

## **Arbitration and Mediation in Condominium Law\***

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### **1. Introduction**

The Florida Statutes require that residential condominiums include a provision for mandatory, non-binding arbitration in their bylaws and the Florida Statutes allow for parties to request voluntary mediation to resolve condominium disputes in place of arbitration.<sup>1</sup> As a result of the prevalence of these alternative dispute resolution forms in the statutory laws regarding condominiums in Florida, it is important to understand when arbitration and mediation are used and how the processes work under Florida law.

The purpose of this paper is to better understand the alternative dispute methods in Florida condominium law and the advantages and disadvantages of the arbitration and mediation as they are written. Section 2 will discuss the general concepts of arbitration and when arbitration may be a useful alternative to litigation. Section 3 will discuss how mediation generally works and when the process may be a useful. To gain a better understanding of the development in the law, Section 4 will discuss the legislative history for alternative dispute resolution rules in condominium law in Florida. Section 5 will discuss the current process of arbitration in Florida condominium law. Section 6 will discuss the types of disputes that the legislature currently requires parties to arbitrate before pursuing litigation. Section 7 will discuss the mediation processes, which parties may choose as an alternative to mandatory arbitration in Florida condominium law. Finally, Section 8 will discuss the benefits to both alternative dispute resolution methods used in Florida condominium disputes.

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## **2. What Is Arbitration?**

Generally, arbitration is a process in which an arbitrator or a panel of arbitrators hears the facts and issues of a case, using more flexible rules of evidence, in order to reach a decision.<sup>2</sup> A decision by an arbitrator may be binding or non-binding, depending on what the parties agree to or depending on applicable law. In binding arbitration, the parties agree in advanced to abide by the arbitrator's decision.<sup>3</sup> In non-binding arbitration, the parties determine whether they wish to agree to the decision of the arbitrator after they hear what the decision.<sup>4</sup>

Some of the benefits of arbitration as an alternative dispute resolution method as opposed to traditional litigation is that arbitration reduces the burden of trying the case from the courts,<sup>5</sup> is a private process,<sup>6</sup> is resolved much quicker than traditional litigation,<sup>7</sup> is less costly when parties do not later apply for de novo review,<sup>8</sup> and is more flexible that traditional litigation.<sup>9</sup>

Arbitration is conducted through a separate agency from the courts.<sup>10</sup> When arbitration is required statutorily, often there is an accompanying provision explaining who the party should file arbitration proceedings with. When arbitration is mandated in a contract, the parties usually select their arbitrator or panel of arbitrators.<sup>11</sup> In both cases, it is not necessary for the parties to file anything with the court unless a party believes that the case could be litigated instead of arbitrated under their contract or under the applicable statute or if a party files a complaint for de novo review of the arbitrator's decision with the court after non-binding arbitration. Since binding arbitration prohibits de novo review in a trial court and since non-binding arbitration rarely results in a request for de novo review in a trial court, arbitration is successfully able to reduce congestion in the courts. This is particularly true where statutes require arbitration, such as the Florida Statutes pertaining to specific types of condominium disputes that may arise.

Unlike court documents that are almost always public record, arbitration usually results in a decision that is not publicly accessible because arbitration is conducted by private arbitrators or by an

entity separate from the court. The arbitrator's decision will be private, unless the entity that conducts arbitrations is subject to public records requests. Since arbitration is private, many companies prefer to use arbitration to litigation is that arbitration is private. As a result, many companies find it beneficial to use arbitration, specifically when the companies are worried that litigation could damage their reputation or when companies are worried the judgment award will prompt new plaintiffs to come forward, arbitration clauses can resolve their concerns.

Generally, arbitration is resolved much quicker than traditional litigation. Because there is more availability for arbitration and because arbitration itself is faster because of the relaxed rules of evidence, arbitration is able to achieve a decision more quickly than litigation. Nationally, although the average arbitration takes about 15 months,<sup>12</sup> the average court trial may take several years depending on the type of lawsuit and the court in which the lawsuit is filed.

Arbitration is less costly than litigation because arbitration takes less time and involves less discovery and more relaxed evidentiary rules that reduce the time for an arbitrator to reach a decision.<sup>13</sup> As a result of the reduction in time spent, the cost of attorney's fees are reduced.

While there are many benefits to arbitration, one of the main issues with mandatory, binding arbitration, which is typically agreed to contractually, is that it arguably infringes on a party's due process rights because it denies the option for a trial by jury.<sup>14</sup> Even when a party "believes that the arbitrator did not consider all the facts or follow the governing law, the party cannot file a lawsuit in court or appeal the decision on the merits."<sup>15</sup> A party can only contest arbitration in a circumstance where the party believes the arbitrator has committed fraud.<sup>16</sup>

Arbitration also deviates from ordinary rules of evidence and discovery, which may make it difficult to gain the documents necessary to prove case or may allow evidence, which may unfairly harm one of the parties, depending on the type of lawsuit.<sup>17</sup> Unless parties enter into an agreement where each party "fully and intelligently" consents to mandatory, binding arbitration, it is difficult to argue that the

process is fair.<sup>18</sup> While the constitutionality of allowing mandatory, binding arbitration in situations where there is unequal bargaining power is still in question, one way to avoid the problem is by requiring mandatory, non-binding arbitration.<sup>19</sup>

Mandatory, non-binding arbitration is a way to gain the benefits of arbitration while preserving a party's right to litigate. Since the arbitrator's decision is not binding, parties are free to pursue litigation once they have finished the arbitration process. However, since litigating will make the case more expensive and, in many cases, the party that brings the case to court bears any additional expenses unless the outcome is significantly different from the arbitration, parties may be less willing to pursue litigation unless the party believes the outcome of arbitration is significantly different from what a court would decide.<sup>20</sup>

