



MEDIATION & ARBITRATION REQUEST PROCESS

(please read thoroughly)

The guidelines in this document are from the Code of Ethics and Arbitration Manual of the National Association of REALTORS® and have been compiled to give the complainant an overview of the process when submitting a request for mediation or arbitration. The Code of Ethics and Arbitration Manual contains complete information relevant to mediation and arbitration procedures, and is available for your review or purchase at the office of the REALTORS® Association of Maui ("RAM") if you wish to review the process in greater detail.

A request for mediation or arbitration may be filed when there is, or has been, some contractual agreement, and there is a real estate related business dispute between a member of the public or a member of the RAM ("complainant") and a member of the RAM ("respondent"). Mediation and arbitration, typically, deal with a monetary issue (alleged violations of the Code of Ethics may not be mediated). Requests for arbitration **must be filed within one hundred eighty (180) days** after the closing of the transaction, if any, or within one hundred eighty (180) days after the facts constituting the arbitrable matter could have been known in the exercise of reasonable diligence, whichever is later. (S.42b.3)

When an ethics complaint and an arbitration request are filed at the same time arising out of the same facts and circumstances, the arbitration hearing shall be held first and the ethics hearing shall be conducted by a different hearing panel after the conclusion of the arbitration hearing. (SoPSP.35)

• MEDIATION PROCESS

The REALTORS® Association of Maui offers mediation in the following situations:

1. REALTOR®/REALTOR® – REALTORS® must be from different firms. REALTORS® may request mediation provided the Principal Broker with whom he or she is associated joins in the mediation request and requests the mediation with the Principal Broker of the other firm;
2. Client/REALTOR® – A client of a REALTOR® may request mediation in a real estate related business dispute with a REALTOR® (principal) arising out of an agency relationship;
3. Customer/REALTOR® – Real estate related business disputes between a REALTOR® (principal) and a customer of the REALTOR® may be mediated by the Association if a written contractual relationship has been created by a REALTOR® between a customer and a client, provided all parties to the dispute agree in writing.

MEDIATION IS OFFERED: Boards are required to offer mediation as a preliminary, voluntary alternative to arbitration. Where mediation is offered prior to review of an arbitration request by the Grievance Committee and one or more of the parties declines or the mediation attempt is unsuccessful, the parties will not again be offered mediation. If a party requests a second opportunity to mediate, a second mediation can be scheduled at the discretion of the Association. (Appendix V to Part Ten)

INITIATION OF A MEDIATION PROCEEDING: Mediation is provided at no cost by the RAM. Mediation is a purely voluntary means of assisting parties in reaching an amicable settlement of their differences in a real estate related business dispute. If a complainant is willing to mediate, the RAM Professional Standards Administrator will contact the respondent to see if he or she is willing to mediate. If both parties (principals) are willing to present facts and communicate, and are interested in resolving the dispute, effective mediation can occur. The mediation can take place only if the principals are present (principals shall be defined as those parties in a capacity to make a binding agreement. Witnesses and counsel are not necessary). Initial information for an Agreement to Mediate form is compiled by the Professional Standards Administrator via telephone; and the form is signed by the parties prior to the mediation.

MEDIATION PROCEEDING: The mediation officer will ask each party to explain the controversy, and parties will be encouraged to find a mutually acceptable settlement. The mediator, a neutral person, has no authority to impose settlement, but may offer a resolution if the parties have reached a point of being unable to negotiate further. A party to a mediation may withdraw from the process at any point prior to reaching an agreement. If the parties agree to a settlement, this agreement will be put into writing and signed voluntarily by all parties, and cannot be the subject of a subsequent arbitration hearing. In the event either of the parties later fails to abide by the terms of the settlement, the matter may not be arbitrated; rather, the unsatisfied party can seek enforcement of the settlement agreement in a court of competent jurisdiction. If mediation is unsuccessful, the complainant may request arbitration. Any offer of settlement by the parties or suggested resolution proposed by the mediation officer which was not accepted shall not be introduced as evidence or considered in any manner should the matter require arbitration.

CONFIDENTIALITY: Complete confidentiality will apply to mediation. The mediator will not be called to testify in any subsequent arbitration or other legal proceeding because the mediator is bound by confidentiality not to disclose anything that occurred during mediation.

