

# Professional Standards

## Ethics and Arbitration Procedures for REALTORS®

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# Professional Standards

## Ethics and Arbitration Procedures

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by Oliver E. Frasca, Esq.

- I. **Grievance Committee** – (Augmented by AE or CEO-- procedure only)
  - A. **Ethics Cases:**
    1. **General**
      - a. Screening and initial review of cases
      - b. Responsible for the enforcement of the Code of Ethics
      - c. Ensure due process for all participants/members
      - d. Code of Ethics enforcement
        - (1) Educate the member
        - (2) Offense against the Board
        - (3) Offense against the membership
        - (4) NO place for personal vendetta
        - (5) AE/CEO Chairperson should not be interjecting opinions
        - (6) This is NOT appropriate
          - (a) “Finally we will get \_\_\_\_\_” or,
          - (b) “I saw several of these last year when I was on Professional Standards” or,
          - (c) “I have done deals with this person, I know what s/he is like.”
        - (7) Only the information in the Complaint is to be used
      - e. Hearing may result in discipline or denial of membership
      - f. Don't
        - (1) Hold hearings
        - (2) Pass judgment on people
        - (3) Become a police force
        - (4) Let personal enter into the decisions
        - (5) Make up procedures
        - (6) Discuss things outside the issues raised in the Complaint
    2. **Determination**
      - a. Membership determination -- REALTORS® Only as Respondents
        - (1) Existing members
        - (2) Former members (escaping jurisdiction)
        - (3) Broker member or salesperson (broker associate)
      - b. Complaint in proper form
      - c. Complaint filed within *180 days of the time that the alleged offense and the facts relating to it could have been known by the complainant in the exercise of reasonable diligence.*



- d. Arbitration vs. Ethics (sequence)
- e. Litigation/License Law Enforcement pending
  - (1) Criminal -- automatic wait for final judgement
  - (2) Civil Litigation -- consult with Board attorney
    - (a) Degree of similarity with ethics case
    - (b) Degree that civil case would resolve the ethics case
    - (c) Length of the anticipated delay
    - (d) Impact on the other board members
    - (e) Hearing in ethics will not deprive the member-respondent of due process in either forum
  - (3) License Law Enforcement Action -- consult with Board attorney

### 3. Options

- a. Hearing -- Forward case to the Professional Standards Committee
 

*"If a complaint, together with any supporting documentation, **taken as true on its face**, would constitute unethical conduct on the part of the respondent, then the Grievance Committee should not determine the truthfulness of the complaint but rather should refer the matter before Hearing Panel of the Professional Standards Committee."*
- b. Dismiss the Complaint
 

*"An unwarranted or frivolous complaint is **one** which, even if taken as true, would not constitute unethical conduct on the part of the respondent."*
- c. More Information
  - (1) Return to complainant for more information
    - (a) Charges are vague or unclear
    - (b) Wrong articles selected (include copy of Code)
    - (c) Complaint includes a request for arbitration
    - (d) Compound complaint asks for ethics and arbitration
  - (2) Assistance with Complaint
    - (a) Grievance Committee member provides technical assistance in clarifying complaint only
      - i) Language barrier
      - ii) Disability
      - iii) No one else available to help complainant
      - iv) **Not** an Association Executive function
    - (b) Committee member does not become an advocate
    - (c) Committee member does not argue case for the complainant
    - (d) Committee member does not participate in deliberations over complaint at Grievance meetings



- (e) Caution: appearance of prejudice or actual prejudice to the respondent-member
- d. Amend/Alter the Complaint
  - (1) Deleting articles
    - (a) No supporting evidence
    - (b) Not properly identified
  - (2) Adding articles (Caution)
    - (a) Correcting the article number
    - (b) The article best suited to the facts alleged
  - (3) Adding individual parties respondent
    - (a) Broker
    - (b) Other respondents (brokers/salespersons) in same transaction
- e. Grievance Committee Becomes Complainant (Caution)
  - (1) Who will the respondent have to cross examine?
  - (2) What will happen when a REALTOR® or member of the public refuses or is unable to attend a subsequent hearing if the committee believes there is sufficient information
  - (3) If they determine on their own to investigate potentially unethical conduct
  - (4) If they are directed by the Directors (never do this) to investigate potentially unethical conduct. Who will serve as the appeals board? Why did a member of the Board not file the complaint?

#### 4. Reply

- a. Board must *have* adopted a policy in advance (**pick one only**)
  - (1) Reply requested *before* given to Grievance Committee
    - (a) leads the committee to "hold a mini-hearing"
    - (b) on the merits of the case
  - (2) Reply *not* requested before given to Grievance
    - (a) Committee should make its determination based on the allegations in the complaint only
    - (3) Committee discretion (NOT recommended)
- b. Check to see what your Board policy is.

