THE MUNICIPAL LAW QUARTERLY©

of the CITY SOLICITORS AND TOWN COUNSEL ASSOCIATION *the* Bar Association of Massachusetts Municipal Attorneys

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Letter from the President

Greetings! As the new President of CSTCA, I am pleased to welcome you to the Fall 2012 edition of the CSTCA Municipal Law Quarterly. One of my first orders of business as President is to extend my sincere gratitude to our most recent past President, Stacey Bloom, for her excellent leadership as President of the Association for 2011 to 2012. Stacey shepherded significant advancements of the Association during her term, including updates and improvements to the newsletter. The publication has grown so significantly that it has been renamed "CSTCA Municipal Law Quarterly" beginning with this issue to reflect its status as more of a journal than a mere newsletter. Stacey continues to serve on the Editorial Board as Editor-in-Chief and, along with the other members of the Board, has put together an excellent edition for fall.

The CSTCA's resources such as the newsletter and listserv, as well as the educational programs and collegial relationships, have provided me with a strong support network as I advanced in my legal career. I joined CSTCA immediately upon entering the practice of law, and it has been an integral part of my growth not only as a municipal attorney, but as a member of the legal profession in general. I could not have predicted that eight years after joining the Association I would be serving as President, but this opportunity is a testament to the support I received as a member. If you are an experienced municipal attorney, I highly recommend that you encourage your younger associates or assistants to join and participate in the Association to gain exposure to its many benefits as I was at an early stage.

Our upcoming Annual Meeting, September 28-30 in Springfield, is an excellent program to attend whether you are new to municipal law or have been a member of the Association for many years. We have planned an exciting program including the usual favorites such as the annual presentation by SJC Associate Justice John M. Greaney's (ret.) and a land use update, along with new features such as a program on urban agricultural issues. This promises to be one of our most informative and entertaining annual meetings to date, and we hope to have the pleasure of your company there.

Sincerely,

Heather C. White

Heather C. White, Esq.
President

Inside This Issue:

Robert L. Marzelli, Esq.

(Retired) Town Counsel
Marshfield

Our friend, colleague and mentor Bob Marzelli retired earlier this month, after serving for more than 31 years as Marshfield Town Counsel. Bob is a past president of the CSTCA, and continues as an active member and a great resource to all municipal attorneys. At the past CSTCA August seminar, Bob was presented with the President's Award, in recognition of his many contributions to the CSTCA, municipal law and local government.

MUNICIPAL SPOTLIGHT ON: Robert L. Marzelli, Esq.

By: Peter Mello, Esq.
Petrini & Associates, P.C.

1. In what city/town were you born?

   Brockton, Massachusetts.

2. Where did you attend college and law school?

   Brown University;

   Georgetown University Law School.

3. What municipalities do you represent?

   The town of Marshfield for 31 years, and special counsel or interim counsel work for a number of other towns over the last 25 years.

4. Has municipal law changed a lot since you began practicing? If so, how?

   I would say the most significant change is the recognition of municipal law as a discrete, full-fledged professional practice area, rather than an agglomeration of subsets of other practice areas. Along with this has come the growth of firms that focus on, or practice exclusively, municipal law. That in turn has resulted in a broader and deeper professional environment for municipal lawyers. A professional environment long enjoyed by other practitioners, e.g., conveyancers or trial lawyers

5. What is your favorite discipline within your municipal practice? Why?

   Rather than any specific discipline, I enjoy the counseling role in all areas. Specifically, working with a municipal officer or employee to reconcile often conflicting legal, political and social constraints in order to achieve a desirable result that may have at first seemed out of reach.

6. What is one of your proudest moments as a lawyer?

   I would say it is the present moment when, on the verge of retirement, I was somewhat surprised to discover that the town officials and employees I have worked with over the years actually did appreciate my dedication to this kind of work.

7. What is the most useful advice you could give regarding the practice of law?

   Resist the nearly, always-irresistible urge to take on more work than you can accomplish on time and still have a life.

8. What do you like to do outside of work?

   Golf. I love the beach at all times of the day. I enjoy reading biographies and lis tening to music, from classical to Bruce Springsteen, who I guess is kind of classi cal himself.

