

Mediation as a Tool for Conflict Resolution in HOA's

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A recent television [broadcast segment](#) highlighted the most common complaint of HOA living: Communication.¹ As with every other interpersonal relationship, the peaceful co-existence within an HOA Community requires ongoing, respectful and productive communication. How an HOA handles conflict can determine whether the community remains an enjoyable place in which to live - or whether it appears on the evening news of Channel 7.²



If you have served on the board, managed or lived in an HOA, you are no stranger to conflict. When community disputes arise, what's a Board or a Homeowner to do? The quality of the HOAs' conflict resolution practices usually plays a big role in the ultimate outcome. **Mediation** is an excellent tool that can be used to deal with conflict before it becomes unmanageable, and it accomplishes the task efficiently, effectively and confidentially.

I. 2013 Top Ten Complaints for HOA's ("HOA's")

According to the HOA Information and Resource Center³ ("Center"), the following are the top ten biggest sources of conflict within HOA Communities:

1. Communication with owners
2. Not following governing documents
3. Improper or selective enforcement of covenants
4. Not performing maintenance
5. Accounting (assessments/fines/interest/improper budgeting)
6. Failure to produce records
7. Meeting issues
8. Election and voting issues
9. Intimidation, harassment or retaliation
10. Conflicts of interest

¹ 2013 Annual Report from the HOA Information and Resource Center ("2013 Annual Report"), p. 13-15.

² "Condo owners say HOA refuses to address flooding issues," Russell Haythorn, Channel 7, 10:13 PM, Jun 9, 2014, updated 10:24 PM, Jun 9, 2014

³ 2013 Annual Report, p. 14.

II. Common types of conflict that arise in HOA's

According to the Center, there are currently 8,857 registered Home Owner Associations in the State; registration is a mandatory requirement in Colorado, though not all HOA's comply.⁴ That's 880,326 units, filled with people who have a bone to pick with their board, their property manager or their neighbor. Last year, the Center received 1,248 HOA-related complaints, from 327 different people.⁵ Of these, over 500 (40.4%) complaints involved HOA property managers, 744 complaints (59.6%) involved an HOA in general or its board of directors as either a cause or responsible party.⁶

For many HOA's, the board is comprised of neighbors who have volunteered their time, professional knowledge and leadership skills, in hopes of bettering their community. The role of a Community Association Manager ("Manager") is important and necessary. Few HOA boards have the desire and/or ability to manage the day-to-day logistics of an HOA. The manager acts as a liaison between the HOA board and homeowners, handling the financial and administrative (enforcement) aspects of the HOA, and (most importantly for many), maintaining the community property. Many times, the manager is seen as the arm of the board, and some homeowners skeptically believe that the two work in *cahoots*. This is not always the case. Good collaboration between the board and the manager is needed for an association to thrive.

Unfortunately, too many owners perceive both the manager and the board as *megalomaniacs on a power trip*. One thorny issue is a board majority's disregard for their own governing documents, to the detriment of their community. What are the minority board members supposed to do? Boards have a duty to enforce their governing documents, and they don't want to be held liable for breaching that fiduciary duty. If board members can't monitor their own, what can owners do?



1. Conflict between HOA members (board/owner; board/board member; manager/owner; manager/board):

The biggest complaint centers around the communication disconnect between the board, the manager and the homeowners. This can result from a belief that: 1) a board/manager has not been transparent in handling HOA matters; 2) the board/manager is violating the existing governing documents, or; 3) they are selectively favoring/targeting certain homeowners who are friends (or foes) of the board or a board member. This, coupled with a lack of knowledge regarding the HOA's governing documents, is a recipe for disaster for any Community.

2. Examples of HOA Conflicts:

The Case of the Data Disconnect:

⁴ 2013 Annual Report, *supra*, p 7; CRS § 38-33.3- 117; 401(1): "Every unit owners' association shall register annually with the director of the division of real estate, in the form and manner specified by the director."

⁵ 2013 Annual Report, *supra*, p. 12.

⁶ 2013 Annual Report, *supra*, p. 14.

