

BETH A. GRIMM  
Retired HOA Attorney  
Email: [califcondoguru@aol.com](mailto:califcondoguru@aol.com)  
Web: [californiacondoguru.com](http://californiacondoguru.com)  
Blog: [condolawguru.com](http://condolawguru.com)

A Resource for HOAs and HOs throughout the State of California

**SOUTHCOAST HOMEOWNERS ASSOCIATION**

**APRIL 20, 2019**

**HOW TO PREPARE FOR IDR, ADR, SMALL CLAIMS COURT AND HOA HEARINGS  
... AND A BIT ABOUT FINANCIAL REVIEW REQUIREMENTS.**

Welcome and Happy 2019. Happy for me anyway, I'm retiring from giving legal advice, but not from sharing valuable information. Life is art for me. The **californiacondoguru** resources will remain live and well. The free monthly E-news (**WHAT'S NEW IN HOA LAND**) and blog (**condolawguru.com**) will continue. Thanks to Mike and all Southcoast members for 20+ years of pleasure doing this program.

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Now, **HOW TO PREPARE FOR ... SOME DEFINITIONS WILL BE HELPFUL**

**Enforcement** –(of what?) I emphasize "force" because the word carries that connotation. But sometimes it just means applying the right kind of pressure to get the parties to resolve the differences without force. Enforcement can be a "chess game" directing the parties to an end result based on strategies and moves geared toward finding resolution of disputes and violations. An HOA board of directors is charged with "enforcement" of the CC&Rs and other governing documents, and what exists in California law. "Governing documents" include the Articles of Incorporation, the Bylaws, CC&Rs aka the Declaration, and any rules and regulations, policies, etc., that regulate and govern the association. The California laws are found in the Davis Stirling Act in the Civil Code and in the Nonprofit Mutual Benefit Corporation law. The Bylaws generally define the authority of the Board and the organizational structure, including elections provisions. The enforcement most generally relates to what is in the CC&Rs and Rules, as these contain property use and restrictions and pertain to conduct and obligations of owners.

**ADR**:=alternative dispute resolution. This is resolution of disputes "alternative" to litigation. ADR has been around longer and is a more generally understood process than IDR (which is an internal process wholly within the HOA). The most commonly recognized processes of ADR are arbitration or mediation. There are others (negotiation, conciliation, etc.). A formal Request for Resolution by participation in ADR is required prior to filing litigation in many circumstances. There are exceptions based on remuneration being sought, circumstances suggesting urgency, and the like. Arbitration is a process whereby the parties prepare for and meet in a setting before an "arbitrator" similar to court. Parties present their cases. The arbitrator issues a decision. Arbitrators can be retired judges, or attorneys or laypersons. Mediation is a process whereby the parties meet together with

an independent party, more or less a facilitator called a Mediator, who will help the parties come to an agreement, which by its terms can be made enforceable.

**IDR, or MEET AND CONFER** = internal dispute resolution. If an Owner or HOA is considering litigation against the other, they are required to follow the ADR mandates, but the IDR process is voluntary. A meeting is offered or requested. If the Board requests it, an Owner may decline to participate. If an Owner requests it, a Board is required to participate and can choose which Director or Directors attend.

**Fiduciary duty** is the responsibility of the Board to enforce the governing documents through consistent and fair practices. Responsibilities are often memorialized in rules and policies. These must be circulated to the members in draft form for comment, before the board formally adopts them. Davis Stirling Act ARTICLE 5. Operating Rules, Civil Code Sections 4340 – 4370.

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**PREPARATION AND PRAGMATIC AND UNEMOTIONAL ACTIONS ARE THE KEY!  
A GOOD WRITTEN RECORD IS CRITICAL!**

**Suggested steps in any violation.** *Nothing dictates the order in which the processes should be used, or prevents using a combination of processes concurrently, except that a hearing or fines must be preceded by a proper notice and some litigation requires the offer of ADR as a precursor.*

**Step 1: Verify and Document the Problem.** Do this in writing for ANY problem. Require a written complaint from the complaining party, or document what has been observed, providing dates, times, and a description of the observation. (The Association "record" is critical to success as the enforcement or dispute resolution processes progress.)

