



Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

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Professional Standards Changes for 2003

The *Code of Ethics and Standards of Practice of the National Association of REALTORS®* sets high standards of business practice and professional conduct for REALTOR® members. By ensuring honorable, faithful and competent service, these standards ensure the protection of the public. Additionally, by providing for peer review by knowledgeable individuals, they help preserve a cooperative yet competitive marketplace. Likewise, the REALTOR® arbitration process has the ability to resolve broker business disputes economically and efficiently without resorting to the courts, thereby upholding the cooperative principles that have been designed to best serve the interests of clients and customers and the public in general.

This *Legal Update* overviews NAR's most significant *Code of Ethics* and policy changes over the past year. The changes made include revised standards of practice regulating to the presentation and negotiation of multiple offers, the conduct of a REALTOR® in a position to work with a buyer who is a party to a buyer agency agreement, and a listing broker's disclosures to his or her prospective client regarding the terms of the compensation that will be offered to cooperating brokers. Other revisions relate to maximum fines for ethics violations, arbitration between brokers, multiple ethics complaints and other procedural matters.

Presenting and Negotiating Multiple Offers

Whether listing agents should disclose the existence of multiple offers to purchase has been the subject of ongoing debate at NAR for over two years. Some believe that listing brokers should use any and all efforts to induce potential purchasers to make their highest and best offers, including the disclosure of the existence of other offers. Others take the position that offers are confidential and that disclosure of even the existence of an offer to another potential purchaser is unfair.

Legal Hotline Questions & Answers: Disclosing Other Offers

The following Legal Hotline questions and answers from 2002 illustrate different opinions about whether the existence of other offers should be disclosed to buyers. These answers provide a summary of the rules and ethics standards that applied in these situations—before NAR enacted a new standard of practice and case interpretation.

A listing broker has had a policy that if the broker has received one offer and another offer comes in prior to the presentation of the first offer, the listing broker would contact the first cooperating broker and inform him or her of the second offer, suggesting that if the first buyer would wish to

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change the offer in any way that it must be done quickly. Some brokers say that they have received legal advice that disclosing the existence of another offer may be a license law breach. Please advise.

Wis. Admin. Code § RL 24.12(1) reads: "A licensee acting as a principal or an agent in a real estate or business opportunity transaction **shall not disclose any of the terms** of one prospective buyer's offer to purchase, exchange agreement or option contract proposal to any other prospective buyer or to any person with the intent that this information be disclosed to any other prospective buyer. Licensees shall encourage all prospective buyers to submit their best offers. A licensee **may, but is not required to, disclose information known by the licensee regarding the existence of other offers** on the property, the fact that a seller has accepted an offer, that the offer is subject to contingencies and that the offer is subject to a clause requiring removal of certain contingencies upon the occurrence of an event such as receipt, acceptance or conditional acceptance of another offer." (emphasis added)

The listing broker may, but is not required, to disclose the existence of other offers. This is a case-by-case decision for the broker unless the listing broker has an office policy dictating how this is handled or unless the listing broker and the seller modified the listing contract to indicate how the listing agent should handle such a situation.

A buyer looked at the property with Agent A and wrote an offer that was well under the list price. Presentation of the offer was delayed for several days because the seller was out of town. While the seller was gone, a second offer came in from another broker and the listing agent wrote a third offer. The listing agent did not tell the other agents about any of the other offers. The seller accepted the

third offer and rejected the other two offers without countering. The first buyer is very unhappy because he was not given opportunity to counter the offer. Please advise.

Per § RL 24.12, the listing broker had no obligation to tell the other brokers about the other offers if he or she didn't promise to.

Key Point: With respect to disclosing other offers, § RL 24.12(1) provides that real estate licensees may, but are not required to, disclose the existence of other offers or that the seller has an accepted offer. Real estate licensees may not disclose the existence of other submitted offers if the seller directs that this information is confidential per Wis. Stat. § 452.133(1)(d) or if the seller orders that the licensee not disclose the existence of other submitted offers per Wis. Stat. § 452.133(2)(c). Licensees also should remember that if a licensee tells the buyer that he or she will let the buyer know if more offers come in, the licensee has created a duty to provide this information to the buyer. However, this promise should never be made if the seller directs the licensee to keep information concerning other offers confidential.

Is a real estate broker/agent obligated to tell another broker/agent that there is an accepted offer on the property they are inquiring about?

There is no obligation for a real estate licensee to make this disclosure, but REALTORS® are held to higher standards. Standard of Practice 3-6 states, "REALTORS® shall disclose the existence of an accepted offer to any broker seeking cooperation. (Adopted 5/86)"

REALTOR® Practice Tips: REALTORS® must disclose the existence of accepted offers to brokers seeking cooperation unless the

seller has indicated that this information is confidential per Wis. Stat. § 452.133(1)(d). Any confidentiality directive should be in writing in the listing contract (or an addendum or amendment thereto) or on a copy of an agency disclosure form.

