

THE STEPS TO FILING FOR MEDIATION - (CLAIMANT)

The Santa Clara County Association of REALTORS® offers mediation of disputes with reference to a real estate transaction. If you are involved in a real estate dispute and wish to file for mediation, the following information is provided for your use:

Step 1. Read and complete the following forms: *(Note: All Forms must be clearly hand printed)*

- a. Request for Mediation - Fill out all information. It is critical that you, the claimant, clearly complete each section, including the correct name(s) and contact information for the other (Respondent) party to the dispute. We can not contact the other party without this information. If you don't have this information, your agent can normally help you track it down.
- b. Mediation and Confidentiality Agreement.-. This is the agreement between you and the Responding party, which details the terms and conditions under which the Mediation will be conducted. *Note:* To be completed after the attorney has been assigned
- c. Mediator Disqualification Form: Review the flyer which details the biographical background of our Mediator panel. In Par. B of the disqualification form, check one of the boxes. Either (1) that you have no objection to any of the mediators or (2) you have the right to disqualify any mediator if you feel that any mediator would not provide you a fair hearing. Then, sign the form

Step 2:. Provide a check in the amount of \$100.00 (Made out to SCCAOR) for your half (1/2) of the Administrative Filing Fee. These fees are non-refundable

Step 3: Mail the completed forms, along with your check to: Professional Standards Department, SCCAOR, 1651 N. First Street, San Jose, CA 95112.

Step 4: Once your paperwork is received, a Request for Mediation package will be sent to the Responding Party by the Professional Standards Department staff.

Step 5: Once the Responding party returns their completed documents, the dispute will be assigned to a Mediator who was not disqualified by you or the Responding party. The Mediator will then contact each party to arrange a time for the mediation.

If you have any questions, contact the Professional Standards Department by calling (408) 445-5099 or fax: (408) 445-5082.

REQUEST FOR MEDIATION - COMPLAINANT

Name _____ Spouse or partner: _____

Address _____ City _____ Zip Code _____

Best Phone (day) _____ Email: _____

Address of the property under dispute: _____

Are you the buyer _____ seller _____ Other, specify _____

Name of Other Party _____

Their Address _____

City _____ Zip Code _____ Phone _____

What is the claim you are seeking, including amount of money, if any (attached explanation or any related documents)

Has litigation been filed on this matter? _____ Will your attorney be present at mediation? _____

Name of your Attorney (if any) _____ Company Name _____

Their Address _____

Phone (day) _____ FAX Phone _____

Email Address _____

Note: We strongly suggest that your agent and their broker be present at the mediation.

Name of your Agent or Representative _____

Co. Name _____ Broker's Name: _____

Address _____

Office Phone (day) _____ Email _____

Will your agent be present at mediation? _____ Will your agent's broker be present at the mediation? _____

Dates you are unavailable for mediation (next 6 wks) _____

Signature _____ Date _____

Signature _____ Date _____

Rev. 4/09

WHAT IS MEDIATION?

It is a process in which parties submit their dispute to a third-party neutral mediator who works with them to reach a settlement satisfactory to both parties. Mediators receive a fee from the parties for their services and are rewarded in knowing that their efforts have resulted in an amicable settlement and diverted time and money required by arbitration and litigation.

MEDIATION BENEFITS Rather than having a jury or judge decide the dispute, the parties, with help of the mediator, are directly engaged in the negotiation of the settlement. And, they work to come to a settlement agreeable to all parties. The neutral mediator can view the dispute objectively and can assist the parties to explore alternatives. The cost of settlement will never be less expensive than mediation since resolving the dispute at this earlier stage will avoid expensive legal fees and time. .

HOW DOES IT DIFFER FROM LITIGATION It is less formal and the decision is determined by the parties themselves, to reach their own settlement rather than a judge or jury making the decision. Through caucuses each party is able to better understand the opposing party's view. It enables the parties to explore alternatives and possible compromises.

STAGES OF MEDIATION The purchase contract requires disputes to be mediated prior to taking legal action but the parties must still agree in writing that their dispute will be conducted through mediation. The filing party requests mediation describing the dispute and the amount of money being sought. A \$100 Admin fee must be submitted with the request. The responding party is contacted and may submit a written response and/or counterclaim in addition to their \$100.00 Admin fee. A roster of potential mediators is mailed to each party. The parties have the right to challenge any mediator. The SANTA CLARA COUNTY ASSOCIATION OF REALTORS® (SCCAOR) will appoint a mediator. The filing papers are delivered to the mediator who sets the time, date and place for the mediation conference with each party. Mediator fees are payable in advance of the mediation conference.

