

NATIONAL ASSOCIATION OF REALTORS®
Buyer-Seller Dispute Resolution System (DRS)

May, 1994 (Revised May, 2011)

Introduction

This Dispute Resolution System (DRS) is not intended to replace arbitration or mediation activities conducted by associations' Professional Standards Committees. The program is designed to resolve disputes between buyers, sellers and real estate brokers/salespeople not otherwise covered under Article 17 of the Code of Ethics and Standards of Practice of the NATIONAL ASSOCIATION OF REALTORS® (NAR).

“Dispute Resolution System” and the acronym “DRS” are used to identify methods of resolving disputes out of court, including mediation and arbitration. DRS programs are increasingly important as parties and the courts are utilizing programs that avoid the legal system and resolve disputes in a quick and cost efficient manner. DRS reflects a serious effort to design workable and fair alternatives to civil litigation.

There are several types of DRS programs, including:

- **Negotiation** - Direct bargaining between disputing parties with the parties attempting to resolve the dispute without the involvement of a neutral third party. Many real estate brokers practice this method of DRS without even realizing it. One example is where a disgruntled buyer on a walk through inspection finds the seller broke the mailbox when moving out of the home and the real estate broker offers to replace the mailbox to resolve the problem.
- **Mediation** - In mediation, a neutral third party assists the disputants in negotiating a mutually acceptable settlement. Mediators do not make decisions but instead help the parties make their own agreement by clarifying issues, utilizing persuasion, and employing other conflict resolution strategies and techniques. Although there is no guarantee that every dispute will be resolved, surveys show that settlements are reached over 80% of the time.
- **Arbitration** - Arbitration is probably the best known DRS method. In arbitration, parties agree to submit existing or future disputes to a neutral third party, the arbitrator, or a panel of arbitrators who decide how the dispute will be resolved. In binding arbitration, the decision of the arbitrator(s) is final and binding. In non-binding arbitration, the parties choose whether to accept the arbitrator's decision or to proceed to litigation.

Benefits of DRS

- Faster than litigation.
- Less expensive than litigation.
- Discourages litigation of frivolous claims.
- Parties actively participate in the process.
- Provides a service brokers and salespeople can offer to clients and customers.
- Enhances the image of REALTORS® by providing consumers viable alternatives to litigation.
- Potential for lowering cost of Errors and Omissions insurance.

In addition to the above benefits, in mediation:

- Parties retain their legal rights to arbitrate or litigate if mediation is unsuccessful.
- Parties control the outcome.
- Process helps restore goodwill between disputants.
- True interests of the parties (not just their positions) are discovered/addressed.
- Process and agreement are flexible, allowing parties to move beyond different views of law or fact to creative durable solutions beyond “win/lose”.
- Solutions are just as binding and enforceable as arbitration awards.
- Parties are less likely to have to go into court to enforce their agreement than in arbitration because the parties have entered into the agreement as opposed to having a third party render an award.

The NATIONAL ASSOCIATION OF REALTORS® DRS Program

These materials were developed by the NATIONAL ASSOCIATION OF REALTORS® for associations to use in conducting alternative DRS programs involving consumers (i.e., buyers and sellers). Many associations have already implemented the mediation program developed by NAR in 1990, or have adopted this program when it was first offered back in 1994. Other associations have designed and implemented their own DRS programs.

These materials update the NAR program. Associations are free to use the mediation materials, the arbitration materials or a combination of mediation and arbitration.

A combination mediation/arbitration program may be the most useful in settling disputes in a timely and cost-efficient manner. In a combined program, the DRS clause in the agreement provides for a two-step process, first mediation and then, if mediation is not successful, arbitration. The key is to first have the parties make good faith efforts through mediation to make their own settlement. If parties cannot resolve their differences through mediation, they have committed to arbitration, through which a neutral third party decides the dispute based on the facts.

The NAR program is designed to resolve disputes between buyers, sellers, and real estate brokers/salespersons. The program is not designed to be used for disputes between REALTORS®. Disputes between REALTORS® must be resolved through mediation and/or arbitration procedures established in the NAR *Code of Ethics and Arbitration Manual*.

Many civil court systems across the United States have adopted some form of DRS. Generally, DRS is triggered at the time the lawsuit is filed. Depending upon the particular type of program, once a suit is filed, the parties must participate in mediation or non-binding arbitration. If the DRS is unsuccessful, civil litigation begins. DRS programs are frequently encouraged because they provide a measuring stick for the parties to determine the relative strength of their cases. The NAR program does not conflict with court-annexed DRS programs because the NAR program takes place prior to the filing of litigation.

The NAR program creates minimal legal exposure for associations. Associations should review each component and, after the decision is made to adopt one or both components, carefully follow the NAR Guidelines. Associations that follow these Guidelines, and provide confirmation to NAR that a DRS program has been adopted locally, will be covered under the professional liability insurance provided by NAR.

Note: At the discretion of the local association, the local DRS program can be offered in rental transactions between landlords and tenants, and their real estate brokers/licensees.

Background

The concept of a REALTOR® DRS program for buyer-seller disputes was conceived in 1987 by members of the REALTORS® Liability Task Force. In January 1988, members of the then newly formed REALTORS® Risk Reduction DRS Subcommittee began the task of designing and developing a Dispute Resolution System that could be easily implemented by local associations and REALTORS® throughout the country.

In their deliberations, members of the subcommittee evaluated and debated the merits of arbitration as well as mediation. Because of the non-adversarial nature of mediation, and the fact that disputants did not give up legal rights in agreeing to mediation, the NAR program was developed initially as a mediation program. The Mediation Guidelines were developed and sent, in 1990, to every association for their independent endorsement and administration.

Since 1990, several state associations have successfully developed and implemented arbitration programs. Because of their success and the interest in arbitration, in 1992, the Risk Reduction Committee decided to expand the NAR DRS program to include Arbitration Guidelines, at the discretion of local associations.

Guidelines for Considering, Adopting, and Implementing a Buyer-Seller Mediation Program

How the Buyer-Seller Mediation Program Works

After reviewing these materials, associations voluntarily decide whether they will offer mediation to consumers. Mediation can be initiated through the use of a mediation clause in the association's standard forms. The clause can be included in the body of the sale contract or as an addendum to the contract (see Appendices A and B). Similar clauses can be added to listing agreements and to buyer representation agreements.

When signing a contract or addendum containing a mediation clause, the parties to the transaction commit to submit any dispute that arises from the transaction to mediation. Where parties do not commit to mediation in advance of a dispute developing, an agreement to mediate can be entered into by the parties after a dispute arises (see Appendix C). In either situation, while the agreement to submit disputes to mediation is binding when signed, the parties retain their right to pursue other legal remedies if mediation is unsuccessful. Parties are not bound to agreements reached during the mediation conference unless they sign a written mediation settlement agreement. Once parties have signed a written mediation settlement agreement, they are legally bound by its terms and cannot subsequently arbitrate or litigate the now-resolved dispute.

With few exceptions, almost any real estate dispute can be mediated under the program. Exceptions include disputes involving complex legal issues, alleged criminal conduct, alleged violations of state license laws or regulations, and alleged violations of the Code of Ethics and Standards of Practice of the NATIONAL ASSOCIATION OF REALTORS®.

The mediation component includes forms, materials, and information associations need to implement to conduct buyer-seller mediation.

Considerations

Prior to implementing a mediation program for buyer-seller disputes, associations should be certain that the association's leadership, staff, and members know and understand the level of commitment and resources required to initiate and administer an effective mediation.

