CONFLICT RESOLUTION:

HOW ADR HELPS COMMUNITY ASSOCIATIONS

A Guide for Association Practitioners

By Mary Avgerinos

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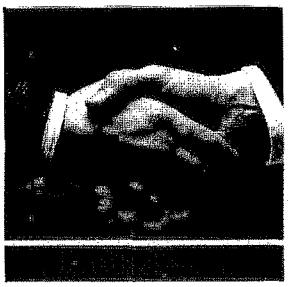

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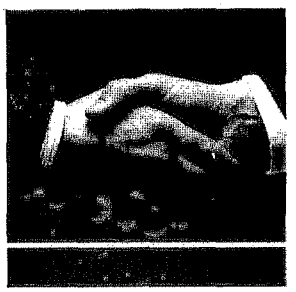
INTRODUCTION:

BACKGROUND AND KEY POINTS



WARY PURCHASERS, WHO OFTEN JUDGE THE ACTIONS of association boards and managers on negative media stories, may view association communities as overly-regulated fiefdoms of "condo commandos." And if they do, it is unlikely that they will purchase a home in a community association. This leaves the association with a complex problem. It must attract buyers, while enforcing rules and regulations that are not based on conformity, control, and constraint. It must balance both collective and individual rights.

To achieve this goal, the association must manage conflict through a constructive, people-centered strategy. Popular approaches to managing conflict that foster greater understanding and communication include alternative dispute resolution (ADR) and consensus-building.

ADR, which includes negotiation, mediation, and arbitration, provides associations with an alternative to the traditional justice system and has been embraced by attorneys who are disillusioned with the judicial system. According to Steven L. Schwartz, Esq. in his article, "Business and Legal Communities Look to ADR" published in the April-September 1996 issue of the *Dispute Resolution Journal*, lawyers are highly skilled in adversarial dispute resolution. And though they attempt to practice "professional civility" in court, the judicial system makes friendly relationships difficult.

Judges often are frustrated with the system as well. They cope with heavy caseloads and contentious adversaries. Many judges feel they have become administrators who are more concerned with moving congested court dockets than dispensing justice. Clients also believe the system is hostile, slow, and expensive. This uncertainty makes the victor indistinguishable from the vanquished.

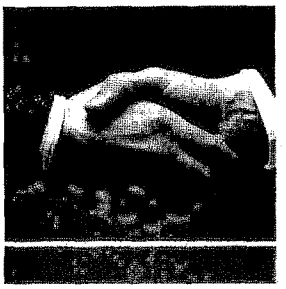
This guide presents ADR methods in the order in which they are recommended for use. The early use of negotiation facilitates greater independence on the part of the association and requires the least amount of time and resources because it does not require the assistance of an outside party, such as a professional mediator or attorney. Mediation is the next step due to its collaborative nature and minor investment of time and money. Arbitration is the least preferred ADR alternative, although it has its place in resolving complex legal issues.

KEY POINTS

- ADR is an alternative to the traditional justice system. It includes negotiation, mediation, and arbitration.
- In negotiation, participants identify the issues in dispute, educate each other about their needs and interests, generate settlement options, and bargain over final agreement terms.
- In mediation, a neutral party—the mediator—resolves conflict between two or more parties.
- In arbitration, a neutral party—the arbitrator—renders a final, legal decision based on evidence and testimony.
- The association can use meetings, forums, open houses, and workshops to build support for its decisions within the community. This method is called consensus building.

CHAPTER ONE:

MANAGING CONFLICT



ASSOCIATIONS HANDLE CONFLICT IN MANY WAYS. Though they may choose from a number of informal, private conflict-resolution techniques, many associations choose either to avoid the problem or jump into litigation.

THE AVOIDANCE APPROACH

Association board members may avoid conflict because they don't have the time or energy to personally address residents' concerns. Instead, they ask the manager to handle their people problems or ignore them until they escalate into complex situations. Though this approach initially minimizes the problem, it weakens the board's ability to build one-on-one relationships with the members. And the board needs these relationships because they create the sense of community that leads to resident participation in association affairs and compliance with the covenants.

Associations also avoid conflict when they believe the conflict isn't important enough to warrant action or that they're powerless to change the situation. This type of thinking is largely due to the belief that the other party is wrong. However, it takes two conflicting forces to create friction. Consequently, each party can make constructive change. Since people can only control themselves (e.g., what they think or how they act), the best place to begin a conflict resolution strategy is with an introspective evaluation that includes such questions as "How am I, personally, contributing to this problem?" and "What can I do, personally, to make it better?"

The avoidance approach rarely benefits an association. Even minor disputes can escalate if they're not constructively addressed. (See "Evolution of a Conflict," page 2.)

THE ALTERNATIVE DISPUTE RESOLUTION APPROACH

As associations improve their ability to effectively manage conflict, they generally gravitate toward ADR strategies and principals. ADR is particularly attractive to

FIGURE 1. EVOLUTION OF A CONFLICT

Mrs. Smith first observed moisture along the walls and floor of her condominium crawl space. The moisture had dampened some of her storage boxes. Believing that the association was responsible for the damage, she called the manager and reported the problem. The manager thought the moisture was the result of recent rains and refused Mrs. Smith's requests to investigate the problem.

During the next three months, the problem worsened—along with Mrs. Smith's health. First, she developed related allergy problems, which were followed by pneumonia. While she was convalescing, she called the manager about the moisture problem. The manager promised to investigate the problem, but did not follow up on his word until Mrs. Smith had called him twice more. By the time the manager hired an engineer to investigate the problem, the moisture had damaged all of Mrs. Smith's off-season clothing and holiday decorations.

The investigation revealed that a faulty irrigation line caused the flooding. Therefore, the association was responsible for the irrigation line—$900; the crawl space's foundation and interior walls—$1,200; a new hot water heater—$300; damaged clothes and possessions—$2,000; and medical costs.

Though the association's insurance company paid most of the bills, its annual premium increased substantially. The association also ended up paying out-of-pocket expenses of $2,500 and an insurance premium that cost $12,000 more per year.

Analysis—The association could have avoided this problem if it had:

1. **Anticipated conflict and acted to prevent it.** The manager should have investigated Mrs. Smith's problem after receiving her second phone call—at the latest. At this time, the association could have accurately assessed her concern and made repairs for less than $2,000. Instead the situation was allowed to continue until the damage became severe and costly.

2. **Paid attention to the psychological, substantive, and procedural interests involved in the dispute.** (See "Objectively Evaluating a Dispute," page 3.) Mrs. Smith's initial interest was substantive—examination and repair of her crawl space. But over time, her interests became more numerous and complicated. A procedural and psychological interest evolved about how the association handled her complaint and how she felt about it.

3. **Identified the problem earlier.** (See "Negotiating Successfully," page 12.) With board permission, the manager could have explained the problem to Mrs. Smith and negotiated an appropriate action plan.

association managers and volunteer leaders. It offers techniques that entail proactive, people-oriented approaches that strengthen and preserve working relationships.

A NEW PHILOSOPHY OF CONFLICT

Associations that develop a constructive view of conflict are improving their ability to manage problem situations. By adopting the following presuppositions about conflict, associations will approach difficult situations with greater wisdom, clarity, and comfort:

- Conflict is neither good nor bad. It is merely feedback from the association's environment regarding a problem situation.
- Conflict can clarify—and even improve—relationships.
- Conflict strengthens associations through mutual dialogue with other parties and generates acceptable resolutions.

After creating a resourceful frame of mind regarding conflict, associations can begin managing it. Because disputes tend to become emotional, complex, and overwhelming, they need to be broken into smaller parts. Then the negotiator or mediator can begin creating a resolution strategy.

Objectively Evaluating a Dispute

The first step in any negotiation or mediation process is for the negotiator or mediator to objectively evaluate the dispute to determine possible causes. Usually a combination of problems leads to the dispute. Common causes of conflict include:

- Lack of information
- Competition of interests, either real or perceived
- Different value systems
- Personality or relationship conflicts
- Poor communication
- Structural situations (e.g., policy, physical environment, hierarchy of authority, etc.)

The evaluation of possible causes of conflict involves trial-and-error experimentation in which one observes the dynamics of a dispute and tests probable solutions. Objectively evaluating a dispute is not always easy. Conflict can be uncomfortable and those involved may get caught up in an emotional cycle. Consequently, these individuals may react to, rather than handle, the problem.

To take control of a problem situation, the association should look at it from the standpoint of an objective observer. A neutral perspective will help the association identify probable causes of the conflict.