#### 5. Appeal

- a. Grievance Committee dismissals only
- b. Must be filed within 20 days
- c. Directors get only what committee had
- d. Directors consider the same question as the committee
  - (1) Forward to hearing
  - (2) Uphold dismissal

#### 6. Most Common Mistakes and Helpful Hints

- a. No "Reply" policy (inconsistent treatment)
- b. AE involvement -- other than procedure



- c. Professional Standards Chairperson goes too far
- d. President does get involved
- e. Board asks Grievance to file or investigate someone
- f. Oral filing (never)
- g. Discourage people from filing
- h. Discussion of the case prior to hearing
- i. Article Specific Complaints not used

## B. Arbitration Cases

### 1. General

- a. Screening and initial review of cases
- b. Simple tests
- c. Substitute for court
  - (1) Member benefit
  - (2) Faster and less expensive
- d. What they don't do:
  - (1) Hold hearings
  - (2) Pass judgment on people or who is right?
  - (3) Become a police force
  - (4) Let personal enter into the decisions
  - (5) Make up procedures or rules establishing who gets paid
  - (6) Discuss things outside the issues raised in the Complaint

### 2. Case Review

- a. Membership determination
  - (1) Current member
  - (2) Obligation to arbitrate extends past termination
- b. Subject matter
  - (1) Business dispute *arising out of the real estate business*
  - (2) Certain non-business disputes
  - (3) Successful Sale (one that closes)
  - (4) No earnest money splits unless agreement (not MLS)
- c. Form of complaint
  - (1) No ethics allegations
  - (2) Asks for relief that can be granted
    - (a) Money not specific performance
    - (b) Not discipline
    - (c) Not license law issues
    - (d) Attorney fees
    - (e) Not already resolved in another forum
  - (3) Complaint and Agreement to Arbitrate in proper form
  - (4) Signed arbitration agreements and deposits must be received from both parties



- (5) Caution: Arbitration may be conducted without a signed arbitration agreement from the respondent provided the respondent appears and takes part in the hearing.
- (6) Caution: Arbitration may be conducted in the absence of the respondent and without a signed arbitration agreement and deposit if all procedural due-process steps have been followed (Caution)
- (7) State law will determine which option a Board may utilize
- (8) Advice of the Board or State Association counsel needed
- d. Request must be filed within *180 days of the time the facts giving rise to the request could have been known with reasonable diligence.*
- e. Litigation pending
  - (1) This is a substitute for litigation
  - (2) Can't happen
  - (3) Can have litigation to enforce agreement to arbitrate
- f. License law violation -- not a factor in arbitration
- g. Fees
  - (1) Board filing fee may not exceed \$500
  - (2) State Association's fee may not exceed \$500

### 3. Parties

#### a. Mandatory

REALTOR® Principal (Broker) v. REALTOR® Principal (Broker)  
 Client (Seller or Buyer) v. REALTOR® Principal (Broker)

#### b. Voluntary

Customer v. REALTOR® Principal (Broker)  
 REALTOR® v. REALTOR® (same office)  
 REALTOR® Principal v. non-member Broker

#### c. Include all necessary parties

- (1) Other broker (3<sup>rd</sup> party)
- (2) Former broker
- (3) Board membership (different boards)
- (4) Consolidation of claims arising out of the same transaction
  - (a) Consolidation of several separate arbitrations
  - (a) Due process
  - (b) Potential double payment
  - (c) Same transaction
- (5) Only members in good standing or otherwise entitled to invoke arbitration
- (6) Parties that were members at the time facts giving rise to the dispute occurred

### 4. Options

- a. Send it on to hearing
- b. Reject the request



- (1) Reasons for Board (Grievance Committee) to Opt Out
- (2) Due Process
  - Is there any reason to conclude that the Association would be unable to provide an impartial Hearing Panel?*
  - (a) Local power in the market area
  - (b) Prejudicial comments by
    - i) Small disliked brokerage office "every one knows they are trouble"
    - ii) Association Executive
    - iii) Potential panel members
    - iv) Grievance committee members
    - v) Professional standards committee members
- (3) Arbitrable Matter
  - Is the matter at issue related to a real estate transaction and is it properly arbitrable, i.e., is there some basis on which an award could be based?*
  - (a) Contract
  - (b) Agreement
- (4) Amount too large
- (5) Matter too "legally complex"
- (6) Arbitrators knowledgeable
  - (a) Residential v. Commercial
  - (b) Time and experience
- c. Preliminary Action
  - (1) Board's procedures must be consistent with state law
    - (a) Some states permit advance agreements to arbitrate future disputes
    - (b) Some states permit agreements to binding arbitration made after the dispute occurs
    - (c) Some states do not recognize agreements to participate in binding arbitration before or after the dispute arises

