



# MADRP Bulletin

## May 2005



Maine Association of Dispute Resolution Professionals

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### Thinking About Credentialing, Quality Assurance and Who Decides *by Paul G. Charbonneau*

Credentialing is generally seen as promoting quality assurance and ensuring the competent practice of mediation. It's also about credibly professionalizing the field and marketing.

For some, another professional background (law, social work, psychology) is what truly professionalizes the practice of mediation.

For others, mediation is or must become a stand alone professional practice deserving its place in the pantheon of helping professionals. Volunteer mediators are equally expected to demonstrate certifiable competencies.

In practice, the competence of mediators is usually judged by their overall effectiveness, sometimes turning away from the age-old question of the end justifying the means. If they get the job done in an ethical manner, they must be competent and the public is well served.

This view propels us to the heart of the matter: the standards against which effectiveness is measured. Mediator A is seen as not particularly effective because s/he "did not lean on my client" or did not "push" hard enough for settlement or because s/he relinquished too much control to the clients or just "sat there, like a bump on a log."

And yet, before our very eyes, sparkles the crown jewel of mediation practice: client self-determination. We can hold out self-

determination as mediation's greatest value and marketing attraction, The new ACR Model Standards affirm in standard number one: "Self-determination is the act of coming to a voluntary, un-coerced decision in which each party makes free and informed choices as to process and outcome."

To what extent and by whom, in practice, is self-determination valued, promoted, allowed or discouraged? And who most influences that dynamic? Who are the policy-makers and the referring evaluators of effectiveness and what priorities shape the formulation of policies and the referrals?

Unless users and proponents of mediation services are engaged in "difficult conversations" about what criteria measure competent and ethical practice, quality assurance will be "in-house" shop-talk that will yield to outside expectations and pressures. If credentialing is on the horizon, the time is now to launch educational programs about competent practice and its criteria, starting with legislatures, the bench, the bar, policy makers and, yes, funders. This is no time for conflict avoidance.

Your Maine Association of Dispute Resolution Professionals could initiate that effort if spurred on by its membership.

### Message from the President

On May 4 I attended USM's Maine Women's Conference. Sheila Heen was the keynote speaker. Sheila is one of the three authors of Difficult Conversations and she was MADRP's keynote at our ADR Week Banquet in 2000. The crowd of about 250 women loved her and were very interested in what she had to say about how to deal with the conflict in their lives. Not once did she mention the word "mediation" or "ADR" but talked to them in terms they could easily relate to. What does this have to do with MADRP? One of our members has suggested revisiting our mission statement to "get away from the 'alternate dispute resolution' concept since the alternates are now the norm". His suggested wording: "...an organization that educates its members and the public in a variety of ways to deal with differences and solve disagreements..."

Maybe it's time to change how we speak about what we do?

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**Looking for more information about the Spring Conference?**

**Go to [madrp.org](http://madrp.org)**





## Open Forum on Confidentiality in Mediation

By Lisa Levinson



### SAVE THE DATE!

The 10-hour FAMILY LAW FOR MEDIATORS COURSE will be offered on October 27th and 28th in Augusta. Registration materials will be available later this summer. If you have questions or would like to be on the mailing list, contact June Zellers at 582-9007 or [jjzellers@prexar.com](mailto:jjzellers@prexar.com).

### NH Conflict Resolution Association presents:

**Family Wars: The Alienation of Children**– June 3rd

**Asset Division: The law, practicalities and drafting challenges**– June 17th

More information: [info@nhcra.org](mailto:info@nhcra.org) or Melanie Stephens 224-8043

Have an opinion you want to express? An insight? A musing? Share your perspective and inspiration with everyone in MADRP. Send your work to [tobey@bartongingold.com](mailto:tobey@bartongingold.com)

On April 8, 2005, the MADRP Expansion Committee offered a day-long open forum to discuss the issue of confidentiality in mediation. I came to the Black Bear Inn in Orono, with a lot of questions. As it turned out, the session raised more questions than it answered for me.

The anchors of the day were a panel of extremely articulate, thoughtful people. Each person mediated in different arenas, and brought different perspectives to the discussion.

Kevin Cuddy, Esq.: Although mediation is only 30% of his business, Kevin has been instrumental in writing rules and laws for the Maine court system. He feels that mediation is a narrow process in that participants need to know the mediation process and mediators need to respect, understand and hold in confidence what parties say. He also feels there is an external, or broader side to mediation. What happens to communications beyond the mediation process? Is confidentiality being used as a shield for inappropriate conduct? How can the information disclosed in mediation be used?

To him, Rule 408 of the Rules of Evidence are clear on these questions in that it states that evidence in mediation is not admissible on any substantive issue in dispute. Judges have the leeway to decide what is

substantive and what is not. He feels that the Uniform Mediation Act is too narrow and takes away the leeway judges need to make decisions that work on a case-by-case basis. In addition, lawyers are held to rules of ethics: lawyers need permission to divulge information to other parties.

In his experience, no mediator has been called to testify to use a mediated process as evidence in court. He feels that the existing Rules are adequate to prevent this.

Diane Kenty: As the CADRES director, Diane has serious doubts that the existing Rule adequately protects all mediators. She feels that mediation is guided by bedrock principles: neutrality, and confidentiality. If these bedrock principles are not protected, mediation cannot be viewed as a viable process.

Diane feels that there are three issues at work:

1. We have a patchwork system with no consistent rules in different types of disputes and venues;
2. The existing rules are not strong enough given the high stakes of what is involved in the process;
3. There is a lack of understanding about mediation, and clear consistent rules will help to clarify the process.

