



MADRP Bulletin September 2005



Maine Association of Dispute Resolution Professionals

Volume X, Issue IX

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Message from the President

Over the next two weeks I'm facilitating five public meetings as part of an Environmental Impact Statement public outreach process. NEPA, the National Environmental Policy Act, requires public participation for every transportation project that significantly impacts the environment (social and natural). This particular project involves the potential reorganization of airspace over an airport. There are great potential impacts, mostly social. Imagine living in a neighborhood never having planes flying overhead and you learn that a study is proposing possible new routes over your home.

This work challenges all my facilitation and mediation skills. The public is usually hostile and while I'm hired by the study team as a neutral, I'm perceived as part of the group seeking to destroy the community's quality of life. The group is sometimes over 300, making it impossible to use any of the communication skills we've learned as mediators. I find myself being a very directive facilitator, not my favorite thing. So, you might ask, why do you do it, Susanna?

The immediate and honest response is, mediator/facilitator types living in Maine patch together

different clients and jobs to make a decent wage. My second response, equally honest, is that I like it. Communication in these forums without a facilitator (sometimes the overseeing agencies, FAA, FHWA run the meetings) is pretty rare. I like doing whatever I can to open the two-way channel and help people hear each other. Sometimes I'm not allowed to do much, but in some projects I'm gaining influence with my clients and have convinced them that having initial small one on one meetings with the affected parties, prior to the public meeting, would enhance understanding on both sides. I also encourage my clients to respond directly to public inquiries, where in the past they had been guarded and defensive with responses. Like most conflicts, so much of it is about trust, feeling valued and being heard.

This is the approach I try to sell to my clients and I've found a great quote to use with them, to show them what I mean. Red Auerbach, the famous Boston Celtics coach, was asked what he said to his team to make them do so well. His response was "it doesn't matter what you say, what matters is what they hear". Isn't this true for all the work we do with conflict? We try to create that environment where people can actually hear each other and ourselves.

Update on Maine Residential Real Estate Mediation Program (MRREMP)

Maine Residential Real Estate Mediation Program (MRREMP) has had a very active summer. A total of 21 telephone inquiries were made over the course of three months, five in June, nine in July, and eight in August. Prior to that, MRREMP was averaging two to three inquiries per month.

During the summer months, there were five cases mediated and resolved by MRREMP's professional pool of mediators, with an additional four cases currently assigned to mediators and pending mediation. There were five cases that settled, without the need for mediation, after both parties were contacted by

MRREMP; and four cases resulted in one of the parties refusing to mediate.

Participant evaluations of the program's administration and the mediation process have been quite favorable, which speaks highly of MRREMP's talented group of ten rostered mediators.

The deadline for new applicants seeking consideration to be on the mediator roster is October 1, 2005. If you are interested in applying, email Bambi Magaw, Program Administrator, at bammo2@earthlink.net, or call 862-5110.

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Submissions Wanted!

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





MADRP Members Comment Against Proposed Amendments to Rule 408 by Doug Lotane

Community Mediation Center Events

Look for dates and times for the Community Mediation Centers (CMC) fall mediators' orientation, a CMC open house and a volunteer recognition event coming soon. Want more information? Call Alex at 772-4070 or write to cmcl@maine.rr.com

NH CONFLICT RESOLUTION ASSOCIATION WORKSHOPS

MEDIATION AIKIDO:
Using the Energy of Conflict for Positive Results.
FRI., 10/14/05, 9:30-3:00 at the Society for the Protection of NH Forests, Concord.

NH LAW UPDATE: Recent changes in statutes, rules, forms and court procedures.
WED., 11/16/05 12:30-4:15 at UNH Manchester

For more information, contact: info@nhcra.org or call Melanie or Carol at 603-224-8043

SAVE THE DATE!

The 10-hour FAMILY LAW FOR MEDIATORS COURSE will be offered on October 27th and 28th in Augusta. If you have questions or would like to be on the mailing list, contact June Zellers at 582-9007 or jzellers@prexar.com.

Three MADRP members were present on September 15 for public commentary before seven members of the Supreme Judicial Court regarding the proposed amendments to Rule 408 of the Maine Rules of Evidence. Doug Lotane, representing MADRP's Board, and Tracy Quadro, representing Community Mediation Centers, offered live testimony before the justices. Also present was Diane Kenty, who presented extensive written commentary on behalf of the CADRES Committee.

MADRP's opposition faulted the proposed changes for having the effect of excluding private mediation from coverage by the Rule and for providing an almost absolute exclusion for all evidence regarding conduct or statements by any mediation participant. MADRP's position stated that there may be valid reasons for exceptions to absolute privilege in mediation and that the list of exceptions contained in Section 6 of the *Uniform Mediation Act* should be considered by the court if changes to Rule 408 are to be made. MADRP's position closely is one that of the CADRES Board.

Written text of comments presented to the Court:

Comments of the Maine Association of Dispute Resolution Professionals (MADRP) Regarding the Proposed Amendments to Rule 408 of the Maine Rules of Evidence

Confidentiality is a fundamental principle of mediation and integral to the integrity of the mediation process. While MADRP believes that broad protection for confidentiality in the mediation process is necessary, we do not support the proposed amendments in their current form.