**5. Reply -- Not an issue**

**6. Appeals of Grievance Committee's dismissal**

- a. If the arbitration request is dismissed, that dismissal may be appealed to the Board of Directors
- b. Directors receive only what the committee had
- c. May uphold the Grievance Committee decision or overrule and send to Professional Standards Committee

**7. Most Common Mistakes and Helpful Hints**

- a. Improper parties
  - (1) Salespeople (broker associates) instead of Brokers
  - (2) Note: may change for corporate membership
  - (3) Result: Award equals judgment
- b. All the parties



- (1) Other competing selling agents
- (2) Builder, seller or buyer
- c. Inclusion of Ethics overtones in complaint

## II. Hearing Procedures

### A. Rights of parties

- 1. Impartial (3-5) member panel
- 2. Advance notice of
  - a. Schedule call in advance
  - b. Time and place of hearing
  - c. Attorney participation for one side
  - d. Witnesses list to be called by a side
- 3. Present evidence and testimony
- 4. Cross-examine the other party's witnesses
- 5. Opening and closing statements
- 6. No self-incrimination
- 7. Expenses not covered

### B. Panel is not a court of law

- 1. Bound by state law
- 2. Discourage accepting any "briefs" from attorneys (50/50 rule)
- 3. Each party is responsible for conduct of their attorneys: may dismiss the attorney, if so -- then reschedule hearing

### C. Hearing Panel Members

#### 1. Grounds for automatic disqualification

- a. No more than one member connected with the same firm, partnership or corporation
- b. May not be related by blood or marriage to the complainant or the respondent
- c. May not be an employer, partner or employee of the complainant or respondent
- d. May not be a party to the hearing
- e. May not be a party or a witness in any other pending case involving the complainant or the respondent
- f. Individual served on Grievance Committee

#### 2. Parties have the right to challenge for cause

- a. Other factors that would prevent a panel member from rendering an impartial, unbiased and knowledgeable decision
- b. Challenges for cause are ruled on by Professional Standards Committee Chairperson (be liberal)
- c. If the Chairperson is challenged, the decision is made by the Professional Standards Committee Vice Chairperson



- d. If both the Chairperson and the Vice Chairperson are challenged, the Board President makes the determination
- e. If either party is a REALTOR-ASSOCIATE® or a REALTOR® other than a principal, at least one panel member must be a REALTOR-ASSOCIATE® or REALTOR® other than a principal

**D. Withdrawal of the complaint**

**1. Ethics**

- a. After the complaint referred for hearing, may be withdrawn only with the Hearing Panel's approval
- b. Not a determination on the merits

**2. Arbitration -- requires both parties' agreement**

**E. Hearing Panel Opt Out**

**1. Due Process** Is there any reason to conclude that the Association would be unable to provide an impartial Hearing Panel?

- a. Local power in the market area
- b. Small disliked brokerage office "every one knows they are trouble"
- c. Prejudicial comments by
  - (1) Association Executive
  - (2) Potential panel members
  - (3) Grievance committee members
  - (4) Professional standards committee members

**2. Arbitrable Matter** Is the matter at issue related to a real estate transaction and is it properly arbitrable, i.e., is there some basis on which an award could be based?

- a. Contract
- b. Agreement
- c. Amount too large
- d. Matter too Legally Complex
- e. Knowledgeable Arbitrators
  - (1) Residential v. Commercial
  - (2) Time and experience

**III. Pre-Hearing Overview**

**A. Prepare the Panel**

- 1. Stress need to have a poker face
- 2. Serious business for the parties
  - a. No idle talk at, during or after hearing
  - b. No "deal talk" at any time
  - c. No friendly "hello how are you" conversations
  - d. Avoid even the appearance of impropriety



3. Questions for players
  - a. Best written down
  - b. Best held until others are finished
  - c. Best handed to Chairperson
  - d. Avoids "Well in my office..."
  - e. "As we all know \_\_\_\_\_ is standard"
  - f. Give the parties a chance to present their case and entrap each other, to prove their case
4. Reading during hearing
  - a. Pleadings
  - b. Other documents
  - c. Try not to read but to listen
5. Note taking
  - a. Be careful
  - b. Take your time
6. Review witness testifying procedure with witness chair
7. Review of Chairperson's responsibilities
8. Cite the authority of the Board to hold the hearing

**B. Prepare the room**

1. Location of panel -- straight table
2. Location of attorney/administrative officer
3. Location of court reporter
4. Separate tables/space

**IV. Hearing Procedure**

**A. Chairperson** -- reads procedure following the N.A.R. manual exactly

1. Reviews the room setup
2. Confirms that everyone in attendance
3. Confirms that all know the rules
4. Deals with any objections
5. Explains the court reporter rules -- Only the Chairperson or attorney for panel talks to the reporter