### **3. What is Mediation?**

Mediation is a process where a mediator works as a neutral third party whose role is to facilitate a discussion between the parties that may or may not result in a settlement between the parties, depending on whether the parties can reach an agreement. Like arbitration, mediation also deviates from ordinary rules of evidence and discovery, which may make it difficult to gain documents necessary prove a case or may allow evidence that is ordinarily suppressed in court. However, because the parties are working towards a settlement, the parties only need to persuade each other, not an arbitrator or a judge. Therefore, evidence is not as necessary a component as it is in arbitration or litigation. Additionally, foregoing discovery reduces the cost of mediation.<sup>21</sup>

Mediation differs from arbitration because, in mediation, the parties must work together to come to a solution whereas in arbitration, the arbitration makes a final decision.<sup>22</sup> Around eighty percent of mediations nationwide end in settlement.<sup>23</sup> Mediation works best in situations where the parties are willing to compromise.<sup>24</sup> Mediation is useful because the mediator may help the parties work towards a solution that they had not thought of on their own.<sup>25</sup> Often, a party may be focused on one issue that blocks

communication regarding other issues that may be more significant.<sup>26</sup> A mediator is an impartial person whose goal is to help parties overcome communication blocks that may have kept the parties from reaching a compromise on their own by helping the parties understand each other's prospective.<sup>27</sup> Mediation may also help the parties understand why the conflict developed.<sup>28</sup>

In mediation, the parties are the ultimate decision makers.<sup>29</sup> Although the mediator works to facilitate a discussion between the parties, the mediator does not act as a judge.<sup>30</sup> Because the parties are in control of the mediation, the parties are free to come up with solutions to their problems that a court or an arbitrator would not have decided.<sup>31</sup> As a result, the solutions may be better suited to the parties.<sup>32</sup> If the parties agree to the provide solution, they are contractually bound to the agreement, making it legally enforceable.<sup>33</sup> As a result, if one party does not fulfill their promises, the other party may sue for breach of contract.<sup>34</sup>

Mediation does not always result in a decision.<sup>35</sup> To the contrary, in arbitration, whether or not it is binding, an arbitrator renders a decision.<sup>36</sup> On the other hand, at the end of mediation, if parties are unable to reach an agreement, the mediator may declare that the parties reached an impasse.<sup>37</sup> This may be advantageous because parties can go into a mediation without feeling the pressure associated with knowing their case will be decided based on what happens during the session. Even when the mediation results in an impasse, the time and effort taken during mediation are not necessarily wasted because the parties have a better understanding of the issues that will be litigated at trial.<sup>38</sup> The fact that mediation may result in an impasse may also be a disadvantage of mediation.<sup>39</sup> A party could use mediation as an effort to delay litigation and drive up the cost of litigation.<sup>40</sup>

#### **4. History of Alternative Dispute Resolution in Florida Condominium Law**

The arbitration section of the Florida statutes concerning condominium law first came into effect in 1982 as a voluntary binding arbitration clause requirement for condominium bylaws.<sup>41</sup> The law requiring the option of arbitration was found under Florida Statute § 718.112, which pertains to bylaws of

a condominium.<sup>42</sup> Bylaws without a voluntary binding arbitration clause were deemed to have an arbitration clause.<sup>43</sup> The purpose of adding arbitration clauses to condominium bylaws was to help level the playing field between a condominium association and a unit owner because associations are more able to “bear the costs and expenses of litigation than the unit owner,” who must rely on their own financial resources.<sup>44</sup> Additionally, the legislature believed allowing arbitration would reduce congestion in the courts.<sup>45</sup> When the arbitration section was added to the Florida statutes involving condominium law, the legislature also added that the Division of Florida Land Sales and Condominiums of the Department of Business Regulations should begin to employ full-time arbitrators, who arbitrated the condominium disputes.<sup>46</sup>

In 1991, the arbitration clause in the statute pertaining bylaws was amended to require a mandatory, non-binding arbitration clause, referring to a separate section to discuss the specific process.<sup>47</sup> The separate section, Florida Statute § 718.1255, which still governs arbitration in condominium law, was added in 1991 to create a way for condominiums to resolve disputes more efficiently than they were resolved in the past.<sup>48</sup> Specifically, “the Legislature finds that the courts are becoming overcrowded with condominium and other disputes, and further finds that alternative dispute resolution has been making progress in reducing court dockets and trials and in offering a more efficient, cost-effective option to court litigation.”<sup>49</sup>

While the legislature does not provide a reasoning for changing the law from voluntary, binding arbitration to mandatory, non-binding arbitration, other than citing a recommendation from the Condominium Study Commission,<sup>50</sup> one explanation may be that the infrastructure for arbitration had improved since 1982 when the legislature allowed the Division of Florida Land Sales and Condominiums of the Department of Business Regulations to employ full-time arbitrators so they were better equipped to require arbitration. The legislature likely requires non-binding arbitration to avoid a due process issue of statutorily denying a party’s right to a jury trial because the statutory law is an imposition on the parties,

unlike an arbitration clause in a contract in which parties presumably had the ability to bargain for binding arbitration.<sup>51</sup> Considering that the Florida legislature cited the importance of retaining the right to a jury trial in the statutes, the legislature contemplated this.<sup>52</sup> While wanting to preserving a party's right to a jury trial, the legislature likely wanted to increase the amount of cases that were brought to arbitration rather than litigation, making mandatory, non-binding arbitration the best fit.

