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# Using Mediation to Resolve Residential Co-Op Disputes: The Role of New York Law School

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USING MEDIATION TO RESOLVE  
RESIDENTIAL CO-OP DISPUTES:  
THE ROLE OF NEW YORK LAW SCHOOL

LAWRENCE M. GROSBURG\*

I. INTRODUCTION

New York Law School recently embarked on a project to promote the use of mediation by residents of cooperative corporations (“co-ops” or “co-op”) in the TriBeCa area of Manhattan. It is an interesting marriage of academia and public service. This effort is part of New York Law School’s larger “Law In TriBeCa” program. Loosely, the primary goal of this umbrella program is to strengthen the connection between the law school and its neighbors.<sup>1</sup> Another aim is to link our educational mandate and public service efforts to the needs and interests of the community.<sup>2</sup> Helping to make available mediation services to TriBeCa residents is thought to be one way to accomplish these goals. In one sense, however, there is not yet even full or meaningful recognition in the community of the need for or the desirability of mediation to resolve co-op disputes. Therefore, one of the objectives of this mediation project is to educate the community about the advantages of mediation to resolve co-op conflicts. Another is to facilitate the actual use of mediation to resolve co-op conflicts. From the academic side, the goal is to enhance our efforts to teach law students how mediation can be an effective mechanism to resolve conflicts, and also, how to mediate. The circumstances in which people reside in co-ops make mediation especially suitable for disputes that arise among them. Law students will benefit by helping educate the community about mediation, by observing mediation sessions, or by assisting in the conduct of

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\* Professor of Law, New York Law School. I want to thank Joshua Barsky, Class of 2002, for his excellent research assistance and for his encouragement and support of the development of this mediation project at New York Law School.

1. The Law in TriBeCa Program has included a speaker series to which the community has been invited, as well as service efforts such as those in response to the World Trade Center disaster.

2. The notion of bridging the gap between “town and gown” is not a new one. It is fascinating, nevertheless, how its periodic resurfacing in various places and ways can suddenly awaken both groups to the potential gains available through cooperative ventures. The one under discussion here is just such an example.

mediations. These are the goals and the potential mutual benefits of the TriBeCa Mediation Project. For a variety of reasons this seems a propitious time to begin such a project.

In Part II, I will summarize why the number of co-ops has risen in recent decades, *and*, in turn, discuss how the number of disputes in co-ops has similarly grown to reflect that increase in co-op residents. Part III addresses one consequence, namely the extraordinary growth in the judicial litigation of co-op conflicts. The rationale for mediation is briefly introduced in Part IV, which describes why this method of dispute resolution is more appropriate for certain kinds of conflicts, and explains why the co-op dispute is one such category where mediation seems preferable to litigation. The logistics of the mediation process are outlined in Part V. As part of the TriBeCa Mediation Project, we are using a concept that has proven useful to many corporations. Our Project will involve the solicitation of pledges from co-op boards to use mediation first, or at least encourage its use, before going to court to resolve a conflict. Part VI describes the somewhat analogous “corporate alternative dispute resolution (“ADR”) pledge” that has been adopted by many large public companies.<sup>3</sup> This concept could be transferred to the residential cooperative corporation. The goal, again, is to encourage co-op boards and their residents, first to appreciate and then to take advantage of the potential benefits of mediation.<sup>4</sup> Finally, Part VII summarizes the obstacles to effectuating these ideas, the chief one of which is the prevailing societal climate that predisposes individuals dealing with conflict to think first about approaching the situation in an adversarial manner. The first challenge is to recognize that changing such behavioral norms is difficult.<sup>5</sup>

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3. CPR Institute of Dispute Resolution is the organization that formulated the “pledge” concept. CPR was established in 1979 with the goal of assisting large corporations in resolving disputes and avoiding litigation. Charles Renfrew, *Into the 21<sup>st</sup> Century: Thought Pieces on Lawyering and Problem Solving and ADR*, 19 ALTERNATIVES TO THE HIGH COST OF LITIGATION 7 (2001).

4. As an additional incentive, we have established a cooperative arrangement with a group of trained mediators to offer a free consultation regarding the issue of the appropriateness of mediation for a particular dispute. There may also be the possibility of free or reduced rate mediation services for co-op residents depending on need.

5. *Cf.* John Woods, *Collaborative Divorce Gains a Foothold*, N.Y.L.J., Aug. 12, 2002, at 1 (while collaborative efforts to affect divorce are gaining ground, changing the adversarial culture with respect to matrimonial disputes is similarly difficult).

