

Maine Town & City

The magazine of the Maine Municipal Association

APRIL 2019

Downtown Deal

Revitalizing core areas
seen as challenge
that must be met



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If you want to revive civility, choose mediation over litigation

The authors, both attorneys, encourage municipal officials to consider advantages of a mediator-led approach. One, they write, stands out: It saves a lot of money.

**By Rebekah Smith
and Peter Schroeter**

Managing town affairs can be challenging. Mediation is an effective tool that can be used in a myriad of town government situations to alleviate conflict and chart a plan for moving forward.

The recent increase in the popularity of mediation signifies a dramatic shift in how disputes are resolved. In former U.S. Sen. George Mitchell's recent article in this magazine, he noted that a key to leading our democracy towards more civil discourse is redoubling "our efforts to hear and understand the view of those who think differently from us. We need to ask: *Why do they believe as they do? Why do they act as they do? Is there something in their position that I don't understand or that I've been wrong about?*"

Mediation is a process that allows the parties to examine those important questions, in a facilitated and controlled setting.

A mediator is tasked with helping the parties to not only describe their experience in the situation that is at issue but also in helping parties to envision opportunities for resolution to move beyond the conflict at hand. A mediator doesn't decide who

is right or who is wrong, but does try to help the parties fully evaluate their positions and the potential avenues of resolution. Because the process is non-binding, the parties are better able to focus on how to resolve their dispute rather than winning a favorable decision.

Useful in many ways

Mediation is increasingly being utilized in administrative contexts within state government and has proven to be useful to municipalities too. For example, a municipality could refer warring neighbors to a mediation process to avoid continued use of town resources to address an issue not within the town's purview. Or a mediator could be utilized when a developer has proposed a development and neighboring citizens are voicing concerns to help resolve these before the two sides become entrenched. A mediator or a facilitator can be helpful in facilitating a forum on larger issues facing a town, such as whether to expand public transportation or how to address the closure of a large employer in the municipality. Mediation is also often a useful tool in resolving employment issues that can occur within town government. Eminent domain cases are an area of law where mediation is often used, and mediation can be particularly helpful in resolving other property disputes as well.

A mediation session typically starts with a group session where the mediator explains the process and his or her role and the parties, or their attorneys, make statements about the case that outline what they consider to be the important factors in evaluating the case. The parties are often separated into private conference rooms to meet

confidentially with the mediator. In those sessions, called caucuses, the mediator helps the parties consider the strengths and weaknesses of their positions, identify their interests and goals, and develop settlement proposals. The mediator goes back and forth between the parties relaying offers and counter offers while continuing to assist the parties with analyzing the important elements of their case. The meetings typically last for a few hours up to an entire day until the parties reach an agreement or it becomes clear that an agreement cannot be reached in which case the mediator adjourns the meeting. If an agreement is reached, a settlement document is prepared with the help of the mediator for signing by the parties.

In the past, settlement efforts in the litigation arena were limited to direct negotiations through the attorneys, usually after engaging in time-consuming and expensive adversarial litigation tactics. As litigation has become increasingly, sometimes prohibitively, expensive and courts are increasingly requiring mediation to accommodate an overburdened legal system, there is a growing demand for experienced, skilled mediators to help the parties evaluate their cases and facilitate negotiations. Mediation, or some other form of alternative dispute resolution, is now a required step in many cases within Maine's civil court system.

Three key advantages

Mediation has three important benefits: confidentiality, control and costs. Mediation is confidential, unlike litigation, which is a public process where court filings and proceedings are generally available and open to the

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public. The confidentiality of the process covers statements made during the mediation, positions taken by the parties on various issues, information disclosed to the mediator and settlement proposals. Based upon court rules and standard confidentiality provisions in mediation participation agreements, the parties are precluded from introducing evidence related to the mediation in any pending or subsequent court proceeding.

The confidentiality protections of mediation help the parties speak freely and openly, including the acknowledgment of uncertainties and risks of their case, without fear that any information discussed with the mediator or exchanged with the other side will be used against them in any court proceeding if the case is not settled. This helps the mediator identify the real interests of the parties, assist them with the evaluation of their case, and focus on how to achieve resolution rather than adopting positions based on gaining advantage in litigation.

Control over both the process and the outcome is another important advantage of mediation over litigation. In mediation the parties decide the entire process, including selecting the mediator, timing of the mediation and information to be exchanged. Litigation, on the other hand, subjects the parties to court mandated schedules and procedures which force the parties to focus on compliance with those mandates at considerable expense. The flexibility of mediation enables the parties to focus on their interests and the merits of the case and the most expedient and cost-efficient way to resolve their dispute.

Just as important as the process, is the control that the parties have over the outcome. In litigation the parties give complete control and decision-making authority to a judge or jury. In doing so, they give up the ability to fashion their own remedy, which can include creative solutions that a court bound by legal principles cannot achieve. The satisfaction of achieving a mutually agreed upon resolution instead of having a decision imposed upon them by a third party can't be overstated.

Mediation saves money

Probably the most tangible benefit of mediation is the tremendous

cost savings that can be achieved. Because of overburdened court dockets and the increasing complexity of legal disputes, attorney's fees for each side can be prohibitively expensive and often exceed the amount in controversy. Litigation that goes all the way to trial typically costs each party \$20,000 to \$50,000 in attorney's fees. In cases involving complex business and legal issues, fees can easily reach six figures for each side. Employment cases can cost employers \$100,000 or more in legal fees and, if they lose the case, subject them to paying an equal amount for the prevailing employee's attorney. Because mediation can take place before litigation is initiated or, if litigation has started, early in the process, the cost savings are dramatic and greatly enhance the parties' ability to

achieve a resolution that is financially favorable to the litigation alternative.

Although the focus of this article has been mediation, other alternative dispute resolution processes as well as meeting facilitation by a training mediator, are variants that can also be helpful to municipal governments. Given this magazine's recent focus on reviving civility, mediation is one of the best ways to return civility to a challenging conflict and move the parties through entrenched positions to mutually agreed-upon outcomes. We would be happy to serve as a resource to any municipality seeking to learn more about how mediation could be employed within town government. Feel free to contact us if you would like further information or a training on mediation processes. ■



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