• **ARBITRATION PROCESS**

According to Article 17 of the REALTORS[®] Code of Ethics, arbitration is **MANDATORY** between REALTORS[®] of different firms or between a client and a REALTOR[®]. However, Article 17 does not require REALTORS[®] to arbitrate in those circumstances when all parties to the dispute advise the Association in writing that they choose not to arbitrate before the Association. Arbitration is **VOLUNTARY** between REALTORS[®] of the same firm (considered “in-house” as long as the REALTORS[®] belonged to the same firm at the time of the dispute), or between a customer and a REALTOR[®] (“voluntary” means that both parties may chose to use the arbitration facilities, but have to agree in writing to abide by the decision of the panel). The intent of Article 17 is that only disputes arising from facts occurring after each of the parties has become a Member are subject to mandatory arbitration. (Sec. 44)

When an ethics complaint and an arbitration request are filed at the same time arising out of the same facts and circumstances, the arbitration hearing shall be held first and the ethics hearing shall be conducted by a different hearing panel after the conclusion of the arbitration hearing. (*Statements of PSP.35*)

1. **REQUEST AND AGREEMENT TO ARBITRATE FORM.** The person requesting arbitration (complainant) must submit the Request and Agreement to Arbitrate form (refer to form for requirements and restrictions) and the required arbitration filing fee of \$250 to the Professional Standards Administrator of the RAM. The complainant must include a typed statement that gives an overview of the situation in chronological order, indicating the nature of the controversy and the amount in dispute, and include one-sided copies of pertinent, supporting documents. The complainant should be thorough – this is the complainant’s opportunity to state his or her case. (The complainant should retain a copy of all documents for reference.) (S.47)

Pursuant to Section 44 of the Rules, when Arbitration is between the REALTOR[®] principals, the Request and Agreement to Arbitrate form must be signed by the REALTOR[®] principal (Designated REALTOR[®]) since only the REALTOR[®] principal has the authority to disperse funds. REALTOR[®] non-principals who invoke arbitration, and have a vested financial interest in the outcome, have the right to be present throughout the proceedings and to participate but are not considered to be parties. A REALTOR[®] principal may file an arbitration request individually or jointly with any other complainant who has a vested financial interest in the outcome; however, only the REALTOR[®] principal in considered to be a party to the arbitration request.

2. **INITIAL REVIEW OF A REQUEST FOR ARBITRATION BY GRIEVANCE COMMITTEE CHAIRPERSON.** Upon receipt of a request for arbitration, the Grievance Committee Chairperson shall review the arbitration request and any evidence and document inclusions. The Chairperson may assign one or more members of the Grievance Committee to review the request and to make any necessary evaluation. The member(s) may, if necessary, gather additional information on the matters complained of if additional information appears necessary to make a knowledgeable disposition of the arbitration request. The reviewer(s), if appointed, shall complete the assignment promptly and prepare a report and recommendation for the Grievance Committee. (S.42)

3. ARBITRATION REQUEST FORWARDED TO RESPONDENT. A copy of the Arbitration Request, as submitted by the complainant, is forwarded to the respondent for informational purposes only. The Association neither requires nor accepts a response to the arbitration request from the respondent at this time. If the matter is referred to hearing by the Grievance Committee, the respondent will be notified that a response is required.

4. GRIEVANCE COMMITTEE'S REVIEW AND ANALYSIS OF A REQUEST FOR ARBITRATION. The Grievance Committee meets within approximately thirty (30) days following the initial review by the Grievance Committee Chairperson or assigned reviewer. While the Grievance Committee has meetings, it does not hold hearings and does not determine entitlement to awards. The function of the Grievance Committee is to make only such preliminary review and evaluation of the request for arbitration as is required to determine proper disposition of the request for arbitration. In reviewing a request for arbitration, the Grievance Committee considers the following:

- a. Is the request for arbitration acceptable in the form as received by the committee? If not in proper form, the Chairperson may request that the Professional Standards Administrator contact the complainant to advise that the request must be submitted in proper form.

NOTE: If deemed appropriate by the Chairperson, a member of the Grievance Committee (or the RAM Professional Standards Administrator) may be assigned to contact the complainant and to provide procedural assistance to amend the request or resubmit a new request in proper form and with proper content. The Grievance Committee member or Professional Standards Administrator providing such assistance shall ensure that only procedural assistance is provided to the complainant, and that the complainant understands that neither the member nor the Professional Standards Administrator is representing the complainant.