According to the legislature, one purpose of mediation is to “resolve the underlying dispute in good faith, and with a minimum expenditure of time and resources.”<sup>53</sup> As a result, when Florida Statute § 718.1255 was added in 1991, the legislature added a provision allowing for voluntary mediation.<sup>54</sup> However, the legislature added mediation as an option for alternative dispute resolution without an indication of what the mediation process would entail or how it would interact with the arbitration process.<sup>55</sup> Mediation was an informal process that parties could use in place of arbitration or, if mediation was unsuccessful, as a precursor to arbitration.<sup>56</sup> The arbitrator would simply adopt any mediation settlement into their decision.<sup>57</sup> In 1997, the legislature added more information to the mediation aspect of alternative dispute resolution providing guidelines “for attendance at the mediation, guidelines in conducting the mediation, and for sanctions.”<sup>58</sup> The legislature's reason for adding to the alternative dispute resolution section regarding mediation was to provide more specificity to the process.

## **5. The Florida Condominium Arbitration Process**

Mandatory binding arbitration under Florida Statute § 718.1255 (2016) applies only to residential condominiums unless the condominium document provides otherwise.<sup>59</sup> To begin the arbitration process, a party must file a petition with a \$50 filing fee prior to litigation through the court.<sup>60</sup> The petition must include proof that the petitioner gave the respondents “written notice of the specific nature of the dispute;” “a demand for relief, and a reasonable opportunity to comply or to provide the relief;” and “notice of the intention to file an arbitration petition or other legal action in the absence of a resolution of the dispute.”<sup>61</sup> A petition may be dismissed if it fails to include proof of each of these.<sup>62</sup> In a situation where a lawsuit is

filed with the court, the responding party waives their right to arbitration when they file an answer to a petitioner's complaint.<sup>63</sup>

The petition is assigned to an arbitrator, who makes "a preliminary determination as to whether the controversy described in the petition falls within the jurisdiction of the division and whether the petition complies" with the requirements for mandatory arbitration.<sup>64</sup> If the petition does not comply, the arbitrator will either enter an order requiring that the party amend their complaint or reject the petition.<sup>65</sup> If the petition is found to have the requirements and a dispute requiring mandatory, non-binding arbitration, the arbitrator preliminarily finds that the petition complies.<sup>66</sup> The arbitrator then serves the complaint and an order requiring a response to all respondents by certified mail or personal service.<sup>67</sup> However, if the complaint requires emergency relief, a party may seek relief through a court hearing. In order to request emergency relief, the party must file a motion to stay with the arbitrator, including facts that support a temporary injunction.<sup>68</sup>

Since arbitration uses the ordinary statutes of limitations under applicable law so the responding party or parties have 20 days to respond to the complaint, unless the arbitrator ordered a shorter time period because "the health, safety, or welfare of the resident(s) of a community is alleged to be endangered."<sup>69</sup> Petitions involving elections are handled on an expedited basis.<sup>70</sup> In ordinary circumstances, the response to the complaint follows ordinary rules of Florida Civil Procedure as to the timing and the necessary elements of the response.<sup>71</sup> A respondent may dispute the fact that the case is being arbitrated if the respondent believes the case does not fall under the requirements for mandatory arbitration.

Parties have an option of requesting that the case be referred to mediation (to be discussed in Section 7) instead of proceeding with the arbitration process.<sup>72</sup> If the mediation is unsuccessful, the parties may continue with arbitration or proceed with litigation on de novo review.<sup>73</sup>

Once parties have filed a complaint and an answer, an arbitrator will issue subpoenas for “the attendance of witnesses and the production of books, records, documents, and other evidence.”<sup>74</sup> Subpoenas are enforceable under the Florida Rules of Civil Procedure and a party may have a court compel attendance and production.<sup>75</sup> Florida Rules of Civil Procedure also applies to discovery before arbitration.<sup>76</sup>

The statutes do not specify procedure for the arbitration but generally, each party presents an opening statement, then, each party presents evidence or testimony, and finally, each party will present a final summation.<sup>77</sup> When the arbitration process is over, the arbitrator will present his or her decision in writing.<sup>78</sup> The final decision includes the rights of the parties to seek judicial proceedings.<sup>79</sup> “The arbitrator in the final order may grant mandatory or prohibitory relief, monetary damages, declaratory relief, or any other remedy or relief which is deemed just and equitable. However, no final order may include the imposition of a civil penalty.”<sup>80</sup> Once the arbitrator makes a decision, parties must either agree to the decision or, within thirty days, a party may file a complaint with the court seeking de novo review of the case.<sup>81</sup> However, if the outcome of the trial is similar to the arbitration decision, the party that files a complaint seeking de novo review is “assessed the other party’s arbitration costs, court costs, and other reasonable costs, including attorney’s fees, investigation expenses, and expenses for expert or other testimony or evidence incurred.”<sup>82</sup> If the case is brought to court, the case is tried de novo because an arbitrator’s decision is separate from a judicial decision.<sup>83</sup>

Either party may seek arbitration costs and attorney’s fees before the arbitrator renders his or her decision.<sup>84</sup> After the arbitrator renders his or her decision, the prevailing party has 45 days to seek arbitration costs and attorney’s fees, including the justification for the amount.<sup>85</sup> An opposing party may respond to the request for arbitration costs and attorney’s fees within 20 days.<sup>86</sup>

Once parties agree to an arbitrator’s decision or allow 30 days to pass without filing for de novo review with the appropriate court, the decision is binding. As a result, a party may file a petition with the court to

enforce the decision.<sup>87</sup> A petitioner may recover any attorney's fees and cost incurred in order for a court to enforce the arbitrator's decision from the respondent.<sup>88</sup>

