaintiff to exercise all internal Board remedies the appeal remedy available through the Association prior to initiating litigation filing a lawsuit against the Association, dismissal of such claims by a court a legal challenge is not a certainty, particularly if the respondent-plaintiff can successfully assert argue that the association's Board's appellate appeal remedy, though available, would result in a predetermined or sham conclusion. The procedural safeguards incorporated built into the Code of Ethics and Arbitration Manual provide the Directors associations with an avenue a simple way to correct perceived wrongs mistakes without necessarily first expending their human and financial resources of the Board in defending against possibly meritorious on unnecessary litigation. In other words, the procedures in the Manual Directors' review provides Boards associations with an internal, administrative "safety valve" to correct mistakes, particularly serious procedural mistakes, without first having to become a defendant becoming involved in litigation.~~

Third, ~~at least in certain instances, the Directors of a local Board or Association can may~~ reasonably ~~become~~ concerned about the severity of discipline proposed by a ~~H~~hearing ~~P~~panel without a ~~comprehensive knowledge of knowing~~ all of the ~~hearing details of a hearing~~. For example, where a violation of the Code of Ethics is ~~the first by a REALTOR's first~~, and the findings of fact demonstrated that only a minor violation ~~had occurred, which was~~ likely the result of inadvertence or ignorance rather than gross negligence or intentional misconduct, and the proposed discipline is suspension or expulsion from membership, ~~then~~ the Directors may be reasonably concerned about the severity of the proposed discipline ~~proposed by the Hearing Panel~~. On the other hand, if the violation ~~was representative is part of a pattern or of repeated practice of unethical conduct by a REALTOR and the findings of fact show that the violation was is a serious one but the discipline recommended was is relatively insubstantial, then~~ the Directors might also be reasonably concerned about the severity of the proposed discipline ~~proposed~~ and could recommend to the ~~H~~hearing ~~P~~panel that the discipline be increased. In neither of these scenarios would the Directors ~~have an absolute need to refer to the transcript or the tape recording of the hearing to become~~ legitimately concerned.

~~Fourth~~Last, in many some cases the Directors can be frustrated by the lack of ~~underlying detail that is missing from some ethics Hearing Panel in ethics decisions. Any Every~~ decision, whether a finding of a violation is reached or not, ~~should needs to~~ include a succinct, narrative description of the relevant facts ~~as determined by the Hearing Panel based on the evidence and testimony presented to it the hearing panel. This A well written, comprehensive decision with detailed findings of fact not only enables the parties to understand the basis on which for the Hhearing Ppanel's concluded that decision whether the Code was or was not violated, and it also enables the Directors to ratify the Hearing Panel's decision absent without an appeal, confident in the knowledge that the hearing panel has correctly applied the Code of Ethics to the facts of the matter. (Adopted 11/92)~~

- Appendix X to Part Four, Before You File and Ethics Complaint (excerpted below), was amended as follows:

Filing an Ethics Complaint

The local Board or Association of REALTORS® can provide you with information on the procedures for filing an ethics complaint. Here are some general principles to keep in mind.

- Ethics complaints must be filed with the local Board or Association of REALTORS® within one hundred eighty (180) days from the time a complainant knew (or reasonably should have known) that potentially unethical conduct took place (unless the Board's informal dispute resolution processes are invoked, in which case the filing deadline will momentarily be suspended).
- The REALTORS® Code of Ethics consists of seventeen (17) Articles. The duties imposed by many of the Articles are explained and illustrated through accompanying Standards of Practice or case interpretations.
- Your complaint should include a narrative description of the circumstances that lead you to believe the Code of Ethics may have been violated.
- Your complaint must cite one or more of the seventeen (17) Articles of the Code of Ethics which may have been violated. Hearing Panels decide whether the Articles expressly cited in complaints were violated—not whether Standards of Practice or case interpretations were violated. (Revised 11/11)
- The local Board or Associations of REALTORS® Grievance Committee may provide technical assistance in preparing a complaint in proper form and with proper content.
- Chairperson's Procedural Guide: Conduct of an Ethics Hearing, last paragraph was amended as follows:

Proceeding following hearing—executive session: *(After adjournment, the panel will remain in executive session and frame a report of finding and opinion to set forth the decision. The panel will follow explicitly the procedure set forth in the Code of Ethics and Arbitration Manual as to opportunity for rehearing or for an appeal if provided. Boards should consider having Board counsel should review all ethics decisions of any hearing conducted by a Professional Standards Hearing Panel involving the alleged unethical conduct by Board Members, as established in the bylaws. Such review should occur prior to any action of the panel becoming final or effective. This will serve to protect the Board by minimizing vulnerability to litigation.* (Revised 11/11)

- Chairperson's Procedural Guide: Conduct of an Arbitration Hearing, last paragraph was amended as follows:

Proceeding following hearing—executive session: *(After adjournment, the panel will remain in executive session and determine the award. The panel will follow explicitly the procedure set forth in the Code of Ethics and Arbitration Manual as to opportunity for procedural review. Boards should consider having Board counsel should review all decisions of any hearing conducted by a Professional Standards Hearing Panel involving the resolution of business disputes, as established in the bylaws. Such review should occur prior to any action of the panel becoming final or effective review awards prior to issuance.* This will serve to protect the Board by minimizing vulnerability to litigation.) (Revised 11/11)

- Chairperson's Procedural Guide: Conduct of an Interboard Arbitration Hearing, last paragraph was amended as follows:

Proceeding following hearing—executive session: *(After adjournment, the panel remains in executive session to determine the award, if any. The panel will follow the procedure set forth in the Code of Ethics and Arbitration Manual as to the opportunity for procedural review. Boards should consider having Board counsel should review all decisions of any hearing conducted by*

~~a Professional Standards Hearing Panel involving the resolution of business disputes. Such review should occur prior to any action of the panel becoming final or effective review awards prior to issuance. This will serve to protect the Board by minimizing vulnerability to litigation.)~~
(Revised 11/11)

- Chairperson's Procedural Guide: Conduct of an Appeal Hearing (Ethics) was amended as follows:

Testimony of other parties to the original ethics hearing: At this time, any other parties to the original ethics hearing will have an opportunity to explain why the decision of the ethics Hearing Panel should be upheld by the Appeal Hearing Tribunal. Any party testifying must restrict his/her discussion to the issues raised in the appeal.

Questions from panel members: The members of this panel are authorized to ask questions at any time during this appeal. (Revised 11/11)

Confirmation of fairness/opportunity to testify:

Do each of you feel that this appeal hearing has been conducted fairly?

(If yes) All parties to this appeal hearing have indicated that they feel this appeal hearing has been conducted fairly.

Have each of you had an adequate opportunity to state why you believe that the decision of the original ethics Hearing Panel should or should not be upheld by this Appeal Hearing Tribunal?

(If yes) The parties have indicated that they have had an adequate opportunity to state why they believe the decision of the original ethics Hearing Panel should or should not be upheld by this Appeal Hearing Tribunal.

- Chairperson's Procedural Guide: Conduct of a Procedural Review Hearing (Arbitration) and Chairperson's Procedural Guide: Conduct of a Procedural Review Hearing (Interboard Arbitration) were both amended as follows:

Testimony of other parties to the original arbitration hearing: At this time, any other parties to the original arbitration hearing will have an opportunity to explain why the Award of Arbitrators should be upheld by the Procedural Review Hearing Tribunal. Any party testifying must restrict his/her discussion to the issues raised in the Request for Procedural Review.

Questions from panel members: The members of this panel are authorized to ask questions at any time during this procedural review. (Revised 11/11)

Confirmation of fairness/opportunity to testify:

Do each of you feel that this procedural review hearing has been conducted fairly?

(If yes) All parties to this procedural review hearing have indicated that they feel this procedural review hearing has been conducted fairly.

Have each of you had an adequate opportunity to state why you believe that the original Award of Arbitrators should or should not be upheld by this Procedural Review Hearing Tribunal?

(If yes) The parties have indicated that they have had an adequate opportunity to state why they believe the original Award of Arbitrators should or should not be upheld by this Procedural Review Hearing Tribunal.

- 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.

