Bulletin of the Maine Association of Mediators
May 2009

Professionals Committed to Cooperative Conflict Resolution

Volume XII, Issue IV **May 2009**

THE PRESIDENT'S MESSAGE

By Anita Jones

It was certainly a busy week – the week of May 11. On Tuesday that week we accompanied some of MAM's finest orators to testify on behalf of the Uniform Mediation Act before the Judiciary Committee of the Maine Legislature. The very next day, we hosted another annual spring conference, held in Freeport at the Hilton Garden Inn, featuring Dr. Aaron Lazare speaking on Apology.

First the hearing. Originally supposed to be the exact same day, the hearing was ultimately brought forward one day to avoid the conflict, thanks to the efforts of sponsor and mediator, Rep. Dick Wagner. There were ten speaking in favor of the UMA: Dick Wagner, the sponsor; MAM President-elect Peter Malia speaking on behalf of MAM; Bowdoin Professor, writer on mediation, and mediator himself, Craig McEwen; Michael Kerr from the National Conference of Commissioners of Uniform State Laws; mediator and former legislator Dave Webb; Leo Della Cotta from Maine Services for the Elderly; Sheila Mayberry, MAM Treasurer; Mary Beth Paquette from Community Mediation Services in Augusta; Cush Anthony, mediator and former legislator; and Rep. Terry Hayes, a Guardian ad litem who works with mediators. In addition to speakers were letter writers, David Plimpton and Jim Cohen among them, and hangers-on such as MAM President Anita Jones who didn't want to prolong the session by saying things that had already been said and eloquently.

Those who spoke in opposition to the UMA were three: Matt Dyer, Chair of the Maine Committee on Rules of Evidence; Peter Murray, consultant to that committee and author of Rule 514; and Richard Thompson from the Maine Trial Lawyers Association. Probably contributing as much as the speakers to the legislators' confusion and disunity was a letter from District Attorney Janet Mills which stated her opposition to the bill.

In the end, after the workshop session following the public hearing ended, the Judiciary Committee agreed to carry the bill over to the next session with the understanding that MAM will lead an effort to bring the stakeholders together and work out an agreement. Not that tall an order for a bunch of mediators, right? But it will not be a simple matter. You will hear more about this in the future.

A word on the Spring Conference. It was energizing and fun and brought together about sixty participants to hear about and discuss everything from parenting coordination, to the new foreclosure mediation bill. The conference was well received overall and enjoyed another beautiful spring day in Freeport. More details in another article in this issue.

Your Board of Governors worked overtime to accomplish these huge efforts. Many thanks to all of them for their hard work. You can reach me at abjones@maine.rr.com.

PRIVILEGED MEDIATION COMMUNICATIONS

By Cushman Anthony

The battle over whether all communications made in mediations should be privileged goes very deep. It is more than a struggle between lawyers and mediators, it is a debate about the goals of the judicial system.

Lawyers tend to believe that the purpose of court actions is to ascertain Truth, and that does indeed have a capital "T" for most attorneys. They believe that if both sides can fully state their case, a judge can determine what actually happened, what the Truth of the situation really was and is.

Mediators see their work as resolving conflicts; the courts for them are a backup system for reaching peaceful settlement of a dispute if mediation does not work out. In other words, the goal of both their work and the judicial system as a whole is the settlement of disagreements. There is no such thing as "The Truth;" there are as many different truths as there are participants in an experience. The goal is to make peace among the participants.

As a result, for lawyers it is critical to create as few privileges as possible, since they adversely affect the court process. During his testimony before the Judiciary Committee, Peter Murray consistently used the word "secrets" when discussing privileged communications. It is bad to have any more secrets created than absolutely necessary, because that interferes with the effort to ascertain The Truth, or what "actually" happened.

For mediators, however, their focus is far less on what people believe happened in the past, and much more on the future. If secrets are created in getting people to settle their differences, that is not a problem. What matters is that the parties resolve the conflict, and resume their lives in peace.

So what really is the goal of the judicial system, and of mediations taking place in the shadow of the courthouse? It depends whom you ask.

That is the true disagreement that is raging over whether privileged communications in joint sessions of mediations should be created. It is a debate over the goals of the whole process, and whether the focus should be on past events or on the future.

