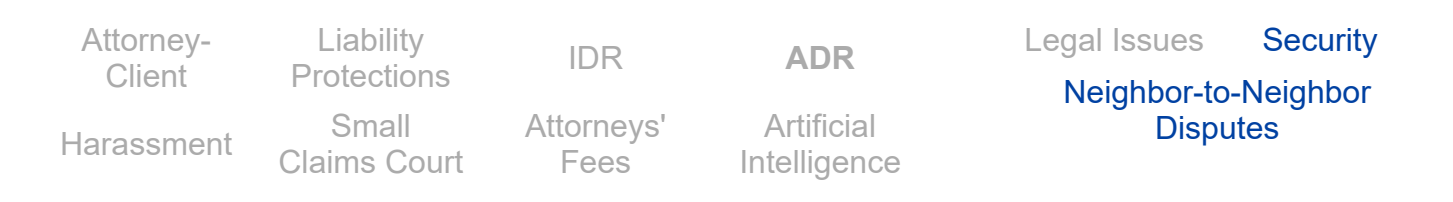


ALTERNATIVE DISPUTE RESOLUTION (ADR)



ADR, IDR, Litigation Comparison Chart

	Internal Dispute Resolution (IDR)	Alternative Dispute Resolution (ADR)		Litigation
		Mediation	Arbitration	
Structure	Informal	Informal	Less informal	Formal
Attorneys	Attorneys are generally not involved.	Attorneys are often involved.	Attorneys are usually involved, and attorneys' fees are allowed.	Parties can represent themselves in court but normally hire lawyers. Attorney's fees are allowed.
Time	IDR is usually held within 30 days.	Mediation within ~90 days.	Arbitration should occur within 90 days, but can take much longer.	The case should go to trial within 12 to 24 months, but can take up to five years, depending on the court's calendar and the parties' vigorous litigation.
Cost	No cost.	It depends on the mediator (~\$200-\$500 per hour) and the length of the mediation. Each side pays half the cost.	It depends on the arbitrator (~\$200-\$500 per hour), the contentiousness of the parties, and the length of the arbitration. Fees and costs can range from \$10,000 to \$40,000 or more per side.	It depends on the parties' aggressiveness, the lawyers' hourly rates, how soon it gets to trial, and whether it is a jury or bench trial. Fees and costs can range from \$15,000 to \$600,000 or more per side.
Misc.	HOA is required to participate if requested by	The dispute may escalate to arbitration or litigation if pre-	Limited right of appeal. The prevailing party may be entitled to attorneys' fees and costs.	An offer of ADR may be required before proceeding.

	the owner, but the owner is not required to participate if requested by the association.	litigation mediation is unsuccessful.		
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Pre-Litigation Alternative Dispute Resolution (ADR)

Neither associations nor their members may file an enforcement action in superior court unless the parties have endeavored to submit their dispute to alternative dispute resolution pursuant to [Civil Code § 5930](#). An "enforcement action" is defined to include a legal proceeding to enforce the Davis-Stirling Act, the Corporations Code, or an association's governing documents. ([Civ. Code § 5925\(b\)](#)) Parties are required to offer alternative dispute resolution ([Civ. Code § 5925\(a\)](#)) if the anticipated litigation is:

- Solely for [declaratory, injunctive relief, or writ relief](#). ([Civ. Code § 5930\(b\)](#))
- For declaratory, injunctive relief, or writ relief in conjunction with monetary damages not in excess of [small claims limits](#). ([Civ. Code § 5930\(b\)](#))
- Before initiating foreclosure on an owner's interest. ([Civ. Code § 5705\(b\)](#))

An offer of ADR is not required:

- In [small claims actions](#). ([Civ. Code § 5930\(c\)](#))
- If preliminary or temporary injunctive relief is necessary. ([Civ. Code § 5950\(a\)\(3\)](#))

Costs of ADR. Costs associated with ADR proceedings are borne by the parties. ([Civ. Code § 5940\(c\)](#))

Initiating a Request for ADR. As required by [Civil Code § 5935](#), to initiate the process for pre-litigation ADR, all parties to the dispute must be served with a Request for Resolution. The Request must include all of the following:

- A brief description of the dispute between the parties.
- A request for alternative dispute resolution.
- A notice that the party receiving the request for resolution is required to respond within 30 days of receipt, or the request will be deemed rejected.
- If the party on whom the request is served is the member, a copy of this article.

Serving a Request for ADR. Service of the Request for Resolution shall be by personal delivery, first-class mail, express mail, facsimile transmission, or other means reasonably calculated to provide the party on whom the request is served actual notice of the request. ([Civ. Code § 5935\(b\)](#)) The Court of Appeal in [Cabrini Villas v. Haghverdian](#) (2003) also allowed for service by certified mail, provided there is a signed return receipt by the person being served.

