Dispute Resolution for All Counselors? A New Way of Looking at Our Business

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SOME OF YOU CAN REMEMBER when there was no television. It was a theory yet to be perfected and commercialized. Younger generations cannot visualize a time when television didn't dominate almost every room of our homes and offices. Similarly, students of law in the next couple of decades may be surprised to find that "dispute resolution" clauses—both mediation and arbitration—were not always included in contracts.

With dispute resolution emerging as a "new frontier" real estate-related practice, The Counselors of Real Estate® is providing assistance and information to counselors who have an interest in establishing mediation as an offering of their professional services. Some have asked if mediation or the other skilled techniques of dispute resolution fit in the practices of counselors. Perhaps there is another twist to this question. Can a practitioner of real estate-related disciplines benefit from using the techniques and skills of dispute resolution and yet never practice formal mediation?

As our society has become more litigious and litigation costs have risen dramatically, American business has sought ways to reduce that cost of doing business. In the last couple of decades "alternative dispute resolution" and "mediation" have become familiar terms in the boardroom and in the executive suite. American business has embraced this concept in handling disputes between the company and its customers, the company and its vendors, employees and management, and between employees. Conflict and its manifestation—disputes—will happen at some point in most groups, whether business, political, charitable or religious in function. Conflict occurs because people have different ideas, values, interests or accepted behavior patterns. Conflict may have several different causes: poor communication, evil intent on the part of one or more parties, selfishness, personality disorders or scarce resources. Yet conflict is not the real problem. *Unresolved* conflict is. The resulting costs, hidden and obvious, of unresolved conflict can be seen in the expenses of litigation, damaged relationships or loss of customers.[1] While there are several alternatives in dealing with conflict, mediation is a less costly approach and one in which maintaining or reestablishing relationships is most likely.

About the Authors

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Although Americans in the 20th and 21st centuries would like to take credit for the development of this creative process, recognition should be given to societies of centuries ago in China and Asia, Phoenicia, ancient Greece and Rome that employed the principles of dispute resolution in similar matters within their cultures.[2] Confucius believed that the best way to resolve a dispute was through moral persuasion and agreement rather than coercion.[3]

Further acknowledgment goes to the United Kingdom where, in the 20th century, mediation became institutionalized in the secular arena and was recognized as having a role in and of itself. The Conciliation Act relating to the conduct of industrial relations was enacted in the U.K. as early as 1896.

While we Americans neither invented nor perfected it, we have successfully borrowed the process and are using it with our own modifications. In the United States, alternative dispute resolution (ADR) processes were formalized as an alternative to litigation early on, with the U.S. Department of Labor (established in 1913) appointing a panel, the "commissioners of conciliation," to deal with labor-management disputes. These commissioners later became the U.S. Conciliation Service and, in 1947, that entity became the Federal Mediation and Conciliation Service. Some of the early writings in ADR drew on the experiences of labor and industrial dispute resolution and adapted them to the resolution of interpersonal conflict.[4] Late in the 20th century, American giants such as Halliburton, Shell Oil Company and General Electric incorporated internal processes in their companies that allowed for collaboration before litigation could be pursued, especially in employee-related matters.[5] In addition, many states have now encouraged this alternative to parties' settling disputes in court by allowing for the establishment of local centers for dispute resolution. These public centers are partially supported by fees collected by the court.

While the authors incorporate dispute resolution techniques generally in this article, specific attention is addressed to the skills used in mediation. Mediation should not be confused with arbitration. In arbitration, a decision or "award" is made regarding the dispute by an arbitrator or a panel of arbitrators based on the evidence provided to the decision maker(s). In mediation, the parties in dispute are encouraged or led to an agreement to resolve the conflict themselves, with the mediator assisting as facilitator, analyst, referee, and proposer of creative ideas for solutions. The styles of mediators can vary from one who simply carries messages to the disputing sides to one who becomes very involved in analysis and recommending points of solution.

Mediation as an alternative to resolving disputes by litigation or other costly solutions of conflict has become increasingly accepted and praised. In fact, in his article about the "vanishing jury trial,"[6] Joseph Ryan notes: "According to statistics kept by the administrative office of the United States Courts, in 1962 there were 5,800 civil trials—about 11 percent of all dispositions. In 2004, although there were eight times as many cases filed, there were only 3,900 federal civil trials, or 1.7 percent of case dispositions."