## II. THE RISE IN THE NUMBER OF CO-OPS

There has been an extraordinary increase in the number of residential cooperative corporations in New York City over the past twenty years. This growth is the product of several legislative enactments that modified existing housing, banking, and tax laws. In 1982, the New York City legislature enacted the "Goodman-Grannis" bill<sup>6</sup> which facilitated the conversion of rental apartment buildings into co-ops. This law ameliorated the severe constraints of the then existing rent control and rent stabilization laws.<sup>7</sup> The purpose of the post-Second World War rent regulations was to ensure adequate housing at reasonable rents. By the late 1970s, however, there were other housing problems that were more acute than rent control concerns. Residential neighborhoods were deteriorating rapidly due to landlord neglect. Real estate owners asserted that they lacked incentives to rehabilitate or to even maintain their buildings. Because of rent regulations, very few investors were making commitments to construct new rental housing in New York City.

The 1982 law encouraged the conversion of rental buildings into co-ops by enabling the conversion to occur through a "non-eviction" plan. This plan permitted as few as 15% of the building's tenants to initiate the conversion process, provided that the tenants who chose not to participate could remain and retain the benefits of the rent control and rent stabilization laws.<sup>8</sup> Previously, a conversion plan required 50% of the tenants in a building to agree to the conversion plan, following which the non-participating tenants could be evicted.<sup>9</sup> The 1982 amendment offered a much less harsh option insofar as accom-

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6. N.Y. GEN. BUS. § 352-eeee (McKinney Supp. 1982-1983). State Senator Goodman and Assemblyman Grannis were the two major sponsors of this legislation.

7. See Robert M. Nelson, Note, *Examining Cooperative Conversion: An Analysis of Recent New York Legislation*, 11 FORDHAM URB. L.J. 1089, 1104-1108 (1983).

8. See N.Y. GEN. BUS. § 352-eeee(1)(b),(c) (McKinney Supp. 1982-1983). As indicated above, this section is commonly known as the Goodman-Grannis Bill. The Act protects tenants residing in a building that is undergoing conversion to a coop from being harassed and illegally evicted by landlords and real estate developers. Under the Act, a "non-eviction" plan allows for conversion to cooperative housing if at least fifteen percent of the occupants of the dwelling unit or immediate family member agree to occupy the unit once it has become vacant. Under an eviction plan, fifty-one percent of the current occupants that agree to purchase their apartments, is needed to convert the building and evict the remaining residents who do not wish to or are unable to purchase their apartment.

9. *Id.*

modating those who did not want to or could not afford to participate in the purchase of their apartments through a conversion effort.<sup>10</sup>

This change led to a significant increase in conversion plans.<sup>11</sup> Once investors realized that conversion would be easier, it also produced a rise in the number of rental buildings they purchased.<sup>12</sup> Existing tenants who wished to retain the benefits of rent control or rent stabilization could remain, and at the same time, other tenants could much more easily become co-op owners.<sup>13</sup>

Another legislative change relating to the financing of co-op unit purchases also greatly contributed to the increase in co-op conversions. Previously, banks and finance companies viewed co-op loans as personal property loans and *not* as real property purchases financed by the traditional real estate mortgage. Shares in a co-op were viewed the same as shares of common stock in a business corporation and not as real property that could secure a mortgage. New York City enacted an amendment to the Banking Law that promoted co-op ownership through bank loans.<sup>14</sup> Under the amendment, co-op bank loans could now be secured "within ninety days from the making of the loan by an assignment or transfer of the stock or other evidence of ownership interest of the borrower and a proprietary lease."<sup>15</sup> While this banking change was enacted several years earlier, in 1971, its significance was enhanced when the non-eviction conversion changes became law in 1982. The two legislative changes reinforced the impact of each and contributed to the enormous growth of co-op conversion and ownership in the 1980s.

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10. See Nelson, *supra* note 7.

11. Richard J. Kane, Note, *The Financing of Cooperatives and Condominiums: A Retrospective*, 73 ST. JOHN'S L. REV. 101, 121-122 (1999).

12. *Id.* "[R]eal estate players were buying under-valued residential properties that were subject to rent control and rent stabilization, converting those buildings into cooperatives and condominiums and selling the units, which would ultimately break the rent control or rent stabilization cycle." *Id.* at 122.

13. See Bruce Czachor, Note, *Cooperative and Condominium Conversions in New York: The Tenant in Occupancy*, 31 N.Y.L. SCH. L. REV. 763 (1986).

14. N.Y. BANKING LAW § 235(8-a) (McKinney 1990). This section allows banks to place a one and one-half per centum per annum increase over what is normally prescribed by law on loans for real property. This section was enacted into law to give banks incentives to provide loans to purchasers of co-ops. It reflected recognition of the banks' reluctance to do so because co-op shares were viewed as personal not real property. The half per centum annum allowed above the normal interest rates on personal property loans was the inducement. See also Richard Siegler, *Proprietary Lease Modifications*, N.Y.L.J., July 13, 1990, at 3.