- b. Are all necessary parties named in the request for arbitration? The duty to arbitrate is an obligation of REALTOR® principals. REALTOR® principals include sole proprietors, partners in a partnership, officers or majority shareholders of a corporation, or office managers (including branch office managers) acting on behalf of principals of a real estate firm.
- c. Was the request for arbitration filed within one hundred eighty (180) days after the closing of the transaction, if any, or within one hundred eighty (180) days after the facts constituting the arbitrable matter could have been known in the exercise of reasonable diligence, whichever is later?
- d. Are the parties members in good standing or otherwise entitled to invoke arbitration through the Association's facilities? Were the parties members at the time the facts giving rise to the dispute occurred?
- e. Is litigation pending in connection with the same transaction?

NOTE: No arbitration shall be provided on a matter pending litigation unless the litigation is withdrawn with notice to the Association and request for arbitration, or unless the court refers the matter to the Association for arbitration.

- f. Is there any reason to conclude that the Association would be unable to provide an impartial hearing panel?
- g. If the facts alleged in the request for arbitration were taken as true on their face, is the matter at issue related to a real estate transaction and is it properly arbitrable, i.e., is there some basis on which an award could be based?
- h. If an arbitrable issue exists, are the parties required to arbitrate or is their participation voluntary?
- i. Is the amount in dispute too small or too large for the Association to arbitrate?
- j. Is the matter too legally complex, involving issues that the arbitrators may not be able to address in a knowledgeable way?
- k. Is there a sufficient number of knowledgeable arbitrators available?

5. GRIEVANCE COMMITTEE'S DECISION. Notification of the Grievance Committee's findings will be forwarded to the complainant and the respondent within approximately two (2) weeks of the Grievance Committee meeting.
6. REQUEST FOR ARBITRATION REFERRED TO HEARING. If all of the relevant questions have been considered, and a majority of the Grievance Committee conclude that the matter is properly arbitrable by the Association, the Grievance Committee shall send the request for arbitration to the chairperson of the Professional Standards and Arbitration Committee for arbitration by an arbitration hearing panel. (S.42B)
7. RESPONSE IS REQUIRED. If the Grievance Committee finds the matter properly subject to arbitration, the Professional Standards Administrator shall notify the respondent within approximately two (2) weeks of the Grievance Committee's instructions. (S.47b)

The REALTOR® principal (Designated REALTOR®) will be required to complete a Response and Agreement to Arbitrate form and return the written response, all supporting documents, and a \$250 deposit to the Association within fifteen (15) days from the date of mailing to respondent. (S.47c) (S.20a) The respondent should be thorough – this is the respondent's opportunity to state his or her case.

When Arbitration is between the REALTOR® principals, the Request and Agreement to Arbitrate form must be signed by the REALTOR® principal (Designated REALTOR®) since only the REALTOR® principal has the authority to disperse funds. REALTOR® non-principals who are affiliated with a respondent and have a vested financial interest in the outcome have the right to be present throughout the proceedings and to participate but are not considered to be parties. A REALTOR® principal may respond to a Request for Arbitration individually or jointly with any other respondent who has a vested financial interest in the outcome; however, only the REALTOR® principal is considered to be a party to the arbitration request. (S.44)

8. RESPONSE TO COMPLAINANT. A copy of the Response and Agreement to Arbitrate form and supporting documents will be mailed to the complainant within approximately two (2) weeks of receipt by the Association.

NOTE: Arbitration shall not proceed unless the signed Agreements and deposits have been received. If a party does not sign or make the deposit, the other party or the Association may apply to the Second Circuit Court for an order directing said arbitration. (S.48a&b)