A homeowner has painted his front door a glorious shade of red – well, *orange*, which his Fung Shui mandates because of his south facing door, and his partner mixed the color personally. The board has sent him a notice that it must be repainted, or he will face fines. The homeowner and the Board President do not like each other. The President and her friends on the Board won the majority vote to fine the homeowner, much to the frustration of the minority Board members, who are his friends. Dueling Facebook pages have popped up, each with their own views on the basis for the conflict; each are posting comments that border on libel. The ongoing dispute has escalated into a polarization of the community and threats of dueling lawsuits, based upon allegations of discrimination, slander and libel. The Board has contacted the Association’s attorney, who advocates legal action to protect the Association and the Board. The homeowner doesn’t have the money to hire a lawyer, but he has a connection at the local television station.

The Case of the Community Busy-Body:

Normally, it is the board's responsibility to ensure that people are complying with the HOA rules and regulations. Just because one lives in an association doesn't mean that *everybody* will be appointed as police officers. But, there's always someone who becomes frustrated with a board's inattention to a violation, or the property manager's failure to immediately address an issue.

The result: the *Community Busy-Body*, who regularly monitors the Solo Cup contents at the community pool for prohibited alcohol. She notes the number of cars parked at the home on the corner and the parking violations of neighbors and their guests. She attends the board meetings, demanding enforcement of the regulations, to the point that the board has prevented her from attending the meetings. Busy-Body feels she is being singled out, and the community now dislikes her with a passion.



The Case of the Recalcitrant Property Manager:

An elderly homeowner has an ongoing problem with water entering his property through a poorly maintained common area. The property manager, who has the ear of the Board President, has ignored the homeowner's requests for assistance. The manager has persuaded the president that the homeowner is an elderly curmudgeon, with no legitimate claim. The Board, without further investigation, allows the manager to handle the situation. "Elderly Curmudgeon," sustains mold damage to his property, but doesn't have the money or the energy to fight the property manager, who determines which common areas receive future repair work first, *or at all*. In the last two weeks, Elderly Curmudgeon has visited the ICU to support two other elderly friends: one passed away. Elderly Curmudgeon would sell his home, but can't afford to do so, even if he

could afford to mitigate the mold issue for resale purposes. He is frustrated and powerless to resolve his situation.

The Case of the “Barking Neighbors”

A longtime elderly neighbor is frustrated at the parties and loud music played at all hours of the night by his new, younger neighbor. He requests that they “turn down that racket,” prompting an unintended response: “Younger Neighbor” turns it up louder, accompanied by some colorful language. “Elderly Neighbor” calls the police, who arrive and force a shutdown of the party. Younger (now resentful) Neighbor escalates the conflict by revving up his truck early in the mornings, immediately outside Elderly Neighbor’s bedroom window, and frightening him and his wife. Elderly Neighbor responds by reporting to the board the multiple cars parked at Younger Neighbor’s home, resulting in Board-issued fines. Neighbors now are at war, and signs like this graphic photo (not part of this actual case scenario) are created and placed for all to see, embarrassing and intimidating Elderly Neighbor and his now very frightened wife.



In each of these scenarios, there is a communication disconnect. Governing documents may allow or prohibit certain aesthetic designs or color schemes, and statutory laws specify a board’s and a property manager’s fiduciary obligations. An allegedly improper meeting by an HOA board, may have been completely legitimate, but lacked an appropriate amount of transparency. In the last scenario, an escalating conflict relating to simple manners has become an intimidating, toxic situation that could result in the emotional or physical harm to a long time community member.



The most destructive aspect of the above scenarios involves a frustration that one or both sides have not been *heard*. So, what was initially an easily resolved paint color issue (through respectful discussion and informed dialogue), became a toxic community feud, with potential lawsuits and legal fees on the line. What’s the lesson? The cost of escalating, unresolved conflict could be an embarrassing fifteen minutes in the limelight, or an expensive and very public lawsuit.

