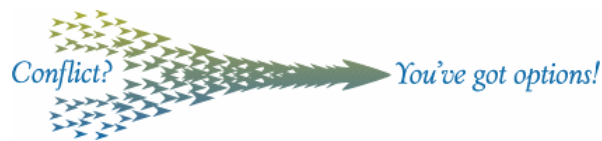


# Maine Association of Mediators August 2007 Bulletin



Maine Association of Mediators  
*Professionals Committed to Cooperative Conflict Resolution*

Volume XII, Issue IV

August 2007

## MAKING A LIVING, DEVELOPING A PROFESSION

By  
John Alfano, President

More people have been telling me their difficulties attempting to develop a mediation practice that is financially successful. I have been fortunate to be in the labor side of mediation which has no shortage of work, much of it well-paying. But the competition for court mediation and other mediation is fierce and difficult to win. Even though I am an experienced labor mediator since 1983, my efforts to branch out into other mediation fields has been a resounding failure, even though I had consulted with veterans in the field and marketing consultants. I can imagine the difficulties mediators new to the field have encountered.

Are there too many of us? Are we selling our work too cheaply? Are we not giving the disputants and their advocates what they want from mediation? How do we overcome the resistance from the advocates? How do we overcome resistance from disputants? All of these questions and more need to be answered before we can develop a successful personal practice and a successful and recognizable profession.

How can we get the answers to these questions? Maybe we need a summit with advocates, clients, ADR professionals, agencies and all the various stakeholders. Maybe the answers are there before us already, and we just haven't seen them. I don't know the answers to those questions, but the next Association President and Board of Governors will have to confront them so that the Association and the profession can grow and thrive.

That is the challenge before us as we head into the next phase of the profession and the next years of the Association. I am interested in your thoughts [jalfano1@maine.rr.com](mailto:jalfano1@maine.rr.com). We will print some your thoughts, suggestions and concerns for the profession in the next issue of the *Bulletin*.

**Don't Miss  
MAM's**

**ANNUAL  
CONFERENCE**

**OCT. 17  
11:30 TO 2**

**AUGUSTA**

**DETAILS BY  
EMAIL**

## Facing Tough Municipal Issues? A Neutral Facilitator Can Help

By Tobey Williamson

If tight budgets, increasing costs of health care, differences of opinion about overtime expenses and competing views about how to best meet staffing needs sound like a recipe for impasse in fire department contract negotiations, the City of Auburn has a secret to share with you. Pat Finnigan, Auburn's City Manager, and Mike Scott, President of the International Association of Fire Fighters Local 797, have learned that neutral facilitators with conflict resolution training can help negotiators to develop collaborative solutions to contentious contract issues while building a sense of teamwork that supports department-wide improvements.

At a time when the residents of Auburn were demanding tax relief and discussions were beginning about how Lewiston and Auburn might consolidate some city services, the two-year contract between the Fire Department Union and the city was due to expire. There were a number of issues that the two sides saw from different perspectives, but they agreed that their last round of negotiations were helped by the facilitation of neutral mediators



from Barton & Gingold and that they could use support with group communication during this round as well. “We knew that we would have eventually worked out the issues ourselves. But we also knew that given the nature of our recent discussions, having a neutral, outside party to help us to communicate would likely save time and lead to some improvements in our working relationships. The process had worked well for us in the past, and we were pleased again this time,” Finnigan said.

For the past 12 years, a “Quality Council,” affectionately known as the “QC,” made up of union and management representatives has met regularly to discuss issues and work together to be sure that the fire department runs as smoothly as possible. Barton & Gingold helped Auburn to create this structure at a time when union and management were hardly speaking. That first year and ever since, this forum has served the department well and led to a more collaborative approach to decision-making and contract negotiations. “It takes time and the QC meetings often fall on days-off for at least one of the firefighters. But the alternative is that the issues would not be discussed as openly as they are and we would probably end up reacting to decisions that affect us rather than participating in the process of making them. So, in the end, the Quality Council is worth the extra effort,” Mike Scott said.

