



Conflict?

You've got options!

PROFESSIONALS COMMITTED TO COOPERATIVE CONFLICT RESOLUTION

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**Our Mission**

The Maine Association of Mediators is a nonprofit 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.

**Submission deadline**

for May issue:  
April 19, 2013  
FMI: MAMBulletin@aol.com

[mainemediators.org](http://mainemediators.org)

**The President's Message**

By Peter J. Malia, Jr.

I recently had the privilege of serving on a Maine Association of Mediators' Board of Governors subcommittee charged with the responsibility of interviewing candidates to replace outgoing Administrator, **Lisa Fourre**. Before I discuss that process and announce the hiring of our new Administrator, I want to take this opportunity to thank Lisa for her service to our organization. Lisa joined us in August of 2011 after longtime Administrator **Tracy Quadro** left to join the Maine Attorney General's Office. A transition like that is always difficult, but I must say that working with Lisa has been a pleasure. Her cheerful personality and multiple talents have contributed a great deal to our organization and, on behalf of the Board of Governors (Board) and our members, I wish Lisa the best of luck with her future endeavors.

Now on to the hiring process: Board members **Maria Fox**, **Chris Neagle** and I interviewed several interesting, diverse and highly skilled candidates so it was an extremely difficult decision. With the Board's agreement, we offered **Liz Andrews** of Freeport the position and she accepted. We anticipate that she will be a great fit for the Maine Association of Mediators as Administrator. Liz holds a degree from Smith College and has also pursued other study at the University of Southern Maine. Along with new Program Chair Maria Fox, new treasurer Chris Neagle and the Board, I heartily welcome Liz and look forward to working with her to advance the purposes and reach of the Maine Association of Mediators.

Speaking of advancing our purposes and reach, the Board is working on a survey which we will soon be sending out to all of our members. Please set aside time to answer the questions in order to help strategize on ways to improve the organization and provide the membership benefits that you are looking for.

Finally, I hope to see all of you on March 7 at Verrill Dana in Portland for what I am sure will be an insightful and entertaining program on the topic of "The Prisoner's Dilemma" presented by **Jonathan Reitman**. Look for more information on that program in this bulletin. If you are planning to attend, please let us know (even if your attendance is free of charge) so that we may have an accurate head count and plan appropriately. As always, please contact me if you have any suggestions or thoughts regarding the Maine Association of Mediators.

## Local and National Foreclosure Diversion Program Reports

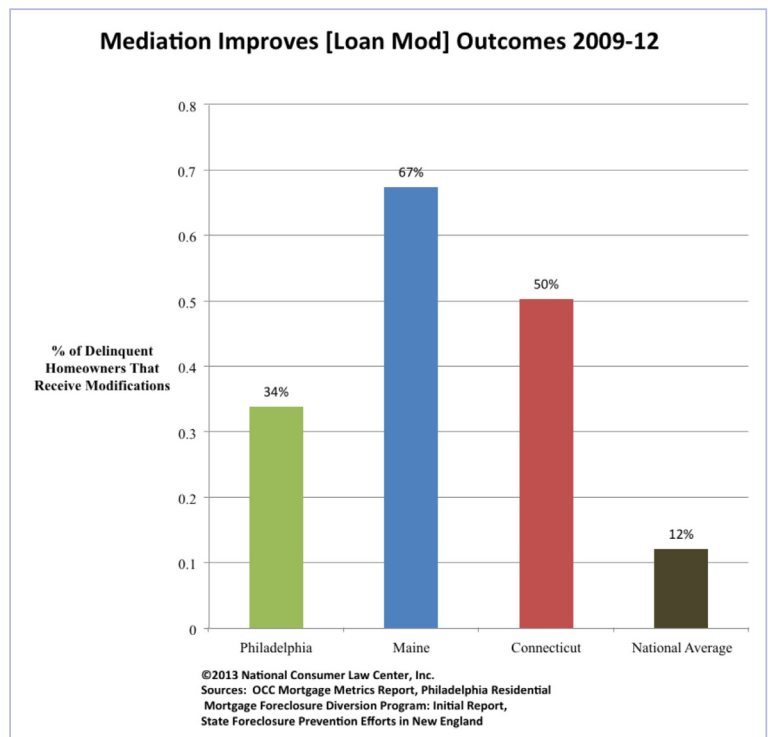
By Paula Craighead

**L**aura Pearlman, Manager of Maine's Foreclosure Diversion Program (FDP) for the Administrative Offices of the Courts and a former FDP mediator, presented testimony before the 126th's Legislature's Joint Standing Committee on Insurance and Financial Services on Tuesday, February 26. The brief information session allowed the committee, who has oversight over the program, to ask the manager questions on her nine page, February 15, 2013 written report covering three calendar years from 2010 through 2012.

