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Professionals Committed to Cooperative Conflict Resolution

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THE PRESIDENT'S MESSAGE

By Anita Jones

September always means to me following the lead of school kids everywhere and buckling down to get some serious work done, after the lazy days of summer. Serious work for Maine Association of Mediators right now is the LD 1378 Stakeholders' Meetings which got under way on Tuesday, September 8th; as well as planning for our Annual Meeting on November 4th in Augusta, and recruiting a good strong Board of Governors for the coming year.

The Stakeholders' Group got off to a good start, ably led by **Ann Gosline**, the facilitator for the meetings. The goal for the first meeting was to learn who else is in the room and what perspective each brings to the discussion. It was a time for gathering information to share and making sure everyone is working from the same basic understanding of the situation as it exists today. The next meetings will be more about exchanging ideas in the search for common ground. This group offers a unique opportunity to "walk the talk" of mediation, to sit with those with differing opinions and share interests and perspectives. But make no mistake; it is as critical for the mediation world as who gets the children or how the marital property is divided in divorce mediation. One thing we have learned through this year-long process of protesting Rule 514 and supporting LD 1378 to enact the Uniform Mediation Act, is that mediation in Maine right now has no law that protects confidentiality, although we do have Rule 408 which limits the use of FM mediation evidence should the case go to court, but it has loop holes. The "emperor is only half dressed" as Craig McEwen says, and we need to fix that. Any thoughts you may have or questions you want answered, contact me at abjones@maine.rr.com.

We are pleased to welcome the new **Justice Ellen Gorman** to our Annual Meeting. She is the liaison to the CADRES Committee, and has long been interested in mediation. The date is **November 4; the time 10am to 2pm; the place 11 King Street, Mediation and Facilitation Resources, in Augusta.** *(Cont'd on page 4)*

NOV. 4 ANNUAL MEETING OF MAINE ASSN. OF MEDIATORS TO FEATURE SUPREME JUDICIAL COURT JUSTICE ELLEN GORMAN

Supreme Judicial Court Justice Ellen Gorman will be the featured guest at the Annual Meeting of the Maine Assn. of Mediators, being held at Mediation and Facilitation Resources, 11 King Street, Augusta from 10:00 to 2:00 on Wednesday, November 4.

Justice Gorman will make a few remarks at 11:00 and lead a discussion session afterwards. Justice Gorman was appointed to the SJC by Governor Baldacci in 2007 after 11 years as a District Court judge and six years on the Superior Court. A 1982 graduate of Cornell Law School, she is the SJC Court liaison to the CADRES Committee.

In addition to Justice Gorman, other agenda items will include the election of new officers and the M.A.M. Board of Governors as well as recognition of outgoing B.O.G. members.

The fee for attending the annual meeting will be \$20, as lunch will be included.

A special announcement and signup email will be sent soon to members, and signup can be accomplished through the M.A.M. website, www.mainemediators.org.

We hope to broadcast the meeting to locations throughout the state where a reduced fee will be requested. The upcoming announcement will have more details. Watch for the email blast.

TRYING TO RESOLVE A DISPUTE? CHOOSE THE RIGHT PROCESS

(fm the "Negotiation Newsletter"-Harvard Law School Program on Negotiation)

When you're stuck in a conflict, three basic questions can clarify which path to follow.

Consider the following disputes:

- A divorcing couple disagrees on the best custody arrangement for their three young children.
 - A manager accuses his former employer of firing him due to age discrimination.
- An electronics company accuses another company of patent infringement.

Suppose that in each case, the parties and their lawyers have exhausted their attempts to negotiate a resolution on their own. They're ready for outside help in ending their dispute, yet they don't know where to turn.

When it comes to dispute resolution, we now have many choices. Understandably, disputants are often confused about which process to use. This article offers some guidance, adapted from Frank E. A. Sander and Lukasz Rozdeiczer's chapter on the topic in *The Handbook of Dispute Resolution* (Jossey-Bass, 2005).

Types of dispute resolution

Here's a review of the three basic types of dispute resolution:

Mediation. The goal of mediation is for a neutral third party to help disputants come to consensus on their own. Rather than imposing a solution, a professional mediator works with the conflicting sides to explore the interests underlying their positions. Mediation can be effective at allowing parties to vent their feelings and fully explore their grievances. Working with parties together and sometimes separately, mediators try to help them hammer out a resolution that is sustainable, voluntary, and nonbinding.

Arbitration. In arbitration, a neutral third party serves as a judge who is responsible for resolving the dispute. The arbitrator listens as each side argues its case and presents relevant evidence, then renders a binding decision. The disputants can negotiate virtually any aspect of the arbitration process, including whether lawyers will be present and which standards of evidence will be used. Arbitrators hand down decisions that are usually confidential and that cannot be appealed. Like mediation, arbitration tends to be much less expensive than litigation.

Litigation. The most familiar type of dispute resolution, civil litigation typically involves a defendant facing off against a plaintiff before either a judge or a judge and jury. The judge or the jury is responsible for weighing the evidence and making a ruling. Information conveyed in hearings and trials usually enters the public record. Lawyers typically dominate litigation, which often ends in a settlement agreement during the pretrial period of discovery and preparation.