APPOINTMENT OF A MEDIATOR (SCCAOR) will appoint a qualified mediator from those persons not disqualified by either of the parties. Should the appointed mediator be unable or unwilling to serve, SCCAOR reserves the right to substitute another mediator.

QUALIFICATION OF A MEDIATOR All mediators in the SCCAOR Mediation program have been trained in mediation techniques and have substantial experience. Prior to accepting an assignment, each mediator must agree that they have no financial interest or a personal relationship with anyone related to the case and agree to withdraw if they feel any circumstances are likely to lead to a presumption of bias or prevent their ability to remain neutral during the mediation.

AUTHORITY OF THE MEDIATOR The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute agreeable to all parties. Whenever necessary, the mediator may obtain expert advice for technical aspects of the dispute provided the parties agree in advance and assume the expense of obtaining such advice.

REPRESENTATION Any party has the right to be represented by any person (or attorney) at the mediation provided the name and addresses are communicated in writing to the mediator at least fifteen (15) days in advance of the mediation. They will not be allowed in the mediation unless the mediator has been notified in advance.

DATE, TIME AND PLACE OF MEDIATION The mediator will set the date, time and place of each mediation session and communicate that information to each of the parties.

PREPARING FOR THE MEDIATION CONFERENCE Understand that you will be presenting your case, documents and other evidence to support your argument. Be prepared to define the problem, explain your solution and how you arrived at your conclusion. Ascertain the strengths and weakness of your case. Have your facts and documents ready to support your claims. Seek to make your proposals reasonable and be willing to be open to the other party's understanding of the case... Determine, in advance, what you might be willing to accept to settle the case. Remember, that your presentation should be about the facts and not a personal attack against the other party.

THE MEDIATION ITSELF The parties should come to the conference prepared and have all documentation with them. If you intend to present documents into evidence, be sure to bring copies for the other party and the mediator. The mediator will describe the procedures and ground rules covering each party's opportunity to talk, the order of presentation, decorum, discussion of unresolved issues, use of breakout caucuses and the confidentiality of the proceedings. The filing party presents their view of the dispute then the other party responds. If joint discussions reach a stage where there is no progress, the mediator will break into private caucuses with each party. The mediator will not advocate for either party but act as "an agent of reality." The mediator will attempt to assist each party to understand the other parties' demands and work toward reducing a disagreement into a workable solution. The mediator will help the parties to remain focused and help prevent escalation of the disagreement. If both parties approach the mediation fairly and honestly, there is an excellent chance that there will be a satisfactory settlement. If parties can not reach an agreement, the mediation will be terminated.

PRIVACY Mediation conferences are private. Only the parties and their preapproved representatives may attend. Other persons may only attend with the permission of the other parties and the mediator.

NO STENOGRAPHIC RECORD There will be no stenographic of the mediation process. The proceeding will not be tape-recorded.

CAUCUSES are meetings in which a mediator talks with the parties individually to discuss the issues. Anything disclosed during private caucuses will not be disclosed to the other party with permission of the disclosing party.

CONFIDENTIALITY The mediator will not divulge information disclosed to the mediator by the parties or witnesses in the course of the mediator. All documents received by the mediator while serving in that capacity are confidential. The mediator will not be compelled to produce such records or to testify in regard to the mediation in any adversarial proceeding or court.

COUNTERCLAIMS are counter demands made by a respondent in his or her favor against a claimant. They are not mere answers or denials of the claimant's allegation and will be resolved during the mediation.

DOCUMENTS Should either party intend to present documents during the mediation, that party should provide enough copies for the mediator and other party.

END OF MEDIATION The mediation will end when: (a) settlement agreement is signed by the parties; (b) the mediator determines that further efforts at mediation are no longer productive; or (c) the party or parties declare(s) in writing that the mediation has ended.

EXPENSES All witness other fees and the party requiring such services will pay expenses. Costs of any proofs or expert advice produced at the request of the mediator will be borne equally by the parties unless they agree otherwise.

EXCLUSION OF LIABILITY Neither the SANTA CLARA COUNTY ASSOCIATION OF REALTORS® nor the mediator will be a necessary party in judicial proceedings relating to the mediation. Neither the SANTA CLARA COUNTY ASSOCIATION OF REALTORS® nor the mediator(s) will be liable to any party for any act or omission in connection with any mediation conducted under these rules.

NEGOTIATION is a process in which disputants communicate their differences to one another and with this knowledge, try to resolve them.

PARTIES are the disputants.

RESPONDENTS are responding parties, also known as the defendants.

