Bulletin of the Maine Association of Mediators
June 2010

Professionals Committed to Cooperative Conflict Resolution

Volume XIII, Issue III www.mainemediators.org **June 2010**

The President's Message

By Peter J. Malia, Jr.

As most of you know by now, effective January 1, 2010, the Maine Supreme Court adopted amendments to Rule 408 of the Maine Rules of Evidence, and adopted newly created Rule 514. Rule 408 addresses the admissibility into evidence of mediation conduct and statements, and Rule 514 creates a privilege for mediators.

As I mentioned in my last President's Message, the Maine Supreme Court recently issued a decision which discusses these new rules of evidence, State of Maine v. Deane Tracy. I promised to say more about this case in our next bulletin, so here it goes.

In 2006, Deane Tracy and his wife Sarah agreed to purchase a 1992 Mercedes Benz from Melissa and Ken Curtis for $3,500. However, the Tracy's only paid $1,000 and the Curtises eventually filed a small claims case against the Tracy's for $2,500. The parties engaged in small claims mediation, and three things happened during that mediation which later proved to be significant. First, Sarah Tracy stated in mediation that she had actually paid a total of $1,500, not just $1,000. Second, the Curtises offered to settle for $2,000 if Sarah Tracy could document that payment. Third, Deane Tracy failed to notify the Curtises that he was in possession of a bill of sale marked "Paid in full."

At the small claims trial, Deane Tracy miraculously produced the aforementioned bill of sale marked "paid in full." This document was admitted into evidence in the small claims trial. As it turns out, Mr. Tracy had altered the bill of sale to add the words "Paid in full." The decision does not tell us what the outcome of the small claims trial was.

Five months after the small claims trial, the State of Maine charged Mr. and Mrs. Tracy with forgery (a Class D crime), related to the altered bill of sale. Prior to the trial on the forgery charges, the State of Maine moved for admission of testimony regarding the 3 issues set forth above from the small claims mediation session. The Tracy's argued that Rule 408(a) prohibited the admission of mediation evidence. However, the trial court admitted the mediation evidence over the Tracy's objection. Mr. and Mrs. Tracy were found guilty of forgery, and Deane Tracy appealed his conviction to the Maine Supreme Judicial Court.

On appeal, Deane Tracy argued that the trial court should not have admitted any evidence related to the small claims mediation session. In particular, Mr. Tracy argued that the three issues noted above from the small claims mediation session should not have been admitted.

Mr. Tracy first argued that the admission of the mediation evidence violated his fifth amendment right against self incrimination. The Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself." The Maine Supreme Court rejected this argument, concluding that "we have never required a mediator in a court ordered mediation to advise the parties of the Fifth Amendment privilege against self-incrimination, and we do not adopt such a requirement today."

The Supreme Court then undertook to explain "three concepts arising in the Maine Rules of Evidence that sometimes generate confusion regarding the use of mediation-related evidence at trial." These three concepts are confidentiality, privilege and admissibility. These three concepts were defined and explained in our January, 2010 Bulletin by myself and Peter Murray, Esq. Visit our website (mainemediators.org) for past bulletin issues. The Maine Supreme Court in its decision described a confidential communication as "one made in the context of a special relationship with the intent that it not be disclosed to any third parties except in strictly limited circumstances." The Court explained that specific privileges have been established in the Maine rules of evidence "to protect these types of confidential communications from being disclosed at trial."

The Court noted that these privileges "serve to facilitate candor and important relationships that rely on the sharing of sensitive, confidential information." Importantly, the Supreme Court noted that statements and conduct during the small claims mediation session were not, and still are not, confidential communications protected by any privilege, although Rule 514 now creates a limited privilege that can be claimed by mediators. Of course, this is one of the major reasons why the Maine Association of Mediators proposed the Uniform Mediation Act to the 124th Maine Legislative last year: to promote the candor of parties through the confidentiality of the mediation process. Although that effort was unsuccessful, it did result in the positive changes to Rule 408, and the adoption of Rule 514.

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Regarding the concept of admissibility, the Court noted that "by making certain evidence inadmissible, the Rules of Evidence address concerns about fairness in the administration of justice, the efficiency of trials, and the truth-seeking function of the Courts. As an example, the Rules "restrict the admissibility of evidence for purposes of … encouraging compromise and settlement of claims, M.R. Evid. 408."

