NEW YORK CITY BAR

MEDIATE YOUR CO-OP/CONDO RESIDENTIAL DISPUTE

Through the New York City Bar Co-op and Condo Mediation Program

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Complimentary Breakfast Program
For the Real Estate Industry and the Bar

March 21st, 2013 at 9:00am
New York City Bar Association
42 West 44th Street, New York NY

Mediation is an informal, voluntary approach to settling disputes between owners, renters, boards, managing agents, contractors and others, facilitated by neutral mediators trained and experienced in assisting parties to resolve their disputes, out of court. It is quick, private, confidential and inexpensive. Moreover, its non-binding nature allows the participants to engage in the process without waiving any rights they may have to pursue judicial remedies in the event the mediation is not successful.

The City Bar's Coop/Condo Residential Dispute Mediation Roster consists of a panel of neutral mediators who have received special training and have years of experience in facilitating the settlement of disputes through mediation. They also know real estate law, particularly as applicable to residential co-ops and condominiums, where, often the nature of the disputes, and the issues presented take on unique and emotional characteristics. Because of this, mediation is especially well-suited to settling residential disputes between shareholders, unit owners, tenants and subtenants, boards and managing agents.

The process may be implemented by voluntary agreement or required by the co-op or condominium's governing documents.. It may cover many of the issues that arise in residential buildings, for example noise, odors, smoke, pets, damage and repairs, assessments, the payment and allocation of maintenance and common charges, violations of bylaws, leases and subleases, and House Rules and impermissible sublets and rentals.

BENEFITS: Your clients and boards will thank you for keeping the matter out of court. Most disputes brought to mediation result in an enforceable settlement agreement. Parties may, but need not, retain an attorney to attend the mediation. There is no "winner" or "loser"; rather, the parties, with the assistance of the mediator, work together toward a mutually acceptable outcome. The terms of settlements arrived at through mediation are often more flexible and suited to the parties' needs than the decisions rendered by courts.

The Program is geared to Real Estate Professionals, Boards and Real Estate Lawyers. We know your time is valuable, so we will adhere to the following schedule:

8:45 – 9:00AM	Continental Breakfast and Networking
9:00 – 9:20 AM	Keynote and introduction to the Mediation Program
9:20 – 9:40 AM	Review of the various matters that have benefited from mediation
9:40 – 10:10AM	"Real Life" Role Play Mediation on a typical mediation session,
10:10-10:25AM	Debriefing of the lawyers, parties and mediator in the role play
10:25 -10:40AM	Introduction to forms and procedures to implement mediation
10:40 – 11:00AM	Q. and A. to the Panel members and Comment by attendees.

Faculty and Panelists

Program Chair:
Michael P. Graff, Graff Dispute Resolution

Coop/Condo Lawyers:
Robert Braverman, Braverman Greenspun PC
Bruce A. Cholst, Rosen Livingston & Cholst LLP
Bryan J. Mazzola, Cantor, Epstein and Mazzola, LLP
Marianna L. Picciocchi, Kaufman, Friedman, Plotnicki & Grun, LLP
Darryl M. Vernon, Vernon & Ginsberg, LLP
Steven R. Wagner, Wagner Davis P.C.

Mediation Lawyers:
Bart J. Eagle, Law Offices of Bart J. Eagle, PLLC.
Nancy Kramer, Nancy Kramer Mediation
Charles M. Newman, Office of Charles M. Newman
Jeffrey T, Zaino, American Arbitration Association

Property Management:
Gregory Haye, Samson Management

SPONSORSHIP and INQUIRIES

Sponsored by City Bar Committees on Alternate Dispute Resolution Committee (Chris Stern Hyman, Chair) and Cooperative and Condominium Law (Andrew Brucker, Chair). Co-sponsored by: Council of New York Cooperatives & Condominiums (NYC Inc.); NY Association of Realty Managers (NYARM); For further information contact Michael P. Graff at mail@graffdisputeresolution.com.

Table of Contents

Panelist Bios (Listed Alphabetically)

Robert J. Braverman is the managing partner of **Braverman Greenspun, P.C.** For the majority of his twenty-year legal career, Rob has specialized in the representation of condominium associations and cooperative apartment corporations. In addition to providing many of the firm's clients with day-to-day legal advice, Rob's practice has, over the last several years, been largely focused on assisting Boards of newly constructed or rehabilitated buildings in connection with sponsor-related construction and governance issues. Rob has also spearheaded a number of cases of first impression in the co-op and condominium area, authored numerous articles on "hot topics" in real estate law, developed a CLE accredited seminar on New York co-op and condominium law, and participated in the ABCNY's 24 hour mediation training program.

Bruce A. Cholst joined **Rosen Livingston & Cholst LLP** in June 1989 as a senior litigation associate, and became a partner in January 1996. He represents the firm's cooperative and condominium clients in complex sponsor defect and sponsor arrears litigation, shareholder controversies, commercial and residential non-payment actions, vendor claims, board election disputes, and governing document analysis. He has also negotiated and drafted commercial leases, management agreements, and handled several successful board election campaigns on behalf of both management and insurgent slates.

Mr. Cholst graduated from New York Law School in 1977. He clerked for two New York State Supreme Court Justices and worked at two other law firms prior to his current association.

Mr. Cholst currently serves on the New York City Bar Association Committee on Cooperatives and Condominiums.

Mr. Cholst frequently lectures and writes on issues regarding cooperatives and condominiums for various community organizations and trade groups, and is regularly quoted in trade journals and in the *New York Times* Real Estate Section. He has authored a booklet *When to Litigate, When to Mediate: a Guide to Dispute Resolution for Co-op and Condo Boards* and co-authored an article published in the *New York Law Journal* titled "Overcoming Limitations of Condo Boards In Dealing With Unruly Residents." Mr. Cholst currently serves as a board member of his own Manhattan Cooperative.

Bart J. Eagle formed the **Law Offices of Bart J. Eagle, PLLC** in April 1997. The firm specializes in commercial law and litigation and the general practice of law. Mr. Eagle has represented individuals and entities in federal and state courts, before administrative tribunals, and in arbitration and mediation proceedings. Mr. Eagle is on the roster of mediators of the Commercial Division of the Supreme Court of the State of New York, County of New York, and is a member of the Alternative Dispute Resolution Committee of the New York City Bar Association and the New York State Bar Association Alternative Dispute Resolution Section and Mediation Committee.

Michael P. Graff is an attorney with **Graff Dispute Resolution**, mediator, arbitrator and settlement counsel in all aspects of commercial litigation, arbitrations (American Arbitration Association; Labor and Commercial tribunals), appearing in mediations (JAMS, NAMS and court-sponsored) and appeals (Federal and State Courts), as lead counsel, mediator and/or arbitrator. He has resolved over 2000 cases, in varied industries, particularly in contract, consulting, construction, employment relations and discrimination, real estate (including coops and condominiums, commercial leasing).

He is frequently assigned to mediate or arbitrate cases from the Commercial Divisions of New York State Supreme Court, New York and Queens Counties; the Southern District of New York; Attorney-Client Fee Disputes (NY County Lawyers); New York Peace Institute Community Mediation, the Civil Courts of New York and Kings Counties and NYC Contract Dispute Resolution Board. He is a member of the N.Y. City Bar Association's Coop & Condo Law Committee, the Alternate Dispute Resolution Committee (Adjunct) and the New York and Florida Bars.

He has presented CLE programs at the City Bar ("*The Art of Pleading*"), at Cardozo Law School, June 21, 2012, and at Association for Contract Resolution-Greater New York, 11th Annual Conference *"Tips for Effective Presentation of your Case at Mediation."* Frequently called upon as a resource on residential news articles, he is the author of *Condominium Liens: Which Come First*, The Queens Bar Journal, 1992. He has served, and continues to serve, as a board member or president of condominiums for over 30 years.

Nancy Kramer is a mediator and occasional arbitrator with a general practice who handles workplace, family, commercial, co-op/condominium and personal injury disputes. She does private mediations, serves as Special Master in the Appellate Division, First Department and is on the arbitration panel for the Financial Industry Regulatory Authority (FINRA). Nancy also mediates for the American Arbitration Association (AAA), New Jersey Superior Court; New York County Supreme Court, Commercial Division and United States Postal Service. Before opening her dispute resolution practice, she had a long legal career in the public sector. A graduate of Columbia University Law School and Brandeis University, Nancy teaches about mediation frequently, for the American Bar Association, Brooklyn Bar Association, Council of New York Co-operatives & Condominiums, New York City Bar Association, New York Corporation Counsel, New York State Attorney General's Office, New York State Bar Association, Practicing Law Institute and Touro Law School and others. She also writes on mediation topics.

Bryan J. Mazzola is a partner at the New York City firm of Cantor, Epstein & Mazzola, LLP, that specializes in Coop-Condo law and the defense of cooperative corporations, condominium associations and the members of their boards of directors and managers. Mr. Mazzola has focused his career on commercial business litigation and appellate practice with special emphases on cooperative/condominium and employment-related law and in addition to litigating and trying cases in the Southern and Eastern District Courts and in New York State courts, he has experience before various federal and state agencies, such as the New York City Department of Housing Preservation and Development; the Equal Employment Opportunity Commission, the State Division of Human Rights and the

City Commission on Human Rights. Mr. Mazzola also has extensive experience in alternative dispute resolution forums and has mediated hundreds of disputes. Mr. Mazzola graduated with a J.D. from Hofstra Law School in 1999 where he was a member of the Labor Law Journal and provided pro-bono services to low income tenants at the housing rights clinic. He was admitted to the New York State bar in 2000 and is a member of the New York City Bar Association and its coop/condo law committee.

Marianna L. Picciocchi is an associate of the firm of Kaufman Friedman Plotnicki & Grun, LLP. She specializes in matters of real estate and commercial litigation, including significant representation of condominium associations and cooperative apartment corporations. Ms. Picciocchi practices extensively before the trial and appellate courts of New York. Before joining her current association, Ms. Picciocchi worked at firms serving as general counsel to co-op and condominium boards throughout the NYC area, as well as the Roman Catholic Diocese of Brooklyn, the Federal Trade Commission, and the Office of the Attorney General.

Ms. Picciocchi serves on the Cooperative and Condominium Law Committee of the Association of the Bar of the City of New York. In this position, she spearheaded and was appointed as the Chair of the Sub-Committee formed to propose amendments to both the Real Property Law (to create a super-priority lien for condominiums associations) and the Real Property Actions and Proceedings Law (to create standing for condominium associations to collect rents from the tenant of a non-occupying unit owner).

Ms. Picciocchi is serving as a faculty panelist of the City Bar CLE program *Hot Topics Affecting Cooperatives and Condominiums 2013* (April 17, 2013) and will present the topic of Condominium Non-payments.

