

"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 non-confrontational 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?



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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 are 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 explain 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, 111., 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."



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Agreement to Mediate.

The undersigned agree that they are involved in a contractual dispute defined by Article 17 of the Code or in a specific noncontractual dispute as outlined in Standard of Practice 17-4. The undersigned agree to submit this dispute to mediation in accordance with the mediation guidelines, as set forth in the *Code of Ethics and Arbitration Manual* of the East Polk County Association of Realtors® Any Agreement signed by the parties, pursuant to the mediation conference, shall be binding.

As a party to the mediation process, I understand and agree as follows:

Parties to mediation may withdraw from the process at any point prior to reaching an agreement. Parties to mediation that do not reach an agreement shall be free to pursue arbitration of the dispute in accordance with the guidelines set forth in the *Code of Ethics and Arbitration Manual* of the National Association of Realtors®. The parties acknowledge that the mediator is not providing legal representation, legal advice, or legal services, and that the parties are advised of their right to be represented by counsel at the mediation and also of their right to obtain independent legal advice (if counsel are not at the mediation) before signing any final settlement agreement.

Any offers of settlement that were not accepted or any suggested resolution proposed by the Mediation Officer that was not accepted will not be introduced as evidence nor considered in any manner should the matter require arbitration by the Board's Professional Standards Committee. However, if the parties agree to a settlement of the dispute, and the settlement is reduced to writing and has been signed by all of the parties, the matter shall be considered resolved, and shall not be the subject of a subsequent arbitration hearing. In the event that either of the parties fails to abide by the terms of the settlement, the matter may not be arbitrated; instead, the other party should be encouraged to have the settlement agreement judicially enforced by a court of competent jurisdiction.

No aspect of this mediation conference shall be relied upon or introduced as evidence in any ethics, arbitration, judicial, or other proceeding, including, but not limited to: views expressed, or suggestions made by a party with respect to a possible settlement of the dispute; admissions made in the course of the mediation; proposals made, or views expressed by the Mediator or the response of any party thereto. No privilege shall be affected by disclosures made in the course of mediation. Disclosure of any records, reports, or other documents received or prepared by the Board or Mediation Officer shall not be compelled. Neither the Board nor the Mediation Officer shall be compelled to disclose or to testify in any proceeding as to information disclosed or representations made in the course of the mediation or communication to the Mediator in confidence. Neither the Mediation Officer, the East Polk County Association of Realtors®, the Florida Association of Realtors® nor the National Association of Realtors® nor any of its Member Boards shall be deemed "necessary parties" in any judicial proceedings relating to mediation under this Agreement. The parties acknowledge that the mediation proceedings will not be recorded and that weapons of any type are prohibited.



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Are the circumstances giving rise to this request for Mediation the subject of civil or criminal litigation or in any proceeding before the state real estate licensing authority or any other state or federal regulatory or administrative agency? Yes No

By my signature on this Agreement to Mediate, I acknowledge my rights and agree to the terms of the mediation procedures as stated above. I hereby affirm that I have the authority to enter into and sign a binding written agreement to settle this dispute.

Complainants:

Respondents:

Type/Print Name

Signature Date

Address

Type/Print Name

Signature

Address

Mediation Officer Selection Form

In the matter of _____ vs. _____
Complainant Respondent

The following individuals have agreed to serve as Mediation Officers for disputes between RealtoR® members of the East Polk County Association of Realtors®. As a party to this mediation, you have the right to challenge any Mediator that you believe would not be acceptable to serve as the Mediation Officer for your mediation conference. This form must

be returned to the Board office by _____

Name: _____

I (will _____, (will not _____ reason _____), accept this person as a Mediator for this dispute.

Name:- _____

I (will _____, (will not _____ reason _____), accept this person as a Mediator for this dispute.

Name: _____

I (will _____, (will not _____ reason _____), accept this person as a Mediator for this dispute.

Name:- _____

I (will _____, (will not _____ reason _____) accept this person as a Mediator for this dispute.

Name:- _____

I (will _____, (will not _____ reason _____), accept this person as a Mediator for this dispute.

Name:- _____

I (will _____, (will not _____ reason _____), accept this person as a Mediator for this dispute.

Name of RealtoR® Principal/Authorized Designee (Type/Print)

Signature of RealtoR® Principal/Authorized Designee Date

(Adopted 11/11)

Mediation Resolution Agreement

Form #A-17

The undersigned, as Members of the _____ and pursuant to the mediation guidelines

Board or State Association

incorporated into the _____ 's professional standards procedures, have voluntarily.

Board or State Association

participated in and agree to the following resolution:

The undersigned agree to be bound by the above resolution and waive any and all future rights to submit the dispute to arbitration before the Professional Standards Committee of the East Polk County Association of Realtors® or to litigate the matter. We further hold the East Polk County Association of Realtor® harmless, acknowledge that we were advised of our right to attorney representation at the mediation and attorney review of the Resolution Agreement, and expressly waive any and all liability of the East Polk County Association of Realtors® or any claim that we have against the East Polk County Association of Realtors® arising out of the manner in which the East Polk County Association of Realtors®

conducted the mediation or the resolution of the dispute reached as a result of the East Polk County Association of Realtors mediation procedures. Further, if the award is judicially enforced, the non-complying party agrees to reimburse the other party for court costs and reasonable attorney's fees.

Type/Print

SignatureDate

Type/Print

SignatureDate

As Mediation Officer of the East Polk County Association of Realtors®, I do attest that I was present during the mediation process and that the above resolution agreement was voluntarily entered into by the parties to the dispute.

