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CALIFORNIA ASSOCIATION OF REALTORS®

# **IMPLEMENTATION GUIDELINES DISCIPLINARY 2007**

**Prepared by the  
CALIFORNIA ASSOCIATION OF REALTORS®  
Corporate Legal Department  
525 South Virgil Avenue  
Los Angeles, CA 90020**

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## **INTRODUCTION**

The following guidelines are offered to help clarify and aid in the implementation of the *California Code of Ethics and Arbitration Manual* (the "*Manual*"). They are not intended to be a substitute for the *Manual* and should not be taken as such. They are to assist in specific circumstances and to provide rationale for the *Manual* provisions. To the extent these guidelines conflict with the provisions of the *Manual*, the *Manual* shall control.

### **A. BASIS FOR DISCIPLINARY ACTION**

#### **1. Association's Obligation to Enforce the Code of Ethics**

As part of its charter agreement with the National Association of REALTORS® ("N.A.R."), a Member Association agrees and is obligated to enforce the N.A.R. Code of Ethics. Local Associations, in enforcing the Code, must accept and process complaints regarding the Code in an objective and fair manner and according to the rules and procedures used by the Association for such complaints.

#### **2. Duties of Membership**

Association membership is voluntary. If a real estate licensee elects to join a local Association, his or her membership duties include the obligations to:

- abide by the Code of Ethics;
- abide by the Association's bylaws; and
- submit to arbitration with other members and clients and abide by the arbitration award.

#### **3. Power to Take Disciplinary Action Against an Association Member**

Disciplinary action can be taken against a member for the following:

- a violation of any of the above membership duties;
- a final judgment and conviction of a felony or a crime of moral turpitude;
- a violation and final conviction of California real estate law or the Real Estate Commissioner's regulations.
- for any action brought for conviction of a felony or real estate law, the appeal period must elapse before disciplinary case is processed.

The Association also has the power to take disciplinary action against the designated REALTOR® for the unethical conduct of real estate licensees affiliated with the designated REALTOR®'s office, whether or not the licensees are members of the Association. The rationale is that the designated REALTOR® is ultimately accountable to the Association for the membership obligations of the office.

Sometimes a complaint is filed against a member who was not a member of the Association at the time the facts giving rise to the complaint occurred. If the named respondent was not a REALTOR® member at that time, the Association may not process the complaint, as the respondent had no duty to abide by the membership obligations of REALTOR® members, such as the Code of Ethics or bylaws of the Association. If, however, the respondent was a REALTOR® member of another Association, the current Association

may hold the hearing and impose discipline. The basis for this is that a REALTOR® must abide by the Code of Ethics regardless of which Association he or she maintains membership.

#### **4. Duties of MLS Participants and Subscribers**

By becoming and remaining a participant or subscriber in the MLS, a real estate licensee agrees to abide by the MLS rules and regulations. This is the MLS equivalent of an Association membership duty and is the basis for discipline of participants and subscribers.

#### **5. Citations**

The MLS Committee, subject to approval of the Association's Board of Directors, may implement a schedule of fines or "citations" for MLS rules violations. Under a citation system, the Association or MLS staff issues citations for those violations brought to the attention of the Association or MLS that have been approved for citation under the system. Usually citation systems are developed for mechanical and routine MLS rules violations that staff can easily determine, such as failure to submit a listing or failure to change the status of a listing.

Any MLS participant or subscriber receiving a citation has the option to (1) pay the fine within a certain time frame; or (2) request a hearing to contest the citation. If the participant or subscriber fails to pay the fine by the time frame specified and does not otherwise request a hearing, the Association or MLS may suspend participation privileges for nonpayment as long as the original citation notified them that they would be suspended for nonpayment.

If the participant or subscriber requests a hearing to contest the citation, the citation is usually referred to the Grievance Committee who will then act as the complainant at the hearing. As the complainant, the Grievance Committee can conduct further investigation and gather all relevant evidence in order to present the citation at the hearing. However, the "evidence" is usually simply a written statement from the Association or MLS staff who issued the citation that indicates the specific facts that prompted the citation. For example, if the citation was for late reporting of sales, the statement would indicate the date the information was received (or inputted into the computer) and the date of close of escrow and a copy of the citation issued.

With respect to procedures, the procedure used for MLS citation hearings is the same as for any other complaint. For example, the parties have the right to challenge any potential hearing Panel members and the parties have the right to request a review of any decision reached.

It should be noted that even when a citation is issued and a hearing subsequently requested, the Grievance Committee is not obligated to proceed as the complainant. For example, if upon further investigation the Grievance Committee determines that the citation was issued in error or the evidence indicates there was no infraction of the MLS rules, the Grievance Committee is not bound to proceed with the complaint and may dismiss the citation.

Once a hearing occurs, the hearing Panel will decide the discipline if it makes a finding of violation. The hearing Panel's recommended discipline should not exceed that of the fine indicated in the citation. If a violation is found, the record of the violation goes into the person's file and is used for future consideration of discipline.

The overall purpose of a citation system is twofold. First, a citation system helps create better compliance with the MLS rules. Second, it provides an expeditious and convenient way for participants and subscribers who admit the infraction to pay a fine rather than being exposed to a full hearing. The purpose of a citation system IS NOT to replace the hearing process. The participants and subscribers must still be provided the right to a full hearing to assure they have been given due process.

As a final note, sometimes Associations and MLSs believe they have to create a separate process and procedures for citation hearings. However, introducing new and separate procedures is unnecessary and can further complicate the hearing process. Therefore, in most situations, Associations are advised to process citations hearings under the same procedures as those used for other disciplinary complaints.

## **6. Power to Take Disciplinary Action Against an MLS Participant or Subscriber**

Disciplinary action can be taken against an MLS participant or subscriber for the following:

- a violation of any MLS rule;
- a final judgment and conviction of a felony or a crime of moral turpitude (see glossary for definition);
- a violation and final conviction of California real estate law or the Real Estate Commissioner's regulations.

The Association also has the power to take disciplinary action against the MLS participant for the violation of MLS rules by real estate licensees affiliated with the MLS Participant's office, whether or not the licensees are subscribers in the MLS. The rationale is that the MLS participant is ultimately accountable to the Association for the MLS obligations of the office.

Sometimes a complaint is filed against a real estate licensee who was not a participant or subscriber in the MLS at the time the facts giving rise to the complaint occurred. If the named respondent was not a participant or subscriber, the Association may not process the complaint, as the respondent had no duty to abide by the MLS rules and regulations until he or she became a participant or subscriber.

## **7. Distinction Between a Disciplinary Complaint and Arbitration**

A disciplinary complaint alleges that a member or MLS participant or subscriber has violated one or more of their membership or MLS obligations under the Code of Ethics, Association bylaws, or MLS rules. If such allegations are true, the response to the violation by the Association is imposing discipline. Only such discipline as provided for in the *California Code of Ethics and Arbitration Manual* may be recommended by a hearing Panel and imposed by the Board of Directors. For example, the Association cannot revoke a real estate license or award damages in response to a disciplinary complaint. Disciplinary complaints are accepted by the Association and referred to the Grievance Committee for review.

In contrast to disciplinary complaints, arbitration is a method to resolve monetary disputes. Arbitration is an alternative to litigation and the arbitration hearing Panel may award money to one more of the parties. An arbitration hearing does not, however, impose discipline. Complaints requesting only arbitration are not processed through the Grievance Committee.

However, in a combined disciplinary and arbitration complaint, the disciplinary portion should be processed through the Grievance Committee. If the Grievance Committee recommends that the matter be forwarded for a hearing, it should be held in abeyance pending the outcome of the arbitration portion of the complaint. In such cases, the arbitration should be held first to avoid prejudice to the arbitration by reason of a finding of a violation of a membership duty or MLS rule. The disciplinary hearing is held after the arbitration has been completed and must be before a different hearing Panel.

Care should be taken not to give legal advice, however, explanation should be provided to any complainant as to the scope and limitation of the disciplinary and arbitration processes at the Association as follows:

- a. the Association does not have legal authority to suspend or terminate a real estate license;

- b. the Association does not have legal authority to consider or decide allegations involving a violation of the state real estate license laws or any other alleged violation of law unless a court or the Department of Real Estate (DRE) has made a final ruling that the law has been violated;
- c. the Association can only process arbitrations of real estate related monetary disputes involving members of the Association or MLS or between members of the Association and their clients provided the client agrees to be bound by the arbitration award.

## **8. Joint Ethics and MLS Complaints**

A hearing Panel may hear complaints alleging violations of both a duty of membership and an MLS rule violation by a respondent arising out of the same set of facts and circumstances. In such a case, however, the hearing Panel is limited to recommending the maximum of any one discipline per hearing, not per allegation. For example, the hearing Panel cannot impose a \$5,000 fine for the Code of Ethics violation and a \$5,000 fine for the MLS violation, but may only impose \$5,000 total fine for all violations. The hearing Panel could impose a \$2,500 fine for the Code of Ethics violation and a \$2,500 fine for the MLS violation for a total of \$5,000.

