



CALIFORNIA
ASSOCIATION
OF REALTORS®

New Standard of Practice 10-5 December 4, 2020

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Agenda for Today's Webinar

- Summary of changes to NAR's Professional Standards policies
- FAQs about new policy and its application
- New sanctioning guidelines
- Guidance from NAR on analyzing SOP 10-5 cases
- Hypothetical case discussion
- Q&As



Summary of Changes

- On November 13, the NAR Board of Directors voted to make some significant changes to its professional standards policies. The changes went into effect immediately upon enactment by the Board.
- Specifically, NAR voted to do the following:
 - Add a new Standard of Practice 10-5 to the Code of Ethics stating the following: **“REALTORS® must not use harassing speech, hate speech, epithets, or slurs based on race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity.”**
 - Revise a professional standards policy statement to expand the applicability of the Code of Ethics to all of a REALTOR®’s activities, not just real estate-related activities and transactions involving REALTORS®.
 - Revise the definition of a “public trust” violation to include all forms of discrimination and fraud. Pursuant to NAR policy, “public trust” violations must be reported by the local association to the real estate licensing authority in the state and/or other relevant governmental agencies.



Is it true that the Code of Ethics now applies to everything I do? That seems overly expansive.

- The new Standard of Practice 10-5 to the Code of Ethics required NAR to change its policy to expand Code of Ethics enforcement to cover all of a REALTOR®'s activities.
- However, to be disciplined, a REALTOR® must still have done something to violate a specified duty in the Code of Ethics, either in the Articles of the Code of Ethics or in one of the Standards of Practice.
- The vast majority of Code of Ethics duties are only applicable to the real estate business and real estate transactions. Thus, the Code of Ethics still does not reach into every aspect of a REALTOR®'s personal life.



Why does NAR want to regulate activities outside the real estate business and/or the real estate transaction?

- ▶▶ A REALTOR®'s speech and conduct reflect on the REALTOR® organization, as well as the entire industry, whether said publicly on a business social media profile or privately on a personal one.
- ▶▶ When a REALTOR® pledges to abide by the Code of Ethics, the highest principles and ethics of REALTORS® must be followed in all of their activities and cannot be abandoned in a profession dedicated to protecting the best interests of consumers.
- ▶▶ Put simply, when one REALTOR® engages in discriminatory speech and conduct, those actions demonstrate to consumers that they represent the actions of REALTORS® collectively. The REALTOR® brand is built on ethics and integrity, and discriminatory speech depletes the strength of that brand.




How does Standard of Practice 10-5 relate to Article 10, which deals with discrimination?

- ▶▶ Article 10 provides as follows: *REALTORS® shall not deny equal professional services to any person for reasons of race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity. REALTORS® shall not be parties to any plan or agreement to discriminate against a person or persons on the basis of race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity. REALTORS®, in their real estate employment practices, shall not discriminate against any person or persons on the basis of race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity.*
- ▶▶ Standard of Practice 10-5 directly flows from the requirement to not deny equal professional services or be parties to a plan to discriminate. Specifically, disparaging a particular protected class may indicate members of the class will not be treated equally by the REALTOR®.
- ▶▶ In addition, bias against protected classes revealed through the public posting of hate speech could signal that REALTORS® would not take clients from certain protected classes or not treat them equally in the provision of their services, which would lead to violations of the Fair Housing Act due to overt discrimination or disparate impact.



Does Standard of Practice 10-5 interfere with my First Amendment right to free speech?

- The First Amendment provides that neither the United States Congress nor any state may abridge the freedom of speech of American citizens. With some exceptions, the First Amendment does not prohibit a private organization from restricting the speech of its members, employees, or users.
- NAR, C.A.R., and your local association are private associations that are supported by dues from members, are not exercising any governmental function, and do not have the powers generally available to state agencies such as revoking a real estate license.
- As such, the First Amendment does not preclude NAR, C.A.R., and your local association from imposing this ethical duty as a condition of membership.




Why did NAR decide to make this change right now? Was this really a major problem that needed to be addressed?

- ▶▶ During the social unrest throughout the nation in late spring and summer of 2020, NAR received an unprecedented number of complaints about REALTORS® posting discriminatory speech and conduct online, especially on social media. Local and state associations experienced a similar influx of these complaints.
- ▶▶ A local association of REALTORS® wrote to NAR President Vince Malta requesting that NAR consider the Code of Ethics' applicability to this type of speech and conduct.
- ▶▶ Additionally, the 2019 [Newsday investigation](#) of discrimination in real estate in Long Island, New York shed a light on discrimination that has persisted historically but that many were not in a position to experience or see happening.
- ▶▶ The Code of Ethics has embodied principles of fair housing for decades, and as such, NAR's action to add a hate speech provision to the Code is consistent with the spirit and intent of the Code, as well as the guidance embodied in the Golden Rule.




