

Maryland State Bar Association Alternative Dispute Resolution Section Newsletter

**ADR Section
wins 2008
MSBA
Presidential
Best Section
Projects
Award!**

**Join us in O.C.
on June 12th
for our
Collaborative
Law session,
and on June
13th for a
mediation of
the "Scopes
Monkey Trial"**

Table of Contents

Message from the	
Chair	1
Happy Birthday	
Title 17	2
Presidential Best	
Section Projects	
Award	3
DCM Updates	3
Calendar of ADR	
Events	5

Message from the Chair

Dear Section Members:

We have had a busy last several months. The Section Council has met monthly to discuss a number of topics which include better coordination with the DCM Coordinators, planning the programs at the Annual Meeting, reviewing nominations for the Robert M. Bell ADR award, as well as the newly created award – the ADR Section Service Award.

I am pleased to announce that the Council, as of April 2008, has decided to award the ADR Section Service Award posthumously to Elizabeth Yarema. We wanted to recognize the service and contribution that Elizabeth made to the Section council in its infancy, and generally to mediation in the State of Maryland. The Service Award will be presented to Elizabeth's family at our June business meeting in Ocean City. Please plan to attend. That will be held at the Clarion Hotel on Thursday June 12th, beginning at 7:45 a.m.

We also wanted to highlight the programs that we have featured at Ocean City. Suzy Eckstein has been working diligently to provide two excellent speakers to present on Collaborative Law. The program will begin immediately after our business meeting on Thursday. It is being co-sponsored by the Estates and Trusts Section as well as the Business Law Section, and we thank them for their sponsorship. On Friday at 11:00 a.m., with a generous underwriting and sponsorship with the Litigation Section, we are presenting the Scopes trial, contrasting the trial from a litigation standpoint as well as resolutions for mediation. The entire credit for that program goes to the participants, but most particularly to Master Theresa A. Furnari. Master Furnari has written an engaging, colorful, and informative script. The participants in this program come from both Sections and they include the

Honorable Alex Wright, Roger Wolf, Craig Distelhorst, Theresa Furnari, Paul Beckman, Tom Murphy and Natalie Mac Sherry. I thank all of them for participating in what should be a very interesting, thoughtful and entertaining program. The Litigation Section is providing lunch so all of those who attend should enjoy the food as well as the entertainment.

On that same day, the Litigation Section and the ADR Section again are working together to host a reception honoring Judge Wright's elevation to the Court of Special Appeals. Many of you know that Alex is a member of our Section Council. He was also an active member of the Litigation Section. It is a fitting tribute to Judge Wright, whom I have know personally for many, many years. The reception will be held at the Clarion Hotel beginning at 4:30 p.m. It is a closed reception to members of the Section Council, however, we encourage your attendance and please R.S.V.P. as quickly as you can to Suzy Eckstein. Her email address is suzyeckstein@oakleyeckstein.com and her phone number is (301) 424-8081.

This is my last message to you via newsletter and I want to welcome Rich Melnick as your new Chair. He will officially be succeeding me at the Annual meeting in June, however he has worked very, very well in ascending to this responsibility. It has been a pleasure working with Rich. Coming in behind Rich will be Steve Shapiro who will be Vice-Chair, and Andrea Terry who will serve as Secretary. We are excited about next year's program and agenda. I again encourage your comments, constructive criticism, and collaboration on any issues that you wish to see the Section become more actively involved in. Thank you again, and hopefully I will see you in Ocean City

Very truly yours,

Thomas J. Dolina

Happy Birthday Title 17: Innovative ADR Statute is 10 Years Old *By: Louise Phipps Senft, Esq.*



“Title 17 dramatically changed the face of litigation for businesses and other entities.”

The Maryland Court of Appeals Rules governing Alternative Dispute Resolution, and more specifically, mediation, Title 17 et seq., (hereinafter “Title 17”) dramatically changed the face of litigation for businesses and other entities. Adopted ten years ago, Title 17 set forth the standards for mediation in the circuit court. Shortly thereafter, Chief Judge Robert M. Bell implemented an unprecedented request that all 24 circuit courts put in place the option and availability of mediation for all civil matters on the docket.