The proposed change to Rule 408(a), the removal of the words "*or in mediation*", is not necessary. We feel that this change, in conjunction with the proposed changes to subsection (b), would preclude the application of Rule 408 to private mediation.

With regard to the proposed changes to Rule 408(b), the removal of the words "*domestic*

relations", with no further changes, is problematic in that the resulting term "*court-sponsored mediation session*" is not defined.

Additionally, an absolute exclusion for all evidence regarding conduct or statements by any mediation participant does not appear to be practical nor desirable. MADRP believes that there may be valid reasons for exceptions to absolute privilege in mediation. MADRP believes that the list of exceptions contained in section 6 of the *Uniform Mediation Act* (below) should be considered by the Court if changes to Rule 408 are to be made.

MADRP feels that the codification of exceptions is important to protecting the perception that communication in the mediation process is confidential. On the one hand, defined exceptions, such as threats or acts of violence, allow the mediator to enunciate these exceptions prior to beginning the mediation process, thus informing the participants of those exceptions. On the other hand, establishing a process to determine the admissibility of evidence that is not otherwise available, or to show that the need for the evidence substantially outweighs the interest in protecting confidentiality, will provide a uniform framework for future triers of fact to utilize when the breach of confidential mediation communication is sought.

UNIFORM MEDIATION ACT SECTION 6. EXCEPTIONS TO PRIVILEGE.

- (a) There is no privilege under Section 4 for a mediation communication that is:
 - (1) in an agreement evidenced by a record signed by all parties to the agreement;
 - (2) available to the public under [insert statutory reference to open records act] or made during a session of a mediation which is open, or is required by law to be open, to the public;
 - (3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;
 - (4) intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity;
 - (5) sought or offered to prove or disprove a

Exceptions to Privilege, cont'd

claim or complaint of professional misconduct or malpractice filed against a mediator;

(6) except as otherwise provided in subsection (c), 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; or

(7) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the

[Alternative A: [State to insert, for example, child or adult protection] case is referred by a court to mediation and a public agency participates.]

[Alternative B: public agency participates in the

[State to insert, for example, child or adult protection] mediation].

(b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

(1) a court proceeding involving a felony [or misdemeanor]; or

(2) except as otherwise provided in subsection (c), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

(c) A mediator may not be

compelled to provide evidence of a mediation communication referred to in subsection (a)(6) or (b) (2).

(d) If a mediation communication is not privileged under subsection (a) or (b), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection (a) or (b) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

Legislative Note: If the enacting state does not have an open records act, the following language in paragraph (2) of subsection (a) needs to be deleted: "available to the public under [insert statutory reference to open records act] or".

First Session at Seeds of Peace by Tracy Quadro

This summer I was fortunate enough to be chosen to facilitate the first session of Seeds of Peace International Camp. I worked with a group of Delegation Leaders or "DLs", the adults who accompany the teenaged campers on their journey to the U.S. The DLs in my group were from Israel, Palestine, Jordan, Egypt, Yemen, Morocco, India, Pakistan and Afghanistan.

The first task of my two co-facilitators and I was to "break the ice" between the participants and all get to know one another. Then we taught communication skills, based on the book Difficult Conversations. Our goal was to expose the participants to techniques to help diffuse the emotions and manage the conflict better when they did have their difficult conversations.

The group members had multiple discussions

regarding issues in their home countries that were important to them. They discussed their fears and their hopes for the future, as well as the conflicts between their governments. They shared what would have to happen for them to have a good life.

I felt privileged and honored to be accepted into the trust of these wonderful people from war-torn places. All of our group members were articulate, intelligent and thoughtful. Their insights into themselves, their countries and each other were inspiring. And I was also impressed by their ability to have fun! You've not done karaoke until you've sung "Man, I Feel Like a Woman" with a Palestinian woman, an Israeli woman, a Yemeni woman and an Indian man. My hope is that they carry that spirit of kinship home with them to share with their family, friends and neighbors.

Beyond Neutrality, by Bernard Mayer

Discussion Group Meetings in Portland

Dates: Friday, October 14, & Tuesday, October 25, 2005

Time: 8:00 a.m. (both days)

Venue: USM Library (Portland Campus)

Facilitator/Host: Marion Killian

R.S.V.P: Marion
mediator@maine.rr.com Tel. 879-7979

In his book Beyond Neutrality Bernard Mayer has set forth many challenges that mediators face as a profession. Has he provided answers to these challenges? Please come with your insights on how we can best answer the challenges that Bernard has set for us.

Whet your appetites with thoughts for growth - these discussion groups will be a great precursor to MADRP's Annual Meeting on November 9th which will focus on this book and the issues it raises!

MADRP 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.

October 5, 2005 MADRP Board of Governors, Augusta

November 9, 2005 Annual Meeting and Program, Augusta

**MAINE ASSOCIATION OF DISPUTE RESOLUTION
PROFESSIONALS (MADRP)**

P.O. Box 8187
Portland, ME 04104

Phone: (877) 265-9712
Website: www.madrp.org



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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

2005 Committee Chairs

Expansion: Bambi Magaw/ Marc Sevigny
Events: Jeff Croft
Practice Quality: Paul Charbonneau
Public Policy: Doug Lotane
Public Info: John Alfano
Meetings: OPEN
ME Residential Real Estate Mediation Program
(MRREMP): John Alfano
Membership: Lisa Levinson

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.