

# Bulletin of the Maine Association of Mediators October 2008



*Professionals Committed to Cooperative Conflict Resolution*

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October 2008

## What Makes an Effective Agreement to Mediate?

Topic of discussion at the October Meeting.

By Vice President, Peter Maila, Esq.

At the fall MAM meeting on October 8, 2008, this question was asked and answered by a panel of mediators that included Jack Erler, Shari Broder, Dave Webb, and Mary Beth Paquette. Jonathan Reitman moderated the panel discussion, which took place at USM Portland, as well as at two additional sites in Augusta and Bangor, via satellite.

Members of the audience, as well as panelists, learned a great deal from the exchange of ideas. Reitman posed these questions to the panel: Why the need for an Agreement to Mediate? What are the key elements of the Agreement? How do you implement the Agreement with your clients?

The panel identified some key elements of an Agreement as confidentiality, a willingness to participate, and payment. As is so often the case, a long discussion ensued about confidentiality. Payment was another detailed discussion that included an interesting tip from Jonathan. He has included in his Agreement to Mediate the statement that counsel is responsible for payment if parties do not provide payment in a timely manner.

Other discussion topics: binding agreements, the role of the neutral, time commitments, and the importance of having the "decision maker" present were among the many that provided a lively discussion.

## SEE PAGE 2 FOR BREAKING NEWS!

### Slate of Officers for 2009

The Association's Nominating Committee has developed a Slate of Officers and Board Members for 2009. The Committee, Chaired by Sheila Mayberry, included Mary Beth Paquette, Tamar Mathieu and Jane Clayton. The Association's Bylaws provides for a Nominating Committee to suggest a slate of officers and Board Members to constitute a Board of Governors to be elected at the Annual Meeting. The Bylaws also provide for nominations to be made from the floor at the meeting.

Following are the names of the of the nominees:

#### Officers:

**Anita Jones: President**  
**Peter Malia: Vice President**  
**Secretary: Mary Beth Paquette**  
**Treasurer: Diane Kenty**

#### Board of Governors:

**Maria Fox**  
**Ann Martin**  
**James Cohen**  
**Eileen McGuire**  
**Sheila Mayberry**  
**John Alfano**

Elections will be on November 19, 2008 at the Association's Annual Meeting at the Holiday Inn, Augusta, at 10:30 a.m.

## ANNUAL MEETING

**Making Mediation Your Day Job: A Conversation about ADR  
Marketing and Leveraging the Internet**

with

**Dr. Tammy Lenski**

November 19, 2008  
Augusta Holiday Inn  
10:30 AM—2:00 PM

[Click here for Registration Information](#)

## BREAKING NEWS! SJC Adopts New Rule 514

In late October the Supreme Judicial court adopted a new rule, Rule 514 on Mediation Privilege, effective January 1. While it is early to understand completely how this may change our practice, it is expected that it will change the nature of confidentiality protection for mediation in Maine.

As you may recall, Maine Association of Mediators, with the backing of the membership, wrote a strongly worded letter to the Supreme Judicial Court on June 18, 2008 stating our opposition to this rule with our objections clearly outlined. Unfortunately, the Association's views did not prevail.

Look for continued discussion on this development here and in other venues. —Anita B. Jones

[TEXT OF RULE 514](#)

### Employment Opportunities for Mediators – The USPS REDRESS® Program

— Tracy Quadro

Many seasoned mediators are aware that sustaining a career in mediation takes creativity, networking, marketing and versatility. Of course, it's easier when mediators are able to become part of a system that offers mediation to their clients, such as through the Maine Association of Realtors, the Maine Court System and the USDA. Mediation is at a 'tipping point,' and is turning up in an increasing number of conflict resolution processes, sometimes in surprising places.

For the past 14 years the United States Postal Service has offered its REDRESS® program to employees filing a complaint under the Equal Employment Opportunity (EEO) Act. Any Postal employee who believes that he or she has been the subject of illegal discrimination on the basis of race, color, religion, sex, national origin, age, disability, or retaliation may file an "informal complaint." The employee may choose to attempt to resolve the complaint through traditional means or through mediation.

