

Litigation versus Alternative Dispute Resolution - Part II

The 2019 OREF forms revisions did not make any major changes⁶ to the alternative dispute resolution (“ADR”) provisions of Sections 37-38.3.

But before addressing the arbitration process, it is critically important for brokers and their clients to understand that mediation is an essential first requirement in the ADR process under the OREF Sale Agreement. Accordingly, I will address that process first, since the vast majority⁷ of disputes are resolved at this stage.

Mediation of Claims. Section 32.8 of the Sale Agreement provides, in part:

...a prevailing party shall not be entitled to any award of attorney fees unless it is first established to the satisfaction of the arbitrator(s) (or judge, if applicable) that the prevailing party offered or agreed in writing to participate in mediation prior to, or promptly upon, the filing for arbitration. (Emphasis added.)

The purpose of this provision is intended to serve as a disincentive to parties who fail to offer or agree to mediate a dispute. Winning in arbitration, but not being entitled to recover prevailing attorney fees, is akin to winning the battle but losing the war. Why? Because attorney fees can reach or exceed the amount in dispute. And even if they don't, they can substantially diminish one's net recovery. Filing a claim for \$50,000 but spending \$25,000 in nonrecoverable attorney fees to win the case results in a 50% net recovery. Not only that, but that result can add insult to injury if the claimant could have settled the case for \$25,000 in mediation, without firing a shot.

“Offered or Agreed to Mediate”. There is no magic to these words, except to say that it must be in writing and be unequivocal.⁸ Although the Sale Agreement does not define how long one side has to respond to the other side's offer to mediate, under the PMAR DRS rules, Respondents are given 20 days to respond to an offer to mediate.⁹ If the 20-day period has expired, however, and a Respondent belatedly agrees to mediate, PMAR calls the Claimant to ask if they are agreeable to re-opening the mediation process.

I submit that taking a hard line by refusing to mediate after the 20-day period has expired, is risky; if you refuse to mediate, despite a Respondent's belated agreement to do so, leaves the issue up to the arbitrator to decide at the end of the hearing. If the Respondent loses, but the arbitrator sees them as a fair and reasonable person, he or she could conclude that notwithstanding their belated agreement to mediate, the losing party should not have to pay the other side's attorney fees.

⁶ On a minor change was made:

⁷ Conservatively, 75% - 80%, per PMAR statistics.

⁸ Be careful! A conditional commitment to mediate (e.g. “I will mediate so long as you use X mediator”, or “so long as it's held at my office”, etc.) could be deemed insufficient.

⁹ What occasionally occurs at PMAR is that a Respondent calls saying they have been out of town and requests a short extension of time to respond. This request is routinely granted.

In such cases, it might be prudent for either the offeror or offeree to ask for an evidentiary hearing with the arbitrator up front, as to whether the agreement to mediate came too late. My guess is most arbitrators would prefer to give the parties an opportunity to mediate, even belatedly, rather than depriving one side of the right to prevailing attorney fees at the outset.

The take-away is, subject to limited exceptions, always offer to mediate; if the other side first offers, always agree, even if it is after the arbitration has been filed. Avoid declaring silence as a “refusal to mediate”, since silence can be equivocal, and you can be sure that if you deem the other side’s silence to be a refusal, they will conjure up reasons as to why it was not.

“Prior to, or Promptly Upon, the Filing for Arbitration”. The reason for this phrase is because it may be necessary for a claimant to immediately file for arbitration. One reason is so the claimant can become entitled to record a [lis pendens](#) on the property in the event of a claim for specific performance.¹⁰ Or, say a buyer wanted to obtain [injunctive relief](#), enjoining (i.e. “preventing”) the seller from taking some severe action, such as turning off water service to a neighbor on a shared well.¹¹ Lastly, quickly filing for arbitration may be necessary to stop the running of the applicable statute of limitations.¹²

The easiest way to preserve one’s right to attorney fees in such cases is to either make the written offer to mediate contemporaneous with the arbitration filing, or simply place the offer in the Statement of Claim filed in arbitration. Then, if the respondent agrees to mediate, the parties can suspend the arbitration process, pending the outcome of the mediation.

