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Residential real-estate mediation

AN OVERVIEW OF REAL-ESTATE MEDIATION REQUIREMENTS UNDER THE CALIFORNIA ASSOCIATION OF REALTORS® RESIDENTIAL PURCHASE AGREEMENT

Foreseeing the potential for litigation in real-estate transactions, virtually all contracts drafted by the California Association of REALTORS® contain a requirement for mediation before demanding arbitration or filing a court action. The requirement for mediation is enforced simply by making it a precursor to the potential recovery of attorney fees. No prelitigation mediation – no attorney fees, even if one prevails, making such a provision a potential malpractice trap for the unaware. There are some exceptions to mediation and some misunderstood exceptions, which are a basis to delay mediation but not preclude it.

This article reviews the contractual real estate mediation process required under the California Association of REALTORS® Residential Purchase Agreement ("RPA") and other standard REALTOR® forms. We look at when they apply, how to comply, and the risks of non-compliance.

The California Association of REALTORS® "standard" forms

The California Association of REALTORS® (C.A.R.) forms are ubiquitous in California residential real estate. If you practice in California residential real estate or plan to purchase, sell, or lease residential real estate personally, you absolutely must be familiar with these forms.

C.A.R. has a form for virtually everything related to real estate, from purchases to amendments, disclosures, and the mediation requirements we will discuss. While C.A.R. forms are copyrighted, they are so prevalent (and available for purchase) that even non-REALTORS®, lawyers, real estate professionals, and consumers often use the forms in all aspects of real estate.

C.A.R. has an army of attorneys, REALTOR® committees, subcommittees, including the "Standard Forms Committee," and groups that report to subcommittees. They all meet, usually three times a year at conference events, or more frequently as needed, to update the forms. Whenever there are new laws or new lawsuits in real estate, updates are considered and sometimes required. For these reasons, the RPA has grown from a one-page straightforward contract to a 16-page beast in the most recent December 2022 version.

Two fun facts about REALTOR® forms: 1. At the bottom left corner of each REALTOR® form, the revision date is shown. For example, the most recent RPA as of the date of this article states, "RPA revised 12/22," meaning it is the December 2022 version. Always use the most current version when drafting documents and look for out-of-date documents as a sign of potential copyright violation or haste in drafting. 2. Every REALTOR® form has a name and an abbreviation for reference. For example, the C.A.R. purchase agreement is called the "California Residential Purchase Agreement and Joint Escrow Instructions" and is C.A.R. form RPA. The C.A.R. lease agreement is called the "Residential Lease or Month-to-Month Rental Agreement" and is C.A.R. form RLMM.

Text of the requirement for mediation under C.A.R. form "RPA"

The current 16-page RPA is clear on the mediation requirement and exclusions. The current December 2022 version contains the provision for mediation in paragraph 30(A). It states:

> 30(A). The Parties agree to mediate any dispute or claim arising between them out of this Agreement, or any resulting transaction, before resorting to arbitration or court action. The

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> mediation shall be conducted through the C.A.R. Real Estate Mediation Center for Consumers (www.consumermediation.org) or through any other mediation provider or service mutually agreed to by the Parties. The Parties also agree to mediate any disputes or claims with Agents(s), who, in writing, agree to such mediation prior to, or within a reasonable time after, the dispute or claim is presented to the Agent. Mediation fees, if any, shall be divided equally among the Parties involved, and shall be recoverable under the prevailing party attorney fees clause. If, for any dispute or claim to which this paragraph applies, any Party (i) commences an action without first attempting to resolve the matter through mediation, or (ii) before commencement of an action, refuses to mediate after a request has been made, then that Party shall not be entitled to recover attorney fees, even if they would otherwise be available to that Party in any such action. THIS MEDIATION PROVISION APPLIES WHETHER OR NOT THE ARBITRATION PROVISION IS INITIALED.

(C.A.R., California Residential Purchase Agreement and Joint Escrow Instructions (December 2022 ed.) ¶ 30.)

Summary of the mediation requirement and consequences for failing to comply

Simply put, the RPA states that if a party fails to request or attend mediation before filing a court action or demand for arbitration, they will not be awarded attorney fees or costs, even if they are ultimately the prevailing party in that litigation. The RPA restricts recovery of attorney fees by tying it to the mediation requirement.

As a backdrop, the recovery of attorney fees is not automatic in California litigation, even for the prevailing party. To recover attorney fees the prevailing party must have a contract, statute, or law mandating such recovery. (Code Civ. Proc. § 1033.5, subd. (a)(10).)

