WHEN TO LITIGATE
WHEN TO MEDIATE

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

BRUCE A. CHOLST, ESQ.

ANDERSON KILL
ATTORNEYS AND COUNSELORS AT LAW

This booklet is dedicated to my family, whose love, support and insight have enabled me to thrive.

When To Litigate
When To Mediate
A Guide to Dispute Resolution
for Co-op and Condo Boards

By Bruce A. Cholst, Esq.

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A Guide to Dispute Resolution for Co-op and Condo Boards
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This booklet is intended solely to provide general summary information, and is not intended to constitute legal advice applicable to specific matters. For more information, please contact Bruce A. Cholst, Esq. at 212-278-1086 or bcholst@andersonkill.com

Foreword

Increasingly, we are recognizing the need to acknowledge and resolve problems in our daily lives. In cooperative and condo-minium housing, disputes between neighbors can poison an otherwise congenial atmosphere. It is always in everyone's best interests to resolve these problems as soon as they arise. But how is this best accomplished?

Litigation is rarely healthy for the cooperative or condominium as a whole or for the residents involved. Nor can either easily afford the considerable expenditures of time, money, and energy that protracted legal action require.

In this concise and well-reasoned essay, Bruce Cholst advocates mediation as a kind and gentle form of dispute resolution where each side can have its say and be heard. But, as Mr. Cholst points out, there are instances where litigation is the appropriate means of addressing the issue.

Read on to learn the advantages and disadvantages of problem solving through mediation, arbitration, and litigation. I am confident that you will find this booklet to be an invaluable resource for facilitating dispute resolution within your cooperative or condominium.

Mary Ann Rothman
Executive Director
Council of New York Cooperatives & Condominiums

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.

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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 share- holders 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 emotion-ally 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 clients 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.)

Notes and Questions

Notes and Questions

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Bruce A. Cholst is a shareholder in Anderson Kill's New York office concentrating his practice in real estate, litigation and cooperative and condominium law.

Mr. Cholst represents cooperative and condominium clients in complex sponsor defect and sponsor arrears litigation, shareholder controversies, commercial and residential nonpayment actions, foreclosure suits, vendor claims and board election disputes. He also counsels clients on corporate and governance issues and negotiates their commercial leases and management contracts.

Mr. Cholst has served on the New York City Bar Association Sub-Committee on cooperatives and condominiums as well as the New York State Bar Association Cooperative and Condominium Liens Subcommittee.

He frequently writes and lectures and is often quoted in the trade press and the *New York Times* on issues relating to Cooperatives, Condominiums and Homeowner Associations. In 1997, Mr. Cholst published a booklet entitled "When to Litigate, When to Mediate: A Guide to Dispute Resolution for Co-op and Condo Boards." In 2012, he co-authorized with Rosen Livingston & Cholst Partner Mary L. Kosmark an article published in the *New York Law Journal* titled "Overcoming Limitations on Condo Boards in Dealing With Unruly Residents."

Mr. Cholst has been serving since 2000 as a member of his own Manhattan Cooperative's Board of Directors.

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