

NATIONAL ASSOCIATION OF REALTORS® DISPUTE RESOLUTION SYSTEM
Mediation/Arbitration
A CONSTRUCTIVE ALTERNATIVE TO LITIGATION

Guidelines for Member Associations

May, 1994

Introduction

The DRS Mediation/Arbitration Program is not intended to replace or to be used in connection with arbitration or mediation activities conducted by an association's Professional Standards Committee. The program is designed to accommodate and provide for disputes between buyers, sellers and agents, which are not covered under Professional Standards Policies and Procedures.

Dispute Resolution Systems (DRS) is a general term used to identify means of resolving disputes out of court, such as by mediation or arbitration. DRS programs are becoming increasingly important today as parties and the court system alike are now trying to find DRS programs that will take them out of the traditional legal system and solve their disputes in a quick and cost efficient manner. DRS reflects a serious effort to design workable and fair alternatives to traditional civil litigation.

There are several types of DRS programs. The more familiar are:

1. **Negotiation** - This is the direct bargaining between two parties to a dispute where they attempt to resolve the dispute without the intervention of others. Many real estate brokers utilize this form of DRS without realizing it. An example may be when a disgruntled buyer calls after a walk through and finds that the seller broke the mailbox when he was moving out of the home. A real estate broker may offer to purchase a new mailbox in order to resolve the conflict. This resolution has been accomplished using the DRS program of **negotiation**.
2. **Mediation** - In mediation, a neutral third party assists the disputants in negotiating a mutually acceptable settlement. Mediators do not render decisions but help to facilitate the parties to the dispute to come to their own agreement by clarifying issues, utilizing persuasion and other conflict resolution strategies. Although there is no guarantee that the dispute will be resolved, surveys reveal that settlements are reached over 80% of the time.
3. **Arbitration** - Arbitration is probably the best known DRS method. In arbitration agreements, parties agree to submit existing or future disputes to a neutral third party, an arbitrator, who will decide how the dispute will be resolved. In binding arbitration, that decision is a final resolution of the dispute. In non-binding arbitration, the parties elect whether to settle with the arbitrator's decision or to continue on to litigation.

Benefits of DRS Program

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

The NAR Program

The materials in this manual were developed by the NATIONAL ASSOCIATION OF REALTORS® for Associations to use in setting up their own alternative dispute resolution system programs. Many associations have already implemented the mediation program developed by NAR in 1990. Other associations have designed and implemented their own arbitration programs.

The materials in this manual update the NAR mediation program and add guidelines for an arbitration program. Associations are free to use either the mediation materials, the arbitration materials or a combination of mediation and arbitration.

A combination mediation/arbitration program may be the most beneficial to settling disputes in a timely and cost-efficient manner. In a combined program, the DRS clause in the agreement provides for a two-step process, first mediation and then arbitration. The key to the combined program is to first have the parties mediate to come to their own settlement. If this does not occur, the parties then have committed to arbitration, allowing a neutral third party to make a final determination of the dispute based on the facts of the situation.

The NAR programs are designed to resolve disputes between buyers, sellers, and real estate salespersons. The programs are not designed to be used for disputes between REALTOR® members. These disputes must still be arbitrated in accordance with Article 14 of the REALTORS® Code of Ethics and through the Professional Standards Procedures.

Many court systems across the United States have incorporated some form of DRS into their processes for civil lawsuits. Generally, the DRS program is triggered at the time the lawsuit is filed. Depending upon the particular type of program, once the suit is filed, the parties to the lawsuit must first either go through mediation or non-binding arbitration. If the DRS program is unsuccessful, the civil litigation begins. Regardless of whether these DRS programs are successful, they are widely encouraged because they act as a measuring stick for the parties in viewing the strength of their cases and judging the success rate of future litigation. The NAR

programs do not necessarily conflict with these court-annexed DRS programs as the NAR programs are initiated prior to the filing of litigation. However, where a court-annexed program exists, parties who have used either the NAR mediation program or a non-binding arbitration system, may find they will be required to use a similar DRS program again, prior to litigation.

The NAR programs are also designed to create minimal legal exposure to the associations. Association should review each component and, if a decision is made to adopt one or both components, follow the guidelines for implementation as they are set forth in this manual. An association that follows the guidelines and submits the appropriate documents to NAR will have professional liability insurance coverage for administering the NAR programs. Neither program contemplates that associations will act as mediators or arbitrators within the programs. This activity is currently outside the scope of the association's professional liability insurance coverage. An association that desires to become actively involved in mediating or arbitrating disputes will need to purchase separate insurance for the association and the individual mediator/arbitrators.

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 then newly formed REALTORS[®] Risk Reduction DRS Subcommittee began the task of designing and developing a Dispute Resolution System that could be easily implemented by local associations and member firms throughout the country.

In their deliberations, members of the subcommittee evaluated and debated the merits of arbitration as well as mediation. Because of the non-adversarial nature of mediation and the fact that members did not give up legal rights in agreeing to mediation, the NAR program was developed initially as a mediation program. The Mediation Guidelines were developed and sent, in 1990, to every Association for their independent endorsement and administration.

Since 1990, several state associations have successfully developed and implemented arbitration programs. Because of their success and the interest in arbitration, in 1992, the Risk Reduction Committee decided to expand the NAR program to include guidelines for developing an arbitration program.

How the Mediation Program Works

After reviewing the information provided in this mediation component, associations voluntarily decide whether or not to endorse and participate in the program. Once this is accomplished, the mediation process is initiated through the use of a mediation clause in the association's standard agreements. The clause can be included in the body of the contract or as an addendum to the contract (See Appendix A and B). Similar clauses can be added to a listing agreement or a buyer representation agreement.

When they sign a contract or addendum containing a mediation clause, parties to the transaction pre-commit to submit to mediation any dispute that might arise from the transaction. Where parties do not pre-commit to mediate, an agreement to mediate can be signed by the parties when a dispute arises (See Appendix C below). In either situation, 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 arbitrate or litigate the dispute.

With few exceptions, almost any type of real estate dispute can be mediated under the NAR rules and procedures. Exceptions include disputes that involve extremely complex legal issues, allegations of criminal misconduct, violations of the state's license laws, and disputes and controversies that are covered under Professional Standards policies and procedures, including commission disputes between REALTORS[®] that are arbitrated under Article 14 of the REALTOR[®] Code of Ethics.

This mediation component contains all of the essential forms, materials and information that associations and members need to implement and use the mediation component.

ENDORISING THE MEDIATION CONCEPT

In endorsing the program, an association must demonstrate that it can satisfy the criteria which NAR has established to safeguard the integrity of the program on a national basis. These criteria and the use of the mediation rules and procedures are the only conditions which NAR imposes on associations that want to endorse and implement the program as a service to members, sellers, and buyers.

The intent of the criteria is not to discourage or exclude associations from participating in the program, but rather, to make certain that an association's leadership, staff, and members know and understand the level of commitment and resources that are required to effectively initiate and administer the mediation program as an ongoing service of the association. In addition, associations must meet and maintain the below criteria in order to have coverage for claims arising out of the endorsement under NAR's Professional Liability Insurance Program.

STEP 1. Association president, E.O. and legal counsel need to first review the contents of these Guidelines, paying particular attention to the "Criteria For Association Participation" and the Mediation Rules and Procedures.

STEP 2. Leadership, staff and appropriate committees need to discuss the Guidelines and "Criteria for Association Participation" in the Mediation Program to determine whether association can satisfy criteria and to determine what resources the association will need to initiate, promote and administer the DRS program, e.g., staff time, volunteer time, administrative expenses. Costs for implementing, promoting and administering the program will vary depending on association size and level of activities which the association undertakes.

STEP 3. Identify and contact mediators and/or mediation groups in association's geographic area to initially confirm availability of mediator(s) and/or mediation group(s) who are:

a. Capable of providing mediation services which satisfy the program needs and requirements; and

b. Interested in DRS and willing to provide mediation services if the association adopts the program.

[NOTE: Association should defer actual selection of mediators until the Board of Directors has formally endorsed the program.]

STEP 4. Provide DRS program information to members; solicit and obtain feedback; identify and respond to specific concerns and questions which members may have about the program.

- STEP 5.** Present information to the Board of Directors with appropriate recommendation(s), e.g., that the association endorse the mediation program for implementation; that XYZ committee have oversight of program activities; that an implementation plan be drafted and submitted to appropriate individuals or group(s) by XXX (date); etc. [**NOTE:** Recommendations should include proposal for incorporating mediation clause into association's standard sales contract.]
- STEP 6.** Adopt and follow recommended guidelines and procedures for implementing, promoting, and administering DRS program.
- STEP 7.** Reproduce and provide seller/buyer information brochures, mediation forms and training materials to REALTOR[®] firm principals (See Appendix G below).
- STEP 8.** Submit to the NATIONAL ASSOCIATION OF REALTORS[®] a written "Notice of Endorsement," signed by the association president and executive officer who will be administering the program (See Appendix D below).

CRITERIA FOR ASSOCIATION PARTICIPATION

In order to participate in the Mediation Program of the NATIONAL ASSOCIATION OF REALTORS[®], associations must:

1. Have a full-time, paid executive officer or verify that administrative support will be provided by the executive officer or professional staff of:
 - a. A neighboring association.
 - b. The state association.
 - c. Mediation provider with whom the association has a written service agreement.
2. Consult with and obtain the opinion of legal counsel regarding the program's applicability under state law before the program is endorsed.
3. Confirm availability of qualified mediators or mediation groups that are capable of and willing to provide mediation services which satisfy the program needs and requirements.
4. Submit to the NATIONAL ASSOCIATION OF REALTORS[®] a written "Notice of Endorsement," signed by the association president and executive officer who will be administering the program (See Appendix D below).
5. Ensure appropriate on-going involvement of legal counsel in the program activities following endorsement of the program.
6. Actively promote and encourage use of DRS programs by REALTORS[®], sellers and buyers.
7. Monitor program performance; promptly submit mediation evaluation forms for all cases mediated through the program; respond to surveys which NAR may conduct to evaluate the success of the program nationally; and notify the state association and NAR of problems or concerns which may arise.

MEDIATION RULES AND PROCEDURES

- 1) **Agreement of Parties.** These Mediation Rules and Procedures shall apply when the parties have agreed in writing to mediation under the NAR Program. By mutual written agreement of all the parties to the claim, any specific provision of these Rules and Procedures pertaining to mediation may be modified.

