INNS OF COURT

TABLE EIGHT PRESENTATION: MEDIATION

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By:

Elizabeth LaRochelle, Hon. Gary Hicks, Hon. Thomas Barry, Clara Lyons, Aaron Lang, Julian Jefferson, Charles Bauer, and Grant Gendron

With Assistance from: Melinda Gehris and Hon. Charles Temple

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- **Duration**
  - 1-3 hours

Small Claims and District Court Mediations

Small Claims Mediation:

- There is a brochure available through the court website providing basic information about mediation for parties. Additionally, Courts include information on mediation in their Notice of Pre-Trial Hearing (example attached).

- Rule 4.12 of the Circuit Court of the State of New Hampshire, District Division: Small Claims Actions governs small claims mediations.

- The mediations are confidential.

- There is no additional cost for mediation as the program is funded by surcharges on the filing fee. The surcharge is $5 for cases of $5,000 or less, and $60 for cases over $5,000.

- Mediation is voluntary for small claims cases of $5,000 or less. As the court website describes, "the court will either offer mediation as an option to you on the same day as your case is scheduled, or you will be contacted by a mediator who will set up a mediation session at the court in advance of your hearing day. The District Court Clerk where your case is scheduled will be able to tell you which process that particular court uses if you are unsure and would like to know in advance."

- Under RSA 503.1(IV), mediation is mandatory for small claims cases over $5,000. If a party fails to appear at a scheduled mediation, judgment may be rendered in favor of the party that appeared. If neither party appears, the case shall be dismissed.

- Any agreement reached through mediation (or otherwise) must include a judgment amount, and the parties must submit acknowledgement that they understand other mediation requirements.
    - The agreement is then submitted to the court for approval, unless an unrepresented party requests time in which to consult an attorney about the agreement before submission.
    - Additionally, a Mediation Report form is e-filed with the Court immediately after completing the mediation (example attached).

- As an important practice note, the default Agreement form (example attached) is what the mediator fills out upon settlement. If the case settles at mediation with the defendant agreeing to pay, most mediators will check the "Judgment for Plaintiff" box on the form.
    - That is bad for defendants who do not want a judgment entered against them, but the form does not contain an option analogous to the standard docket markings for a case without judgment for either party.
    - It is therefore prudent for defense attorneys to make sure the mediator does not check off the Judgment for Plaintiff box, and instead adds in the standard docket markings language (example attached).
        - Not all mediators are lawyers, so this may require some explanation.

Circuit Court Mediation:

- As with small claims, there is a brochure available through the court website providing basic information about mediation for parties.

- Rule 3.28 of the Rules of the Circuit Court of the State of New Hampshire, District Division: Civil Rules governs district court civil writ mediations.

- Mediation is confidential.

- As with small claims mediation, there is no additional cost because the program is funded by a $10 surcharge on all District Court civil writ filing fees.

- The District Court Civil Writ mediation program is voluntary.

- In some jurisdictions, the parties must contact the court clerk to request a mediation. In others, the Court sends the parties an "Opt-Out of Mediation Notice," and if the party wishes to attempt mediation, the party needn't do anything. The Court will then schedule mediation unless it receives an Opt-Out notice from any party.

- A party's failure to appear at a mediation program causes the parties to lose the opportunity to participate in the mediation program.

Family Court Mediation

Mediation is a great alternative to litigation so much so that the Courts are highly encouraging couples to participate in mediation before you can get before a Judge. A mediator will be the neutral facilitator between the parties to try and move you each towards settlement.

In Divorce/Parenting cases, the Court offers mediation to offer an informal process where the parties can try to resolve a dispute without the hostility that is sometimes associated with going to court. In New Hampshire, the family courts typically require mediation for parties' dealing with a Parenting Petition or a Divorce involving minor children, unless there are some extenuating circumstances like domestic violence issues. Couples who do not have children but are involved in the divorce process may opt to be sent to mediation—although it is not typically required.

The parties meet in a private, confidential setting to work out a solution to their problem with the help of the mediator. The mediator will not decide any issues for the parties and does not force disputing parties to reach an agreement or accept particular settlement terms.

The Family Division also offers free mediation in adoption cases where the Division of Health and human Services is involved. The purpose of this mediation is to establish a permanent home for children who are in the custody or guardianship of DHHS. This mediation is voluntary and may help birth parents and potential adoptive parents enter into an agreement for ongoing communication or contact that is in the best interest of the child, that recognizes the parties' interests and desires for ongoing communication or contact, that is appropriate given the role of the parties in the child's life, and that is legally enforceable by the courts.

Family division mediations can occur with either Court-appointed mediators or with a private mediator. Many of the more routine family cases can be settled using the Court-appointed mediator to resolve some, if not all, of the matters pending before the Court. However, with more complicated cases (whether due to asset structure or otherwise) a private mediator may be a better choice to help ensure settlement.

Collaborative Law

Another approach similar to mediation that has arrived in the family law context within the past five (5) years is the Collaborative Law Process. Collaborative Law is a team approach to getting through a divorce. The Collaborative Process is seen as a method that gives families the tools to work together and come up with creative solutions for their own unique situation. It prepares them for resolving future conflict within the family. Each person has his or her own attorney but then there are two neutral professionals (a financial neutral and mental health coach) that help move the process along.