### **B. INITIATING THE COMPLAINT**

#### **1. Filing a Disciplinary Complaint**

Any person, whether or not a member, participant or subscriber, may file a complaint against a member or a participant or subscriber alleging a violation of a membership or MLS duty. The complaint must be in writing, signed by the complainant and state the facts upon which the complaint is based. A complaint must be filed within one hundred and eighty (180) days after the facts constituting the wrongful conduct could have been known in the exercise of reasonable diligence.

The Association has neither jurisdiction nor authority to process many types of complaints. As such, the Association Executive and the Grievance Committee should only accept those complaints that fall within the authority and jurisdiction of the Association. For example, if the respondent was not a member or a participant or subscriber at the time the facts and circumstances giving rise to the complaint occurred, the Association may not have jurisdiction to process the complaint.

If the Association receives a telephone complaint, the Association Executive should explain the need for a written complaint in order for the Association to take any formal action in the matter. The Association Executive should also forward a complaint form and a copy of the Code of Ethics and Standards of Practice and/or the MLS rules to the individual if the individual wishes to proceed with a written complaint.

Sometimes, a letter or anonymous note is sent to the Association alleging violations and requesting the Association to take action. If possible, the Association Executive should attempt to contact the person who sent the letter and request that a formal written complaint be filed by that person. However, if the person is unwilling to do so or the Association Executive cannot determine who sent the letter, the letter may be referred in its original form to the Subcommittee of the Grievance Committee, which has been formed for that purpose, for consideration. The Subcommittee shall review and may investigate the complaint and 1) dismiss the complaint as unworthy of further consideration; 2) notify the respondent of the complaint and give an opportunity to correct; or 3) refer the complaint to the Association Executive Committee for hearing. If the Subcommittee, on behalf of the Grievance Committee, refers the matter for hearing, the Grievance Committee shall be the complainant and one of the members of the Subcommittee shall represent the Grievance Committee at the hearing.

In reviewing a complaint filed with the Association, the Association Executive and Grievance Committee should make sure that the complaint contains a sufficiently detailed written statement of the facts which also shows how those facts support the alleged violations. This statement is referred to in the complaint form as "Exhibit 1." Frequently, complainants fail to include sufficient detail for the named respondents to fully understand what conduct they are being charged with that allegedly violated their membership or MLS duties.

## 2. Parallel Proceedings

Sometimes Association disciplinary complaints are filed at the same time or follow the filing of a complaint with the DRE or the initiation of a lawsuit concerning the same matter.

From a practical standpoint, waiting for civil litigation or DRE proceedings to be resolved may take several years. Therefore, the Association may desire to go forward with the case despite the other proceeding. However, there are situations where the Association may also wish to hold the processing of a case in abeyance pending the outcome of the proceeding. In general, the decision to hold the matter in abeyance or proceed will depend on the type of parallel proceeding.

First, if a criminal investigation or trial is pending based on the same facts and circumstances as the disciplinary complaint, the disciplinary complaint should be held in abeyance until the outcome of the criminal proceeding. Also, if the sole basis of the disciplinary complaint is an alleged criminal law violation, the Association cannot proceed with the complaint until a final court judgment finds that such a violation did in fact occur.

Second, if a civil litigation or any proceeding before the DRE or any other state or federal regulatory or administrative agency arising out of the same facts and circumstances is pending, the association may process the complaint and proceed to hearing or it may be held in abeyance. To decide whether to proceed, Association or C.A.R. legal counsel should be consulted and the following factors:

- a. **SIMILARITY:** The degree of similarity between the issues, facts and circumstances giving rise to the pending litigation, regulatory or administrative proceeding and the issues, facts and circumstances underlying the disciplinary complaint. The more similar, the more consideration is given to hold the matter in abeyance.
- b. **UNNECESSARY WORK:** The degree to which resolution of the civil litigation or regulatory or administrative proceeding may make consideration of the complaint unnecessary. For example, a DRE proceeding which results in a license revocation makes the hearing unnecessary.
- c. **DELAY:** The degree to which pending civil litigation or regulatory or administrative proceeding would delay prompt disposition of the complaint. The more delay, the more likely the matter should be heard.
- d. **IMPACT:** The nature of the alleged violation and the extent to which it impacts on cooperation with other members or MLS participants and subscribers. If the alleged activity would place the Association or its members or the MLS or its participants and subscribers in legal jeopardy, the matter should be heard.

Generally, a complaint will not be held in abeyance without a determination that processing the case would have an unfair advantage or impact on the civil litigation or governmental proceeding.

In cases where a decision is made to hold the matter in abeyance, the association should still accept the complaint as filed. Only the processing of the matter will be held in abeyance. This is to insure that after the conclusion of the parallel proceeding if the person filing the complaint still wishes to proceed with the

complaint at the association, he or she will be able to do so without being considered as not having filed the complaint timely.

### **3. Designated REALTOR® and MLS Participant as Named Party**

A designated REALTOR® does not have to be named as a complainant or respondent in a complaint. However, where a person has a complaint against a real estate licensee who is not a designated REALTOR®, that party, or the Grievance Committee when reviewing the complaint, can also name the designated REALTOR® as a respondent. If the Grievance Committee decides to add the designated REALTOR® as a named respondent, it must do so with the approval of the person filing the complaint. If the person does not agree, the Grievance Committee must decide whether to become a co-complainant in the matter.

In any event, even if a designated REALTOR® is not formally named as a respondent in the complaint, the designated REALTOR® is still given notice of the complaint and all subsequent matters regarding the complaint, including the hearing date and any final action taken by the Board of Directors. Furthermore, the designated REALTOR® has the right to attend any hearing or review of the matter..

A designated REALTOR® may not be disciplined for acts of real estate licensees that occurred before that licensee was affiliated with the designated REALTOR®. In these cases, the designated REALTOR® at the time the acts occurred should be named if discipline is sought against the designated REALTOR®. However, where the real estate licensee changed offices, the Association should still notify the licensee's current designated REALTOR® of any pending complaints and discipline imposed upon the licensee. To avoid any problems, the Association should adopt a uniform policy to do this and not make the decision on a case by case basis.

Like a designated REALTOR®, the MLS participant for a subscriber does not have to be named as a complainant or respondent in a MLS rules violation complaint. However, where a person has a MLS rules violation complaint against a real estate licensee who is not the MLS participant, that person, or the Grievance Committee when reviewing the complaint, can also name the MLS participant as a respondent. If the Grievance Committee decides to add the MLS participant as a named respondent, it must do so with the approval of the person filing the complaint. If the person does not agree, the Grievance Committee must decide whether to become a co-complainant in the matter.

In any event, even if a MLS participant is not formally named as a respondent in the complaint, he or she is still given notice of the complaint and all subsequent matters regarding the complaint, including the hearing date and any final action taken by the Board of Directors. Furthermore, the MLS participant has the right to attend any hearing or review of the matter at the association.

A MLS participant may not be disciplined for acts of real estate licensees that occurred before that licensee was affiliated with the MLS participant. In these cases, the MLS participant at the time the acts occurred should be named if discipline is sought against the MLS participant. However, where the real estate licensee changed offices, the Association should still notify the licensee's current MLS participant of any pending complaints and discipline imposed upon the licensee. To avoid any problems, the Association should adopt a uniform policy to do this and not make the decision on a case by case basis.

### **4. Confidentiality of Proceedings**

The Association, the Grievance Committee, hearing Panel members and the parties all have a duty to maintain the confidentiality of the proceedings and any resulting decisions. This duty of confidentiality also applies in situations where a party attempts to discuss the results of the hearing with a Panel member. However, there are some exceptions to this duty. They are:

- The Grievance Committee may engage in discussions regarding the matter so that they may perform their functions and preliminary review;

- The Association may publish that a member has been suspended or expelled from the Association, or that an MLS participant or subscriber has been suspended or expelled from the MLS;
- The Association may publish the names of ethics violators if the Association has adopted a policy to publish their names pursuant to procedures acceptable by N.A.R. policy;
- Disclosure of the proceedings, including the allegations, findings and decisions, may occur where disclosure is required by law (i.e. subpoena, deposition, testifying in court, etc.);
- The respondent in a disciplinary hearing may disclose the results in order to vindicate his or her professional reputation;
- Any party to a disciplinary or arbitration hearing may disclose the results in court where there is a civil case involving the same set of facts and circumstances.

If a Grievance Committee member, hearing Panel member, or party violates the duty of confidentiality, he or she may be disciplined by the Association for violation of the Code of Ethics and the rules and procedures of the *Manual*.

It is improper for a party to attempt to contact a hearing Panel member and influence him or her outside the hearing. If a Panel member is drawn into a conversation with a party prior to the hearing or during a break, he or she must disclose the facts of the conversation to all parties and the hearing Panel prior to the hearing going forward. All parties are then given the opportunity to respond to the incident by either raising additional arguments at the hearing or, in extreme cases, requesting disqualification of the Panel member.