- 2) **Initiation of Mediation.** Any party may initiate mediation under these Rules and Procedures by completing, signing and mailing to the mediation vendor and all other parties, a Request to Initiate Mediation Transmittal Form (Transmittal Form found in Appendix E). Such form shall contain or be accompanied by the following information, to the extent known or readily available:
 - a) A fully executed true copy of the agreement containing the mediation clause;
 - b) A copy of such other written agreement invoking these Mediation Rules and Procedures;
 - c) 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 Rules and Procedures.
 - d) The names, addresses and telephone numbers of the parties to the case, including the name of the parties insurance company;
 - e) Nature and amount of the claim (brief statement of the facts that give rise to the claim, the damages or relief sought);
 - f) Preferred place and time of hearing.

- 3) **Selection of Mediator.** Not later than ten days after receipt of the Transmittal Form, the mediation vendor shall appoint a qualified mediator.
 - a) 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.

- 4) **Time and Place of Mediation Conference.** Within ten days of his 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 sixty days from date of receipt of the Transmittal Form, and shall allow for not less than twenty days advance notice of the conference, which notice shall be given by the mediation vendor to all parties.

- 5) **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.

a) 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.

6) **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.

7) **Confidentiality.**

a) 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:

i) Views expressed or suggestions made by a party with respect to a possible settlement of the dispute;

ii) Admissions made in the course of the mediation;

iii) Proposals made or views expressed by the mediator or the response of any party thereto.

b) No privilege shall be affected by disclosures made in the course of mediation.

c) Disclosure of any records, reports, or other documents received or prepared by mediation vendor cannot be compelled.

d) The mediation vendor shall not be compelled to disclose or to testify in any proceeding as to information disclosed or representations made in the course of the mediation or communication to the mediator in confidence.

8) **Mediated Settlement.** The mediated settlement must be reduced to writing by the parties or by the mediator (if the mediator is an attorney), then dated and signed at the mediation conference by all parties agreeing to its terms, but in no event shall the settlement be signed later than ten days after the conclusion of the mediation conference (See Appendix F for sample agreement).

9) **Judicial Proceedings and Immunity.** Neither the mediation vendor, nor the mediator, nor the NATIONAL ASSOCIATION OF REALTORS® or any of its member associations, shall be deemed "necessary parties" in any judicial proceedings relating to mediation under these Mediation Rules and Procedures. Neither the mediation vendor, nor any mediator nor the NATIONAL ASSOCIATION 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 NAR Mediation Program.

10) **Mediation Fees.** Mediation fees shall be in accordance with the published fee schedule.

11) **Timing of Claims.** The time limitation by which parties must bring claims in accordance with these Rules and Procedures are to be governed by state law. Local counsel should be consulted regarding this issue.

IMPLEMENTING THE MEDIATION PROGRAM

After the board of directors has endorsed and authorized implementation of the mediation program, the executive officer or appropriate committee should draft a step-by-step plan for implementing the program. Following is a list of major activities which should be covered in the plan:

1. [] Revise standard listing agreement, buyer representation agreement and sales contract to include mediation clause (See Appendix A and B). Plan to have firms add the mediation clause to their company contracts or use an addendum until the association's standard contracts are reprinted. [**Note:** If members use the state association's standard contract, request that the state association revise its contract to include a mediation clause.]

2. [] Identify and select mediation providers (per guidelines in this section).

3. [] Prepare reproduction proof for "personalized" seller-buyer information brochure (See Appendix G). Include association's name, address and telephone number. Include mediator's name, address, telephone number and fee schedule if association has exclusive Service Agreement; space permitting, include names, addresses, telephone numbers and fee schedules of mediators approved under Multiple Provider Option.

4. [] Prepare for reproduction a list of approved mediation providers. (Multiple Provider Option only.) Include name, address, telephone number and fee schedule for each provider.

5. [] Reproduce sufficient numbers of mediation brochures, mediation provider lists, mediation forms, and broker/ salesperson training materials to accommodate:

Designated REALTOR[®] and Branch Office Manager Activities. Direct mailing and orientation handouts.

Seller-buyer Information Packet. To be provided to sellers and buyers who contact the association or participating firms for information on how to initiate mediation under the program rules.

New Member Orientation. Include brochure with New Member Orientation Kit and/or as handout during orientation; additional materials may be provided at the option of the association.

Media Kits. To be provided to news media.

E&O Insurance Companies (See Sample letter, Appendix H below). Enclose with letter to E&O insurance companies requesting consideration

of premium credit and/or full or partial payment of mediation fees for REALTORS® who are using mediation in their agencies.

[**Note:** Insurance company may ask for list of REALTORS® who are participating in the program. NAR recommends that this activity be coordinated through the state association for state-sponsored E&O insurance programs.]

Member Promotion. Include brochure as insert in association newsletter; handout at association meeting(s).

6. [] Plan and schedule orientation/training program for designated firm principals and branch office managers to familiarize them with the mediation program and its use by salespeople, sellers and buyers.
7. [] Prepare media release and media kits for dissemination to news media; identify opportunities for using news media to inform public about the mediation program.
8. [] Identify and schedule promotional activities to inform members about mediation and to encourage their acceptance and use of mediation.
9. [] Revise new member orientation program to include section on mediation.

Identifying, Qualifying and Selecting Mediators

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

IDENTIFYING MEDIATORS - WHERE TO LOOK

The National Association recommends and encourages the use of private mediators. The rationale for using private mediators is to dispel any perception among sellers or buyers that mediators are biased toward or sympathize with brokers and sales salespersons who may be parties to the dispute. Such biases could negatively affect both the mediation process and the success of the program.

The association should check the following sources for the names, addresses and telephone numbers of individual mediators and mediation groups operating within the association's jurisdiction or geographic area:

- Telephone "Yellow Pages"
- State and local bar associations
- State and local chambers of commerce
- Better Business Bureau
- Clerk of court's office
- State Attorney General's office
- Colleges and universities
- Real estate professionals trained in mediation
- Affiliate members (attorneys, lenders, title companies, etc.)
- Newspaper and trade journal advertising
- Community resolution centers
- United Way headquarters

See Appendix I below for a listing of DRS providers.

OPTIONS FOR PROVIDING MEDIATION SERVICES

There are two options for providing mediation services under the mediation program. The association may choose to negotiate an exclusive agreement with a single provider as outlined in Option #1 or to include multiple mediation providers as outlined in Option #2. Both options have advantages and disadvantages. Both options are acceptable to NAR.

Option #1. Exclusive Service Agreement with Mediation Provider.

The association enters into a written contract or service agreement with a single mediation provider (individual or group) who is capable of serving all areas within the association's jurisdiction and who meets other criteria which the association establishes. Associations should review "Tips For Negotiating Exclusive Service Agreement With Mediation Provider" in Appendix J.

Under this arrangement, brokers and salespeople provide buyers and sellers with the name, address, telephone number and fee schedule of the mediation provider with whom the association has contracted. (Information is easily inserted into the Seller-Buyer Information Brochure).

<u>ADVANTAGES</u>	<u>DISADVANTAGES</u>
Ability to negotiate services & fees	Sellers/buyers have no choice of provider.
Greater control over performance and fee range	Services may be more limited
Allows mediator name, address, phone number and fee schedule to be published as part of Seller-Buyer Information Brochure	
Fees can be standardized for duration of contract	

Option #2 Multiple Providers

The association approves multiple mediation providers who individually or collectively are capable of serving all areas within the association's jurisdiction. Each of the providers must be able to satisfy criteria which the association establishes.

Under this arrangement, the association provides to member firms, for dissemination to their sellers and buyers, a list of names, addresses, telephone numbers, and fee schedules for all mediators and mediation groups selected by the association to participate in the mediation program. Sellers and buyers choose a mediator from among those individuals and groups listed.

<u>ADVANTAGES</u>	<u>DISADVANTAGES</u>
Sellers and buyers can choose a mediator who best satisfies their needs/wants	Less control over services and performance.
May provide a greater range of fees.	May not be able to standardize fees.
Less formal letter of agreement vs. contract/agreement.	Adds another component to formal seller-buyer handouts.
	Adds additional step in initiating mediation.
	Sellers-buyers may be uncomfortable with having to select a mediator; may generate more calls to association.

PRELIMINARY SCREENING
(COMPLETE PRIOR TO ASSOCIATION ENDORSEMENT)

Once the association has obtained the names, addresses, and telephone numbers of mediators and mediation groups operating within the association's geographical area, the next step is to pre-qualify potential mediators. The association should contact each individual and group on its list to establish their: 1) interest in the mediation program; 2) ability to provide mediation services that meet program needs and requirements; 3) current fees; and 4) credentials and qualifications. The association should inform individuals and groups about the mediation program, program requirements and criteria for mediators. The association should also inform providers that the program is being considered for endorsement by the Board of Directors and that the association will notify provider of the association's decision.

QUALIFICATION AND SELECTION
(COMPLETE FOLLOWING DIRECTOR ENDORSEMENT)

Procedures. The association should determine how individual mediators and mediation groups will be screened and selected. NAR recommends that a working group of no more than five members, including the chairman, be appointed to make recommendations for the selection of mediators. The association's Executive Officer and Legal Counsel should participate in the selection process.

Notice of Endorsement and Request For Proposal. At the same time that the association notifies potential mediation providers of the directors' decision to endorse and implement the mediation program, the association should send a letter (Request For Proposal) to each potential provider requesting them to submit a written proposal or letter that contains the following:

- Confirmation of provider's interest in the mediation program.
- Confirmation of provider's ability to serve designated areas within the association's jurisdiction.
- Provider's fee schedule and any terms or conditions that apply to fees, e.g., payment terms, time periods during which fees will be in effect, fee increases and related notices, etc.
- Confirmation of provider's willingness and ability to perform prescribed mediation activities and services, e.g., pre-conference and post-conference activities, filing of NAR evaluation form, etc.
- Education, training, experience, references and other qualifications that demonstrate provider's ability to execute activities required under the mediation program and conduct successful mediation conferences.
- Confirmation that provider meets the NAR recommended minimum qualifications.

- Confirmation of provider's ability to satisfy other criteria which association has established.

The association's letter should include the date by which the association must receive the written proposal and a brief summary of the association's timetable and procedures for selecting mediators to participate in the program. If individuals and groups being asked to submit proposals have not previously received copies of the Mediation Clause, Rules and Procedures, forms, and Seller-Buyer Information Brochure, these should be enclosed with the association's letter (A sample Request For Proposal For Mediators is included in Appendix K).

Interviews. Once all proposals have been received and reviewed, interviews should be arranged and conducted. Interviews can be conducted by telephone if personal interviews cannot be arranged.

Final Selection and Approval by Board of Directors. The working group's recommendations should be presented to the appropriate committees for final recommendation to the Board of Directors. Following action by the directors, the association should thank all providers for submitting proposals and inform them of their acceptance or rejection.

