



## The Lawyer and The Mediation Process

By Michael L. Lapin, Esq.

To some, this title may seem to be an oxymoron. After all, wasn't mediation developed as an *alternative* to the adversary system? Legal combat induces stress. Mediation suggests something "softer" - like "meditation." As Justice Warren E. Burger put it:

*"The existing judicial system is too costly; too painful,  
too destructive, too inefficient for a truly civilized people. . ."*

Mediation is economical, encouraging, constructive and efficient. So, you ask, why undermine all these advantages by allowing the lawyers to be part of the mediation process?

### DISPUTES USUALLY COME WITH LAWYERS INVOLVED

First of all, an attorney may already be of record if the dispute has reached the litigation arena. In the court-ordered mediation, the mediator takes the party with the lawyer already attached at the hip. Also, if the mediation is triggered by a contractual clause mandating mediation as a precondition to the filing of a lawsuit, the lawyer is usually already part of the remedial process. In fact, the real world scenario is that many, if not most, mediations are initiated by lawyers. After an assessment of the client's case, and in particular the relationship of the parties, the lawyer may very well decide to embrace the advantages of mediation. The courtroom warriors are not necessarily always litigation-obsessed.

The court-ordered mediation can be tricky for the mediator. Usually mediation is a consensual procedure. Where the parties to a mediation are present voluntarily, the mediation has the best chance of success. The court-ordered mediation presents the opposite scenario. The parties and their attorneys are present only because the court has ordered them to be there. In addition, the court will frequently set a mediation deadline that forces a mediation to take place before the lawyers have taken enough discovery to know what their case (or defense) is really worth. While these are not always fatal impediments to a settlement, they tend to dampen the effectiveness of the mediation process.

⚡ The viewpoint that the lawyer profits on the conflicts of his client, and is really not motivated to see them go away before the processes of demand, argument, filing of complaint, answer, motions, discovery, trial, and perhaps even appeal have been entered into the time sheets is cynical and not reflective of the moral bearing of most lawyers. ⚡

So, does the lawyer's presence enhance the mediation process? Is the lawyer really useful in assisting the mediator and the parties to work toward a compromise? Is the lawyer so focused on advocacy and legal posturing that the mediation is hopelessly doomed? How might this fit into the mediation of a real estate dispute?

### AN UNFORTUNATE TALE

Some years ago, a developer friend had an option to acquire about 65 acres of raw land. The parcel was adjacent to a lake as well as to several established single-family detached home communities. The developer planned to build condominium units and supporting amenities on the site.



One of the homeowners in the area did not take kindly to this plan, and became very active in organizing opposition to the project. He was very successful in generating passionate opposition as well as garnering publicity and wide-spread support against the proposed project. An associate of the developer approached the leader of the opposition group and held a number of meetings with him to identify the areas of concern of the surrounding home owners. It was a slow and difficult process, but over a period of time the points of contention were identified. The associate and the homeowners' leader eventually were able to devise a comprehensive plan that met each of the homeowners' concerns yet left the contemplated project financially feasible.

The associate took the painstakingly fabricated agreement to the developer and explained its details, advantages and disadvantages. The developer was enraged that any group thought it could interfere with his right to build out this property as he wanted. He had been advised by his lawyers that the land was already zoned residential and that the density of the project was within allowable limits. Why should he make any changes in his development plans or extend himself to cooperate with those opposed to his plan? In effect he told his associate to tell the homeowners to take a hike.

Well, they hiked all right. They hiked right over to the meeting of the city's planning commission on the night it was to review the project for necessary permits. The administration hall was filled to overflowing with residents objecting to the plan. The opposition was organized, vocal and demonstrative. Given the publicity over this project and the political pressure applied by the homeowners in the weeks before the planning commission meeting, the developer's application was denied. The developer was never thereafter able to do anything with the property and eventually relinquished his option.

A sad story and an expensive lesson. Admittedly this episode took place many years ago, before organized community opposition to real estate development became a way of life. However, the potential and unnecessary loss of a project (or a lawsuit, or a relationship) due to the refusal to compromise is certainly still a recurring fact of life.

