



DISPUTE RESOLUTION SECTION

“Disputes arise across a broad spectrum of relationships and substantive areas of the law. Alternatives to litigation may best serve client needs for resolving many of these disputes. The NYSBA Dispute Resolution Section has prepared a series of White Papers to set forth some of the special advantages of mediation and arbitration in the various contexts in which disputes commonly arise.”

Edna Sussman, Chair, NYSBA Dispute Resolution Section

David Singer, Chair, White Paper Subcommittee

SUCCESSFUL RESOLUTION OF COOPERATIVE, CONDOMINIUM AND HOMEOWNERS ASSOCIATION DISPUTES

By Gail R. Davis, and Walter Goldsmith*

"Traditional litigation is a mistake that must be corrected... For some disputes trials will be the only means, but for many claims trial by adversarial contest must in time go the way of the ancient trial by battle... Our system is too costly, too painful, too destructive, too inefficient for really civilized people." Chief Justice Warren E. Burger of the U.S. Supreme Court

Any litigator will attest that litigation has become a lengthy and expensive proposition. It is a stressful process that destroys relationships. As some disputes will inevitably arise, lawyers seeking to best serve their clients must consider other forms of dispute resolution which can avoid much of the delay, expense and disruption of traditional litigation. Mediation and arbitration, both of which are responsive to party needs in a way that is not possible in a court proceeding, are two of the most frequently utilized forms of dispute resolution. They have particular applicability in the field of Cooperatives and Condominiums since the process may result in preserving relationships and enhancing a sense of community among neighbors. Similarly, neighbors in Homeowners Association disputes may benefit from utilizing the mediation process. There is a growing realization that mediation may be the most effective and appropriate process in resolving such disputes because possible resolutions crafted in mediation can be controlled, designed and created by the participants to conform to their lifestyles rather than a remedy being imposed by a judge which is limited in scope.

Mediation and arbitration are no longer *alternate* dispute resolution mechanisms. but have become common in the resolution of commercial and non-commercial disputes between and among business entities and/or individuals. Mediation and arbitration are routinely incorporated into contracts as the method of choice for resolving disputes that

may arise in the future.¹ They are also routinely used after problems arise and the parties are seeking an appropriate means to resolve their disputes. We review the benefits of mediation and arbitration generally and how they can serve to improve your client's experience in resolving disputes in the field of Cooperatives, Condominiums and Homeowners Associations and lead to a better outcome.

I. MEDIATION

“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, and expenses, and waste of time.” Abraham Lincoln

Mediation is the process in which parties engage a neutral third person to work with them to facilitate the resolution of a dispute. The growth of mediation over the past fifteen years has been exponential, a tribute to the success of the process. User satisfaction is high as parties retain control and tailor their own solution in a less confrontational setting that preserves relationships and results in a win/win instead of a win/lose. While not every case can be settled, an effort to mediate is appropriate in virtually any subject matter and any area of the law. The advantages of mediation include the following:

1. ***Mediation Works.*** Statistics have shown that mediation is a highly effective mechanism for resolving disputes. The rate of success through mediation is very high. For example, the mediation office of the U.S. District Court for the Southern District of New York reports that over 90% of its cases settle in mediation. Most cases in mediation settle long before the traditional “courthouse steps” at a significant saving of cost and time for the parties.

2. ***Control by the Parties.*** Each dispute is unique, and the parties have the opportunity to design their own unique approach and structure for each mediation. They can select a mediator of their choice who has the experience and knowledge they require, and, with the help of the experienced mediator, plan how the mediation should proceed and decide what approaches make sense during the mediation itself.

