

Bulletin of the Maine Association of Mediators February 2009



Professionals Committed to Cooperative Conflict Resolution

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January 2009

THE PRESIDENT'S MESSAGE

By Anita Jones

As we begin a new year for the Maine Association of Mediators we find ourselves with a very full plate. In December the Maine Supreme Court agreed to delay the implementation of a newly proposed rule to the Maine Rules of Evidence, Rule 514, after an outcry from mediators and mediation supporters. Rule 514, if enacted, would provide protection for mediators, but it would extend a privilege to communications made in **caucuses only**. Communications made in joint session would not be privileged.

The stay will give us time to work for the enactment of the Uniform Mediation Act which would provide confidentiality for the entire mediation process, whether in the court system or not.

We are planning a big meeting with all the stakeholders in this crucial issue on March 20, Friday, from 10 to 12AM. We will have three sites again, connected by ITV, so you should be able to attend somewhere close to you. More details on that soon. We will have a panel of five highly qualified people discussing both the UMA and Rule 514 so we can see how confidentiality protection differs from one to the other. They will take your questions and comments as well. See other articles on this issue in this *Bulletin*.

We are happy to welcome five new members of the Board of Governors starting this month. Morrison Bonpasse from Newcastle, Jim Cohen from Portland, Maria Fox also from Portland, Anne Martin from Brookfield, NH, and Eileen McGuire from Camden began with the Board Retreat in December and have each taken particular responsibilities going forward. Welcome folks!

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THE LATEST NEWS ABOUT RULE 514!

New Officers and Board elected for 2009

The following people were elected to serve as Officers and on the Board of Governors for 2009:

Officers:

Anita Jones: President

Peter Malia: Vice President

Secretary: Mary Beth Paquette

Treasurer: Diane Kenty [since resigned]

Board of Governors:

Maria Fox

Anne Martin

James Cohen

Eileen McGuire

Sheila Mayberry

John Alfano

SAVE THE DATE

Special meeting for members and all stake holders on March 20, 2009.

Three Locations: Portland Augusta and Bangor, meeting place and satellite locations TBA..

Panel discussion: *Confidentiality in Mediation Focusing on the Uniform Mediation Act and Maine's Evidence Rule 514*

More information to follow.

VACANCY

The Association's Maine Residential Real Estate Mediation Program is seeking candidates for Program Administrator. For more information, contact [Anita Jones](#).

BREAKING NEWS! SJC Delays New Rule 514

In late October the Supreme Judicial Court moved to adopt a new rule, Rule 514 on Mediation Privilege, effective January 1. Based in part on concerns expressed by the Association in a letter to the Chief Justice, the Law Court in December decided to stay the effective date of the proposed rule until June 1, 2009, which will allow the Maine Legislature to consider whether or not to adopt the Uniform Mediation Act (UMA) as eleven other states have done.

Look for continued discussion on this development here and in other venues. —Anita B. Jones

[TEXT OF RULE 514](#)

The Association Supports Adoption of the Uniform Mediation Act

by **James Cohen**

Last year, the Maine Supreme Judicial Court considered, adopted, and then stayed implementation of Rule 514 of the Maine Rules of Evidence. The proposed rule, which was recommended by the Court's Advisory Committee on the Rules of Evidence, established a privilege related to confidential communications made during mediation caucuses of court-sponsored cases.

The Association opposed Rule 514 primarily because of its narrow scope and because the rule would have created two-tiers of communications during mediation: privileged communications during caucuses, and unprivileged communications during joint mediation sessions. This structure would have discouraged candid conversations during critical sessions when the parties are together and would have cut against the goal of promoting successful resolution of disputes through mediation.

Based in part on these concerns, the Law Court on December 12, 2008 decided to stay the effective date of the proposed rule until June 1, 2009. According to Chief Justice Saufley in a separate letter to the Association, the stay would allow the Maine Legislature to consider whether or not to adopt the Uniform Mediation Act (UMA), which Act has been adopted in eleven other states.

Following the Court's notice of stay, the Association's Board of Governors voted to pursue the submission and adoption of the UMA in Maine, and in January, Representative Wagner of Lewiston filed a bill that would accomplish this goal. If enacted, the UMA would establish a clear evidentiary privilege for communications made during mediation sessions ordered by a court or agency

or where the parties otherwise agree that their statements will be confidential. The UMA will be considered by the Legislature's Judiciary Committee later this winter.

The Association supports adoption of the UMA for two key reasons. First, unlike Rule 514, the UMA's privilege would cover not only statements made during caucus, but also statements made in joint session. Second, unlike Rule 514, the UMA will apply to more than simply court-sponsored mediations, but will also cover agency-sponsored mediations and mediations where the parties voluntarily agree to maintain confidentiality. In short, because the UMA is more comprehensive than Rule 514, the Association believes the Act will better allow Maine people to successfully resolve their disputes through mediation.

To facilitate a broader understanding of the UMA, the Association will be holding a conference in March with speakers from several stakeholder groups, including a representative from the National Conference of Commissioners on Uniform State Laws which drafted the UMA. This conference will provide a great opportunity to learn more about the UMA and whether it makes sense for Maine.

James Cohen is a partner with Verrill Dana, LLP, a former Mayor of Portland, and a member of the Board of Governors of the Maine Association of Mediators. He can be reached at cohen@verrilldana.com.

Mediation in New Hampshire

By Anne Martin

Mediators interested in mediation opportunities in New Hampshire, should begin their search at the Office of Mediation & Arbitration (www.courts.state.nh.us/adrp/index.htm). The Office of Mediation & Arbitration (OMA) "has overall responsibility for managing, developing and overseeing" the ADR programs of the Judicial Branch of New Hampshire.

