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Professionals Committed to Cooperative Conflict Resolution

In this issue:

President's Message	1
Perspective: Model Standard III (F) Measures the Lawyer-Mediator's Commitment to Mediation	2
Ask the Mediator: Family Property Mediation	4
Upcoming events	7
Contact MAM	7
Submission information	1

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 September issue:
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FMI: bulletin@mainemediators.org

The President's Message

By Peter J. Malia, Jr.

I recently reviewed my materials from the 40-hour "Introductory Course to the Theory and Practice of Mediation," which I completed in August 2005. The program was presented through the University of Southern Maine's Division of Continuing Education by **Nancy Markowitz** and **Paul Charbonneau**. In addition to rediscovering a wealth of information that I had not looked at in six years, I stopped to consider my journey as a mediator thus far.

Following completion of this program, I began mediating (as a New Hampshire attorney), for the New Hampshire Superior Court in Carroll County as part of their fledgling mandatory mediation program for superior court civil cases. Most of the cases I mediated involved personal injury, with a few employment disputes and real estate disputes sprinkled in, as well. I was able to acquire enough mediation hours to apply and qualify for the Court Alternative Dispute Resolution Service (CADRES) program here in Maine. I qualified for the Rule 16b superior court roster and the CADRES district court small claims roster in 2007; for the CADRES federal roster in 2008; and for the CADRES family matters roster in 2009.

Although a review of my manual refreshed my recollection of the different models of mediation practice, when I stopped to consider my mediation experience thus far I realized that my early years as a mediator were characterized by a heavy emphasis on **facilitative mediation**, described as:

- Directive as to process
- Nondirective as to outcome
- Purpose is settlement (mediator-driven, party-designed)

I realized that I had not made any use of **transformative mediation**, described as:

- Responsive to parties' initiatives
- Party-driven as to process and outcome
- Purpose is to enhance the quality of party interaction
- Fosters empowerment and recognition

I stopped to consider why I had relied so heavily on the facilitative approach and, in

(Continued on page 6)

Model Code Standard III (F) Measures the Lawyer-Mediator's Commitment to Mediation

By Matthew L. Caras

In 2005, the Model Code Standards of Conduct for Mediators (hereafter, the Model Standards) were revised and approved by the American Bar Association's House of Delegates. That year, the Model Standards were also adopted by the Association for Conflict Resolution and the American Arbitration Association. While some local, state, regional and national programs and organizations within which mediators practice have adopted standards of conduct that supplement or are different from the Model Standards, the Model Standards have become universal. In Maine, the Maine Association of Mediators has adopted the Model Standards and requires its members to follow them.

There are organizations and programs that enforce mediator standards of conduct within the organization or program; however, as a general matter, Model Standards adherence lacks an oversight body. And, by their own terms, "unless and until adopted by a court or other regulatory authority," they "do not have the force of law." Yet, the compelling purpose of the Model Standards—to promote and ensure the integrity of the mediation process, principally through mediator impartiality and confidentiality—is so fundamental to the success of mediation as an institution that the Model Standards are increasingly perceived as creating a standard of care for mediators.

Many mediators are practicing lawyers. Indeed, in court-mandated mediation and other mediation involving disputes, it is often presumed that a lawyer's knowledge of legal rights and remedies is an attribute that will enhance alternative dispute resolution. In addition to being governed by mediator standards of conduct, the professional conduct of the Maine lawyer-mediator is governed by the Maine Rules of Professional Conduct.

One of the Model Standards presents a dilemma for the lawyer-mediator who benefits from a mediation practice in developing business for his or her law practice.

Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest. —**Model Code Standard III: Conflicts of Interest, (F).**

When, subsequent to the mediation, a mediation party requests legal representation from the lawyer-mediator, Model Code Standard III (F) requires the lawyer-mediator to make a determination as to whether representation of the party "might create a *perceived or actual* conflict of interest" or "*raise questions* about the integrity of the mediation." The language of Standard III (F) provides some guidance as to the factors that should be considered in making the determination, referring specifically to (i) amount of time that has passed since the mediation, (ii) the nature of the existing or proposed relationship with the mediation party and (iii) the services to be rendered in the contemplated legal representation. Standard III (F) is intended to ensure case-specific mediator impartiality as well as ensure that mediation as an institution is perceived by the public as a process in which the mediator is impartial.

