

THE BENEFITS OF MEDIATION FOR COMMON INTEREST COMMUNITIES

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Because our country is a democracy, the law is the ultimate arbiter of disputes in our country. Parties to a dispute can seek to obtain redress through the litigation process. Generally, in litigation, one side of the dispute files a lawsuit against the other side, and both sides, through the process of obtaining evidence, attempt to prove their case in court. Litigation can result in a trial, either by a jury of twelve strangers, or by a judge, both of which have the authority to render a verdict in favor of one side or the other. Thus, one side “wins” and one side “loses” in litigation.

The outcome of litigation is always uncertain, and most litigated cases are settled before trial. Often, however, a settlement can seem like a compromise with which neither side is satisfied. I have heard compromise described as combining hot and cold water, resulting in lukewarm water. No one is really satisfied with lukewarm water. Compromise, however, can also involve combining water and yeast, resulting in bread. In mediation, the goal is to make bread.

In most cases, both sides to a dispute have much to gain by accommodation and very much to lose by litigation. Yet, naturally, each party to a dispute wants to “win.” Winning, in the context of litigation, however, does not necessarily resolve the underlying conflicts which led to the dispute, and, of course, one party must lose. In mediation, which is a form of alternative dispute resolution, all parties win and there are no losers, since the resolution of the conflict involves the parties fashioning their own solution. The greatest success in mediation occurs where the parties want to resolve their dispute, share an interest in avoiding litigation, and have a continuing relationship which will require them to communicate with each other in the future. Thus, mediation is uniquely suited to resolve disputes in common interest communities. Members of common interest communities are essentially neighbors and, even after a dispute between them

is resolved, will continue to live together in the community. If their disputes can be resolved, and they learn to better communicate with each other, they can collaborate together for the betterment of the community.

Litigation rarely results in a resolution of the underlying conflicts, particularly if the process continues for a period of time. Litigation is a win-lose proposition, and negative feelings against the “other side” emerge and proliferate. Even where the litigation ends in a favorable outcome for one side, if the parties have not resolved their underlying conflicts, further strife between them is certain to occur in the future. Through the mediation process, the parties hopefully can learn better communication skills that will facilitate their resolution of future disputes.

Mediation is a process whereby a third party acts as a facilitator to assist the parties toward a resolution of their dispute. It is a process that, unlike litigation, which is adversarial, involves negotiation and problem-solving. It is collaborative as opposed to confrontational, and allows the parties to fashion their own remedy. Everything said in mediation is confidential, allowing the parties the freedom to express themselves without worrying that what is said can be used against them. The parties are in control of the process – where it will take place, how long it will continue, and, most important, the ultimate resolution.

Unlike litigation, which involves a determination of the rights of the parties through an adversarial system, in which the rules (the law) determine the outcome, mediation, since it is collaborative and involves the parties developing their own solutions, provides the opportunity for the parties to fashion creative solutions to problems for which the legal system has no response. Unlike a judge or jury who have the power to impose a solution on the parties, the mediator assists the parties in arriving at their own resolution, resulting in reconciliation as opposed to a short-lived “victory” for one side.

Mediation and other forms of alternative dispute resolution are favored under the law. California law requires that homeowners and homeowners associations attempt to resolve their disputes through some form of alternative dispute resolution before filing a lawsuit against each other. (Civil Code section 1369.520). California law sets forth recommended procedures for associations and homeowners to follow in requesting alternative dispute resolution. (Civil Code sections 1369.530 through 1369.560). Associations must also provide an expeditious procedure for resolving disputes between them and their members (and can utilize this process for disputes among members), and are encouraged to utilize neutral third-party mediators to assist them. (Civil Code sections 1363.810 through 1363.850).

Acknowledging both the legal requirements for, and the benefits of, alternative dispute resolution, Community Associations Institute (CAI) has an Alternative Dispute Resolution Policy statement, which encourages attempts to settle arguments and disagreements outside of the courtroom.

The CAI local chapter has instituted a low-cost mediation program. Qualified mediators with knowledge of community association law and practice are available to assist associations, homeowners and vendors in resolving their disputes before entering into the costly, time-consuming and ultimately unfulfilling litigation process. Whether you take advantage of this resource, or other resources available, all parties will benefit from participating in a collaborate process where they can create their own solutions to resolving their conflicts. With hard work and a little bit of luck, the mediation can even result in the parties making, and breaking, bread together.

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