

Ethics Corner: To Report or Not to Report?

Is it an exception (to mediator confidentiality)?

By Maureen Denihan & Jonathan S. Rosenthal

We use “Ethics Corner” to discuss issues that arise in our field and this is one of those occasions. At a recent staff meeting, we discussed confidentiality in ADR sessions, and more specifically exceptions to confidentiality in those sessions. To be precise, we were considering which exceptions to ADR practitioner confidentiality have mandatory reporting requirements and which have permissive reporting requirements. And, follow-up questions emerged from these conversations including *what are ADR practitioners required to report* and *to whom do we make a report?*

Let’s start from the beginning. One of the hallmarks of the ADR processes offered in District Court is confidentiality. There are some well known and agreed upon exceptions to confidentiality, including one of the most widely known, child abuse. We wanted to dedicate this ethics corner to spotlight exceptions to confidentiality and what the exceptions might mean in terms of a mediator’s obligations.

When considering what confidentiality means in the context of our ADR sessions, ADR practitioners should turn to the *District Court Agreement to Participate in ADR form* and the *Maryland Standards of Conduct for Mediators, Arbitrators, and Other ADR Practitioners*, and the *MPME Standards of Conduct*¹. The **District Court’s Agreement to Participate in ADR** form provides that “with some exceptions, anything that is said or done during an ADR session [in the District Court of Maryland Day of Trial ADR Program] will be held in confidence by the ADR Practitioner...”² That means that the ADR practitioner, whether mediator or settlement conference attorney, will maintain confidentiality of the session. That section continues on to list three exceptions to confidentiality: “a) evidence of child or elder abuse; b) an act or credible threat of violence; c) anything relevant to a complaint against the ADR practitioner or the District Court of Maryland.”

If an exception to confidentiality arises, it does not automatically mean that a practitioner must break confidentiality. Rather, an exception to confidentiality means the ADR practitioner has to decide what, if anything, should be disclosed and to whom. It is up to the practitioner to understand whether the exception *requires* that confidentiality will be broken or that the practitioner *has flexibility to decide* if confidentiality will be broken under the expressed exceptions.

So, the initial questions for the ADR practitioner to consider are: has an exception to confidentiality occurred, and if so, what, if anything, does the exception mandate or permit the ADR practitioner to do. To determine whether the practitioner is mandated or permitted to do something with the information that was the basis of the exception, one must look to where the exception is found. For example, the exception to confidentiality regarding child abuse is

derived from a statute (**Annotated Code of Maryland, Family Law Article, Section 5-705**). Within that statute the action to be taken by the mediator is mandatory, and that action is one of reporting to authorities. Conversely while the exception to confidentiality regarding elder abuse is also derived from a statute, reporting of that kind of abuse is either permissive or mandatory, depending upon one’s occupation (**Annotated Code of Maryland, Family Law Article, Section 14-302**). Another exception to confidentiality is “an act or credible threat of violence.” That exception is found in the Agreement to Participate in ADR form. For this exception to confidentiality, the ADR practitioner’s action is permissive, not mandatory.



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¹ Another place to look soon will be the District Court ADR Rules.

² The focus of this article are the obligations of the ADR practitioner. Others in the room must consider their own obligations.

My Two Cents, *from 5*

8. Finally, consider going through a **certification process**. Not all ADR processes have certification, but mediation does. Keep in mind that when you took your basic (or beginning) mediation training in Maryland, you were probably presented with a certificate, but you were not certified for anything other than warming a seat for 40 or so hours. Being “certified” implies a certain level of expertise and skill level. **MCDR** and **Community Mediation Maryland** both offer either certification or evaluation through a rigorous and effective performance-based process. And both are straight forward processes. Even if you are not certified on your first try, the learning you can gain from the experience is tremendous. Both processes require role players, yet another way to get your toes wet. Think about it: are you ready to go in front of the video camera and have someone review your performance? It may be a scary thought, but it will help you become a more thoughtful practitioner.

I could go on, but hopefully you get my point. We all have the ability to continue to improve. Whether we choose to do so is another question entirely. Here in Maryland, the resources are almost endless. **So, what’s your next move?** Do you want to learn more about what you don’t know? *Oh, and by the way, Mr. Belding’s first name was Richard.*



ADR Lending Library...

