

Appendix VI to Part Ten Mediation as a Service of Member Boards

Although no party to an arbitrable matter can be required to submit to mediation and mediation cannot and is not intended to be a substitute for the arbitration procedures described elsewhere in this Manual, mediation can be a useful tool in resolving the conflicts that arise involving Board Members and their clients and customers. Mediation must be available in instances where arbitration would be provided under Part Ten, Section 44 of this Manual. Mediation can resolve disputes, promote amicable resolutions, and reduce the number of cases requiring the more formal and complex arbitration procedures of the Board, thus reducing the time and effort required of Board Members serving on the Professional Standards Committee. (Revised 11/03)

Selection of Board Mediation Officer: Conducting successful mediation procedures requires tact, diplomacy, and a sense of equity. Careful consideration should be given by the Board President (or the Board of Directors of the Board) in selecting the Board's Mediation Officer. Many Boards will find that one Mediation Officer will be sufficient. However, in large Boards, consideration can be given to appointing a standing panel of two, three, or more Mediation Officers depending upon the number of requests for arbitration normally filed in the course of a year.

A Board Mediation Officer should be appointed for a term of at least one (1) year. Consideration can be given by the local Board to making the appointment for two (2) or even three (3) years. It is strongly recommended that any individual serving as a Board Mediation Officer have extensive prior experience on the Board's Grievance Committee, Professional Standards Committee, and/or Board of Directors. The Mediation Officer should be thoroughly conversant with the Board's arbitration procedures as well as with the real estate rules and regulations of the state. It is recommended that the Mediation Officer not serve concurrently as either an officer or director of the Board, or as a member of the Grievance Committee, or as a member of the Professional Standards Committee. If Mediation Officers are members of the Grievance Committee, they shall not participate in the consideration of requests for arbitration or ethics complaints arising out of the same facts and circumstances giving rise to a matter they attempted to mediate. If Mediation Officers are members of the Professional Standards Committee, they shall not serve on an arbitration Hearing Panel in cases where they had initially attempted to resolve the dispute prior to an arbitration hearing, or on an ethics Hearing Panel in cases where an ethics complaint arises out of the same facts and circumstances giving rise to a matter they attempted to mediate. The Mediation Officer should be someone widely respected for fairness, experience, and impartiality. Only to the degree that all parties to the mediation can be confident that the mediator is impartial will mediation procedures be successful. By having more than one Mediation Officer, assignments can be made to utilize a particular individual whose experience, abilities, and relationship renders him/her most appropriate for the particular assignment. (Revised 11/91)

Mediation Not Mandatory: It must be understood by all parties that participation in mediation procedures is entirely voluntary. The parties should be offered the opportunity and encouraged to participate in the mediation process in good faith, and, further, encouraged to abide by the determination. The parties to mediation should be aware that they may withdraw from the process at any point prior to

reaching an agreement. Any offers of settlement that were not accepted or any suggested resolution proposed by the Mediation Officer that was not accepted will not be introduced as evidence nor considered in any manner should the matter require arbitration by the Board's Professional Standards Committee. However, if the parties agree to a settlement of the dispute, and the settlement has been reduced to writing and has been signed by all of the parties, the matter is deemed resolved and cannot be the subject of a subsequent arbitration hearing. In the event either of the parties later fails to abide by the terms of the settlement, the matter may not be arbitrated; instead, the other party should be encouraged to have the settlement agreement judicially enforced by a court of competent jurisdiction. (A sample settlement agreement is included as Form #A-17, in Part Thirteen of this Manual.)

Need for Adequate Notice: Although participation in mediation is not required of the parties, the need for due process remains. Generally, there will be no need for the parties to be represented by legal counsel nor for the Board to have legal counsel present at a mediation proceeding. However, since mediation is an attempt to bring the disputing parties together in an informal setting to resolve their differences, every effort should be made to ensure that the parties are provided with adequate prior notice (at least ten [10] days) and that the time and location of the proceeding is mutually convenient to all involved. However, this requirement shall not preclude parties to a dispute waiving such notice and agreeing to mediate at any time agreed by all parties. (Revised 11/03)

Initiation of Mediation Proceedings:

Option 1: As specified in the arbitration procedures elsewhere in this Manual, each request for arbitration should be referred to the Board's Grievance Committee for consideration as to whether the matter is appropriate for arbitration. In the event the Grievance Committee determines that a matter is properly arbitrable, that information should be provided to the Board Secretary (or Board Executive Officer), who will then notify both the complainant and respondent that the matter has been deemed arbitrable and that the Board's mediation procedures are available. The Board Secretary or a Mediation Officer will inquire of each party as to whether they will participate in the mediation procedures. If both parties respond affirmatively, the matter will be referred to the selected and assigned Mediation Officer, who will contact the complainant and respondent and establish a mutually convenient time and location for the mediation.

Option 2: Alternatively, the Secretary (or Executive Officer), upon receipt of a request for arbitration, will inquire of all parties whether they desire to participate in mediation prior to review of the arbitration request by the Grievance Committee. If the parties agree, the matter will be referred to the Mediation Officer, who will arrange a mutually convenient time and location for mediation. If the mediation attempt is unsuccessful, or if either of the parties wishes to discontinue the mediation process for any reason, then mediation will be terminated and the request for arbitration will be referred to the Grievance Committee for review. Where mediation is offered prior to review of an arbitration request by the Grievance Committee, and one or more of the parties declines or the mediation attempt is unsuccessful, the parties will not again be offered mediation. If a party requests a second opportunity to mediate, a second mediation can be scheduled at the discretion of the Association. (Revised 11/03)

Conduct of Mediation Procedures: If, for any reason, any of the parties (or the Mediation Officer) is unable to participate on the date agreed, the procedure should be rescheduled to the earliest mutually acceptable date. Witnesses, if any, should be kept to a minimum. (Revised 11/03)

Realizing that a dispute already exists between the parties, the Mediation Officer should make every effort to encourage a conciliatory atmosphere while ensuring a full discussion of all pertinent facts. The complainant and respondent should be encouraged to appreciate each other's position in the matter and to effect a solution that will eliminate the need for arbitration by the Board's Professional Standards Committee. The parties can agree to a mutual resolution of the matter at any time during the mediation procedure. If, following a thorough discussion of all the pertinent facts, the parties are still unable to resolve the matter, the Mediation Officer may, at the Mediation Officer's discretion, then make a recommendation. Any recommendation for resolution can be oral or in writing and will be provided to both parties at the conclusion of the mediation procedure. The parties can agree to the Mediation Officer's proposed resolution at that time. If neither of the parties desires to give additional consideration to the Mediation Officer's resolution, both parties will be given a specified period of time, not to exceed forty-eight (48) hours, to consider the resolution and to advise the Mediation Officer of their acceptance or rejection of it. If either of the parties rejects the proposed resolution, the mediation procedure will be deemed concluded and the matter will proceed to arbitration. Any party who does not respond to the Mediation Officer within seventy-two (72) hours will be deemed to have rejected the suggested solution and arbitration will proceed. (Revised 11/96)

NOTE: When the Board adopts the mediation procedures described in this Manual or develops similar procedures, they should be included in the Board's *Code of Ethics and Arbitration Manual* in whole or by reference. (Revised 11/96)