

# Homesellers/Homebuyers Dispute Resolution System

## WHAT IS DRS?

The Homesellers/Homebuyers Dispute Resolution System (DRS) is an alternative dispute resolution system that uses mediation. The program offers sellers, buyers, brokers and other parties in a real estate transaction an efficient, affordable method of resolving disputes out of court.

The program was conceived and developed by the National Association of REALTORS® (NAR) and is being implemented throughout the country by the cooperative efforts of state associations, local boards, and REALTOR® firms.

## HOW DOES THE PROGRAM WORK?

After reviewing information provided in the DRS Guidelines for Member Boards, REALTOR® associations voluntarily decide whether or not to endorse and participate in the program. A board must demonstrate that it can satisfy the criteria that NAR established to safeguard the integrity of the program. The criteria and use of the DRS Rules and Procedures are the only conditions that NAR imposes on boards that want to endorse and implement the program as a service to members, sellers, and buyers.

To ensure the broadest possible use of the DRS program, NAR chose not to endorse or enter into a formal agreement with a single mediation provider. Participating boards have the responsibility of identifying qualified mediators who can provide DRS mediation services in their respective areas.

Participating member firms incorporate use of a mediation clause in their standard sales contracts. This is done by including the clause in the body of the contract or as an addendum to the contract. When they sign a contract or addendum containing a mediation clause, parties to the transaction pre-commit to submit to mediation any dispute that may arise from the transaction. While the agreement to submit disputes to mediation is binding when signed, parties retain their right to pursue other legal remedies if mediation is unsuccessful. Parties are not bound to agreements reached during the mediation conference until they sign a written mediation settlement agreement. Once parties have signed a written mediation settlement agreement, they are legally bound to abide by its terms and cannot subsequently litigate the dispute. Mediation results in a signed mediation settlement agreement 80-90 percent of the time.

With few exceptions, almost any type of real estate dispute can be mediated under the DRS Rules and Procedures. Exceptions include disputes that involve extremely complex legal issues or allegations of criminal misconduct and disputes and controversies that are covered under Professional Standards policies and procedures, including commission disputes between REALTORS®.

The DRS Guidelines for Member Boards contains all of the essential forms, materials, and information that real estate boards and members need to implement and use the DRS program once the decision to participate in the program has been made.

## **BACKGROUND**

The concept of a REALTOR® DRS program was conceived in 1987 by members of the REALTORS® Liability Task Force. In January 1988, members of the newly formed REALTORS® Risk Reduction DRS Subcommittee began the task of designing and developing a Homesellers/Homebuyers Dispute Resolution System that could be easily implemented by local boards and member firms throughout the country.

In their deliberations, members of the subcommittee evaluated and debated the merits of arbitration as well as mediation. Arbitration and mediation are both faster and less expensive than litigation, but mediation offers distinct advantages and benefits that arbitration does not.

Two considerations were critical to the decision to use mediation:

1. The importance of non-adversarial dispute resolution to the business interests of REALTORS®. While arbitration ensures that a dispute will be decided, arbitration, like litigation, is adversarial – one party wins, one party loses. Mediation, on the other hand, is a non-adversarial process that focuses on the mutual goals of the disputing parties and actively involves them in the process of resolving their differences. Consequently, mediated settlements are generally acceptable to all the parties. This is not always true in arbitration.

Much of the business that brokers and sales agents enjoy is repeat business generated by referrals from clients and customers who are satisfied with the services a broker or agent provides. All agreed that buyers and sellers would perceive access to DRS mediation as a valuable broker service, and that the non-adversarial process of mediation would contribute more to long-term goodwill between brokers and their clients and customers than would arbitration.

2. Legal concerns related to arbitration. Because arbitrators are legally empowered to render binding decisions, parties who agree to arbitrate disputes forfeit their rights to file their cases in court. This aspect of arbitration raises significant issues:
  - a. Sellers and buyers would be reluctant to give up their right to litigate, which would discourage their participation in the program.
  - b. Exposure of brokers and sales agents to: 1) potential claims of “unauthorized practice of law” for presenting and explaining the legalities of arbitration and 2) liabilities associated with claims that a broker or sales agent failed to appropriately disclose and explain the rights of parties would be forfeiting if they signed an arbitration clause.
  - c. Concern that legal liabilities associated with arbitration would discourage REALTOR® participation in the program.

Because mediators do not have the authority to render binding decisions, the seller and buyer do not forfeit their legal rights to pursue other remedies if mediation is unsuccessful. This makes mediation a more acceptable form of dispute resolution for sellers, buyers, and brokers.

