



THE ROLE OF LAWYERS IN MEDIATION
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MARCH 2013

In 2005, in the course of earning my first ADR certificate, I found myself contemplating the role of legal counsel in mediation. Reflection upon the concept that the aim of mediation is to get beyond “positions” and begin exploring the interests of the parties raised questions surrounding the benefits of disputing parties having legal representation at mediation. Practical experience has led me to understand and respect the role that legal representation can play in condominium dispute resolution and making the most of the mediation opportunity. Consider the following:

1. *Director Liability.* Section 37(3)(b) of the *Condominium Act, 1998* (the “Act”), saves directors from exposure to personal liability if their actions are guided by the opinion of a lawyer (or other professional whose profession gives merit to the opinion). That is, by obtaining and relying on the advice of a lawyer in addressing a dispute, Board members can protect themselves from attracting personal liability. On many occasions, a lawyer’s advice can serve as the voice of reason in guiding a Board of Directors as to the most appropriate course of action and can be particularly helpful when a conflict becomes personal to directors;

2. *Parameters of Resolution.* A lawyer can provide a party with insight into his/her legal position in respect of a dispute, as well as clarification surrounding the parameters of resolution vis-a-vis the confines of the Act. Condominium disputes can have “limitless” possible resolutions, provided these are found within the four corners of the Act;

3. *Message Delivery Assurance.* While direct interaction between the parties in conflict during the course of a mediation session can be helpful, it can also be an emotional experience. The presence of legal representation at a mediation session can help ensure that a party is able to convey his/her message to the other side; that everything a party had planned to share is shared even if the party gets caught up in emotions surrounding the conflict. This can assist in ensuring that the most is made of the opportunity that mediation provides;

4. *Weighing Settlement Options.* As settlement options surface in the course of a mediation session, some parties find it helpful to have legal insight immediately available. Particularly in the course of gauging how reasonable a resolution option is and whether it complies with the Act, the thoughts of a lawyer can be quite helpful and even serve to increase the chances of settlement – particularly if the mediation delves into “new” areas of discussion. Legal advice is typically required to confirm a mediated settlement in any event; and

5. *The Value of Experience.* As a mediator who believes it is important for parties to be comfortable in a mediation session, I have found that some parties find comfort in involving legal representation – particularly in terms of preparing for the session and leveraging the insight shared through prior mediation experiences. The guidance and experience of someone who has been through it before can sometimes be quite valuable to ensure that the most is made of the mediation opportunity.

Over the years, I have had the pleasure of working with several condominium lawyers who have appreciated the practical aspects of condominium community disputes and who have embraced the notion of attempting a conciliatory approach in resolving conflict. Not all conflicts can be mediated to settlement, but you do not know if you do not try. Recent case law is serving to highlight the benefits of trying through reinforcement of the high cost of going to court and encouragement of the courts to try a conciliatory approach first regardless of whether it is mandatory to do so.

While parties sometimes mediate in the early stages of conflict without counsel, and mediation can be an effective process without lawyers taking part, it is prudent for parties involved in a dispute to at least consider if legal representation can benefit them in light of the above considerations.

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Marc actively manages condominium conflict and advocates for mediation in the early stages of condominium disputes. He earned an Honours Bachelor of Arts at the University of Toronto (Trinity College), holds an Executive Certificate in Conflict Management from the University of Windsor Faculty of Law and is a member of the ADR Institute of Ontario, the ADR Institute of Canada, the Toronto & Area Chapter of the Canadian Condominium Institute, the Association of Condominium Managers of Ontario and the Institute of Law Clerks of Ontario.

Marc brings unique insight in mediating condominium conflict through the knowledge and experience he has gained as a condominium director, resident and law clerk. His mediation practice is focused exclusively on condominium disputes.

Marc Bhalla carries professional liability insurance and is a regular contributor of articles to **CONDOCENTRIC.ca**



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