CONDO KNOWLEDGE IS POWER

by Marc Bhalla, Hons. B.A., Q. Med.

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Primum non nocere - ***First, do no harm***

While the role of a mediator is not to impose a decision or provide legal advice, mediators risk doing a disservice to all involved in a condominium conflict if discussion leads to a solution that is not legal or feasible. It is therefore essential for any mediator involved in addressing a condominium dispute to understand how condos work. Such insight can help ensure that anyone seizing the mediation opportunity is not left in a worse position than they were in before mediation.

For those not convinced that there is merit in selecting a mediator with "condominium knowledge", the following are some practical examples to demonstrate where and how mediators without expertise in this speciality area of practice risk doing more harm than good:

1. **Reality.** It is one thing to generate a series of options to weigh in determining how best to address an issue and another entirely to ensure that the options contemplated are realistic. A mediator's job is not to determine how plausible certain options are; however, in helping parties better understand what to consider to realize the reality of their options, a mediator can ensure that possibilities are not viewed with rose coloured glasses.

Example: A condominium corporation is addressing a compliance issue with a unit owner. In the course of mediating, the possibility of making changes to the condominium by-law that is alleged to be violated arises. The parties settle on this basis, failing to appreciate that a majority of all unit owners is required to pass a condominium by-law or consider what would occur in the event that approval of a new by-law was not forthcoming (i.e. the community struggles with owner participation).

Particularly when one or more parties mediate without legal representation, a mediator with an understanding of such common condominium processes as the proportion of owners required to pass a by-law, the need to register a Section 98 Agreement on title or the timeline by which a Condominium Lien must be registered can allow for the consideration of the reality of various options presented to address the issue, rather than risk leaving the mediation with an impossible resolution that risks only escalating the matter.

This is not to suggest that a mediator can or should replace the role of legal representation, but rather that a mediator with knowledge of the nuances of condos can help ensure that parties weighing options understand what they need to consider in assessing an option's viability.

2. **Structure.** I have come across too many stories of the mediation opportunity being squandered because the mediator involved improperly structured the process. In addition to neglecting to realize that a condominium community may have a mediation by-law in place to govern the process, mediators who lack sufficient understanding of how condominiums operate have attempted to mediate issues without even the correct parties at the table. This has happened both in the course of voluntary mediation and such "encouraged" by the courts pre-trial.

*Example: On trial day, a backlogged court schedule leads a judge to effectively force parties to meet with mediators as they await their trial. The mediators require the condominium directors in attendance to wait outside the room as the unit owner involved in the issue, the condominium's lawyer and property manager are gathered to mediate. Not surprisingly, the mediation fails to resolve any of the issues as the condominium's authority to settle were not even permitted to participate in the process.**[1]***

The example above is one of many where mediators have failed to appreciate who has the authority to settle on behalf of a condominium and how to properly establish the appropriate participants in the process. Perhaps in the example above, the mediators were so focused on balancing the number of bodies on either side of the table that they neglected or made assumptions about the how and who of decision making for condominiums. Balancing power dynamics is of little use if you leave the power out of the process!

3. **Empathy.** Mediators who fail to appreciate the reality of condominium life may struggle to empathize with parties experiencing a condominium conflict. They can take all the courses, read all the blog posts and translate all of the case law they like but such mediators are unable to fully or intimately understand the practical reality of the situation. Such understanding is important, particularly with the increased use of technology in dispute resolution processes.

Example: To address discomfort expressed by neighbouring condominium residents about meeting in person, a mediator utilizes Skype to conduct a mediation without the parties actually having to meet in person. The "safety" of the on-line forum allows both neighbours to express strong feelings about a long-standing conflict between them. The mediation session concludes with both neighbours far clearer on what the other thinks of them. Shortly after shutting down their computers, they find themselves sharing an elevator.

While mediators are wise to find creative ways to bring parties together and otherwise address concerns to allow participants in mediation to be as comfortable as possible, it would be a mistake to view all condominium conflicts like workplace, family or other types of disputes, where parties can have much more control over if and when they will interact.

Mediators with an intimate understanding of condominiums appreciate how important an interaction plan is for conflicting parties who continue to exist in community with one another. In my practice, I have also found that sharing past experiences involving similar conflicts can help generate ideas which can allow everyone to leave a mediation much more comfortable, even if the conflict remains ongoing. Rather than risk the possible escalation of your conflict by someone who fails to understand the nuances of condominiums, make the most of your mediation opportunity by selecting a mediator with condo knowledge.

Marc Bhalla, Hons. B.A., Q. Med. is a mediator who specializes in condo conflict management.

He can be reached at mbhalla@elia.org.

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[1] *It is important not to make assumptions about settlement authority with respect to condominiums. Directors only have the power to make decisions at duly constituted Board meetings. Thus, unless specific settlement authority had previously been granted by the Board of Directors to the directors in attendance at trial, all participating in a "last minute mediation" should be clear on how the potential resolution of the matter would play out. For example, any potential settlement may need to be taken back to the Board of Directors to review and ratify before becoming official.*

Unfortunately, many who are not well versed in how condominiums function tend to make assumptions surrounding settlement authority, failing to appreciate the appropriate role of the property manager or the limitations of power granted to members of the Board outside of duly constituted Board meetings.