Many lawyer-mediators in Maine focus on the Maine Rules of Professional Conduct, not the Model Standards (or other applicable standards of conduct for mediators), in determining whether a conflict of interest exists when requested by a mediation party to provide legal representation following the mediation. After all, the Rules of Professional Conduct are

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the standards of conduct with which the lawyer-mediator is most familiar, and they are standards of conduct that are enforced.

Under the Rules of Professional Conduct, subsequent to the mediation the lawyer-mediator cannot represent a party to the mediation in the same matter or a related matter. Rule 1.12(a) provides that a “lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a ... mediator,” and Rule 2.4(e) (3) provides that “upon conclusion of the mediation, the lawyer shall not represent any of the parties in the matter that was the subject of the mediation, or in any related matter.”

However, under the Rules of Professional Conduct, the lawyer-mediator may, subsequent to the mediation, represent a mediation party in a matter that is unrelated to the mediation and that doesn’t involve one of the other mediation parties. Furthermore, it appears that the lawyer-mediator may, subsequent to the mediation, represent a mediation party in a matter that is unrelated to the mediation even if it involves or is adverse to one of the other mediation parties.

The Model Standards are more restrictive than the Rules of Professional Conduct, requiring scrutiny by the lawyer-mediator even where the proposed legal representation of a mediation party subsequent to the mediation does not involve one of the other parties to the mediation and does not involve a matter related to the mediation.¹ For example, time elapsed since the mediation is irrelevant as a factor in determining whether a conflict of interest exists under the Rules of Professional Conduct but is a consideration under the Model Standards. Whereas Model Code Standard III (F) cautions that, even where the subject matter of the proposed legal representation is unrelated to the subject matter of the mediation and doesn’t involve one of the other parties to the mediation, legal representation on the heels of the mediation may erode public confidence in mediation. Moreover, Standard III (F) cautions that representation on the heels of the mediation may even cause one of the other parties to the mediation to question—with hindsight—the lawyer-mediator’s impartiality in the mediation that has been concluded (*i.e.*, “raise questions about the integrity of the mediation”).

Concern over the potential adverse impact of legal representation of a mediation party by the lawyer-mediator following the mediation manifests itself in the standards of conduct of various local, state, regional and national programs, including Maine’s important and highly visible Court Alternative Dispute Resolution Service (CADRES). CADRES Policy and Procedures Manual, revised in 2010, incorporates the Code of Conduct for Judicial Branch Neutrals and contains additional conflict of interest provisions. Section L (4) of the CADRES Manual states: “After serving as a [mediator] in a court ADR session, a [mediator] on the court ADR rosters shall not perform private professional services (e.g., as a lawyer) for a party in that court ADR session for a period of at least six (6) months following the session.”

In summary, the lawyer-mediator who is committed to mediation as an effective means of alternative dispute resolution will endeavor to conduct his or her concurrent mediation and law practices in a manner that complies with the Model Code Standards of Conduct for Mediators as well as the Maine Rules of Professional Conduct.~

Footnote:

1. Indeed, Comment 2 to Rule 2.4 of the Maine Rules of Professional Conduct suggests that the Model Standards may require scrutiny beyond that required by Rule 2.4.

Matthew L. Caras is a member of the MAM Board of Governors. He is counsel to the business law group for the Portland law firm of Verrill Dana and also founder, principal and managing partner of Leaders, LLC, a merger and acquisition advisory services firm with offices in Portland, Maine and Lexington, Massachusetts. Matt has completed the 12-week Harvard Law School dispute resolution program as well as the 40-hour Northwestern University mediation skills program.

Ask the Mediator: Family Property Mediation

Paula Craighead interviews Peter Plumb

*In March, the Bulletin began a series of articles that pose questions by leaders from various Maine constituencies and entities to one or more MAM members. We refer queries to our members because, although the field of mediation is presently unlicensed in most states, MAM members voluntarily agree to a code of professional standards. (One of those standards' canons is discussed elsewhere in this issue.) In this article, MAM member **Peter Plumb** answers questions based on our conversations with two family members who provide stewardship of distinctly different summer properties in New England: one, a farmhouse and managed forest in Vermont; the other, the former summer home of an acclaimed American artist on an island in Penobscot Bay.*

Q: What are examples of matters for which families have requested a mediator's help, especially when family members express the desire to maintain close personal relationships?

