

## Alternative Dispute Resolution for Community Associations

### What is alternative dispute resolution?

Alternative Dispute Resolution or "ADR" is a process for resolving disputes other than in court. It involves either mediation or arbitration.

### What is mediation?

Mediation is a form of dispute resolution that uses a neutral third party whose role is to assist the parties in reaching an agreement between themselves. The mediator does not decide the dispute for the parties. The mediator acts as a moderator or facilitator who helps the parties resolve their dispute by mutual agreement. Mediation is non-binding on the parties, unless the parties come to an enforceable agreement as a result of the mediation process.

### How is a mediation conducted?

Mediation is an informal process. The mediator helps the parties to reach an agreement between themselves. The mediator will not decide who is right or wrong. Sometimes both parties will be in the room together with the mediator, and sometimes the mediator will speak privately with each party. If the parties agree on a resolution of their dispute, the mediator will help them prepare a written agreement. The parties will then be bound by their agreement.

### What is arbitration?

Arbitration is similar to a court proceeding in that the arbitrator will listen to the evidence presented by both sides, and then decide the outcome of the case. The setting is less formal than a courtroom since there is no jury, and the arbitrator is not a judge. Because the arbitrator decides who wins and who loses, he or she acts like a judge.

### How is an arbitration conducted?

An arbitration is conducted like a trial, only somewhat less formal. Each side is given an equal opportunity to present its case. Witnesses can be called and cross examined. The parties will be allowed to argue their case to the arbitrator. The rules of evidence are usually less strict than in a trial. At the conclusion of all the evidence, the arbitrator will decide who wins and who loses.

### Is arbitration binding or non-binding?

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Unless the parties have previously agreed in a contract that any arbitration will be either binding or non-binding, the parties have the option of deciding the form of arbitration. If the arbitration is binding, the ruling of the arbitrator can be enforced just as if a judgment had been entered after a trial in court.

What are our rights if we are unhappy with an arbitration award?

If the arbitration is "non-binding," you can reject the award, and even file a lawsuit if you so desire. The arbitration will have no effect on the rights of the parties. However, if the arbitration is "binding," your options are limited. You may not reject the award and file a lawsuit. Unlike a lawsuit decided by a judge or jury, your rights of appeal are extremely limited. These disadvantages must be balanced against a relative speedy and final result.

Are we required to mediate or arbitrate?

For certain types of cases, yes. Civil Code section 5930 requires that an attempt must be made to mediate or arbitrate certain types of disputes before a community association or individual owner will be allowed to file a lawsuit against the other. Generally, this applies to all cases in which the association is seeking injunctive or declaratory relief, and the amount in question is under \$5,000. An injunction is a court order to one of the parties to do something or to refrain from doing something. Declaratory relief asks the court to make a binding interpretation or declaration of the rights of the parties. With respect to assessment collection cases, if an owner requests ADR pursuant to Civil Code section 5925 *et seq.*, the association must participate before initiating nonjudicial foreclosure. Similarly, if an owner requests IDR (Internal Dispute Resolution) pursuant to Civil Code section 5900 *et seq.*, the association must participate before recording a lien. Small claims cases are excluded from the requirement to mediate or arbitrate.

Why consider mediation or arbitration to resolve a dispute?

In some cases, the law requires you to utilize alternative dispute resolution before litigating. Litigation of a dispute also can be very expensive and can be very lengthy. Mediation and arbitration can usually be accomplished more quickly and at less cost than litigation. Instead of the dispute lasting over a year before it is resolved, the dispute may be resolved in only a few weeks or months. Because the time frame is shorter, and because mediation and arbitration are more informal than litigation, the attorney's fees are usually much less than if litigation is used to resolve disputes.

Can we mediate or arbitrate other kinds of disputes?

Civil Code section 5930 requires alternative dispute resolution in only certain defined situations. However, any dispute may be resolved through mediation or arbitration if both parties agree to do so. All that is required is the desire for both sides to resolve their

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disagreement quickly and inexpensively as compared to the cost and time necessary for litigation. The parties can agree to both the form of alternative dispute resolution and the individual who will conduct it unless by prior agreement they have already made these decisions.

How much does it cost to mediate or arbitrate a dispute?

Because mediation is a more informal process, there are local mediation services that will mediate a dispute between an association and a homeowner for a few hundred dollars. Private mediators can be more expensive, often as much as several hundred dollars per hour. Unless the parties agree to some different division of the cost, each party will pay an equal share of the total cost. Arbitration is a more formal process and, as a result, is usually more expensive. There are usually more options in an arbitration proceeding, such as taking depositions, and the use of expert testimony at the hearing. Although more expensive than mediation, arbitration is usually less expensive than litigation through the court.

Are attorneys involved in mediation and arbitration?

Because the mediation process is informal, the parties may decide to proceed without their attorneys. Attorneys can be present during the mediation, although their role is less involved than in an arbitration or in a trial. In cases where significant legal issues are involved, such as in interpreting provisions of the CC&Rs, it is frequently a good idea to have an attorney present at the mediation. Because the rights of the parties will be decided in an arbitration, it is preferable to have an attorney present during an arbitration, even if the arbitration is non-binding. It is common for attorneys to conduct their client's case in an arbitration proceeding.

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