**B. Complaint** -- read into the record or accepted by parties

1. Parties and witnesses sworn
2. Presentation starts
  - a. Opening statements
    - (1) Complainant first (time about 10-15 minutes)
    - (2) Respondent now or may reserve for start of their case
  - b. Complainant presents
    - (1) Witnesses
      - (a) Direct examination by Complainant
      - (b) Cross by the Respondent



- (c) Re-Direct by Complainant
- (d) Re-Cross by Respondent
- (e) The Chairperson may exclude any questions or testimony that he or she deems irrelevant or argumentative
- (2) Evidence comes in through witnesses only
- (3) Failure to provide list prior to hearing precludes ability to call that witness
- (4) Panel may decide that their testimony is essential – Other party has the right to request a continuance
- (5) Witnesses present only to give testimony and to be cross-examined
- (6) Parties are responsible for the expenses of their witnesses
- c. Respondent presents witness in same fashion
- d. Panel members ask questions as determined by Chairperson before hearing
- 3. Closing statements by the complainant, then the respondent
  - a. Only one for each side
  - b. Does not entail asking anyone questions
- 4. Panel Chairperson asks if there was a fair and full hearing
- 5. Adjournment to the executive session
  - a. After the hearing is adjourned, the panel goes into an executive session
    - (1) Whether the Board legal counsel remains for the executive session is a matter of local Board option
    - (2) Whether the Association Executive remains for the executive session is a matter of local Board option

## V. The Verdict -- Closed Session

- A. **Ethics** – Standard of proof that must be met "clear, strong and convincing"
  - 1. **Decision**
    - a. Must be in writing
    - b. Must have:
      - (1) "Findings of fact"
      - (2) Conclusions as to unethical conduct
      - (3) Recommended discipline, if applicable
    - c. Must be signed by a majority of the panel – Dissenting opinions may be filed (not encouraged)
  - 2. **Discipline only if member found in violation**
    - a. Member's previous record may be reviewed by the Panel
    - b. Discipline proposed must be authorized in the Board's professional Standards procedures
    - c. May not exceed authorized forms of discipline in the N.A.R.'s Code of Ethics and Arbitration Manual



- d. Reasons for discipline
  - (1) Two purposes
    - (a) To educate the member
    - (b) To punish the member
  - (2) Cannot be used as a "level" or a "club" to coerce other action
- e. Should be reasonable and should fit the offense
- f. Forms of discipline
  - (1) Letter of warning
  - (2) Letter of reprimand
  - (3) Attendance at ethics course or other appropriate course or seminar
  - (4) Fine, not to exceed \$2,500 -- \$2,500 is the maximum fine, regardless of the number of Articles violated
  - (5) Probation, for one year or less
  - (6) Suspension
    - (a) for no less than 30 days, nor
    - (b) more than one year
  - (7) Expulsion from membership, for a period of one year to three years
  - (8) board has the option of allowing the respondent to pay a fine (not more than \$2,500) in lieu of suspension – is there a message here?
    - (a) May be exercised by a respondent only once in any three-year period
    - (b) Not an option if the suspension is a result of a failure to arbitrate
  - (9) Publication of name of offender (New in 2000)
    - (a) Requires adoption *before* transgression occurred
    - (b) Adopted by Board of Directors

**3. Decision provided to the parties**

- a. Notified of their rights to request a rehearing or an appeal
- b. Directors do not get the decision until after the rehearing and the appeal periods have expired and the appeal has passed

**B. Arbitration – Standard of proof for arbitration awards -- "preponderance"**

- 1. **"Procuring cause"** -- the series of unbroken events that resulted in the desired objective (the sale of property)
  - a. No predetermined rule or standard for the entitlement
    - (1) No "threshold" rule
    - (2) No "contract in hand" rule
  - b. Awards must be based on all the facts and circumstances related to the transaction
  - c. *"Arbitration guidelines"* -- see *N.A.R. manual* – many suggested factors for consideration by a Hearing Panel in the arbitration



2. **Award**
  - a. Must be in writing
  - b. No "findings of fact" or rationale for the panel's award -- allegations of unethical conduct may not be considered
  - c. No predetermined rules as to entitlement
  - d. Award may not be greater than the amount in dispute
  - e. Signed by the majority of arbitrators
  - f. No dissenting opinions
  - g. Arbitrators not concurring in the award may not discuss the matter with the parties
3. **Indicate the disposition of the deposits**
  - a. Deposit of the prevailing party returned
  - b. Deposit of the other party retained by the Board
  - c. If a partial award made, a portion of the deposits may be retained by the Board
4. **After the decision (award) rendered**, the case may not be reopened
  - a. Due process claims are considered by the Board of Directors
  - b. Limited form of review of the arbitration procedure
  - c. Arbitration awards themselves not appealable
    - (1) Limited right of appeal in arbitration
    - (2) Based on due process or procedural problems
5. **Procedural Review** – after the award served on the parties, a twenty-day limit to request a procedural review
6. **Settlement**
  - a. Parties may settle their dispute at any time prior to the rendering of an award
  - b. Portion of each party's deposit may be retained by the Board to cover its costs up to the time of the settlement