Recent NAR Actions Regarding the Disclosure of Other Offers

The debate over whether the existence of other offers should be disclosed to cooperating agents led to NAR's adoption of a new Standard of Practice 1-15 and new Case Interpretation #1-28, which both went into effect on January 1, 2003.

New Standard of Practice 1-15

The new Standard of Practice 1-15 provides, "REALTORS®, in response to inquiries from buyers or cooperating brokers shall, with the sellers' approval, divulge the existence of offers on the property. (Adopted 1/03)"

New Case Interpretation #1-28: Disclosure of Existence of Offers to Prospective Purchasers

The following summary of [Case #1-28: Disclosure of Existence of Offers to Prospective Purchasers](#) (adopted November 2002) illustrates the proper application of the new Standard of Practice 1-15 to a fact situation. For the full text of the case interpretation, go to <http://www.realtor.org/2003CEAM.nsf>.

In case #1-28, the seller listed her home for sale with the listing broker and the listing contract included the seller's authorization for the broker to disclose the existence of offers to prospective purchasers.

The listing broker received a good offer from Buyer Z. Right after scheduling a time to present the offer to the seller, he received a call from a buyer's broker. His client was interested in making an offer on the sell-


er's property, but price was a bit of a concern. The buyer's broker asked the listing broker if there were other offers on the property, indicating that his buyer-client would likely make a higher offer if there were competing offers on the table. The listing broker told the buyer's broker, "That's confidential information. Please tell your client to make his best offer." The buyer-client did not write an offer. Buyer Z's offer was accepted and later closed.


Several months later, the seller ran into the buyer's broker at a social event. The seller asked the buyer's broker if he thought that the buyer-client would have made an offer if the listing broker hadn't refused to disclose that another offer had been submitted. The buyer's broker said he couldn't know for sure, but that the buyer-client had not been favorably impressed.

The seller filed an ethics complaint against the listing broker alleging violation of Article 1 of the Code of Ethics as interpreted by Standard of Practice 1-15. She noted that she had clearly authorized the listing broker to disclose the existence of pending offers and that his arbitrary refusal to tell the buyer's broker could have caused or contributed to the buyer-client's decision to not write an offer.

The listing broker contended that he had simply been honest to the buyer's broker and his client and that he had not misrepresented the availability of the property. "I'm not required to turn every sale into an auction, am I?" he asked rhetorically. The hearing panel, however, found that the listing broker had violated Article 1 as interpreted by Standard of Practice 1-15. They noted that Standard of Practice 1-15 requires REALTORS®, if they have the seller's approval, to disclose the existence of offers to purchase on listed property when asked by potential buyers or cooperating brokers.

Seller-clients can dictate whether and under what circumstances the broker reveals the existence of submitted offers under § 452.133(2)(c) (brokers must follow orders of the client if they are within the scope of the agency agreement). In addition, Standard of Practice 1-15 creates a new duty for REALTORS® to disclose the existence of other submitted offers under certain circumstances.

 **REALTOR® Practice Tips:** REALTORS® must disclose the existence of other submitted offers if asked and if the seller has authorized the disclosure of this information. When a property is listed, REALTORS® should discuss with sellers whether they want the existence of submitted offers disclosed to buyers and cooperating brokers. If they do, REALTORS® should obtain the seller's written authorization in the listing contract (or an addendum or amendment thereto). The authorization may specify whether the disclosure is authorized only when the broker is asked or whether the broker should volunteer the information.

 **REALTOR® Practice Tips:** Absent a seller's directive ordering or prohibiting the listing broker's disclosure of the existence of submitted offers, REALTORS® still have the discretion to choose whether to disclose the existence of submitted offers per § RL 24.12.

Presentation of Multiple Offers: New Case Interpretations

Two new case interpretations relating to Article 1 of the Code of Ethics, and to Standard of Practice 1-6, which commands REALTORS® to submit offers and counter-offers objectively and as quickly as possible, were recently adopted by NAR. Both interpretations involve scenarios where two or more offers are submit-

ted and one of the offers is written by the listing agent.

**New Case Interpretation #1-29:
Multiple Offers to be Presented
Objectively**

The following summary of Case #1-29: Multiple Offers to be Presented Objectively (adopted November 2002) illustrates a violation of Standard of Practice 1-6. For the full text of the case interpretation, go to <http://www.realtor.org/2003CEAM.nsf>.

Buyer B saw the seller's house on the listing broker's Web site, called the listing broker for information, and the listing broker showed the house to Buyer B three times. At Buyer B's request, the listing broker wrote an offer to purchase for Buyer B and called the seller to schedule an evening appointment to present the offer.