**Step 2: Send a Courtesy Letter.** Communicate with the owner. A phone call works for some associations but keep a written record of it. The Step 1 information can be memorialized in a "courtesy" letter to the owner who is responsible. Sometimes an owner is simply unaware that they or their tenant have violated a restriction or provision exists in the governing documents, or failed to maintain something that is their responsibility, so a courtesy letter may take care of many common problems.

**Step 3: Issue a Warning Letter/Demand/Possible Notice of Process.** A more pointed letter reiterating the problem and history and demanding compliance within a stated time should be sent. This letter should include the violation(s) as well as a list of remedies that will be considered (suspension of rights, fines, reimbursement assessments, right of entry, self-help, etc.). You could include a notice of an IDR meeting or notice of a hearing, might consider a combined meeting (example: IDR first, then hold a hearing if agreement is not reached).

**Step 4 or 5: IDR or Hearing.** IDR-If the owner demands the IDR meeting, some or all of the board is required to attend. Owner can bring an attorney, so can the Board. Also called "Meet and Confer". Face to face might get the parties talking and might resolve things. If its time for a Board Hearing -the Board will sit in judgment and mete out discipline like fines or other things.

**Step 6: Alternative Dispute Resolution.** An ADR request is required before filing certain lawsuits. Not required for small claims although some judges will ask.

**Step 7. Legal Action (Litigation).** If the differences are unresolvable through any of the above steps the HOA or owner may consider litigation. Certification will have to be made as to offer of ADR in many cases.

## **PREPARATION FOR PROCESSES/ESTABLISHING A RECORD.**

**Keep good written records.** Need I say more?

**Write out scripts if needed** (whether you are the Board, manager, or an owner presenting his or her case. Example, script for a director leading a hearing. Scripts can allay nervousness, provide a roadmap for the process, prevent missing important points or aspects of the process.

**Adopt rules and policies.** These help clarify authority and obligations of all parties. And they are easier to read, digest, remember and follow than bulky Bylaws and CC&Rs. ***People may actually read them!*** Which is what you want.

**Remain calm throughout any meetings, hearings or processes.** Listen, and participate. Who can think, act, and make rational decisions in a highly charged state. Practice ways to calm yourself down. Know your triggers. If you cannot remain calm, someone else should speak for you. Within the Board, choose the most rational calm Director to conduct enforcement meetings. If you are an individual, bring a calm, rational someone with you to help you. The law allows for an owner to bring a representative to meetings, except in some rare cases (it does not allow an owner to bring a lawyer to a board meeting to listen in or challenge the Board.

## **For Small Claims Court.**

**Prefiling Prep:** Go online and pull the forms in your county. Skim them and prepare a claim form. Add an addendum if needed but don't present your case with the papers. Just identify the parties and the claim. The county court sites usually provide a contact #/person to help with the forms. Obtaining these and completing forms could, if presented in draft form to the other side BEFORE filing, trigger talks about settlement. (Remember the chess game?) Once filed, the complaint needs to be served properly on the defendants. This can be done by various methods as noted on the website where you find the forms.

**Hearing Prep: Write out a concise statement.** Edit, edit, edit. Cut. Cut. Cut. Judges are short on time! **Get to the Point.** Attach any ***relevant*** evidence you have. Prepare a copy for the Judge/Hearing Officer and the other side in case the Hearing officer asks you to provide. Get help with organization, preciseness and clarity. Make salient points. **DO NOT TRY TO PROVE THE OTHER PERSON IS A BAD PERSON, TRY TO PROVE WHY YOU ARE ENTITLED TO A JUDGMENT! RAMBLING EMOTIONAL STATEMENTS WON'T HELP YOUR CASE!** Again, make salient points and most importantly, make it clear to the Judge and other side **WHAT YOU WANT.** Make it rational, something you might reasonably be entitled to, and not an ounce of blood, jail time, or scorn. The Hearing

Officers are objective parties. They feel your pain. They will likely listen to what you have to say and if it makes sense, and evidence supports what you are asking for, you give yourself a chance to get a favorable ruling.

**OUTSIDE HELP:** You can enlist the help of an attorney, but cannot bring them with you to argue your case, unless it is an appeal of a small claims court judgment.