15. N.Y. BANKING LAW § 235(8-a) (McKinney 1990).

Finally, a federal amendment to the income tax laws provided a very attractive incentive to those contemplating an investment in a co-op apartment.<sup>16</sup> In 1986, the Internal Revenue Code was amended to permit the owners of shares in a residential co-op to take a tax deduction for their share of the deductible expenses of the residential cooperative corporation, such as a building mortgage interest or building taxes, provided that at least 80% of the income of the co-op is from tenant shareholders.<sup>17</sup> This change allowed the cooperative corporation's tax deductions to be passed through to the individual shareholders, which further increased the number of co-op conversions.<sup>18</sup> For example, in 1986 alone, New York State approved 443 conversion plans in New York City, and the total number of units converted in 1986 was 40,561. The number increased slightly in 1987.<sup>19</sup>

In addition to these legislative changes, there are other more subtle adjustments in American life styles that have contributed to the growth of co-ops.<sup>20</sup> The increase in two wage-earner families has produced a need for people to live closer to their work, and therefore, for urban multiple dwellings that are nearer to work-sites. The desire for enhanced security has also led to moves to co-op apartment buildings where the costs of additional security can be shared. Similarly, people seem to be busier than ever, and prefer not to have the maintenance responsibilities of individual homeowners. Increasingly, as the number of retired persons grows, the decision is to sell a house in the suburbs and move back to the city. All of these sociological trends have contributed further to the growth of co-op and condominium owners in urban areas.

### III. THE CORRELATIVE RISE IN CO-OP LITIGATION

It should not come as a surprise that as the number of people residing in co-ops has increased, so too has the number of conflicts

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16. I.R.C. § 216(b)(2) (2002). This section was amended in 1986 to include as a "person," either an individual or a corporation. It allows a flow through tax break from the cooperative corporation to the individual or "person" if 80% of the co-ops' revenue is derived from residential revenues.

17. *Id.*

18. See Czachor, *supra* note 13, at 763 n.3.

19. *Id.* at 763-764 n.4.

20. See Scott Mollen, *Alternate Dispute Resolution of Condominium and Cooperative Conflicts*, 73 ST. JOHNS LAW REV. 75, 77-8 (1999).

between and among such residents.<sup>21</sup> Indeed, for at least a couple of reasons, the rate of increase in conflicts is probably much greater than the growth rate in the numbers of co-op residents. Homeowners typically do not have common interior building walls that they share with their neighbors, let alone a floor that is the ceiling for the neighbor below (or the other way around). Usually, there is space between individual freestanding homes, possibly even significant acreage in some suburbs. The co-op resident in a multiple dwelling resides in a much different environment. The mere fact of this greater degree of closeness in a multiple dwelling co-op is likely to produce more conflict; it seems inevitable.<sup>22</sup>

Because of the more concentrated use of limited and shared space, co-ops also typically promulgate "house rules" of one sort or another. These might include anything from rules about pets,<sup>23</sup> to requirements for carpets on wood floors, to policies on when the elevators may be used to move large items such as furniture. To a significant extent, these rules constrain residents from pursuing their own needs and desires in contrast to more unfettered behavior if they were residing in a freestanding house. Such concessions to congregated living elicit intense reactions from those who comply and then observe violators not being penalized. Thus, more people living together in a relatively compressed area inevitably produces greater possibilities of

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21. One commentator cited statistics showing 4,328 Housing Court litigations involving co-ops over a three-month period in the boroughs of Brooklyn, Queens and Manhattan. *Id.* at 75. Those figures do not include the Bronx or conflicts that find their way into the State Supreme Court or the federal court. The latter, for example, would include such claims as those asserting racial discrimination in the purchase of co-ops. *See, e.g.,* *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032 (2d. Cir. 1979) (a leading case in the area of housing discrimination law).

22. "[T]he fact of more people living together in a relatively compressed area inevitably produces greater possibilities of conflicts arising." GERALD D. SHUTTLES, *THE SOCIAL CONSTRUCTION OF COMMUNITIES* 233-4 (1972). Dr. Shuttles, a sociologist, goes on to write with respect to the accompanying security concerns: "The quest of a good community is, among other things, a quest of neighborhood where one does not fear standing an arm's length from his neighbor, where one can divine the intent of someone heading down the sidewalk, or where one can share expressions . . . ."

23. *E.g.,* *Noble v. Murphy*, 612 N.E.2d 266, 268 (Mass. App. Ct. 1993) (residents of a condominium complex were fined at a rate of \$5/day for violating the house rules on keeping pets; the defendants were ultimately ordered to pay \$15,244.75 in penalties, costs and attorneys' fees); *Cf. Frank Cerebino, Condo Dweller Wins Cat Fight With Commandos*, *THE PALM BEACH POST*, Jan. 26, 2000, at B1 (a cat owner wins a dispute with a condominium with respect to compliance with rules on pets).

conflicts, whether from lack of fair enforcement of such rules or, simply, the fact of more disputes between co-op residents.