For the most part, the standards of Title 17 echoes the principles of the national and international ethical guidelines for mediators in the Model Standards of Conduct for Mediators (hereinafter “the Standards”) promulgated by the Association for Conflict Resolution, the American Bar Association, and the American Arbitration Association. What is most noteworthy for both Title 17 and the national Standards is that they reflect the shaping impact that the transformative approach for mediation has had in the conflict resolution and alternative dispute resolution fields and on the ethics of mediator practice. A transformative approach is one that is based on a relational theory of practice, and which focuses on assisting people in conflict or negotiations in removing the barriers so they can more fully consider the interests and needs presented by the other parties while having their own viewpoints and needs more fully considered as well - both of which pave the way to more fully informed decision making and to lasting agreements when agreement was the parties’ goal. Title 17 has been revised a few times over the years since its inception in 1998, and as of 2002, had begun to embrace a transformative approach in its defining language that governs mediation in Maryland.

Technically, while Title 17 only applies to court referred mediation, common practice in Maryland has seen the rule applied by courts generally in District

Court matters and in non court referred yet still litigated matters, as well as matters involving counsel but not in litigation as is the case with many business and employment transactions. To more fully understand the leadership role the Maryland Courts have taken with regard to mediation practice in the state over the last 10 years, let’s take a closer look at the actual language of Title 17, which defines “Mediation.”

“Mediation’ means a process in which...

1. “...the parties work with one or more impartial mediators...”:

This means being neutral and appearing neutral. It is the first thing the court mentions. Why is neutrality necessary if by definition the mediator is not to be fact finding or making decisions or even recommendations? Because a partial mediator can influence, and even pressure a party(ies) to agree to something the mediator believes is fair or appropriate that a party(ies) may not want to do. Parties need to feel relaxed and safe and comfortable so they can think clearly, speak openly, listen to and understand the other party and discern and consider what is being said and offered by the other parties and decide how and if they will make agreements. Title 17 is strident in its language to ensure this type of neutrality, which is also embraced by a transformative philosophy.

Being impartial also includes not having a conflict of interest or having a stake in the outcome. Thus, while mediators may use their skills in many arenas outside of mediation, when they are mediating, it is with a capital M: Mediating with an ethical duty to be impartial.

2. “...who, without providing legal advice...”

This language is intended to preserve a mediator’s neutrality. Implicit in neutrality is not giving legal advice. Title 17 also intends to make clear that mediation is not the practice of law. If lawyer mediators steer clear of giving

(Continued on pages 4 and 5)

The ADR Section wins MSBA Presidential Best Section Projects Award

On May 19, 2008, the ADR section was notified that its work in planning and executing the first annual Maryland Business ADR Conference, earned it this years MSBA Presidential Best Section Projects Award. After planning this project for more than one and one-half years, the ADR Section presented this enormously successful, all day event on October 30th, 2007 at the BWI Airport Marriott Hotel.

The 2007 Maryland Business ADR Conference featured presentations by Chief Judge Robert M. Bell; the presentation of a State of Maryland Proclamation by a representative from Governor O'Malley's Office; a keynote luncheon address by Kathryn Bryan (President, Institute for Conflict Prevention and Resolution); eight educational break-out sessions by nationally recognized speakers; a networking hour; and a dinner at which United States Ambassador Dennis Ross was the keynote speaker.

The purpose of the Business ADR Conference was to educate and encourage businesses and their attorneys regarding the use of ADR methods, including litigation, in addressing conflict in a variety of business-related settings. The Conference also helped enable businesses to develop and enhance ADR systems and awareness. The participants' positive feedback demonstrates that the event met its goals.