As part of her written report and presentation, Pearlman highlighted the continuing success of the program, quantified by both an increase in use of the program (in 2012, parties in 43% of foreclosure cases requested mediation, up from 30% in 2010) and decrease in foreclosure judgments ( 21% of cases filed in the past three years, down from 33% in 2010). A 2012 pilot project launched in Bangor and Rockland that allowed multiple mediators to conduct short mediation sessions on the day of the information session for homeowners will broaden to more courthouses this year. The pilot program met its goal to streamline initial steps in the mediation process so the parties may immediately make a plan for document submission and loan modification review, pursue another course in lieu of foreclosure, or conclude mediation.

The key questions posed (response in brackets) from the committee members concerned how Maine compares with other states in the rate of avoiding foreclosure judgment (very well if not one of the best), whether amending the law would improve the level of authorization of the national lenders' representatives attending telephonically (probably not) and what is happening to the 61% of foreclosure cases that haven't gone through the mediation program (not sure, will try to determine how to track this). The chair pro tem thanked FDP Manager Pearlman for the report and seemed to reflect the mood of the smiling committee when he said the state is running "a remarkable program."

Another recent foreclosures-related report issued on the national level, entitled "At a Crossroads: Lessons from the Home Affordable Modification Program (HAMP)," also cites the success of Maine's FDP program. The National Consumer Law Center, the report sponsor, provided The Bulletin with the chart data reprinted above. The chart illustrates a strong comparative showing for Maine's mediation program for HAMP loan modification results compared to the national average and two other jurisdictions.



*For a complete copy of the 2012 FDP Report to Maine's Joint Standing Committee on Insurance and Financial Affairs, visit the Maine judicial branch website or send an email request with "2010-2012 FDP Report" in the subject box to [MAMBulletin@aol.com](mailto:MAMBulletin@aol.com). The National Consumer Law Center "At a Crossroads" 2013 HAMP report can be downloaded at <http://www.nclc.org/issues/at-a-crossroads.html>*

## Prisoner's Dilemma and Conflict Resolution

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The Program Committee of the Maine Association of Mediators will host a talk on March 7 by Maine mediator Jonathan Reitman. Reitman will discuss the competing merits of competition and cooperation rewards in conflict resolution using the game theorem known as "prisoner's dilemma." The following is a short history of the game as background for the program.

Prisoner's Dilemma was created or popularized by three mathematicians, all whom died in the late twentieth century. **Merrill Flood**, a pioneer in the field of management science, and **Melvin Dresher**, a noted game theorist, framed the initial game contours in 1950. **Albert W. Tucker**, long-time mathematics chair at Princeton, later formalized and named the game, presenting it as follows:

*Two members of a criminal gang are arrested and imprisoned. Each prisoner is in solitary confinement with no means of speaking to or exchanging messages with the other. The police admit they don't have enough evidence to convict the pair on the principal charge. They tell the prisoners their plan to sentence both to a year in prison on a lesser charge. Simultaneously, the police offer each prisoner a deal. If she testifies against her partner, she will go free while the partner will get three years in prison on the main charge. There is a catch: If both prisoners testify against each other, both will be sentenced to two years in jail. If both remain silent (tacitly cooperate with each other and not the police), they will each receive one year on the lesser charge.*

In this classic version of the game, collaboration is dominated by betrayal; if the other prisoner chooses to stay silent, then betraying them gives a better reward (no sentence instead of one year), and if the other prisoner chooses to betray, then betraying them also gives a better reward (two years instead of three). Because betrayal always appears to reward better than cooperation, all purely rational self-interested prisoners would betray the other, and so the likely outcome for two purely rational prisoners is for them both to betray each other. The interesting part of this result is that pursuing individual reward logically leads the prisoners to both betray, but they each would get a better reward if they both cooperated with (that is, not betray) their partner. There are studies to show that humans tend more towards cooperative behavior in similar games, much more so than predicted by exercises and games that seem to reward rational self-interest. *– excerpt from Wikipedia, 2-18-13*