The Collaborative Process is designed to meet the couple's needs. Having a financial neutral to help paint the economic picture of life after divorce can be not only educational but a huge relief

to know there is a plan in place. The mental health coach helps facilitate this process at a pace comfortable to the parties and can assist when facing road blocks to settlement that are often caused by emotional reactions to the process of separation or divorce.

What are some of the differences between Collaborative Law and Mediation?

The main differences between Collaborative Law and Mediation are:

Counsel - you are required to have your own attorney in the Collaborative Process. In mediation, you can go unrepresented.

Discovery – as part of the Collaborative Process you will gather all of your financial documents and work through a future budget with a highly qualified financial professional. In mediation, it is expected that you have shared all financial information with your partner prior to the mediation session and you are coming in with a plan of what you want.

Team Approach – in Collaborative Law there is a team to support you and your partner through the divorce process. Each member of the team is trying to come up with unique solutions to your individual set of facts. The sky is the limit when you have everyone brainstorming ideas! In mediation, it is usually just the individuals proposing what they believe is in his or her best interests and trying to get the other person to compromise. Mediation is great when the issues are few and the solutions are black and white.

Court – in the Collaborative Process, the parties agree not to go to Court. They sign an agreement that commits them to the Collaborative Process and promise that they will get new lawyers if they break that promise. The thought of losing your attorney and having to get new counsel keeps people motivated and focused on settling the issues. In Mediation if things do not settle, you can have your attorney file a motion and request a hearing. Often times knowing that you can have a hearing if things do not work in Mediation doesn't push people to try and settle, thinking they may do better in front of a Judge.

Probate Division Mediation Program

(http://www.courts.state.nh.us/adrp/probate/index.htm)

Q. What is the purpose of the Probate Mediation Program?

A: The Probate Court implemented its mediation program to increase access to justice; to increase parties' participation in court processes and their satisfaction with the outcome; to allow cases to settle more quickly with less expense to the parties; to reduce future litigation by the same parties; and to expand dispute resolution resources to the parties. Probate Court Administrative Order 11 establishes the mediation policies of the Probate Court.

Q: What is Mediation?

A: Mediation is an informal process where parties try to resolve a dispute without the hostility that is sometimes associated with going to court. In mediation, the parties meet in a private, confidential setting to work out a solution to their problem with the help of a neutral third person, the mediator. A mediator does not decide who is right or wrong. The mediator does not force the disputing parties to reach agreement or to accept particular settlement terms. The mediator helps each side to better understand their situation. The mediator fosters a problem solving atmosphere and lessens the temptation to engage in unproductive behavior.

The mediator ensures that each of the parties to the dispute has an opportunity to be heard and understood. The mediator encourages the parties to create a solution that meets their individual needs.

Q. What are the basic principles of mediation?

A: Mediation is based upon principles of communication, negotiation, facilitation and problem solving that emphasizes:

a. The needs and interest of the parties
b. Fairness
c. Procedural flexibility
d. Privacy and confidentiality
e. Full disclosure
f. Self determination

Q. How does mediation work?

A: Dealing with disputes is often painful, and petitioning the court may feel like a last resort. Mediation eases the difficulty of the court process. It gives the parties a chance to talk together about the problems that prompted the petition. It provides a way to work out a solution that addresses those problems in a way that is acceptable to everyone involved. It can reduce stress and uncertainty.

Q. What are the benefits of mediation?

A: At mediation you have a chance to present your ideas in an informal, private setting with the support and advice of your attorney, if you have one. It is a time for you to be heard and to listen to others.

In mediation you have a better opportunity to control the outcome of your dispute.

The mediator is impartial and trained to help you and the other party talk about your needs and differences so that you can work things out together.

Mediation may help you reach agreements that will let you get on with your life and possibly keep you out of court in the future.

By discussing your options in mediation you may discover choices you did not know you had.

Mediation may help improve communications and permit the parties to find better ways to deal with this conflict.

Costs associated with mediation may be lower than those experienced for prolonged litigation.

Q. How do I prepare for mediation?

A: Mediation deals not only with your legal claim but also deals with underlying issues that are important to you. It is important that you understand the nature of your dispute and what you really want to happen when the case is resolved.

If you have an attorney, it is important to discuss what your reasonable expectations for an outcome would be should your case go to court. You can, therefore, compare your options at mediation with what would be available through litigation.

It is important to come to the mediation session with an open mind, ready to consider new options that may not have been raised previously. It is also important to be willing to share information with the other parties and to work together towards reaching an understanding that would be acceptable to each of you.

Q. What happens during mediation?

A: At the start of a mediation session, the mediator will explain how mediation works and will answer your questions.

The mediator will ask each of you to state your views, express your feelings, and describe what you would like to have happen in your case.

The mediator may ask to meet with you alone (and with your lawyer if you have one) so you can talk more comfortably. If you do have an attorney, you may take a break and talk to your attorney privately at any time.

If an agreement is reached, it will be put in writing and signed by all parties. Later, the agreement will be presented to the judge who will review it and then issue a court order approving the agreement.

If an agreement can not be reached between the parties, or if one or more of the parties fails to follow through with the mediation session, the court will hear the case in a regular court hearing. Our experience is that even when a case is not resolved through mediation, often the parties have a better understanding of the underlying issues following a mediation session, and settlement may follow outside of the mediation session.