FIGURE 2. A COMPARISON OF NEGOTIATION, MEDIATION, ARBITRATION, AND TRIAL

Negotiation

- Negotiation is an informal, cooperative, problem-solving approach that allows the people involved to focus objectively on each interest.
- Negotiation is directed by the people involved. Consequently, it can be initiated at any time and has no fiscal cost.
- Negotiation strengthens and preserves relationships.
- Negotiated agreements are created solely by the people involved.
- Negotiated agreements are not legally binding unless they are formalized into a legal contract or court order.

Mediation

- Mediation is an informal, cooperative, problem-solving approach.
- Mediation is facilitated negotiation. It requires a neutral party to resolve disputes.
- Attorneys may be present in mediation.
- Mediation strengthens and preserves relationships.
- Mediated settlement agreements are created solely by the parties involved.
- Mediated settlement agreements are not legally binding unless formalized into a legal contract or court order.

Arbitration

- Arbitration is a formal, rule-oriented process that can cost time and money.
- Arbitration involves a neutral party who listens to each case in a fact-finding hearing. The arbitrator makes a final award in favor of one party.
- The arbitrator and attorneys play key roles in this process.
- The award is legally binding.
- Under limited circumstances, the arbitration award can be appealed to the courts.
- Arbitration is highly adversarial and may not preserve relationships.

Trial

- A trial is a public, formal, rule-oriented process that may require a substantial amount of time and money.
- As in arbitration, a judge or jury makes a "win-lose" decision that may be appealed in some circumstances.
- Litigation may destroy relationships.

The following questions can help negotiators and mediators to assess a dispute:

1. **How is the relationship contributing to the conflict?**

Is information an issue? Does one party have less information than the other? How are the involved parties interpreting the information? How can the association introduce information that will help resolve the problem? For example, disputes regarding back payment of association dues are commonly caused by members who have different data.

Are structural problems, such as policies, operating procedures, rules, physical set up, or roles, contributing to the conflict? How can these elements be changed to better serve the association? For example, the association may be enforcing outdated rules. As a result, conflict may occur.

Is the association communicating effectively with the members? How can the association improve communication? For example, someone leaves a board meeting and inaccurately reports a board decision. Consequently, members gossip about the decision. The gossip creates conflict and makes it difficult for the board to implement the decision. If the board had proactively disseminated information about its decision to the members, it would have prevented communication-related conflict.

2. **How can the association address strong feelings?**

Strong emotions commonly prevent associations from working through conflict. If emotions are not managed early in the negotiation or mediation process, they may create an impasse that cannot be removed until they are addressed. See "Managing Strong Emotions," page 8.

3. **How can the association and the opposing party work together?**

Look for areas of agreement and periodically emphasize them in ways that help the parties work as a team.

4. **What are the parties' underlying interests?**

What is important to each party? Conflict generally occurs because of one or more of the following dynamics:

What was said or done (substantive).

The way something was done (procedural).

The way someone felt as a result (psychological).

Many times the underlying source of conflict does not involve the actual content of a situation (the substantive issue), but rather, how the situation was handled and how a party felt about it. When an association examines these issues, it is aiding the conflict-resolution process.

5. **What creative solutions would meet both parties' needs? What solutions would**

be ideal, minimally successful, or unacceptable for each party?

6. Would each party consider the needs of the other?

7. How can the association incorporate the needs of each party into the solution?

The way a problem is articulated influences the way it is resolved. For example, if the board asks residents how it could efficiently conduct business at the monthly meeting, while allowing them to voice their concerns, the problem becomes a joint concern.

Each of these questions can be answered in a variety of ways. If the association initiates negotiation, it can speculate on the answers before approaching the other party. The questions also can serve as a basis for discussion during the negotiation.

In mediation, the mediator should structure the premediation conference around this evaluation. (See Chapter 3, page 15.) By answering these questions through discussion with each party, the mediator can begin formulating a resolution strategy. Many of these questions also can be considered during the mediation.

Establishing Rapport

When individuals establish rapport with each other, they can communicate with greater comfort, ease, and acceptance. Needless to say, people can influence those with whom they have rapport.

Without rapport, communication and cooperation are an up-hill battle. Therefore, it is important to develop satisfactory rapport before moving forward with any conflict resolution strategy.

Rapport can occur naturally, but it can also be intentionally built. Natural rapport can be observed between friends. It is demonstrated through similar actions related to facial expressions, body language, and speech. An individual can establish rapport with another in a number of ways, including:

- Mirroring body movements. An individual may establish rapport by subtly matching—not mimicking—a person's body movements.
- Mirroring voice. An individual may lead an angry, loud person to a calmer state by softening his or her voice.
- Noting breathing patterns. An individual may establish rapport by matching a person's breathing patterns.

For more information on establishing rapport, purchase a book from a local bookstore, such as *Instant Rapport* by Michael Brooks. It will be a worthwhile investment.

FIGURE 3. HOW TO IMPLEMENT AN ALTERNATIVE DISPUTE RESOLUTION PROGRAM

1. Develop a policy of proactive conflict management.
Provide board members with training in negotiation and mediation. Publicize the association's commitment to preserve relationships through constructive conflict resolution. Modify legal documents to mandate ADR prior to legal proceedings. (See Appendices 1 and 2, page 36.)

2. Prepare for conflict.
Most associations will face some form of conflict. Prepare for it by maintaining strong communication with members. Studies show that most conflict results from poor communication.

Some boards hesitate to communicate because they believe that informed residents can be "dangerous" to the community. But lack of communication causes members to suspect the worst. And if members believe the board made an unauthorized decision, they will resist it—even if they agree with the decision.

Contact members at the first hint of a communications breakdown. The earlier the association intervenes, the fewer financial, social, and emotional costs it will incur.

3. Involve those closest to the problem.
Obtain satisfactory and timely solutions by involving individuals closest to the problem.

4. Seek reasonable solutions.
Association boards and managers must blend the elements of business, government, and community. Their resolution strategies must be technically and legally sound, workable, and socially responsible. If the board or manager overemphasizes legal issues, he or she can turn minor problems into major battles. Do not overlook the human factor when making a decision.

5. Supplement—don't replace—the legal system.
Litigation often is a legitimate approach to resolving a dispute, but often litigants misuse the legal system by expecting it to work out their problems for them. The truth is that the legal system can only address specific issues from a legal standpoint. This is why litigation often is an ineffective means of resolving disputes over the long term.

A dispute comprises many dimensions. What is often identified as the cause of the conflict—and the issue that ends up in court—really is a smoke screen for the true dispute. Consequently, after the issue is decided in court, the root cause of the conflict remains.

ADR does not replace the legal system. It's intended to make the legal system work more efficiently because it will separate and examine all of the substantive, procedural, and psychological issues that comprise a dispute, leaving a clearer picture of what should legitimately be left for the courts (should ADR fail at resolution) and what issues would be impossible or inappropriate for the courts to resolve.

Establishing Communication Guidelines

Before beginning a negotiation or mediation process, the association should establish standards that will guide discussion and encourage constructive interaction. Examples of such guidelines include:

- Refrain from interrupting.
- Speak respectfully.
- Listen attentively.
- Refrain from accusations or insults.

Managing Strong Emotions

Often, conflict stirs up strong emotions among those involved in the dispute. Although board members and managers may feel uncomfortable dealing with hostile feelings, they must address them before proceeding with a resolution. They can start by neutralizing the effects of strong emotion. To do this, they should create opportunities for involved parties to express their emotions.

Venting emotions accomplishes two important functions:

- It allows for a physiological and psychological release so that the angry parties can proceed to substantive issues.
- It allows the involved parties to tell each other how strongly they feel about the situation.

Just knowing that venting anger is a natural and necessary occurrence in most disputes helps associations to manage it with ease.

Listening Actively

Negotiators and mediators use active listening to understand a verbal message, identify the emotion, and restate the content to the speaker using similar words.

For example, an angry individual might say, "Every time I submit a repair request, I wait several weeks for you to respond!"

To this, the listener would say, "Sounds like you're really frustrated that it takes so long to get a reply to your maintenance request?"

The person would then verify whether the listener is on the right track and respond.

Active listening can be the single most effective communication technique used in mediation and negotiation because it:

- Demonstrates that the speakers have been correctly heard and understood.
- Legitimizes the expression of strong feelings.
- Builds understanding and feelings of empathy between people.

Reframing Hostile Language

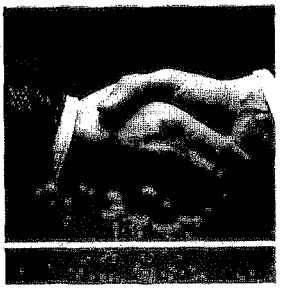
Often, when an individual expresses negative feelings, the message is not conveyed with diplomacy or forethought. These messages tend to escalate the listener's emotion. Associations can diffuse explosive situations by reframing the message—keeping the same message, but changing the words. For example, one person might say, "That was really a stupid thing to do. There are a million ways you could have handled it better."