After receiving her Bachelor of Arts from Seton Hall University, Cum Laude, with a full academic scholarship, she received her Juris Doctor from Brooklyn Law School, while graduating in the top third of her class. She is admitted to practice in the States of New York and New Jersey.

YOUR CO-OP/CONDO RESIDENTIAL DISPUTE

THROUGH THE SERVICES AVAILABLE FROM THE

NEW YORK
CITY BAR

42 West 44th Street • New York, NY 10036 • (212) 382-6600 • www.nycbar.org

Mediation

constructive, mutual effort to resolve
your co-op/condo residential dispute

between

owners, renters, sponsors,
boards of directors, managing agents,
contractors, insurers, and others

Quickly

Efficiently

Fairly

Cheaply

and

Sensibly

What Is Mediation?

Mediation is a fairly informal, totally voluntary approach to settling disputes instead of going to court. A neutral person -- a trained mediator -- facilitates negotiations between parties to help them find a mutually acceptable resolution to their issues. Mediation is confidential and non-binding; either party or the mediator may stop the process at any time. If the parties do reach a resolution, a settlement agreement will be signed and is binding on both parties.

Who's Involved?

The parties to the dispute and a selected mediator are the key people. A party may, but need not, have an attorney present; the parties themselves are the owners and drivers of the process. Occasionally, a witness or expert may be called to participate.

Why Mediate?

Most (70-80%) cases brought to mediation settle, and the process is quicker and cheaper than litigation.

So What Do I Do?

- Read this brochure completely.
- Have the parties to the dispute sign the Agreement to Mediate in the back of this brochure, and return it and the $100 per party administration fee to the Bar Association,
- The Bar Association will send you a list of mediators from which you will mutually select your mediator.
- Your mediator will then contact you to arrange your first mediation session.

Read On !!

Mediation or Litigation

Significant Differences

Mediation	Litigation
Parties drive the settlement process and keep control of the outcome	Parties give up control to a third party - a judge and/or jury
Mediator cannot impose a settlement or decide issues	Judge and/or jury decides for or against you
Process may be stopped prior to signing a settlement agreement	Once process is started, your participation is mandatory
Parties may tell their whole story; engage in give & take to find a resolution	Parties may only answer questions asked
Mediator guides the process by identifying core issues and common interests, exploring alternative interpretations, and generating offers and counteroffers	Jury and judge hear only the evidence allowed in, and judge is bound by court procedural rules and laws
Restores communication; rigid positions give way to find a mutually acceptable resolution	Each side postures heavily in hopes of "winning"
Involves joint meetings, but also individual sessions where a party can really open up	Only joint, public evidentiary hearings
Process is private and confidential	Process is open to the public and a stenographic record is made
Settlement agreement can be based on views, opinions, tolerances, timing factors, etc.	Judge's decision must be law applied to evidence presented
Is FORWARD LOOKING - Aims for a resolution that is mutually satisfactory and thus allows both parties to move on.	Looks backward -- "he said/she said" and "he did/she did" approach. Losing party may appeal, possibly for years
Allows for continued or salvaged relationships between the parties	Often results in long-term distrust, animosity or worse
Low cost - may involve only a few hours or a single session	Costly - often years in preparation, trial and possible appeals

Mediation Rules and Procedures

1. Agreement of the Parties:
Parties who agree to mediate their dispute under the auspices of the New York City Bar Association (the "Bar Association") are deemed to have adopted these procedures.

2. Initiation of Mediation:
The parties to a dispute may initiate mediation by filing with the Bar Association the form Agreement to Mediate signed by both parties (and their lawyers, if any), together with a non-refundable administration fee of $100 per party. It is the responsibility of the parties to obtain each other's signature to the Agreement to Mediate (and that of their lawyers, if any).

3. Selection of Your Mediator:
Upon receipt of the signed Agreement to Mediate and the administrative fee, the Bar Association Coordinator will provide the names of five qualified mediators. The parties must together select two names from the list and return the selection form to the Coordinator who will then contact those two to determine who is available the sooner.

4. Date, Time and Place of Mediation:
After consulting with the parties (who shall be responsible for coordinating with their lawyers, if any), the mediator shall fix the date, time and place of the initial mediation session.

5. Identification of Matters in Dispute:
If the matter is not in litigation, the parties may provide the mediator in advance of the first mediation session a brief summary (not more than ten pages) of the issues in dispute and of attempts at settlement so far.

If the dispute is already in litigation, at least ten days prior to the first mediation session, the parties shall submit to the mediator a copy of the complaint and answer, plus any counterclaim, affidavits and rulings on motions, if any (but not discovery documents unless requested by the mediator).

At the first session, the parties will be expected to present all relevant information and documentation.

6. What Your Mediator Can and Cannot Do:
The mediator will attempt to help the parties analyze their issues and positions with the goal coming to a mutually agreeable resolution of their dispute. The mediator may eventually suggest paths toward resolution or offer an opinion, but has no authority to decide any issue, or to impose a settlement on the parties, or rule in any way that one party is right or wrong. The mediator will conduct joint meetings with all parties present, but may also choose to conduct separate meetings with each party and 'shuttle' between the parties as the session progresses.

The mediator may suggest that a party bring in an expert if certain technical aspects to the dispute merit that. Any fees payable for such outside expert advice/opinion will be the responsibility of the party who chooses to bring such person into the mediation, unless the parties agree to share the cost.

The mediator shall have the sole authority to interpret and apply these rules.

7. Avoiding Ethical Problems:
The parties to the mediation are advised that the mediator is NOT representing either party, and that no attorney-client relationship or privilege exists between the mediator and the parties. The mediator is not providing legal services to the parties, but is acting as an independent, neutral facilitator to the disputants in order to assist them in resolving their own dispute.

8. Party Participation vs. Representation:
Mediation is effective only when the persons to the dispute who have settlement authority participate in the mediation session. Consequently, the parties must attend the mediation session(s) even if they are represented by someone else or by counsel. Attendance of lawyers for the parties is permitted, but not necessary. Other persons, including witnesses, may attend the mediation if requested by a party.

9. Confidentiality:
All documents and verbal information disclosed to a mediator during the course of mediation under these Procedures shall be deemed confidential and private and shall not be divulged by the mediator to the other party unless the relevant party authorizes disclosure, or to any third party except as required by law and in response to a court order. In case of any subsequent proceeding, the mediator may not be subpoenaed by either party to furnish documents presented during mediation, nor to reveal the nature or content of any information discussed or revealed during mediation. Further to that end, the mediator shall not keep any documents or any copies thereof presented during the course of mediation.

The parties (and their lawyers, if any) understand and agree that everything that occurs during the mediation process is in the nature of settlement discussions. Therefore, all statements made or notes taken by either party or the mediator, as well as any documentation presented during the mediation are non-discoverable, inadmissible, and without prejudice in any subsequent or concurrent litigation or arbitration, except that evidence otherwise discoverable and/or admissible under the relevant rules of the other adjudicating body shall not be rendered inadmissible because of its prior use in mediation.

The parties (and their lawyers, if any) shall respect and maintain the confidentiality of the mediation session(s) undertaken, and shall not rely on or introduce as evidence in any subsequent or concurrent litigation or arbitration:

a. Views expressed or suggestions made by another party regarding a possible settlement of the dispute;
b. Admissions or offers or counteroffers made by another party in the course of the mediation;
c. Suggestions made or views expressed by the mediator in the course of the mediation; or
d. Proposals made or views expressed by a lawyer or other party representative in the course of the mediation.

10. No Stenographic Record:
There shall be no stenographic, tape or video recording of the mediation. The mediator and parties may take notes during the mediation.

11. Ending the Mediation:
The mediation may end:
a. By the parties signing a settlement agreement;
b. By a statement by the mediator that further efforts at mediation are not worthwhile at this time; or
c. By a statement by a party that they choose to terminate the mediation prior to settlement.

12. Exclusion of Liability:
The parties (and their lawyers, if any) agree that neither the Bar Association and its staff, nor any mediator provided under this program shall be deemed a 'necessary party' in any judicial proceeding which may refer to this mediation.

Neither the Bar Association and its staff, nor any mediator provided under this program shall be liable to any party for any act or omission in connection with any mediation conducted under these Procedures.

13. Expenses:
The expenses of representatives, experts or witnesses for a party shall be paid by the party bringing such persons into the mediation. All other expenses, including the mediator's hourly fees and the administrative fee of the Bar Association, shall be borne equally by the parties, unless they agree otherwise.

AGREEMENT TO MEDIATE

We (and our lawyers, if any) wish to use the mediation services of the New York City Bar Association in order to seek a resolution of our dispute.

We understand that the Bar Association will forward to us a list of mediators from which we will select the person to serve as our mediator. We understand that the mediator, if a lawyer, will not be providing legal services to us and that no attorney-client relationship will exist between the mediator and the parties.

We confirm that each party has received and read the brochure on mediation provided to us by the Bar Association, and agree that the Mediation Rules and Procedures set forth in that brochure shall govern our mediation.

We further agree:

- To coordinate with the mediator to select a mutually convenient time and place for the initial mediation session.
- To pay a non-refundable administrative fee of $100 per party to the Bar Association.
- To pay the mediator's fee apportioned equally among the parties (unless the parties expressly agree otherwise), payable at the time(s) as the mediator may require.
- To work diligently for a mutually acceptable resolution to our dispute directly, without threat of litigation.
- To provide the other party and mediator all relevant documents and information.
- To LISTEN, really listen, to the other side's input and seek to find common interests that may lead to a resolution of our dispute.
- To be courteous and respectful to the other party and the mediator.
- To maintain confidentiality of all information, verbal or written, exchanged during the mediation, irrespective of its outcome. This includes our agreement not to disclose any proposals, offers, admissions, or opinions made during the mediation process as evidence in any subsequent lawsuit, administrative procedure, hearing or arbitration, unless compelled to by law. We also commit not to subpoena the mediator or otherwise seek to have him/her as a witness in any subsequent lawsuit or arbitration.

We also confirm that neither the mediator nor the New York City Bar Association will be liable to any party for any act or omission made in connection with the mediation conducted under this Agreement.

continued on next page

Party 1:

_____

Print Signature

Address: _____

Telephone: _____ Date: _____

Attorney for Party 1
(if any) _____

Print Signature

Telephone: _____ Date: _____

Party 2:

_____

Print Signature

Address: _____

Telephone: _____ Date: _____

Attorney for Party 2
(if any) _____

Print Signature

Telephone: _____ Date: _____

Party 3:

_____

Print Signature

Address: _____

Telephone: _____ Date: _____

Attorney for Party 3
(if any) _____

Print Signature

Telephone: _____ Date: _____

Return this "Agreement to Mediate" fully completed together with a check for $100 per party payable to the <u>New York City Bar</u> to:

New York City Bar Association
42 West 44th Street
New York, NY 10036
Attn: Mediation Service, Clare Plunkett

Clare Plunkett can be reached at (212) 382-6772 or cplunkett@nycbar.org

No Court — Rather, Collaboration

Did you know that 70-80% of lawsuits are settled prior to or during the actual trial?

