



Mediation, Arbitration Forms of Dispute Resolution

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Q: Can you please explain to me the difference between mediation and arbitration and give an example of when one is preferred over the other?

B.B. (via e-mail)

A: Mediation and arbitration are two common forms of what the legal community calls “alternative dispute resolution.” The purpose of alternative dispute resolution is to keep disputes out of court, when possible, and to be certain that any disputes that do make it to court have been the subject of a good faith effort to resolve the dispute. Filing and prosecuting a lawsuit can be extremely time consuming and expensive, and while not always the case, alternative dispute resolution is often more expedient and less costly.

Mediation is a process in which a trained mediator, best thought of as a facilitator, meets with the parties to the dispute, both individually and collectively, to try to help the parties reach an agreement to resolve the dispute. Many disputes arise and continue due to mere communication failure. A well-trained mediator can assist the parties in overcoming communication problems. A mediator may bring new ideas to a continuing dispute and may be able to propose a satisfactory resolution that the parties did not consider.

A mediator may, in some cases, pull one or both parties aside individually and candidly point out

the merits of the opposing party’s position. To be clear, a mediator is not a judge and is not charged with evaluating the merit of any party’s claim, nor determining the proper legal outcome of any dispute. In the community association law arena, mediation is most common with homeowners associations as the Florida Homeowners’ Associations Act requires pre-suit mediation, or at least an attempt at mediation, prior to filing a lawsuit concerning certain disputes between members and the association.

Arbitration is designed to provide the parties with a ruling where one party prevails, and one party loses as determined by the arbitrator. There are both “binding” and “non-binding” arbitration proceedings. For example, parties may enter into a contract that requires binding arbitration in the event a dispute later arises. Moreover, parties may agree to settle their dispute through binding arbitration after the dispute has arisen. A decision to engage in binding arbitration is usually motivated by the parties’ mutual belief that court proceedings are too time consuming and expensive.

“Non-binding” arbitration is what is required by the Florida Condominium Act for any “dispute” as defined in that statute. “Dispute” under the Condominium Act means any disagreement between two or more parties involving the

authority of the board, under the statute or according to the association documents, to take action or not to take action involving an owner's unit or appurtenances to the unit, or concerning the alteration or addition to a common element. Also, included in the definition of "dispute" is any claim of a failure of a governing body to properly conduct elections, give adequate notice of meetings or other actions, properly conduct meetings, or allow inspection of books and records. The Condominium Act requires mandatory, non-binding arbitration of all "disputes" prior to filing a lawsuit based upon that dispute. Once the arbitrator makes a ruling, the parties may either accept the ruling or one or both of the parties may reject the ruling and file a lawsuit.

Q: I recently moved into a community governed by a homeowners' association and heard through several of my neighbors that the association is in financial trouble. I want to get copies of all of the financial records in order to figure out whether this is true, or just a rumor. Am I entitled to have the association send copies of these records to me? **J.D. (via e-mail)**

A: Homeowners' associations are required to maintain the association's financial records as a part of its official records. The Florida Homeowners' Association Act requires the association's official records to be open to inspection by members or their authorized agents at reasonable times and places within ten business days after the association receives a written request for access to the records.

When a property owner, or his or her authorized agent, inspects the records, the association must provide copies of records that are requested during the inspection. The association may charge up to fifty cents per page for copies made on the association's photocopier. If the association does not have a photocopy machine available where the records are kept, or if the records requested to be copied exceed 25 pages in length, the association can have copies made by an outside vendor and may charge the actual cost of copying.

If the homeowner's association fails to provide access to the official records within ten business days after receipt of a written request, a rebuttable presumption is created that the association willfully failed to comply with the requirements of the Homeowners' Association Act. This failure can result in an award of damages against the association for actual damages or minimum damages. Minimum damages are set by statute at fifty dollars per day up to ten days, with the calculation beginning on the eleventh business day after receipt of the written request.

You should be aware that your homeowners' association is required to provide each member with a copy of the annual budget or a written notice that a copy of the budget is available upon request at no charge to the member. If you request a copy of the budget, it must be provided to you within the time limits discussed above.

Homeowners' associations can adopt written rules regarding the frequency, time, location, notice, records to be inspected, and manner of inspection of the official records, which is allowed by statute. The Homeowners' Association Act indicates that such rules cannot impose a requirement that an owner demonstrate any proper purpose for the inspection of the records, state any reason for the inspection, or limit an owner's right to inspect the records to less than one eight hour business day per month.

A final note is that there are some records that are not accessible to members in the HOA setting, including: any record protected by the lawyer-client privilege or the work-product privilege; information obtained by the association in connection with the approval of a lease, sale, or other transfer of a parcel; any disciplinary, health, insurance, and personnel records of the association's employees, and; any medical records of parcel owners or community residents. The rules for condominium associations with respect to official records are slightly different.

Q: Can my condominium association's board members say that we are going to be self-managed

without a vote of the owners? Can the board, by itself, choose who is going to be the manager?

P.A. (via e-mail)

A: Unless otherwise provided in the condominium documents (which would be unusual), the decision to engage the services of a community manager, or to be self-managed, will rest with the board of directors. Likewise, if the association decides to hire a manager, the decision of who to hire is made by the board of directors.

You should note that there is no requirement that your condominium association hire a manager. However, if your association does hire a manager, the manager must be licensed if the condominium consists of more than fifty units or has annual income in excess of \$100,000.00. If the board decides to self-manage the condominium association, it can act as the “manager” without the board members being licensed so long as they are not paid.

Additionally, an association can hire administrative support staff, who are not licensed, as long as they do not engage in acts of “community association management.” “Community association management” is defined by Florida Statutes as any of the following practices requiring substantial specialized knowledge, judgment, and managerial skill, when done for payment, and when the association or associations served contain more than 50 units or have an annual budget or budgets in excess of \$100,000.00: controlling or dispersing funds of a community association; preparing budgets or other financial documents for a community association; assisting in the noticing or conduct of community association meetings, and; coordinating maintenance for the residential development and other day-to-day services involved with the operation of a community association.

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners’ associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm’s Naples and Ft. Myers offices.

Send questions to Joe Adams by e-mail to jadams@becker-poliakoff.com This column is not a substitute for consultation with legal counsel. Past editions of this column may be viewed at www.becker-poliakoff.com.