

Hawaii Condominium Bulletin

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Education Trust Fund

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Live or Virtual? Is the Future Here to Stay? Born of Necessity. Driven by Ease? by Louis Chang, Esq.

Over the past year, we have been forced to learn to use virtual technologies. Many have come to appreciate, even love, the ease, convenience, flexibility, time and cost savings associated with meetings, hearings, mediations, arbitrations and conferences conducted via video conferencing technologies such as Zoom, Teams and others. Indeed, the advantages are many, including:

1. Ease of scheduling and gaining participation of busy people in far-flung locales
2. Cheaper
3. Efficient
4. Saves time, travel costs
5. No Commuting
6. Working in the comfort of own home or office
7. Safety in a pandemic, safety and reduced risk from personal aggression
8. Great tools, sharing screen, private conference rooms, whiteboards for drawing, group drafting of documents, muting and turning video cameras on and off.



There seems to be a growing expectation that our future interactions, negotiations, mediations and arbitrations will largely be conducted virtually. If that is so, what might we lose? In person interactions, discussions and negotiations can be described as a rich or full medium for human engagement. When we are physically present and together, we have the full range of communication, words, eye contact, body language and tone of voice. We have a full view of faces, gestures, reactions and responses. There is greater synchronicity in the human interaction with the opportunity to touch, interact, relate informally and to move around. We can share human experiences more easily, we can share food, treats, offer tea or coffee. In such a rich medium, it is easier to develop a sense of commonality or "We"ness.

In contrast, with virtual interactions, a leaner medium for human engagement, there are potential shortcomings. They include:

1. A sense of distance and detachment. Participants are viewed in separate visual boxes. People appear to be less engaged
2. Less party commitment, investment and focus can make it seem easier to withdraw from difficult discussions and negotiations
3. The virtual environment reinforces a sense of separation and allows more group think, demonizing of others and negative attribution biases
4. Sense of "Other"ness

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Message from the Chair

Greetings,

Welcome to December and the holiday season.

Fundamentals of Successfully Operating an Association was held on Saturday October 23. Presented by CAI Hawaii and subsidized by the Real Estate Commission, 416 people registered for this 3-hour webinar that featured 6 speakers discussing the basics of operating a condominium association. To view the webinar and any of the speakers, click on to the link here, www.caihawaii.org or visit the Real Estate Branch website at www.hawaii.gov/hirec for a video of the event.

This edition of the Condominium Bulletin highlights the processes of mediation and voluntary binding arbitration as a means of resolving condominium disputes outside of the courtroom. You'll find contact information on all the private providers that offer subsidized mediation and voluntary binding arbitration to condo owners in associations registered with the Real Estate Branch. (Another good reason to make sure your condo association is registered with the REB.)

With so much of our personal and professional interactions taking place now on an electronic platform, including mediation and arbitration, how does this work? Find out in a piece by attorney Lou Chang. Mr. Chang has been practicing law and conducting mediations and arbitrations for over 30 years.

Tracy Wiltgen, Executive Director of the Mediation Center of the Pacific, established in 1979, and one of the oldest dispute resolution centers in the United States, offers a brief description of and the differences between facilitative and evaluative mediation and respective benefits of each style. Both of these styles of mediations are subsidized by the REB.

Keep up with the current condo issues, legislative news and educational events for the condo community, by signing up for the Commission's quarterly email subscription service. Get it at the link here, <http://cca.hawaii.gov/reb/subscribe>.