## **5. Qualification for Panel**

A person shall automatically be disqualified from serving on a hearing Panel in any case in which he or she is:

- a party;
- related by blood or marriage (to the fourth degree) to a party;
- an employer, employee, partner or other business associate of a party.

In addition to these basic disqualification rules, several other qualification rules apply. For example, if the person will be a witness in the proceeding, the person should not serve as a hearing Panel member. Also, only one person connected with any firm, business, partnership or corporation may serve on the same hearing Panel. With respect to this requirement, franchises are generally independently owned and operated and not considered "one" firm, even though the names are the same. However, to avoid the appearance of impropriety, C.A.R. recommends that the association should attempt to avoid appointing more than one member of "same name" franchisees to any hearing Panel and should not appoint a hearing Panel member who is affiliated with a same name franchise as one or more of the parties.

When putting together the list of potential Panel members to send to the parties, the Association Executive should eliminate from the list the names of those members who are automatically disqualified.

Before hearing a matter, the members of the Grievance Committee, hearing Panel and Directors must certify that there is no reason they cannot hear the case. This is an important element of due process and each person should honestly assess his or her ability to sit on a particular case.

## 6. The Grievance Committee and Professional Standards Committee

The Grievance and Professional Standards Committees are two unique entities with separate and distinct functions. The Grievance Committee's function is to:

- review the complaint to insure the proper articles and sections are cited based on the alleged facts;
- screen complaints in order to prevent abuse and harassment through frivolous or unwarranted complaints filed for harassment purposes.

The Grievance Committee initially considers allegations of unethical conduct or violations of the MLS rules. The Grievance Committee does not determine guilt or innocence.

A Subcommittee of the Grievance Committee may be established to review anonymous complaints. Members of the Subcommittee are appointed by the Grievance Chair, for a one-year term. Members of the Subcommittee must sign an agreement not to file any anonymous complaints for the year they are on the Subcommittee. (See Role of The Grievance Committee for details). As a general rule, Associations should appoint Grievance Committee or Professional Standards Committee members for three-year terms on a staggered basis to ensure continuity of experience and stability of the committee. In selecting members of the Grievance or Professional Standards Committees, the president should consider the following recommended criteria:

- number of years as a REALTOR®;
- number of years in the real estate business;
- primary and secondary fields of real estate endeavor/expertise;
- participation in post-licensing real estate education;
- training in the Code of Ethics;
- position in firm (principal, non-principal);
- size of firm;
- common sense;
- open-mindedness;
- receptive to instruction/training;
- other relevant professional or procedural training.

The Committee should have balanced representation of REALTORS®, REALTOR-ASSOCIATE@s, men and women, and include representatives of various racial and ethnic groups. Committee members should be mature, experienced, knowledgeable persons of a judicial temperament. They must be able to keep information confidential.

Grievance Committee members evaluate all disciplinary complaints and therefore may not sit as hearing Panel members or hear a matter on review. The Professional Standards Committee is charged with the responsibility of conducting disciplinary and arbitration hearings.

It is not recommended that Directors serve on the Grievance or Professional Standards Committees. However, if a Director does serve on these committees, he or she may serve as a member of a review Panel provided the Director did not participate in a matter at the Grievance or Professional Standards Committee levels. Therefore, it is important to consider whether that Director may better serve the Association by serving on a review hearing or serving on the Grievance or Professional Standards Committee.

## 7. Association Executive's Function

The Association Executive is the administrative channel through which the Grievance and Professional Standards Committees correspond and carry out their respective functions. The Association Executive does not make decisions or determinations concerning professional standards matters and must be careful to avoid making such determinations. Rather, the Association Executive advises the committees of the appropriate procedures and coordinates all professional standards matters from receipt of the complaint to final determination. The Association Executive is the intermediary between the complainant, respondent, Grievance Committee Chairperson, Professional Standards Committee chairperson, hearing Panel Presiding Officer and the Directors. The Association Executive is responsible for all hearing arrangements and record keeping. The Association Executive should not attend the hearing or advise on substantive matters.

## **8. Association Legal Counsel**

Because effects on business reputations and membership restrictions can result from disciplinary proceedings, from time to time it is necessary to consult legal counsel during the professional standards process. This can include having legal counsel present at hearings for guidance on procedure and law to seeking legal guidance prior to decisions being communicated to the parties. Also, when contemplating suspension or expulsion as discipline, the Association may be exposed to significant legal risks. Therefore, the Association should rely on the advice of legal counsel prior to such action. Having said the above, the presence of legal counsel during a disciplinary hearing is a matter of Association discretion. Legal counsel is not a part of the hearing Panel, therefore may not participate in the conduct of the hearing. If counsel believes an action or procedure is inconsistent with the Association's established procedures or may result in potential liability to the Association, counsel's concerns should be communicated, at the time the action occurs, to the Presiding Officer who shall make the final decision.

## **9. Multi-Association Professional Standards Hearings and Shared Panel Members**

If an Association is processing a case and for some reason needs to borrow Panel members or Grievance Committee members from another Association, the process for doing so is relatively simple. Each Board of Directors needs to adopt a resolution stating that their Association agrees to borrow/lend Panel members. This can be done on a case by case basis, or the resolution may be written to govern all cases as necessary. Usually, the Association making the request continues to process the case, and the borrowed Panelists act as agents of that Association for the purpose of hearing the matter. However, some Associations have agreements that one Association will not only lend Panel members, but will process the case as well. This is strictly at the discretion of the Associations entering the agreement.

When Associations enter into an agreement to share Panelists, whether or not it is in the form of a multi-Association agreement, a centralized administration agreement, or merely to borrow Panel members when the need arises, all of the protections and immunities exist for the shared Panel as would exist if the Panel were handling a case involving their own Association members or MLS participants and subscribers.

## **C. ROLE OF GRIEVANCE COMMITTEE**

### **1. Action of the Grievance Committee**

As previously stated, the Grievance Committee reviews complaints alleging a violation of a membership or MLS duty to determine whether or not the complaint should be forwarded to the Professional Standards Committee for hearing. It does not, however, determine a member's guilt or innocence or mediate between the parties. Its primary function is to determine whether or not a disciplinary complaint is appropriate for hearing.

When the Association Executive refers the complaint to the Grievance Committee, the Grievance Committee chairperson may schedule a hearing for the full Grievance Committee to hear the matter or the Chairperson may assign three or more members of the Grievance Committee to review and analyze the complaint. If the complaint is vague, overly general or does not allege violations of a specific Article or MLS section, the Grievance Committee can instruct the complainant to provide more details prior to processing the complaint. If necessary, in rare circumstances, the Grievance Committee can also appoint a Grievance Committee member to contact the complainant to make sure the complaint is submitted in decipherable form. If such clarification is sought, that Grievance Committee member does not participate in the Grievance Committee's evaluation of the complaint.

### **2. Frivolous Complaints**

The Grievance Committee prevents harassment of members by reviewing and dismissing unwarranted and frivolous complaints. An unwarranted or frivolous complaint is one which, taken as true, would not constitute unethical conduct on the part of the respondent. For example, if the seller of real property files a complaint alleging the member is unethical for using profanity, the Grievance Committee would not forward the complaint for hearing. Even if true, there is no specific prohibition against the use of profanity in the Code of Ethics or MLS rules. A frivolous complaint is **not** one which, after talking to the respondent to get his or her side of the story, appears to be without merit. Dismissing a complaint in this manner is basically deciding the case on its merits which the Grievance Committee cannot do.

### **3. Mediation of Ethics Complaints**

N.A.R. policy allows associations to mediate disciplinary complaints. Therefore, if the association has adopted procedures for the mediation of a complaint, those procedures may be followed.

However, using the Grievance Committee as the mediator is usually inappropriate. In general, the role of the Grievance Committee is not to attempt to "settle" a disciplinary complaint by trying to get the parties to "work things out." While this may satisfy the parties involved, an alleged violation is a wrong against the Association and its members not just the person filing the complaint and a resolution of the problem between the parties does not automatically eliminate the wrong against the Association.

Even so, the Grievance Committee still plays an important role in public relations for the Association and can possibly open lines of communication between the complainant and respondent. For example, if the Grievance Committee dismissed the complaint, the Committee could assign a committee member to talk with the complainant. Sometimes a member of the public alleges acts that are simply not covered by the Code of Ethics no matter how "unethical" the acts may seem. If a member of the Grievance Committee takes the time to explain to the public why the complaint has been dismissed, the member of the public may be left with a better feeling towards the Association.

