

## Finding the Recipe for Success When Navigating Real Estate Disputes

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Real estate disputes are often difficult to navigate. Real estate litigation comes in all shapes and sizes, and arises out of any number of business relationships among owners, investors, landlords and tenants, contractors and subcontractors, and lenders, to name a few. Mediation provides a confidential means of alternative dispute resolution (ADR) between parties to a dispute that has agreed to attempt to resolve their dispute through the use of an independent, impartial neutral.

Mediation is voluntary and confidential, and any resolution requires the consent of all parties. The likelihood of a successful mediation is directly related to the participation of all decision-makers. As discussed further below, in-person attendance at mediation is less of a requirement with the advent of Zoom and other

videoconferencing platforms. Nevertheless, the participation of all decision-makers remains paramount.

Because the pandemic has forced us to conduct mediations virtually, the pre-mediation organization has become more important. Gone are the days of a brief joint opening session among all parties and counsel to discuss logistics and processes. The recipe for successful mediation in today's business environment starts with advance planning, including the following:

- **Scheduling.** The first step is to schedule a date that will work for all parties.
- **Zoom capability.** Each participant must have access to computer hardware and software that allow them to participate in the virtual proceeding. JAMS provides access



to a Zoom account and a virtual ADR moderator to initiate and assist with monitoring each session. All attorneys and their clients should understand how to use Zoom before the mediation starts.

- **Pre-mediation briefing.** Real estate disputes often include lengthy transaction documents, surveys, emails, and correspondence between parties, among other documents. Two of the key functions of

the pre-mediation briefing are to organize the presentation of documents and allow the parties to submit pre-mediation briefs. Particularly in a Zoom environment, separating relevant provisions of a contract, deed of trust, loan agreement or other document to simplify sharing the key issues is paramount. It is also helpful to provide a pre-mediation brief (which can be confidential and will not be shared with other parties) to provide the mediator with background information before the mediation starts.

- **Client preparation.** An attorney should take time to explain the mediation process to his or her client in advance. This can include what will be expected of the client. The attorney should also review key documents and identify the issues that the mediator will discuss. It is also a good idea to discuss acceptable settlement terms and options in advance of the mediation. Nothing stops a real estate mediation in its tracks faster than a client and an

attorney who are not on the same page with respect to settlement terms.

Historically, mediations have been viewed as single-day or multiple-day sessions. The larger the number of parties and the more complicated the issues, the more likely the need for a second or even third day. The attorneys, with the assistance of the mediator, should determine how long it may take to reach a settlement. Because of the eye strain and fatigue caused by staring at a computer screen all day, it is important to take breaks every 90 minutes throughout the day. Each individual case will have its own rhythm, but it is important to remember the law of diminishing returns in a Zoom environment.

In a typical mediation, particularly with multiple parties, there will be periods of time when the mediator is engaged with a particular party. In an in-person mediation, the parties can see the mediator moving from room to room and understand what is happening. However, in a Zoom environment, clients and attorneys may not always know what is happening beyond their screens. Attorneys should prepare their clients in advance for periods of inactivity. Clients and attorneys can

turn their attention to emails and other matters during these interludes. Parties and attorneys have to stay aware of what is happening in the mediation. Mediators generally communicate by text or email as they maneuver between the various rooms.

Given how long trials can take, many parties see the benefit of attempting to resolve a dispute by mediation. Due to the savings in both time and cost, as well as the control the parties have over the result, mediation is a preferred alternative in many real estate disputes.

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