



March 2011

Volume IX, Issue II

Professionals Committed to Cooperative Conflict Resolution

## In this issue:

President's Message	1
Ask the Mediator: elder issues	2
Four Chairs: excerpt on nonviolent communication	5
Upcoming event: April 7	4
Contact MAM	7
Submission information	7

## Our Mission

The Maine Association of Mediators is a nonprofit 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.

Submission deadline for  
May issue:  
**April 19, 2011**

FMI, see notice on p. 7.

## The President's Message

By Peter J. Malia, Jr., Esquire

In the December President's Message, I announced the appointment of several new members to the Maine Association of Mediators Board of Governors: **Richard Romeo, Matthew Caras, Stacey Mondschein-Katz, Janet Tockman** and **Todd Ketcham**. I would like to tell you a bit more about our new members in this President's Message, and in the coming months as well.

**Richard P. (Dick) Romeo** began practicing law in Maine in 1977. Dick was a partner in the law firms of Curtis Thaxter Stevens Broder & Micoleau, LLC, and later, Smith, Elliott, Smith & Garmey, P.A., where he focused primarily on commercial transactions, complex litigation and products liability cases. In 2003, Dick became the executor director of the Phoenix Foundation, a nonprofit charitable foundation known for its creative programs and values-based leadership and cultural-competency training for diverse clientele including educational institutions, Seeds of Peace and the military. Dick's engineering and business training has facilitated his continued mediation of a variety of civil disputes over the past 15 years. He is a seminar instructor in Maine's Foreclosure Diversion Program and he also designed, and continues to teach, one of Maine's first peer mediation training programs for elementary students.

**Stacey Mondschein-Katz** is the founder and owner of SMK Consulting Services, LLC, a healthcare compliance and education firm. Stacey has extensive experience in a wide array of healthcare matters, including clinical and regulatory compliance, bioethics and confidentiality issues, policy development, conflict management and business transactions. Her litigation experience includes conducting jury trials and disciplinary hearings, as well as advising peer review panels on medical staff issues. Before starting SMK, Stacey worked for 5 years with Kozak & Gayer, P.A., a health law boutique firm located in Augusta. Prior to moving to Maine, Stacey served as associate counsel to New York City's Health and Hospitals Corporation, providing legal counsel to New York City's 11 city-owned hospitals. Stacey also served as an assistant district attorney in Brooklyn, New York. Stacey has spoken or written on topics including the risks and benefits of electronic health records, patient confidentiality, conflict resolution, clinical research, compliance,

*(Continued on page 7)*

# Ask the Mediator: Elder Mediation

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By Rebekah Smith, Esquire

*The Bulletin is inaugurating a series of articles that will pose questions by leaders from various Maine businesses, organizations and government entities to one or more MAM members. MAM members voluntarily agree to a code of professional ethics that includes confidentiality of all matters mediated on behalf of their clients. In this article, MAM member **Rebekah Smith** answers questions based on our conversation with **Dawn Wheeler**, activity director at **Ocean View in Falmouth** ([oceanviewrc.com](http://oceanviewrc.com)), one of Maine's premier retirement communities.*

## **Q: What are examples of issues where mediation involving seniors is often helpful?**

**A:** Often a change in the personal circumstance of the elder triggers a family to consider mediation. This could be a new situation or a combination of situations, such as death of a spouse, financial concerns, decline in mental or physical health or an increase in concerns about the elder's safety.

Issues well suited for elder mediation include:

- Medical decisions
- Residence options
- Personal matters such as driving, medication management, checkbook handling
- Family member roles and responsibilities
- Inheritance, trust and estate matters
- How to share an inherited vacation home
- Financial planning
- Personal property distribution
- Guardianships, including assistance to avoid the need for guardianships
- Family business matters

In addition to helping a family find solutions to these particular kinds of problems, mediation often helps families improve communication, create decision-making processes and anticipate issues before crises develop.

Mediators can help a family determine whether they need or may benefit from other professional resources, such as legal or geriatric care advice. Those individuals may be consulted between mediation sessions or may be invited to attend the mediation, if the family desires.