- Association leadership, key staff and legal counsel should familiarize themselves with these Guidelines.
- Discuss the Guidelines with leadership, staff, and appropriate committees and determine whether the association has the resources needed to initiate, promote, and administer the program (i.e., costs for implementing, promoting, and administering the program will vary depending on association size and other factors).
- Identify and confirm the availability of qualified mediators and/or mediation providers in the area.
- Provide information about the association's Buyer-Seller Mediation initiative to members, obtain and consider their feedback, and respond to concerns and questions members have about the program.
- Make a formal presentation to the association's board of directors, including implementation recommendation(s) (e.g., that XYZ committee have oversight of program activities, that an implementation plan be drafted and submitted to appropriate individuals or group(s) by a specific date, etc.).
- Follow the recommended procedures for implementing, promoting, and administering the mediation program.
- Provide informational brochures, forms, and training materials to REALTOR® firms.
- Have adequate staff and volunteer support sufficient to implement and conduct the program.
- Consult with legal counsel to ensure compliance with state law.
- Actively promote and encourage use of the program by REALTORS®, sellers, and buyers.
- Monitor program performance.

Mediation Procedures

Agreement of parties

These procedures shall apply when the parties have agreed in writing to mediation under the program. By mutual written agreement of all parties to a dispute, any specific provision of these procedures may be modified.

Initiation of mediation

Any party may initiate mediation by completing, signing and mailing to the association, mediation provider if already known, and to all other parties, a Request to Initiate Mediation Transmittal Form (see Appendix D). A request for mediation must include the following information, to the extent known or readily available.

- A fully executed copy of the agreement containing the mediation clause or copy of such other written agreement invoking mediation under the program.
- In the absence of a contract clause or other written agreement to mediate, a written request by any party seeking to have the association attempt to persuade one or more parties to submit an existing dispute or claim to mediation under the program.
- The names, mailing addresses, e-mail addresses, and telephone numbers of all parties.
- The nature of the claim and amount in dispute (i.e., brief statement of the facts that give rise to the claim, the damages, or relief sought).

Selection of mediator

Not later than twenty (20) days after receipt of the Request to Initiate Mediation Transmittal Form, the association will appoint a qualified mediator, if one has not been established in advance.

No person shall serve as a mediator in any dispute if that person has any financial or personal interest in the results of the mediation unless, after full disclosure, the parties give their written consent.

Time and place of mediation conference

Within ten (10) days of appointment, the mediator or association staff will notify the parties of the date, time, and place of the mediation conference. The mediator will use reasonable efforts to set a date, time, and location acceptable to all parties.

Conduct of mediation conferences

At the mediation conference, the parties will be expected to produce all information reasonably necessary to understand the issue(s) presented. Such information will usually include relevant written materials and a description of any witness(es) and what each could testify to. The mediator may ask the parties for written materials or information in advance of the mediation conference.

At the mediation conference, the mediator will conduct an orderly settlement negotiation. Parties at the mediation conference must have authority to enter into a binding written agreement settling the dispute. The mediator will be impartial in such proceedings and has no authority to compel the parties to agree to a proposed settlement.

Representation by counsel

Participation of legal counsel is generally discouraged. However, parties may be represented at the conference by counsel. Any party who intends to be represented by counsel must notify the mediator and all other parties that they will be represented by counsel at least ten (10) days in advance of the conference.

Confidentiality

No aspect of the mediation shall be relied upon or introduced as evidence in any 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 by or prepared by the mediator cannot be compelled.

The mediator cannot be compelled to disclose information or testify in any proceeding about information disclosed or representations made in the course of the mediation or communication to the mediator in confidence.

Mediated settlement

The mediated settlement must be reduced to writing by the parties, dated, and signed by all parties either at the mediation conference or no later than ten (10) days after the conclusion of the mediation conference (see Appendix E).

Judicial proceedings and immunity

Neither the mediator nor the association shall be deemed "necessary parties" in any judicial proceedings relating to mediation under this program. Neither the mediator nor the association shall be liable to any party for any act, error, or omission in connection with any service rendered under the program.

Mediation fees

Mediation fees shall be as established in the association's fee schedule.

Timing of claims

The time limitation by which parties must bring claims pursuant to this program may be governed by state law. Legal counsel should be consulted regarding applicable filing deadlines.

NAR's Model of Mediation

Except for any conflict with any requirement of this program, mediation proceedings should be guided by NAR's Model of Mediation (available on Realtor.org, URL: <http://www.realtors.org/MemPolWeb.nsf/pages/mediationtoolsresources>).

NAR mediator/mediation resources

These materials are supplemented by the information, materials, and resources available on the Law and Policy site at Realtor.org.

Options for Providing Mediation Services and Implementing a Mediation Program

After the board of directors has authorized implementation of a mediation program, the association executive and/or appropriate committee should draft a step-by-step plan for implementing the program.

There are several options for providing mediation services. The association can use qualified REALTORS® as mediators, may negotiate an exclusive agreement with a single provider or may choose to use several mediation providers.

Exclusive service agreement with a single mediation provider

The association enters into a written contract with a single mediation provider (individual or group) meeting the association's criteria and needs. Under this arrangement, members will provide buyers and sellers with the name and contact information of the association's mediation provider.

Multiple providers

The association identifies and qualifies two or more mediation providers capable of satisfying the association's criteria and needs. Under this arrangement, the association will provide member firms, for dissemination to their clients and customers, the names and contact information of all mediation providers selected by the association to participate in the mediation program. Buyers and sellers choose a mediator from among the providers listed.

Following are some of the activities which should be covered in any implementation plan.

Revise standard listing agreement, buyer representation agreement, and sales contract to include mediation clauses. Encourage members to add mediation clauses to their company contracts or use an addendum until the association's standard contracts are reprinted. [Note: If members use the state association's standard forms, encourage the state association to revise those contracts to include mediation clauses.]

Identify/select mediators (refer to pages 11-13).

Prepare a list of approved mediators.

Prepare reproduction proof for "personalized" buyer-seller informational brochures (see Appendices F and G). Include association's name, mailing address, email address, and telephone number.

Reproduce sufficient numbers of mediation brochures, mediation forms, and broker/salesperson training materials to accommodate:

- Designated REALTOR® / Branch Office Manager DRS Packet: Direct mailing and orientation handouts (see Appendix H).
- Buyer-Seller DRS Packet. To be provided to buyers and sellers who contact the association or participating firms for information on how to initiate mediation under the program. (see Appendix I)
- DRS Mediation Orientation. Include as part of an orientation kit; additional materials may be provided at the option of the association/broker (see Appendix J).
- Media Kits. To be provided to news media (see Appendix K).

- Member Promotion. Include the “personalized” Buyer-Seller Mediation brochures as an insert in association newsletter and/or handout at association meeting(s).

Plan and schedule an orientation/training program for principal brokers and branch office managers to familiarize them with the mediation program and its use by buyers, sellers, and real estate brokers/salespersons.

Prepare media release and media kits for dissemination to news media. Identify opportunities for using news media to inform public about the mediation program.

Identify and schedule promotional activities to inform members about mediation and to encourage their acceptance and use of mediation.

Update new member orientation program to include information about mediation.

Where to Look for Mediators

In addition to REALTORS® and others trained as mediators by the National Association and many of the state associations, the following are potential sources of individual mediators and mediation service providers:

- Professional Standards Training/Mediation Resources Database – Realtor.org
(URL: <http://www.realtor.org/pstmrsrc.nsf>)
- State and local bar associations
- State and local chambers of commerce
- Better Business Bureau
- Clerk of court's office
- State Attorney General's office
- Colleges and universities
- Affiliate members (attorneys, lenders, title companies, etc.)
- Newspaper and trade journal advertising
- Community dispute resolution centers
- Classified telephone directories

Minimum Criteria for Mediators

Associations can ensure the success of their mediation program by establishing qualification criteria for individuals who wish to serve as mediators. Objective criteria provide the basis for selection of individuals with the knowledge, skills, and expertise needed to mediate disputes under the program.