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**Calling all mediators and interested persons to the first MAM Program of 2013**

### Why Are Conflicts So Hard?

*How the Prisoner's Dilemma Evolved and What It Can Teach Us*

Speaker: **Jonathan Reitman, Esq.**

Date and Place: **Thursday, March 7, 2013**

Verrill Dana, One Portland Square, Portland, ME

Time: **8:30 a.m. registration/check-in/coffee**

Program: **9:00 – 10:30 a.m.**

Fee: **FREE to MAM members, \$30 for nonmembers**

*1.5 CLE and CADRES credits available*

Space is limited – **pre-registration is encouraged by or before Wednesday, March 6**

by emailing: [administrator@mainemediators.org](mailto:administrator@mainemediators.org)  
or registering online at [www.mainemediators.org](http://www.mainemediators.org)

## Ask the Mediator

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*In this article, Portland-native **Elizabeth “Liz” Germani** answers questions based on our conversations with various business entities and litigators. Liz Germani litigates and mediates as a partner in the Portland law firm of Germani Martemucci Riggle and Hill. Primarily a practitioner of evaluative mediation, much of her mediation work comes from colleague attorneys who request her services pursuant to Rule 16B in the areas of civil litigation, commercial transactions and employment.*

**BULLETIN:** How can a mediator help when commercial parties to a deal are in conflict but expect to maintain a relationship or enter into future business deals?

**GEMANI:** The difference between mediating and litigating is pretty stark when the parties expect to maintain a relationship going forward. In litigation, there is a tendency to be completely adverse. It also is usually going to only settle a single issue. When you mediate, what you can negotiate is limitless. The parties are allowed to even change their agreement! Depending on what the relationship is, especially when the parties want to protect the relationship, mediation is the way to go. Once, I had a case between an independent contractor and their client. When I asked the contractor during a caucus, do you still want to do work with this client? He answered yes, but is that possible? We ended up making future work part of the negotiation and they ended up working together again which never would have happened if they had litigated their issue.

**BULLETIN:** Can you think of an example where a mediator helps start an internal conversation that no business owner wants to start due to a desire to avoid conflict among key personnel?

**GERMANI:** I wouldn't say that a mediator is in the position to help start the conversation but they can help the employer look at things a bit differently. An example is a case where one of the parties was a person in a position of power in the company. His actions may have been innocent but another employee viewed them as harassment. I think that until the parties came to mediation, the powers that be didn't really see the other side of it. I don't have any way as a mediator to get them to talk about [harassment in the workplace] except to ask they open their eyes to another way to view the situation. I can say "if this were me, I might look at it like this." What the mediator brings to the issue is an objective, non-adversarial vision of the same facts. I wasn't telling the CEO any new facts, what I said was that the accuser isn't necessarily [making a frivolous claim] when facts are viewed from other angles: did you think about this, did you think about that? For example, are there other people in the company who may have the same complaint but aren't coming forward because they are intimidated? While I can't, as a mediator, directly start a conversation that may be needed internally, the party may go back to their business office and speak within the company about alternative ways to address a situation that has arisen out of some conflict.

**BULLETIN:** When the mediator is an attorney, can legal advice be given on tax or valuation matters, for example?

**GERMANI:** No. I stay clear of legal advice. The advice I give is: This is how I think a jury may view these facts or a judge may rule on this issue. Or I may offer a viewpoint on what claims to pursue or what

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claims to drop. I may say “I don’t think this claim is worth very much” or “I think you have a big risk of summary judgment.” I may mention a legal decision that I think should be considered by the lawyers representing the parties. I once had a dram shop case in mediation and the attorneys and I had a long discussion about the statute and the risks. I may offer views on risks [to the parties], not legal advice.

**BULLETIN:** At what point or stage of a conflict is it worthwhile for mediation to commence? Who hires or engages the mediator’s services if there is no written agreement between/among parties on how to address conflict resolution prior to imminent litigation?