Claims Not Subject To Arbitration Under OREF Sale Agreement; Exclusions. Certain claims, by their nature, are not appropriate for mandatory mediation and arbitration.

- **Foreclosures.** Any claim where a recorded security interest is held by a creditor (e.g. trust deed, mortgage, vendor’s interest under a land sale contract) in a debtor’s land, must be filed in court in order to force a sale of the land to satisfy the indebtedness.
- **Evictions.** Any claim against a person in possession of a property that is owned by another must be filed and tried in court. This includes claims against a seller

¹⁰ ORS 93.740 permits a litigant to file a notice on the public record (aka a “lis pendens”) that a certain property is the subject of some form of court action. This step has the effect of clouding the title to the property in dispute, so the seller-respondent cannot sell to someone else or encumber the property with a large loan from a bank that had no notice of the impending litigation. Pursuant to the terms of the dispute resolution section of the OREF Sale Agreement, the parties agree that filing for arbitration shall entitle the claimant to utilize ORS 93.740, even though the claim was not filed in court.

¹¹ It would be nonsensical under these circumstances to make a claim and then wait until the mediation had been completed before filing for arbitration.

¹² The OREF Sale Agreement also provides that the filing in arbitration shall be treated the same as filing in court, for purposes of stopping the running of the statute of limitations.

who holds over after closing, or after expiration of their written rent-back agreement with the purchaser.

- **Realtor® v. Realtor® Disputes.** Matters subject to the professional standards Ethics and Arbitration procedures of the National Association of REALTORS®.
- **Commission Disputes Under Listing Agreement.** This includes Realtor® v. Realtor® commission sharing disputes where the Listing Agreement already contains an ADR clause. (Note: This is not to say there is no mediation/arbitration in commission disputes, but only that they must proceed under the Listing Agreement’s ADR process¹³ and not the OREF Sale Agreement.)
- **Provisional Process.** All claims between Seller and Buyer where a party needs immediate judicial assistance to (a) require the other party to cease doing something or (b) to immediately perform some act, also known as an “injunction”. This was addressed above, and a (true) example is where the buyer was on a shared well with seller, and after closing, seller sought to turn off buyer’s well water from the pump house located on seller’s property. **Note:** The arbitration provider under the Sale Agreement, Arbitration Service of Portland, has now developed procedural rules allowing provisional process, so the need to go to court for immediate relief is diminished.
- **Monetary Claims of \$10,000 or Less.** These disputes must be pursued (if at all) in the Small Claims Court; they may not be undertaken using the mandatory mediation/arbitration provisions under the Sale Agreement. Subject to very limited exceptions¹⁴, attorneys are not permitted to represent parties in Small Claims Court.

This requirement has helped reduce mediations and arbitrations over earnest money disputes or smaller buyer vs. seller non-disclosure claims. The downside, however, is that the judge’s decision is not appealable in Small Claims Court, so the outcomes can depend more upon the court’s opinion of *how the case should turn out*, rather than upon a strict reading of the law.¹⁵

Should The ADR Section of the OREF Sale Agreement Be Changed? Some brokers believe that the residential form should be changed to allow the parties to select one form of dispute resolution or the other, e.g. ADR or court litigation. They point to OREF’s Commercial Sale Agreement which permits this election.

At the time we created the commercial form many years ago, there were some other commercial forms in existence, all of which ignored ADR – the only choice was to go to court. ADR was just evolving. Thus, the thinking at the time was that OREF did not want to introduce a new sale agreement for commercial transactions and “force” ADR on the

¹³ Commission disputes are typically subject to the ADR rules under the Professional Standards Arbitration provisions of the National Association of REALTORS®.

¹⁴ Court permission is required. I obtained it once when the plaintiff/seller was an attorney and brought a small claims court complaint against my client, the listing agent.

¹⁵ For example, there is a risk that a Small Claims Court Judge could split the earnest money, where strictly speaking, that is not an option under the Sale Agreement; either the buyer defaulted and lost their earnest money, or they did not.

parties in lieu of court litigation. In other words, we felt a new commercial form would be more acceptable if the parties had a choice.

Additionally, we believed that sellers and buyers of commercial projects would be more sophisticated, and likely aware of the differences between the two methods of dispute resolution, so they could decide for themselves.