## **Q: How does a mediator address power imbalances and competency issues in a mediated discussion involving adult children and parents on the issue of moving into a retirement community?**

**A:** Two key principles of elder mediation are that the mediator should ensure the informed consent of all of the parties, such that they have sufficient information to consent to the group decision, and maximize the self-determination of the elder. By speaking with each family member first in a confidential session, a mediator begins to understand the power

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imbalances and competency issues that may arise within the group before working with the family in the larger setting. Not all seniors have capacity issues, but when an adult child raises a concern that a parent is not competent to take part in a discussion about whether to move into a retirement community or other setting, the mediator will explore whether the senior is capable of meeting some minimal requirements for participating in the mediation. Specifically, can the senior:

- Follow a conversation
- See how specific issues are interrelated
- Focus on one issue at a time
- Understand consequences, and cause and effect
- Take responsibility for his or her own actions
- Identify desired outcomes
- Understand the role of the mediator

A mediator who has training in aging concerns can maximize options for the senior to participate, such as arranging for suitable accommodations, selecting a comfortable and familiar setting for the whole family meeting, being sensitive to the length of sessions, using larger print on written documents, speaking clearly while using a lower pitch of voice and removing background noise.

With regard to power imbalances, a mediator is tasked with ensuring that all family members are well informed and capable of fully participating in any decisions that are made. When family dynamics are blocking a family's ability to resolve conflicts, the mediator's role is to identify those dynamics to help the family move forward. Finally, a mediator is also watchful for signs of abuse or neglect of any party.

All of these mediator skills are particularly useful when helping a family address whether a senior should move from his or her home into a retirement community.

**Q: Does a mediator need to be involved when adult children decide it's time for 80-year-old Dad to turn over his car keys, or is that a safety decision best made by the children alone?**

**A:** Mediation can smooth the way for families who are grappling with issues of how to address an aging member's safety needs, including driving, by fostering consensus about how to move forward. When it comes to an elder's ability to drive, by specifically identifying the needs and interests of the elder—whether they are to get to medical appointments, attend social engagements or run errands—a mediator's skills allow families to clarify the situation. Once interests are identified and ground rules for allowing focus on the issue are established by a neutral party, the family members can often meet needs in a safe way that allows the senior as much independence as possible. If adult children take action unilaterally, the senior may feel betrayed and family relationships may suffer. It is important to note that a mediator cannot be engaged to "take away the keys" or to do anything to further the interests of one or more parties. The mediator must always function in a neutral capacity.

**Q: What is the best way for an adult child to approach his or her parents about concern for their safety at home, alone?**

**A:** When a mediator is involved, s/he will work to enable the adult child to identify the issues that caused the safety

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## Ask the Mediator (cont.)

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concern while also underscoring the adult child's interest in keeping her parents safe. Because it is often difficult for elders to face declining capacity, the mediation can provide an environment in which those concerns can be more easily explored.

**Q: What levels of interest are necessary to make it worthwhile to pay for mediation?**

**A:** Mediation can be appropriate for a range of matters—from those of simple dimensions to those that are extremely complex. Mediation is usually a much less costly option than litigation or delaying action until a crisis appears. The benefits, including charting a course for future decision-making, can be long-term and empowering for the entire family. Because mediation is an entirely voluntary process, it is up to the participants to determine if the benefits of hiring a mediator outweigh the cost.

The mediator likely will charge an hourly fee for the work, including the time preparing for the mediation, conducting the mediation and drafting a memorandum of the agreements made, if the parties want a written document. Some mediators charge for travel time or enlist a second mediator to help with the whole family meeting, so it is important to ask about those aspects, as well. The mediation itself may take anywhere from a couple of hours to a couple of days, depending on the complexity of the issues and the number of people involved.

**Q: When might management suggest mediation if there is ongoing disagreement about noise between two adjacent residents?**

**A:** Any disagreement between two adjacent residents can be an appropriate matter to involve a neutral mediator. But in the particular case of two elder neighbors, a mediator sensitive to elder issues will maximize the opportunity for residents to reach their own resolution without intervention by management, which might resolve the immediate problem but spark others. In the case of a noise dispute, the mediator will help the two neighbors to identify their own interests as well as those of the neighbor, and to work together to find mutual interests to support a resolution to the conflict.

*Rebekah Smith is a mediator, arbitrator and administrative law judge with expertise in policy analysis. She previously clerked for the First Circuit Court of Appeals and the Maine Supreme Judicial Court and served as a Skadden Arps Fellow at Maine Equal Justice Partners. She mediates in the areas of general civil litigation, special education, employment and elder law.*

Save the Date!

