

"No Losers in Mediation" Article

The following article, first published in the September/October 2001 issue of *Real Estate Business*, provides practical information on mediation. It is reproduced with the permission of the Counsel of Residential Specialists and the Council of Real Estate Brokerage Managers, which jointly publish *Real Estate Business*.

NAR is encouraging REALTORS® to use an alternative to the adversarial approach of arbitration: mediation. What is mediation and why is it so much better than arbitration?

To offer members an alternative to arbitration, the National Association of REALTORS® (NAR) is requiring all REALTOR® Associations to offer mediation services as of January 2002. Until now, mediation has been optional; associations could offer it to their members, but were not required to do so. The new mediation services will be used exclusively to settle commission disputes between REALTORS®.

What is mediation?

Simply put, mediation is a structured negotiation facilitated by a neutral third person called a "mediation officer." The mediation officer assists the parties in a dispute to arrive at a mutually agreeable settlement.

The mediation officer clarifies issues while remaining dispassionate and focused. He or she guides the discussions between the parties. By providing a forum in which the parties can tell their sides of the story in a nonconfrontational way, the mediation officer helps find common ground on which to resolve the dispute.

How is mediation different from arbitration?

Arbitration and mediation are both methods of resolving disputes outside the courtroom. With arbitration, however, a hearing panel plays a role similar to a judge. The procedures, while abbreviated and informal, are like those used in our judicial system.

There is an arbitration hearing (like a trial) where every party has the right to present evidence and witnesses and to cross-examine the other parties and their witnesses. The hearing panel renders a decision, called an award, based on the evidence and arguments presented. After the hearing, the parties have no control over the hearing panel's award and are bound by its decision.

When a real estate professional becomes a member of a REALTOR® Association, he or she agrees that in exchange for the benefits of membership in the association, he or she will be bound by the duties imposed by the NAR Code of Ethics, including the duty to arbitrate.

Arbitration under Article 17 of the NAR Code of Ethics is binding on all parties. Unless there is evidence of procedural deficiency, it is not subject to further review or appeal. In other words, the parties have to accept the hearing panel's decision. Mediation, on the other hand, is simply a form of negotiation. None of the parties can be forced to accept a settlement. Participation in mediation by individual REALTORS® is completely voluntary. No party can be forced into mediation. It will be offered only as an alternative to arbitration.

What are the advantages of mediation over arbitration and litigation?

Mediation is less adversarial than arbitration or litigation. The arbitration process produces a decision imposed upon the parties whether they like it or not. With mediation, the parties will optimally settle their differences by consensus rather than by the decree of a hearing panel.

Mediation is more likely to allow the parties to maintain their former relationship. By achieving a "win-win" result through mediation, all of the parties should feel that they are getting fair treatment. This should optimally preserve or even improve relationships between the parties and make it easier for REALTORS® to work amicably with each other in future transactions.

Mediation is quicker and less expensive than arbitration. Because of the less confrontational process involved, mediation takes less time and effort. In addition, under the new NAR requirements, mediation will be offered to members free of charge, except for a nominal filing fee. If the association determines that it must hire an outside professional mediator, the association, not the participating parties, will bear the cost of the mediation.

Mediation is more flexible than arbitration. Mediation provides a casual forum in which the parties can design a creative resolution to their dispute. They have a vested interest in the successful outcome of the mediation and may be more likely to comply with the settlement than if the decision is imposed on them. If the parties cannot reach a settlement, arbitration is still available to them.

Can the mediation officer make a decision to resolve the dispute?

No. The mediation officer does not have the authority to impose a decision on the parties. If all the parties agree, the mediation officer can, however, offer settlement proposals. The mediation officer can also offer an evaluation of the likely outcome of arbitration.

How does one become a mediation officer?

Sufficient numbers of well-trained mediation officers are critical to the success of the mediation program. NAR is holding a series of training sessions for mediation officers. Local associations select REALTORS® and association executives with previous experience or training in dispute resolution to attend. The training sessions provide instruction in negotiation strategies and emphasize communication skills.

How is a mediation officer chosen?

As of this year, all REALTOR® Associations are required to enter into multi-board Professional Standards Enforcement Agreements with at least one other Board. Boards participating in these enforcement agreements will jointly appoint a sufficient number of mediation officers to serve the geographic regions they cover. Mediation officers can be REALTORS®, association staff or outside professional mediators.