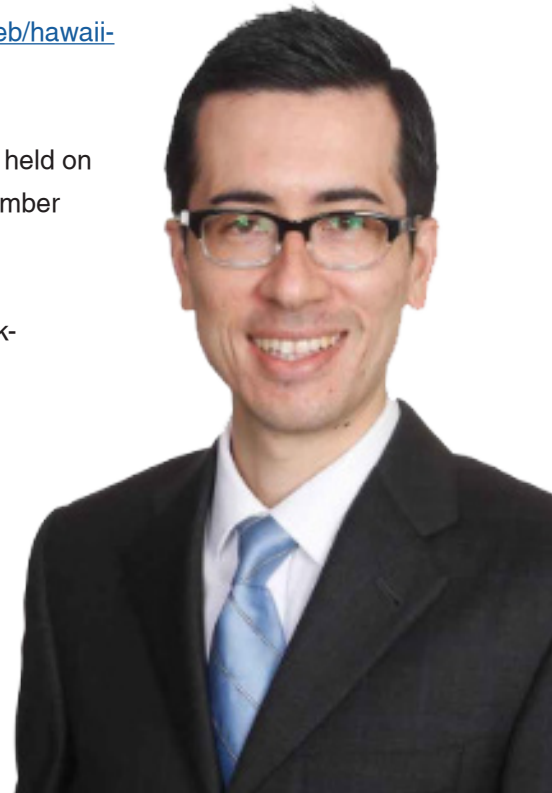
To view any of our 15 educational videos, click the link here <https://cca.hawaii.gov/reb/hawaii-condo-living-guide/>.

All are welcome to attend the monthly Real Estate Commission meetings which are held on Zoom; let us know you'll be attending, and we'll send you a link to join in. The December Commission meeting will be held on December 17, 2021.

Stay safe everyone. Have a happy new year, a peaceful 2022, and thank you for taking the time to read our Condominium Bulletin.

John R. Love

Chair, Condominium Review Committee



Live or Virtual? Is the Future Here to Stay?

Born of Necessity. Driven by Ease? (cont. from page 1)

5. Shorter and reduced range of communication, nods, gestures, facial expressions, eye communications, sounds
6. Head & shoulders body language of view allows less complete observation of communication cues
7. Sequential communications with some video lag
8. Multi-tasking & distractions
9. Less eye-contact.

There are other challenges presented by the virtual environment. We are learning to watch out for “zoom fatigue”. With videoconferencing, being on camera can create tension. The sense that everyone is looking at you and the worry that you have to look good can be uncomfortable. There is also the risk of multi-sensory brain overload. There is much more to see, listen to, process, evaluate and assess. There are multiple video boxes to monitor. There is also a growing culture of people having short attention spans. With all that’s going on, multitasking and distractions, people can feel mental and physical exhaustion.

For negotiations and mediations, the use of virtual technologies and videoconferencing has proven to be an amazing, effective and productive tool. We may need to be sensitive to identifying the kinds of situations and disputes that can be productively and effectively conducted virtually and those that may be better handled in person. I, for one, hope that we don’t lose the human touch and succumb to the temptation of having all of our communications and interactions done on a videoconferencing platform. The pleasure and richness of in-person human interaction can be critically important in the development of trust, establishment of rapport and building of relationships. As a mediator, my sense is that where ongoing relationships are important, such as in business, partnership, family and divorce conflicts, the human touch and dynamic may be more effectively conducted, managed and handled directly and in person. For those of you who might be interested, there is an insightful discussion of the differences in consideration associated with negotiations and interactions conducted in person or by written text, email, telephone and videoconferencing. The author, Noah Ebner, wrote a chapter entitled “The Human Touch in ODR: Trust, Empathy, and Social Intuition in Online Negotiation and Mediation” for an upcoming book. If you can’t find it by googling the author and title, feel free to contact me for a copy.

There are things that we, as negotiators and mediators, can do to try to minimize the disadvantages associated with utilizing virtual technologies. Before engaging in negotiations and before conducting mediated discussions, negotiators and mediators can contact, meet and connect with participants. Establishing a human connection and sharing of commonalities is fundamentally important for positive human interactions. If interactions are limited to videoconferencing, it is still possible to chat, talk story and to draw connections. We can do things to maintain a sense of authenticity and to humanize our interactions. Consider selecting a comfortable or thematic virtual screen for your videoconferencing. Pictures, music and stuff visible in your video background and a participants’ video background can be the source of discussion and an opportunity to share commonalities. You can even have a virtual handshake or a fist bump with starburst on screen. You can unmask yourself and be human, personable, present and real. Not everyone is comfortable utilizing video conference technologies. So, one thing that can be done is to arrange for a “tech check” to make sure that people can connect and have a steady and adequate Wi-Fi connection. You can help participants, have good sound and video and look good, comfortable and competent in an online environment.