## **6. Types of Disputes Requiring Arbitration**

The types of condominium lawsuits that must be pursued in arbitration are limited to disagreements that primarily focus on certain situations. Condominium disputes that should be arbitrated under Florida law include "any disagreement between two or more parties that involves: (a) the authority of the board of directors... (b) The failure of a governing body... [Or] (c) A plan of termination."<sup>89</sup> Specifically, disputes involving the authority of the board of directors include whether the board of directors may "require any owner to take any action, or not to take any action, involving that owner's unit or the appurtenances thereto" or the board of director's ability to alter or add to a common area or element of the condominium.<sup>90</sup> Disputes regarding the failure of a governing body include whether the governing body "properly conduct elections," "Give adequate notice of meetings or other actions," "Properly conduct meetings," or allowed "inspection of books and records" in compliance with the statute or with the association's documents.<sup>91</sup> Disputes involving breach of fiduciary duty and a request for an accounting are also subject to mandatory, non-binding arbitration.<sup>92</sup>

Except for disputes involving the termination of a condominium, disputes may not be "between or among a unit owner or unit owners and tenants, except where the association is a party and the dispute is otherwise eligible for arbitration."<sup>93</sup> In a case where the unit owner sold his condominium before an arbitration decision was render, the court held that mandatory, non-binding arbitration was not required because the unit owner was no longer a unit owner within the meaning of the statute.<sup>94</sup> Similarly, arbitration is not mandatory when an issue arose before the party became a unit owner.<sup>95</sup>

Condominium disputes that may be litigated without pursuing arbitration include disputes involving "title to any unit or common element; the interpretation or enforcement of any warranty; the levy of a fee or assessment, or the collection of an assessment levied against a party; the eviction or other

removal of a tenant from a unit; alleged breaches of fiduciary duty by one or more directors; or claims for damages to a unit based upon the alleged failure of the association to maintain the common elements or condominium property.”<sup>96</sup> Although fee or assessment disputes tend to involve the authority of the board, courts do not consider them disputes that require arbitration.<sup>97</sup> Lawsuits involving construction defects also do not require arbitration.<sup>98</sup> While these disputes do not fall within the statutory definition for condominium disputes, if both parties agree for the disputes to be arbitrated or mediated instead of litigated, the parties may do so.

When litigation is filed and it is unclear whether the issue pertains primarily to an issue that should be arbitrated, a court may make the determination as to whether it should be arbitrated. For example, one court held that condominium unit owners litigating over parking spaces that the association’s officers and directors preferentially assigned to themselves was an issue of authority rather than title.<sup>99</sup> Another case where it was unclear whether the lawsuit required arbitration was a disagreement where a condominium association’s disapproved of a unit owner leasing his unit to a third party.<sup>100</sup> Since the court considered the dispute as primarily regarding the authority of the board of directors, not a title dispute, the case required arbitration.<sup>101</sup>

When a member or members of the board of directors are being recalled, a board of directors may request a recall arbitration proceeding within five business days of the recall if the board disagrees with the recall.<sup>102</sup> When the board member is being recalled at a unit owners or members meeting and the board of directors does not certify the recall, a recall arbitration proceeding is permitted.<sup>103</sup> Similarly, when the board member is being recalled by written agreement of the majority voting interest within the condominium and the board does not certify the recall, a recall arbitration proceeding is permitted.<sup>104</sup> Only a board of directors may petition for recall arbitration proceedings and failing to file the petition within five business days is deemed as assenting to the recall.<sup>105</sup> Similarly to the procedure for ordinary arbitration petitions, an arbitrator may accept or deny the petition.<sup>106</sup> Within 10 days of receipt of the

petition, the arbitrator will serve the unit owners or members with the petition submitted by the board of directors.<sup>107</sup>

## **7. The Florida Condominium Mediation Process**

Either party in a case may request that the arbitrator refer their case to mediation instead of arbitration before or after the answer to the petition has been filed.<sup>108</sup> The legislature encourages “voluntary mediation through Citizen Dispute Settlement Centers” before arbitration or instead of arbitration.<sup>109</sup> A Citizen Dispute Settlement Center is a center created by the chief judge of that judicial circuit.<sup>110</sup> If all parties agree to mediation, the case must be set for mediation.<sup>111</sup> Even without agreement, “the arbitrator may refer a dispute to mediation at any time.”<sup>112</sup>

Once a case is referred to mediation, the parties must agree to a mediator.<sup>113</sup> If the parties are unable to agree on a mediator from a list provided by the arbitrator, the arbitrator will select the mediator.<sup>114</sup> Once the mediation conference is scheduled, physical presence with full authority to settle the case from zero to the full amount a party is asking for is required. However, associations may comply by having at least one representative with full authority to settle with an approval by the board of administration within five days of the mediation conference. If a party fails to attend, the arbitrator will impose sanctions against the party, “including the striking of any pleadings filed, the entry of an order of dismissal or default if appropriate, and the award of costs and attorneys’ fees incurred by the other parties.”<sup>115</sup>

Only the mediating parties and their attorneys may attend mediation, unless all parties consent.<sup>116</sup> Since mediation proceedings are privileged and confidential, if the parties fail to reach an agreement during mediation, they may not use information revealed during mediation in any subsequent arbitration or trial.<sup>117</sup> Once at the mediation conference, parties should attempt to resolve the conflict in good faith.<sup>118</sup> However, because everything said during a mediation conference is confidential, unless all parties agree

to allow specific information to be used at arbitration or trial, there is no way of regulating whether a party acts in good faith during a mediation conference.<sup>119</sup>