Deane Tracy relied on M.R. Evid. 408(a) to argue that the evidence from the mediation session was inadmissible at the criminal trial on the charges of forgery. The Maine Supreme Court disagreed. The Court noted that it was important to distinguish the criminal trial on the forgery charges from the small claims trial. The small claims trial centered around the dispute between the parties related to the purchase and sale of a Mercedes Benz, which was obviously quite different in many ways from the criminal trial on the forgery charges.

When mediation evidence is offered in separate litigation of a different dispute between an outside party and a participant in the mediation, the mediation evidence will most often be admissible, because in such a case it is "offered neither to establish liability on the negotiated claim nor to establish an issue in dispute between the parties to the negotiation." The Court concluded by stating that "although the parties are free to posture and bargain during civil mediation, they may not use that mediation as a shield behind which to act in furtherance of a crime," which is essentially what Deane Tracy had attempted to do in this case.

Although this case took place before the effective date of the new rules, the Court offered a helpful analysis of whether the result would have been any different if analyzed pursuant to the rules which became effective on January 1, 2010. The Court noted that the mediator may have asserted a privilege against testifying pursuant to M.R. Evid. 514, but the claimed privilege would have had to have been examined pursuant to the exceptions set forth in Rule 514, namely the crime-fraud exception and the manifest injustice exception. See M.R. Evid. 514(c) (2), (7). The Court also noted that the evidence from mediation would have still been admissible under the new rules "as long as the evidence was offered through the mediation participants rather than the mediator himself."

To conclude, I would say that "justice was served" by the Court's application of Rule 408 to the facts of this case. Rule 408 seeks to balance the need for confidentiality in mediation sessions with the need for courts to have access to the information that they need to make the right decision. I'm sure we can all agree that it would have been a travesty for Mr. Tracy to use mediation "as a shield behind which to act in furtherance of a crime." Stay tuned for more Maine Supreme Court cases interpreting revised Rule 408 and new Rule 514. I'll be sure to provide you with summaries in future bulletins.

As always, feel free to contact me with questions or comments at pmalia@hastings-law.com, or at 207-935-2061.

THE MAINE ASSOCIATION OFMEDIATORS PRESENTS:

A SPECIAL EVENING WITH PROF. ROBERT MNOOKIN, CHAIRMANOF HARVARD LAW SCHOOL'S PROGRAM ON NEGOTIATION ANDTHE WILLISTON PROFESSOR OF LAW CHAIR AT HARVARD LAW

BARGAINING WITH THE DEVIL: WHEN TO NEGOTIATE AND WHEN TO FIGHT

Social hour from 5:30 to 6:30, presentation from 6:45 to 8:15.
Cost is $25 for members, $35 for non-members.
Register at: mainemediators.org

A Brief for ADR by Mediation

Don Lowry

Disputes come in all shapes and sizes, and so do the way in which disputes can be resolved. As lawyers our first thought is recourse to the courts. Litigate. Let the issue be decided by a judge or a jury. But of course the judicial system is not right for dealing with every disagreement, nor even for most disagreements. Unfortunately many disputes which might be better taken care of elsewhere end up getting dumped on the courts.

India and Pakistan both claim sovereignty over Kashmir, so how can this dispute be resolved? A war ought to do the trick, but would a war be in the best interests of these countries? Certainly many countries in history have opted for this form of dispute resolution. It is unrealistic to expect that one country will decide that conceding will be worth obtaining peace and good relations with the other country.

Suppose that a husband wants to stay at home for the evening to watch a ball game, but his wife has her mind set on going to a movie. What would be a good way to solve this impasse? Filing suit is clearly not an option, nor would you expect the parties to seek professional help in coming to a resolution. In a case like this most likely one party will give in to the other, because the issue is not important enough to fight about. Or perhaps, if both are adamant, the husband will stay home, and the wife will go to the movies by herself .

These examples illustrate the wide range of ways in which disputes can be resolved, from war down to simple compromise in order to keep the peace, and the wide range of types of disputes. What is clear is that not all means of dispute resolution are appropriate for every form of disagreement.

The judicial system in the United States is, perhaps, the best form of dispute resolution yet devised by man, but it, like any other form of dispute resolution, has its limitations. By seeking a determination of a disagreement in court the parties submit to the use of a third party with coercive power as well as to the win-or-lose nature of any decision. Furthermore there is a narrow focus on the immediate matter in issue as distinguished from a concern with the underlying relationship between the parties, not to mention the lengthy delays and expense that are associated with litigation.

