

# Bulletin of the Maine Association of Mediators January 2010



*Professionals Committed to Cooperative Conflict Resolution*

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## THE PRESIDENT'S MESSAGE

By Peter Malia

I am excited to have assumed the role of President of the Maine Association of Mediators on January 1, 2010. My term of office will expire on December 31, 2011, which gives me two years at the helm. I'm looking forward to working with the Association's Board of Governors to offer exciting and informative conferences and seminars over the next 24 months to further the practice of mediation, arbitration, early neutral evaluation and facilitation in the State of Maine. In fact, we are already working on a program which will take place on March 4, 2010, at which we will be discussing the new court rules regarding evidence and confidentiality in mediation. We are also working on a spring conference, tentatively scheduled for May 12<sup>th</sup> in Freeport, which will offer a keynote speaker as well as a number of interesting break out session topics. Stay tuned for more information in the coming weeks.

To tell you a little bit about myself, I'm originally from Cape Elizabeth, Maine, and after graduating from Cheverus High School in Portland, I attended the College of the Holy Cross. After a year in the Jesuit Volunteer Corps, I attended Syracuse University College of Law. Prior to joining Hastings Law Office in Fryeburg, I represented the Department of Human Services for the Maine Attorney General's Office. I have been in private practice since 1996, in both Maine and New Hampshire. After completing the week long mediation course offered through the University of Southern Maine in August, 2005, presented by Nancy Markowitz and Paul Charbonneau, I began mediating for the New Hampshire Court system. Shortly thereafter, I joined the CADRES program

and began mediating in Maine. In addition to continuing with the Court work, I have, over the years, established a private mediation practice as well. I have found that that my clients have a strong desire to resolve their disputes as inexpensively and expeditiously as possible.

Moving on to the Association's business, in our last bulletin (November 2009), I wrote an article updating you on L.D. 1378: An Act to Adopt Portions of the Uniform Mediation Act. To refresh your recollection, the Judiciary Committee carried the bill over to January 2010, and asked the Maine Association of Mediators to convene a stakeholders group to discuss the issues of mediation confidentiality and privilege. Litchfield, Maine lawyer and mediator, Ann Gosline ably led the stakeholders through a series of meetings which has resulted in a new rule of evidence providing mediators with a privilege, Rule 514, as well as substantial amendments to Rule 408 providing a much higher level of mediation confidentiality than the rule previously afforded. As I said above, on March 4, we will be offering a program to discuss these new rule changes.

I would like to conclude my first president's message with a word of heartfelt thanks to our outgoing President, Anita Jones. Anita assumed the presidency two years ago when the Association was at a crossroads, and she has led a resurgence which has once again positioned our organization to be Maine's "go-to" source of information for news, events and education pertaining to mediation, arbitration, early neutral evaluation and facilitation in the State of Maine as we begin the second decade of the twenty-first century.

Please call me at 207-935-2061, or e-mail me at [pmalia@hastings-law.com](mailto:pmalia@hastings-law.com) if you have any questions, comments or concerns.

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## HOW I SPENT MY SUMMER VACATION

Cushman Anthony

One day last February I was getting caught up on unread mail I had received at my home. One newsletter told about the work of the Africa Great Lakes Initiative of the Friends Peace Teams, an organization I knew about through my Quaker ties. It has been doing excellent reconciliation work among the survivors of brutal Hutu/Tutsi violence that has been plaguing the Great Lakes region of Africa (Rwanda, the Democratic Republic of Congo, Uganda, Kenya, and Burundi). Good work that I can support from a distance, I reflected, and planned to renew my annual contribution to the organization.

Then I read about a project they had recently begun, teaching community mediation skills to local leaders in that part of the world, in an effort to resolve minor conflicts before they could erupt into ethnic violence. The article stated that the group needed additional skilled mediators to volunteer, so the project could be expanded in size and effectiveness. A light bulb went on in my head, and I knew that I was supposed to be one of those volunteers. I applied shortly thereafter and was gratefully accepted as one of the mediation teachers in the project. I was only able to go for the month of August, though they wanted me for longer.

It was an incredible experience. I served in Burundi and Rwanda. I co-facilitated with a community mediator from Oregon for one group of somewhat experienced mediators who were striving to improve their skills. Next I organized and ran workshops for two other groups of folks who were totally new to the mediation concept. The mediation students were both men and women, and came from all walks of life. They were universally highly motivated and extremely appreciative.

I was housed in rather rudimentary but safe and clean accommodations in buildings owned by the Society of Friends there. I attended church services with them, celebrations that include much dancing and singing, surprisingly fundamentalist and evangelical for one who was used to going to Quaker Meeting in this country. I ate their meals, which typically included rice or spaghetti, cooked or uncooked bananas, beans, some sort of meat, often another vegetable, and pineapple or another tropical fruit.