Diane supports the Uniform Mediation Act and sees it as

the means to address the three issues, support the bedrock principles and guarantee that mediators cannot be part of further legal actions by the parties. Mediators in other states have been subpoenaed, and she sees the Uniform Mediation Act as a way of protecting mediators here before it becomes an issue, as it has in other states. Diane also pointed out that the good faith statute holds only for domestic relations, not for other forms of mediation, putting other forms of mediation at risk.

Diane acknowledged that the Uniform Mediation Act does not answer the question of who is a mediator, who is a neutral evaluator, and does not define the mediation process. These areas need more work to help clarify the roles and process of mediation.

Tracy Quadro: As the director of a community mediation program, all the mediations are done outside the court's jurisdiction. Community mediations involve a wide variety of mediations, and volunteer mediators provide the mediation services. Since non-lawyers are not held to the rules of conduct, and since these are not court mediations, Rule 408 does not apply. There are no protections or clear rules for community mediators. For Tracy, the Uniform Mediation Act provides the protection community mediators need because it

## Confidentiality Forum, cont'd

covers all mediators, not just mediators involved in court or legal mediations.

Tom Johnston: As a labor mediator, Tom has a unique perspective on confidentiality. To him, confidentiality equals keeping information from the press. All parties must mediate in good faith. Good faith is a widely used term, and does not have a strict definition. As a result, the charge of not mediating in good faith is sometimes played out in the press as a pressure tactic by one side or the other. Tom stated that there is no confidentiality in labor mediation. Tom acknowledged that community mediators need some protection, but did not want labor mediators to be part of any defining rules and/or regulations. He felt that labor mediation was not subject to the same concerns as other types of mediation.

Rebecca Burns: Worker's compensation mediators have the authority to determine sanctions, sign bonding agreements, and recommend unresolved issues for hearings. This process is a very strictly defined and regulated process. Confidentiality is defined within the process. Rebecca felt that worker's compensation mediators did not fit into the same category as other mediators. She stated that since their process is very specific and has very tight definitions, she did not want to be included in any rules that would impact on this type of mediation.

So, I left the forum with the following questions:

1. Does the Uniform Mediation Act include all the different types of mediation represented by the panel? How does it address

the concerns of labor and worker's compensation mediators? How do we protect mediators in some venues and not others in other venues?

2. How can we continue this dialogue to come to some understanding of all the issues involved, from all the perspectives represented?

3. If mediators are to be protected from subpoenas, how do we talk about that with parties? Since we aren't specifically protected in the mediations that we do—How do we talk about it now? What do we do about protecting community mediators now? In the future?

I hope we will continue this dialogue in other parts of the state with the diversity represented on the panel.

## Book Group Notice

If you are interested in the book group, but not able to attend because of timing or some other reason, please Contact Anita Jones, Diane Kenty, or Nolan Thompson  
[abjones@maine.rr.com](mailto:abjones@maine.rr.com),  
[diane.kenty@maine.gov](mailto:diane.kenty@maine.gov),  
[nthompson@maine.usm.edu](mailto:nthompson@maine.usm.edu) to discuss options for making the group more user friendly.

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### SPECIAL EVENT: What, When & Where?

#### Maintaining Neutrality When Mediating in Small Town Maine

**DATE:** Monday, June 13, 2005  
**TIME:** 1:00 pm - 3:00 pm  
**LOCATION:** Acadia Hospital, 268 Stillwater Avenue, Bangor, in the Penobscot Room.

On June 13, 2005, following the CADRES Regional meeting in Bangor, MADRP will have a great presentation on the challenges of **Maintaining Neutrality When Mediating in Small Town Maine**. Three mediators from Aroostook County, Nancy Lavertu, Peter Albert and Bob Glidden, will share their insight and experiences on mediating in an area where there are a limited number of mediators, and often, where everybody knows everybody else.

## Calendar of Events

Membership meetings are 9:30 to 10:00 for coffee and networking followed by a program from 10:00 to 12:00. The MADRP Board meets for a mini meeting 8:30 to 9:30 before the membership meeting.

May 17, 2005	<b>Spring Conference</b>	9AM-4PM	Portland
June 1, 2005	MADRP Board of Governors		Augusta
July 6, 2005	Membership Meeting		TBA
August 3, 2005	MADRP Board of Governors		Augusta
September 7, 2005	Membership Meeting		TBA
October 5, 2005	MADRP Board of Governors		Augusta

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Want to sponsor an issue of the Bulletin,

Contact John Alfano at [jalfano1@maine.rr.com](mailto:jalfano1@maine.rr.com)



**MAINE ASSOCIATION OF DISPUTE RESOLUTION  
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RESOLUTION PROFESSIONALS**

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**2005 MADRP Officers**

Susanna Liller, President  
Marc Sevigny, Vice President  
Carol Corwin, Treasurer  
Tracy Quadro, Secretary

Expansion: Bambi Magaw/ Marc Sevigny  
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Practice Quality: Paul Charbonneau  
Public Policy: Doug Lotane  
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Meetings: OPEN  
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(MRREMP): Sharon McHold  
Membership: Lisa Levinson

**2005 Committee Chairs**

Professional Development: Kathy Leen  
Advertising: John Alfano  
Facilitator Section: Paul Boticello  
Bulletin: Tobey Williamson  
Nominating Committee: Nancy Markowitz  
Program Liaison: Diane Kenty  
At-large Board members: Sheila Mayberry,  
Kathleen Roberts

**MADRP MISSION**

MADRP is a non-profit organization of diverse professional interests seeking to broaden public understanding and acceptance of alternative forms of dispute resolution. MADRP strives to enhance professional skills and qualifications of mediators, arbitrators, and other neutrals through training, educational development and promotion of standards of professional conduct.