Establishing qualification criteria

NAR recommends that the association appoint a committee to develop mediator qualification criteria. The committee's recommendations should then be presented to, and approved by, the board of directors. Consideration should be given to special or unique needs of the association.

Recommended minimum qualification criteria

To help associations qualify and select capable mediators, NAR developed the following minimum qualification criteria. NAR recommends that associations consider adopting these criteria as minimum standards for qualifying mediators.

To serve as a mediator, individuals should meet the following qualifications.

Mediators can be:

- REALTORS[®] with tact, diplomacy, and a sense of equity who have a familiarity with state real estate rules and practice, five years of real estate experience, and who have completed a recognized course of instruction on mediation; or
- Professional mediators with recognized mediation credentials who are members in good standing with an established public or private dispute resolution organization and who possesses a fundamental knowledge of real estate satisfactory to the association; or
- Real estate professionals including title officers, real estate attorneys, appraisers, association staff, etc., who are trained in mediation by and possess real estate satisfactory to the association.

Prospective mediators must agree to follow the program's procedures and requirements.

Prospective mediators must be willing to provide mediation services on terms and for fees acceptable to the association.

Potential mediators' experience in mediating cases involving the following may help demonstrate their ability to conduct successful mediations under the program.

- Mediation involving other professionals (e.g., architects, engineers, lawyers, accountants, building contractors, homebuilders, etc.),
- Mediation involving contracts for professional services
- Mediation of disputes involving more than two parties

Associations should verify the credentials and qualifications of individuals and the companies the individuals are affiliated with prior to the individuals being considered as potential mediators. The association should ask for and check references.

Preliminary Screening of Mediators

After the association has identified potential mediation providers and established objective criteria for individuals who may serve as mediators, the next step is to pre-qualify mediators. The association should contact each potential provider to establish their:

- Interest in the mediation program
- Ability to provide mediation services that meet program needs and requirements
- Current fees
- Credentials and qualifications

Qualification and selection

Determine how individual mediators and mediation providers will be screened and selected. NAR recommends that a working group of members make recommendations for the selection of mediators. The Association Executive or other appropriate staff and association legal counsel should also participate.

Request for proposal

When the association notifies potential mediation providers of the decision to implement the mediation program, the association should send a letter with the Request for Mediator Proposal (see Appendix L) to each potential provider requesting them to submit a written proposal that confirms:

- Provider's interest in participating in the mediation program
- Provider's ability to serve the association's jurisdiction
- Provider's fee schedule and any terms or conditions that apply to fees (e.g., payment terms, time periods during which fees will be in effect, fee increases and related notices, etc.)
- Provider's willingness and ability to perform mediation activities and services, etc.
- Provider's education, training, experience, references and other qualifications demonstrating provider's ability to conduct the activities required under the mediation program and to conduct successful mediation conferences
- Provider's ability to satisfy all criteria the association has established
- Compliance of the program with applicable state law(s).

The association's letter should include the date by which the association must receive the written proposal and a brief summary of the association's timetable and procedures for selecting mediators to participate in the program.

Interviews

Once all proposals have been received and reviewed, interviews can be conducted.

Selection and approval by board of directors

The working group's recommendations should be presented to the appropriate committees for final recommendation to the board of directors. Following action by the directors, the association should thank all providers for submitting proposals and inform them of their acceptance or rejection.

Keep mediation provider(s) informed and involved

Mediators and mediation providers can be valuable resources during initial implementation of the program. Keep your mediation providers informed of the association's progress and any challenges that the association may be experiencing.

Guidelines for Considering, Adopting and Implementing a Buyer – Seller Arbitration Program

How the Buyer-Seller Arbitration Program Works

Arbitration is an informal hearing in front of a neutral third party or panel, the arbitrator(s), who discovers the facts of the dispute through testimony and evidence and then renders a final determination of the dispute, called an arbitration award. The basic structure of an arbitration process is:

- If permitted under state law, parties to a real property transaction commit to submitting their disputes to either binding or non-binding arbitration. Parties must be notified that if they commit to binding arbitration, they give up their legal right to litigate the dispute in the future.
- A dispute arises and a written request for arbitration is made to the association.
- Notice is given to the other party(ies) to the dispute together with a request for response to the arbitration request.
- A list of qualified arbitrators is provided to the parties. Each party notes those arbitrators who are acceptable to them. The arbitrator lists are then matched and the arbitrator(s) are appointed. There may be the option to have one or three arbitrators on the panel.
- The arbitrator notifies all parties to the dispute of the time and place for the hearing. Parties are also advised that they may be represented by legal counsel.
- At the hearing, each party may open with a statement as to their position on the dispute. Testimony from witnesses may be heard and witnesses cross-examined. Documents in support of a position are also received at this time.
- The hearing then ends and the arbitrator renders an award within a specified time period following the hearing.

Associations should review the information in these Guidelines and decide whether to develop and implement an arbitration program in consultation with the association's legal counsel.

These Guidelines are intended to help ensure the integrity of the association's arbitration program. The intent of the Guidelines is not to discourage associations from participating in the program, but rather, to ensure that leadership, staff, and members know and understand the level of commitment and resources required to initiate and administer an effective arbitration program as an ongoing service of the association.

Considerations

The Buyer-Seller arbitration program should include the following elements:

- The entire arbitration process should be completed within ninety (90) days from the date the initial arbitration request is received by the association.
- Arbitration awards should be provided to the parties not later than thirty (30) days from the date the hearing is conducted.
- Arbitration clauses or addendums clearly explain the arbitration process and are signed by all parties to the transaction.
- A statement requiring all parties keep the proceedings and records of the arbitration private and confidential, and the following disclaimer:

Neither arbitrator, or the NATIONAL ASSOCIATION OF REALTORS® or any of its member associations shall be deemed “necessary parties” in any judicial proceedings relating to arbitration under these guidelines, nor shall the arbitrator or the NATIONAL ASSOCIATION OF REALTORS® or any of its member associations shall be deemed “necessary parties” in any judicial proceedings relating to arbitration under these guidelines, nor shall the arbitrator or the NATIONAL ASSOCIATION OF REALTORS® or any of its member associations be liable to any party for any act or omission in connection with any arbitration conducted following the association’s arbitration procedures.

Associations implementing Buyer-Seller Arbitration programs are encouraged to:

- Have adequate staff and volunteer support sufficient to implement and conduct the program.
- Consult with legal counsel to ensure:
 - compliance with state law, including arbitration clauses in listing agreements, buyer representation agreements, and sales contracts, that are enforceable under applicable state law
 - the arbitration program minimizes arbitrators who are real estate broker/salesperson liability for unauthorized practice of law claims. If under state law the activities of a real estate licensee under the program would be considered the unauthorized practice of law, the association should seek an advisory opinion from the state real estate commission before proceeding with the arbitration program.
- Adopt written procedures and make them available to members and their clients and customers prior to their agreeing to arbitrate future disputes.
- Conduct training for members who serve as arbitrators for the association.

Binding versus non-binding arbitration

Arbitration awards can be either binding or non-binding on the parties. If an arbitration program will be adopted, the directors should decide if awards will be binding or non-binding. This decision is left to the discretion of each association.

In binding arbitration, the arbitrator(s) renders a final decision (award). Neither party may litigate any of the allegations resolved by the award. The award may be confirmed by a court which gives the award the full force and effect of a judgment.

