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SOLUTIONS THROUGH RESEARCH

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Real Estate Litigation, Mediation and Malpractice Insurance

Texas statutes define mediation resolution procedure where a forum is provided before an impartial person (the mediator) to facilitate communication between parties and to promote reconciliation, settlement or understanding. A mediator may not impose his or her judgment on the issues as in arbitration. Unless the parties agree on a settlement in writing, there is none.

Mediation received a boost in 1987 when it became one of the five statutorily recognized Alternative Dispute Resolution (ADR) procedures in Chapter 154 of the Texas Civil Practices and Remedies Code. For a more in-depth analysis of the procedures, see "To Sue or Not to Sue: Alternatives to Litigation" in *Letter of the Law*, Volume 3, Number 2.

Using mediation to settle real estate disputes received another boost in 1995 when the mediation addendum was added to the promulgated contract forms. Presently, many Texas judges require court-ordered mediation before hearing a case.

Real Estate Center Survey

The Real Estate Center staff at Texas A&M University wanted to determine if Texas practitioners use mediation to settle real estate disputes. The Center conducted a survey that attempted to establish:

- how often real estate licensees are sued based on closings,
- the chief allegation of wrongdoing levied against licensees,
- how often mediation is used to settle lawsuits and
- whether or not licensees with errors and omissions (E&O) insurance are more apt to be sued.

To gather facts, the Center mailed two random surveys. One was sent to licensees (both brokers and salespersons) based on the size of the city where they practiced and the other to real estate brokers, without regard to city population.

Survey Results: Mediation Often Used

Three hundred forty useful responses were returned. A useful response came from those who had actively practiced real estate for the past five years and had experienced more than one closing per year during that period.

Respondents averaged 111 closings over the past five years, or about 22 per year. A reported 43 lawsuits were filed against 30 of those responding. This indicates that the combined survey results averaged one lawsuit for every 884 closings.

Note: Eleven of the lawsuits (about 25 percent) were filed against three licensees. One licensee was sued six times by different plaintiffs. These statistics reveal that if a licensee is sued, he or she is apt to be sued more than once by different plaintiffs.

Note: In the survey sent to *licensees* (brokers and salespersons), one lawsuit was filed per 686 closings. In the survey sent to *brokers only*, one lawsuit was filed per 1,109 closings. It appears that salespersons, who are often less experienced than brokers, are sued nearly twice as often.

The chief complaint against real estate practitioners involved a violation of the Texas Deceptive Trade Practices Act.

Mediation was used to settle a surprisingly high number of disputes. The survey revealed that 13 of the 43 lawsuits (approximately 30 percent) were settled in this manner.

E&O insurance did not appear to attract lawsuits. Among all responding brokers, 98 indicated that they carried E&O insurance, while 93 did not. Nine brokers carrying E&O insurance were sued, and eight brokers not carrying insurance were sued.

In the first survey, licensees were asked if they had E&O insurance only if they had been sued. Forty-five percent of those sued had E&O insurance, while 55 percent did not.

Thus, based on the survey, real estate practitioners were sued at approximately the same rate, whether or not they had insurance.

The survey queried the respondents' reactions to mediation. Satisfied users praised the mediator's competence. Dissatisfied respondents questioned the merits of the plaintiffs' cases. To them, this method of ADR represented legal extortion. Others felt plaintiffs used mediation as a tool to learn more about others' cases in preparation for trial and had no intention to settle.

To some degree, venting is a normal reaction to the circumstances and must precede serious settlement negotiations.

Suggestions from Professional Mediators

To learn more about mediation, the Center solicited suggestions from several people who professionally mediate real estate disputes. Here are some of their comments.

Remember that mediation is not a trial where one party carries a burden of proof to win. As one mediator put it, "There are no winners, and there are no losers. There are no home runs, and there are no strikeouts."

Mediators are not judges or arbitrators. They are neutral facilitators in establishing dialogue between (or among) the parties to mutually reach a settlement. One party should expect to pay more than desired, the other to receive less than desired.

Both parties should have sufficient facts to make an informed decision. The necessary facts should include:

- a sound or professional estimate of the damages or injuries incurred, such as an appraisal of losses or documented repair costs;
- knowledge of past judicial awards for similar lawsuits in the jurisdiction where the case would be tried;
- a calculation of time, expenses, attorneys' fees, etc. that would be exacted if the case goes to trial and is possibly appealed;
- an understanding of the time value of money if a settlement is not reached;
- the psychological strain a trial (and possible appeals) places on the parties and their lifestyles;
- the opportunity costs the parties would experience during trial and by not practicing real estate; and
- a clear understanding of what the other party desires for settlement.

Do not expect a quick settlement once mediation begins. As a general rule, mediators commence with an open session where the parties present their side of the dispute. Afterwards, the mediator tries to continue the dialogue. If an impasse is reached, the mediator separates the parties and goes from room to room in private sessions seeking resolution.

Meaningful mediation takes time. Mediators say that serious negotiations generally do not begin for three to four hours. One mediator stated that in South Texas, six to eight hours typically transpire before true negotations begin. Consequently, beware of mediators who schedule sessions in designated time blocks.

Understand that venting emotions generally occurs during the opening session. To some degree, venting is a normal reaction to the circumstances and must precede serious settlement negotiations. Lawsuits evoke anger, resentment and other strong feelings. Once a suit is filed, all communication between the parties must be channeled through the attorneys. Consequently, when the parties face each other and are free to speak, tempers often flare. One mediator stated that the general sessions sometimes make "blood boil."

Realize that mediation is the last chance to control the outcome of a controversy. One party may be right, but proving it may be expensive in terms of both time and money. Additional issues may be addressed and settled more quickly in mediation than in a trial setting.

Ensure that the parties who can enter a binding settlement agreement are present. Do not let any party leave to consult with someone who makes the ultimate decision. Have that person present when mediation begins.

Attorney Status Not Required

The mediator need not be an attorney but should possess some knowledge of the subject matter, the outcome of prior cases involving the controversy and recoveries for similar matters in

local courts. Although the mediator should remain neutral, their expertise may provide valuable guidelines for settlement. They should bring a "reality check" to the dispute.

An attorney's representation is optional, depending on the complexity of the problem. If the parties have the facts necessary to make an informed decision, attorneys may hinder settlement, especially when fees become exorbitant. Although all issues may be presented, rarely are attorneys' fees or punitive damages included in a mediated settlement.

Requesting mediation does not indicate a weak case. Once a party can make an informed decision, they should seek mediation to rectify the dispute as quickly, economically and fairly as possible.

One mediator pointed out that real estate practitioners are professional negotiators and, therefore, should have no problem with mediation.

When asked if real estate practitioners should use the "Agreement for Mediation" addendum to the promulgated contract forms, the mediators did not agree. Those against its use took issue with the form but not with mediation itself.

Mediators felt that practitioners should not be compelled to mediate when the issues lay between the buyer and seller. If practitioners sign the addendum, they are automatically involved in the mediation process. For this reason, mediators felt the agreement should be included in the promulgated contract forms, not in an addendum.

The author thanks Matt Trotter, a senior industrial distribution major, for his assistance in tabulating the survey results.

The Letter of the Law *is published quarterly by the Real Estate Center to provide timely legal information that may affect the practice of real estate.*

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