During video conference negotiations and mediations, it is also good practice to check in with each other frequently to make sure people are comfortable. People should consider asking more clarifying questions to confirm that communications are heard and understood. Taking frequent and regular breaks is also helpful. If possible, doing something physical or fun can be helpful. Having an opportunity to stretch, go outside, look at the clouds, rainbows and horizon entities in the breaths can be relaxing and helpful.

Louis Chang has more than 30 years of experience as a mediator, arbitrator and lawyer in Hawaii. His practice now focuses nearly exclusively on work as a neutral mediator and arbitrator. He can be reached at louchang@hula.net.

Facilitative vs Evaluative Mediation of Condominium Disputes: What's the Difference? by Tracy Wiltgen, Esq.

The Hawaii State Legislature and the Real Estate Branch of the Department of Commerce and Consumer Affairs strongly support the use of dispute resolution processes to address conflicts that arise among condominium owners and boards. This is evidenced by the facts that the Hawaii Revised Statutes (HRS) Chapter 514B mandates mediation upon a written request by a board or owner to the other party and the process is subsidized through the Condominium Education Trust Fund. To further promote the use of dispute resolution services for addressing disputes arising in condominium associations, every few years, additional statutory changes are implemented.

For example, in 2015 HRS Chapter 514B was amended to include “evaluative” mediation as an option to the traditional “facilitative” mediation that was available. Then more recently, the use of evaluative mediation was further encouraged when HRS § 514B-161 was again amended to state that “if evaluative mediation is requested in writing by one of the parties pursuant to subsection (a), the other party cannot choose to do facilitative mediation instead, and any attempt to do so shall be treated as a rejection to mediate.”

With the ever-growing offering of dispute resolution services to address condominium disputes, and the clear emphasis on using evaluative mediation, it is important for boards and owners to understand the mediation approaches, and which approach is best suited for each situation. When considering mediation, it is first important to remember that irrespective of the approach, there are certain core elements to every mediation, as well as specific values or principles, that apply to every mediator.

All mediations are comprised of a convening phase when the parties agree to mediate, an opening, a fact-finding or information-sharing phase, a negotiation phase, and a closing. How mediators handle each phase depends on their individual style and their determination how to best work with the parties. Thus, some mediators will speak directly to each party in the convening phase, while others will have administrative staff handle the logistics. Similarly, some mediators will conduct the opening in a joint session with everyone in the room and then later move to private sessions with each party, while others will meet separately with each party throughout the entire mediation. Because of the flexibility of the mediation process and the different styles of mediators in managing the process, it is important for parties to understand prior to the mediation session, how a mediator plans to manage the various phases of the mediation, as well as what the mediator approach will be.

Second, all mediators are guided by the same principles of remaining impartial and promoting the self-determination of the parties. This means that mediators disclose any potential conflicts of interest prior to mediating, and they don't take sides during the mediation. Additionally, mediators don't push for one party over the other, and they don't make decisions. Even when evaluative mediators provide an assessment of the issues based on their expertise, the decision of whether to accept that assessment and reach an agreement, is ultimately up to the parties.