A second phenomenon is one that is a product of the change from the status of a renter to that of a homeowner. It likewise is not a startling observation that people generally are more committed to preserving the physical as well as aesthetic desirability of their homes when they own them, as opposed to when they rent them.<sup>24</sup> Similarly, owners take a greater interest in ensuring that the value of their investments is not adversely affected by decisions or actions taken by others, including fellow co-op owners, board members, or managing agents.

Still a third possible explanation of the increase in co-op disputes stems from the manner in which co-op boards approve prospective purchasers. Generally, the seller and prospective buyer of a home in the suburbs only have to deal with each other (and their lawyers and mortgagees) in negotiating and consummating the sale. The prospective purchaser of a co-op generally must be approved by the co-op board. This produces the possibility of a conflict between the potential buyer and the board, or between the seller (who wants the purchaser approved) and the board. It can also create significant conflicts between members of the board about whether to approve a particular purchaser.<sup>25</sup>

Litigation is no less costly for co-op disputes, nor the subject of any fewer delays due to general court congestion, than is the case for any other category of lawsuits.<sup>26</sup> In New York City, a special part of the Housing Court was recently established to hear co-op disputes.<sup>27</sup> While the purpose was to expedite the litigation of these disputes, it is too early to assess the results of this change. For reasons described in Part IV below (discussing ways to encourage greater use of mediation),

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24. Cf. Allison D. Christians, *Breaking the Subsidy Cycle: A Proposal for Affordable Housing*, 32 COLUM. J.L. & SOC. PROBS. 131, 153-4 (1999). In commenting on the impact of a tax credit program facilitating the transfer from rental status to ownership for low-income families, the author writes that "after years of dealing with landlord neglect, the tenants understood the benefits of their ownership interest immediately, and they have maintained the building's physical structure as well as appearance and safety." *Id.* at 154.

25. See *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d at 1032 (discrimination claim by purchaser against the co-op board).

26. Estimates of litigation costs in the United States range from \$100 billion annually to \$300 billion. Michael Netzley, *Alternative Dispute Resolution: A Business and Communications Strategy*, 4 BUS. COMMUNICATION QUARTERLY 83 (2001).

27. See Jay Romano, *Mediation Instead of Litigation*, N.Y. TIMES, Feb. 15, 1998, § 11, at 3 [hereinafter *Mediation*].

there may be even greater non-monetary costs for co-op litigation than other kinds of court battles. Unlike a tort claim between strangers, for example, the consequences of a bitter court battle with a next-door neighbor on your floor might be the creation of a permanent hostile living environment.

While there are unusual or outrageous lawsuits<sup>28</sup> in many areas of law, it seems that the number of ludicrous examples is disproportionately large in the co-op dispute category. One frequently cited case involved a dispute over who should pay the \$909 for window guards that resulted in litigation costs of over \$100,000.<sup>29</sup> The residents who did not want to pay for the window guards were held liable for all of the attorneys fees incurred in litigation: their own legal fees plus those of the co-op association. The losing resident in the case made the ultimate understatement at the conclusion of the case: "It's a disgusting amount of money. I certainly don't ever want to see a lawyer again."<sup>30</sup>

Some of this increase in the number of lawsuits arises out conflicts over house rules. As noted above, co-op house rules can include regulation of the manner in which renovations are completed, to the use of common areas, to the amounts of "flip taxes" on the sale of a co-op unit, to the cost of a parking space, to assessments for modernizing a lobby.<sup>31</sup> Co-ops are essentially run by a lay board (although usually a professional managing agent is hired by the board to oversee the day-to-day operation of the building). Board membership is a voluntary position. In that context, co-op residents are typically educated middle and upper-class individuals who often seem more easily disposed to question (i.e. pursue alternatives and criticize) the decisions of their neighbor-board members, than if all decisions were being made by professional real estate people.<sup>32</sup>

At the same time, the courts defer generally to the judgment of the co-op boards, even with their lay membership.<sup>33</sup> Indeed, as already indicated, the New York Court of Appeals has held that co-op boards are subject to the "business judgment" rule<sup>34</sup> in situations similar to

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28. *E.g.*, *Levandusky v. One Fifth Avenue Apartment Corp.*, 553 N.E.2d 1317 (N.Y. 1990).

29. Mary Voboril, *How \$909 Spat Cost \$100,000 in Legal Fees*, NEWSDAY, Mar. 6, 1994, at 20.

30. *Id.*

31. *See* Mollen, *supra* note 20, at 79-81.

32. *Id.*

33. *Levandusky*, 553 N.E.2d at 1318.

34. *Id.*

the window guard case<sup>35</sup> and other house rules cases,<sup>36</sup> and has clearly announced that the judiciary should not interfere with such decisions by trying to substitute their own judgment for that of the board.<sup>37</sup> Notwithstanding that grant of discretion to boards, the increase in co-op litigation has not slowed down.