### **LAWYERS UNDERSTAND THE RISKS**

Now, who knows better than the lawyer what the impact of a failed effort to compromise might be? Who knows better than the lawyer what the costs and consequences associated with a stubborn denial of reality can be? The viewpoint that the lawyer profits on the conflicts of his client, and is really not motivated to see them go away before the processes of demand, argument, filing of complaint, answer, motions, discovery, trial, and perhaps even appeal have been entered into the time sheets is cynical and not reflective of the moral bearing of most lawyers.

The service of a lawyer arises to no higher level than the recommendation to a client that a conflict be mediated before resorting to the assertion of constitutional rights or to the institution of litigation. A client is entitled to the partisan advocacy of his lawyer. Yet the lawyer knows that in many instances the strength of the client's case and likelihood of prevailing is offset by the costs and uncertainties of a trial. By bringing in the experienced mediator, the lawyer is providing the client a valuable reality check by an impartial third person without appearing to be forgoing his duty to represent that client and be his advocate.



The advantages of having used mediation in the scenario described above are readily apparent. In fact, the developer's associate functioned as a kind of mediator when he met with the homeowners' representative and worked out an agreement that would have let the project proceed with little real cost to the developer.

Had that associate been trained as a mediator he might have been able to persuade the developer from the outset that the compromise in this situation was worth a little give in order to get a lot. Also, had the matter been in litigation, the lawyers for each side would likely have similarly worked on their clients to accept a compromise that really afforded both sides meaningful gains.

### **THE LAWYERS ROLE**

So the moral of the story is that the lawyer can and should be an important part of the mediation process. The conscientious lawyer can influence his client to consider mediation when a dispute arises, or ideally in advance by the policy of using a mediation clause in the controlling documents of each transaction. The lawyer can retain the posture of an advocate for his client, while letting the mediator deal with the development of issues of compromise. In addition, through the judicious selection of a mediator experienced in the area of the dispute (such as commercial real estate in the cited example) the lawyer will be saving much time and cost for his client because the parties will not have to take the time to educate a court on the issues and practices common to that particular industry. By incorporating mediation into the resolution process, the lawyer can reduce the stress endemic to dispute and increase the likelihood of the preservation of important relationships.

### **CLIENT SATISFACTION**

A successful mediation usually produces a satisfied client for the lawyer. Even the mediation that does not result in a compromise agreement is useful and satisfying in that it usually clarifies, eliminates or consolidates the issues, and enables the parties to meet in a temperate setting for what has probably been the first direct exchange of views between them since the dispute arose. My experience is that the satisfied client is the client that returns. Funny how that works.

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## Selecting The Real Estate Mediator

By Michael L. Lapin, Esq.

The following scenario is far from an unlikely depiction of circumstances that can arise in the world of commercial real estate. In fact, it represents an actual case that involved me as a partner in the entity that owned the shopping center. I have set it out in full so that the various interests of the parties can be appreciated.

As the owner of a 250,000 square foot neighborhood shopping center, your client is attempting to refinance the property. His lender has required your client to use a specific firm to conduct an environmental inspection of the property. The firm found contamination in the dry cleaning establishment, and the calculations done by the firm indicated astonishing level of toxic residue that will cost an enormous amount of money and time to remediate.

The lender has told your client that as a result of this finding it will not make the loan. However, the contamination has been reported and the state is requiring a clean up. Your client hired its own environmental consultant who, in reviewing the reports of the lender's firm, discovered a mathematical error in the calculations that determined the level of contamination. Your client's firm tells him that the original tests, if correctly calculated, show an almost negligible amount of toxic residue, requiring virtually no significant remediation.

Your client has not only paid the lender for all the preliminary reviews, including the environmental testing, but has paid a significant application fee as well. However, the lender has denied the refinancing based on the environmental issue at the dry cleaners. Although the rejection was based on faulty calculations by the lender's designated environmental firm, the lender does not want to wait for the uncertain and lengthy process of obtaining a no-action letter from the state's environmental agency, and no longer wants to consider this particular refinancing application. Further, the lender believes it has earned the application fee and will not consider a refund.

Your first reaction may be to threaten the lender with a lawsuit in light of the unfairness and arbitrariness of its decision. However, your client has a long-standing relationship with this lender, and in fact is working with the lender on financing and refinancing a number of other commercial properties.

