

Bulletin of the Maine Association of Mediators June 2008



Maine Association of Mediators
Professionals Committed to Cooperative Conflict Resolution

Volume XIII, Issue III

June 2008

President's Message

President Anita B. Jones

When you plan a conference with someone "from away" as the keynote speaker, you hold your breath as he starts, hoping he's as good as he's reputed to be. In the case of Dan Shapiro, our expectations were met and even exceeded.

On a beautiful day in early May about eighty people gathered in Freeport's lovely Hilton Garden Inn for a day-long conference. The morning was spent entirely with Dr. Shapiro, and the afternoon offered six workshops to choose from in two sessions with experienced Maine professionals.

You might think three hours is a long time to sit and hear from one person, but the group was spell-bound by Shapiro's combination of animated acting out examples of different behaviors; a variety of teaching modes; his real life stories; and his compelling, simple, and immediately useful wisdom about the use of emotions in negotiation and mediation. His message in a nutshell: to stimulate helpful emotions we can express appreciation; build affiliation; respect autonomy; acknowledge status; and help make the person's role fulfilling. If you want more details, talk with someone who attended.

Rather than rest on our laurels, the Board of Governors started immediately to plan the next event, a membership meeting for September with a topic geared more to the nuts and bolts of our practices. The importance of our Agreement to Mediate document can be easily overlooked but is the contract between us and our clients, spelling out expectations and boundaries, including confidentiality. A panel of your colleagues will discuss what they include in their Agreements, and engage in a dialogue with those present about this interesting topic. We are exploring the possibility of holding this as a video conference, so it can be attended by folks throughout the state, so keep your eye on your emails for further details.

Please feel free to contact me at any time with your thoughts and ideas for our statewide ADR group at abjones@maine.rr.com.

BREAKING NEWS

The **Supreme Judicial Court** will consider in mid-June the proposal for a **new Rule 514** which would redefine the scope of privacy of mediation. Presented in sessions for MAM members in February and at the May Conference, this new Rule would limit confidentiality to caucuses with one party and the mediator and not allow the full group dialogue to be confidential. *This would impact every mediation held from that point and nullify one of the basic principles of mediation.*

MAM plans to object to this rule through a letter. This letter will be circulated by email on Monday, 6/16/08, written by June Zellers, and, as a member, you will be invited to indicate if you do **NOT** wish to have your name listed. **Please watch for this email to see the contents of the letter.**

You also may wish to write your own letter. Possible talking points: Your stories of mediations that settled due to clients' confidence in confidentiality that allowed for free exchange of offers. Changes in the mediator role under the new rule. Disempowerment of parties. Misuse of mediation information.

**Send your letter to The Chief Justice of the
Maine Supreme Judicial Court., P.O. Box 368
Portland 04112-0368**

The more letters, the stronger our intervention.

SAVE THE DATE
SEPTEMBER 10, 2008
MEMBERSHIP MEETING

What Goes Into an Agreement to Mediate

will be the topic for discussion at the September Meeting with panelists to be announced later. The discussion will provide us with the nuts and bolts of mediation agreements, and methods to protect the integrity of

mediation. The Association is investigating video conferencing so that participants may attend electronically from a distant site. You will be receiving a notice when the conference locations are determined and the program is finalized. There may be a moderate fee to offset the costs. More to follow!

TRACY QUADRO REPLACES MOODY!



Tracy Quadro, former executive director of Community Mediation Service (CMS) has been hired part time as the Association's Administrative Assistant, replacing Roger Moody. Tracy has been active in ADR for many years, piloting new and innovative programs. She taught conflict resolution skills for Seeds of Peace International Camp in 2005, and taught knitting at a school for impoverished children in the Safe Passage program in Guatemala. At CMS she was involved in managing employee and volunteers, writing and administering grants, legislative work and fund raising. According to acting President Anita, "Tracy was a great candidate for the job. She has been on the Board of Governors (BOG) for many years. She knows how the Association works and what it wants to accomplish." She will be involved in coordinating the various day-to-day work of the Association and conferences and programs. Much of the work of the Association still will done by volunteers, however. "Tracy's experience with CMS volunteers will be a tremendous asset to the Association", according to Jones.