That same day, Broker R introduced his client, Buyer X, to the seller's house. In the afternoon, Broker R submitted Buyer X's offer to purchase the seller's house to the listing broker. That evening, the listing broker presented both of the full price offers to the seller. There seemed to be little difference between them.


The listing broker commented that he had carefully pre-qualified Buyer B and didn't know if Broker R had pre-qualified his client. The listing broker also observed that buyer's brokers may make transactions complicated because they are demanding and cause delays. The seller accepted Buyer B's offer and the deal closed.

Buyer X was upset that his offer was not accepted so he called the seller and asked him why. The seller explained that he had been concerned about Buyer X being able to obtain financing, and about the delays that would be caused by the participation of a buyer's agent.

Buyer X reported the seller's com-

ments to Broker R. Broker R filed an ethics complaint alleging that the listing broker's comments violated Article 1 as interpreted by Standard of Practice 1-6. He claimed that the listing broker had cast Buyer X's offer in an unflattering light, made inaccurate and unfounded statements about buyer agency, and had presented the offer in a subjective and biased manner.

The listing broker tried to justify his comments by noting that he had no personal knowledge of Buyer X's financial status and that it was conceivable that an overzealous buyer's agent could raise obstacles and delay a closing. At the hearing the listing broker admitted that his comments had been essentially speculative. The hearing panel concluded that the listing broker's comments and overall presentation had not been objective, in violation of Standard of Practice 1-6, and found the listing broker in violation of Article 1.

 **REALTOR® Practice Tips:** REALTORS® must be careful to present all offers in an objective manner and confine their remarks to the facts.

**New Case Interpretation #1-30:
Multiple Offers Where Listing
Broker Agrees to Reduce Listing
Broker's Commission**

The following summary of Case #1-30: Multiple Offers Where Listing Broker Agrees to Reduce Listing Broker's Commission (adopted November 2002) illustrates a situation where a listing broker and seller may agree to a commission reduction without it being disclosed to other brokers as a variable commission. For the full text of the case interpretation, go to <http://www.realtor.org/2003CEAM.nsf>.

Buyer B saw the seller's house on the listing broker's Web site, called the listing broker for information, and the listing broker showed the house

to Buyer B three times. At Buyer B's request, the listing broker wrote an offer to purchase for Buyer B and called the seller to schedule an evening appointment to present the offer.

That same day, Broker R introduced his client, Buyer X, to the seller's house. In the afternoon, Broker R submitted Buyer X's offer to purchase the seller's house to the listing broker. That evening, the listing broker presented both of the full price offers to the seller. There seemed to be little difference between them.

The seller asked the listing broker about countering one or both of the offers, but the listing broker was worried about chasing the buyer away by countering a full price offer. The listing broker also reminded the seller that the full price offers triggered the listing broker's entitlement to a commission under the terms of the listing contract. The seller wanted to find a way to increase his sale proceeds, so he agreed to accept the listing broker's offer if the listing broker reduced his commission.

Knowing that he and the seller were free to renegotiate the terms of their agreement, the listing broker agreed to reduce his commission by one percent. The seller accepted Buyer B's offer and the transaction closed.

Buyer X called the seller directly and asked him why his full price offer had been rejected. The seller replied that he had accepted a full price offer because of the one-percent commission reduction.

Buyer X told this to Broker R who filed an ethics complaint against the listing broker alleging that the commission reduction caused the seller to accept the offer produced by the listing broker, that the presentation of the offers was not objective because of the commission reduction, in violation of Article 1 as interpreted by

Standard of Practice 1-6, and that the listing broker's failure to tell Broker R about the variable commission arrangement violated Article 3 as interpreted by Standard of Practice 3-4.

The listing broker insisted that he had said nothing inaccurate, untruthful, or misleading about either of the offers, and that he and the seller were free to renegotiate the terms of their listing contract at any time. He acknowledged that by reducing his commission with respect to the offer he produced, he may well have created a dual or variable rate commission arrangement as described in Standard of Practice 3-4. If that commission arrangement had been part of their agreement when the listing contract was executed or before the offers were submitted, then he would have disclosed the modified commission arrangement as soon as practical. If the accepted offer had fallen through and the seller's property had gone back on the market, then the existence of the variable rate commission arrangement would have had to have been disclosed. The listing broker contended that it was not necessary or feasible to disclose the variable commission because it was negotiated with the seller during the presentation of the offers.

The hearing panel agreed with the listing broker's reasoning and found no violations.

Key Point: REALTORS® who are listing brokers are not required to disclose to other brokers when they have reduced their commissions during the course of presenting multiple offers to sellers. While this type of arrangement would be a variable commission under other circumstances and subject to disclosure per Standard of Practice 3-4, the timing and circumstances relieve the listing broker of the duty to disclose in this particular situation.