Because mediation conferences are non-judicial and informal, neither the Citizens Dispute Settlement Center nor the mediator may adjudicate, sanction, or penalize a party.<sup>120</sup> A mediator may, however, declare that the mediation has reached an impasse, which ends the mediation.<sup>121</sup> When a mediator declares an impasse, the arbitration will terminate unless all parties agree to continue with arbitration.<sup>122</sup> If the parties do not agree to continue with arbitration, the arbitrator enters an order of dismissal for the case and the parties must re-file the case in court.<sup>123</sup>

Generally, the parties share the expenses of mediation. However, if the parties proceed with litigation after the mediation and arbitration process, the prevailing party may be able to recover any costs incurred in connection with mediation in any subsequent litigation.<sup>124</sup> Similarly to arbitrator decisions, any agreement reached during mediation is enforceable through the applicable court. A party that files a petition with the court to enforce a mediation settlement agreement may seek “any costs and fees incurred in the enforcement of a settlement agreement” from the opposing party.<sup>125</sup>

## **8. Benefits to Alternative Dispute Resolution in Florida Condominium Disputes**

Both arbitration and mediation have a positive impact on condominium disputes in Florida. The Florida legislature implemented the alternative dispute resolution section of the condominium statutes in order to reduce the disadvantage that unit owners face when litigating against their condominium association when the association has access to more financial resources,<sup>126</sup> to reduce the court dockets and amount of trials,<sup>127</sup> and to provide a more flexible, “efficient, cost-effective option to court litigation” without encourage frivolous or nuisance lawsuits.<sup>128</sup>

The use of mandatory, non-binding arbitration coupled with optional mediation has proven to be an ideal method of reducing lawsuits while preserving the right to litigate disputes and it has been successful in reducing the number of cases that go to court.<sup>129</sup> The law has been largely successful in

reducing the court docket and the number of trials on condominium disputes. Since the implementation of mandatory, non-binding arbitration, the legislature managed to nearly eliminate trivial condominium disputes, such as parking disputes and pet cases, at the appellate level.<sup>130</sup> Despite the fact that there has been litigation over which types of cases must be arbitrated and which cases may be litigated without arbitration, most other cases have been diverted to arbitration, decongesting the courtrooms compared to the litigation before the implementation of the statute.<sup>131</sup>

Arbitration has also resolved disputes faster than litigation in condominium disputes.<sup>132</sup> Because arbitration has more relaxed rules of evidence and discovery, parties are able to argue their case in less time than they could with litigation.<sup>133</sup> While many condominium disputes may not be as intricate that they would save a substantial amount of money to the individual parties, in the aggregate, the amount saved is significant. In cases where the dispute requires immediate attention, the case is heard even faster than traditional litigation because of the statutory changes allowing for a party to petition for the case to be heard as quickly as possible.<sup>134</sup>

The statute has also helped to reduce costs through arbitration. Since the process is resolved more quickly than litigation, parties are able to save attorney's fees and litigation costs and expenses.<sup>135</sup> Unless a party seeks de novo review, arbitration should be less expensive than litigation. The reduction in cost also creates greater equality among the parties since it levels the playing field between the deep-pocketed condominium association and the personally-financed unit owner.<sup>136</sup>

The legislature designed the arbitration process to be more flexible than traditional litigation.<sup>137</sup> In addition to reducing the cost and time of litigation, flexibility allows the arbitrator to work in a way that is more beneficial to the parties. Additionally, the process is more private,<sup>138</sup> unless a party files a lawsuit in court, in which case the decision would be in the court record of the case.

The greatest advantage to arbitration as it is tailored for Florida condominium disputes is that parties are able to enjoy the benefits of arbitration while still reserving the right to proceed with trial.<sup>139</sup>

Some of the disadvantages to arbitration are mitigated by the structure of the statute on alternative dispute resolution. In particular, because the statute limits circumstances which require arbitration to situations where there is less need for discovery and rules of evidence, a party will not be unduly harmed.

One criticism to requiring arbitration is that a party did not agree to arbitrate. While arbitration may be beneficial, if a party would prefer litigation, the arbitration process could end up costing a significant amount of money. By virtue of living in a condominium, a party agrees to arbitrate an issue before being able to litigate. Additionally, if the party arbitrates and decides to litigate after, the party is risking the possibility of having to pay costs and fees associated with the process, effectively discouraging most parties from pursuing litigation.

In some condominium cases, mediation may be even more beneficial to parties than arbitration because the focus of mediation is to try to work together to resolve disputes. Mediation is particularly useful when both parties intend to continue to live in the condominium after the dispute is resolved.<sup>140</sup> Understanding how the dispute arose and the other party's point of view may be helpful in preserving a relationship so the parties may be amicable towards each other after the dispute is resolved.<sup>141</sup> Because the process is not focused on a prevailing party, a benefit to mediation is that both sides may gain something from the process.<sup>142</sup> Allowing the other party to benefit may help improve relations in the future.<sup>143</sup>

Similarly to arbitration, the fact that mediation lacks discovery may not be a disadvantage to the parties as it would be for other types of cases. Since neither party has pertinent information that the other party does not have access to and the disputes are over problems that do not need much discovery to prepare for the case, such as whether someone may have a particular pet these disputes do not require extensive discovery.

Making mediation an option under the alternative dispute resolution statute allows parties to decide whether compromise is something that the parties can do. Some parties want to prolong litigation because

they are emotionally invested in the process and feel that they have been treated unfairly. In those circumstances, since it would be difficult to reach a settlement, mediation would be a waste of time and money for the parties. In other situations though, where a party simply wants a particular issue solved but does not hold animosity towards the other party, mediation is an opportunity to settle the issue while maintaining their relationship and saving time and money.