## VI. Ethics Hearings -- Special Procedures

### A. Amended complaints

1. **Prior to the hearing**
  - a. Complainant may amend the complaint
    - (1) Amended complaint provided to the respondent
    - (2) Opportunity to file an amended response
  - b. Panel may disallow filing the amended complaint
    - (1) Matter then continued to a new date
    - (2) Hearing held on the original complaint
2. **During the hearing**
  - a. Complaint may be amended by
    - (1) Complainant or
    - (2) Hearing Panel
  - b. Respondent has



- (1) Opportunity to request a continuance, (hearing rescheduled not less than 15 or more than 30 days) or
- (2) Proceed on an amended complaint at that time
- (3) Record should reflect that the respondent waived the right to have the hearing continued

**3. Signed by the amending party**

**4. Served on the respondent for the amended response**

**B. Failure of the complainant (member or public) to appear**

1. If the complainant is unable or unwilling to appear -- the complaint is referred back to the Grievance Committee
  - a. If sufficient evidence to proceed
    - (1) Grievance Committee becomes the complainant (Caution)
    - (2) Complaint is amended
    - (3) Hearing is rescheduled
    - (4) Respondent provided with amended complaint
  - b. If insufficient evidence available -- the complaint is dismissed
2. Case is over (recommended)
  - a. Due process right to cross examine your accuser
  - b. How to prove innocent against a grievance committee

**VII. Arbitration -- Special Procedures**

**A. Refusal to arbitrate should be referred to the Board of Directors**

1. When the Grievance Committee has determined that the arbitration is mandatory
2. May result in disciplinary action for failure to abide by the arbitration obligation of Article 17
3. Could be either Complainant or Respondent

**B. Complainant's failure to appear**

1. Panel chairman should determine the reason for failure to appear
2. If the respondent unavoidably delayed, consideration should be given to rescheduling
3. Arbitration may proceed in the absence of a party
4. Disciplinary action for refusal to arbitrate should not be taken
5. Board will arbitrate and an enforceable award will be rendered
6. Much like a default judgment with a hearing on damages

**C. Respondent's failure to appear**

1. Hearing may proceed -- the panel makes its decision based on available evidence
2. Panel chairman should determine the reason for failure to appear



3. If the respondent unavoidably delayed, consideration should be given to rescheduling

**D. Satisfaction of the arbitration award**

1. Anticipated that members will abide by (pay) the awards promptly
2. Failure to pay should not be cause for disciplinary action in the first instance
  - a. Award recipient should seek judicial enforcement -- including his or her attorney's fees and court costs
  - b. Board may subsidize the award recipient in seeking judicial enforcement
  - c. N.A.R.'s Arbitration Award Enforcement program
3. Pattern or practice of refusing to pay the awards -- may be the basis for disciplinary action

**VIII. Arbitration related to the areas of specialty practice**

**A. Arbitration requests related to commercial, investment, industrial, etc., transactions**

1. If the Professional Standards Committee does have a sufficient number of members qualified in that area
  - a. Board President appoints other Board members qualified in that area to serve on the panel, or
  - b. Advises the Board of Directors that qualified panel members cannot be impaneled
2. If the Directors agree that the Board cannot impanel a panel of members qualified in that specialty area
  - a. Request for arbitration is referred to the State Association
  - b. Pursuant to procedures in part five, Code of Ethics and Arbitration Manual
3. Make sure the record reflects approval of the panel at the start when there have been last minute substitutions or acceptance of non-specialty people

**B. State Association**

1. If State Association provides arbitration as a service to its members or
2. State Association cannot impanel a representative peer panel knowledgeable in that specialty area
  - a. Parties are released from their obligation to arbitrate
  - b. Parties may pursue other remedies
3. Should be following the same rules as N.A.R. and local boards

**IX. Mediation**

**A. Mediation defined -- as it differs from arbitration**



1. Voluntary
2. Non-adversarial
3. Role of mediator -- find areas of agreement; suggest modification of point of view; bargain -- this for that

**B. Mediation Facts**

1. Success rate -- depends on skill of mediator
2. Time -- usually less than 60 days
3. Cost -- \$300 - \$800 a day for mediator

**C. Choosing the mediation officers**

1. Significance
2. Mediator versus arbitrator
3. Responsibilities of the mediator
4. Qualifications
5. Out sourcing
  - a. Cost
  - b. Member benefit
  - c. Other types of disputes

**D. Mediation background**

1. How and where mediation begins -- parties agree to written complaint and response; agree to time and place; separate rooms
2. Mediation centers
3. Some organizations using mediation -- management v. union