Pointers for Presenting and Negotiating Multiple Offers

The Code of Ethics and Arbitration Manual, in Appendix IX to Part Four, contains a good list of guidelines for presenting and negotiating multiple offers, which was the basis for the following list. For the full text of the appendix, go to <http://www.realtor.org/2003CEAM.nsf>.

- The obligation to the client's interests is primary, but REALTORS® must treat all parties honestly.
- The decisions about how offers will be presented, whether counteroffers will be made and ultimately which offer, if any, will be accepted, are made by the seller—not by the listing broker.
- When taking listings, explain to sellers that they might receive more than one offer at the same time, and tell them that there are various ways to respond. For example, some options are to accept the best offer and counter the others as secondary, inform all potential purchasers that other offers are on the table and invite them to make their best offer, counter one offer while putting the others to the side, or use a WB-46 multiple counter proposal. Explain the pros and cons. Explore questions such as whether disclosing the existence of one offer will make a second potential purchaser more likely to sign a full price purchase offer or to find a different property, and whether telling several potential purchasers that each will be given a final opportunity to make their best offer results in spirited competition or an exodus from the negotiation table.
- When entering into buyer agency agreements, explain to buyers what will happen if more than one of your buyer-clients want to purchase the same property.
- Explain the pros and cons of vari-

ous negotiation strategies. For example, making a low offer might result in a bargain buy or it may cause the seller to accept a higher offer, while making a full-price offer might mean that the buyer pays more than the seller's minimum price or it might mean that the buyer's offer is selected as the primary offer.

- Disclose the existence of offers on the property per Standard of Practice 1-15. If a seller directs you to advise buyers about the existence of other offers, fairness dictates that all buyers be told.
- Make reasonable efforts to keep cooperating brokers informed about the status of their offers and counteroffers.
- Apply the Golden Rule and “do unto others ...” Be prompt, ongoing and open when communicating with other brokers and extend fair and honest treatment to all parties.
- “REALTORS® shall submit offers and counter-offers objectively and as quickly as possible.” (Standard of Practice 1-6)

Providing Services to Buyers with Buyer Agency Agreements: Amended Standard of Practice 16-13

Article 16 of the Code of Ethics says that REALTORS® should not interfere with the exclusive brokerage relationships of other REALTORS®. Generally this is easier to do with respect to sellers because there are normally several visible indicators that a broker has a listing contract: MLS listing, yard signs, etc. It is more difficult to know when a buyer is a party to an exclusive representation agreement. NAR, therefore, instituted the requirement that REALTORS® must ask whether a buyer is subject to an exclusive representation agreement in order to facil-

itate meaningful compliance with Article 16.

Standard of Practice 16-13, as revised effective January 1, 2003 (additions underlined), states:

“All dealings concerning property exclusively listed, or with buyer/tenants who are subject to an exclusive agreement shall be carried on with the client’s agent or broker, and not with the client, except with the consent of the client’s agent or broker or except where such dealings are initiated by the client. (Adopted 1/93, Amended 1/98)

“Before providing substantive services (such as writing a purchase offer or presenting a CMA) to prospective purchasers, sellers, tenants or landlords (“prospects”), REALTORS® shall ask prospects whether they are parties to any exclusive representation agreement. REALTORS® shall not knowingly provide substantive services concerning a prospective transaction to prospects who are parties to exclusive representation agreements, except with the consent of the prospects’ exclusive representatives or at the direction of prospects.”

It appears fairly obvious that Wisconsin licensees may not provide significant services to a property owner who is a party to a standard exclusive right-to-sell listing contract—brokers cannot provide substantive marketing or negotiation services to such a seller without the consent of the listing broker or upon the direction of the owner.

Applying the revised standard is not so easy with respect to buyer agency agreements. Almost all Wisconsin buyer agency agreements only provide exclusivity in the sense that the broker who is a party to the buyer agency agreement is the only buyer’s broker that the buyer may work with throughout the term of the contract. The buyer may still work with and

negotiate directly with owners and owner’s agents. The NAR Legal Department, however, has confirmed that Wisconsin WB-36 buyer agency agreements are “exclusive representation agreements” as that term is used in Standard of Practice 16-13.

Under that interpretation, if a REALTOR® is the agent manning an open house or has a friend or relative that is a prospective buyer, the REALTOR® may not write an offer for that buyer prospect without first asking the prospect if he or she is a party to a buyer agency agreement.

Even if the prospect says that he or she has a buyer agency agreement, it is still permissible for the REALTOR® to ask the prospect if he or she would like the REALTOR® to write an offer to purchase.

