

2010-2011 BROKER-IN-CHARGE ANNUAL REVIEW

SECTION THREE

DISCIPLINARY PROCEDURES

Outline:

[Introduction](#)

[Authority of the Commission](#)

[Disciplinary Proceedings](#)

[How Initiated?](#)

[Investigations](#)

[Probable Cause](#)

[Prosecuting Disciplinary Cases](#)

[Settlement](#)

[Procedure](#)

[Trials](#)

Learning Objective: This Section will acquaint brokers with the procedure utilized by the Legal division to process the numerous complaints received each year and to help brokers understand their obligations and options, if they are a respondent in an inquiry or disciplinary case.

INTRODUCTION

As mentioned in Section Two, the Legal Services division employs five full time attorneys, three consumer protection officers, three information officers, and five support staff. Legal receives nearly 1400 complaints each year and each complaint must be screened to determine whether and how to proceed. The processing of complaints and how disciplinary cases emerge is the subject of this section and is intended to acquaint brokers with “the system” in the unfortunate event the broker is the subject of an inquiry.

While it may not be your favorite mail, ***do not ignore letters or other correspondence from the Commission!*** Denying it is there will *not* alter reality nor make it disappear; in fact, refusing to communicate with the Commission in response to an inquiry may lead to harsher disciplinary action than the underlying violation might warrant. An example is the broker who dutifully, if not reluctantly, notified the Commission that he had been convicted of prostitution 75 days earlier. A letter of inquiry was sent requesting more information about the circumstances surrounding the conviction (relevant to “moral turpitude”), as well as several subsequent letters, but the broker refused to communicate with Legal. Ultimately, it was called

for hearing and the broker's license was *revoked*, primarily for not responding and providing information to the Commission. (And the conviction, of which he probably was not proud, went in the *Bulletin*.)

Reporting Criminal Convictions and Disciplinary Actions

Be aware that **Rule A.0113** requires any broker who is *convicted of any felony or misdemeanor* **or** who is disciplined by *any governmental agency* in connection with any occupational license, **or** whose notarial commission is restricted, suspended or revoked **shall** file with the Commission a **written report** of such conviction or action **within 60 days** of the final judgment, order or disposition in the case. A form for this report is available on the Commission's website under "Forms." Failure to report a criminal conviction or disciplinary action by another governmental licensing agency *of this or any other jurisdiction* to the Commission as required only aggravates the situation and may lead to disciplinary action for failure to report, even though the underlying transgression in and of itself might not have resulted in disciplinary action. While some seem to think that if they don't report the conviction/disciplinary action, the Commission won't find out, they often are wrong. Such matters come to the Commission's attention in numerous ways.

Must I report an arrest? No, only convictions. If I am found not guilty or am granted a prayer for judgment continued (PJC), must I report that? No, because one has not been found guilty of an offense. If a misdemeanor traffic offense is reduced to an infraction, must that be reported? No, because an infraction is not a misdemeanor. If I was convicted of driving while impaired six months ago while vacationing in Colorado must that be reported? *Yes*, because it at least is a misdemeanor, and possibly a felony. The rule says *any* misdemeanor or felony must be reported, regardless of where it occurs. If I file personal bankruptcy, must I report that? Not after one is licensed, as the rule does not require reporting civil judgments entered against a licensee, although bankruptcies and outstanding civil judgments must be disclosed on license applications.

AUTHORITY OF THE COMMISSION

The Commission's authority to impose disciplinary action on licensees, whether individuals or entities, is set out in **G.S. 93A-6, "Disciplinary action by Commission,"** among other statutes. Its subparagraph (a) lists the fifteen things for which brokers may be disciplined. It begins:

(a) The Commission has the power to take disciplinary action. Upon its own initiative, or on the complaint of any person, the Commission may investigate the actions of any person or entity licensed under this Chapter, or any other person or entity who shall assume to act in such capacity. If the Commission finds probable cause that a licensee has violated any of the provisions of this Chapter, the Commission may hold a hearing on the allegations of misconduct.

The Commission has the power to suspend or revoke at any time a license issued under the provisions of this Chapter, or to reprimand or censure any licensee...

