



**WEST COAST  
RESOLUTION  
GROUP**

## **How To Succeed In A Real Estate Mediation**



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### **BACKGROUND**

The California Association of Realtors (CAR) Residential Purchase Agreement and Joint Escrow Instructions (RPA) is the form that is used in almost all residential real estate transactions in the State of California. It and most other transactional forms for residential and commercial transactions contain a Mediation Clause, which requires parties to the transaction to mediate any disputes arising under the agreement or in the transaction described in the agreement to go to mediation prior to engaging in any other dispute resolution process. If a party to the agreement files suit or demands arbitration without first unsuccessfully requesting the other party to mediate the dispute, the filing party may lose his or her right to recover attorney's fees if they prevail in the litigation or arbitration.

Mediation is a CONFIDENTIAL process. What is said at the mediation remains confidential if the mediation is unsuccessful and you go on to another dispute resolution process. The California Evidence Code protects participants in the mediation in order to allow them to speak freely without concern that what they say will "come back to bite them later". Because of mediation confidentiality, it is important to fashion any agreements reached at mediation in an appropriate format. The Settlement Agreement should always be in writing and signed by all parties to be bound. It should recite that the agreement is "binding, admissible and enforceable".

## HOW TO SUCCEED AT MEDIATION

### 1. Prepare your case.

- Identify what you hope to achieve at mediation.
- For money damage claims, prepare a detailed summary or damages. Include estimates, invoices, receipts and canceled checks.
- Other claims, bring photographs and reports.
- Be prepared to present your case in the presence of opposing parties.
- Tell them how this dispute has affected your life.

### 2. Evaluate available alternatives if mediation is unsuccessful.

- What is your BATNA (Best Alternative to a Negotiated Agreement)? Arbitration or litigation?
- What will it cost?
- How long will it take?
- What is the risk of an unsuccessful outcome?
- What is your exposure to pay the other party(ies)' costs and attorney's fees?
- What is your risk tolerance?

### 3. Exchange information with other parties BEFORE mediation.

- Use this important OPPORTUNITY to educate your opponent and your opponent's attorney.
- Provide them with your list of claims and supporting information.
- Summary of damages, evidence of your expenses, photographs, citation to legal authority which supports your position.
- Provide a summary of the expected testimony of other witnesses and experts.

### 4. Identify what your opponent hopes to achieve at mediation.

Acknowledge your opponent's valid positions. Do you owe your opponent anything? Is there any non-monetary consideration that is "low cost to you / high value to your opponent"? Mediation is an "interests-based" negotiation. Identify both your interests and objectives and those of your opponent and negotiate accordingly. LISTEN carefully to your opponent when he/she is outlining their claims, you will LEARN important information about their concerns and objectives.

### 5. You and your opponent are the decision makers - mediators facilitate the negotiation.

Remember, the mediator is a neutral third party. Their goal is to find a satisfactory agreement between both parties. Be reasonable in the positions you take. Don't ask for the sun, the moon and the stars. If

you do, you will doom the negotiation to failure because it will polarize the negotiation. Start your negotiation in or just outside of “the ballpark”.

**6. Are there other decision-makers who need to be present at mediation?**

Make sure everyone who needs to be at the session is available (i.e., spouses, brokers, managers, insurance adjusters). You need ALL decision-makers present at the mediation.

**7. Are there other parties that need to be participants?**

Sometimes it will be necessary to have an industry specialist involved in the mediation (i.e., agents, home inspectors, contractors, etc.). They may attend as “witnesses” and become contributing “participants” to the settlement.

## **CONCLUSION**

Enjoy the ride.. Mediation is a fabulous process, but be patient with it. It takes time for the process to work its magic. Be respectful of your opponents and their representatives. You will be respected in turn. Mediation can be a tremendously creative and collaborative process. There are no bad ideas and it’s always okay to think “outside the box”. A settlement at mediation can include far broader concessions and agreements than the mere payment of money, which is about the only medium of exchange that can be used by Judges and Arbitrators. I hope that you find your mediation experience enjoyable, satisfying and SUCCESSFUL!