

## ARBITRATION OF DISPUTES

### Association can Decline Arbitration

- Association can decline arbitration if
  - Issues are too legally complex
  - Amount in controversy is too great

Parties are released from obligation to arbitrate

### Parties' Waiver of Right to Arbitrate

By initiating judicial proceedings or willingly taking part without objection, member waives right to force mandatory arbitration

### Selection of Hearing Panel

- If parties do not sign "Waiver of Disclosure" form, each potential arbitrator must complete and sign disclosure form (disclose if you've been an arbitrator for party or attorney in last 5 years)
- Professional Standards Committee members list (and disclosure forms, if any) sent to parties
- Parties have opportunity to challenge
- Four members chosen from unchallenged individuals
- Three are panel members, fourth is alternate
  - Panel members are decision-makers
  - Alternate cannot actively participate in hearing (no questions, comments or participation in deliberations)
- One panel member is Presiding Officer ("PO")
- Due process concern
  - All must be objectively unbiased
    - Automatic disqualification: (1) related by blood or marriage to party, (2) financial interest in outcome of matter, (3) one of the parties or (4) employer, employee or business associate of party
    - Bend-over-backwards rule – if an objective 3rd party would think you have reason to be biased, excuse yourself – avoid the perception of impropriety

### Response from Respondent

- Late filing of response - OK
- Due process concern
  - Respondent has right to defend him/herself

### Withdrawal of Complaint

- Complainant may withdraw complaint at any time
  - Case is dismissed

### Failure of Respondent to Appear at a Duly Noticed Hearing

- If valid reason, hearing should be continued
- If no valid reason, hearing can go forward without respondent
  - No default judgment (no automatic loss)
  - Complainant must still prove case

- Due process concern
  - Right to defend him/herself

#### **Failure of Panel Members to Attend**

- Move alternate to sit on panel
- Only two panel members
  - Parties agree to two panel members
  - Continue hearing

#### **Right to Counsel**

- Party can be represented by attorney
- Counsel has rights analogous to those in judicial proceedings
  - make opening and closing statements
  - examine and cross-examine witnesses
  - PO controls the hearing and must not permit counsel to badger witnesses or the panel
- Due process right to counsel

#### **Who may be present in hearing room**

- All parties
- Attorney for party and/or Association
- Broker of salesperson-party
- Anyone with financial stake in outcome

#### **Continuance may be Granted**

- Upon motion of panel
- Upon motion from a party
- Panel discretion

#### **Duty to Testify**

- Every member has a duty to testify
- Subpoenas allowed for hearing only – no pre-hearing discovery

#### **Formal Rules of Evidence Do Not Apply**

- Formal judicial procedures and rules of evidence are not applicable
- See attached Summary of General Principles Regarding Evaluation of Evidence

#### **Right to Present Evidence**

- Documentary evidence
- Witness testimony
  - Witnesses sworn by PO
  - Witness only allowed in hearing room to be sworn and while testifying
  - Accountants and other expert witnesses OK
- Due process concern
  - Right to a full and fair hearing
  - Right to defend him/herself

### **Right to Cross-Examine**

- Parties and/or counsel can cross-examine witnesses
- Panel members may question witnesses

### **Video/Tape Recordings**

- All hearings are tape recorded
- Only purpose and permissible use of video or tape recording is Directors' Review
- Video/Tape recorder is usually operated by alternate

### **Burden of Proof**

Complainant has burden of proof

### **Outline of Procedure**

- PO makes opening statement and swears in parties and witnesses
  - Articulate the ground rules
  - Speak in laymen's terms
  - Sample attached
- Witnesses leave room
- Complainant makes opening statement
- Respondent can make opening now or at end of complainant's evidence
- Complainant presents evidence and calls witnesses
- Respondent presents evidence and calls witnesses
- At conclusion of each witnesses' testimony, other party can cross examine witness Members of hearing panel can question witnesses and parties at any time
- Upon conclusion of all evidence and testimony, each party can make closing statement – usually complainant goes first

### **Deliberation and Decision of Hearing Panel**

- At the completion of the hearing, all the parties are dismissed
- The panel members may then refer to their notes and the tape recording of the hearing, discuss the issues and make a decision
- Commission disputes should be decided using C.A.R. Procuring Cause Guidelines (attached)
- No Findings of Fact
- All three members of panel have equal vote
- Money award only – no ethics violations
- The decision of the hearing panel is by simple majority vote
  - How much money is owed to whom and how soon must it be paid
  - Only award amount of money requested, plus costs if requested in writing
  - No punitive damages
  - No damages for pain and suffering