For me, getting conflicts resolved peacefully, rather than ascertaining the facts of the past, is what matters most, so people can put whatever they experienced in the past behind them and can move on to deal with the future successfully.

Cushman Anthony can be reached at cush@maine.rr.com.

Apology Expert, 6 Workshops Enliven Spring Conference

by Will Van Twisk

Members and guests at the MAM Spring Conference in Freeport May 13 were treated to a good deal of fresh thinking on subjects relevant to mediators and professionals in related fields. The association was pleased to be able to present former Chancellor of the UMass Medical School, psychiatrist Aaron Lazare who had a full morning to explore his research on the subject of apology.

Found by some to be an atypical medical doctor and administrator, Lazare discussed the increasing interest in his work and need for this, and proved to be a simple-talking educator who conducts his research in "conceptual, rather than statistical" ways. His many references to anecdotal instances of the use of complete, as well as poorly-done apologies, including examples from his own family, could have been seen as scattered ramblings but instead were to him important case histories that add significantly to this analysis of basic human emotions here.

He supplied a model written apology that could have been used by radio commentator Don Imus after his notorious remarks, with fully-developed ingredients, the "healing mechanisms" of a good apology: these include acknowledgement, explanation, remorse and reparation, and each must be expressed in the correct way in order to be effective and meaningful.

Later in a smaller workshop, Lazare expressed that the emotions of shame, guilt and humiliation are "action indicators" requiring resolution, since they affect our functionality and we have great difficulty in blocking them out. With surprising frequency, we experience "delayed apologies" where a person expresses remorse for old actions, and this can operate reciprocally, as when to persons associated in some way say "why don't we put our past differences behind us?"Other afternoon workshops covered timely topics (more details of workshops on the MAM website):

- We had the latest information from members of the state Commission charged with studying creation of a foreclosure mediation program
- Another session was held on the important terms within Mediation Agreements used to engage our services
- The greater use of facilitation work in the public policy context was explored
- Mediators and guardians *ad-litem* learned about the new roles in parenting coordination in high-conflict post-divorce work

Mediator and attorney June Zellers was able to fill in admirably when another presenter could not attend, and discussed the Choice Points model of mediator training and peer consultation. The method, developed with mediator Jacqui Clark, is also used in skills development for CADRES mediators.

William Van Twisk is a mediator from Brunswick, Maine. He can be reached at Will Van Mediations, www.maine-mediator.com.

Community Mediation Services to Merge with Volunteers of America, Northern New England!

Community Mediation Services (CMS) announced the pending merger of with Volunteers of America, Northern New England.

CMS promotes community peacemaking by creating environments and opportunities for dialogue and understanding. Since 1994, their trained volunteers have provided high quality alternative conflict resolution services to Mainers who would not otherwise have access.

On July 1st, CMS will become the Community Mediation Services program of Volunteers of America, Northern New England (VOANNE), a well-respected provider of innovative human services to meet the material, emotional and spiritual needs of individuals, strengthen families, and build healthier, more productive, and more compassionate communities. VOANNE share CMS's enthusiasm for alternative conflict resolution, and commitment to making these tools available.

The CMS Board will continue its involvement, serving as Advisory Board to the CMS program and contributing a member to the VOANNE Board. Since Amy Wilmot, the Program Coordinator has chosen to move on to a new endeavor, CMS is recruiting for a new Program Coordinator. The position will be posted soon, at: http://www.voanne.org/

The CMS Board believes it has found the perfect match for both the its mission and the operations. CMS will continue to rely on the talents and support of the roster of volunteers.

More information to follow as the merger continues.

ARBITRATION: *IS IT ALTERNATE DISPUTE RESOLUTION*?

By Shari Broder, Esq.

It is ironic that people view arbitration as a method of "alternative" dispute resolution. Arbitration has been used to resolve disputes for literally thousands of years. It was used by Philip of Macedonia and George Washington, and is older than the common law system we inherited from England. At some point in history, courts became the "alternative" method of dispute resolution.

About a hundred years ago, the wind shifted again, and people began resolving more disputes using arbitration. Precipitated by the passage of the National Labor Relations Act in 1935, labor arbitration became the preferred method of dispute resolution in labor-management relations. After using arbitration for over 70 years, no one is clambering to get back into the courts.