A: Over the years, I have found that families generally have a hard time talking to each other about family matters, particularly about summer properties. Often, there are also intergenerational issues, which make communication even harder. At the outset, more often than not, a family wishing to discuss summer-property issues prefers to start with a facilitated meeting, since—frequently—many family members have no idea what the issues actually are. Thereafter, in a situation where a resolution cannot be reached, the next round could be a mediated session. One such example for me involved an expansive summer property on the Maine coast. The complex had been originally constructed almost 100 years ago by a wealthy family and was now in the hands of the third generation—descendants of the three children of the initial builder. Economic ability varied wildly, as did the desire to own and use the property. A long facilitated session preceded periods of submediations among various parts of the family.

Q: How does a mediator address power imbalances in a mediated discussion between and among adult siblings, parents and parent siblings on the issue of deciding to sell or maintain (and share) a family property?

A: Power issues tend to revolve more around financial capacity and ownership percentages than anything else. As any good mediator (or facilitator) must, it is important to make sure that all interested parties feel that they are heard fully and respectfully. Decisions to sell can be especially painful, particularly if driven by economic reality.

Q: Can a mediator help start a conversation that no family member wants to start due to a desire to avoid conflict?

A: Yes! It helps to know in advance what the principal issues that could cause conflict really are.

Q: How does a mediator deal with complex tax-management strategies such as easements, tree-growth programs, use abatements and so forth? If the mediator is an attorney, can advice be given on tax and estate matters?



Did you know?

The Maine Association of Mediators manages a separate roster of experienced real estate contract dispute resolution mediators? Contact **Eliza Nichols** for more information on the Maine Residential Real Estate Mediation Program at: mrremp@mainemediators.org.

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A: It is highly inappropriate for a mediator, even if he or she is an attorney familiar with the law involved, to offer advice on any significant tax or real estate issue. Rather, I encourage the participants to bring the expertise they wish to the table, preferably in person. However, I personally do not hesitate to urge families generally to focus on the issues of governance, legal ownership structure and mechanisms for buy-in and buy-out, since these are crucial to all situations.

Q: What level of interests is necessary to make it worthwhile to pay for mediation? If there are 15 interested family members across three generations and four states, can mediation still work? Who hires or engages the mediator's services when there are several family members involved?

A: In part, my answer to the first question, above, is relevant here. I have had situations where a “branch of the family” will designate a single person or two people to represent that branch of the family at family meetings, particularly when multiple generations are involved in a single branch of the family. If an ownership structure (such as a family LLC or trust) is in place, then it will generally have a bank account and the persons charged with management of the property will generally engage the mediator and pay the costs through common resources.

Q: What can the current stewards and the future stewards expect in a mediation process on a family property where there is no consensus on an objective for the property—that is, no agreement on whether to sell, maintain with no endowment, establish an endowment to maintain, and so forth)? If the family property requires major repairs, can mediation help the family members establish priorities for maintenance?

A: There are many good solutions to “family property” issues. The real problem is to get all parties thinking creatively about their own needs and hopes for the property (or perhaps the property’s proceeds of sale). Mediation and/or facilitation provides a neutral, safe place in which people can discuss their needs, hopes and fears. In families, at least, unlike some other situations, one should be able to start with a fundamental premise of good will and some willingness to reasonably accommodate other family members.

Q. If a partition proceeding has been initiated or is imminent, can mediation still be helpful or cost-effective?

A: Absolutely. In Maine, at least, Rule 16B requires alternative dispute resolution (usually mediation) at an early stage in the proceeding. Partition proceedings in particular cry out for a mediated agreement rather than an outright sale or a hatchet-like division of the property. I do think a lawyer experienced in real estate law generally, including partition practice, is a plus in these circumstances—assuming that the mediator is a qualified mediator and/or facilitator.

Q. Are there questions that you recommend we ask a mediator before engaging services?

A: Yes.

1. What is your experience in mediating and/or facilitating among families who own summer properties?
2. What is your specific skill set—is dealing with real estate matters among them? In addition, what is your experience in dealing with Family Limited Liability Companies and/or family real estate trusts?
3. Can you steer us toward options for expertise, if necessary, i.e. appraisers, tax consultants, land use planners? ~

Peter Plumb is a mediator and law partner in the Portland firm of Murray, Plumb and Murray. He received his mediation training from CDR Associates in Bolder, Colorado, and from Gosselin & Reitman in Maine. Peter has counseled or mediated issues for several families in Maine and New England who steward properties that have been in the family for many generations. He mediates in the areas of general civil litigation, family businesses and family properties.

The President's Message (cont.)