Three questions to ask

Dispute resolution is often a multistep process that can start with negotiation, move on to mediation, and, if necessary, end in arbitration or litigation. This progression allows parties to start off, quite naturally, with less-expensive, less-formal procedures before making bigger commitments of money and time.

Still, there may be situations in which you wonder if it would be better to sue first and then aim for a settlement, rather than starting with a more collegial process. Sander and Rozdeiczer advise you to choose the right dispute-resolution method by answering the following three questions about the case you're facing.

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Choose the right dispute resolution process— (Cont'd from page 2)

Question 1: “What are my goals?” Simply knowing what you want to get out of the process can help you decide where to start. Begin by prioritizing your goals. For example, Carla wants to hash out a custody agreement with her husband as quickly and inexpensively as possible. Because she wants to make sure they both abide by the agreement, she wants them to decide the final outcome together.

It seems clear that, given Carla’s goals, mediation is the best choice for her dispute. Mediation is typically faster and cheaper than arbitration or litigation, and mediation also gives parties the greatest degree of control over the final outcome.

By contrast, Jack, who feels he is the victim of age discrimination by his former employer, has the primary goal of winning a large financial settlement. Thus, for him it may be wise to start with arbitration. If he also wants to set a legal precedent that could benefit others in his situation, he might turn to litigation instead. In both instances, he would do well to listen closely to his attorney’s assessment of his odds of winning the case and a large settlement.

What if you and the other party can’t agree on your goals? Sander and Rozdeiczer advise you to start off with mediation, as it is a safe, non-binding procedure for both sides.

Question 2: “Which process will capitalize on the best features of the dispute?” Every dispute has features that can help you reach a beneficial outcome, write Sander and Rozdeiczer. Which process will best trigger the strengths of the case?

The authors have identified a number of dispute features that lend themselves well to mediation: a good relationship between parties and their attorneys, opportunities for creative problem solving, the willingness of one or both sides to apologize for any mistakes or wrongdoing, eagerness to settle quickly, and the presence of multiple issues that might lead to tradeoffs. If your dispute has one or more of these characteristics, mediation may be the best choice for you. By contrast, if you would benefit from formal protections, such as enforcement of key deci-

sions, then arbitration or litigation might be a more fitting option. Suppose that Company A believes Company B is guilty of infringing on one of its patents. Even if mediation resulted in Company B’s agreeing to stop manufacturing the product in question, Company A might not have confidence that Company B would abide by the decision. Because it believes it has a strong case, Company A decides to bypass mediation and go straight to arbitration.

Question 3: “Which process will best overcome barriers to resolution?” As you try to answer this final question, Sander and Rozdeiczer advise you to keep in mind that both sides to a dispute often prefer a settlement to an arbitrator, judge, or jury’s binding win-lose decision. Thus, it helps to focus on the ability of the three different dispute-resolution methods to help you overcome barriers to settlement.

In particular, when parties are having trouble communicating and have a strong desire to air their feelings, mediation is often the best choice. When more than two parties are involved in a dispute, such as grandparents or other relatives in the case of a custody dispute, mediation might also be optimal, as it allows multiple parties to become involved. However, when parties have different opinions regarding the law affecting their case, a judge or arbitrator’s expertise ultimately may be needed.

When in doubt, mediate

In sum, the low-risk, relatively low-cost nature of mediation makes it the “go-to” dispute-resolution process. Mediation allows negotiators to work together toward maximizing their outcomes under the guidance of an expert, rather than handing over their dilemma for someone else to resolve on their behalf. Mediation can also be a beneficial choice when negotiators need to work with each other in the future.

If a mediator is unable to help you and the other side reach agreement, you may still need to turn to litigation or arbitration, but you will do so

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THE PRESIDENT’S MESSAGE (cont’d from page 1)

We are working on a way to share this meeting with our members in the north, so stay tuned on that. If you’d like to join the Board of Governors and help fashion the future of your statewide professional organization, this is the time to come forward.

Let me know of your interest by emailing abjones@maine.rr.com. We’ll be glad to have your fresh ideas and energy!

CHOOSE THE RIGHT PROCESS (Continued from page 3)

with a better understanding of your case and the issues at stake. In future articles, we will tell you more about how different alternative dispute-resolution processes, including mediation and arbitration, typically unfold.

Resource:

“Selecting an Appropriate Dispute Resolution Procedure,” by Frank E. A. Sander and Lukasz Rozdeiczer. *The Handbook of Dispute Resolution*, ed. Michael L. Moffitt and Robert C. Bordone. Jossey-

Bass, 2005 (a publication of the Program on Negotiation at Harvard Law School).

This article first appeared in *Negotiation*, a monthly newsletter published by the Program on Negotiation at Harvard Law School. To download free Negotiation special reports and learn how to subscribe to this award-winning newsletter, please visit: www.pon.harvard.edu.

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MISSION of ME. ASSN of MEDIATORS

The Association is a non-profit organization of diverse professional interests seeking to broaden public understanding and acceptance of alternative forms of dispute resolution. The Association strives to enhance professional skills and qualifications of mediators, arbitrators, and other neutrals through training, educational development and promotion of standards of professional conduct.

2009 CALENDAR OF EVENTS

Oct 7 **BOG* Meeting** 9:00-11:00 am.
 Nov 4 **Annual Meeting** 10:00-2:00 p.m.
at 11 King Street
in Augusta. (See
“Presidents Message”)

* BOG = Board of Governors