### **4. Analyzing the Complaint**

If a complaint, together with Exhibit 1 and any other supporting evidence and documentation submitted by the complainant, taken as true on its face, would constitute a violation of a membership or MLS duty

on the part of the respondent, then the Grievance Committee does not determine the truthfulness of the complaint but rather should refer the matter for hearing. In this case, there is no reason to "investigate" the matter or question the respondent. For example, a complaint states that a member failed to disclose that he or she was purchasing the listed property on his or her own account. It is not necessary for the Grievance Committee to check with the title company and retrieve escrow documents, etc. to prove the member actually purchased the property, that escrow closed and that title was taken in his or her name. It is up to the complainant to prove in the hearing that the facts are true. If the complaint did not provide any specifics regarding the facts, the complainant (not the respondent) would be contacted to get the facts supporting the allegation but not the evidence to prove it.

The Grievance Committee or members assigned to review the complaint should look only to those facts relevant to the complaint. The Grievance Committee's decision to refer the matter for a hearing is a judgment call which should be made only after careful consideration of all the facts and circumstances in a particular case. The Association may be liable for invasions of privacy if the Grievance Committee exceeds its scope.

It may be advisable, in rare circumstances, for a member of the Grievance Committee to contact the complainant for clarification of the facts, especially if the complainant is a member of the public. This can serve as a useful public relations tool for the Association and puts the complainant on notice what his/her burden of proof is in future hearings. If such clarification is sought, that Grievance Committee member does not participate in the Grievance Committee's evaluation of the complaint.

Often, the Grievance Committee perceives its role as gathering the necessary documentation and evidence for the hearing Panel to make its decision. Generally, the Grievance Committee should only engage in gathering factual information needed to consider the complaint. It is not the obligation of the Grievance Committee to prove the facts or the complaint as this burden rests with the complainant.

To summarize the process of the Grievance Committee when reviewing a complaint, the Grievance Committee should follow these steps:

- assume the facts to be true as stated;
- ask: do these facts support a violation(s) of the Code of Ethics Article(s), MLS rules section(s) or bylaw section(s) cited;
- was the complaint filed within the time limitation (one hundred and eighty (180) days after facts could have been known with the exercise of reasonable diligence);
- have the correct parties been named; and
- check for parallel proceedings.

## **5. Contacting Respondent Not Required**

The respondent should not be contacted by the association or the Grievance Committee during their review of the complaint. Instead, if the Grievance Committee feels that clarification is needed, they should contact the complainant. In fact, contacting the respondent in the review stage may prove detrimental to the process as the respondent will probably want to provide the Grievance Committee with his or her side of the story. However, the respondent will have the full opportunity after the Grievance Committee's decision to refer the matter for hearing to present his or her defense in his or her response to the complaint and at the hearing.

## 6. Modifications to Complaint

The Grievance Committee has broad discretion to modify a disciplinary complaint. This is a key role of the Grievance Committee and should be strongly emphasized. Examples of situations when it is appropriate for the Committee to exercise this discretion are:

1. If the complaint alleges multiple violations and the Grievance Committee determines that one or more of the allegations are unworthy of further consideration, those allegations may be dismissed while the balance of the complaint is forwarded for hearing.
2. If the Grievance Committee determines that the complaint cites an inappropriate Article of the Code of Ethics, bylaws section or MLS rule, the Grievance Committee may amend the complaint by deleting the inappropriate article or section rule and adding the appropriate one. If the Grievance Committee adds an article or section to the complaint and the complainant does not agree with the addition, the Grievance Committee may file its own complaint citing the Article or MLS section. Both complaints would be heard simultaneously by the same hearing Panel.
3. A complaint may name a real estate licensee but not the licensee's designated REALTOR®. The Grievance Committee can amend the complaint and add the designated REALTOR® as a named respondent. However, if the complainant does not agree with the addition of the designated REALTOR®, the Grievance Committee must become a co-complainant in order for the matter to proceed to hearing against the designated REALTOR®. The Grievance Committee would present the complaint against the designated REALTOR® only.
4. Sometimes many complaints may be filed against the same respondent for the same acts, for example, the distribution of one advertisement. The Grievance Committee has the discretion to join these complaints together, and to act as the complainant if the original complainants won't agree with this decision. In a situation with many complainants, the Grievance Committee may choose to exercise its discretion to act as the complainant. Conducting many hearings on the same issue, or allowing many complainants in one hearing may be seen as harassing the respondent. The Grievance Committee should act to avoid this.
5. Similarly, sometimes separate complaints will be filed by the same complainant involving the same set of facts and circumstances. One complaint alleges a violation of the Code of Ethics and one alleges an MLS rules violation. The Grievance Committee has the discretion to join these together to be heard in one hearing and should, so that the respondent is not required to go through more than one hearing arising out of the same set of facts and circumstances.
6. Finally, the Grievance Committee has the discretion to add a party as a respondent to the complaint. This usually comes up because a complainant will name the office manager and a salesperson and not name the designated REALTOR®. Often the Grievance Committee deletes the office manager and names the designated REALTOR®, however, this is not appropriate. The Grievance Committee should leave the office manager as a respondent and add the designated REALTOR®. If the complainant refuses to agree to the addition of the designated REALTOR®, the Grievance Committee must join as a complainant.

## 7. Grievance Committee as Complainant

The Grievance Committee may, upon its own motion, and must, upon instruction of the Directors, investigate a member's actions when there is reason to believe the member's conduct may be subject to disciplinary action. If it finds enough facts to support the allegation, the Grievance Committee acts as the complainant and the matter is referred for hearing. In this instance, the Grievance Committee prepares the matter for hearing as would any other complainant, except that Association counsel cannot serve as counsel for the Grievance Committee complainant. The Grievance Committee may select one or more Committee members to represent the committee at the hearing. This person also signs the complaint and any forms at the hearing on behalf of the Grievance Committee.

Another situation in which the Grievance Committee serves as complainant is when the Grievance Committee deletes an alleged violation from the complaint or dismissed the complaint and the complainant object(s). If the complainant requests a review by the Directors of the committee's deletion of a charge and the committee's decision is upheld, the complainant must sign the amended complaint or the complaint will go to the Grievance Committee to act as the complainant.

## 8. Review of the Grievance Committee Decision

A complainant may request that the Directors review the Grievance Committee's decision to delete an alleged violation from the complaint or to dismiss the entire complaint. There is no review of any other type of Grievance Committee action.

To review the Grievance Committee's action, it is recommended that an appointed review Panel of the Directors be selected to conduct the review. This is important because a Director who serves on a review of the Grievance Committee's action may not serve on a review of the hearing Panel's decision and recommendations. Therefore, there must be Directors available to serve on any subsequent review of the hearing Panel's recommendations, if necessary.

When the Directors review the Grievance Committee's decision, the parties do not have the right to be present. Therefore, there is no time limit and notices are not required. The Directors only consider the documents and information which the Grievance Committee considered in making its recommendation. Generally, this would only be the complaint and supporting documentation submitted with it.

The Directors' decision will be to ratify the Grievance Committee's decision or to grant the complainant's request. For example, if the Grievance Committee dismissed the complaint but the Directors agree with the complainant that the matter should be forwarded to hearing, the Directors can order that the matter be sent for hearing. Likewise, if the Directors ratify the Grievance Committee's decision to dismiss the complaint, the complaint is dismissed and no further disciplinary proceeding may be taken by the Association regarding the complaint.

### **D. SUBCOMMITTEE FOR ANONYMOUS COMPLAINTS**

Members of the Subcommittee are appointed by the Grievance Chair, for a one-year term. Members of the Subcommittee must sign an agreement not to file any anonymous complaints for the year they are on the Subcommittee. When an anonymous complaint is received, the Grievance Chair assigns it to three impartial members of the Subcommittee. These Subcommittee members have the ability to investigate a complaint before making their decision and are given authority to act for the Grievance Committee. In order to send a complaint to hearing "you must be able to touch it, hear it and see it."

Options for the Subcommittee are:

- 1) dismiss the complaint as unworthy of further consideration;
- 2) notify the respondent of the complaint and give an opportunity to correct; or
- 3) refer the complaint to the Association Executive Committee for hearing.

If the Subcommittee, on behalf of the Grievance Committee, refers the matter for hearing, the Grievance Committee shall be the complainant and one of the members of the Subcommittee shall represent the Grievance Committee at the hearing.

## **D. PROCESSING THE COMPLAINT**

### **1. Getting the Response**

When a complaint is forwarded from the Grievance Committee to the Professional Standards Committee for hearing, the Association Executive sends a copy of the complaint to the respondent along with the Notice to Respondent and a blank Response. The respondent has fifteen (15) days to respond to file a written response. However, failure to file a response within this time frame is not fatal and the hearing Panel may accept late filings of responses. As a general rule, late filings should be accepted by the hearing Panel. If necessary, the hearing Panel may grant a recess or continuance to give the complainant time to review the late response.

### **2. Notice**

When giving notice, it is not necessary to use certified mail. Regular first class mail is all that is required for giving notice. In fact, using certified mail sometimes causes problems because a respondent may refuse to accept it and therefore will not receive notice. Even so, many associations prefer using certified mail so that there is a record of receipt. If an association elects certified mail, C.A.R. recommends that regular first class mail be used as well. This will avoid the problem of the respondent refusing to accept the certified mail since first class mail is presumed to have been received. In addition, an association may elect to use a delivery service that also provides a record of delivery and avoids the problem of the respondent refusing acceptance.