SETTLEMENT When the parties reach an agreement, they should reduce the terms in writing. If any or all of the issues remain unresolved, the parties may take legal action against the other party.

MEDIATION AND CONFIDENTIALITY AGREEMENT

The undersigned parties have agreed to settle their dispute regarding a property commonly known as _____ through mediation through the Santa Clara County Association of REALTORS® Mediation Services program. By signature below, parties agrees to the following:

- I. GENERAL:** The mediator is a neutral intermediary who may not, and will not, act as an advocate for or give legal advice to either party. In this regard, if the mediator is an attorney, no attorney-client relationship is created between any party and the mediator. The mediator strongly recommends that parties consult with a qualified real estate attorney and other appropriate advisors concerning their legal, financial, and other rights and obligations before signing this Agreement, commencing the mediation process, during the mediation process, and before any agreements are reached concerning the dispute. Further, each party is strongly advised and urged to have any settlement agreement prepared by or reviewed by that party's own counsel before executing any agreement.
- II. COST OF MEDIATION:** All costs related to the mediation shall be shared equally (50/50) between the parties. If there are two parties, fees will be divided equally, If there are three (3) parties, fees will be split three (3) ways, etc.. The charge for mediation services also includes Mediator's prep time (*including but not limited to file review, research, scheduling the mediation, travel time, and telephone calls*) and is calculated at mediator's hourly rate in ¼ hour increments. Should the prep time and mediation actually exceed three (3) hours at the party's request, any additional time will be payable at the end of the mediation and shared equally between the parties. Should either party be a member of Santa Clara Association of REALTORS®, the mediator fees will be waived.

<u>DESCRIPTION</u>	<u>FEE</u>	<u>EXPLANATION</u>
Admin fee	\$200.00	Non-refundable , Split equally by parties
Mediator's Retainer	\$600.00	Split equally between the parties and paid to the mediator prior to the mediation. This will cover three (3) hours of the mediator time
Mediator fee	\$200 per hr	Should mediation exceed three hours, this fee in ¼ hour increments will split equally by the parties and paid at the end of the mediation
Continuance fee	\$150.00	to be paid by the party requesting the Continuance. Increases to \$250 on 2 nd time
Conference Room	\$100.00	Optional, if room needed (first 3 hours + \$75.00 each additional hour shared equally by the parties) paid in advance

III. SETTLEMENTS CONTINUANCES & CANCELLATIONS: If the dispute is settled between the parties or the mediation cancelled after the retainers have been paid but prior to the mediation being scheduled, the mediator will deduct an amount equal to the time spent in preparation for the mediation, and return any unused retainer. Cancellations or settlement of the dispute after the mediation date has been set will result in a cancellation fee equal to two (2) hours of mediation time, or \$400.00. The remainder will be returned to the parties.

If within ten (10) days prior to the scheduled mediation date, any party experience an emergency and need to continue (*reschedule*) the mediation, a \$150.00 continuance fee must be paid to the Mediator by the party requesting the continuance. A second continuance by the same party will increase to \$250.00 All requests for continuances much be in writing and sent to the mediator. Since re-scheduling of the parties is extremely difficult, continuances are strongly discouraged.

IV. CONFIDENTIALITY: In order for the mediation process to be successful, the parties must feel free to discuss the problem and their position openly and honestly. In order to promote this communication and to facilitate the settlement of the dispute, the participants agree that all statements made and materials used during the course of the dispute resolution process are strictly confidential and cannot be used should there be no settlement and a subsequent legal action is taken.

V. EVIDENCE CODE: The participants agree that the provisions of California Evidence Code Sections 1115-1128 and 703.5 apply to this dispute resolution process.

1119. Except as otherwise provided in this chapter:

- (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other non-criminal proceeding in which, pursuant to law, testimony can be compelled to be given.
- (b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other non-criminal proceeding in which, pursuant to law, testimony can be compelled to be given.
- (c) All communications, negotiations, or settlement discussions by and between participants in the course of mediation or mediation consultation shall remain confidential.

1120.

- (a) Evidence otherwise admissible or subject to discovery outside of mediation or mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.

1121.

- (a) Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is Mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally, in accordance with Section 118.

Section 703.5 states, in part: “No mediator shall be competent to testify in any subsequent civil proceeding as to any statement, conduct, decision or ruling occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could...constitute a crime.”

- IV. EXPLANATION OF EVIDENCE CODE:** Evidence Code Section 1119 and 1122 can be interpreted to mean that anything the parties, mediators, witnesses or other participants say during mediation is confidential and cannot be compelled to be repeated as evidence in court, unless all parties agree. This section also means that all documents and other papers prepared by the parties, mediators, witnesses or other participants for or during the mediation are confidential and cannot be used in court without the consent of all parties. Evidence Code Section 1120 does not prohibit the use in court of documents or other evidence prepared for this reason other than in this mediation.