Thus, the Commission has five options as to the disposition of any inquiry or case:

- **Dismiss**
- **Reprimand**
- **Censure**
- **Suspend**
- **Revoke**

How does a reprimand differ from a censure? Technically, a censure is a harsher form of reprimand, but, as a practical matter, it is rarely used. If the Commission decides to reprimand or suspend a license, it "...may also impose reasonable conditions, restrictions, and limitations upon the license, registration or approval issued to the disciplined person or entity." Occasionally the Commission will impose a sentence, but then stay its effect on condition that the broker does something, typically, certain specified education, by a stated date and if the broker fulfills the condition, then the disciplinary case is dismissed or the sanction reduced. If a license is *revoked* or *suspended* for any period of time, the statute requires the Executive Director to transmit a certified copy of the disciplinary order to the Clerk of Superior Court in the county where the broker maintained his/her principal place of business for entry of the order in the judgment docket.

Note that the Commission not only has jurisdiction over licensees, but also has the *authority to seek injunctive relief* in Superior Court against unlicensed persons or entities who are engaging in brokerage. The Commission has exercised this power in the past to initiate legal proceedings against unlicensed persons and obtain a court order directing the person or entity to cease engaging in brokerage until such time as they are properly licensed. Failure to abide by the court order may result in a contempt of court citation which, among other things, may include a period of incarceration. The Commission may issue subpoenas both for the attendance of witnesses to testify at a hearing, as well as to produce documents, records or other materials that may be relevant to the trial of a case.

Character Issues of License Applicant

As mentioned briefly in Section Two, character issues of applicants for licensure are not reviewed until *after* an applicant has passed the State licensing examination, because if one fails the examination, one is not eligible to be licensed. All character issues that may delay or prevent licensing are first reviewed and investigated by the License Application Analyst, a staff member of the Education and Licensing Division. Character issues may include criminal convictions, disciplinary action by any licensing board, previous bankruptcies, outstanding tax obligations or significant outstanding judgments.

If after reviewing the applicant's written explanation of the circumstances, the License Application Analyst declines to approve licensure, he then reviews the questionable applications with the Executive Director and the two formulate recommendations as to licensure to be presented to the Commission at its next meeting. The License Application Analyst prepares written summaries of the applicant's criminal convictions or past disciplinary actions by other occupational boards, as well as outstanding judgments, liens and/or bankruptcies filed against or by the applicant for review by the nine Commission members. The Commission then decides

whether to approve the license application or continue the matter. If there are pending criminal charges (i.e., unresolved charges) against an applicant, a decision as to licensure may be *postponed* until the disposition (outcome) of the pending criminal case is known.

In any application case where the decision is *continued*, that applicant will receive a letter inviting him or her to schedule a “character conference” to explain the circumstances surrounding the event and why s/he should nonetheless be licensed. These conferences are conducted monthly in Raleigh by the License Application Analyst, in conjunction with two Commission members and a staff attorney, who interview the applicant. The two Commission members then decide what to recommend to the full Commission. That recommendation will either be: **1) to approve licensure, 2) to defer licensure, or 3) to defer with conditions.** An example of a deferral with conditions for an applicant with a recent criminal conviction might be that a broker license will be issued upon the applicant successfully completing any probation imposed under the sentence. Another example might be that a broker license is granted on the condition that the individual may not become a broker-in-charge for three years. Thus, to “defer with conditions” is basically to grant the application, subject to specified conditions.

If the full Commission votes to *defer* an application, i.e., decline to issue a license, the applicant will receive a letter by certified mail informing him/her that s/he has sixty (60) days from receipt of the letter to request a formal hearing before the Commission to plead his/her case as to why s/he/it should be licensed or approved. *The application of a “deferred” applicant who fails to timely request a hearing will be deemed denied.* **Note:** unlike disciplinary actions where the burden of proof is on the Commission to prove a violation occurred, **the burden of proof in application cases is on the applicant** to show why a license should be granted.

DISCIPLINARY PROCEEDINGS

How Initiated?

The vast majority of disciplinary cases opened every year are the result of *consumer complaints* against licensed real estate brokers. While no particular form is required, the Commission provides a standard complaint form on its website and encourages its use. [See REC 4.01F: “Complaint.”] Under the Commission’s rules [Rule A.0601(a)], **complaints must be:**

- in *writing*,
- **identify the broker(s)** complained against, and
- set forth the *essential facts* of the complaint.

