

Using Mediation to Resolve Disputes in Your Community Association While Improving its Bottom Line



by James A. Rosenstein, Esq. and Gary A. Krimstock, Esq.¹

Introduction.

As a member of a community association or its property manager, do any of these three scenarios sound familiar?

Scenario 1: Although the declaration for your condominium authorizes establishment of a reserve fund to pay for major capital items, for years the payments into it have been quite small in order to hold down the unit owners' annual assessments. However, the roofs have now begun to leak and your association's board has concluded that they should all be replaced at a cost that is far in excess of the balance in the capital reserve fund. To meet this expense, the board is proposing a large capital assessment for the current year, and (to preclude a similar problem in the future) substantially increasing the amount of each unit owner's contribution to that fund on an on-going basis. The unit owners are up-in-arms over this proposal.

Scenario 2: After living relatively harmoniously for a dozen years in your planned community of 25 townhouses, a number of conflicts have arisen between neighbors on such contentious topics as parking on shared driveways, barking dogs and loud noises. Some of the affected homeowners have asked the community association to intervene while others are threatening litigation.

Scenario 3: The back yards of units in your community association are enclosed with fences owned by their respective unit owners but initially constructed by the developer with uniform materials and appearance. Over the years, many fences have deteriorated significantly. Several owners are now seeking approval to replace their fences using materials and colors of their own choosing. However, other owners have expressed concern that the appearance and materials of replacement fences should be consistent with the existing ones.

The association's declaration requires that changes to fences be approved by an architectural review committee

appointed by the board but it does not specify the criteria to be used in granting this approval. The architectural review committee has historically functioned exclusively like a hearing board and its members have no experience in resolving this type of multi-party multi-position conflict. This issue has the potential to divide the community.

Mediation would be an excellent way to resolve any of these situations in a timely and cost-effective manner. Other examples of when mediation might be a viable alternative are issues relating to covenants and rules enforcement, assessment collections, disputes between the board and manager, and contract disputes between the association and its vendors. For examples of other situations that lend themselves well to mediation, please see various items in the Appendix.

What is Mediation and When Should You Consider Using It?

In essence, **mediation is negotiation facilitated by an impartial third party (the mediator) for the purpose of resolving a conflict or dispute or solving a problem.**² A **conflict**, per *Webster's New Collegiate Dictionary*, is a "competitive or opposing action of incompatibles: antagonistic state or action (as in divergent ideas, interests or persons)", while that dictionary defines a **dispute** as a "verbal controversy; debate; quarrel."

Scenarios 1, 2 and 3 illustrate the two principal situations in which mediation typically can be most effective. Scenario 1 describes a conflict that could be diffused if action is taken promptly before the conflict escalates into a full-scale dispute. However, the apparent extent of polarization in the community indicates that a resolution is not likely without some impartial outside intervention. On the other hand, Scenarios 2 & 3 are examples of clearly definable disputes that the parties would like to resolve in a cost-effective, expeditious and confidential manner but they lack the tools needed to do it on their own.

The principal difference, from a dispute resolution perspective, between the situation described in Scenario 1 and those summarized in Scenarios 2 and 3,

lies in the extent to which the dispute is ripe for negotiations – whether with or without the assistance of a mediator. In Scenario 1, the principal issues have not been clearly defined, all of the parties to the conflict have not been identified, and their respective underlying interests and willingness to resolve it through negotiations have not been ascertained. Until this groundwork has been laid – which is the job of a trained and experienced conflict assessor with no stake in the outcome of the assessment -- attempting to negotiate a resolution would probably be unproductive and might even be counterproductive.³

On the other hand, in Scenarios 2 and 3 the issues, the parties and their interests appear clear and the only remaining procedural question is whether the parties are willing to try resolving their dispute through direct negotiations or facilitated negotiations (i.e., mediation) or whether they prefer to "duke-it-out" before an arbitrator or judge. This last question should be readily answerable, at which time the matter can proceed to negotiation, mediation, arbitration or litigation.

Viewed in this light, mediation should be considered by organizations, individuals and their lawyers whenever they are faced with a conflict or dispute that they can not resolve on their own.

How Does Your Community Association Get the Help Needed to Resolve A Conflict or Dispute?⁴

Once you have identified a dispute or potential dispute that would appear to lend itself to mediation, you should decide whether or not it is ready for mediation. There are several factors to consider when deciding whether a conflict assessment should be conducted or whether to proceed directly to mediation:

- Have the issue or issues at the heart of the conflict been adequately defined?
- Has everyone who has a stake in the conflict (or its resolution) been identified (the stakeholders), as well as their respective underlying interests that may need to be

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addressed in order to resolve the conflict?

- Are these stakeholders willing to attempt to resolve their conflict through negotiation rather than in an adversarial manner (through arbitration or litigation)?

If all of these questions can be answered in the affirmative, then the matter is ripe for mediation. If you are unable to answer any of the questions or if you answer “no” to either of the first two questions, you should consider scheduling a conflict assessment. Once you have all these answers, you can decide whether mediation is likely to be productive. For example, if some of the essential parties to the dispute are not willing to negotiate (i.e. you get a negative answer to the question under bullet point three), you may have no alternative but to initiate litigation.

