THE SUCCESSES OF "FAILED" MEDIATION
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In assessing the competency of a mediator, many look to "success rate" – typically, the percentage of mediations where a settlement was reached. While achieving settlement may certainly be a desirable outcome for those taking part in mediation, whether or not a settlement is achieved is not within the power of the mediator – it is within the power of the parties!

The mediator's job is to help breakdown communication barriers, challenge the parties, facilitate the examination of interests and otherwise encourage the parties to fully consider all of their options to determine if a potential settlement is better than their next step in addressing the dispute. It is not always the case that settlement is best for the parties, yet mediation can still be considered a success even if it does not produce a resolution.

Unlike proceeding to arbitration or court where disputing parties strive to convince a third party of their position and, win or lose, are guaranteed an outcome, mediation offers no guarantees of settlement. That is the point. Mediation provides those engaged in conflict with the opportunity to resolve it; whether or not the opportunity is taken – or is worthwhile – is within their own control. The parties control the process *and* the outcome.

So, why take the opportunity that offers no guarantees? Why incur the expense of mediation if there is a chance that it could only add to the overall cost of the conflict? What is there to be gained if a settlement is not reached?

In the context of condominium conflict, there are several advantages that can fall out of a mediation which does not end in settlement:

1. **A chance to be heard.** Over the years, I have seen unit owners proceed to court with unwinnable cases that have become very personal to them. Even when they lose and face cost consequences (that could have very easily been avoided), some have expressed satisfaction. Why? Because they had their chance to be heard. Particularly when a unit owner is in dispute with the condominium corporation, there can be little direct interaction between the owner and the Board (the decision makers of the condominium). Owners can feel ignored, without "power" and with only a litigious option.

   Unlike at trial, where each party presents their case to a judge, at mediation parties present to each other. This provides an opportunity for each party to "get off their chest" their emotions and views of the conflict and to hear what the other side has to say in a safe environment. The purpose is not to refute accusations or prove that the other party is wrong, but to listen and explore. Particularly when there is an opportunity for such an

exchange to take place on a without prejudice basis with the parties interacting directly and in person, a great deal of satisfaction (and progress) can be obtained.

2. **Cost savings.** How can there be cost savings if mediation does not resolve the dispute? One way is to narrow the scope of the conflict. When the parties have a chance to examine both their own interests and those of the other side, they can get to the bottom of what the conflict is truly about. Agreeing on certain facts, their next steps in addressing their dispute or even what they need someone to decide for them can greatly reduce the overall cost of the conflict and perhaps even the amount of time that goes by until it is ultimately resolved.

3. **An interaction plan.** Many condominium disputes involve parties who are in community with each other. Delay in resolving a conflict can impose particular challenges - a chance meeting in an elevator, an awkward run in at the mailbox, an exchange of eye contact at the Annual General Meeting, and so on can further antagonize the parties. The trial process takes a long time and the close proximity of the parties to one another can be unpleasant, particularly in the setting of one's home or workplace. In mediation, even if no settlement is reached, the parties can take the opportunity to explore how they will interact until a resolution is in place. Guidelines can be set and parameters established to provide an understanding in recognition of the inevitable interaction to take place going forward.

4. **Something to think about.** Often, groundwork for a settlement can come out of the examination of options and exchanges of the parties in the confidential and without prejudice setting of mediation. The insight that can be gained into the other party's perspective or ideas generated in a creative brainstorming session can provide something to think about and even impact the opposing party's Best Alternative To a Negotiated Agreement (BATNA). Even if the conflict proceeds and settlement is reached on the morning of the trial, mediation may be responsible.

While a success rate is the only "stat" that mediators can use to display their effectiveness, it is not always a good, or the only, indication of a mediator's abilities. Parties should be sure to verify a mediator's knowledge and experience in the area of the dispute, training/credentials and abilities to make the process worthwhile even if they do not leave the mediation with a settlement agreement in hand.

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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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