It is the legal division’s policy to investigate every consumer complaint, unless it clearly states no cause within the Commission’s jurisdiction. While a complainant is not required to perfectly plead/articulate his/her case, it must appear that some violation of Real Estate License Law or Commission rules has occurred. A complaint’s failure to present sufficient facts to demonstrate a violation will be taken into consideration when the legal division determines what resources will be devoted to any inquiry. The legal division will investigate an anonymous

complaint *if the information supplied by the complainant is sufficiently detailed to allow independent verification.*

In addition to consumer complaints, cases also may be opened either due to a complaint by one licensee against another, or on the Commission's own initiative because of some matter or situation of which Commission staff became aware. A person who files a complaint with the Real Estate Commission gains no special status thereby and does *not* become a "party" to a case before the Commission. A complainant is akin to an informant, who because of his/her special knowledge may become a witness if the matter goes to hearing, but otherwise has no special standing before the Real Estate Commission. The only standing required of the complainant is a good faith belief in the truth of the allegations asserted.

Most Common Complaints

Other than monies missing from trust accounts, the most common complaints Legal receives include the following:

- Misrepresentation
- Contract problems
- Agency issues
- Loan Fraud
- Professionalism (or more accurately, the lack thereof)

Misrepresentation cases involve those where a broker has made a false or misleading statement, as well as, more commonly, those where the broker failed to disclose a material fact (negligent or willful omission). Liability may attach in both instances. Complaints arising from contract matters often include allegations that the broker prepared or "drafted" a legal instrument, or language to be included in a legal instrument, for others that later turned out to be inadequate, or the complaint may relate to contract formation issues, such as disputes over acceptance.

Another common complaint is the buyer's or seller's irritation with the broker-escrow agent who refuses to release a disputed earnest money deposit, because "it's just as clear as the nose on your face who's entitled to receive that deposit!" Prudent brokers should have a copy of Rule A.0107(g) ready to give to all disgruntled sellers/buyers so they can read for themselves the constraints on the broker's ability to release disputed funds, i.e., written consent of the parties, or one sues the other, or the broker uses the G.S. 93A-12 procedure.

Cases involving agency issues may include the failure to provide the *Working with Real Estate Agents* disclosure brochure and to have an express agreement as to representation, failure to have a written agency agreement when required by Rule A.0104, or undisclosed or uninformed dual agency (the last of which still scores annually in the top 10 problems nationally). "Professionalism" complaints basically relate to the broker's handling of the transaction, e.g., availability, promptness in returning messages/responding to emails, gathering information, assistance in negotiating issues, presenting documents, etc..

Investigations

In eighty percent (80%) of the Commission's cases, the decision not to prosecute is made by the Commission's legal counsel during or at the conclusion of the Commission's investigation. New cases are first screened by an attorney in the Commission's legal division who decides whether they will be **investigated by correspondence or by a field investigation**.

Correspondence

If most of the necessary information can be gathered by correspondence, then the case is referred to a "consumer protection officer" who will write to the responding broker and witnesses to obtain statements and documents. Routine or minor complaints and cases which lend themselves to this sort of inquiry are handled in this manner. An attorney in the legal division works closely with the Commission's consumer protection officers. The initial "Letter of Inquiry" will advise the broker that a complaint has been filed, a copy of which is enclosed, and that s/he is asked to *respond with his/her rendition of the facts within fourteen days of receiving the letter*. The letter may also request the broker to provide copies of various documents. If an additional week or so is needed to prepare a thorough response, the broker may contact the consumer protection officer who wrote the letter and request an extension. ***Licensees should never underestimate the importance and effectiveness of a well-drafted response to an inquiry in affording the best opportunity to avoid disciplinary proceedings.***

Licensees should be aware that a broker's *failure to promptly and fully respond* to a letter of inquiry from the Commission's legal or audits and investigation staff ***is itself an offense that may result in disciplinary action***. The licensing statutes and Commission rules require brokers to maintain records of their transactions and trust accounts and to make these records available for inspection by the Commission's investigators without prior notice. A broker who fails to respond completely only invites greater scrutiny. Failure to keep required records and make them available for inspection is considered to be a very serious offense. Brokers should provide the Commission's investigative personnel with complete and truthful responses. If the broker respondent has a factual or legal defense, then it should be raised in the response.