9. What is one of the proudest moments outside of your career?

   Watching two of my daughters graduate from law school.

10. What was your favorite age? Why?

    Twenty-one years old. I had just gradu ated from college and the world seemed full of endless possibilities.

Review of "INTERNET AND EMAIL EVIDENCE PART 2"

By: Jordan Shapiro, Esq.
Special Counsel to the City of Malden

This article is a follow-up to the article published in the Spring edition of the now named Municipal Law Journal. This "Part 2" of "Internet and Email Evidence" is published due to the enormous demand that exists for litigators, who can hardly find anything worthy and helpful on this subject. As I stated in the first paragraph of my review of Part 1, the source of this fine article is "The Practical Lawyer" magazine, published by American Law Institute-American Bar Association. The article is authored by Attorney Gregory Joseph of New York and generally deals with federal court rules. However, the article contains priceless information for any type of litigation involving the internet and emails. Part I primarily dealt with what the author described as "the near-ubiquity of Internet evidence." This part focused on the "challenges raised by email evidence."

Like internet evidence, email evidence has both authentication and hearsay issues. They are similar in that they concern the use of the Internet to send personalized communications. The authenticity of email evidence is governed by Fed. R. Evid. 901(a) which requires only "evidence sufficient to support a finding that the items is what the proponent claims it is." Under Fed. R. Evid. 901 (b)(4), email may be authenticated by reference to its "appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." Again, in this review, I am omitting the literally hundreds of citations by the author and invite anyone who wishes a free copy to contact me.

If email is produced by a party opponent from the party's files and on its face purports to have been sent by that party, these circumstances alone may suffice to establish authenticity when the email is offered against that party. Documents produced during discovery are deemed authentic when offered by a party opponent. This rule only applies to emails produced by a party opponent, not your own client. But: failure to object may be sufficient evidence to authenticate an email. And a witness who sent or received the emails, who testifies that the emails are the personal correspondence of the witness, can also authenticate it; so the recipient of the email can authenticate it as being from a purported author. This won't always work, especially if it involves an unsolicited email, with no prior familiarity with the identity of the sender. Thus, for example, proof of the identity of the email sender in a "Nigeria based" scam failed.

When dealing with a business, it is important, for authentication purposes, that the email reflects the identity of the organization, even in an abbreviated form (frequently after the @ symbol).

Circumstantial evidence has been held to help auth-

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Top Ten Mistakes Cities and Towns Make in Responding to Public Records Requests

By: Shawn A. Williams, Esq. Supervisor of Records, Office of the Secretary of the Commonwealth

10. "Why do you want the records?"

A Massachusetts government records custodian once said she did not want to provide requested records because they may appear on the requester's blog. There is no need for doubt: the records WILL appear on that blog. Another custodian tried to deny access to an electronic copy of a spreadsheet because she feared the requester would check the math in the formulas. These are not valid reasons to deny access to public records.

9. "Who are you?"

A records custodian is generally not permitted to ask a requester why he or she seeks copies of public records. This makes sense, if you think about it. The public status of a government record is not determined by the identity of the requester. If it is public to one it is public to all.

8. "The copies are $.75 per page."

The Public Records Access Regulations clearly state that a custodian may charge $.20 per page for paper copies, $.50 per page for computer printouts. Absent specific authority granting a different fee, custodians must adhere to this per-page cost.

7. "I'm too busy to deal with this right now."

Everyone is busy, all the time. Responding to requests for public records is an important part of the job of any public servant. A custodian must comply with a request within ten calendar days. This may mean that you initially send an acknowledgment to the requester and inform them that a substantive response will follow within a reasonable period of time. For the record, six months later is not reasonable.

6. "I don't like you."

Towns are small. Everyone knows everyone. There is someone in every town that wants to fact-check and second-guess every decision that is made. Many of these requesters are known by name, some are known by face. They must be treated the same as everyone else.

5. "I'm claiming ten exemptions for records that don't exist."

