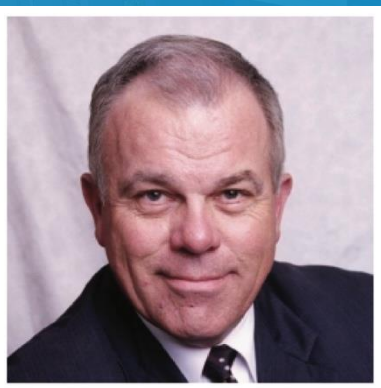
Mediating Pre-Litigation Real Estate Disputes

By Doug Barker



A growing variety of real estate disputes are subject to mediation before litigation is initiated. Among the kinds of disputes that require (or are most appropriate for) pre-litigation mediation are the following:

- **Disputes between the Homeowners Associations (HOAs) and their respective members. See footnote 1.**

- **Disputes arising out of real estate transactions, including:**

  - Alleged breaches of the California Association of Realtors (CAR) form Purchase Agreement.
  - Alleged failures to disclose latent defects in real property which is the subject of a sale. See Civil Code section 1102.
  - Commission disputes between an agent/broker and his/her client
  - A prospective buyer seeking return of a deposit in a failed transaction.
  - A prospective seller seeking specific performance in a failed transaction.
  - A buyer seeking rescission.
  - An action for partition (which does not require pre-litigation mediation, but is a sort of dispute best referred to mediation).
  - Encroachment (also best resolved in mediation rather than by a trier-of-fact that cannot develop the creative solutions available at mediation).
  - See footnote 2.

Many lawyers feel that pre-litigation mediations are much too often unsuccessful, and therefore a waste of time and money. This article addresses strategies and approaches that will significantly enhance chances that a pre-litigation real estate mediation will end in settlement or, at worst, information exchanges that will often result in settlement shortly following the mediation session.

Pre-mediation, the lawyers should discuss each party's motivation for attending mediation and, perhaps, involve the mediator in that discussion.

Real estate disputes are very often burdened by emotional overlays. In HOA cases, the Board of Directors has become disgusted with the member, and vice versa. If the issue is a refusal to proceed with a transaction or a failure to disclose allegedly known latent defects (i.e., fraud), one or both of the parties are typically angry, self-righteous, and convinced they are going to prevail at trial. Often, such parties attend mediation committed to doing nothing more than "checking the required mediation box." If one or both parties attend mediation without any willingness to compromise, settlement is unlikely, and the mediation process will merely cause the parties to become even more disgusted with one another than they were before the mediation.

Before mediation, lawyers should discuss with one another the willingness of each party to compromise and find a settlement solution so that no one is surprised and disappointed at the mediation itself. If a lawyer is representing an unbending client, he/she should consider a pre-mediation telephone conversation with the mediator to discuss personality issues and other barriers to settlement. Indeed, it may be appropriate to arrange a telephone conversation involving both/all lawyers and the mediator to address impediments to settlement so that the lawyers and mediator can collaborate on a strategy for overcoming those barriers before or at the mediation, and open the door to addressing issues on their merits (rather than being shut down by emotion and stubbornness).

Parties rarely settle based on unsubstantiated representations of alleged facts.

The primary difference between a pre-litigation mediation and a mediation convened, say, 60 days before trial is that no formal discovery has been conducted before a pre-litigation mediation. Therefore, unless, pre-mediation, the parties are willing to freely exchange documents (including photographs), witness identities, and, in certain cases, expert reports, the chances of settlement at mediation will be low. Lawyers want to give their clients sound advice, including meaningful evaluations of their clients' case. A lawyer will do the best he/she can to evaluate the case before the early mediation, but that evaluation will be substantially (if not exclusively) based on what the client has told and shown the lawyer; which might be quite different from what the other side has to offer. If each side is willing to share, pre-mediation, the essence of its case, each lawyer is then able to comprehensively weigh that provided information against the claims being made.

Not sharing information until the day of mediation will have benefit, too, but the risk is that the late-shared information will be too much for the opposing client (and lawyer) to process and "fact-check" during the mediation session itself. Waiting until the mediation to share information may promote eventual settlement, but chances are excellent that late sharing will be too much for the opposition to process "on the spot" in mediation and therefore change its position within the mediation session.

