CALIFORNIA ASSOCIATION OF REALTORS®

IMPLEMENTATION GUIDELINES
ARBITRATION
2023

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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*. 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. Language in red underlined font is new for 2023.

A. BASIS FOR ARBITRATION

1. Duty and Privilege to Arbitrate

Arbitration is not unique to organized real estate. Several other groups of professionals as well as companies and individuals use arbitration to resolve their disputes. When a real estate licensee joins a local association, he or she is entitled to the rights and benefits of REALTOR® membership. However, he or she is also bound by the obligations of membership, such as agreeing to abide by the Code of Ethics. Article 17 of the Code of Ethics is one of the cornerstones of organized real estate and it contains the REALTOR® obligation to use arbitration to resolve disputes.

While only REALTORS® are bound to abide by the Code of Ethics, real estate licensees who participate in the MLS also agree to abide by the MLS rules and regulations. The California Model MLS Rules, which most MLSs in California use, require participants and subscribers to arbitrate disputes that arise from listings on the MLS. Therefore, even if a real estate licensee is not a member of the local association, he or she may nonetheless be obligated to arbitration by being a participant or subscriber in a MLS.

2. The Association Member's Arbitration Agreement

Arbitration by its nature is contractual. That is, parties to arbitration agreed through some type of contract to be obligated to arbitration. In addition, parties may agree to arbitrate disputes either before or after the dispute arises. In California, arbitration agreements must generally be in writing to be enforceable. A local association member's written agreement to arbitrate exists by virtue of:

- the signed membership application;
- the agreement to abide by the Association's bylaws; and
- the agreement to abide by the Code of Ethics, specifically, Article 17.

While the agreement to arbitrate exists when an individual joins the Association, this agreement is repeated on the arbitration complaint and response forms. **However, refusing to sign an arbitration complaint or response does not alter the existing arbitration agreement. If a member fails to sign either form, the obligation to arbitrate still exists.**

Members also agree to arbitrate disputes with their clients, provided the client agrees to binding arbitration using the Association. Because a member's client has not previously agreed to arbitrate, the client's agreement to arbitrate is contained in the client of member arbitration complaint form (Form PA-1). This form also binds the client to comply with the arbitration award. Therefore, unlike a member, a client must complete and sign Form PA-1 in order to be bound by arbitration using the Association facilities.

Although Association membership is individual, many firms operate their real estate business under a corporation or other business entity. Sometimes, members attempt to use the corporation as a shield to

avoid their arbitration responsibilities. However, the membership application provided by C.A.R. and Section 42(a) of the *California Code of Ethics and Arbitration Manual* states that the member binds him or herself and the corporation for which he or she acts to arbitration. Furthermore, the *California Model Bylaws* also contain a similar section making this clear. Even so, an association may find it helpful to request that a member submit a corporate resolution specifically authorizing the member to bind the corporation to arbitration. Preferably, this should be done at the time of the arbitration complaint or response is filed, but it may be done at any time prior to the arbitration.

Often, members enter into separate agreements (such as in the listing agreement or a buyers' broker agreement) to arbitrate a dispute somewhere other than at the Association. This is perfectly legal and ethical and the Association should treat this agreement as superseding any agreement the member may have to arbitrate the particular dispute at the association.

Sometimes a member will attempt to bypass the arbitration process by filing a civil lawsuit against another member. If a member does this, the respondent member can request the court to compel arbitration at the local association in accordance with the arbitration agreement. However, if the respondent member fails to request the court to compel arbitration and responds to the civil lawsuit, the parties are effectively waiving their right and obligation to arbitration at the local association. Furthermore, neither member is in violation of Article 17.

3. The MLS Participant's or Subscriber's Arbitration Agreement

Assuming the MLS rules include a rule requiring arbitration, a MLS participant's or subscriber's written agreement to arbitrate exists by virtue of:

- the signed MLS application;
- the agreement to abide by the MLS rules and regulations.

While the agreement to arbitrate exists when an individual joins the MLS, this agreement is repeated on the arbitration complaint and response forms**. However, refusing to sign an arbitration complaint or response does not alter the existing arbitration agreement. If a member fails to sign either form, the obligation to arbitrate still exists.**

A person who is not a member of any local association but who is a participant or subscriber in a MLS will have an obligation to arbitrate disputes regarding listings in the MLS with other participants or subscribers of that MLS. Therefore, even if the participant or subscriber is not a member of a local association, the person may nonetheless be obligated to arbitrate disputes regarding listings on the MLS with the members of the local association who participate in the MLS. And, likewise, members of the local association will also have an obligation to arbitrate with the participant or subscriber.

4. Disputes Arising Out of the Real Estate Business

Members are not required to arbitrate all disputes with other members, only those that "arise out of the real estate business." As a general guideline, the types of disputes that arise out of the real estate business are those that arise between members when acting in the capacity of their real estate licenses and that involve monetary disputes, such as a procuring cause dispute over a commission. If a member objects that the matter does not "arise out of the real estate business," the matter is still referred for a hearing and the arbitrators will make that determination. However, in some cases, a dispute may be submitted for arbitration that clearly did not arise out of the real estate business. In these situations, the association may consult with legal counsel and refuse to accept the arbitration complaint.
With respect to MLS participants and subscribers, they agree to arbitrate disputes that not only arise out of the real estate business but they must be in conjunction with a listing filed on the MLS.

5. Disputes with the Public and Clients

In general, members are not obligated to arbitrate disputes with the general public. However, members are obligated by Article 17 to arbitrate contractual disputes with their clients provided the client agrees to submit the dispute to the association and agrees to be bound by the arbitration award. With respect to MLS participants and subscribers, they are not obligated to arbitrate with the general public or their clients.

In order for the member to be obligated to arbitrate a dispute with his or her client, three elements must be met:

- the dispute must arise from an agency relationship between the client and member;
- the dispute must be a contractual dispute; and
- no superseding arbitration agreement exists between the member and the client (i.e. arbitration agreement in a listing or buyers' broker agreement that indicates arbitration will occur somewhere else).

