

DEALING WITH REGULATORY COMPLAINTS

REALTORS® are licensed and regulated under Article 25 of the Occupational Code, MCL 339.2501 (the “Code”) and the Administrative Rules which have been promulgated by the Department of Labor and Regulatory Affairs (the “Rules”). Under the Code and the Rules, the Department of Labor and Regulatory Affairs (“LARA”) is authorized and empowered to regulate the conduct of REALTORS®. The power to regulate granted to LARA also includes the power to discipline. The power to discipline can be triggered by complaint from a member of the public, a governmental agency or literally any other third party who believes a REALTOR® has violated some part of the Code or Rules.

I. What Is At Stake?

A. A complaint filed by a third party against a REALTOR® with LARA attempts to allege one or more violations of the Code or the Rules.

B. LARA determines whether the allegations made by the complainant could constitute a violation of Section 604 of the Code. MCL 339.604. Section 604 provides:

A person who violates 1 or more of the provisions of an article which regulates an occupation or who commits 1 or more of the following shall be subject to the penalties prescribed in section 602:

- (a) Practices fraud or deceit in obtaining a license or registration.
- (b) Practices fraud, deceit, or dishonesty in practicing an occupation.
- (c) Violates a rule of conduct of an occupation.
- (d) Demonstrates a lack of good moral character.
- (e) Commits an act of gross negligence in practicing an occupation.
- (f) Practices false advertising.
- (g) Commits an act which demonstrates incompetence.
- (h) Violates any other provision of this act or a rule promulgated under this act for which a penalty is not otherwise prescribed.

- (i) Fails to comply with a subpoena issued under this act.
- (j) Fails to respond to a citation as required by section 555.
- (k) Violates or fails to comply with a final order issued by a board, including a stipulation, settlement agreement, or a citation.
- (l) Aids or abets another person in the unlicensed practice of an occupation.

C. If there is a violation of Section 604 of the Code, then the REALTOR® may be subject to penalties under Section 602 of the Code, MCL 339.602. Section 602 provides as follows:

A person, school, or institution that violates this act or a rule or order promulgated or issued under this act shall be assessed 1 or more of the following penalties:

- (a) Placement of a limitation on a license or certificate of registration for an occupation regulated under articles 8 to 25.
- (b) Suspension of a license or certificate of registration.
- (c) Denial of a license, certificate of registration, or renewal of a license or certificate of registration.
- (d) Revocation of a license or certificate of registration.
- (e) In the case of a person licensed or registered under this act and except as otherwise provided for by this act, an administrative fine to be paid to the department, not to exceed \$10,000.00.
- (f) Censure.
- (g) Probation.
- (h) A requirement that restitution be made, based upon proofs submitted to and findings made by the hearing examiner after a contested case.

D. In Section 602 of the Code, the risks involved in a complaint against a REALTOR® can be extremely high, *e.g.*, revocation of the REALTORS®' license and a \$10,000 fine.

II. The Process.

A. In pursuing civil litigation, the parties must follow the procedures set forth in detail in the Michigan Court Rules and in local rules adopted by a court. There is no detailed road map for the procedure in a complaint filed with LARA against a REALTOR®. The procedure outlined in this Article is solely based upon the experience of the author.

B. Someone wishing to initiate a complaint against a REALTOR® with LARA is provided with a form entitled "Statement of Complaint." The Statement of Complaint instructs the person wishing to make the complaint to type or legibly print their complaint on the form. The complainant is required to provide the name, address, telephone number and the name of the person whom they dealt with and the license number if known of the person or entity against whom they wish to file a complaint. The complainant is also required to provide their personal information, *i.e.*, name, address and telephone number and also indicate whether the complainant is willing to testify at a hearing or engage in a mediation to attempt to quickly resolve the complaint. Further, the complainant is required to indicate whether they have contacted the person against whom they are making the complaint and if so, what was the response. The complainant is also required to indicate whether they have also filed a claim with any other agency or have started a criminal or civil action against the REALTOR®. Further, the complainant is asked what they want the REALTOR® to do to resolve the complaint. They are also required to identify any financial losses and then briefly explain their complaint and attach any documents they believe support their complaint.

C. A REALTOR® against whom a complaint is filed with LARA typically first learns of the complaint when they receive a Notice to Respondent from LARA. Enclosed with the Notice to Respondent are the Statement of Complaint and any documents filed with the Statement of Complaint.

D. A REALTOR® receiving a Notice to Respondent is required to reply in writing to the office specified in the Notice to Respondent within 30 days of receipt of the Notice. The REALTOR® is instructed to indicate in his or her response whether he or she confirms or denies the claims made in the Statement of Complaint. Further, the REALTOR® is directed to provide copies of any documents the REALTOR® had to support his or her position in opposition to the Statement of Complaint.

