

By Louise Phipps Senft

The negotiating table

# Turning problems into opportunities

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## MEDIATION IN REAL ESTATE CASES

This article will discuss mediation in noncommercial real estate matters. This subject matter is high on the list of disputes for which mediation is especially fitting for a number of reasons. First of all, the purchase or sale of a residence is usually the biggest and most important contract the average person enters into. In addition, these contracts are typically not of the variety where the parties are prepared to walk away when and if a dispute arises. The seller often is in the process of buying a new residence and absolutely needs the proceeds from the present sale to meet this future contractual obligation. Similarly, the buyer often has terminated a lease or other living arrangement and has made moving and other arrangements to occupy the house or condominium in question, not to mention forming an emotional attachment to the anticipated new home. The buyer wants to buy this residence, and the seller is likewise looking forward to his or her new residence.

Going to court to resolve the dispute in question is usually not desirable. Time is of the essence. The remedies available in court are limited to such things as a declaration that the contract is invalid, ordering compliance with the contract as written, or awarding damages. None of these may be what is most wanted by one or more of the parties.

Working out disputes at the settlement table at the time of closing is uncertain, and if it happens, it tends to be under pressure and along lines of compromise which may not be the best settlement possible for either of the parties. By comparison, the mediation process can meet the time of essence requirement. It can, if necessary, be scheduled on different dates and times as required and usually within a couple days or even hours of the dispute arising. Weekends or evenings can be available as well.

Compared to the limited remedies available in court, the options that can be considered in mediation are almost unlimited. A dispute about the condition of the house, e.g., whether there is a water problem in the basement, can involve guarantees with attached remedies by the seller. Putting money in escrow at settlement to cover this potential problem may not be available where the seller has financial needs for the money. However, money in escrow is certainly something that can be discussed at mediation. Either of these approaches may seem more secure to the parties and can be a mediated outcome and written into a formal agreement reached through the mediation process.

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Other money adjustments can be made in mediation. Provisions can be made for a post settlement inspection by a neutral expert. Temporary living arrangements with rental or reimbursement provisions can be made. There may be a claim to be made against the home inspector or the real estate broker against the Real Estate Commission Guaranty Fund, or in court, with adjustments between the buyer and seller agreed upon depending on the outcome. This is only a partial list of the options that can be considered; and the mediation agreement can be structured to survive, and not be merged into, any closing on the property.

When potential problems surface before the date scheduled for closing, it is a good idea to promptly consider mediation. Mediators believe that people in general want to resolve conflicts and disputes. And mediators believe that people in conflict have the ability to have a productive conversation even about disputed matters. This is true even of people who seem to get some satisfaction out of carrying a grudge. Keeping a conflict or dispute alive carries a price that people sooner or later don't enjoy paying. Resolving a conflict in something as important as a real estate matter can be most welcome to a buyer and a seller. The parties want very much to settle. When it develops in mediation that the parties are trying together to accomplish this, resolution momentum can build.

I have thus far discussed disputes between buyers and sellers. There can also be conflicts among the real estate brokers or sales agents involved. There are mechanisms within Real Estate Professional Associations to handle these. An alternative might be mediation before a non-Realtor neutral. A dispute sometimes arises over entitlement to the sales commission, i.e., which licensee was the "procuring cause" of a sale and therefore entitled to the sales commission. People in everyday life almost never on their own settle conflicts on a legal basis. They look to see what seems fair or workable and usually don't look at a state statute or court decision for precedence or guidance; they often have an intuitive sense of what is fair based on their life expertise.

There are legal and practice standards on which a decision can be made as to who was the "procuring cause" of a sale. But in real life, a sale may happen not just because of the efforts of one real estate broker or salesperson. In a non technical sense, there can be concurring causes for a sale to have happened. For instance when more than one person might have had a role in the sale, the sharing of a commission might seem more fair or workable than a decision awarding the commission to only one of two parties each having some justifiable claim to it.

In relation to what is at stake in a residential real estate dispute, one risks little other than nominal time and expense to try mediation. The potential benefit is substantial. Considering mediation in any conflict makes sense.

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