To give some examples, a member who represented a seller exclusively in a real estate transaction is not obligated by their arbitration agreement under the association's rules and procedures to arbitrate a dispute with a buyer regarding the transaction. However, if the member was a dual agent in the transaction and represented both the buyer and seller, the member would be obligated to arbitrate the dispute with the buyer, provided the buyer agreed to submit the dispute to the association and be bound by the arbitration award. In both of these examples, a real estate licensee who is only a MLS participant and subscriber would not be obligated to arbitrate with the client.

Associations frequently receive requests from the public to arbitrate with the association's members and MLS participants and subscribers. Prior to processing a complaint, the association should make sure that the member is otherwise obligated to arbitrate the dispute. If not, the complaint should not be processed.

6. Timing of the Dispute

In general, as long as the facts and circumstances giving rise to the dispute occurred while the licensee was a member of the local association or a participant and subscriber in the MLS, the licensee will be obligated to arbitrate the dispute if it otherwise meets the requirements for arbitration. The obligation to arbitrate cannot be avoided by simply resigning from the local association or MLS.

Sometimes, a member may hold membership in several different local associations. In this situation, another member can file a complaint at any association where the other member holds membership or the association where both members hold common membership. Also, if both members belonged to the same association at the time the dispute arose, and then one member subsequently resigned and joined a different local association, the arbitration could be held at either local association.

7. Claims that Cannot be Arbitrated at the Association

Pursuant to NAR policy, the following types of claims shall not be arbitrated at any REALTOR® Association: (i) tortious interference with business relationships; (ii) tortious interference with a contractual relationship; (iii) economic duress; (iv) intentional infliction of emotional distress; (v) other tort claims, such as libel/slander; (vi) employment claims, other than commission disputes; (vii) fraud/misrepresentation claims; (viii) property claims, both real and personal; (ix) Disputes between two listing brokers where no contract exists between the parties and the dispute is not as specified in Standard of Practice 17-4(4). In addition, NAR limits the award in an arbitration proceeding to the amount in dispute, and so an arbitration award will not include punitive damages or damages for pain and suffering.

B. INITIATING THE ARBITRATION COMPLAINT

1. Invoking Arbitration

To invoke arbitration at a local association, a written arbitration complaint (Form PA-1 or A-1) must be filed with the local association. Once a complaint is filed, the association will need to process the complaint to make sure the person filing the complaint and the persons named as respondents in the complaint are required to arbitrate the dispute at the local association. The local association is only required to accept arbitration complaints involving mandatory arbitration situations and may reject complaints where the parties are not obligated to arbitrate through the association.
There are two exceptions to the general obligation of members to arbitrate disputes with other members.

a. If the members are or were affiliated with the same firm at the time the dispute arose (i.e. an interoffice dispute), the members are not obligated to arbitrate the dispute and the association is not required to provide arbitration unless all parties agree to the arbitration.

b. If the members have agreed to submit a dispute to another association forum (for example, the American Arbitration Association), with respect to that dispute, the association should treat this as an arbitration agreement that supersedes their previous arbitration agreement with the association. In these situations, the association may refuse to process an arbitration complaint because there is a separate agreement to arbitrate before another forum.

2. Association's Right to Decline Arbitration

Occasionally, a dispute submitted for arbitration may meet the basic filing requirements but the substance of the dispute will be legally complex and or involve a significant amount of money in dispute. In these situations, the association has the right to decline arbitration as too legally complex or because of the magnitude of the amount involved and release the parties from their obligation to arbitrate at the association.

Usually, a matter is considered too legally complex when the dispute involves a legal issue that is beyond the training of the arbitration hearing Panel. For example, a party may claim alleged illegal advertising practices by another member that have caused monetary damages to the member. Since most hearing Panels are not trained to address claims of illegal advertising, the matter could be dismissed as too legally complex.

With respect to the magnitude of the amount involved, there are no set rules for when an association can decline on this basis. However, the association should not be deterred from handling an otherwise standard dispute arbitrated by the association (i.e. a procuring cause commission dispute) simply because the amount in controversy happens to be larger than past disputes.

The procedures for declining an arbitration based on legal complexity or the magnitude of the amount involved are contained in Section 44 of the *California Code of Ethics and Arbitration Manual.* Under this Section, if the hearing Panel feels the dispute should not be arbitrated based on one of these grounds, it shall make a recommendation to the Board of Directors to this effect. Also, if a hearing Panel has not yet been convened, upon reviewing the complaint and response, the Professional Standards Committee Chairperson and legal counsel representing the association may jointly recommend to the Board of Directors that the matter not be arbitrated.

In either of the situations above, the Board of Directors reviews the recommendation. If the Board of Directors concurs, the matter is dismissed and all parties are relieved of their obligation to arbitrate. They may then pursue other remedies, such as filing a court action or arbitrating before another arbitration

forum. If, however, the Board of Directors disagrees with the recommendation, the matter will be referred back to the Professional Standards Committee for hearing before a new hearing Panel.

3. Duty to Arbitrate Before C.A.R.

In the event members from different local associations have a dispute, they are required to arbitrate the dispute through C.A.R. Interboard Arbitration. Also, if the complainant in the matter desires, he or she can file for arbitration at the association where the respondent holds membership. However, the purpose of C.A.R. Interboard Arbitration is to give members of different associations a neutral forum in which to have their dispute arbitrated. As such, the member may not want to file the complaint at the respondent's association for fear of having the hearing Panel biased in favor of the respondent.

For purposes of determining whether C.A.R. Interboard Arbitration is appropriate, membership is determined at the time the facts giving rise to the dispute occurred. If Associations have entered into a multi-association professional standards agreement, the dispute can also be heard by a multi-association Panel rather than C.A.R.

If it appears that the dispute is subject to C.A.R. Interboard Arbitration, the association should refer the member to the C.A.R. Interboard Administrator for further information and processing.