Finally, at the risk of stating the obvious, a total unwillingness to share information with the other side (whether before or during mediation) essentially guarantees that there will be no settlement at mediation. Parties will not be motivated to compromise if presented with nothing more than unsubstantiated promises of what the evidence will eventually reveal.

Consider a joint session.

Over time, joint sessions (i.e., all lawyers and parties in the same room to present their evidence and arguments) have fallen into disfavor among lawyers. Many lawyers believe a joint session will result in the parties becoming emotional, and that the joint session will, therefore, be counter-productive. However, that concern is often worth the risk because joint sessions essentially replace depositions and other discovery in which no formal discovery has been accomplished. They also provide the following benefits:

- The lawyers are able to meet the opposing parties and, similar to depositions, get a sense of how each party is going to be perceived by a jury. In the minds of many lawyers, witness evaluations are critical components of a meaningful case evaluation. In a joint session, a given party may not choose speak (deferring 100% to his/her lawyer to present the case), but, nonetheless, such parties can be evaluated subjectively from demeanor and general body language.

- When the lawyers lay out their cases, face-to-face, there is nothing lost in translation. "Shuttle diplomacy" (i.e., the parties remain separated and the mediator shuttles from one room to the next) is a poor substitute for the lawyers (and, perhaps, the parties, if they are willing) sharing their positions (evidence and arguments) directly with one another.

- Even if a given party chooses not to speak during a joint session, that party nonetheless feels the satisfaction of knowing that his/her position has been heard by the opposition party, the opposition party's lawyer, and the mediator. The party, knowing that he/she has been "heard," substitutes for needing his/her "day in court."

- In HOA cases, the parties will continue to live in the same community after the mediation (and litigation) is over. A controlled joint session environment provides an

excellent opportunity for parties to sit in the same room and safely discuss their perspectives and differences. A collateral benefit of a joint session might be to begin the process of repairing relationships. Also, it is probably of value for each party (board members and homeowner) to know that they have "ownership" in developing the eventual settlement.

Ground rules for a successful joint session.

For any joint session to be successful (where "successful" equals an effective and virtually unemotional exchange of anticipated evidence and arguments), there need to be ground rules which include the following:

- When one side has the floor, the other side cannot interrupt or demonstrate non-verbal signs of disagreement or disrespect.

- When the other side is speaking, it is providing the listeners with a gift—that of knowledge—which the speaker has no obligation to give. That gift should be fully recognized and appreciated because "knowledge is power."

- Parties need to be reminded that there is a difference between understanding and agreeing. The purpose of a joint session is to gain an understanding of the other party's position with no requirement that the listener agree with that position Litigation is fundamentally adversarial. However, mediation is one time when the parties work collaboratively because neither party can get what it wants—resolution—without the participation and consent of the other side. Therefore, it is counter-productive and self-sabotaging to disparage, humiliate, or disrespect the opposition party. Instead, civility and persuasion should be the mentality and approach.

- The mediator must set the proper tone for the mediation and enforce the ground rules. In a strictly controlled joint session, everyone who wishes to speak will have his/her opportunity. During that process, the parties will learn of the other side's position, and, because of that learning, they will make the best available choices with respect to resolution.

Not every case is suitable for a joint session, especially if one or both the parties would be unable to respect the purpose of a joint session and comply with the ground rules above. However, in the right case, joint sessions can be very valuable (and efficient, as compared to "shuttle diplomacy") for enabling parties and lawyers to meaningfully juxtapose their evidence and arguments against those of the other side. The result is a greater chance settlement will be achieved at mediation.

Focus your client on the consequences of not settling the case.

Often, real estate disputes are handled by lawyers on an hourly (rather than contingency) basis. At the time a pre-litigation is convened, little financial "pain" has been felt by the parties because no discovery has been done and, often, experts have not been retained. Accordingly, the parties are self-righteous and committed to achieving their perception of "justice" at the pre-suit mediation. The parties thus have little concept of what awaits them if the dispute proceeds through the litigation process.