Legal Hotline Questions & Answers: Providing Services to Buyers with Buyer Agency Agreements

The following Legal Hotline question and answer section illustrates the application of the amended Standard of Practice 16-13 to various fact situations.

A listing agent is sitting at an open house. A buyer walks through the house and wants to write an offer with the listing agent. Does the listing agent have to ask the buyer if he has a buyer’s agent?

Yes. The newly revised Standard of Practice 16-13 requires the listing agent to ask the buyer if he or she is party to a WB-36 Buyer Agency/Tenant Representation Agreement before the listing agent can provide substantive services like writing an offer to purchase.

Can an agent contact a buyer and ask to show buyer properties when the agent knows the buyer has a buyer agency contract with another broker?

Only if the agent has the consent of the buyer or the buyer’s agent. The agent may ask the buyer if the buyer wants the agent to show him or her properties. It may prove helpful to have the buyer’s consent in writing if the buyer is going to proceed without the assistance of his or her buyer’s agent.

Do REALTORS® have to ask every buyer if they have a buyer agency agreement?

No. The question must be asked only if the REALTOR® is about to provide substantive services such as writing an offer to purchase or presenting a CMA. Other substantive services arguably would include setting up and conducting a private showing. Note that Wisconsin real estate licensees who do not belong to the REALTOR® organization do not have to follow this requirement.

A buyer sets up an appointment with the listing agent to see a property. The listing agent has been informed that this buyer is a party to a buyer agency agreement. If the listing agent writes the offer anyway, is this a violation of the Code of Ethics? The buyer approached the listing agent and asked to write the offer with him.

Under the revised Standard of Practice 16-13, it would seem that the listing agent should ask the buyer whether he has a buyer agency agreement to confirm that there is an agreement currently in place and to comply with the literal language of the standard. The buyer already has directed the listing agent to write the offer.

A buyer who is party to a buyer agency agreement called and met with a co-broke agent on property not in the MLS. The buyer stated that he was working with the buyer’s agent, but did not mention the buyer agency agreement. The listing agent said that the buyer doesn’t have to work

with the buyer's agent on this because the property is not in the MLS. Does the co-broke have the obligation to ask if buyer has a buyer agency agreement? How to proceed?

Although the buyer is not compelled to work with the buyer's agent, it is not because the property is not listed in the MLS. If the cooperating broker was a REALTOR®, he would be obligated by Standard of Practice 16-13 to ask the buyer whether he was a party to a buyer agency agreement. If the buyer correctly answered yes, then the cooperating broker could still ask if the buyer wanted the cooperating broker to write the offer for him.

Disclosures to Prospective Listing Contract Clients: Amended Standard of Practice 1-12

Effective Jan. 1, 2003, Standard of Practice 1-12 is revised to state (additions underlined, deletions with strikethrough):

“When entering into listing contracts, REALTORS® must advise sellers/landlords of: 1) the REALTORS®’s ~~general~~ company policies regarding cooperation ~~with~~ and the amount(s) of any compensation that will be offered to subagents, buyer/tenant agents, and/or brokers acting in legally recognized non-agency capacities ...”

Sellers generally assume that the compensation offered to cooperating brokers is adequate to encourage cooperation and a wide market exposure. While the amount of compensation offered is generally left to the listing broker, seller-clients have a direct stake in the resulting levels of cooperation generated. Therefore, NAR reasons, sellers are entitled to know what the listing broker is offering to cooperating brokers. Accordingly, NAR amended

Standard of Practice 1-12 to require listing brokers to make specific disclosures to potential seller-clients about their cooperation policies and the amount of compensation they offer to cooperating brokers.

This amendment dramatically changes the concept long-observed in Wisconsin that a listing broker is not required to disclose his or her compensation policies to sellers or others. NAR has indicated that brokers should disclose their MLS compensation splits, tell the owner if they have policy letter compensation agreements with various brokers, and indicate that the owner may see a copy of the policy letters upon request. Brokers should consider disclosing the compensation offered in their policy letters if it is substantially different than their MLS compensation or if the primary means of offering compensation in the market area is by policy letter.

Legal Hotline Questions & Answers: Disclosures to Prospective Listing Contract Clients

The following Legal Hotline question and answer section illustrates the application of the amended Standard of Practice 1-12 to various fact situations.

Re: Disclosure of compensation splits with cooperating brokers. (1) If a broker does not belong to any MLS, does that broker still need to disclose to his/her seller how he/she will offer compensation splits? (2) Where on the listing agreement does the broker write this split of compensation?

1) Yes. The amendment to Standard of Practice 1-12 requires REALTORS® to disclose their cooperation policies and the compensation amounts offered to cooperating brokers—this is not limited to MLS compensation.