4. Proper Parties

a. Complainants

Under California real estate law, commissions must be paid to a broker and may not be paid directly to a salesperson. Section 57 of the *California Code of Ethics and Arbitration Manual* incorporates this concept and requires that if anyone other than a responsible broker files an arbitration complaint in a dispute that involves that member's responsible broker (except for disputes between the member and the responsible broker), the responsible broker at the time the facts and circumstance giving rise to the dispute occurred must also join the complaint as a co-complainant. For example, if the dispute is a commission dispute between two real estate offices and only the salesperson files the complaint, that salesperson's responsible broker must join the complaint as a complainant or the arbitration may not be processed.

b. Respondents

Unlike the complainant side of an arbitration complaint, the *California Code of Ethics and Arbitration Manual* does not specify what parties must be named as respondents. As such, it is the complainant's obligation to determine the necessary and appropriate respondent(s) depending on the facts and circumstances of the dispute. However, if asked by a complainant, an association can indicate that the responsible brokers in the matter are typically named as parties when the dispute involves a commission dispute. The reason is that commissions can only flow through real estate brokers. However, other than this, associations should avoid the trap of helping complainants name specific respondents for the complaint.

If a named respondent feels that he or she has been improperly named in an arbitration complaint, the association can convey this information to the complainants and ask if they wish to amend the complaint. If the complainants disagree and maintain that they have named the correct parties, the association should inform the respondent that he or she will need to argue the issue to the arbitration hearing Panel. The association and its staff do not have the authority to make this decision.

The Association or the hearing Panel once it has been convened has the discretion to join together multiple arbitration complaints involving the same parties and arising out of the same set of

circumstances. This can be at the request of a party or on the Association's own motion. It is recommended that Association counsel be consulted.

5. Confidentiality of Proceedings

Arbitration proceedings, including the allegations, findings and decisions reached, are treated as confidential under Section 53 of the *California Code of Ethics and Arbitration Manual*. Furthermore, this Section requires the association, the hearing Panel members (including the Directors who serve on a review Panel) and the parties to maintain and protect this confidentiality. If a hearing Panel member or party violates his or her duty of confidentiality, the Association can discipline him or her.
There are three exceptions where the duty of confidentiality does not apply. First, whenever disclosure is required by law (i.e. such as by a subpoena or in a deposition), disclosure may occur. Second, any party may disclose the results of the matter where the party is involved in a civil proceeding involving the same set of facts and circumstances. Third, disclosure to C.A.R. is made by the Association, in accordance with policy adopted by the C.A.R. Directors, which requires that each Association submit such information to C.A.R. through a secure repository maintained by C.A.R.

Sometimes after a hearing Panel has issued its award, a party attempts to contact one or more of the hearing Panel members to discuss the award. For several policy and legal reasons, C.A.R. recommends that the hearing Panel members firmly reject any such attempts and refuse to discuss the award. In most situations, the party probably disagrees with the award and will be confrontational with the hearing Panel member. Also, depending on what the hearing Panel member says, the party may try to use the hearing Panel member's statements to challenge the award to the Board of Directors or a court of law.

6. The Professional Standards Committee

The Professional Standards Committee is charged with the responsibility of conducting disciplinary and arbitration hearings. C.A.R. recommends that associations appoint Professional Standards Committee members for three-year terms on a staggered basis to ensure continuity of experience and stability of the Committee. Also, in selecting the Professional Standards Committee members, C.A.R. recommends that the President consider the following 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 and persons of a judicial temperament. They should know and understand the concepts of due process and be able to exercise judgment as hearing Panel members. <u>They must also have the capability to keep information confidential.</u>

It is not recommended that the Directors of the Association also serve on the Professional Standards Committee. However, if a Director does serve on the Committee, he or she can serve as a hearing Panel member. If a Director participated in a matter at the Professional Standards Committee level and it comes before the Directors for review, the Director is automatically disqualified. Therefore, it is important to consider whether that Director may better serve the association by serving on review hearings or serving on the Professional Standards Committee.

7. Role of the Association Executive

The Association Executive is basically that of a court clerk. That is, he or she is the administrative channel through which complaints are initially filed, processed and reach final determination. The Association Executive does not make decisions or determinations concerning professional standards matters and must be careful to avoid doing so. The Association Executive also performs other functions in the process. For example, the Association Executive provides information regarding the process and procedures and acts as the intermediary between the complainants, respondents, Grievance and Professional Standards Committee Chairpersons, the hearing Panel members and the Board of Directors. The Association Executive is also responsible for arranging the hearing room and record keeping. Whether the Association Executive attends hearings in an administrative capacity is a matter of local discretion. Some Boards and Associations have determined that it is beneficial to have the Association Executive present to provide technical assistance and expertise, while other Boards and Associations choose to have one of the panelists (or Board counsel) provide procedural guidance. This is a matter to be determined by each Board and Association depending on, for example, staff resources, staff experience in professional standards matters, hearing panelists' experience relative to procedures and enforcement of the Code of Ethics, the complexity of the issue, and whether or not Board counsel will be present.

With respect to arbitration complaints, the Association Executive has the role of determining whether the dispute is proper for association arbitration. This role is actually very limited in that the determination is made on procedural filing considerations and not on the substance of the dispute. For example, the Association Executive makes sure the named complainants and respondents are members of the association or MLS and bound to arbitrate the dispute. The Association Executive determines whether the time frame for filing the arbitration complaint has elapsed. Additionally, if the Association Executive makes sure that the complainant's responsible broker at the time of the facts giving rise to the dispute occurred is named, if appropriate. If there is a factual dispute regarding these procedural requirements (i.e. whether a complaint was filed timely), the Association Executive does not make this determination and instead refers the complaint for hearing. At that point, it will be the obligation of the parties to raise the procedural issue to the hearing Panel who will ultimately make the decision.

8. Role of the Association Legal Counsel

Association legal counsel can be of great assistance to the association when processing arbitrations, especially those that contain detailed procedural questions and issues. To avoid problems from occurring, the association is always free to contact and consult association legal counsel at any time. For example, it is advisable to seek the guidance of legal counsel when there are questions regarding whether the association has jurisdiction over the parties or if there is concern that the matter is too legally complex. Also, if there is pending civil litigation on the matter, association legal counsel should be consulted to determine whether the association should proceed with the arbitration or hold the matter in abeyance. While consulting legal counsel may cause the association to incur legal fees, this can save a lot of time and expense by solving problems before they occur.