## **9. Conclusion**

In the practice of condominium law, it is necessary to understand the strengths of using arbitration and mediation. Arbitration allows parties to resolve issues more quickly, privately,<sup>144</sup> cost efficiently,<sup>145</sup> and flexibly than traditional litigation while reducing the strain put on the courts.<sup>146</sup> On the other hand, mediation provides the same advantages as arbitration while allowing parties to reach their own decision, rather than allowing an arbitrator to make the ultimate decision.

The addition of alternative dispute resolution to the Florida statutes governing condominium law has help meet several important goals to improve litigation that were set by the legislature. Initially, when the legislature first implemented alternatives to litigation in 1982, voluntary, binding arbitration was the only form of alternative dispute resolution for parties. In 1991, the legislature changed the rule to require mandatory, non-binding arbitration and optional mediation for parties.

The process of arbitration requires a party file a complaint with an appropriate arbitration division, based on Florida civil procedure. An arbitrator is appointed to the case and decides whether the complaint preliminarily has the necessary qualification for arbitration. Then the arbitrator will submit the complaint to the respondent, who must file a response to the complaint. The respondent may request that the dispute be litigated if it does not involve one of the categories of disputes the legislature limits mandatory, non-binding arbitration to, which are disputes involving the authority of the board of directors, the failure of a governing body, or a plan of termination. Once it is determined the case will be arbitrated, parties may have the arbitrator subpoena witnesses. After the arbitration, the arbitrator will issue his or her decision.

The parties must either file a case, de novo, within 30 days or let the 30 days lapse, making the decision binding on the parties.

If the arbitration case is referred to mediation, the parties select a mediator or, if they cannot agree, the arbitrator will select a mediator. Both parties must appear or have someone with full authority to settle present at the mediation. The mediator will use techniques to work the parties towards a settlement that both parties contribute to create. If the parties cannot agree, the parties reach an impasse and the case is either dismissed or sent back to arbitration.

Mandatory, non-binding arbitration works to reduce congestion in the courts and works to resolve routine disputes in a way that is less expensive and more timely than litigating a dispute without the due process concerns that mandatory, binding arbitration presents. Mediation is an alternative to arbitration that allows the parties to be in control of the decision while maintaining many of the advantages to arbitration.

Since both arbitration and mediation can be beneficial in different situation, the Florida legislature has created a system that reduces the burden on the courts by allowing more complicated matters to be litigated, unless parties agree to mediate or arbitrate, while allowing more simplistic matters to be arbitrated or mediated.

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<sup>1</sup> FLA. STAT. § 718.1255 (2016)

<sup>2</sup> Senator Russell D. Feingold, *Mandatory Arbitration: What Process Is Due?* 39 HARV. J. ON LEGIS. 281, 283 (2002)

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> FLA. STAT. § 718.1255(3)(b) (2016)

<sup>6</sup> Edna Sussman and John Wilkinson, *Benefits Of Arbitration For Commercial Disputes*, AMERICAN BAR ASSOC. (2012), [http://www.americanbar.org/content/dam/aba/publications/dispute\\_resolution\\_magazine/March\\_2012\\_Sussman\\_Wilkinson\\_March\\_5.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf)

<sup>7</sup> Senator Russell D. Feingold, *Mandatory Arbitration: What Process Is Due?* 39 HARV. J. ON LEGIS. 281, 285 (2002); FLA. STAT. § 718.1255(3)(c) (2016)

<sup>8</sup> FLA. STAT. § 718.1255(3)(b), (d) (2016)

<sup>9</sup> FLA. STAT. § 718.1255(3)(c) (2016)

<sup>10</sup> *See generally* FLA. STAT. § 718.1255(4) (2016)

<sup>11</sup> Mark Partridge, 1-5 ALTERNATIVE DISPUTE RESOLUTION: AN ESSENTIAL COMPETENCY FOR LAWYERS § 5.03[d] (2013)

<sup>12</sup> Financial Industry Regulatory Authority, *Dispute Resolution Statistics* (2016), <https://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics>

<sup>13</sup> Senator Russell D. Feingold, *Mandatory Arbitration: What Process Is Due?* 39 HARV. J. ON LEGIS. 281, 289 (2002); Bette J. Roth, Randall W. Wulff, and Charles A. Cooper, ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE § 1:3 (2016)

<sup>14</sup> Senator Russell D. Feingold, *Mandatory Arbitration: What Process Is Due?* 39 HARV. J. ON LEGIS. 281, 288-289 (2002)

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<sup>15</sup> Id. at 283

<sup>16</sup> Id. at 284

<sup>17</sup> Senator Russell D. Feingold, *Mandatory Arbitration: What Process Is Due?* 39 HARV. J. ON LEGIS. 281, 289 (2002); Bette J. Roth, Randall W. Wulff, and Charles A. Cooper, ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE § 1:3 (2016)

<sup>18</sup> Senator Russell D. Feingold, *Mandatory Arbitration: What Process Is Due?* 39 HARV. J. ON LEGIS. 281, 284 (2002)

<sup>19</sup> Id. at 290-292

<sup>20</sup> FLA. STAT. § 718.1255(4)(l) (2016); Daniel Morman & Jonathan Whitcomb, *Navigating the Nonbinding Arbitration Minefield in Florida*, 81 FLA. BAR J. 18 (May 2007)

<sup>21</sup> David A. Hoffman, MEDIATION: A PRACTICE GUIDE (MCLE) § 1.8.1 (2013)

<sup>22</sup> David A. Hoffman, MEDIATION: A PRACTICE GUIDE (MCLE) § 1.1, 1.3 (2013); *Mediation in Florida*, FLORIDA COURTS (2016), <http://www.flcourts.org/resources-and-services/alternative-dispute-resolution/mediation.stml#Advantages%20to%20mediation%203>; Senator Russell D. Feingold, *Mandatory Arbitration: What Process Is Due?* 39 HARV. J. ON LEGIS. 281, 283 (2002)

<sup>23</sup> David A. Hoffman, MEDIATION: A PRACTICE GUIDE (MCLE) § 1.8.1 (2013)

<sup>24</sup> *Mediation in Florida*, FLORIDA COURTS (2016), <http://www.flcourts.org/resources-and-services/alternative-dispute-resolution/mediation.stml#Advantages%20to%20mediation%203>

<sup>25</sup> Id.