If/when at mediation it seems likely that a party is not interested in compromising further, someone (that party's lawyer and/or the mediator) owes it to the party to apprise him/her of the costs and risks of going forward, including:

- Some estimate of what attorneys' fees will likely accrue though litigation until there is a verdict, ruling, or award.
- Some estimate of how much money should be budgeted for "ordinary" expenses, particularly reporter's fees.
    - Some lawyers assume $1,000 per deposition in reporter's fees. That is an estimate, subject to the length of the deposition and the number of exhibits attached to the transcript.
- Some estimate of how much should be budgeted for expert expenses.
- A discussion of how dependent the outcome of the case is going to be on witnesses who are not allied with or controlled by the party. Outcomes often depend upon the testimony of such witnesses.
- The time it will take to get through adjudication of the case. Parties watch TV where fictional cases are accepted by the lawyers and, very shortly thereafter, the trials commence. Consequently, parties mistakenly expect cases to move swiftly through the litigation process to trial.
- "Creative solutions" (i.e., solutions that involve actions or behaviors instead of or in addition to the payment of money) are more often relevant in early mediations than in negotiations occurring a few weeks before trial.
- The time commitments and emotional toll of being in litigation.
- The risk that the trier of fact will not agree with the party's perspective.

- Depending upon the case, there could be coverage issues with involved insurance carriers.

- In terms of the "prevailing party" being entitled to attorneys' fees and costs, the risks that (1) the other side might be the prevailing party, or (2) even if the self-righteous party prevails, the court may not award all of the attorneys' fees and costs requested by the party.

- Will the prevailing party through litigation be able to collect on the judgment?

The wise lawyer does not discuss such issues as a means of intimidating or terrorizing his/her own client. Rather, discussion of the issues above is necessary to achieve "informed consent" from the client to walk away from whatever opportunity to settle is available at the mediation. Such disclosures also protect the lawyer from ever having to hear, "You never told me that," or "I didn't know this would cost so much," or "I never knew that it would take so long to get to trial."

Use of a statutory offer (CCP section 998) to redefine "prevailing party."

Even if the dispute is not resolved at the pre-litigation mediation, enough should be learned that, as soon as litigation is filed, each party could serve on the other a Code of Civil Procedure section 998 Statutory Offer. The best practice is to serve the 998 Statutory Offer as a straight pass-through to the party, with "fees and costs to be determined by the court." That way, the party receiving the 998 cannot claim that, as of the date of the 998, fees and costs exceeded the amount of the 998.

The specter of failing to better a 998 should cause a party to reconsider proceeding with the litigation; and the existence of a 998 may shift determination of the "prevailing party" and, along with it, the recoverability of attorneys' fees and costs.

Conclusion

For a pre-litigation mediation to be successful, both/all parties must be willing to reveal all the evidence and arguments which they believe to support their case. If both/all parties are willing "to put all their cards on the table," then, contrary to the old saying "reasonable minds can differ," there is an excellent chance that "reasonable minds won't differ," and the case should resolve.

Footnote 1

Civil Code, Article 3, Section 5930(a) – "A [homeowners] association or a member may not file an enforcement action in the superior court unless the parties have endeavored to submit their dispute to alternative dispute resolution pursuant to this article."

Footnote 2

CALIFORNIA REAL ESTATE PURCHASE AGREEMENT AND JOINT ESCROW INSTRUCTIONS

26. DISPUTE RESOLUTION:

A. **MEDIATION:** Buyer and Seller agree to mediate any dispute or claim arising between them out of this Agreement, or any resulting transaction, before resorting to arbitration or court action. Buyer and Seller also agree to mediate any disputes or claims with Broker(s) who, in writing, agree to such mediation prior to, or within a reasonable time after, the dispute or claim is presented to the Broker. Mediation fees, if any, shall be divided equally among the parties involved. If, for any dispute or claim to which this paragraph applies, any party (i) commences an action without first attempting to resolve the matter through mediation, or (ii) before commencement of the action, refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney fees, even if they would otherwise be available to that party in any such action. This mediation provision applies whether or not the arbitration provision is initialed. [*Paragraph then references Section 26(C) regarding exclusions to this mediation requirement.*]