

## USE OF ADR FOR REAL ESTATE MATTERS

### Panelists:

Patrick C. McKeever, Esq., *Miller, Miller & Canby, Chtd.*

Robert C. Park, Jr., Esq., *Linowes and Blocher, LLP*

Jennifer B. Speargas, Esq., *Associate Litigation Counsel, NRT, LLC*

### Moderator:

Erik C. Johnson, Esq, *Creative Dispute Resolutions, LLC*

#### I. Statistics – Settlement Versus Trial

- Study conducted in September 2008 demonstrated the financial risks associated with foregoing settlement and taking one's chances at trial
- Study analyzed 2,000 cases over a 3-year period and compared the settlement offers and demands previously made by the parties with the verdicts they ultimately received at trial
- Found a high rate of decision error – *i.e.*, receiving an amount at trial worse than that offered by the other side during the course of the case
- While the rate of decision error was higher for plaintiffs than defendants, the mean cost of that error was significantly higher for the defendants
- Examples:
  - Eminent Domain
    - Plaintiffs – Error Percentage: 41.7%; Mean Cost: \$72,100
    - Defendants – Error Percentage: 33.3%; Mean Cost: \$523,600
  - Contracts
    - Plaintiffs – Error Percentage: 44.3%; Mean Cost: \$144,900
    - Defendants – Error Percentage: 44.3%; Mean Cost: \$1,528,700

#### II. Mediation/Arbitration/Settlement Conferences/Neutral Case Evaluations

- Explanation of the general processes and differences among them
- Different styles for mediation – *e.g.*, facilitative, evaluative

### III. Types of Real Estate Disputes Where ADR Can Help

- Eminent domain/condemnation actions
- Commercial/office leasing disputes
- Real estate financing negotiations and disputes
- Land use/zoning
- Real estate brokerage claims
- Breach of contract claims (deposits, specific performance, etc.)
- Landlord/tenant
- Easements
- Construction-related disputes (general v. sub-contractor; homeowner v. contractor, etc.)
- HOA/property management

### IV. Benefits of Mediation

- Significant savings in time and money
- Useful in managing clients' expectations - "reality check"
- Eliminates risks associated with trying cases in front of a jury
- Confidential process
- Allows parties to be heard and to express/resolve emotions
- Allows for creativity when fashioning resolutions - can agree on relief that the court could never award
- Parties more likely to abide by agreements if they had a hand in crafting it
- No real downside to mediation - most cases settle, but even those that don't, some benefits are realized (better understanding of each side's interests/motivations, better appreciation of your own case, narrowing of the issues, laying the groundwork for future settlement, etc.)

### V. Benefits of Arbitration

- Closure
- Savings in time and money - expedited (or no) discovery; streamlined adjudicatory process

## VI. Timing

- When to suggest/pursue mediation
- Pre-suit, start of discovery, after some important depositions taken, etc.
- Cost-savings diminish the later ADR is used

## VII. Tips for Advocates

- Prepare client for the process
- Be prepared yourself on the core issues in the case and be able to discuss strengths and weaknesses with the mediator in private caucus
- Be prepared to discuss with the mediator and client all aspects of the attorneys' fees and costs to date and in the future, and how they factor into settlement negotiations (*e.g.*, budget projections, collectability, risk tolerance)
- Anticipate the motivations/interests of the other side, but be sure to listen during the mediation and adapt accordingly
- Be careful of treating mediation like you're in the courtroom arguing in front of a jury
- How/when to educate mediator about strengths/weaknesses of your case
- Offer to the mediator your views on the impediments thus far to settlement
- Be prepared to tailor your presentation based on the mediator's approach and style
- Choose a mediator carefully and consider subject matter expertise and what type of style and approach would be most helpful (*i.e.*, facilitative, evaluative, etc.)

## VIII. ADR Clauses

- Use of contractual clauses mandating mediation and/or arbitration

## IX. Myths About Mediation

- Sign of weakness
- Have to reveal all my evidence
- Will open the floodgates to more litigation
- This case will never settle
- Strips away the proverbial "day in court"