Keep Mediation Provider(s) Informed and Involved. Mediation Providers can be a valuable resource during initial implementation of the program. Keep your mediation providers informed of the association's progress and any problems that the association may be experiencing. Involve the provider to the greatest degree possible.

CRITERIA FOR QUALIFYING DRS MEDIATORS

Associations can help to ensure the success of their mediation program by establishing qualification criteria for individuals who wish to participate as mediators. Such criteria provides the basis for objective selection of individuals who possess the knowledge, skills and expertise needed to mediate disputes under the NAR Rules.

Establishing Qualification Criteria. NAR recommends that the Association appoint a committee to develop and recommend mediator qualification criteria for the Association and that the committee's recommendations be approved by the board of directors. Consideration should be given to special or unique needs of the Association as well as to the minimum qualification criteria developed and recommended by NAR.

Recommended Minimum Qualification Criteria. To help Associations qualify and select capable mediators, NAR developed the following minimum qualification criteria. **NAR recommends that Associations adopt these criteria as minimum standards for qualifying mediators:**

To Participate As A Mediator, An Individual Must Satisfy The Following Minimum Qualifications:

I. Mediator shall be:

A. A REALTOR[®] member who: (1) possesses the qualities of tact, diplomacy, and a sense of equity as stated in the NAR CODE OF ETHICS AND ARBITRATION MANUAL (110a), "Appendix 1 to Part Four;" (2) has a familiarity with real estate rules and regulations of the state; (3) has five years of real estate experience; and (4) has completed a course of instruction on mediation under guidelines approved by the state association or local association (*); **or**

B. A professional mediator who has been trained and who is a member in good standing of an established public or private agency such as the American Arbitration Association, other established private mediation groups, chambers of commerce or better business bureaus and who possesses a fundamental knowledge of real estate (**) that is satisfactory to the Association; **or**

C. A real estate professional such as a title officer, real estate attorney, appraiser, etc., who (1) is trained in mediation by an Association-approved mediation company; and (2) possesses substantial experience in real estate that is satisfactory to the Association.

II. Prospective mediators must agree to abide by the NAR Rules and Procedures

III. Prospective mediators must be willing to consider negotiation of a specialized fee schedule for mediation services/conferences.

An individual's experience and track record in mediating cases that have involved any of the following would also help to establish the individual's ability to conduct successful mediations under the NAR Rules:

- mediations involving other professionals, e.g., architects, engineers, lawyers, accountants, building contractors, homebuilders, etc.,
- mediations involving contracts for professional services
- mediation of disputes involving more than two parties

The Association should verify the credentials and qualifications of all individuals and groups being considered as potential mediators. The Association should ask for and check references provided by prospective mediators.

NAR discourages the use of paid Association staff and legal counsel as mediators under the mediation program. Association staff and legal counsel, however, should be allowed to participate in mediator training seminars to become more familiar with the program. As a reminder, mediators under the NAR mediation program are acting in an individual capacity and are not representing any association. All mediators will need to obtain their own professional liability insurance coverage for their mediation activities.

*** To protect the integrity of mediation as a viable, neutral source for dispute resolution, whenever an Association selects or approves REALTORS® as mediators it should also provide the name of at least one mediator who is not a member of the association.**

**** For Mediation Program purposes, "fundamental knowledge of real estate" means that the mediator is familiar with (has working knowledge of) the process by which real estate is marketed and conveyed in the local market area and is not meant to imply that a mediator must possess or demonstrate the same level of knowledge or expertise as a practicing real estate salesperson, attorney or lender.**

Summary of Mediation Components

1. **Rules and Procedures.** The rules and procedures that govern the participants' and mediators' duties and obligations from the time the commitment to mediate is made through the mediated settlement.
 - a. **Agreement of Parties** - The commitment to mediate.
 - b. **Initiation of Mediation** - Filing of the Request to Initiate Mediation Transmittal Form.
 - c. **Selection of Mediator** - Provider must appoint mediator within 10 days of receipt of the Transmittal Form.
 - d. **Mediation Conference** - Mediation conference must take place within 60 days of receipt of Transmittal Form. All relevant information must be presented. The Mediator has no authority to render a binding decision.
 - e. **Representation by Counsel** - Any party may be represented by counsel.
 - f. **Confidentiality** - No aspect of the mediation conference shall be relied upon or introduced as evidence in any arbitration, judicial or other proceeding.
 - g. **Mediated Settlement** - The mediated settlement must be put into writing and signed by all parties within 10 days of the conclusion of the mediation conference. Parties who do not agree with the terms as stated are not obligated to sign the settlement agreement.
 - h. **Timing of Claims** - The time limitation by which parties must bring claims in accordance with these Rules and Procedures are to be governed by state law. Local counsel should be consulted regarding this issue.
2. **Mediation Clause.** Clause states that the parties commit to submit to mediation any disputes which may arise out of the transaction.

Option A. Language to be incorporated as clause in the body of the sales contract. NAR recommends this option over Option B - Addendum. (**Appendix A**)

Option B. Language in addendum form; designed to be signed and attached to the sales contract. (**Appendix B**)
3. **Agreement to Mediate.** Serves the same purpose as the Mediation Clause but is not part of the sales contract. The Agreement is used by parties who have not pre-committed to mediation but who later agree to mediate disputes. The Agreement documents the willingness and commitment of the parties to submit disputes to mediation. It may be signed before or after a dispute arises. (**Appendix C**)

4. **Endorsement Notice.** Must be sent to NAR's Risk Reduction Department immediately after the association's Board of Directors endorses the mediation program. This triggers the professional liability insurance coverage for the endorsement. **(Appendix D)**
5. **Request to Initiate Mediation Transmittal Form.** The form which a party files with a mediation provider to initiate the mediation process. The form includes all information the mediator needs, including the names and addresses of parties to the dispute, the amount in dispute and the intention of the parties to be represented by counsel. **(Appendix E)**
6. **Sample Mediation Settlement Agreement.** Evidence of the settlement agreement between the parties. Parties who do not agree with the terms as stated are not obligated to sign the agreement. **(Appendix F)**
7. **Seller/Buyer Information Brochure.** Provides an overview of DRS in concise, easy to understand language. Brochure is designed to introduce clients and customers to the DRS Mediation Program. **(Appendix G)**

HOW THE ARBITRATION PROGRAM WORKS

Arbitration is an informal hearing in front of a neutral third party, the arbitrator, who discovers the facts of the dispute through testimony and documents and then renders a final determination of the dispute, called an arbitration award. The basic structure of an arbitration process is as follows:

If permitted under state law, parties to a real property transaction pre-commit to submitting their disputes to either binding or non-binding arbitration. Parties must be notified that if they commit to binding arbitration, they give up their legal right to litigate the dispute in the future.

A dispute arises and a request for arbitration is made to the endorsing association or arbitration company. This request may be accompanied by a written complaint.

Notice is given to the other relevant parties with a request for response to the complaint.

A list of qualified arbitrators is provided to the parties. Each party notes those arbitrators that are acceptable to them. The arbitrator lists are then matched and the arbitrator(s) are appointed. There will usually be the option to have one or three arbitrators on the panel.

The arbitrators shall notify all parties to the dispute of the time and place for the hearing. Parties are also notified that they may be represented by legal counsel.

Prior to the hearing, limited discovery is allowed.

At the hearing, each party may open with a statement as to their position on the dispute. Testimony from witnesses may be heard and the witnesses cross-examined. Documents in support of a position are also received at this time.

The hearing then ends and the arbitrators render an award within a specified time period following the hearing.

Under the NAR arbitration program, associations need to review the information contained in these guidelines and decide whether to develop and implement an arbitration program. Because of the various state arbitration statutes, associations will need to develop their own arbitration programs. This should be done following the guidelines set forth in this manual and in conjunction with the association's legal counsel. The mandatory arbitration guidelines below have been developed by NAR and must be followed by each association in their development of their arbitration program in order to maintain professional liability insurance coverage for the administration of an arbitration program.

The guidelines have also been adopted to ensure the integrity of the arbitration program on a national basis. The guidelines are requisite to association participation in the NAR arbitration program. The intent of the guidelines is not to discourage or exclude associations from participating in the program, but rather, to make certain that an association's leadership, staff, and members know and understand the level of commitment and resources that are required to effectively initiate and administer an arbitration program as an ongoing service of the association.

MANDATORY GUIDELINES FOR ASSOCIATION PARTICIPATION

In order to maintain insurance for your arbitration program under the NATIONAL ASSOCIATION OF REALTORS® Professional Liability Insurance Program, associations must:

1. Have a full-time, paid executive officer or verify that administrative support will be provided by the executive officer or professional staff of:
 - a. A neighboring association
 - b. The state association
 - c. Arbitration provider with whom the association has a written service agreement.
2. Develop the arbitration program in conjunction with legal counsel to be certain that :
 - a. Arbitration agreements in listing agreements, buyer representation agreements, and sales contracts are enforceable within the relevant state statutes,
 - b. The arbitration program is designed to minimize a real estate broker/salesperson liability for unauthorized practice of law claims. (If under state law the activities of a real estate licensee under the program would arguable be considered the unauthorized practice of law, the Association should seek an Advisory Opinion from the state real estate commission before proceeding with the arbitration program.) and
 - c. The state law regarding arbitration programs and clauses are followed.
3. Ensure on-going involvement of legal counsel in the program activities following development and endorsement of the program.
4. Develop the arbitration program using one arbitration provider company that:
 - a. Has been in the business for no less than three years,
 - b. Has available several professional arbitrators who possess a fundamental knowledge of real estate that is satisfactory to the association, and
 - c. Who agrees to abide by the mandatory arbitration guidelines developed by NAR.
5. Reduce the association's arbitration rules and procedures to writing and make them available to real estate brokers/salespeople, buyers, and sellers prior to their commitment to arbitrate a dispute.
6. Submit to the NATIONAL ASSOCIATION OF REALTORS® a written "Request For Insurance" form that is signed by the association's legal counsel, president, and executive

officer. (See Appendix L) The association must also submit the written rules and procedures with the Request.