The mediator or negotiator could reply, "You believe that (I or Mr. Smith) could have handled the situation in a more effective manner? Would you be willing to offer (me) any ideas about how things could be done more effectively in the future?" By changing the concept of the message it's possible to positively influence a person's attitude.

A constructive attitude, along with some familiarity with basic communication skills, is invaluable to anyone engaged in the ADR or consensus-building processes.

CHAPTER TWO:

NEGOTIATING CONFLICT



NEGOTIATION IS THE COOPERATION OF TWO OR MORE DISPUTING parties to achieve mutually acceptable goals. It requires participants to identify controversial issues, educate each other about their needs and interests, generate possible settlement options, and bargain over the terms of agreement. Successful negotiations generally result in a tangible exchange, such as money, or an intangible exchange, such as an apology. There are two major negotiation styles: positional bargaining and interest-based bargaining.

POSITIONAL BARGAINING

Negotiators use positional bargaining when they:

- Have limited resources.
- Believe the other party is the opponent or enemy.
- Believe that a gain for the other party means loss for the association.
- Believe that a compromise is a sign of weakness and loss of control.
- Believe that the association's solution is the only correct solution.
- Are on the offensive at all times.
- Are not interested in maintaining future relationships.

An individual who uses the positional-bargaining strategy will not stray from his or her position. For example, such an individual might say "That's impossible, it just can't be done that way" or "This is the only solution."

Positional bargaining involves little creativity, flexibility, or sensitivity. It creates winners and losers and may irreparably damage a relationship.

INTEREST BASED BARGAINING

Negotiators who use interest based bargaining attempt to satisfy as many needs and interests as possible by working cooperatively with other involved parties. Interest based

bargaining is used when the negotiators value future relationships. Interest based bargainers believe that:

- There are enough solutions to satisfy everyone.
- People and problems are separate (e.g., respect people, solve the problem).
- Parties in dispute are a problem-solving team.
- Future relationships are important and must be preserved.

Interest based bargainers believe that problems are resolved because each party is satisfied with the outcome. The success of an association depends on member cooperation. Therefore, the association should use interest based bargaining.

NEGOTIATING SUCCESSFULLY

Effective negotiation takes preparation. Ensure successful negotiation by reviewing the questions outlined in Chapter 1, pages 5–6 and taking the following steps:

1. **Use a constructive approach.** Contact the other parties by phone, personal request, or writing in a non-confrontational manner.

2. **Establish rapport.** When approaching others, use opening statements that:

- Establish a partnership between people that is based on cooperation. This will dispel the fear that someone will get scolded or blamed. To accomplish this, begin your statements with "I" messages rather than beginning with "you," which immediately makes people defensive. For example, an association board that is dealing with owners who have not paid their dues could say, "I noticed that we don't have a record of receiving your dues for the past two months." This opens the door for further discussion by suggesting that the association may have made a record-keeping error. Compare this to a communication that begins with "you." "You haven't paid your dues" leaves little room for discussion, and effectively closes the door on cooperative communications.

  In a situation where a resident is disrupting board meetings, the president could say, "I value your opinion, and I'd like to hear more after the meeting when I can give you my full attention." This is far more effective than, "You're out of order, and you'll have to wait until after the meeting."
- Tell the other person that the association values its relationship with them.
- Tell the other person that the association will generate solutions through a shared effort and is open to suggestions.

3. **Clarify perceptions.** Individuals see themselves and others through their perceptions and base their behavior on those perceptions—even if they're incorrect. Ask each person how he or she perceives the experience so the association can clarify misperceptions.

The association can help clarify perceptions by asking each participant to tell his or her story. At this time, everyone else should listen. Let each person finish talking before taking questions. Listen for causes of the conflict within the story. Use the active listening and reframing techniques covered in Chapter 1.

People often use nonspecific nouns and verbs when they describe a difficult situation. For example, an individual may say, "You people don't know what you are doing" or "I had real problems with that letter."

The association can get at the heart of the matter by clearing up vague messages. Clarify words such as "people" by asking "Which people?" or comments such as "I had real problems" with "Specifically, what types of problems are you having?"

4. Identify interests and desired outcomes. After the participants describe how they see the situation, identify their needs and interests. Often, an individual will identify his or her position on the issue. And many times, that position is inflexible.

For example, a board president and a zealous new board member may be negotiating conflict caused by the new member's harsh criticism of the association manager. In this situation, the board president should ask "What is it that you want?" The new board member may respond by saying "I'd like the association to hire a new manager." This statement is a position.

Conflict resolution challenges the association to focus opposing parties on their underlying interests—not their positions. In the above situation, the president could accomplish this goal by asking "What would hiring someone new accomplish?" The board member's responses will eventually reveal his underlying interests.

In this situation, the board member might reply, "Because we might get a manager who would return our phone calls!" By asking questions, the president has found that the new board member really wants a manager who will return phone calls—not necessarily a new manager.

Individuals involved in conflict are concerned with something that was done, the way it was done, or the way they felt about it. In this situation, the new board member has a psychological and procedural interest in the issue—not a substantive one.

The board president should consider the manager's point of view, as well. The manager may not return each call because they are frequent and are made at inconvenient times. The manager might need:

- Uninterrupted time to do his or her work (substantive).
- To feel that the association board respects his or her work load (psychological).

5. Agree to move forward. After the board president identifies the underlying interests of the conflict, he or she should attempt to move forward using active listening and reframing skills.

For example, the board president could say, "I know it's important for you to feel the manager responds to your concerns. If she demonstrates that she can respond in ways that still allow her to accomplish her work, do you think she can continue to be an effective manager for this association?" The answer probably will be "yes." If it is, the association can move forward.

6. Generate and evaluate options. After the board president frames the issues in a way that incorporates the parties' interests and agrees to continue negotiating, he or she should generate a number of options that meets those interests.

7. Select the option that best satisfies mutual interests.

8. Develop feedback criteria. Encourage feedback by asking each person what will be different if the association implements the options, how will the association know they are working, and what should the association do if they fail?

9. Write the agreement and have each person sign it. Include a detailed description of agreed upon actions and a review of how the association will evaluate the situation.

WHO SHOULD USE INTEREST BASED BARGAINING?

Because negotiation is such a basic, versatile conflict resolution technique, it's in everyone's best interest to learn the basic skills and use them regularly. In fact, if every association owner, board member, and manager took on the perpetual role of "negotiator" there would be much less need for mediators or attorneys. Addressing problems between people when they're first detected through constructive dialogue, in a sense, is a form of risk management that can spare the association and its members a great deal of emotional, financial, and social expense.

FIGURE 4. HOW TO NEGOTIATE SUCCESSFULLY

- Be willing to resolve matters. When people need something from each other, they are usually more willing to resolve matters through negotiation.
- Exert influence. Influence can motivate people to cooperate in the resolution process. For example, if the board can inflict consequences for inaction, residents may be more willing to negotiate.
- Attempt to settle the dispute. People are more willing to negotiate if failure means taking the case to court or suffering other significant losses.
- Compromise with the other parties. People must be willing to compromise for negotiation to work.

CHAPTER THREE:

MEDIATING CONFLICT

MEDIATION IS AN INFORMAL, NONADVERSARIAL PROCESS that involves the use of a neutral party—a mediator—to resolve conflict between two or more people. The mediator aims to resolve the dispute to the mutual satisfaction of each person. Generally, mediation is voluntary, although association declarations may require it in some circumstances.

Associations often choose to mediate disputes because of mediation's history of success. Mediators have an eight-to-one chance of reaching a mutually satisfactory agreement. This success is often less costly and faster than litigation. And the free-flowing discussion necessary to resolve highly personal issues may not occur in litigation.

Mediation also can keep minor conflicts, which may have devastating consequences, from reaching the courtroom. It's not unheard of for community associations and residents to run up legal bills in the thousands of dollars to resolve in court disputes that originally involved only a few hundred dollars. Adversaries in court often continue to live in the same community after the trial. A negative trial experience may create a lasting environment of discomfort and hostility.

Even unsuccessful mediation can be beneficial. For instance, it can:

- Reduce the scope of subsequent litigation by clarifying the real issues.
- Soften the ground for a post-mediation/pre-trial settlement.
- Expedite the discovery process.
- Identify settlement options that usually would not be pursued in arbitration or litigation.
- Allow each party to gain significant information about the case and the other person's position.

WHEN TO MEDIATE

Mediation is flexible and may be used at any stage of conflict. Mediation conducted before arbitration or litigation may save time, money, and relationships. Mediation initiated after an action has been filed can motivate people to reach a settlement outside of court. Generally, as long as people have enough information to make an informed decision, it's never too early or too late to consider mediation. The participants also can reschedule the mediation conference if they need more information.