## **BENEFITS OF DRS MEDIATION**

1. Faster than litigation.
2. Less expensive than litigation.
3. Discourages litigation of frivolous claims.
4. Parties do not forfeit their legal rights to arbitrate or litigate the dispute if mediation is unsuccessful.
5. Parties actively participate in the process and control outcomes.
6. Process contributes to long-term goodwill between agents and their clients and customers.
7. Provides a service that brokers and sales agents can offer to their clients and customers.
8. Improves image of NAR, local associations, and members because they have taken initiative to find and provide alternatives to litigation.
9. Potential for lowering cost of E&O insurance by lowering the number of claims that must be settled or litigated by the insurance company.

## **FREQUENTLY ASKED QUESTIONS**

### **What is mediation?**

Mediation is a non-adversarial process that brings disputing parties together with a neutral, unbiased third party (mediator) who assists them 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.

### **How does mediation differ from arbitration?**

An arbitrator has the authority to render a binding decision, similar to a judge in a court of law. The parties, therefore, 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 leave as winners – there are no losers. The advantage of mediation is that you have a part in working out the terms of the eventual settlement and must agree to the final outcome for it to be enforceable.

**When the DRS mediation clause is presented to a buyer or seller, isn't the real estate agent raising a "red flag" by bringing up the issue of a potential dispute at the outset of the transaction?**

Not if the agent presents mediation in a positive, non-threatening way. The agent should point out that the mediation clause is similar to other clauses in the contract that are designed to protect the interest 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 agent should emphasize that mediation does not involve high risks. Parties are not bound to agreements reached in mediation unless they sign a written settlement agreement. If a settlement isn't reached, parties are free to submit their dispute to arbitration or go to court. Agents should stress that mediation is successful 80-90 percent of the time.

**If a party signs a contract or an addendum that contains a mediation clause, is the party required to mediate if a dispute arises?**

Yes. The signed agreement to mediate is binding, and parties must submit the dispute to mediation. The agreement to mediate does not bind the parties to results that might be achieved during mediation, and parties retain the right to go court in the event that mediation is unsuccessful. If a settlement is reached during mediation it becomes binding only 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 to abide by its terms and cannot subsequently litigate the dispute.

**Who are the mediators?**

DRS mediators are trained professionals who have absolutely no personal interest in the outcome of the mediation. The Board of REALTORS® reviews and verifies the credentials and qualifications of all DRS mediators.

**Do the parties involved in a dispute have the option of choosing the mediator who will mediate their dispute?**

Yes; however, if the local board has entered into an exclusive DRS Service Agreement with a single mediation group, the parties mediating under the DRS Rules and Procedures must select a mediator affiliated with that group. The mediators from which the parties choose are trained professionals who have absolutely no personal interest in the outcome of the mediation. The Board of REALTORS® reviews and verifies the credentials of the mediators.

**How are the choices of the parties restricted if the local board has entered into an exclusive DRS Service Agreement with a mediation group?**

The parties are restricted to choosing mediators who are affiliated with the mediation group with whom the board has an exclusive agreement. In addition, the parties will be bound to the agreed upon fee schedule of that mediation group. The mediation group will maintain a list of individual certified mediators from which the parties may choose to assure the use of unbiased mediators.

**What types of disputes can be mediated?**

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 (i.e., who gets the deposit if the sale falls through); cost of repairs to property when there is a question of possible negligence or an agent or seller fails to disclose a know defect (e.g., a defective roof, termite infestation, or structural damage); claims for damages when there is a charge of possible misrepresentation concerning the condition of the property, appliances, or other major features (e.g., central air conditioning was never connected to the new addition of the house); property is connected to a septic tank, not a sewer line as stated in the listing contract.

**Are there any types of disputes that can't be mediated under DRS?**

Yes. Disputes that cannot or should not be mediated under the DRS Rules include: disputes that involve extremely complex legal issues or allegations of criminal misconduct, disputes and controversies including disputes between REALTORS® that are subject to arbitration or hearing before a Professional Standards panel, and disputes that are not directly connected to a real estate transaction.

**Who pays for the mediation?**

Parties are free to negotiate their own arrangements. In most cases, parties split mediation fees equally.

**How much does mediation cost?**

The cost of mediation varies depending on the size of the claim, the complexity of the issues, and the mediator. Fees are established by the mediator and can range anywhere from \$50 to \$1,500. Smaller, less complex disputes take less time to mediate and settle and therefore, will cost less than larger, more complex disputes. It is important to note that because the fee is usually split between the parties, no party pays an excessive amount.