These "attorney fees provisions" can be extremely powerful tools in litigation. It is not uncommon for well over six figures in attorney fees and costs to be incurred in disputed real-estate matters taken through a trial or arbitration; thus, the ability to recover attorney fees is often vital to litigants. Likewise, a looming 'threat' of such recovery is often leveraged in negotiating and resolving real-estate disputes.

The RPA contains a contractual provision for recovering attorney fees in paragraph 22. It is tied to the requirement for mediation. The RPA attorney fee provision states:

> 22. ATTORNEY FEES AND COSTS: In any action, proceeding, or arbitration between Buyer and Seller arising out of this Agreement, the prevailing Buyer or Seller shall be entitled to reasonable attorney fees and costs from the non-prevailing Buyer or Seller, except as provided in paragraph 30A.

(C.A.R., California Residential Purchase Agreement and Joint Escrow Instructions (December 2022 ed.) ¶ 22.)

Reading the attorney fee provision (RPA paragraph 22) in conjunction with the mediation provisions (RPA paragraph 30) brings full circle the consequence of non-compliance with mediation, i.e., losing the potential for recovery of attorney fees, even to the prevailing party.

Exceptions to the mediation requirement

Equally important to the requirement for mediation, and often misunderstood, are a few exceptions. The current December 2022 RPA contains exceptions for mediation at paragraphs 30(B) and 31(B) and states:

> 30(B). ADDITIONAL MEDIATION TERMS: (i) Exclusions from this mediation agreement are specified in paragraph 31B; (ii) The obligation to mediate does not preclude the right of either Party to seek a preservation of rights under paragraph 31C; and (iii) Agent's rights and obligations are further specified in paragraph 31D. These terms apply even if the Arbitration of Disputes paragraph is not initialed. (Id. at ¶ 30(B).)
>
> 31(B). EXCLUSIONS: The following matters are excluded from mediation and arbitration: (i) Any matter that is within the jurisdiction of a probate, small claims or bankruptcy court; (ii) an unlawful detainer action; and (iii) a judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage or installment land sale contract as defined in Civil Code § 2985.

(*Id*. at ¶ 31(B).)

As can be seen, under the plain text of the RPA, one is not required to engage in prelitigation mediation for probate, small claims (i.e., $10,000, or less), bankruptcy, unlawful detainer (eviction), foreclosure, or enforcing a deed of trust, mortgage or installment land sale contract (though such contracts may contain their own dispute resolution provisions).

Similarly, but often confused, are an additional set of circumstances in which mediation is not immediately required but is required immediately *after* filing a lawsuit or arbitration claim. Therefore, these are not exceptions at all but rather *deferments*. They include the ability to file a lawsuit to preserve the statute of limitations and/or enable the recording of a notice of pending action (lis pendens) being the most common. The RPA details these additional circumstances in paragraph 31(C) and states as follows:

> 31(C). PRESERVATION OF ACTIONS: The following shall not constitute a waiver nor violation of the mediation and arbitration provisions: (i) the filing of a court action to preserve a statute of limitations; (ii) the filing of a court action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, provided the filing party concurrent with, or immediately after such filing makes a request to the court for a stay of litigation pending any applicable mediation or arbitration

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> proceeding; or (iii) the filing of a mechanic's lien.

(*Id.* at ¶ 31(C).)

While one may file a civil-court action in these instances concurrently with or even before any effort at mediation, it does not waive the requirement for mediation. Instead, it merely postpones mediation until after the filing, with the filing party remaining fully obligated to comply with the mediation requirement, including seeking a stay of litigation.

The mediation requirement applies to the parties, not per se agents or brokers

The mediation requirement in the RPA applies to all parties to the contract. Generally, this is only the buyer(s) and the seller(s), *not* their respective agents. While agency relationships are noted in the RPA (and well beyond the scope of this article), the RPA expressly notes: "Real Estate Agents are not parties to the Agreement between Buyer and Seller." (*Id.* at page 16.)

The RPA allows agents to 'opt in' to a mediation if requested and if they agree. (*Id.* at ¶ 30(A).) However, this provision has no teeth since attorney fees regarding disputes between the buyer or seller and their agent are contained in separate agreements, such as the "Residential Listing Agreement" (C.A.R. form RLA). This C.A.R. agreement is used with sellers, or the "Buyer Representation and Broker Compensation Agreement" (C.A.R. form RLA). It is available to buyers, but is used less frequently than it should be.

