

## **Disciplinary Hearings: A Primer**

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Few will dispute that effective rule enforcement requires some form of member discipline, including straightforward, efficient and easily understood disciplinary hearing procedures. But instead of relying upon the disciplinary hearing as that “gotcha moment” used to deliver punishment for violations, the member disciplinary hearing can be an effective tool to develop an understanding of and to ensure compliance with the association’s rules.

One cannot address discipline or compliance hearings without discussing due process. Due process requires that before an association imposes discipline on a member for a rule violation, the association must provide the member with: 1) notice of the violation they are being charged with, and 2) an opportunity to address the board about the violation. Although due process requirements may be contained in the governing documents, it is mandated by Civil Code Section 1363(h) and requires ten (10) days’ notice to the member before the board intends to conduct a hearing on the violation.

This hearing notice sets the tone of the hearing and can invite compliance or discourage attendance altogether. It can serve as a meaningful way for the board to educate the member about the association’s rules and make a good faith attempt to achieve an amicable resolution with the homeowner. In this way, the hearing is an opportunity to encourage compliance with the governing documents.

To be effective, the hearing notice should contain the following:

- A clear statement or description of the violation for which the hearing is going to be held.
- A clear explanation of the purpose of the hearing.
- A clear statement about the consequences of not appearing.
- A description of what the member must do to comply voluntarily and providing a reasonable opportunity to do so in lieu of the hearing.

### **Prep and Guide the Board**

Preparing your board for the hearing is equally important. First, consider establishing a hearing procedure for your community to be used for all compliance hearings. Second, provide the board with all the facts and circumstances necessary to make an informed decision on the matter. Include photographs if helpful and arrange for a site visit if necessary such as when addressing architectural compliance matters.

Despite the nature of the violation, remind your board members to treat the member with respect, giving the member the benefit of the doubt. For some, the hearing can be intimidating so it is important to give the member a fair opportunity to explain his/her side of the story without interruption.

Your association's hearing procedure should provide the directors with an opportunity to question the member. Management should help the directors resist the temptation to challenge or cross-examine the member. The objective of the hearing is to discover facts, not debate with the member. Make sure the board does not deliberate or reach a decision in the presence of the member.

Make every effort to maintain control of the hearing and try to end on a civil tone. Thank the member for attending and let him/her know when to expect a decision. If appropriate, obtain a commitment to comply or correct the violation.

### **What Else to Expect**

Of course, with disciplinary hearings, like all things in community associations, we must expect the unexpected. Here's a look at a few issues that may come up:

**Legal counsel:** The disciplinary hearing is generally between the board and the member. It isn't a place for legal counsel. If the member insists on having counsel present, advise the board that the Association should also have counsel present. This enables the Association to maintain control of the hearing process.

**Witnesses:** Due process requires notice and a hearing; it does not entitle the member to bring witnesses or to cross-examine their accuser. That said, allowing a member to bring a witness in support of his/her position may lead to a more balanced hearing, and prevent a claim that the process was not fair; it will also allow for a more objective board decision. For those reasons, be open to the possibility that a witness may further resolution. However, it can also make the hearing more contentious. Sometimes a member may request the complaining party's or accuser's identity.

In matters where the accuser is the only witness to the violation, assist the board in determining whether the association is obligated to disclose the identity of the accuser. The best practice, however, is for the board or management to independently verify the violation wherever possible.

**Owner request for an open hearing:** Disciplinary hearings should be held in executive session. Occasionally, a member will demand that the hearing take place in an open board meeting but holding a disciplinary hearing in public will likely escalate the dispute and will not further the resolution process. It does not serve the "community" to hold member disciplinary hearings before the general membership. If such a demand is made, consult counsel as to the options available to the board.

**Handling no shows, and the importance of making a record:** For a variety of reasons a member may not appear at the hearing, making it all the more important that the hearing notice address the consequences of not appearing. The board should proceed with the member's hearing, note the member's absence for the records, and reach a decision following deliberation of all facts available to the board at that time. This approach serves to document the board's hearing procedure in the event that the matter leads to a court proceeding.