III. What laws govern HOA’s?

HOA’s, with certain exceptions, are governed by a few key state laws, notably: the Colorado Common Interest Ownership Act (“CCIOA,” pronounced “Kiowa”), and the Colorado Non-

Profit Act.⁷ All HOA's are required to annually register with the Director of the Division of Real Estate.⁸ Those which fail to do so are limited in their ability to deal with delinquent owners, as they may not impose or enforce certain liens and they are limited in the actions they may pursue or specific means of enforcement they may utilize, until they are validly registered.⁹

The Legislature created the HOA Information and Resource Center ("Center") in 2010.¹⁰ The Center is organized within the Division of Real Estate, a division of the Department of Regulatory Agencies ("DORA"). The Center collects information from HOA's via registration and from the inquiries and complaints it receives. The Center, under the leadership of the HOA Information Officer, Gary Kujawski, is responsible for providing information to unit owners, HOA boards, declarants, and other interested parties about the rights and responsibilities set forth in CCIOA and other applicable state law.

So, one question that needs to be asked when discussing HOA dispute resolution is whether CCIOA applies in whole or in part to an HOA community. CCIOA, with some exceptions, applies to those common interest communities ("CIC's") built after 1992.¹¹ Some CICs formed prior to July 1, 1992 have elected treatment under CCIOA, pursuant to Colorado Revised Statute § 38-33.3-118.

IV. What does the law say about Mediation in HOA's?

CCIOA *requires* HOA's to adopt a written policy that sets out its dispute resolution process, and to make it available to all owners upon request.¹² It *encourages* HOA boards to adopt Alternative Dispute Resolution ("ADR") policies as part of their governing documents, to minimize the rush to litigation in situations that do not involve an imminent threat to the peace, health, or safety of the community. These can include mediation and/or arbitration as preconditions to filing a complaint.¹³

“(1)(b) On or before January 1, 2007, each association shall adopt a written policy setting forth its procedure for addressing disputes arising between the association and unit owners. The association shall make a copy of this policy available to unit owners upon request.”

⁷ CRS § 38-33.3-101, *et seq.* Colorado Revised Non-Profit Act §§ 7-121-101, *et seq.*; 7-128-101 *et seq.* Additional state laws that may be relevant include the Colorado Fair Housing Law, the Colorado Fair Debt Collection Practices Act, and Local Municipal Ordinances that relate to building codes, animal control, and parking restrictions.

⁸ CRS § 38 - 33.3- 401(1) (2013).

⁹ *Id.* § 401 (3); 2013 Annual Report, *supra*, p. 5.

¹⁰ CRS § 12-61-406.5(1) (2013); 2013 Annual Report, *supra*, p. 1).

¹¹ CRS §§ 38-33.3-101, 115-118 (applies to CIC's after 1992, with exceptions). “HOA” or “homeowners’ association” means an association or unit owners’ association formed before, on, or after July 1, 1992, as part of a common interest community as defined in section 38-33.3-103, C.R.S.”

¹² CRS § 38-33.3-124 (1)(a)(I) (II) (b)(2)(a).

¹³ *Id.*, § 38-33.3-124 (1)(b)(2)(a).

(2) (a) *Any controversy between an association and a unit owner arising out of the provisions of this article may be submitted to mediation by agreement of the parties prior to the commencement of any legal proceeding.*

(b) *The mediation agreement, if one is reached, may be presented to the court as a stipulation.* Either party to the mediation may terminate the mediation process without prejudice.

(c) *If either party subsequently violates the stipulation, the other party may apply immediately to the court for relief.*

(3) The declaration, bylaws, or rules of the association may specify situations in which disputes shall be resolved by binding arbitration under the uniform arbitration act, part 2 of article 22 of title 13, C.R.S., *or by another means of alternative dispute resolution under the "Dispute Resolution Act," part 3 of article 22 of title 13, C.R.S.*" (CRS § 38-33.3-124; Emphasis added.)

