

## **Appendix Q**

### **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 (the 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 in arbitration 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 the availability of mediation in a positive, non-threatening way. The salesperson should point out that the mediation clause is similar to other clauses in the contract designed to protect the 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 agreements reached in mediation aren't binding 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 much 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 obligate the parties to reach an agreement, and parties retain the right to go to court in the event that mediation is unsuccessful. If a settlement is reached through mediation it becomes binding 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 by its terms and cannot subsequently litigate the dispute.

**Q: Who are the mediators?**

A: DRS mediators are trained individuals who have no personal interest in the outcome of the mediation.

**Q: Do the parties involved in a dispute have the option of choosing the mediator?**

A: Yes, however, if the local association has entered into a DRS agreement with a mediation group, the parties mediating under the DRS 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 Procedures include disputes that involve extremely complex legal issues or allegations of criminal misconduct, violations of a state's real estate license laws or regulations and disputes that are not directly connected to a real estate transaction.

**Q: How much does mediation cost?**

A: The cost of mediation may vary depending on the size of the claim, the complexity of the issues, and the mediator. Fees charged for mediation services are established by the mediator. 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 procedures, the mediation conference must be held within thirty (30) 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) thirty days. The typical mediation conference lasts from between two to four hours, and a second conference is rarely needed.

**Q: Can parties be represented by counsel?**

A: Yes. While any party may be represented by counsel, if a dispute does not raise complex issues, parties may choose not to be represented by counsel. All parties must be notified, in advance of the mediation conference, of another party's intention to be represented by counsel.

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

A: Yes.

Last amended 4-24-11