

SELECTED MEDIATION ISSUES

Mediation is an informal process by which parties voluntarily agree to present their disputes to a neutral individual in an effort to resolve their differences.

The forms published by the California Association of Realtors (“CAR”) which pertain to the purchase and sale of a multifamily residential dwelling (i.e. apartment building) contain a paragraph which provides that in the event that a dispute arises between the buyer and seller, the parties will participate in mediation prior to filing a lawsuit or an arbitration proceeding. The pre-printed provision in the CAR forms contractually requires the parties to submit their disagreements to mediation prior to commencing formal proceedings of any kind. That mediation provision appears in Section 23A of the CAR form entitled “Residential Income Property Purchase Agreement and Joint Escrow Instructions.” It also appears in other purchase/sale contracts distributed by CAR.

The mediation paragraph is included in the same section (i.e. Section 23) as the provision which allows the parties to elect arbitration instead of litigation in the event of a dispute.

To effectuate the arbitration clause, the parties must jointly initial at the end of Section 23. However, often overlooked is the fact that the CAR form requires the parties to participate in mediation even if they do not initial the box for arbitration.

Thus, whether or not the parties elect arbitration as the preferred method of a binding resolution of any dispute, the CAR forms require mediation before either arbitration proceeding or litigation is filed.

Of course, the buyer and seller have the right to strike out Section 23A (i.e. the mediation paragraph) prior to signing the purchase agreement, but rarely does that occur. In general, having the mediation provision remain included in the CAR form, rather than crossing it out, is advantageous to both parties as it effectively encourages them to settle their differences before engaging in expensive and lengthy formal proceedings.

Endless articles have been written about the best approaches to settle a case at mediation. Their recommendations are numerous, such as: be professional and courteous, contest issues but not personalities, be thoroughly prepared, do not have direct discussions with the other side, do have direct discussions with the other side, etc. I will not submit my own recommendations in this column as to how to settle. I leave that to others. Instead, let me comment on certain select issues which circumscribe most mediation settlements.

Verbal settlement agreements are difficult, if not impossible, to enforce. Thus, lawyers desire to reduce the settlement provisions to a written document before the parties depart from the mediation. Also, if there is a delay between the verbal agreement and the later preparation of the settlement back at the lawyers’ offices, the parties might change their minds about settling.

Thus, once a settlement is reached at mediation, it should be immediately memorialized in writing and signed by the parties before they depart.

Mediations typically last 4 to 7 hours. By the end of the session, the parties and their attorneys are often fatigued after having done quiet battle over many hours. Assuming that the disputes are resolved by the end of the mediation, the lawyers typically handwrite the provisions of the settlement on yellow legal size paper or, alternatively, on white notebook paper. By the nature of things, tired attorneys using a pen rather than a computer customarily write settlements which consist of one or two pages. Had the settlement been prepared in the office of one of the lawyers, it is likely to have been 5 to 10 typed pages containing numerous additional provisions with careful thought being given to every sentence in the document.

A cardinal principle of mediation is that nothing written which is prepared during the course of mediation is admissible in evidence in any subsequent arbitration or civil action. (Evidence Code Section 1119(b)). Thus, if a settlement agreement is crafted at the conclusion of the mediation whereby the parties set forth their resolutions, the general rule is that such a writing is not later admissible in court or in an arbitration in the event that one of the parties breaches the settlement or fails to perform his/her obligations under it. That is the law, unless an exception applies.

The biggest pitfall with hurried handwritten agreements prepared at the mediation is that the attorneys often forget to include provisions which avoid the exclusionary rule of Evidence Code Section 1119(b). Since a settlement agreement is a writing prepared during the course of the mediation, it is inadmissible at a future proceeding (absent an exception) even if a party breaches the agreement. For that reason, the Evidence Code provides exceptions which allow it to be enforced provided that certain critical language is included in the agreement.

Evidence Code Section 1123 states that a settlement agreement is admissible as evidence provided that at least one of the following conditions is satisfied:

1. The settlement agreement expressly provides that it is admissible; or
2. The settlement agreement provides that it is subject to disclosure in any future proceedings; or
3. The settlement agreement provides that it is enforceable; or
4. The settlement agreement provides that it is binding.

Without satisfaction of at least one of the foregoing four conditions, a party may find to his/her dismay that the agreement is unenforceable following a breach by the other party. A surprising number of settlement agreements, perhaps because the lawyers are fatigued or they are

hurriedly prepare the document late in the day, fail to include the necessary “exception” language. Thus, no matter how tired the parties or their counsel may be, it is essential to include the language of at least one of the four conditions, and preferable to include the language of all of them.

Another common pitfall is that a written settlement sometimes does not contain all of the material terms of the settlement, or at least it leaves certain material terms for future agreements. Such partial agreements may be unenforceable. Accordingly, prudent counsel will do their best to include all of the material terms in the written agreement even though the mediation may last longer than estimated.

Lawyers who read this column and seek a fuller explanation of the problems attendant to settlement should review the recent California Supreme Court decision in Fair v. Bakhtiari 40 Cal. 4th 189.

RECOMMENDATIONS

The most important recommendations I can make after a verbal agreement of settlement has been reached at a mediation are the following:

- 1. Be certain that all of the material (i.e. important) provisions of the settlement are then and there included in the written agreement.**
- 2. Specifically state in the settlement agreement that the document is admissible and subject to disclosure in any future proceeding.**
- 3. Specifically state in the agreement that it is enforceable and binding on all parties to it.**

By settling at mediation and following these three recommendations, the parties can control their own destiny without placing it in the unpredictable hands of an arbitrator, judge or jury.

BIOGRAPHY

Dale Alberstone is a prominent real estate attorney who has practiced real property and business law in Century City for the past 31 years. He has been appointed to periodically serve as a judge pro tem of the Los Angeles Superior Court and is a former arbitrator for the American Arbitration Association. He also testifies as an expert witness for and against other attorneys who have been accused of legal malpractice.

Mr. Alberstone has been awarded an AV rating from Mardindale-Hubbell. An AV rating, registered through Reed Elsevier, reflects an attorney who has reached the heights of

professional excellence and is recognized for the highest levels of skill and integrity.

The foregoing discussion is intended as a general overview of the law and may not apply to the reader's particular case. Readers are cautioned to consult an advisor of their own selection with respect to any particular situation.

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