¹ The Cooperative & Condominium Committee of the New York City Bar has developed a Model Mediation Provision for adoption by Boards as a House Rule of a Co-op or Rule and Regulation of a Condominium which will be posted on its website which states: “It is Board policy that all disputes between or among residential unit owners or occupants be submitted to non-binding mediation. Parties are encouraged to speak with their respective insurance companies and may engage legal counsel. All parties are required to act in good faith including attendance by an individual with full settlement authority at the initial session of mediation for up to one full business day. Any written agreement entered into between or among the parties shall be enforceable in accordance with its terms provided it does not conflict with the proprietary lease or condominium by-laws.” The committee also endorses the use of mediation in other appropriate disputes such as those involving owners, boards and third parties. See www.nycba.org

3. ***The Mediator plays a crucial role.*** The mediator's goal is to help the parties settle their differences in a manner that meets their needs, and is preferable to the litigation alternative. An experienced mediator can serve as a sounding board, help identify and frame the relevant interests and issues of the parties, help the parties test their case and quantify the risk/reward of pursuing the matter, if asked provide a helpful and objective analysis of the merits to each of the parties, foster and even suggest creative solutions, and identify and assist in solving impediments to settlement. This is often accomplished by meeting with parties separately, as well as in a group, so that participants can speak with total candor during the mediation process. The mediator can also provide the persistence that is often necessary to help parties reach a resolution.

4. ***Opportunity to Listen and be Heard.*** Parties to a mediation have the opportunity to air their views and positions directly, in the presence of their adversaries. The process can thus provide a catharsis for the parties that can engender a willingness to resolve differences between them. Moreover, since they are heard in the presence of a neutral authority figure, the parties often feel that they have had "their day in court."

5. ***Mediation Helps In Complicated Cases.*** When the facts and/or legal issues are particularly complicated, it can be difficult to sort them out through direct negotiations, or during trial. In mediation, in contrast, there is an opportunity to break down the facts and issues into smaller components, enabling the parties to separate the matters that they agree upon and those that they do not yet agree upon. The mediator can be indispensable to this process by separating, organizing, simplifying and addressing relevant issues.

6. ***Mediation Can Save An Existing Relationship.*** The litigation process can be very stressful, time consuming, costly and often personally painful. At the end of litigation, the parties are often unable to continue or restart any relationship. In contrast, in mediation disputes -- such as those between an employer and employee or partners in a business -- can be resolved in manner that saves a business or personal relationship that, ultimately, the parties would prefer to save.

7. ***Expeditious Resolution.*** The mediation can take place at any time. Since mediation can be conducted at the earliest stages of a dispute, the parties avoid the potentially enormous distraction from and disruption of one's business and the upset in one's personal life that commonly results from protracted litigation.

8. ***Reduced Cost.*** By resolving disputes earlier rather than later the parties can save tremendous sums in attorney's fees, court costs and related expenses.

9. ***Lessens the Emotional Burden.*** Since mediation can be conducted sooner, more quickly, less expensively and in a less adversarial manner, there typically is much less of an emotional burden on the individuals involved than proceeding in a burdensome and stressful trial. Furthermore, proceeding through trial may involve publicly reliving a particularly unpleasant experience or exposing an unfavorable business action which gave rise to the dispute. This is avoided in mediation.

10. **Confidential Process and Result.** Mediation is conducted in private -- only the mediator, the parties and their representatives participate. The mediator is generally bound not to divulge any information disclosed in the mediation. Confidentiality agreements are often entered into to reinforce the confidentiality of the mediation. Moreover, the parties may agree to keep their dispute and the nature of the settlement confidential when the matter is resolved.

11. **Avoiding the Uncertainty of a Litigated Outcome.** Resolution during mediation avoids the inherently uncertain outcome of litigation and enables the parties to control the outcome. Recent studies have confirmed the wisdom of mediated solutions as the predictive abilities of parties and their counsel are unclear at best. Attorney advocates may suffer from "advocacy bias" -- they come to believe in and overvalue the strength of their client's case.

In an analysis of 2,054 cases that went to trial from 2002 to 2005, plaintiffs realized smaller recoveries than the settlement offered in 61% of cases. While defendants made the wrong decision by proceeding to trial far less often -- in 24% of cases -- they suffered a greater cost -- an average of \$1.1 million -- when they did make the wrong decision.²

A mediator without any stake in the outcome or advocacy bias can be an effective "agent of reality" in helping the parties be realistic as to their likely litigation or arbitration alternative."

12. **There are no "winners" or "losers."** In mediation, the mediator has no authority to make or impose any determination on the parties. Any resolution through mediation is solely voluntary and at the discretion of the parties.

