MEDIATION FOR PUBLIC BOARDS AND ENTITIES

Florida Gulf Coast University
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A Presentation of:

DOYLE CONFLICT RESOLUTION
9132 Strada Place, Suite 401
Naples, Florida 34108
www.DoyleResolution.com
MEDIATION FOR PUBLIC BOARDS AND ENTITIES:
An Outline of Reasons and Ideas

Dispute Resolution in the 21st Century

- **Litigation**, the default method of dispute resolution in the United States, can be effective but it is not efficient. It has become crushingly expensive, is always uncertain and often takes so long that the resolution has little meaning by the time it is completed.

- **Arbitration**, often touted as the low-cost answer to litigation, is not always less expensive or faster than litigation. Even when quicker and less expensive, it still involves a decision made by a third party.

- **Mediation** is non-binding and therefore cannot be guaranteed to bring a dispute to an end. But it is quick, relatively inexpensive, has a high settlement rate and, most importantly, has an outcome determined by the parties.

- **Direct negotiation** between disputing parties or even between their attorneys seems to be increasingly rare. If handled well, it can be the most efficient and effective dispute resolution process.

Why Mediate?

- Mediation is risk free. It is a non-binding process and no party can be coerced to settle.

- In disputes where ongoing relationships are involved (e.g. employer-employee disputes), mediation can help protect the relationships.

- Although mediation is not free (it requires time of the disputing parties and their attorneys and the expense of a mediator) the cost is much less that protracted litigation. The settlement rate of disputes that are mediated is about 60%.

- In Florida, state courts routinely order almost all cases to mediation in an attempt to relieve the strain of over-crowded courts. Since it is likely that a litigated dispute will be sent to mediation, it makes sense to attempt settlement through mediation early when the “sunk costs” of litigation is not inhibiting a settlement decision.
Legal Requirements for a Public Entity in Mediation

- In all litigated cases:
  - Participation is required. The general rule for mediation is that a party must send a representative with the authority to settle.
  - Public entities are required to send a representative to mediation with "full authority to negotiate . . . and recommend settlement."
    - Florida Rule of Civil Procedure 1.720(d) - state court
    - Local Rule 16.2(e) Federal District Court, Southern District of Florida
    - Note: The Middle District Federal Court Local Rule 9.05 makes no exception from the general rule for public entities. Therefore, it is recommended that the court be petitioned to allow the board to designate a representative to negotiate and recommend a settlement.
  - Florida's Sunshine Law requires public entities to make decisions (including settlement of litigation) at an advertised public hearing.
  - The public entity may discuss litigation in executive session, "a shade meeting," but may not make decisions at shade meetings.

- Settlement is not required at mediation. There is no court requirement that the board's representative settle the case or even agree to recommend a particular settlement.

- The Board, in a public meeting, may reject a negotiated settlement. Even when the designated negotiator recommends a settlement, there is no legal requirement that the board approve the recommended settlement.

- Pre-suit mediation (as opposed to cases in litigation) does not allow for any shade meetings to discuss the case. Opinion of the Florida Attorney General – AGO 2009-14.

Effective Tools (Best Practices) for Public Entities in Mediation

A. The Board must be well informed in advance of the mediation so that guidance can be given to the board's negotiator. A shade meeting should be used to discuss the case so that the possible outcomes of litigation can be discussed freely.
   1. Risk assessment is critical, using all information available. The Board should understand its BATNA (best alternative to a negotiated agreement) and WATNA (worst alternative to a negotiated agreement).
   2. Evaluation of risk should include the cost of an adverse outcome, the cost of litigation, non-economic factors such as time to be consumed for faculty and administrators, the possible effect the case may have on other pending or threatened litigation and the effect of publicity surrounding the case.
B. The Board should give guidance to the negotiator (by consensus since official votes cannot be taken), but should also trust the negotiator to use his or her best judgment in participating in settlement negotiations.

C. During mediation, the negotiator should endeavor to resolve the case using the parameters relayed by the board at its pre-mediation session.
   1. Effective participation in mediation includes not only advocacy and presenting the board's position, but active listening to learn anything that will affect the risk assessment for the case.
   2. If a settlement can be reached, it may be signed by the board's attorney, but with clear language that the agreement is signed to indicate that the settlement will be recommended and no agreement exists until approved by the board at an advertised public meeting. *Delray Beach v. Keiser*, 699 So. 2d 855 (Fla. 4th DCA 1997).

D. Following mediation, the board should meet again in executive session to receive the negotiator's report and recommendation.
   1. The risk assessment should be re-evaluated based on the negotiator's report.
   2. Any new facts or developments in the case must be explored to assist the board in its final decision.
   3. The board may accept or reject any settlement recommended.

**NOTES:**
Robin Doyle – biographical notes

Robin began his career as a trial lawyer in Naples in 1975 when there were fewer than 100 members of the Collier County Bar. After trying criminal cases for several years, he became well known for handling construction and commercial disputes. He tried many jury and non-jury trials and represented clients in arbitrations around the state and out of Florida. He was a Board Certified trial lawyer, certified both by the Florida Bar and the National Board of Trial Advocacy. For 12 years, he was the head of the Litigation Section for the Florida offices of Quarles & Brady.

In 2005, Robin left trial practice to become a full time neutral. His practice includes mediation, arbitration, neutral evaluation, and negotiation consulting. He has mediated cases from Naples and Miami in South Florida to the Florida panhandle and in New York City. He has lectured on the subjects of Construction Law, Evidence, Alternative Dispute Resolution and Ethics and he has helped train mediators in Florida and in New Orleans after Hurricanes Katrina and Rita.

Mediation is a profession that calls for skills and training different from the skills of a trial lawyer and Robin has worked to meld mediation skills with his years of experience as a litigator. He studied negotiation and mediation at Harvard Law School, trained as a mediator at the University of South Florida and with well-known mediation trainer Perry Itkin, and studied advanced mediation skills at the Strauss Institute at Pepperdine University Law School and the Association for Conflict Resolution. He regularly lectures on mediation advocacy and ethics to lawyers in Florida.

Robin has also been active in the community, serving as Chairman of the Florida Bar Evidence Committee, Chairman of Economic Development Council, Chairman of the Collier County Airport Authority and an officer of the Collier County Bar. He currently serves as a member of the Stetson University College of Law Board of Overseers and is scheduled to teach advanced mediation at the law school in 2016.

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239-213-0033