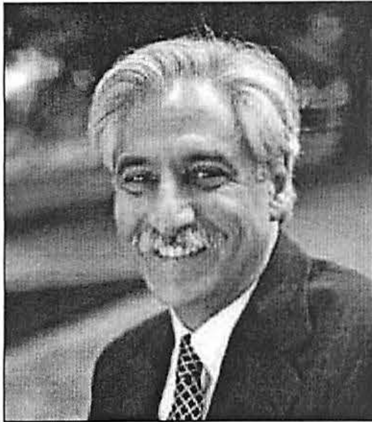
Mediation Of Real Estate Disputes



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Douglas M. Bregman

Mediation may not be the most common choice for real estate disputes, but it can be one of the most effective.

MEDIATION IS a process for resolving or mitigating existing or potential disputes. It is not necessarily a single activity; it may be a group of activities that can differ substantially from one case or problem to another. Mediation involves the intervention of someone "outside" the dispute who helps to produce a settlement, but only when the parties agree on all its terms. Like conciliation, mediation brings disputants together and attempts to reduce conflict but, unlike conciliation, mediation remains a vital force all the way through to settlement. There is no one "right" way to mediate. Different disputes and different parties demand different strategies and tactics from mediators. Mediators themselves differ in background, personality, and skills. This article will briefly review the mediation process and highlight its particular advantages in the real estate context.

WHY SHOULD PARTIES MEDIATE REAL ESTATE DISPUTES? • There are several characteristics of mediation that make it an especially good choice for real estate disputes:

- The parties "own" the solution to their dispute and can tailor it to the peculiarities of their lease, transaction, etc.;

- Procedures are informal; litigators may not be needed;
- There is a greater opportunity to be heard to "speak one's piece" than when appearing before a judge;
- Each party will feel, at some level, that he or she has had his or her day in court;
- No outside force pronounces one side a winner and the other a "loser";
- Satisfaction with the process has been shown to be high;
- Creative options for settlement are encouraged and given a more thorough exploration than is often possible in court;
- Better relations are preserved between the parties. This is especially important if there will be ongoing contact between them.

PERSONAL ATTRIBUTES OF THE MEDIATOR • Each mediator has his or her own personal style, strengths and weaknesses. Each mediator's personal attributes may vary; however, listed below are skills basic to all mediators:

- Acceptance (of people's feelings, ideas and goals);
- Awareness (of the mediator's biases and predispositions);
- Objectivity (in spite of the mediator's biases);
- Patience;
- Candor;
- Flexibility;
- Creativity;
- Sense of proportion;
- Sense of humor;
- Listening ability.

ROLES OF THE MEDIATOR • In the course of a mediation session, a mediator plays a number of roles, including:

The Facilitator. The mediator facilitates the mediation process by keeping the discussion moving, by handling conflict so that it becomes an impetus to movement rather than a contribution toward hardened positions, and by phrasing and rephrasing the parties' positions and areas of possible agreement;

The Opener Of Channels Of Communication. When the parties are not talking to each other for one reason or another, the mediator intervenes to re-establish communication. If communication exists, but in a form that exacerbates tensions or hardens bargaining positions, the mediator helps the parties alter their language, timing or behavior;

The Translator And Transmitter Of Information. Sometimes the parties are talking but they are not understanding each other. They might not only be unaware of certain facts, but they may also have a different perception of the meaning of facts they know. Here the mediator can act to transmit new information and translate the meaning of information into new terms. Both functions are important;

The Distinguisher Of Wants From Needs. The mediator knows that the bargaining positions of one person may be expressions of hurt, anger, fear, or a desire to punish, as well as realistic hopes for concessions from the other side. Usually parties cannot settle a dispute without modifying the content of their original demands. The mediator helps them distinguish their true underlying needs — those things that must take place for the dispute to be settled — from their original desires, and helps the parties modify their bargaining positions accordingly;

The Generator of Options. This is one of the most creative aspects of mediation. Although it is not the mediator's job to decide on a solution and sell it, he or she helps the parties articulate and

evaluate as many realistic options for settlement as possible. If this is done artfully, the parties will retain "ownership" of their settlement and will not find later that better solutions to the dispute went unexplored;

The Organizer. At the beginning, most parties simply want to tell their stories and make the best case for their positions. But when the negotiation stage of the process is underway, the parties want the mediator to organize and give direction to the discussion;

