COMMUNITY COUNSEL

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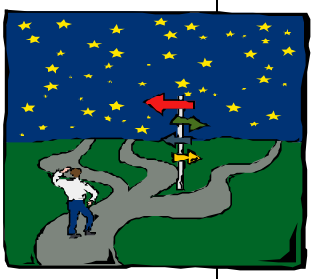
IMPORTANT ALERT !!

Please come to Tallahassee on Wednesday, March 30, 2005, for Community Association day with the Legislature. It's important to protect your community from excessive government regulation and extreme efforts to prefer some owners at the expense of all owners. Call Janet for details.

A Mediation Primer

For years the courts have required lawsuits to go to mediation before they go to trial. The 2004 Florida Legislature went a step further and required mandatory mediation for homeowners' associations before filing a covenant enforcement lawsuit. In condominiums, covenant enforcement actions may be referred to mediation after they are filed. Therefore, officers and directors for community associations need to be aware of mediation and how it operates.



Mediation has been described as a consensual process under which an impartial, neutral third party, i.e., the mediator, acts to encourage and facilitate the resolution of a dispute without prescribing what that resolution should be. Although a court can order parties into mediation, once they get there what the parties do is entirely up to them. A mediator does not have the authority to impose a resolution to the dispute. A mediator is not a judge and is not supposed to coerce parties at mediation into doing something against their will. Instead, a mediator's purpose is to help parties and their attorneys negotiate with each other. In this regard a mediator generally uses people skills and psychology more than the legal tools.

While mediation is informal, preparation for it should not be lax.

Mediation is, for the most part, an informal process. Only at the beginning of a session is the procedure even remotely formal. The mediation conference usually begins with both parties and their attorneys, if any, present in the same room with each other and the mediator. This is called a joint session. The mediator begins the joint session with an opening statement which includes a personal introduction, a description of the mediation process and statements directed at the parties aimed at encouraging them to start thinking about settling the case. The mediator's opening statement is followed by opening statements from the parties, given in any order the mediator desires. These statements usually set forth each party's initial position.

After the opening statements, the process is more free flowing. The parties may continue to confer in joint session or the mediator may take one party into a caucus, where the mediator confers with one party and their attorney outside the presence of the other party. The caucus periods may be long or short. The parties may later come back into joint session or the mediator may have a series of caucuses with one side, then the other. Early in the mediation a good mediator will get a sense of the case, the parties and their attorneys and try to find a strategy to eventually lead to a negotiated settlement. However, there is no set formula for how the mediator will act.

While mediation is informal, there should be nothing lax about preparing for mediation. With good preparation a party can more effectively press for a favorable settlement from the other side or even persuade the mediator that the other side needs to be pressed harder if the case is to settle.

Communications during mediation are confidential, except where disclosure is required by law. Nothing said in mediation can be used in the trial of the case. However, anything revealed in mediation could be followed up with discovery. If a party is candid with a mediator in caucus but does not want certain information revealed to the other side, that party needs to inform the mediator that the information needs to be kept confidential.

If an oral settlement is reached during mediation, it should be reduced to writing and signed before leaving the mediation session. Otherwise, if one of the parties has a change of heart the next day there will be no agreement from that mediation.

The advantages of mediation are that it saves time, money, aggravation and the anxiety of possibly going to trial. Each party gets to have some measure of control over the outcome of the dispute. Although the settlement may not be what each of the parties originally intended, a settlement precludes the possibility of a more uncontrolled and possibly worse outcome at trial. Mediation also saves the additional expenditure of attorney fees for preparing and conducting a trial.