**GERMANI:** You don’t need to have started a lawsuit, but you need to have exchanged enough information so that both sides are clear what the issues are. For you to tell me I’m a lousy employer or I make a lousy product or I did something horrible without giving me any factual basis to evaluate the claim is a waste of time. That only polarizes and doesn’t help [reach a resolution]. So generally, people can come to me pre-suit but after exchanging information. For example, I mediated an employment issue where the claim was not in suit but the parties knew everything about each other’s positions because they’d been talking about it in the employment setting for some time. The employee had met with the supervisor who was part of the management team. They had already talked to witnesses and investigated. There was no suit filed, but both sides had ample information. If one side does not have the information, that’s a waste of time. Somebody has to have reason to resolve it.

Regarding payment for mediation, that can be negotiated in the mediation. Ten to twenty percent of the time, one party will pay the entire fee as part of the negotiation although typically it’s shared.

**BULLETIN:** Are there questions that you recommend someone ask a business/commercial transactions mediator before engaging services?

**GERMANI:** I would want to know the amount of mediation experience the person has. You have to be able to listen well. A lot of times, when you listen (and listening is a skill!) you hear people say more than they realize. The mediator hears what I call ‘subtext.’ One dramatic example is a case where a man had lost his daughter tragically in a drunk driving accident. As I talked to him during the course of mediation, what became clear to me that more important than the money involved was doing what he could to make sure that no other kid got killed by a drunk driver. Part of the settlement was that the young driver who had been drinking and driving would go around to schools and talk to people about drunk driving. You can get something like that out of mediation. I don’t think that he would have thought to ask a judge for that. I could hear his worries: did this other guy have a drinking problem? Was he going to drink and drive again? Even if he does jail time, he’ll be back out on the street and then what? When there’s a nonmonetary agreement, we can negotiate ways that those things happen: we put the tasks in writing, have the schools write to the attorney that the driver spoke at the school, when that was and so forth. I don’t typically let parties leave the session saying “we’ll work it out later.” I’ve also come to learn that the more the parties know each other going into a conflict, the more we need to document specifically what is to happen when they leave the mediation. There’s so much knowledge of each other when parties have been working together a long time. It’s really difficult—similar to a marriage! Business partners will bring up long ago situations that turn out to be the basis for eroded trust between them.

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**BULLETIN:** Having done this work for a while, what do you do to keep it fresh?

**GERMANI:** It's never personal to me. These are parties that you are trying to help. I've probably done 350 of these at least. I do construction, commercial transactions and employment. It's probably easier to do this work than family law because it's typically things that can be evaluated objectively, attaching numbers to claims for the most part. Even so, in the commercial setting, you can be creative. Once, a case simply resolved when one party agreed to deliver a load of gravel to the other. It's nice to be able to step outside the box and ask one party or the other: what is it that you really want? This question doesn't get asked, and is not usually answered, in a trial setting.

## What's ahead, MAM?

- **MAR 7, Thursday, in Portland,**  
Program: "Why Are Conflicts So Hard?," Jonathan Reitman  
CADRES and CLE credits available  
FMI: [administrator@mainemediators.org](mailto:administrator@mainemediators.org)
- **MAR 7, Thursday, in Portland, ME**  
Board of Governors monthly meeting  
Maine Association of Mediators  
FMI: [pmalia@hastings-law.com](mailto:pmalia@hastings-law.com)
- **APR 4, Thursday, in Portland, ME**  
Board of Governors monthly meeting  
Maine Association of Mediators  
FMI: [pmalia@hastings-law.com](mailto:pmalia@hastings-law.com)
- **MAY 2-9, Thursday start date, in Topsham, ME**  
40 hour Mediation Certificate Training  
FMI: [elaine.bourne@voanne.org](mailto:elaine.bourne@voanne.org) or  
**207.373.1140, ext. 238** at VOANNE

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### Contact MAM

Maine Association of Mediators  
P.O. Box 8187  
Portland, ME 04104

[mainemediators.org](http://mainemediators.org)

1-877-265-9712

Liz Andrews, Administrator  
[administrator@mainemediators.org](mailto:administrator@mainemediators.org)