WHAT IS APPROPRIATE FOR MEDIATION?

Mediation has been used for years as a primary means for resolving complex disputes, such as construction defect litigation. However, due to the relatively minor cost of mediation, it can be used to resolve virtually any type of community association dispute. Following are a few areas that are typically suitable for mediation.

1. Covenants and rules enforcement and assessment collection. Association covenants cannot be changed or mediated. However, the way covenants are enforced can be mediated. In these instances, mediation can address the manner in which corrective action was taken and establish communication between the association and the opposing party.

Mediation allows each person to share his or her perspective of the violation issue. This exchange allows for the violator to "save face" by explaining why the violation occurred. It also allows the association to explain the importance of complying with the covenants. In many cases, this dialogue will lead to cooperation.

Mediation teaches people about litigation costs. Violators who understand the costs involved in litigation are more willing to compromise.

2. Dispute between neighbors. Community associations consist of many individuals—with different values and beliefs—living in close proximity. This arrangement is sometimes exacerbated by the presence of very thin, uninsulated walls. In this environment, neighborhood disputes are just waiting to happen—barking dogs, stereo noise, loud or disrespectful children. Mediation is an excellent way to resolve these disputes because it facilitates personal communication. When people communicate on a personal level, they can negotiate guidelines for acceptable behavior.

3. Dispute between the board and the manager. Board members and managers often have conflicting ideas about how an association should be managed. But both groups deserve to work in a peaceful environment. Mediation can be extremely successful in facilitating the communication that leads to collaboration.

4. Contract disputes. Mediation is often useful in resolving disputes between associations and vendors.

5. Person in need of an apology or explanation. Many association disputes develop because members believe they did not receive adequate information regarding a board action or that they have been treated unfairly. In these situations, the association may be able to resolve the dispute simply by apologizing to the member or explaining matters. Usually, a mediator can facilitate this interchange.

6. Unreasonable or difficult opposing counsel. Many times an opposing party will develop unreasonable expectations regarding the outcome of litigation. This can occur through discussion with aggressive counsel or with peers who lack familiarity with the legal issues involved. Mediators help disputing parties objectively assess their complaint.

7. Nonparticipating parties. An opposing party may allow an attorney to make all case-related decisions. Such an individual may be quiet, angry, or cautious in nature. Regardless of the reason, mediation promotes direct, personal dialogue between that person and the opposing party. This exchange can uncover issues and explanations—information that could allow the parties to settle—that litigation would not identify.

WHAT DOES THE MEDIATOR DO?

The mediation process relies on a third person who has no personal stake in the outcome of the dispute. The mediator ensures constructive interchange between people. This individual will not allow a meeting to degenerate into adversarial posturing or name-calling.

Mediation strategies vary depending on the nature and cause of the dispute. The mediator's general activities, however, include:

- **Conciliation.** Conciliation is used to improve peoples' attitudes toward each other. It facilitates constructive discussion.
- **Facilitating effective two-way communication.** This involves clarifying perceptions, stating interests and needs related to the situation, identifying common ground and areas of disagreement, gathering and assessing options, and helping the parties select a resolution strategy.
- **Developing an agreement, usually in the form of a memorandum of understanding, that reflects the specific resolution strategy identified in mediation.** The mediator has no authority to mandate settlement and neither party has the power to impose settlement upon the other. The resulting agreement evolves through negotiation and mutual consent.

A professional third party does not always conduct mediation. In cases of minor dispute, a competent, articulate community member may serve as mediator. This individual should, however, be familiar with mediation and, if possible, coached on the mediation process in advance. In disputes that are complicated or intense, as most are, it isn't advisable to use someone inexperienced in mediation to facilitate the process.

In some instances, however, an association should hire an experienced mediator. These situations include:

- **Disputes that have intensified over time.** These situations leave the disputants highly emotional. Often they are unwilling to initiate negotiation.
- **Situations that were initially addressed through the negotiation process, but have experienced a deadlock due to inflexible positions or intense emotions.** When people have inflexible positions or intense emotions, the dispute may become deadlocked in the negotiation process.
- **Complex disputes.** In disputes with complex issues and that involve a lot of people, the individuals involved may find it difficult to organize a resolution.
- **Disputes with numerous parties.** Conversation becomes cumbersome in disputes with several parties.

CAN MEDIATION BE CONDUCTED WITHOUT ATTORNEYS?

Whether an attorney is involved in the dispute resolution process is entirely up to the people involved. Sometimes an association may consult with an attorney who recommends mediation, but isn't present during the mediation. In this situation, the attorney may wish to review the agreement provisions before they are officially signed. Other times—when the parties believe the dispute is significant, complicated, or the litigation process already has started—the attorney should be involved and present.

Two attorneys, one representing each side and conducting themselves in a similar manner, can create a balance of power between the participants. However, a power imbalance is created if one side has an attorney present at the mediation and the other does not. When there is an imbalance of power, one party has an advantage over the other. The less prominent the role of the attorney (e.g., in the role of resource rather than advocate), the more acceptable his or her presence will be to the opposing party. Any objections to the presence of an attorney should be addressed before the mediation begins. As a rule, attorneys are extremely valuable to the mediation process. In fact, in most community association disputes, it is an attorney who recommends mediation. (See Appendix 3, page 38.)

STEPS IN THE MEDIATION PROCESS

Mediation involves several steps.

1. **Agree to mediate.** Before mediation can take place, the disputing parties must agree to participate. The association should confirm in writing the parties' willingness to mediate. (See Appendix 4, page 40.)

2. **Select a mediator.** First, decide whether to use a paid or a volunteer mediator. Volunteer mediators may be found at local law schools and colleges. Minor disputes may even be mediated by someone from the association. Paid mediators may be found in the local Yellow Pages or through a professional mediation organization.

When selecting a mediator, consider his or her experience (e.g., years of practice, number of disputes mediated, familiarity with community association issues). Request a resume, fee schedule, and references. Also interview the mediator personally to consider whether his or her style fits the association. Some are people-oriented. Others are process-oriented. They may allow the parties to move at their own pace, intervening only to keep negotiations flowing, or they may take an aggressive stance.

3. **Prepare each party for the mediation process.** (See "How Attorneys and Managers Can Prepare People for Mediation," page 20.)

4. **Arrange for a pre-mediation conference.** The mediator will schedule meetings with each person before initiating any discussion. This allows the mediator to assess the dispute, examine possible underlying causes, and formulate viable resolution strategies.

This meeting allows the mediator to assess the participant's balance of power and their ability to negotiate for themselves. Sometimes, the parties are so emotionally charged that they cannot interact effectively. The mediator can help generate their resourcefulness.

If the dispute involves a covenant violation or another issue requiring legal action (should the mediation fail), the mediator should meet with the board to determine what action it plans to take, what settlement options are acceptable, and what options would be inappropriate according to legal documents and prescribed policy.

5. **Establish a time and place for mediation.** Conduct the mediation in a comfortable, neutral, nonthreatening location with side rooms for a caucus. Plan the mediation soon after everyone has agreed to mediate. People cooperate better if the mediation proceeds quickly. Once the location and date are set, ask the mediator to send out a written confirmation to all participants.

6. **Conduct the mediation conference.** Follow these procedures and processes at the mediation conference:

FIGURE 6. HOW ATTORNEYS AND MANAGERS CAN PREPARE PARTIES FOR MEDIATION

Though attorneys generally would not let their clients sit for a deposition without adequate preparation, they may fail to review the mediation process for people in association disputes.

An association attorney or manager can effectively prepare clients for mediation by posing and answering the following questions in a review session.

1. **Who is the mediator and what is his or her background?**

2. **Where and when will the mediation be held? Who will be attending?**

3. **About how long will the mediation last?**

4. **What is the mediator's role?**

- Provide a neutral opinion.
- Ensure a safe and constructive environment.
- Empower the parties to negotiate for themselves.

5. **What is the lawyer's role?**

- Present an opening statement that is designed to generate a satisfactory resolution for the client.
- Assist the client and the mediator with the negotiation.
- Listen carefully to what the parties say during mediation.
- Talk openly with the mediator in caucus.
- Decide what is disclosed in mediation.
- Understand that the dispute belongs to the client.
- Permit the client to make the decision, subject to legal advice and counsel.
- Empathize with the other side to encourage a positive resolution.

6. **What is the client's role?**

- Listen to and understand the other person's point of view.
- Constructively express his or her point of view and interests.
- Reevaluate his or her case based on what is said.
- Respect the mediator and the opposing party.

FIGURE 6. HOW ATTORNEYS AND MANAGERS CAN PREPARE PARTIES FOR MEDIATION (CONTINUED)

- Negotiate an acceptable resolution based on his or her interests, the interests of the other person, and what is fair and reasonable.

