MADRP Bulletin
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Conflict? You've got options!

Maine Association of Dispute Resolution Professionals

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Senior Mediators Release Statement Urging Effective Negotiation Approaches

This article was sent to MADRP by Jonathan Reitman who asked that it be shared with MADRP members.

There comes a time when even mediators will speak up. Mediators are conflict resolvers who help others to resolve conflict in a voluntary and constructive way. Mediators are normally quiet, priding themselves on their impartiality and neutrality. Now, however, over 75 of the world's leading mediators have "had enough" according to Mediate.com CEO Jim Melamed, and have signed a statement urging that community, national and global leaders engage effective negotiation and mediation approaches. Here is the text of the **Mediators' Statement** developed at the recent Senior Mediators Conference in Keystone, Colorado:

Given that the world is confronted with real and perceived threats from several international arenas we, the undersigned, urge that citizens of our nations insist their elected and appointed government officials immediately engage in honest, direct and unconditional negotiations with all authorities and powers who can resolve these pending crises in ways that are equitable and practical for all concerned without sacrifice to national sovereignty or security. As citizens of the world and as professional negotiators and mediators we urge that proven conflict resolution processes be employed now.

Upon www.mediate.com's release of the Keystone Conference Mediators' Statement, initiative Executive Director William Lincoln stated, "**The Mediators' Statement is crisp, non-accusatory and non-political -- it's just an honest statement asking for direct negotiations and mediated negotiations in every sector.**"

In addition to maximizing the use of effective negotiation and mediation in situations of community, national and international turmoil, Associate CRI Director Polly Davis adds, "The Mediators' Statement and birth of the International Coalition of Concerned Mediators initiative emphasize that **we need to bring civility back into our negotiation and conflict resolution discussions**."

CRI Executive Director William Lincoln adds that "Permitting 'the spirit of compromise' to be the motivating force for coming to the table is the wrong impetus. **Converting real and potential conflict into mutual challenges is the correct and most productive mindset**. A constructive negotiation attitude is more important than tricks and tactics and certainly a better approach than war. The International Coalition of Concerned Mediators will emphasize constructive negotiation and mediation approaches that demand candor, humanity and creativity. Our joint survival demands no less."

Signatory mediators and the ICCM ask all who support the Mediators' Statement to express your support at www.concernedmediators.org by adding your name to the list of supporters and by sharing this opportunity with your family, friends and colleagues. We can change the world for the better! Please do your part! We need you now.
For additional information, contact the International Coalition of Concerned Mediators (ICCM) at www.concernedmediators.org.

FORMER CHIEF JUSTICE DANIEL E. WATHEN SHARES HIS VIEWS ON ARBITRATION

JUDGING V. ARBITRATING: IS THERE A DIFFERENCE?

By Daniel E. Wathen, Esq.

Based on twenty-four years of judging followed by five years of arbitrating, my short answer to the title question is: "Not much." The core function of hearing a case and making a decision is virtually the same—arbitrating is judging without a robe. There are some differences, however, and the well prepared arbitrator should anticipate the differences and adjust to them.

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Plan to Attend the

MADRP ANNUAL MEETING

Following the Fall Conference

Abromson Center, USM
At 4PM

See inside for more details

Daniel E. Wathen, Esq. continued

First there is a difference in the type of litigation. In my experience, cases submitted to arbitration tend to involve commercial matters and other types of cases that are rarely seen in a general jurisdiction trial court. I have arbitrated cases involving construction disputes and business valuation, but, surprisingly, the more common assignment thus far has involved claims arising out of corporate mergers, acquisitions or investments. The arbitration agreement in such cases usually provides for fairly expansive discovery and the application of the Federal Rules of Evidence. The principal advantages of arbitration seem to be confidentiality and instant access to a private judge. Typically, the quality of the lawyering is very high and the cases are exceedingly well prepared.

Second, as an arbitrator, you do not have a clerk's office. Whether the case is self-administered or administered by AAA or some other organization, usually there is a procedure for accelerated exchange of documents. This means that the parties have unfiltered email access to the arbitrator. In this age of electronic discovery, the daily email traffic and conference calls increase in number as the case progresses toward a hearing. It is not uncommon to inspect a mass of electronic documents in camera and rule on them within a day or two. I sure do miss the clerk of courts' office. My responsibility to maintain a file, a docket and a schedule and to manage the progress of the case takes a bit of effort and the services of a good assistant. For example, I have had cases where the exhibits alone fill eight or ten storage boxes. Notwithstanding the complexity of the litigation, unfiltered access to a private judge does work. Aided by counsel, I have processed such cases from beginning to end within six months.

Finally, there are the related questions of authority and demeanor. Obviously an arbitrator does not have the full range of authority granted to a judge. Missing completely from the arbitrator's tool kit are management tools such as sanctions and the power of contempt. The arbitrator has authority to make a decision but no authority to enforce it. At first blush, this seems like a significant difference. I have learned, however, that in practice the authority to decide the case carries with it much of the authority needed to get the job done. For example, I have issued trial and deposition subpoenas for service in other states. Could people ignore my subpoena? Yes. Do they? No. Usually their association or affiliation with one of the parties provides a practical motive for complying. Could the parties ignore my discovery orders? Yes. Do they? No, because they realize that eventually I am going to decide the case. Recently I read a case upholding an arbitrator's inclusion of damages for discovery violations in the final award. Whether one is prepared to go that far, the point is really quite simple -- as a practical matter, the power to make a final decision includes a fair measure of ancillary authority. The overriding importance of the authority to make a final decision should not have surprised me. In my years as a judge, I never used the power of contempt and rarely imposed sanctions.