In the words of the USPS description of the process: "The Postal Service™ is convinced that when disputing parties are given the opportunity to participate in a transformative mediation session, not only do they gain a better understanding of the conflict, but they also develop a better ability to communicate with each other. In the end, conflicts in general are reduced as communication is improved. This all leads to a better workplace." ([http://www.usps.com/redress/a\\_howit.htm](http://www.usps.com/redress/a_howit.htm))

REDRESS stands for Resolve Employment Disputes, Reach Equitable Solutions Swiftly. Leave it to the Post Office ("neither wind, nor rain, etc.") to come up with such a great acronym. The process was instituted in partial settlement of a lawsuit filed by Florida employees who found the complaint process slow, remote and ineffective. Since the mediation option has been in place, there have been no more incidents of employees acting out in what had in the common lexicon been characterized as "going postal." Although no causal link has

ever been formally made, mediators know that talking it out can soothe even the most frayed nerves!

Once the employee, known as the "counselee," files the complaint, he or she has an option to choose mediation to help resolve the matter. If that option is chosen, an EEO investigator will discuss the complaint with the counselee, to determine whether the issue is appropriate for mediation. The session is provided free of charge to the participants, and is usually conducted during the counselee's work shift, at the postal facility where he or she works. Parties may choose to have a representative present, which may include a supervisor, attorney or union official. If the issue is not resolved in mediation, the matter proceeds to a formal hearing process.

The REDRESS program uses the Transformative Mediation model exclusively. Local mediators are trained in the technique by contractors of the Postal Service, and are evaluated afterward to determine their fitness to serve on the REDRESS roster. Mediators on the roster agree to adhere to the eight-point REDRESS Standards of Practice. When a mediation is requested, the EEO investigator will contact a local rostered mediator to set up the session. The mediator receives a packet of information shortly before the session, which includes all necessary forms and information. There is no set timeframe for the session, which may last all day if necessary. The mediator will send completed paperwork back to the EEO investigator, after which payment, a flat fee renegotiated every year, is sent.

Recently, the REDRESS roster was opened for the second time in the program's history. Trainings were held, and new mediators were added to the program. The REDRESS program is alive and well, and growing in popularity and use among USPS employees. Another example of the rise in mediation and the promise that the time of the negotiated agreement has arrived!

## Collaborative Practice: *A new approach to resolving conflict in Maine*

By David Webb, Esq.

*Following is part 2 of 2 installments continued from the August 2008 edition of the Bulletin.*

### Settlement Team Meetings.

An important part of the Collaborative Process is the “settlement team meeting”. This meeting involves clients, counsel and team members and will usually occur after some initial information gathering and discussions among team members has taken place. Often, these meetings are facilitated by a mediator or other neutral party with good facilitation skills trained in collaborative techniques.

Guidelines for the team meetings include:

**Open and respectful communication.** Any of the participants can speak directly to any of the others, in a non-blaming way that leaves open the opportunity for different points of view or perspectives. Of course, active listening (paraphrasing, reflection and inquisitive listening) are encouraged.

**Focus on present and future.** Comments are discouraged that delve into old history or personal attacks.

**Interest based negotiations.** Lawyers or mediators at the meetings can help the parties to focus on underlying interests, rather than their “positions”. Of course, the law is still an important factor, and lawyers may discuss the likely outcome of a litigated result as part of the dialogue. The legal arguments, however, are often subordinated to the exchange of more complex and important personal goals and objectives of the parties, and to make sure that each client feels that the process was fair and open.

**Documentation.** Can include meeting minutes, summaries of agreements reached, “homework” or “to do” lists for the next meeting, or agenda items for future meetings.

### Collaborative Law and Mediation

In my experience, cases are resolved on a continuum, with parties who can reach resolutions with very little professional help on one side of the continuum and on the other side, complex cases that require separate lawyers and experts, geared to proceed to a full trial. Parties with less complicated cases and limited budgets will still be able to create fair settlements simply through the use of an experienced mediator (and perhaps “consulting” attorneys or other professionals to provide advice along the way). More complicated financial or legal cases, however, are ripe for the Collaborative process. In what would have been a tradi-

tional “legal forum” type case, the use of collaborative process will not only create opportunities for better resolutions, but significant cost savings as well.