Felony Settlement Conference Policies & Procedures

NH Superior Court

December 2015

Introduction

Beginning in 2012, the New Hampshire Superior Court Felony Settlement Conference Program was founded to provide a meaningful alternative path to resolution of criminal cases in New Hampshire. The following policies and procedures are the result of experience and input from multiple stakeholders to the program, and a direct contribution of dedicated defense attorneys, prosecutors and victim-witness advocates who volunteered their time to collaborate on this project. The outcome is a comprehensive set of policies that represents the interests of everyone participating in the Felony Settlement Conference Program, indeed providing a realistic path to resolution of appropriate criminal cases in the New Hampshire Superior Court.

Tina L. Nadeau, Chief Justice
New Hampshire Superior Court

NEW HAMPSHIRE SUPERIOR COURT FELONY SETTLEMENT CONFERENCES

The New Hampshire Superior Court has established a Felony Settlement Conference Program in order to provide an avenue of negotiation between parties and settlement of criminal cases. Settlement conferences may be used for evaluative, facilitative, and restorative justice purposes, and will assist negotiations between the parties to criminal cases when the parties have been unable to reach a negotiated disposition. Settlement conferences do not serve the purpose of starting negotiations, but rather provide a forum in which to further negotiations and/or bring together concerned parties to reach resolution. Both the prosecutor and defense counsel must agree to participate in the settlement conference and, except by agreement of the parties, settlement conferences may only be requested after the State and Defendant have each made a good faith offer for a negotiated resolution of the case and have had an opportunity to discuss the proposed dispositions with their respective constituent(s) or client. Specifically, the request for a settlement conference may be made after the State has complied with the victims' rights statute or made what it deems to be reasonable efforts to do so, and defense counsel has discussed the State's offer with the Defendant and a counteroffer is made and the State has had an opportunity to respond.

Settlement conferences are conducted by retired and senior associate New Hampshire Superior Court judges or active judges who have not had and will not have any contact with the case. Settlement conferences may be conducted at any time in the process of a case, and the Court will schedule the settlement conference at least two weeks out from the filing of the request in order to allow parties and participants to prepare for the conference. The Settlement Conference Request Form (Attachment A) will indicate the purpose of the settlement conference (evaluative, facilitative, or restorative), minimal case information and status of plea negotiation. A settlement conference memorandum will be filed by both the State and the defense counsel with the Court not less than five days in advance of the settlement conference. These memoranda will contain more detailed case information, a list of participants, and specifically, what issues, questions, and/or additional information are anticipated to be part of the conference (i.e. proposed dispositions, apology from defendant, questions from victims, etc.).

Types of Settlement Conferences

Three types of settlement conferences have been defined as follows:

Evaluative: this type of settlement conference is primarily for the lawyers to obtain the opinion of a judge regarding the posture of their case. This type of conference may be useful to parties who want a better idea of what value a judge will place on the case and to seek input from the settlement judge on legal issues pertaining to the case. Parties requesting this type of conference feel that it would be beneficial for the settlement judge to evaluate the case, to point out strengths and weaknesses in the case and to make recommendations to each party with the goal of settling the case. Unless by agreement of the parties, it is expected that an evaluative settlement conference will occur after initial negotiations between the parties. It is anticipated that the participants in this conference would include the settlement conference judge and attorneys. The defendant's presence would not be required and there would be no other active participants.

Facilitative: this type of settlement conference may be utilized when reasonable efforts at plea negotiation have been made, but progress towards a negotiated disposition has not been made. Mandatory negotiation before this type of settlement conference is not required if the defendant refuses to make a counteroffer. Parties requesting this type of settlement conference request that the settlement judge facilitate negotiations by asking questions, determining what interests are most important to each party, and helping the parties to find options to satisfy these interests. This type of conference may be useful to educate a defendant. In addition to the State, defense counsel, defendant, and victim/witness advocate, it is the victim's right to be present and participate (if he or she chooses) in the facilitative settlement conference. Other participants may include anyone else with a stake in the case who may appropriately contribute to the conference (police, counselors, community official/members, family members of defendant, etc.).

Restorative: this type of settlement conference is intended to be used in cases where a defendant is accepting responsibility for his or her actions and is going to plead guilty to the charges at hand. The parties should be near to a resolution, but not have terms fully negotiated. Parties requesting this type of conference request that the settlement judge create an opportunity for victim impact to be shared in a more personalized environment and victim concerns and questions to be explored and answered. This type of conference offers an opportunity to

offenders to demonstrate responsibility through an accountability statement/apology. In addition to the State, defense attorney, defendant, and victim/witness advocate, it is the victim's right to be present and to participate if they choose to do so. Others with a stake in the case or who may appropriately contribute may also participate (police, counselors, community official/members, family members of defendant, etc.).

Settlement Conference Procedure

The settlement judge facilitates the conference, performing a role similar to that of a mediator in a civil case. The settlement judge does not make any decisions and must be careful not to appear to coerce either side in reaching an agreement. With the agreement of the parties and compliance with RSA 21-M:8-k, the NH Victims' Bill of Rights, the settlement judge may take the defendant's plea or under unusual circumstances, a further settlement conference may be scheduled. However, upon conclusion of the settlement proceedings and/or the defendant's plea and sentencing, the settlement judge will have no further contact with the case. Settlement conferences are confidential plea negotiations, within the meaning of Rule of Evidence 410, and neither the parties nor the settlement judge may disclose the contents of the settlement conference to the trial judge or any other person.