7. What does the mediation process include?

- An introduction by the mediator.
- An introduction by the lawyers.
- An explanation of a caucus.
- An expression of each person's point of view.
- Identification of the issues by the mediator in order of party preference for discussion.
- The identification of particular interests.
- The identification and prioritization of options for each issue through brainstorming.
- An agreement that is made by the parties, written by the mediator, and signed by the parties.

8. What is important to the participant? In other words, what are their psychological, procedural, and substantive interests; what is the worst-case scenario; and what are they willing to accept to avoid litigation?

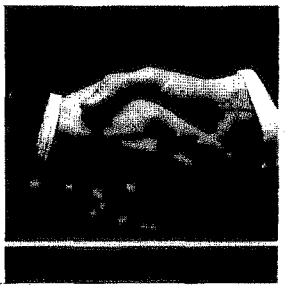
- The mediator will establish a positive, productive atmosphere when introducing the mediation purpose and process. The mediator will offer guidelines that will facilitate constructive discussion.
- The mediator will explain the mediation process and assure participants of its confidentiality. Then the mediator will ask the disputants to participate in good faith and review their roles and responsibilities.
- Each person will describe the situation as he or she sees it and specify what outcome is preferred.
- The mediator, participants, and attorneys present will answer questions and clarify information.
- The mediator will help the participants identify the interests behind their positions so they are not stuck on one solution. A flexible process increases the chances of finding a solution that will satisfy everyone.

- The mediator will help the participants evaluate options addressing the issue.
- The participants will evaluate options and select an alternative that best meets their needs.
- The participants will reach a final agreement and formalize it into a written document. The document usually will be in the form of a memorandum-of-understanding. (See Appendices 5 and 6, pages 42–45.) The final settlement must be durable and practical. Because the mediation process is not limited to judicial remedies, the parties may find creative solutions. All parties will abide by the final agreement, which is a voluntary commitment. The board may need to ratify the agreement after the mediation conference.

If the participants reach a deadlock, the mediator should hold a caucus. A caucus is a private meeting between the parties where they address any obstacles. All of these steps occur in an informal conference. Though the parties do not need to meet rules of law or evidence, attorneys may review the results.

CHAPTER FOUR:

ARBITRATING CONFLICT



SOME DISPUTES ARE SO COMPLEX THAT RESOLUTION THROUGH negotiation or mediation would not be appropriate. Arbitration is a viable alternative in these cases.

In arbitration, two or more parties agree to submit their dispute to an impartial party, the arbitrator. The arbitrator conducts a hearing, reviews testimony and evidence, and renders a decision. The decision is final and legally binding.

WHAT IS ARBITRATION?

Though arbitrated decisions are legal and final, they should not be confused with litigated decisions. Arbitration differs from litigation in several important ways. It has:

1. **Informal procedures.** Arbitration procedures are relatively simple. Arbitrators do not apply strict rules of evidence, motion practice, or formal discovery. In addition, the arbitrator is not required to provide transcripts of the arbitration process. Rules fluctuate with each situation.

2. **Reasonable costs.** Arbitration costs less than litigation due to the absence of formal discovery, extensive motion practice, or interlocutory and post-award appeals.

3. **Arbitrators are selected by the participants.** The parties in dispute may assess the arbitrator's qualifications. This enables them to select an individual who understands their particular situation.

4. **Private hearings.** All hearings are closed and do not become public record.

5. **Efficient.** Ninety percent of all arbitrations conclude in two days or less.

6. **Final awards are enforceable in court.** Arbitrators are not generally required to state the reasons for their decisions. However, the parties may require the arbitrator to make findings of fact and state conclusions of law.

Court intervention is governed by state and federal arbitration laws. Judicial review is limited to defects in the arbitration process, such as:

- The arbitrator exceeded his or her authority.
- The arbitrator failed to hear evidence or refused to grant a reasonable postponement of the hearing.
- The award was granted due to corruption or fraud.
- The arbitrator was biased.

Few arbitration awards are challenged in court or found inappropriate.

THE ROLE OF THE ARBITRATOR

The arbitrator's office is quasi-judicial in nature. U.S. law gives arbitrators immunity from civil liability. Opposing parties may not depose arbitrators to clarify or impeach their award unless they can establish that misconduct has occurred. In 1855 the U.S. Supreme Court said:

> *If an award is within the submission and contains the honest decision* of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be in substitute of the judgment of the chancellor in place of the judges chosen by the parties and would make an award the commencement, not the end, of litigation.

An arbitrator's authority is derived from:

- The arbitration agreement.
- Applicable arbitration rules, such as American Arbitration Association (AAA) procedural rules.
- Applicable state and federal arbitration laws.

Arbitration does not necessarily imply a legal approach to problem solving or a reliance on strict rules of evidence or civil procedure. An individual does not need to be an attorney to act as an arbitrator because the guiding principle in arbitration is to hear all pertinent evidence. However, an arbitrator should have substantive knowledge of the issues.

It is essential to select an impartial, ethical arbitrator because this individual acts as a judge, jury, and appellate court for the disputants. Before commencing with the proceedings, the arbitrator should fully disclose any information that would lead to partiality or the appearance or partiality.

ADMINISTERING THE ARBITRATION PROCESS

The arbitration process can be administered by a formal neutral-party agency, such as the American Arbitration Association. It also can be self-administered, though this method is not preferred.

FIGURE 7. CHECKLIST FOR DRAFTING ADR CLAUSES

Consider the following when drafting an ADR clause:

- Which ADR methods should be attempted and in what sequence (e.g., negotiation prior to mediation or mediation prior to arbitration)?
- What issues will be subject to ADR?
- What are the requirements for initiating the ADR process, including notice requirements?
- What time frames should apply?
- What methods will be used for selecting mediators and arbitrators?
- What mediation or arbitration hearing sites will be considered?
- Who may and who shall attend hearings?
- Will the process be confidential?
- How much will be allocated for costs?
- What prehearing exchanges of information and discovery procedures will be allowed?
- Will the parties be permitted to bring prehearing motions?
- What briefs or other position papers will be used?
- What prehearing or administrative conferences will be allowed?
- What relief will the arbitrators be authorized to grant?
- How will evidence be presented at the hearings; will it include the use of witnesses and experts? Will the rules of evidence apply?
- Will the arbitration award be in writing, and must it be supported by the arbitrator's findings?
- Will the award or settlement be presented to a court for confirmation?
- Will the decision be subject to appeal and, if so, on what grounds?

The benefits of using an agency, such as the AAA, include: a comprehensive set of rules by which the arbitration process is conducted; required standards for AAA arbitrators, including professional experience and ethical considerations; and a case administrator assigned to each dispute who is responsible for coordinating the arbitration process.

Generally, arbitration that is conducted according to AAA rules and procedures is administered in the following manner:

Step 1—The dispute may be filed with an AAA regional office in three ways: as a demand, a submission (e.g., submitting an existing dispute to arbitration), or a court referral. The filing documents are stamped to show what date the case was filed with the AAA.

Step 2—The filing documents are reviewed by the AAA case supervisor for the wording of the arbitration clause or agreement, the appropriate filing fee, completeness of the documents, and the hearing locale requested.

Step 3—The case is entered in the AAA's case management system where a case number is assigned and a file created.

Step 4—The file is assigned to a case administrator who analyzes the dispute, examines the documents, and prepares a list of appropriate arbitrators and a calendar of hearing dates. The file is forwarded to the parties in dispute.

Step 5—After 10 days, the parties select the arbitrators from the list. The parties also may file a statement raising the question of whether the claim is arbitrary, they may object to the requested hearing locale, make counterclaims, and/or request a conference with the case administrator.

Step 6—The selected arbitrators are interviewed and screened for potential conflicts of interest. If any disclosures are made, they are immediately communicated to the parties. Any arbitrator making a disclosure is either removed from the case or affirmed by the AAA because the nature of the disclosure does not warrant removal.

Step 7—Large, complex cases are subject to a preliminary hearing.

Step 8—An evidentiary hearing is conducted.

Step 9—The evidentiary hearing is closed and the award is due within 30 days, or 14 days in expedited cases.

Step 10—The award is transmitted to the parties.

To find out more about AAA procedures, rules, training opportunities, and membership requirements, contact a regional AAA office, or visit online at www.adr.org.

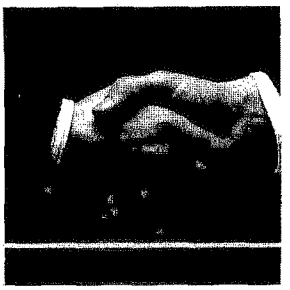
INCLUDING ADR PROVISIONS IN LEGAL DOCUMENTS

If an association incorporates an ADR clause into its declaration, it is requiring disputants to use a process that may be cheaper, less time-consuming, and less adversarial than litigation. ADR clauses can require either negotiation, mediation, arbitration, or all three. Such a clause can help overcome one of the greatest obstacles to successful dispute resolution—getting both parties to the table.