Differences in mediator approaches focus primarily on the tools and strategies used to assist parties in reaching a resolution. While all mediators ask questions and gather information to set the stage for negotiations, mediators who use the facilitative approach generally guide the discussion based on the underlying interests of the parties, without providing an opinion or judgment regarding the merits of the claims or the likely judicial outcome of the case. This doesn't mean they won't offer suggestions when the parties are stuck. In the beginning of the mediation, mediators using a facilitative approach will focus more on the parties' stories, feelings, and needs, and negotiations will then be centered primarily on how the parties' needs, or interests can be met. Mediators who use the evaluative approach on the other hand, focus more on the merits of the case and who would be more likely to prevail if the case were to proceed to court. Negotiations focus primarily on a legal analysis rather than the interests of the parties. Mediators who use an evaluative approach must have subject matter expertise of condominium law and case law to provide an effective assessment of the strengths and weaknesses of each parties' position. Because mediators using the facilitative approach primarily focus on interest-based negotiation, they may not have sufficient expertise and knowledge of the governing laws to use evaluation as a tool if desired by the parties.

Both mediation approaches have advantages and disadvantages. A facilitative approach provides the parties with the opportunity to focus on more than the presenting legal issues and therefore, can allow for greater creativity in problem-solving. Equally important, because more time is invested in listening to the stories of the respective parties to understand their interests and negotiate solutions based on those interests, both parties may leave with a sense of satisfaction and their relationship may ultimately be strengthened. However, the facilitative approach may take longer to ensure that everyone feels heard and to thoroughly explore a variety of options that could meet both parties' interests. Parties who believe they have a strong legal case and would prevail in court, may be frustrated that the mediator didn't emphasize this perspective, and instead invested time in exploring feelings and needs.

Facilitative vs Evaluative Mediation of Condominium Disputes: What's the Difference? (cont. from page 4)

An evaluative approach can be effective when the parties have extremely different perspectives of the law. By providing the parties with an expert evaluation of the case, a party with a weaker case may recognize the value of settling rather than wasting more time and money fighting. In other instances, both parties may be motivated to compromise, if the mediator's assessment of the facts indicates that neither party has a strong case. If both parties are open to the mediator's assessment, the process may move much faster. However, one or both parties may walk away feeling frustrated or even coerced because there wasn't enough time dedicated to listening to their interests and concerns. Equally important, if a party feels they haven't been heard and the mediator makes an assessment that the party has a weak case, then that party may feel that the mediator is not impartial and thus refuse to reach an agreement at the last minute. This outcome will leave both parties feeling frustrated with increased animosity towards each other.

To determine which approach may be the most productive, parties should consider several factors including whether: the dispute is in the early stages; one or both parties are represented by attorneys; strengthening or maintaining a cordial relationship between the parties is important; and whether the dispute is about the law or about communication, miscommunication, fairness, feelings, and/or personalities. If a dispute is in the early stages, attorneys won't be involved in the conversation, and the relationship between the parties is valued, then a facilitative approach may be ideal. On the other hand, if the board and owner have been in conflict over the issue for an extended period, both parties are represented by attorneys, then an evaluative approach may be needed to help move the parties forward to a resolution.

Conflict is a fact of life, particularly within condominium associations that are comprised of diverse people living closely together and governed by a myriad of bylaws and rules. Due to these challenges and the fact that boards and owners have continuing relationships, the sooner mediation is accessed, the more likely the process will result in a successful outcome. And remember, in condominium mediations, a successful outcome is more than a written agreement. A truly successful condominium mediation resolves the immediate issues and enables the parties to move forward without continued fighting and animosity in the future. To achieve that, the parties need to feel that they were truly heard and that the process was fair.

Tracey Wiltgen, Esq., is the Executive Director of the Mediation Center of the Pacific, a non-profit corporation that assists over 7,000 people annually in preventing and resolving conflict.

Spotlight on Ku'ikahi

Hilo's Ku'ikahi Mediation Center has been "finding solutions, growing peace" since 1983. It is one of the REB's subsidized mediation providers and one of two on Hawai'i Island, the other being West Hawai'i Mediation Center.

Ku'ikahi has an active community outreach program as part of its efforts to increase public awareness and acceptance of mediation as a form of dispute resolution. It offers a monthly "Brown Bag Lunch Series" as well as Zoom presentations on topics such as bringing tenants and landlords together to avoid eviction; managing stress; handling and dealing with change; and the best options for resolving conflicts.



Executive director Julie Mitchell concludes a successful mediation.