Does this mean we should permit an election for residential transactions? No. First, for all of the reasons discussed above, ADR is far more accepted today in all types of disputes, including commercial.

But when presented with an election in the residential form, home buyers and home sellers (many first timers) would undoubtedly look to their brokers for direction and advice. How would/should a broker respond? (a) "I can't advise you, go ask your attorney." (b) "I had a horrible experience once and prefer XYZ....of course I'm not an attorney so I can't advise you." Saying you're not an attorney but recommending one form of dispute resolution over the other, is, regardless of the disclaimer, is a form of "legal advice". While this is not to say the Oregon State Bar will come after you – but why go down that path at all? Giving clients a choice, inevitably leads to asking the Realtor® what he or she prefers.

And lastly, consider this: The ADR section of the OREF Residential Sale Agreement applies to brokers and their parties. Would you, as a broker, like to have your client sue you in court for \$XXXX, and ask for a jury trial – versus mediation/arbitration? You can be sure your E&O carrier would not be thrilled to find out that they were going to have to provide a defense in court where a runaway jury could decide your fate.

In the final analysis, ADR is by far, the more acceptable form of dispute resolution in almost all real estate disputes, commercial, residential etc. Even though there is no right to appeal the merits of an arbitrator's decision, the advantages of ADR in cost, time, and finality, far outweigh the judicial process.

Conclusion. There was a time when most attorneys believed the only way to resolve disputes was to take them to court and let the judge decide. And if the outcome was not to a party's liking, they could always appeal. In Oregon, that generally means two appellate opportunities, one from the trial court to the Court of Appeals, and from there to the Oregon Supreme Court. It is the appellate courts where judicial opinions are written, thus forming the body of law known as "precedent", or "case law".

Today, courts are jammed with cases, some, such as criminal matters, take precedence over civil cases, due to "speedy trial" rights guaranteed under the state and federal constitutions. County budgets are already stretched thin by public service demands, leaving less than an adequate number of available judges and courtrooms. The result is that civil trials can often be delayed or set over, simply because of a lack of resources.

As noted in Part I, Oregon long ago instituted a mandatory arbitration program, such that most civil cases where the relief sought was limited to a monetary award of \$50,000 or

less, must first go to arbitration. If one of the parties disagrees with the arbitrator's decision, they can retry the case in the court system, and ultimately appeal the decision to the Court of Appeals and Supreme Court.

Additionally, before trying a case before a judge, the parties must certify that they have first tried to mediate the matter through a professional mediator or other resource. So, even in court, the parties are required to first lay down their guns and talk things over.

In the final analysis, "going to court" means that for the bulk of most civil cases, alternative dispute resolution does occur. The only difference between mandatory mediation and arbitration under the OREF Sale Agreement, and that required by the court system, is that the losing party in court has the opportunity to eventually use the appellate process, whereas, the only right of appeal from arbitration is limited not to the arbitrator's decision - which conceivably can be wrong – but to a flaw in the process, such as errors in computation, clerical or typographical mistakes, or undisclosed conflicts by the arbitrator.

As for the number of litigants who file complaints in court, the percentage of them ever seeing the inside of a courtroom is miniscule, e.g. under 1.00% in Multnomah County. In smaller counties, the numbers are certainly higher. But invariably, in court, most parties ultimately tire of the battle, and settle.

The real advantage of the ADR process under the OREF Sale Agreement is that because mediation is a required first step, before large sums of money are spent in arbitration, a good mediator can, after a few hours shuttling back and forth between the parties, usually assist in finding a solution which resolves the matter.

An added advantage in private ADR is that under the mediator and arbitrator selection process that occurs under the Sale Agreement, the parties do have some involvement in who will hear their case.¹⁶ Not so in court, where judges are assigned, and the litigants have no say in who will hear their case.¹⁷

¹⁶ Parties are given a list of names from which each side can strike some and select the remaining names in order of preference. This information is not shared with the other side. Then the arbitration provider can select one or more candidates to hear the matter, depending their commonality on both side's list.

¹⁷ It is for this reason that whenever I've gone to court on real estate matters, I make sure that the judge receives a fully researched memo on the legal issues, be they specific performance, adverse possession, or breach of contract, etc.