

How to Present Your Case

Deanne M. Rymarowicz, Esq., GLVAR Legal Council

This month we pick up where last month's article ended. You've already prepared your complaint or response to a Professional Standards Hearing, and it's now the day of your hearing. Here's what to expect.

As with any other important meeting, it's best to arrive a few minutes in advance of the hearing time. You will be asked to sign a confidentiality agreement. This agreement states that the hearing and the decision are confidential information and must not be disclosed or discussed except under the very narrow circumstances set forth in the *Code of Ethics and Arbitration Manual*.

It is a very good idea to bring your transaction file to refresh your memory. The hearing panel may ask you clarify the date you called someone, or some other fact. Remember that a hearing may be held several months after the event in question, and it may be difficult to remember every detail. Also, the panel can ask to see the original of a document if the copy you submitted is illegible or cut off.

The hearing proceeds as follows:

Introduction. The panel chair makes introductory comments. At this time, any additional documents may be reviewed by the chair and the opposing party. Generally speaking, documents produced the day of the hearing are not acceptable. Documents that were reasonably available before the hearing should have already been produced within the 15 day rule. Showing up at the hearing with 50 pages of new evidence shows no consideration for the process, the panel or the opposing party. Decisions whether to accept such documents are made on a case-by-case basis, considering such issues as the relevance of the document and the prejudice to the other side.

Testimony and Cross Examination. During this phase of the hearing, each side is given the opportunity to present his/her case and bring on any witnesses. The complainant goes first. When the complainant is done testifying, the respondent is given the opportunity to ask questions. The respondent should not argue his case, rather, he should ask questions to help clarify an issue. For example, rather than say, "I disagree with what the complainant said. I did provide her with the resale package," this series of questions is much more to the effective:

Q: Can you please turn to page A-6. What is this document?

A: The receipt of resale package.

Q.: Are those your initials under "buyer?"

A.: Well, yes.

Q.: So, reviewing this document, do you now recall that I did give you the resale package?

A.: Uh. Yeah, I guess so.

Remember, it has to be a question, not your opinion or argument. You'll have a chance for that later. The panel chair will interrupt you if you stray from the question format.

When the respondent has completed any cross examination, the panel members will ask questions. Then, the complainant will call her witnesses, and the same process will be repeated until all witnesses have concluded testifying. When a party's witness is called, the party may choose to ask specific questions or simply ask the witness for his recollection of events. Generally speaking, it is better to guide the testimony with questions. This helps to ensure that the witness is actually supporting your side of the case, and makes it easier for the panel to understand how the witness fits in to the story.

Once the complainant rests her case, the process begins all over for the respondent, and follows the same format.

One note about panel questions: you should not make any assumptions if the panel has few or no questions, or dozens of questions. The panel's job is to come to a peer judgment fair to all parties, and it is important that the panel understand both sides' arguments.

Closing Arguments. At the conclusion of the evidentiary phase, each party is given the opportunity to present a closing argument. This is an excellent time to tie the evidence to the code (ethics) or the elements of procuring cause (arbitration). A good rule of thumb is to state what the allegation is, state how the evidence supports that, and to ask for relief.

Examples:

“Article 1 of the Code of Ethics states that a REALTOR must protect and promote the interests of his buyer. Today, the panel heard testimony of the buyer who stated that her REALTOR never pointed out that the property's zoning was being reviewed. You also heard from that REALTOR that he knew the zoning was being reviewed, because he had a conversation with the building department. He also admitted he did not tell his client, because he wanted the deal to go through. It is up to this panel to decide whether the Respondent's admissions are enough to find him in violation of Article 1.”

“There are many elements that factor in to the question of procuring cause. I ask you to consider these facts, which I have proven through my testimony, the testimony of the buyer, and the documents. I had continuous contact with this buyer 4 weeks before the respondent stepped in. I introduced the buyer to property, whereas the respondent never showed the property to the buyer. I wrote an offer on buyer's behalf, but was instructed to withdraw it an hour later. That same day, buyer's cousin received her real estate license, and a week later, the respondent wrote an identical offer, which was accepted. Each of these factors favors me as the procuring cause.”

Keep in mind that the complainant bears burden of proof. That is, the complainant must show by clear, convincing and strong evidence that the respondent violated the Code of Ethics (ethics) or that she is entitled to a commission (arbitration). Each party may be

provided with a copy of the Code of Ethics, and parties to an arbitration are likewise provided with a copy of the factors that may be considered by the hearing panel in determining procuring cause. It is helpful to use these resources, as well as the *Code of Ethics and Arbitration Manual*, in preparing your case.

After the Hearing

When the parties have left the hearing room, the hearing panel remains in session, closed and off-the-record, to make its decision. Ethics decisions are usually written up in seven to ten days, and mailed to the parties. An ethics decision includes detailed findings of facts, conclusions and a recommendation for discipline, if the panel found the respondent in violation.

An arbitration award is usually faxed to the brokers the day after the hearing, and followed up with a copy in the mail. Arbitration awards do not contain findings of fact, and it is sometimes difficult for the non-prevailing party to understand what he or she did “wrong.” Unlike an ethics decision, there is no indication that the non-prevailing party behaved in anything but an ethical manner. Arbitration awards are highly fact-specific, and no one factor is determinative; rather, the panel analyzes the entire course of conduct.

Each decision is accompanied by applicable instructions for appeal or procedural review. Ethics and arbitration decisions have different grounds which may be reviewed by the Board of Directors. You should review the information carefully before deciding to review a decision, and make sure that your appeal is timely filed.