**E. Mediation meeting format**

1. Opening comments by mediation officer
2. Presentation of position by complainant
3. Presentation of position by respondent
4. Offers of resolution/dialogue
5. Suggested resolution by mediation officer
6. Agreement/no agreement (see end of this outline for sample mediation form)

**X. Board of Directors**

**A. Role of the Directors when no appeal is filed**

1. Ethics Hearing Panel recommendations are provided to the Directors for review – even if no appeal is filed, after the time period for filing an appeal has passed (20 days)
2. In most cases, the panel's recommendations are adopted
3. Directors must adopt the panel's recommendations, unless they are concerned with the possible procedural deficiency in the hearing process



- a. Refer matter back to the Professional Standards Committee
- b. Heard by a new Hearing Panel composed of different Professional Standards Committee members

**B. If appeal is filed – to hear the appeal**

- 1. That is why no contact with parties prior to appeal
- 2. No starting the process at the Board level

**XI. Final Action of the Directors**

**A. Dissemination of the decision**

- 1. **Board President** (or AE) provides the final action to
  - a. Complainant
  - b. Respondent
  - c. Board of Directors
  - d. Chairperson and members of the Hearing Panel
  - e. President of any other Board in which the respondent holds membership – Disciplinary action by one Board may have an effect on the member's continued membership in another Board
  - f. Board legal counsel
  - g. Government agency, if directed by the Directors
    - (1) Prior notification to the parties
    - (2) Part of the Board policy (written)
    - (3) Not on a “case by case” basis (due process problems)
- 2. **Board members** are not notified of the final action unless
  - a. Ethics – discipline of suspension or expulsion of the member
  - b. Arbitration – never

**B. Discipline requiring action by the disciplined member**

- 1. **Final order of the Directors** should
  - a. Specify any additional sanctions that may be imposed if the respondent does not comply with the discipline
  - b. These sanctions may be automatically imposed
- 2. **If the final order does not include additional sanctions for the failure to comply with the discipline**
  - a. Failure should not be the basis for subsequent ethics hearings
  - b. If additional sanctions are contemplated
    - (1) Member has the opportunity to appear before the Board of Directors to explain the failure to comply
    - (2) If the explanation unsatisfactory, additional discipline may be imposed

**C. Directors must adopt the panel's recommendation, unless**

- 1. Concerned with possible procedural deficiency in the hearing process



- a. Refer matter back to the Professional Standards Committee
- b. Heard by a new Hearing Panel composed of different Professional Standards Committee members
- 2. Concerned with the nature or appropriateness of the proposed discipline
  - a. May reduce the discipline
  - b. May refer the matter back to the original Hearing Panel for reconsideration
  - c. Directors' concerns should be provided to the Hearing Panel

**D. Probation**

- 1. Imposed in lieu of other discipline
- 2. Other discipline held in abeyance -- discipline held in abeyance may be imposed if subsequent violation(s) of the Code occur during the probationary period
- 3. If the current violation related to the violation that resulted in probation
  - a. Probation may be revoked
  - b. Discipline suspended during the probationary period may be imposed, as well as discipline recommended by the current hearing panel
- 4. If the current violation minor, inadvertent or otherwise unrelated -- probationary status should be unaffected

**XII. Rehearing Procedures**

**A. Right to request a rehearing in an ethics proceeding**

- 1. Either the complainant or the respondent may request based on new evidence
- 2. Based on newly discovered evidence that could not have been discovered prior to, or during, the hearing

**B. Rehearing request**

- 1. Must be made within time frame specified in the Board's procedures
- 2. Must be in writing
  - a. Based on newly discovered material evidence that could not have been presented at the original hearing
  - b. Requester believes the evidence would have had an effect on the panel's decision
  - c. Indicate why the evidence not available earlier
  - d. Request made to the Hearing Panel (Chairperson)
- 3. If the request denied, the petitioner may appeal to the Board of Directors
- 4. Petitions not granted within two weeks of filing are deemed denied

**C. Rehearing**

- 1. Conducted by the same Hearing Panel



2. Limited to the consideration of new evidence -- the other party has the opportunity to rebut
3. Same time and notice requirements apply as applied to the original hearing

### **XIII. Appeal Procedures**

#### **A. Ethics -- appeal to the Board of Directors by either party**

1. Either the complainant or the respondent may appeal
  - a. Alleged procedural deficiencies
  - b. Lack of due process
  - c. Punishment does not fit the crime
2. No new evidence may be submitted
3. Decision of the Board of Directors based on the transcript from the hearing (or the Chairperson's Summary), the written appeal and the testimony provided by the Chairperson and the parties at the appeal hearing
4. Directors may accept the decision of the Hearing Panel, modify or reject the decision of the Hearing panel