13. **Parties Retain Their Options.** Since resolution during mediation is completely voluntary, the option to proceed thereafter to trial or arbitration is not lost in the event the mediation is not successful in resolving all matters.

14. **The pro se litigant.** Mediation can be very helpful when a party does not have an attorney and is therefore representing him/herself *pro se*. Court litigation can be very difficult for the *pro se* litigant who is unable to navigate the complexities of the court process and trial. With the downturn in the economy, studies showed that fewer parties are represented by counsel and that lack of representation negatively impacted the *pro se* litigant's case.³ Dealing with a *pro se* litigant in court can also create difficult

² Randall Kiser, *Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients*, (Springer Science + Business Media LLC New York publ.) (2010)

³ Report on the Survey of Judges on the Impact of the Economic Downturn on Representation in the Courts (Preliminary), ABA Coalition for Justice, July 12, 2010, available at <http://new.abanet.org/JusticeCenter/PublicDocuments/CoalitionforJusticeSurveyReport.pdf>

challenges for the party that is represented by counsel. However, in mediation, the parties can more easily participate in the process and benefit from the involvement of an experienced mediator.

15. *More creative and long-lasting solutions.* Parties develop and create their own solutions to issues addressed in mediation and may enter into innovative, creative solutions tailored to their own particular lifestyle and business interests rather than being limited by the remedies available in court or arbitration.⁴ Because the parties are involved in crafting their own solutions, the solutions reached are more likely to be long-lasting ones, adhered to by the parties.

II. ARBITRATION

“Choice- the opportunity to tailor procedures to business goals and priorities- is the fundamental advantage of arbitration over litigation.”⁵

Arbitration is the process in which parties engage a neutral arbitrator or panel of three arbitrators to conduct an evidentiary hearing and render an award in connection with a dispute that has arisen between them. As arbitration is a matter of agreement between the parties, either pre-dispute in a contract as is generally the case, or post-dispute when a difference arises, the process can be tailored to meet the needs of the parties. With the ability to design the process and the best practices that have developed, arbitration offers many advantages including the following:

1. *Speed and Efficiency.* Arbitration can be a far more expedited process than court litigation. Arbitrations can be commenced and concluded within months, and often in less than a year. Leading dispute resolution providers report that the median time from the filing of the demand to the award was 8 months in domestic cases and 12 month in international cases compared to a median length for civil jury trials in the U.S. District Court for the Southern District of New York of 28.4 months and through appeals in the Second Circuit many months longer.⁶

2. *Less Expensive.* The arbitration process can result in substantial savings of attorney’s fees, court costs and related expenses because the arbitration process generally does not include time consuming and expensive discovery that is common in courts in the United States (such as taking multiple depositions and very extensive e-discovery). Time consuming and expensive motion practice is also much less common.

⁴ Irene C. Warshauer, *Creative Mediated Solutions*, 2 New York Dispute Resolution Lawyer n.2, p. 59-60 (Fall 2009).

⁵ Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the “New Litigation.”* 7 De Paul Bus. & Comm. L.J. 3 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1372291

⁶ *Judicial Business of the United States Courts 2009* Table C-5, available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2009/tables/C05Mar09.pdf>

3. ***More Control and Flexibility.*** In cases where arbitration is required by contract, the parties can prescribe various preferences to suit their needs, such as the number of arbitrators hearing the case, the location of the arbitration and scope of discovery. Once the arbitration is commenced, a party seeking a more streamlined and less expensive process will be better able to achieve that goal than in court where the applicable procedural and evidentiary rules govern. The parties will also have input in scheduling the hearing at a time that is convenient.

4. ***Qualified Neutral Decision Makers.*** The parties can select arbitrators with expertise and experience in the relevant subject matter or that meet other criteria that they desire. Arbitration avoids a trial where the subject matter may not be within the knowledge or experience of the judge or jury.

5. ***Arbitration is a Private Process.*** Arbitrations are conducted in private. Only the arbitrators, the parties, counsel and witnesses attend the arbitration. Confidentiality of the arbitration proceedings, including sensitive testimony and documents, can be agreed to by the parties. In contrast, court proceedings are generally open to the public. In the generally less adversarial context of a private arbitration, ongoing relationships suffer less damage.

