

# When Mediation Fails

**T**he April 2014 issue of *California Real Estate* magazine included an article about the Alternative Dispute Resolution (ADR) process of mediation. This article is about the next step in the ADR process: arbitration. C.A.R.'s Residential Purchase Agreement and Joint Escrow Instructions (RPA) provides that, when mediation fails, if the parties initialed the arbitration clause, the parties will move on to arbitration.

What does arbitration mean? Arbitration is an ADR procedure in which a third party "arbitrator" is selected by the parties, or with the assistance of the arbitration service provider, to hear the case of all parties involved in the matter. While a mediator attempts to encourage the disputing parties to reach an agreement, he or she will not make a decision about the dispute if the parties cannot do so. An arbitrator actually sits in judgment to decide which side prevails in the matter. Arbitration can be either binding or non-binding on the parties, depending upon the terms set forth in the contract and whether or not an enforceable arbitration provision is included. If all parties have not initialed the arbitration provision in the RPA, the dispute will proceed to court; however, even if not initialed, the parties may still mutually agree to arbitrate when the dispute arises. When a party agrees to arbitration, he or she gives up the right to go to court and have a trial by a judge or jury, and, where arbitration is binding, also gives up the right to appeal the award for the most part. Under the RPA, the decision of the arbitrator is generally final and binding on the parties; however, in some unconscionable situations, an attack on the arbitration award may be made. Such a limited right to appeal can be a downside to binding arbitration, but on the other hand, it can be a light at the end of the litigation tunnel.

The benefits of arbitration are similar to those of mediation. As compared to litigation, arbitrations are generally shorter, less costly, and less formal than a lengthy court lawsuit, which can take years to complete. Arbitrations are somewhat more formal and more complicated than mediation. Arbitration agreements usually specify applicable standards. In C.A.R.'s RPA, unless the parties specifically agree otherwise, an arbitrator must be "a retired judge or justice, or an attorney with at least five years of residential real estate law experience." There are also some statutes that regulate arbitration. The RPA states that the arbitration "shall be conducted in accordance with that portion" of the California Code of Civil Procedure, commencing with Section 1280, and that "enforcement of the agreement to arbitrate shall be governed by the Federal Arbitration Act" (codified at 9 U.S.C. Section 1 et seq.). The California Code of Civil Procedure Section 1283.05 provides for the parties' limited rights to depositions and other discovery, similar to that available to the parties if they were in a civil court action, which the parties may want to use in preparation for the arbitration hearing. Other agreements might reference the rules of the American Arbitration Association ([www.adr.org/aaa](http://www.adr.org/aaa)). As with mediators, no license is required to be an arbitrator. Some third parties offer "certification" programs, but that "certification" is merely issued by the provider of

the program itself.

Like mediation, there is generally a flat filing fee and an hourly rate for the arbitrator. All parties may be represented by counsel in arbitration; however, expect costs to increase as attorneys' fees and costs are added to arbitration fees and costs. While arbitration costs are generally shared equally by the parties, as provided in the RPA, if one party loses the arbitration, the prevailing party's attorneys' fees and costs may be awarded to the non-prevailing party, which increases costs to that party. The RPA also provides that if a party has previously started an action or gone to court without first having had requested mediation, or if such party had previously refused to participate in mediation, then that party may not be awarded attorneys' fees and costs, even if they otherwise would have been.

How does one start the ADR process of arbitration? When a dispute cannot be resolved by mediation, a party requests to arbitrate the dispute. The parties will generally reach an agreement to select an arbitration provider, and then select an arbitrator from that provider's list. As with mediation, arbitration service providers and programs can be found on the California Department of Consumer Affairs website, through local bar associations, on the internet or through social media. A trained and experienced mediator, recognizing when the parties cannot come to a meeting of the minds under the mediation process, might also suggest proceeding with arbitration. If a party refuses to arbitrate or is not cooperating with arbitration, even though they had initialed the arbitration clause, the other party may go to court to compel arbitration.

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It is the usual practice for the arbitrator to hold a hearing, similar to an informal court trial, at which all sides can present evidence, submit written documentation stating their arguments and positions, and call and cross examine witnesses. The arbitrator will thereafter evaluate the case and present an arbitration award stating the arbitrator's decision. A judgment upon the arbitration award may be entered into a court having competent jurisdiction.

Paragraph 26C(1) of the RPA provides some exceptions to the ADR processes of both mediation and arbitration, including matters within the jurisdiction of the small claims court. For example, one of the most common disputes under the RPA is one regarding the return of the deposit to the buyer, and the seller's right to keep the deposit. Many deposits are \$10,000 or under, which is the jurisdictional limit of the small claims court for an individual. All such disputes are exceptions to the ADR process under the RPA.

Under RPA Paragraph 26A, buyers and sellers agree to mediation and arbitration with each other and with their brokers. Under Paragraph 26C(2) of the RPA, brokers are not obligated to, nor can they be

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compelled to, mediate and arbitrate any such disputes or claims, unless they agree to do so in writing "prior to, or within a reasonable time after, the dispute or claim is presented to the broker." No other third parties generally involved in real estate transactions, such as home inspectors, lenders, loan brokers, termite providers or

other consultants, are subject to the ADR provisions, as they are not parties to the contract.

The legal section of C.A.R.'s website provides Q&As on mediation (C.A.R.'s Q&A entitled, "Mediation for Consumers," <http://www.car.org/legal/arbit-mediation-ethics-folder/mediation-for-consumer/>) and arbitration (C.A.R.'s Q&A entitled, "Arbitration for Consumers" <http://www.car.org/legal/arbit-mediation-ethics-folder/arbitration-for-consumer/>). These two Q&As are also available in Chinese, Korean, Spanish, Tagalog and Vietnamese. Just click on the preferred language tab at the top of the Q&A to view the article in the selected language. You may print them out and provide them to your clients. ♦

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