Emotions can still run high even with an open process for communication, especially when contract negotiations become the major focus for the Quality Council. Neutral facilitators with mediation skills help by laying out a process with groundrules and then ensuring that the conversations stay on track and continue to be productive. The process used by different professional mediators or facilitators varies in some ways, especially in regards to style, but typically share a similar format.

The process used in Auburn started with a common listing of the issues to be discussed and an agreement on the order in which they would be taken up. Taking one issue at a time, everyone was encouraged to tell “the story” from their own perspective. Once everyone agreed that the background on the issue had been clarified, then the facilitators helped the group to create a list of “interests going forward,” or, in other words, the aspect(s) of the issue that needed to be addressed to come to resolution. The next step was to create a list of options to meet those interests by addressing the various underlying needs stated by the group’s members. The facilitators explicitly encouraged creativity during option development and used process to reinforce this encouragement. Feedback on ideas expressed during this early brainstorming stage was limited to clarifying questions, rather than the criticisms that can easily derail innovative ideas before they can be properly evaluated on their merits.

After all the issues had been discussed over several meetings using the format described above, the negotiating teams were asked to create packages of the options they had brainstormed. They utilized information gathered by the group to answer questions that had been raised along the way about the options and issues. Creating comprehensive proposals to deal with all of the issues helped everyone to look at the department as a whole and to wrestle with the trade-offs required to create consensus and stay within the allocated budget. With continued discussion and some tough decisions, the Quality Council was able to agree on a contract to bring to the Union Body and the Selectmen for final approval.

*About the Author: Tobey Williamson is an Associate with Barton & Gingold in Portland and Vice President of the Maine Association of Mediators. In addition to working with the City of Auburn on their recent Fire Department contract negotiations, he helps to diffuse tensions between parties on projects nationwide related to land use, transportation, environmental and economic development issues.*



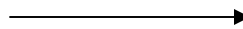
*This article, written by David Plimpton, Esq.,  
is continued from the June edition of the Bulletin*

The articles highlight two characteristics (beyond skill, training, knowledge/experience, and ethical practice) which cross-cultural studies and experience in the U.S. have shown parties and their representatives increasingly demand in mediators. They are in some ways the antithesis of the autonomy, independence, and lack of connection to parties which many mediators strove to maintain:

1) Connection to, recognition by, membership in the same "community" as the parties. If connection to the community of the parties is important, relevant general communities of mediation participants to which mediators might therefore seek connection could include various professional groups, social organizations, religious groups, special-interest groups, governmental agencies, and court ADR services.

The reasons for an increased demand for evaluative mediators, if in fact a widespread phenomenon, are beyond the scope of this article. However, if part of the reason for this is the increasing complexity of disputes, and relevance of specialized areas of legal and other expertise, then connection by mediators to, or recognition within, specialty communities, might be important to developing business or getting more opportunities to mediate. Illustrative examples of specialized communities could include retired judges, trial lawyers, social workers, police officers, specialty law groups, contractors, management groups, labor unions, real estate professionals, teachers, school administrators, accountants, financial advisors, medical professionals, diplomats, bureaucrats and so forth.

2) Authority in the form of above-average seriousness of demeanor, purpose, experience and gravitas. If authority, perceived or real, is important to mediation participants, for example, then sitting judges in court settlement conferences/mediations may be sought



by parties and their representatives. Retired judges, because of their experience on the Bench in deciding cases, may evince authority to participants. Likewise with high-profile mediators and mediators with well-established reputations for effectiveness. Another example is the authority which flows to a mediator through appointment by a court or well-accepted government agency, such as a labor relation agency.

The articles discuss some of these examples in more detail, as well as the examples of the search for connectedness and authority in mediation occurring in other cultures.

One implication for the U.S. mediation profession is the fact, as pointed out in the articles that evaluative styles of mediations are likely to be the favored styles used by many mediators who share the characteristics highlighted in the articles (e.g., retired judges and specialists in the subject matter of the dispute). Moreover, evaluative styles may be requested by lawyers representing parties, because it squares best with their own approach to evaluating cases on behalf of clients, and because the increasing factual and legal complexity and specialized nature of disputes makes evaluation either a perceived or real value.