#### **B. Arbitration – appeal to the Board**

1. Alleged lack of due process
2. Not on the merits
3. Not on new evidence

#### **C. Request**

1. Made to the Board President
2. Must be filed within the time frame specified in the Board's procedures
  - a. Twenty days, if no petition for the rehearing is filed
  - b. Ten days, after the rehearing is denied
  - c. Twenty days, after the decision in rehearing is final
3. Must be accompanied by an appeal deposit (not greater than \$250)
4. Must be in writing
  - a. Stating the basis for the appeal
  - b. Basis on which the respondent may appeal
    - (1) Misapplication or misinterpretation of the Code
    - (2) Procedural deficiency in the hearing process
    - (3) Lack of due process
    - (4) Nature of the discipline recommended by the panel
    - (5) Other
  - c. Complainant's appeal limited to
    - (1) Procedural irregularities (deficiencies) that denied due process
    - (2) Other lack of due process

### **XIV. Appeal hearing**



- A. Scheduling – Board Secretary (or AE)**
1. Provides a copy of the appeal to the other party(ies)
  2. Notifies the parties of the time and the place for the appeal hearing, giving not less than ten days notice
    - a. Next regular meeting of the Directors
    - b. Special meeting of the Directors
    - c. May be heard by a panel of the Directors or the Board's Executive Committee
- B. Appeal hearing procedures**
1. Appeal hearing limited to the basis set forth in the appeal
  2. Limited to issues raised in the written appeal
  3. Hearing Panel Chairperson presents the transcript or summary
  4. Each party has a chance to correct the transcript or summary
  5. Each party may present arguments why the panel's recommendation should or should not be followed
  6. No new evidence may be presented
- C. Decision of the Directors on appeal**
1. The Directors may
    - a. Adopt the Hearing Panel's decision and recommendation for discipline
    - b. Modify the Hearing Panel's decision and/or the recommendation for discipline
    - c. Dismiss the matter if "findings of fact" do not support the conclusion of unethical conduct
  2. If concerned with possible procedural error
    - a. Refer matter back to the Professional Standards Committee
    - b. New hearing on the matter before a different Hearing Panel
  3. If concerned with the nature or appropriateness of discipline
    - a. May impose a lesser discipline
    - b. May refer matter back to the same Hearing Panel
    - c. Directors' concerns should be provided to the panel for its consideration
  4. Disposition of the appeal deposit
    - a. If the panel's recommendation adopted, the deposit goes into the general treasury of the Board
    - b. If the panel's recommendation rejected, the deposit is returned to the party making the appeal
    - c. If the panel's recommendation modified, the Directors determine the disposition of the deposit
  5. Directors' decision



- a. Reasons for the modification or the dismissal of the panel's recommendation should be provided, in writing -- failure to provide the reasons does not invalidate the decision
- b. Dissenting opinions may be filed
- c. Discipline imposed by the Directors may not exceed that recommended by the panel

**XV. Appeals of arbitration hearing procedures -- arbitration award (decision)**

**A. In writing**

**B. Disposition of the amount in dispute**

- 1. No "findings of fact"
- 2. No explanation of the arbitration panel's rationale for the award
- 3. Unlike ethics decisions, no "dissenting opinions"

**C. Each arbitration award stands on its own merits**

- 1. Award itself may not be appealed or challenged
- 2. Limited right to challenge the process (procedures used in the arbitration hearing)
  - a. Lack of due process
  - b. Other procedural deficiencies (Board did not adhere to its established arbitration procedures)
- 3. Request for the procedural review (appeal) goes to the Directors

**D. Appeal Process**

- 1. Appellant must file the appeal in writing
  - a. Indicate the basis for the appeal
  - b. Must be filed within the twenty-day appeal time limit
    - (1) Consider any issues not raised in the appeal
    - (2) No new evidence
    - (3) Will not review the award itself
    - (4) Directors' concerns
- 2. Right to challenge the members of the appeal panel (Directors)
  - a. Challenge to the qualifications of a tribunal member applies
  - b. Any Director who was a party or involved in the matter, or a member of the Grievance Committee or a member of the Arbitration Hearing Panel may not serve
- 3. Presentation of the appeal
  - a. Appellant presents the basis for the appeal -- no new evidence may be presented
  - b. Chairperson of the Arbitration Hearing Panel responds to the appellant's allegations



- c. Other parties to the arbitration have the opportunity to explain why the panel's decision should be followed --- restricted to the issues raised in the appeal
- 4. Executive sessions
  - a. Directors determine whether the procedures followed by the arbitration panel provided all the parties with due process
  - b. If the process was defective
    - (1) Invalidate the original award
    - (2) Refer for hearing -- different Hearing Panel of Professional Standards Committee
    - (3) If cannot impanel -- refer to state association or release from obligation