<sup>26</sup> *Mediation in Florida*, FLORIDA COURTS (2016), <http://www.flcourts.org/resources-and-services/alternative-dispute-resolution/mediation.stml#Advantages%20to%20mediation%203>; David A. Hoffman, MEDIATION: A PRACTICE GUIDE (MCLE) § 1.3 (2013)

<sup>27</sup> Id.

<sup>28</sup> Id.

<sup>29</sup> *Mediation in Florida*, FLORIDA COURTS (2016), <http://www.flcourts.org/resources-and-services/alternative-dispute-resolution/mediation.stml#Advantages%20to%20mediation%203>

<sup>30</sup> Id.

<sup>31</sup> Id.

<sup>32</sup> Id.

<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> FLA. STAT. § 718.1255(4)(h) (2016)

<sup>36</sup> FLA. STAT. § 718.1255(4)(k) (2016)

<sup>37</sup> FLA. STAT. § 718.1255(4)(h) (2016)

<sup>38</sup> David A. Hoffman, MEDIATION: A PRACTICE GUIDE (MCLE) § 1.8.2(a) (2013)

<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> Florida Session Laws of 1982, s. 4 ch. 82-199, 462 (1982)

<sup>42</sup> Id.

<sup>43</sup> Florida Session Laws of 1982, s. 4 ch. 82-199, 464 (1982)

<sup>44</sup> FLA. STAT. § 718.1255(3)(a) (2016)

<sup>45</sup> FLA. STAT. § 718.1255(3)(b) (1991)

<sup>46</sup> Florida Session Laws of 1982, s. 4 ch. 82-199, 464 (1982)

<sup>47</sup> Florida Session Laws of 1991, s. 10, ch. 91-103, 641 (1991)

<sup>48</sup> FLA. STAT. § 718.1255(3)(b) (1991)

<sup>49</sup> Id.

<sup>50</sup> Fla. H.R. Comm. on Judiciary, HB 1465 (1991) Staff Analysis 2 (May 7, 1991) (available at Fla. Dep't of State, Fla. State Archives, Tallahassee, Fla.)

<sup>51</sup> Senator Russell D. Feingold, *Mandatory Arbitration: What Process Is Due?* 39 HARV. J. ON LEGIS. 281, 288 (2002)

<sup>52</sup> FLA. STAT. § 718.1255(3)(d) (2016)

<sup>53</sup> Peter M. Dunbar, THE CONDOMINIUM CONCEPT: A PRACTICAL GUIDE FOR OFFICERS, OWNERS, REALTORS, ATTORNEYS, AND DIRECTORS OF FLORIDA CONDOMINIUMS 211 (14th ed. 2014); FLA. STAT. § 718.1255(4)(g) (2016)

<sup>54</sup> Fla. H.R. Comm. on Judiciary, HB 1465 (1991) Staff Analysis 2 (May 7, 1991) (available at Fla. Dep't of State, Fla. State Archives, Tallahassee, Fla.)