Virtually everybody I encountered was friendly. Small children who saw me passing by would run out to the street to try their recently learned rudimentary English skills. Frequently they would call out "muzungu," which means white person, and I discovered that word is not at all derogatory but rather carries respect, no matter who utters it.

My classes were delivered in English, and a local pastor or another educated person who was also him/herself a trained mediator would translate into the local language, which was Kirundi in Burundi and Kinyarwanda

in Rwanda. They are basically two dialects of the same root language, and are similar enough to be understandable across regional and country lines.

I taught exclusively transformative mediation techniques (as requested by the program organizers), so mediators would not only be able to solve the immediate problem, but could also transmit empowerment and recognition skills to the disputants that would serve them well in future conflicts. The role play topics were selected by those playing disputants, and usually involved property border disputes, problems caused by cattle or goats that had wandered into neighbors' property, or issues within extended families.

The high point for me came at the end of my third workshop, one for beginners, when on their own the students decided on their own to organize a committee to establish a mediation center in that community in rural Rwanda. I have since learned that the group is still meeting and developing a center there. Very satisfying to me.

It was a genuinely life-changing experience. I understand on a deeper level the value of caring relationships among individuals. The experience also powerfully reinforced for me that material possessions are of no great importance. I also have new strong friendships in a part of the world where I had never been before.

The organization ([www.aglifpt.org](http://www.aglifpt.org)) is planning to do more mediation teaching in that part of Africa next summer. You might consider volunteering. It can deepen your life as well.

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More pictures on page 5.

## When do “sacred” issues keep negotiators apart?

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At some point or another, most negotiators claim that a certain issue is a deal breaker. If you're trying to sell your business, for instance, you might walk away from talks with a potential buyer who you believe would lay off many of your longtime employees. Or if someone asks you to go in on a venture that violates your moral principles, you might refuse to even consider the prospect.

A desire to safeguard your personal integrity, health, or safety, or that of those close to you, may cause you to declare certain issues sacred in your negotiations—completely nonnegotiable under all conditions. Yet a refusal to compromise on key issues can lead to impasse in an otherwise beneficial deal.

Moreover, researchers have long theorized that many of the issues we claim are sacred are actually “pseudo-sacred”—that is, they're off-limits under some but not all conditions. According to this view, our resolve regarding sacred issues can waver, whether or not we realize it.

When do negotiators stand firm on sacred issues? In a recent experiment, a research team led by professor Ann E. Tenbrunsel of Notre Dame University explored this question. In particular, they looked at whether the strength of one's *best alternative to a negotiated agreement* (BATNA)—an important source of power in negotiation—affects whether negotiators bend or stand firm on the issues they hold sacred.

### Negotiating a sacred space

In their study, Tenbrunsel and her colleagues asked pairs of MBA students to negotiate a hypothetical environmental dispute between a lumber company that had recently purchased the rights to harvest trees in an area inhabited by a Native American tribe, and members of the tribe, who objected to harvesting because they viewed the land to be sacred. One student in each pair acted as the representative of the lumber company, and the other student represented the tribe.

Before their negotiations began, some of the pairs were encouraged to think about the principles and convictions that would be important to them as they conducted their talks. By contrast, those in the control group were not explicitly instructed to think about principles. In addition, some of the pairs were told they had a strong BATNA (specifically, a high chance of winning a court battle if they couldn't negotiate an agreement), and other pairs were told they had a weak BATNA (a low chance of winning the dispute in court).

### How power affects values

In the talks that followed, among pairs of negotiators who were told in advance that they had a strong outside alternative to agreement, those who focused on sacred issues had more impasses than did negotiators who were not focused on sacred issues. However, when pairs of negotiators had weak alternatives, focusing on sacred issues did not increase the rate of impasse.

It seems that a lack of power motivated negotiators to relax their stance on their principles and convictions and come to agreement. Thus, the students' stated principles and convictions were revealed to be “pseudo-sacred” rather than sacred, according to the research team. The negotiators stood by their sacred values and accepted impasse only when they could afford to do so. Even students who held extreme environmental views were willing to cave under the pressure of a weak BATNA.

### Relaxing our standards

In the real world, negotiators probably are more likely to hold fast to their principles in the midst of heated talks than the students in this low-stakes experiment were. Yet the study does reinforce the importance of looking carefully at your BATNA and other sources of power before you negotiate. If your outside alternatives are weaker than you originally thought, you may become more willing to make tradeoffs on a previously taboo issue. In addition, telling your counterpart about your willingness to compromise on a key value could motivate him to do the same.