So why spend so much time and money in a litigation mode when statistically you are most likely to settle your dispute eventually?

Why turn over your dispute to a third party to decide for you?

Mediate Your Settlement Now!

Quickly & Cheaply

Get This Matter Behind You!

YOUR CO-OP/CONDO RESIDENTIAL DISPUTE

THROUGH THE SERVICES AVAILABLE FROM THE

NEW YORK CITY BAR

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www.nycbar.org/pdf/mediate.pdf

MEDIATION is an Opportunity to Resolve your Co-op/Condo Dispute Quickly, Efficiently, Inexpensively and Sensibly.

Disputes which may be Mediated include those between:

Owners about noise or smoke or anything else,
An owner and the board regarding repairs or other matters,
The management company and the board or an owner,
A contractor and the management company or the board,
A renter and an owner or the board,
Other issues involving owners, board, management and contractors

Co-op/Condo Cases which have been Mediated include:

Between Owners:

Case #1

Two owners owned the identical units in the same line with terraces directly below each other. The lower-floor owner occasionally smoked cigars on his terrace and the smoke bothered the owner directly above him, one of whose children was asthmatic and very negatively affected by smoke. Their attempts to talk about this had resulted in shouting matches in the elevator and exchanging insults.

In the mediation, the parties were able to vent their anger and listen to each other. The mediator helped them quickly resolve their issues with the smoker agreeing to smoke only at specified times (week-ends, when the other family was generally away) and both of them working out a way to communicate further difficulties should they arise in the future. Through mediation, the dispute was resolved in a way that was satisfactory to both parties.

Case # 2

The Board was informed about noise which one owner complained was coming from another unit above him. After trying to resolve it amongst themselves, the parties decided to mediate the dispute and during the first session of the mediation it was discovered that the noise was an issue for both owners and was

apparently caused by a third owner. The third owner was invited to and did participate in an additional session of mediation. Through everyone's cooperation and the skillful guidance of the mediator, all parties agreed to reduce the noise level at specified times in consideration of their neighbors and on mechanisms to resolve such noise issues should they arise in the future. The matter was resolved and a written agreement was reached through mediation.

Between Owner & Board:

Case # 3

The parties sought mediation in a dispute between a shareholder and the Board. Workers hired by the Board left a tarp off the roof during roof repair, which flooded and caused major leaking in the shareholders' apartment. Dampness spread throughout the apartment and mold was detected by the Board's environmental tester, which was ultimately abated. The parties negotiated a restoration/repair schedule which required that the shareholders move out of the apartment - live in a hotel. Thereafter, a dispute occurred over who was responsible for repair to faulty windows and the parties reached an impasse. The Board sued the shareholder for eviction in NYC 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 stepped in to pay the maintenance and agreed to suspend foreclosure since the parties were attempting resolution.

The Mediation was very successful and resulted in a stipulation and settlement of the case with the energetic help of the mediator and the commitment of the parties. The mediator was skilled at discerning each side's points, finding areas of compromise, and she was effective in getting the parties to go back and do the necessary work to resolve the composite pieces of the problems. After these important details were resolved, the parties and lawyers finished negotiating the agreement.

Case # 4

The dispute involved a small, eight-unit condo located in the heart of midtown Manhattan, most of whose owners lived elsewhere, subletting their units to quasi-permanent subtenants. The Board complained that one owner used the unit as a short-term boarding house, allowing unscreened, unsupervised people to stay for short periods of time, causing serious safety, noise and wear and tear problems for the condo, and the Board sued that owner. The owner counterclaimed that the Board failed to provide the required financial reports and failed to make necessary repairs and upkeep, which made it difficult to sell the apartment.

In mediation, the parties had an opportunity to express their emotions and present their positions. The persistent guidance of the mediator helped them formulate an acceptable resolution. 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 some basic repairs and furnish financial reports to the unit owners. The dispute was successfully resolved through mediation and the litigation was discontinued.

For More Information go to:

http://www.nycbar.org/pdf/mediate.pdf **or Call: 212-382-6772**

SESSION OUTLINE
"TIPS FOR EFFECTIVE PRESENTATION OF YOUR CASE AT MEDIATION"

1. Introduction:
    a. This is an outline for an Interactive workshop, to share questions and solutions to questions.
    b. We present an extensive outline, but will only have time to hit the highlights in the time allotted.
    c. Use this outline as a checklist in practice.
    d. There will be an opportunity for Q. and A. at the end of out session.

2. Why you might want mediation, in the first place.
    a. Benefits
        i. Change a two-way fight to the death into a three-way search for a solution.
        ii. Reduces devotion of Time and Resources if a negotiated agreement is achieved.
        iii. Provides you with information.
        iv. Exploration of creative solutions
        v. Provides client and attorney with neutral sounding board for their own positions.
        vi. Provides opportunity to receive benefits of resolution at the earliest date (consider the time value of money).

vii. Exploration of creative solutions that a court may be powerless to grant.
viii. TIP: Parties can communicate directly with each other safely and freely. More importantly, you get a chance to speak directly to their decision makers, without your words being filtered by his attorney.
ix. Party principals can save face by an out of court settlement.
x. Confidentiality
    1. TIP: Applies to what is said or done. It does not apply to what is learned. For example; at a later discovery of the party, the attorney can have a better idea of what to ask and the party's likely responses. You cannot use his mediation statements to impeach
    2. You can be open with the mediator who will not reveal communications to him unless you authorize.
    3. Applicable to the proceedings possibly to the eventual agreement.
    4. The Uniform Mediation Act ("UMA"), drafted by the National Conference of Commissioners on Uniform State laws is an attempt to provide a "privilege that assures confidentiality in legal proceedings." It is being considered in New York, but has not been adopted.
    5. *Hauzinger v. Hauzinger*, 43 AD2d 1289 (4th Dep't), aff'd __ NY2d___ , 2008 NY Slip Op 05781, 2008 WL 2519811,holds UMA immunity is not applicable in New York, and refused to enforce the confidentiality agreement in the mediation of a matrimonial settlement, where the courts were asked to review the fairness. The mediator was required to testify.
    6. In court-directed mediation, confidentiality and immunity from testifying is in the rules.
    7. Confidentiality of parties v. confidentiality of the mediators.

b. Pitfalls
    i. Mediation requires devotion of Time and Resources.
    ii. Mediation is hard work, but for the mediators and the attorneys.
    iii. Provides adversary with information
        1. It sees the quality of your evidence.

2. It learns the character of your witnesses.

3. When, in the life of a dispute, can it benefit from mediation?
    a. Consider initiating the first proposal to mediate. Sophisticated counsels do not consider this to be a sign of weakness. It is a sign of confidence that you feel a neutral will help your adversary see the strength of your case and the weakness of its case.
    b. As neutrals, mediators can bring value even to those disputes that are not "ripe" for settlement. They can help the parties get the case ready for future settlement in the most efficient way, or even avoid the dispute coming to a head.
    c. For a dispute to be ripe for settlement the parties should have sufficient data to enable them to bargain intelligently and in good faith.
    d. Once parties have the requisite data, the sooner mediation can start the better, because –
        i. Costs rapidly accrue, which parties seek to add to the settlement goals.
        ii. Positions harden. Parties become entrenched.
        iii. Chances of a cooperative splitting of the pie diminish. The "pie" gets smaller with the expenditure of time and resources.

4. Selecting the mediator.
    a. TIP: Generalist vs. Specialist; the debate lingers on. Some of the areas where specialists can add value are-
        i. Complex commercial disputes
        ii. Technical
        iii. Construction cases, involving Towers of Insurance
        iv. Labor (see, limited opportunity to request specialist under A.D.R. Rules of the S.D.N.Y.)
        v. Matrimonial (See Rules of the Matrimonial Part)
        vi. Former judges; it depends, Professional judicial habits die hard.
    b. Private mediation agencies and practitioners.
        i. It is OK to use due diligence to select, (as in jury selection).
        ii. Request and carefully read the mediator's resume.
        iii. Request references if not otherwise recommended to you by prior user.
        iv. Consider background and experience

v. Discuss there mediation style as applied to your type of case.
vi. Name-brand mediators are booked long in advance, so plan ahead.
vii. TIP: Name-brand mediators can be expensive, but (sometimes) you get what you pay for
viii. If you are a member of an association, inquire as to the experience of the candidates with your fellow members.

c. Court-annexed mediation
    i. Most have undergone extensive training and experience, some more than others. The biographies of the panel members are posted on the Web site for Supreme Court, NY and some others.
    ii. Fees, after 4 hours of pro bono time, are permitted and generally limited to $300/hour.
    iii. Some courts offer a choice to select from.
    iv. Check the Rule of the particular jurisdiction, as these programs are still experimental and evolving.

d. TIP: Mediators selected by your adversary should not necessarily be rejected or avoided.
    i. The mediator makes no decisions. You always retain the right to reject their recommendations.
    ii. If your adversary chooses the mediator, it may mean that it is because it feels that the mediator has the ability to settle the case on mutually agreeable terms and it has faith in his judgment.
    iii. If in doubt, tell the prospective mediator about your concerns. Since the other side trusts the mediator, he may be more effective and persuasive than a mediator with whom it is unfamiliar.
    iv. Feel free to ask for references from the attorneys or parties in other cases that he mediated in which your adversary was a party.
    v. Ask his feeling about the particular concerns you have regarding the subject matter of the action or the attributes of your client.

e. TIP: Because the mediator has no power to decide a dispute, *ex parte* communications with mediators, either prior to joint sessions, in caucuses and otherwise, are the rule, rather than the exception. You can talk about the case, your particular problems that may impact on the negotiation, and what you think about your

adversary. As mediators do not function as judges or arbitrators, so that there is no prohibition. But do not expect any compromise to the mediator's neutrality.