If a party informs the association that they will be represented by legal counsel, the Association Executive should send all communications and notices regarding the disciplinary matter to both the party and their attorney unless the party instructs otherwise.

### **3. Continuances and Continuance Fees**

The parties may request continuances of the hearing date. Generally, continuances should be granted unless a pattern of abuse (i.e. delay tactics, avoidance, etc.) begins to surface. Common valid reasons for continuances are sudden illness, accident, death of a family member, improper notice of hearing, improper notice of other party having legal counsel, inability to review documentary evidence prior to hearing or attorney court conflicts. Excuses for not appearing, such as vacations and business meetings, are generally not valid reasons for granting a continuance, although each request must be reviewed to determine whether or not to grant the continuance.

Depending when the continuance request is made, the Professional Standards Committee Chairperson or his or her designee and the hearing Panel have the discretion to grant continuance requests. If the request is made prior to the hearing being convened, the Professional Standards Chairperson makes the decision. If the request is made at the hearing, the hearing Panel makes the decision.

Continuance fees can be imposed as a deterrent to those who abuse the availability of continuances and as reimbursement for additional administrative costs. The association may adopt a reasonable fee that can be charged for a continuance, except that each party may have one continuance at no charge. A late notice of representation by counsel resulting in a continuance will subject the person giving notice to a continuance fee even if it is the only continuance given to the party.

In determining which party is assessed the fee, the association must look to the party who causes the necessity for the continuance. For example, if the complainant, prior to or at the hearing, amends his complaint and the respondent needs adequate time to prepare, the complainant should be assessed the continuance fee. Or, if a party fails to exchange evidence prior to the hearing and the opposing party needs time to prepare, the continuance fee should be charged to the party who failed to exchange the evidence.

All requests for continuances must be in writing and accompanied by the continuance fee, if appropriate. If the continuance is not granted, the fee will be returned to the party.

#### **4. Withdrawal of an Association Disciplinary Complaint**

If after the Grievance Committee has recommended that a hearing be arranged, but before the hearing Panel is convened, a complainant wishes to withdraw the complaint, the Association Executive shall promptly refer the matter back to the Grievance Committee for a determination whether a potential violation of the public trust, as defined, may have occurred. Only where the Grievance Committee determines a potential violation of the public trust may have occurred may the Grievance Committee proceed as the complainant.

“Public trust” is defined as a demonstrated misappropriation of client or customer funds or property, willful discrimination, or fraud resulting in substantial economic harm.

After a hearing begins, a complaint can be withdrawn only with the hearing Panel's approval. In such event, the hearing Panel may:

- refer the complaint to the Grievance Committee to consider whether the Grievance Committee should file a complaint (NOTE: in this case the Grievance Committee is not limited to only those instances where a potential violation of public trust is present, they may go forward on any complaint they think appropriate);
- refuse to allow the complaint to be withdrawn and proceed with the hearing in which case the burden of proof will be difficult unless the complainant is willing to be a witness; or
- allow the complaint to be withdrawn with no further action, which would not be a decision on the merits of the case. Presumably, a complaint could be brought again if the complainant changes his or her mind and re-files the complaint within the time limitation.

In general, it is recommended that the complaint be referred back to the Grievance Committee in order to avoid the problems that arise with the other two options as discussed.

#### **5. Amendment of an Association Disciplinary Complaint**

A complaint may be amended after the Grievance Committee's initial determination. If, prior to convening the hearing, the complainant wishes to amend the complaint by adding or deleting an Article of the Code of Ethics or alleging an additional violation of a membership duty, the written amended complaint is sent to the Grievance Committee for review and analysis. If the Grievance Committee approves the amended complaint it supersedes the original complaint and is sent to the Association Executive for notice and hearing following normal procedures. If the Grievance Committee does not

approve the amended complaint, the hearing will go forward on the original complaint unless the complainant withdraws it.

Once the hearing is convened, but before it is adjourned, the complaint can be amended by either the hearing Panel itself or the complainant with the consent of the hearing Panel. Generally, the only reason to amend a complaint at the hearing is to add articles or sections allegedly violated. This is usually done to conform the complaint to the evidence presented. If the amendment is granted, it must be filed in writing. The complaint may not be amended after the hearing is adjourned, as this would deprive the respondent of the due process right to defend against the charge,

If the complaint is amended, the respondent has an opportunity for a continuance to adequately prepare a defense to the new allegations. If the respondent waives a continuance, the waiver should be in writing.

If a continuance is granted, the respondent may request the hearing be held with the same or a different Panel, and the hearing must be set at least 15 but not more than 30 days in the future, unless the parties agree otherwise. It is best to set the date during the original hearing so that all involved are aware of the date. It is good practice for the Association Executive to send notice of the new hearing date to all parties and Panel members as a confirmation.

Like the Grievance Committee, the hearing Panel also has the discretion to join together complaints involving the same parties or arising out of the same set of facts and circumstances. This would normally be at the request of one of the parties, but the Panel has the power to do so on its own if appropriate. An example might be if during the hearing, the Panel is informed there are other complaints involving the same advertising. The Panel could decide to join all the cases together and make one decision regarding the advertisement.

## **6. Selecting the Hearing Panel**

Concurrently when the complaint is sent to the respondent, the Association Executive is required to send to both the complainant and respondent a list of names of those on the Professional Standards Committee who will serve on the hearing Panel and a form on which parties can submit challenges to any potential hearing Panel members "for cause." "For cause" does not mean that the parties are free to challenge for any reason. It means that there are facts and circumstances that demonstrate the likelihood that the Panel member may be biased or partial in the matter and will be unable to render an impartial decision. For example, the potential Panel member may be a close personal friend of one of the named parties or may be a recent past business partner.

It is recommended that challenges be accepted whenever they are made known unless the Association feels certain they are being used strictly as a delay tactic. This avoids the appearance of impropriety and serves to prevent problems that may arise later. However, if the association is certain that the challenges are being used to delay the process, or if a party attempts to challenge the entire list of available Panel members, the Professional Standards Chairperson may deny the requests for challenge. Often, a party will challenge a Panel member but give an insufficient reason for the challenge, such as "political differences" or "past problems." In such cases, the association is free to require the party to provide a more detailed reason or deny the request.

Many of the controversies surrounding challenges are eliminated by using multi-association professional standards committees. It is more difficult to use the challenge process as a "tactic" when the number of committee members is three or four times greater than just the association's committee and there are members on the committee from other associations.

Each party has ten (10) days to make challenges and return the completed forms to the association. The Professional Standards Committee Chairperson and the Association Executive usually work together to select the hearing Panel from the names not stricken for cause or automatically disqualified.

Ultimately, the responsibility rests upon the hearing Panel members to disqualify them whenever it is appropriate to avoid any appearance of impropriety and doubts about the neutrality of the hearing Panel. This is true even if the Panel member is not challenged by either party.

Hearing Panels should have an odd number of members to avoid the possibility of a tie vote and the hearing Panel must consist of at least three (3) members. C.A.R. recommends that the hearing Panel is kept at the minimum of the three because larger hearing Panels can make the scheduling and hearing process cumbersome.

Associations may find it beneficial to name an alternate hearing Panel member in the event that a selected hearing Panel member is unable to attend the hearing as the use of an alternate can avoid the need for a continuance. Like an alternate juror, the alternate Panel member attends the hearing so he or she may serve at a moment's notice. However, unless actually called upon to serve, the alternate does not participate in or observe the deliberations.

The alternate should be selected from the list of Panel members not challenged by the parties. If this is done, the parties may not object later at the use of the alternate as a hearing Panel member. If there is no alternate who has sat through the entire hearing and the hearing Panel only consisted of three members, the hearing must be postponed and a new hearing set unless all parties agree to go forward with only two hearing Panel members pursuant to Section 55(h) of the Manual.

If any party is a salesperson, at least one (1) hearing Panel member must be a salesperson. For purposes of hearing Panel selection, a salesperson is defined by office function, not license status. Therefore, if one party is functioning as a salesperson in an office, at least one of the hearing Panel members must be a licensed salesperson or broker associate. This does not mean that the remaining hearing Panel members must be principal brokers.

The requirement that the hearing Panel consist of a majority of brokers is met by looking at the license status of the individuals. Therefore, this requirement may be satisfied by a hearing Panel member who has a broker's license even if his or her office function is that of a salesperson. Other than the requirement of salesperson representation in the case of a salesperson complainant or respondent, the make-up of the hearing Panel is at the discretion of the Professional Standards Committee Chairperson. The primary reason for the salesperson requirement is to insure equal representation (similar to a jury of your peers). The Professional Standards Committee Chairperson shall designate one of the hearing Panel members as the Presiding Officer who conducts the hearing. The Presiding Officer also maintains the proper decorum in the hearing and establishes hearing procedures consistent with the *Manual*. The person selected as Presiding Officer should have previous experience as a hearing Panel member.