In a response to a records request a government records custodian may be tempted to prospectively claim exemptions to withhold the responsive records before a review has been completed to see if the records actually exist. It may; however, it may be a better move to wait until a representative sample has been reviewed to see whether any records do exist. In a recent appeal to the Supervisor of Records, a requester sought a copy of a surveillance video. The custodian denied the request, citing an exemption to the Public Records Law. Upon inquiry by a Public Records Division attorney, the custodian realized that the retention period for the record had passed and no record existed. If this review had been done prior to writing the denial an appeal would not have been necessary. It creates confusion for the requester and the Supervisor of Records if a custodian claims a laundry list of exemptions that may or not apply. The right to claim an exemption to the Public Records Law survives even if not noted in the initial response.

4. "The lawyers must review everything, and their hourly rate is $3,200.00 per hour."

A lawyer does not need to review every response to every public records request. A lawyer need not be the one who writes a response to a public records request. A lawyer need not supervise the response to every public records request. An appeal to the Supervisor of Records of a fee estimate that includes attorney fees will be closely scrutinized. There are times when legal review is necessary, but most review and redactions may be completed by a non-attorney custodian with the superior knowledge of the records, perhaps with a five minute phone call to counsel if necessary.

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Top Ten Mistakes Cities and Towns Make in Responding to Public Records Requests:

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3. "I've redacted the records, but don't hold them up to the light."

If a custodian has a valid exemption claim, it is important to know proper procedure for redacting records. First, never redact the original. Second, only redact the portions that are exempt. Then, make a copy of that page to ensure that the redacted portions are truly removed from view.

2. "I've retained every scrap of paper since the day I started working here. Where is my pencil – oh, it's behind my ear again."

A wise records professional once said there are two types of records managers: pack rats and sewer rats. Either way you are a rodent, and that is not good. It is best to have a reasonable records management plan to remove and properly dispose of all records not required for long-term retention. Many e-mails, for example, are simply "after use" records that may be disposed quickly after sending and or reading. Consult the retention schedules found at www.sec.state.ma.us/arc/arcrmu/rmuidx.htm for more information on retention of records.

And the Number One Biggest Mistake Cities and Towns Make in Responding to Requests for Public Records:

1. "Why can't you have the records? Because you can't!"

A records custodian must put a denial of access to public records in writing, must cite an exemption, and state why the exemption applies. Simply saying "it's not public," or "privacy," is not enough to satisfy the burden under the law. Simply reciting the language of the exemption, without an explanation as to why it specifically applies to the records is not enough to satisfy the burden. Many public records appeals could be avoided if custodians follow this simple formula: request + specific exemption claim + explanation as to why exemption applies to requested record = valid response.

Custodians of government records have a chance to avoid a public records appeal if they follow these steps. For more information, see *A Guide to the Massachusetts Public Records Law*, found at http://www.sec.state.ma.us/pre/prepdf/guide.pdf.

Review of "INTERNET AND EMAIL EVIDENCE PART 2" - cont. from p. 3

enticate that emails were sent by a specific person, and include: a witness or entity received the email; the email bore the customary format of an email, including the addresses of the sender and recipient; the address of the recipient is consistent with the email address on other emails sent by the same sender; the email contained the typewritten name or nickname of the recipient in the body of the email; the email contained the electronic signature of the sender; the email recited matters that would normally be known only to the individual who is known to have sent it; the email was sent in reply to one sent to the person ostensibly replying; following receipt of the email, the recipient witness had a discussion with the individual who purportedly sent it; and the conversation reflected this individual's knowledge of the contents of the email.

A Mass case was cited for the proposition that" absent a showing of reason to disbelieve a sender's or recipient's representations concerning the authenticity of email, the court may decline to permit discovery into the computer system of the sender/recipient in light of the intrusion that forensic discovery would involve. Williams v. Mass. Mut. Life Ins Co., 226 F.R.D. 144, 146 (D. Mass 2005).

The author then addressed hearsay issues with emails, and began by pointing out that "an email offered

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Review of "INTERNET AND EMAIL EVIDENCE PART 2" - cont. from p. 5

for the truth of its contents is hearsay and must satisfy an applicable hearsay exception." Merely notarizing an email does not render it non-hearsay. The business records exception may help, the author said, although courts have applied that rule "unevenly."