Drafting an arbitration clause requires numerous considerations. It's important to note whether the association will specify the arbitration procedures that apply prior to the dispute or whether the association will allow the disputants to determine them on a case-by-case basis. Clauses that specify arbitration procedures give the association more control over the arbitration process. ADR clauses may include provisions that address the selection of arbitrators, whether discovery will be permitted, rules for the admission of evidence, whether the arbitration award should be reasoned, and grounds for appealing arbitration awards. Such provisions are important because these issues are not included in the AAA Commercial Arbitration Rules or many state statutes pertaining to arbitration.

CHAPTER FIVE:

COLLABORATIVE DECISION MAKING



COMMUNITY ASSOCIATION BOARD MEMBERS AND MANAGERS are responsible for carrying out business that protects literally millions of dollars worth of real estate. Daily problems arise that range in magnitude and importance, but all require sound business judgment to resolve. Many times resolution also requires the cooperation or consensus of association residents, who all have different interests, values, and personalities. Their cooperation can mean the difference between solving a problem on paper and actually reconciling it.

Association leaders and managers must strive to meet the needs of the entire community. In so doing, they rarely please everyone. When conflicting opinions arise, the result can incur both social and financial costs.

Many community associations are beginning to identify a formula for successfully generating homeowner support. They are finding that by engaging in a proactive ADR process of strategic communication and collaborative decision making, they can minimize or avoid conflict. Attempts to "thwart the system" by association residents are replaced by acts of support and approval. At the very least, residents will reluctantly support a course of action because they are included in the decision-making process. Cooperation, on any level, means the freedom for management to implement a solution with minimal social and financial costs.

BUILDING AN ADEQUATE SUPPORT BASE

When building a consensus for board actions, the association should not expect every resident to enthusiastically support its actions. Consensus building means that residents support a particular course of action because they believe the action is in the best interests of all owners.

Developing consensus among homeowners does not always come easily. In fact, homeowners may fight a board proposal if they believe it does not address a serious problem or that the decision-making process is not legitimate. The association must consider owner concerns by reviewing their input and needs.

Sometimes, homeowners will reject a board proposal, only to approve a similar one at a later time. This usually is due to damage control efforts (e.g., some type of mediation process) that the board pursues after its proposal is rejected and everyone is angry. The mediation process simply does something the board should have done prior to its decision-making efforts—involve residents in the decision-making process. Once homeowners feel on board they tend to cooperate. Think about the time, money, and feelings that would be spared if consensus-building efforts were employed each time a board had to make an important decision.

The key to preventing conflict and generating support depends on the following areas of accomplishment:

1. **Responsibility.** Homeowners and residents must believe that the board is acting within its power and that its actions are fair.
2. **Responsiveness.** Homeowners and residents must believe that the proposed course of action corresponds to their values and interests as much as possible and that any trade-offs are equitable and fair.
3. **Effectiveness.** Homeowners and residents must believe that the board and management are willing to listen, compromise, and communicate.

THE COMMUNITY-INVOLVEMENT PROCESS

Associations should consider several factors before developing a consensus-building process. These factors are based on the three areas of accomplishment outlined above.

1. Begin the consensus building process by introducing a compelling problem statement. The statement should include how the association and its members are—or will be—adversely affected by the problem, and what will happen if it isn't addressed.
2. Explain the board's duty to address the problem and its commitment to pursue action.
3. Elicit input from the homeowners regarding the board's plan. Eliciting input is not always easy because homeowners typically do not voice what is important to them. Instead, it's easier for them to react to proposals presented by the association as long as those proposals are not in final form, and there is more than one from which to choose. Finalized options mean that their concerns were not considered. Presenting only one proposal limits their choices.

Consequently, if association leaders and managers can place a range of unfinished alternatives before the members—thus offering them choices and an opportunity to enhance the options—they probably will express their values and needs through the selection and refinement process.

The association also may want to consider the "null alternative" or doing nothing. If the board does an adequate job, however, of educating residents about the negative consequences associated with the null alternative, homeowners generally won't select it. If nonetheless, they do choose to do nothing, the problem probably is not as important as the board thinks. The board should consider pursuing the problem at a different time.

4. Allow owners to ask questions, refine and add options, and decide what works for them. This period is critical in addressing residents' psychological and procedural interests. Generally, if owners believe the board considers their concerns, they will support its substantive interests.

5. Take the time to review the proposed course of action with homeowners before implementing it. Many people cannot visualize a proposed course of action. The board can address this issue by spelling out its intentions in a variety of clear and illustrative ways.

For example, if buildings need to be painted, conduct a demonstration where one building or one side of a building is painted with a proposed color.

Remember that despite owners' support for a course of action, they will likely oppose the action if they believe the board did not legitimately initiate it.

PUBLIC-INVOLVEMENT TECHNIQUES

The board can use a myriad of public-involvement techniques to build support for its decisions. A few of these techniques are briefly examined below.

Meetings

Though conflict-management meetings can be helpful, the meeting format is vastly overused. Too many associations will call a meeting at the drop of a hat, but will not execute the meeting in a productive manner.

Before the association calls a meeting, it should consider:

- What is the purpose of the meeting?
- How can the association increase its chances of accomplishing the purpose?
- What is the agenda?
- What discussion guidelines can the association impose to ensure maximum efficiency?

Too many meetings leave participants frustrated and dissatisfied. If the association and opposing parties cannot adjourn a meeting with a sense of accomplishment, the meeting should be seriously evaluated. One good way to evaluate a meeting is to ask the parties to provide feedback at the end of the session. Though it may be negative, feedback is important for board credibility.

One strong advantage of holding a meeting is that participants may interact personally with each other. However, the issues may become polarized if members of different interest groups meet who are far from developing a consensus.

If the meeting is held to gather concerns, board members may not want to attend. It may be more beneficial to hire a professional facilitator or a community leader to conduct the meeting.

Working Meetings

Working meetings are designed for a small group (12 people or fewer) to engage in a problem-solving process. For example, a working meeting may address conflict between the board and the architectural review committee.

Although these meetings have a specific agenda, they allow for free-flowing discussion. The primary goal of a working meeting is to reach consensus by clearly identifying areas of agreement and disagreement. This allows the participants to expand on areas of agreement by addressing problem issues.

A working meeting is essentially a group negotiation process. Its structure can be similar to interest-based negotiation. Parliamentary procedure is not recommended for working meetings because it restricts open, creative discussion.

Forums

A forum is not designed to accomplish a specific task or to negotiate an issue. It airs differences through constructive dialogue. A forum comes in handy when the board must make a quick decision but believes the issues are not well-defined.

To organize a forum, one should:

- Extend an open invitation and publicize it widely.
- State, at the beginning of the forum, that the purpose is to make a quick decision.
- Ask a neutral party to moderate.
- Invite all interests to briefly voice their viewpoints.
- Document concerns exactly as they were expressed.

Provide owners with documentation of the meeting. After the board develops a course of action, it should announce the decision and explain how it considered

homeowner concerns. If the board did not consider owner issues, explain why. Although quick decisions are not recommended for important issues, a forum is the best way to respond to an emergency.

The Open House

An open house is held in an informal setting, such as a clubhouse or other public building, in which the board provides information to homeowners about a problem and possible solutions. The open-house format, which gives homeowners time to review the information, ask questions, react to alternatives, and make further suggestions, is one of the most effective techniques for generating support for a major decision.

Open houses generally last for several days to accommodate diverse schedules. And by attending at their leisure, owners are less likely to have a "gang mentality" that may exist in large groups with polarized interests.

Since an open house allows homeowners to review options, the board and the association manager must effectively display information—through pictures, illustrations, and charts—that depicts the problem and proposed solutions. Provide displays and handouts that are clear and simply understood. Ask owners to specify their reactions and suggestions for solutions on a survey before leaving.

Note: Board members should not defend a particular option.

The Town Meeting

Some say town meetings are the cornerstone of democracy. A meeting such as this is an exciting community event that is quite useful for generating community spirit and support. Similar to the public forum, the town meeting helps the board listen to residents' sentiments and aspirations about the community. Town meetings also provide a forum in which the board and the residents can engage in a productive dialogue.

A town meeting should be a semi-informal event where residents are comfortable interacting with their neighbors. Scheduling it on a Saturday morning with a pancake breakfast and child care can go along way to ensure attendance.

A town meeting is an excellent way to start any strategic planning process because it helps generate resident opinions regarding budget priorities. By gaining consensus on spending before it happens, the board can build support for its actions throughout the year.

