



## **Why Mediation is the First Alternative in Real Estate Disputes**

**By Michael L. Lapin, Esq.**

The moral cynic may quip, "No good deed goes unpunished." A similar attitude may arise when the real estate transaction goes sour. A commission dispute, an alleged breach of lease, use clause infringement, the transfer of property triggering an acceleration clause, a contested allocation of common area expenses, a title insurance claim for an unrecorded easement. You get the idea.

The recorded deed, the executed lease, the funded loan. Deal over? Not always. Disappointing results, unanticipated problems, frustrated expectations, all frequently lead to finger pointing.

"Sue the bastard!" This is usually the first impulse of the aggrieved. The threat of litigation certainly underscores the party's belief in the correctness of his position, as well as his willingness to bring mighty forces to bear. Kind of like the old war ship coming about to deliver a broadside from its iron cannons.

But maybe there is a better way; a way that is less costly, fully confidential, and in control of the parties. A way that may allow the parties to resolve a dispute and to continue living with each other during the life of the executed contract (lease, loan, etc.).

### **MEDIATION - A PROCESS AND A METHOD.**

By introducing into the attempt to resolve a dispute, a "neutral" third-party (mediator) who has no decision-making authority but who can facilitate exchanges of information, insights, and offers of compromise, some of the existing antagonism may be dissipated. With much of the face-to-face posturing eliminated through the use of private caucuses and transmittal of information by the mediator between the parties as authorized by them, mediation can focus on the elements of the dispute, and its resolution is less likely to be hindered by the kind of pressures seen in trials or arbitration proceedings.

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Most importantly, mediation is fully consensual. A mediation proceeding can last only as long as the parties are willing for it to last. The mediation belongs to the parties, not to a judge or jury, not to an arbitrator, not to the lawyers and not to the mediator. Mediation does not require the parties to waive their right to litigate or arbitrate should the mediation not result in a resolution of their dispute. Even in such instances, the mediation process usually results in a narrowing of issues, and frequently the resolution of one or more issues, leaving those remaining unresolved for decision by a court or arbitrator. Thus, even an incomplete mediation can result in cost savings and time efficiency.

In mediation, confidentiality is assured by statute. For example, California Evidence Code, section 1119, provides that the mediator may not testify in court as to what was said during a mediation, nor may the parties seek to have the mediator testify. In addition, confidentiality protection is usually underscored by a written contract among the parties, their lawyers and the mediator prior to start of the mediation proceeding.



## **MEDIATION – THE PRACTICAL CHOICE FOR REAL ESTATE.**

Increasingly, mediation is becoming the process of choice. Recent data shows that more than 60% of Fortune 500 corporations have pledged to use non-litigious dispute resolution process, primarily mediation.

Why is mediation especially suited to real estate professionals? Veterans of commercial real estate know that you wind up meeting and dealing with many of the same people over and over again through the years. There is an element of interdependency in the real estate business. The developers need the leasing agents, the leasing agents need the tenants, the tenants need the developments, the developments need the lenders, the lenders need the mortgage brokers and bankers, they all need financing, and sellers need buyers and buyers need product, and they all need clear title, title insurance and escrow services.

Yesterday's pizza shop is today's national restaurant. Yesterday's local title and escrow office is today's national title conglomerate and industry leader. The broker you sued years ago is today in control of the adjacent land that is indispensable to the financial viability of your current project. The tenant that you sued to relocate to an obscure corner of your mall some years ago, is today in control of the major department store chain that your lender has said is essential to consummating the takeout loan on your new shopping center development.

Burning bridges is counterproductive. In the real estate industry it can be suicide. There is probably no quicker way to ignite that bridge than to file a lawsuit. Now, when all is said and done, there will be times when that lawsuit has to be filed. As a lawyer, I know that such times arise. But as a long-time real estate player and a mediator, I believe that there is a lot I can do to push such times back; and with mediation, hopefully never have to arrive at that place.

## **Finally, there are some other reasons that mediation should be the process of choice.**

- First, mediation can enable the parties to take the high road. The abrasiveness that can characterize legal combat in the courtroom can wear down human dignity.
- Second, public exposure of mistakes and errors is not, absence fraud, necessarily in the public interest. The creation of a public record that permanently documents our weaker moments seems a bit excessive.
- Also, by being away from the public glare of the courtroom, away from prolonged depositions and excruciating interrogatories, and in a private and confidential setting with a mediator, parties are more likely to find it easier to examine their own conduct, evaluate the benefits of constructive compromise, and hopefully repair and maintain relationships.
- In short, with the help of a good mediator, the parties are more likely to open their minds and maybe even change their attitudes. They will have a better chance of getting past the underlying circumstances that may have contributed to the dispute in the first place.



- The private, confidential setting in the presence of an effective, engaged mediator, whose only job, as difficult as it may be from case to case, is to distill relevance from a sea of emotion and confrontation and to impress on the parties the importance of that relevance, is a process that provides the best chance of helping the parties' problems go away with far greater speed, far less cost and, as in most successful mediations, with relationships intact.

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Michael L. Lapin, a member of the bars of California and Illinois for over thirty-five years, is a full-time mediator, serving the real estate and business communities. He has owned/managed as general partner 1.5 million square feet of retail/commercial property, overseeing development, leasing, financial and operational management. He is also a licensed real estate broker.

A twelve-year member of the Orange County Airport Commission (twice chairman) and three-year member of the Orange County Public Finance Advisory Committee (chairman), he was retained by the County of Orange during 1999-2000 in a consultant capacity of Program Manager of the Orange County MCAS El Toro Master Development Program, administering a \$10 million annual budget.

In the course of a professional career spanning the practice of law, real estate development and public service, Mr. Lapin has negotiated and resolved hundreds of disputes. More information about him may be found at [www.lapinmediation.com](http://www.lapinmediation.com) or by emailing him directly at: [mlapin@lapinmediation.com](mailto:mlapin@lapinmediation.com)