Welcome aboard, Tracy!

MEDIATION IN NEW JERSEY

Joan Fischer

New Jersey's court approved civil mediation program was instituted in 1998, when the state Supreme Court granted permanent status to a pilot program which was developed for civil, general equity and probate cases. Governed by New Jersey Court Rule 1:40 et seq. the Statewide Mediation Program empowers, but does not mandate, the court to require parties to participate in at least two hours of mediation, at no charge, in any type of civil, general equity or probate matter.

Since inception of the Statewide Program, in order to encourage alternatives to litigation, the Supreme Court has authorized many NJ counties to utilize Presumptive Mediation Pilot Programs, in which twelve specific types of cases are automatically referred to mediation (civil rights, law against discrimination, environmental litigation, real property, contract/commercial, tort, professional malpractice other than medical, employment, toxic tort, construction and tenancy.) The salient difference between the two mediation programs is that with the Statewide Program, the judge has the discretion to send any case to mediation, whereas with the Presumptive Program, referral to mediation is automatic for the twelve specified types of cases, and discretionary for all other types of cases.

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Moody Resigns As MAM's ED To Run For Public Office

Roger Moody, the Association's first Executive Director, resigned effective June. He is moving to the next level in his lifelong career in public service—to run for Knox County Commissioner. Moody retired after a long run as Camden Town Manager. He came to the to the

Association after working for a bank in Camden. He has served the Association very well since June 2006, where he helped the leadership through a time of change—the Association's reorganization, name change and new website design. Roger has been behind the scene keeping things together. He's been actively involved in the redesign of the Association's website, which has undergone many incarnations since the original design by Peter Michaud.

Acting President Anita Jones said that Roger will be missed. "He has been a real asset during budget development and handling the day to day matters." John Alfano added, "I mediated and arbitrated labor contracts for Roger when he was Camden Town Manager. He always knew the right thing to do for employees. He had been a good sounding board for me during my presidency." The position will be replaced by an administrative assistant at Moody's suggestion. [see related article on this page]

Good luck in your next pursuit!

EARLY NEUTRAL EVALUATION

Daniel E. Wathen,

If my own ADR experience over the last seven years is any guide, I have to conclude that early neutral evaluation is one ADR tool that is not in high demand. As a newly retired judge with twenty five years of judicial experience, I began with the naïve assumption that neutral evaluation might be a marketable skill. I have learned that it is, but not as a free standing service.

Only once in seven years have I been asked to conduct an early neutral evaluation. The parties in that case sought my views as to whether the case would survive a motion for summary judgment. In a lengthy letter, I explained why I thought it would and that was the last I heard from them. In the abstract, you might think that parties would be willing to save time and money by sitting down to learn the strengths and weaknesses of their case with an experienced neutral at an early stage in the controversy. Strategic considerations, however, make this a very unlikely scenario in most cases. Because more than ninety five percent of all civil cases are settled rather than going to trial, a free standing evaluation by a neutral will often impede the negotiations that will inevitably occur, rather than serve as a catalyst for settlement. In short, at the beginning of the negotiating process, most lawyers will be reluctant to pay for the chance of receiving an unfavorable evaluation that may stiffen their opponent's bargaining position. I cannot say that I blame them.

I recall that one of my former colleagues, Justice David Nichols, after retiring from the Court, offered mediation and neutral evaluation as a linked service—he would mediate the case and if unsuccessful, he would provide the parties with his evaluation. I do not

know how this service was received, but I do not think that the concept has been picked up by any other practitioner since Justice Nichols' demise. Once again, few would risk an unfavorable impact on the negotiating process by agreeing to an evaluation as the price for an unsuccessful mediation session.