Type/P1int

Signature

Date

Code of Ethics and Arbitration Manual

Notice of Request for Mediation

In the matter of _____ vs. _____
Complainant Respondent

A request for mediation involving the above-named case prior to a hearing of this matter by the Professional Standards Committee of the Board has been received. A copy of the dispute is enclosed. If you wish to participate in the mediation process at this time, please complete the Mediation Agreement Form and return it to the Board office at the address shown on this form by

_____. The Agreement must be signed and dated by the
Realtor" principal or his/her.

Date

authorized designee. If no response is received from you by the appointed date, the case shall be referred to the Grievance Committee of the Board for determination at its next scheduled meeting.

Signature of Professional Standards Administrator

Date

Form Optional: This may be accomplished by telephone.

(Amended 11/12)

Code of Ethics and Arbitration Manual

Notice of Selection of Mediation Officer

In the matter of _____ vs. _____

Complainant

Respondent

t

The above parties are notified that _____ has agreed to serve as the Mediation Officer for your mediation conference. The Mediation Officer or the Board staff will contact you directly to set up the date, time, and location of the mediation conference.

The Mediation Process:

- (1) Participation in the mediation process is voluntary. *
- (2) Parties to a mediation conference may withdraw from the process at any point prior to reaching an agreement. Should you choose to withdraw from the process prior to reaching an agreement, the complainant is free to pursue arbitration of the dispute in accordance with the guidelines set forth in the *Code of Ethics and Arbitration Manual of the National Association of Realtors*".
- (3) If the parties to the mediation conference agree to a settlement of the dispute, and the settlement is reduced to writing and has been signed by all of the parties, the matter shall be considered resolved, and shall not be the subject of a subsequent arbitration hearing. In the event that either of the parties fail to abide by the terms of the settlement, the matter may not be arbitrated; instead, the other party should be encouraged to have the settlement agreement judicially enforced by a court of competent jurisdiction.
- (4) Parties to the mediation may be accompanied by and represented at the conference by legal counsel. If it is your intent to have legal counsel present at the mediation conference, the Mediation Officer or the Board staff should be advised of this fact at least ten (10) days prior to the mediation conference.
- (5) Parties to the mediation may agree to a mutual resolution of the matter at any time during the mediation conference. If following a thorough discussion of all the pertinent facts, the parties are still unable to resolve the matter, the Mediation Officer may make a recommendation for the resolution of the dispute. The recommendation for resolution can be oral or in writing and may be provided to both parties at the conclusion of the mediation conference. The parties can agree to the Mediation Officer's proposed resolution at the time it

is presented to them. If neither of the parties' desire to give additional consideration to the Mediation Officer's resolution, both parties will be given a specified period of time, not to exceed forty-eight (48) hours, to consider the resolution and to advise the Mediation Officer of their acceptance or rejection of the recommended resolution. Failure to respond to the recommended resolution within the specified time period will be deemed as a rejection of the suggested resolution. If either of the parties reject the proposed resolution, the mediation conference will be deemed concluded and the matter will proceed to the Board's Grievance Committee for determination. If the Grievance Committee has previously referred the dispute to the Board's Professional Standards Hearing Panel, the matter will proceed to arbitration.

- (6) If the parties to the mediation conference are unable to resolve the dispute, any offers of settlement that were not accepted or any suggested resolution proposed by the Mediation Officer that was not accepted will not be introduced as evidence nor considered in any manner should the matter require arbitration by the Board's Professional Standards Committee.

Signature of Professional Standards Administrator

Date

*This form may be revised to reflect that mediation of otherwise arbitrable disputes is mandatory.

(Revised 1/11/11)

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Ethics and Arbitration Manual

Code of

Request for Mediation

In the matter of _____ vs. _____
Complainant Respondent

I am requesting mediation with the above-named disputant. There is due, unpaid, and owing to me (or I retain) from the above-named person the sum of\$ _____. My claim is predicated upon the statement attached, marked Exhibit I and incorporated by reference into this application.

Signature of Realtors Principal/Authorized Designee Date

Type/P1int Name Phone

Address City State Zip

Form Optional: This may be accomplished by telephone.

(Amended 11/12)

Sample Letter Advising of Mediation Officer

To: Send to both the complainant and respondent for mediation conference

Dear _____

Thank you for agreeing to mediate your dispute with. *

Your mediation conference has been scheduled for _ , 20_ 30 _
Time Day and Date

at the Association Office located at 700 Avenue B. SW, Winter Haven, FL 33880.

Please advise me by _____ if you have a conflict with this date.
Date

The procedures for a mediation conference are less formal than the procedures for an arbitration hearing conducted by a Board of Realtors. Since a mediation conference is not an arbitration proceeding or court action, but rather a structured negotiation to find a mutually acceptable solution to a dispute, it is not necessary for you to present testimony from witnesses. However, if you believe you cannot fully explain your position without a witness, you may ask a witness(es) to be present. Additionally, the decision of whether to be represented by legal counsel at the conference is an individual decision to be made by each of the parties to the dispute.

If it is your intent to have legal counsel or witnesses present, please so advise
by _____
Date

This will allow appropriate notice to be provided to all parties to the dispute of your intention to be represented by legal counsel and/ or to have witnesses present at the conference.

I may be reached at _____ if you have any questions with regards to your scheduled mediation.

Phone

conference or the mediation process in general. I look forward to the opportunity of assisting you in reaching a mutually acceptable solution to the dispute.

Sincerely,

Professional Standards Administrator

cc: The Mediation Officer

*This form may be revised if the Board of Directors requires mediation of otherwise arbitrable matters.

(Adopted 11/11) Code of Ethics and Arbitration Manual 184

Termination of Mediation Conference

In the matter of _____ vs. _____
Complainant Respondent

The above named parties have not been able to resolve their dispute through mediation, and the mediation conference has been terminated.

Name of Mediation Officer (Type/Print)

Signature of Mediation Officer

Date