Mediation

Interested in saving time and money? Mediation is the winning solution.

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The Voice for Real Estate™

Even REALTORS® who are committed to high standards of conduct occasionally have honest business disputes with other professionals, clients, or customers. There is an ongoing need for efficient and economical mechanisms to resolve such disputes. Arbitration is valuable, but mediation is simpler and easier.

What is Mediation?

"The act or process of mediating; intervention between conflicting parties to promote reconciliation, settlement, or compromise."
– *Webster's Ninth New Collegiate Dictionary*

- Arbitration and mediation are valuable in resolving business disputes.
- Both mediation and arbitration are private and neutral/with expertise.

But . . .

- Mediation is an attractive alternative to arbitration.

Why Use Mediation?

Mediation

- Low or no cost
- Little delay
- Win/win outcome
- Collaborative
- Maximum range of solutions
- Improves relationships

Arbitration

- Moderate cost
- Moderate delay
- Win/lose/split
- Adversarial
- Result limited to monetary award
- May damage relationships

Key Features

Voluntary/Private Process

- Parties decide to enter the mediation process.
- Parties can leave the mediation process at any time.
- Parties have complete control over the outcome.

Neutral/Impartial Mediator

- Understands issues quickly because typically, the facilitator is familiar with real estate practices and customs.
- Mediates only matters in which he/she remains neutral and impartial.
- Discloses conflicts of interest (parties may agree to continue following disclosure or terminate session).
- Facilitates and assists with negotiations – controls the process, not the substance.
- Honors the concepts of self-determination, respect, and civility.
- Enhances the parties' abilities to understand their own and each other's needs.
- Helps parties understand the alternatives to settling.
- Should possess these qualities, according to William Simkin in *Settling Disputes*:
  - wisdom of Solomon
  - the hide of a rhinoceros
  - the patience of Job
  - abilities of a half-back
  - wit of the Irish

Confidential Process

- Mediation is a confidential settlement process.
- Neither the mediator nor the parties disclose the communications or conduct of the mediation, unless all parties agree (with limited exceptions, such as risk of harm).

- Ethical violations discovered as a result of participation in the mediation are not reported.
- Settlements discussed in mediation are not admissible in arbitration.
- A mediator cannot be a witness in arbitration or court (cannot be subpoenaed).
- Information gathered and exchanged may be used in arbitration only to the extent that it was obtained independently from the mediation process.

Why Mediation Works

- Most disputes are successfully resolved
- High speed
- Low or no cost
- Flexible
- Maintains/improves relationships
- Improves poor communication- clarifies misunderstandings because parties come together and talk
- Discovers/addresses the true interests of parties
- Moves beyond different views of law/fact
- Allows creative solutions beyond win/lose
- Respect and civility are the ground rules
- Solution is just as binding and enforceable as arbitration

Mediation is purely voluntary. No one has to use it, but it can save time and money and can be quicker, easier, and more amicable for resolving business disputes than arbitration.

When Will it Not Work?

- When a precedent is necessary
- When there is no relationship and it is cheaper to contest the claim
- When vindication/punishment remains the main objective
- When the “jackpot syndrome” is involved (maximize/minimize recovery)

Process Overview

Pre-mediation Preparation

- Ten days prior to session, parties receive a letter explaining the mediation process and logistical issues.
- Parties agree to mediate.
- Mediator is selected/appointed by random rotation, mutual request, or objection to a proposed mediator.
- Arrangements are made via letter or telephone.
  - Pre-mediation concerns are addressed.
  - Date and time typically scheduled at the convenience of the parties within 30 days of the request for mediation or 30 days following the Grievance Committee’s determination of arbitrability.
- Witnesses and/or attorneys may attend, but this is not necessary because the process is non-adversarial; does not invoke findings of fact.
- Information is exchanged.
  - Parties need not prepare exhibits or extensive documentation. If a document will clarify an issue it may be used, but parties are reminded that mediation is not a fact-finding conference.

Mediation Conference

1. **Mediator's opening statement/questions**

   Explain process/rules/goals, including voluntariness, neutrality, and confidentiality.

2. **Parties' initial statements/questions**
   - Understanding perspectives
   - Venting
3. **Identification of issues**
4. **Create agenda**
5. **Cross-talk**

   Parties respond to each other and explain/explore information, needs, and feelings.

6. **Caucus (private meeting)**

   Mediator may meet privately with the parties to clarify needs and explore options for resolution and proposals.

7. **Building an agreement**

   With the mediator's assistance, parties explore and refine workable solutions.

8. **Conclusion**

   Agreement is reached/signed before leaving mediation, or all agree that no further progress can be made, in which case parties are free to pursue arbitration.

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