9. CLASSIFICATION OF ARBITRATION REQUEST. If either party to an arbitration request believes that the Grievance Committee has incorrectly classified the issue presented by the request ("mandatory" or "voluntary" arbitration situation), the party has twenty (20) days from the date of receipt of the Grievance Committee's decision to file a written appeal of the Grievance Committee's determination using Form #A-20, Appeal of Grievance Committee Dismissal or Classification of Arbitration Request; however, no additional information may be added or attached to the form. If a party contends that the issue is not arbitrable, they have an opportunity to petition the arbitration hearing panel to dismiss the arbitration request. Only those materials and information which were available to the Grievance Committee when the Committee made its determination will be presented to the Directors (or a panel thereof) and considered with the appeal. The complainant and respondent do not have the right to appear at the hearing before the Directors. In the event of such an appeal, the Grievance Committee must report its written conclusions to the Board of Directors. If the Directors determine that the arbitration request was incorrectly classified, they shall reclassify the request as either "mandatory" or "voluntary" arbitration and refer it to the Secretary for appropriate processing. (S.45d)
10. DISMISSAL OF ARBITRATION REQUEST. If the Grievance committee dismisses the request as being unworthy of further consideration, the decision may be appealed by either of the parties to the Board of Directors (or a panel thereof) within twenty (20) days from the date of the Association's notification of the Grievance Committee's decision. Only those materials which were presented to the Grievance Committee when the committee made its decision will be presented to the Board of Directors and considered with the appeal. The complainant and respondent do not have the right to appear at the appeal hearing before the Directors. In the case of a dismissed arbitration request, any deposit submitted by the complainant shall be returned to the complainant. Dismissal of an arbitration request by an Association of REALTORS® does not prohibit REALTORS® from exercising other remedies, including litigation, that may be available to them. (S.42c&47c/e)

11. ARBITRATION HEARING IS SCHEDULED. If the Grievance Committee refers the arbitration to a Professional Standards Hearing, the complainant and respondent will appear before a hearing panel of the RAM. The date for hearing will be set and all parties will be notified of the date and place of hearing at least twenty-one (21) days in advance of the scheduled hearing date. (S.51b)
12. CONFIDENTIALITY. The parties are reminded that they shall not discuss the case with any member of a hearing panel or the Board of Directors of the RAM prior to the hearing or after the hearing and prior to or after the announcement of the decision. The allegations, findings, and decisions rendered in ethics and arbitration hearings are confidential and should not be reported or published by the Association, any member of a tribunal, or any party under any circumstances except those established in the *Code of Ethics and Arbitration Manual* of the National Association as from time-to-time amended. (SofPSP.19)

Pursuant to Article 14, Standard of Practice 14-2, "REALTORS[®] shall not make any unauthorized disclosure or dissemination of the allegations, findings, or decision developed in connection with an ethics hearing or appeal or in connection with an arbitration hearing or procedural review.
13. SELECTION OF HEARING PANEL. The hearing panel consists of at least three (3), and not more than five (5), panel members of the Professional Standards and Arbitration Committee, and may have one (1) alternate panel member. The parties will receive a list of the potential panel members prior to the hearing and have the right to challenge any of the individuals. No more than one person licensed with any firm, partnership, or corporation may serve on the same tribunal. A person shall automatically be disqualified as a member of a tribunal (hearing panel or Board of Directors) in any case in which the person is:
 - a. related by blood or marriage to either complainant, respondent, or a REALTOR[®] acting as a counsel for either the complainant or respondent;
 - b. is an employer, partner, or employee, or in any way associated in business with either complainant, respondent, or a REALTOR[®] acting as counsel for the complainant or respondent;
 - c. a party to the hearing, or a party or witness in any pending case involving a party to the hearing (S.27a);
 - d. objected to by a party due to factors that would prevent a tribunal member from rendering an impartial, unbiased and knowledgeable decision. If the reason is deemed sufficient to support your challenge, the individual challenged will not be appointed to the panel. (S.27)
14. SETTLEMENT PRIOR TO HEARING PANEL DECISION. The parties to an arbitration may settle the issue between them by agreement at any time. In such event, upon written notification from both parties to the Professional Standards Administrator, the arbitration proceedings shall be terminated and the termination shall be recorded in the file. A portion of each party's deposit may be retained by the Association to cover the costs incurred by the Association up to the point of settlement of the dispute. (S.52)
15. COMPLAINANT UNABLE TO ATTEND HEARING. No arbitration hearing may be held in the absence of the complainant, and no award may be rendered without a hearing on the merits. (S.48a)
16. RESPONDENT UNWILLING TO ATTEND HEARING. Arbitration in the absence of a respondent may take place where permitted by state statute or case law. Where arbitration takes place in a respondent's absence, the respondent is still entitled to be represented by legal counsel. Counsel may make opening and closing statements; call witnesses; cross-examine witnesses called by other parties; and introduce affidavits, documents, and other admissible relevant evidence. Counsel may not testify to events and facts of which counsel has no firsthand knowledge. (S.48a)
17. RIGHT OF COUNSEL TO APPEAR. Every party may be represented by legal counsel (REALTOR[®] counsel may only be used during an ethics hearing). The role of counsel includes the making of opening and closing statements on behalf of the party represented, examining and cross-examining witnesses, and introducing affidavits, documents, and other admissible relevant evidence, but does not include testifying as a witness unless the panel determines such testimony is essential to ensure due process. REALTORS[®] providing such representation are cautioned to avoid the unauthorized practice of law. The Association and all other parties must be given at least fifteen (15) days notice prior to the hearing. In the event parties do not provide this information within the time specified, the panel shall take all steps, including continuance of the matter, if necessary, to guarantee the rights of all parties to representation by counsel. (S.29) Each party is responsible for the expenses of his or her respective counsel. (S.51c)