Evaluative Settlement Conferences will involve the attorneys and the settlement judge only. This conference may take place in chambers or in another private space with the judge. Prior to the start of the settlement conference, parties will agree whether the conference will be held on the record or not.

Facilitative and Restorative Settlement Conferences suggested format is as follows:

1. The judge will meet informally with counsel and victim/witness advocate in chambers prior to the settlement conference. A brief overview of issues or reasons for the conference may be reviewed and the judge will be made aware of any updates in the information provided in the settlement conference memoranda. The format of the conference will be reviewed and the victim/witness advocate may provide input regarding concerns and/or special considerations for a participating victim. If there are to be any ex parte communications during the settlement conference or special format arrangements, this should be discussed and agreed upon during the chambers conference.

2. The settlement conference itself should be held on the record to avoid potential claims of coercion, ineffective assistance of counsel or false promises. This record will be sealed after the conference.

3. The settlement conference is confidential. Nothing said during the conference may be used as evidence in trial, nor may the contents of the conference be disclosed to the trial judge or any other person. Prior to beginning the settlement conference, the parties must waive the applicability of Superior Court Rule 98 to statements made during the proceeding. The only exceptions to the policy of confidentiality (including for exculpatory evidence) are those outlined in the Settlement Conference Confidentiality Policy (Attachment B).

4. The judge begins the settlement conference by introducing herself/himself to the defendant, victim and any other attendees. The judge then explains the purpose of the settlement conference and the process, including the informal, interactive nature, and defendant's confidentiality protections. The judge emphasizes that the defendant is participating voluntarily and that his participation has no bearing on his right to have a trial by jury. The judge should query the defendant to ensure he understands that by participating in a settlement conference, he is not giving up his rights to a jury trial. The defendant is also asked if he understands and agrees to the process. The judge shall confirm compliance with the victims' rights statute by querying the State. The judge shall advise the defendant and the State that by agreeing to participate in the settlement conference, they are waiving their right to discovery of statements made during the conference and agreeing to abide by the Settlement Conference Confidentiality Policy.

5. The judge next reviews the charges against the defendant and the maximum penalties for each offense. After assuring that the defendant understands the charges and potential sentence and has no questions, the judge asks the prosecutor to give an offer of proof as to each charge and to set forth the recommended sentence and the reasons for the recommendation, including any applicable office policies, sentences for similar crimes, aggravating and/or mitigating facts of this crime, etc.

6. The judge shall seek input from the victim or Victim/Witness Advocate at this point or may defer this until after defense counsel and defendant have a chance to speak. This

communication may occur without defense counsel and defendant present if requested by the victim or Victim/Witness Advocate and agreed to by the parties. Flexibility in how this portion of the settlement conference transpires should be offered to ensure compliance with the victims' rights statute.

7. Defense counsel and the defendant have the opportunity to present their case. This may include any mitigating factors of the crime itself, information about the defendant's personal history and circumstances, any efforts the defendant has already taken to rehabilitate herself/himself, and any facts that would support an inference that defendant will no longer be involved in the criminal justice system. Defense counsel may also suggest an appropriate sentence under all of the circumstances. The prosecutor and/or judge may question the defendant about any of the information provided by the defendant or counsel.

8. After all attendees have spoken and asked questions, counsel may at that point agree on an appropriate sentence recommendation or the settlement judge may meet with each side privately. These individual meetings are not ex parte communications under the rules of judicial or professional ethics because the role of the settlement judge is that of a facilitator and not a judicial officer. Depending upon what transpires during the individual conferences, both sides may or may not meet together again with the settlement judge. If the parties reach a negotiated plea, they may further agree to have the settlement judge take the plea at that time or a later time. The settlement judge recognizes it is a victim's right to be present for a plea and sentencing. The settlement judge will ensure compliance with the victims' rights statute before taking a defendant's plea. If no agreement is reached, the case continues as scheduled and the settlement judge shall have no further contact with the case unless so requested by the State and Defense.

At the conclusion of all types of settlement conferences, a standard Settlement Conference Report Form (Attachment C) will be completed by the Settlement Conference Judge.

New Hampshire Superior Court - Rule 32. Alternative Dispute Resolution

Rule 32 governs alternative dispute resolution ("ADR") in Superior Court Cases.

The rule mandates that in every Superior Court civil case (with limited exceptions which will be discussed below) the parties must participate in either: (1) mediation; (2) neutral case evaluation; or (3) binding arbitration.

Parties must notify the Court of their intent with respect to ADR in the case structuring order. Ideally, parties confer and come to a decision about ADR jointly. This includes an agreement about the type of ADR – most typically mediation – as well as an agreement about the neutral who will conduct the ADR. The parties can also choose whether the ADR will be paid or volunteer. If the parties are unable to agree, the Court will make the decision.