By Maureen Denihan

Over the past few years the District Court of Maryland ADR Office has collected an exceptional variety of ADR-related publications, including scholarly journals, magazines, newsletters, and books in our ADR Lending Library. A complete book list and comprehensive lending library policy document will be made available in the 1st quarter of 2012 on the District Court’s ADR Office web site for review, download and/or printing.

Publications from the library may be borrowed by all active ADR volunteers. Those wishing to borrow from the library will be asked to first read the lending policies and procedures document, and affirm they understand how to borrow from, and return items to, the Lending Library. After an initial affirmation, a registered user may borrow up to two books at a time, for a period of 30 days. Lost, stolen or damaged books will be replaced at the borrowers expense.

Here’s just a sample of some of the titles available from the ADR Lending Library:

Ed’sitorials on Mediation, Edward P. Ahrens, Jr.

Becoming a Reflective Practitioner (3rd Edition), Christopher Johns

How to Mediate Like a Pro— 42 Rules for Mediating Disputes, Mary Greenwood

Lawyers as Peacemakers: Practicing Holistic Problem-Solving Law, J. Kim Wright

Making Money Talk: How to Mediate Insured Claims and Other Monetary Disputes, J. Anderson Little

Beyond Neutrality: Confronting the Crisis in Conflict Resolution, Bernard S. Mayer

We hope you will share with us what you learned from reading the various publications in our ADR Lending Library. There is no requirement to submit a book review, but if you decide to do so we will ask your permission to include the review in a future edition of *A Winning Solution*.

Stay tuned to your e-mail inbox for an invitation to become a registered borrower of the District Court’s ADR Lending Library.

...Drop Your Nook®, Pick Up A Book



Conflict Resolution Resonates with Local Maryland Residents

By Maureen Denihan & Sarah Kauffman

In 2005, the Association for Conflict Resolution (ACR), an international conflict resolution membership organization, started annually recognizing the third Thursday in October as 'Conflict Resolution Day' to widely promote alternative methods of conflict resolution. The District Court of Maryland ADR Office began hosting events on Conflict Resolution Day in 2006. We quickly surmised that dedicating a "day" to promoting ADR merely scratched the surface of the District Court's geography. The District Court ADR Office intentionally transformed the outreach opportunity from one day into a week, and now into a month-long celebration named 'Conflict Resolution Month.'

The idea of dedicating an entire month to being visible in multiple District Courthouses is to provide another avenue for the public to access information about ADR processes and services. "One might argue that promoting the appropriate use of ADR to those who walk into a courthouse may be perceived as 'too little, too late.' We think it's never too late. People have choices. If we can inform the public about ADR, and provide them with local resources the hope

is next time they are in a dispute they will consider ADR as a realistic possibility either outside of court or within the court process," said **Jonathan S. Rosenthal**, Executive Director of ADR Programs.

Ultimately, the ADR Office hopes those who visit Conflict Resolution Month event tables walk away with some understanding of ADR and its uses. "If we help folks recognize there is a difference between mediation and 'meditation', we've done a good thing. If we've explained the benefits of mediation and settlement conferences, then we're helping to create an informed consumer. And even if the consumer doesn't remember the nuances of the ADR processes we offer, and they only remember the resources available in their community, then we've served the public well," said Deputy Director **Maureen Denihan**. "One of the goals is to distribute information about local community mediation centers (CMC) and other ADR service providers," added Rosenthal.

To that end, literature was distributed describing the processes of mediation and settlement conference, their uses, and benefits at 17 locations throughout Maryland. District Court ADR Office Regional ADR Programs Directors invited local community mediation centers (CMC) to partner in disseminating information to the public. What follows is a description of Conflict Resolution Month events around the state. The summary of the events are grouped by Regional ADR Programs

Director and the districts they cover. Where their availability complimented the civil docket schedules, the RPD scheduled local events on civil docket days to increase exposure to litigants. Table positioning has a lot to do with the success of any of these events. "We try to position ourselves in locations that have heavy foot traffic to increase visibility," said **Cindy Faucette**, Regional ADR Programs Director.

Baltimore County

The Baltimore County events were held on October 25th in Catonsville and October 27th in Towson. Cindy shared that the outreach event provides an awesome opportunity to educate

litigants or consumers of District Court services about ADR, especially to those who express concern and anxiety about the unknowns of the litigation.