If the Presiding Officer uses a standard format for the opening statement, the Association Executive may distribute this beforehand to the parties to ensure that they are aware of the procedures.

## **F. CONDUCTING THE HEARING**

### **1. Transcript/Right to Record**

The association must provide an official record of every hearing. The purpose of doing this is to create a record of the hearing procedures for any subsequent review. This requirement may be satisfied by hiring a court reporter, but, typically it is met by tape recording the hearing.

There are pros and cons to both methods. Tape recording is less costly, however, it is difficult to understand and be certain who the speaker is when listening to it. A court reporter is more expensive, however the transcript is very easy to follow. In addition, a tape recording would not normally be admitted into court as evidence, but a court reporter's transcript will be. If a court reporter is used by the Association, there is no affirmative duty on the part of the Association to pay for a transcript for the parties, however, parties must be permitted to tape record the hearing. Any party who wants a copy may

be required to pay the transcription costs as well as for a copy for the Association. If tape recording, the Association may want to consider giving the responsibility for operating the tape recorder to an alternate panelist as this will avoid burdening the hearing Panel members. The Association should avoid using staff to operate it as it is never recommended that staff sit in on hearings.

## **2. Right to Counsel/Other Representation**

Every party has the right to legal counsel at any hearing. This is one of the most fundamental aspects of due process. We can enforce the rule that a party must provide notice of legal representation within a certain time frame by requiring that a party pay a continuance fee if necessary for not complying with the rule. However, the Association may not prohibit a party from having legal representation even if the notice requirement is not followed. The *Manual* requires that notice be given to the Association and all parties of the intention to have counsel using the specified form. Prudence dictates that the Association Executive should independently notify all parties as well to ensure that there is actual knowledge.

N.A.R. policy also allows for non-legal representation by a REALTOR® in ethics proceedings. If a party chooses to be represented by a REALTOR®, the same notice requirements for legal representation apply.

## **3. Appropriate Role of Legal Counsel in the Hearing**

A party may be represented by legal counsel in any hearing. However, no party may refuse to directly respond to requests for information or questions addressed to him by the Panel members except on grounds of self-incrimination (for criminal issues only), or on other appropriate grounds.

Each party shall be held responsible for the conduct of his counsel. Efforts by counsel to harass, intimidate, coerce or confuse the Panel members, parties or witnesses, or otherwise disrupt the proceedings can be grounds to exclude counsel. The decision to exclude counsel shall be by majority vote of the Panel. If counsel is excluded, a hearing may be continued to enable the party to obtain alternate counsel, however, the continuance may not be granted if it appears to be a delay tactic. A decision by the Panel to exclude counsel should be made only after careful consideration and preferably with the advice of Association legal counsel.

A party's counsel may understandably seek to invoke courtroom procedures and technicalities not applicable to a disciplinary hearing. A Panel can minimize this tendency by explaining the purpose and procedures at the beginning of the hearing. The following points should be covered:

- a. all relevant evidence will be admitted. The Presiding Officer will broadly construe the term "relevance";
- b. no attorney may confuse, coerce, intimidate or harass the parties, Panel members or witnesses;
- c. the Panel need not accept the statements of counsel as being the statements of his client if the Panel desires direct testimony;
- d. the Panel will rule at any time on the admissibility of evidence, and technical rules of evidence do not apply; and
- e. the Panel members will ask questions which they deem pertinent and significant of any party at any time during the hearing.

## **4. Failure of Parties to Appear**

If the complainant refuses or is unable to appear at the hearing, the complaint is usually referred back to the Grievance Committee. If the Grievance Committee believes it can prove the case without the testimony of the complainant and there is otherwise sufficient information for the matter to be considered by a hearing Panel, even though the complainant can not or will not appear, the complaint can be amended to name the Grievance Committee as complainant. The respondent is then sent a copy of the amended complaint.

Sometimes the respondent fails to appear even though he or she has been properly notified and no continuance or adjournment has been obtained. In such event, the hearing Panel may proceed with the hearing in the respondent's absence and shall reach a decision based on the available evidence. However, the hearing Panel may not find against the respondent solely because he or she did not appear at the hearing.

To protect a party's rights, a telephone call should be made to determine the reason, if any, for the failure to appear. The hearing Panel should then decide whether to grant a continuance, if requested by the party failing to appear, dismiss the case or take any other appropriate action. If the party is reached and requests a continuance, it is recommended that the Panel grant the continuance unless certain that it is being used as a delay tactic.

Sometimes a respondent will request that he be allowed to respond only in writing particularly if it is a minor violation and he admits to his wrongdoing. Under this or similar circumstances, the complainant may also agree to have a hearing based only upon the written complaint and response. If all the parties agree, this is permissible and the Panel would make its decision based only on the written evidence submitted.

## **5. Conducting the Hearing**

The Professional Standards Committee chairperson shall designate one of the hearing Panel members as the Presiding Officer. The Presiding Officer is responsible for conducting the hearing and may prescribe any procedures for the hearing not inconsistent with the rules and procedures of the Association. The person selected as Presiding Officer generally should have previous experience as a hearing Panel member.

If the Presiding Officer uses a standard format for the opening statement, the Association Executive may distribute this beforehand to the parties to ensure that they are aware of the procedures.

Once the complaint and response (if any) are submitted, the hearing is set at least 21 days in advance at a time all parties can attend. The Association Executive shall notify all parties and the Panel members of the hearing date.

Disciplinary hearings are relatively informal proceedings that are not designed to follow the strict and sometimes complicated rules of evidence that would be followed in court. Although the technical rules of evidence are not applicable, the Panel is empowered to rule on the admissibility of evidence. If, for example, a party is consuming a great deal of time on a subject that has no bearing on the case, the Panel may caution the party and eventually even disallow further submission of the evidence. Unless a party can show that evidence has a direct bearing and is linked to the facts of the case at hand, the evidence may be refused. However, the Panel should be extremely careful in rejecting evidence. Failure to accept relevant evidence is grounds for challenging a decision. If in doubt, the Panel is well advised to accept the evidence, and determine its value and credibility during deliberations. If a party has an attorney that consistently objects on technical rules of evidence, the Panel may wish to refer the party and his counsel to the Outline of Procedure.

On a rare occasion, the hearing may last longer than one day. If this happens, the hearing should be adjourned at the end of the day and reconvened as soon as possible, preferably the next day.

All Panel members should maintain a calm, objective and judicial atmosphere. The Panel members are not judge nor jury, but rather peers seeking all relevant information to render a decision based on the facts. Panel members should avoid being flip, frivolous, sarcastic or judgmental in their words or gestures. They should attempt to be professional in their approach, and they should carefully avoid any reflection of partisanship in their questioning or observations. For example, Panel members should avoid using leading questions of witnesses. They should not preach or teach, but should let their findings and recommendations serve to educate the parties.

Panel members should take special care to treat all parties in the same manner. For example, if one party is addressed by his first name, all parties should be addressed in that manner. This avoids giving the impression that the Panel members have different relationships with each party.

Whenever the Panel is concerned about a procedural matter, the Panel should feel free to call a recess to the hearing for a few minutes and consult legal counsel advising the Association. Getting legal advice before taking an action may prevent a lot of problems from occurring.

## **6. Due Process Required**

A lack of due process may cause a decision to be invalidated. Therefore, a party to a hearing has the right to:

- adequate notice of a complaint and response;
- time to prepare a defense;
- representation by legal counsel;
- challenge of potential Panel members;
- necessary continuances for good cause;
- testify on his own behalf, call and cross-examine witnesses;
- notification of the decision rendered.

Due process does not, however, include an automatic right to a transcript of the proceeding. If a party wishes a transcript, he may pay for a copy of the Association's official record of the hearing or, at his own expense, have a court reporter present. In this event, the party shall pay the court reporter and provide a copy of the transcript, if made, to the Association. Due process does not require tape recording of a hearing; N.A.R. policy, however, requires tape recording of a hearing as a service to the parties, not for legal reasons.

## **7. Witnesses**

The Manual provides that the hearing Panel may summon its own witnesses, however, it is not recommended that the Panel actually exercise this power. The parties have a responsibility to present and prove their own case, and the hearing Panel should remain neutral. If, under those rare circumstances, a hearing Panel finds it necessary to bring in witnesses, legal counsel should first be consulted.

## **8. Decision of the Hearing Panel**

When the hearing Panel has considered all written evidence and oral testimony, they should end the hearing and go into deliberations. After deliberating, the hearing Panel makes a decision by majority vote. Each Panel member has the right and obligation to fully participate in the deliberations and decision-making process.

The presence of Association legal counsel during deliberation(s) is a matter of local Association discretion. If the Association attorney does sit in on the deliberations, he or she should not participate in any discussion and should advise only on procedural, not substantive, issues.