Parties are not required to participate in ADR if they file a joint motion with the Court, confirming that formal ADR was completed before suit was filed. Parties may also move to be exempted from the rule for "good cause," if the motion is filed within 180 days of the service date. While there is no published case law on what constitutes good cause in this context, these motions tend to be disfavored. For example, anecdotally, a defense motion asserting that mediation should not occur because the defense will not make an offer, will typically be denied.

Parties may be sanctioned for failing to comply with the rule requiring ADR. Sanctions may be whatever the court deems "just under the circumstances." This is left to the discretion of the trial court. Sanctions may be as significant as dismissal of a claim. *See* Lillie-Putz Trust v. Downeast Energy Corp., 160 N.H. 716 (2010) (dismissing a writ as a sanction for the Plaintiff's refusal to appear at a scheduled mediation was an appropriate sanction based on the circumstances of the of the case).

The Court maintains a list of approved "Rule 32 Neutrals" that parties may choose from when selecting the neutral who will conduct the ADR. In order to be added to the list, a neutral must submit an application to the Chief Justice of the Superior Court for approval. The neutral must: (1) be an attorney in good standing in New Hampshire; (2) have either training or experience as a civil mediator, or served before as a Superior Court mediator; (3) participate annually in 8-hours of mediation-centered training . The Court maintains its list of Rule 32 Neutrals at http://www.courts.state.nh.us/adrp/superior/r170/Rule-32-mastercharts.pdf

Parties are not required to use approved Rule 32 Neutrals. To choose someone not on the list, all parties need to do is agree to a candidate, and provide the name of the selected person to the Court in the case structuring order.

Superior Court Neutrals have immunity. In addition, ADR proceedings are presumptively confidential and inadmissible in later court proceedings. This applies to any documents prepared by a party or attorney to aid with the Mediation.

The parties are expected to file a report with the Court within thirty days after the ADR is complete, to inform the Court of the outcome.

Under the prior version of Rule 32 (Rule 170), parties had to pay $50.00 into the Court if they choose to participate in volunteer mediation. Under the current rule, however, this is not necessary. A $10.00 surcharge is now collected every time a new action is filed, and this money goes towards the ADR program.

New Hampshire Supreme Court Mediation - Supreme Court Rule 12-A

The Supreme Court may refer cases pending in the court for mediation. All mediation will be conducted by a retired full time judge or marital master.

The following types of cases are not eligible for Supreme Court mediation: criminal, domestic violence, election, guardianship, involuntary commitment, juvenile, CHINS, delinquency, termination of parental rights, cases brought by a prisoner, and stalking cases

The parties must agree to participate in the mediation. The fee for each party is $225.00.

Further processing of the case by the Court will be suspended for 90 days while the case is mediated, and this can be extended if necessary.

The office of mediation and arbitration selects the mediator and schedules the mediation session. This office also receives all communications and filing from the parties related to the session

15 days after the mediation is concluded the mediator must file a written report with the Court stating whether the mediation had any effect on the pending case. The report shall not include any assessment by the mediator of the underlying issues in the case.

If there was no settlement, the case processing will begin again.

Supreme Court mediations are confidential. Information exchanged in these mediations are inadmissible in later court proceedings. This applies to any documents prepared by a party or attorney specifically to aid with the mediation.

United States District Court for the District of New Hampshire – Court Sponsored Mediation - Local Rule 53.1

The Federal District Court has a court sponsored mediation program that is governed by Local Rule 53.1.

Parties are not required to participate in the Court's mediation program. However, the Court has the authority to order the parties to participate in court sponsored mediation, and will often do so if the parties do not opt to participate in private mediation on their own.

If parties choose to participate in the Court's program, the first step is to notify the Court of the intent. Typically this is done in the discovery plan, or by filing a joint mediation statement.

The parties may ask that a district or magistrate judge serve as the mediator, or they may select the mediator from a panel of mediators maintained by the court. The Court maintains a list of approved mediators, including their respective areas of concentration and hourly fee, at http://www.nhd.uscourts.gov/mediation-panel-list. The mediators are governed by "Model Standards of Conduct for Mediators in the District Court for the District of New Hampshire Mediation Program." Among the requirements articulated by the Court are that the mediator must: (1) ensure the parties come to a voluntary, uncoerced decision about resolving the case; (2) be impartial; (3) determine if he or she has any conflicts of interest, and immediately disclose any conflicts that are discovered so the parties may decide if they want to proceed with that mediator; and (4) keep the mediation confidential.

If the Court has ordered the mediation, the mediator will be selected by the Court. The parties may also agree to select a private mediator if all the parties can agree.

The parties are required by the Court's guidelines to exchange a Mediation Conference Statement five days before the mediation and to provide a Confidential Addendum directly and only to the mediator.

Mediators have immunity, and mediations are confidential, including the documents prepared by the parties to aid in the mediation. No statements made in these documents, or during the mediation, may be used at trial. Notably, the Court guidelines actually require that mediation statements be destroyed after the mediation.

First Circuit Court of Appeals

The First Circuit's mediation rules are governed by Rule 33 of the Federal Rules of Appellate Procedure and Local Rule 33.0.

Local Rule 33.0 mandates mediation of all civil appeals, with the following exceptions: habeas corpus petitions; prisoner petitions; pro se cases; summary enforcement actions of the National Labor Relations Board; Social Security appeals; petitions for review from orders of the Board of Immigration Appeals; and original proceedings, such as petitions for mandamus.