The Agent Of Reality. This is one of the mediator's most critical roles. Parties' bargaining positions are often based on unrealistic ideas about practical matters (how far a dollar will go), external forces (what a court will or will not do to the other side) or the role of other important players (whether the insurance company will support the terms of a financial settlement). In addition, a party may be unwilling to compute the costs of not reaching an agreement. Depending on whether the party is by nature an optimist or pessimist, the mediator helps him or her consider the best alternative to a negotiated agreement or the worst alternative to a negotiated agreement. The mediator's job is to increase the awareness of each party of the true needs of both parties and to build a realistic framework within which the parties can assess the costs and benefits of a particular proposal or of continuing versus resolving the overall conflict;

The Bad Guy. Parties may be angry at each other. They may be angry at having to accept less than they hoped for or wanted. They may be unhappy with the pace of the mediation process (too fast or too slow). Better that some of this anger be directed at and absorbed by the mediator than that it all flow toward the other side, impeding an agreement. The mediator must have a thick hide, a sense of humor and a willingness to take the blame for some of the negative feelings of the participants;

The Old Hand. When the parties have developed a certain amount of trust in the mediator, he or she can offer mild opinions about options or negotiating strategies without giving offense. For example, if a party offers a proposal that patently will not fly with the other side, the mediator can say, "You know, in my experience that suggestion is likely to meet with the objection that...," and then steer the party in a more constructive direction;

The Worrywart. A major responsibility of the mediator during the closure stage of the process is helping parties test the stability, completeness and adaptability of the proposed agreement. To do this, the mediator helps parties anticipate what might go wrong, and then suggest ways to either prevent the problem or provide means of resolving later disputes.

STAGES OF MEDIATION: PROCESS AND SKILLS • The reason that a mediator needs a broad array of personal attributes and needs to play so many roles is that each stage of the mediation calls for specific skills and attributes:

- Stage 1: getting started — skills/attributes needed: confidentiality, commitment, and confidence;
- Stage 2: gathering information — helping the parties to openly express themselves and then to separate the needs from the wants;
- Stage 3: identifying issues — skills/attributes needed: ability to "frame" major points of agreement/disagreement between or among the parties;
- Stage 4: developing options — skills/attributes needed: creativity, knowledge of the facts and law;
- Stage 5: caucusing — skills/attributes needed: integrity, strength, conviction;

- Stage 6: reaching agreement — skills/attributes needed: care, thoroughness.

The remainder of this article will explore how each stage of the mediation process unfolds and what the mediator needs to do to make it all work.

STAGE 1: GETTING STARTED • Getting the process underway is obviously important — if the parties have a bad feeling about mediation at the beginning, it will make it harder to arrive at a mutually acceptable resolution, despite the fact that the parties have so much control over what that resolution can look like. Although getting started can be complicated, it can be broken down into several discrete steps. Giving each step some thought in advance can make it all much easier.

1. The Introduction

- Establish a non-confrontational rapport at the beginning. Make introductions and seat the participants in a way that is comfortable and permits dialogue and interaction;
- Explain the mediation process generally and its purpose. Emphasize that the process is voluntary and that either party can terminate it at any time;
- Explain the role of the mediator and that it varies from case to case (you don't have to explain the details of facilitative, evaluative, and transformative mediation in technical terms, but let the parties know that the mediator's role will depend in large part on how they want the process to go forward;
- Invite the involvement of the parties;
- Explain that the mediator will not rule on the case — the parties reach their own agreement; mediator has no power to decide because the parties reach their own agreement; distinguish from litigation or arbitration (collaborative vs. decisional process).

2. Laying Out The Ground Rules

- Make sure that the parties sign a retention agreement. This will impress on the parties the seriousness of the process and get their commitment to the process;
- Make it clear that confidentiality is paramount, and that the extent of what will be communicated is largely within the control of the parties. This will help to create a safe environment for settlement;
- Have the parties agree not to summon or subpoena the mediator and that the mediation will be treated as settlement proceedings if there is future litigation, such that the entire process is "off the record";
- Explain to the parties that the mediation will proceed in separate sessions ("caucuses"). Normalize separate meetings and rules relating to caucus;
- Explain how communications will take place — courteous behavior, no interruptions (modeling fairness).

3. Explain the Procedure

- Explain how the mediation process will proceed in the parties' particular case;
- Let the parties know that in a joint session, one party presents comments and his/her/its position; the other parties then respond. Anything a party does not want to discuss openly should be reserved for the private caucus;
- Exhort the parties to avoid interruptions and cross-examination. The mediator may ask questions to clarify the mediator's understanding of the parties' perspective. Parties should take notes so that they can comment or clarify at the appropriate time;
- Explain that the mediator then will caucus privately with each side. Make it clear that they are confidential. Anything said will not be repeated to the other side unless a party authorizes disclosure. Discussion will cover strengths

and weaknesses of the party's case and any factors a party may want to add;

- Tell the parties that the final joint session will convene when parties have approached settlement and they will establish the terms of the settlement agreement;
- Discuss any questions of the parties and then begin the initial joint session.