In the deliberation process, the hearing Panel reviews the evidence presented by the parties and makes conclusions regarding the relevant facts of the matter. If conflicting evidence or testimony was presented regarding an alleged fact, the hearing Panel must weigh the credibility of the evidence or witnesses and determine the fact. If the hearing Panel is unable to determine a fact based on the evidence and testimony presented (or lack thereof), the hearing Panel must then assume the fact was not proved.

Once the relevant facts are determined by the hearing Panel, it decides whether or not those facts clearly demonstrate a violation(s) of a membership or MLS duty. For example, if it is found that the respondent failed to advertise his or her licensee or REALTOR® status, this is a violation of Article 12.

Regardless if the facts support a violation, the hearing Panel should determine the facts relevant to the case. This constitutes a "Findings of Fact." Findings of Fact should be carefully and clearly drafted so that anyone reading them will fully understand what facts constitute the matter. If the hearing Panel feels the Findings of Fact support a violation of alleged in the complaint, the Findings of Fact should also clearly state this as well.

If the hearing Panel determined a violation occurred, the hearing Panel should review the member's file for past violations. Review of the member's file is not relevant or appropriate for determining violations, only for recommending appropriate discipline. Upon review for any past violations, the hearing Panel would then make any recommendations for discipline.

The hearing Panel should be given a copy of the Sanctioning Guidelines in the appendix of the Manual to help them determine and recommend appropriate discipline.

## **9. Presentation of Evidence**

The Code of Ethics and Association bylaws require members, if so requested, to appear and testify in a disciplinary hearing (see Article 14 of the Code of Ethics and the *California Code of Ethics and Arbitration Manual*). Subpoena powers are not available in disciplinary hearings. For the most part, non-members can be invited but not compelled to appear and testify. The absence of certain witnesses (usually sellers or buyers) who are unwilling to appear imposes some limitation in ascertaining all pertinent facts. However, the hearing Panel should make use of all facts that can be ascertained. For example, a party may only have a written declaration from a witness. This should be accepted by the Panel, however, are not to be given as much weight as the testimony of a witness who is at the hearing. This is based on the Panel's inability to observe the witness making the statement and the fact that the other party is unable to cross examine the witness.

Witnesses should only be present when testifying and should not be allowed to listen to or be present for any other testimony. Parties, of course, are present during the entire proceeding even if they are also witnesses. Often, someone who is not a named party will request to be allowed to remain in the hearing. This is not permitted unless the person is representing a party who is not there (and there is written confirmation of this from the party) or the complaint is amended to make this person a party. If such amendment is made, a continuance should be granted if requested.

Parties should be encouraged to exchange evidence, including names of witnesses, prior to the hearing to avoid a continuance based on necessity to adequately prepare a case as subpoenas are not provided.

The Presiding Officer should set up procedures for the presentation of evidence in an orderly fashion. Generally, the hearing proceeds as follows:

- a. COMPLAINANT'S OPENING STATEMENT - A brief summary of what the complainant intends to prove.
- b. RESPONDENT'S OPENING STATEMENT - A brief summary of the respondent's side of the story and what he intends to offer as a defense. The respondent is not required to make an opening statement at this point and may defer it until after the complainant has presented his case (Step f).
- c. COMPLAINANT'S PRESENTATION OF EVIDENCE - Witnesses and documentary evidence are presented by complainant.
- d. CROSS-EXAMINATION OF COMPLAINANT'S WITNESSES - respondent has the opportunity to question each witness after the testimony. The complainant will probably be a witness for himself and be subject to cross-examination.
- e. QUESTIONING BY PANEL MEMBERS - After the respondent has cross-examined a witness, the Panel members may question the witness if further clarification is needed. The Panel members should not engage in extensive cross-examination and "make the case" for either party. Questioning by Panel members is particularly useful to put the witnesses at ease in testifying and to clarify or focus the issues.
- f. RESPONDENT'S OPENING STATEMENT - If the respondent has not yet made his opening statement, he presents a brief summary of his side of his story and his defense.
- g. RESPONDENT'S PRESENTATION OF EVIDENCE - Witnesses and documentary evidence are presented by respondent.
- h. CROSS-EXAMINATION OF RESPONDENT'S WITNESSES - complainant has the opportunity to question each witness after the testimony. The respondent will probably be a witness for himself and be subject to cross-examination.
- i. QUESTIONING BY PANEL MEMBERS - After the complainant has cross-examined a witness, the Panel members may question the witness if further clarification is needed. The Panel members should not engage in extensive cross-examination and "make the case" for either party. Questioning by Panel members is particularly useful to put the witnesses at ease in testifying and to clarify or focus the issues.
- j. CLOSING STATEMENTS - Each party, first the complainant, then the respondent, summarizes what he has proven and tells the Panel members why he should prevail.

The Presiding Officer should make any necessary concluding remarks which include:

- informing the parties of the remaining procedure;
- telling the parties when they will get a determination; and
- asking the parties if they have anything else to tell the Panel members.

The hearing is then concluded, the parties are excused and the Panel members deliberate.

## 10. Disciplinary Recommendations

Discipline may only consist of one or more of the following:

- a. Letter of Warning in the member's/participant's file for a specified time period.
- b. Letter of Reprimand in the member's/participant's file for a specified time period.
- c. Fine commensurate with the gravity of the determined violation not to exceed \$5,000 (alternative discipline must also be imposed).
- d. Attendance at an ethics training course or other appropriate educational course (alternative discipline must also be imposed).
- e. Probation of the imposed discipline for a stated time period not to exceed one year. This involves the selection of appropriate discipline and then the decision to place the discipline in abeyance until (and if) the member violates the same Article during the probationary period. At that time, the Directors may activate the discipline. This, of course, would be in addition to the discipline for the second offense.
- f. Suspension of Association membership and services/MLS services for a stated period of time not less than 30 days nor more than one year with an automatic right of reinstatement without paying the Association initiation fees or attending the orientation program. The obligation to pay Association dues is not suspended.
- g. Expulsion of Association membership and services/MLS services for a stated time period of 1-3 years with reinstatement only by application for membership after the specified time. The application will be considered on its merits and processed as if the individual were a new member, including payment of initiation fees and attendance at the Association orientation.

If the findings are that a party violated both a membership and an MLS duty, the discipline for all the violations is limited to that stated in the Manual.

The hearing Panel may only **recommend** discipline. It is up to the Directors to actually impose the discipline. The hearing Panel may recommend and the Board of Directors may impose any combination of disciplinary actions they feel appropriate to the violation. Therefore, it is crucial that the hearing Panel craft their findings of fact so that the Directors will have enough information to make their final decision whether or not the decision is reviewed. The hearing Panel should refer to the Findings of Fact background paper and N.A.R. Sanctioning Guidelines contained in the Appendix to this Manual to help them with their decision.

If the discipline recommended by the Panel is either a fine or attendance at an appropriate course, alternative discipline must also be imposed. The alternative discipline must be something the Association controls (i.e., letter of warning, letter of reprimand, suspension or expulsion). If the alternative discipline is not imposed, then the disciplined member could refuse to pay the fine or attend the ethics course and remain undisciplined. The Association cannot force payment of fines or attendance at a course. Therefore, the alternative discipline must be one that the Association can control.

If the Panel chooses to place a member on probation it must first designate the appropriate disciplinary action and then elect to hold it in abeyance (probation) for a stated period of time. If, during that time, the member violates the same membership or MLS duty, the Directors may impose the original discipline. In order to remove the probation and enforce the discipline, there must be a finding by a disciplinary hearing Panel that the member engaged in activity during the probationary period that violated the same membership or MLS duty.

Until a disciplinary decision is final, it shall not be disclosed to any persons except the Directors, complainant, respondent, legal counsel and the Association Executive.

After a decision is final, Association members and C.A.R. may be notified and the DRE is automatically notified of suspension or expulsion of the disciplined member unless the decision provides otherwise.

## **G. POST HEARING PROCEDURES**

### **1. Distributing the Decision**

Once the hearing Panel has completed the findings of fact and its recommendations for discipline, they are given to the Association Executive. The Association Executive should review their decision to make sure it is consistent with the rules and procedures of the Manual (i.e. does not contain discipline not authorized, i.e. write apology letter, or that there is alternative discipline as appropriate). The Association Executive then sends the decision to the parties with the Notice of Review rights to the parties. The decision should be sent within a reasonable period of time after the hearing date. The Association Executive should date stamp the decision to reflect the date it is sent and should also mark that date off on the disciplinary processing checklist.

If, because it is Association policy or because of the severity of the recommended discipline, the decision is reviewed by Association legal counsel, the review takes place prior to notifying the parties of the decision. The Association Executive is considered to receive the decision after review by Association legal counsel. Association legal counsel should be encouraged to promptly review disciplinary findings and recommendations to avoid unreasonable delays.

Once the decision is sent, the parties can request a rehearing, request a review or accept the decision as rendered. The findings and recommendations of the hearing Panel are only that--recommendations, and are not final until the Directors take final action on them.