Ku'ikahi has a mediation program devoted to landlord/tenant evictions (Landlord Tenant Eviction Mediation Program) and makes regular presentations to groups such as the Hawai'i County Bar Association and the National Association of Residential Property Managers on this program and on the eviction moratorium.

Ku'ikahi can be seen on Na Leo TV and in articles and public service announcements in the print media via Hawai'i Tribune-Herald and Big Island Now.

Since 1983, Ku'ikahi has been a part of the Hilo area community and invested in "finding solutions, growing peace". Give them a call at (808) 935.7844.

Ask the Condominium Specialist

Q: I've been involved in an ongoing dispute with my condominium association. I understand that the Real Estate Branch offers subsidized mediation for condo owners to help resolve disputes. Where can I get more information about this?

A: REB has been subsidizing mediation with private mediation providers as a means of solving condo owner disputes since the early 1990s. Because the Hawaii condominium law is based on the philosophy of self-governance by the owners with little jurisdiction given to the government for resolving disputes, mediation is the first line of defense in resolving disputes among owners, including board members.

Information on all of our private mediation providers can be found at our website here - www.hawaii.gov/hirec. The parties to a mediation pay a nominal cost, with the remainder subsidized by the Condominium Education Trust Fund.

Why attempt mediation? First, it's the least costly form of private dispute resolution, with the subsidy from the REB putting this option within many owners' financial reach. Mediation can often reach a resolution in a matter of hours, compared to days, weeks or months' long litigation and litigation's related costs.

Mediation allows the participants a greater role in the resolution by allowing the mediating owners, to some extent, to craft their own solutions beyond what could be accomplished in a court hearing as well as mediation being a collaborative process, allowing the parties to fully invest in the resolution process and the settlement agreement.

To find out more information on the process, including the option of voluntary binding arbitration, contact a mediation provider of your choice from our list which is also included in this bulletin.

While not every case will settle, with evaluative mediation, the parties leave with the benefit of a neutral perspective of their case for future consideration of the dispute which did not exist before the mediation.

For a discussion and explanation of the differences between facilitative and evaluative mediation, both of which are offered through the REBs subsidized providers, see Tracy Wiltgen's article in this edition of the bulletin.

The information provided herein is informal and intended for general informational purposes only. Consult with an attorney familiar with the Hawaii condominium law for specific legal advice regarding your situation.



Mediation Case Summaries

From September 2021 through November 2021, the following condominium mediations or arbitrations were conducted pursuant to Hawai'i Revised Statutes §§ 514B-161 and 514B-162.5 and subsidized by the Real Estate Commission for registered condominium associations. The Mediation Center of the Pacific conducted additional condominium mediations through the District Courts while mediation providers conducted community outreach in their respective communities.

Dispute Prevention and Resolution, Inc.

AOUO vs. Owner	Dispute over access to owner's unit for work on common element.	Mediated to agreement.
Owner vs. AOUO	Owner claimed damages to unit from common element leak. While the mediation has ended, the parties continue to review the mediator's proposal for settlement.	
Owner vs. AOUO	Owner alleges violation of the bylaws by the AOUO in AOUOs refusal to pay for damages to owner's unit.	Mediated; no agreement.
Owner vs. AOUO	Dispute regarding various fees imposed on owner and subsequent lien on owner's unit.	Mediated; no agreement.
Owners vs. AOUO	Owners allege various violations of association governing documents, including misspending of AOUO funds on unit doors and retaliation against owners. While active mediation has ended, all parties continue to review the mediator's proposal for settlement.	
Owner vs. AOUO	Disagreement over whether widening of owners driveway is allowed under the association documents.	Mediated; no agreement.
Owner vs. AOUO	Allegations of numerous violations of the bylaws and house rules all negatively interfering with the owner's daily life.	Mediated to agreement.

Lou Chang, a Law Corporation

Owner vs. AOUO	Parties mediated the issue of water intrusion into the owner's unit from the common elements, and responsibility for repairing the damage.	Mediated to agreement.
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Kauai Economic Opportunity, Inc.