On the morning of the event in Catonsville, Cindy shared that a litigant who approached the

table expressed frustration with the outcome of his case. "He thought he didn't get a fair shake," Cindy reflected, and informed him that mediation may provide an opportunity for him and the other side to sit down together to have a conversation where they develop possible solutions that work for both sides, rather than having a decision imposed on them.



The Association for Conflict Resolution (ACR) Conflict Resolution Day Poster

Fairly Legal: The Value of Mediation & Conflict Resolution in Your Court

Q & A with COCA Administrative Assistant, Terry Youngbar

By Sarah Kauffman

The Maryland Mediation and Conflict Resolution Office (MACRO) and the District Court ADR Office partnered to present *Fairly Legal: The Value of Mediation & Conflict Resolution in Your Court* to judiciary employees. During the interactive course, attendees were provided an opportunity to explore the uses of mediation in the judicial system. The course is designed to provide a better understanding of mediation, its benefits, and how to apply effective dispute resolution skills to diffuse a variety of conflicts. Terry Youngbar, Administrative Assistant at the Coordinator of Commissioner Activity (COCA) Office, attended the class. Terry took some time to share her thoughts about the class.

1. What made you decide to register for the Fairly Legal course?

I was curious to see how the mediation process works and also wanted to become a more well rounded judiciary employee. I was really intrigued to see how matters could be resolved by a means other than litigation.

2. What was one highlight from the course?

A big highlight for me was being involved in a role play in which ADR was used to resolve a dispute. The role play provided me with a practical example of how effective mediation can be used to resolve disputes (rather than going to court).

3. What was something new that you learned by attending Fairly Legal?

I learned a lot about the mediation process, the variety of cases that can be brought to ADR, and that mediation is a viable option for litigants to use as an avenue to resolve their disputes.

4. Would you recommend Fairly Legal to another judiciary employee? And, why or why not?

I would definitely recommend this course to another judiciary employee. This course gives judiciary employees the opportunity to learn about ADR and enhance their own overall knowledge of how the Maryland judiciary system operates.

5. How could the Fairly Legal course be improved?

It would have been helpful to get a list of real life tough disputes that had been resolved using a method of ADR.



Terry Youngbar, Administrative Assistant at the Coordinator of Commissioner Activity

SAVE THE DATE!
Next Fairly Legal Courses*:

March 23, 2012 & September 27, 2012

9:00 a.m. - 4:00 p.m.

Judicial Education and Conference Center Annapolis, MD

* Interested judiciary employees should contact the Office of Professional Development if you wish to attend.

Conflict Resolution Month Article, *from 8*

Cindy said the litigant was unfamiliar with the mediation process, much less when to use it and how to find a service provider. She provided the litigant with information about mediation resources in Baltimore County.

Along with Cindy and **Leona Elliott**, Director of Roster Management, **Jamie Simmons** a representative from the Baltimore County Conflict Resolution Center (BCCRC), explained that mediation is voluntary and confidential and provided free-of-charge to District Court litigants. Jamie and Cindy also explained that mediation is available through private practitioners and BCCRC.

“Local court, community mediation center, and bar association support for these events has been outstanding.”

Frederick County

Outreach in Frederick was targeted to District Court litigants on October 28th by Cindy and **Beth Heinle**, Administrative Assistant.

Howard and Carroll Counties

In Howard and Carroll Counties, “local court, community mediation center, and bar association support for these events has been outstanding,” boasted Cindy. A prime example of superior court support comes from District Ten’s Administrative Clerk **Nancy Mueller** and how she notified court employees in both Ellicott City and Westminster via e-mail about the Conflict Resolution Month events on the Friday prior to their respective Monday events. (*Howard County was on October 31st and Carroll County was October 24th.*) Thank you Nancy for sharing the event with local court employees, and for reminding them

that this event is for them as well!

Carroll County bailiff **Andy Stefankiewicz** took this opportunity to compliment the benefits ADR has brought to the Carroll County bench. “You guys do a good job and you save the court a lot of time,” he said.

Patricia Ryan and **Larry Brock** from Carroll County Community Mediation Center helped staff the table with Cindy and **Sarah Kauffman**, Data Management and Public Information Coordinator, in Westminster. The Mediation and Conflict Resolution Center at Howard Community College provided their materials for distribution at the Ellicott City event. “It was a great opportunity to connect with members

of the Howard County Bar,” expressed Cindy, who appreciated the occasion to get in some valuable face time with local attorneys

that she often sees in the courtroom, but doesn’t usually have time to interact with because she’s busy managing the program.