#### IV. WHY MEDIATION FOR CO-OP DISPUTES?

Much has been written about the desirability of pursuing “problem-solving” negotiation methods as an alternative to knockdown, drag-out adversarial bargaining approaches.<sup>38</sup> Rather than viewing a conflict in zero-sum terms – that whatever one party gets, the other party loses – it often can be useful to try to see the dispute in “win-win” terms. One way to look at the mediation process is that it enables a mediator to play a problem-solving role with each of the parties to a dispute – to try to move the disputants off a rigid adversarial and competitive posture. This is a particularly useful alternative perspective if the parties to a dispute will be continuing to have a relationship after the conflict is concluded. This would include a dispute between an employer and her employee; a battle over custody and visitation between divorced parents; or, as I am suggesting in this essay, a conflict between two residents in a co-op when the parties will continue to be living as neighbors in a self-contained community.

This, then, was the context out of which arose the idea for the New York Law School TriBeCa Mediation Project. It developed from an informal conversation I had with the head of the Council of New York Cooperatives and Condominiums.<sup>39</sup> What we quickly discovered was that cooperative residential apartments were making very little use of mediation as a way to resolve disputes, despite the fact that co-op disputes seemed a logical match for mediation. Despite the logic, how-

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35. Voboril, *supra* note 29.

36. *E.g.*, Noble v. Murphy, 612 N.E.2d 266, 268 (Mass. App. Ct. 1993).

37. *Levandusky*, 553 N.E.2d at 1321.

38. The most famous example is the best-selling book, ROGER FISHER & WILLIAM URY, *GETTING TO YES* (1991).

39. Marc Luxemburg is the President of the Council of New York Cooperatives and Condominiums (“CYNOC”). The CYNOC was established in 1975 as a not-for-profit corporation that provides services for the New York area. The CYNOC lobbies local and state government on behalf of co-ops and condominium boards and associations. Additionally, the CYNOC provides its members with information on tax issues, management tips, policy concerns, and a full range of services relating to the needs of coop and condo residents, managers and boards.

ever, there has not been any noticeable increase in the use of mediation to resolve co-op conflicts. To the contrary, as indicated above, the level of traditional adversarial litigation has increased rapidly. This failure to make much use of mediation was not because no one had recognized the potential value of mediation for co-op disputes. Some number of lawyers and bar association groups had made concerted efforts in this regard.<sup>40</sup> Those efforts to date simply have not produced any significant results or achieved visibility in the world of co-ops. The conversation with Marc Luxemburg did lead, however, to a NYLS workshop designed for co-op board chairs to introduce them to the concept of mediation, and then, ultimately, to the inauguration of the Project itself.

As Mary Ann Rothman, the Executive Director of the Council of New York Cooperatives and Condominiums, succinctly put it, “[D]isputes between neighbors can poison an otherwise congenial atmosphere.”<sup>41</sup> Picture for a moment a fifteen-story building in which there is a dispute between an upstairs co-op resident with the person immediately below about leaks from the upstairs unit. However the conflict gets resolved, the two disputants will continue to reside in the building. Whether they like it or not, it is inevitable that at a minimum they will share a ride in a six-foot square elevator, let alone have to deal with a possible recurrence of the leak that led to the dispute in the first place. Everyone else in the building is likely to know about the conflict and reach their own conclusions about which of their neighbors behaved more outrageously. Is adversarial litigation the best way to deal with the initial conflict being addressed? One of the benefits of media-

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40. E.g., BRUCE CHOLST, WHEN TO LITIGATE, WHEN TO MEDIATE (1997) (a pamphlet prepared by New York practicing lawyer who also mediates); see also Walter Goldsmith, *Cooperative and Condominium Disputes*, N.Y.L.J., Oct. 21, 1994, at 1; Romano, *Mediation*, *supra* note 27, at 3. The author describes a program of the Association of the Bar of the City of New York that would encourage the use of mediation, and, indeed, make available for a very modest administrative fee, *pro bono* mediation services by trained mediators. This program that is still in effect, has yet to be fully accepted and developed for reasons not entirely clear. Factors contributing to the program's full acceptance may include those discussed below concerning the difficulties encountered in changing behavioral norms. A key distinction between the City Bar program and the Project discussed in this essay is that here, the disputants will have to pay a reasonable fee for mediation services, subject to the possibility there may be a reduced fee or no fee for first-time users who are low income residents. The thought here is that mediation will not be “valued” unless the users have a measurable stake in its outcome, as evidenced by the payment of a fee for the mediation services.

41. CHOLST, *supra* note 40, at *foreward*.

tion is that the entire process is confidential. And if the dispute goes to mediation at a very early stage (as it could if the co-op were to adopt the “pledge” to use ADR), it is likely that no one else need ever know about the conflict.