(2) The disclosure does not have to be in the listing contract—it could be a separate memo or an addendum to the listing contract. If it were put in the listing contract itself, it will likely go in Additional Provisions on page 4 of the listing contract because the topic of cooperation policies and compensation is not really addressed anywhere in the form.

In the event a broker takes a listing contract for 10 percent commission and it is signed by seller, does the broker need to inform the seller if the broker is going to pay out only 2.4 percent on a co-broke?

Yes. Standard of Practice 1-12 in the *Code of Ethics* states,

“When entering into listing contracts, REALTORS® must advise sellers/landlords of:

“1) the REALTORS®’s general company policies regarding cooperation with and the amount(s) of any compensation that will be offered to subagents, buyer/tenant agents, and/or brokers acting in legally recognized non-agency capacities ...”

When listing properties, the broker must disclose the company's cooperation policies and the compensation amounts that will be offered to cooperating brokers. Must this disclosure be in writing or can the broker verbally disclose his cooperation policies?

Standard of Practice 1-12 in the *Code of Ethics* does not specify that these disclosures be in writing. It only says that the broker must advise the seller about the broker's cooperation and compensation policies and amounts. Thus, a verbal disclosure might satisfy the standard.

However, Article 9 of the *Code of Ethics* states that REALTORS® should assure that all agreements, whenever possible, should be in writing for the protection of the parties. Similarly, §

RL 24.08 provides that licensees should put all agreements in writing. Providing this information in writing will more effectively protect the listing broker and the client should there be a problem later on.

What is the obligation of a broker to explain the effects of withholding a listing from the MLS?

The listing contract states in lines 84-89 that the broker's marketing efforts may include the use of the MLS and the Internet. A listing broker should explain to the client why there will be no MLS marketing and the impact that limited marketing can have upon reaching as wide an audience of potential buyers as possible and securing the highest purchase price. This should be explained to the client when the listing is taken.

While Standard of Practice 1-12 in the Code of Ethics requires the disclosure of cooperation and compensation, it does not specifically address marketing methods.

NAR Increases Maximum Fine for Ethics Violations to \$5,000

Apparently many local boards and associations are reluctant to suspend or expel a REALTOR® as a form of discipline. Many are concerned that a suspended or expelled REALTOR® may initiate retaliatory legal action. In order to give boards another potential penalty to impose that has some teeth, the maximum fine that may be imposed as a discipline for violation of the Code of Ethics is \$5,000 beginning Jan. 1, 2003.

That means that the possible sanctions that may be imposed by a local board for an ethics violation now include:

- A letter of warning with a copy in the member's file;
- A letter of reprimand with a copy in the member's file;

- Required attendance at ethics courses or seminars;
- An appropriate and reasonable fine not to exceed \$5,000 (amount should relate to the gravity of the offense and objective of the proposed sanction);
- Probation for not less than 30 days nor more than one year;
- Suspension of REALTOR® membership for not less than 30 days nor more than one year, which may include automatic reinstatement privileges, and may include the option of paying assessment of up to \$5,000 in lieu of suspension;
- Expulsion from REALTOR® membership with no reinstatement privilege for a specified period; and
- Suspension or termination of MLS rights and privileges; and
- An administrative processing fee of up to \$500 charged against any respondent found in violation of the *Code of Ethics*.

Article 17: Arbitration Between Listing Brokers

A recommendation that REALTORS® arbitrate with each other under Article 17 when each may have a separate, concurrent exclusive listing contract was not approved at the November 2002 NAR meetings. There is no duty for listing brokers to arbitrate against each other, but they may each have a legitimate claim against the seller. Consequently, the following underlined material was added on the second page of Appendix I to Part 10, "Arbitrable Issues," in the *Code of Ethics and Arbitration Manual*:

"Under the circumstances specified in Standard of Practice 17-4, the cooperating brokers may arbitrate between themselves without naming the listing broker as a party. If this is done, all claims between the parties,

and claims they might otherwise have against the listing broker, are extinguished by the award of the arbitrators. Similarly, Standard of Practice 17-4 also provides for arbitration between brokers in cases where two (or more) brokers each have open listings and each claims to have procured the purchaser. Since the determiner of entitlement to a commission under an open listing is generally production of the purchaser, arbitration between the two (or more) "open" listing brokers resolves their claims against the seller. This open listing scenario is to be distinguished from the situation in which two (or more) listing brokers each have exclusive listings and each claim entitlement to a commission pursuant to their respective listing agreements. Because exclusive listing agreements generally provide for payment of a commission if the listed property is sold—whether through the listing broker's efforts or not—each listing broker could have a legitimate, enforceable right to a commission from their client. Thus, Standard of Practice 17-4 does not obligate listing brokers to arbitrate between themselves when both (or all) have independent claims to commissions based on their respective exclusive listing agreements (Amended 5/02)."