Deadline to Respond & Complete ADR. A party on whom a Request for Resolution is served has **30 days** following service to accept or reject the request. If a party does not accept the request within that period, the request is deemed rejected by the party. ([Civ. Code § 5935\(c\)](#)) if the party on whom a Request for Resolution is served accepts the request, the parties shall complete the alternative dispute resolution within **90 days** after the party initiating the request receives the acceptance, unless this period is extended by written stipulation signed by both parties. ([Civ. Code § 5940\(a\)](#))

Refusal to Participate. If a party unreasonably refuses to participate in alternative dispute resolution and the case proceeds to court, the court can consider it when it comes to the award of [attorney's fees](#).

[Section 5950](#), subdivision (a), requires a party commencing an action to file a certificate of efforts to resolve the dispute with the initial pleading. The certificate must state that either: "(1) Alternative dispute resolution has been completed in compliance with" [sections 5925 et seq.](#); "(2) One of the other parties to the dispute did not accept the terms offered for alternative dispute resolution"; or "(3) [preliminary or temporary injunctive relief](#) is necessary." ([§ 5950](#)) In the first action, plaintiffs filed a complaint without a certificate. In the second action, plaintiffs filed a certificate that was deemed not to "comply with [Civil Code section 5950](#)." The court reasoned that "to dismiss the first action, and re-file it without making any substantive changes or any additional attempt to engage in ADR was

frivolous.” The court’s determination that the action was frivolous depended upon the conclusion that the plaintiffs did not comply with section 5950. (*Retzloff v. Moulton Parkway HOA* (2017) 14 Cal.App.4th 742, 753)

Discovery. ADR is not an excuse to engage in extensive discovery before litigation. (*Retzloff v. Moulton Parkway HOA*)

Certificate of Compliance. If ADR is unsuccessful and the parties proceed to litigation, the party filing the action must include a certificate stating that one or more of the following conditions are satisfied (*Civ. Code § 5950(a)(3)*):

- ADR has been completed,
- The other party did not accept ADR, or
- *Preliminary or temporary injunctive relief* is necessary.

Demurrer. Failure to file a certificate of compliance is grounds for a demurrer or a motion to strike unless the court finds that dismissal of the action for failure to comply with this article would result in substantial prejudice to one of the parties. (*Civil Code § 5950(b)*)

Attorney's Fees. In *Grossman v. Park Fort Washington Ass'n*, the court changed the starting point for the award of attorney's fees. Normally, any fees incurred before filing a complaint are not awarded. Here, the court concluded that the pre-litigation ADR process mandated by the Davis-Stirling Act is the actual start of litigation. Accordingly, attorney's fees expended in pre-litigation ADR can be awarded at the discretion of the court if the matter proceeds to litigation.

Mediation

Mediation is a voluntary process where parties select a neutral third party (often a retired judge) to act as a facilitator to settle the dispute. The mediator does not decide who is right or wrong. Instead, the mediator talks to each side (usually in separate rooms) and works to eliminate obstacles to settlement. In the end, both parties may be induced to compromise and settle their dispute. No evidence or testimony is required. The mediator has no power to impose a decision on the parties. However, if the parties settle their dispute and sign an agreement, the settlement is enforceable in court.



Benefits of Mediation. The benefits of using mediation to resolve disputes are significant.

- Disputes are resolved quickly. A single hearing is often sufficient to resolve the dispute.
- Mediation is significantly less expensive than litigation. Because litigation involves lawyers and experts, and typically lasts from 12 to 18 months, legal fees on both sides can be extremely high. Moreover, the losing party frequently pays the other party's legal fees in addition to their own.
- Unlike public court proceedings, mediation is confidential unless the parties agree otherwise.
- Mediation is voluntary; a party cannot be forced to accept an outcome he or she does not like. As a result, any party may withdraw at any time.
- Mediation is non-binding until a settlement agreed to by all parties is reached.
- A mediated settlement eliminates the unpredictable nature of litigation.

Confidentiality. Unless consented to by the parties, evidence of anything said or of admissions made, or documents prepared for mediation, is not admissible in evidence in any civil action. The California Supreme Court in *Foxgate HOA v. Bramalea* (2001) held that "confidentiality is essential to effective mediation. In addition, *Rojas v. Superior Court* (2004) held that writings made for, during, and pursuant to mediation are not discoverable. In 2011, the California Supreme Court, in a unanimous decision, confirmed the doctrine of mediation confidentiality. In *Cassel v. Superior Court* (2011) 51 Cal.4th 113, confidentiality is not conferred upon facts or a document just because either is referred to or used at mediation. Documents that would otherwise be discoverable cannot be shielded by mediation.