Although the role of the mediator is not prominently featured in Webb’s book, the Maine conference highlighted the unique role that mediators can play in the collaborative process. Fundamentally, the mediator skill set is right on point to keep the Settlement Team meetings productive and on track. This function can be especially important since attorneys have the important but difficult task of shifting from *adversarial mode* to *cooperative mode*. (Collaborative practitioners refer to this change in approach as a “paradigm shift” that is needed to practice Collaborative Law effectively.)

### Conclusion

Maine is well positioned to create a vibrant Collaborative Law community. Organizations like Kids First have helped to create important partnerships between the mental health and legal professions. In addition, the State Court ADR system along with active private ADR practitioners have provided a strong and growing network of mediators, lawyers and mental health professionals whose approach and collective wisdom is in-sync with the principals of the Collaborative Process.

Citations:

ii. Vogel, Wray & Ousky, Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes Vogel, Wray & Ousky, Id.

iii. Presenters at the November 2007 conference indicated that the average cost of a full collaborative case, where both parties had counsel, mental health coaches, and retained the jointly used child and financial specialist, was under \$20,000.00. The presenters anecdotally suggested that such cases would cost over \$60,000.00 in a traditional litigated forum.

iv. Vogel, Wray & Ousky, Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes.

DAVID C. WEBB, Esq. is a mediator, arbitrator and trainer specializing in employment, family, construction and education law. He is the founding partner of Middle Bay Associates, a dispute resolution and consulting practice in Brunswick Maine. He has taught programs on negotiation and conflict management at the University of New Hampshire, Israel College and PCI College in Dublin, Ireland. He may be reached at 207-725-6262, or at [dwebb@MiddleBayAssociates.com](mailto:dwebb@MiddleBayAssociates.com).

## What Happened?

—John C. Alfano

Have you ever mediated a dispute where you have become the problem? That happened to me a few times with minimum detriment to the mediation. This happened most recently with not so minor results, when one of the disputants was obviously manipulative and unwilling to compromise even on issues where there would have been no loss or cost to him. The other party was motivated to settle because she wanted the matter to go away with a reasonable settlement.

I found myself reacting to the manipulator's behavior in ways that were detrimental to mediation. I wanted him know that I was not naive, that I could see through his

behavior, and I would not be manipulated, primarily, to satisfy my own needs even though I knew that I was jeopardizing the successful conclusion of the mediation. After all, I have been a mediator since 1983, and no one is going to think he could manipulate me. Before I realized that I had put myself before the parties' interests, I had irreparably damaged the mediation making it nearly impossible for the parties to settle the matter. Novices get caught in this trap, not seasoned mediators. However, there I was, the seasoned mediator caught in the trap.

I have been in mediation before where there had been particularly obnoxious and rude people. In those cases, I had put the parties' interests before mine, and have helped settle the dispute anyway. Why this situation was different remains a mystery to me. I know he did not want the matter

settled except under his no-compromise terms. But I have encountered people like that before and had been able to remain focused on the parties' interests. There was something different and unidentifiable about this person that caused me to forget my mediation skills.

I learned that no matter how experienced we may be, we have to make sure that we do not work for our egos at the expense of the parties'. In the meantime, I keep running this mediation through my head hoping to find out how I went wrong.

John Alfano, a partner in Hunt & Alfano Arbitrators, is a mediator and arbitrator in Biddeford, Maine, member of the Board of Governors and Editor of the *Bulletin*.

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### 2008 Board of Governors

<b>Acting President</b>	Anita B. Jones	<b>Board Member</b>	Colleen Newcomb
<b>Acting Secretary/Treasurer</b>	Diane E. Kenty	<b>Board Member</b>	Peter Malia
<b>Immediate Past President</b>	John Alfano	<b>Board Member</b>	Mary Beth Paquette
<b>Maine Bar representative</b>	Jane Clayton	<b>Board Member</b>	Sheila Mayberry

#### MISSION

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

*Maine Association of Mediators*

#### 2008 CALENDAR OF EVENTS

**Nov. 19 Annual Meeting 10:30-2:30**  
**Holiday Inn - Augusta**

Nov. 19 BOG Meeting 9:00-9:45

Dec. 10 BOG Annual Retreat 9:00-4:00