### Maine Association of Mediators

presents its Spring program  
at Verrill & Dana on  
April 7, 2011  
8:30-10:00 a.m.

CLE and CME credits available  
\$15 conference rate; free to MAM members

For registration and agenda, contact:  
[administrator@mainemediators.org](mailto:administrator@mainemediators.org)

## Four Chairs

Transcribed from a presentation by Peggy Smith

In the January MAM Bulletin, Maine attorney and mediator **Todd Ketcham** wrote about the use of nonviolent communication and transformative mediation as tools for Maine mediators. On Feb. 3, he moderated a three-person panel in a continuing education program called “Building Bridges” on those topics. The panel included **Peggy Smith**, **Karen Groat** and **David C. Webb**. The following is an excerpt from a presentation by Smith, who began by placing four empty chairs in a row at the front of the filled room—leaving a noticeable space between the second and third chairs.



Nonviolent communication gives us options on how we give and receive information. In our culture, we are conditioned to receive information in one of two ways.

*[After requesting a volunteer from the audience to share a personal and difficult-to-hear statement made to them at some point in the past, Smith sits down in the first chair.]*

When sitting in Chair Number One, I think in response [to the volunteer’s statement]: “Would you get a life? Mind your own business! Who are you to tell me that?” So, there’s a problem. Who’s got the problem? Whatever it is, it’s *your* fault. There’s a problem and the fault lies outside. I don’t even need to say those words, “would you get a life” and so forth. Nonviolent communication has nothing to do with how we talk; it’s how we’re *thinking*. So in this process, we define “violence” the way Gandhi defined it: am I making myself or the other person wrong *in my thinking*? That’s the root of violence. If we want to have transformation happen, it’s not how nice I speak, but what am I *thinking* in this moment? If I think, “you’re wrong,” I’m in Chair Number One.

*[Smith requests the volunteer to repeat the statement and moves to sit in the second chair.]*

Chair Number Two: “Oh, I never do it right, I worked really hard, but I could have been better—I did it wrong again.” Another problem...who’s fault? *My* fault. It’s me. I spend much of the day wondering whose fault it is. Some of us get so good at this we can sit *between* the two chairs: “It’s your-fault-my-fault-your-fault-my-fault,” from moment to moment. Any wonder by 3:00 in the afternoon I want coffee, organic chocolate or a martini to take the edge off? *[While speaking, Smith sits quickly back and forth between the first two chairs, at one point coming to rest on the edges between both, prompting laughter from the audience].* We’re pretty exhausted all the time. If we work with this [awareness], we understand [fault finding] is not innate human nature, but the conditioning of our culture. Nonviolent communication can offer us options to responding to difficult statements and situations—again, in our own minds, not in our words.

So, in nonviolent communication, the gap between the first two chairs and the second two chairs represents a pause. The pause represents the opportunity to realize that we are in judgment. I can pause however long I need to do so. From there, I have other choices.

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With nonviolent communication, we have Chair Number Three:

*[Smith asks the volunteer to repeat the statement once more and moves to the third chair.]*

Chair Number Three: “Hmmm, hearing that, I’m aware of feeling both surprise, shock ... and, part of me is laughing, because of the needs of acceptance, understanding and being seen for my true intentions. That’s what’s alive for me in this moment.”

In this third chair, in any moment, I’m connecting to my own feelings. In nonviolent communication, the premise is that all humans have the same needs. So we’re never in conflict with someone at the level of needs. A caveat: I use the word “need” differently than how it’s usually used. In nonviolent communication, we use the words “needs, values or yearnings.” In this way, “need” means something different than how we typically use the word. *[Smith says an explanation of the complexity of human need requires a longer training session and then continues.]*

We are in conflict with each other when we talk at the level of *strategy*. Most of us confuse our *strategies* with our needs. We come into conflict at the point of *strategies* that we use in order to try and nourish human needs.

Sometimes, I naturally slide over to the last chair:

*[As she requests the volunteer to repeat the statement one final time, Smith slides into the fourth chair.]*

Chair Number Four: “I’m wondering if you are feeling anxious? Because you really value well-being and harmony and you are really hoping for that in my life as well as yours.” This is a way that I create some curiosity in myself. I may not even say this to the other person. It’s in my own mind. I’m willing to consider what needs are motivating these “outrageous statements.” What happens when I think “outrageous statements?” What chair is that? Yes, Number One. Any label, any diagnosis, separates me from someone else. When I am in Chairs Three or Four, I become less and less interested in diagnosis and labels of any sort.