Again, citing a Massachusetts case (decided by Chief Judge Young in the USDC in 1997), Judge Young rejected proffered evidence under Fed. R. Evid. 803(6) because, while it may have been the "employee's routine business practice to make such records, there was no sufficient evidence that [his employer] required such records to be maintained...[I]n order for a document to be admitted as a business record, there must be some evidence of a business duty to make and regularly maintain records of this type. The author did cite many cases where emails were held to constitute business records.

Yet, under Fed. R. Evid. 801 (d)(2), emails sent by party opponents constitute admissions and are not hearsay. Similarly, an email from a party opponent that forwards another email may comprise an adoptive admission of the original message, depending on the text of the forwarding email. If there is not an adoptive admission, however, the forwarded email chain may comprise hearsay-within-hearsay. An email could fall within the "excited utterance exception" to the hearsay rule, or could be admissible to demonstrate a party's then-existing state of mind (within Fed. R. Evid. 803(3)).

In one rather unusual case, the party's chosen email address itself was admissible as evidence of the party's state of mine (murder prosecution court admitted evidence that defendant's email address was "Cereal Kilr 2000" because it provided insight into his frame of mind).

The article covered "privilege issues" and waiver, especially in the context of emails to attorneys that are subject to a claim of attorney-client privilege or work product protection. Keeping a privilege log under Rule 26(b)(5) could be critical, however. One case held, "While the court could find that plaintiff... has waived his claims of privilege due to the insufficiency of his privilege lot, in the absence of bad faith on the part of the non-moving party in preparing the... privilege log,....the court will decline to find waiver and instead require the non-moving party to supplement his privilege log."

Text messages are also dealt with in some detail in this article. The author began this subject by noting that" text messages are effectively emails sent by cell phone but they present unique problems because they are transitory....generally, testimony of accurate transcription, together with whatever other corroboration may be available, is sufficient prima facie evidence of authenticity."

Like emails, text messages "have certain seemingly

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KNOW YOUR MUNICIPAL DEPARTMENTS, BOARDS AND COMMISSIONS: BOARDS OF LIBRARY TRUSTEES

By: Peter Mello, Esq., Petrini & Associates, P.C.

I. Principal Governing Statutes/Regulations:

- G.L. c. 78, § 10, et seq. (see G.L. c. 78 generally for statutes governing public libraries)
- Regulations governing Libraries are contained at 605 CMR 2.01 – 7.03

II. Composition:

- "Any number of persons . . . divisible by three," elected by the voters. G.L. c. 78, § 10; 18 MAPRAC § 9.29.
- "When such board [of trustees] is first chosen, one third thereof shall be elected for one year, one third for two years and one third for three years." G.L. c. 78, § 10. After such initial formation, board members' terms of office are three years in duration. Id.
- Different requirements may apply with respect to a "free public library, or free public library and reading room, owned by the town . . . [which] has been acquired entirely or in part through some gift or bequest which contains other conditions or provisions for the election of its trustees, or for its care and management, which have been accepted by the town." Id.
- "In cities, the number of public library trustees is determined by charter, by ordinance or by special legislative enactment." 18 MAPRAC § 9.29, n. 2.

III. Core Functions:

- To "have the custody and management of the library and reading room and of all property owned by the town relating thereto." G.L. c. 78, § 11.
- To spend the money raised or appropriated by the town for the support and maintenance of the town library. Id.
- To administer "all money or property which the town may receive by gift or bequest for" the town library. Id.
- For the purpose of improving library services, a board of trustees may "enter into an agreement with the board or boards of any neighboring library or libraries, to pay for services in common, or to manage a facility to be operated jointly by more than one municipality, such payments to be shared in accordance with terms of such agreement." Id.
- To report annually to the town regarding the board of trustees' receipts and expenditures, and the property in the board of trustees' custody, "with a statement of any unexpended balance of money and of any gifts or bequests which it holds in behalf of the town, with its recommendations." G.L. c. 78, § 12.
- The board of trustees "shall establish a written policy for the selection of library materials and the use of materials and facilities in accordance with standards adopted by the American Library Association." G.L. c. 78, § 33; 18 MAPRAC § 9.29.
- The board of trustees "shall, except in the case of those employees subject to the provisions of chapter one hundred and fifty E, execute a written employment contract with an employee of said library outlining the basic conditions of employment, including but not limited to the establishment of a probationary period and the procedure for dismissal during this period and the establishment of a procedure which specifies the cause for dismissal after the completion of such probationary period." G.L. c. 78, § 34; 18 MAPRAC § 9.29.