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## **FISCAL RESPONSIBILITY IN HOAs**

In 2019 a new law was passed in California which forces boards to acknowledge fiscal responsibility. Affected are Civil Code sections are 5380 and 5500 and new ones added are 5501, 5502, and 5806. The Legislature focused heavily on fraud prevention, rules for those entrusted with managing HOA finances, and YIKES, even NOTES "that still further action may be necessary to achieve that goal." Boards, if you don't get on board, expect more stringent laws next year!

The Davis Stirling Act and Corp. codes limit personal liability of volunteer officers or directors if certain conditions are met, such as good faith, reliance on experts (an element of good faith), consistency in enforcement, and following the law.

### **The new law**

Require HOAs to maintain fidelity bond coverage.

Require managers of HOAs who holds fund belonging to the HOA in an interest-bearing account in a bank, savings association, or credit union in the HOA name.

Prohibit transfers by the manager or any board member that are greater than \$10,000 or 5% of an association's total combined reserve and operating account deposits, whichever is lower, without receiving prior written approval from the board.

Requires that Boards or a specific committee charged with the review requirements certain financial documents monthly. That requirement was previously only tied to a quarterly commitment.

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The items that need to be reviewed include

- a current reconciliation of the association's operating accounts
- a current reconciliation of the association's reserve accounts
- the current year's actual operating revenues and expenses compared to the current year's budget
- the latest account statements prepared by the financial institutions where the association has accounts
- an income and expense statement for the association's accounts
- the check register, monthly general ledger, and delinquent assessment receivable reports. These last ones were not detailed in the law before, but they are now.

**REVIEW STANDARD:** Requirements are met when every member of the board, or a subcommittee of the board including the treasurer and at least one other board member, reviews these documents and statements independent of a board meeting, if the review

is ratified at the board meeting. Ratification of the financial review must be done at an OPEN meeting and needs to be reflected in the minutes of the meeting.

[**NOTE:** No HOA police will come into your homes with recording devices or security cameras to see if you do this, but if you ever end up on the courtroom stand as a witness being challenged on your fiduciary duty under oath and you cannot swear that you did what was required, you might be facing individual liability, and that you are not protected by the immunities afforded when you follow the law!]

[**NOTE:** Reserves Primers at: <http://californiacondoguru.com/publications.html> provide more guidance. - All Primers are affordable at \$25.00]

**Contrary to a popular misconception, there is NO support in the law for reviewing financials behind closed doors in executive session meetings which some Boards want to do, especially IF THE FINANCIALS PRESENT A DISMAL PICTURE!**

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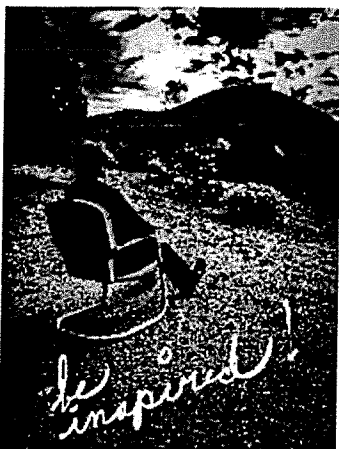
#### **BOOKS AND PUBLICATIONS AVAILABLE ON THE WEBSITE:**

FINDING THE KEY TO YOUR CASTLE  
THE CONDO OWNERS HANDBOOK  
THE DAVIS STIRLING ACT IN PLAIN ENGLISH  
THE SMALL HOA SURVIVAL GUIDE  
20 PRIMERS IN THE AREAS OF BOARD BASICS, ASSESSMENTS, ENFORCEMENT AND DISPUTES, ARCHITECTURAL CONTROL, CHOOSING MANAGEMENT, MAINTENANCE-WHO MAINTAIN WHAT, AND RESERVES AND FISCAL RESPONSIBILITIES.

#### **E-NEWSLETTERS ARE ARCHIVED ON THE WEBSITE.**

**The condolawguru blog provides answers to questions I receive through the website.**

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**AS FOR OTHER ENDEAVORS OF MY PRESENT AND FUTURE, CHECK OUT [bethgrimmcreativearts.com](http://bethgrimmcreativearts.com)**

Among other things I display art in a local gallery and am teaching iphone artistry to willing students where I live and other places. I am also continuing to write with several essay and poetry books and a memoir in play and one little art book on the website at this time called "Be Inspired". I am happy and working toward several goals which were put on hold during my attorney years! I hope you will check it out.