Owners vs. AOUO	Dispute regarding whether association documents provided for the making of improvements onto the common elements.	Mediated; no agreement.
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Mediation Providers

These are the subsidized mediation providers on Oahu and the Neighbor Islands for condominium associations registered with the REB. Check with the evaluative mediation providers for their availability to conduct evaluative mediations on the Neighbor Islands.

Facilitative Mediation Providers

Oahu: Mediation Center of the Pacific, Inc.
1301 Young St. 2nd Floor, Honolulu, HI 96814
Tel: (808) 521-6767 / Fax: (808) 538-1454
Email: mcp@mediatehawaii.org

Maui: Mediation Services of Maui, Inc.
95 Mahalani Street, Suite 25, Wailuku, HI 96793
Tel: (808) 244-5744 / Fax: (808) 249-0905
Email: info@maui-mediation.org

W. Hawaii: West Hawaii Mediation Center
65-1279 Kawaihae Road, #202, Kamuela, HI 96743
Tel: (808) 885-5525 (Kamuela)
Tel: (808) 326-2666 (Kona)
Fax: (808) 887-0525
Email: info@whmediation.org

E. Hawaii: Ku'ikahi Mediation Center
101 Aupuni St. Ste. 1014 B-2, Hilo, HI 9672
Tel: (808) 935-7844 / Fax: (808) 961-9727
Email: info@hawaii-mediation.org

Kauai: Kauai Economic Opportunity, Inc.
2804 Wehe Road, Lihue, HI 96766
Tel: (808) 245-4077 Ext. 229 or 237
Fax: (808) 245-7476
Email: keo@keo-inc.org

Evaluative Mediation Providers

Lou Chang, A Law Corporation
Mediator, Arbitrator, Attorney
Member, National Academy of Arbitrators
P.O. Box 61188, Honolulu, Hawaii 96839
Tel: (808) 384-2468
Email: louchang@hula.net
Website: www.louchang.com

Charles W. Crumpton
Crumpton Collaborative Solutions LLC
TOPA Financial Center, Suite 702
745 Fort Street, Honolulu, Hawaii 96813
Tel: (808) 439-8600
Email: crumpton@chjustice.com
Websites: www.acctm.org; www.nadn.org;
www.accord3.com; and www.mediate.com

Mediation Center of the Pacific, Inc.
1301 Young St., 2nd Floor, Honolulu, HI 96814
Tel: (808) 521-6767
Email: mcp@mediatehawaii.org

Dispute Prevention and Resolution
1003 Bishop Street, Suite 1155, Hon., HI 96813
Tel: (808) 523-1234
Website: <http://www.dprhawaii.com/>

2021 - 2022 Real Estate Commission Meeting Schedule

Real Estate Commission – 9:00 a.m.

Friday, December 17, 2021

Friday, January 28, 2022

Friday, February 25, 2022

Thursday, March 24, 2022

Friday, April 22, 2022

Friday, May 27, 2022

Friday, June 24, 2022

Friday, July 22, 2022

Friday, August 26, 2022

Friday, September 23, 2022

Friday, October 21, 2022

Friday, November 18, 2022

Friday, December 16, 2022

Until further notice, Laws & Rules Review Committee, Condominium Review Committee, and Education Review Committee Meeting items will be discussed at Real Estate Commission Meetings.

Real Estate Commission Meetings will be held online via the Zoom platform until the Department resumes in-person meetings. Thereafter, all meetings will be held in the Queen Liliuokalani Conference Room of the King Kalakaua Building, 335 Merchant Street, First Floor.

Meeting dates, locations and times are subject to change without notice. Please visit the Commission's website at www.hawaii.gov/hirec or call the Real Estate Commission Office at (808) 586-2643 to confirm the dates, times and locations of the meetings. This material can be made available to individuals with special needs. Please contact the Executive Officer at (808) 586- 2643 to submit your request.



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