5. Mediation Service Agreements deal with the following:
    a. Fee Structure and responsibility for payment
    b. Confidentiality and being barred from testifying, to be signed by all individuals and parties present at mediation sessions.
    c. Discuss and decide preference for mediation style, such as Facilitative vs. Evaluative.
        i. Facilitative: Mediator encourages self-determination and discloses no judgment or opinion.
        ii. Evaluative: Mediator's evaluation and judgment is desired.
        iii. May start as Facilitative and evolve into Evaluative
        iv. Med-Arb. If mediation fails, the neutral makes a binding decision. Confidential communications during the process may influence the award. Raises issues of privilege and confidentiality
        v. Arb-Med. The neutral acts as an arbitrator, hears the case and renders a sealed award. The neutral then attempts to facilitate a settlement. If unsuccessful, the award is issued.
    d. In court-annexed mediation , terms and conditions terms are fixed by court rules, so that no formal agreement is required. To avoid surprises, when fees apply and what they would be should be discussed at the start.

6. Pre-Mediation procedures
    a. Initial conference agenda:
        i. Arranging for disclosure needed to negotiate in good faith
        ii. TIP: Who shall attend mediation sessions? You are entitled to know that it will be someone with authority to hear the facts and theories from an adverse party and bind the adversary to a settlement. It will be a waste of your time if adversary is not bringing the right people to the table. "That's all the authority I have" is unacceptable. The best practice is that the representatives should include one authorized to agree to the amount demanded, if that amount can be justified in good faith.
        iii. Commitment to a full day, if necessary. An additional reserve date may be indicated if the case is complex. "I have

to make a 3:30 train" is unacceptable when others have committed themselves.

iv. Location for the mediation that preserves the feeling of neutrality.

v. Interim relief, e.g., preserving the status quo, hiring of neutral consultant.

b. TIP: Convening stage mediation (Pre-mediation caucuses}. This consists of ex parte caucuses prior to joint sessions, and may be days in advance or immediately prior to the joint session.

   i. Not a universal practice. A fair number of mediators are not familiar with it, or do not believe it is helpful.

   ii. May be requested by the mediator or by the parties.

   iii. Participation may boost your client's comfort level with mediator; rapport and credibility.

   iv. Discuss special problems that may arise in mediation, e.g., and intimidating relationship.

   v. Helps parties set reasonable approaches and goals for the mediation.

   vi. Ex-parte convening sessions are OK, since the mediator is not a decision maker, but the fact of the meeting itself should be disclosed to the adversary.

   vii. Review of prior negotiations, so as not to move backwards.

   viii. Educates and prepares mediator to overcoming factors that may prevent resolution.

   ix. Makes sure that all the right people will be physically present. Telephonic presence is a poor second choice.

c. Ì TIP: Use the convening session to determine if there are any issues that can be agreed upon in advance?

d. Discuss the Mediation Brief, as preferred by the Mediator

   i. TIP: Ask the mediator what he would like included, and follow mediator's direction. Usually, it will include the following:

      1. Description of the Parties and the history of their relationship.

      2. The material facts and exhibits, e.g. contracts, photos, expert reports.

      3. Controlling principals of law, and if determinative, the controlling case and statutes.

4. The history of prior settlement discussions.
5. Whether there any issues that we can agree upon in advance.
6. Describe what have been the past obstacles to settlement. Why did the prior attempts to negotiate a settlement fail?
7. What you think the other side views as a fair settlement?
8. Any other information that you want the mediator to know to better understand the matter from your client's perspective.
9. Suggestions for an agenda and what the negotiated settlement should look like in order to meet your client's needs. This will save time.
10. The overall tone of the submission should not be incendiary, but conciliatory and indicative that you understand the positions of each party. That builds trust.

ii. Confidentiality of submissions:

1. Submissions to the mediator can be all confidential, all shared, or a mixture. For example, items 1 – 5 can be shared and 6 -10 can be confidential.
2. Sharing more, rather than less, improves the chances of success in mediation. If the information contained in items 1-5 is not shared with the adversary, or is disclosed to the adversary for the first time at the mediation session, it may not be possible for the adversary and its executives to fully evaluate it and be able to respond during the mediation session. It could result in impasse, or at least the need to reconvene for a subsequent session.
3. Indicate on the face sheet the submission that you wish to keep confidential.

7. Preparation for Mediation
   a. TIP: Preparation for mediation is as important as preparing for trial, since your case will more that likely be settled and disposed of before trial.
   b. The attorney must prepare (1) himself, (2) the client, and (3) the mediator.

c. Define issues and interests. What does each party need to achieve, both psychologically and economically?
    i. Yours, and
    ii. Theirs
d. Identify the critical facts and decide how to illustrate and show them with maximum impact. Professionally made exhibits, as used in court, are helpful, and hopefully get the adversary to focus more on your points, and less on its points.
e. Prepare client to listen closely and be open to learn and process new information and ideas presented by the mediator and the adversary during mediation.
f. TIP: Help your client to be realistic. [Most attorney-client disputes arise because the client feels it was encouraged by the attorney into maintaining inflated impressions about the strength and value of its case rather than the vulnerabilities**. Why did I spend more on the litigation than I could have settled for?]** Emphasize that it is usually unlikely that one can guaranty the outcome of litigation. Litigation involves risk. The client should not hear about the weaknesses in its case for the first time from the mediator or adversary. To manage this inherent risk the lawyer must guide the client in attempting a settlement through negotiation or mediation. In either case, the attorney assists the client developing a "Settlement Range."
    i. One of the most successful ways that a Settlement Range is computed is by assessing your client's BATNA (Best Alternative to a Negotiated Agreement) and its WATNA (Worse Alternative to a Negotiated Agreement). See, Roger Fisher and William Ury, *Getting to Yes* (New York: Penquin Books, 1983).
    ii. This seemingly simple assessment is really quite complex. Also known as "Decision Analysis." It works when the participants are trying to divide a "fixed pie," and both parties want to claim as much of the pie as possible. It involves creating a factor for the various risks along the path of a litigation, such as the outcome of a motion for summary judgment and loss at a trial, and multiplying that factor by the high range and the low range of the verdict sustainable.
    iii. An alternative concept is known as "Integrative Negotiations." This involves creating value or "Enlarging the pie." It occurs when the parties have a shared interest in

the subject matter of the dispute, such as when dealing with intellectual property or natural resources. They combine their interests to create joint value.

iv. Be brutally frank with Client on this assessment. If you are not, and the eventual outcome is unexpected, the client will feel mislead.

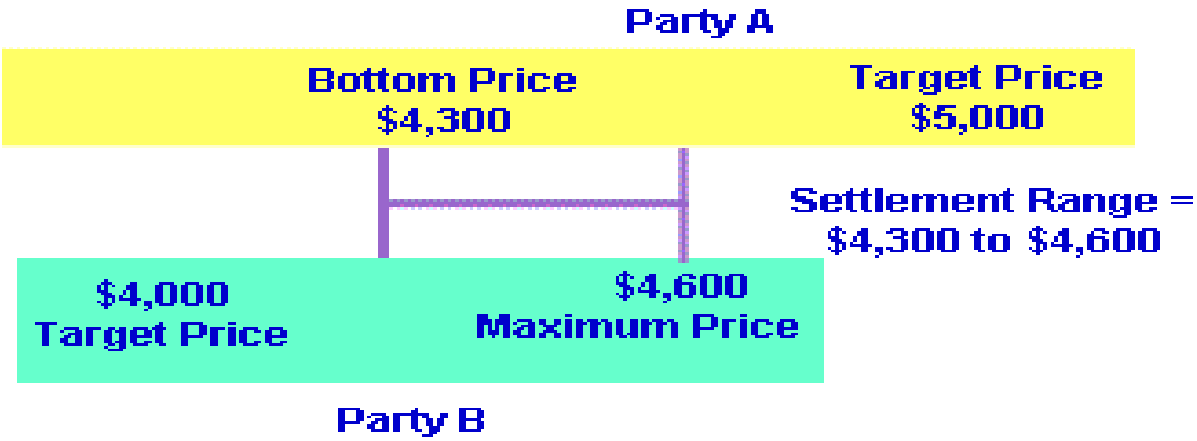
v. Putting these assessments together, calculate your Settlement Range, which is somewhere within the scale of values between the BATNA and WATNA.

vi. It is within the Settlement Range that you and your client can fix the following values:

    1. Target Point (Desired Settlement Point): The preferred price, aspiration, or the point at which the party would like to conclude negotiation, the optimal point.
    2. Resistance Point (Walkaway Point or Bottom Price): The reservation price, beyond which your party will not go. If you do not establish this value there is a possibility your client can walk away with a bad deal, suffer buyer's remorse (and blame you). This value remains secret, and might not even be revealed to the mediator, except perhaps when on the verge of impasse. Your objective is to reach an agreement as close as possible to your adversary's Resistance Point. When the claimant's resistance point is lower the respondent's, then a deal is possible. If claimant's resistance point is higher that the claimant's, then no deal is possible.
    3. The Initial Offer (Opening Position): This is the artful balance between being optimistic and realistic. This will be a number in excess of your target price, but not far in excess as to discourage the adversary from believing that negotiations can proceed in good faith. The number should be at or between your BATNA and well above your Target Price. It must be presented with a reasoned explanation showing that it was not pulled out of thin air. For example, it should be supported by a written computation that might include your BATNA, or by jury verdict reports, with a modest discount for the (a) the savings

for present value, (b) unrecoverable costs of further litigation, and (c) a modest factor for the chance of an adverse judgment.

4. Here is an illustration of how negotiation values may work. When your bottom price is less than your adversary's resistance price, a settlement is possible, as you are both within the Settlement Range. It will be referred to below as the Zone of Possible Agreement ("ZOPA"). See, Spangler, *Zone of Possible Agreement (ZOPA)*, June 2003, http://www.beyondintractability.org.
5. ZOPA exists if there is a potential agreement that would benefit both sides.



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vii. CAUTION: At this point in the process, your client has not yet had the opportunity to fully assess the strength of your adversary's presentation. You must caution your client to listen attentively and be open to revision of the foregoing values. If your adversary has a more colorable case than first thought, your client's assessment should be modified.

g. Preparation for an Opening Statement.
   i. To be presented by party or its representative, or by Attorney
      1. By party or party representative, if -
         a. Party is articulate and not feeling threatened or uncomfortable.

b. Party would be an impressive, or at least a convincing witness at trial
c. Party has personal knowledge and command of the issues. Always try to have your client speak to the technical aspects of the case, especially if he is at least as knowledgeable as the adversary in the relevant facts.
d. Some mediators will strongly urge that it be the party, but the final choice belongs to the party. They will say –"Let's hear from the parties." However, the choice is not the mediator's.
e. TIP: If it is not to be the party, this should be discussed with the mediator ex parte, to avoid unnecessary contention at the joint session.

