



## News

### Kevin Sido Author's Article, "Resolving Condominium Disputes by Mediation: What Property Managers Need to Know"

February 23, 2011

In so many respects, mediation is especially well-suited for resolving condo disputes. Mediation offers a confidential win-win solution for parties who by their very nature must continue to co-exist for the years ahead. While this short article discusses condominiums, the principles are equally applicable for apartments, town homes, co-ops, and other residential associations.

#### Just What is "Mediation"?

Mediation is a non-binding dispute resolution process where the parties communicate to solve their dispute on mutually agreeable terms. In mediation, no arbitrator, judge or jury hands down some arbitrary decree. Instead, the parties with the assistance of a trained professional mediator work to make an agreement they can and will honor as time moves forward. Mediation is best facilitated with the presence of a trained neutral mediator. That mediator serves as a catalyst for the parties, working to offer solutions based on his experience and his careful listening to the parties' interests.

#### How Does Mediation Differ from Arbitration?

Arbitration calls for a binding "award" from an arbitrator. Once entered, the award cannot be set aside absent fraud or similar problems.

Mediation is not binding unless and until the parties agree to a binding agreement. To be sure, once the parties do so agree the agreement should then be as binding as any other contract. Most importantly, if the parties simply do not or cannot agree in mediation, the process ends with neither party bound. Contrast that with arbitration where the arbitrator is called upon to hear the evidence and enter a final award.

Because mediation is an attempt to reach a voluntary agreement, the parties work in mediation to convince each other, not some arbitrator, judge or jury. The mediator is not a decision maker but a facilitator to the parties.

#### What Are Other Benefits of Mediation?

The benefits are many: confidentiality, low cost, and flexibility are just a few. Mediations are confidential to the parties. No public hearings occur as in the courthouse. Lower costs than arbitration or litigation can be achieved because there is no need to follow rigorous procedural rules. A mediation might last but one day as opposed to numerous day-long depositions in multi-year lawsuits. To be sure, mediations need the all important facts on the table but informality rules. Because the process can move quickly and with very little formality, the expenses of formal litigation processes can be avoided.

An intangible but substantial benefit of a mediated result is the satisfaction realized of the parties' direct participation in the resolution. A mediated result, by definition, is what the parties agreed to and not what some other person(s) decrees, however well-intentioned that neutral might be. That cannot be overlooked—one need only participate in an arbitration or litigation to find that anything short of an absolute and complete win can leave a very frustrated feeling. Mediation, of course, is not some panacea where everybody gets whatever she wants. But mediation is a means by which everybody has the full chance to voice what she wants and participate directly in the negotiations to that end.



Arbitration is regularly criticized as too often a compromise but arbitrary result. Mediation is a compromise too! The big difference is that in mediation the parties are directly participating in forming that compromise. In arbitration, the arbitrator makes a binding ruling; in mediation, the parties decide what is best.

### **Mediation for Condo Disputes**

Condo disputes often fall within two major categories: (1) condo board versus developer over construction/conversion efforts and (2) unit owner and condo board disputes. The former often arise shortly after turnover of the board from developer to the independent unit-owner board. These disputes are often strongly akin to the broader category of construction disputes, an area which has long recognized the value of mediation. Developers should certainly recognize that future sales of future developments can be sabotaged by an image-destroying lawsuit, to say nothing of the costs presented.

The second area, involving unit owners and the condo board, presents a special challenge for the mediated solution. By definition the unit owner, as an owner, has a strong interest in his position. The unit owner cannot overthrow the decisions of the condo board, at least not until a new election is held. The condo board is not in a position to simply discharge an uncooperative unit owner as an employer might remove an insubordinate employee. Short of a forcible entry to remove an offending unit owner, the board must find a way to both solve the problem at hand and yet still achieve peace in the years ahead as that unit owner still holds his/her unit. Enter mediation.

Mediation offers perhaps that rare opportunity for the condo board and unit owners to achieve what they need while accomplishing a realistic scenario for the peaceful co-existence of the future life at the condominium. Mediation, again, is not the magic solution to all disputes. Yet what other mechanism dispenses with most formalities while offering the forum for direct communication to solve the problem at hand?

Examples of disputes for condo mediation can include disputes over parking, scope of limited common elements (e.g., patios) pets, and virtually any violation of the rules and regulations of the condominium. Financial issues are certainly ripe for mediation. Disputed board actions of most any sort can be dealt with. Mediation can also address future conduct of the parties, not just who damaged whom in the past.

Condo disputes, by definition, call into play the circumstances surrounding where the parties live. Short of divorce or serious bodily injury, what dispute affects us more than a dispute over where we live? As such, what is more emotion laden than controversy over where we live? Moreover, dwellings represent for nearly everyone their most significant financial investment.

### **Should Property Managers Actively Urge Mediation?**

Property Managers certainly don't welcome disputes among unit owners, condo boards, or developers. Who wants the ongoing stress of such disputes? While the property manager might or might not be directly involved as a party to such disputes, the able property manager certainly wants to offer sound advice to resolve disputes early on. Litigation can damage a building's image, possibly reflecting adversely on the manager. Successful and early resolution strategies, guided by the property manager, certainly lead to successful long-term relationships.

### **Tips for a Successful Mediation**

Preparation for the mediation is important. Mediating parties need to develop a game plan of their options yet not get fixed on any one solution. Charting the range of acceptable compromises leads to a more successful mediation for all.

Ahead of the mediation, many mediators call for the parties to submit a position paper. That paper might be held in confidence or it might be shared with the other side. Be certain, of course, which practice is being followed. Outlining the positions for the paper can serve to streamline one's thinking and prioritize the possible solutions.

Mediation is vastly improved when the parties bring an open mind to the mediation session. Plan ahead especially when multiple representatives will be present. Determine who will be the chief spokesperson for the board and what authority he/she will have.



For the individual condo owner(s), preparation is no lesser important than for the board or the developer. Thinking ahead to prepare the factual presentation is essential. Keeping an open mind during the mediation is extremely important for all.

If the mediation does result in an agreed solution, then that very solution should be written right away and signed by all. On one end of the spectrum, the writing can serve to remind all involved, should memories fade of the agreed solution. On the other end, the writing becomes a contract enforceable in a court of law should a party simply balk on conforming future conduct to the agreed solution.

Mediation offers substantial benefits to condominium associations, boards and unit owners. All are encouraged to enjoy those benefits of self-directed solutions, with costs typically far, far cheaper than litigation in the courthouse or arbitration.