Because the arbitrator has the judge's most useful tool, the authority to decide the case, then it is important that the arbitrator maintain the respect of the parties by acting like a judge -- reserved, dignified, patient, attentive and concerned. Arbitration hearings are often conducted in more informal surroundings but it is important for the arbitrator to maintain a somewhat formal style and stay above the fray.

Although there are differences, there is one important similarity -- to conduct a hearing promptly and efficiently in a good case with good lawyers, is a thing of beauty and a joy forever, with or without a robe.

MADRP'S ANNUAL MEETING

Plan to attend this important meeting following the conference on Nov. 17 at 4pm

VOTE on By Law changes
(proposed changes to be mailed to you by Nov. 1)

VOTE on 2007 Officers and Directors

CELEBRATE the 2006 MADRP Annual Award winner

MEET MADRP's first Executive Director Roger Moody

MADRP Spruces up By Laws

As part of our effort to improve the way the MADRP works, the Board of Governors has reviewed the By Laws by which we are governed to be sure they are in sync with our new structure.

In the "new" MADRP, the three regions of the state, North, Central and South, will each have their own Networking & Continuing Education meetings to make it easier for those in the furthest reaches of our state to join their colleagues, yet still maintain MADRP's character as a statewide organization.

Revising the By Laws will allow us to change our committees to reflect the new structure of MADRP: some standing committees mentioned in the current By Laws are no longer relevant or have been combined. There are currently no provisions to allow us to have three regional sections of MADRP. These and other updates will keep our By Laws current and relevant to the dynamic organization we have become.

Copies of the revised By Laws will be sent to members by Nov. 1 prior to the vote during the Annual Meeting on Nov. 17.

DOES THE MEDIATOR NEED TO LOOK AT A FAMILY MATTERS CASE DIFFERENTLY IN A POST-JUDGMENT CASE?

By Jane S.E. Clayton, Esq. and Edward C. Spaight, Esq.

While all divorce or child custody cases eventually come to an end, as family law practitioners and mediators know all too well, few - if any - of these matters are ever really over. Today, it is not uncommon for parties with children to return to Court for a second or subsequent "round" of litigation regarding custody, contact, support and related issues. These later-round cases pose different problems for family law mediators and raise difficult issues that are not always in consideration the first time around.

Post-judgment litigants often come to mediation with a very different mindset than participants in an initial action. In the original case, there are a great number of unknowns. Often, the wounds of the initial separation are still fresh. The parties are just getting used to the idea of living in separate residences, and are often jousting over custody and contact arrangements regarding the children. Frequently, both parties are seeking primary residence of the children, or one (sometimes both) parties may come into mediation with unreasonable or unrealistic ideas regarding contact and custody.

By the time the parties reach mediation in a post-judgment case, on the other hand, the stage is usually quite different. In all but the highest-conflict situations, some time will have passed since the original proceeding. Whether the original proceeding was resolved by agreement, or imposed by a judge or magistrate, the parties will have had some experience dealing with the reality of raising children after separation.

In addition, it is said that, much like in the grieving process, there are several "stages" to the process of divorce. These stages include: 1. Holding on to the relationship; 2. Letting go; 3. Ambivalence; and 4. Settling down. (Source: Kids First Center, Portland. Used with permission.) The parties do not always transition through these stages in an orderly fashion, and it is not uncommon to see a party go back and forth among the steps throughout the divorce and the post-divorce process. Indeed, it can often take two or more years for a person to get through all of the stages of the process, so that a mediator in a post-judgment case is not immune from the dynamics that each different stage brings to mediation. Furthermore, just as in the first round of litigation, it is rare for both parties to be at the same stage at the same time. It is very difficult, indeed, when one party is still clinging to the relationship and to the way things "used to be", while the other party has moved on.

Complicating matters further in a post-judgment case are the dynamics brought about by new partners, new spouses and new children. In Maine, this is not at all an unusual dynamic. From newly created "Brady Bunch" families with new stepchildren to new children being born to parties with new partners, new issues have been created that rarely appear in the initial round.

Part II of this article will appear in the December issue of the Bulletin

Maine Family Law for Mediators

Thursday, November 2 and Friday, November 3, 2006
At USM, Portland
Presenter:
June D. Zellers, Esq.
Common Ground Mediation Services

This 10 hour course will present the basics of the law and court procedures to enable mediators to handle family law cases successfully. It will meet the required 10 hours of family law training, one component of the qualifications for listing on the CADRES domestic relations roster, and will also qualify for continuing education credits for retention on that roster. Covered topics will include: the divorce process; parental rights and responsibilities; the role of other helpers in the system; use of Child Support Guidelines; division of property and debts; spousal support; and other related issues.

For more information and registration form, contact:
The USM Center for
Continuing Education
P. O. Box 9300
Portland, ME 04104-9300
780-5900

2006 MADRP ADR AWARD

Award Criteria

The purpose of the ADR award is to recognize and honor an individual or group whose accomplishments have promoted the use of alternative dispute resolution (ADR). To be eligible a recipient must:

Have made a significant contribution to the field of ADR as demonstrated by promoting and focusing attention and the use of ADR, and whose work exemplifies the value of ADR
Not be member of the Award Judging Committee
Be either an individual or organization who primarily resides in Maine.

The Award Judging Committee is made up of the three past recipients of the ADR award; Ann Gosline, Nancy Markowitz and Paul Charnneau and the MADRP Executive Officers. The Award Judging Committee reviews each nomination and uses MADRP's consensus process to make the final decision.

Please send your nominations with a short statement as to why you think this person should receive the award- by October 27th to Nancy Markowitz at nmark@usm.maine.edu. If you have any questions or comments contact: Nancy Markowitz: 207-780-5839 or nmark@usm.maine.edu