Another role of association legal counsel is to be present during a hearing to advise the hearing Panel on issues of procedure. However, whether an association elects to have its legal counsel present at an arbitration hearing is a matter of local discretion. For example, some associations have legal counsel

present only if one or more of the parties will have legal counsel. Other associations have decided to have legal counsel present at all arbitration hearings.

Whatever the decision of the association, since association counsel is not part of the hearing Panel, he or she may not participate in the decisions of the hearing Panel. If legal 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 may be communicated at the time the action occurs to the Presiding Officer who shall make the final decision.

If a party to an arbitration requests a review of the award, the Association may choose to have the Association attorney conduct the review. However, if the attorney has provided ANY legal advice to the Association regarding that case, then he (and anyone from his or her firm) is prohibited from conducting the review.

C. PROCESSING THE COMPLAINT

1. Initiating an Arbitration

An arbitration complaint consists of the written form (PA-1 or A-1), an exhibit (usually called “Exhibit 1”), and any other attachments and documents the complainant desires to include with the complaint. Once an arbitration complaint is received and processed, it should be sent to all respondents with a blank response form for completion and return to the Association. Sometimes, a respondent thinks that if he or she does not accept the complaint or fails to respond, the arbitration will somehow "go away." This, of course, is not true and a hearing can be scheduled and conducted whether or not a response is received and even if the respondent does not appear. However, certain steps should be taken to insure the arbitration hearing will be valid in the absence of the respondent which are discussed in more detail under the heading “The Hearing.”

2. Counterclaim

The respondent has the right to counterclaim against the complainant if he or she feels that the complainant owes him or her money in addition to the money already disputed in the complaint. The respondent must affirmatively request the counterclaim. If a counterclaim is not filed, the respondent cannot receive money damages. For procedural purposes, a counterclaim, like a complaint, must be noticed to the complainant and requires an adjustment of all appropriate notice time frames. A counterclaim is not appropriate to request fees and costs.

3. Notice

When possible, email is the preferred form of service for notices and documents associated with the administration of an arbitration. Notices sent by email must include the association’s request that delivery be acknowledged by the intended recipient within twenty-four (24) hours by return email. Automatic notification that an email has been opened is not sufficient for this purpose. The association must be certain the intended recipient has read the email. If receipt of the notice has not been acknowledged by the intended recipient within twenty-four (24) hours, the recipient will be contacted by telephone to confirm receipt and the recipient’s confirmation will be noted in the file. If receipt of notices sent by email cannot be confirmed, the notices will be resent via first class mail, by any mail delivery service or by certified mail.

When giving notice by mail, it is not necessary to use certified mail. Regular first class mail, delivery by a mail delivery service or email 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 are represented by legal counsel, the Association Executive should send all communications and notices regarding the arbitration to both the party and their attorney unless the party instructs otherwise.

4. Previous Court Order

If it is clear that the matter has been previously decided by a court, the Association should not process the arbitration. However, the Association Executive should consult with legal counsel to determine whether the previous judgment involved the same parties and issues to the extent that it will prevent an arbitration. A common situation where this may arise is probate commission disbursements. Some probate judges will specifically rule on the commission split between the brokers. Others judges will leave the split to the real estate brokers to determine on their own. In the second case, arbitration would be appropriate if the parties reach an impasse.

5. Time Limit for Filing

A complaint meeting all filing requirements must be filed within one hundred and eighty (180) calendar days after the closing of the transaction, if any, or after the facts constituting the arbitrable matter could have been known in the exercise of reasonable diligence, whichever is later. In most cases, the parties are aware of the dispute prior to close of escrow on the underlying transaction and therefore the complaint must be filed with the association within one hundred and eighty (180) calendar days from the date the transaction closes. However, sometimes the transaction has not closed (and never will), or, if the party filing the complaint did not know of the dispute until after the close escrow. In these situations, the complaint must be filed within one hundred and eighty (180) calendar days from the time the facts giving rise to the dispute could have been known in the exercise of reasonable diligence. Additionally, when a party utilizes the Association or C.A.R. ombudsman program, the filing deadline is suspended until the case is reported closed by the ombudsman. For example, if the complainant contacts the ombudsman hotline on February 1 and the ombudsman notifies the Association that the ombudsman case has been closed on February 5, the deadline to file the complaint will be extended by 5 days.

If there is a factual dispute as to whether a complaint has been filed timely, the association should process the complaint and let the parties raise the issue to the hearing Panel. However, if a respondent objects that the complaint is filed untimely prior to the hearing, the association should inform the respondent that they will need to raise and argue the issue to the hearing Panel as the hearing Panel has the ultimate authority to make this decision.

If a complainant waits until after the 180 day time limit has lapsed and submits a dispute that would otherwise be subject to arbitration at the Association to state or federal court, the respondent may ask the court to remove the complaint to the Association for arbitration and the Association must accept such complaint, without regard for the time limit, even if it is received later than one hundred and eighty (180) days after the closing of the transaction, if any, or after the facts constituting the arbitrable matter could have been known in the exercise of reasonable diligence.

Regardless of the time limit, the parties can always agree to resolve their dispute using another forum, such as another arbitration service or litigation.

6. Professional Standards Hearings and Shared Panelists

Sometimes, an association will need to borrow hearing Panel members from another association. This usually happens when the association is unable to form a qualified hearing Panel based on disqualification and challenges to its Professional Standards Committee members. The processes for doing this is relatively simple. For example, each Board of Directors of the associations can adopt a general resolution stating that the associations agree to borrow and share hearing Panel members. Or, the associations can adopt this resolution on a case by case basis. Also, many associations have entered in shared professional standards enforcement agreements that more clearly detail the obligations of the associations to one another when borrowing or sharing panelists.

In cases where associations have entered into formal shared enforcement agreements, it is typical for the association making the request to borrow the panelists to continue processing the case. The borrowed panelists will then travel to the association and serve on the hearing Panel for that case. However, some associations have agreements that one association will not only lend hearing Panel members, but will process the case as well. In other words, the administration and processing of professional standards matter is "contracted out" to the other association. This is strictly at the discretion of the associations entering the agreement.