Field Investigation

Cases that require witness interviews, trust account audits, or the examination of evidence that cannot easily be identified and obtained through correspondence are assigned to the Commission's Audits and Investigations division. Following their field investigation, the case investigators and their supervisors organize their findings in written reports and submit them to the Commission's legal division. Field investigation resources are very limited and are reserved for the most serious cases. The A&I investigation staff is comprised of auditors and investigators, some of whom are recruited from criminal law enforcement agencies.

The Real Estate Commission has authority to issue investigative subpoenas and Legal regularly issues such subpoenas to aid investigations. While the Commission's authority to obtain financial records from a bank or other financial institutions is constrained by the Financial Privacy Act [NCGS Chapter 53B], the License Law provides a procedural exception to the Financial Privacy Act when trust records are the object of the subpoena. [GS 93A-6.1(b).]

Objections to a subpoena issued by the Real Estate Commission must first be addressed to the Commission, rather than a Court.

Investigator Reports and Case Files

The Commission's investigators assemble files and reports in each case. Files contain the complaint, correspondence to and from witnesses, documentary evidence, notes and memos concerning witness statements, subpoenas, affidavits, and similar materials. In most instances these materials will be made available on request to respondent brokers and their counsel and will be treated as public records with regard to inspection by disinterested parties. There are exceptions to this policy, however.

The Real Estate Commission and most occupational licensing boards are "public law enforcement agencies" as that term is defined by state law. The same law also provides that the Commission's case files are not public records. [GS 132-1.4.] The Commission's legal division will withhold materials in a case file from public examination when disclosure would frustrate an on-going investigation by the Commission or by another law enforcement agency cooperating with the Commission's inquiry. When a notice of hearing has been issued to a broker respondent, however, the Commission will open its file to that respondent and his attorney.

Probable Cause

Once the investigation has concluded and all the information and documents have been assessed, the consumer protection officer or investigator, in conjunction with a staff attorney, will discuss the facts and what outcome might be appropriate. Because of the high volume of cases, the Commission has given its legal counsel the authority to close cases and most cases are disposed in this way. Merely having a case dismissed is **not** equivalent to being deemed "innocent" or not at fault. *In most of the cases, the broker committed some violation, but in the grand scheme of things was it major or minor, intentional or inadvertent, was any consumer greatly harmed and, if so, did the broker make it right? All of these factors are considered in determining whether to dismiss, dismiss and warn, or conditionally dismiss.*

The process within the legal division is deliberative. At regular meetings, members of the staff debate the evidence and merits of cases to determine whether to proceed. When Legal staff believes that disciplinary action is warranted, it must first convince the "Commission" that probable cause exists. Only cases in which the evidence is strong and/or the violation serious are referred to the Commission.

Commission Approval

The probable cause determination must be made by the full Commission, that is, by a voting majority of a quorum present when the matter is discussed. A brief written synopsis of the *facts* of the case *without any names* and staff recommendation is provided to Commission members in advance of the meeting for their review. The Commission may *approve* staff's recommendation or *reject* it. Following the probable cause determination, the Commission's legal division sends the respondent broker a courtesy report advising him/her of the outcome of

the determination. If there is a complaining witness, s/he also receives a copy of the notice. This report is called the “Case Status Report.” It notifies the respondent of any of the following:

- initiation of a disciplinary proceeding has been authorized
- a Notice of Hearing or settlement conference or proposal will be forthcoming
- the case was closed without action
- the case was closed but a caution/warning issued
- continued for further consideration.

PROSECUTING DISCIPLINARY CASES

If the Commission approves the initiation of formal proceedings, case preparation and negotiation reverts back to Legal professional staff, supplemented as necessary by the investigators in Audits and Investigations. Respondents may choose to represent themselves or hire legal counsel, as they wish.

Settlements

The Commission’s legal division *proposes a settlement in nearly every case*. Usually a settlement will be tendered to an accused broker shortly after s/he has been notified that the legal division has been authorized to commence disciplinary proceedings. The settlement offer may be contained in a letter, but in most cases it is set out in a proposed consent order. The broker-respondent may be directed to appear for a settlement conference with the assigned staff attorney.