Calvert County

Regional ADR Programs Director **Nancy Kreitzer** was responsible for events in Upper Marlboro, Prince Frederick and points south. The October 18th event in Prince Frederick was “an opportunity to ‘plant the seed’ about how useful and beneficial ADR can be,” Nancy offered. “Although the initial interest in the pens, water bottles, clips and other ‘freebies’ was obvious, it didn’t take much to engage the onlookers in conversation about mediation,” explained Kreitzer. When probed, a fair number of people acknowledged that they were at least familiar with the mediation process. Nancy continued, “many of those who were unfamiliar with the process were



Promotional items were distributed at various outreach events across Maryland.

interested in learning more about it.” One of the highlights of the event was when a litigant who participated in a day of trial mediation stopped by the table to express her sense of fulfillment because she had accomplished one of the to-do’s listed in the terms of the agreement reached in mediation. “I’m so glad she stopped by to share that with us. People mulling about in the hallway outside of the two offices could hear her excitement and it made them interested in what was going on at our table,” said Nancy.

Charles County

On October 12th, Conflict Resolution Month activities resumed this year in the new LaPlata courthouse after a brief two year hiatus. “It was a very productive morning. Several attorneys inquired about joining the District Court’s volunteer mediator and settlement conference attorney roster, which is great. La Plata is one of the locations where we have a need for additional ADR volunteers to help provide Day of Trial ADR services to litigants,” Nancy said referring to the fact that we are recruiting new volunteers for Charles County.

Conflict Resolution Month Article, *from 10*

Local Judges Talley and Wells have continued to show support and enthusiasm for mediation. Their willingness to refer cases to mediation provides citizens in Charles County with an option when confronted with conflict. (If you are interested in becoming an ADR practitioner for the Charles County program, [click here](#) for an application.)

Prince George's County

Due north of La Plata on Route 301, the Upper Marlboro event was held on October 25th. Nancy shared what she considered to be a very valuable example of why tabling in the courthouse can enlighten litigants about the possibilities mediation can bring to relationships. "A grandmother, mother, and teenage son approached the table after participating in a peace order hearing. The family was very interested in how the communication between the teenage son, and his child's mother might improve if they tried to have a conversation in mediation." **Danielle Booz**, with Community Mediation Prince George's, explained to the family that mediation may help to improve their long term relationships.

St. Mary's County

Leonardtown was the first Conflict Resolution Month event on October 3rd. There to staff the table with Nancy was **Lindsey Bradley** (St. Mary's County Community Mediation Center (SMCMC) Operations Manager) and a volunteer mediator from SMCMC **Ellen Hahn**. "There was no shortage of interested and inquisitive visitors to the table," Nancy remembered. "Lindsey's enthusiasm about mediation was infectious," and then added, "I really enjoyed getting to know Ellen better. She is one of the

mediators on our Day of Trial roster and is a natural communicator," she added. "And although this is the fourth year I have been doing this, I have to say the reaction of the Court Support Staff in all of my districts is overwhelmingly positive. In particular, I love getting to 'hang out' with the bailiffs, whose sense of humor and outlook on life is refreshing," Nancy reflected.

Baltimore City

One of the busiest District courthouses in the state, the civil division on Fayette Street played host to three days of events on October 3rd, October 5th, and October 7th. Two ADR office staff members, Leona Elliott and Sarah Kauffman, joined Regional ADR Programs Director, **Shannon Baker**, in distributing informational materials to the public. Scheduling the events on civil docket days when ADR practitioners are present provide an opportunity for Shannon to refer litigants to ADR that same day. It can also have great recruitment effects. At the October 3rd event, **Darren Kadish**, volunteer settlement conference attorney, was on the schedule and introduced fellow attorneys to Shannon, who then used that as an opportunity for recruitment. Shannon noted that it was great having volunteers scheduled during the outreach events. "It was so helpful to have volunteers on the schedule those three days, so we could mention

the opportunity to litigants before their trial and, hopefully, they would take advantage of ADR that day," she said.