Then how does neutral evaluation become a useful and marketable skill? The impasse procedures that I use for mediation draw heavily on my evaluation of the case. Whether I provide a mediator's proposal that is either all yes or all no, or whether I suggest a range within which negotiations might continue, the process reflects my neutral evaluation of the case. The critical differences are: (1) The evaluation comes only at the end of a mediated negotiation process, and then only if it is absolutely necessary. The risk of harm to bargaining positions is greatly diminished under such circumstances. (2) The proposal is delivered only if the parties agree, and their agreement is sought only after impasse. (3) Finally, I always present the proposal to the parties not as my evaluation of what the case is worth in court but rather as my evaluation of where it could be settled.

Under these circumstances, one more than one occasion, I have seen neutral evaluation move parties by several million dollars, with both sides taking a single jump of more than 200 percent. A valuable ADR tool, yes, but only sparingly used and under very specific circumstances.

Daniel Wathen, retired Chief Justice of the Maine Supreme Judicial Court, is Of Counsel PierceAtwood, Portland, Maine. He can be reached at dwathen@pierceatwood.com

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Share your knowledge and experience with your colleagues. Write an article for the *Bulletin* and receive world-wide exposure.

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IS YOUR MEMBERSHIP DUE?

**Membership renewal information
will be mailed to you.**

Renew now!

New Jersey

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For family law matters, economic mediation programs operate in all counties. The goal of these programs is to save the parties time and money by resolving such issues as equitable distribution of marital property, and child and spousal support. Recently, the Supreme Court instituted yet another pilot program, specifically for "Lemon Law" automobile repair cases.

Depending on the type of case, the county in which it is filed, and whether it is pursuant to the Statewide or Presumptive programs, a mediator will either be randomly assigned to the matter from a list of approved mediators, assigned to a particular mediator based on expertise, or selected and agreed to by the parties' counsel. For the most part, mediators are not paid for the first two hours of mediation, which is defined to include preparation time, organizational phone conference, and at least one hour of actual mediation. If the parties choose to continue for longer than those two hours, they must share the fees and expenses equally on an ongoing basis.

Court assigned mediators must keep the court informed of progress and conclusions reached. All case statements and other documents and materials remain confidential. The only public record of a mediation is the signed agreement to be incorporated in consent judgment or settlement placed on the record

In addition to the general requirement of an 18 hour basic mediation skills course (40 hours for family court matters), the training and certification of mediators in New Jersey varies depending on the type of case. For example, for custody matters a graduate degree or certification of advanced training in behavioral or social science is needed, along with training in mediation techniques, and supervised clinical experience in mediation, preferably with families. For general equity and probate matters, at least 5 years of professional experience in the field of expertise and an advanced degree or an undergraduate degree and mediation experience is required. There are other requirements for special civil part (often mediated by volunteers or law clerks if landlord/tenant matter) and for Municipal Court matters.

Stuart Lederman, Esq., of the prominent NJ firm of Riker Danzig, has had significant experience with mediation of commercial matters. He believes that, in general, New Jersey mediation programs have been successful in alleviating some of the court backlog, and in saving litigants' resources. He has found that mediation is less effective when there are novel legal issues to be resolved, where the amount at stake is greater than \$100,000, and where the parties have not had prior experience with large legal bills or suffered through litigation that saps their strength. He suggests that NJ court mediation programs could be improved by more thoroughly screening which cases should be sent to mediation before discovery is complete, and by assigning mediators with experience in a particular area to a case within their area of expertise.

Joan Fischer, Esq. has moved from Morristown, New Jersey to be closer to her family and to practice mediation from Boothbay. She can be reached at fischer.joan@gmail.com.

2008 Board of Governors

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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 other neutrals through training, educational development and promotion of standards of professional conduct.

Maine Association of Mediators 2008 Calendar of Events

Aug. 6 BOG meeting 9:00-11:00 a.m. Portland
Sept. 10 BOG/Membership Meeting at USM
from 10:00 - 12:00 (more later)
November 2008 Annual Meeting - TBA