7. Continuances and Continuance Fees

All requests for continuance of a hearing must be in writing and must state the reason for the request. Requests for continuance can only be granted when all parties mutually agree to a subsequent specified date or when the Professional Standards Chairperson, his or her designee, or the hearing panel chair determines that denying the request for continuance would deny the requesting party a fair hearing. Continuances requested after a hearing has convened shall be considered by the hearing Panel, and granted as necessary.

Generally, valid requests for continuances should be granted unless a pattern of abuse (i.e. delay tactics, avoidance, etc.) begins to surface. The following are some valid reasons for continuances:

- A party is unable to present pertinent material evidence because a key witness is unavailable due to sudden illness, accident, or death.
- A party needs additional time to obtain counsel, and they have not unreasonably delayed doing so.
- A party has just recently discovered new evidence and needs extra time to prepare to argue additional claims or defenses. The party's failure to discover this evidence earlier must have occurred due to no fault or negligence on its own part.
- A party received improper notice of the hearing or improper notice of the other party having legal counsel.

The aforementioned reasons for granting a continuance are non-exhaustive, and there may be other circumstances which constitute good cause sufficient to merit a continuance. However, most excuses for a party being unable to appear, such as vacations or business meetings, are generally not valid reasons for granting a continuance.

Depending on when the continuance request is made, the Professional Standards Committee Chairperson or his or her designee and the hearing Panel chair or the hearing Panel as a whole have the discretion to grant continuance requests.

Each party is entitled to one continuance, for good cause, free of charge. However, continuance fees can be imposed for subsequent continuance requests, 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. A late notice 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.

8. Amending the Complaint

If the complainant wishes to amend the complaint, proper notice must be given to all parties who are then given the opportunity to respond. An amended complaint is treated as a new complaint and supersedes the original complaint. As such, all notices, time frames and continuances must be adjusted accordingly. After a hearing commences, a complaint can only be amended with the hearing Panel's approval.

9. 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.

The first step in putting together the list of potential Panel members ("proposed neutral arbitrators") , is the elimination of the names of those members who are automatically disqualified.

The second step is the elimination of the names of any members who have served, within the last five (5) years, as an arbitrator in an arbitration for any of the parties, lawyers for parties in this case and any other lawyer in the law firm of a lawyer in this case. The Association Executive should consult the Association Professional Standards records for this information. If this elimination process results in an insufficient number of candidates for this arbitration, their names may remain on the list and the Arbitration Disclosure Statement (Form A-21) forms completed (with the required information about the prior arbitrations), but steps should be taken to avoid doing so, if possible.

After the list has been narrowed as set forth above, the Association Executive must send to each of the proposed neutral arbitrators remaining on the list an Arbitration Disclosure Statement (Form A-21), which must be returned to the Association Executive within ten (10) calendar days. If a proposed neutral arbitrator does not return the completed Arbitration Disclosure Statement (Form A-21) to the Association Executive, his or her name may not be included on the list of names that is sent to the parties.

Proper execution of this phase of the process, requiring the completion of Arbitration Disclosure Statement (Form A-21) forms, is extremely important, since failure to provide the parties with the proper disclosures is ground for the court to vacate an arbitration award.

10. 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 may serve on the hearing Panel ("proposed neutral arbitrators"), their completed Arbitration Disclosure Statements (Form A-21), and a form on which parties can submit challenges to any potential neutral arbitrators on the basis of information disclosed in an Arbitration Disclosure Statement (Form A-21) or "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 fifteen (15) calendar 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 themselves whenever it is appropriate to avoid any appearance of impropriety and there are 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 be kept at a maximum 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 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.

If the Association requires that the hearing Panel consist of a majority of brokers, the Association should determine who qualifies as a broker 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.

11. Exchange of Evidence Prior to Hearing

Although there is no specific requirement for pre-hearing discovery or exchange of evidence, the parties should be encouraged to do so. This includes exchange of names of witnesses. Due process requires that parties be entitled to know the evidence being used against them. If a party attempts to “surprise” the other party by concealing and presenting a large amount of evidence and documents at the hearing, the hearing Panel may grant a recess, or even a continuance, to give the party ample time and opportunity to review the evidence and documents and prepare a defense.

The only exception to this is the right of the parties to receive a witness list from the other party if the amount in dispute is over $50,000 as discussed later.

D. 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 recording the hearing.

There are pros and cons to both methods. 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 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 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 recording, the Association may want to consider giving the responsibility for operating the 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.

If, for some reason a recording is blank, incomplete, or so garbled that it is not understandable, the arbitrators' decision is not invalidated. The recording required by NAR policy is to assist the parties in a possible Directors' review and is for the benefit of the parties. It is not a due process right.

In the event one party to a hearing requests a copy of the recording prior to the lapse of the time period for a Directors' review, any other party to the hearing may also request a copy of the recording prior to the Directors' review, and the time limit is waived for that request.

Any transcript or recording of a hearing shall be destroyed upon final action of the Directors or, if no request, when the time lapses to request a review.

2. Interpreters and Translators

In the event a non-English speaking party in an arbitration case requires an interpreter, or in the event a party requires an interpreter for a witness, the party requesting the interpreter must bear the cost to provide a qualified interpreter that is certified or registered and in good standing with the Judicial Council of California. The Association can provide the requesting party(ies) with a list of qualified interpreters located in the Association's county by conducting a search on the California Interpreters Program website at the following URL: http://www.courts.ca.gov/3796.htm. At the Association's option, Association staff can assist the party with contacting the interpreter and arranging for the interpreter's services.

In the event both parties speak the same non-English language and require an interpreter, or in the event both parties plan to call witnesses that speak the same non-English language and require an interpreter, the cost of the interpreter shall be split evenly between both parties. Only one neutral interpreter will be allowed in the hearing and will assist all parties with translation needs.

If the prevailing party in the arbitration makes a written request for the cost of the interpreter or translator to be reimbursed, the arbitration hearing panel may reimburse the party for those costs using Form A-10.

The party intending to utilize an interpreter shall notify the Association and all other parties at least ten (10) days prior to the date of the hearing, and in such notice shall indicate the name of the party or witness requiring an interpreter and the language which will be used by the non-English speaking party or witness, as well as any dialect of such language, if applicable.

