



LAW:

Can Municipalities Afford Not to Mediate?

By DANIEL M. FUNK

At a time when municipal budgets are being pared to the bare minimum, there is, unfortunately, no corresponding decrease in municipal claims, conflicts and disputes of all kinds. The cost of claims settlements and judgments, as well as counsel fees, continue to plague city and town budgets.

Municipalities can always hope for good fortune in terms of what claims are brought and what judges and juries might do when these claims are pushed to the limit. And in some instances, fighting a claim in court is absolutely the right or necessary thing to do, such as when a policy position or a rule of law needs to be fought to a decision.

The vast majority of cases, however, are settled prior to a judicial ruling. The question then becomes, what price has been paid by the municipality in money, time, energy, staff resources, and perhaps employee morale prior to any such settlement?

Our judicial system is well established as the customary means of resolving disputes. When individuals or other legal entities feel wronged or harmed in a way that allows for legal redress, they will contact an attorney who will advise them and provide advocacy services on their behalf. What happens after that varies from a quick settlement to long, drawn-out litigation, and everything in between.

Faced with claims and conflicts, municipalities tend to follow this path, seeking advice and counsel from their municipal attorneys. In a sense, this is understandable. Don't we all believe that we can figure out the best resolution to a problem by relying on what we believe to be a tried and true method that is widely accepted? The cost of relying solely on this traditional approach, however, can be quite high.

There is an alternative means of resolving conflicts and disputes that need not lead to such a high price. That alternative is mediation.

Mediation has been used as a cost-effective dispute resolution tool for many years in the private sector, but it has not yet been embraced by local government. The option is hardly revolutionary, but it does break with tradition, and it takes some creative thinking. Mediation is still considered a method of "alternative dispute resolution." Perhaps the time has come to make mediation less of an "alternative" for municipalities and as much a part of the norm as going to court. If ever there

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was a time when municipal leaders may want to consider mediation as an option for certain disputes, this just might be it.

THE FEDERAL EXAMPLE

In 1990, as the federal government was looking for increased efficiencies in resolving disputes, Congress enacted the Administrative Dispute Resolution Act. The law made mediation and other forms of alternative dispute resolution a mandatory part of the dispute resolution process for federal agencies. Congress made the following findings in support of the enactment of the law:

1. "Administrative proceedings have become increasingly formal, costly and lengthy, resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes."
2. "Alternative means of dispute resolution have been used in the private sector for many years and, in appropriate circumstances, have yielded decisions that are faster, less expensive and less contentious."
3. "Such alternative means can lead to more creative, efficient and sensible outcomes."
4. "An increased understanding of the most effective use of such procedures will enhance the operation of the government and better serve the public."

Every one of these Congressional rationales apply to other levels of government, including municipalities. The success of mediation at the federal level is a strong object lesson for local governments.

WHAT IS MEDIATION?

Mediation is often described as "assisted negotiation," where a neutral party (the mediator) works with the parties in conflict to define their goals and develop options for resolution and mutual gain. The following five principles govern mediation and professional mediators:

- **Confidentiality:** The mediator makes a commitment to the parties and to the profession to keep the content of the discussions private. The mediator may not testify before a subsequent judicial proceeding.
- **Impartiality:** A mediator will strive

to conduct a process that is viewed as fair by all parties. A mediator will also work to treat all parties equally and without bias.

- **Voluntariness:** Each party must make an affirmative commitment to participate in the mediation process in good faith. This commitment does not prevent either side from withdrawing from the process for any reason once the mediation begins.
- **Self-determination:** In mediation, it is the parties, and not the mediator, who determine the outcome of their dispute. Accordingly, mediated agreements have a greater likelihood of follow-through and compliance.
- **Informed consent:** Mediators work to make sure that parties are informed about the mediation process before they begin and have access to information and advice before giving their consent to any final agreement.

BENEFITS FOR LOCAL GOVERNMENTS

The benefits of mediating municipal disputes include the following:

- **Cost savings:** Litigation is unavoidably very expensive. It can cost thousands—even hundreds of thousands—of dollars that could be better spent delivering required services.
- **Time savings:** Litigation takes public officials and employees away from their job duties to assist in fact investigations, determining how to respond to complaints in all their various forms, discovery, trial preparation, and the trial itself. Avoiding those tasks will allow for increased productivity of the officials and employees involved.
- **Privacy and confidentiality:** Because the mediation process is private, the parties are free to express themselves on the issues without the glare of the public eye. With confidential negotiations, there is a greater likelihood of settlement that might not otherwise be available to public officials. The final settlement is public, but the process leading to resolution is not. This benefit applies as well to public boards and commissions otherwise subject to the state's open meeting law. (Under state law [M.G.L. Ch. 30A,

Sect. 21], one of the allowed purposes for which an executive session may be held is, "To meet or confer with a mediator, as defined in Section 23C of Chapter 233, with respect to any litigation or decision on any public business within its jurisdiction involving another party, group or entity...")