The Colorado Legislature acknowledges that resolving HOA disputes in court is inefficient.¹⁴ Unnecessary litigation adversely affects the parties involved. HOA's must raise assessments on the entire community to deal with the legal expenses involved in an unsuccessful lawsuit, or one that settles on the court steps on the eve of trial. This leads to further resentment and distrust within the community. For homeowners, few have the financial means to pursue or defend an action in court, and they lack the knowledge necessary to fight a case "pro se" (unrepresented by counsel).

Few law firms specialize in homeowner complaints, and the result is a power imbalance for the homeowner in general, and in favor of the HOA. [The Mediation Association of Colorado](#) ("theMAC") has vigorously supported the Center's developing of a list of qualified mediators for referrals, and for the Legislature to provide more teeth into any existing or future legislation involving the use of mediation as a form of HOA dispute resolution.

V. What is Mediation and why use it?

Simply put, Mediation is a voluntary, informal process by which a neutral, third party (the Mediator) facilitates a dialogue between two parties in conflict, to help them resolve their dispute.

a. It's Efficient

Parties decide when, where, how and to what extent they wish to resolve their conflict. Since many jurisdictions in Colorado now send civil cases to mediation prior to scheduling a court

¹⁴ CRS § 38-33.3-124(1)(a)(I)

hearing or a trial date, it makes far more sense to engage in mediation before filing an action and incurring significant legal fees in the process.

b. It's Effective

Parties in mediation have the power to resolve one or all of their issues at once, and in the manner that works for them. They can agree upon a date to mediate, which might be much sooner than a court hearing or trial date. They can choose to resolve the smaller issues, while agreeing to proceed to a judicial determination as to others. Where parties decide to continue to trial, mediation provides the ability to clarify and focus the issues – saving time, legal costs and emotional energy. Sometimes, the dialogue that takes place in mediation may be the first opportunity for parties to view the dispute through the other's eyes. This alone may provide the possibility for early resolution.

c. It's Voluntary

The hallmark of Mediation is that it is party-determined. Parties are not forced to come to agreement, nor are they forced to remain in mediation. This is empowering for a homeowner who believes he/she must agree to the terms demanded by a board or property manager. Likewise, it is reassuring to a board that an obstreperous homeowner who has wholly unreasonable demands cannot coerce them into agreement. Notably, no one is forced to relinquish their right to proceed to court if they choose, or if it makes the most sense to have a judicial determination if they can't resolve the matter.

d. It's Confidential

What happens in mediation stays in mediation. With some limited statutory exceptions relating to specific threats of harm, discussions in mediation are strictly confidential.¹⁵ This is helpful to an owner or a board looking to minimize the toxic gossip surrounding an issue. It's an advantage when looking to avoid embarrassing disclosures for failure to pay an assessment (ugly divorce, alcoholism, drug addiction or medical issues). In mediation, a board can then construct a resolution that complies with its responsibilities regarding foreclosure proceedings.¹⁶ Mediation allows a board to craft appropriate "public disclosures," while maintaining relevant privacy interests of the homeowner or the community. This cannot happen in an open court hearing, or in a monthly board meeting, where statements are a matter of public record.

e. It's Future Focused

Mediation assists parties in determining how they can work cooperatively going forward. This is critical for owners who intend to continue living in the same community. As the *Elderly Curmudgeon* above noted, "this will be the last place I live. I don't want to spend my final days fighting my neighbors." Mediators are not judges – they don't assign blame, nor do they judge one side or the other. Mediation doesn't look to resurrect the past behavior or actions any more than necessary to assist in a forward-looking resolution that makes sense for all concerned.

¹⁵ C.R.S. §§ 13-22-307

¹⁶ As codified in C.R.S. §§ 38-33.3-117, 38-33.3-209.5, 38-33.3-316, and 38-33.3-316.3; effective January 1, 2014

f. It's Binding and Enforceable

One of the great Mediation Myths, espoused mainly by its opponents, is that mediation is a waste of time and provides no closure or binding resolutions. However, per CCIOA¹⁷ and the Colorado Dispute Resolution Act (“CDRA”)¹⁸, agreements that are made in mediation and signed by all parties are contracts; they are binding and enforceable. When parties file them with the court as a stipulation, they can become judicially enforceable court orders, with all the contempt powers of the court behind them.