Will I be found in violation of Article 10 if I share or “like” a social media post that is later found to be discriminatory, even if I personally did not make the discriminatory comment?

- ▶▶ This will ultimately be up to each professional standards hearing panel and will depend on the content of the message and context in which it is “liked” or shared.
- ▶▶ The target of the new Standard of Practice is intended to be those who engage in discriminatory speech rather than those who are reacting to it.
- ▶▶ Nevertheless, keep in mind that you could be found in violation if you make comments that approve of or amplify the discriminatory speech of someone else.




I'm a broker. If my agent makes a statement that is found to be in violation of Standard of Practice 10-5, will I also be found in violation?

- ▶▶ In October, the C.A.R. Board of Directors passed a motion that provides guidance to professional standards hearing panels regarding when it is appropriate to discipline a broker or Designated REALTOR® (“DR”) based on the actions of their salesperson.
- ▶▶ The guidance states that A DR and/or broker **can** be found in violation of the Code of Ethics if: (i) their salesperson’s violation stems from the DR’s and/or broker’s failure to establish a system to adequately supervise agents and to monitor salespersons’ compliance with the Code of Ethics; or (ii) a salesperson’s potential violation of the Code of Ethics is brought to the attention of the broker and/or DR, but the broker and/or DR does not take reasonable steps to remediate the violation. A DR and/or broker **should not** be found in violation of the Code of Ethics if: (1) the salesperson’s actions were contrary to the broker’s and/or DR’s established policies; and (2) the salesperson’s actions could not have been prevented by the broker’s and/or DR’s reasonable supervision of the agent.




Can Standard of Practice 10-5 be applied retroactively?

- No. A member can only be found in violation for discriminatory speech that has taken place after the effective date of the new policy which is November 13, 2020.
- According to NAR, if discriminatory speech was posted online prior to November 13, 2020 but remains online after that date, it will not be actionable because the violation would have occurred when the original speech was posted.
 - However, if the speech is reposted or shared after November 13, it could then be actionable.



The new Standard of Practice prohibits “harassing speech, hate speech, epithets, or slurs.” How are those terms defined? Are hearing panels going to interpret this Standard of Practice consistently?

- NAR’s enactment of the new policy included the adoption of a [**new Appendix XII to Part Four of the Code of Ethics and Arbitration Manual**](#) which lays out, with great specificity, the definitions of the terms used within Standards of Practice 10-5.
- The Appendix is designed to make sure that consistent application of Standard of Practice 10-5 can be achieved throughout the country. Moving forward, NAR's Professional Standards Committee will continue working to develop case interpretations to assist members and professional standards enforcement volunteers in understanding the Standard of Practice 10-5’s applicability.



Why doesn't Standard of Practice 10-5 cover all of the protected classes in California?

- The Code of Ethics is a national policy, and most states do not include all the protected classes California does (whereas some states have other categories that California does not).
- Keep in mind that if a protected class is not specifically mentioned in Standard of Practice 10-5, it will not be covered by the new policy.
- Of course, REALTORS® should still be respectful of all persons, including the protected classes under [California's Fair Housing Laws](#), even if a particular instance of discriminatory speech is not actionable under the NAR Code of Ethics.




Does Standard of Practice 10-5 restrict my ability to freely express my political and religious opinions?

- ▶▶ NAR has clarified that to violate Article 10 as interpreted by Standard of Practice 10-5, a REALTOR® must say something that is truly offensive and intimidating to a person because of their membership in a protected class.
- ▶▶ Saying something that is merely controversial or “politically incorrect” is not a violation of the Code of Ethics unless it includes harassing speech, hate speech, slurs, or epithets that target a protected class.
- ▶▶ Political and religious opinions that are expressed by members in a respectful manner will not be actionable under the Code of Ethics.



Can't a competitor just make up a story and file an ethics complaint against me as a form of retaliation?

- ▶▶ As with any alleged Code violation, ethics complaints alleging a violation of Article 10 as interpreted by Standard of Practice 10-5 will be processed consistent with C.A.R.'s professional standards enforcement process, which affords all parties a full and fair opportunity to present their case, defend themselves, provide evidence and witnesses, and be represented by counsel.
- ▶▶ A burden of proof must be met by the complainant to find a violation of the Code of Ethics.
- ▶▶ The complainant must show a violation with "clear and convincing evidence."



Do REALTORS® have a duty to remove discriminatory statements made by others on electronic media that the REALTOR® controls?

- According to Standard of Practice 15-3: “The obligation to refrain from making false or misleading statements about their businesses, and 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.”
- It seems like the same principle should apply for discriminatory speech covered by SOP 10-5, but NAR has not yet weighed in on this question.
- For now, it is best to assume that SOP 15-3 does not apply to Article 10 cases unless NAR determines otherwise.
- However, it is certainly “best practices” for REALTORS® to remove discriminatory speech posted by others on their social media accounts when they become aware of it.