7. Incorporate into its arbitration program the following elements:
 - a. That the entire arbitration process shall be completed within 60 days from the date the initial arbitration request was delivered to the arbitration company,
 - b. That the arbitration award shall be rendered not later than 30 days from the date the hearing is closed,
 - c. That the arbitration clause or addendum to the agreement clearly explains the arbitration process and is signed by all parties to the transaction, and
 - d. That the association's arbitration rules contain:
 - i. a statement that requires all parties to keep the proceedings and records of the arbitration private and confidential, and
 - ii. this statement: **"Neither the arbitration company, nor the arbitrator, nor the NATIONAL ASSOCIATION OF REALTORS® or any of its member association shall be deemed 'necessary parties' in any judicial proceedings relating to arbitration under these guidelines. Neither the arbitration company, arbitrators, nor the NATIONAL ASSOCIATION OF REALTORS® shall be liable to any party for any act or omission in connection with any arbitration conducted following these guidelines."**
8. Conduct training on the association's arbitration program and the unauthorized practice of law for member firms, brokers, and salespeople.

Information for a More Effective Arbitration Program

The following information is provided to assist association's in developing their own arbitration programs.

Sample Program

Several state associations have already implemented arbitration programs at the state level for use by their member associations. The elements of the Minnesota Association of REALTORS® Arbitration Program have been included in Appendix M for your review. Other associations with successful arbitration programs include the Missouri Association of REALTORS® and the Michigan Association of REALTORS®.

Biding Versus Non-Binding Arbitration

An arbitration program can be developed which is either binding or non-binding on the parties. This decision is left to the discretion of each association.

In binding arbitration, a neutral renders a final decision on the dispute. Neither party may litigate any of the allegations resolved by the arbitration. The arbitration award may be confirmed by a court which then gives the award the full force and effect of a judgement.

In non-binding arbitration, the final award can be rejected by either party. If accepted, the parties must then adhere to the decision found in the award as in binding arbitration and there is no future ability to litigate the dispute. If rejected, the parties can proceed to litigation on all the issues in dispute. This type of arbitration is often used to gauge how the litigation may proceed. In this sense, the arbitration may ultimately encourage a later settlement of the dispute.

Hearing at the Property Site

Many arbitration programs are designed so that they arbitration hearings are actually conducted on the property site where a property condition is in dispute. This procedure is effective because it provides all parties to the dispute and the arbitration panel with the opportunity to see the actual damages that occurred to the property.

Oversight Boards or Committees

NAR recommends that each association maintain a standing committee, such as a Risk Reduction Committee, that will have oversight of its DRS program. This committee would be responsible for insuring that the association's program follows the NAR guidelines and that all procedures are fair and equitable to all parties. The committee may also be responsible for selecting the DRS providers, conducting the training on the programs, and insuring that the appropriate evaluation forms are completed and returned to NAR. Some associations may want to involve individuals other than members in the oversight of their DRS program. In this case, an oversight board can be created. The Minnesota Association of REALTORS® maintains an oversight board over their arbitration program that consists of representatives from the

Association, the Minnesota Real Estate Commission, and the arbitration provider. Please note that no professional liability insurance coverage exists under the NAR Professional Liability Insurance Program for members of an oversight board or committee other than members of the association.

Judicial Confirmation of an Arbitration Award

Once the arbitration award is final, should the prevailing party have reason to believe the decision will not be accepted and litigation will ensue, the party can seek confirmation of the arbitration award through a suit for declaratory relief. A petition for declaratory relief needs to follow the procedures established by the local court. No petition should be prepared without the assistance of legal counsel. The intent of the petition is to have a court confirm the arbitration award. Once this is accomplished, the award will have the same force and effect as a judgement.

Attorney Advisor

This concept is currently used by the Convention Liaison Council Program which arbitrates disputes that arise in the convention and exposition industry. Here, an arbitration panel is assisted by an attorney advisor. The advisor interprets the law and also questions witnesses. In addition, the advisor answers legal questions that arise throughout the hearing. However, the advisor does not have a vote in the final award decision. This is left to the arbitrators.

Fees

Arbitration companies may have a set fee structure and rules. Otherwise, an arbitration program can be developed where all the parties to the dispute divide the arbitration fees equally. Or, the party who files the arbitration request can pay the entire fee with the understanding that the party or parties held responsible will ultimately pay the fee.

Legal Consideration for Association's Legal Counsel

To assist an association's legal counsel in developing the associations arbitration program, the following issues are set forth for consideration:

Pre-Commitment to Arbitrate

Most states have adopted a state arbitration statute. Under this statute or related case law, it may not be legal in the state for parties to pre-commit to arbitration. This is true in the state of Nebraska and may be true in other states as well.

Antitrust Concerns

In the recent case of Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 961 F.2d 1148 (5th Cir.), the Court of Appeals held that if the plaintiff can prove that a trade association used legal seminars and bulletins to provide members with information on arbitration clauses with the intent of letting them know that other members were willing to act in combination to require use

of such clauses by customers, an antitrust case against the association would be established. This case should be further analyzed for its impact on associations in the Fifth Circuit.

Privileged Information

A California Court of Appeals ruling addresses whether arbitration testimony is privileged. In Moore v. Conliffe, California Court of Appeal, First District, No. A056436, January 19, 1993, rehearing denied February 11, 1993, the court held that the statements of those who testify in private arbitrations are not privileged because "neither a private arbitration proceeding nor a deposition held in connection therewith is a judicial proceeding...as that term has been interpreted by case law."

Broker/Salesperson Orientation

Vital to the implementation of any DRS program is the support of an Association's member firms. The association needs to provide each member firm with the information and materials necessary to take advantage of this new member service. Outlined below is a comprehensive orientation program for all parties involved in the program: brokers, salespeople, buyers and sellers.

DESIGNATED REALTOR® - BRANCH OFFICE MANAGER MAILING

The purpose of the mailing is to ensure that all principal brokers and office managers are aware of the association's endorsement of the selected DRS program, the applications of DRS and the principal broker's role in the successful implementation of DRS at the agency level. Mailing should include:

1. Cover letter signed by the association's president encouraging the firm's participation in the DRS program.
2. Copies of the following DRS materials:

MEDIATION COMPONENT

- * Mediation Clause/Addendum
- * Mediation Rules and Procedures
- * Agreement to Mediate
- * Request to Initiate Mediation Transmittal Form
- * Evaluation Forms (Appendices O-R)
- * Sample Mediation Settlement Agreement

- * Seller-Buyer Information Brochure
- * List of Approved DRS Mediators (if association does not have Exclusive DRS Service Agreement)
- * Seller-Buyer Guide for Initiating Mediation (Appendix N)
- * Broker Guide for Salesperson Orientation
- * Broker Presentation Outline
- * Outline for Salesperson Orientation
- * Salesperson Checklist/Script

ARBITRATION COMPONENT (Materials to be developed by the association to be in line with the association's arbitration rules and procedures. The mediation materials can be used as guidelines in creating the arbitration materials).

- * Arbitration Rules and Procedures
- * Arbitration Forms
- * A Seller-Buyer Information Brochure
- * Seller-Buyer Guide for Initiating Arbitration
- * Broker Guide for Salesperson Orientation
- * Broker Presentation Outline
- * Outline for Salesperson Orientation

If possible, the cover letter should include the date(s), time(s) and location(s) of an association-sponsored DRS training program(s) and request that brokers and managers bring enclosed materials with them to the orientation program.

DESIGNATED REALTOR® - BRANCH OFFICE MANAGER DRS MAILING

The purpose of conducting DRS training program(s) for Designated REALTORS® and office managers is to provide them with information about DRS, techniques for implementing DRS at the firm level, and an opportunity to ask questions and discuss concerns. If possible, association counsel should participate in the program.

Each participant should have copies of the materials that were mailed (see above) and a program outline. The association's executive officer or other knowledgeable person should serve as facilitator for the program.

With regard to mediation, a video training kit has been developed by NAR for this program. The training kit is automatically mailed to each association upon receipt of the completed "Notice of Endorsement" form. The training kit contains a 25-minute videotape on mediation, a camera-ready workbook, and a facilitator guide. The videotape presents a true-to-life scenario that is resolved through the mediation process. Included in the tape is an explanation of the benefits of mediation, an effective presentation of the mediation process to buyers and sellers, and a sample mediation conference. This training kit should be used for the mediation portion of the DRS training. Likewise, a similar type of program should be used for an arbitration orientation program.

SELLER-BUYER INFORMATION PACKET

The purpose of the packet is to provide sellers and buyers with more information about DRS than the Seller-Buyer Information Brochure contains. Sellers and buyers will need to have the information and forms in the packet to initiate mediation/arbitration under DRS program rules.

The association and participating member firms should have pre-made supplies of the packets so seller-buyer inquiries and requests can be promptly handled. Packet contents should include:

1. Form cover letter signed by principal broker or by association's president or executive officer.
2. Copies of the following forms and materials:

MEDIATION COMPONENT

- * Seller-Buyer Information Brochure
- * Mediation Rules and Procedures
- * Mediation Clause/Addendum
- * Agreement to Mediate
- * Request for Initiating Mediation Transmittal Form
- * Seller-Buyer Guide for Initiating Mediation
- * List of Approved DRS Mediation Providers (if association does not have Exclusive DRS Service Agreement)

ARBITRATION COMPONENT

- * Arbitration Rules and Procedures
- * Arbitration Forms
- * An Informational Brochure
- * Seller-Buyer Guide for Initiating Arbitration

SALESPERSON ORIENTATION

To participate in an association's DRS program, principal brokers need to conduct orientation programs for its salespeople. The purpose of this orientation is to acquaint the salespeople with the selected DRS program and how it works. In addition, the broker needs to ensure that the salespeople can successfully present and explain the program to clients and customers. Lastly, an orientation program gives the salesperson an opportunity to ask questions and discuss concerns.

Each participant in the salesperson training program should have the following materials:

Salesperson Orientation Outline

Salesperson Checklist (For Mediation Component)

Seller-Buyer Information Brochure
DRS Rules & Procedures

If Using The Mediation Component Also Handout,

Mediation Clause

Agreement to Mediate Form

Request To Initiate Mediation Transmittal Form

Sample Mediation Settlement Agreement

Evaluation Forms

Answers To Frequently Asked Questions (Appendix S)

If Using The Arbitration Component Also Handout Those Forms And Materials Developed By The Association Or Arbitration Company.

To assist in this training, the following Broker's Presentation Outline has been developed. This outline is based on the Mediation Component. Should an association endorse an arbitration program, the broker presentation outline will need to be amended to be in line with the association's arbitration rules and procedures.

BROKER REPRESENTATION OUTLINE

I. Need For Alternative DRS

A. Broker-Salesperson Liability

1. Salespeople are aware of liabilities they incur in their everyday activities.
2. Claims against salespeople are sometimes frivolous or made because the salesperson is "there." DRS programs discourage frivolous claims.