Review of "INTERNET AND EMAIL EVIDENCE PART 2" - cont. from p. 6

self-authenticating features, like the sender's cell phone number, which may be translated into a name, as by action of the recipient. But because, like email, texts could be generated by a third party, these features are generally considered circumstantial evidence of authenticity to be considered in the totality of the circumstances." So, one case it was stated: "In the majority of courts to have considered the question, the mere fact that an email bears a particular email address is inadequate to authenticate the identity of the author; typically courts demand additional evidence. Text messages are somewhat different in that they are intrinsic to the cell phones in which they are stores...However, as with email accounts, cellular telephones are not always exclusively used by the person to whom the phone number is assigned."

What about the "best evidence" rule? Transcription of text messages "have been held not to violate the best evidence rule if the proponent satisfied Fed. R. Evid. 1004(a) which provides that an original is not required when all of the originals are lost or destroyed and not by the proponent acting in bad faith."

Are text messages hearsay? Again, the author provided some helpful information: "Each...text message, of course, is an out-of-court statement, and therefore must be excluded from consideration as hearsay unless Plaintiffs are able to identify a ground for its admissibility."

The author concluded these two fine articles with the astute observation that "Internet and email evidence is here to stay. While they both present some novel challenges, the Rules of Evidence apply to them in fairly familiar ways. The better an attorney's grasp of the nuances of the Rules, the more useful---and powerful-- this evidence can be."

UPCOMING SEMINARS & MEETINGS

September 28-30, 2012: **CSTCA's Annual Meeting**. Sheraton Hotel, Springfield, MA
Programs include: Urban Agriculture– the Farmer in the City; Federal Court for the Non-Federal Court Municipal Attorney; Land Use and Zoning Law Update, Education Law Update, Municipal Trial Issues, Constitutional Law Update, Casino Law– A Community's Rights, Working with County, State and Federal Enforcement Agencies on Local Fraud and Wrongdoing; Municipal Potpourri and much more! U.S. District Court Judge Michael A. Ponsor is the key-note luncheon speaker on Friday, September 28, 2012.

October 18—19, 2012: ABA Forum on the Construction Industry Fall Program. Sheraton Hotel, Boston, MA. The ABA's fall program, "Construction Counseling: Pulling Together for a Winning Strategy," will focus on how corporate counsel and outside counsel can work together to achieve the best results of their clients. Registration and program information is can be accessed at http://www.registration123.com/aba/12FALLMEETING.

October 21—24, 2012: IMLA 77th Annual Conference. Hilton Hotel, Austin, Texas. More information is on the IMLA website at www.imla.org. Special rates are available to early registrants, prospective members and first-time attendees.

NEW GUIDANCE FOR CONSERVATION COMMISSIONS REGARDGING WAIVER OF DEADLINES UNDER THE WPA AND STANDARD OF REVIEW FOR ENFORCEMENT ORDERS

By: Lauren Clifford Galvin, Esq.
Murphy, Hesse, Toomey & Lehane, LLP

A. WPA Decision Deadline May Be Waived or Extended

Our firm recently handled a case in which the Supreme Judicial Court decided that the Wetlands Protection Act ("WPA") deadline requiring a Conservation Commission to render a decision within 21 days may be voluntarily extended by the applicant. Before the Supreme Judicial Court issued its decision in Garrity v. the Conservation Commission of Hingham, 462 Mass. 779 (2012), the Wetlands Protection Act was silent as to whether the 21-day decision deadline could be waived or extended and under what circumstances such a waiver could take place.

In Garrity, the Supreme Judicial Court ruled that the 21-day WPA decision deadline may be waived as long as the waiver is:

- Voluntary in fact;
- Its duration is in writing, defined and reasonable in length; and
- Notice of the waiver's duration is a matter of public record, available to all interested persons.