Baltimore City is one of the locations where it is extremely beneficial to include more than one partners' materials at the table. Whether it was Baltimore City Community Mediation or University of Maryland Francis King Carey School of Law Mediation Clinic, pamphlets were quick to fly off the table. Passers by were very interested to find out about the local service providers and some even appeared impressed that conflict resolution resources are widely available in Baltimore City.



District Court in Baltimore, MD
(Fayette Location)

Harford County

Walking into the Bel Air courthouse you are typically greeted by a friendly bailiff telling you to remove all of your belongings from your pockets and please remove your belt. This

particular Friday was a bit different than most. Instead of being greeted by the bailiff, members of the public were greeted with a smile and warm hello from Regional ADR Programs Director Shannon Baker. Shannon's to-do list on October 21st included distributing literature, promotional goodies and surveys and to leave a lasting impression on the public and judiciary employees.

The ADR Office has a strong pre-trial mediation partnership with Harford County Community Mediation Program (HCCMP).

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Because all of these scenarios are slightly different we will discuss each issue separately.

First, child abuse. **Family Law Article, Section 5-702**, provides that the purpose of the subtitle is to protect children who have been subject to abuse or neglect by: (1) mandating the reporting of any suspected abuse or neglect; and (2) giving immunity to any individual who reports, in good faith, a suspected incident of child abuse or neglect. Specifically, **Section 5-704** mandates reporting of suspected child abuse or neglect by *health practitioners, police officers, educators, or human services workers*, and **Section 5-705** mandates reporting by *any other person* than those mentioned in **Section 5-704**, if that person has reason to believe the child has been subjected to abuse. What this means for ADR practitioners in our program is that reporting suspected child abuse or neglect is mandatory for all of us, and it falls within one of our expressed exceptions to confidentiality. (**Section 5-701** provides definitions of abuse, neglect, and a variety of other relevant terms. For more information and who to report to, refer to **Family Law Article, Sections 5-701 to 5-705.**)

With regard to elder abuse, **Family Law Article, Section 14-302**, lists who is mandated to report vulnerable adult abuse. Any health practitioner, police officer, or human services worker who has reason to believe that a vulnerable adult is in danger is required to report, whereas any concerned person may make a report. The statute provides definitions of abuse, neglect, self-neglect, and exploitation, as well as defining a vulnerable adult as an adult who lacks the physical or mental capacity to provide for the adult's daily needs (**Section 14-101**). That means adult includes individuals 18 and older, not just senior citizens. For ADR practitioners in our programs this means that reporting vulnerable adult abuse is mandatory for some professionals (as noted above), permissive for everyone else, and it falls within one of our expressed exceptions to confidentiality.

As noted earlier, we also get guidance from our various ADR Standards of Conduct. The **Maryland Standards of Conduct** and the **MPME Standards** both expressly provide that mediators may be required by applicable law to disclose mediation communications that would otherwise be confidential. Additionally, the language used in the Maryland Standards **applies to both mediators and settlement conference attorneys** in that it recognizes the degree of confidentiality a neutral must maintain may be subject to rules, agreements, statutory obligations, and court orders.

In summary with regard to allegations of abuse and the applicable exceptions to confidentiality, ADR practitioners volunteering in the District Court of Maryland should keep the following in mind:

1. All ADR practitioners, regardless of professional affiliation, shall report suspected child abuse or neglect.
2. ADR practitioners that are also health practitioners, police officers, or human services workers shall report suspected abuse, self-neglect, or exploitation of vulnerable adults.
3. ADR practitioners who otherwise do not have a mandatory reporting requirement may report suspected abuse, neglect, self-neglect, or exploitation of vulnerable adults.

This discussion on ADR practitioner confidentiality is just the tip of the iceberg. For example, what happens when a participant believes an exception to confidentiality has occurred and the ADR practitioner does not? What happens when an observer invited by the ADR practitioner believes an exception to confidentiality has occurred, but you do not? We could on, but we've run out of space. We welcome your thoughtful feedback!

**To become familiar with the signs of physical, behavioral, social, and financial abuse, go to the Office of Adult Protective Services of the Maryland Department of Human Resources has a list of signs on their web site at www.dhr.maryland.gov/oas. [Click here](#) to open the flier. Links to the statute and local offices of Adult Protective Services is available on www.peoples-law.org by selecting 'Senior Citizens' from the web site's home page.*