B. Increasing Number of Claims in Recent Years

1. Research done by NAR shows claims against brokers and salespeople have increased dramatically over last five years.
2. Approximately 70% of claims are made by frustrated buyers.
3. Average claim is approximately \$3,000 or less - excluding costs of litigation.
4. Cost for litigating claims can be as much as three times the amount of claim.

C. Higher E&O Insurance Costs

1. Because costs for litigating claims are so high - and takes so long - many frivolous or small claims are settled. DRS programs discourage frivolous claims.
2. Increased number of claims and settlement by insurance companies increases premium costs. Lowering number of claims may lower insurance costs.

D. Cost and Inefficiency of Litigation

1. Because of the increased number of cases being filed in court, decisions can take up to two years to be rendered.
2. Attorneys fees and court costs frequently cost more than the amount of the claim.

E. Win-Lose Litigation Hurts Long-Term Broker-Client-Customer Relationships

1. Litigation is adversarial - somebody wins and somebody loses.
2. Losers are usually unhappy and unhappy clients or customers, fairly or unfairly, blame the broker or salesperson.
3. Unhappy clients & customers:
 - a. Don't come back;
 - b. Don't speak highly of company; and
 - c. Don't refer other clients and customers.

II. DRS Mediation Program

A. Introduction

1. Voluntary participation by associations & firms.
2. Program gives brokers, sellers, buyers and other parties to a real estate transaction a non-adversarial, efficient, affordable alternative to litigation through mediation.
3. Almost any type of dispute can be mediated under DRS Rules.
4. Exceptions include disputes that involve:
 - a. Complex legal issues or allegations of criminal misconduct.
 - b. Disputes and controversies that are subject to ethics or arbitration proceedings under the Association's Professional Standards procedures including disputes between REALTORS[®].
 - c. Violations of a state's real estate license laws.

B. How The Mediation Component Works

1. Sellers and buyers voluntarily pre-commit to mediate disputes by signing a sales contract or addendum to the contract that contains a mediation clause.
2. Salesperson presents and reviews mediation clause just as he presents other clauses in contract.
3. Signing a contract or addendum that contains a mediation clause legally binds the seller/buyer to submit disputes to mediation under DRS rules.
5. When a dispute arises, the initiating party completes the "Request To Initiate Mediation Transmittal Form" and delivers it to the association for process. The association will then either notify all parties involved of the mediation request and provide the parties with the list of mediators or will forward the "Request" to the sole mediation provider (depends upon the system selected by the association).
4. Mediation is the process of bringing disputing parties together with an unbiased, objective third party (mediator) who assists the parties in reaching a mutually agreeable settlement to the dispute. The mediator does not render decisions as do arbitrators and judges. Rather, the mediator acts as a facilitator.
5. Settlements reached as a result of mediation are not binding until parties have signed a written settlement agreement.
6. If mediation is unsuccessful, i.e., a settlement isn't reached, parties are free to pursue other legal remedies - arbitration and litigation.
7. If seller/buyer does not sign a contract or addendum pre-committing to mediation, seller/buyer can initiate DRS Mediation by signing the Agreement to Mediate. The agreement can be signed either before or after a dispute arises.

C. Benefits of DRS

1. For Brokers and Salespeople

- a. Improves our public image because we have taken initiative to offer an alternative to litigation.
- b. We are offering service to clients and customers that will save them time and money should a problem arise.
 - (1) Mediation is non-adversarial; parties participate in resolving the problem so they are satisfied/happy with results which means they are more likely to "come back" and to refer other clients and customers to us.
 - (2) Avoid delays that postpone closings by being able to resolve disputes quickly and efficiently.
 - (3) May lower E&O insurance costs by lowering number of claims. Insurance companies are recognizing value of mediation and may eventually give premium credits or deductible incentives to firms that use mediation.

2. For Sellers-Buyers

- a. Faster.
- b. Less expensive.
- c. Non-adversarial approach; parties have control over outcome.
- d. Avoid cost of litigating frivolous claims.
- e. Freedom to pursue other legal remedies if mediation isn't successful.
- f. Reliable - mediation is successful 80-90% of the time.

III. Mediation Components and Their Uses (Review and discuss each component).

- A. Seller-Buyer Information Brochure
- B. Mediation Clause
- C. Agreement to Mediate
- D. Rules and Procedures
- E. Request to Initiate Mediation Transmittal Form
- F. Seller-Buyer Guide for Initiating DRS Mediation
- G. Evaluation Forms
- H. Sample Mediation Settlement Agreement

IV. Presenting Mediation Information to Sellers and Buyers (Walk through and discuss Salesperson Checklist).

V. What to Do When a Dispute Arises.

- A. Try to resolve through negotiation before mediation is invoked.
- B. Provide buyer/seller with Information Packet and explain what he/she needs to do.

[**Note:** If dispute involves broker or salesperson, party will contact the association for this information.]

VI. Broker's Office Policy and Procedures for DRS (Cover any policies and procedures the company has.)

VII. Question and Answers (Refer to "Answers to Questions Most Frequently Asked" found in Appendix S)

SALESPERSON ORIENTATION OUTLINE

- I. The Need For Alternative Dispute Resolution Systems.
 - A. Brokers/salesperson liability.
 - B. Cost and inefficiency of litigation.
 - C. Win-Lose litigation hurts long-term broker-client-customer relationships.

- II. The Selected Dispute Resolution System.
 - A. Introduction
 - B. How Mediation/Arbitration works.
 - C. Why one type of DRS was selected over another.
 - D. Benefits of DRS.

- III. DRS Program Components And Their Use.
 - A. Seller-Buyer Information Brochure
 - B. Relevant Forms
 - C. Mediation/Arbitration Rules and Procedures
 - D. Seller-Buyer Guide for Initiating DRS Mediation.

- IV. Presenting DRS Information To Sellers And Buyers.

- V. What To Do When A Dispute Arises.
 - A. Try to resolve the dispute through negotiation before suggesting the DRS program.
 - B. Mail or deliver Seller-Buyer Information Packet upon request.

- VI. Broker's Office Policy And Procedure For DRS.

- VII. Questions And Answers.

CHECKLIST for PRESENTING DRS MEDIATION CLAUSE TO SELLERS AND BUYERS
SALESPERSON

(If an association endorses an arbitration program, this checklist can be used to develop a similar one to explain arbitration to sellers and buyers. Because of the concern regarding salespeople engaging in the unauthorized practice of law, any such checklist needs to be reviewed by the association's legal counsel)

1. [] Review Mediation program and Mediation Clause with seller/buyer.

___ Inform seller/buyer about the Mediation program.

___ Explain that mediation is a process that brings disputing parties together with an neutral, unbiased third party who, as a trained professional, helps parties reach a mutually acceptable solution to the dispute.

___ Emphasize that the mediator does not have the power or authority to render a decision as do arbitrators or judges. Explain that the mediator may suggest options and possible solutions in order to help the parties, but that the mediator does not pass judgment or render decisions.

___ Terms of settlement reached during mediation conference are not binding until all parties sign a written settlement agreement. This is usually done at the close of the mediation conference.

___ Review the mediation clause with the seller/buyer; explain that the mediation clause is similar to other clauses in the contract and does not imply or suggest that a problem or dispute is going to arise.

___ Explain that pre-committing to mediation binds the seller/buyer to submit any dispute that might arise to mediation. Agreeing to mediate does not mean that the seller/buyer is agreeing to a settlement, rather, he/she is agreeing to try to resolve the dispute through mediation rather than in court.

___ Emphasize that seller/buyer does not give up any legal right to pursue other remedies such as arbitration or litigation if mediation is not successful. Mention that mediation is successful in 80%-90% of cases submitted to mediation.

___ Explain that pre-commitment expedites the mediation process and that while parties can agree to mediate after a dispute arises, there is no guarantee parties will submit to mediation without precommitment.

2. Emphasize the value and benefits of mediation as an alternative to litigation.
 - Faster (typically, mediation takes about thirty days).
 - Less expensive (Fee ranges from \$50-\$1,500).
 - Seller/buyer should consult an attorney, but attorney does not have to be present at the mediation; as a rule, attorneys do not attend the mediation conference.
 - More positive and constructive method of resolving disputes because parties participate in the process and resolve the dispute themselves; win-win resolution vs. win-lose resolution.
 - Mediation is successful 80%-90% of the time. If mediation isn't successful, parties have not lost substantial amounts of time or money (parties usually share the cost of mediation), and parties are free to pursue other legal remedies.
 - Usually do not have problems enforcing terms of settlement because the terms and conditions have been developed by the parties themselves rather than being imposed by an arbitrator or judge.
3. Provide seller/buyer with copy of "Seller-Buyer Information Brochure."
4. Recommend seller/buyer consult an attorney.
5. Obtain signed disclosure verifying:
 - Seller/buyer received a copy of the brochure.
 - Salesperson reviewed and explained mediation clause and program.
 - Salesperson advised seller/buyer to consult an attorney.
6. Close with positive statement about decision to pre-commit to mediation.

SALESPERSON PRESENTATION GUIDE TO BUYERS AND SELLERS REGARDING MEDIATION

The following script is an example of how mediation can be presented by salespeople to buyers and sellers prior to the signing of a contract to purchase real estate:

Everything appears to be in order and I would like to again congratulate you on your wise decision to buy this home.

I would like to take just a moment to tell you about a new program that has been introduced by the NATIONAL ASSOCIATION OF REALTORS® and the Association of REALTORS®. Court costs, attorney fees and long delays have made traditional litigation through the courts an unattractive method of resolving disputes. These problems can be avoided through the Dispute Resolution System Mediation Program.

Mediation is less expensive and less time-consuming than litigation. Mediation brings the parties together with an impartial third party who is a trained, professional. With the mediator's help, parties usually reach a mutually agreeable solution. It is very important to understand that the mediator does not have the power or authority to render a binding decision on the parties as does an arbitrator or judge. The mediator assists the parties to reach an agreeable solution. The outcome of a mediation conference is not binding unless the parties agree, in writing, to a settlement. In the event that the parties do not arrive at an agreement, they are free to pursue other legal alternatives for resolving the dispute including arbitration and litigation. You do not forfeit any legal rights whatsoever.

Please take a copy of the Announcement Brochure and these program materials which describe the System in greater detail. I encourage you to review the information and consult with your attorney if you wish.

I want to emphasize that by encouraging you to pre-commit to mediation I am in no way suggesting that a problem is going to occur. Look at the mediation as a precaution. If a problem does arise, mediation allows you to resolve the problem without going to the time and expense of court.

I'm sure when you've read the brochure and talked with your attorney that you'll agree that pre-committing to mediation is a good decision.