California



Condo Law

## What's New in HOA Land....

**BETH A GRIMM, P.L.C. (Attorney)**

3478 Buskirk Ave. #1000 • Pleasant Hill, California 94523

Office: (925) 746-7177 Fax: (925) 215-8454

**BETH GRIMM IS OFFICIALLY RETIRED AS OF 12/31/2018**

2019 JANUARY

### HOW TO PREPARE FOR IDR, ADR, SMALL CLAIMS COURT AND HOA HEARINGS.

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Happy January 2019. I have to say I feel very free having retired. If you need attorney advice, a referral is provided on my website at [californiacondoguru.com](http://californiacondoguru.com).

I'm happy, though, to keep resource website going for a time, while am looking for someone to take it over including the publications. All orders for publications will be filled. All primers and guides are current as of December 31, 2018. When an order is placed for any primer or guide, I will also include copies of any new laws that were passed that are pertinent to the subject matter so that you will have full information, that were written when I was practicing law, so you have that perspective,

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and subsequent laws. PLEASE NOTE THAT as always, nothing that is provided in my general publications or in this E newsletter should be construed as legal advice. If you need legal advice, contact a licensed attorney. I am a retired attorney, willing to continue to be a resource for information and suggestions for solutions not to be construed as advice relating to any individual scenario.

This said, now I can get down to business. A reader asked me if I would create a guide preparing for IDR, ADR, and small claims court. I'll do that and one better, I will also give my best thoughts about preparing for a hearing before the board. I get a lot of inquiries from owners who are put off by the notices of a hearing. Some notices are so harsh it discourages owners from appearing; the owner assumes from the pointed notice the decision is already made so why bother. I can't say that I blame them when I see some of the notices that owners have sent me over the years. I addressed one of these notices in a recent blog. Here is just a sampling:

The E-mail inquiry: "The Board in my HOA has sent me an ORDER requiring me to attend a [hearing]... to defend my actions ...under penalty of fines, loss of privileges, and/or loss of standing." This was the first notice of a violation the owner had received (no inquiry letter, no warning letter).

A more balanced approach which would certainly go a long ways toward encouraging the owner to come would be providing the owner with "notice" of the hearing at which the board "invites them to appear" and "provide a response" to the reported violations (identified so the owner knows what they are responding to). I also suggest asking the owner to submit something in writing to be

considered if the owner didn't want to or could not appear at the stated time.

I know somebody's going to read that and say why be so namby-pamby. A violator is a violator we don't have to be nice to them.

I'd ask what happened to the community aspect of this? Are you promoting enemies of the state or seeking to inform members of the why's and wherefores of rules and regulations and the importance of being a good neighbor or community member? I attended a few hearings that one of the HOAs I represented where the president explained to the persons before the board the importance of being a good member of the community; and the goal of the board to help them understand what it is to live in such a community. Owners came in listened, often apologized, and if so, were dismissed with the president encouraging them to avoid being called back in the same or similar conduct.

It's an inconvenience for boards to hold hearings and some managers form unfair opinions and they don't like owners or find someone to be a problem child and some people just have zero skills in writing communications. Professional communications that explain the why and the wherefore are generally better received than pointed accusatory messages. And anything that is better received usually engenders a better response.

Likewise, a professional, meaningful, balanced response from an owner who is trying to make a point either at an HOA hearing or in an IDR meeting, or in an ADR procedure, or in Small Claims Court is going to receive more attention and



respect than a pointed, accusatory, harsh, irresponsible, emotional tone.

**What are the kinds of things that would make any communication better?**

**Clarity** - the more clearly you communicate, the more likely the receiving party is to understand your message.

**Brevity** - the fewer words you use to describe and support your point or points more likely the person or people reading it are to get through to the end and get the full message.

**Organization** - The more organized you are in your presentation, the easier it will be for anybody reading it to be able to process it in an organized way. For example, many communications are best if they start with an introduction that briefly summarizes, what you are going to say, then addresses the meat of the matter which includes your points and explanations, and then a good wrap-up conclusion that reiterates the most important points made. A TRIPLE THREAT!