6. ***Arbitration provides Finality.*** In court proceedings, parties have the right to appeal the decision of a judge or the verdict of a jury. In contrast, the grounds for court review of an arbitration award are very limited. The award of an arbitrator is final and binding on the parties.

7. ***Special considerations for international arbitrations.*** Party selection of arbitrators ensures that a neutral decision maker rather than the home court of one party decides the case, and allows the parties to select an arbitrator with cross cultural expertise and understanding of the different relevant legal traditions. Of crucial importance also is the enforceability of arbitration awards under the New York Convention, in contrast to the much more difficult enforcement of court judgments across borders.

III. RESOLVING COOPERATIVE, CONDOMINIUM AND HOMEOWNER ASSOCIATION DISPUTES

Although arbitration is used in a variety of commercial disputes, it has not been a first choice in disputes involving cooperatives and condominiums.⁷ Among other

⁷ Much of the following applies to homeowner association disputes. However, unlike cooperatives and condominiums, homeowner associations consist of individually owned homes, with owners sharing the expenses of maintaining common areas, such as roads and recreational facilities. Despite compartmentalized ownership of units, association by-laws may contain restrictive provisions regarding such items as the nature, composition and color of exteriors of homes; detailed requirements regarding use of recreational facilities; and use and maintenance of lawns, porches and other areas appurtenant or

obstacles, the parties are often reluctant to give up their day in court. Boards, in particular, may not wish to broaden the limited grounds permitted for challenging their decisions, pursuant to the “business judgment” rule.⁸

Mediation, on the other hand, has broad potential for effective use. Unlike commercial disputes, which are often (but not always) centered on money, cooperative and condominium conflicts can span a broad spectrum of legal and non-legal issues. Controversies may involve powers and duties of Boards, contents of bylaws, cooperative proprietary leases and condominium declarations, responsibilities of managing agents, contractors, suppliers and professionals, and law and regulation regarding use and division of space, etc. Also, powerful emotions may be involved, notably those of owners, whose spaces are used as homes for the owners and their families, who each may believe that “my home is my castle,” and may not consider the impact of behavior on a neighbor.

1. *Disputes among Owners.* Disputes among owners such as those concerning smoking, noise, cleanliness, use of apartments or other annoyances, are some that frequently arise and are particularly well-suited to mediation. Each party would have an opportunity to express his/her point of view, and to hear, and understand the other’s concerns. Also, the parties would retain control of the process and craft a solution which would fit their lifestyles, interests and concerns.

An example of a dispute between owners resolved in mediation involves cigar-smoking on the terrace by an owner which affected the owner of the identical unit with a terrace in the same line directly above. The owner above had asthmatic children who were badly affected by the smoke rising from the lower unit. Prior attempts to talk with each other had resulted in shouting matches and insults. In mediation, the parties expressed their anger and were able to hear each other’s concerns. The mediator quickly helped resolve the issue, with the smoker agreeing to smoke only at designated times on weekends, when the other family was generally

adjacent to homes. These arrangements introduce a panoply of potential disputes, including those connected with permitted uses of homes and common areas by owners and boards; displays of holiday decorations, religious articles and even American Flags in and around exteriors of homes; issues arising from subleasing; respective rights and obligations of Boards and owners, notably those involving structural items such as roofs and unit exteriors; and remedies available to boards where owners violate governing documents or rules and regulations of the association. As with disputes within cooperatives and condominiums, mediation is of potential use, bearing in mind differing emphasis and dynamics arising from restrictions and limitations place by associations on rights and prerogatives traditionally associated with ownership of real property.

⁸ The “business judgment” rule (Matter of Levandusky v. One Fifth Ave., Apt. Corp., 75 N.Y.2d 530 [1990]) applicable to the board of directors of cooperative and condominium corporations, limits a court’s inquiry “to whether the board acted within the scope of its authority under the bylaws (a necessary threshold inquiry) and whether the action was taken in good faith to further a legitimate interest of the condominium. Absent a showing of fraud, self-dealing or unconscionability, the court’s inquiry is so limited and it will not inquire as to the wisdom or soundness of the business decision.” Schoninger v. Yardarm Beach Homeowners’ Assn., Inc., 134 A.D. 2d 1, 9 (1987).

away. and establishing a procedure to communicate with each other should future difficulties arise.