Appendix VI to Part Ten Mediation as a Service of Member Boards

Although no party to an arbitrable matter can be required to submit to mediation (unless REALTORS® [principals] are required by their Board to mediate otherwise arbitrable disputes pursuant to Article 17) and mediation cannot and is not intended to be a substitute for the arbitration procedures described elsewhere in this Manual, mediation can be a useful tool in resolving the conflicts that arise involving Board Members and their clients and customers. Mediation must be available in instances where arbitration would be provided under **Part Ten**, Section 44 of this Manual and a Board can require REALTORS® (principals) to mediate otherwise arbitrable disputes pursuant to Article 17. Mediation can resolve disputes, promote amicable resolutions, and reduce the number of cases requiring the more formal and complex arbitration procedures of the Board, thus reducing the time and effort required of Board Members serving on the Professional Standards Committee. (Revised 11/11)

Selection of Board Mediation Officer:

Conducting successful mediation procedures requires tact, diplomacy, and a sense of equity. Careful consideration should be given by the Board President (or the Board of Directors of the Board) in selecting the Board's Mediation Officer. Many Boards will find that one Mediation Officer will be sufficient. However, in large Boards, consideration can be given to appointing a standing panel of two,

three, or more Mediation Officers depending upon the number of requests for arbitration normally filed in the course of a year.

A Board Mediation Officer should be appointed for a term of at least one (1) year. Consideration can be given by the local Board to making the appointment for two (2) or even three (3) years. It is strongly recommended that any individual serving as a Board Mediation Officer have extensive prior experience on the Board's Grievance Committee, Professional Standards Committee, and/or Board of Directors. The Mediation Officer should be thoroughly conversant with the Board's arbitration procedures as well as with the real estate rules and regulations of the state. It is recommended that the Mediation Officer not serve concurrently as either an officer or director of the Board, or as a member of the Grievance Committee, or as a member of the Professional Standards Committee. If Mediation Officers are members of the Grievance Committee, they shall not participate in the consideration of requests for arbitration or ethics complaints arising out of the same facts and circumstances giving rise to a matter they attempted to mediate. If Mediation Officers are members of the Professional Standards Committee, they shall not serve on an arbitration Hearing Panel in cases where they had initially attempted to resolve the dispute prior to an arbitration hearing, or on an ethics Hearing Panel in cases where an ethics complaint arises out of the

same facts and circumstances giving rise to a matter they attempted to mediate. The Mediation Officer should be someone widely respected for fairness, experience, and impartiality. Only to the degree that all parties to the mediation can be confident that the mediator is impartial will mediation procedures be successful. By having more than one Mediation Officer, assignments can be made to utilize a particular individual whose experience, abilities, and relationship renders him/her most appropriate for the particular assignment. (Revised 11/91)

Mediation is Not Mandatory or Voluntary as Determined by the Board: It must be understood by all parties that participation in mediation procedures is entirely voluntary (unless REALTORS® [principals] are required by their Board to mediate otherwise arbitrable disputes pursuant to Article 17). If the Board does not require REALTORS® to mediate otherwise arbitrable matters The the parties should be offered the opportunity and encouraged to participate in the mediation process in good faith, and, further, encouraged to abide by the determination. The parties to mediation should be aware that they may withdraw from the process at any point prior to reaching an agreement. Any offers of settlement that were not accepted or any suggested resolution proposed by the Mediation Officer that was not accepted will not be introduced as evidence nor considered in any manner should the matter require arbitration by the Board's Professional Standards Committee. However, if the parties agree to a settlement of the dispute, and the settlement has been reduced to writing and has been signed by all of the parties, the matter is deemed resolved and cannot be the subject of a subsequent arbitration hearing. In the event either of the parties later fails to abide by the terms of the settlement, the matter may not be arbitrated; instead, the other party should be encouraged to have the settlement agreement judicially enforced by a court of competent jurisdiction. (A sample settlement agreement is included as Form #A-17, in **Part Thirteen** of this Manual.) (Revised 11/11)

Need for Adequate Notice: ~~Although participation in mediation is not required of the parties, the need for due process remains.~~ Generally, there will be no need for the parties to be represented by legal counsel nor for the Board to have legal counsel

present at a mediation proceeding. However, since mediation is an attempt to bring the disputing parties together in an informal setting to resolve their differences, every effort should be made to ensure that the parties are provided with adequate prior notice (at least ten [10] days) and that the time and location of the proceeding is mutually convenient to all involved. However, this requirement shall not preclude parties to a dispute waiving such notice and agreeing to mediate at any time agreed by all parties. (Revised 11/11)

Initiation of Mediation Proceedings:

Option 1: As specified in the arbitration procedures elsewhere in this Manual, each request for arbitration should be referred to the Board's Grievance Committee for consideration as to whether the matter is appropriate for arbitration. In the event the Grievance Committee determines that a matter is properly arbitrable, that information should be provided to the Board Secretary (or Board Executive Officer), who will then notify both the complainant and respondent that the matter has been deemed arbitrable and that the Board's mediation procedures are available. The Board Secretary or a Mediation Officer will inquire of each party as to whether they will participate in the mediation procedures unless mediation has been determined to be mandatory in which case the Secretary or Mediation Officer will establish a time and location for the mediation. If mediation is voluntary and both parties respond affirmatively, the matter will be referred to the selected and assigned Mediation Officer, who will contact the complainant and respondent and establish a mutually convenient time and location for the mediation. (Revised 11/11)

Option 2: Alternatively, the Secretary (or Executive Officer), upon receipt of a request for arbitration, will inquire of all parties whether they desire to participate in mediation prior to review of the arbitration request by the Grievance Committee unless mediation has been determined to be mandatory in which case the Secretary or Mediation Officer will establish a time and location for the mediation unless the respondent asks that the arbitration request be reviewed by the Grievance Committee. If mediation is voluntary and the parties agree, the matter will be referred to the Mediation Officer, who will arrange a mutually

convenient time and location for mediation. If When mediation is voluntary and the mediation attempt is unsuccessful, or if either of the parties wishes to discontinue the mediation process for any reason, then mediation will be terminated and the request for arbitration will be referred to the Grievance Committee for review. Where mediation is offered on a voluntary basis prior to review of an arbitration request by the Grievance Committee, and one or more of the parties declines or the mediation attempt is unsuccessful, the parties will not again be offered mediation. If a party requests a second opportunity to mediate, a second mediation can be scheduled at the discretion of the Association. (Revised 11/11)

NOTE: If a Board requires REALTORS® (principals) to mediate otherwise arbitrable disputes, there can be no allegation of a violation of Article 17 if a party refuses to mediate unless an arbitration request has been filed, the Grievance Committee has referred the arbitration request for hearing on a mandatory basis, and the party then refuses to mediate. (Adopted 11/11)

Option 3: Boards may also offer disputing parties an opportunity to mediate prior to an arbitration request being filed. (Adopted 11/11)

However, regardless of the option chosen by the Board, there can be no allegation of a violation of Article 17 if a party refuses to mediate unless an arbitration request is filed, the Grievance Committee has referred the arbitration request for hearing on a mandatory basis, and the party then refuses to mediate. (Adopted 11/11)

Conduct of Mediation Procedures: If, for any reason, any of the parties (or the Mediation Officer) is unable to participate on the date agreed, the procedure should be rescheduled to the earliest mutually acceptable date. Witnesses, if any, should be kept to a minimum. (Revised 11/03)

Realizing that a dispute already exists between the parties, the Mediation Officer should make every effort to encourage a conciliatory atmosphere while ensuring a full discussion of all pertinent facts. The complainant and respondent should be encouraged to appreciate each other's position in the matter and to effect a solution that will eliminate the need for

arbitration by the Board's Professional Standards Committee. The parties can agree to a mutual resolution of the matter at any time during the mediation procedure. If, following a thorough discussion of all the pertinent facts, the parties are still unable to resolve the matter, the Mediation Officer may, at the Mediation Officer's discretion, then make a recommendation. Any recommendation for resolution can be oral or in writing and will be provided to both parties at the conclusion of the mediation procedure. The parties can agree to the Mediation Officer's proposed resolution at that time. If neither of the parties desires to give additional consideration to the Mediation Officer's resolution, both parties will be given a specified period of time, not to exceed forty-eight (48) hours, to consider the resolution and to advise the Mediation Officer of their acceptance or rejection of it. If either of the parties rejects the proposed resolution, the mediation procedure will be deemed concluded and the matter will proceed to arbitration. Any party who does not respond to the Mediation Officer within seventy-two (72) hours will be deemed to have rejected the suggested solution and arbitration will proceed. (Revised 11/96)

NOTE: When the Board adopts the mediation procedures described in this Manual or develops similar procedures, they should be included in the Board's *Code of Ethics and Arbitration Manual* in whole or by reference. (Revised 11/96)

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>.