18. WITNESSES. Every party may have witnesses present at the hearing, and the tribunal may summon its own witnesses. All witnesses will be excused from the hearing after completion of their testimony and cross-examination. Any party who intends to call witnesses at the hearing must provide the Association and all other parties with the names of these witnesses at least fifteen (15) days prior to the hearing. Failure to provide this information within the time specified will constitute a waiver of the right to call those witnesses at the hearing, unless the other party agrees to allow their testimony. In any case where all of the names of witnesses a party intends to call at the hearing have not been provided within the time specified, if the hearing panel believes that the testimony of that witness(es) is essential to ensure due process, their testimony may be permitted provided the other party has the right to request that the hearing be recessed and continued to a date certain, not less than five (5) business days later. (S.30) Each party is responsible for the expenses of expert witnesses he or she calls. (S.51c)
19. HEARING PROCEDURES. At the hearing, every party has the right to present any witnesses, to submit any evidence pertinent to the case, and to cross-examine witnesses. Every party will be given ample opportunity to state their case, uninterrupted. Each party will have an opportunity to question the other party, and may present a closing statement. The hearing panel has the right to interrupt at any time to clarify a point of a party. Before permitting testimony relating to the character or general reputation of anyone, the hearing panel shall satisfy itself that the testimony has a direct bearing on the case at issue. Attorneys may speak on behalf of a party, but the panel still has the right to question a party directly. If your case is referred to a hearing, you will receive written, detailed procedures that are followed during the hearing.

Upon notice by the Secretary, the parties to the dispute shall, with diligence, present to the arbitrators in writing such statements and proof which they deem necessary to support their claims. Proof may be submitted in the form of affidavits or otherwise. The hearing panel of arbitrators may require that statements be verified by affidavits or that accuracy or authenticity of any documents or other papers submitted be verified by affidavit. At the hearing, the arbitrators shall receive any further written statements, documents, or other papers, and shall hear oral testimony. The hearing panel may receive and consider any evidence they deem material and proper, including evidence of accountants and other experts (parties should be aware that evidence submitted at a hearing may not necessarily be accepted into evidence by the hearing panel). (S.51c) It is recommended that all documents be presented prior to the hearing so that all parties have the time to review said documents.

20. TRANSMITTING DEVICES. Cellular phones, two-way radios and other transmitting devices may not be operated during ethics hearings, arbitration hearings, appeal hearings, and procedural review hearings absent specific, advance authorization from the panel chair. (SofPSP.55)
21. "REMOTE" TESTIMONY. The policies and procedures established in the National Association's Code of Ethics and Arbitration Manual contemplate that except in extreme circumstances parties and their witnesses will participate in ethics and arbitration hearings in the physical presence of hearing panels and the respective parties.

"Extreme circumstances" in which parties and witnesses to ethics and arbitration hearings may be permitted to participate in those hearings by teleconference or videoconference at the discretion of the hearing panel chair are defined as circumstances where (1) postponement or rescheduling of the hearing to permit their participation is not feasible and (2) failure to accept such testimony or permit such participation would deny a party a fair hearing.