Section 1121 can be interpreted to mean that a mediator cannot file a report with the court or other adjudicative body about what the mediator thinks should be the result of the mediation. Also the court is not allowed to take into consideration the mediator’s opinion of the case.

Section 703.5 can be interpreted to mean that the mediator cannot testify in court about what the mediator saw, heard, or knows about the mediation proceedings, unless something that the mediator saw, heard, or knows would be a crime.

- V. HOLD HARMLESS:** Parties agree that the mediator has no liability for any act or omission in connection with the mediation and will hold him/her harmless against any loss or expense and defend them against any subsequent action arising out of this mediation.

Note: All staff/representatives and files are protected under California Evidence Code Chapter II.

Note: The parties have the option of making any settlement agreement enforceable if all parties sign it. Parties may also agree that any agreement (written or oral) by law must be shared with the District Attorney, courts, or other entities if requested.

Mediator Bios

GUY R. BERRY

180 Great Oaks Blvd
San Jose, Ca 95119
408-690-2998
Email: guy@guyberry.com

Primary Business: Expert Witness in real estate litigation cases, Legal trainer to the real estate industry and public, real estate sales since 1978

Mediator since: Certified by Florida Superior Court in 1991, Pepperdine Law School In 2005.

Types of Disputes: Any dispute arising out of a real estate transaction for residential house or townhouse, residential income property or land

Experience: More than 50 mediations handled with a 90%+ settlement rate. Licensed since 1978. Many years experience on Grievance (Ethics) committees as wells as presiding officer of numerous Arbitration and Ethics hearings.

CARL SAN MIGUEL, GRI

Highland Properties & Highland Financial
286 E. Hamilton Ave., Suite B
Campbell, CA. 95008
408-374-5211, fax: 408-374-9991

Primary Business: real estate sales, finance, management

Mediator since: 1994

Types of Disputes: mediation and arbitration involving real estate transactions

Experience: Jr. Col. Prof. Real Estate, business purchases, SCCAOR: Arbitration & Professionals Standards Committee, Ethics Instructor, CAR Regional Chair, Past CAR VP Regional Chair and NAR Director, and Past President of Santa Clara County Association of REALTORS®

SUSAN GOLDEN, CRS, GRI

Susan Golden Mediation Services
Golden Group Properties
1540 Parkmoor Avenue, Suite A
San Jose, CA 95128
Office (408)295-4653, Fax (408) 295-4657

Primary Business: Real Estate sales since 1985

Mediator since: 1995

Types of Disputes: Real estate deposit disputes, Real estate non-disclosure disputes, landlord-tenant, neighbor-to-neighbor, Homeowner Association

Over 120 mediations performed

Experience: Santa Clara County Superior Court Mediation Panel; Santa Clara County Small Claims Court; Mediator and Mediation Trainer for Santa Clara County Dispute Resolution Program Services; Hearing Officer & Chair of SCCAOR Professional Standards Committee 1999, 2003, 2004, 2005, 2006; Chair of SCCAOR Grievance Committee, 1995

DOUGLAS TOBIN

Intero Real Estate Services
12900 Saratoga Avenue
Saratoga, CA 95070
408-863-3060 fax:408-863-3099

Primary Business: 25 years in residential real estate

Mediator since: 1991

Types of Disputes: mediation and arbitration involving real estate transactions

Experience: Full-time professional 20 years, in all areas of real estate including, single family residential, income property & exchanges, short sales, REO transactions, foreclosures, bankruptcy and probate and expert witness testimony.

SCCAOR: Hearing Officer, Chairman of Arbitration & Professional Standards Committee, CAR Director, Past CAR Regional Chair and Past President of Santa Clara County Association of REALTORS®.

ANTHONY F. VENTURA

Miller, Morton, Caillat & Nevis
25 Metro Drive, 7th Floor
San Jose, CA 95110
408-292-1765, fax: 408-436-8272

Primary Business: Partner with practice involving real estate, business and insurance litigation.

Mediator since: 1998

Types of Disputes: mediation and non-binding arbitrations involving real estate transactions

Experience: Since 2003, Mr. Ventura has served as a Judge Pro Tempore for the Santa Clara County Superior Court serving as a settlement officer for mandatory settlement conferences. Mr. Ventura also gives seminars regarding various real estate topics for the Santa Clara County Association of Realtors and various escrow companies and brokers.

Rev 04/09