## V. THE LOGISTICS OF MEDIATION

Until relatively recently, mediation was not formally included among the methods of resolving co-op disputes. Form proprietary leases might have had an arbitration clause,<sup>42</sup> as a possible alternative to litigation.<sup>43</sup> But, it is only recently that mediation clauses have been proposed as useful additions to the standard terms of the form co-op proprietary lease.<sup>44</sup>

Mediation is a very flexible process. It can be conducted informally and may take place in a variety of settings, perhaps even in the co-op building itself – in a community room, for example, if it is suitable for such purposes. The parties can bring lawyers if they wish, but they are not required to do so. There also can be a list of lawyers available for consulting before, during, or after the mediation. Ideally, the focus would be on communication between the parties. It is, after all, the parties who will be the ones who have to live with each other after the dispute is over and live with the terms of the resolution. Depending on how complicated the issue is, parties may or may not want to submit a “pre-mediation statement” to the mediator. Selection of the mediator might proceed in any of several ways, along the lines proposed to be used in the New York Law School TriBeCa Mediation Project described here.

A major potential benefit of mediation in the co-op context is that the parties — not a third party such as a judge or an arbitrator — can

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42. Jay Romano, *Proprietary Co-op Lease: New Model*, N.Y. TIMES, Dec. 17, 2000, § 11, at 7 [hereinafter *New Model*].

43. “Use of arbitration and mediation in New York cooperatives and condominiums has thus far been limited. Arbitration clauses . . . have generally been confined to such matters as determination of respective amounts of energy use for two or more units and disputes regarding common charges. Mediation clauses have been all but non-existent.” Goldsmith, *supra* note 40.

44. CYNC has developed a form proprietary lease as a model document that members may consult in amending and updating their own proprietary leases. In the latest version of the CYNC lease — version 2.02 — mediation was added to arbitration as an additional ADR method of dispute resolution. E-mail from Mary Ann Rothman, Executive Director, CYNC, to Lawrence M. Grosberg (Mar. 30, 2002) (on file with the author).

shape the terms of any agreement reached. They can design something that makes sense for them, whether or not it makes sense to, or would be likely to be devised by others, not party to the dispute. A noise dispute comes immediately to mind as a case in point. Setting hours for certain kinds of music or activities can be quite different for any two parties with views on the subject.<sup>45</sup> Because co-op disputants will be continuing to reside in the same building and inevitably come in contact with each other, as one lawyer active in co-op litigation wrote, "Mediation is a 'natural' for resolving the vast majority of co-op/condo disputes."<sup>46</sup>

As indicated above, the cost of litigating co-op conflicts can be high. It is not only the individual resident for whom it can be expensive; co-op boards also want to avoid litigation costs. One commentator noted, "With hourly rates ranging from \$250 - \$400 for an experienced trial lawyer, litigation can quickly become a black hole for shareholder dollars. . . . It is the area most likely to wreak havoc with the co-op's budget because it is so unpredictable."<sup>47</sup> Because of the high costs of litigation, another commentator has recommended that compulsory mediation-arbitration be instituted for all co-op disputes.<sup>48</sup>

Finally, if no resolution is reached using mediation, neither party is prejudiced from going to court later. Any agreement reached through mediation is completely voluntary. If the parties cannot agree, they may proceed otherwise, including the option to go to court. Mediation, as one commentator noted, is a "no-lose" proposition.<sup>49</sup>

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45. Benjamin F. Sands, *The Subtle Art of Mediation: Solving Disputes Between Residents*, COOPERATOR, at [http://directory.cooperator.com/archives/article.asp?qa\\_id=00000303](http://directory.cooperator.com/archives/article.asp?qa_id=00000303) (last visited Sept 9, 2002) (in one noise dispute, a mediated solution included the simple act of moving stereo speakers).

46. CHOLST, *supra* note 40, at 7; see also, Elizabeth Lent, *Love Thy Neighbor . . . As Best You Can: Dealing With Difficult Residents*, COOPERATOR, at [http://directory.cooperator.com/archives/article.asp?qa\\_id=00000592](http://directory.cooperator.com/archives/article.asp?qa_id=00000592) (Dec.-Jan. 2001) (last visited Sept. 8, 2002).

47. Jay Romano, *Reducing Legal Costs in a Co-op*, N.Y. TIMES, Aug. 18, 1996, § 9, at 2.

48. Alvin I. Apfelberg, *Laying Down the Law: Mediation-Arbitration v. Litigation*, COOPERATOR, at [http://directory.cooperator.com/archives/article.asp?qa\\_id=00000537](http://directory.cooperator.com/archives/article.asp?qa_id=00000537) (June 2000) (last visited Sept. 8, 2002) (Nevada and Texas have such statutes for all civil litigation, not only co-op disputes).