1. How do attorneys factor into mediation?

Although mediation is clearly a better way to resolve most HOA disputes, sometimes litigation is unavoidable. As seen above, the laws relating to HOA’s are complicated and voluminous. Most boards, owners and property managers have little knowledge of the relevant laws or the consequences for compliance failure. It is always important to become informed about one’s rights and obligations in an HOA. Securing advice from legal counsel can be critical to determine whether the dispute can be resolved early, without the costs of litigation, or if there needs to be a judicial determination by way of a lawsuit. Informed people make better decisions; they do not act from a position of desperation and fear. Spending an hour with an attorney, though at a cost, is far less expensive than preparing for and continuing through trial.



2. All are welcome in Mediation – Even attorneys!

Neither party is precluded from having counsel attend mediation in person, or available by phone, email, text or web connection. This too, is empowering for both sides. An attorney who is willing to provide discounted fees, or “unbundled services” (representing a client for one specific issue), can provide much needed insight in the most cost efficient manner. Finally, mediation does not deprive anyone of proceeding to, or continuing in court. Mediation allows parties (with or without attorneys) to understand certain aspects of the dispute, through a mutual data discovery (“*Oh, you mean we have to provide the Owner with the documents?*”), and an understanding of what laws apply to the situation (“*Oh, you mean I can smoke pot in my house, but not in my front yard?*”). The remaining issues (“*You are harassing me, because I am disabled, my service kangaroo is not a pet, and therefore you are violating my civil rights*”) may proceed to litigation. This saves parties time, money and confusion as to the real issues in dispute.

¹⁷ CRS §§ 38-33.3-124 (2) (b)-(c).

¹⁸ CRS §§ 13-22-301, 308. “Settlement of disputes. (1) If the parties involved in a dispute reach a full or partial agreement, the agreement upon request of the parties shall be reduced to writing and approved by the parties and their attorneys, if any. If reduced to writing and signed by the parties, the agreement may be presented to the court by any party or their attorneys, if any, as a stipulation and, if approved by the court, *shall be enforceable as an order of the court.*” (Emphasis added.)

VI. How does Mediation work?

An experienced, trained Mediator works with parties to help them discover the underlying issues that are driving the conflict. He or she focuses the discussion on the interests and concerns of the parties, not the blame or threats of future litigation. The mediator provides safe boundaries and guidelines to allow respectful, productive, forward- looking discussion to take place, thereby allowing each side to be heard, and to tell his/her story. Where parties reach a resolution, the mediator helps create the agreement as the parties want/need, such as:

- What will happen
- How will it happen
- When will it happen
- Who will pay, and by what time, and in what manner
- What happens if there is no compliance
- Other aspects necessary to add to the agreement (future communication protocol)
- Any other important provisions or terms that assist the parties going forward (such as a non-disparagement provision or a “Public Statement”)

VII. The real source of conflicts

So, we’ve talked about conflicts relating to violations of relevant statutes, codes or covenants, but let’s look at the real sources of conflict in HOA’s. **Most conflicts are emotionally based:**

- Passive/aggressive behavior: the “*you are not the boss of me*” argument, resulting in “accidental” keyed cars, trash cans knocked over, dog poop all over someone’s lawn or signage anonymously posted;
- Embarrassment: Failure to pay an imposed assessment, due to financial hardship such as a divorce, termination from work, or other medical issue;
- *Truth, Justice and the American Way*: I’ll pay my HOA dues when you finally fix my problem/shut that dog up/ move that RV!
- Escalating hostility and frustration due to ongoing neighbor-neighbor issues: “Barking Neighbors;” and,
- Disagreement over political, religious or personal views: ripping down community notices for upcoming meetings or get-togethers of a particular group.

Although the interesting topiary photo to the right may be initially humorous, it is this type of escalating conflict that can tear a community apart.



