SPECIAL CHALLENGES TO MEDIATING BROKER CASES

by Malcolm Sher

The economy is likely to spawn an increase in litigation naming real estate brokers and inspectors who were involved in the transaction. Attorneys' fees and expert testimony make these cases very expensive to litigate. Many cases are susceptible to early mediation but broker cases offer unique challenges to the mediator. This article will address six of them, including the difficulties of multi-party cases, emotional issues, insurance coverage problems, meeting significant differing interests, tax considerations and attorneys' fees.

First, broker cases typically involve multiple parties. One of the biggest hurdles facing settlement is getting all the players to attend the mediation. Several forms of residential purchase agreements require buyers and sellers to mediate their disputes. Some listing agreements also mandate mediation between sellers and listing brokers. Selling brokers usually have no such obligations. Nor do other potential defendants such as termite and home inspectors. When they are encouraged to participate, usually under the threat of being separately sued, the mediator is faced with reconciling differing factual scenarios, legal theories and measures of damages. Thus, multi-party cases tend to be more time-consuming, often necessitating prolonged caucusing with the mediator.

Second, because broker cases invariably involve allegations of professional negligence, or even fraud, emotions run deep. This often presents the biggest challenge to settlement. Buyers allege that sellers deliberately concealed material defects and that brokers misrepresented or negligently failed to properly inspect and discover them. Professional inspectors are labeled incompetent. Buyers threaten to report the professionals to their respective licensing authorities. Brokers resent the challenge to their "professional integrity", deny that they did anything wrong and often blame the sellers for not following their advice to disclose everything. Sellers doggedly defend their disclosures as truthful, argue ignorance of the need for permits when remodeling and justify non-code-compliant work as safe. All defendants dismissively assert "buyer's remorse" and challenge overstated repair costs as a "shakedown" of them and their insurers. To be effective, the mediator must recognize that these cases engender significant emotional overlay and must be prepared for shifts among defendants who initially seemed to be unified but suddenly point fingers at one another. The parties should be encouraged to check their emotions at the door and acknowledge that settlement will ultimately involve making non-emotional business decisions that will allow them to move on with their lives and careers.

Third, insurance issues often permeate these cases. Some claims may be covered, whereas others such as fraud may not be. Coverage may be denied to a broker who has sold his or her own property through the brokerage. Financial elder abuse, increasingly associated with "creative" seller-financing may generate reservation of rights by insurers. So, too might lawsuits involving housing discrimination, because the various statutes

under which they are brought allow fines, penalties or multiple damages which are excluded from coverage under most E&O policies. These situations are particularly challenging even for experienced mediators and may generate “mini mediations” with insurers, their coverage attorneys and *Cumis* counsel. Sometimes the case may even evolve into separate coverage litigation in different Federal or State courts and require several mediation sessions if a global settlement is to be achieved.

Fourth, in broker cases the parties almost always seek inconsistent settlement outcomes. For example, a defrauded buyer may be unsatisfied with a monetary settlement and prefer to rescind the transaction and recoup the purchase price plus out-of-pocket costs, including mortgage payments, taxes, moving expenses and re-decorating expenses. The seller may be only too pleased to accept rescission, especially in a rising market, or may reject rescission if the sale proceeds have been spent on other acquisitions. Brokers will usually reject rescission, particularly if it means returning commissions or if it is clear that the seller, rather than the brokers, was at fault. Sometimes, however, brokers will cooperate if they can be assured of the chance to re-list the property or are guaranteed to recoup lost commissions in other transactions. Similarly, intransigent insurers may be prevailed upon to contribute even where coverage is questionable in order to close the file and avoid the risk and the high cost of trying these types of cases. The skillful mediator will help shape a solution that satisfies needs and interests leading the parties away from positional-based negotiating.

Fifth, there may be tax consequences to settlements, further complicated if the property involved was acquired in an IRC Section 1031 Exchange. Before engaging in a mediation involving potential rescission, counsel should be familiar with the technicalities of “undoing” transactions and have consulted with the buyer’s lender and tax advisor. Where warranted, CPAs, appraisers and other relevant professionals should be asked for written opinions, expressly made subject to the mediation privilege or even attend the mediation. The mediator must never be put in the position of giving legal advice on such critical issues or losing neutrality.

Sixth, mediators experienced in broker cases will know that only certain parties in the litigation, usually only the buyer and seller will be entitled to “prevailing party” attorneys’ fees. These cases tend to become attorneys’ fees-driven. A buyer paying counsel on a contingency fee basis may consider “rolling the dice”, believing that, if successful, his attorneys’ fees will be paid by the seller or borne by his own attorney if he loses. Sellers, evaluating the possibility of loss, might threaten bankruptcy as a bargaining chip, in which case the outcome of the case becomes less relevant when compared to the seller’s resources, his own lawyer’s likelihood of being paid and what value is placed on avoiding bankruptcy. The mediator should explore with brokers who are not exposed to attorneys’ fees the possibility that an adverse judgment might still affect their insurability or premium rates.

In conclusion, mediators in broker cases can assist the parties and counsel to explore a variety of workable solutions, some of which may even preserve relationships which

have not been irreparably damaged. The decision of whether to pay or accept a given sum to settle the case or consider other less obvious solutions should ultimately be a business decision. Parties and counsel who are willing to concede that litigation seldom has a certain outcome and jury trials are particularly unpredictable, will take advantage of the skilled mediator's experience and tact.

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