REALTORS® Not Precluded from Filing Complaint with State Real Estate Regulatory Agency

Case Interpretation #17-7 was amended to clarify that while Article 17 requires REALTORS® to arbitrate contractual and specific non-contractual disputes with other REALTORS®, alleged *Code of Ethics* or license law violations do not fall within the arbitration forum. REALTORS® must recognize that they are free to file ethics or license law complaints without fear of retaliation or alleged violation of Article 17.

For full text of the case interpretation, go to <http://www.realtor.org/2003CEAM.nsf>.

Complaints Filed with More than One Local Board

Apparently REALTORS® sometimes file similar or even identical ethics complaints with two or more local boards or associations, sometimes due to uncertainty or other times due to maliciousness. Confusion and misunderstanding can result when the local associations receiving the duplicate complaints do not know the same complaint has been filed with another board.

REALTORS® may be subject to the jurisdiction of more than one association if they hold membership in more than one association or they participate in an MLS without having REALTOR® membership in that particular association (Board of Choice—Universal Access to Services). Ethics complaints can be filed with any local board or association in which the alleged perpetrator is subject to the *Code of Ethics*.

Policy Statement 42 provides in relevant part, “If an ethics complaint or an arbitration request is received and reviewed by an Association’s Grievance Committee, and is dismissed as not warranting a hearing, the respondent shall not be subsequently become subject to the same or substantially similar ethics complaint or arbitration request in the same or another Association.”

This means that if the same complaint is filed with two or more boards or associations, the one that acts first in determining whether or not a hearing will be required is determinative. If the first association says yes to a hearing and the second association to act says no, then a hearing will take place with the first association. If the first association to act says no, and the

second association says yes, no hearing will take place anywhere.

In order to minimize the potential for two or more local boards or associations to unknowingly receive and process the same complaint, Form #E-1 Ethics Complaint in the *Code of Ethics and Arbitration Manual* has been revised to require complainants to indicate whether they have filed or intend to file a similar or related complaint with another association and to require that the complainant identify the other associations and the dates filed. The added language states:

“You may file an ethics complaint in any jurisdiction where a REALTOR® is a member or MLS Participant. Note that the REALTORS® Code of Ethics, Standard of Practice 14-1 provides, in relevant part, ‘REALTORS® shall not be subject to disciplinary proceeding in more than one Board of REALTORS® ... with respect to alleged violations of the Code of Ethics relating to the same transaction or event.’

Have you filed, or do you intend to file, a similar or related complaint with another Association(s) of REALTORS®?

___ Yes ___ No

If so, name of other Association(s) _____ (date(s) filed)”

Clarification of Policy Regarding Ratification of Ethics Decisions by the Board of Directors

Part Four, Section 22(a), Decision of hearing Panel, *Code of Ethics and Arbitration Manual* (<http://www.realtor.org/2003CEAM.nsf>) has also been recently revised. Ethics decisions provided to the board of directors will be the complete and unedited version unless the board or association board of directors adopts procedures where decisions presented to the board will not include the names of the parties.

The Wisconsin Professional Standards System

In November of 1994, the Wisconsin REALTORS Association Professional Standards Task Force reviewed the results of the WRA Membership Survey and concluded that there is a general lack of understanding and education concerning the professional standards process and that the professional standards process was so complex and cumbersome that members shunned away from employing it to resolve their disputes. There were concerns that the fear of retribution, and business or personal relationships led to inconsistency in ethics enforcement and arbitration awards. In some areas, the membership was not large enough to provide impartial hearing panels. Procuring cause was the least understood concept of all.

NAR does not necessarily require each local board or association or each state association to adopt the NAR Manual. As an alternative, local boards and associations and state associations may establish procedures which are certified to NAR as meeting due process requirements and which are consistent with applicable state laws. In keeping with the Task Force’s findings and goals, the Task Force developed procedures and forms for processing both ethics complaints and requests for arbitration in Wisconsin. The Task Force’s professional standards procedures and forms are used as a supplement to NAR’s professional standards, as set forth in the Manual. To the extent that the Wisconsin standards conflict with NAR standards, however, the Wisconsin standards control and are applied in lieu of the Manual.

The Wisconsin professional standards were adopted by the WRA Board of Directors, effective January 1, 1997. The Wisconsin procedures attempt to simplify and streamline the professional standards process, reduce pro-

Excerpt from the *Wisconsin Professional Standards Manual*

“Note: The following manual revises and supplements the National Association of REALTOR®’s Code of Ethics and Arbitration Manual. Those sections of NAR’s manual which are not inconsistent with the provisions of the Wisconsin Professional Standards Manual shall remain in full force and effect.

