

Allowing for Creativity and Success in Real Estate Mediations – A Case Study of Time,
Togetherness and Talk

By
David I. Karp

Residential neighbors facing the unwelcome prospect of shared usage of their common hillside through a quiet title action for prescriptive easement settled recently. They agreed to an exclusive license agreement for a fixed period in exchange for dollars.

The younger, entrepreneurial neighbor seeking exclusivity had certain funds available to secure her privacy; her elderly neighbor, who of course wanted to preserve his own property rights but could not see the parcel in question anyway from his home, also wanted to preserve his retirement funds otherwise to be drained by litigation expense and to bolster his financial resources for the hard times ahead.

Neither exclusivity nor payment is the usual court-outcome in a residential prescriptive easement lawsuit (*see, e.g., Harrison v. Welch* (2004) 116 C.A.4th 1084, 1090, 11 Cal.Rptr.3d 92). Consequently, in this one example of a creative outcome in real property disputes, the result came for the parties via mediation, but neither easily nor quickly.

Fortunately for the described disputants, their competent counsel understood the mediation process well enough to allow for the settlement to develop with time, togetherness and talk.

In *To his Coy Mistress*, Andrew Marvell wrote, “But at my back I always hear / Time's winged chariot hurrying near.” Some litigators seem to hear the same message inside. They start the mediation session insisting, “We only have three hours to get this done.” They constantly look at their watches. In the described mediation, the attorneys had the wisdom to allow time for the process to develop.

In so doing, the lawyers gave the mediator the freedom to set the stage in an extended joint session and thereafter to engage the parties privately to reveal their real interests, needs, goals, fears, expectations, and hopes.

Many fear the joint session. Winston Churchill is reported to have said, “My wife and I tried two or three times in the last 40 years to have breakfast together, but it was so disagreeable we had to stop.”

Because many litigators naturally fear the inherent emotion and occasional barbs or outbursts that can occur from any conflict, some litigators begin their mediations by stating, “We need to be in separate caucuses so we can start the negotiations right away.” The attorneys in the described mediation knew better.

They knew that the parties could be together for a joint session, guardedly perhaps, if prepared in advance, and that negotiation would come later.

In the joint session that occurred because the lawyers understood its purpose and trusted the mediator to manage it, the mediator introduced the parties to the process, described what would take place throughout the day and then led the parties to focus on (and to limited degree share with each other) their respective needs and interests rather than their legal positions. The parties listened, talked, learned to understand more about the process, themselves, and their motivations/emotions in pursuing the conflict, found out more about each other, and set upon the path to find a solution that would fit the needs of *both* sides and that both sides could tolerate.

Later, the parties separated for private caucuses and to conduct the negotiation. Then, through the course of the day, with introspection and guidance, many creative possibilities emerged that led to an agreed result after nine hours.

But none of this could have happened without the wisdom of counsel in allowing for time, togetherness and the heart-to-heart talk that gave rise to neighbors repairing their relationships and surmounting their difficulties.

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David I. Karp is a full time mediator of real estate and business disputes with offices in Van Nuys, CA. He can be reached at david@karpmediation.com or at 818-781-1458.