The parties are required to file a docketing statement no later than 14 days after the case is docketed in the Court of Appeals. The Court will notify settlement counsel – who is appointed by the Court - if the case is eligible for mediation. Settlement counsel will then contact the parties to schedule a settlement conference. The parties will be required to submit a copy of any relevant orders, memoranda, opinions, or other information about the appeal prior to the conference.

Settlement Counsel will then contact the attorneys to schedule the conference. Settlement Counsel will request that the attorneys submit a copy of the relevant orders, memoranda, opinions, and other relevant information about the appeal before attending the conference.

The conferences last approximately 1 – 3 hours. They typically occur before briefs are submitted. Conferences typically occur in settlement counsel's offices. The Boston office generally handles appeals from the District of New Hampshire. In special circumstances, settlement conferences can occur by telephone.

Settlement Counsel may conduct follow up telephone conferences, or even require an additional in-person conference.

After the conference is complete, settlement counsel files a report with the clerk's office indicating whether settlement has been reached. The report is not to include any information or opinions about the substantive issues, nor is to refer to any communications made by the parties during the conference.

BTLA MEDIATION

Introduction

The New Hampshire Board of Tax and Land Appeals (BTLA) "hear[s] and determine[s]" matters involving taxation, property valuation, and the condemnation of property. RSA 71-B:1, :5 (2012). In taxation matters, if a municipality denies a property tax abatement, the aggrieved applicant may appeal that denial to the BTLA. According to the BTLA's website, "most appeals will be subject to a mediation requirement."[1] And, "[i]f mediation is not successful, the board will hold a public hearing and issue a decision with detailed findings, which is appealable to the supreme court."[2] What follows is a brief overview of the BTLA mediation process.

Rules

Implemented in 2008,[3] BTLA mediation "allows parties to have meaningful and productive discussions about [an] appeal and the grounds thereof" with the goal of avoiding a formal hearing.[4] The BTLA emphasizes that the rule governing mediation does not mandate that parties reach a settlement. Rather, it is meant to encourage parties to meet and discuss their appeal to resolve or narrow down their issues.[5]

In its current form, the mediation rule requires that, "[a]fter a determination that the taxpayer has complied with all . . . filing requirements," the BTLA "issue an order to encourage informal discussions . . . requiring the parties to meet." N.H. Admin. Rules Tax 203.07(a). Parties then have 120 days to "[a]rrange to meet to discuss the appeal at a mutually convenient time," and to file a "report of settlement meeting" with the BTLA after the meeting or discussion. Id. 203.07(a)(1), (d)(1)-(2). Once the parties file the report of settlement meeting with the BTLA, that report "shall become a board order." Id. 203.07(i)(1). If the report states that the parties have settled their dispute, the appeal is at an end. Id. If the parties fail to agree, the BTLA must "proceed with scheduling a hearing." Id. 203.07(i)(1).

Mechanics

The mediation process may, but need not, occur "in person." The BTLA permits parties to discuss their appeal by phone or e-mail, "provided that this is done in good faith."[6] During the process, municipalities must provide taxpayers with "[t]he bases for [their] assessment [of the taxpayer's property], including all market data analysis and all other documentation used in establishing the assessment initially and in responding to the [taxpayer's] abatement application." N.H. Admin. Rules Tax 203.07(h)(1).

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[1] https://www.nh.gov/btla/appeals.
[2] https://www.nh.gov/btla/appeals.
[3] https://www.nh.gov/btla/appeals/propertytax.htm.
[4] https://www.nh.gov/btla/appeals/documents/CommonlyAskedQuestionsforMediationProcess.pdf.
[5] https://www.nh.gov/btla/appeals/documents/CommonlyAskedQuestionsforMediationProcess.pdf.
[6] https://www.nh.gov/btla/appeals/documents/CommonlyAskedQuestionsforMediationProcess.pdf.

Either party may initiate the mediation process. If one party fails to respond to the other's repeated, documented attempts to mediate, the party attempting mediation may file a motion to enforce compliance with the BTLA's mediation order. Parties may also request an extension to the mediation rule's 120-day deadline as long as the request is made more than 30 days from the deadline.

Conclusion

BTLA mediation encourages the expeditious resolution of taxation matters, which is important because, according to the BTLA's 2014 Biennial Report, "the waiting period for [taxation] appeals to be heard by the board is usually within [one] to [one and a half] years from the date of filing."[7] More information on BTLA mediation may be found at its website: https://www.nh.gov/btla. Frequently asked questions concerning BTLA mediation are also available here: https://www.nh.gov/btla/appeals/documents/CommonlyAskedQuestionsfor MediationProcess.pdf.

[7] https://www.nh.gov/btla/aboutus/documents/2014Report.pdf.

Webster-Batchelder American Inns of Court

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So, what's '*new*' in New Hampshire Civil Mediations these days?

Younger NH lawyers are not coming up through the ranks and acting as mediators on civil cases in NH. There seems to be a small group of lawyers and retired judges in NH that are regularly used as civil mediators by counsel and parties. The usual suspects of NH civil mediators are older (a/k/a more experienced). It is a bit concerning that there is not an up-swell of younger mediators working their way onto the short list. This is probably due to the fact that younger lawyers are not as experienced because they are not able to try jury and court cases much anymore. Consequently, they cannot speak with authority as to what a judge or jury might do with a certain set of legal or factual issues.