For the resolution of many controversies an "alternative" method of getting to an end result is appropriate, thus ADR, alternative dispute resolution. ADR comes in many forms: Arbitration; Case Evaluation; Facilitation; Mediation; Ombuds.

In the context of civil disputes in the State of Maine mediation is by far the most extensively utilized form of ADR, so a brief review of that process is in order.

Mediation is defined as a discussion involving two or more people conducted with the help of an impartial third party, the mediator. It is an informal, non-adversarial process often described as "assisted negotiation". All decisions, from the initial decision to participate in mediation to the terms of any agreement, are in the hands of the parties. The mediator, who holds no authority to impose a decision on the parties, helps the parties to identify interests and explore the range of options available to reach a resolution. Rather than focusing on the substantive rights of the parties under law, mediation utilizes techniques which will aid the parties in producing a workable plan that will meet the underlying interests of all.

There are five basic principles which underlie all mediation:

Voluntariness - It is indispensible to the conduct of mediation that the parties freely enter the process, have the right to withdraw at any time and are free to accept or reject any proposed agreement.

Informed Consent - This affirms the parties' right to be fully informed about the mediation process and about their legal rights.

Self-determination - In mediation the parties have the right to define their issues and to have the final say as to the terms of any agreement reached.

Impartiality/Neutrality - The parties in mediation have a right to a process that serves all parties equally and fairly and to have a mediator who will not show any perceived or actual bias or favoritism.

Confidentiality - In order for the parties to feel free to candidly discuss the issues and potential solutions, the mediator will not disclose any information disclosed by the parties during mediation except to the extent consent is given by the parties.

There is much more that can be written about the role of the mediator and styles of mediation, but this brief summary of the process should serve as a review for seasoned mediators and would-be mediators in the basics of mediation, the most common form of ADR.

Don has been a lawyer for 47 years with experience in personal injury, med. malpractice, social security disability and domestic violence, having recently completed 40 hours mediation training. He can be reached at don@lowrylaw.com or lowrylaw.com.

INTEREST BASED BARGAINING AND PUBLIC SECTOR LABOR CONTRACTS

by John Alfano

I have mediated over 120 public sector labor contracts in Maine and New Hampshire for teachers, college instructors and municipal employees using the Federal Mediation and Conciliation Services (FMCS) interest based bargaining model with varying degrees of success. The parties in those cases generally want to (a) negotiate a contract, (b) change the way management and labor relate to each other, and (c) permanently change their labor-management culture. I have been almost 100% successful in reaching ratified contracts, but in most cases, the parties failed to make sustainable cultural change.

The longest and most sustained change occurred with one employer and two different unions representing four groups of employees, each under different contracts. The new culture was sustained for almost 8 years, degrading by degrees each year during collaborative negotiations until the parties reverted to the traditional and contentious labor-management relationship. This change occurred because new union leadership believed that the collaborative relationship produced contracts that were inferior to what they could have been had the parties used the traditional model. And, new and difficult labor problems helped fuel the transition away from the collaborative model. Management reacted similarly although representatives were more comfortable than the union with the collaborative relationship. However, the parties eventually threw out the baby, the bath water, and me (the mediator), for a clean sweep, reverting to traditional bargaining.

It is difficult to disprove their perception that collaborative relationships produce lower quality contracts as long as the labor practitioners' continue to believe in the long-standing tradition that a good contract is one that neither party likes. That foolishness has been repeated to labor practitioners for decades at training programs, workshops and rubber chicken speeches. Are labor and management advocates and mediators striving to make everyone dissatisfied? I don't think so. Collaborative bargaining generally produces contracts that solve difficult problems directly in ways that both parties enthusiastically rather than grudgingly endorse. In the above example, both parties will agree that the contracts addressed their problems. Because they were negotiated without the traditional labor-management dance, the parties believed that their opponents could have been 'squeezed' for more, either in gains or give-backs.

The traditional labor-management culture is difficult to change because the parties' inter- and intra-relationships are controlled by personalities, power, and individual political and personal needs, all of which have to be reconciled during bargaining. If it is difficult to reconcile these factors to settle individual disputes, reconciling them to change culture is monumental if not impossible.