2. By attorney if the foregoing factors are lacking.
    a. Tip: This is not to be the same as an opening statement at a trial. The attorney may start by pointing out that if the matter goes to trial, both sides will pull all stops to competently present the most overwhelming to insure they will win and the other side will lose. If you were not convinced of that, you would not have commenced (or opposed) this lawsuit. You then allow that this is not the objective in the mediation.
    b. The intent and purpose is not to inflame and harden the positions of the adversaries.
    c. The objective is educating your adversary that all participants share interdependence in the success of the mediation. Mediation is a joint venture.
3. TIP: You need to show that you are fair in understanding the position of the adversary. You do this by accurately and fairly reframing their position so that your adversary knows that you understand, even if y9u do not agree. If you follow their opening, thank them for it and restate their points to show that you were listening and understand them. Remember,

"understanding" your adversary's position is not the same as "agreeing" with that position.

i. You need to appear as trustworthy and impartial as possible in discussing the strength and weaknesses of both sides.
ii. You need to appear as someone your adversary can talk to, to whom it can appeal to with reason.
iii. You want to be as courteous and civil as possible, thanking them for being there.
iv. After showing that you understand the emotional components of the adversary's position, attempt to persuade the adversary to focus on the facts, rather than the emotions, as if they were a neutral judge or jury. Your goals include informing the adversary of your client's issues and interests.

ii. How much to reveal?
1. Elements of the cause of action
2. Schedule with itemization of claims. Get the focus of the discussions to be the items of claim.

h. Persons you will want to attend. (On these issues, the mediator is your best ally, as he too does not want to waste his time if there is no likelihood of settlement.)
i. Individuals that have personal knowledge of the facts
ii. Experts, such as engineer, architect, economists or accountant.
iii. The decision-maker on any settlement, who you want to hear and determine your client's presentation and the opposition.
iv. TIP: Significant others who have to live with your client's settlement, e.g. spouses, partners.
v. TIP: Refuse to attend mediation unless assured that the person with full authority is to attend. If it is court-annexed mediation, the court will generally back you up on this.
vi. Where insurance companies are involved, in some cases in "tower" arrangements, where different companies are involved at different dollar levels, you must gain a n understanding of the structure and insure that the

companies responsible for the likely amount of the settlement are represented.

vii. Special problems arise when dealing with a government agency as an adversary. In such cases, settlements are generally subject to approval of a controller or other official. Some research is necessary to understand the particularities of the party in such cases.

i. In your briefcase:

i. Punch list of items to be covered by party spokesman

ii. Controlling exhibits, such as documents and photos, with copies for all.

iii. Statements of claim or Pleadings, if litigation has commenced, and any controlling decisions rendered by court.

iv. Itemized statement of claim, with copies for all.

v. TIP: Trial Graphs and visual aids.

8. Conduct of Mediation.

a. Arrive early to spend a little quality time with the Mediator. It is an ideal time to review issues and suggestions as to the agenda for the session.

b. The Mediator will usually make an opening statement, establishing the ground rules and how he hopes the mediation will go, explaining the process (for the benefit of the non-attorneys present).

c. Which party makes an opening statement first?

i. Usually, the party with the burden of proof should open first, but this is subject to agreement. For example, if the other party has a serious affirmative defense that might bar recovery, it might logically wish to go first.

ii. Throughout joint sessions, remarks and eye contact should be directed to the other party, whom you are trying to convince, not the mediator.

iii. Respect and courtesy encourages agreement; no interruption, but listening party can take notes so as not to forget important points or questions.

iv. This is an opportunity to ask questions to clarify issues.

d. "Getting past yesterday;" try to focus on going forward and not dwell on the past. However, often when emotions are high, there is a need to vent. But that should not dominate the time after the opening remarks.

e. "Mediation Tone" should govern the style and demeanor of the lawyers throughout the mediation. One can be powerful, convincing and persuasive while avoiding the rancor that can disrupt or discourage the mediator and adversary from hoping for a reasoned settlement.
f. TIP: Remember; to succeed, this is the time to focus on creative problem solving and settlement. On this day you are from the State Department, not the Defense Department. Shock and Awe is appropriate only when diplomacy fails.
g. TIP: Try to have your adversary join you in focusing on what must be done to move forward. Sometimes a private caucus with your adversary will help. In front of his client he may need to grand-stand, but one on one may help set a constructive mood.
h. Emphasize that success in mediation is a shared responsibility.

9. TIP: The first offer: The opening statement is not the time to make any offer. That should happen after both sides have listened to the other's opening statements.
    a. It is often a good idea to caucus with the mediator before making an offer. He has a neutral take on whether the adversary is ready to negotiate.
    b. The first offer will not be accepted. It should be viewed as a starting point for negotiations. Your adversary will expect that there will be significant modification. You need to anticipate that there will be a need for built-in margin.
    c. The exception is a practice has became known as "Boulwarism," named for Lemuel Boulwar, the vice-president of General Electric in charge of labor negotiations. GE had the bargaining power and the will to make one "take it or leave it" offer which the company considered to be fair and reasonable, and it was well=know that it will never budge from it. (It was a tactic that the NLRB ruled to be an unfair refusal to bargain, and illegal.) You can use this tactic if you represent GE. If not, it is up to you to make your client flexible.
    d. When ready to make an offer, it is really a suggestion of what you propose the settlement should be (your Initial Offer). Be sure to justify it. It should not be a round number or other relief that no reasonable court would award. Try to make it appear to be a thoughtful number, based upon a shared calculation, not a round number pulled out of the hat.

e. Your offer need not be blind to extra-legal arguments, if such is the decision of your client, for example:
    i. The adversary has an immediate need for relief.
    ii. The adversary lacks the resources to support litigation.
    iii. Adversary needs to get matter off its financial statement.
f. TIP: Who makes the first offer?
    i. There is no rule, but as a general proposition, where your client has not made the last offer, there is no prejudice in making a first offer.
    ii. If you client has made a reasoned last offer in prior negotiations, that offer should be reiterated and supported by argument, and not changed until there is a good faith counter-proposal.
    iii. Never bid against yourself, at auctions or at negotiations. If your adversary does not respond positively to your last good faith offer, there is no negotiation. In general, it is for the mediator to go to work on your adversary at that point.

g. Heuristic Biases (See, *Negotiation and Mediation*, Peter J. Carnevale and Dean G. Pruit*t, Annu. Rev. Psychol.* 1992, 43:531-82). These are also referred to as "cognitive biases," of mental shortcuts engaged in a statistically significant number of negotiators. Some negotiators are assumed to have a limited attention and capacity to store and retrieve information from memory. They use heuristics – shortcuts and other simplifying strategies – to help manage information. They include the following:
    i. ANCHORING: Most people subconsciously adjust their expectations based upon the first numbers they hear. That is why a first offer and a first demand should show thoughtfulness and a willingness to negotiate a settlement. An arbitrarily chosen reference point has an inordinate negative influence on judgments. It was observed that prior information on pricing has an unusual impact in negotiations. The initial offer, within the realm of credibility, thus had a beneficial effect on negotiation.
    ii. BIAS DUE TO FRAMING OF OUTCOMES: With a positive frame, negotiators viewed prospective outcomes as gains and saw the negotiation as an effort to maximize net profits. Ex.: Show a concern for the other party's outcomes. Ex: If we can achieve a settlement today you will be able to save

your client tens of thousands of dollars, all flowing to, and representing a gain to, the bottom line, while still not overcompensating the claimant.

iii. THE FIXED-PIE PERCEPTION: Do not assume that "your win is my loss;" or zero-sum. This happens when negotiators believe that the other negotiators' interests are directly opposed to theirs. Some negotiations provide an opportunity for joint gain. When we buy a carrot cake, my wife only likes the frosting, and I only like the cake part. Therefore, we each get the whole cake. We have a win-win outcome.

iv. ILLUSORY CONFLICT: Try to point out the common interests of the parties, such as marketing a product and gaining royalty income. The licensor had no interest in distributing the product, which the distributor had no interest in manufacturing it. They had compatible interests.

v. REACTIVE DEVALUAITON: Don't devalue a proposal even before your adversary proposed it. Sometimes, with a little tinkering, your adversary's proposal can also benefit your client. Avoid the reaction, and persuade your adversary to avoid the reaction that whatever is good for one party is bad for the other.

h. The caucus.

i. Tip: Do not try to "play" the mediator. It will waste time. Also, he has heard that one before.

ii. TIP: Prepare your client to experience the reality check in caucus. Don't let you client walk into a caucus unprepared.

1. It is good for you and your client to hear.
2. It does not mean that he is not neutral; your adversary is going to get the same treatment.
3. Be prepared to counter the mediator's reality check, giving the mediator the ammunition to challenge your adversary's arguments in their caucus.
4. Try to get the mediator to verbalize your point, to make certain he understands and in comfortable in expressing it in their adversary's caucus. Make him your spokesman.

iii. TIP: Always ask the mediator for his advice prior to proposing a settlement offer. Ask the mediator what he thinks would be the reaction to that offer. Often the

intention of the offer is not to settle on it, but to act as a catalyst for a counter-offer. Then, consider that advice. However, your client must have the last word on making the offer.

iv. Propose options that might be beyond the power of the court to direct, or encourage the mediator to do so, and authorize the mediator to float these options to the adversary.

i. Consider a Neutral Expert. In complex and technical cases, where the parties seem far apart on the facts and their implications, it may be useful to suggest that they agree to bring in a neutral expert in whom they both trust.

   i. They must agree on the selection of the expert, fee sharing and that neither will use the expert or his report in the trial of the action if there is not settlement.

   ii. The mediator must still maintain his role in facilitation of the process.

j. Your objective (with the help of the Mediator) is to convince your adversary that your client's BATNA and WATNA are realistic, so that his settlement range makes sense.

   i. Once you and your adversary have a Settlement Range that overlap, you have achieved a ZOPA (Zone of Probable Agreement).

   ii. Within this zone, an agreement is possible. Outside of this zone no amount of negotiation will yield an agreement. It is at some point in the ZOPA that your client should be prepared to settle.

   iii. If the ZOPA for each party is irreconcilable, then you need to enlarge the pie to create a "win-win" solution. Think creatively. There may be alternatives not contemplated in the zone that might bridge the gap, such as -

      1. Future services or agreements.
      2. Payment terms or guaranties.
      3. Buy-outs.
      4. Division of the pie giving each party the part that fits there needs.

