

Mediation - How Does it Work?

Every Residential Purchase Agreement created by CAR has a provision calling for mediation of disputes between buyers and sellers.

Paragraph 17.A. states, in part, that “Buyer and Seller agree to mediate any dispute or claim arising between them out of this Agreement, or any resulting transaction before resorting to arbitration or court action. It also state that “this mediation provision applies whether or not the arbitration provision is initialed.” There are a few exceptions, such as matters under the jurisdiction of small claims, probate or bankruptcy courts. For the most part, however, Buyers and Sellers are required to mediate all disputes between them.

Mediation is a process of dispute resolution in which an impartial third party intervenes in a conflict or dispute with the consent of the participants and assists them without coercion or the appearance of coercion. Mediation differs from arbitration or a court trial in that the final decision making authority rests with the participants, rather than with an arbitrator or a judge.

The process encourages the parties to understand each other’s point of view. Listening to each other (or to the mediator) and understanding the other side’s position is most important. Even if a final agreement is not reached, a good mediation session will usually serve to clarify the issues and bring the parties closer to an agreement.

The mediation process allows participants to define and clarify issues, reduce obstacles to communication, explore possible solutions and, hopefully, reach a mutually satisfactory agreement.

The process starts, obviously, with a dispute between the Buyer (usually the buyer is the one making a claim) and the Seller. Even though the Brokers are not part of the contract, the Buyers and Sellers are usually going to blame their agent for something they did or didn’t do. Since that is often the case, the agents can (and are usually encouraged) to participate in the mediation. The reason agents want to be involved is so that they have a better understanding of what the complaint is, and often times, have documents that are valuable to the mediation.

Depending on the severity of the claim, there could be attorneys involved for both the Buyer and Seller and the agents. However many people are involved in the mediation, they must all agree on a mediator to conduct the mediation. Sometimes, a conflict of interest could disqualify a particular mediator. The cost of the mediator is shared by the parties involved in the mediation. If there is a Buyer, a Seller and two agents, each would pay one-fourth of the cost.

When a mediator is hired, a date must be agreed upon by all of the parties. When there are attorneys involved, they must also be available. When the date and time is established, the mediator will also establish dates by which time the parties will be required to provide a mediation brief or letter explaining their position and interpretation of the facts. The mediator will read these documents in order to get a better understanding of the dispute.

On “mediation day” the parties meet at the mediator’s office. Usually in a large conference room, the mediator meets with all of the parties and everyone introduces themselves. The mediator will then discuss his understanding of the facts (and perhaps differences in the statements of the facts), discuss the mediation process and what it hopes to achieve, and talk a little about the cost of litigation in time and money.

The mediator will then break the parties up into groups. Sometimes the agent may join their client's group, unless the client is accusing their agent of wrongdoing, in which case the agent will be in his own group. The mediator then goes from group to group, trying to highlight both the strong points and the weak points of each side's position. He will also encourage the parties to make some kind of offer to bring the matter to a conclusion without incurring any additional expenses. Mediation rarely takes less than three hours, and could last the entire day. The goal of the mediation is to get the parties to come to an agreement on their own.

If there is an agreement reached, the mediator will immediately prepare a written settlement agreement for all of the parties to sign. While the agreement is often times followed up by a more formal written agreement drafted by one of the attorneys, the document signed at the mediation is a valid, enforceable document.

One note of interest is that in almost every case, one of the sentences in the agreement is that "each party to be responsible for their own attorney fees and costs." That statement essentially negates paragraph 22 of the Residential Purchase Agreement, which provides for attorney fees to a prevailing party to any action to enforce the agreement. This means that someone could spend \$5,000 in legal fees and costs to collect \$10,000 in damages. That also means they could have gone to small claims court and saved a lot of time and energy.

Beginning on December 1, 2006, I will be offering mediation services as a certified mediator. My many years of experience in the real estate profession along with my legal background will allow me to provide a significant amount of insight and common sense to situations which may seem totally out of hand to others. Hopefully, I can be of help to you and your clients if the need for a mediator ever arises.

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