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 and between Real Estate agents. Buyer and seller mediations typically involve a disagreement regarding how to handle deposit monies after a sale falls through or how to resolve a post-settlement problem such as with a property disclosure issue or a repair. Mediations involving agents typically involve an allegation that an agent violated our Code of Ethics or to try to resolve a dispute regarding the payment of a commission before heading to "arbitration". In reality, mediation can be used to resolve *any* dispute regardless of whether Real Estate was involved or not.

Unfortunately, even though the seller and buyer representation contracts and the Agreement of Sale all contain a Mediation paragraph, *many* agents and consumers do not understand the process. That could be a good thing if it means they never had a situation that caused them to reread the paragraph. I can only wonder why buyers or sellers signed a contract without understanding everything they were signing and wonder what else they did not know. I usually learn more about that when we meet.

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, neutral mediator to discuss their concerns in the hope of reaching a *voluntary* and *binding* solution. Many disagreements are resolved before the formal meeting takes place. It is NOT "arbitration" where the parties "make their case" to someone who will make a final decision which may not be good for either side.

In seller/ buyer mediations, the process starts when one party has an issue with the other that they cannot resolve so they request mediation. The Agreement of Sale technically requires mediation to resolve disputes but that is not always what happens. 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 was crossed out, the parties may have no choice but to pursue a *more* expensive and *more* complicated legal process which will involve a third party who has the power and authority to render a decision. I rarely see that paragraph crossed out and hope that, if it was, the agents explained the clause to their clients and that the clients made the choice.

To start mediation, paperwork is filed with the REALTOR Association 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 advised to bring anything they need to support their side of the story and they are allowed to bring an attorney as long as that is known to all ahead of time to avoid any surprises. Some people will only bring an attorney if the other side is bringing one. The meeting or mediation conference 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 should the dispute move forward.

The party who filed for mediation presents their side first, telling what happened and what they are asking of the other party to end their dispute. If the issue is about the return of deposits, the 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* a known "material defect" or that they did not properly address an agreed-upon repair, the buyer/ new owner will have to prove that the seller/ former owner knew *or* should have known about the issue and disclosed it. The simple fact is that there are things that just happen

after settlement. Many seem 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, mediations can be *emotional*. Attorneys may be involved and, in my opinion, they can be a real asset as legal questions often arise. I am not an attorney so I cannot address legal questions. 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 they are entitled to get what they paid for. I have rarely had any issues with attorneys and have typically found them very helpful.

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 or not. In my experience, when agents have attended they were generally but not always helpful with providing documentation and establishing a timeline as far as what happened when. If both parties bring their agents, the agents can often explain details unknown or unfamiliar to their clients. However, there are situations where an agent is part of the reason there is an issue and that becomes apparent as testimony is presented. There are also times when I am asked why an agent did not attend as well as other times when an agent was not very helpful and/ or was not prepared for the meeting.

After the initial or opening statement by the person who filed the request, I offer the other party the opportunity to do one of two things, whichever makes them more comfortable. They can either ask questions based on the opening testimony or they can present their side of the situation. My role is to *facilitate* a conversation by getting 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 openly communicate, find "common ground" by agreeing to some of what was said and be willing and able 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 when 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 ask or answer questions but I am not there to render a decision.

There are times when one party wants 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 have 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 or ask me questions to better understand what is happening. 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 say what they want from the other party. I want to be helpful and 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 want to hear it.

For example, I have conducted mediations concerning deposit disputes where it seems obvious that one 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 so 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 neutral and honest. I am not there to judge either side, 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 and facilitator through the process.

There are times when the parties will not get back into the same room so I have to relay messages back and forth, 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* their situation and consider their *voluntary* options before moving forward to a possibly more expensive and potentially hostile meeting with a forced outcome.

Mediation is a valuable process and a benefit to working with a REALTOR. 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. A number of the disputes that I have heard should have or could have been *avoided* through better training, the proper use of our standard forms or by simply communicating better.

Some people adopt a "take it or leave it" attitude/ approach when they have a dispute 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 they dislike public speaking. That alone should make them less likely to want to go to arbitration where they lose control of the voluntary outcome. Meeting with 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!

There is <u>no</u> <u>time</u> for inexperience, empty promises *or* false expectations!

HIRE WISELY: We are <u>not</u> "*all the same*"!