**How long does the whole process take?**

Under the DRS Rules, the mediation conference must be held within 60 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 days. The typical mediation conference lasts from between one to four hours, and a second conference is rarely needed.

**How successful is mediation?**

Research shows that 80-90 percent of all disputes submitted to mediation are successfully resolved and that agreement is usually reached within two hours.

**Can parties be represented by counsel?**

Yes. DRS Rules and Procedures state that any party may be represented by counsel. If a dispute involves a small sum and does not raise complex issues, parties may choose not to be represented by counsel, which means that a party does not have to pay the attorney to attend the mediation conference. The rules also state that all parties be notified, in advance of the mediation conference, of another party's intention to be represented by counsel.

**Can commission disputes between REALTORS® be mediated under DRS?**

No. Disputes that are normally arbitrated under Article 14 of the REALTOR® Code of Ethics are specifically excluded from mediation under the DRS Rules.

**Why should the Board adopt DRS when we already offer mediation services through our Professional Standards Committee?**

The DRS Mediation Program is not intended to replace or to be used in connection with arbitration or mediation activities conducted by a board's Professional Standards Committee. The program is designed to accommodate and provide for disputes that are not covered under Professional Standards Policies and Procedures.

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

Yes, provided all parties in the dispute agree to mediate the dispute under the DRS Rules and Procedures.

# Mediation Rules and Procedures

## **AGREEMENT OF PARTIES**

These DRS Mediation Rules and Procedures shall apply when the parties have agreed in writing to mediation under the Homesellers/Homebuyers DRS. By mutual written agreement of all of the parties to the claim, any specific provision of these DRS Rules and Procedures pertaining to mediation may be modified.

## **INITIATION OF MEDIATION**

Any party may initiate mediation under these DRS Rules and Procedures by completing, signing, and mailing to the mediation vendor and all other parties a Request to Initiate Mediation DRS Transmittal Form (Transmittal Form). Such form shall contain or be accompanied by the following information, to the extent known or readily available:

- A fully executed true copy of the agreement containing the mediation clause;
- A copy of such other written agreement invoking these DRS Rules and Procedures;
- In the absence of a contract clause or other such written agreement, a written request by any party seeking to have the mediation vendor attempt to persuade one or more of the others to submit an existing dispute or claim to mediation under these DRS Rules and Procedures;
- The names, addresses, and telephone numbers of the parties to the case, including the name of every insurance company known to have received notice of the dispute or claim, and the corresponding insurance company file or claim number;
- Nature and amount of the claim (brief statement of the facts that give rise to the claim and damages of relief sought); and
- Preferred place and time of hearing.

## **SELECTION OF MEDIATOR**

No later than ten days after receipt of the Transmittal Form, the mediation vendor shall appoint a qualified mediator. 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 have given their written consent.

## **TIME AND PLACE OF MEDIATION CONFERENCE**

Within ten days of his/her appointment, the mediator and the parties shall set the date, time, and place of the mediation conference provided; however, such date shall not be more than 60 days from date of receipt of the DRS Transmittal Form and shall allow for no less than 20 days advance notice of the conference, which notice shall be given by the mediation vendor to all parties.

## **CONDUCT OF MEDIATION CONFERENCES**

At the mediation conference, the parties will be expected to produce all information reasonably required for the mediator to understand the issue presented. Such information will usually include relevant written materials and a description of any witnesses and what each could testify to. For more complex cases, 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 shall have authority to enter into and sign a binding written agreement to settle the dispute. The mediator will be impartial in such proceedings and has no authority to force the parties to agree to a settlement.

## **REPRESENTATION BY COUNSEL**

Any party may be accompanied by and represented at the conference by counsel. In the interest of fairness, however, a party who intends to be represented by counsel shall notify the mediation vendor and other parties of such intent at least ten 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; and
- 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 the mediation. Disclosure of any records, reports, or other documents received or prepared by the mediation vendor cannot be compelled. The mediation vendor shall not be compelled to disclose or testify in any proceeding as to 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 mediator, then dated and signed at the mediation conference by all parties agreeing to its terms; however, in no event shall the settlement be signed later than ten days after the conclusion of the mediation conference.

## **JUDICIAL PROCEEDINGS AND IMMUNITY**

Neither the mediation vendor, nor the mediator, 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 these DRS Rules and Procedures. Neither the mediation vendor, nor any mediator, nor the National Association of REALTORS® serving under these procedures shall be liable to any party for any act, error, or omission in connection with any service or the operation of the Homesellers/Homebuyers Dispute Resolution System.

## **MEDIATION FEES**

Mediation fees shall be in accordance with the published fee schedule.