Such a waiver will be a benefit to Conservation Commissions because it will allow them more time to render decisions. These extensions will be particularly helpful in complex matters.

B. Enforcement Orders Given Greater Force by the SJC

Enforcement Orders are issued by Conservation Commissions when individuals perform work in a wetlands resource areas or the buffer without first obtaining an Order of Conditions pursuant to the WPA and local regulations. In Garrity, the Supreme Judicial Court dictated for the first time the legal standard Massachusetts Courts should use when reviewing Enforcement Orders. The lower court had held that the Enforcement Order in Garrity was invalid because it was not based upon "substantial evidence." However, the Supreme Judicial Court said that "substantial evidence" was not the correct standard for reviewing an Enforcement Order and that the Enforcement Order should be reviewed to see if it is "arbitrary and capricious." This is a higher standard and will make it more difficult for litigants to overturn Enforcement Orders in court. The SJC also ruled that the burden of establishing that a Conservation Commission acted arbitrarily and capriciously when issuing an Enforcement Order is on the person who did the illegal work, which will also make such orders more difficult to overturn.

Can Municipalities Afford Not to Mediate?

By: Daniel M. Funk, Esq.

At a time when municipal budgets are being pared to the bare minimum, there is, unfortunately, no corresponding decrease in municipal claims, conflicts and disputes of all kinds. The cost of claims settlements and judgments, as well as counsel fees, continue to plague city and town budgets.

Municipalities can always hope for good fortune in terms of what claims are brought and what judges and juries might do when these claims are pushed to the limit. And in some instances, fighting a claim in court is absolutely the right or necessary thing to do, such as when a policy position or a rule of law needs to be fought to a decision.

The vast majority of cases, however, are settled prior to a judicial ruling. The question then becomes, what price has been paid by the municipality in money, time, energy, staff resources, and perhaps employee morale prior to any such settlement?

Our judicial system is well established as the customary means of resolving disputes. When individuals or other legal entities feel wronged or harmed in a way that allows for legal redress, they will contact an attorney who will advise them and provide advocacy services on their behalf. What happens after that varies from a quick settlement to long, drawn-out litigation, and everything in between.

Faced with claims and conflicts, municipalities tend to follow this path, seeking advice and counsel from their municipal attorneys. In a sense, this is understandable. Don't we all believe that we can figure out the best resolution to a problem by relying on what we believe to be a tried and true method that is widely accepted? The cost of relying solely on this traditional approach, however, can be quite high.

There is an alternative means of resolving conflicts and disputes that need not lead to such a high price. That alternative is mediation.

Mediation has been used as a cost-effective dispute resolution tool for many years in the private sector, but it has not yet been embraced by local government. The option is hardly revolutionary, but it does break with tradition, and it takes some creative thinking. Mediation is still considered a method of "alternative dispute resolution." Perhaps the time has come to make mediation less of an "alternative" for municipalities and as much a part of the norm as going to court. If ever there was a time when municipal leaders may want to consider mediation as an option for certain disputes, this just might be it.

THE FEDERAL EXAMPLE

In 1990, as the federal government was looking for increased efficiencies in resolving disputes, Congress enacted the Administrative Dispute Resolution Act. The law made mediation and other forms of alternative dispute resolution a mandatory part of the dispute resolution process for federal agencies. Congress made the following findings in support of the enactment of the law:

1. "Administrative proceedings have become increasingly formal, costly and lengthy, resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes."
2. "Alternative means of dispute resolution have been used in the private sector for many years and, in appropriate circumstances, have yielded decisions that are faster, less expensive and less contentious."
3. "Such alternative means can lead to more creative, efficient and sensible outcomes."
4. "An increased understanding of the most effective use of such procedures will enhance the operation of the government and better serve the public."

Every one of these Congressional rationales apply to other levels of government, including municipalities. The success of mediation at the federal level is a strong object lesson for local governments.

WHAT IS MEDIATION?

