

**Embracing Mediation:
A Best Practice for Local Government Attorneys**

By: David P. Bobzien. Esq.

During the 23½ years I served as the Fairfax County Attorney, I never considered mediation as a viable alternative to going to trial. Part of it was having received my legal training at a time when the use of mediation to resolve legal disputes was virtually non-existent. A much larger part was having the luxury of a hefty office budget that could readily pay for depositions and experts and the comfort of knowing that adverse money judgments, which, thankfully, were few, could easily be absorbed within the County's four-billion-dollar annual budget.

But the salad days are over. On the morning of November 23, 2016, I read with alarm that the Fairfax County Executive was predicting an \$83 million shortfall for the coming fiscal year. When County revenue is largely dependent on the real estate tax, the Washington area's luke-warm real estate market, when coupled with lower-than-expected state funds from Richmond and a strong aversion to raising taxes, spells difficult fiscal times for the foreseeable future. (The voter rejection in November of a proposed meals tax erased a hoped-for \$96 million and added to the misery.)

I am certain that most other Virginia localities are in this same leaking boat. It is time for all of us to embrace mediation as the preferred alternative to trial. And it's not just about saving money. The greatest benefit is that it really works. The McCammon Group, with which I have been associated since my retirement from the County, has year in and year out compiled an 85% success rate. (70% result in a settlement on the day of the mediation and half of the remaining 30%, through the persistence of the mediator, settle within a few days.)

There so many aspects of mediation that should appeal to a local government attorney. Mediation permits the parties to control the outcome and not leave it to the dice roll of a bench trial, or even riskier, a jury trial. Mediation permits the locality's officials and employees to continue fulfilling their job duties, without the distraction of participating in discovery, trial preparation, and the trial itself.

Privacy is another significant benefit of mediation. Local government attorneys are used to hearing the oft-repeated call for "transparency" coming from the public and their elected officials, when in their hearts they know that "translucency" should surround most litigious situations. Because the mediation is private, the parties are free to express themselves without the self-muting or the evidentiary constraints that occur in a public trial. While any settlement will be a matter of public record and, perhaps, debate, the discussions leading up to that settlement are confidential and do not run the risk of causing adverse political or liability consequences.

McCammon Group Neutral, Mark Rubin, uses the classic story of siblings fighting over a single orange to demonstrate the ability of mediation to foster creative solutions. A parent might settle the argument by giving the orange to one or the other or by cutting it in half and giving a half to each one. Going to trial is much like asking a judge or jury to decide who gets the orange or how much of the orange each should get. But what if one sibling wants the orange rind for baking and the other wants the juice of the orange for drinking? Both wishes could be satisfied. Mediation provides the parties to a dispute with an opportunity to achieve a reasonable resolution by working together, with the assistance and guidance of a mediator. A successful mediation may see the parties fashioning creative solutions that would not likely result - or even be considered - during litigation.

Many disputes occurring in local government settings involve adversaries who will continue to deal with each other after the conflict is resolved. An example would be a contract dispute with a construction company that frequently is the successful bidder on your public works projects. The collaborative nature of mediation lends itself to continued and maybe improved relationships between the parties.

Every locality will experience a high-profile dispute that leads to media attention and public scrutiny. It is usually in the best interest of the locality to resolve the dispute as quickly and quietly as possible. Lengthy, visible litigation is clearly not in the locality's best interest. Mediation provides the framework for fast, non-public resolution.

One of the keys to a successful mediation is to have the individuals with the authority to settle a case physically present at the mediation. For example, in the mediation of an automobile accident personal injury claim, the insurance carrier needs to have its person with the authority to settle in the room or, while not preferred, at least reachable by phone. This can present a problem to a locality if a settlement has to be blessed by the City Council or the Board of Supervisors, but it is not insurmountable. Many governing bodies have given authority to their chief executive officers or department heads to settle a monetary dispute up to a certain limit. But when ratification of a settlement must await a meeting of the governing body, a completed agreement and an assurance by the local government attorney that best efforts will be used to persuade the governing body to ratify it can count as a successful mediation.

I urge all of you to get out there and mediate!

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