“Introduction—Professional Standards—Process and Procedures

In its detailed review and analysis of the process and procedures of the professional standards system, the WRA Professional Standards Task Force adopted two goals: (1) remove unnecessary complexity and simplify/streamline the process—in other words, make it ‘user friendly;’ and (2) change the philosophy of the system from one in which the local board/association, or the WRA, is acting as the ‘police force’ to one in which the system is recognized as a ‘service’ to the members and the public. It is extremely important that members and the public view the professional standards system as a means of resolving their differences rather than a complicated maze nearly impossible to navigate or a system where ‘big brother’ acts as the prosecution, judge and jury.

“Included in this Manual are the procedures and forms, as recommended for modification, for processing both ethics complaints and requests for arbitration (changes are highlighted in bold italics). Among the more significant changes are:

- “There is a single Professional Standards Committee. What was previously known as the Grievance Committee would no longer be required as a separate

standing committee. Ethics complaints and requests for arbitration would be initially screened by a Review Panel composed of members of the Professional Standards Committee. This change would allow more flexibility in use of the Committee members as well as providing a greater variety of experience for Committee members.

- “Ethics complaints are no longer required to specify a specific article(s) of the Code of Ethics. Rather, the complainant would simply be required to set forth in writing the facts which he/she believes constitute unethical conduct. The Review Panel will assign, as appropriate, the articles of the Code for consideration by a Hearing Panel if the complaint is forwarded on by the Review Panel for a hearing.
- “Parties to a request for arbitration will be given the opportunity to meet together with a Settlement Officer in an effort to resolve their differences without going through the hearing process (“Settlement Conference”). This change recognizes the needs of the parties as being of primary importance.
- “Ethics complaints from members or from the public, who subsequently refuse or fail to attend a duly noticed hearing, shall be dismissed. The Review Panel will not “step into the shoes” of the Complainant in such cases. It is believed that the individual(s) with the first hand knowledge of the facts are the proper parties to bring a complaint, not the local board/association through its Professional Standards Committee.

- “Ethics complaints, like requests for arbitration, will be permitted to be withdrawn by the parties at any time prior to the hearing. After an Ethics Hearing has been commenced, the complaint may be withdrawn with the consent of the Hearing Panel.
- “Written statements offered at ethics and arbitration hearings from individuals not in attendance at such hearings shall be by affidavit with the signatures of the individuals notarized. This is designed to address the problem concerning the accuracy and validity of such statements.
- “NAR’s ‘Uncontested Hearing Procedures’ for ethics complaints are adopted. These procedures allow, in certain instances, for the Respondent to admit to the facts alleged in the complaint and permit the Hearing Panel to immediately go into Executive Session for purposes of making its decision and recommendation without first conducting an ethics hearing.
- “Arbitration awards will include the findings of fact by the Arbitration Hearing Panel that served as the basis of the arbitration award. While awards made in arbitration hearings cannot be used as precedent in future hearings, it is felt that the parties to an arbitration can receive valuable benefit from the knowledge of why the Arbitration Panel made its decision.”

The remainder of the Wisconsin Professional Standards Manual can be found on the WRA Web site at <http://www.wra.org/Legal/index.asp>?

cedural roadblocks and supply some deadlines and other details not stated the Manual procedures. Since there adoption, many of the provisions or concepts stated in the Wisconsin Manual have been adopted by NAR for the NAR Manual.

An excerpt from the Wisconsin Manual appears on page 10 of this Update.

Professional Standards Tools for REALTORS®

The following professional standards documents are available from NAR.

- The 2003 *Code of Ethics and Standards of Practice of the National Association of REALTORS®* is provided at <http://www.realtor.org/mempolweb.nsf/pages/printable2003Code>.
- The 2003 *Code Of Ethics And Arbitration Manual* is available online at <http://www.realtor.org/2003CEAM.nsf>.
- The *Code of Ethics* in English, Spanish, Chinese, Korean, Vietnamese, and Tagalog have been updated for 2003 and can be found online at <http://realtor.org/mempolweb.nsf/pages/code>.
- A *Chronological Documentation for Processing an Ethics Complaint* is available online at: <http://www.realtor.org/mempolweb.nsf/pages/ethicschronologicaldocumentation>. This 35-page packet of materials features a chronological example of how a local board receives, processes, and resolves an ethics complaint. It includes sample letters, forms, and a comprehensive, detailed written decision. The sample forms and letters may not be applicable in every situation so local administrators should revise the sample forms and letters as reason and circumstance dictate.
- A free mediation brochure is available online at: <http://www.realtor.org/MemPolWeb.nsf/pages/mediationflyer>.

Conclusion

Professional standards revisions are designed to enhance the quality of the services that REALTORS® provide to consumers. The recent changes to the Code of Ethics and Arbitration Manual will help REALTORS® avoid any perceived unfair treatment of customers and clients and give proper deference to existing agency relationships.

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