ADR programs include: Divorce/Parenting Mediation or Neutral Evaluation, Adoption Mediation, Probate Court Mediation and Small Claims. This article will briefly review the District Court Small Claims Mediation and the Superior Court Rule 170 Alternative Dispute Resolution programs.

In the District Court Small Claims Mediation program, Mediators contract with the New Hampshire Judicial Branch through the Administrative Office of the Courts to serve as a mediator for a term of one year. Qualifications established by the Judicial Branch and the OMA must first be met and are delineated in NH District Court Rule 4.29. Once added to the District Court Small Claims Roster, mediators are paid on a per case basis, currently \$60. per case. For information on litigation of small claims in New Hampshire, you may wish to review Chapter 503 of the New Hampshire Revised Statutes as well as the District Courts Small Claims webpage, www.nh.gov/judiciary/district/claims.htm.

To act as a neutral in Superior Court, mediators must meet the requirements of New Hampshire Superior Court, Rule 170 Alternative Dispute Resolution (ADR), <http://www.courts.state.nh.us/rules/sror/sror-h3-170.htm>. This rule is known as the Superior Court's Rule 170 ADR Program, with goals of making ADR services more "flexible, user-friendly... efficient and operational" throughout the State. These goals were recently emphasized in a letter from New Hampshire Chief Justice John T. Broderick Jr. and Director of the OAM, Karen J. Borgstrom, Esq.

see New Hampshire, page 4.

Using ADR Principles To Resolve Claims of Wrongful Conviction

By Morrison Bonpasse

Lawyers and citizens are taught that if a mistake occurs in a criminal trial, an aggrieved and convicted defendant can appeal to a higher court and the mistake can be corrected. However, what if the appeal process does not achieve a just result, and an innocent person remains convicted of a crime? For most wrongfully convicted people and their families, that's considered to be the end of the road.

Even before reaching that bleak result, wrongly convicted people and their friends, relatives and other supporters need to understand that justice is too important to be left to the courtroom dramas played with lawyers, prosecutors and judges and sometimes, juries.

Some of the techniques and core values of Alternative Dispute Resolution can be used to achieve justice when the rule-driven adversarial system fails, as it does approximately 1-5 percent of the time.

First, there is the "Common Ground" that everyone is interested in justice, and that no one wants to see innocent people in prison, except perhaps for the real perpetrators. Seeking Common Ground is a classic ADR technique. During the investigation of a crime and arrests, prosecution and trials, the defendants square off against law enforcement and each side increasingly sees the other as evil and uninterested in justice. Such perceptions are magnified when the adversarial system tends to shut off normal communication between the sides.

Sometimes, it takes time to find those on the other side who seek that Common Ground. The search effort requires polite persistence until one or more people in law enforcement come forward to respond to an invitation to explore the truth. In the 1991 "Roslindale Bomb" cases in Massachusetts, (www.alfredtrenklerinnocent.org) where a Bomb Squad policeman was killed, and where two arguably innocent men were convicted, one policeman indicated such an interest in the truth; and then he courageously encouraged others to pursue with him the Common Ground of truth and justice.

Jurors want to make just decisions and then return to their normal lives. While the legal rules discourage

see Claims, page 4.

New Hampshire [continued from page 3]

Additionally, the letter from Chief Justice Broderick and Director Borgstrom requested continued support for the annual \$350 roster fee, where ADR professionals desiring to be paid for their ADR services, pay an annual roster fee. This annual roster fee helps offset administrative costs of running ADR programs. If you prefer to volunteer only, you do not need to pay the roster fee and your name will be shown on the OMA's on-line volunteer list.

Importantly, to those readers interested in placement on the Superior Court Rule 170 ADR Program, "all neutrals (neutral evaluators, mediators, arbitrators) must be attorneys admitted to practice in New Hampshire" and there are training requirements. This article is meant to assist readers as they explore New Hampshire opportunities; it is not intended to give legal advice or take the place of the OMA in providing the most recent information.

For further information, contact the Director of the OMA, Karen J. Borgstrom, Esq., (kborgstrom@courts.state.nh.us) or 603-271-6418.

Anne Martin is a mediator practicing in New Hampshire. She can be reached at sanbornfarm@verizon.net.

Claims [continued from page 3]

attorneys and the media from seeking out jurors after verdicts have been given, it still can be done with respect and sensitivity. In one of the "Roslindale Bomb" cases, that of Alfred Trenkler, three jurors were located 15 years after their unanimous verdict of guilty. All three were interested in hearing the full story, and all three wrote letters to the trial judge to ask that their own verdicts be overturned and that Trenkler be either exonerated or given a new trial.

Victims of crime and their families are the most sensitive group to approach, and the best method is indirectly through common friends. While revenge is a powerful motivator for victims and their families, they, too, are interested in justice; and that's especially true in the Roslindale Bomb cases where the victims were police officers. Another Common Ground shared among the victims and all stakeholders is the desire for closure. In wrongful conviction cases, the victims and their families initially blame the convicted innocent person and his/her family for delaying the desired closure, but at some point the victims and their families can see that the best route to such closure is by supporting the pursuit of the truth and remove themselves from the position of blocking a reconsideration of the case.

To be continued in the next issue.

Morrison can be reached at Morrison@bonbassedisputeresolution.com

2009 Board of Governors

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

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

February 4	BOG Meeting	9:00-11:00 a.m.
March 20	Special meeting for all stakeholders on Mediation Confidentiality	9:00-11:00 a.m.
April 1	BOG Meeting	9:00-11:00 a.m.
May [TBA]	Spring Conference	[TBA]
June 3	BOG Meeting	9:00-11:00 a.m.
July 1	BOG Meeting	9:00-11:00 am.