The situation seems to you ripe for mediation. While the client wants at minimum a return of his loan application fee, he does not want to end the relationship with the lender over this one transaction. For its part, the lender also values the relationship with your client, but believes it has fully earned its application fee and does not want to act inconsistent with its company policy.

**“ A successful mediation between an experienced and sophisticated commercial property owner and an established lending institution will be the work of the mediator who can gain the respect of the parties not only for credentials as a mediator but because of his own background, knowledge and experience in the subject matter of the dispute. ”**



Although mediation is an attractive alternative in this instance, its potential usefulness will be greatly enhanced by the careful selection of the mediator.

A successful mediation between an experienced and sophisticated commercial property owner and an established lending institution will be the work of the mediator who can gain the respect of the parties not only for credentials as a mediator but because of his own background, knowledge and experience in the subject matter of the dispute.

While a "neutral" is defined as not taking part in either side of a dispute, this neutrality does not, nor should it, necessarily limit the resources that the mediator can avail himself of in identifying with the parties, their goals, and the parameters of the industry in which they work. The mediator that "has been there" and can communicate that identification to the parties, is going to be way ahead in garnering the credibility that is so essential in assessing the problems and alternative solutions that will be forged in the back-and-forth mediation negotiations.

Mediation of real estate disputes requires the dexterous use of both evaluative and facilitative mediation techniques. However, the degree of evaluation and facilitation that is called for in any particular dispute will be affected by the mediator's knowledge of the realities of the real estate world in which the parties will have to function when implementing the details of their mediated agreement. Indeed, the parties will quickly understand the practical implications of the various proposals, and the mediator whose experience is lacking in this area will be of little use to them and to the mediation process.

In my early years as a "dirt lawyer" I never documented a real estate deal or a loan transaction without "experiencing" the property involved. My many years in real estate - developing, managing, leasing and always negotiating - have taught me that experience builds exponentially. The first deal is a learning experience, the second is more than the sum of one plus one. It is only experience that educates you to the potential ramifications of the elements in any transaction.

If your physician recommends a particular surgical procedure and you want a second (or third) opinion, whose will you seek - the doctor who has done one or two, or the doctor who has done a hundred? An NFL owner does not hire as his head coach last year's Heisman Trophy winner. He may be a talented player, but the judgment, vision and pool of working knowledge that make an effective head coach will require many football seasons.

That shopping center, office building, industrial park, apartment building, residential development, title company, lending institution, mortgage company, leasing agency and management company are as important and inviolate to their owners as is any NFL franchise to its owner. The mediator that is going to be called upon to mediate disputes affecting their world will only be as effective as his understanding and experience with that world. While you want your Neutral to be impartial as to the outcome of mediation, you certainly don't want him "neutered" when it comes to drawing on his experience and understanding of industry norms and his guidance as to the real-world viability of solutions that are being considered by the parties.



Mediating the case with which we started this article is more likely to be effective with the mediator that understands and has had experience in dealing with commercial property, lenders and loan applications, and the nuances that affect on-going relationships among the players that are involved in the world of commercial real estate financing. The “neutral” side of real estate mediation should be thought of only in terms of impartiality towards the parties. It should not inhibit the mediator from drawing upon his experience and knowledge in guiding the parties to a workable, lasting agreement.

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## **"PLEASE -DON'T TAKE LICENSE WITH MY LICENSE!"**

By Michael L. Lapin, Esq.

## **"IT SHOULDN'T HAVE HAPPENED, BUT IT DID"**

As a manager with a real estate brokerage company, you have oversight responsibility for the activities of your sales people. You and your company do your best. You hold regular training sessions, utilizing company policy and procedural manuals that reflect the most current appellate decisions and Department of Real Estate disciplinary proceedings. You keep abreast of the progress of every deal and even look over the paperwork generated at each significant step of the transaction. The deal closes and you congratulate your salesperson. You may even include some special celebration upon presenting the hard-earned commission check to him or her.

You move on to the next deal. The finished transaction quickly becomes recent history. The file is eventually warehoused. The details fade from memory as the weeks pass.

When the buyer's attorney's letter hits your inbox, you struggle to recapture your memory of that concluded deal. The letter is calculated, however, to get your attention and to accelerate your recollection because it not only itemizes certain factual allegations, but characterizes them with the accusation that conjures up visions of endless damages – "fraud".

