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10 Tips for Mediating Real Estate Disputes

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1. Tell Clients What They Can Expect.

Have your client reasonably prepared for understanding the process. Mediation can be a tough. They will not get their way. Reaching a settlement invariably means some concession by all parties and preparing your clients with this understanding can avoid unreasonable expectations going into a mediation. Clients must understand that there are few, if any, guarantees in litigation.

2. Ask Clients What They Expect.

Talk with your clients prior to mediation about what types of resolution they could live with, short of taking their case trial. Is the client willing to part with all or some of the property? If so, at what cost? Would an easement or something short of the whole bundle of sticks be

acceptable? What motivations are in play and how can those be addressed through possible creative solutions? Knowing potential terms of a mediated settlement agreement, as well as possible conditions and contingencies, prepares you to put pencil to paper when the time comes.

3. Consider What The Mediator Needs To Know To Do Her/His Job.

While not always required and may not even be necessary in some matters given cost-benefit considerations, prepare a written submission for the mediator's review in advance of the session. Provide the mediator with key pleadings and orders. Be clear, if appropriate, with the mediator that you are providing such documents for reference and background as needed and that the mediator need not engage in hours of unnecessary pre-session "study" at the expense of the participants. Even if you choose to send only a prepared meditation statement in advance, bring all relevant litigation documents to the mediation session so they are available as needed.

Factual background; information on the parties; an outline of key or controlling legal authorities; and a history of prior settlement discussions, if any, are both important and helpful to the mediator. Solid, concise, clear, reasonable, and practical outlines of your client's positions are extremely helpful to the mediation process. Also helpful is a candid assessment of your client's perceived strengths and weaknesses, and a candid statement on settlement wants, needs, and expectations. Your mediation statement will be CONFIDENTIAL, though parties sometimes, for strategic or tactical purposes, share their submission with one or more other parties.

4. Don't Leave It Back At the Office.

While settlement discussions often continue after an unsuccessful mediation, being prepared and having documents readily available can help on the day the parties are under one roof and face-to-face with the mediator. Telling a mediator that you've got a box full of photos to prove 15+ years of adverse possession is less helpful when the box is back at the office. Explaining to the mediator all your defenses to the filed mechanic's lien is less persuasive when you've left the proof on your PC. For boundary and encroachment disputes, bring the best evidence that you have. This is typically in the form of dated photos, historical affidavits or statements, and surveys. In disputes over the purchase of real estate, be sure to have a copy of the purchase agreement ready, including any binding arbitration provisions. Challenges to the enforcement, or cancellation, of purchase agreements are commonplace. A clear understanding of damages available to the parties in cases of specific performance, recession, or claimed mutual or unilateral mistake are critical if an effective mediated resolution is to be reached.

5. Know Who Else Needs To Be Part Of The Solution.

Be sure you have updated title work so that you know all the possible people and entities whose participation may be needed to effectuate a proposed settlement agreement. For example, in resolving a boundary dispute by way of a land swap, the settlement should be contingent on the ability to procure consent from any mortgage lenders. If not already named and appearing in the action, you may need to contact the lenders to seek authority to revise a legal description secured by a lender's mortgage. Consent from the lenders can avoid triggering a due-on-sale clause and getting partial releases or mortgage modifications may be a necessary part of the solution to avoid a later marketability issue if the lenders' interests aren't dealt with as part of the mediated settlement.

6. Understand What The City/County Might Have To Say About It.

In preparing a settlement agreement contingent on approvals at the city and county levels, be sure to factor in sufficient time for the necessary approvals to be obtained. For example, a proposed resolution with the exchange of deeds may be deemed a minor subdivision or administrative subdivision requiring additional survey work to prepare a revised legal descriptions; review by the city planner and the city's engineering department; and approval by the city council. At the county level, approval of the deed will likely be required, as well as taxes paid current when presenting the deeds to the county for recording and proposing revised descriptions of the tax parcels.

7. Work With The Mediator, Not Against.

Do your best to work with the mediator to achieve a resolution. Of course, we understand that you are a good and a zealous advocate for your client but try to avoid blowing too much wind in the form of confidence and unreasonable expectations into your client's sails. Be candid with the mediator. Trust the mediator and let the mediator know that you can be trusted. Consider a confidential pre-mediation call with the mediator. Ask and be clear that it is confidential. Advise the mediator of who is likely to attend, whether there are any personality challenges that will be present, and if there are any concerns for safety of the participants. This is particularly applicable to bitter boundary line challenges. Where a concern, ask the mediator to control traffic to avoid personal meetings and confrontations. Staging the parties on separate ends of an office, or on separate floors, can be helpful.

8. Know Who Has Authority. And Who Does Not.

Have decision makers and stakeholders attend in person. Tell the mediator how many participants you intend to bring and, if non-parties, what their roles in the process will be. In situations where adjusters from insurers or title insurers are out-of-state, ask for permission to have such participants appear by phone unless a court has ordered otherwise or unless the adjuster is fully engaged and has reason, purpose, or need to travel to personally participate. While personal participation is desired and ideal, some matters do make more economic sense for an adjuster (but typically not a party) to appear by phone. When

adjusters are allowed to appear by phone, be certain that they are available during the entire session. Mediators will want to talk to the adjusters by phone, particularly during critical stages in the process.

9. Not Your First Rodeo. Prove it.

Yes, all cases are different and clients unique. Yet, when resolving real estate disputes, there are commonalities in the means by which cases can be resolved. Consider having your own settlement agreement language prepared on your laptop, tablet, etc. For example, consider what language is common and particular to resolution of mechanic's lien disputes or boundary disputes. If you anticipate a boundary line dispute may be resolved with a boundary line adjustment, be prepared with language that any such agreement is contingent on obtaining the necessary governmental approvals and identify the party responsible for clearing any contingencies. On matters involving a potential need for exchange of deeds, agreement on easement terms, lien waivers or satisfactions, or other standard conveyance, financing, or release documents, consider bringing drafts of the same to the mediation. Also have them available in electronic non-PDF format for the convenience of the mediator and staff. Such documents should be prepared fair, square, and neutral. With participants present, it is often easiest to obtain signatures on such documents as part of a settlement right at the session. The mediator can hold such signed documents in trust with specific instructions on when, if at all, to release them as provided in a final mediated settlement agreement. If there is future drafting to be done, consider agreeing to a provision that the mediator shall participate in resolving such disputes and, if need be, serve as a final binding arbitrator as to which form of competing settlement documents should control. Have proposed easement language, corrective deeds, or other instruments necessary to fully resolve a matter at the ready if at all possible.

10. Don't Skimp On The Details.

Unless absolutely crunched by time or uncertainty, request that the mediator be as detailed, clear, and specific as possible when drafting a mediated settlement agreement. A simple "bullet point" agreement that leaves much ambiguity, that calls for parties to later draft documents that will likely be the products of sharp advocacy and leaving litigants who came in hating each other to work out final details "later" is a recipe for disaster and ultimate failure. You pay your mediator a right fair fee. Demand that we do our jobs by not only getting you to resolution, but by providing fair, neutral, clear, complete, and concise settlement agreements to the parties on their way out the door.