

RESPONSES TO FREQUENTLY ASKED QUESTIONS ABOUT MEDIATION

Q: What is mediation?

A: Mediation is a non-adversarial process that brings disputing parties together with a neutral, unbiased third party (mediator) who assists the parties in reaching a mutually agreeable settlement of the dispute. The mediator does not render decisions or impose sanctions. Settlement terms reached and agreed to by the parties during the mediation become binding when parties sign a written settlement agreement.

Q: How does mediation differ from arbitration?

A: An arbitrator has the authority to render a binding decision, similar to a judge in a court of law. The parties, therefore, forfeit their right to have their dispute tried in a court of law. Mediators, on the other hand, have no authority to render a decision but merely assist the parties to arrive at a mutually agreeable solution. If the parties fail to reach a settlement, they are free to pursue other forms of dispute resolution including arbitration and litigation. In successful mediations all parties have a part in working out the terms of the eventual settlement and must agree to the final outcome for it to be enforceable.

Q: When the DRS mediation clause is presented to a buyer or seller, isn't the real estate salesperson raising a "red flag" by bringing up the issue of a potential dispute at the outset of the transaction?

A: Not if the salesperson presents mediation in a positive, non-threatening way. The salesperson should point out that the mediation clause is similar to other clauses in the contract that are designed to protect interests of the parties. The mediation clause in no way suggests that a dispute will arise, any more than the option to have a home inspection means that there will be defects in the property. The mediation clause provides parties with an efficient, less expensive alternative to litigation in the event a dispute should arise. The salesperson should emphasize that mediation does not involve high risks. Parties are not bound to agreements reached in mediation unless they sign a written settlement agreement, and if a settlement isn't reached, parties are free to submit their dispute to arbitration or go to court. Salespeople should stress that mediation is successful 80%-90% of the time.

Q: If a party signs a contract or an addendum that contains a mediation clause, is the party required to mediate if a dispute arises?

A: Yes. The signed agreement to mediate is binding and parties must submit the dispute to mediation. The agreement to mediate does not bind the parties to results that might be achieved during mediation, and parties retain the right to go to court in the event that mediation is unsuccessful. If a settlement is reached during mediation it becomes binding only when it is put into writing and signed by all the parties. Once the parties have signed a written settlement agreement, they are legally bound to abide by its terms and cannot subsequently litigate the dispute.

Q: Who are the mediators?

A: DRS mediators are trained professionals who have absolutely no personal interest in the outcome of the mediation. Under the NAR DRS program, Association's do not handle the mediations but refer the mediations to either one mediation provider or to a list of mediation providers who are acting in their own individual capacity.

Q: Do the parties involved in a dispute have the option of choosing the mediator who will mediate their dispute?

A: Yes, however, if the local association has entered into an exclusive DRS Service Agreement with a single mediation group, the parties mediating under the DRS Rules and Procedures must select a mediator affiliated with that group.

Q: What types of disputes can be mediated?

A: Almost any type of dispute between or among buyers, sellers, brokers and other parties to a real estate transaction can and should be mediated. These include: disputes over earnest money deposits, e.g., who gets the deposit if the sale falls through; cost of repairs to property when there is a question of possible negligence or failure to disclose a known defect, e.g., a defective roof or termite infestation; claims for damages when there is a charge of possible misrepresentation concerning the condition of the property, e.g., central air conditioning was never connected to the new addition on the house.

Q: Are there any types of disputes that can't be mediated under DRS?

A: Yes. Disputes that cannot or should not be mediated under the DRS Mediation Rules include: disputes that involve extremely complex legal issues or allegations of criminal misconduct, violations of a states real estate license laws, disputes and controversies including disputes between REALTORS® that are subject to arbitration or hearing before a Professional Standards panel, and disputes that are not directly connected to a real estate transaction.

Q: Who pays for the mediation?

A: Parties are free to negotiate their own arrangements. In most cases, parties split mediation fees equally.

Q: How much does mediation cost?

A: The cost of mediation varies depending on the size of the claim, the complexity of the issues, and the mediator. Fees are established by the mediator and can range anywhere from \$50 to \$1,500. It is important to note that because the fee is usually split among the parties, no party pays an excessive amount.

Q: How long does the whole process take?

A: Under the DRS Rules, the mediation conference must be held within 60 days from the date on which the mediator receives the "Request to Initiate Mediation Transmittal Form" from the party initiating mediation. Most mediation conferences, however, are scheduled and conducted within 30 days. The typical mediation conference lasts from between 1 to 4 hours, and a second conference is rarely needed.

Q: Can parties be represented by counsel?

A: Yes. DRS Rules and Procedures state that any party may be represented by counsel. If a dispute involves a small sum and does not raise complex issues, parties may choose not to be represented by counsel which means that a party does not have to pay the attorney to attend the mediation conference. The Rules also state that all parties must be notified, in advance of the mediation conference, of another party's intention to be represented by counsel.

Q: Can commission disputes between REALTORS[®] be mediated under DRS?

A: No. Disputes that are normally arbitrated under Article 14 of the REALTOR[®] Code of Ethics are specifically excluded from mediation under the DRS Rules.

Q: Why should the Association adopt DRS when we already offer mediation services through our Professional Standards Committee.

A: The DRS Mediation Program is not intended to replace or to be used in connection with arbitration or mediation activities conducted by an association's Professional Standards Committee. The program is designed to accommodate and provide for disputes that are not covered under Professional Standards Policies and Procedures.

Q: Can DRS be used to resolve disputes for commercial real estate transactions?

A: Yes. Provided all parties in the dispute agree to mediate the dispute under the DRS Rules and Procedures.