Mediation in Residential Real Estate Transactions

By D.W. Duke

With the increasing use of Alternative Dispute Resolution (ADR) to resolve disputes in a variety of contexts, no industry has captured the effective utilization of ADR, and in particular, mediation, more than the residential real estate industry in the State of California. The utilization of mediation in real estate disputes has significantly reduced the number of real estate cases that reach the courts.

Pursuant to the California Association of REALTORS® Residential Purchase Agreement and Joint Escrow Instructions (RPA), when a party files suit, or institutes arbitration without first offering mediation, that party waives the right to recover attorney fees.

There are a number of exceptions, such as filing suit to record a lis pendens, or in foreclosing on real property. However, notwithstanding these limited exceptions, this mediation requirement has proven effective in residential real estate disputes by inducing the parties to mediate, the result of which the majority of such cases are settled before ever reaching the courts.

The operative language of the mediation requirement in the Residential Purchase Agreement is found at paragraph 26.A.:

"Buyer and Seller agree to mediate any dispute or claim arising between them out of this Agreement, or any resulting transaction, before resorting to arbitration or court action. Buyer and Seller also agree to mediate any disputes or claims with Broker(s) who, in writing, agree to such arbitration prior to, or within a reasonable time after, the dispute or claim is presented to the Broker. Mediation fees, if any, shall be divided equally among the parties involved. If for any dispute or claim, to which this paragraph applies, any party (i) commences an action without first attempting to resolve the matter through mediation, or (ii) before commencement of an action, refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney fees, even if they would otherwise be available to that party in any such action. This mediation provision applies regardless of whether the arbitration provision is initialed. Exclusions from this mediation agreement are set forth in paragraph 26(c)." [Form RPA-CA, page 7, paragraph 26.A., ©1991-2010 California Association of REALTORS®]

Paragraph 26.C.(1) provides:

"EXCLUSIONS: The following matters shall be excluded from mediation and arbitration: (i) a judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage or land sale contract, as defined in Civil Code §2985; (ii) an unlawful detainer action; (iii) the filing or enforcement of a mechanics lien; (iii) and any matter that is within the jurisdiction of the probate, small claims or bankruptcy court. The filing of a court action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not constitute a waiver or violation of the mediation and arbitration provisions." [Form RPA-CA, page 7, paragraph 26.C.(1) ©1991-2010 California Association of REALTORS®]

The effectiveness of these mediation provisions is well known to attorneys whose practice involves real estate litigation. An important component of the mediation requirement is the contractual attorney fee award at paragraph 21 of the RPA which provides:

"21. ATTORNEY FEES: In any action, proceeding, or arbitration between Buyer and Seller arising out of this Agreement, the prevailing Buyer or Seller shall be entitled to reasonable attorney fees and costs from the non-prevailing Buyer or Seller, except as provided in paragraph 26(a)." [Form RPA-CA, page 6, paragraph 21,

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Without the attorney fee provision of the RPA, awarding attorney fees to the prevailing party, the mediation requirement would have no enforcement mechanism. It is the potential loss of recovering attorney fees that gives the mediation provisions enforcement power.

Unfortunately, the concept of mediating, before filing suit or instituting arbitration, remains foreign in many areas of law other than real estate. Attorneys and claims examiners often seem entrenched in the concept that settlement negotiations cannot occur until formal discovery has been completed.

Some formal discovery may certainly be necessary where unknown facts, essential to a determination of liability or damages, cannot be obtained in the absence of some formal discovery. Such situations become much less common if both parties are willing to share information to make the mediation meaningful. In a situation where there remains unknown evidence critical to a settlement, the parties can easily stipulate to conduct limited discovery for the purpose of obtaining the necessary information.

A practice of mediating before litigation could substantially reduce the number of cases that actually reach the courts. Further, it would save parties and insurers millions of dollars per year in unnecessary litigation expenses. Perhaps in time, we will see this practice expanded to other fields of law thereby reducing court congestion and expense to the parties.

(D.W. Duke is a member of SDAR's Risk Management Committee and the C.A.R. Strategic Defense Panel. He is the managing attorney of the Inland Empire office of Spile, Siegal, Leff & Goor, LLP.)