How Can Your Community Association Find Someone with the Requisite Skills, Knowledge and Experience to Conduct a Conflict Assessment or to Mediate the Dispute?

First, it is important to understand the similarities and differences between an ideal mediator and an ideal conflict assessor. While there are differing opinions on the ideal characteristics of

each, here is one expert’s list of the qualities of an ideal mediator:

- “Absolute impartiality
- Trustworthiness and ability to motivate people to disclose confidential information.
- Mediation experience
- Good listening skills
- Ability to understand the law and facts
- Good people skills
- Leadership qualities
- Problem-solving skills
- Flexibility
- Strong negotiating skills
- Patience
- Good management skills
- A sense of humor
- Good business sense”⁵

Here’s another “expert’s” list of desired qualities for a conflict assessor:

- Impartiality
- Some knowledge of the issues at stake
- Conflict assessment experience
- Effective interviewing skills
- Ability to “connect” with the stakeholders ⁶

Some people may be qualified to act as both conflict assessor and mediator in the same matter, although the parties might decide against using the same person in both roles if it creates an unacceptable conflict of interest. On the flip side, sometimes you may not find one person with a sufficient combination of these qualities to serve as either a mediator or conflict assessor for your dispute -- in which case you might use a team composed of individuals who together possess all of the requisite qualities.

How do you find a qualified mediator or conflict assessor? Someone in your association or its lawyer may be able to recommend such a person or organization. Also, there are quite a few professional organizations to which professional neutrals belong that could recommend people in your area to interview -- for example, the Association for Conflict Resolution (of which Mr. Rosenstein previously served as president), the Dispute Resolution Section of the American Bar Association, Dispute Resolution Sections and Committees of your state or local bar association, and organizations that provide mediators (for a fee), such as the American Arbitration Association and JAMS.

Contracting for conflict assessment or mediation services is pretty straightforward but is beyond the scope of this article. For this, we recommend consulting your association’s attorney and items 1 and 6 in the Appendix.

How do Mediators Help Parties Resolve Conflicts or Disputes?

Although each mediation can be tailored to meet the needs of the parties (and this is one of the principal advantages of mediation compared to other types of dispute resolution), generally speaking, the components of a mediation are preparation for the mediation, the mediation itself, and documenting the outcome of the mediation.

Preparation: Preparation for mediation is every bit as important to achieving a successful outcome as is preparation for negotiations without the benefit of a third-party facilitator. Depending upon whether the parameters of the dispute and the identity of the disputants are clear, mediation preparation includes:

- clarifying the issues;
- identifying all necessary parties;
- determining the willingness of those parties to participate in the mediation;

- deciding whether to mediate and which issues to include in the mediation;
- identifying a mediator who is mutually acceptable to the parties; and agreeing on procedural rules for the mediation, including how any resulting agreement will be documented.

Mediation: Generally speaking, skilled mediators help parties resolve their conflicts or disputes by applying techniques that are not readily available to the parties themselves or in ways that differ from how the parties themselves could use them. Table I provides examples of how, in a community association setting (where the issues relate to the ownership or use of property or some aspect of the operation of the association), a skilled mediator (1) helps the parties identify the obstacles to reaching resolution, and (2) employs the tools that are likely to be most effective in overcoming these obstacles.

Documenting: After an agreement is reached, the parties and their respective lawyers should document the terms accurately and completely in the form of a legally binding written contract.

Why Consider Using Mediation Rather than Another Type of ADR or Litigation?

Unlike litigation, and sometimes arbitration, parties who elect to mediate can pick the person they both want to serve as the mediator.

Unlike arbitration and litigation, the parties themselves decide on the outcome of their mediation – including the terms of any resulting legally enforceable agreement. If, after mediation they are still unable to agree on all terms, the unresolved ones can be raised in subsequent arbitration or litigation.

Unlike litigation, and to some extent arbitration, the parties and the mediator can tailor the “forum to fit the fuss” by deciding on the issues to be addressed, the specifics of the process to be used to address them, the outcome of the process (which is not restricted to remedies that are available in court) and even which parties will participate. This usually results in win-win resolutions in which the parties are invested, unlike arbitration or litigation, which produces a winner and a loser and often ongoing acrimony between the parties. This benefit is particularly valuable in a

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community association context – where the parties continue to live in the same community after the dispute has been resolved.

Unlike litigation, and increasingly arbitration, mediation can be quite cost-effective -- principally because it can be used effectively early in a dispute, before a party incurs the substantial legal expenses typically encountered in preparing for and participating in either arbitration or litigation.

Unlike litigation, and occasionally arbitration, mediation is confidential. This can be particularly important in disputes where public disclosure could publicize potentially embarrassing situations, or negatively affect property values.

Conclusion.

The timely and appropriate use of mediation almost always produces better results for the parties in less time, with reduced business disruption, and at lower cost than either arbitration or litigation.