10. Avoiding Impasse: While some of the ways that avoiding an impasse are outlined below, the advocate must never fear the possibility that a particular case cannot be settled in mediation. In such a case, leave the

mediation after thanking the mediator and the adversary for their efforts and leave with a tone of good will. Many times a mediation that ends with an impasse will still have accomplished laying groundwork for future negotiation. Also, better mediators will try to stay in contact with the parties and encourage a change of thinking as time passes. Suggestions for breaking an impasse follow:

a. Exchange Value in the negotiation:
    i. Listen carefully and ask questions to identify interests and needs.
    ii. Ferret out the party's UNARTICULATED NEEDS, by asking searching and open-ended questions.
    iii. Bring options to the table. There is no harm in experimenting and floating creative ideas.
    iv. TIP: If your idea does not work, ask your adversary if it has any ideas to put on the table.
    v. Exchange low-cost for high-value items. These can include apologies, letters of recommendation, confidentiality, and payment terms in exchange for concessions of value to your client.
    vi. Cooperate with adversary to fulfill its needs.
b. Conduct to avoid:
    i. Offers or demands that cannot be justified, so as so appear to be in bad faith.
    ii. Agreeing to "Splitting the Difference" before you are within the ZOPA.
    iii. Personal attacks
    iv. Factual misrepresentations and fraud.
    v. Concerns about maintaining good relations with the mediator, the adversary or its attorney.
    vi. Threats, but you can certainly alert your adversary that it is walking a thin line, legally or ethically.
    vii. Preventing face-saving concessions
    viii. Changing your position without corresponding change in position from your adversary.
    ix. Unwillingness to stand pat, or walk away
    x. Impatience; you do not score advantages by being the first to pack up bags and leave.
c. Tools of persuasion
    i. Show how your concessions equate with theirs and are fair.

ii. Identify possible precedents from the past or between your adversary and other parties.
iii. The concessions are justifiable both in the instant dispute and as precedent for future transactions between the parties or with third-parties.

d. Mutuality of Vulnerability
    i. Each party representative tells what might happen if the dispute went to court, both in the strength of your case and the risks.
    ii. Then, assume that you went to court and disaster struck. How would you explain that to your client? How could this have happened? (It will happen to at least one of the parties.)

e. Divide and Settle:
    i. In dealing with a dispute involving multiple parties, it is very often beneficial to settle out the more cut-and-dry cases, reduce the number of parties at the table, and them clear the air to focus on the main issues. This is common in construction disputes, where amongst the multiple parties, the case can be settled against one or more.
    ii. In dealing with multiple claims against a single party, a claim can be settled, contingent on global settlement ultimately being reached.

f. Adjourn to another day:
    i. Sometime, the parties have accomplished all that they can for the day.
    ii. It is OK to summarize where the parties are and adjourn to another day, giving all a chance to regroup and consider where they are and how they can move forward.

11. Impasse – An impasse (unlike diamonds) are not forever; even after appeal, mediation can succeed.
    a. The Three P's.
    b. Impasses are made to be broken.
    c. The threat of an impasse can sometimes be an effective tactic to achieve a settlement. It is really a dare. Since your adversary (as well as you) has made an investment in the mediation process, he does not want to have to explain to his client that it was a wasted investment.
    d. Encourage follow-ups by mediator.

e. Conditional offers: If I can get my client to point "X" can you get adversary to
    i. accept that offer, or
    ii. improve his demand to "Y"?
f. Mediator's Proposal – A mediator can suggest a settlement and privately ask each party whether it will accept it.
    i. If both agree, the matter is settled.
    ii. If one party does not agree, the identity of the party that agreed is kept confidential, so that the other party does not know that about it, and the settlement fails.
    iii. If the mediator's proposal is not accepted, that usually ends the mediation, as the mediator has stated his evaluation. For that reason, the mediator will seldom make the proposal unless, having spoken to both parties, he believes that it is within the ZOLA and will be accepted.
g. Med. - Arb. In the event of an impasse, the parties agree that the mediator will make a final and binding decision.
h. Baseball arbitration: Each party makes a confidential proposal for settlement. The mediator becomes an arbitrator and must select the one that seems right to him. He can only chose one or the other. There is an inherent incentive for each party to submit a fair proposal.

12. Preparation for memorandum of understanding
    a. TIP: Arrive at the session with check – list, if not a draft, of the agreement you would be prepared to sign, including all terms, with numbers blank. The excitement or the lateness of the hour may otherwise cause you to overlook something.
    b. If there are any sticking points besides the agreed negotiated settlement, do not spring them up at the last minute. Mention them as a part of any offer on the table, such as
        i. Confidentiality
        ii. Installment payment terms, with or without guaranties and penalties for default
        iii. Apologies
        iv. Non-disparagement clauses
    c. At this stage it is bad faith to add additional substantive terms.
        i. This is no time for a party to say "I almost forgot" or "I can't pay until the next fiscal year, " or "I also need a release of company Y."

d. If you settled, do not leave without a signed memo of understanding (MOU). A handshake is not enough.
e. Leaving a MOU to another day invites buyer's remorse.
f. Can be quick and dirty term sheet, or a carefully drafted agreement.
g. If a term sheet is signed, provide that if a more formal agreement is not executed in 30 days, have a fail-safe provision, e.g.:
    i. the term sheet shall be deemed final and binding, or
    ii. the mediator shall arbitrate the differences and his decision will be final and binding.

13. Settlement Counsel: This is a relatively recent area of specialty in the legal profession.

14. Ethical Issues
    a. Failing to advise a client of the availability of mediation.
        i. In certain jurisdictions the Code of Professional responsibility requires an attorney to advise his client of the appropriateness and availability of mediation.
            1. Va. Canon 6 (Competence)
            2. Va. Rule 1.2 of the Rules of Professional Conduct
        ii. New York Rules of Professional Responsibility, 22 NY Rules of Court, Part 1200 (April 1, 2009, has not explicitly gone that far, but there is pressure from various bars to do so. Until it does, it may be argued that it is the best practice to do so, and to even include it in the lawyer's letter of engagement.
        iii. There is no apparent down-side to advising the client of the alternate dispute resolution alternative to litigation.
    b. Rule 1.1: **Competence** (a) A lawyer should provide competent representation to a client. Competent representation required that legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. This includes representation at a mediation. (NOTE: the provision for "zealous" advocacy has been removed from the Rules.)
    c. Rule 1.12: **Specific Conflicts of Interest for Former Judges, Arbitrators, Mediators or other Third-Party Neutrals**
    (b) Except as stated in paragraph (e), and unless all parties to the proceeding give informed consent, confirmed in writing, a lawyer

shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as:

(1) an arbitrator, mediator or other third-party neutral; or

(2) a law clerk to a judge or other adjudicative officer or an arbitrator, mediator or other third-party neutral.

(c) A lawyer shall not negotiate for [his own] employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral.

d. Rule 2.4: **Lawyer Serving as Third-Party Neutral**
e. Rule 3.3**: Conduct Before a Tribunal**
f. Rule 3.4 **Fairness to Opposing Party and Counsel**
    i. Legal obligation to produce "smoking gun."
g. Rule 3.4(e) A. "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."
    i. What about threats of ethical misconduct, where there is an obligation placed upon lawyers to report such conduct?
    ii. Does the rule of confidentiality bar the lawyer from reporting misconduct?
h. Rule 4.1: **Truthfulness in Statements to Others**

In the course of representing a client, a lawyer shall not knowingly make a false statement of fact to a third person.

COMMENT 1: A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.

COMMENT 2: Whether a particular statement would be regarded as on of fact can depend on the circumstances. Under generally accepted conventions in negotiations, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category; so is the existence of an undisclosed principal, except where nondisclosure of the principal would constitute fraud.

This certainly applies to representing a client in mediation. Examples may include the following:

i. My best and final offer (at this time, or, until I hear a reason to change my offer).
ii. I am going to file in bankruptcy.
iii. The truth (yes), but the whole truth (?) A lawyer has no duty to inform an adversary of relevant facts (but may not provide statements which he knows to be false).

i. Rule 4.2:**Communication With Person Represented By Counsel**

(a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

a. "Reply All," when receiving an email from adversary who CC'd his client? What about a BCC?
b. Outside of Joint Session.
c. TIP: However, in a joint session the lawyer has a perfectly ethical and important opportunity to communicate directly with his represented adversary.)
j. Avoidance of fraud, impropriety and dishonesty.
    i. All participants in mediation are bound by this rule.
    ii. You cannot ask the mediator to transmit information that violates this rule. A mediator will not do this.
    iii. You cannot offer the mediator or opposing counsel the prospect of future employment in the course of mediation.
k. Special issues when the adversary is *pro se.*
    i. When it lacks knowledge that it has a good legal defense, e.g. statute of frauds, statute of limitations, lack evidence required to prove the elements of a *prima facie* case.
    ii. Mediator, feeling the responsibity for the integrity of the mediation processes, will urge, or at least offer the opportunity to the *pro se* party to obtain legal advice. At what point does the mediator overstep his neutrality?

15. Q. & A.

When To Litigate

When To Mediate

A Guide to Dispute Resolution for Co-op and Condo Boards

By
Bruce A. Cholst, Esq.
Partner
Rosen & Livingston
Attorneys At Law

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Printed in the United States of America.
Fourth Printing December 2001.

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This booklet is dedicated with love to my wife Judy, and our daughters Rachel and Cecilia, whose support and understanding allow me to work late into the night and who unfailingly make home the best place to come back to.

Table of Contents

Preface

We live in the most litigious society in history. Whereas once, bringing suit against another party was the last, most threatening, and least desirable step in the process of dispute resolution, today it is more and more commonly the opening salvo. As a result, our court calendars are overflowing with pending law suits, and our abilities to communicate, negotiate, and compromise with one another have suffered.

Moreover, the application of the law has become in many ways something of a spectator activity, as we now can watch any number of televised trials, packaged more like media events than the serious and sometimes life-changing proceedings they really are. This technological 'voyeurism,' defended for better or worse by our Constitutional right to a public trial, further desensitizes us to the ultimately human issues involved in both the dispute itself, and in the process of its resolution.

It is important to remember that, as Americans, we are wholly entitled to pursue legal recourse when we believe that we have been wronged and we seek the protection and satisfaction only the law can provide. The law exists, after all, to protect us from the extremes of passive victimization at one end and over-zealous vigilantism at the other.

But it is equally important to remember that viable and satisfactory alternatives to litigation do exist — alternatives such as mediation. This is especially true when disputes arise within co-ops and condos, which are simultaneously corporate and financial entities, as well as self-contained residential communities.

As corporate and financial entities, co-ops and condos typically enter into any number of legal agreements with other entities. Indeed, the Proprietary Lease and By-Laws are contracts between the co-op or condo association and its shareholders or unit owners. When a dispute arises around these agreements, it is sometimes most advisable to litigate or arbitrate.

On the other hand, certain kinds of disputes lend themselves to mediation, which is usually a faster, cheaper, and less divisive process. This is especially true in co-ops and condos, where most disputes are between community members who will be dealing with each other on a continuing basis long after their controversy has been resolved.

The purpose of this booklet is to inform you, as a co-op or condo dweller/decision-maker, of your options relative to the resolution of both legal and interpersonal disputes, and to empower you to make the most informed decision regarding **When To Litigate, When To Mediate**. I hope you find it helpful.