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particular, splitting the parties up into different rooms, or “caucusing.” It occurred to me that, when mediation became more prevalent (i.e., mandatory), during the early years of my private practice, the mediators I used for my superior court civil cases were mostly experienced trial attorneys. Some of them might have received some mediation training, but some probably had never received any mediation training whatsoever. Therefore, it should come as no surprise that their process was evaluative, meaning that it was directive as to both process and outcome. In addition, they tended to rely heavily on the use of caucuses. My mediation style therefore followed suit, although I was not as directive as to the outcome (only the process), thanks to my training with Nancy and Paul.

However, a couple of years ago, as the result of the CADRES peer review program, I was fortunate to have **Deborah Belanger** sit in on one of my small claims mediations in South Paris District Court. As was my routine back then, after introductory remarks and a brief exchange of positions, I split the parties up into different rooms. At the conclusion of the mediation (I cannot recall whether or not the case settled), Deborah asked me why I did this. I realized that I had no good answer to that question, other than that it was the way I always did it; it was familiar and comfortable for me. She urged me to try to keep the parties together for a longer period of time, perhaps for the entire mediation if possible. I took her advice and immediately began to do so.

I am happy to report that now, several years and many, many mediations later, I rarely utilize a caucus for any type of CADRES mediation. In fact, I recently mediated a difficult family dispute in a private mediation in which a mom had entered into an agreement to live with her son and his family at their home for a period of 10 years. She prepaid 10 years worth of rent and also contributed a significant amount of money to help them renovate their house to create an in-law apartment for her. A couple of years later, the son and his wife divorced, and unbeknown to the mom, the son put the house up for sale. The house was sold (to the son's new girlfriend!), and mom was evicted. You may imagine the emotions around the mediation table, with mom (and her lawyer), son (pro se), son's ex-wife (pro se), and son's girlfriend (now owner of the house, with her lawyer).

As a newer mediator, I am sure I would have quickly moved to separate these people into different rooms as soon as possible. However, having become more comfortable over the past few years dealing with and even encouraging emotion, I kept everyone in the same room throughout most of the mediation. At times, of course, one of the represented parties would step out to talk to their lawyer. However, for the most part, we stayed together. It was an extremely emotional afternoon, but the case settled. Had I caucused the parties at the earliest available opportunity, I do not believe that the case would have settled, because there were things that they needed to say to each other. It was particularly clear that there were some things that the mom needed to say to her son!

Therefore, I think it is instructive for all of us to pause, on occasion, and consider both our mediation style and our alternatives and to at least be aware of, if not apply, different mediation models and techniques.

Moving on to the business of the Maine Association of Mediators, we hosted **F. Lee Bailey** at the Portland Country Club on the evening of Thursday, June 9. Mr. Bailey's engaging presentation preceded an informative question-and-answer session. Our programs and events committee is currently working on programs for the fall. We also have organized a committee to plan a spring conference for Thursday, May 10, 2012, at the Hilton Garden Inn in Freeport. If you have seen an interesting mediation speaker, or read any good mediation books or articles lately, please feel free to suggest speakers and/or topics to **Stacey Mondschein Katz** at stacey@smkconsultingservices.com (spring conference) or Deborah Belanger at debbiebelanger@gmail.com (ongoing programs). You can also reach me at pmalia@hastings-law.com. ~

What's Ahead, MAM?

August 4, Thursday, in *Portland, ME*
MAM Board of Governors monthly meeting
Maine Association of Mediators
FMI: administrator@mainemediators.org

September 9–10, Friday-Saturday, in *South Portland, ME*
Training in Nonviolent Communication, “Basics for Professionals”
Sponsored by Youth Alternatives Ingraham
FMI: *Karen Groat, 207-632-1111, kgroat@yimaine.org*

October 5–7, Wednesday–Friday; **October 13–14**, Thursday–Friday; in *Topsham, ME*
Training for Mediation with VOANNE certificate (40 hours)
Sponsored by Volunteers of America Northern New England (VOANNE)
FMI: *Nancy Markowitz, 207-373-1140, ext. 229; mediate@voanne.org; 207-441-3076*

October 25–28, Tuesday–Friday, in *Topsham, ME*
Training: Family Law for Maine Mediations; Domestic Violence Issues for Family Matters;
Consumer Law for Small Claims Court mediations
Sponsored by Volunteers of America Northern New England (VOANNE)
FMI: *Nancy Markowitz, 207-373-1140, ext. 229; mediate@voanne.org; 207-441-3076*

Contact MAM

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