The legal division uses a short form consent order in which standard provisions are part of the form. Blank spaces on the form are reserved to recite the facts, violations, and sanctions appropriate to the particular case. A separate consent order is prepared for each responding broker in a case. *Because settlement saves valuable staff and Commission time, the legal division builds a settlement premium into settlement offers when the circumstances of the case permit*. It goes without saying that a broker who has embezzled a significant sum from his/her trust account can expect little in the way of a premium in settlement.

Under the provisions of Rule A.0615, case settlements must first be approved by the Commission’s legal counsel. Once that approval is obtained, the Commission itself must give final approval. If the Commission rejects a proposed settlement, the facts and conclusions in the rejected settlement do not bind the responding broker or the Commission’s prosecuting attorney. The Commission members do not engage in settlement negotiations themselves and when they are dissatisfied with a proposed settlement, the members do not recommend another proposal or result. Last minute settlements occur, but they are not favored, especially if persons already have been subpoenaed to testify at the hearing.

Hearing Procedure

A quorum of the nine members of the Real Estate Commission acts as the tribunal in its own contested cases. Although an occupational licensing board may refer a case to the Office of Administrative Hearings, the Real Estate Commission has never done so. Customarily, the Commission's chairman presides at contested case hearings, but sometimes another member is designated to preside.

Venue & Service

Cases usually are heard in Raleigh, as Raleigh is fairly centrally located and the Commission members meet at the Commission's office every month for their regular business meeting. The Commission's office contains a hearing room large enough to accommodate around 50 persons. Several cases are scheduled during the regular two day meeting period, and occasionally a separate two day calendar for hearings only is scheduled. When a case involves a large number of witnesses concentrated at some location distant from Raleigh, the Commission may direct that the hearing be held at a location more convenient to the participants. Under state law, venue determinations in occupational licensing board cases fall within the agency's discretion.

Legal schedules hearings in contested cases by balancing a number of factors including:

- the seriousness of the allegations,
- the risk of ongoing harm,
- the availability of parties and witnesses,
- the time available on the Commission's calendar, and
- the Commission's convenience.

Under this system there is a tendency for shorter proceedings to move ahead of cases where there are numerous witnesses, but the division's attorneys work to combat this. The calendar is usually filled two-to-three months in advance and each hearing slot is double or triple booked to make sure Commission members' time is not wasted.

The Commission's legal division usually issues **notices of hearing** to respondent brokers three or four weeks in advance of the date established for the hearing. The notice of hearing states the allegations against the broker and is similar in purpose to a "complaint" in a civil court proceeding. While staff attempts to give three to four weeks notice, this is not always possible and sometimes only the *minimum notice (fifteen days)* is given. *Service of process is usually accomplished by certified mail or personal delivery.* The legal division will, on occasion, ask a local sheriff's office to serve a contested case notice.

Discovery

Once the notice of hearing has been issued in a disciplinary case, it is the general policy of the Commission's legal division to make everything in its disciplinary case file available to the respondent broker and his attorney. This includes investigator reports of witness interviews, correspondence with respondents and witnesses, and documentary evidence. The legal division will withhold only trial preparation materials and other documents, as permitted by state law.

Motions and Other Pleadings

Unlike civil court cases, there is little motions practice in disciplinary cases. Because the Commission's legal division adheres to an open-file discovery policy, disputes over discovery or evidence are rare.

Occasionally respondent brokers (and sometimes even the Commission's prosecuting attorney) will request a postponement of a scheduled hearing. These motions are not granted routinely, but will be allowed only when genuine grounds for delay exist. Last minute requests to postpone or continue hearings are not favored. The amount of time Commission members have to volunteer to hear cases is finite. When a Respondent makes a continuance request after the point in time when another case could be substituted for that hearing slot, it wastes the Commission's resources. To combat this, the legal division often double-books hearing slots, as previously mentioned.

The Commission's rules require pre-trial motions and other pleadings to be written, but as long as the petitioner's meaning is clear, there is no ceremony as to form. Some attorneys practicing before the Commission will make their motions look like their superior court equivalents. Others will simply submit a letter. Either form is acceptable. [Rule A.0601(d).]