## PROBLEMS AND COMPLICATIONS

### XVI. Declaratory judgment

- A. Should be secured if the Board anticipates legal challenge to the discipline
- B. Discipline should be held in abeyance pending the court's confirmation of the Board's action
- C. Declaratory judgment will confirm that the Board's action (discipline) will not violate the member's rights

### XVII. Other complications

#### A. Escrow of arbitration awards with the Board

- 1. No disciplinary action for the failure to pay an award in the first instance -- must be a pattern or practice of refusal to pay the awards before the disciplinary action may be taken
- 2. Board may not prohibit the parties from
  - a. Having the arbitration process reviewed by the Board of Directors and/or
  - b. Challenging the award in the courts
- 3. Boards have the option of establishing procedures to help ensure the payment of awards
  - a. Require the non-prevailing party to either
    - (1) Pay the award or
    - (2) Deposit the (escrow) award with the Board, if a challenge to the arbitration process will be made
      - (a) Failure to pay the award or the escrow award with the Board treated as a violation of a membership duty, not as a refusal to arbitrate
      - (b) Any interest accrued on the funds in escrow paid to the party to whom funds ultimately released
  - b. After making the deposit, the non-prevailing party must



- (1) Request a procedural review before the Directors within a specified period
  - (2) If the Directors confirm the award, the non-prevailing party has an additional time period to institute the legal challenge
    - (a) If the Board does not receive notice that a legal challenge has been instituted, the board releases the funds to the prevailing party
    - (b) If notice is received, the funds remain in escrow pending the court's determination
  - (3) If a procedural review by the Directors is not requested -- the Board must receive notice that the legal challenge to the award has been instituted within a specified time period.
- c. Failure to make the deposit
- (1) Considered by the Board of Directors
    - (a) At the next regularly scheduled meeting or
    - (b) At a special meeting
  - (2) Non-prevailing party given notice of the hearing and the opportunity to explain the failure to make the deposit
    - (a) Directors may impose discipline or
    - (b) May grant extra time to make the deposit

**B. Postponement of the hearing**

1. Ethics hearing may be postponed
2. Requests for the postponement should be in writing -- granted at the discretion of the Hearing Panel

**C. Recording the hearing**

1. Board must record the hearing
2. Parties may record the hearing at their own expense
  - a. The Board's recording is the official record of the hearing
  - b. If a party has its tape transcribed, a copy of the transcript must be provided to the Board at no cost

**D. Joinder of the REALTOR® (principal)**

1. Previous N.A.R. policy required the REALTOR® (principal) to be joined in any ethics complaint
  - a. Involving a non-principal REALTOR® in his or her firm
  - b. Involving a REALTOR-ASSOCIATE® in his or her firm
2. Current N.A.R. policy provides the Board with option:
  - a. May continue to automatically join the principal in all ethics complaints -- the Board's procedures must include specific provisions
  - b. May join the principal in an ethics complaint only
    - (1) By action of the complainant



- (2) By action of the Grievance Committee
  - (3) by action of the Hearing Panel prior to the hearing
    - (a) If the principal is joined in the complaint by the Hearing Panel during the hearing
      - i) Provisions of amending a complaint during a hearing apply [Section 22(f) (2)]
      - ii) Principal has the right to have the hearing reheard from the beginning by the same panel or he or she may waive this right
3. Even if a REALTOR® (principal) not automatically joined, has the right to
- a. Be present and/or participate in the hearing -- the Hearing Panel may require his or her presence
  - b. Participate in the hearing, if requested by the respondent -- consult and testify on the respondent's behalf
  - c. Receive copies of the complaint and the response
    - (1) Provided with notice of the hearing date and place
    - (2) May be called on by the parties or the panel as a witness
  - d. Receive copies of the panel's "findings of fact," conclusions and any recommended discipline
  - e. Receive copies of the requests for the rehearing or appeal
    - (1) Notices of these proceedings
    - (2) Has right to be present and participate
    - (3) Receives a copy of the final action by the Directors
  - f. If the respondent non-principal REALTOR® or REALTOR-ASSOCIATE® changes firm affiliations after a complaint is filed, but before the Hearing Panel reaches a decision, above specified rights accrue to both the former REALTOR® (principal) and the current REALTOR® (principal).

**E. Resignation or termination of membership while an Ethics complaint is pending (*New Rules Coming from N.A.R. here*)**

- 1. If the respondent resigns or causes membership to otherwise terminate after the complaint is filed, but before the final action by the Directors
  - a. Hearing process suspends
  - b. Association Executive forwards complaint to any other Board in which the respondent holds membership
  - c. If the respondent not a member of another Board or if the Association Executive cannot make a determination
    - (1) Complaint held in abeyance until the respondent rejoins Board or
    - (2) Respondent holds membership in another Board
- 2. If the ethics complaint transferred to another Board, the complainant must be notified