After the parties have agreed to participate in the mediation process, the association sends them a form listing the available mediation officers. Each party accepts or rejects mediation officers listed on the form.

The assignment of a mediation officer is made by the association from the names of mediation officers that are acceptable to all the parties. The assignment may also take into consideration any area of special expertise that a mediation officer may have that is relevant to the dispute.

The mediation officer remains neutral and must disclose any conflict of interest. He or she cannot be related by blood or marriage to any of the parties, be a business associate of any of the parties, or be a party in or witness to any other pending case that involves these agents.

How is mediation initiated?

A REALTOR® can file either a request for arbitration or a request for mediation. The request (whether for arbitration or mediation) will be referred to the Grievance Committee for a determination of whether the dispute is properly arbitrable. If the Grievance Committee determines that the dispute is arbitrable, the parties will be notified and will be offered mediation to settle the dispute.

How is mediation conducted?

The way a mediation session is run varies depending on the individual mediation officer conducting the session. The general format of a mediation session follows.

The mediation officer establishes the seating arrangements for the session. The arrangement should allow all the parties to see and hear each other as well as the mediation officer.

The mediation session begins with the mediation officer giving an opening statement. He introduces himself and explains his role in the process. He explains the ground rules to be followed. The parties sign a mediation agreement in which they voluntarily submit to the mediation process, acknowledge that they have the authority to enter into and sign any written settlement agreement that may be produced by the mediation and agree that they will be bound by any such written settlement.

Each party explains its side of the dispute. The mediation officer may allow the parties to address questions to each other. Next, the mediation officer and the parties work together to identify the issues that need to be addressed. The mediation officer clarifies each party's needs, ideas and criteria for resolution of the dispute. The mediation officer may allow each party to meet privately with him to discuss information and options for resolution. This is called a caucus.

Finally, the parties, with the help of the mediation officer, explore alternative solutions to the dispute. If the parties reach agreement, they write down the terms of the agreement on a settlement form before leaving the mediation session. If, on the other hand, no agreement is reached, the parties sign a "no settlement form" and the mediation officer explains the next steps to the parties.

Does a REALTOR® need to be represented by an attorney in a mediation?

No. Mediation is intended to be non-adversarial and no findings of fact or law are made. If one party decides to have an attorney present, the other party must be notified before the mediation session. If one party arrives at the mediation session with an attorney without giving notice, the other party can request that the session be rescheduled to allow that party to have its attorney present.

Will a REALTOR® need to have witnesses or evidence prepared for a mediation?

No. Mediation is not a fact-finding procedure, so witnesses are usually not needed and the parties do not need to assemble exhibits or other documentation. In some cases, a witness may be able to clear up a misunderstanding. If so, the witness may be asked to attend some or all of the session. Similarly, if a document would clarify an issue, it can be used.

If a settlement of the dispute is reached through mediation, what form should the settlement take?

The agreement, which should be clearly written in simple language, is approved by all the parties. It should state what each party has agreed to do, or how much is to be paid and by whom, and when the agreed-upon things will be done. The written agreement should be positive in tone and should focus on the agreement reached by the parties, not on assigning blame.

Can a REALTOR® withdraw from the mediation process without penalty?

Yes. A REALTOR® can withdraw from the mediation at any time before the parties reach agreement. However, once the parties have signed an agreement, the matter cannot be the subject of a later arbitration.

What happens if one of the parties does not abide by the terms of agreement?

If one side does not follow the written mediation agreement, arbitration is not available to settle the matter. The appropriate action is for the other side to go to court to have the mediation agreement enforced. Any terms that the parties agree to during the course of the mediation session that aren't put into writing in the mediation agreement cannot be judicially enforced.

If I participate in a mediation, can any information I reveal during the mediation be used by the other side in a later proceeding?

No. All discussions, statements and documents that are obtained through mediation are confidential. If an arbitration follows a mediation in which there was no agreement, any information gathered in the mediation can only be used in the arbitration if it is obtained independent of the mediation process.

Any offers of settlement made during the mediation that are not accepted cannot be introduced as evidence in a later arbitration. Similarly, any resolution suggested by the mediation officer that is not accepted cannot be introduced in a later arbitration. The mediator cannot be called on to testify in any subsequent proceeding and is required to destroy notes or other documentation 30 days after the mediation is concluded. Neither the parties nor the mediation officer are required to report any potential ethical violations that may be discovered during the mediation process.