VIII. The cost of unresolved conflict

When conflict is allowed to continue unabated, the costs can be high for some, and unimaginable for others. In the case of the “barking neighbors” above, escalating behavior can include calling police for real or trumped up violations, public embarrassment and intimidation, and in extreme cases, physical violence or emotional abuse. Elderly residents suffer isolation and may even collapse under the pressure. Those with the financial ability simply move, but they take their stories with them.

Communities become polarized when board conflict has been allowed to continue, with no clear resolution. Toxic gossip can destroy relationships and ruin reputations. When a board feels it has no other alternative, it refuses to open meetings or provide documents, resulting in decreased transparency. In one circumstance, a community became so polarized over a board issue that the opposing side spent the evening secretly ripping down the announcements put up by the other side for an upcoming event.

For some, the conflict becomes too much and they explode. A recent, well publicized event involving a resident who took a bulldozer to his own community, plowing over cars (the photo to the right), fences and buildings, is a dark reminder of how an issue insignificant to some can become explosive to others.



IX. The cost of unresolved conflict to the community

Unresolved conflict not only affects the individuals immediately involved, but also the community at large. Litigious neighbors require HOA’s to spend money on legal fees, defending claims better handled out of court. Rogue boards and unrestrained property managers create ongoing conflict, distrust and a sense of powerlessness for the owners; especially elderly residents. Owners who have the ability to leave – do. After they leave, they let others know about how bad it is over at XYZ Community. Unresolved conflict can affect resale values and create negative PR for the community – who would want to live in a place that is run by “Terrorists”?



X. Resistance to using mediation for certain types of conflict

Certainly, there are some matters that are better addressed through litigation, but reasonable minds differ as to what they may be. In the end, if there is any chance that an informal, voluntary process could help parties hear each other and allow them to safely, confidentially settle their dispute – why wouldn’t that be the first step taken towards community conflict resolution?

XI. Traits of an effective HOA Community

➤ Knowledge is power: Become and stay informed

A board member is usually a volunteer position, and few associations offer training that provides in-depth guidance for inexperienced board members. If you choose to be on an HOA board, learn what your governing documents require of the Board, the property manager and the owners. Learn what laws apply to your own community. Homeowners have responsibilities, too. Every homeowner should read their governing documents and follow them. For a community to be successful, it's important to strive for a "we" perspective, which is not always easy.

➤ A little HOA self-awareness can go a long way: responsible boards make decisions for the many, not just a few

As a homeowner, remember that your board may make decisions that are unpopular and may inconvenience a few homeowners, but they are made for the long-term benefit of the entire community, not just you or your street. If you disagree about an issue, ask for a friendly *and respectful* face-to-face conversation with a Board Member; it will give both of you the opportunity to explain your perspective, which may not have been possible within the time constraints of a board meeting.

➤ Learn your communication protocols and follow them! Don't be "that guy."

If your community has communication protocols, learn what they are and follow them. If your property manager is the contact person for the garage gates malfunctioning, or the broken sprinkler going off at 2 am, *Call him*, not the board member who may be on vacation with his family. If you and your neighbor are having a dispute about noise, address it according to the community protocols, and don't ask the property manager or the board to step in and take a side – at least not until you have exercised all reasonable options to resolve the matter yourself. Treat your neighbors, the Board, and association manager with respect and courtesy – Remember *the Golden Rule*.

➤ Learn what your HOA has for its dispute resolution policy. If it doesn't include mediation – why not?

HOA's must have an ADR policy in place, and provide it to homeowners who request it. So, find out about your ADR policy. If mediation is not a fundamental part of it, *ask why not?* Begin a dialogue (in accordance with communication protocols, of course), that explores the advantages and options of mediation as a first resort in your community. If mediation is a part of the policy – follow it. It could be the answer to many, if not most of the conflicts, you face.

XII. Conclusion

Unless you win the Lottery, chances are you will remain in your HOA Community for some time. There will always be situations where seeking a legal remedy through the courts is the best course of action. But for the conflicts that begin as a communication or data disconnect, or even a simple failure to employ the Golden Rule, mediation is a proven method that allows neighbors to work together as neighbors should – informally, respectfully and proactively.

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