Sanctioning Guidelines: What did NAR add?

- “Cases in which there is reason to believe that violations of the public trust, **including demonstrated misappropriation of client or customer funds or property, discrimination against the protected classes under the Code of Ethics, or fraud** have occurred should be considered particularly egregious violations of the Code of Ethics when determining appropriate discipline. Associations are encouraged to critically examine these types of cases and recommend discipline consistent with the seriousness of these violations, their harm to consumers, and to the reputation of REALTORS® as committed to the highest level of professionalism.”
- New Example C: “In social media discussions, REALTOR® C posted several discriminatory and offensive comments which were deemed to be in violation of Article 10 as they discriminated against individuals on the basis of race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity. In determining appropriate discipline, the Hearing Panel considered REALTOR® C’s comments as hate speech and discrimination in violation of Article 10 and had reason to believe that a violation of the public trust occurred. Based on the offensiveness of REALTOR® C’s comments and his total disregard for the Code of Ethics’ obligation to not be a party to any plan to discriminate against members of the protected classes of Article 10, the Hearing Panel recommended a \$5,000 fine and mandatory completion of implicit bias training.”



Sanctioning Guidelines: What did NAR add?

- “Hearing Panels are cautioned of the due process concerns of considering a Respondent’s history of Code violations, as considering too long of a history involving different types of violations can unreasonably affect the severity of the discipline. Typically, Associations might look back a minimum of three years, however, if there is consistency in the types of violations or if the violations are of the public trust, considering a longer history of violations could be appropriate in crafting meaningful discipline aimed at stopping the behavior.”
- Additional Factor added when considered appropriate discipline: “Was the violation one of the public trust, including demonstrated misappropriation of client or customer funds or property, discrimination against the protected classes under the Code of Ethics, or fraud?”



Sanctioning Guidelines: What did NAR add?

- New Guidelines for the most serious violations (Tier III):
 - First Time violations:
 - violation considered very serious, or
 - **the violation was of Article 10 as interpreted by its Standards of Practice, or of Article 3 as interpreted by Standard of Practice 3-11, or**
 - substantial harm or injury caused to others, or
 - violation resulted from knowing disregard of the Code's obligations
 - Possible discipline:
 - letter of reprimand
 - fine of \$10,000 or less
 - attendance at relevant education session(s)
 - suspension for ninety (90) days or less
 - any combination of the above
 - Termination of membership for up to three (3) years



Sanctioning Guidelines: What did NAR add?

- New Guidelines for the most serious violations (Tier III):
 - Repeat violations:
 - violation considered very serious, or
 - **the violation was of Article 10 as interpreted by its Standards of Practice, or of Article 3 as interpreted by Standard of Practice 3-11, or**
 - substantial harm or injury caused to others, or
 - violation resulted from knowing disregard for the Code's obligations
 - Possible discipline:
 - attendance at relevant education session(s) or course
 - fine of \$15,000 or less
 - suspension for six (6) months or less
 - any combination of the above
 - Termination of membership for up to three (3) years



Analysis in SOP 10-5 Cases

There is a 2-part test:

- Did the respondent engage in harassing speech, hate speech, epithets, or slurs?
- Was the discriminatory speech based on a protected class, i.e. race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity?
- For there to be a violation, the answer to **both** questions must be “yes.”



Definitions

- ▶▶ NAR's Code of Conduct and Anti-Harassment Policy defines "harassment" and sexual harassment."
 - Harassment includes inappropriate conduct, comment, display, action, or gesture based on another person's sex, color, race, religion, national origin, age, disability, sexual orientation, gender identity, and any other protected characteristic.
 - Examples of harassment include, but are not limited to: epithets, slurs or negative stereotyping; threatening, intimidating or hostile acts; denigrating jokes; and the display or circulation of written or graphic material that denigrates or shows hostility toward an individual or group based on a protected characteristic.
 - "Sexual Harassment" includes not only physical acts but also includes verbal and non-verbal/nonphysical acts.
 - "Sexual harassment can be:
 - ▶ Verbal: Sexual innuendoes, suggestive comments, jokes of a sexual nature, sexual propositions, or threats.
 - ▶ Non-Verbal: Sexually suggestive objects or pictures, graphic commentaries, suggestive or insulting sounds, leering, whistling, or obscene gestures. ...



