

Alternative Dispute Resolution in Real Estate Markets

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Alternative Dispute Resolution (ADR) in Real Estate Markets

Introduction

The potential for conflict exists in every business relationship where contractual, agreements are made.

ADR includes Mediation, Arbitration and Case Evaluation.

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Definition

Mediation is an informal, confidential and structured process whereby a trained neutral acts to encourage and facilitate the resolution of a dispute between two or more parties.

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Principles of mediation

Voluntariness

Informed consent

Self-determination

Impartiality/neutrality

Confidentiality

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Voluntariness – recognizes the right of parties in a dispute to enter freely into mediation and to any agreements reached in the mediation process.

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Informed consent – affirms the party's rights to information about the mediation process, their legal rights, options and relevant resources.

Mediation participants may be represented by council.

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Self-determination – recognizes that parties have the ability and the right to define their issues, needs and preferred solutions and to determine the outcome of the mediation process.

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Impartiality/neutrality – affirms the parties' rights to a process that serves all parties fairly and equally and to a mediator who acts without bias or favoritism.

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Confidentiality – affirms that all information received from the parties will be kept within the mediation program.

Neither a mediator nor his/her notes may be brought in as evidence in a future trial related to the subject of mediation. (Statutory protection in Massachusetts)

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The mediation process

Referral: Parties in a dispute may be referred to a mediation session by one of their attorneys or by a judge sitting at court where the dispute has been brought for a hearing.

Agreement to mediate: All parties in a dispute must agree to enter into the mediation process, and have the right to withdraw from the process at any time they feel disadvantaged.

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Acceptance of the mediator: The parties and their attorneys jointly select a qualified mediator. The mediation fee and any expenses will be agreed by the parties prior to the mediation process.

The Joint Session: The first session includes all the parties, their attorneys and witnesses, if any. Each party presents their case, their concerns, observations and arguments – without interruption.

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Private sessions: The mediator conducts sessions with each party successively in an attempt to identify substantive issues and interests, searching for common ground, eliminating irrelevant issues.

Mediator encourages each party to find a solution w/o interjecting his/her own suggestions. Mediator facilitates by carrying options and suggestions back and forth between the parties until agreement is found acceptable to both/all parties.

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The agreement: Mediator drafts agreement as he/she understands the parties' intentions. The parties review the draft, make any necessary corrections or amendments. When the written agreement finally acceptable to both/all sides, mediator conducts joint session for formalization of the agreement.

If the dispute was referred to mediation by a judge the signed agreement is submitted to the court as final resolution to the dispute.

Once formalized an agreement may not be appealed.

Mediator keeps no notes from the process.

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Other forms of ADR

Case evaluation: An expert or panel of experts hears all aspects of a dispute and renders an opinion on the merits of the claims and the likelihood of success by one party or the other in formal litigation. The opinion is not binding on the parties but is intended as advisory to the parties in attempt to avoid unlikely or unnecessary litigation. The opinion may not be entered as evidence in any future litigation.

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Arbitration: A process agreed to by parties in dispute (often contractually) with agreement to accept the arbitrators decision. An appointed arbitrator or board of arbitration hears testimony and evidence by the principals, witnesses and experts under oath, with argument by counsel as in formal litigation.

Arbitrator(s) makes final judgment as would a judge, which is binding.

Advantage of arbitration is the time and costs saved over a court's crowded docket.

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Comment

Mediator's position

Mediator not to offer solution

Mediator's expertise in the case:

advice of the mediator?

The pragmatics of mediation

An opportunity for disputants to find their own solution
vs. a solution imposed by a court. Win/win vs. win/lose.

Representation by counsel:

Assistance to the mediator or not?

Anecdotal comment