Mediation is often described as "assisted negotiation," where a neutral party (the mediator) works with the parties in conflict to define their goals and develop options for resolution and mutual gain. The following five principles govern mediation and professional mediators:

- **Confidentiality**: The mediator makes a commitment to the parties and to the profession to keep the content of the discussions private. The mediator may not testify before a subsequent judicial proceeding.
- **Impartiality**: A mediator will strive to conduct a process that is viewed as fair by all parties. A mediator will also work to treat all parties equally and without bias.
- **Voluntariness**: Each party must make an affirmative commitment to participate in the mediation process in good faith. This commitment does not prevent either side from withdrawing from the process for any reason once the mediation begins.
- **Self-determination**: In mediation, it is the parties, and not the mediator, who determine the outcome of their dispute. Accordingly, mediated agreements have a greater likelihood of follow-through and compliance.
- **Informed consent**: Mediators work to make sure that parties are informed about the mediation process before they begin and have access to information and advice before giving their consent to any final agreement.

BENEFITS FOR LOCAL GOVERNMENTS

The benefits of mediating municipal disputes include the following:

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- **Cost savings**: Litigation is unavoidably very expensive. It can cost thousands—even hundreds of thousands—of dollars that could be better spent delivering required services.

- **Time savings**: Litigation takes public officials and employees away from their job duties to assist in fact investigations, determining how to respond to complaints in all their various forms, discovery, trial preparation, and the trial itself. Avoiding those tasks will allow for increased productivity of the officials and employees involved.

- **Privacy and confidentiality**: Because the mediation process is private, the parties are free to express themselves on the issues without the glare of the public eye. With confidential negotiations, there is a greater likelihood of settlement that might not otherwise be available to public officials. The final settlement is public, but the process leading to resolution is not. This benefit applies as well to public boards and commissions otherwise subject to the state's open meeting law. (Under state law [M.G.L. Ch. 30A, Sect. 21], one of the allowed purposes for which an executive session may be held is, "To meet or confer with a mediator, as defined in Section 23C of Chapter 233, with respect to any litigation or decision on any public business within its jurisdiction involving another party, group or entity….")

- **Political gain**: Every city or town periodically experiences a highly sensitive, high-profile, emotional and even embarrassing claim that leads to unwanted headlines. It is usually in the interest of the municipality and its leaders to resolve such a claim quickly and quietly, if possible. Mediation can accomplish these goals if the mediator is brought in before the matter gets out of hand and the parties become entrenched.

- **Creative solutions**: Mediation provides the parties to a dispute with an opportunity to shift their approach from seeing the other side as an adversary to seeing the other side as a partner in resolution. Once the parties realize they can achieve a reasonable resolution by working together, they, with the assistance of and guidance of the mediator, can fashion creative and meaningful solutions that would not likely result from—or even be considered—during litigation.

- **Improved relationships and communication**: Many disputes involve combatants who will continue to deal with each other after the conflict is resolved (e.g., a municipality and a citizen group; a municipality and an employee, a group of employees or their union; a municipality and a community agency).

The collaborative nature of the mediation process increases the prospects for improved relationships between the disputants. A successful, personnel-oriented mediation can also improve employee morale immeasurably.

WHERE MEDIATION CAN WORK

While not all-inclusive, the following examples are fairly common disputes that are often good candidates for mediation:

- **Third-party claims**: Most claims brought against municipalities tend to be rather routine, but local governments are involved in many operations that can affect local residents, businesses, visitors and contractors, so it is inevitable that large and difficult claims make their way to city or town hall. It is critical for municipal decision-makers to try to identify claims that just might develop into expansive and time-consuming litigation. These cases should be examined early on for whether mediation is a possible means for resolution.

- **Internal workplace disputes**: Employees who don't get along can create workplace distractions that can impede productivity. Public employers can often require the employees to mediate their issues toward resolution. Although elected officials cannot be ordered into mediation, it is just as available to them when turf issues or political antagonism become so problematic that they cannot work cooperatively.

- **Public policy issues**: Mediators can provide consensus-building among community groups and local government when policy issues are being considered for planning and/or legislative purposes. This is especially critical when government seeks out citizen input on such matters. Governmental plans can come to a standstill or be severely delayed if community interests are so divergent as to paralyze the process of citizen input and recommendations. Mediators can work with disparate groups to reach consensus on their recommendations to the local government and avoid delays in implementing new policies or enacting new laws.