In non-binding arbitration, the award can be rejected by either party. If accepted, the parties must then adhere to the award as in binding arbitration, and issues giving rise to the dispute cannot be subsequently litigated. If rejected, the parties can litigate the issues in dispute.

Oversight committee

NAR recommends that the directors appoint a standing committee to exercise oversight of its arbitration program, including responsibility for ensuring that the association's program follows the association's established procedures and affords all parties fundamental due process. The committee may also be responsible for qualifying, selecting, and conducting the training.

Appendices

- Appendix A. Mediation Clause in Sales Contract
- Appendix B. Mediation Clause, Addendum to Sales Contract
- Appendix C. Agreement to Mediate
- Appendix D. Request to Initiate Mediation Transmittal Form
- Appendix E. Mediation Settlement Agreement
- Appendix F. *Mediation the winning solution for buyers and sellers* brochure
- Appendix G. Buyer-Seller Guide for Initiating Mediation
- Appendix H. Designated REALTOR[®] / Branch Office Manager DRS Packet
- Appendix I. Buyer-Seller DRS Packet
- Appendix J. DRS Mediation Orientation
- Appendix K. Samples Press Release
- Appendix L. Request For Mediator Proposals
- Appendix M. Tips for Negotiating a DRS Service Agreement/Contract
- Appendix N. Checklist for Presenting DRS Mediation Clause to Buyers and Sellers
- Appendix O. Salesperson Script for Discussing Buyer-Seller DRS Mediation
- Appendix P. Tips for Promoting DRS Program
- Appendix Q. Responses to Frequently Asked Questions about Mediation
- Appendix R. Evaluation by Parties
- Appendix S. Broker/Salesperson Evaluation
- Appendix T. Certification of Endorsement

Appendix A. Mediation Clause in Sales Contract

Any dispute or claim arising out of or relating to this contract, the breach of this contract or the services provided in relation to this contract shall be submitted to mediation in accordance with the Association's Dispute Resolution System. Disputes shall include representations made by the buyer(s), seller(s) or any real estate broker or other person or entity in connection with the sale, purchase, financing, condition or other aspect of the property to which this contract pertains, including without limitation allegations of concealment, misrepresentation, and/or negligence. Any agreement signed by the parties pursuant to the mediation conference shall be binding.

The following matters are excluded from mediation hereunder:

- a. judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage, or land contract
- b. an unlawful detainer action
- c. the filing or enforcement of a mechanic's lien
- d. any matter which is within the jurisdiction of a probate court, or
- e. violation of a state's real estate license laws.

The filing of a judicial action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not constitute a waiver of the right to mediate under this provision, nor shall it constitute a breach of the duty to mediate.

By initialing in the place below, you hereby acknowledge that you have received, read, and understand the Buyer-Seller Guide for Initiating Mediation for the association's Dispute Resolution System and agree to submit disputes as described above to mediation in accordance with the Dispute Resolution System.

Buyer's initials / date

_____/_____

Seller's initials / date

_____/_____

Listing broker's initials / date

_____/_____

Selling broker's initials / date

_____/_____

Appendix B. Mediation Clause, Addendum to Sales Contract

The undersigned hereby agree that any dispute or claim arising out of or relating to the attached contract dated _____, between _____ and _____, the breach of that contract or the services provided shall be submitted to mediation in accordance with the Association's Dispute Resolution System. Disputes shall include representations made by the buyer(s), seller(s) or any real estate broker or other person or entity in connection with the sale, purchase, financing, condition or other aspect of the property to which this contract pertains, including without limitation allegations of concealment, misrepresentation, and/or negligence. Any agreement signed by the parties pursuant to the mediation conference shall be binding.

The following matters are excluded from mediation hereunder:

- a. judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage, or land contract
- b. an unlawful detainer action
- c. the filing or enforcement of a mechanic's lien
- d. any matter which is within the jurisdiction of a probate court, or
- e. violation of a state's real estate license laws.

The filing of a judicial action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not constitute a waiver of the right to mediate under this provision, nor shall it constitute a breach of the duty to mediate.

The parties hereby acknowledge that they have received, read and understand the Buyer-Seller Guide for Initiating Mediation for the association's Dispute Resolution System and agree to submit disputes as described above to mediation in accordance with the Dispute Resolution System.

Seller(s) signature / date

_____/_____
_____/_____

Buyer(s) signature / date

_____/_____
_____/_____

Listing broker signature / date

_____/_____

Selling broker signature / date

_____/_____

Board nor the Mediator 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 Mediator, the _____ Board/Association of REALTORS[®], the _____ State Association of REALTOR[®] nor the NATIONAL ASSOCIATION OF REALTORS[®] or 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.

The undersigned hereby acknowledge that they have received and read *Mediation the winning solution for buyers and sellers* brochure and understand its contents and have the authority to enter into and sign a binding written agreement to settle this dispute.

Seller(s) signature / date

_____/_____
_____/_____

Buyer(s) signature / date

_____/_____
_____/_____

Listing broker signature / date

_____/_____

Selling broker signature / date

_____/_____

Other(s) signature / date

_____/_____
_____/_____

Appendix D
Request to Initiate Mediation Transmittal Form

Note: To be completed and mailed to DRS mediator by party requesting mediation

Date: _____

1. Names of All Parties to the Dispute and Their Role in Transaction

2. Party Requesting Mediation

Name: _____ Telephone: _____

Address: _____

 Buyer Seller Broker Salesperson Builder/contractor Other

Professional Liability Insurance Company:

Name and Address of Legal Counsel:

Name: _____ Telephone: _____

Firm: _____ Fax: _____

Address: _____

3. Other Parties

Name: _____ Telephone: _____

Address: _____

Buyer Seller Broker Salesperson Builder/contractor Other

Professional Liability Insurance Company: (if known)

Name and Address of Legal Counsel:

Name: _____ Telephone: _____

Firm: _____ Fax: _____

Address: _____

Name: _____ Telephone: _____

Address: _____

Buyer Seller Broker Salesperson Builder/contractor Other

Professional Liability Insurance Company: (if known)

Name and Address of Legal Counsel:

Name: _____ Telephone: _____

Firm: _____ Fax: _____

Address: _____

Name: _____ Telephone: _____

Address: _____

() Buyer () Seller () Broker () Salesperson () Builder/contractor () Other

Professional Liability Insurance Company: (if known)

Name and Address of Legal Counsel:

Name: _____ Telephone: _____

Firm: _____ Fax: _____

Address: _____

Name and address of Legal Counsel:

Name: _____ Telephone: _____

Firm: _____ Fax: _____

Address: _____

4. Brief Description of Claim:

5. Amount of money involved: _____

6. Have there been any court pleadings filed in this case? () Yes () No

If yes, are there any trial dates or time limitations involved? () Yes () No

Date _____ Court

County _____ Judge

Court case # _____

7. Do you have authority to enter into and sign a binding written agreement to settle this on behalf of the party you represent? () Yes () No

Comment:

8. Do you need additional information from another attorney? () Yes () No

If yes, what?

9. Has a prior agreement to mediate been signed by the parties? () Yes () No

If yes, please attach copy of the signed agreement.

A completed copy of this form should be sent to the DRS mediator provider in your state for processing. Check with your state association or local board of REALTORS® to determine which local association provides support for the DRS program.