Confidentiality Disclosure. An attorney representing a person in a mediation or a mediation consultation must provide his or her client, as soon as reasonably possible before the client agrees to participate in the mediation or mediation consultation, with a [printed disclosure](#), containing the confidentiality restrictions related to mediation, and to obtain a printed acknowledgment signed by that client stating that he or she has read and understands the confidentiality restrictions.

No Discovery. Parties to alternative dispute resolution (ADR) sometimes believe they can engage in discovery (records demands, depositions, requests for admissions). The Court of Appeal determined that the association was not required to provide the plaintiffs with documents before ADR. ADR is not an excuse to engage in extensive discovery before litigation. (*Retzlaff v. Moulton Parkway HOA*)

Fees Are Apportioned. The cost of the mediation is equally divided between the parties unless the parties agree otherwise.

Length of Mediation. Typically, cases are resolved after a half day or a full day of mediation.

Lawyers Allowed. Because the parties are trying to work out their differences without incurring significant legal expenses, many choose not to involve lawyers. However, all parties are allowed to bring lawyers into the mediation process if they choose to.

Mediation Brief. Mediation briefs are recommended but not required. A brief is nothing more than a written synopsis of the dispute and why a party believes his/her position is correct. Briefs are generally submitted in advance of the mediation to allow the mediator to become familiar with the dispute.

Settlement. If, during mediation, the parties reach an agreement to settle their differences, a settlement agreement is prepared describing the terms of settlement. The agreement is then signed, and the matter is concluded.

Arbitration (Binding & Nonbinding)

In arbitration, a neutral third party without a jury takes testimony under oath and receives evidence just as a judge would in court, but in an informal setting. The arbitrator then makes a finding or "award" similar to a ruling by a judge.

Nonbinding Arbitration. The parties have the discretion to abide by the arbitrator's decision and retain the right to take the dispute to court. Parties generally do not choose this form of arbitration because most consider it a waste of money. Why go through the time and expense if the parties can ignore the outcome?

Binding Arbitration. The parties waive their right to go to court, and the arbitrator's decision becomes final and binding. The decision is fully enforceable in court.

Advantages. Arbitration tends to be faster and less expensive than litigation in the courts. Discovery is limited, which significantly reduces expenses. Because there is no jury, the hearing is faster and presentation of evidence is less formal. This dispute is confidential since it does not appear in public court records.

Disadvantages. Generally, the decision, even if flawed, cannot be appealed. Under the California Arbitration Act ([Code Civ. Proc. § 1286.2](#)), there are limited exceptions to this rule. The exceptions are:

- The award was procured by corruption, fraud, or other undue means.
- There was corruption involving any of the arbitrators.
- The rights of the party were substantially prejudiced by the misconduct of a neutral arbitrator.

- The



arbitrators exceeded their powers, and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.

- The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy, or by other conduct of the arbitrators contrary to the provisions of this title.
- An arbitrator making the award either: (i) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (ii) was subject to disqualification upon grounds specified in [Section 1281.91](#) but failed upon receipt of a timely demand to disqualify himself or herself as required by that provision.

If an arbitrator makes a legal or factual error in deciding a case, the decision is non-appealable. However, provisions can be added to the arbitration agreement providing a mechanism for review of the decision. (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334)

Unless agreed otherwise, the rules of evidence are relaxed, which means hearsay evidence may be allowed. The fact that discovery is limited may mean that parties are going into the arbitration without a full picture of the strengths and weaknesses of the case.

CC&Rs and Arbitration. Some CC&Rs require disputes between members and the association be resolved by binding arbitration rather than litigation in the courts. The Supreme Court found such provisions enforceable. (*Pinnacle Museum Tower Ass'n v. Pinnacle Market Development*)

Recommendation: As noted above, even when the board is on solid ground and the directors expect to win, there are no guarantees. For example, the hardest things to uncover are the hidden biases of the arbitrator. The arbitrator may be hostile to associations. Also, witnesses and testimony do not always perform as expected. Finally, without pre-hearing discovery, the other side may spring surprise witnesses or documents into the arbitration. If an arbitrator makes a decision that is contrary to the facts and the law, the association cannot appeal the decision. Hence, the only time an association should take a matter into binding arbitration is if the board can afford to lose the case.

Miscellaneous ADR Issues

CC&R ADR Provision. An association's CC&Rs may contain a provision compelling the association and members to use alternative dispute resolution instead of the courts to resolve disputes. Such provisions are enforceable provided they are strictly followed. (*Mansouri v. Superior Court*)

Annual Notice. Associations are required to annually provide members with the following language: "Failure of a member of the association to comply with the alternative dispute resolution requirements of [Section 5930](#) of the Civil Code may result in the loss of the member's right to sue the association or another member of the association regarding enforcement of the governing documents or the applicable law. (Civ. Code § 5965(a))

ASSISTANCE: Associations needing legal assistance can [contact us](#). To stay current with community association issues, subscribe to the [Davis-Stirling Newsletter](#).



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