Whenever a motion is received in time to be considered by the full Commission at a scheduled meeting, it will be decided by the full Commission. When time does not permit such consideration, non-dispositive motions are decided by the Commission's chairman. [Rule A.0612.] (A "non-dispositive motion" is one that does not resolve or decide or conclude or "dispose of" a case, e.g., a motion to continue.) The Commission or its chairman will allow a Respondent who desires a hearing on a motion to be heard. Hearings on motions made to the chairman between meetings are usually heard informally over the telephone by agreement of counsel.

Formal, written answers responding to allegations in a notice of hearing are **allowed, but rare**. Stipulations are also rare, but the Commission is grateful when the legal division's prosecutor and the responding broker's attorney stipulate to preliminary matters and foundational facts that are not in dispute. The Commission is often uncomfortable with fact stipulations which interrupt the narrative flow of the presentation of evidence through witnesses and documents. In other words, if the Commission has to hear some of the case, it would just as soon hear all of it, once the preliminaries are out of the way.

Disqualification

Commission members try very hard to identify possible grounds for disqualification early in the contested case process and disqualify themselves when such grounds appear to exist. Motions to disqualify a Commission member from hearing a case should follow the procedure contemplated in N.C.G.S. § 150B-40(b); however, even when such procedure has not been followed, the member in question may recuse himself if it will not disrupt the Commission's proceedings and serves to improve the respondent's comfort level. Commission members are conscientious in their compliance with state law concerning *ex-parte* communications which are

disfavored. (Ex parte communications are when one side attempts to be heard outside of a hearing without the opposing party being present as well.)

Trials

Proceedings before the Real Estate Commission are formal. The chairman or other member appointed to preside is addressed as “Mister Chairman” or “Madame Chairman.” (However, no offense is taken when an attorney accustomed to addressing a judge says “Your Honor.”) In every other respect, a hearing before the Real Estate Commission is much like a trial before a district or superior court judge without a jury. Attorneys, their clients, and witnesses will receive the same courtesy before the Commission as they might reasonably expect from judges in the trial division.

Court Reporting

The Commission engages a court reporter to record and transcribe every evidentiary hearing. Motion hearings are usually not recorded unless witnesses are expected to testify as part of the proceedings. The Commission will make a copy of the hearing transcript available to a responding broker at no cost.

Evidence

The Commission adheres to a reasonably strict standard of evidence. The Commission expects attorneys not to quibble about the admissibility of documents and copies unless a genuine issue of authenticity or accuracy really exists. Likewise, the Commission may tolerate a certain amount of leading questions and even hearsay if it tends to move the case along and the evidence adduced is not in controversy. Cases before the Real Estate Commission invariably involve one or even several real estate transactions and the evidence is usually document rich. Opposing counsel forgive each other the fine points of foundation when there is no dispute about the origin or genuineness of a document or its contents. The Commission prefers that *only one copy of a documentary exhibit be placed before it*. Multiple copies (i.e. one for each Commission member) tend to create a confusing snowstorm of documents on the Commission’s table making a particular exhibit difficult to locate.

Character Evidence

In a license application case, an applicant’s character is usually in question; consequently, the Commission expects and allows character evidence. When the Commission’s legal division has raised specific incidents as blots on an applicant’s character, the Commission will allow witness testimony about those incidents. Otherwise, the Commission will allow general character evidence from any witness who establishes sufficient knowledge to give it. *In disciplinary cases, however, character is not in issue and the Commission generally does not allow character evidence except as it may be strictly allowed by the rules.*

Expert Testimony

The Commission is accustomed to expert testimony especially when questions of accounting, appraisal, environmental health, local land use regulation, and similar matters are

before it. The Commission does *not* normally allow expert broker's testimony about the standard of care or the minimum expectations established by the real estate license law or rules. Before the Commission will allow an expert to express an opinion as evidence, it will require the expert's qualifications to be established on the record.

Objections

The Commission chairman, as presiding officer of the hearing, rules on evidentiary objections. Because the chairman often is not an attorney, the person raising the objection should explain and support the basis of the objection. The Commission generally expects objections to be reserved for those situations where the integrity and fairness of the proceeding are actually in jeopardy. [Note: the fact that a party or witness may not like or agree with other's testimony or characterization of an event does not make the testimony legally objectionable.]