Bruce A. Cholst

Bruce A. Cholst, Esq.

An Introduction to the Dispute Resolution Processes of Litigation, Arbitration, and Mediation: What They Are, How They Work, and How They Are Different

What is Litigation?

Litigation is the process whereby each party involved in a dispute presents evidence and arguments in a **formal setting** to a **third party** who **decides the controversy in favor of one party and against the other**.

In the process of litigation, the formal setting is a **courtroom**; the third party is a **judge and/or jury**; and the decision that is reached is **legally binding on all parties involved in the dispute**.

What is Arbitration?

Arbitration is the process whereby each party involved in a dispute presents evidence and arguments in a **semi-formal setting** to a **third party** who evaluates the evidence and **decides the controversy in favor of one party and against the other**.

In the process of arbitration, the semi-formal setting is a **hearing room determined by the arbitrating agency**; the third party is a designated **arbitrator**; and the decision that is reached is **usually guided by legal precedents and, unless otherwise agreed by the disputing parties in advance of the arbitration, is legally binding on all parties involved in the dispute**.

Litigation and arbitration are presented together here because of the similarities in the ways they are conducted and the results they produce. Here are the most salient similarities and differences between litigation and arbitration:

- In both litigation and arbitration, a third party **hears evidence for the purposes of evaluation and decision.** In litigation, the third party is a judge and/or jury within a courtroom, whereas the third party in the process of arbitration is an arbitrator within a designated arbitration location. In litigation, judges are assigned to each case at random, whereas the parties in arbitration generally agree among themselves upon the choice of an arbitrator.

- In both litigation and arbitration, one party prevails and the other is defeated. Both litigation and arbitration produce a 'winner' and a 'loser.'

- In both litigation and arbitration, the Rules of Evidence are applied. However, whereas the Rules of Evidence are strictly applied in litigation, they may be less strictly applied in the process of arbitration.

- Both litigation and arbitration are inflexible processes because judges are limited and bound by, and arbitrators are usually guided by, legal precedent.

- The decisions reached in both litigation and arbitration are legally binding on all parties. In litigation, there are no exceptions. However, in arbitration the parties may (but, in fact, rarely do) agree in advance not to be mutually bound by the decision.

- Litigation is generally expensive, time-consuming, and emotionally draining because the process does not merely involve presentation of evidence. Rather, motion practice, discovery, and the prospect of appeal(s) by the losing party are all integral parts of the litigation process. Each of these factors tends to increase the cost and delay resolution of the controversy. In arbitration, motion practice, discovery, and the right of appeal are generally waived.

Thus, arbitration is, for all practical purposes, nothing more than 'litigation lite.'

Paramount Factors to Consider When Deciding Whether to Litigate or Arbitrate

- If money, time, and stress reduction are the most decisive considerations, arbitration may be more appropriate than litigation. However, the trade-off must also be considered: In arbitration, motion practice, discovery, and the right of appeal all are waived.

- If you lack the proof necessary to win your case at the time the controversy arises, and such evidence is in the possession of third parties, discovery is essential. In this case, litigation is more appropriate.

- If legal precedents decisively favor your position, you may want to consider a motion for Summary Judgment. Since motion practice is waived in arbitration, litigation would be the preferable procedure in this instance.

- If you want to pursue your claim to the 'bitter end' on the basis of principle, and time and money are not decisive considerations, you should opt for litigation because that process preserves the right of appeal.

What is Mediation?

In contrast to litigation and arbitration, mediation is the process whereby evidence is presented to a neutral third party – the 'mediator' –, **not for the purposes of evaluation and decision, but for the purpose of discovering common ground among the disputants. The mediator then attempts to seize upon this common ground to forge a negotiated agreement between the disputants.**

If such an agreement is concluded, it is reduced to writing and becomes contractually binding on all disputants. The parties are free to break off discussions at any time before the agreement is signed, and instead pursue litigation or arbitration. (Various surveys show that approximately 85% of all disputes submitted to mediation result in a negotiated agreement between the disputants.)

In the process of mediation, the setting can be **any location agreed to by the disputants or determined by the mediator, and formal rules of evidence do not apply**.

In mediation, unlike litigation and arbitration, there are no 'winners' or 'losers' because the mediator does not decide in favor of either disputant, and neither is found to be in the wrong. Rather, resolution of the controversy is a product of amicable negotiation between the disputants. This enables the disputants to deal with each other on an equal footing long after their controversy has been resolved. Thus, the primary benefit of mediation is that it preserves rather than severs the parties' relationship.

The following additional facts are helpful in understanding why mediation deserves consideration as a first step in dispute resolution, and why it may be more desirable than litigation or arbitration for the resolution of disputes:

- **Mediation is a flexible, creative process.** In the process of mediation, neither the mediator nor the disputing parties are bound by any legal precedent. Because mediation is a purely consensual process, once all the disputants agree to participate, they are free to forge a broad, creative agreement that goes beyond legal precedent. That is to say, as long as the agreement reached is within the general bounds of the law, there are no other limits on the terms, scope, or conditions of the agreement that can be forged through the mediation process.

- **No one is forced to participate.** Although the ultimate agreement arrived at through the process of mediation is put in writing once it is reached, and is

then enforceable as a binding contract, the mediation process itself is non-binding. That is to say, none of the disputants is required to enter into the process at any point, nor to agree to the suggested resolution the process yields. Each disputant is completely free to walk away and proceed with litigation or arbitration at any time during the mediation process. However, it bears repeating that, once all the disputants sign the written mediation agreement, its terms become a binding contract.

- **The mediation process is strictly confidential.** This is in contrast to litigation and arbitration, where verdicts and sometimes awards are a matter of public record and are therefore subject to scrutiny by potential adversaries, credit reporting agencies, and the press.

- **Disputants may agree to mediate at any stage of their controversy.** This is true even *after* a judgment or arbitration award has been issued. (However, mediation efforts are most effective when undertaken at the *earliest* stages of the controversy, before the parties' passions are inflamed and their attitudes toward the conflict become hardened.) Potential disputants may even agree to mediation *before* a controversy materializes.

- **Mediation is more convenient, less expensive, less time-consuming, and less emotionally-draining than either litigation or arbitration.** Court cases and arbitration hearings can take place in inconvenient locations; incur significant costs; last years, even decades; and cause tremendous emotional distress. Conversely, because the parties who enter into the mediation process are in it to resolve their differences together, the process takes considerably less time and is significantly less emotionally trying.

These factors, in concert with the fact that mediation can take place anywhere, mean that the entire process

involves a far smaller investment of money and time than either litigation or arbitration. In fact, it is not unusual for the process of mediation to settle disputes within a few hours. And, as already noted, approximately 85% of all mediations result in a written settlement agreement.

In both Litigation and Arbitration:

- A third party hears evidence for the purposes of evaluation and decision, producing a 'winner' and a 'loser.'
- The Rules of Evidence are applied.
- Since judges are bound by, and arbitrators are generally guided by, legal precedent, their ability to forge an innovative 'global' solution is often impaired.
- The decisions reached are legally binding on all parties.

By contrast, in Mediation:

- A third party hears evidence for the purpose of forging a negotiated agreement between the disputants.
- The process is flexible, creative, and confidential.
- No one is forced to participate, and disputants may agree to mediate at any stage of their controversy.
- Mediation is usually less expensive, less time-consuming, less emotionally draining, and more convenient than either litigation or arbitration.

The Applicability of Mediation to Co-op/Condo-Based Disputes

While litigation and/or arbitration may well be the most effective means of enforcing legal rights in specific instances, mediation is a 'natural' for resolving the vast majority of co-op/condo-based disputes. This is so because co-op and condo complexes are self-contained communities in which the disputants inevitably will come in contact with each other on a continuing basis, both during and after their controversy. Successful mediation of the dispute – so that there is no 'winner' and no 'loser,' just a negotiated settlement – ensures harmony and productive interaction during these contacts. Obviously, the minimization or elimination of discord among community members greatly facilitates management of the property.

Consider the following list, which identifies the complete range of co-op/ condo-based disputes:

- Resident versus Resident
- Resident versus Board
- Resident versus Building Staff
- Board versus Building Staff
- Board versus Sponsor
- Board versus Commercial Tenant or Unit Owner
- Board versus Managing Agent or Other Professional
- Board versus Contractor, Vendor, or Service Company
- Guest or Business Invitee versus Board (i.e., in defense of a tort claim)

The first seven of these types of disputes share this in common: They are strictly between members of the co-op/condo community who will be dealing with each other on an ongoing basis. Mediation facilitates productive interaction and peaceful co-existence among these individuals, despite the inevitable occasional disputes that arise in such a community.

Vendor and Third Party disputes constitute a different category because these people are not part of the community, and neither the Board nor the residents deal with them on a continuing basis. Thus, there is not the same

incentive to choose mediation with respect to these kinds of disputes. (Of course, if time, money, and the absence of emotional distress are primary considerations, mediation is still a viable option.)

As already noted, mediation can proceed only if all parties agree to participate in the process. This agreement can be entered into either before the dispute even materializes, (i.e., a contract stipulating in advance that all disputes which might arise in the future will be submitted to mediation), or at any stage during the dispute. Either way, the Board is in a position to foster such an agreement if it so chooses.

Pre-dispute mediation agreements may be effected through a Board-sponsored Proprietary Lease or By-Law amendment which mandates mediation as the **Avenue of First Resort** before reverting to litigation or arbitration in the event any dispute cannot be resolved through informal negotiation. Once validly enacted by the requisite super majority of shares or common interests, such a provision is contractually binding on all shareholders or unit owners. This means that if one disputant 'jumps the gun' by initiating litigation before mediation has been attempted, the other party can have the proceeding dismissed on the grounds that it was prematurely commenced.

Mediation clauses are pro-active measures with the goal of reducing the incidence of litigation within the community. Since the overwhelming majority of all mediations result in a resolution, the odds greatly favor settlement of any given dispute *before* litigation ensues. (Refer to page 13 for suggested language for a Co-op Mediation Clause. Refer to page 14 for suggested language for a Condominium Mediation Clause. Of course, your Corporate Counsel should be consulted with respect to the suitability of such a provision to your complex and the proper method of enactment.)

As soon as it becomes aware of a controversy, the Board is also in a position to foster post-dispute mediation agreements by inviting the disputants to an 'informal meeting' – possibly over coffee or tea – to hash out their differences and facilitate a compromise solution. Any agreement reached in this fashion should be reduced to writing and signed by all parties so that it becomes contractually binding. Many co-op and condo Boards already have established standing committees to facilitate this function.