Name of DRS mediator selected, if one has been agreed to by the parties:

Please provide confidential copy of this form to:

Member Policy Department, 10th Floor
NATIONAL ASSOCIATION OF REALTORS®
430 North Michigan Avenue
Chicago, IL 60611-4087

Appendix E. Mediation Settlement Agreement

In the matter of mediation between _____
and _____

Date: _____

Case number: _____

Mediator: _____

SETTLEMENT

We, the undersigned, having mediated our dispute in accordance with the DRS adopted by the _____ Association of REALTORS® agree as follows:

The undersigned agree to be bound by the above resolution and waive any and all future rights to submit the dispute to arbitration or to litigate the matter. We further hold the _____ (Board or State Association) harmless, acknowledge that we were advised of our right to attorney representation at the mediation and attorney review of the agreement, and expressly waive any and all liability of the _____ (Board or State Association) or claim that we have against the _____ (Board or State Association) arising out of the manner in which the mediation was conducted, or the resolution of the dispute was reached. Further, if the agreement is judicially enforced, the non-complying party agrees to reimburse the other party for court costs and reasonable attorney's fees.

Signed/dated:

_____/_____/_____ _____/_____/_____
_____/_____/_____ _____/_____/_____

Appendix F.

Mediation the winning solution for buyers and sellers brochure

(Only available in Adobe Acrobat, pdf.)

Appendix G

Buyer-Seller Guide for Initiating Mediation

Note: Retype this guide with the association's name, mailing address, e-mail address, and telephone number.

When a dispute arises. The decision to initiate mediation under the DRS program should be made only after all attempts to negotiate an acceptable solution have been exhausted.

Call your broker or salesperson. Your broker or salesperson can be instrumental in resolving conflicts and disputes. Talk with your broker or salesperson before you initiate mediation proceedings.

Consult your attorney. You should inform your attorney of your intent to initiate mediation under the DRS program. Your attorney will be able to provide you with advice and counsel -- and may be able to help you resolve the dispute without having to proceed to mediation.

To initiate mediation. When all attempts to negotiate a settlement have failed, you should proceed as follows:

A. If you and other parties have pre-committed to mediation (i.e., you have signed a sales contract or addendum to the contract that contains a mediation clause or you have signed the DRS Agreement to Mediate or other written agreement):

- Contact your broker or salesperson or the local Association of REALTORS[®] to request a Buyer-Seller DRS packet. The packet contains everything you will need to initiate mediation.
- If the association has approved more than one mediation provider, the name, mailing address, telephone number and fee schedule of each provider appears on a list prepared by the association. You must select a mediator from those listed. If you need help, call your broker or salesperson. If your dispute is with the broker or salesperson, you can call the local Association of REALTORS[®].
- Complete and sign the Request to Initiate Mediation Transmittal Form. Mail the original form and required attachments to the mediation provider. A copy of the signed form and attachments should be mailed to the association address and another to your attorney.

When the mediation provider has received your request, the provider will contact all parties named and will schedule the mediation conference in accordance with DRS procedures.

B. If you or other parties have not pre-committed to mediation (i.e., you have not signed a sales contract or addendum to the sales contract that contains a mediation clause):

- Contact your broker or salesperson or the local Association of REALTORS[®] to request a Buyer-Seller DRS packet. The packet contains everything you will need to initiate mediation.
- If the association has approved more than one mediation provider, the name, mailing address, telephone number and fee schedule of each provider appears on a list prepared by the association. You must select a mediator from those listed. If you need help, call your broker or salesperson. If your dispute is with the broker or salesperson, you can call the local Association of REALTORS[®].
- Complete and sign both the Agreement to Mediate and the Request to Initiate Mediation Transmittal form. Mail both forms and required attachments to the mediation provider with a cover letter requesting the mediator's help in obtaining the agreement of other parties to mediate the dispute rather than litigating or arbitrating the matter and requesting that the mediator initiate mediation under the DRS procedures upon agreement of all parties to mediate the dispute. The mediator may charge an additional fee for this service. One copy of both signed forms and attachments should be mailed to the association address and another to your attorney.

The mediation provider will proceed with your request.

Note: Your broker or salesperson and attorney may be able to assist you in obtaining the agreement of other parties to mediate the dispute.

Appendix H

Designated REALTOR® / Branch Office Manager DRS Packet

The purpose of this packet is to provide all principal brokers and office managers information ensuring that they are aware of the association's endorsement of the selected DRS program, the applications of DRS and the principal broker's role in the successful implementation of DRS at the firm level.

Mailing should include a cover letter signed by the association's president encouraging participation in the DRS program and copies of the following documents from the Appendices of the DRS materials.

Mediation Component

- Mediation Clause/Addendum
- Agreement to Mediate
- Mediation Procedures
- Request to Initiate Mediation Transmittal Form
- Sample Mediation Settlement Agreement
- *Mediation the winning solution for buyers and sellers* brochure
- Buyer-Seller Guide for Initiating Mediation
- DRS Mediation Orientation
- Checklist for Presenting DRS Mediation Program to Buyers and Sellers
- Salesperson Script for Discussing Buyer-Seller DRS Mediation
- Tips for Promoting DRS Program
- Responses to Frequently Asked Questions about Mediation
- Evaluation Forms

Arbitration Component

Materials to be developed by the association consistent with the association's arbitration procedures and applicable state law(s). The mediation materials can be used as a template in creating the arbitration materials. Information provided to members should include:

- Arbitration Procedures
- Arbitration forms, clauses, and agreements

DRS Training: If possible, the cover letter should include the date(s), time(s) and location(s) of an association-sponsored DRS training program(s) and request that brokers and managers bring enclosed materials with them to the orientation program. The purpose of conducting DRS training program(s) for Designated REALTORS® and office managers is to provide them with information about DRS, techniques for implementing DRS at the firm level, and an opportunity to ask questions and discuss concerns. If possible, association counsel should participate in the program. The association's executive officer or other knowledgeable person should serve as facilitator for the program.

Appendix I. Buyer-Seller DRS Packet

The purpose of this packet is to provide buyers and sellers with information about DRS. Buyers and sellers will need to have the information and forms in the packet to initiate mediation, and if applicable arbitration, under the DRS program.

The association and participating member firms should have prepared packets so buyer/seller inquiries and requests can be promptly handled.

Packet contents should include a cover letter signed by principal broker or by the association's president or executive officer with copies of the following documents from the Appendices of the DRS materials.

Mediation Component

- *Mediation the winning solution for buyers and sellers* brochure
- Mediation Procedures
- Mediation Clause/Addendum
- Agreement to Mediate
- Request for Initiating Mediation Transmittal Form
- Buyer-Seller Guide for Initiating Mediation
- Responses to Frequently Asked Questions about Mediation
- Evaluation by Parties Form

Arbitration Component

Materials to be developed by the association to reflect the association's arbitration procedures and applicable state law(s). The mediation materials can be used as a template in creating the arbitration materials. Information provided to buyers and sellers should include:

- Arbitration Procedures
- Arbitration forms, clauses and agreements

Appendix J. DRS Mediation Orientation

To participate in an association's DRS program, principal brokers need to conduct orientation programs for their affiliated/employed salespeople. The purpose of this orientation is to acquaint the salespeople with the selected DRS program and how it works. In addition, the broker needs to ensure that the salespeople can successfully present and explain the program to buyers and sellers. Lastly, an orientation program gives salespeople an opportunity to ask questions and discuss DRS.

Each salesperson should receive the following materials:

- Salesperson Orientation Outline
- Mediation Clause/Addendum
- Agreement to Mediate Form
- Mediation Procedures
- Request to Initiate Mediation Transmittal Form
- Sample Mediation Settlement Agreement
- *Mediation the winning solution for buyers and sellers* brochure
- Checklist for Presenting DRS Mediation Program to Sellers and Buyers
- Salesperson Script for Discussing Buyer-Seller DRS Mediation
- Tips for Promoting DRS Program
- Responses to Frequently Asked Questions about Mediation
- Evaluation Forms

To assist in this training, included with this orientation is a Salesperson Orientation Outline and a Broker's Presentation Outline

If using the arbitration component, also handout the forms and materials developed by the association or arbitration provider.

