

# 3 TIPS AND TRAPS OF REAL ESTATE MEDIATION

By **Christopher Hanson**



There are plenty of real estate-related disputes to keep lawyers busy: arguments over boundary lines, easements, title insurance, partition and accounting actions, non-disclosure of property defects, failed construction or repair issues, specific performance claims, and broker negligence, and the list goes on and on.

Now, after COVID-19, there are commercial tenancies and companies that are failing and closing everywhere, not to mention residential tenancies. The court systems, like most other governmental agencies, have been shut down. The backlog is horrendous!



What is the solution? Throughout the country, buyers, sellers, landlords, tenants, and sometimes lenders are entering into negotiations to reach a solution in these difficult times. Those negotiations are almost always facilitated by a real estate mediator.

However, many of the parties who come to a mediation are not as well prepared as they can be. They fall into traps for the unwary. They lose the opportunity to reach the very settlement they've come to mediation for.

Here are 3 of the most common traps of mediation and 3 tips on how to maximize your opportunity for a successful mediation effort.

## TRAP 01

### IDENTIFYING POSITION VS. INTEREST



No one in a mediation is interested in your position, and it's a failure to not best position your interest. It sounds trite to talk about oranges when describing a trap and tip for successful mediation - but I will anyway.



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Two teens are fighting in the kitchen - over the last orange. The volume gets louder and louder. Each *\*demands\** the orange. Each is *\*adamant\** that their want for the orange is far greater than the other's. They have dug into their position.

There is only one orange and one of them will get it. Period. Mom comes in. "What's all the screaming about?" The teens, together, in unison, shout: "I want the orange!"



Their positions are well staked out.

Mom asks a question of each: "Why?"

"I am making a chiffon cake and I need the zest for my icing," says one. "I'm on a diet and want a glass of unprocessed organic orange juice," says the other.

Now, Mom knows their interests. A deal can be brokered where each gets what they need - as opposed to what they wanted.

Know what your interests are when you walk into a mediation. Many don't.

## TRAP 02

### KEEPING CARDS TOO CLOSE TO THE VEST



"I don't want to give away too much information" is a common refrain from attorneys participating in a mediation. "I won't release my Mediation Brief to the other side."

Mediations only work when each side is prepared to release information the other side needs to know in order to make a decision. 'Hide the Ball' is a well known game, but it is counter productive to a meaningful mediation effort.



Holding on to a 'litigation mentality' when engaged in a mediation process is the single largest cause of failure in mediations.

Those who fear showing the 'smoking gun' too early should take comfort in the premise that anything prepared for, and anything said in a mediation is protected from disclosure afterward.

In many states that protection is a "privilege" in others it is an "evidentiary bar." Still other states have no restriction - so the mediator's agreement creates a contractual bar for use of mediation materials.



## TRAP 03

### "JUDGING" TOO QUICKLY



76% of attorneys in a recent poll said they preferred a "subject-matter-expert" attorney instead of a retired judge for a mediation. Why? Because judges are so used to being 'the boss' that they find it difficult to be the facilitator, the cajoler, the catalyst.

Judges often make up their minds quickly, and early on, as to whether one party's 'position' is valid. Judges frequently don't care about interests, but are more prone to perceive positions.

Yet, many attorneys (or their clients) feel that "only a judge" can beat the other side into submission. (Not to mention that if you try to 'beat' the other side into anything, the mediation will likely fail.)

Before you become 'set' with picking a judge to act as your mediator, look through the roster of subject-matter-expert attorneys as well. You can often find just the right one for just your kind of dispute.



After all, you wouldn't want a construction defect attorney/mediator for a traumatic brain injury claim. Right? Or a judge that has done 'a little of everything' and doesn't have a focus on your kind of claim?

## TIP 01

### PROPERLY PREPARING PROMOTES PEAK PERFORMANCE



While not a trial, a mediation is also an exercise in persuasion. The audience isn't a jury - it's the mediator and the 'other side.' So, how you present yourself is important. And like any other performance, rehearsal is key.

Zoom or GoToMeeting or Skype, or some other video conference technology is how you will likely experience a mediation (for the next year - or two). So, just like you got used to riding a bike, or driving a car, you need to get used to using video conference platforms. Pick one; try it out between the attorney and client. Share screens.

Look at your background. You really don't want the laundry basket or the leftover dishes sitting on the counter behind you when you're going through the mediation teleconference.

Position your camera. No one, and I mean no one, wants to be looking up your nose for 4 or 8 hours during a mediation. Or the top 1/3 of your head. How you appear during the mediation matters, still; so, if you are more comfortable sitting on the couch - do so, but just not in your PJs or sweats.



## TIP 02

### REST AND PEACE



A mediation, even one where you're sitting on your couch, is a stressful experience for everyone involved. Get a good night's rest. Find a place to 'attend' the mediation where you won't be distracted.

**Turn off your cell phone.** Don't 'multi-task' - especially when you're 'in session.' You'll fail miserably at both tasks. Trust me. There will be 'dead time' when the mediator is in another 'room' talking with the other side.

Those dialogs can last (what seems like) forever. Grab a book. Pull out some knitting. Get something handy - that you can put down in an instant - because, when it's your turn to be 'on' you need to be all there and all in.

## TIP 03

### BE A BOY SCOUT - BE PREPARED

Two key points that can stall or even kill a mediation right at the end, after you've spent hours struggling through the positions, interests, anger and frustration - and exhaustion - of a mediation:

1. The "persons" that have authority (like an insurance company representative - or a partner - or spouse) aren't there.
2. No one has a settlement agreement template on hand (because no one believed the case would ever settle).



It is a frustrating waste of time and effort to go through the mediation process without all the 'decision makers' present and authorized to 'sign on the dotted line.'

It's even more frustrating when the paper that the dotted line is on, hasn't been reviewed until literally the last 10 minutes of a mediation. Everyone is exhausted by that point. And arguing about the 'fine points' of a settlement agreement after 8 or 10 hours of a mediation - is torture of a special kind.



We won't even start a mediation if all the decision makers are not present, and able to remain throughout the entire mediation.



We always ask the attorneys to circulate their template settlement agreements in advance of the mediation. If they don't have one, we'll supply ours (but ours is designed for California, so if this is a Texas or New York case, the attorneys in those states need to provide their law-appropriate settlement agreements in advance).

With just these Tips and Traps covered in advance - your chance of achieving a successful outcome through a mediation is far, far greater.



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