Tips for Promoting DRS Program

Actively promoting the value, benefits, purpose and use of DRS is critical to the success of the program locally as well as nationally. A well-designed promotional plan will include promotional activities targeted to members of the association and the public. Be imaginative, and by all means, add your own ideas to those listed here.

MEMBERSHIP

Provide members with information about the Association's DRS program. Keep members informed of association's plans and decisions via meetings and membership publications.

- Include copy of Seller-Buyer Information Brochure as an insert in the association's newsletter or magazine and as a handout at membership meetings.
- Include DRS presentations at membership meetings: invite an area mediator/arbitrator to speak to members about the value and benefits of DRS as an alternative to litigation; have association counsel discuss the selected DRS program, the relevant forms, and other legal considerations of program; ask REALTORS® who are participating in the program to share their experiences with other members.
- Design flyers and other promotional pieces that help REALTORS® understand the value and benefits of DRS to brokers, salespeople, sellers and buyers.

SELLERS, BUYERS AND PUBLIC

Use news media to reach largest audience.

- Arrange radio and TV talk show appearances; encourage feature articles in local newspapers; use DRS as topic in columns which association or members may write for local papers.
- Prepare a "media kit" that can be distributed with media releases, public service announcements, etc.
- Inform state and local elected officials about the DRS program.
- Reach business community through public speaking engagements at Rotary Club and Chamber of Commerce meetings.
- Release or write guest articles for: local newspapers, real estate journals, affiliate member publications (e.g., lenders, title insurance companies, home inspectors Bar Association publications Chamber of Commerce newsletters, etc.)

[Note: A sample press release and media fact sheet on mediation have been included in this section. Similar press releases and media fact sheets should be developed for use in an arbitration program.]

Sample Press Release

(Retype this release on Association stationery, filling in the appropriate information in the blanks as indicated. The contact at the top of the release should be the person who handles media calls. The retyped release should be mailed or hand delivered to area newspapers.)

FOR FURTHER INFORMATION CONTACT:

Media relations contact : _____

Phone number: _____

Local Association of REALTORS[®] Launches Mediation Service For Buyers, Sellers

(Your Town) Date -- "Area real estate buyers and sellers now have an alternative to expensive and time-consuming litigation when there is a problem with their transactions," according to (Full Name of Association President) , President of the (Association Name) .

The mediation component of the Dispute Resolution System (DRS), was developed by the NATIONAL ASSOCIATION OF REALTORS[®] for implementation by its more than 1,800 local Associations of REALTORS[®] nationwide. Through the service, sellers and buyers have access to mediators who have agreed to conduct mediations under the DRS Rules and Procedures.

"Although most real estate transactions are completed smoothly, occasionally there is a need to resolve a dispute," said (Last Name of Association President) . "Many of the most common disputes, such as disagreements over earnest money deposits, are natural candidates for this type of service."

(Last Name of Association President) added that DRS is a very economical and efficient method of settling conflicts that otherwise might take months to resolve through the courts or through outside arbitration services. (Add sentence(s) briefly describing approximate fees involved for parties, indicating that fees may vary depending on the complexity of the case.)

In the mediation process, the parties meet with a trained, impartial mediator who helps them attempt to reach a mutually agreeable solution to the dispute. Unlike an arbitrator, the mediator cannot render a binding decision. If the parties cannot reach an agreement, they may pursue arbitration or litigation. Professional mediation groups around the country report a success rate of 80%-90%.

"It's a 'win-win' situation, with no risk involved for either party," said (Last Name of Association President) . "If the parties reach a settlement, the dispute is over. If they don't, they are free to take other courses of action without prejudice."

For additional information on the DRS, contact the (Association Name).

Fact Sheet

ABC Association OF REALTORS® MEDIATION PROGRAM FACT SHEET

(Retype this fact sheet on Association stationery, filling in the appropriate information in the blanks as indicated. The contact at the top of the fact sheet should be the person who handles media calls. This fact sheet should serve as background information in conjunction with a news release or feature story idea for local media.)

What: The Dispute Resolution System (DRS) Mediation Program is a dispute resolution service designed by the NATIONAL ASSOCIATION OF REALTORS® for its more than 1,800 local Associations of REALTORS®. The program offers sellers, buyers, brokers and other parties in a real estate transaction an efficient, affordable method of resolving disputes out of court. Associations voluntarily choose to endorse and participate in the program.

How: Participating associations identify qualified mediators who provide DRS mediation services. All parties involved must agree to use the DRS program before mediation begins. The mediator does not have the authority to render a binding decision, nor does the mediator have the authority to force any party to enter into an agreement. Rather, the mediator merely assists the parties in working together to reach a mutually agreeable solution.

Any settlement worked out through mediation must be put into writing and signed by all the parties to become a binding contract which is enforceable in a court of law. In the event the parties are unable to agree to a solution to the dispute, they are still free to pursue arbitration or litigation as though mediation had never taken place.

Benefits:

- Faster than litigation.
- Less expensive than litigation.
- Discourages litigation of frivolous claims.
- Parties do not forfeit their legal rights to arbitrate or litigate the dispute if mediation is unsuccessful.
- Brokers are providing a service to their clients and customers.
- Potential for lowering the number of claims that must be settled or litigated by the insurance company, thereby lowering insurance costs for all parties.
- Mediation has a success rate of 80 - 90 percent.

Cost: (Write a brief statement outlining fees for parties involved.)

Who: The DRS program is available from the (Association Name) . The program was designed and distributed by the NATIONAL ASSOCIATION OF REALTORS®. For

additional information on the DRS mediation program, contact, (Full name of contact) at (Telephone) .

The (Association name) is one of more than 1,800 Associations of REALTORS[®] that comprise the NATIONAL ASSOCIATION OF REALTORS[®], the nation's largest trade association and The Voice for Real Estate.

APPENDIX A. MEDIATION CLAUSE
(For insertion in Sales Contract)

Any dispute or claim arising out of or relating to this contract, the breach of this contract or the services provided in relation to this contract shall be submitted to mediation in accordance with the Rules and Procedures of the Dispute Resolution System. Disputes shall include representations made by the Buyer(s), Seller(s) or any real estate broker or other person or entity in connection with the sale, purchase, financing, condition or other aspect of the property to which this contract pertains, including without limitation allegations of concealment, misrepresentation, negligence and/or fraud. Any agreement signed by the parties pursuant to the mediation conference shall be binding.

The following matters are excluded from mediation hereunder: (a) judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage, or land contract; (b) an unlawful detainer action; (c) the filing or enforcement of a mechanic's lien; (d) any matter which is within the jurisdiction of a probate court; or (e) violation of a state's real estate license laws. The filing of a judicial action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not constitute a waiver of the right to mediate under this provision, nor shall it constitute a breach of the duty to mediate.

By initialing in the place below, you hereby acknowledge that you have received, read and understand the standard announcement brochure for the Dispute Resolution System and agree to submit disputes as described above to mediation in accordance with the Dispute Resolution System.

Buyer's Initials / Date

_____/_____

Seller's Initials / Date

_____/_____

Listing Broker's Initials / Date

_____/_____

Selling Broker's Initials / Date

_____/_____

Note: Due to provisions in your state law, the mediation clause language may need to be revised to indicate that the contract survives past the closing of sale .

APPENDIX B. MEDIATION CLAUSE
(Addendum to Sales Contract)

The undersigned hereby agree that any dispute or claim arising out of or relating to the attached contract dated _____, between _____ and _____, the breach of that contract or the services provided shall be submitted to mediation in accordance with the Rules and Procedures of the Dispute Resolution System. Disputes shall include representations made by the Buyer(s), Seller(s) or any real estate broker or other person or entity in connection with the sale, purchase, financing, condition or other aspect of the property to which this contract pertains, including without limitation allegations of concealment, misrepresentation, negligence and/or fraud. Any agreement signed by the parties pursuant to the mediation conference shall be binding.

The following matters are excluded from mediation hereunder: (a) judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage, or land contract; (b) an unlawful detainer action; (c) the filing or enforcement of a mechanic's lien; (d) any matter which is within the jurisdiction of a probate court; or (e) violation of a state's real estate license laws. The filing of a judicial action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not constitute a waiver of the right to mediate under this provision, nor shall it constitute a breach of the duty to mediate.

The parties hereby acknowledge that they have received, read and understand the standard announcement brochure for the Dispute Resolution System and agree to submit disputes as described above to mediation in accordance with the Dispute Resolution System.

Seller(s) Signature / Date

Buyer(s) Signature / Date

_____/_____
_____/_____
_____/_____
_____/_____

Listing Broker Signature / Date

Selling Broker Signature / Date

_____/_____
_____/_____

APPENDIX C. AGREEMENT TO MEDIATE

(Note: This Agreement does not have to be executed if parties have previously committed to mediation via the contract for sale or other written agreement to mediate.)

The undersigned parties agree that they are involved in a dispute concerning the purchase of real estate to the signed contract dated _____. A copy of the executed contract is attached and made part of this Agreement by addendum.

The following is a brief summary of the dispute:

The undersigned further agree to submit the above-described dispute to mediation in accordance with the mediation Rules and Procedures of the Dispute Resolution System. Any Agreement signed by the parties, pursuant to the mediation conference, shall be binding.

The undersigned hereby acknowledge that they have received and read the Dispute Resolution System Information Brochure and understand its contents.

Seller(s) Signature / Date

_____/_____
_____/_____

Buyer(s) Signature / Date

_____/_____
_____/_____

Listing Broker Signature / Date

_____/_____

Selling Broker Signature / Date

_____/_____

Other(s) Signature / Date

_____/_____
_____/_____

APPENDIX D. ENDORSEMENT NOTICE

(Please Type or Print)

**To: Dispute Resolution System Liaison
Risk Reduction Department, 10th Floor
NATIONAL ASSOCIATION OF REALTORS®
430 N. Michigan Avenue
Chicago, IL 60611**

1. The Board of Directors of the _____ Association of REALTORS® voted on _____, 19__ to endorse and implement the Mediation program of the NATIONAL ASSOCIATION OF REALTORS®.

2. Legal counsel was consulted prior to endorsement and has agreed to provide appropriate on-going advice and recommendations. () Local () State

Counsel Name: _____

Phone: _____

Address: _____

City _____ State _____ Zip Code _____

3. The program will be administered by (contact):

- a. () Association Executive Officer

Name: _____

Phone: _____

Mailing Address: _____

City _____ State _____ Zip Code _____

- b. () Neighboring Association Executive Officer () State Association

[Associations without E.O.]

Association Name: _____

E.O. Name _____ Phone: _____

Mailing Address: _____

City _____ State _____ Zip Code _____

- c. () Mediation Provider: Please attach documentation from the Mediation Provider. Documentation should include provider's name, address, and phone number.