When I first became a neutral, it was as a labor arbitrator. During my years as a litigator, I enjoyed arbitrating cases so much more than litigating in the courts. I liked the less formal atmosphere, having a date certain for the hearing, rather than a trailing docket, and being able to bring the dispute to a close in a few months, rather than years. There is no cumbersome and costly discovery, although the parties often cooperate in preparing documents and stipulations for the hearing. Once I realized that I did not want to fight with people for a living, I decided to try to establish a practice as a labor arbitrator. I use the word "try" because, as with any neutral practice, it was not easy to generate business early on. Labor arbitrators must have experience in the field of labor-management relations, and be acceptable to both unions and management. Because arbitrators decide the outcome of disputes, labor and management representatives who select arbitrators want to know the arbitrator's track record and reputation before choosing him or her. It is a chicken and egg problem to get those first few cases.

There are two main types of labor arbitration. Interest arbitration is used when the parties reach an impasse during their negotiations over the terms of their labor contract, commonly known as a collective bargaining agreement. Upon reaching impasse, the parties first attempt to mediate the issues in dispute. When mediation is unsuccessful, interest arbitration can ultimately resolve their contract dispute, as the arbitrators can determine the terms of the contract.[1] Interest arbitration is normally conducted by a three-person arbitration panel comprised of a neutral chair, a labor representative and a management representative, all of whom serve in a neutral capacity on the panel. In Maine, interest arbitration is fairly uncommon, as contract disputes of this sort usually resolve in mediation or through the intermediate step of nonbinding fact finding.

Once the parties have a collective bargaining agreement in effect, they have a right to grieve any alleged violations of it. If those grievances are not resolved through the steps of the grievance process contained in the agreement, the last step in that process is grievance arbitration. The parties may agree to select a single arbitrator to preside over the grievance arbitration (either by contacting the arbitrator directly or through an administering agency, such as the American Arbitration Association or Federal Mediation and Conciliation Service) or a three-person panel composed in the same manner as an interest arbitration panel. The Maine Board of Arbitration and Conciliation (BAC)[2] is such a panel, comprised of a neutral chair (yours truly), a labor representative and a management representative. The BAC provides both grievance and interest arbitration services. The contractual grievance procedure usually determines how the arbitrator is selected.

_____

1.In the public sector in Maine, the decision of the arbitrators is not binding with respect to financial issues.

2. For more information, see http://www.maine.gov/mlrb/bac/arbandconciliation.htm.

Shari Border can be reached at sbroder@suscom-maine.net.

THE SENSUAL MEDIATOR!

By Tracy Quadro

Sen-su-al (*adj.*): **1.** Relating to or affecting any of the senses or a sense organ; sensory.

Mediation is all talk, right? Wrong! Mediation is a full-contact sport. Just as we need to be aware of our biases, we need to be aware that we impact all the senses of the parties in the room – and how we impact their senses may impact the process. Veteran mediators know this, but some new mediators may be so busy thinking about the steps and phases that they forget about the mediator as a process variable. Let's take the senses one at a time:

Sight:

We all know enough to dress professionally in the mediation room. But for most mediations, if you dress too professionally – in a three piece suit and tie or a women's business suit, for example – the parties may see you as unapproachable, or see the process as more formal and restrictive than it really is. Ideally, the parties should see mediation as a more informal, comfortable, user-friendly part of the litigation process. A comfortable process may lend itself to more creative solutions.

Also, give some thought to the colors and patterns that you wear in a mediation. Hot colors, such as red and orange, may tend to incite an arousal response ("fight or flight") in the parties, similarly to waving a red cape in front of a bull (yes, I realize bulls are color blind, but work with me here). The same response may be elicited by bright, 'loud' or visually 'busy' patterns on fabrics. Even so little as a red tie or scarf may make parties feel uncomfortable – and the tricky part is that they won't consciously understand why, assume that their emotions are running high and react accordingly. To keep the visual noise at a minimum, keep colors 'cool' (blue, green) or neutral (tans, earth tones).