Before the hearing begins, all parties will need to sign a "hold harmless" waiver stating that the Association will not be held liable for any actions or omissions of the interpreter.

In the event any party intends to present a written document at an arbitration hearing that is in a language other than English, a translation by a qualified independent translator shall be presented along with the documents at least ten (10) days prior to the date of the hearing. The party must provide proof that the document was translated by a translator who is certified or registered and in good standing with the Judicial Council of California.

3. Right to Counsel

Every party has the right to legal counsel at any hearing, including reviews, even if the party is unable to attend the hearing. This is one of the most fundamental aspects of due process.

A related situation frequently occurs in the arbitration hearing process. A party may request that the Association allow someone to be with them in the hearing who is not an attorney, but is there to support or advise other than in a legal capacity. The Association must not permit this. However, a broker may appoint a REALTOR® affiliated with the broker's firm to attend an arbitration hearing on his or her behalf when the broker is unable to personally attend, provided that the Association receives fifteen (15) days advance written notice from the broker.

4. Failure of Parties to Appear

If the complainant refuses or is unable to appear at the arbitration hearing after having been duly notified of the hearing, the Association should dismiss the complaint.

If the respondent fails to appear, the hearing can proceed. However, to protect the respondent's rights and to insure the enforceability of the arbitration award, the association should take affirmative steps to make sure the respondent's failure is not due to lack of notice or some unforeseen circumstance, such as a car accident or sudden major illness. For example, a telephone call should be made to the respondent's office to determine the reason for the failure to appear. Once these steps are taken, the hearing Panel should then decide whether to grant a continuance or go forward with the hearing. If the respondent was contacted and requested a continuance, it is recommended that the Panel grant the continuance unless certain that it is being used as a delay tactic.

Upon written request, the presiding officer of the hearing Panel may allow a party or witness to remotely testify or attend the hearing. In that case, the parties' rights and obligations are the same as if the appearance was in person. Written request for remote testimony must be submitted at least fifteen (15) days from the date of the hearing. Only those parties eligible to attend the entire hearing in person would be entitled to participate "remotely" for the entirety of the hearing. Witnesses may only participate remotely for their own testimony. Hearing panels, association staff, or association counsel should employ steps to verify the identity of "remote" participants, to preclude unauthorized individuals from being in the presence of the "remote" participant, and to employ appropriate safeguards to ensure confidentiality of the proceedings. The costs of "remote" testimony shall be the responsibility of the party requesting the opportunity to participate or offer testimony by teleconference or videoconference.

5. Conduct of the Panel Members

Hearing Panel members should avoid, so far as possible, from discussing the case with any person prior to the hearing. In addition, the hearing Panel members are bound by confidentiality regarding the hearing proceedings, except for disclosures on the Arbitration Disclosure Statement (Form A-21), which are required by law. Also, while it is improper for a party or a party's attorney to attempt to contact a Panel member and attempt to influence him or her outside the hearing, sometimes this does occur. If it does, the hearing Panel member must disclose the facts of the conversation to all parties and the hearing Panel no later than prior to the beginning of the hearing. 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 hearing Panel member.

Fundamental to due process is that all parties have a right to know what evidence is being submitted and used against them. Therefore, hearing Panel members should not conduct independent investigations of

the facts or issues before them and should base their decision only on the evidence and testimony submitted by the parties at the hearing.

Panel members should follow the law and apply it to the facts of the case to the best of their knowledge and understanding. If the Panel members wish, they may ask all parties to submit their legal arguments for consideration. That way, all sides can argue their points. Panel members should NOT make statements to the parties that they are not bound by the law and have no intention of following it. Such statements merely inflame the parties and provoke court challenges of the award.

6. Conducting the Hearing

Arbitrations are relatively informal proceedings and are not designed to follow the strict and sometimes complicated rules of procedure and evidence that would be followed in a court of law. Although the technical rules of evidence are not applicable, hearing Panel members are 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 members 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, evidence can also be refused. However, hearing Panel members should be extremely careful in rejecting evidence. Failure to accept material and relevant evidence is a basis for overturning an award. If in doubt, the hearing Panel members are 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 members may wish to refer the party and his or her legal counsel to the Outline of Procedure regarding the appropriateness of making such objections.

Parties are encouraged to settle the dispute at any time. At the outset of the hearing, the hearing panel chair should inform the parties that settlement is an option. At any time during the hearing, the parties can ask for a recess in an attempt to reach a settlement agreement. The parties, with the assistance of their respective counsel, can determine the terms of their settlement agreement. The parties should be advised that the arbitration will continue to be processed until formally withdrawn by the complainant.

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 hearing Panel members should maintain a calm, objective and judicial atmosphere. The Panel members are not judge or 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, hearing Panel members should avoid using leading questions with witnesses. They should not preach or teach, but should let their findings and recommendations serve to educate the parties.

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

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

7. Due Process Required

A lack of due process may cause a decision to be invalidated. Therefore, a party 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; and
- 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. NAR policy requires recording of a hearing as a service to the parties, not for legal reasons.

8. Appropriate Role of Legal Counsel in the Hearing

A party may be represented by legal counsel in any arbitration hearing. However, no party may refuse to directly respond to requests for information or questions addressed to him by Panel members except on grounds of self-incrimination (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, confuse the Panel members, witnesses or parties, or otherwise disrupt the proceedings, shall be grounds for exclusion. The decision to exclude counsel shall be by majority vote of the Panel members. If counsel is excluded, a hearing may be postponed to enable the party to obtain alternate counsel. However, a continuance may not be granted if it appears to be a delay tactic. A decision by the Panel members to exclude counsel should be made only after careful consideration and preferably with the advice of Association counsel.

A party's counsel may understandably seek to invoke courtroom procedures and technicalities not applicable to an arbitration. 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 Panel will broadly construe the term "relevant";

b. no attorney may confuse, coerce, intimidate or harass the parties, witnesses or Panel members;

c. the Panel members need not accept the statements of counsel as being the statements of his client if they desire direct testimony;

d. the Panel members will rule on the admissibility of evidence. The technical rules of evidence do not apply; and

e. the Panel members will ask questions which they deem pertinent and significant of any parties at any time during this hearing.