### **2. Rehearing**

The complainant or respondent can petition for a rehearing only on the grounds of newly discovered material evidence which could not, with reasonable diligence, be discovered and presented at the original hearing. It is not enough that the evidence was not presented, it must be demonstrated that it could not have been discovered in time for the hearing. The party requesting the rehearing must complete the Petition for Rehearing describing the newly discovered evidence and stating reasons why it could not be discovered. A Petition for Rehearing must be filed within twenty (20) calendar days after the decision is sent to the parties. Once received by the Association Executive, a copy should be sent to all the parties and the hearing Panel. The hearing Panel has fourteen (14) calendar days to review the petition and decide whether or not to grant the rehearing. If it takes no action, the petition is automatically denied.

It is very rare for there to be a rehearing because evidence is generally available for the first hearing. Caution should be used to make sure parties do not use rehearings as a way to get another chance at a hearing.

If the hearing Panel decides to rehear the matter, the new hearing is noticed following the normal hearing procedures. The hearing itself is limited only to the new evidence being presented. If the new evidence alters the recommendation of the Panel, a new decision is completed.

### **3. Review by Directors**

After the disciplinary hearing (and rehearing, if any) has been held and the decision rendered, either the complainant or the respondent may request that the decision be reviewed by the Directors or appointed review Panel.

Such a request must be filed within twenty (20) calendar days of sending of the hearing Panel's recommendation (either the original or the rehearing) or within ten (10) calendar days of a denial of a petition for rehearing.

The party requesting the review must file the Request for Review, which states specifically the bases for review and the supporting information.

A review can be based on:

- the misapplication or misinterpretation of membership or MLS duty;
- procedural deficiency or lack of due process; or
- unwarranted discipline recommended by the hearing Panel.

The Directors, when reviewing a decision, is a Panel as defined in the Manual. This means that they are subject to automatic disqualification rules and may be challenged by the parties.

The Panel members will only consider the information provided by:

- a transcript (if any) of the hearing, or a verbal summary by the Presiding Officer (or his designated representative);
- pertinent portions of a tape recording (if any) of the hearing;
- the request for review;
- the reply to that request (if any); and
- the findings of fact and recommendations of the hearing Panel.

The review Panel shall not re-hear all the facts or determine guilt or innocence, and shall only consider those issues raised by the parties in the Request for Review and reply to that request. No new evidence regarding the merits of the case is permitted (see Appendix B for Review Procedures and Presiding Officer's Statement). The parties have the right to be present at the review hearing with legal counsel if they choose and present their reasons for or against the recommendations of the hearing Panel. Such evidence is limited to the issue being reviewed. The facts of the case are to be presented through a verbal summary of the Presiding Officer or a transcript (if any). For example, if the party filing the request for review is of the opinion the hearing Panel misinterpreted a particular article of the Code of Ethics, the proper evidence would be evidence of the Standards of Practice and Case Interpretations provided as guidance. The facts giving rise to the violation itself are not relevant to the Panel's misinterpretation or misapplication of an article except to show that the facts are dissimilar to those intended to be covered by the article as demonstrated by the standards of practice and case interpretations.

If the hearing was tape recorded, under the procedures of the manual, a party may play parts of the tape to illustrate the issues on appeal. HOWEVER, the tape should not be played in its entirety as a substitute for the transcript or the Presiding Officer's summary. The Directors should require that the party only play the relevant parts of the tape. Because of the many inherent problems with playing the tape, such as the difficulty of understanding the speakers and determining who the speakers are, the Directors must be very careful to only allow playing of the tape to supplement the party's position, and NOT to allow it to be used to reopen the substantive issues of the case.

Once the testimony is presented to the review Panel, the parties and their attorneys are dismissed and the review Panel decides what course of action to take.

The Directors, by a vote of the majority after deliberations, may :

- adopt the recommendation of the hearing Panel, including the recommended discipline;
- dismiss the case if they conclude the findings of fact do not support the recommendation;
- refer the decision back to the Professional Standards Committee for a new hearing with the same or different hearing Panel as appropriate. A different hearing Panel is preferable if the Directors are concerned with a possible procedural deficiency; or
- modify any portion of the recommendation, including the discipline. The Directors should not modify the discipline so that it is greater than that recommended by the hearing Panel. The Directors should only reduce it if necessary to protect the Association from liability for imposing excessive discipline, NOT substitute their judgment for that of the hearing Panel.

#### **4. Action of the Directors if there is no Request for Review**

The Directors, when taking final action on a disciplinary matter when there is no request for review, is a Panel as defined in the Manual. Even when no request for review has been filed, the Directors receive copies of the decision when taking final action on a disciplinary matter. The Directors must adopt the hearing Panel's decision unless it is deficient on its face. If the discipline is obviously excessive, or there is a clear lack of due process, the Directors may refer the decision back to the hearing Panel for appropriate action. For example, if a new member is expelled for failure to advertise his or her REALTOR® status, the discipline would be considered excessive and the decision referred back for more appropriate discipline. This exception is a limited one, the purpose of which is to protect the Association from potential liability. The parties still have the burden of requesting a review of any recommendation they feel is incorrect.

If the Directors feel that the decision must be modified in order to protect the Association, it should be sent back to the hearing Panel with instructions on what changes they feel should be made. The Directors should not make the changes themselves unless the hearing Panel refuses and the Association would be subject to liability if the changes aren't made.

Upon final action by the Directors, the Association Executive shall notify the complainant, respondent, Professional Standards Chairperson and the hearing Panel.

#### **5. Publishing the Names of Ethics Violators**

N.A.R. policy allows local associations to adopt a policy to publish the names of ethics violators under certain circumstances. The C.A.R. Manual incorporates these procedures under Section 17. However, in order for an association to use the procedures, the association's Board of Directors must first adopt a resolution to publish names pursuant to these procedures.

Assuming a local association has adopted a policy to publish names, the following procedure applies. If a member is found in violation of the Code of Ethics a second time within a three (3) year time period, the member's name, the fact that the member has been found in violation of the Code of Ethics, the Article(s) violated, and the discipline imposed shall be published in the official communication vehicle of the Association. Such publication shall not include the name of the firm the member is, or was, licensed or affiliated with. In cases where the member's name is similar to another Association member's or MLS Participant's or Subscriber's name, the member's real estate license number or office address (or both)

may also be published.

## **6. Reporting “Public Trust” Violations to the DRE**

It is Association’s obligation to refer final ethics decisions holding members in violation of the Code of Ethics to the California Department of Real Estate in instances where there is reason to believe that the “public trust” may have been violated. “Public trust” as used in this context refers to demonstrated misappropriation of client or customer funds or property, willful discrimination, or fraud resulting in substantial economic harm.

To meet this obligation, the association’s Board of Directors should review the disciplinary matter and make a determination that the “public trust” may have been violated. After making this finding, the findings of fact can then be forwarded to the DRE.

It should be reminded that this obligation only exists to those violations that involve misappropriation of client or customer funds or property, willful discrimination or fraud resulting in substantial economic harm. This is a high standard and only serious violations should be forwarded to the DRE. The Board of Directors will have to determine on a case by case approach as to what violations meet this threshold.

## **7. Declaratory Relief**

In most instances, the respondent accepts the imposed discipline. However, when the respondent disagrees with the decision in such matters, he may initiate litigation against the Association, its officers, Directors and committees. This possibility should not intimidate nor deter the proper exercise of the Association's responsibility. However, the Association should exercise diligence to minimize its exposure.

If the Directors have reason to believe that the decision will become the basis of litigation, it may specify that the discipline shall become effective upon entry of the final court judgment in a suit brought by the Association for declaratory relief.

Declaratory relief is more important in the cases of suspension or expulsion because the member will be deprived of member benefits and, due to the publication of the decision, may claim injury to his reputation.

An action for declaratory relief is brought in Superior Court. The Court scrutinizes the action of the Association to make sure that the respondent has been afforded due process of law, and that the Association has followed its procedures and declares that the Association has not violated any rights of the member.

## **8. Record Retention**

Once the decision is final with the association, the case file, including the decision, recommended discipline and all documents and correspondence regarding the matter, should be retained by the association in accordance with its record retention policy. However, any tape recordings of the hearing should be destroyed. If the association does not have a record retention policy for this type of document, it is recommended that associations retain the case file for a period of three (3) years beginning on the date the decision is final with the association.

Sometimes, a disciplinary matter is filed with the association and during processing one or more of the named respondents resigns from membership. Under N.A.R. policy, the association is required to suspend processing of the matter with respect to the resigned member and hold the matter in abeyance or refer the matter to another association where the resigned member may hold membership, assuming this is known. In situations where the matter cannot be referred to another association, a decision needs to be made to decide how long to retain the records of the matter held in abeyance. For example, it may be beneficial to hold the records indefinitely in case the resigned member later attempts to rejoin the association or MLS. This way, the association can require the member to complete the pending matter as a condition to receiving membership. However, it may be that the person will never rejoin the association. Therefore, the association may want to adopt a time frame for pending matters.