What does this mean for the practice of counselors of real estate? Is the establishment of a mediation practice just another added partition of the practice of real estate consulting? But what about those counselors who have neither the time nor the desire to enter the practice of mediation? The authors suggest that all counselors would benefit from learning and applying more of the principles upon which mediation practice is based. Mediation is, in fact, more of an art than a science.

An old adage says: "Under all is the land." And that is the notion upon which our profession advises, brokers, develops, finances, buys, sells, and from which it enjoys monetary benefits. The preamble to the code of ethics and standards of practice of the National Association of REALTORS® recognizes the importance of land in our profession:

> *Under all is the land. Upon its wise utilization and widely allocated ownership depend the survival and growth of free institutions and of our civilization. REALTORS® should recognize that the interests of the nation and its citizens require the highest and best use of the land and the widest distribution of land ownership. They require the creation of adequate housing, the building of functioning cities, the development of productive industries and farms, and the preservation of a healthful environment.*[7]

Beginning in the 18th and 19th centuries, an economic theory developed that considered land as one of the agents of production along with capital, labor and coordination, and therefore, a contributor to value. While economic theorists debated and modified this basic

premise, land continued to be a foundational element in the theories of value.[8] Thus, "Under all is the land" implies more than its physical reality. It is the surface of the earth, the source of all minerals, the source of our food supply, and the foundation of our social and economic life as well as the source of wealth.[9]

Alfred Marshall (1842–1924) contributed greatly to the contemporary value theory and the basis of the techniques of the appraisal of real estate. Marshall's focus on supply and demand theories included what he called "market forces" and a perfect "economic market" that would bring equilibrium to supply and demand. Marshall's vision of market forces was, without saying it, the identification of the "human element" involved in all real estate transactions.[10]

Marshall's analysis was that supply and demand could ultimately be perfectly balanced, yet seldom does a market exist in perfect balance or "equilibrium." It is the human element that deciphers and perceives why the transaction should be at one price level or another. The supply and demand is real, but its impact on price is a perception driven by vision, desire and analysis of human beings.

Since "equilibrium" is only theoretical, the interpretation of it in the market produces differences of opinion, and a difference of opinion produces conflict in regard to valuation and other transaction terms. Seldom do buyers and sellers agree on a price or a lease amount without having some difference of opinion. The buyer wants to buy for less and the seller would like to sell for more. So, barring identical expectations on the part of the buyer and seller at the onset, every real estate transaction is a conflict and thus, a potential dispute. These conflicts do not often nor necessarily result in a dispute—particularly one that requires some action, such as litigation, to resolve. Generally, most are resolved in peaceful negotiations or in impasse where the potential transaction fails to materialize. Accordingly, if the conflicts are mostly settled by continued negotiation (collaboration), what interest does the counselor serving as consultant have in the application of mediation principles to those transactions?

Let's see how that is important to the counselor. Land does nothing without the human element causing something to happen. Yet, often in our real estate transactions, the human element is obscured. The human element creates demand. One of the appraisal principles (estimating value) is anticipation. We believe anticipation to be the most significant of the influences on market movement. Anticipation develops and fosters a human decision. In real estate investment, an individual or individuals, not an electronic device, sees the opportunity or risk singularly, makes decisions based on all input data and takes action thereupon. Many influences may cause the individual(s) to have a certain anticipation, but the individual or collective decision usually has unseen and unknown elements of thought. A person must be *motivated* to desire a piece of real estate or to sell. That motive may be obvious, or thought to be obvious, or may be obscured. If it is obscured or masked, the underlying interest of the party in the transaction remains unrealized and the desired maximum benefits of a potential transaction may also be unrealized.

As counselors, perhaps another aspect, then, of our service to a client should be to look for the motives of the players in the transaction. This article is based on that concept and proposes that the skills used in interest-based mediation can be applied to hasten successful agreements. To the broker, the analyst, the appraiser, the buyer and seller, this principle of going to the underlying interest—the motive—is the key to discovering why the transaction takes place or should take place at all. And, it is the lack of understanding "why" that may cause one party to have an advantage in a negotiation over another. That same lack of understanding may bring the parties to impasse.

Motives or unseen, underlying interests may have the most significant impact upon the decisions being made in any transaction.

An actual case in a mid-size southwestern U.S. city demonstrates how the techniques of dispute resolution (specifically, mediation) can serve the counselor and the counselor's client well.