Increasingly, in my experience, and that of other mediators with whom I have spoken, parties and their representatives expressly articulate a desire for demonstrable evaluative skills in a mediator, even if they are willing to try a collaborative approach first. The articles point to a preference on the part of many mediation participants for retired judges and lawyers known for evaluation skills certain kinds of disputes, rather than mediation process skills.

If all of this is true or a developing trend, what are the implications for mediators trying to respond to the market, the styles of mediation they employ, their relationships to potential groups of mediation participants, and future efforts of ADR educators, trainers and organizations of neutrals, such as the Maine Association

*Continued on pg. 4*

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## ***All You Ever Wanted to Know About Maine's Court Mediation Program***

Court mediation in Maine began 30 years ago, in August, 1977, as a small claims mediation experiment in the Portland District Court. By the end of the year some divorce and civil cases were also being mediated. Don Kimmelman, a MAM member and a CADRES mediator, is writing *The History of Court Mediation in Maine* which he expects to have in print by October. Part One of the book details the history from the early 1970s to 1988. Part Two highlights the important events in court mediation/ADR from 1988 until the present time. An excerpt and more details about the book will appear in the October Bulletin. Court mediation in Maine began 30 years ago, in August, 1977, as a small claims mediation experiment in the Portland District Court. By the end of the year some divorce and civil cases were also being mediated. Don Kimmelman, a MAM member and a CADRES mediator, is writing *The History of Court Mediation in Maine* which he expects to have in print by October. Part One of the book details the history from the early 1970s to 1988. Part Two highlights the important events in court mediation/ADR from 1988 until the present time. An excerpt and more details about the book will appear in the October Bulletin.



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#### 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

### Maine Association of Mediators

#### 2007 Calendar of Events

October 17 **Annual Meeting of Membership**  
**!!:30 to 2, Augusta: details TBA**

December 5 **BOG Retreat**

Plimpton's article continued from page 3

tion of Mediators?

What are the implications for ethical values and professional standards in mediation, if connectedness to the parties and/or their representatives is an important attribute. Do ethics have to be rethought or will more detailed and extensive disclosure be enough to address the issues. For example, is forum-shopping no longer to be seen as a potential ethical, impartiality or disclosure problem, but rather as just the reality of participants demanding what they really want in a mediator?

And what of the efforts of mediators, educators, trainers, and ADR professional groups on the question of mediation styles and techniques most beneficial to the parties. Within the profession and academic community, many people experienced in mediation believe that collaborative and problem-solving mediation styles are more effective and better for the parties than evaluative/directive approaches. But if evaluative styles are what at least a significant part of the market wants, should these efforts be redirected?

The articles pose a practical issue for mediators and mediator professional groups. Is there or can there be a large enough market to support the many mediators whose practices and approaches are not, and may not be able to be, based on significant connectedness to potential groups of parties and representatives, or an aura of authority? The articles conclude that there are significant challenges facing the mediation profession as it currently exists and the challenges as outlined appear worthy of attention. However, these conclusions are not at this point necessarily shared by many in the profession. A more positive view is often expressed by mediation trainers. An example of an optimistic view of the future of professional mediators using collaborative, as opposed to purely evaluative, approaches can be seen in Kichaven, Jeff, *Professional Mediator: A Distinction that Makes a Difference*, June 2006 (<http://www.irmi.com/Expert/Articles/2006/Kichaven06.aspx>).

And, finally, is the mediation training field (1) using the right training approaches, (2) training the right or wrong people to be mediators, (3) training too many people for what the public and parties need or want in mediators, and (4) training people for the right roles in what may be a new mediation paradigm? For, example, the articles pose the question of whether mediation training would be better suited to the needs of the marketplace if it were designed more to help people (a) develop life skills or (b) work within their professions to resolve inevitable conflict (e.g., as professional or business managers, in the helping and teaching professions, and in law enforcement).

In my view there is no substitute for reading and digesting the substance of these articles. The reader will have much to ponder about the future direction of mediation and dispute resolution in general.

END