While those C.A.R. forms also have a mediation requirement, most brokers will seek to avoid involvement in a dispute between buyer and seller. Thus, a separate demand for mediation, and even a separate mediation, often occurs for claims against agents and their brokers.

How to demand mediation

The RPA is silent as to any specific demand requirements, but C.A.R. has a form for demanding mediation, the "Demand for Mediation," C.A.R. form DM. It outlines a commonsense approach to an unambiguous demand for mediation.

To ensure there is no dispute that a demand for mediation was made, consider including the following information in the demand: reference to the purchase agreement and the mediation requirement; the parties' names; an overview of the dispute; a suggested mediator, mediation provider, or reference to the default C.A.R. Meditation Center as stated in the RPA; contact information for a response; a reasonable "deadline" for a response; and statement to the effect that "A failure to timely respond to this demand may be interpreted as a refusal to mediate."

Delivery of a mediation demand

The RPA is silent as to any specific requirements for delivery of a mediation demand, the timeline for a response, or when the mediation must occur. However, the RPA does discuss and define "Delivery" as it pertains to other aspects of the RPA, such as:

> [P]ersonal receipt of the document by Buyer or Seller or their Authorized Agent. Personal receipt means (i) a Copy of the document, or as applicable, link to the document, is in the possession of the Party or Authorized Agent, regardless of the Delivery method used (i.e., e-mail, text, other), or (ii) an Electronic Copy of the document, or as applicable, link to the document, has been sent to any of the designated electronic delivery addresses specified in the Real Estate Broker Section on page 16.

(C.A.R., California Residential Purchase Agreement and Joint Escrow Instructions (December 2022 ed.) ¶ 25(K).)

"Authorized Agent" means an individual real estate licensee specified in the Real Estate Broker Section of the RPA. (Id. at ¶ 25(E).) On Page 16 of the RPA, there are two sections for the respective buyer's and seller's agents to specify a "Designed Electronic Delivery Address." That address is frequently, but not always, provided by the agent representing the parties using their own email address or some generic 'transaction' email address used by many brokerage firms. Thus, it is possible to email the demand for mediation to a party's agent, but if there is no response, additional delivery effort is likely required before proceeding with the litigation.

Responding to a mediation demand

A response should be an unequivocal agreement to mediate. While a detailed denial, counter demand, or otherwise responsive letter may be appropriate, there should be no ambiguity with the compliance to attend mediation. If counsel or their client wants to dispute the allegations raised, it should be in a separate correspondence or, at least, a new paragraph following the unambiguous agreement to mediate. Outright rejection or denial of the claims, without also agreeing to mediation, may be considered a refusal to mediate.

When the opposing party creates problems

Selecting a mediator and dates for the mediation can often be a contentious process. Sometimes people are busy, and coordination is difficult. Sometimes parties are accused of creating artificial delays. There is no set rule for this debate – common sense and good faith will dictate.

If the opposing party is unresponsive to a request for mediation, it would be wise to make at least one more attempt, and likely a few. For example, suppose the opposing party agrees to mediation but is thereafter being difficult in selecting a mediator and/or scheduling a mediation date. In that case, there needs to be a documented and good-faith attempt to work with the other party. Documentation should include offering numerous alternative dates, suggesting several proposed mediators, and even, perhaps, an offer to allow a mediation service provider to simply 'pick' a mediator and/or date absent an agreement otherwise within a set timeframe.

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When the opposing party's conduct effectively refuses to cooperate, the party initiating the mediation demand may eventually have no choice but to proceed with a lawsuit or arbitration filing. If, after initiating a lawsuit or arbitration, the opposing party then wants to mediate, strong consideration should be given to mediation attendance without waiving any claim that the opposition failed to comply with the mediation requirements before suit was filed.

Conclusion

Mediation is required by the C.A.R. RPA (and most other C.A.R. contracts) prior to filing a lawsuit or demand for arbitration to preserve the potential recovery of attorney fees. The demand for mediation should be made prior to filing a lawsuit or demand for arbitration, with several follow-up efforts absent a response. A party receiving a mediation demand should timely respond their agreement to mediate and document the response.

Failing, refusing, or simply forgetting to demand mediation can substantially cost that party, even if they prevail. Moreover, if a prevailing party failed to comply with the prelitigation mediation requirement and therefore is unable to recover attorney fees and costs, significant leverage in settlement negotiations is also lost. An attorney who forgets mediation demand requirements before filing a lawsuit or arbitration on behalf of their client is open to a malpractice claim and may look foolish to the opposition, and certainly to their client, once discovered.

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