Examination by Commission

The Real Estate Commission will allow direct and cross examination of every witness called to testify. Usually, following cross-examination, the chairman will invite individual Commission members to ask the witness questions. These questions may not be confined to matters addressed in direct and cross-examination. It is permissible to object to a question put by a Commission member. Following the Commission's examination, the chairman will allow opposing counsel an opportunity to ask follow-up questions. Although the chairman may refer to this as redirect and re-cross, the limitations imposed by the rules on such examinations are usually considerably softened.

Decision Process

After hearing closing arguments, the Commission members usually retire to deliberate and make their decision. The Commission's deliberations are private and are not recorded. When the Commission returns from its deliberations, the chairman (or other presiding member) usually announces the decision orally to those present. The decision is announced as though it were unanimous.

This is the Commission's customary procedure; however, the Commission may, and sometimes does, deliberate at a later time. Only those members conducting the hearing participate when deliberation is delayed. In any case, the Commission's decision is not final until it is reduced to writing and sent to the responding broker. [GS 150B-42(a).] *The time period of a respondent's right to seek judicial review begins with delivery of the written order and not the oral announcement of the Commission's decision.*

The Commission's written decisions contain findings of fact and conclusions of law in accordance with statutory requirements. The written findings will not regurgitate all of the evidence presented at the hearing. Rather, just those facts adduced by the evidence that support and explain what the fact-finder found to be relevant and true comprise the findings that in turn must logically support the conclusions of law.

Judicial Review

Any person or entity who is dissatisfied with the Commission's decision in a contested proceeding may file a formal petition with the Superior Court of Wake County (or in the superior court of the county where they reside) requesting judicial review of the Commission's decision. The petition must be filed within 30 days of the date the individual/entity was served with the Commission's decision or the licensee loses the opportunity to seek judicial review. The petition "... shall explicitly state what exceptions are taken to the decision or procedure and what relief the petitioner seeks." The broker serves the petition on the Commission and any other applicable parties who may file a response to the petition within 30 days of service setting forth their own written exceptions to the decision. The Commission must then prepare a certified copy of the record within a certain time period specified by statute and transmit it to the superior court for judicial review. *There is not a new trial at the superior court level.* Rather, the court will limit its review to the submitted record. The superior court judge may base his/her order solely on the written arguments submitted or may allow oral argument. It may affirm, reverse and remand or otherwise modify the Commission's decision.

Possible Sanctions

As mentioned previously, the Real Estate Commission may revoke or suspend a broker license and it may censure or reprimand a broker.

Revocation

In the Commission's practice, license **revocation** is loss of licensure for an indefinite time. A broker whose license is revoked *has no license*. A broker whose license has been revoked may apply to the Commission to have it reinstated *unless* the revocation was *permanent*. In applying for *reinstatement*, the former licensee must satisfy all the requirements imposed upon any other license applicant and must overcome the mark revocation has made against his character. Ever since the decision of the North Carolina Court of Appeals in In Re: Betty Nantz, 177 N.C. App. 33, 627 S.E.2d 665 (2006), the Commission has begun to "permanently revoke" the licenses of respondent brokers whose conduct is so egregious that the Commission determines that the hope of future licensure should be foreclosed.

Surrender

G.S. 93A-6(e) allows a broker, whether an individual or an entity, who has been accused of some misconduct or violation that might result in disciplinary action, to choose to voluntarily surrender his/her/its license rather than proceed to hearing. A broker who **surrenders** his/her/its license *no longer has a license* and relinquishes all rights and privileges related thereto and may not thereafter engage in real estate brokerage activity unless and until s/he files an application at some future point seeking *reinstatement* of his/her/its broker license. As with revocations, the nature and seriousness of the prior transgression will be considered in deciding whether to grant reinstatement of the former license and on what, if any, conditions. If a licensee has consented to a *permanent surrender* of his/her/its license, then s/he may never apply for reinstatement. The Commission must consent and approve the surrender of a license before it is effective.

Suspension

In a license **suspension**, the *broker still has a license, but is prohibited from using it for a specified period of time*. The privilege of using the license is suspended or withheld. At the conclusion of that period of time, the respondent broker's license is **restored** to him/her, assuming s/he pays any accrued annual renewal fees within 60 days of license restoration. (The broker will receive a letter from the Commission informing him/her of the amount of any delinquent fees.) Unlike surrendered or revoked licenses, no further action on the broker's part is required to restore the license other than paying any delinquent fees and satisfying any continuing education requirements, if s/he wants the license to be on active status.