4. We have reviewed the "Criteria for Association Participation" in the DRS Program and hereby confirm that we are able to satisfy each of the criterion listed.

_____/_____
Association President

_____/_____
Association Executive Officer

cc: State Association Executive Vice President

APPENDIX E
REQUEST TO INITIATE MEDIATION - TRANSMITTAL FORM

(To be completed and mailed to DRS Mediation Provider by party requesting mediation)

DATE : _____

1. NAMES OF ALL PARTIES TO THE DISPUTE

2. PARTY REQUESTING MEDIATION

Name _____ Phone No. _____ Fax: _____

Address: _____

Buyer Seller Broker Salesperson Builder/contractor Other

Professional Liability Insurance Company:

Name and Address of Legal Counsel or Other Representative:

Name _____ Phone No. _____

Firm _____ FAX : _____

Address: _____

3. OTHER PARTIES

Name _____ Phone No. _____ FAX _____

Address: _____

() Buyer () Seller () Broker () Salesperson () Builder/contractor () Other

Professional Liability Insurance Company (if known):

Name and Address of Legal Counsel or Other Representative:

Name _____ Phone No. _____

Firm _____ FAX _____

Address: _____

Name _____ Phone No. _____ FAX : _____

Address: _____

() Buyer () Seller () Broker () Salesperson () Builder/contractor () Other

Professional Liability Insurance Company (if known):

Name and Address of Legal Counsel or Other Representative:

Name _____ Phone No. _____

Firm _____ FAX : _____

Address : _____

* * *

Name _____ Phone No. _____ FAX : _____

Address: _____

() Buyer () Seller () Broker () Salesperson () Builder/contractor () Other

Professional Liability Insurance Company (if known):

Name and Address of Legal Counsel or Other Representative:

Name _____ Phone No. _____

Firm _____ FAX : _____

Address: _____

Name and Address of Legal Counsel or Other Representative:

4. BRIEF DESCRIPTION OF CLAIM:

5. AMOUNT OF MONEY INVOLVED: _____ (\$ _____)

6. Have there been any formal court pleadings filed in this case? () Yes () No

If yes, are there any trial dates or time limitations involved? () Yes () No

Date _____ Court

County _____ Judge

Court Case # _____

7. Do you have authority to enter into and sign a binding written agreement to settle this on behalf of the party you represent? () Yes () No

Comment:

8. Do you need additional information from another attorney? () Yes () No

If yes, what?

9. Has a prior agreement to mediate been signed by the parties? () Yes () No

If yes, please attach copy of the signed agreement.

PLEASE MAIL THIS FORM TO THE DRS MEDIATION PROVIDER WHO HAS BEEN SELECTED AND AGREED UPON BY THE PARTIES. IF NO AGREEMENT EXISTS, MAIL TO ANY QUALIFIED DRS MEDIATION PROVIDER IN YOUR AREA.

Please Provide CONFIDENTIAL Copy of this Form to:

Dispute Resolution System Liaison
Risk Reduction Department, 10th Floor
NATIONAL ASSOCIATION OF REALTORS®
430 North Michigan Avenue
Chicago, IL 60611-4087

Name of DRS Mediation Provider Selected:

APPENDIX F. MEDIATION SETTLEMENT AGREEMENT

In the matter of mediation between (insert name)
and (insert name).

DATE:

CASE NUMBER

MEDIATOR:

SETTLEMENT

We, the undersigned, having mediated our dispute in accordance with the DRS Rules and Procedures agree as follows:

Signed/Dated:

_____/_____
_____/_____
_____/_____
_____/_____
_____/_____
_____/_____

APPENDIX H. SAMPLE LETTER TO E&O INSURANCE PROVIDERS

(This letter, or a modification of this letter, should be addressed to the appropriate representative of the insurance company. If the contact is not known, call the company and ask for the name and title of the person in charge of professional liability (E&O) insurance programs.)

Dear Name of Contact :

The _____ Association of REALTORS® has recently endorsed the Dispute Resolution System. This DRS mediation program is an alternative dispute resolution system in which sellers, buyers, brokers and other parties to a real estate transaction can settle disputes through mediation. The enclosed materials explain the program in greater detail.

Sellers, buyers, and real estate brokers will benefit from the use of the DRS mediation program. E&O insurance providers will also benefit since real estate brokers who agree to mediate claims will have claims that cost less to defend and settle.

Recognizing the value that the DRS mediation program can have to E&O insurance providers, we are asking you to consider the following:

1. Endorsement and use of the DRS Mediation Program.
2. Premium credits and/or full or partial payment of mediation costs for insureds who adopt and use DRS mediation.

Your company's endorsement will give the DRS additional credibility among brokers and their clients and customers which, in turn will encourage greater use of the program. Greater use of the program should result in lower costs for the insurance company.

We would be happy to meet with you or other representatives from the Name of Company to discuss the DRS Mediation program and the actions proposed in this letter.

I look forward to receiving your response.

Sincerely yours,

cc: State Association Executive Officer

APPENDIX I. LIST OF MEDIATION/ARBITRATION PROVIDERS

*(No endorsement by the NATIONAL ASSOCIATION OF REALTORS®
of any particular company is intended or implied.)*

<p>U.S. Arbitration 525 Westland Building 100 South King St. Seattle, WA 98104 206 467-0794 Loc: 30 Offices in U.S.</p>	<p>Resolve 1250 24th St. N.W., St. 500 Washington, D.C. 20037 202-778-9634</p>
<p>Endispute 1820 Jefferson Place, N.W. Washington, D.C. 20036 800-448-1660 Loc: MA, NY, CA, IL, D.C.</p>	<p>American Arbitration Association 140 W. 51st. Street New York, NY 10020-1203 212 484-4000 Loc: 35 Regional Offices</p>
<p>The Mediation Alternative 23 Empire Drive St. Paul, MN 55103 612 228-3526</p>	<p>The Private Adjudication Center Duke University School of Law 3024 Pickett Road Durham, NC 27705 919 493-7770</p>
<p>American Intermediation Service 1 Montgomery West Tower, Suite 2100 San Francisco, CA 94104 415 788-6253 Loc: IL, NY, CT, LA, CA</p>	<p>Neighborhood Justice of Chicago 4040 N. Lincoln Avenue Chicago, Illinois 60618 312 342-3290</p>
<p>Center for Dispute Settlement 1666 Connecticut Avenue, N.W. Suite 501 Washington, D.C. 20009 202 265-9572</p>	<p>The American Mediation Association 1901-17 West Bay Drive Suite 191 Largo, Florida 34640 813 797-7000</p>
<p>Judicate 1979 Marcus Ave., St. E125 Lake Success, NY 11042 800-473-8853 Loc: PA, CA, NY</p>	<p>Judicial Arbitration & Mediation Services, Inc. 500 N. State College Boulevard, St. 600 Orange, CA 92668 714-939-1300 Loc: TX, NY, GA, West Coast</p>
<p>National Academy of Conciliators 1111 W. Mockingbird Lane, St. 300 Dallas, TX 75247 214-638-5633</p>	<p>National Institute For Dispute Resolution 1901 L St. NW, Suite 600 Washington, D.C. 20036 202/466-4764</p>
<p>Council of Better Business Bureaus, Inc. 4200 Wilson Blvd, Suite 800 Arlington, VA 22203 800/537-4600 Loc: 170 offices in U.S.</p>	

APPENDIX J. TIPS FOR NEGOTIATING A DRS SERVICE AGREEMENT/CONTRACT

Before negotiations are initiated, the association should confirm that the mediation provider meets the requirements of the program and has the capability and resources to accommodate the geographical and administrative needs of program.

The DRS service agreement (or contract) should specify:

- Parties to the agreement (association and mediation provider).
- Duration of contract (effective dates).
- Services which provider will perform, e.g., administrative, promotion, training, pre-conference and post-conference activities, etc.
- Services which provider will not perform.
- Any fees, other than mediation fees that will be paid by the parties, that the association agrees to pay to the provider for services performed; payment terms.
- All terms and conditions of the relationship including those recommended by NAR.

NAR recommends that the following conditions be included in the association's Exclusive DRS Service Agreement:

1. Provider must agree to abide by and follow the DRS Rules and Procedures and use the DRS Forms.
2. Provider must agree to defend, indemnify, save and hold the Association of REALTORS harmless against claims brought by third parties relating to the provider's handling of the mediation conference pursuant to the Agreement.
3. Provider must agree to a fee schedule for the duration of the Agreement.
4. The mediation provider must agree that DRS fees agreed to with the association are equal to or less than fees the provider may set in connection with other similar programs.
5. Provider must agree not to use the name or logo of the Association of REALTORS[®] without prior written consent from the association and must further agree not to use the name or logo of the NATIONAL ASSOCIATION OF REALTORS[®] without prior written consent from NAR.
6. Neither the Association of REALTORS[®] nor NAR shall be responsible for payment of mediation fees to the provider in the event of default by any party.
7. Provider must agree to waive the Terms of Agreement, without penalty to the association, if an individual who is a party to the real estate transaction has agreed to mediate under the DRS Rules and Procedures but objects to mediation by the provider on the grounds of economic or other bias.

Note: The association should consult legal counsel before executing any agreement or contract and may wish to have counsel negotiate the terms and conditions of the agreement with the mediation providers.

APPENDIX K. REQUEST FOR MEDIATOR PROPOSALS

The _____ Association of REALTORS® is seeking proposals from qualified mediators for implementation of the NATIONAL ASSOCIATION OF REALTORS® Dispute Resolution System. Attached to this request are components of the system that should be reviewed and understood by prospective mediators prior to submitting a proposal.

Each proposal shall include:

1. Confirmation of the provider's interest in the DRS program.
2. Confirmation of the provider's ability to serve the Association's jurisdiction which includes:
3. The provider's fee schedule and any terms or conditions that apply to fees, e.g. payment terms, time periods during which fees will be in effect, fee increases and related notices, etc.
4. Confirmation of the provider's willingness and ability to perform prescribed DRS activities and services, e.g. preconference and post conference activities, filing the NAR evaluation form, etc.
5. Education training, experience, references, and other qualifications that demonstrate the provider's ability to execute activities required under the DRS program and conduct successful mediation conferences.
6. Certification that the provider meets the NAR minimum qualifications (see attached).
7. Certification that the provider is a mediator as defined in _____ (see attached). (If applicable, cite any state laws that define the qualifications required to be a mediator. Failure to make this a requirement can effect the confidentiality of the mediation process in some states.)