The costs of "remote" testimony shall be the responsibility of the party requesting the opportunity to participate or offer testimony by teleconference or videoconference.

Counsel is permitted to participate in ethics or arbitration hearings only in the physical presence of hearing panels. (SofPSP.56)

22. BURDENS AND STANDARDS OF PROOF IN ARBITRATION. In any arbitration hearing, the ultimate burden of proving that an arbitration award should be issued to the requesting party is, at all times, on parties requesting arbitration.

The standard of proof on which an arbitration hearing decision is based shall be a "preponderance of the evidence." Preponderance of the evidence shall be defined as evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the facts sought to be proved are more probable than not. (SofPSP.26)

23. RECORDING THE HEARING. All hearings are recorded by the RAM and are considered the official record of the proceeding; however, recording may not be used by either party for anything other than an appeal or rehearing (Associations shall prohibit parties from recording appeals or limited procedural review proceedings). Any party to a hearing has the right to obtain a copy of the Association's official tape recording (prior to the appeal deadline) subject to payment of the Association's duplication costs, and any duplication will be conducted under the supervision of the Association. A party may record the hearing; but if transcribed, a copy must be given to RAM (the proceedings will not be interrupted in the event a party has any recording difficulties). All documents pertaining to the case, as well as any recordings, are destroyed after the procedural review period has passed (30 days). (S.31)
24. THE AWARD. The award of the arbitrators shall be made as soon as possible after the evidence is presented. The award shall be in writing and signed by the arbitrators or a majority of them, shall state only the amount of the award, and, when so signed and served on each of the parties, shall be valid and binding and shall not be subject to review or appeal. Any award rendered may not be greater than the amount in dispute, may not include punitive damages, may not include attorney's fees unless expressly provided for in the agreement giving rise to the dispute, and may not include interest unless called for in the arbitration agreement and permitted by state law. Notwithstanding the foregoing, a party to an arbitration proceeding may appeal to the Board of Directors only with respect to such alleged irregularities occurring in the conduct of the proceeding as may have deprived the party of fundamental "due process." (S.53a)
- After the award has been served upon each of the parties, they have twenty (20) days to request procedural review of the arbitration hearing procedure by the Board of Directors. If no such review is requested, the award becomes final and binding following the twenty (20) day period. However, if procedural review is requested, the award is not considered final and binding until after the Board of Directors (or a panel thereof) has concluded that the hearing was conducted in a manner consistent with the Association's procedures and the parties had been afforded due process. (S.53b)
25. COSTS OF ARBITRATION. All, none, or a portion of the deposits of the parties may be returned to any prevailing or non-prevailing party. The deposits of the parties may be used to cover the costs of arbitration as it may be required. Any portion not used specifically to cover the costs of the arbitration shall go into the general operating funds of the Association of REALTORS®. (S.54)
26. REQUEST FOR PROCEDURAL REVIEW BY DIRECTORS. A written request for procedural review of the arbitration hearing procedures must be filed with the President within twenty (20) days after the award has been served on the parties and must be accompanied by a deposit in the sum of \$250. The request for procedural review should cite the alleged procedural deficiencies or other irregularities the party believes constitute a deprivation of due process (e.g., fraud, coercion, bias, prejudice, evident partiality, etc., on the part of hearing panel members or others acting on behalf of the Association). (S.55 & SofPSP.26) (The party to the hearing requesting a procedural review must contact the RAM Professional Standards Administrator for guidelines to be followed.)
27. ENFORCEMENT OF AWARD. The judgment of any competent court of record in Hawaii, state or federal, may be rendered upon the award. If a member fails to comply with an award, the recipient to whom the award has been rendered by the arbitration panel shall be advised by the Association to seek judicial enforcement and to request reimbursement of legal fees incurred in seeking enforcement. At the discretion of the Board of Directors, the Association may support the request for judicial enforcement in the court, and at its further discretion, the Association may reimburse the individual for costs incurred in seeking such judicial enforcement if the court does not grant reimbursement of legal costs to the plaintiff. (S.56)

These guidelines are to assist you in understanding the process that is followed by the REALTORS® Association of Maui when a Request for Mediation or Arbitration is filed. If you have questions, please call the Professional Standards Administrator at 808-270-4600. (This synopsis is consistent with the policies of the National Association of REALTORS®)