The Nominal-Group Workshop

This technique is designed to help residents identify problems and to propose solutions. To succeed, the nominal-group workshop needs as many residents to attend as possible.

The board starts by giving background on the problem and allowing residents to ask questions. Once everyone understands the background information, residents break into small groups of four or five, are given small note cards, and discuss the issues. For example, the groups could respond to the question "What important issues do you believe our association should address over the next five years?" and "What might be one or two effective ways to address each issue?"

After each group addresses two or three important issues, they place them on the note cards, reconvene in the larger group, and share their work with the others. The association can develop a list of issues from this interchange that is prioritized, by vote, according to importance. This list of issues, and the suggestions made for addressing them, is used by the board in its planning and decision making throughout the year.

The public involvement techniques examined in this guide can be extremely helpful to an association in gaining the trust and cooperation of its residents. The resources required to organize and implement one of these events costs much less than backtracking after ineffective decision making has failed.

APPENDICES:

SAMPLE DOCUMENTS

APPENDIX 1. SAMPLE CLAUSE FOR NEGOTIATION PRIOR TO MEDIATION OR ARBITRATION

Contracts and declarations can require the parties to "meet and confer" as the first step in dispute resolution. A negotiation clause such as this encourages the parties to think about dispute resolution early in the process. The following example applies:

Negotiation

If a dispute, claim, question, or disagreement arises out of or relates to this agreement or the breach thereof, the parties hereto shall attempt to settle such dispute, claim, question, or disagreement. To this effect, they shall consult and negotiate, in good faith, with one another to reach an equitable solution that will satisfy all. If they do not reach a solution within a period of _____ days, and if the parties do not mutually agree to use mediation to resolve their differences, then upon notice by either party to the other, disputes, claims, questions, or differences shall be settled by arbitration.

APPENDIX 2. SAMPLE PRE-DISPUTE ARBITRATION CLAUSE

Arbitration

If a dispute arises under this agreement that cannot be resolved by the parties, the parties agree that the dispute will be resolved by binding arbitration. Each party shall select one qualified individual to act as arbitrator and these two shall then select a third qualified individual as the arbitrator. This neutral arbitrator shall serve as chief arbitrator and will be empowered to resolve procedural and evidentiary issues. The parties shall agree on the procedures and time frame applicable to the arbitration, and the arbitrators will decide any procedural issue that the parties cannot resolve. The decision of the majority of the arbitrators will be binding provided that they are involved in all discussions and decisions related to the arbitration process. Each party will be responsible for compensating the arbitrator that it selects. The compensation of the third arbitrator shall be shared equally by the parties.

APPENDIX 3. SAMPLE LETTER TO CLIENT EXPLAINING MEDIATION

PRIVILEGED ATTORNEY-CLIENT COMMUNICATION

Re: Mediation

Dear Mr. Smith:

It is ordered/advisable for the attorneys and clients related to this case to attend mediation. The mediation has been scheduled for _____. The session generally is expected to last two to four hours so please schedule this amount of time so that we can proceed without constraint. If this time is not acceptable to you, please inform me at your earliest convenience.

Mediation is essentially a type of settlement conference that is facilitated by a neutral third party. At this mediation, you and the other party will have the opportunity to personally exchange your perspectives on this situation, voice your concerns regarding it, and inform one another of what, specifically, would have to occur for a successful outcome.

It is important that those directly involved at the mediation have full authority and discretion to settle this case.

Each party will share in the cost of mediation. Therefore, your share will be $_____.

Invoicing will proceed in the following manner:

There are a number of advantages to mediating this case. These include:

1. Mediation puts you in control of your remedy. When a case is tried, a judge or jury decides how the dispute will be resolved. In mediation, the parties attempt to reach a mutually-acceptable agreement.

2. Mediation is flexible. Court proceedings are by strict rules of evidence and procedure. Because mediation is not a court proceeding, these rules do not apply. Consequently, you will be able to discuss your concerns and interests freely without the constraints of such rules.

3. Mediation is confidential. A number of specific protective statutes have been created that make all communication within the mediation process confidential. The mediator can only tell the court whether the case settled or not.

4. Mediation is cost effective. To date, we have incurred $_____ in fees and $_____ in other expenses related to this case. It is estimated that it will cost an additional $_____ to take this case to trial. The cost of mediation is nominal; and, if it is successful, it will save this additional expense.

5. Mediation will allow us to focus on this case. As mentioned above, the mediation is expected to last from two to four hours. During that time, the mediator will conduct private meetings with each party. During these meetings, the mediator will ask the parties questions about the case and will help them analyze their risk and supporting evidence. The mediator also will discuss the strengths and risks of the opponent's case. We will have a chance to work on our case while the mediator is with the other party. If the case does not settle, we can use the information gathered during mediation to prepare for trial.

To prepare for the mediation session, I have enclosed some additional information on mediation, general information on the selected mediator, and a memorandum on the status and issues of your case. Please spend some time focusing on the issues involved in this case so I can have a better idea of how you view them.

We should meet approximately one week before the mediation to evaluate the case and to prepare an appropriate negotiation plan for the mediation. I will phone you to set this appointment within the next few days.

Very Truly Yours,
Jack Smith, Attorney
Enclosures

APPENDIX 4. SAMPLE AGREEMENT TO MEDIATE

This is an agreement between (_____) and (_____) (hereinafter referred to as the "parties") and (_____) (hereinafter referred to as the "mediator"). The parties enter into mediation with the intention of reaching a consensual agreement of their dispute. The provisions of the agreement are as follows:

1. The mediator is a neutral facilitator who will help the parties reach their own settlement.
2. The mediator will not offer legal advice nor will he/she provide legal counsel. Each party is advised to retain their own attorney to be properly counseled about their legal rights, interests, and obligations.
3. It is understood that for mediation to be successful, open and honest communication is essential. Accordingly, all written and oral communications, negotiations, and statements made in the course of mediation will be treated as privileged settlement discussions and are confidential to the fullest extent, provided by law. Therefore:

   a. Except as required by law, the mediator will not reveal anything discussed in the mediation without permission from both parties.

   b. The parties agree that they will not at any time before, during, or after mediation call the mediator or anyone associated with the mediator as a witness in any legal or administrative proceeding concerning the parties.

   c. The parties agree not to subpoena or demand the production of any records, notes, work product, or other materials from the mediator in any legal or administrative proceedings concerning the dispute.

   d. This agreement to mediate and any written agreement made and signed by the parties as a result of mediation, may be used in any relevant proceedings unless the parties make a written agreement not to do so.

4. It is understood that disclosure of all relevant and pertinent information is important to the mediation process. Accordingly, there will be an honest disclosure by each party to the other and to the mediator regarding all relevant information and documents.
5. The parties in mediation should have the expressed authority to negotiate and settle the dispute themselves.
6. While both parties intend to continue with mediation until a settlement agreement is reached, the parties may withdraw from mediation at any time. It is agreed, however, that if a party wishes to withdraw from the mediation process, he or she will discuss this decision with the mediator before doing so.

7. If the mediator determines that it is not possible to resolve the issues through mediation, the process may be terminated once this has been conveyed to the parties.
8. When an agreement is reached, the mediator will prepare a written document outlining the agreed-upon provisions. Each party is advised to review this written document with an attorney before signing the agreement.
9. Unless otherwise arranged, the parties agree to share equally the cost of mediation and other reasonable costs of the mediator that include, but are not limited to, travel, long-distance phone calls, printing, and mailing. The mediator shall be compensated at the rate of $_____ per hour. Reasonable advanced deposits may be required by the mediator toward costs and fees.

The mediator shall have immunity to the same extent as if this were a court ordered mediation.

I have read, understand, and agree to each of the provisions of this agreement.

_____ _____
Client Date

_____ _____
Client Date

_____ _____
Mediator Date

APPENDIX 5. SAMPLE MEDIATION AGREEMENT REGARDING DISPUTE BETWEEN BOARD MEMBERS

Memorandum of Understanding

We, the board of the Sunshine Homeowners Association, acknowledge and accept the responsibility of serving this association in a leadership capacity. Furthermore, we recognize the necessity of working together in a spirit of unity and respect. In light of this awareness, we have entered into mediation and have created an agreement that we believe satisfactorily addresses the concerns that have prevented us from working effectively together in the past.

The terms of this agreement are as follows:

1. Professional Courtesy

   a. We agree to work together in a spirit of trust and cooperation. We will refrain from criticizing one another or the decisions that have been formally made by the board of directors.

   b. We will openly and constructively share our questions and concerns, and, in turn, agree to openly and respectfully listen when those concerns are directed at any one of us.