Salesperson Orientation Outline

The need for alternative dispute resolution systems

1. Brokers/salesperson liability
2. Cost and inefficiency of litigation
3. Win-lose litigation hurts long-term broker-client-customer relationships

The selected dispute resolution system

1. Introduction
2. How mediation/arbitration works
3. Why one type of DRS was selected over another
4. Benefits of DRS

DRS program components

1. *Mediation the winning solution for buyers and sellers* brochure
2. Relevant forms
3. Mediation/arbitration procedures
4. Buyer-Seller Guide for Initiating Mediation

Presenting DRS information to buyers and sellers

What to do when a dispute arises

1. Try to resolve the dispute through negotiation before suggesting the DRS program
2. Mail or deliver Buyer-Seller DRS Packet upon request

Broker's Office Policy and Procedure for DRS

Questions and Answers

Broker Presentation Outline

Need for alternative DRS

1. Broker-salesperson liability

- a. Salespersons are aware of liabilities they incur in their everyday activities.
- b. Claims against salespersons are sometimes frivolous or made simply because the salesperson is “there.” DRS programs discourage frivolous claims.

2. Higher Errors and Omissions insurance costs

- a. Because costs for litigating claims are so high - many frivolous or small claims are settled; DRS programs discourage frivolous claims
- b. Increased number of claims and settlement by insurance companies increases premium costs; lowering number of claims may lower insurance costs

3. Cost and inefficiency of litigation

- a. Because of the increased number of cases being filed in court, resolution can take months or even years
- b. Attorney fees and court costs frequently cost more than the amount of the claim

4. Win-lose litigation hurts long-term broker-client-customer relationships

- a. Litigation is adversarial - somebody wins and somebody loses
- b. Losers are unhappy, and unhappy clients or customers, fairly or unfairly, will likely blame the broker or salesperson
- c. Unhappy clients and customers:
 - Don't come back
 - Don't speak highly of company
 - Don't refer other clients and customers.

DRS mediation program

1. Introduction

- a. Voluntary participation by associations and firms
- b. Program gives brokers, sellers, buyers, and other parties to a real estate transaction a non-adversarial, efficient, affordable alternative to litigation through mediation
- c. Almost any type of dispute can be mediated under DRS procedures
- d. Exceptions include disputes that involve:
 - Complex legal issues or allegations of criminal misconduct

- Disputes and controversies that are subject to ethics or arbitration proceedings under the Association's professional standards procedures including disputes between REALTORS®
- Violations of a state's real estate license laws

How the mediation component works

1. Buyers and sellers voluntarily pre-commit to mediate disputes by signing a sales contract or addendum to the contract that contains a mediation clause.
2. Salesperson presents and reviews mediation clause just as he presents other clauses in contract.
3. Signing a contract or addendum that contains a mediation clause legally binds the buyer and seller to submit disputes to mediation under DRS procedures.
4. When a dispute arises, contact your broker or salesperson, or the local Association of REALTORS® for a Buyer-Seller DRS packet.
5. The initiating party completes the "Request to Initiate Mediation Transmittal Form" and delivers it to the mediation provider and association for process. When the mediation provider has received your request, the provider will contact all parties named and will schedule the mediation conference.
6. Mediation brings disputing parties together with an unbiased, objective third party (mediator) who assists the parties in reaching a mutually agreeable settlement to the dispute. The mediator does not render decisions as do arbitrators and judges. Rather, the mediator acts as a facilitator.
7. Settlements reached as a result of mediation are not binding until parties have signed a written settlement agreement.
8. If mediation is unsuccessful (i.e., a settlement is not reached), parties are free to pursue other legal remedies including arbitration and litigation.
9. If buyer/seller does not sign a contract or addendum pre-committing to mediation, buyer/seller can initiate DRS Mediation by signing the Agreement to Mediate. The agreement can be signed either before or after a dispute arises.

Benefits of DRS for brokers and salespeople

1. Improves REALTORS® public image because we have taken initiative to offer an alternative to litigation
2. We are offering service to clients and customers that will save them time and money should a problem arise
 - a. Mediation is non-adversarial; parties participate in resolving the problem so they are satisfied with results which means they are more likely to come back and to refer other clients and customers to us.
 - b. Avoid delays that postpone closings by being able to resolve disputes quickly and efficiently.
3. Participating in DRS may lower Errors and Omissions insurance costs by reducing the number of claims. Insurance companies recognize value of mediation and may give premium credits or deductible incentives to firms that use mediation.

Benefits of DRS for buyers and sellers

1. Faster
2. Less expensive
3. Non-adversarial approach; parties have control over outcome
4. Avoid cost of litigating frivolous claims
5. Freedom to pursue other legal remedies if mediation isn't successful
6. Reliable – mediation is extremely successful in most situations

Mediation Components

1. *Mediation the winning solution for buyers and sellers* brochure
2. Mediation Clause
3. Agreement to Mediate
4. Mediation Procedures
5. Request to Initiate Mediation Transmittal Form
6. Buyer-Seller Guide for Initiating Mediation
7. Evaluation Forms
8. Sample Mediation Settlement Agreement

Presenting mediation information to buyers and sellers (review and discuss salesperson checklist).

What to do when a dispute arises

1. Try to resolve through negotiation before mediation is invoked.
2. Provide buyer/seller with the Buyer-Seller DRS packet to explain what he/she needs to do.

Note: If dispute involves broker or salesperson, party can contact the association for this information.

Broker's office policy and procedures for DRS (cover any policies and procedures the company has.)

Questions and answers (Refer to "Responses to Frequently Asked Questions" found in Appendix Q)

Appendix K. Sample Press Release

Note: Retype this release on association stationery, filling in the appropriate information in the blanks as indicated. The contact at the top of the release should be the person who handles media calls.

For further information contact:

**Media relations
contact :**

**Phone
number:**

Local Association of REALTORS® Launches Mediation Service for Buyers and Sellers

(Your town) Date -- "Area real estate buyers and sellers now have an alternative to expensive and time-consuming litigation when there is a problem with their transactions," according to (full name of association president), President of the (association's name).

The mediation component of the Dispute Resolution System (DRS) was developed by the NATIONAL ASSOCIATION OF REALTORS® for use by local associations of REALTORS® nationwide. Through the service, buyers and sellers have access to mediators who will conduct mediation under the DRS procedures.

"Although most real estate transactions are completed without difficulties, occasionally there is a need to resolve a dispute," said (last name of association president). "Many of the most common disputes, such as disagreements over earnest money deposits, are natural candidates for this type of service."

(Last name of association president) added that DRS is an economical and efficient method of settling conflicts that otherwise might take months to resolve through the courts or through outside arbitration services.

In the mediation process, the parties meet with a trained, impartial mediator who helps them attempt to reach a mutually agreeable solution to the dispute. Unlike an arbitrator, the mediator does not render a binding decision. If the parties cannot reach an agreement, they may pursue arbitration or litigation.

"It's a 'win-win' situation, with no risk involved for either party," said (last name of association president). "If the parties reach a settlement, the dispute is over. If they don't, they are free to take other courses of action."

For additional information on the DRS, contact the (association's name).

Association of REALTORS® Mediation Program Fact Sheet

Note: This fact sheet can be revised as necessary and published on association stationery, filling in the appropriate information in the blanks. The contact at the top of the fact sheet should be the person who handles media calls. This fact sheet should serve as background information in conjunction with a news release or feature story idea for local media.