The _____ Association of REALTORS® anticipates that the contract with the mediator or mediators selected will include conditions provided in "Tips For Negotiating An Exclusive DRS Service Agreement/Contract With A Mediation Provider" that is also attached.

Proposals must be submitted to:

(Name of Committee)
(_____ Association of REALTORS®)
(Address)
(City, State, ZIP)

on or before ____ P.M. on _____, _____, _____, 2000
in order to be considered.

The Association reserves the right to reject any or all proposals.

Those submitting proposals will be notified of the Association's action regarding the selection of a mediator or mediators within thirty (30) days of any action taken by its Board of Directors.

Questions should be directed to:

(Name)

(_____ Association of REALTORS®)

(Address)

(City, State, ZIP)

(Phone Number)

Attachments:

Mediation Summary of Components

Dispute Resolution Brochure

Mediation Clause to be inserted in agreement or attached as an addendum (specify)

Agreement to Mediate

Mediation Rules and Procedures

Request to Initiate Mediation - Transmittal Form

Seller-Buyer Guide for Initiating Mediation

NAR Minimum Qualifications for Mediators

Tips for Negotiating an Exclusive DRS Service Agreement/Contract With a Mediation Provider

Copy of Applicable State Laws Regarding Mediators, If Applicable.

APPENDIX L. REQUEST FOR INSURANCE FORM

**TO: Dispute Resolution System Liaison
Risk Reduction Department, 10th Floor
NATIONAL ASSOCIATION OF REALTORS®
430 N. Michigan Avenue
Chicago, IL 60611**

1. The Board of Directors of the _____ Association of REALTORS® voted on _____, 19__ to endorse and implement an arbitration program. The Arbitration Program is being developed in conjunction with the following arbitration company:

Name:
Address:

Phone:

2. The Association's Arbitration Rules and Procedures are attached and do conform to the state's arbitration laws. The Arbitration Program also follows the NATIONAL ASSOCIATION OF REALTORS® Mandatory Guidelines for Arbitration Programs.
3. Legal counsel is working in conjunction with the Association and arbitration company to ensure the legality of the program.

Counsel Name:
Address:

Phone:

Signature/Date

_____/_____
Association President

_____/_____
Association Executive Officer

_____/_____
Association Legal Counsel

APPENDIX M. SAMPLE ASSOCIATION ARBITRATION PROGRAM

Contact Nan Roytberg, Legal Affairs, 312/329-8248 for a copy of this Appendix.

APPENDIX N. SELLER-BUYER GUIDE FOR INITIATING MEDIATION

When a dispute arises. The decision to initiate mediation under DRS program Rules should be made only after all attempts to negotiate an acceptable solution have been exhausted.

Call your broker or salesperson. Your broker or salesperson can be instrumental in resolving conflicts and disputes. Talk with your broker or salesperson before you initiate mediation proceedings.

Consult your attorney. You should inform your attorney of your intent to initiate mediation under the DRS Rules. Your attorney will be able to provide you with advice and counsel -- and may be able to help you resolve the dispute without having to proceed to mediation.

To initiate mediation. When all attempts to negotiate a settlement have failed, you should proceed as follows:

- A. If You and Other Parties Have Pre-committed To Mediation i.e., you have signed a sales contract or addendum to the contract that contains a mediation clause or you have signed the DRS Agreement to mediation or other written agreement:
 1. Contact your broker or salesperson or the local Association of REALTORS® to request a Seller-Buyer Information Packet. The packet contains everything you will need to initiate mediation.
 2. If the Association has an exclusive DRS Service Agreement with a mediation provider, the provider's name, address, telephone number and fee schedule appear on the Seller-Buyer Information Brochure. This is the mediation provider with whom you will be dealing.
 3. If the Association has approved more than one mediation provider, the name, address, telephone number and fee schedule of each provider appears on a list prepared by the association. You must select a mediator from those listed. If you need help, call your broker or salesperson. If your dispute is with the broker or salesperson, you can call the local Association of REALTORS®.
 4. Complete and sign the Request to Initiate Mediation Transmittal Form. Mail the original form and required attachments to the mediation provider. A copy of the signed form and attachments should be mailed to the Association at the address shown on the Seller-Buyer Information Brochure and another to your attorney.

When the mediation provider has received your request, the provider will contact all parties named and will schedule the mediation conference in accordance with DRS Rules and Procedures.

B. If You or Other Parties **Have Not** Pre-committed To Mediation i.e., you have not signed a sales contract or addendum to the sales contract that contains a mediation clause:

1. Contact your broker or salesperson or the local Association of REALTORS® to request a Seller-Buyer Information Packet. The packet contains everything you will need to initiate mediation.
2. If the Association has an exclusive DRS Service Agreement with a mediation provider, the provider's name, address, telephone number and fee schedule appear on the Seller-Buyer Information Brochure. This is the mediation provider with whom you will be dealing.
3. If the Association has approved more than one mediation provider, the name, address, telephone number and fee schedule of each provider appears on a list prepared by the association. You must select a mediator from those listed. If you need help, call your broker or salesperson. If your dispute is with the broker or salesperson, you can call the local Association of REALTORS®.
4. Complete and sign both the Agreement to Mediate and the Request To Initiate Mediation Transmittal Form. Mail both forms and required attachments to the mediation provider with a cover letter requesting the mediator's help in obtaining the agreement of other parties to mediate the dispute rather than litigating or arbitrating the matter and requesting that the mediator initiate mediation under the DRS Rules and Procedures upon agreement of all parties to mediate the dispute. (The mediator may charge an additional fee for this service.) One copy of both signed forms and attachments should be mailed to the Association at the address shown on the Seller-Buyer Information Brochure and another to your attorney.

The mediation provider will proceed with your request.

(Note: Your broker or salesperson and attorney may be able to assist you in obtaining the agreement of other parties to mediate the dispute.)

APPENDIX O. MEDIATOR EVALUATION

MEDIATOR EVALUATION

Name:

Firm:

What is your primary occupation?

- Real Estate Professional
- Attorney
- Retired Judge
- Mediator
- Other

Number of years experience as a mediator? yrs.

Number of disputes mediated?

Number of real estate disputes mediated.

Percentage of successful mediation conferences. %

Is addendum clause or other agreement to mediate sufficient to
bind parties to mediate disputes? Yes No

Are the Rules and Procedures adequate to ensure efficiency
and fairness? Yes No

Are the time frames reasonable? Yes No

If the answer to any of the three previous questions was "No," please elaborate.

APPENDIX P. EVALUATION OF PARTIES

EVALUATION OF PARTIES

Which of the Following Parties
Were Involved In This Dispute?

What Was Your Involvement?

Buyer	—	Buyer
Seller	—	Seller
Listing Broker	—	Listing Broker
Selling Broker	—	Selling Broker
Builder/Contractor	—	Builder/Contractor
Appraiser	—	Appraiser
Other	—	Other

Were you an Attorney representing an above party? Yes No

What party? () Buyer () Seller () Listing Broker () Selling Broker

Other

Yes No Don't Know

Was the dispute resolved through DRS?

Do you think the outcome was fair?

Do you think the process was fair?

Do you feel DRS is faster and more
efficient than litigation?

Were the costs of DRS reasonable?

Would you recommend the use of DRS
to others?

Would you generally recommend DRS over
litigation?

Do you feel the mediator acted in a fair and unbiased manner? Yes No

If no, please explain.

Do you feel the mediator was knowledgeable about real estate transactions? Yes No

If no, please explain.

What were the damages claimed? \$

What was the percentage of difference between damages claimed and amount of settlement?
%

Comments (attach a separate sheet, if necessary).

Name:

Address:

Phone:

APPENDIX R. ASSOCIATION EXECUTIVE OFFICER EVALUATION

Please complete the following survey when you receive feedback from members of your Association who have participated in DRS mediation.

Name:

Title:

Name of Association:

	Yes	No	Don't Know
Did the parties think the outcome was fair?	_____	_____	_____
Did the parties feel DRS was faster and more efficient than litigation?	_____	_____	_____
Did parties feel the fees/costs were reasonable?	_____	_____	_____
Would the parties generally recommend a DRS program over litigation?	_____	_____	_____
Did the sales contract contain a DRS clause?	_____	_____	_____
Did the parties feel the mediator acted in a fair and unbiased manner?	_____	_____	_____
Did the parties feel the mediator/arbitrator was knowledgeable about real estate transactions?	_____	_____	_____
Would you recommend the use of DRS to other Associations of REALTORS [®] ?	_____	_____	_____

If no, please explain:

Additional Comments:

APPENDIX S
RESPONSES TO FREQUENTLY ASKED QUESTIONS ABOUT MEDIATION

Q: What is mediation?

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

Q: How does mediation differ from arbitration?

A: 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 have a part in working out the terms of the eventual settlement and must agree to the final outcome for it to be enforceable.

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

A: Not if the salesperson presents mediation in a positive, non-threatening way. The salesperson should point out that the mediation clause is similar to other clauses in the contract that are designed to protect interests 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 salesperson 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, and if a settlement isn't reached, parties are free to submit their dispute to arbitration or go to court. Salespeople should stress that mediation is successful 80%-90% of the time.

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

A: 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 to 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.

Q: Who are the mediators?

A: DRS mediators are trained professionals who have absolutely no personal interest in the outcome of the mediation. Under the NAR DRS program, Association's do not handle the mediations but refer the mediations to either one mediation provider or to a list of mediation providers who are acting in their own individual capacity.

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

A: Yes, however, if the local association 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.

Q: What types of disputes can be mediated?

A: 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, e.g., who gets the deposit if the sale falls through; cost of repairs to property when there is a question of possible negligence or failure to disclose a known defect, e.g., a defective roof or termite infestation; claims for damages when there is a charge of possible misrepresentation concerning the condition of the property, e.g., central air conditioning was never connected to the new addition on the house.

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

A: Yes. Disputes that cannot or should not be mediated under the DRS Mediation Rules include: disputes that involve extremely complex legal issues or allegations of criminal misconduct, violations of a states real estate license laws, 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.

Q: Who pays for the mediation?

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

Q: How much does mediation cost?

A: 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. It is important to note that because the fee is usually split among the parties, no party pays an excessive amount.

Q: How long does the whole process take?

A: 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 1 to 4 hours, and a second conference is rarely needed.

Q: Can parties be represented by counsel?

A: 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 must be notified, in advance of the mediation conference, of another party's intention to be represented by counsel.

Q: Can commission disputes between REALTORS® be mediated under DRS?

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

Q: Why should the Association adopt DRS when we already offer mediation services through our Professional Standards Committee.

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

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

A: Yes. Provided all parties in the dispute agree to mediate the dispute under the DRS Rules and Procedures.