49. Angelina Mason, *Mediation as a First Resort: Preserving Resident Relations*, COOPERATOR, at [http://directory.cooperator.com/archives/article.asp?qa\\_id=00000129](http://directory.cooperator.com/archives/article.asp?qa_id=00000129) (last visited Sept.8, 2002).

## VI. THE CORPORATE ADR PLEDGE

The use of ADR in the business world is increasing. One reason for this is that there is increasing recognition that traditional litigation often is a futile and a very expensive way to resolve disputes. There also is greater appreciation of the need to foster constructive long-term relationships with business associates and increased realization that contentious litigation against anyone with whom future business is contemplated is counterproductive. This awareness has resulted in preventive measures designed to minimize conflicts at the outset of the business relationship,<sup>50</sup> as well as more amicable methods of resolving conflicts after the relationship has begun. This factor has led to increased use of mediation.

More specifically, one way to approach the dispute resolution issue was devised by the CPR Institute for Dispute Resolution, an organization whose focus is on the needs of commercial corporations.<sup>51</sup> CPR promoted the concept of the non-binding pledge to use ADR *before* resorting to the courts, whether as a defendant being sued or as a potential plaintiff in a lawsuit not yet filed. This pledge addressed a deeply ingrained aspect of traditional competitive negotiating. In that adversarial context, the notion of accepted behavioral norm was – and still is to a great extent – that anyone who made a first offer in a negotiation was the weaker of the two adversaries. Otherwise, that initiator of an offer would simply prepare to fight and to let the “best man” win. There clearly was a competitive macho element involved in this approach.<sup>52</sup> A related norm was that anyone who proposed mediation

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50. George Dent, *Lawyers and Trust in Strategic Alliances*, Unpublished Paper presented to New York Law School Faculty, Mar. 13, 2002. (Professor Dent of Case Western University Law School, focuses on the importance of lawyers playing a constructive problem-solving role in helping to negotiate business relationships that will be continuing and which will require the development of viable bases of communicating and cooperative working relationships.).

51. CPR was created in 1979 for the purpose of assisting corporations to settle disputes and avoid the delays and costs of litigation. Renfrew, *supra* note 3 at 7. CPR's mission is to install alternative dispute resolution (ADR) into the mainstream of corporate law departments and law firm offices — to make ADR the preferred delivery system for the legal profession. To fulfill its mission, CPR is engaged in an integrated agenda of research and development, education, advocacy and dispute resolution. It is a leading proponent of party-managed ADR and has been successful in promoting self-administered ADR. CPR Institute for Dispute Resolution, at <http://www.cpradr.org/pledges.htm> (last visited Sept. 10, 2002).

52. MEDIATION: THEORY, POLICY AND PRACTICE 646 (Carrie Menkel-Meadow ed., Ashgate 2d ed. 2001) (suggesting that in the post-modern world of law practice, adver-

was, similarly, a soft person whose underlying position lacked merit. What the CPR pledge enabled the participating corporation to do was ameliorate the perception that the party initiating the ADR discussion was weak. While it could not eliminate that response altogether, it certainly did make the proposal to consider ADR much easier. A company that had adopted the CPR policy of considering ADR first would go to the party with whom it had a dispute and say some variation of the following:

You may not be familiar with the CPR pledge, but we have adopted as a firm corporate policy that whenever we have any dispute — whether as a defendant *or* as potential plaintiff — we first exhaust efforts to resolve the dispute through ADR, preferably mediation or some similar use of a third party to facilitate the negotiation or mediation of a voluntarily reached agreement. Only if that proves unsuccessful do we resort to the courts. So for that reason, we want to know if you want to consider, first, an ADR method of resolving our conflict.

Over “800 corporations have subscribed to the CPR Corporate Policy Statement on Alternatives to Litigation which obligates them to explore the use of ADR in disputes with other signers.”<sup>53</sup> By an approach such as this, companies may assert the same policy to non-signers as to signers. This pledge has made an impact on changing the norms of corporate behavior. Has it eliminated all aggressive negotiating? Clearly that has not occurred. Competitive negotiating (even in the context of mediating)<sup>54</sup> and the occasional “scorched earth” tactics are certainly still on the scene. Yet, it seems indisputable that proposing ADR or even more specifically, mediation, at the very early stages

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sarial perceptions based on gender should be examined carefully). “In feminist epistemology more generally, philosophers of science have argued that even the construction of questions of ‘truth’ in science have depended upon the ‘bias’ of the masculinist view of reality, [relying in part] on the metaphors of ‘competition’ and ‘survival of the fittest’ and the struggle of the cell as examples.” *Id.* at n.62 (citing SANDRA HARDING, *THE SCIENCE QUESTION IN FEMINISM* (1986); EVELYN F. KELLER, *A FEELING FOR THE ORGANISM: THE LIFE AND WORK OF BARBARA McCLINTOCK* (1983)).