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Elder Law Mediation Issues Aired By Panel

A diverse panel probed elder law mediation issues at a continuing legal education program sponsored by the Maine Association of Mediators on the morning of Thursday, June 3 at the offices of Verrill Dana, LLP in Portland. Program Chair, and MAM President, Peter J. Malia, Jr., of the Hastings Law Office, P.A. in Fryeburg, introduced the three speakers: Cumberland County Probate Judge Joseph Mazziotti, Denis T. Culley from Legal Services for the Elderly in Augusta, and Robert M. Raftice, Jr. of Ainsworth, Thelin & Raftice, P.A. in South Portland. The differing perspectives of the three carried through to their presentations.

Judge Mazziotti, speaking first, led off by reminding the audience that the Probate Court is a "form driven court." About half the litigants coming before the Court appear *pro se*. Elder law, the focus of the program, is often about money in contested proceedings. There is no mandatory alternative dispute resolution in Probate Court (as there is in Superior Court under M.R. Civ. P. 16B). Nonetheless, he observed, it is often beneficial where availed of, serving to refine issues and provide context at an early stage of a proceeding.

Attorney Raftice brought the perspective of private practice dealing with specific problems to the panel. Agreeing with Judge Mazziotti's observation, he noted that is also necessary to assess the capacity of the elderly person at the center of the matter. A good mediator looks

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THE ELDER LAW MEDIATION PROGRAM AT VERRILL DANA

On June 3, 2010, the Maine Association of Mediators presented a program at Verrill Dana in Portland entitled: "Elder Law Mediation." Our three panelists consisted of Cumberland County Probate Judge Joseph Mazziotti, South Portland Attorney Robert Raftice of Ainsworth, Thelin & Raftice and Dennis Culley, Senior Staff Attorney for Maine Legal Services for the Elderly. See separate article by Craig Friedrich on page 4 of this issue.

Each speaker provided a unique perspective on elder law mediation issues, particularly in the probate court context. Approximately thirty people attended the program, which ran from 8:30 a.m. to 10:00 a.m.

This was the second program that the Association has offered in this time slot at Verrill Dana. The first took place on March 4, 2010, and it focused on the revisions to Maine Rule of Evidence 408 and new Rule of Evidence 514, both of which relate to mediation (see President's message in this bulletin). Both programs proved to be very popular.

Special thanks go out to James Cohen, a partner at Verrill Dana and a member of the Association's Board of Governors for providing us with the opportunity to hold these programs at Verrill Dana's Portland office.

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beyond the present issues to those that may arise in the future.

Raftice indicated a preference for arbitration, rather than mediation alone. The ability to force a decision can be important to getting a result even in mediation. The mediation proceeding itself can have a downside in that "Unresolved mediation can be polarizing." Tension among participants can be reduced in some cases by sharing of information, particularly health care information protected by HIPPA privacy requirements.

Attorney Culley brought the perspective of Legal Services for the Elderly before the group. He noted that capacity can be a most difficult issue because there are different kinds of capacity. For example, contractual capacity has higher requirements than testamentary capacity. He warned, using a nice quip, that capacity is the "black hole of legal ethics." He also confirmed Raftice's guidance about the need for mediators to know the law, saying "Mediation has to be informed by legal realties."

MaineCare, and the accompanying recovery of benefit rules, are as difficult for mediators as for everyone else, according to Culley. In his experience qualification for MaineCare often is behind financial exploitation of the elderly. The recovery regime, he observed, makes it useful to think of MaineCare as more of a loan program than a grant program for those who are ill and poor. The recovery rules have created "perverse incentives" to transfer assets and the resulting transfers can and do go bad. Further, there is an "endless game of cat-and-mouse" between the State authorities, on one hand, and elders and their attorneys, on the other. The complex rules here are always changing. The result is something that is hard for mediators to deal with.

Culley also provided two one page handouts to those in attendance – about 20 not counting those listening in by telephone. One dealt with improvident transfers and the other with undue influence.

The Maine Association of Mediators website may be found at www.mainemediators.org. This is the second CLE program put on by MAM, with the first being held earlier this year on March 4. Like the first, the program was a bargain, being free to MAM members and $15 for non-members. --*Craig Friedrich* *craigf@mainelawyersreview.com*

BOARD OF GOVERNORS

MISSION:

MAINE ASSOCIATION OF MEDIATORS

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.

2010 Calendar of Events

October 4, 2010

Prof. Robt. Mnookin: *Bargaining With The Devil: When to Negotiate, When to Fight.*

Abromson Center, USM
5:30 to 8:15 PM

Board of Governors meets the first Thursday of the month.