What: The Dispute Resolution System (DRS) Mediation Program is a dispute resolution service designed by the NATIONAL ASSOCIATION OF REALTORS® for its local associations of REALTORS®. The program offers buyers, sellers, brokers and other parties in a real estate transaction an efficient, affordable method of resolving disputes out of court. Associations voluntarily choose to endorse and participate in the program.

How: Participating associations identify qualified mediators who provide DRS mediation services. All parties involved can agree to use the DRS program before mediation begins. The mediator does not have the authority to render a binding decision, nor does the mediator have the authority to force any party to enter into an agreement. Rather, the mediator merely assists the parties in working together to reach a mutually agreeable solution.

Any settlement agreed in mediation must be put into writing and signed by all the parties to become a binding contract enforceable in a court of law. In the event the parties are unable to agree to a solution to the dispute, they are still free to pursue arbitration or litigation.

Benefits:

- Faster than litigation.
- Less expensive than litigation.
- Discourages litigation of frivolous claims.
- Parties do not forfeit their legal rights to arbitrate or litigate the dispute if mediation is unsuccessful.
- Brokers provide a valuable service to their clients and customers.
- Potential for lowering the number of claims that must be settled or litigated by the insurance company, thereby lowering insurance costs.
- Mediation in general has an extremely high success rate.

Who: The DRS program is available through the (association's name). The program was developed by the NATIONAL ASSOCIATION OF REALTORS®. For additional information on the DRS mediation program, contact, (full name of contact) at (telephone).

Appendix L. Request for Mediator Proposals

The _____ Association of REALTORS[®] is seeking proposals from qualified mediators for implementation of the NATIONAL ASSOCIATION OF REALTORS[®] Dispute Resolution System. Attached to this request are components of the system that should be reviewed and understood by prospective mediators prior to submitting a proposal.

Each proposal shall include:

1. confirmation of the provider's interest in the DRS program
2. confirmation of the provider's ability to serve the Association's jurisdiction
3. the provider's fee schedule and any terms or conditions that apply to fees (e.g., payment terms, time periods during which fees will be in effect, fee increases, and related notices, etc.)
4. confirmation of the provider's willingness and ability to perform prescribed DRS activities and services (e.g., preconference and post conference activities, filing the NAR evaluation forms, etc.)
5. education training, experience, references, and other qualifications that demonstrate the provider's ability to execute activities required under the DRS program and conduct successful mediation conferences
6. certification that the provider meets the NAR minimum qualifications (see attachments)
7. certification that the provider is a mediator as defined in _____ (see attached). If applicable, cite any state laws that define the qualifications required to be a mediator. Failure to make this a requirement can affect the confidentiality of the mediation process in some states. If state laws do not define Mediators' qualifications, enclose the association's objective criteria for selecting a mediator.

Proposals must be submitted to:

(Name of Committee)

(_____ Association of REALTORS[®])

(Address)

(City, State, ZIP)

on or before ____ p.m. on _____, 20____ in order to be considered.

The Association reserves the right to reject any or all proposals.

Those submitting proposals will be notified of the Association's action regarding the selection of a mediator or mediators within thirty (30) days of any action taken by its Board of Directors.

Questions should be directed to:

(Name)

(_____ Association of REALTORS®)

(Address)

(City, State, ZIP)

(Phone Number)

Attachments:

- Mediation Clause/Addendum
- Agreement to Mediate
- Mediation Procedures
- Request to Initiate Mediation Transmittal Form
- Sample Mediation Settlement Agreement
- *Mediation the winning solution for buyers and sellers* brochure
- Buyer-Seller Guide for Initiating Mediation
- Criteria for Qualifying Buyer-Seller Dispute Resolution Mediators
- Copy of applicable state laws regarding mediators, if applicable.

Note: Associations may decide to include selected conditions from the “Tips for Negotiating a DRS Service Agreement/Contract” in any request for mediator proposal the association solicits.

Appendix M

Tips for Negotiating a DRS Service Agreement/Contract

Before negotiations are initiated, the association should confirm that the mediation provider meets the requirements of the program and has the capability and resources to accommodate the geographical and administrative needs of program.

The DRS Service Agreement (or contract) should specify:

- Parties to the agreement (association and mediation provider).
- Duration of contract (effective dates).
- Services which provider will perform, e.g., administrative, promotion, training, pre-conference and post-conference activities, etc.
- Services which provider will not perform.
- Any fees, other than mediation fees that will be paid by the parties, that the association agrees to pay to the provider for services performed; payment terms.
- All terms and conditions of the relationship including those recommended by NAR.

NAR recommends that the following conditions be included in the association's Exclusive DRS Service Agreement:

1. Provider must agree to abide by and follow the DRS Procedures and use the DRS Forms.
2. Provider must agree to defend, indemnify, save and hold the Association of REALTORS[®] harmless against claims brought by third parties relating to the provider's handling of mediation conferences pursuant to the Agreement.
3. Provider must agree to a fee schedule for the duration of the Agreement.
4. The mediation provider should agree that DRS fees agreed to with the association are equal to or less than fees the provider may set in connection with other similar programs.
5. Provider must agree not to use the name or logo of the Association of REALTORS[®] without prior written consent from the association, and must further agree not to use the name or logo of the NATIONAL ASSOCIATION OF REALTORS[®] without prior written consent from NAR.

6. Neither the Association of REALTORS[®] nor NAR shall be responsible for payment of mediation fees to the provider in the event of default by any party.
7. Provider must agree to waive the Terms of Agreement, without penalty to the association, if an individual who is a party to the real estate transaction has agreed to mediate under the DRS Procedures but objects to mediation by the provider on the grounds of economic or other bias.

Note: The association should consult legal counsel before executing any agreement or contract, and may wish to have counsel negotiate the terms and conditions of the agreement with the mediation providers.

Appendix N

Checklist for Presenting DRS Mediation Clause to Buyers and Sellers

1. [] Review mediation program and mediation clause with buyer/seller. Explain that:
 - Mediation is a process that brings disputing parties together with a neutral, unbiased third party who helps the parties reach a mutually acceptable solution to the dispute.
 - The mediator does not have the power or authority to render a decision as do arbitrators or judges. Explain that the mediator may suggest options and possible solutions in order to help the parties, but that the mediator will not decide the dispute or render a binding decision.
 - Terms of settlement reached during mediation conference are not binding until all parties sign a written agreement. This is usually done at the close of the mediation conference.
 - The mediation clause is similar to other clauses in the contract and does not imply or suggest that a problem or dispute is going to arise.
 - Pre-committing to mediation binds the buyer/seller to submit any dispute that might arise to mediation. Agreeing to mediate does not mean that the buyer/seller is agreeing to a settlement, rather, he/she is agreeing to try to resolve the dispute through mediation rather than in court.
 - Buyer/seller does not give up any legal right to pursue other remedies such as arbitration or litigation if mediation is not successful. Mention that mediation is successful in many cases.
 - Pre-commitment expedites the mediation process and that while parties can agree to mediate after a dispute arises, there is no guarantee parties will submit to mediation without pre-commitment.

2. [] Emphasize the value and benefits of mediation as an alternative to litigation. Explain that:
 - Mediation is fast (typically, mediation takes less than thirty [30] days).
 - Mediation is less expensive
 - Buyer/seller can consult an attorney, but attorney does not have to be present at the mediation; attorneys generally do not attend the mediation conference.
 - Mediation is a more positive and constructive method of resolving disputes because parties participate in the process and resolve the dispute themselves; win-win resolution versus win-lose result.
 - Mediation is successful much of the time. If mediation isn't successful, parties have not lost substantial amounts of time or money (parties usually share the cost of mediation), and parties are free to pursue other legal remedies.