53. The 800 corporations also signed the statement “on behalf of their 3200 domestic operating subsidiaries.” Over 1500 law firms have signed a similar pledge to counsel their clients about ADR options. See CPR Institute for Dispute Resolution, *supra* note 52.

54. The following title for a CLE program is frequently cited: “*How to Win in Mediation?*”

of a conflict is no longer an unusual event.<sup>55</sup> Serious consideration is being given to the use of mediation at all levels in the corporate culture.

## VII. CHANGING THE WAYS PEOPLE TRY TO RESOLVE DISPUTES

In the interests of increasing the use of mediation to resolve co-op disputes, the NYLS TriBeCa Mediation Project is encouraging co-op boards to adopt a policy that parallels the CPR corporate pledge. That could be done in one or two ways. Informally, a co-op board could pass a resolution effecting the following policy:

With respect to any dispute that arises in our co-op, either between residents, or between the board and a resident or between a staff member and a resident or the board, the chair of the board shall take steps to strongly encourage the parties to the dispute (including the board) to use mediation to resolve the dispute before resorting to the courts.

A more permanent change would be to adopt an amendment to the existing proprietary leases in a co-op.<sup>56</sup> Gaining the requisite board and shareholder approvals to do this however, can be cumbersome. In the long run, that probably is the best way to go.

As part of the effort to implement this policy change, the board would publicize in newsletters, or a comparable method of communication with co-op residents, the fact of this new policy and would request that any conflict first be brought to the attention of the board chair or a designee (in confidence) so that the mechanics for initiating the mediation process might be explained to the disputant(s).<sup>57</sup> As indicated above, as an incentive to the boards to make these mediation pledges, the TriBeCa Mediation Project might provide free consultation as to whether mediation is appropriate and perhaps also media-

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55. Harry Mazadoorian, *Designing Corporate ADR Systems*, N.Y.L.J., Aug. 23, 1999, at S3 (citing the fact of 800 corporate signatories to the CPR pledge as evidence of corporate "preference for ADR").

56. See Romano, *New Model*, *supra* note 42.

57. One experienced co-op lawyer has written that a co-op board could even adopt a "house rule" "requiring" parties to use mediation before resorting to court. Martin Librett, *Change is Good!: Updating House Rules Helps Avoid Conflicts*, COOPERATOR, at [http://directory.cooperator.com/archives/article.asp?qa\\_id=00000307](http://directory.cooperator.com/archives/article.asp?qa_id=00000307) (last visited Sept. 9, 2002). Mr. Librett does concede that the courts have yet to address the question of a board's authority to promulgate such a rule. But, as indicated in the text, a board resolution adopting a CPR pledge would *not* require the use of ADR; it would only require that it be considered before going to court.

tion services for reduced fees or even no fees for a first use of mediation or if the parties are unable to pay for a mediator.

Will this change the nature of resolving conflicts in co-ops? Certainly not overnight. The generally litigious nature of Americans has been documented extensively.<sup>58</sup> Whether that is good or bad or indifferent, is well beyond the scope of this short essay. However, it is clear that our behavioral norms result in reinforcement of adversarial tendencies and that those norms will not be easily changed. This fact is relevant to how we resolve all of our various conflicts, and not just those that arise in co-ops. This in turn is the challenge of the ADR movement generally: How to raise the consciousness of disputants to the fact that there may be effective conflict resolution methods that are alternatives to the traditional means of adversarial litigation. This does not mean that mediation or other ADR options should be used in all conflicts. Rather, it simply means we should more readily recognize while there is time for consideration of options, that there are alternatives to litigating.

Aside from all of the specific reasons cited above as to why co-op residents have and address conflicts as they do, it has been observed that "after relationships involving love and/or sex, the next most passionate relationship in our society is that of the landlord-tenant and its related configurations,"<sup>59</sup> such as found in the co-op context. The question is whether the contentious character of such relationships can be channeled in a constructive and pragmatic direction. In almost all co-op conflicts, the parties remain residents and neighbors after the immediate cause of the conflict has subsided. Is there a way for that continuing relationship to be, if not friendly, at least not contentious? It is for that same reason that mediation often is recommended in domestic relations matters such as custody and visitation disputes, where the parents necessarily must continue to communicate and relate to each other, at least as long as the children are minors. Notwithstanding that observation, there continues to be much extremely contentious divorce litigation, while ADR proponents continue to promote reasoned consideration of non-litigation options in the domestic relations area.

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The initiation of the New York Law School's TriBeCa Mediation Project is intended to encourage the consideration of, and then the use of mediation, for the numerous reasons noted above. While the

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58. JETHRO K. LIEBERMAN, *THE LITIGIOUS SOCIETY*, at *foreword* (1981).

59. Mollen, *supra* note 20.

great increase in co-ops is a relatively recent phenomenon, this may also be the time to develop a less contentious approach to disputes in this context.