The Role of the Attorney in the Mediation Process

Any two people who sit down in good faith to resolve their differences before a neutral third party may be said to be participating in the process of mediation. It follows, therefore, that the mediation process does not, in and of itself, require the services of an attorney.

However, it is the rare disputant, whether it is a co-op or condo association or an individual shareholder/unit owner or resident, that is not well-advised to enlist the help of a competent attorney to represent their interests in any dispute resolution activity, be it litigation, arbitration, or mediation. . If for no other reason than to have a surrogate who is emotionally distanced from the issue at hand, retaining an attorney well-trained in mediation is advisable in most situations.

Throughout the process of mediation, an attorney should:

- Help to decide whether or not mediation is the appropriate dispute resolution mechanism to pursue.
- Participate in the selection of the neutral mediator.
- Prepare the confidentiality agreement, and help to formulate the 'ground rules' governing the mediation.
- Present his/her client's evidence and arguments to the mediator.
- Participate in direct negotiations with the adversary.
- Participate in the drafting of the mediation agreement on behalf of his/her client.

What to Consider When Deciding Whether to Litigate, Arbitrate, or Mediate A Particular Dispute

Co-ops and condos are unique, hybrid entities. Neither wholly corporate/ financial, nor exclusively residential in nature, the potential for a variety of law-based and interpersonal disputes exists inevitably within them.

Typical disputes within co-ops and condos include everything from one resident lodging a noise complaint against a neighbor, to the Board's concern over unpaid maintenance/common charges, to the Board's dissatisfaction with an employee's or management's performance, to the questionable performance of an interior decorator hired to redesign the lobby. Indeed, the potential for disputes within the co-op and condo environment is virtually without end, and within each of these disputes rests a seed that can grow into a legal action.

When To Litigate or Arbitrate

In the majority of situations, the following three specific factors militate in favor of litigation or arbitration when a co-op/condo-based dispute arises:

1. **When you, as one of the disputing parties, have a vastly superior financial position to that of your adversary.**
   As stated earlier, the process of litigation is often expensive and time-consuming. If you have a sizeable 'war chest' dedicated exclusively to legal action in a given controversy, you will also have a decided tactical advantage in pursuing litigation.

2. **Where legal precedents decisively favor your position as a party in the dispute.**
   When previous decisions in cases similar to yours indicate the overwhelming probability of victory in your particular case, and assuming that you have the financial wherewithal and emotional stamina to see the litigation through to its logical conclusion, then litigation may be appropriate.

3. When, for political and/or policy-related reasons, you want to set an example or establish a precedent for dealing with similar situations in the future.
Often, co-op and condo Boards, or shareholders/unit owners, find themselves in a dispute for which a precedent has not yet been established. In these cases, a greater principle than simply 'winning' may be at stake and successful litigation is the only way to 'get it on the books.' In such cases, where the financial and other resources necessary to enter into the litigation process are in place, it may indeed be worthwhile to pursue legal action. Additionally, when the Board wants to 'send a message' to the community (e.g., to demonstrate its intolerance for illegal subletting), it should litigate the issue to judgment rather than seek a mediated compromise settlement.

When To Mediate

Just as there are certain quantifiable factors that militate in favor of litigation, as demonstrated above, so there are other factors that speak to the wisdom of pursuing mediation as a 'first resort' before entering into litigation. In the overwhelming majority of situations, the following five specific factors should be taken into account in favor of mediation as the initial dispute resolution mechanism:

1. Where there is the desire to preserve the relationship with your adversary after the dispute is resolved.
As already discussed, this is arguably the single most important consideration for Boards because it fosters harmony in a self-contained residential community, thereby reducing the prospect of litigation and facilitating management of the property.

2. When there is a shortage of funds with which to finance litigation.
Many a valid law suit has not been brought to court because the plaintiff did not have the financial resources necessary to proceed. Then, too, many a co-op or condo Board and shareholder/unit owner has brought successful legal action against an adversary only to discover that they 'won the battle but lost the war' because

the judgment rendered did not cover the costs of the litigation. When you, as a party to a dispute, do not have sufficient funds to move forward effectively with litigation, and/or where you know that your adversary does not have sufficient funds and it is not your intention to 'break' your adversary, mediation may be the better way to go.

3. When there is a mutual desire for a speedy resolution.
In most disputes arising in co-ops and condos, a fast resolution to the problem is desirable for all parties concerned. In such cases, the speed with which the process of mediation can be commenced and concluded is a strong factor in its favor.

4. When there is a mutual desire to minimize time and emotional commitment necessary to prepare for the 'showdown.'
Preparing for litigation is both time-consuming and emotionally draining, not to mention the time and emotional toll exacted by the actual court appearance itself. In most disputes arising in co-ops and condos, the disputants are usually busy living their 'real lives' separate from co-op and condo concerns. All anyone wants to do is be comfortable coming home at the end of the day. Where all parties want to 'get it over with' to everyone's best advantage, mediation is far more desirable than litigation.

5. Where there is the desire to preserve confidentiality.
Unlike litigation, the process and the outcome of mediation are strictly confidential. Since co-ops and condos are self-contained residential communities, it is often most desirable to keep the dispute and its ultimate resolution confidential unless and until all disputants agree to make them public.

Litigation or arbitration is appropriate when you have a superior financial position, when legal precedents favor you, and/or when you want to establish a precedent. **Mediation** is desirable when you want to preserve relationships, when funds are limited, and/or when a quick and confidential resolution is sought.

Recommended Language for A Co-op Proprietary Lease Mediation Clause

The following language is recommended as an amendment to the existing Proprietary Lease. As always, amendment of a Proprietary Lease requires a vote in the affirmative by holders of a super majority (usually 2/3) of the cooperative's outstanding stock.

Co-op Proprietary Lease Mediation Clause

Any dispute between shareholders of the Cooperative which cannot be settled through negotiation shall be submitted to mediation administered by the American Arbitration Association before resorting to litigation, arbitration, or any other dispute resolution procedure. At the election of the Cooperative's Board of Directors, any dispute between one or more shareholders and the Cooperative which cannot be settled through negotiation shall be submitted to mediation administered by the American Arbitration Association before resorting to litigation, arbitration, or any other dispute resolution procedure. In each such case, the fees, costs, and expenses of the mediator will be borne equally by the disputants. Each disputant will also bear the fees and expenses of its own counsel and expert witnesses, and all costs incurred in connection with the preparation of its own case.

(Please Note: This provision was drafted from my perspective as General Counsel to the Apartment Corporation. Since litigation is sometimes more appropriate than mediation from a tactical standpoint, this provision is designed to give Boards the option of choosing between the two procedures in the event of a dispute between itself and a shareholder. The language can be readily modified if such a tactical advantage is not being sought or if the Board's interests are not paramount. Your Corporate Counsel should be consulted with respect to the suitability of such a provision to your complex and the proper method of enactment.)

Recommended Language for A Condo By-Law Mediation Clause

The following language is recommended as an amendment to existing condo By-Laws. As always, the amendment of a condominium association's By-Laws requires a vote in the affirmative by holders of a super majority (usually 2/3) of common interests.

Condo By-Law Mediation Clause

Any dispute between unit owners of the Condominium which cannot be settled through negotiation shall be submitted to mediation administered by the American Arbitration Association before resorting to litigation, arbitration, or any other dispute resolution procedure. At the election of the Condominium's Board of Managers, any dispute between one or more of the unit owners and the Board of Managers which cannot be settled through negotiation shall be submitted to mediation administered by the American Arbitration Association before resorting to litigation, arbitration, or any other dispute resolution procedure. In each such case, the fees, costs, and expenses of the mediator will be borne equally by the disputants. Each disputant will also bear the fees and expenses of its own counsel and expert witnesses, and all costs incurred in connection with the preparation of its own case.

(Please Note: This provision was drafted from my perspective as General Counsel to the Condominium Association. Since litigation is sometimes more appropriate than mediation from a tactical standpoint, this provision is designed to give Boards the option of choosing between the two procedures in the event of a dispute between itself and a unit owner. The language can be readily modified if such a tactical advantage is not being sought or if the Board's interests are not paramount. Your Corporate Counsel should be consulted with respect to the suitability of such a provision to your complex and the proper method of enactment.)

About
Bruce A. Cholst, Esq.
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Bruce A. Cholst, Esq, is a Partner with Rosen & Livingston, a Manhattan-based law firm specializing in the representation of cooperative and condominium associations. The firm is general counsel to more than 100 such properties throughout metropolitan New York.

Among his professional activities, Mr. Cholst represents the firm's clients in matters involving shareholder/unit owner controversies; residential and commercial non-payment actions; commercial leasing conflicts; vendor claims; Board election disputes; and sponsor defect and arrears litigation. Mr. Cholst is equally experienced at client representation in litigation, arbitration, and mediation dispute resolution procedures.

A recognized authority on co-op/condo governance and law, offering two decades of professional legal experience complemented by seven years as a member of his own co-op's Board of Directors, Mr. Cholst presently serves on the New York State Bar Association Committee on Cooperatives and Condominiums (Liens Sub-Committee), and on the Real Estate Committee of the New York County Lawyer's Association (Cooperative and Condominium Sub-Committee). He is a frequent contributor to and source of expert information for numerous real estate-related publications, as well as The New York Times, and is a popular speaker on issues impacting the multi-unit residential arena.

To learn more about professional dispute resolution for your residential cooperative or condominium; to arrange for a consultation; to arrange for Bruce A. Cholst, Esq., to serve as a Guest Speaker to your property, group, or organization; and/or to discuss any other legal concerns, please call Bruce A. Cholst, Esq., at (212) 687-7770.

Do You Know
When To Litigate and When To Mediate?

Disputes within co-ops and condos run the gamut from one resident lodging a noise complaint against a neighbor, to the Board's concern over unpaid maintenance/common charges, to the Board's dissatisfaction with an employee's or management's performance, to the questionable performance of an interior decorator hired to redesign the lobby.

As every co-op or condo decision-maker knows, the potential for a variety of law-based and interpersonal disputes within the co-op and condo environment is virtually without end. How best to resolve those disputes is the purpose of this booklet.

In **When To Litigate, When To Mediate:** ***A Guide to Dispute Resolution for Co-op and Condo Boards***, attorney and noted co-op/condo law expert Bruce A. Cholst presents:

- **An Introduction to the Dispute Resolution Processes of Litigation, Arbitration, & Mediation**
- **When It's Appropriate and Advisable to Litigate**
- **When Arbitration is the Desirable Alternative**
- **When Mediation is the Most Attractive Option**
- **Recommended Language for Mediation Clause in a Co-op's Proprietary Lease and Condo's By-Laws**
- **And more.**

There's a time to litigate, and a time to mediate. This booklet will help you decide.

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