It is important for the health of our NH civil mediation practice to have more junior attorneys serve as mediators. Take a look at the attached Federal Court Mediator Panel List and you will see what I mean - most are pale, male and nearly stale. Also see the attached Rule 32 Superior Court Mediator List.

In terms of the nuts and bolts of civil mediation practice, there are several emerging trends. More and more civil mediators are using joint and ex-parte pre-mediation telephone conference call to iron out logistics such as:

- *Who will be present at the mediation?*
- *Are there any time constraints for the mediation?*
- *What are the insurance coverage issues?*
- *What type of mediation should be used?*
- *What is the status of the litigation?*
- *Is there additional information needed before mediation?*
- *What are the personalities of the parties – and counsel?*
- *Where are the offers and demands?*
- *Are there liens?*
- *Where are the lienholders?*
- *What are the tax implications?*
- *Do you need / want an MOU?*
- *Are you bringing / exchanging a Settlement Agreement & Release?*
- *Are there technology needs at the mediation?*

- *What are the liability and damage issues?*
- *Are there non-financial consideration issues?*

See attached Pre-mediation Telephone Conference Topics.

One of the worst thing that can happen at a mediation is for counsel and a party to show up and immediately say to the other side "I thought you were going to be bring the CEO / your insurance adjuster / a representative of the lienholder / or the like."

Joint and ex-parte pre-mediation telephone conference calls can be very effective and efficient to help get the mediation started on the right foot. If fact, some cases can settle even before the formal mediation session as a result of the pre-mediation telephone conference calls. That's a good thing for the parties – maybe not so much for the mediator or lawyers?

Civil mediation presentations in NH are becoming more sophisticated than just talking heads. PowerPoints, day in the life films, demonstrative evidence, parties speaking in addition to the lawyer's presentation, and other techniques are being used by NH lawyers to make effective opening session mediation presentations to the other side.

Mediators are following up with counsel and parties after failed mediation sessions. If the matter does not settle during the mediation session(s), mediators are now following up with counsel and parties by telephone and email for days, weeks, and sometimes months after the initial mediation session(s) to assist in bringing the matter to a full resolution

Charlie Bauer
Gallagher, Callahan & Gartrell, P.C.
Concord, NH
603-545-3651
bauer@gcglaw.com

CPB TOPICS FOR PRE-MEDIATION JOINT TELEPHONE CONFERENCE (9/13)

1. Confirm place, date, time – **any time constraints?**

2. **Who will be present at the mediation** – decision makers – attend, telephone, Skype.. Authority to settle – **adjuster present or not – experts?**

3. **Coverage** – limits consent / deductibles etc.?

4. CPB mediation style - Usual practice - **joint session** with **breakout sessions**, - possibility joint session or **just attorneys** - draft **MOU.**

5. **Status of litigation: - trial date**
   - pending motions - discovery disputes
   - depositions - interrogatories
   - court and judge

6. **Any additional information needed before mediation**?

7. Parties – **personalities?** - need to know?

8. **Demand – Offer**

9. **Liability issues:**
   - theory of law - various counts
   - comparative negligence - third-party defendants
   - DeBenedetto defendants
   - experts
   - facts – how, why, where, who, what, when

10. **Damage issues:**
    - physical-medical bills
    - economic – past, present, future
    - emotional damage
    - theory of damages – law
    - experts

11. **Technology** – PowerPoint – day in the life film, etc.?

12. MOU – **settlement agreement and release**

13. **Lienholders? - Taxes?**

14. **Other?**

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Mediation in New Hampshire Courts - Predictions about the Future

Predictions about the future are dangerous in mediation. When serving as a mediator, I resist the temptation to forecast an outcome. However, when considering mediation in New Hampshire, I know change is coming. Most of the changes I anticipate are trends already emerging in other parts of the country, and in our culture.

Our reliance on a formal mediation process in the courts is relatively new. Many practicing litigators didn't take a course on dispute resolution in law school. Today, most law schools offer those courses, and they are popular. Trials are less and less common and advocacy in mediation is an essential skill.

In New Hampshire, we have made great strides in dispute resolution systems in the courts over the past twenty years. Judges, lawyers, and parties recognize the need for mediation prior to trial. The courts have increased the options for parties and for most parties, the process works well.

Nevertheless, I anticipate that over the next ten years there will be changes in the court dispute resolution programs. Most of the changes I anticipate stem from changes in society, and how Gen Xers, Gen Yers and Gen Zers do, and will, participate in the world around them. Consider that the three generations I reference all grew up with the internet. The last two groups consider instant contact the norm. Individuals connect without professionals, and often with people they will never meet in person. Many people rely on reputation they gather through the Internet, and on the growing "sharing economy," including Uber and Airbnb. As the parties to disputes, their expectations and cultural views will force change in the processes we use.

More Direct Negotiation

First, I predict we will see an increase in direct negotiation. Research demonstrates that people under thirty are generally less trusting of, and feel little need to rely on, professionals. More and more of them will be self-represented in the legal system. They are less likely to hire counsel and more likely to try to resolve disputes on their own. They will continue to engage in direct negotiation. If they hire counsel, they will expect their representatives to do the same.