Reprimand

A **reprimand** is a public statement of disapproval by the Real Estate Commission. A broker who is reprimanded does not lose the ability to practice real estate brokerage. Because the statute does not distinguish between "reprimand" and "censure" and dictionaries commonly define "censure" as a reprimand, the Commission has given up using censure as a separate sanction.

Conditions

The sanctions contained in a disciplinary order may also include conditions. Under G.S. 93A-6(f), such conditions are allowed if they are reasonable. Using this authority, the Commission will sometimes impose a period of license suspension on a respondent broker, but expressly provide that if the broker satisfies some identified condition or conditions by a certain date, the period of license suspension will be reduced or even eliminated. Conditions frequently include the completion of education, but may also include the fulfillment of some legal or contractual duty, such as putting records in order or paying for promised repairs.

Publication

The Commission publishes all disciplinary sanctions (reprimand, suspension, revocation, surrender) in the *Real Estate Bulletin*. Cases which result in **licensee suspension or revocation** are entered onto the judgment docket in the broker's county of residence. The Commission also reports such cases to the local newspapers.

REAL ESTATE RECOVERY FUND

Real Estate License Law also establishes a "Real Estate Recovery Fund" that is to be used "...for the payment of unsatisfied judgments where the aggrieved person has suffered a direct monetary loss by reason of certain acts committed by any [licensee]." The Recovery Fund was established September 1, 1979. The "certain acts" that are covered are *limited solely to conversion of trust monies by a licensee*. (G.S. 93A-17(a).) A consumer who obtains a judgment against a licensee for misrepresentation or omission, for example, would *not* be eligible for contribution towards that judgment amount from the Recovery Fund in the event the licensee was uncollectible.

The requirements and procedure for submitting a claim to the Recovery Fund are found in General Statutes 93A-16 through 93A-26. Basically, an individual who has lost money because of conversion by an individual licensee must first sue the individual broker and obtain a civil judgment against the broker. The injured or aggrieved person must also *notify the Commission in writing within 60 days after commencing the lawsuit* that s/he has initiated legal action, unless the claim against the Recovery Fund will be less than \$3,000, in which case the individual may notify the Commission within 60 days of the *termination* of the lawsuit. The individual **must obtain a valid civil judgment against the broker, and then try to execute (collect) on it** by attaching available assets of the broker. If the broker's available assets are insufficient to satisfy the judgment, then the individual may apply to the Recovery Fund for payment, but must file the application with the Commission *within one year of the termination of judicial proceedings, including all appeals.*

Under the Recovery Fund statutes, *only claims against individual licensees who personally misappropriated the funds are subject to reimbursement.* A judgment against a real estate company for the wrongdoing of its agents would not be subject to a Recovery Fund claim. [See G.S. 93A-17(c).] Pursuant to G.S. 93A-21, the Fund's maximum liability is \$25,000.00 *per transaction* regardless of the number of people involved or the number of real estate parcels. The statute also caps the Fund's liability at \$25,000.00 per year per licensee with a maximum aggregate payout of \$50,000.00 per licensee. Excluded from Recovery Fund reimbursement are sums awarded for consequential, special, incidental or punitive damages, interest, civil penalties, court costs or "other similar awards." What appears to be subject to reimbursement is the difference between the amount of money actually given to the broker to hold in trust minus any of those monies repaid by the broker. If the amount of all valid claims exceeds either the maximum per transaction liability or per licensee liability, then the maximum recovery amount is divided among all claimants pro-rata to their claimed amount. A person who files a claim after the maximum permitted limits have been disbursed is not entitled to any payment.

Note that if monies are paid out of the Real Estate Recovery Fund, then the license of the broker against whom the judgment was taken shall be immediately *suspended* as of the effective date of the order authorizing payment. *The license shall remain suspended until such time as the licensee has reimbursed the Recovery Fund all sums paid on the licensee's behalf, plus interest at the legal rate (currently 8% per annum).* ***Only claims pertaining to misappropriated trust monies may be submitted to the Real Estate Recovery Fund.***

[Note: Since 1983, 145 claims have been paid for a total of \$720,372.39.]