Definitions

From Webster's dictionary:

- ▶▶ **Hate Speech:** "speech that is **intended** to insult, offend, or intimidate a person because of some trait (as race, religion, sexual orientation, national origin, or disability)."
- ▶▶ **Epithet:** "**1a:** a characterizing word or phrase accompanying or occurring in place of the name of a person or thing; **b:** a disparaging or abusive word or phrase"
- ▶▶ **Slur:** "**1a:** an insulting or disparaging remark or innuendo: ASPERSION; **b:** a shaming or degrading effect: STAIN, STIGMA"



Definitions

From Webster's dictionary:

- ▶▶ **Race:** "any one of the groups that humans are often divided into based on physical traits regarded as common among people of shared ancestry"
- ▶▶ **Color:** "skin pigmentation other than and especially darker than what is considered characteristic of people typically defined as white"
- ▶▶ **Religion:** "a personal set or institutionalized system of religious attitudes, beliefs, and practices"
- ▶▶ **Sex:** "either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures"
- ▶▶ **Handicap:** "a disadvantage that makes achievement unusually difficult; a physical disability"



Definitions

From Webster's Dictionary:

- **Sexual Orientation:** "a person's identity in relation to the gender or genders to which they are sexually attracted; the fact of being heterosexual, homosexual, etc."
- **Gender Identity:** "a person's internal sense of being male, female, some combination of male and female, or neither male nor female; and/or the totality of physical and behavioral traits that are designated by a culture as masculine or feminine"

From the Fair Housing Act:

- ▶▶ **Familial Status:** "covers families with children under the age of 18, pregnant persons, and any person in the process of securing legal custody of a minor child (including adoptive or foster parents)."
- ▶▶ **National Origin:** "includes birthplace, ethnicity, ancestry, culture, and language. National origin includes a region within a country or a region that spans multiple countries."



Case Example #1.a

Someone posts an article on Facebook which discusses how a female state governor is handling the COVID pandemic. A REALTOR® posts a comment in reply to the article stating: “Fake news, and she’s a piece of s***.”



Case Example #1.b

Same as 1.a, but the REALTOR® adds the following comment: “This is what happens when you elect a woman to lead a state. They all make decisions based on their emotions, not based on rationality.”



Case Example #1.c

Same as 1.b, but now assume the person who posted the initial article is a REALTOR®. The REALTOR® who posted the article notices that the other REALTOR® posted the comments described in 1.a and 1.b on his social media page, but does not take any action to respond or delete the other REALTOR®'s comments.



Case Example #1.d

Same as 1.b. Another REALTOR® sees the comment posted by the first REALTOR® and clicks the “like” button beneath the comment.



Case Example #1.e

Same as 1.d, except the second REALTOR® “shares” the comment written by the first REALTOR® and adds the following comment: “Ain’t that the truth!”



Case Example #2

A REALTOR[®] puts a bumper sticker on their vehicle which states: “Vote for [Candidate A]!” Candidate A has made statements in the past that some people consider racist or sexist. Someone sees the bumper sticker on the REALTOR[®]'s vehicle and files a complaint alleging the REALTOR[®] has violated Article 10 because the REALTOR[®] endorsed a candidate that has engaged in hate speech.



Case Example #3.a

On Facebook, someone posts a photo of a same-sex wedding with the caption: “Congratulations to the happy couple!” A REALTOR® posts a comment below the photo which states: “I believe marriage should only be between a man and a woman.”



Case Example #3.b

Same as 3.a, except the REALTOR® adds the following comment: “Gays and lesbians are guilty of murder, according to the scriptures. All of you will burn in hell for participating in this abomination.”



Case Example #4.a

At a REALTOR® conference, a REALTOR® is introducing a speaker and says: “He’s been a member of C.A.R. for 18 years.” The speaker, when stepping up to the microphone, says: “Thank you, but I want to let you know that my preferred pronoun is ‘she.’”



Case Example #4.b

Same as 4.a, except every subsequent time the REALTOR® interacts with the speaker, the REALTOR® continues to refer to the speaker using masculine pronouns and makes sure to emphasize those pronouns to everyone within earshot.



Case Example #5

- A REALTOR® posts the following comment on Twitter: “Defund the police! All cops are bad!”
- The REALTOR®’s next tweet says: “If you see a police officer, you should shoot them.”
- In response, another REALTOR® tweets: “You’re an idiot and your tweet is dangerous. If I ran into you, I would punch you in the face.”
- Another REALTOR® tweets: “It’s not the cops who are the problem, it’s protesters and looters. As the saying goes: when the looting starts, that’s when the shooting starts.”
- In response to the previous tweet, another REALTOR® tweets: “Time to send them all back to Africa. We don’t want them here.”



NAR Webinar Series

- NAR will host monthly trainings to provide guidance on the changes to the Code of Ethics that were approved by the NAR Board of Directors on November 13, 2020, and to provide an opportunity to ask questions of NAR's policy experts.
- The first webinar already took place Nov. 30 – you can find the recording here:
<https://www.nar.realtor/events/breaking-down-the-changes-to-the-code>
- Register here for 5 more monthly webinars:
https://realtors.zoom.us/webinar/register/WN_4XTff_YLSW_K_MTTxB3CLAA



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Questions?