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RECENT CASE SUMMARIES

In **Eicoff vs. Denson, et al.,** 30 Fla. L. Weekly D337 (Fla. 5th DCA February 4, 2005), Buyer purchased a vacant lot from Seller, on which Buyer planned to construct a residence. Seller owned and resided on the adjacent property. Before the sale, the parties agreed to deed restrictions and restrictive covenants. Buyer began violating the restrictions during the construction of their home, and Seller petitioned the trial court for an injunction requiring Buyer to refrain from any further violations. Buyer allegedly violated the deed restrictions by wrongfully removing (without permission) trees with a diameter greater than twenty-four inches at waist height, by removing trees growing in the buffer zone between the lots, by failing to get Seller's approval for the location, design and materials for Buyer's residence, by placing modular and other temporary structures on the lot, by damaging Seller's driveway and failing to repair said damage, by erecting signs on the lot, by erecting structures in violations of setbacks, and by not keeping tractors, four wheelers and motor homes in an entirely enclosed garage. The trial court entered a temporary injunction against Buyer to prohibit these violations. The trial court enjoined Buyer from making "any further changes on the property, including without limitation planting vegetation, pruning of trees, removing trees, or erecting any structures. The only activity Buyer was permitted to do on the property was to mow the newly sodded grass immediately contiguous to their residence and the grass between the residence and the pond and Seller's residence. At a later hearing, the parties agreed that the injunction would remain in effect until they agreed upon a landscaping plan. Buyer produced a landscaping plan, but before Seller approved it Buyer began planting more than 60 trees and shrubs that were included in the yet-to-be approved plan. In response, Seller filed a motion asking the court to sanction Buyer for violating the injunction by planting the trees and shrubs before approval by Seller of the landscaping plan. The trial court entered an order of civil contempt and ordered that the trees and shrubs be removed. Buyer was remanded to the custody of the sheriff's department until the trees and shrubs were removed, debris in the buffer zone was removed, and all vehicles were enclosed, or until a signed settlement agreement was entered into between the parties. The parties subsequently entered into a stipulation which provided that Buyer would pay an architect to create a landscaping plan and that the cost of the landscaping would not exceed $30,000. The stipulation also provided that Buyer would pay Seller's attorneys' fees, up to $50,000. One of the main objectives of the stipulation was to "soften the view" of Buyer's driveway. Later, Buyer objected to the portion of his architect's plan which called for the demolition and relocation of part of his driveway. After a final hearing the trial court entered a final judgment ordering Buyer to comply with the restrictive covenants and to pay Seller $53,666.25 in attorneys' fees. On appeal, the Fifth District Court of Appeal affirmed in part and reversed in part the judgment of the trial court. Specifically, the appellate court affirmed the rulings of the trial court with respect to the temporary injunction, contempt, and the final order requiring demolition and relocation of the driveway. However, the appellate court reversed the award of fees which exceeded the stipulated amount. The appellate court remanded the case to the trial court to reduce the amount of the fee award to $50,000 in accordance with the stipulation between the parties.

In **Simon vs. Gables Plaza Condominium Association, Inc.**, 30 Fla. L. Weekly D320 (Fla. 3rd DCA February 2, 2005), Owner brought suit against Association for injuries suffered in a slip and fall accident. Owner slipped and fell in Association's parking garage and sustained serious injuries. At trial, the doorman testified that he was aware of problems with the flooring in the garage and admitted that it had been in disrepair for a long time due to flooding. The doorman also testified that Association was aware of the condition. When the problem arose, a rubber mat was placed on top of it. He also testified that the site of the accident was a tile floor covered by a mat and that the tiles were chipped and covered by the mat. Owner testified that she hit a piece of the rug that was on the floor covering the tiles. In granting a directed verdict for Association, the trial court stated that Owner's testimony was that "she tripped or caught her foot on the edge of the rug" and there was "no evidence that there was anything wrong with the edge of the rug." On appeal, the Third District Court of Appeal noted that when reviewing the entry of a directed verdict, an appellate court must view the evidence and all inferences of fact in the light most favorable to the non-moving party. In reversing the trial court, the appellate court found that the jury should have been given the opportunity to determine the cause of the Owner's fall, based on all the testimony. Under the circumstances of this case, the jury should have been given the opportunity to determine whether Owner's fall was occasioned by the defective condition inasmuch as the evidence shows that the fall occurred at the time and place where the defective condition existed.

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