FOOTNOTES

¹ Since the early 70s, James A. Rosenstein, who is Of Counsel to the Philadelphia firm of Fineman Krekstein & Harris P.C., has represented parties engaged in the development and operation of condominiums and other types of planned communities. In the last dozen years, he has also mediated disputes and provided a variety of mediation-related services principally with respect to these types of properties. Gary A. Krimstock, a

senior partner with Fineman Krekstein & Harris P.C., practices real estate and business law, and represents many community associations in the Philadelphia area on operational, management, governance, regulatory, contractual and litigation matters.

² For more information about difficult negotiations, see items 3 & 12 and for more information about mediation in general, see items 1 & 4 through 7 in the Appendix.

³ For more information about pre-dispute mediation, see items 2, 8 & 11 in the Appendix, and for more information about conflict assessment, see items 8 through 11 in the Appendix.

⁴ Although this article focuses on obtaining competent neutrals, your association will likely need to consult with its attorney to prepare for and participate in any mediation process in which it will be a party.

⁵ Pp. 36 & 37 of Item 6 in the Appendix.

⁶ Adapted from pp. 106 & 107 of Item 11 in the Appendix.

7. Roberts, M. (2002). Why Mediation Works When Negotiations Fail. www.mediate.com/articles/roberts4.cfm.

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9. Seher, A. (1997). Mediating Real Estate Disputes. www.wvlaw.com.

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11. Susskind, L. et. al. (Ed.) (1999). *The Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement*. Sage Publications.

12. Ury, W. (1992). *Getting Past No: Negotiating Your Way from Confrontation to Cooperation*. Bantam Books.

James A. Rosenstein, Esq. and Gary A. Krimstock, Esq. are with the law firm of Fineman, Krekstein & Harris, P.C. Mr. Krimstock is Vice President of the PA/DelVal Chapter of CAI.

APPENDIX
Some Useful References

1. Avgerinos, M. (2004). *Conflict Resolution: How ADR Helps Community Associations*. Community Associations Institute.

2. Bent, P. (2003). Deal Mediation: An ADR Approach to Closing Transactions. www.mediate.com/articles. (Business Mediation Archive).

3. Fisher, R. & Ury. (1992). *Getting to Yes; Negotiating Agreement Without Giving In*. Penguin.

4. Moffitt, M. & Bordone, C. (Ed.) (2005). *The Handbook of Dispute Resolution*. Jossey-Bass.

5. Moore, C. (1996). *The Mediation Process: Practical Strategies for Resolving Conflict*, 2d Ed. Jossey-Bass.

6. Picker, B. (1998). *Mediation Practice Guide: A Handbook for Resolving Business Disputes*. Pike & Fischer.

<u>Some Examples of Obstacles to Reaching Resolution</u>	<u>Some Tools that Mediators Use to Help Overcome these Obstacles in Joint (Face-to-Face) Sessions or Private Caucuses</u>
Parties hold differing views about the central problem(s) or issue(s).	Mediator reframes the problem(s) or issue(s), preferably as a shared problem or issue. Mediator encourages the parties to speak directly to each other about their respective views and the reasons for them.
Even though the parties agree on the problems or issues, they hold differing views about how to resolve them.	Mediator helps the parties distinguish between their positions (and those of the other party) and the interests that underlie them. Then focus first on finding mutually acceptable ways to address those interests.
The parties are unable to decide how to address inter-related issues.	Mediator helps the parties (a) understand the relationships among the issues and their relative importance; and (b) use this information to develop a "roadmap" for addressing them.
Parties are thinking in too narrow a framework about possible resolutions.	Mediator facilitates non-judgmental brainstorming by the parties about a wide variety of ways to address their shared or differing interests.
The parties have difficulty communicating with each other (other than difficulties caused by cognitive impairments).	Mediator helps each party to engage in active listening to the other.
One party fears the other party, or has a sense of weakness or lack of empowerment.	Mediator uses a variety of confidence-building measures to start building or restoring trust between the parties, including meeting separately with the mediator (private caucuses), "shuttle diplomacy" and mediator creating a "safe setting".
One or more of the parties feels angry, frustrated, wronged, disrespected or misunderstood.	Mediator provides the parties with an opportunity to "vent" their emotions directly with the other party in a setting where the mediator is present to provide safety.
One or more of the parties are unwilling to even consider the other's proposals (reactive devaluation).	In private caucus, mediator communicates the other party's proposals in the form of "trial balloons" originating with the mediator rather than the other.
One or more of the parties misunderstand their relative strength or have unrealistic expectations.	In private caucus, mediator engages in reality testing and playing devil's advocate with the party.
One or more of the parties blames the other party for creating the problem and does not acknowledge their own role.	In private caucus, mediator encourages the party to make educated guesses about the concerns, needs, etc. of the other party (by putting oneself in the other's shoes).
Each party is unwilling to negotiate a settlement agreement on the basis of the other party's draft (the "dueling-drafts" problem).	The mediator uses "single text negotiation" to help the parties and their counsel generate their agreement.