That said, our words are irrelevant when our energy is somewhere else: If I’m feeling pain, I can’t be in Chair Three. I need to say if I’m in pain. The beauty of nonviolent communication is that the remedy for pain is empathy. Simply, whenever I’m still in Chair One or Two, it means I need more empathy. In nonviolent communication, “empathy” is defined in a very specific way. From the nonviolent communication perspective, [empathy] is very easy to learn.

Chairs One and Two are all about “there’s a problem and I need to find out whose fault it is.” I used to think, if I identify whose fault it is, come up with a brilliant argument, things will change. After decades [of fault finding], I found this never actually works. The gap between Chairs One and Two and Chairs Three and Four represents what it is I do to support myself to move from a place I’ve been in, from how I’ve been acculturated to think, to a new space. How we cross over is very interesting to me: how do we do this? How do we find that pause required in our thinking?

A clue to finding the pause can be found in a story from a program for Maine prison inmates who take a 10-week course in nonviolent communication during their transition from inside to outside prison. There was one young father about to graduate from the program and leave after an 18-month incarceration. I asked him how he creates this pause, this space, before he responds or reacts. First he said, “My higher power. I ask my higher power.” I asked him what he meant by that, and then he said, “When I’m getting aggravated, I imagine my two-year-old daughter standing next to me. I think ‘how would I want to react with her here, with me?’ ” That’s how he creates his pause. We all do it differently.

*(Continued on page 7)*

## The President's Message (cont.)

(Continued from page 1)

ethics and medical staff issues.

**Matthew L. (Matt) Caras** is counsel to Verrill Dana's Business Law Group, focusing on business and commercial law transactions. He also counsels on insolvency matters, having previously chaired Verrill Dana's bankruptcy department. Matt is founder, principal and manager partner of Leaders, LLC, a merger and acquisition advisory services firm with offices in Portland, Maine, and Lexington, Massachusetts. He has a strong interest in advancing the Maine mediator's ability and capacity to provide commercial, business and transaction ADR services. Matt believes that this is an emerging field—one in which ADR professionals in Maine can be leaders. An avid salt and fresh-water fly fishing enthusiast, Matt has completed a 12-week Harvard Law School program in dispute resolution, as well as a 40-hour Northwestern University Mediation Skills Certificate Program.

In my next President's Message, I will highlight our other new board members. In the meantime, feel free to contact me at [pmalia@hastings-law.com](mailto:pmalia@hastings-law.com). I hope to see you all at our April program. ~

### Contact MAM

Maine Association of Mediators  
P.O. Box 8187  
Portland, ME 04101  
[mainemediators.org](http://mainemediators.org)  
**1-877-265-9712**

~  
**Tracy Quadro, Administrator**  
[administrator@mainemediators.org](mailto:administrator@mainemediators.org)



The theme for the May *MAM Bulletin* will be mediated approaches with family and friends regarding joint vacations and summer camps/cottage use. Please submit your proposal ideas by **March 30** to **Paula Craighead**, [pcraig01@alumni.tufts.edu](mailto:pcraig01@alumni.tufts.edu). Accepted proposals will be due by **April 19**.

## Four Chairs (cont.)

(Continued from page 6)

How do you react to things being said to you or being done to you? Ask yourself: "Am I connecting to the feelings that are alive in me?" –that's Chair Number Three. Am I connected to the feelings and needs that *might be* alive (I never know) in the other person? How am I reacting to what is being said to me? Do I have curiosity about why you are doing what you're doing, or about feelings and needs you are trying to contribute to? From the nonviolent communication perspective, the belief is that whatever is done at some level of violence (manipulation may be a level of violence, for example) is an attempt, sometimes a tragic attempt, to meet one of the beautiful human needs inside [the speaker] or to contribute to needs inside of me. We all have them. Most of us make the choice to connect to needs unconsciously. Nonviolent communication is a way to bring the connection into consciousness. ~

*Peggy Smith is a certified nonviolent communication (NVC) trainer and a cofounder of the Maine NVC Network. She taught elementary and middle school in Maine for 32 years and has studied with Zen teacher and peace activist Thich Nhat Hanh since 1991. Peggy lives in Lincolnville, ME.*

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