- **Intergovernmental disputes**: Sometimes disputes arise between neighboring municipalities over the provision of certain services or over joint agreements that are meant to serve both communities. Different levels of government might also engage in conflict over who has jurisdiction over a particular matter. In these instances, two or more governmental bodies can benefit from the time and cost savings of a mediated resolution.

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- **Collective bargaining**: During this period of fiscal austerity, municipal leaders may have little to offer unions in the way of financial or benefit enhancements, which can lead to interminable and stalled negotiations. The parties often turn to voluntary informal mediation to try to resolve an impasse. In the short run, mediation gets the parties back to the table, allows the parties to separate their interests from their emotional responses, helps the parties to communicate better, assists them in exploring options, and allows for creative solutions to be considered. In the long run, mediation can improve relationships that may have been damaged, can improve workplace morale, can allow all parties to maintain dignity in the aftermath, and can save time and money.

DYNAMICS OF MEDIATION

When mediation works, as it often does, it sometimes seems as if the mediator applied magic to help the parties to reach a resolution that they previously were not able to accomplish on their own. In truth, mediation is anything but magical; instead, it is based on commonsense, time-tested strategies in conflict resolution and negotiation. Essentially, the mediator manages three dynamics: the mediation process itself, the interactions between the parties, and the issues and decisions facing the parties.

Through the skillful management of the process, the mediator provides the parties with structure for their negotiation that is simply more conducive to healthy communication. This allows the parties to see and hear each other's perspectives more clearly than before, making it easier for solutions to emerge. Inevitably, the prospects for resolution increase dramatically in such circumstances.

PRACTICAL CONSIDERATIONS

- **Finding a mediator**: The process of choosing a mediator is similar to selecting any other professional service provider. The parties may want to know that the mediator has a certain level of experience, is knowledgeable about the area of concern, and has a successful track record. In addition, the parties may wish to ask prospective mediator candidates for further information, including: where they were trained, a description of the way they will conduct the mediation, references, promotional materials, and billing fees and costs.

- **Best practices for a successful media-tion**: The likelihood that collaboration will be accomplished at the mediation table is increased by the amount of preparation the parties undertake in advance of the mediation. An effective mediator will assist the parties in this preparation by asking them a series of questions to help them identify their goals; brainstorming potential ideas for resolution; and identifying what they could do if they don't achieve resolution. In this manner, the parties arrive at the table prepared not to do battle, but rather to join forces to reach resolution together. (See "Does Mediation Work? You Be the Judge: *A User's Guide to Mediation*," by Charles Doran, Insights magazine, 2008.)

- **Role of counsel**: For some disputes, municipal counsel will be the driving force behind the move to mediation. In such instances, counsel may want to directly participate in the mediation to assist in the process. In other cases, particularly where the mediation is party-driven, the parties may wish to proceed without counsel at the mediation table. There is no legal requirement one way or the other on this point. The role of counsel will be a case-by-case decision by the parties and their respective counsels.

Overall, mediation offers little risk but great potential for reward. At a time when so many cities and towns are struggling to make ends meet, can they really afford not to mediate?

Daniel M. Funk is a mediator with MWI in Boston and oversees MWI's Municipal ADR Program (www.mwi.org/municipal). He served as the city solicitor in Newton for 32 years. With permission, this article is reprinted from the Massachusetts Municipal Association's Quarterly Magazine, The Municipal Advocate—Vol. 26, No.1.

Report on August 2012 CSTCA Program and Awards Ceremony

The August half-day program was an unqualified success. The program focused on municipal crisis management and addressed the pivotal role municipal counsel play in addressing a variety of municipal crisis. The distinguished panelists addressed all types of municipal crisis including natural disasters, financial, fraud and emergency planning. Our panelists included Ed Pikula, Robert Kerwin, and Mary Jo Harris.

The August half-day program, also, featured CSTCA's annual awards ceremony. This year's award recipients were Robert Marzilli, who received the President's Award for his 31 years of distinguished service as Marshfield's town counsel, and Angela Atchue, recipient of the Robert W. Ritchie Award for an outstanding contribution to Municipal Law, for her work on the CSTCA Newsletter. Congratulations to Bob and Angela!

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