9. Subpoena Power for Hearings

Civil subpoenas for the appearance of a witness or the production of documents are available for the arbitration hearing but not for pre-hearing discovery. A blank civil subpoena form is signed by the Association Executive and issued to the requesting party. It is the party's responsibility to complete and serve the subpoena in accordance with California law.

In an arbitration, witnesses and documents may be subpoenaed. The prevailing party may recover reasonable fees and costs incurred in the production of witnesses and documents. The party requesting fees and costs should do so at the hearing. (Form A-10)

10. Witnesses

Any party may call and present witnesses at the hearing. Witness are sworn in by the Presiding Officer, usually at the beginning of the hearing with the parties, but no later than before the witness testifies. Witnesses, unless a named party or a person who has vested financial interest in the outcome of the matter, are not allowed to attend or be present during the hearing except while testifying.

11. Right to Demand Witness Lists

If the amount in controversy is over $50,000, a party has a right to demand a list of the witnesses he or she intends to call and the documents to be submitted as evidence from other parties. The requesting party must also provide a witness list to the other parties.

12. Presentation of Evidence

Affidavits or declarations submitted in lieu of a witness should be considered, but given less weight, because the witness submitting an affidavit or declaration is not subject to cross-examination.

All parties who appear (in-person and remotely) at a hearing are required to answer questions by the Panel and to submit to cross-examination by any other party.

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 that they be allowed to remain in the hearing. This is <u>not</u> 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 for prehearing discovery are not provided.

The Presiding Officer should set up a procedure 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 or herself and be subject to cross-examination.

e. QUESTIONING BY HEARING PANEL MEMBERS - After the respondent has cross-examined a witness, the arbitrators may question the witnesses if further clarification is needed. The arbitration hearing Panel should not engage in extensive questions and "make the case" for either party. Questioning by the arbitration hearing Panel is primarily 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 made his opening statement, he presents a brief summary of his side of the 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 or herself and be subject to cross-examination.

i. QUESTIONING BY HEARING PANEL MEMBERS - After the complainant has cross-examined a witness, the arbitration hearing Panel may question the witness if further clarification is needed. The arbitration hearing Panel members should not engage in extensive questioning and "make the case" for either party. Questioning by the Panel is primarily 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, summarize what they have proven and tell the Panel why they should prevail.

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

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

The Presiding Officer may also offer the parties the opportunity to negotiate a settlement agreement at the conclusion of the hearing, if the parties wish to do so. The hearing is then concluded, the parties are excused and the Panel members deliberate.

14. Deliberation and the Decision

When the hearing Panel members have considered all written evidence and oral testimony, they should deliberate and reach a decision by majority vote. Each hearing Panel member has the same rights to participate in the discussion of evidence and the decision-making process. The decision is made by a majority vote of the hearing Panel. While a dissenting hearing Panel member is not required to sign the award, it is recommended that all hearing Panel members sign the award where possible. Refusing to sign the award will signal to the non-prevailing party that this hearing Panel member was "on his or her side" and may encourage that party to contact that hearing Panel member or even subpoena him or her if the party takes the award to court.

The hearing Panel is not restricted to an all or nothing award based on the amount requested in the complaint. They have the broad discretion to fashion an award that is equitable and that conforms to the evidence presented. The Panel does not have, however, the power to award more than the complainant requests, except if the complainant request justifiable fees and costs which may be awarded in addition to the disputed amount, nor do they have the power to award money to the respondent unless the respondent filed a counterclaim. Whether the request is by the prevailing party or not, the Panel does have the power

to award costs and fees if appropriate. For instance, the losing party may be granted costs incurred by a continuance requested by the prevailing party. Those costs offset the award to the prevailing party.

The hearing Panel cannot order punitive damages or injunctive-type rewards that require a party to take some kind of action.

E. POST HEARING PROCEDURES

1. Distribution of Award

The hearing Panel's award must be in writing and provided to the parties within five (5) days after the award is reduced to writing. The decision is binding on all parties. There are no findings of fact as they are not required by law. Many times parties ask the Panel members how they reached their final decision. It is important that the Panel members not discuss this matter with the parties. Conversations of this nature could prove damaging if the award is ever challenged as they could be introduced as evidence. In addition, this is a violation of the hearing Panel member's duty of confidentiality and the Association has the right to discipline a hearing Panel member for violating this duty.

2. Procedural Review by the Board of Directors

A party has the right to request that a procedural review of the arbitration award by the Board of Directors or an appointed review panel thereof. The request must be in writing and made within twenty (20) calendar days of the date the hearing Panel's award was sent to the parties. The Association Executive should date stamp the decision to reflect the date it is sent and should mark the date off on the arbitration processing checklist. The Association Executive should send the notice of the parties' right to this review along with the arbitration award.

The only basis for a procedural review is that there were alleged procedural deficiencies in the processing or hearing of the arbitration. The request must clearly indicate the alleged deficiencies and contain a reasonably detailed summary of the facts supporting the challenge. The Association Executive may review the request to make sure it properly states a basis for review. A procedural review is not to reconsider the substantive issues of the case.

In California, the courts have the final authority to determine the validity of an arbitration award. As such, any decision made by the Directors may still be taken to court for a final determination.

To avoid frivolous requests for review, the association may adopt a filing fee. This filing fee would be nonrefundable unless the Directors order a new hearing. The amount required by the Association should be high enough to discourage frivolous requests, yet not so high to prohibit those with legitimate claims from filing. NAR also establishes maximum filing fees that associations may charge for a review so the association should check NAR's current requirements.

The Directors, when conducting a review, is a hearing Panel and subject to automatic disqualification and challenges are described earlier. The Directors must complete Form A-7 before hearing the review.

The Directors 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 recording (if any) of the hearing;
- the request for review;
- the reply to that request; and
- the arbitration award.

The Directors 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. No new evidence is permitted (see Appendix B for Review Procedures and President's Statement). The parties have the right to be present with legal counsel if they choose and present their reasons for or against the request for review to the Directors. Such evidence is limited to the issues of the review.

If the hearing was recorded, a party may play parts of the recording to illustrate the issues on review. HOWEVER, the recording 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 recording.