A counselor's client was approached by a political entity that wanted to purchase a closed entertainment property owned by the client family, with the intention of opening the facility for public use. An opening offer was made by the political entity. The counselor was asked by the family to review the offer and assist them in the transaction. The value estimate exceeded the offer substantially and precipitated a meeting with the political entity to discuss the offer. The offer was increased to about half the estimated value and the political entity would not budge on the offer. The mediation-trained counselor perceived there was more to the situation than mere differences of opinion as to valuation. The counselor asked the client's permission to meet privately (and without attorneys) with the head administrator of the political entity. In that meeting, the counselor learned that promises had been

made to the entity's budget approval group that precluded the administrator from going back to ask for more money. The "why" or the underlying interest was now known. The counselor's next step was to seek a creative solution—the collaboration. With a firm view of the interests or motives operating, an agreement was structured whereby the family would make a gift to the political entity for the full value over the offered amount (a tax benefit to the client) and the political entity agreed that the patriarch of the family would be honored by naming the public facility for him. The collaborative approach to the deadlocked transaction resulted in all parties being rewarded satisfactorily in the final arrangement.

In mediation it is extremely important to identify motives, the "whys" of the parties' taking "positions" in the conflict. It may be just as important to the counselor to seek the "whys" of any transaction in which the counselor is an advisor. Often, an understanding of the underlying interests, the "whys" of the offers of the participants, can be useful in structuring a compromise that "makes the deal." As a result, the deal may not lead to one side winning and one side losing.

In many negotiations there need not be winners and losers. In integrative bargaining—also known as interest-based, collaborative or problem-solving negotiation—the goal is for all to win to the extent their interest is best served. The quest for mutual benefit often produces substantial common ground as a foundation for agreement. It becomes the counselor's objective to manage the negotiation context and process to gain the willing cooperation and commitment of all parties to bring about a successful conclusion.[11] Often the parties in a transaction see the possibility of the results as a fixed pie. As such, parties are in competition to "claim value." Only so much can be distributed from that pie. In truth, there may be elements of the transaction that are worth more to one party and less to the other.

Consider this scenario: Two children, a boy and a girl, were arguing over the last apple in the bowl. The mother, wanting to end the fight, cut the apple in two and gave each child half. The boy took the apple and ate his half, throwing the uneaten core with its seeds in the trash. Meanwhile, the girl carefully lifted the seeds from the middle of her half and threw the leftover apple in the trash. The mother never sought "why" the apple was wanted. The boy wanted to eat the apple while his sister wanted the seeds for an experiment at school. In frustration, the mother had ended the fight by dividing the apple equally (distributive negotiation). As a result, neither of the children received the maximum benefit in the process. Integrative negotiation would have given each more than they eventually received. It was a matter of discovering their interests or their "whys" in wanting the apple. It was a matter of motive.

Collaborative-success results are not limited to simple real estate transactions, but are seen in many types of transactions. The principles of interest-based mediation are applicable in every deal from the simple to the complex deliberations of major world decision makers.

Therefore, we ask the question again: "Is dispute resolution for all counselors?" Perhaps a better question is: "Are the techniques of dispute resolution of benefit to all counselors whether or not they intend to add mediation to their practice?" We believe the answer is "Yes." counselors interested in providing mediation services or in using dispute resolution skills and techniques to enhance their consulting practices should consider a quality training regimen that includes specific training in interest-based negotiation and mediation.

SUMMARY

"Under all is the land."

Yet real estate, in and of itself, is inanimate and has no value without the use that humans intend for it. This "motive" for acquiring land is often obscured. The counselor, by employing the proven skills and processes of interest-based negotiation and mediation, can assist the parties in the discovery of underlying interests. The understanding that results is often the key to the creation of solutions previously unavailable.

Thus, the utilization of mediation skills can be important for all counselors, regardless of their intention or desire to actively practice as a mediator.

The mediation profession needs qualified individuals, and counselors who are trained and prepared to serve can meet a vital need in settling real estate transaction disputes. Every jurisdiction in the United States has unique requirements regarding mediation training and credentialing. However, at this time, those requirements are applicable only to mediators choosing to participate in court-annexed mediation. Counselors interested in providing mediation services or in using dispute resolution skills and techniques to enhance their consulting practices should consider a quality training regimen that includes specific training in interest-based negotiation and mediation. ■

ENDNOTES

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