STAGE 2: GATHERING INFORMATION • Gathering information successfully is all about communication skills. "Active listening" is essential; questions should be open-ended, and the mediator should paraphrase and restate the parties' assertions and reframe the issues in a manner that is neutral and gives equal weight to both sides. The information will generally fall into three categories: facts, positions, and interests. It is essential to separate positions from interests at this point, so the mediator should get a thorough explanation of the issues from the parties themselves:

- Invite each side to describe briefly his or her understanding of what the issues are without interruptions. This opportunity to speak gives the parties a significant sense of "ownership" of the process;
- The first party speaks about problems/issues. This provides an opportunity to model neutral listening;
- The mediator summarizes the party's statement. This allows for constructive reframing of issues;
- The second party speaks about problems/issues. Again, this provides an opportunity to model neutral listening;
- The mediator acknowledges areas of agreement and restates in neutral format the issues to be resolved. This creates a framework for both parties' interests and concerns;
- Establish the agenda and decide whether there are issues that are more suited for continued joint sessions. Prioritize and break down the issues.

STAGE 3: IDENTIFYING ISSUES • Identifying issues is different than typical "issue spotting" in legal analysis. Most good attorneys can spot legal issues in fact patterns. In mediation, however, issue identification is largely dependent on how the parties see them. This calls for the ability to do the following:

- Frame issues;
- Separate issues;
- Get buy-in on issues;
- Sequence issues;
- Set an agenda.

STAGE 4: DEVELOPING OPTIONS • There are several ways a mediator can develop options to assist the parties through the mediation process. The first is a technique known as "reframing."

Reframing is the process of using language to alter how a person or a party to a conflict conceptualizes his, her, or another's attitudes, behaviors, issues, interests, or situations. Reframing is used to put things in more neutral terms and helps to mitigate defensiveness, increase understanding and reduce tension. Reframing can soften demands, identify underlying interests, and remove both value-laden language and emotion from communications. It is essential, when engaging in reframing, to keep in mind that every framing has some truth and has relevance for the person who holds it. The purpose of reframing is to further open doors to communication, not to discount anyone's feelings or interests.

The second way to develop options is to separate and regroup the options in a manner that the parties may not have been aware of previously. The parties may be able to take "baby steps" to resolve their issues if they do not view the situation whol-

ly from their own perspective. Separating and regrouping can be done by:

- Changing the person who communicates the message;
- Changing the syntax or wording of the message;
- Changing the meaning of a statement, by broadening or narrowing the meaning and focusing away from positions and toward interests;
- Changing the context of the situation by identifying common ground and minimizing differences.

STAGE 5: CAUCUSING • Caucusing allows a mediator to understand the interests of each party to a dispute and to promote positive negotiating strategies, outside of the hearing of the opposing party. Caucusing accomplishes the following:

- Uncovers latent issues/hidden agendas;
- Promotes negotiating equality;
- Addresses indecisiveness of one or both sides to a dispute;
- Resolves impasses;
- Allows the mediator to try out hypothetical situations and "what ifs" with each side;
- Dissipates the tension when reaching final accords;
- Opens discussions with the mediator feeling free to express himself or herself.

Here are some rules for caucusing:

- In each session, begin and end by asking the parties to let you know about information they provided to you in an individual session that they do not want repeated to the other party;
- Golden Rule of caucusing — do not say anything to a party in a separate session that you would not be able to say in front of the other party were he or she present;
- Do not caucus with one party without having a separate caucus with the other.

STAGE 6: REACHING AGREEMENT • Once the parties have reached an agreement bring all of the parties back together, if possible. Congratulate the parties on achieving an agreement; recognize that each side made concessions in order to achieve settlement, and point out the advantages of reaching an agreement at mediation (e.g., lower costs, ability to maintain relationship and no clear "winner" or "loser"). The agreement should be reduced to writing so that there is no further disagreement. If time is limited such that the full documentation of the agreement is not possible with all the parties present, then at least get all of the significant terms put in writing with all parties signing. The lawyers can then finish the documentation at a later time. The assistance of the mediator in finalizing the documentation may be helpful.

CONCLUSION • Mediation doesn't always spring to mind as a way to resolve real estate related disputes but it should. It offers a way to get disputes settled such that the parties can live with and produce results more quickly and economically than other dispute resolution methods. This speed and effectiveness can save your client time and money.

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