Mediation Explained!

I have been a **Dispute Resolution System (DRS) Mediator** for the Pennsylvania Association of REALTORS (PAR) *since* 2002. I "*mediate*" disputes between Buyers and Sellers (typically involving disagreements regarding how to handle deposit monies when a sale falls through or how to resolve a post-settlement problem) and between agents (to resolve allegations that one violated our Code of Ethics or to see if they can resolve issues regarding payment of a commission before heading to "arbitration"). I enjoy doing this and decided to write this because so many seem uncertain about the process. I guess that could be a good thing if it means you never had a situation that caused you to reread **paragraph 27** of the PAR Standard Agreement for the Sale of Real Estate. There have been a number of times where fellow agents and members of the public have asked me to explain the process to them. I hope this will make the process better understood but I am sure it will lead to more questions.

Let me start by saying what "mediation" *is* and what it *is NOT*: it is a *voluntary* process which provides two parties an opportunity to sit down with a trained person to discuss their concerns in the hope of reaching a *voluntary* and *binding* solution. It is NOT "arbitration" which involves having the parties "make their case" to someone who will make THE decision which may not be good for either side. The best analogy I can use is baseball. Often a player and their team have a disagreement over salary. Typically, the player may place a higher "value" on their services than their team does and the team wants to pay as little as possible. While they may have had a pleasant experience together up to this point, they proceed to arbitration with their attorneys and whatever facts and figures they deem necessary to "prove their case" even though doing so may offend the other party. Many of these disagreements are resolved before the formal process starts as each side fears damaging the relationship and seeks to avoid an arbitrated outcome which is an "either/ or" decision made by a third party. When a dispute is solved through arbitration the relationship between the parties is likely to have suffered and resulted in a so-called winner and a loser or, even worse, two losers.

In Buyer/ Seller disputes, the path to mediation starts when one party comes to believe they have an issue with the other. Hopefully the unhappy party contacts the other (this may be done through their agents depending on when the situation arises) and they try to work things out before committing to starting the formal mediation process. Sometimes people start at the court level and my understanding is that they will be told to "mediate" the dispute if that was part of their agreement. If the mediation clause is struck out, the parties may have no choice but to pursue a *more* expensive and *more* complicated legal process which will land them in front of a third party who has the power to render a decision.

For mediation, paperwork is filed which leads to the selection of a mediator, the determination of a date and time to meet and then to the meeting. Both parties are asked to bring anything they need to present their side of the story and they are allowed to bring an attorney as long as that is known ahead of time to avoid surprising the other party. The process is less formal than it sounds because there is no courtroom but *civility* is expected and the details of the meeting are *confidential*, meaning that they cannot be used later.

The party who filed for mediation presents their side first, telling what happened and what they are asking of the other party. If it is a dispute over the return of deposits, they person who terminated the sale generally seeks to justify why they should be entitled to keep or receive the

amount held in escrow. If it involves a post-settlement issue, typically involving an allegation that a Seller failed to properly *disclose* something they knew about the property, the Buyer/ new owner will have to prove that the Seller/ former owner knew *or* should have known about the issue and disclosed it. This type of mediation is complicated by what may have happened during a home inspection and the simple fact that there are things that just happen after settlement. Our society tends to want to find blame or a reason for everything that happens but there are times when bad things just happen.

Regardless of the specific nature of the dispute, these can be very *emotional* proceedings. Attorneys may be involved and, in my opinion, they can be a real asset as legal questions often arise. I am not at attorney so I cannot address them. If an attorney is not helping the process, the mediator has to "take charge" as the parties have "hired" them for a specified period of time and are entitled to get what they paid for. I have rarely had any such issues.

Agents may or may not be involved depending on whether their client asked them to attend, whether the agent's office allows them to attend and, frankly, whether an agent wishes to be involved. Again, in my experience, most instances where agents attend they are helpful in providing documentation and establishing a timeline as far as what happened when. If both parties bring their agents, the agents can best explain details often unknown or unfamiliar to their clients. However, there are situations where the agent is part of the reason there is an issue and that becomes apparent as testimony is presented.

After the initial/ opening statement, one of two paths is selected. I offer the parties the opportunity to do whichever makes them more comfortable. The other party can ask questions based on the opening testimony or they can present their side of the situation. My role is to get both parties *engaged* in the process by having them talk *to each other*. This is especially critical when there has been little to no prior conversation so neither really knows what the other has to say. There are often simple explanations; other times emotions take over.

Ideally both parties will communicate, agree to some of what was said ("common ground") and perhaps be able and willing to try to find a mutually beneficial solution. If that happens, a statement is prepared and signed by both parties making it *binding*. There are times where both parties finish talking and then stare at me. I have to make it clear that I am **NOT** there to make a decision. I can answer questions and I can ask questions but I am not there to render a decision. Frequently when we reach this point one party or the other wishes to talk to me *in private* to further the conversation before saying anything else to the other party. This is called a "caucus". If one or both parties has brought an attorney it is likely that they will want to talk privately with them. If both parties have attorneys it is likely that the attorneys will want to talk with each other. The format is free-flowing and the goal is to *openly* discuss everything important to the parties to see if *they* can reach a solution.

During my private meetings with either party, they will typically tell me more than what they have said in front of the other person. What I hear is *confidential* but often important enough for me to suggest that they repeat it to the other party. They may also ask me how to put forward what they want from the other party. While I want to be helpful, I have to always keep in mind that the process is about them and their best interests are what matters. That being said, I am often asked my opinion and I will tell them if they affirm that they want to hear it.

For example, I have conducted mediations concerning deposit disputes and sometimes it seems obvious when a party did not fulfill their obligations as stated in their purchase agreement. In

that case, it may be reasonable to assume that if they go to court, they will forfeit their entire deposit. That being the case, they may want to try to reach a better outcome. I understand that that is complicated. When I am involved in mediations involving allegations of ethical misconduct or commission disputes, the facts are also often obvious. The bottom line is that I want to be fair and honest, I want to avoid making it appear that I am seeking a certain outcome and I want the parties to understand their options. I am a guide through the process.

There are times when the parties will not get back into the same room, times where an agreement is prepared but one or both parties want to think about it or need someone else to sign the form who was not present at the time and there are times where they agree to keep talking after our conference ends. I have no control over what happens after they leave but I like to believe that my training allowed me to help them *fully explore* the situation and consider their *voluntary* alternatives before possibly moving forward.

To conclude, **mediation is a valuable process.** At *best*, it allows two disagreeing parties the opportunity to express their thoughts and emotions in a *non-binding,* neutral setting. That in and of itself often works wonders. What is said is *confidential* and may not be used in a legal setting or a future meeting such as when an ethics hearing follows. At *worst*, a number of the disputes that I have seen should have or could have been *avoided* through better training, the proper use of our standard forms or simply by communicating better.

Too often when people have disputes they adopt a "take it or leave it" attitude/ approach and that is usually **not** productive. Even if one side has leverage over the other, human beings tend to react in unpredictable ways and many disputes appear worse than they are. They only deteriorate over time.

Hopefully this explanation makes the process more understandable and a little less daunting but I will tell you that most people dislike the thought of entering a room to discuss a problem as much as the dislike public speaking. That alone should make them less likely to want to go to arbitration where they lose control of the voluntary outcome. A trained, experienced mediator should not concern someone as long as they have the facts on their side. That and a little preparation will go a long way!