Let's return to our opening example, in which you are trying to sell your business. If your only offer comes from someone who would institute layoffs, you might make your peace with the deal if the buyer promised to offer a generous severance package to your employees.

The research team's findings raise an interesting question: Are such compromises on sacred issues good or bad? That's a question only you can answer.

Source: “*The Reality and Myth of Sacred Issues in Negotiations*,” by Ann E. Tenbrunsel, Kimberly A. Wade-Benzoni, Leigh P. Tost, Victoria H. Medvec, Leigh L. Thompson, and Max H. Bazerman. Negotiation and Conflict Management Research, August 2009.

**RULE 514. MEDIATOR'S PRIVILEGE**

(a) **Definitions.** As used in this rule:

(1) A "mediating party" is a person who is participating in a mediation proceeding as a party or as a representative of a party, regardless of whether the subject matter of that proceeding is in litigation.

(2) A "mediation" is any process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute, whether or not the dispute is the subject of litigation.

(3) A "mediator" is a neutral person conducting the mediation proceeding in the capacity of mediator.

This Rule shall be subject to provisions of state and federal statutes and regulations issued thereunder for mediations taking place pursuant to such statutory authority.

(b) **Mediator privilege.** All memoranda and other work products, including files, reports, interviews, case summaries, and notes, prepared by a mediator shall be confidential and not subject to disclosure in any subsequent judicial or administrative proceeding involving any of the parties to any mediation in which the materials are generated; nor shall a mediator be compelled to testify in any subsequent judicial or administrative proceeding concerning a mediation or to any communication made between him or her and any participant in the mediation process in the course of, or relating to the subject matter of, any mediation.

(c) **Exceptions.** There is no privilege under this rule:

(1) *Mediated agreement.* For a communication that is in

**Advisory Committee  
on Rules of Evidence:**

*Rule 514 of the Maine  
Rules of Evidence  
should be amended to  
read as follows:*

an agreement evidenced by a record signed by all parties to the agreement.

(2) *Furtherance of crime or fraud.* If the services of the mediator were sought or obtained to enable or aid anyone to commit or plan to commit or to what the mediating party knew or reasonably should have known to be a crime or fraud, or to conceal an ongoing crime or ongoing criminal activity;

(3) *Plan to inflict harm.* For threats or statements of an intention to inflict bodily injury or commit a crime.

(4) *Mediator misconduct.* For communications sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;

(5) *Party or counsel misconduct.* For communications sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation;

(6) *Welfare of child or adult.* For communications sought or offered to prove or disprove abuse, neglect, abandonment or exploitation in a criminal proceeding or a child or adult protective action.

(7) *Manifest injustice.* For communications that a court, administrative agency, or arbitrator finds, after a hearing in camera, that the disclosure of which is necessary in the particular case to prevent a manifest injustice, and that the necessity for disclosure is of a sufficient magnitude to outweigh the importance of protecting the general requirement of confidentiality in mediation proceedings.

**RULE 408 COMPROMISE AND OFFERS TO COMPROMISE**

*[new text in italics]*

Rule 408 *is amended to read as follows:*

(a) **Settlement discussions.** Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromise or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations or in mediation is also not admissible on any substantive issue in dispute between the parties *or to impeach a witness through prior inconsistent statement or contradiction.*

(b) **Mediation.** Evidence of conduct or statements by any party or mediator at a mediation session *undertaken to comply with any statute, court rule or administrative agency rule or in which the parties have been referred to mediation by a court, administrative agency, or arbitrator or in which the parties and mediator have agreed in writing or electronically to mediate with an expectation of confidentiality,* is not admissible for any purpose *other than to prove fraud, duress or other cause to invalidate the mediation result in the proceeding with respect to which the mediation was held or in any other proceeding between the parties to the mediation that involves the subject matter of the mediation.*

**DON'T FORGET TO RENEW YOUR MEMBERSHIP! THE ASSOCIATION IS WORKING TO PROTECT AND IMPROVE THE ADR PROFESSION. WE CANNOT DO IT WITHOUT YOU!**



## MEDIATION TRAINING IN BURUNDI



### Board of Governors

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Peter Malia, President  
 Anita B. Jones , Secretary  
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**Board Members:**

John Alfano, Debbie Belanger,  
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 Mazziotti, Evan Weston, Vacancy

**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*

**2010 Calendar of Events**

**Board of Governors meet on the first Thursday of each month.**

**March 4, 10:00 MEMBERSHIP MEETING  
 MORE DETAILS TO FOLLOW**

**MAY—SPRING CONFERENCE  
 DATE, & LOCATION TBA**