By passing on inflated rent-rolls that were prepared by the property owner, your salesperson is accused, at minimum, of gross negligence. But since no self-respecting lawyer will be satisfied with a single-count complaint, the letter goes on to say that your company, as the landlord's agent, acted with knowledge, actual or imputed, and is therefore guilty of fraud. If you were lucky enough to represent both sides of the transaction, then your company was also the agent of the buyer, and therefore guilty of breaching a fiduciary duty as well.

**“If the original contractual documents had contained a provision requiring mediation, there would be more than a reasonable chance of resolving the matter without publicity and without the threat of license revocation..”**

The letter ends with a threat certain to finish off your day: in addition to nullifying the deal, returning all monies plus treble damages, your salesperson and your company will be the subject of a formal complaint to be filed with the Department of Real Estate seeking a disciplinary proceeding for a fine and revocation of individual and corporate licenses.

After reviewing the file and discussing that matter with your agent, you have concluded that the agent had no knowledge of any distortions of the rent roll. The rental information was passed on to the buyer as it was given to the agent by the seller. The buyer was a sophisticated and experienced real estate investor and would have been expected to independently examine all the leases and construct his own rent roll for comparison with that prepared by the seller. Your own lawyer believes that good defenses exist to the charges.

You have a good chance of beating a lawsuit. But who can comfortably predict what a judge or jury will do? Equally, if not more importantly, who needs the threat of a license revocation? Company reputation can be tainted and loss of potential business can easily be threatened by claims that go to trustworthiness and



reliability. Even if the matter ultimately settles, the public may be leery of placing business with your company.

“ISN'T THERE ANOTHER WAY TO DEAL WITH THIS SITUATION?”

If the original contractual documents had contained a provision requiring mediation, there would be more than a reasonable chance of resolving the matter without publicity and without the threat of license revocation. Even if no prior mention of mediation had been made, the parties should be educated to the advantages of mediation even at this stage of the dispute.

Mediation that is triggered as a result of a contractual provision requiring that process whenever a dispute arises increases the likelihood of a resolution for several reasons. First, the absence of a lawsuit means there has been no public announcement. It also means that the essence of the dispute is not exacerbated by the creative ability of an attorney to take a single event and clone it into a series of separate counts of a formal complaint.

Second, by having in place a given process means a greater probability of early resolution and significant cost savings. Lawsuits take time. In the time it takes to prepare and file a complaint and answer, many if not most mediations can be successfully concluded. Any company that has been through a lawsuit can comment on the extraordinary internal costs of document production, personnel time in attending depositions and answering interrogatories, not to mention attorney fees.

Third, the parties can take advantage of the confidentiality rules of mediation or construct their own confidentiality agreement. Nothing has to leave the mediation room.

In addition, the parties control the process and give up no options. If they don't like the direction, the mediator goes another way. If an impasse is reached, they can always go back to square one and litigate and threaten license disciplinary hearings.

The process works. But only if the parties, and their attorneys (if involved) sincerely commit to it. The effective mediator will let it be known early to the parties that he is not the decider of the issues. He can give his opinion, even forcefully, but he or she has no decision-making role. This means that the mediator has to make sure that the parties come to the mediation with as much motivation to negotiate a resolution as is possible under the circumstances. Only the parties can make this problem go away.

“BOILER PLATE CAN BE USEFUL AFTER ALL!”

By trying to avoid the entanglements of litigation, you are saying “let's not take the step that is going to make this even more difficult to work out. We can always go there. But we would rather talk this out in an informal and confidential setting in order to allow each of us to understand the other's point of view. Let's save time and money and allow an independent neutral third-party try to help guide us to a settlement. We want to retain the relationship and think this way works for both of us.”



Every broker agreement and every property management agreement should have a provision requiring the mediation of disputes as a condition prior to mandatory arbitration or litigation. It is reflective of sound business judgment for a company to say to its client at the outset that the relation being entered into is valuable. Too valuable to allow it's being jeopardized without trying to resolve it through a constructive, private, cost-efficient and speedy method.

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## **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.

**¶¶ 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. ¶¶**

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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