Online Dispute Systems Will Become the Norm

Second, online dispute resolution systems will flourish. While online dispute systems have been around for years, most exist in a closed setting where disputes are handled systematically and the system efficiently resolves disputes and also prevents more disputes. Airbnb, eBay and PayPal successfully use online dispute resolution systems. These companies have customers engaged in short relationships, with low dollar transactions, across great distances, and based almost entirely on contact through the internet or social media. EBay developed a very successful on-line mediation program. One estimate is that the eBay dispute resolution process handles up to 60 million disputes a year and settles approximately 90% of them – with no human input from eBay.

Modria takes the on-line mediation process to the next level, and beyond. Started by Colin Rule and Chittu Nagarajan, Modria provides a format for on-line dispute resolution on a large scale. Modria provides its customers with a Fairness Engine, which attempts substantive and financial settlement of

disputes. The first step in the Modria process is a "diagnosis module" which gathers information. The "negotiation module" then summarizes areas of agreement and disagreement. Most importantly, the "negotiation module" makes suggestions for resolving the dispute. If the suggestions don't lead to a resolution, the "mediation module" begins, using a neutral third party. According to Modria, the "vast majority" of claims are settled in the first two steps without a human ever becoming involved.

Modria also claims their experience and data have allowed the company to custom design processes that are superior to those run by humans. Based on research from the eBay system, Modria has found that customers who used the system were more likely to return to eBay than other customers. This was true even if the customer "lost" the dispute. The key appears to be a fair, quick system that increases trust and participation.

I predict Modria and its model will be successful. The company isn't targeting fender bender auto accident disputes – although it is already providing a platform for those in New York. Modria seeks to use its platform for complicated disagreements, like patents. Corporations are interested and experimenting with the model. I anticipate court programs will do the same.

As the public becomes more and more familiar with mediation and other forms of dispute resolution, there will greater demand for cheaper, efficient methods for resolving disputes. Although lawyers and governmental agencies often lag behind, I predict these online systems will be the norm in our lifetime.

Opportunities Will Grow for Younger Mediators

Many of the busy mediators in New Hampshire are baby boomers. They have had successful careers as litigators, psychologists, or other professionals before becoming sought-after mediators. With the growth of on-line dispute resolution systems, and the shift from direct personal connection, dispute resolution professionals will be younger. Although not prevalent in New Hampshire, there are more and more lawyers leaving law school and immediately beginning dispute resolution practices, some as mediators and others as ombudsmen. Most of these professionals work for agencies or corporations where a prior professional background is less important than strong mediation skills. The organizations seek to provide a service for clients and employees. These opportunities will increase, allowing younger professionals to begin successful careers as mediators earlier and earlier.

The Profession Will Be Regulated

Each New Hampshire Court has some required credentials for mediators. Family Division mediators must be certified by the Family Mediator Certification Board. Superior Court mediators must be attorneys. Supreme Court mediators must have served on the Bench. But there is no consistency outside the Courts in the requirements for civil mediation training and for on-going skills training.

The American Bar Association and the Association for Conflict Resolution continue to work toward specific professional and practice-based standards for professional mediators. While there isn't yet specific agreement about those requirements, there is generally agreement that the profession will benefit from some form of basic educational and practice standards. I anticipate that within the next ten years, the mediation profession will adopt standards. As mediation becomes more and more prevalent, the public will expect us to set standards for ourselves, and require mediators to meet them.

Final Thoughts

These predicted changes will benefit the practice of mediation and the experiences of the parties in litigation. They will provide opportunities for more cases to reach resolutions created by the parties themselves, likely in a shorter timeframe. I anticipate these changes being incorporated first in disputes where the issues are distributive. In those cases, the parties are dividing something that is finite – money, time, possessions.

In cases where the disputes are based on personalities, connection, moral values, principles, and relationships, parties will continue to seek direct personal connection with a mediator. Family and estate matters benefit from face-to-face mediation, fuller engagement with each other, and in the process. In cases where personal identity and relationships are at the heart of the dispute, choosing a mediator who can connect with the parties will remain essential.

Melinda Gehris
Hess Gehris Solutions
95 North State Street, Suite 3
Concord, NH 03301
Melinda@hessgehris.com

Bibliography

Becca Brennan, *Match or Mismatch.com? Online Dispute Resolution and Divorce*, Dispute Resolution Magazine, Vol. 1, No. 1, Winter 2015, ABA Section of Dispute Resolution.

Robert Coulson, *The Immediate Future of Alternative Dispute Resolution,"* 14 Pepp. L. Rev. 4 (1987). Available at: http://digitalcommons.pepperdine.edu/plr/vol14/iss4/3.

Ethan Katsh and Oma Rabinovich-Ziny, *Technology and Dispute Systems Design: Lessons from the "Sharing Economy,* Dispute Resolution Magazine, Vol. 1, No. 1, Winter 2015, ABA Section of Dispute Resolution.

Colin Rule, *Technology and the Future of Dispute Resolution* Dispute Resolution Magazine, Vol. 1, No. 1, Winter 2015, ABA Section of Dispute Resolution.

International Institute for Conflict Prevention & Resolution, www.cpradr.org

www.mediate.com

www.modria.com