MEDIATION AND ARBITRATION

AS ALTERNATIVES TO THE LITIGATION PROCESS

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From time to time disputes arise that cannot be resolved without third party intervention. A decision must often be made as to whether a lawsuit should be filed, or the matter instead be submitted to mediation and/or arbitration. The purpose of this memorandum is to provide information concerning these options. The information may also be helpful to parties in deciding whether to initial the arbitration option within the standard real estate sales contract.

WHAT IS MEDIATION?

Mediation is a relatively informal procedure in which a neutral third party attempts to facilitate a settlement of the pending dispute. It is a non-binding process in that the mediator does not actually make any decisions or issue any orders that must be followed by the parties. Rather, the mediator acts as a go-between to assist the parties in understanding the legal issues underlying the dispute, and in attempting to reach a settlement. Parties are entitled to legal counsel in mediation, and such representation is strongly recommended. A mediation is a confidential procedure in that settlement demands or offers that may be made cannot be mentioned in any future trial of the case so that the parties are free to make proposals without fear that they will later be treated as admissions of liability or concessions that the claim might be worth less than the amount sought at trial. If the parties are able to reach an agreement at the mediation, a written settlement agreement will be drafted. Once it is signed by the parties, if it is drafted properly, it will be fully binding, and can be enforced in court if necessary.

WHAT ARE THE ADVANTAGES AND DISADVANTAGES OF MEDIATION?

The primary disadvantage of mediation is the time and expense of the process itself. There is no guaranty that mediation will resolve the dispute since the parties ultimately must reach an agreement. Most mediations are completed within a day or two. They are most effective when all involved parties and their insurers (if applicable) are present and represented by counsel, since otherwise parties tend to blame those who are absent for any damages being claimed. In real estate sales disputes, we usually ask that both the buyers and sellers be present along with representatives for the realtors on both sides of the transaction. Other parties may also be appropriate depending upon the nature of the dispute, including for example, property inspectors, appraisers, title companies, and others accused of wrongdoing.

It has been estimated that as many as 80% of mediated matters are successfully settled at the mediation. This obviously will save substantial time and legal expenses that would otherwise far exceed the cost of the mediation. Even if the case does not settle at mediation, the process is almost always very useful in helping the parties and their counsel to understand the claims being asserted by the other side(s). Such information will be helpful in analyzing the case, in determining early the identities of significant witnesses and evidence, and in evaluating the case for future settlement if appropriate. Based upon all of the potential advantages, we usually suggest mediation of most claims so long as all interested parties are willing to take part, and if the matter is being facilitated by an experienced and capable mediator.

WHEN IS MEDIATION REQUIRED?

The technical answer is that mediation is never required except in those rare instances when it is ordered by a court. However, the standard real estate purchase contract provides that if a party does not submit to mediation before a lawsuit or arbitration demand is filed, that party is precluded from asserting a claim for reimbursement of attorneys' fees even if the party ultimately prevails in the lawsuit or arbitration. There is a similar provision in the standard Exclusive Listing Agreement. Accordingly, it is advisable for any party to such a dispute to offer in writing to submit a dispute to mediation before filing a lawsuit or pursuing arbitration. Occasionally it is necessary to file a lawsuit prior to mediation in order to tie up the property by means of the recording of a Notice of Pendency of Action ("lis pendens"), for example in an action to force the specific performance of a sales agreement. In such actions, the lawsuit and accompanying correspondence should contain an offer of mediation in order to preserve the right to claim attorneys' fees later.

HOW DOES MEDIATION DIFFER FROM ARBITRATION?

Binding arbitration is a very different process. An arbitrator, unlike a mediator, is not merely a facilitator, but rather acts as a trier of fact. Although the arbitration process is generally less formal than a court trial, the arbitrator effectively acts in the role of a judge, hearing testimony from various witnesses, reviewing documents and other evidence, and ultimately issuing a ruling that is fully binding upon the parties to the arbitration. Unlike a mediator, who merely tries to facilitate a settlement, the arbitrator will ultimately make a decision in the case, and that decision is fully enforceable just like a court judgment. As with a lawsuit, it is always possible for the parties to reach a settlement at any time during the arbitration process, but if the arbitration is not otherwise settled, the arbitrator's ruling will serve as a final resolution of the dispute.

WHEN IS ARBITRATION REQUIRED?

Generally speaking, binding arbitration is only required if the parties have entered into a contract calling for arbitration of any dispute. The standard real estate purchase contract includes such a clause that must be initialed by all buyers and sellers to be enforceable. Once it is initialed, either side is entitled to enforce it regarding any dispute. If one party files a lawsuit, the other party may enforce the initialed arbitration agreement by filing a motion in the court where the case has been filed. In virtually all instances, the court will then enforce the terms of the arbitration agreement and not allow the court

case to go forward. Even if the arbitration provision in the contract is not initialed, the parties can later, after a dispute arises, agree to submit the matter to binding arbitration. However, if either side refuses, the other side cannot then force binding arbitration.

ADVANTAGES AND DISADVANTAGES OF ARBITRATION

There is a vast difference of opinion regarding whether matters should be submitted to binding arbitration rather than litigated as a court lawsuit. Generally speaking, the arbitration process is faster than litigation. The parties are usually able to agree upon the arbitrator who will handle the matter, and have more control in scheduling the arbitration. Although arbitration is by no means inexpensive, it is often less expensive than litigation since there are less hearings to attend, and less time is wasted. Arbitration can often be completed in a matter of months whereas a lawsuit, if it is not settled, may take a year or more to be resolved, even assuming there is no appeal.

However, there are also disadvantages to arbitration. The constitutional right to a jury is generally waived. An arbitrator is not actually required to follow California law, and can render a decision on whatever basis he or she sees fit. While of course it is true that judge and juries sometimes make bad decisions, the court system allows a right of appeal whereby appellate justices will review the court's decision and determine whether it is in keeping with California statutes and legal precedent. In an arbitration, there is generally no right of appeal, and an arbitrator's decision, no matter how abhorrent or contrary to California law, will not be set aside unless a party can prove it was issued as a result of fraud, an undisclosed conflict of interest, or other intentional wrongdoing on the part of the arbitrator. Those cases are very rare. Accordingly, the value of arbitration in saving time and expense in appropriate circumstances must be weighed carefully against the waiver of rights to jury and appeal. It is also absolutely essential that the arbitrator be familiar with the area of law that is the subject of the claim and that he or she be competent, reasonable, and unbiased.

SHOULD YOU INITIAL THE ARBITRATION CLAUSE IN THE PURCHASE AGREEMENT?

This is not a question that your real estate professional can or should answer. The issue of whether to submit to arbitration is ultimately a legal question, and it would be inappropriate for a real estate professional to attempt to give this legal advice. It is actually a misdemeanor in California for a non-attorney to do so. You may wish to speak with an attorney concerning the advisability of initialing the arbitration clause. Otherwise this is a personal decision to be based largely upon consideration of the pros and cons outlined above.

Lawrence Dreyfuss is president of The Dreyfuss Firm, a professional law corporation located in Irvine, California. He is a 1974 graduate of UCLA and a 1977 graduate of The UCLA School of Law, and has more than 35 years civil litigation experience. He handles cases throughout California in state and federal trial and appeals courts concerning real property transactions and non-disclosures, secured lending and

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