**Be Respectful** - when you are writing a communication for the other side to review, or to make a point, make sure it is respectful. Anyone receiving a communication that is disrespectful is going to focus on that instead of focusing on the salient points you are trying to make. If your point is that the other party is wrong, don't just say they're wrong, provide illustrations or evidence that supports your conclusion. If you are telling the other party they are a jerk, again, provide an illustration of what makes you feel that way. There is nothing that makes a person look more credible than being straightforward and honest, especially when the other party's communication is

emotional, accusatory, and completely absent in supporting arguments or documentation.

**Just the facts ma'am** - when preparing a document for any proceeding or a letter, stick to the facts, not what you think, what you heard, or what you believe, unless you can supply the sources that lead you to certain beliefs. Very few hearing officers, boards, attorneys, or judges, want to hear your life story you are asking for some kind of result or relief.

**Say what it is you want** - so it doesn't get lost in confusion or translation, make sure that whatever you are asking for is concisely stated somewhere in your communication. I would say generally, it would come after your arguments, as part of the summary.

**Use good sentence structure** - If you can't stop and start a sentence with caps and end with periods, properly capitalize words, identify where commas should go, use good grammar or write in the language of the reader, get help. The worst thing about email when people first started using it prolifically was that it seemed like everyone forgot proper sentence structure, capitalization, and punctuation. It seemed like an excuse for being stupid or lazy or just in a hurry, like writing in all lowercase letters. Some people wrote in all capital letters which was often viewed as "shouting." These kinds of communications do not impress and if you want to be respected and heard, it's best to impress, not with irrelevant statements, fluff, or distractions, but with good grammar, sentence structure, and punctuation.

Here's more

Type your communication so people can read it.

Forego email, use real (snail) mail to make official communications more official, with return receipt requested or tracking capability.

Staple, collate, present properly and according to noted specifications.

Always keep a copy for your records.

And here are a few more tidbits about each type of proceeding, other than a board hearing, which I covered above:

**IDR- internal dispute resolution**, sometimes called Meet and Confer. This is a meeting within the Association sought either by the board with an owner or owners who are in dispute or in violation of the Association rules or sought by an owner wants to meet with the board. In order to find out all the specifics, look at the California laws at [www.CA.gov](http://www.CA.gov), and search for keywords dispute resolution. Or you can buy my book called The Davis Stirling Act In Plain English available on my website and get a table of contents which makes it easy to find certain laws by subject and statute references. Since the meeting will involve one or more of the board members and the owners, and will likely be pretty brief, anywhere from 15 minutes to an hour, the owner should be prepared to present in a cogent and cohesive way his or her position which should be reiterated and documentation that can be handed over in case all points don't get an opportunity to be made.

**ADR-Alternative Dispute Resolution.** This is a proceeding where a facilitator, mediator, or even an arbitrator is present to help with resolution of the differences. In a mediation proceeding, a party wants to be prepared using all of the concepts above both with documentation and possibly a script for presentation. Opportunity will occur whether it's a mediation or arbitration for the party

who wants to speak or is the party being charged to present. And you want to make it count.

**Small Claims Hearing.** A small claims hearing is an opportunity for someone to present the case. That person would be the complainant. It's an opportunity for the other party to defend themselves. That would be the defendant. The hearing officer would either be an appointed hearing officer called a referee or would actually be a judge. Normally the referee would start the proceedings giving the parties the opportunity to opt out and wait for a judge to hear the proceeding. It is critically important to have your documentation, based on the above criteria, ready to present both orally and physically (by documents). It is important to have a copy for the other side and the court. The hearing officer or judge will usually take things under consideration so you want not only to have a good oral presentation, but to supply good written documentation so the judge can refer back and be clear on your points when he or she is writing a decision.

I hope this helps. Preparations to get points across for any HOA or court process seems straightforward and even sometimes elementary to me, but of course, after 30 years of helping parties prepare for hearings, processes, procedures, and court, it would!

I value Q and A and invite you to send questions to [califcondoguru@aol.com](mailto:califcondoguru@aol.com) that are short, generic in form, and that if answered will help others as well. I do not give legal advice in answer to questions sent to me or read or save long emails detailing all the problems a writer might send to me. However, as time permits, I do answer questions that apply generally enough to help