- **Political gain:** Every city or town periodically experiences a highly sensitive, high-profile, emotional and even embarrassing claim that leads to unwanted headlines. It is usually in the interest of the municipality and its leaders to resolve such a claim quickly and quietly, if possible. Mediation can accomplish these goals if the mediator is brought in before the matter gets out of hand and the parties become entrenched.
- **Creative solutions:** Mediation provides the parties to a dispute with an opportunity to shift their approach from seeing the other side as an adversary to seeing the other side as a partner in resolution. Once the parties realize they can achieve a reasonable resolution by working together, they, with the assistance of and guidance of the mediator, can fashion creative and meaningful solutions that would not likely result from—or even be considered—during litigation.
- **Improved relationships and communication:** Many disputes involve combatants who will continue to deal with each other after the conflict is resolved (e.g., a municipality and a citizen group; a municipality and an employee, a group of employees or their union; a municipality and a community agency). The collaborative nature of the mediation process increases the prospects for improved relationships between the disputants. A successful, personnel-oriented mediation can also improve employee morale immeasurably.

WHERE MEDIATION CAN WORK

While not all-inclusive, the following examples are fairly common disputes that are often good candidates for mediation:

- **Third-party claims:** Most claims brought against municipalities tend to be rather routine, but local governments are involved in many operations that can

affect local residents, businesses, visitors and contractors, so it is inevitable that large and difficult claims make their way to city or town hall. It is critical for municipal decision-makers to try to identify claims that just might develop into expansive and time-consuming litigation. These cases should be examined early on for whether mediation is a possible means for resolution.

- **Internal workplace disputes:** Employees who don't get along can create workplace distractions that can impede productivity. Public employers can often require the employees to mediate their issues toward resolution. Although elected officials cannot be ordered into mediation, it is just as available to them when turf issues or political antagonism become so problematic that they cannot work cooperatively.
- **Public policy issues:** Mediators can provide consensus-building among community groups and local government when policy issues are being considered for planning and/or legislative purposes. This is especially critical when government seeks out citizen input on such matters. Governmental plans can come to a standstill or be severely delayed if community interests are so divergent as to paralyze the process of citizen input and recommendations. Mediators can work with disparate groups to reach consensus on their recommendations to the local government and avoid delays in implementing new policies or enacting new laws.
- **Intergovernmental disputes:** Sometimes disputes arise between neighboring municipalities over the provision of certain services or over joint agreements that are meant to serve both communities. Different levels of government might also engage in conflict over who has jurisdiction over a particular matter. In these instances, two or more governmental bodies can benefit from the time and cost savings of a mediated resolution.
- **Collective bargaining:** During this period of fiscal austerity, municipal leaders may have little to offer unions in the way of financial or benefit enhancements, which can lead to interminable and stalled negotiations. The parties

often turn to voluntary informal mediation to try to resolve an impasse. In the short run, mediation gets the parties back to the table, allows the parties to separate their interests from their emotional responses, helps the parties to communicate better, assists them in exploring options, and allows for creative solutions to be considered. In the long run, mediation can improve relationships that may have been damaged, can improve workplace morale, can allow all parties to maintain dignity in the aftermath, and can save time and money.

DYNAMICS OF MEDIATION

When mediation works, as it often does, it sometimes seems as if the mediator applied magic to help the parties to reach a resolution that they previously were not able to accomplish on their own. In truth, mediation is anything but magical; instead, it is based on common-sense, time-tested strategies in conflict resolution and negotiation. Essentially, the mediator manages three dynamics: the mediation process itself, the interactions between the parties, and the issues and decisions facing the parties.

Through the skillful management of the process, the mediator provides the parties with structure for their negotiation that is simply more conducive to healthy communication. This allows the parties to see and hear each other's perspectives more clearly than before, making it easier for solutions to emerge. Inevitably, the prospects for resolution increase dramatically in such circumstances.

PRACTICAL CONSIDERATIONS

- **Finding a mediator:** The process of choosing a mediator is similar to selecting any other professional service provider. The parties may want to know that the mediator has a certain level of experience, is knowledgeable about the area of concern, and has a successful track record. In addition, the parties may wish to ask prospective mediator candidates for further information, including: where they were trained, a description of the way they will conduct the mediation, references, promotional materials, and billing fees and costs.

- **Best practices for a successful mediation:** The likelihood that collaboration will be accomplished at the mediation table is increased by the amount of preparation the parties undertake in advance of the mediation. An effective mediator will assist the parties in this preparation by asking them a series of questions to help them identify their goals; brainstorming potential ideas for resolution; and identifying what they could do if they don't achieve resolution. In this manner, the parties arrive at the table prepared not to do battle, but rather to join forces to reach resolution together. (See "Does Mediation Work? You Be the Judge: A User's Guide to Mediation," by Charles Doran, *Insights* magazine, 2008.)

- **Role of counsel:** For some disputes, municipal counsel will be the driving force behind the move to mediation. In such instances, counsel may want to directly participate in the mediation to assist in the process. In other cases, particularly where the mediation is party-driven, the parties may wish to proceed without counsel at the mediation table. There is no legal requirement one way or the other on this point. The role of counsel will be a case-by-case decision by the parties and their respective counsels.

Overall, mediation offers little risk but great potential for reward. At a time when so many cities and towns are struggling to make ends meet, can they really afford not to mediate? ❁