

By Maureen Denihan

## PRACTICE TIP

As you may know, new District Court ADR Rules became effective January 1, 2013. And having read the article in the last edition of this newsletter, *New Rules Rule the Day*, you also know that the Confidentiality Rule 17-105 (formerly 17-109) now applies to mediation in the District Court (as well as the Circuit Court). That article explained the difference between the exceptions to confidentiality in the Court Rules and those listed on our District Court Agreement to Participate (ATP) in ADR form. The article noted that until the ATP form is revised to be consistent with the stated exceptions in rule 17-105, mediators shall inform participants of all the existing exceptions to confidentiality.

This article is intended to provide some additional direction to resources to help facilitate that explanation. To assist with explaining all of the exceptions to confidentiality in our ADR sessions, we developed the **Confidentiality in Mediation Addendum**. The Addendum is to be read to and signed by everyone in the room along with the Agreement to Participate in ADR form for **all cases referred to mediation**. The Addendum lists all of the exceptions to confidentiality from both the Agreement to Participate form and as enumerated in Rule 17-105.

The complete list of exceptions to confidentiality, as they currently stand are:

- a. any disclosures required by law (*Maryland Rule 17-105 (d)*);
- b. evidence or allegations of child abuse (*ATP form, Family Law Article § 5-705*);
- c. evidence of elder abuse (*ATP form, Family Law Article § 14-302(c)*);
- d. allegations of vulnerable adult abuse (*Family Law Article §14-302(c)*);
- e. an act or credible threat of violence (*ATP Form*);
- f. mediation communications to a potential victim **or** to the appropriate authorities to the extent reasonably necessary to help prevent serious bodily harm or death to the potential victim (*Maryland Rule 17-105(d)(1)*);
- g. anything relevant to the assertion of or defense against allegations of mediator misconduct or negligence (*Maryland Rule 17-105 (d)(2)*);
- h. anything relevant to a claim or defense that an agreement arising out of the mediation should be rescinded because of fraud, duress, or misrepresentation (*17-105 (d)(3)*); and,
- i. if there is anything that is said in the mediation that would have been said in court if this mediation hadn't taken place, that information will still be allowed to be said in court (*17-105(e)*).

The list is long, and perhaps arduous, we *know*. And, it will get easier to discuss the exceptions once the Agreement to Participate in ADR form is revised to list only those exceptions to confidentiality provided for in Maryland Rule 17-105. The Addendum is a temporary improvement to the existing Agreement to Participate form in an effort to provide disclosure to mediation participants of all of the exceptions to confidentiality.

The Addendum must be signed by all present in the room during a mediation, identical to how the Agreement to Participate in ADR form is signed by all persons present in a mediation. Because the Addendum is a one page document on white paper, and is not available in a carbonless, triplicate form, photocopies may be requested from the bailiff or courtroom clerk **after** the mediation session concludes and the mediator has returned the parties to the courtroom.

Until the Agreement to Participate in ADR form is revised, mediators may refer to the **Exceptions to Confidentiality Information Sheet** (*bright yellow paper*) for suggestions on how best to explain to mediation participants the exceptions (provided above). The Information Sheet is available with the other ADR forms and materials for your local Day of Trial program. This laminated, fluorescent yellow document includes a list of the exceptions and a “conversational” example to help explain the exceptions.

Questions regarding the application of the Confidentiality Rule and its exceptions may be directed to the ADR Office at [maureen.denihan@mdcourts.gov](mailto:maureen.denihan@mdcourts.gov). And, after responding to you directly, questions and some “best practice” responses may appear in future editions of the newsletter.

## CONFIDENTIALITY