2. *Disputes between Owners and Boards.* Mediations often involve multiple parties, such as owners, managing agents, boards and insurance companies. In a dispute involving a shareholder and the Board, workers hired by the Board left a tarp off the roof during roof repair. The roof flooded and caused major leaking into the shareholder's apartment. Dampness and mold spread through the apartment, which was confirmed by the Board's tester. Ultimately, the mold was abated, which required that the shareholder move out of her apartment and live in a hotel. The parties negotiated a restoration/repair schedule. Thereafter, a second dispute occurred – who was responsible for repair to faulty windows – and the parties reached an impasse. The Board sued the shareholder for eviction in New York City Civil Court based on nonpayment of maintenance which had been withheld since shortly after the roof flood. During the court dispute and negotiations, the Bank agreed to pay the shareholder's maintenance and to suspend foreclosure since the parties were attempting resolution, which relieved pressure for both the shareholder and the Board. With the effective help of the mediator and the commitment of the parties, the parties settled the case. The mediator was skilled at discerning each party's points, finding areas of compromise, and facilitating performance by the parties of work needed to resolve the problem. After these important details were resolved, the parties and lawyers finished negotiating the agreement and the case settled.

Another dispute between the Board and an owner involved a small condominium in which one owner used the unit as a short-term boarding house or hotel, allowing unscreened, unsupervised people to stay for short periods of time. This caused serious safety, noise and wear and tear issues as well as potential problems with laws regarding occupancy for the condominium. The Board sued the owner. The owner counterclaimed alleging that the Board failed to make necessary repairs and properly maintain the common areas and refused to provide required financial reports, making the apartment difficult to sell. In mediation, the persistent guidance of the mediator helped the parties craft a solution satisfactory to both parties in which the owner decided to put the unit on the market and to abide by some restrictions until it sold, and the Board agreed to make basic repairs and furnish reports to the unit owners. The dispute was successfully resolved, and the litigation was settled.

3. *Disputes among the Board, Contractors and Third Parties.* These most often are connected with construction and repairs of units or common areas. Leaks are frequent culprits. In a recent case spanning five years, the owner of a penthouse unit constructed a "greenhouse" in his unit. The greenhouse consisted of enclosure by the unit owner of terrace space already appurtenant to the apartment. The construction was done with the consent of the Board, conditioned on the provisions of an "Alteration Agreement" between the Board and the owner, which contained various rules and limitations regarding the work. A leak occurred, allegedly emanating from the greenhouse into the apartment of the owners on the floor below. The leak caused substantial damage to the apartment, including falling plaster in a

bedroom intended for the owners' new born child. The owners of the apartment below sued the Board, the penthouse owner, the managing agent, the contractors, architects and engineers hired by the Board to correct the problem. The penthouse owner also sued, alleging damage to his unit resulting from failure to cure the leak. Of course, multiple insurers were also involved. Obviously, mediation of these matters is complex and difficult. Favorable results, however, can often be obtained by joint negotiations with the insurers. The insurers must be induced to agree on their respective liabilities regarding the loss so as to generate funds required to resolve the case. In cases where global settlement cannot be accomplished, separate settlements may be reached with individual parties. Obviously the process may be protracted, and requires considerable skill and persistence of the mediator.

IV. CONCLUSION

Joint ownership/living arrangements, such as cooperatives, condominiums and homeowners associations, are fertile fields for knotty disputes that may disrupt orderly administration, impose debilitating costs upon owners and reduce the value of units. Resolution of disputes by means other than litigation is economical, efficient and avoids bitterness that can arise from long term, virulent feuds. Mediation gives parties an opportunity to be heard in a confidential setting, and to participate in crafting solutions fitted to their interests and lifestyles. The mediation process enables the parties to maintain and perhaps enhance their relationships promoting peaceful co-existence in the community. Mediation affords a powerful tool, thus far under utilized, to promote efficient and harmonious operation, and add to the quality of life of owners.

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