Because of the many inherent problems with playing the recording, 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 recording to supplement the party's position and NOT allow it to be used to reopen the substantive issues of the case.

In the deciding the request for review, the Directors only have the power to confirm the award or send it back for a new hearing. The Directors may not modify the award.

3. Action of the Board of Directors if There is no Request for Review

If no request for procedural review is filed within the required time limit, the award of the hearing Panel is final. Unlike in a disciplinary case, the award does NOT go before the Directors for ratification.

4. Enforcement of the Arbitration Award

- **Association Procedures**

After the arbitration award is final (and any appeals to the association have been completed), the prevailing party may request a “show cause” hearing if the non-prevailing party has not paid the award within fifteen (15) days after the due date. The sole purpose of the “show cause” hearing is to determine why the non-prevailing party failed to timely pay the arbitration award and not to re-argue the merits or procedural deficiencies of the matter. The “show cause” hearing is before a panel of three Directors.
Both parties may attend the “show cause” hearing. The non-prevailing party will be asked to “show cause” as to why he or she did not timely pay the arbitration award. If the party pays the full award amount, including any accrued interest, to the prevailing party at any time prior to the “show cause” hearing, the “show cause” hearing will be dismissed, and the case will be considered closed.

Both parties may call witnesses, present evidence, and be represented by legal counsel. The procedures for the “show cause” hearing will be the same as those used for a review hearing to the extent they are applicable to the sole issue of nonpayment of the award. In order to help the Directors determine what evidence is relevant in the “show cause” hearing, the Directors should refer to the “Ability to Pay Checklist” (which can be found in the Appendices section of the *Professional Standards Reference Manual*).

Following the “show cause” hearing, the Directors may: (1) take no action; (2) suspend the non-prevailing party’s association membership; or (3) set a schedule for payment of the arbitration award to the prevailing party.

a. **Take no Action.** The Directors have sole discretion to determine whether the non-payment of the award is justified due to the party’s financial circumstances. If the Directors take no action, it does not invalidate the award and the prevailing party may still pursue judicial enforcement of the award which could convert the award to an enforceable judgment which can be renewed and enforced against the

non-prevailing party as they acquire resources or property. The prevailing party may not request more than one “show cause” hearing.

b. **Suspension of Membership.** The non-prevailing party’s membership will be suspended for thirty (30) days or until the award plus interest is paid to the prevailing party, whichever is longer. Interest begins to accrue on the arbitration award starting from the due date on the award, at the statutory interest rate of ten percent (10%) per annum. The suspension may be held in abeyance as described below.

c. **Payment Plan.** The Directors may set up the timing or amounts of each payment under the payment plan, except that each payment must include at least the amount of interest accrued since the last payment (at ten percent (10%) per annum) plus a portion of the principal amount (i.e., the award). The non-prevailing party’s membership will be suspended if the full amount of any payment is not timely received. The prevailing party may notify the association of any non-payment or partial payment, and the association will send the non-prevailing party notice, with a short turnaround time, to provide evidence of full payment. If the party doesn’t provide evidence of full payment by the deadline, the association may suspend the non-prevailing party’s membership until the full payment is made. The prevailing party is not precluded from pursuing a court confirmation notwithstanding the payment plan.

After the “show cause” hearing, the suspension will be enforced:

- after the award is confirmed or modified by a court, but only if it is not paid by the date ordered by the court (or within fifteen (15) days after the court order if the order does not provide a due date); or
- if no court action is filed, one hundred and one (101) days after the award is finalized.

Interest will accrue at the legal rate of ten percent (10%) until the award is paid, and the non-prevailing party may be liable for court costs and attorneys’ fees if they lose a court action.

The arbitration enforcement policy does not preclude an association from funding court confirmations of arbitration awards administered through its facilities as the association sees fit.

A member who has been suspended for failure to timely pay an arbitration award will have his or her name and photo published in accordance with C.A.R.’s publication policy. Abiding by an arbitration award is a membership duty, and the suspension of membership for failure to timely pay the award is a form of discipline that subjects a member to publication under the current C.A.R. policy.

- **Judicial Procedures**

In addition to requesting a “show cause” hearing pursuant to the Association’s arbitration enforcement policy, the award recipient can seek judicial enforcement of the award if the non-prevailing party has not timely paid the award. The court will generally confirm an award and order payment unless the Association failed to adhere to its procedures or the arbitrators failed to provide due process, in which case the court may order a new hearing. All legal costs, including attorney's fees incurred to enforce the award, should be requested in the petition for confirmation.

Whether or not a party requests a review by the Directors, each party has the right to petition the court to confirm or vacate the award. If either party wishes to do so, he must contact an attorney to ascertain the appropriateness of such an action. A petition to vacate an award is rarely granted. The grounds for vacating an award are narrow and the court gives great deference to the decision of the arbitrators.

The grounds for vacating an award are:

- the award was procured by corruption, fraud or other undue means;
- there was corruption of any of the arbitrators;

- the rights of a party were substantially prejudiced by misconduct of a neutral arbitrator;
- the arbitrators exceeded their powers affecting the merits of the case;
- the rights of a party were substantially prejudiced because the arbitrators failed to postpone a hearing upon sufficient cause shown, failed to hear all material evidence or failed to provide full due process to the parties; or
- an arbitrator failed to disqualify himself/herself, upon receipt of a timely request, if a judge would have been required to disqualify himself/herself if the matter had been heard in court.

If an award is confirmed, a judgment shall be entered as in a civil matter and may be enforced like any other judgment of the court. If an award is vacated, the matter will be reheard under these procedures unless otherwise ordered by the court.

A petition to vacate an award must be filed within 100 calendar days of the date of the service on the petitioner of a signed copy of the award.

A petition to confirm an award must be filed within four (4) years of service on the petitioner of a signed copy of the award.

5. Record Retention

Once the award is considered final with the association, the case file, including the award and all documents and correspondence regarding the matter, should be retained by the association in accordance with its record retention policy. However, any recordings or transcripts of the hearing should be destroyed. The main purpose of retaining this information is to assist the parties in the event judicial enforcement of the award becomes necessary. 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 five (5) years beginning on the date the award is final with the association.