E. A copy of the REALTOR®'s reply to the Statement of Complaint may be provided to the complainant. This in turn may generate additional information being submitted to LARA by the complainant and in turn a request for additional information from the REALTOR® in response to the additional information from the complainant.

F. If LARA determines that there is justification to proceed forward on the basis of the complainant's Statement of Complaint, LARA will become the complainant and will initiate a Formal Complaint against a REALTOR®. The Formal Complaint will specify what acts or omissions the REALTOR® is in violation of the Code or Rules and allege one or more violations of Section 604 of the Code.

G. Upon receipt of the Formal Complaint, the REALTOR® will typically be offered three possible immediate courses of action. First, the REALTOR® may request a compliance conference with LARA. At such a conference, the REALTOR® would demonstrate that he or she had complied with the Code and/or Rules and had not engaged in a violation. Second, the REALTOR® may request a mediation conference. The request would result in a meeting with LARA in which an attempt would be made to settle the case. Usually, this would involve an admission by the REALTOR® of one or more of the violations set forth in the formal complaint and an agreement upon sanctions, *e.g.*, a fine in a specific amount of dollars. Any agreement reached between the REALTOR® and LARA at a mediation conference is subject to approval by the Board of Real Estate Brokers and Salespersons. Third, the REALTOR® can proceed with a contested hearing before an administrative law judge. An administrative contested hearing has many of the attributes of a civil trial, *i.e.*, court rules of procedure and evidence utilized in an administrative trial.

H. If a REALTOR® suffers an adverse result from an administrative trial, the results may be appealed to the circuit court. However, the basis for appeal to a circuit court is very narrow and the likelihood of success of such an appeal is not very good.

III. What To Do?

A. Upon receipt of the Notice to Respondent, a REALTOR® must not simply place the Notice and the Statement of Complaint on his or her to-do list to be responded to four (4) weeks after the date he or she received the Notice. The REALTOR® should immediately review the Statement of Complaint and begun the process of gathering facts and documents in response to the allegations in the Statement of Complaint.

B. Upon receiving a Notice to Respondent, a REALTOR® should very seriously consider retaining an attorney who is experienced in handling these types of administrative matters. Again, the REALTOR® should not delay the decision of retaining counsel until four (4) weeks after receiving the Notice. The sooner legal counsel is retained, the more likelihood that the REALTOR® working with legal counsel may be able to develop a response which adequately addresses any concerns of LARA and avoids of a Formal Complaint. If the REALTOR® does not know an attorney who has experience in these types of administrative matters, he or she should seek to obtain referrals from either other REALTORS® or from members of the legal community.

C. The Statement of Complaint many times will not cite a specific section of the Code or a Rule which the complainant alleges have been violated by the REALTOR®. Instead, it is up to the REALTOR® to determine what, if any, violations could be found from the facts as alleged by the complainant. In some instances it will be very clear what type of violation is being alleged by the complainant, *e.g.*, the REALTOR® was a buyer for the complainant's property and did not identify themselves in writing as a real estate licensee. In other instances, it will be difficult to determine exactly what section of the Code or Rule was allegedly violated based on the facts alleged in the Statement of Complaint, *e.g.*, the REALTOR® was not nice to me and did not handle my transaction fairly. Retaining legal counsel early on to help to assist in the preparation of the response to the Statement of Complaint is very important, as legal counsel should be able to determine if any of the facts alleged by the complainant could be construed as a violation of a section of the Code or Rules. The response can then be prepared to focus on the specific possible violation.

D. A REALTOR® and his or her lawyer should make every effort to provide a response to LARA which results in a dismissal of the Statement of Complaint and results in a Formal Complaint not being issued by the LARA.

E. If the response to the Statement of Complaint is not successful and the LARA proceeds with a Formal Complaint, in almost all instances it is desirable for the REALTOR® to proceed with a mediation conference prior to engaging in a contested case hearing before an administrative law judge. In a mediation conference, the REALTOR® can determine whether it economically makes sense to settle the case or litigate. In many instances, it would simply make sense for a REALTOR® to agree to a minor violation and pay a sanction instead of proceeding forward with the risk and greater expense of a contested case hearing. In other words, in many instances it makes sense for a REALTOR® to plead to a minor violation and pay a \$1,000, rather than pay an attorney \$5,000 to prepare for and participate in a contested case hearing which could result in a much greater sanction against the REALTOR® if the defense is unsuccessful.

IV. Conclusion.

It would appear that the greatest mistake many REALTORS® make is failing to take timely action when they receive a Notice to Respondent. In many, many instances complaints are filed against REALTORS® by complainants who are unhappy with the way a transaction turned out and simply do not allege any violation of the Code or Rules. Preparing early and thoroughly responding to these types of complaints to determine a lack of any violations inures to the benefit of both the REALTOR® and LARA and it avoids potential substantial expenditures by the REALTOR® in the defense of a Formal Complaint.