

Mediation - The Realtor's Obligations To The Client Engaged In A Dispute Vs. NAR Ethical Standards

By Laurel Greenspan Kaufner

Some realtors take the position that once the transaction has been completed and the agency relationship has ended, they no longer owe any duties to their former clients, including participating in any future dispute resolution proceeding unless they are legally mandated to do so.

That being said, most professionals will be there for their clients to see them through the tough times, even after the transaction and agency relationship has ended. Because the realty business depends on reputation, handling this in the appropriate way can bring a realtor loyalties from former clients that are invaluable.

In cases where a dispute arises between the parties to a completed transaction, because of their intimate involvement in the transaction, realtors are often called upon to support their former clients by providing information and guidance. Because of the former agency relationship and a natural affinity for negotiation, which many realtors possess, it is very easy for realtors to slip back into the representative capacity and attempt to "fix" the situation.

Although it is commendable and very professional for a realtor to assist a former client in resolving a dispute regarding the completed transaction, there is a very fine line that realtors must be careful not to cross. "Realtors shall not engage in activities that constitute the unauthorized practice of law..."¹ Presumably, if the dispute arises out of the standard CAR Residential Purchase Agreement, and can't be resolved quickly and easily, the parties will be facing mediation, if they have any intention of pursuing an award of attorney's fees in litigation.²

While it is absolutely imperative that realtors inform their clients of the contractual provision regarding mediation, there is division in both the legal and real estate communities as to the role of the realtor in the mediation process.

Some mediators and other participants in the mediation process inappropriately prevent the participation of realtors who are not personally accused of wrongdoing, by accusing them of engaging in the unauthorized practice of law.

It is important to know in evaluating your level of participation in this process, that engaging in mediation as an interested party, is not engaging in the "practice of law". It is only once one undertakes the role of representative of an

¹ "... and shall recommend that legal counsel be obtained when the interest of any party to the transaction requires it." Article 13, Code of Ethics and Standards of Practice of the National Association of Realtors, Jan. 1, 2004.

² Paragraph 17A, Residential Purchase Agreement, California Association of Realtors.

interested party that this issue may arise. Mediation, in the great majority of disputes, is not a legal proceeding, but an ancient form of dispute resolution that involves a neutral intermediary helping disputants to reach a rational resolution to their dispute.

Due to the extent of realtor involvement in the transaction, which is often complete control of the transaction when an unsophisticated client is involved, the realtor's participation in mediation is often critical to resolution. Further, in every situation where a dispute arises with regard to a completed real estate transaction, all realtors involved in the transaction are also potentially interested parties in the dispute, whether or not they are currently accused of wrongdoing, because of that future possibility.

Because of both the potential of a conflict of interest between realtors and former clients and the potential for inadvertently slipping into a "lawyering" role, it is important that all parties understand that a realtor cannot participate in mediation as a representative of his client, but as an interested party in the mediation.

In the end, the safest way for realtors to be assured that they don't cross the line between support and lawyering, while still maintaining and building the client relationship, is to help the client engage the services of the right mediator, encourage them to seek legal representation and remain available for informational and emotional support. Whether you choose to make this decision on your own or involve your attorney and/or insurance carrier in the final analysis, your level of participation in the resolution process of a dispute arising out of the CAR Residential Purchase Agreement is a decision that should not be entered into without careful consideration and balancing of your desires to serve and keep your clients and your obligations to mandated ethical standards.

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