

Mediation: Making the Effort to Make it Work

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Your association has sent violation letter after violation letter to Member X, repeatedly called him to hearing, possibly levied fines and got absolutely nowhere. The violation's still there and it's eating at you and the rest of the board, manager and neighbors. You feel like Member X is thumbing his nose at the entire community. You're at your wit's end and maybe even anxious to file a lawsuit. OK, time to cool off, assess the options and focus on your goal of achieving compliance with the governing documents.

This is just one of many scenarios that may ultimately result in an association serving a member with a Request for Resolution under Civil Code Section 1369.510 *et seq.* Before an association can file a lawsuit regarding most violations, it must have "endeavored" to submit the dispute to alternative dispute resolution (ADR).

Webster's Ninth New Collegiate Dictionary defines "endeavor" as follows: "to attempt (as the fulfillment of an obligation) by exertion of effort...to work with set purpose." Does the endeavor begin with sending a Request for Resolution and end once Member X accepts the offer to mediate? It shouldn't, and that's where effective mediation preparation comes into play.

Purpose & Early Preparation

To best prepare, first determine what you expect and wish to accomplish at mediation. What is your set purpose? You might meet with the homeowner, reach an agreement, obtain compliance and avoid the time and expense of litigation. Even if an agreement isn't reached, perhaps the process of community healing and consensus building may begin. However, if you firmly believe successful resolution of the dispute is unlikely without litigation and you're only going to mediation because the statute requires it in your situation, mediation just might provide you with a good preview of the strategies and arguments the homeowner (or his attorney) will bring up in court. Hey, by the time you're done, maybe a solution will present itself after all! These possible accomplishments are all important, so don't they deserve a little exertion of effort?

Your mediation endeavor starts well in advance of sending a Request for Resolution. It begins with all of the association's enforcement efforts leading up to that Request. Be consistent with enforcement efforts. The association should communicate

with members regularly, clearly, and in writing regarding violation matters. Maintain a detailed and accurate violation chronology. Establish a clear “paper trail,” demonstrating consistent association efforts to spur compliance and showing association observance of its own published rules and enforcement policies.

If applicable, take, and continue to take, photographs of the violation and of neighboring lots or units. These photographs will be invaluable to a mediator and other participants, including the association’s attorney, so they may better understand the standards and expectations of your community. What is acceptable in one neighborhood may not be considered up to par in another. When addressing violation matters, act from the outset as if the issue will end up going to mediation or even trial. Your paper trail will be seen by the mediator or trial judge, so also keep that in mind when preparing written documentation. By keeping good records of violation enforcement activity, you’re taking an important step toward making disputes easier for mediators to understand and, hopefully, toward facilitating resolution.

The Mediator’s Role

Understanding the role of the mediator is also critical to effective preparation. Mediation is not trial, and the mediator does not act as a judge or make decisions based upon witness testimony or presentation of evidence. Evidentiary information can be useful to convince the other party that a real problem exists and to assist the mediator in understanding the issues, but a mediator can not and will not order either side to do anything. The mediator will instead attempt to bring the parties to a mutually satisfactory resolution. He or she may help you acknowledge valid points made by the other party, and may also help the other party understand the association’s position.

The mediator may also help both sides explore reasonable alternatives, as well as potential risks and benefits of going to trial. Mediation is really a facilitated negotiation. Therefore, before mediation the board should attempt to identify and explore alternatives, and consider the potential risks of not reaching an agreement. By doing so, you’ll have a head start on the negotiation process and get in the mindset of dispute resolution. Mediation isn’t about winning or losing—it’s about finding a mutually acceptable solution.

Identifying Options

The ultimate decision makers at mediation are the parties themselves (*i.e.*, the association and the homeowner) and not the mediator. So, to prepare for mediation, the board must discuss in advance the specific parameters within which it would be willing to settle a dispute. Any board members who will be attending should have authority from the entire board to enter into an agreement to resolve the matter in its entirety. One of the most difficult situations occurs when an agreement is about to be reached, but its terms are outside the scope of the participating board member’s settlement authority. Although it may be possible to reach an informal agreement,

pending obtaining board approval of the terms, this does not achieve desired closure at the mediation table.

Although it is important that the mediator understand the nature of the dispute, it is equally (if not more) important that the other party understand it, too. Since an association's primary goal is compliance with the governing documents, think about what the association might be willing to offer to achieve that goal. Every situation is different, but a mediator will often expect that each side give up something. Maybe this means offering a payment plan, a waiver or reduction of fines, an extension of time to complete work, or possibly a charitable donation or a simple apology. Think about what may have a high level of value to the homeowner, and a low cost to the association. Coming to mediation prepared to propose such low-cost alternatives makes you, as an association representative, part of the solution rather than part of the problem.

Finally, always keep in mind the goal of achieving compliance. As you endeavor to submit a dispute to mediation, make a concerted effort to identify alternative solutions, establish a scope of settlement authority, and be prepared to provide documentation that supports and justifies your expectations. Your efforts will help demonstrate unbiased credibility at the negotiation table and assist the mediator in facilitating clear, direct communication designed to reach a mutually agreeable solution.