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- <sup>59</sup> FLA. STAT. § 718.1255(6) (2016); *United Grand Condo. Owners, Inc. v. Grand Condo. Ass'n*, 929 So. 2d 24 (Fla. Dist. Ct. App. 2006)
- <sup>60</sup> FLA. STAT. § 718.1255(4)(a) (2016)
- <sup>61</sup> FLA. STAT. § 718.1255(4)(b) (2016)
- <sup>62</sup> FLA. STAT. § 718.1255(4)(b) (2016)
- <sup>63</sup> FLA. STAT. § 718.1255 Civil Procedure: Alt. Dispute Resolution: Judicial review 16 (2016); *Sterling Condo. Ass'n v. Hererra*, 690 So. 2d 703 (Fla. 3rd DCA 1997)
- <sup>64</sup> FLA. ADMIN. CODE § 61B-45.018(2) (2016)
- <sup>65</sup> FLA. ADMIN. CODE § 61B-45.018(4) (2016)
- <sup>66</sup> FLA. ADMIN. CODE § 61B-45.018(5) (2016)
- <sup>67</sup> FLA. STAT. § 718.1255(4)(d) (2016); FLA. ADMIN. CODE § 61B-45.018(5) (2016)
- <sup>68</sup> FLA. STAT. § 718.1255(4)(c) (2016)
- <sup>69</sup> FLA. STAT. § 718.1255(4)(i) (2016); FLA. ADMIN. CODE § 61B-45.019(1) (2016)
- <sup>70</sup> FLA. STAT. § 718.1255(5) (2016)
- <sup>71</sup> FLA. ADMIN. CODE § 61B-45.019 (2016)
- <sup>72</sup> FLA. STAT. § 718.1255(4)(e) (2016)
- <sup>73</sup> FLA. STAT. § 718.1255(4)(e) (2016)
- <sup>74</sup> FLA. STAT. § 718.1255(4)(j) (2016)
- <sup>75</sup> FLA. STAT. § 718.1255(4)(j) (2016)
- <sup>76</sup> FLA. STAT. § 718.1255(4)(j) (2016)
- <sup>77</sup> FLA. STAT. § 718.1255 (2016); FLA. 17TH JUD. CIR. AO 2007-4,9 (2016)
- <sup>78</sup> FLA. STAT. § 718.1255(4)(k) (2016)
- <sup>79</sup> FLA. ADMIN. CODE § 61B-45.043 (2016)
- <sup>80</sup> FLA. ADMIN. CODE § 61B-45.043(5) (2016)
- <sup>81</sup> FLA. STAT. § 718.1255(4)(k) (2016)
- <sup>82</sup> FLA. STAT. § 718.1255(4)(l) (2016); Daniel Morman & Jonathan Whitcomb, *Navigating the Nonbinding Arbitration Minefield in Florida*, 81 FLA. BAR J. 18 (May 2007)
- <sup>83</sup> FLA. ADMIN. CODE § 61B-45.043(7) (2016)
- <sup>84</sup> FLA. ADMIN. CODE § 61B-45.048 (2016)
- <sup>85</sup> FLA. ADMIN. CODE § 61B-45.048(2) (2016)
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- <sup>87</sup> FLA. STAT. § 718.1255(4)(m) (2016)
- <sup>88</sup> FLA. STAT. § 718.1255(4)(m) (2016)
- <sup>89</sup> FLA. STAT. § 718.1255(1) (2016)
- <sup>90</sup> FLA. STAT. § 718.1255(1)(a)1.,2. (2016)
- <sup>91</sup> FLA. STAT. § 718.1255(1)(b)1.-4. (2016)
- <sup>92</sup> FLA. STAT. § 718.1255 Civil Procedure: Alt. Dispute Resolution: Mandatory ADR 26 (2016); *Woodlake Redevelopment Corp. v. Woodlake Condo Ass'n*, 671 So. 2d 253 (Fla. 2nd DCA 1996)
- <sup>93</sup> FLA. ADMIN. CODE § 61B-45.013(2) (2016)
- <sup>94</sup> *National Ventures v. Water Glades 300 Condominium Ass'n*, 847 So. 2d 1070, 1073 (Fla. 4th DCA 2003); Daniel Morman & Jonathan Whitcomb, *Navigating the Nonbinding Arbitration Minefield in Florida*, 81 FLA. BAR J. 18 (May 2007)
- <sup>95</sup> *Clark v. England*, 715 So. 2d 365 (Fla. 5th DCA 1998); Daniel Morman & Jonathan Whitcomb, *Navigating the Nonbinding Arbitration Minefield in Florida*, 81 FLA. BAR J. 18 (May 2007)
- <sup>96</sup> FLA. STAT. § 718.1255(1) (2016)
- <sup>97</sup> FLA. STAT. § 718.1255 Civil Procedure: Alt. Dispute Resolution: Mandatory ADR 19 (2016); *Villorin v. Village of Kings Creek Condo. Ass'n*, 789 So. 2d 1157 (Fla. 3rd DCA 2001)
- <sup>98</sup> FLA. STAT. § 718.1255 Civil Procedure: Alt. Dispute Resolution: Mandatory ADR 24 (2016); *Carlandia Corp. Obernauer*, 695 So. 2d 408 (Fla. 4th DCA 1997)
- <sup>99</sup> *Summit Towers Condo. Ass'n v. Coren*, 707 So. 2d 416 (Fla. 4th DCA1998); FLA. STAT. § 718.1255 Civil Procedure: Alternative Dispute Resolution: General Overview 6 (2016)
- <sup>100</sup> FLA. STAT. § 718.1255 Civil Procedure: Alt. Dispute Resolution: Judicial review 18 (2016); *Blum v. Tamarac Fairways Ass'n*, 684So. 2d 826 (Fla. 4th DCA 1996)
- <sup>101</sup> FLA. STAT. § 718.1255 Civil Procedure: Alt. Dispute Resolution: Judicial review 18 (2016); *Blum v. Tamarac Fairways Ass'n*, 684So. 2d 826 (Fla. 4th DCA 1996)

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- <sup>102</sup> FLA. ADMIN. CODE § 61B-50.105(1) (2016)
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- <sup>104</sup> FLA. ADMIN. CODE § 61B-50.105(1)(b) (2016)
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- <sup>106</sup> FLA. ADMIN. CODE § 61B-50.105(7) (2016)
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- <sup>108</sup> FLA. STAT. § 718.1255(4)(e) (2016)
- <sup>109</sup> FLA. STAT. § 718.1255(2) (2016)
- <sup>110</sup> FLA. STAT. § 44.201 (2016)
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- <sup>116</sup> FLA. STAT. § 718.1255(4)(h) (2016)
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- <sup>119</sup> Mark Van Valkenburgh, *Mediating in “Good Faith” in Florida*, (2013)  
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- <sup>120</sup> Fla. Stat. § 44.201(4)(a)
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- <sup>123</sup> FLA. STAT. § 718.1255(4)(h) (2016)
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- <sup>125</sup> FLA. STAT. § 718.1255(4)(m) (2016)
- <sup>126</sup> FLA. STAT. § 718.1255(3)(a) (2016)
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- <sup>130</sup> Joseph E. Adams, *The 2001 Survey Of Florida Law: Community Associations: Statutory Changes and Appellate Law 7/1/00-6/30/01*, 26 NOVA L. REV. 1, 6 (2001)
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- <sup>132</sup> FLA. STAT. § 718.1255(3)(d) (2016)
- <sup>133</sup> Senator Russell D. Feingold, *Mandatory Arbitration: What Process Is Due?* 39 HARV. J. ON LEGIS. 281, 289 (2002); Bette J. Roth, Randall W. Wulff, and Charles A. Cooper, ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE § 1:3 (2016)
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