Sound:

Those of us who are parents realize that the best response to a screaming child is to keep your voice quiet and steady. The same thing happens in mediation. If the mediator keeps a calm, steady voice, with slow, measured breathing, the parties, even those who are 'escalating,'

Smell:

Be aware of what you bring into the room. Some people are allergic or sensitive to perfumes, aftershaves and other fragrances. If you can smell it on yourself, chances are it's too strong. Better yet, consider going *au natural* while in the mediation room. Try to be mindful of the discomfort you may cause without even realizing it.

Taste:

Think about the time of day. Marathon sessions are not un

continued on page 4

common in some types of mediation, especially family matters and contract negotiation. Don't power through mealtime – take a break so that the parties (and you!) may replenish and keep blood sugar levels on an even keel. If people seem to be flagging at around 10:00 AM or 3:00 PM, ask if they need a snack break, or just a leg stretch. And, as a non-smoker I tend not to remember this, but some smokers really feel the need to have a cigarette to keep their minds engaged on the task at hand. Allow room for people to ask for breaks when they need them.

Touch:

This one is tricky, but if you are the type of person who is comfortable and natural with touch, don't underestimate it as a tool in the mediation room. I've used a simple touch to the wrist to comfort someone who is very weepy or sad, or to ground someone who is becoming very angry and seems to be escalating. Use your judgment and be sure you have established a certain amount of trust with the party before attempting this – some people will see the touch as healing, others will recoil with discomfort. Be careful, but don't rule it out.

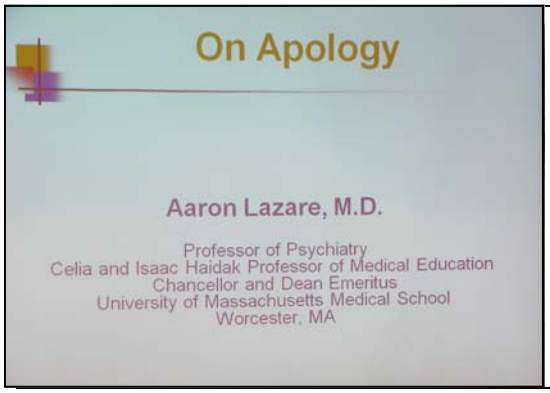
Think as well about the physical atmosphere of the room – if it's stuffy, open a window if you can. If it's cold, see if someone can get that taken care of. Pull the shades if the sun is getting in someone's eyes. Check your surroundings and the parties for signs of fidgeting, a 'pained' facial expression, arm rubbing and goose bumps, etc. Physical discomfort is a stressor that makes it more difficult to concentrate on the tasks at hand.

Humor:

Okay, I know this isn't traditionally thought of as one of the senses, but if you have a sense of humor, use it! Laughter is definitely the best medicine, and can help to break a tense moment or to segue from a difficult point to a new issue. I find that, especially with pro se clients, helping them feel at ease goes a long way toward a successful discussion.

Listen to the parties! If they are commenting about something more than once – "Gee, it's hot in here," or "I was too nervous to eat breakfast this morning," or "My, that sweater is… interesting…" – it may be bothering them. Mediators who are aware of their effect on the senses of the parties are more likely to offer a comfortable process for all. So let your sensuality shine!

Tracy Quadro is a guardian *ad litem* and a mediator. She can be reached at tracyaq@maine.rr.com.



CANDID SPRING CONFERENCE PHOTOS

SEE PAGE 5

2009 Board of Governors

President	Anita B. Jones	**Board Member**	James I. Cohen
Vice Pres.	Peter Malia	**Board Member**	Maria Fox
Treasurer	Sheila Mayberry	**Board Member**	Ann Martin
Secretary	Mary Beth Paquette	**Board Member**	Sheila Mayberry
Board Member	John C. Alfano	**Board Member**	Eileen McGuire
Board Member	Morrison Bonpasse	**Board Member**	Diane Kenty [non voting]

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

2009 CALENDAR OF EVENTS

June 3	**BOG Meeting**	**9:00-11:00 a.m.**
July 1	**BOG Meeting**	**9:00-11:00 am.**
August ?	**BOG Meeting**	**9:00-11:00 am.**
September ?	**BOG Meeting**	**9:00-11:00 am.**

November Annual Meeting

[Time, Date, Program to Be Determined]

2009 Spring Conference