Mediation makes the most efficient use of REALTORS®' time and resources and gives them control over the outcome of a dispute.

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Mediation Makes Room To Negotiate

The process of bringing two parties together to come to agreement is precisely what REALTORS® do day in and day out, says Tom Johnson, CRB, CRS. "Real estate is a mediation process in itself," he says. "If we can get buyers and sellers to come together and work out their differences, why in the world wouldn't we do that with each other when we have disputes? If we didn't have the predisposition to go to arbitration, this would be the logical option."

Johnson, associate broker with RE/MAX Commonwealth in Richmond, Va., a member of the Council of Real Estate Brokerage Managers Board of Directors and a trained mediator, strongly advocates that agents begin to consider mediation as that logical option over arbitration. "Mediation is faster and easier to set up; I'm acting as a mediator in a case next week, and I was only contacted about it last week. Getting a hearing panel of five arbitrators together is harder and takes longer. It costs more and it creates a lot more paperwork." But most important, Johnson says, "The arbitration process is adversarial in nature and is designed to impose a 'win-lose' outcome. The process is more formal, confrontational and cumbersome than mediation. By demanding arbitration, both parties are taking the position that they can't work out their differences."

Toni Sherman, CRS, of Coldwell Banker Residential Brokerage in Glen Ellyn, Ill., says that opting for mediation sends a very different message. "By virtue of choosing mediation over arbitration, both parties are conceding there is room for negotiation. And when I open a mediation, I start by saying that the parties have already shown their ability to reach consensus because they agreed to go to mediation, and they agreed to choose me as the mediator. That starts things off on a positive note."

Sherman also goes in with no prior knowledge of the facts of the dispute. "This gives me a chance to hear the story fresh from both sides," she says. "I don't go in with any preconceived notions." She prefers to let each party speak to her privately, in a caucus, because "that gives each person the opportunity to say all the things they need and want to say. They can call the other person all the names they want without having anyone else hear it. That venting gets them to a point at which they're ready to negotiate." Sherman may talk to each party

two or three times in a proceeding, to get all the facts and consider all the perspectives. "Talking to each party at different times lets me see if we're making any headway and allows us to get to the specifics."

Her role, Sherman says, is to guide the parties and ask the right questions, but not to force a resolution or even make recommendations. Johnson concurs. "In arbitration, a resolution is imposed on the parties in the dispute. Mediation is guided negotiation; no one imposes anything. The mediator is a neutral party whose role is simply to help the people in the dispute find a solution for themselves."

Sherman finds that many disputes could avoid mediation if REALTORS® communicated more openly with each other. "I had a client who went to an open house one weekend when I was away, liked the house and wanted to make an offer. When I came back and found out about this, I immediately called the listing agent to explain the situation — that I had been working with that buyer for some time and wasn't around when the buyer went off alone to the open house. The listing agent honored my relationship with the client. If REALTORS® would communicate directly and openly, a lot of conflicts would be avoided."

Why can't brokers play a more active role in mediating disputes between agents, one might ask. They often do but, Sherman notes, "The process can be time-consuming, and some brokers just don't want to spend the time." In addition, Johnson notes, brokers are often vested in the outcome of these disputes. "Depending on the type of brokerage, the broker may have a financial stake in the agent's commission. The money may already be in the bank. In those cases, the broker isn't going to be any more willing than the agent to settle the dispute without mediation."

For mediation to become the preferred alternative to arbitration, Johnson says, "We have to have a mindset change, a paradigm shift. We're so used to thinking in terms of arbitration that we tend not to consider mediation unless it's suggested." That direct suggestion must begin to come from professional standards administrators at local associations, he says. "When an agent calls up, angry over a problem and wants to schedule an arbitration hearing, the administrator needs to talk to the agent about considering mediation first. Part of the training we're doing to implement the mediation process involves working with these administrators to familiarize them with mediation and get them to think of it first, before going ahead with arbitration."

Why take the time to act as a mediator? Johnson does it because "it's in our best interests to keep relationships in our business civil, and that is much more likely to happen through mediation than through an adversarial proceeding. And to be honest, often in arbitrations the disputing parties can end up looking petty and foolish to their clients and others involved. Mediation can help build our image as real professionals."

Sherman agrees. "I believe that mediation can do a lot for the professional image of REALTORS® and of the industry."