- Parties usually do not have problems enforcing terms of settlement because the terms and conditions have been developed by the parties themselves rather than being imposed by an arbitrator or judge.
3. Provide buyer/seller with copy of the *Mediation the winning solution for buyers and sellers* brochure.
 4. Advise that buyers and sellers can consult with an attorney at any time.
 5. Obtain signed disclosure verifying:
 - Buyer/seller received a copy of the brochure
 - Broker/salesperson reviewed and explained mediation clause and DRS program
 - Buyer/seller was advised that they can consult with an attorney at any time.
 6. Close with positive statement about decision to pre-commit to mediation.

Note: If an association endorses an arbitration program, this checklist can be used to develop a similar one to explain arbitration to buyers and sellers. Because of the concern regarding brokers/salespersons engaging in the unauthorized practice of law, any such checklist needs to be reviewed by the association's legal counsel.

Appendix O

Salesperson Script for Discussing Buyer-Seller DRS Mediation

The following script is an example of how mediation can be presented by real estate brokers/salespeople to buyers and sellers prior to the signing of a contract to purchase real estate:

“Everything appears to be in order and I would like to again congratulate you on your wise decision to buy this home.

I would like to take just a moment to tell you about a program that has been introduced by the NATIONAL ASSOCIATION OF REALTORS[®] and my local Association of REALTORS[®]. While I do not foresee any problems with your transaction, court costs, attorney fees, and long delays that could occur if complications do arise have made litigation through the courts an unattractive method of resolving problems. These problems can be avoided through the Dispute Resolution System of my local Association, called mediation.

Mediation is less expensive and less time-consuming than litigation. Mediation brings the parties together with an impartial third party who is a trained professional. With the mediator's help, parties usually reach a mutually agreeable solution. It is very important to understand that the mediator does not have the power or authority to render a binding decision on the parties as does an arbitrator or judge. The mediator assists the parties to reach an agreeable solution. The outcome of a mediation conference is not binding unless the parties agree, in writing, to a settlement. In the event that the parties do not arrive at an agreement, they are free to pursue other legal alternatives for resolving the dispute including arbitration and litigation. You do not forfeit any legal rights, whatsoever.

Please take a copy of *Mediation the winning solution for buyers and sellers* brochure and these program materials which describe DRS in greater detail. I encourage you to review the information and consult with your attorney if you have questions.

I want to emphasize that by encouraging you to pre-commit to mediation I am in no way suggesting that a problem is going to occur. Look at the mediation as a precaution. If a problem does arise, mediation allows you to resolve the problem without going to the time and expense of court.

I'm sure when you've read the brochure that you'll agree that pre-committing to mediation is a good decision.”

Appendix P. Tips for Promoting DRS Program

Actively promoting the value, benefits, purpose, and use of DRS is critical to the success of the program. A well-designed promotional plan will include information targeted to members of the association and the public. Be imaginative, and by all means, add your own ideas to those listed here.

Membership

- Provide members with information about the association's DRS program. Keep members informed via meetings and membership publications.
- Include copy of *Mediation the winning solution for buyers and sellers* brochure as an insert in the association's newsletter or magazine and as a handout at membership meetings.
- Include DRS presentations at membership meetings. Invite an area mediator/arbitrator to speak to members about the value and benefits of DRS as an alternative to litigation; have association counsel discuss the DRS program, the forms, and other considerations of program; ask REALTORS[®] who are participating in the program to share their experiences.
- Prepare flyers and other promotional pieces to help REALTORS[®] understand the value and benefits of DRS to brokers, salespeople, sellers and buyers.

Buyers, sellers, and the public

- Arrange radio and TV talk show appearances, encourage feature articles in local newspapers, use DRS as topic in columns which association or members may write for local papers.
- Prepare a media kit that can be distributed with media releases, public service announcements, etc.
- Inform state and local elected officials about the DRS program.
- Reach business community through public speaking engagements at Rotary Club and Chamber of Commerce meetings.
- Release or write guest articles for local newspapers, real estate journals, affiliate member publications (e.g., lenders, title insurance companies, home inspectors bar association publications, Chamber of Commerce newsletters, etc.)

Note: A sample press release and media fact sheet on mediation have been included with the Mediation materials. Similar press releases and media fact sheets can be developed for use in an arbitration program.

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

Appendix R. Evaluation by Parties

Evaluation by Parties

Which of the following parties were involved in this dispute?

- Buyer
- Seller
- Listing Broker
- Selling Broker
- Builder/Contractor
- Appraiser
- Other

What was your involvement?

- Buyer
- Seller
- Listing Broker
- Selling Broker
- Builder/Contractor
- Appraiser
- Other

Were you represented by an attorney?

Yes No

Was the dispute resolved through DRS?

Yes No

Do you think the agreement was fair?

Yes No

Do you think the process was conducive to reaching a mutually-agreeable settlement?

Yes No

Do you feel DRS is faster and more efficient than litigation?

Yes No

Were the costs of DRS reasonable?

Yes No

Would you recommend the use of DRS to others?

Yes No

Would you generally recommend DRS over litigation?

Yes No

Do you feel the mediator acted in a fair and unbiased manner?

Yes No

If no, please explain.

Do you feel the mediator was knowledgeable about real estate transactions? Yes No

If no, please explain.

What was the amount in dispute? \$_____

What was the percentage of difference between amount claimed and amount of settlement? _____%

Comments (attach a separate sheet, if necessary).

Name:

Address:

Phone:

Appendix S. Broker/Salesperson Evaluation

- 1. How many transactions in which you participated did you encourage the parties to pre-commit to mediation any disputes arising out of the transaction? _____
- 2. What was your approximate rate of success in getting parties to pre-commit? _____%
- 3. Describe any instances in which you did not attempt to obtain pre-commitment:

- 4. For parties who did not pre-commit, write the percentage or number who cited the following reason(s).

- _____ Did not think disputes would arise.
- _____ Thought mediation would bind them to an unfavorable decision.
- _____ Attorney recommended against it.
- _____ Thought it would be too costly or time-consuming.
- _____ Thought resolution would favor the other party or brokers.

Other:

- 5. Please list activities or approaches that, in your opinion, would achieve a higher percentage of participation by real estate professionals and consumers.

Optional: **Attach Business Card**

Appendix T Certification of Endorsement

The NATIONAL ASSOCIATION OF REALTORS® enhanced Dispute Resolution System (DRS) program has been endorsed by the board of directors of the _____ Association of REALTORS® on _____, 20____.

For more information on the DRS program go to URL: <http://www.realtor.org/mempolweb.nsf/pages/DRS>

Originally adopted in 1994, NAR's DRS program has been completely reformatted and updated. The biggest difference between the 1994 version and the enhanced version is that REALTORS® can now act as mediators and will be covered under the blanket Errors and Omissions Insurance policy provided by the National Association.

Have your president and/or association executive sign, date, and return this form to the NATIONAL ASSOCIATION OF REALTORS® to ensure coverage.

Signature (name), President

Date

Signature (name), Association Executive

Date

Please also confirm whether your association *has* or *has not* adopted the arbitration component of the DRS Program.

Mail, fax, or e-mail this completed document to:

**Legal Affairs
NATIONAL ASSOCIATION OF REALTORS®
Member Policy Department
430 North Michigan Avenue
Chicago, Illinois 60611**

Or go online to URL: <http://www.realtor.org/mempolweb.nsf/pages/DRS> and complete this document and send it electronically per the instructions.

Contact 312-329-8381 or fmaxson@realtors.org with insurance coverage questions. Questions about the program's content may be directed to the Member Policy Department at phone 312-329-8399 or Member_policy@realtors.org.