2. Decision Making

   a. We agree to adequately discuss and evaluate all relevant information and input regarding all decisions and to include every board member in doing so.

   b. We will not make a decision until these discussions have been completed. However, we also agree to consider input within an agreed-upon time frame.

   c. We will accept all decisions made by the board as final and will not criticize those decisions to anyone, particularly residents.

3. Board Meetings

   a. We agree to conduct board meetings in a professional and organized manner. If at all possible, an agenda will be sent out ahead of time for the purpose of review and preparation. Furthermore, we will come to meetings prepared and agree to discuss issues factually, constructively, and succinctly.

   b. We agree to schedule our meetings consistently in intervals that are acceptable and appropriate to the business at hand. Canceling a scheduled meeting must be agreeable to a majority of the board and adequate (within two days) notice given to each director.

APPENDIX 5. SAMPLE MEDIATION AGREEMENT REGARDING DISPUTE BETWEEN BOARD MEMBERS (CONTINUED)

4. Financial Record Keeping

   a. Party A agrees to dismiss the past record-keeping issues that she has experienced over the last year. However, she and the rest of the board acknowledge the importance of accurate and accountable record keeping and agree to take the steps necessary to ensure they are kept.

5. Letters of Intent

   a. The board agrees to write Party A a letter supporting its desire to work cooperatively with her in the future, acknowledging her dedication to the association and stating that there has been no factual evidence of any discrimination on her part.

   b. Party A, in turn, agrees to write Party B a letter supporting her desire to work constructively with him in the future, acknowledging his dedication to the association and expressing regret for any past miscommunication.

We, the board of the Sunshine Homeowners Association agree to the terms of this agreement.

Party A	Date
Party B	Date
Party C	Date
Party D	Date
Sue Jones, Mediator	Date

APPENDIX 6. SAMPLE MEDIATION AGREEMENT REGARDING DISPUTE BETWEEN OWNERS

Memorandum of Understanding

We, Jack Richards and Shirley Johnson, acknowledge and accept the challenges of living within a high-density association. We realize that it is in our best interest to live as neighbors in the most courteous, cooperative, and respectful manner possible. In light of this awareness, we have entered into mediation with Sue Jones and have created an agreement that we believe satisfactorily addresses the concerns that have prevented a comfortable living situation for us.

The terms of this agreement are as follows:

1. Good Neighborliness

   a. We, Jack and Shirley, commit to living in a way that is both comfortable for us, personally, and comfortable for our neighbor(s).

   b. Shirley agrees to maintain a reasonable noise level within her home and to encourage her children, Andy, Melissa, Jeannie, and Johnny to be mindful and respectful of Jack when playing and interacting at home, particularly between the hours of 5:00 p.m. and 7:00 p.m..

   c. Shirley agrees to ensure that her children do not linger noisily on the stairway between their units.

   d. Jack agrees to be mindful and respectful of Shirley's family when his dog barks. He will do everything that he can to minimize the disruption of his dog's barking.

   e. Both Jack and Shirley agree to abide by the association's rules and covenants.

   f. Shirley agrees to keep her children's playthings away from Jack's sliding glass door.

2. Future Contact

   a. Shirley and Jack agree to maintain limited contact with one another (this includes family members, as well) except to notify one another of necessary information. Such notification would include identified violations of this agreement and will always be in writing.

   b. When it is necessary for Shirley and Jack to interact with each other, they will do so with the utmost courteously and respect. Furthermore, Jack and Shirley will refrain from speaking negatively about one another to the other neighbors.

APPENDIX 6. SAMPLE MEDIATION AGREEMENT REGARDING DISPUTE BETWEEN OWNERS (CONTINUED)

3. Possible Future Disputes

   a. Shirley and Jack agree that they will attempt to resolve any future problems as maturely and cooperatively as possible before calling an authority, such as the police or association manager. They agree to do what is reasonably possible to refrain from taking any action that would cause future legal concern.

We do hereby agree to the terms of this agreement:

_____ _____
Shirley Johnson Date

_____ _____
Jack Richards Date

_____ _____
Sue Jones, Mediator Date

APPENDIX 7. SAMPLE ARBITRATION CLAUSE PROVIDING FOR PROCEDURES TO BE DETERMINED POST DISPUTE

In connection with any dispute related to the association's legal documents that cannot be resolved through negotiation or mediation, the parties agree to resolve such disputes through the use of binding arbitration.

1. Procedures. The parties will attempt to develop mutually-acceptable arbitration procedures regarding their dispute. Such procedures shall address the following issues:

   a. The number of arbitrators to be used and the manner in which they will be selected. Generally, for minor disputes, one arbitrator is used. For more complex disputes, three arbitrators are used.

   b. Whether discovery is necessary prior to the arbitration hearing and to what extent.

   c. The timing of the arbitration hearing.

Generally the parties agree that all arbitrators should either be attorneys or other appropriate professionals with knowledge of the subject matter of the dispute and sufficient training to carry out the arbitration. The parties shall also agree on who will preside as chief arbitrator; generally, this is an attorney experienced in arbitration.

If the parties cannot agree on the procedures or the selection of arbitrators, the services of the American Arbitration Association (AAA) shall be sought either through reference to the AAA's Commercial Arbitration Rules or through the AAA's complete administration of the arbitration process.

b. Enforcement of Award. The award of a majority of said arbitrators is to be a reasoned award and, if requested, a judgment may be rendered by the court confirming the award or the award may be vacated, modified, or corrected by the court according to applicable state statutes.

c. Arbitration Fee. Each party shall pay for the services of its selected arbitrator and one-half of the fee charged by a third arbitrator.

APPENDIX 8. SAMPLE POST-DISPUTE ARBITRATION CLAUSE WITH PROCEDURES

In connection with any dispute related to the association's legal documents that cannot be resolved through negotiation or mediation, the parties agree to resolve such dispute through the use of binding arbitration.

1. Within seven days from the time the arbitration is ordered, each party shall select one arbitrator. Within 14 days, these two arbitrators shall then select a third arbitrator who shall preside as chief arbitrator. All three arbitrators shall be attorneys or other skilled professionals with expertise in the dispute subject matter.
2. If the parties or the two appointed arbitrators are unable to select the arbitrator for any reason within the given time period, the following procedures shall apply:

   a. The attorney for the defendant shall contact the American Arbitration Association (AAA) and request that a list of an uneven number of prospective arbitrators who meet appropriate qualifications be provided to the parties.

   b. Within seven days from the receipt of the AAA list, arbitrators shall be selected.
3. The arbitration hearing shall be held at a mutually-agreed upon time and place with the understanding that such hearing is to be scheduled as soon as reasonably possible.
4. The parties agree to provide the arbitrators with copies of all relevant written documents or correspondence as mutually agreed upon by counsel or that is requested by the arbitrators.
5. In the absence of counsel consent for either party, neither the parties in dispute nor their counsel may communicate with the neutral arbitrator or with the opposing party's arbitrator.
6. Each party shall be required to designate and make available for inspection all exhibits and witnesses that it intends to offer at the arbitration hearing at least 20 days prior to the scheduled arbitration hearing.
7. Each party shall be entitled to take depositions of any witnesses designated by the other party, at any time prior to the date of the scheduled arbitration hearing. If either party is unable to schedule the deposition of an opposing witness, despite all due diligence, the parties agree that the arbitration hearing will be continued in order to allow such deposition to be taken, is such a continuance is requested.
8. The parties agree that the hearing shall be conducted as follows:

   a. Plaintiff shall first proceed with presentation of case. At the conclusion of plaintiff's case, defendant shall present any testimony and documentary evidence that

it wishes the arbitrator to consider. The parties shall be given an equal amount of time to present their case, as agreed upon by counsel or the arbitrators. Plaintiff will not have the opportunity to present additional rebuttal evidence after the conclusion of defendant's presentation.

b. The arbitrators shall determine what evidence is relevant, material, and admissible.

c. Counsel for the parties shall be entitled to cross-examine witnesses called by the opposing party at the arbitration hearing, in addition to any questioning and cross examination by the arbitrators. Cross examination by counsel shall be limited to no more than 30 minutes for each witness. If a party cross-examines the other party's witness, re-direct questioning will be allowed for a maximum of 15 minutes and limited to the questions that were asked on cross-examination.

d. The parties agree that counsel for each party will be given reasonable time to make a closing argument following the presentation of evidence up to a maximum of 40 minutes. Plaintiff's counsel shall make closing argument first and can reserve up to a maximum of 10 minutes for rebuttal of the closing argument made by counsel for the defendant.

9. Each party shall be responsible for paying its own attorney's fees and the fees of the arbitrator it has selected. The parties shall otherwise equally divide all costs associated with the arbitration process, including, but not limited to, the cost of the third, neutral arbitrator, the cost of a court reporter, if necessary, and any other costs.

10. The arbitrators shall render a written decision within 10 days following the conclusion of the arbitration hearing.