Richard H. Melnick was the Program Chair and Master of Ceremonies for the 2007 Maryland Business ADR Conference, and Steven Shapiro was the Vice-Chair. The two skillfully led their organizing committees through the arduous tasks of securing logistics (venue, food, scheduling, budget); program planning (recruiting speakers and presentation proposals); promoting and sponsorships (advertising and obtaining co-sponsors); and finance (raising and monitoring financial support for the event).

The ADR section cannot thank The Mediation and Conflict Resolution Office (MACRO) enough for its financial and administrative support, which also helped the volunteer organizing committee succeed. Through all these efforts, the ADR Section created and implemented an exciting, synergistic event that crossed over many legal areas and disciplines to help businesses and their attorneys move into the future with efficient and cutting edge systems and solutions to resolve conflicts in business settings.

From the Differentiated Case Management Corner...

Baltimore City DCM Coordinator Ronna Jablow reports that the Baltimore City Circuit Court has recently decided to add an additional category of civil cases to its mediation program. The court will soon begin referring motor tort cases for mediation. The decision to require mediation in motor tort cases was reached after gathering input from various stakeholders, including attorneys who handle such cases, judges and mediators. As a result of this input, the Court is in the process of refashioning aspects of the scheduling and other procedural requirements for such cases, in order to facilitate effective use of ADR. The court encourages mediators with knowledge of motor tort cases to submit an application to be considered for designation on the Court's mediation roster.

In Baltimore County, DCM Coordinator Joy Keller advises that several circuit court ADR coordinators from across the State are presenting a session entitled "What You Need to Know About MD Circuit Court ADR Programs" at the Center for Alternative Dispute Resolution's 2008 Annual Conference on June 20th, 2008. For more information about this well-known, annual conference see the Calendar of Events.

Title 17 Birthday continued....

legal advice, they cannot be blamed for the unauthorized practice of law.

The Standards expand this language to prohibit a mediator from providing any professional advice. The Standards also however draw the distinction that a mediator may provide information that he or she is qualified by training or experience to provide, if the parties so request such information, and only if the mediator can do consistent with the Standards, such as mediator neutrality and impartiality.

Title 17 and the Standards are clear in preserving the ethical concept of party Self-Determination and have drafted language for what a mediator is to do and not to do to ensure that the parties are able to decide, including decisions to escape confining restrictions of the law and legal remedies and to explore instead other options that will work for them.

3. “assist the parties in reaching their own voluntary agreement for the resolution of the dispute or issues in the dispute.”

Agreement must be the creation of the parties free from the influence of the mediator, again language to ensure parties Self-Determination and the mediator’s proper role, which again also encompasses a transformative approach. Mediators must resist the temptation to insert their own agenda and what they believe is fair or best. No agreement is voluntary if a party is coaxed into, manipulated, or forced, or scared into the terms.

4. “A mediator may identify issues and options....”

Title 17 does not say a mediator should “suggest” issues and options. It is clear to say the mediator may “identify” those issues and options, in other words, those that are in the parties’ negotiations, conversations and context already, rather than created from the mediator’s analysis. The Court recognizes that a mediator cannot know what concerns the parties nor what will best deal with that concern. When a mediator assists in creating a relaxed, safe environment for the parties, this encourages the parties to speak, and from their own interactions and talk, issues and options emerge. It is these issues and options that the mediator may identify. Skillful transformative mediators will regularly identify such issues and options for the parties, including ones that may appear to the mediator as irrelevant to the lawsuit or presenting dispute but may be important to the parties by virtue of their raising them and speaking about them.

5. “...assist the parties or their attorneys in exploring the needs underlying their respective positions...”

17 is set in the litigation context. It assumes parties and counsel will be engaged in positional bargaining situation. Title 17 embraces the problem-solving, win-win approach in this language, and sets forth that a mediator’s job is to assist in helping parties to explore their underlying needs. A transformative approach is to do this job by expanding the method for doing so. It is helpful to discuss candidly and impartially with the parties and their attorneys the basis and practicality of their respective positions and then to offer them the opportunity to discuss such positions with each other. A transformative mediator’s focus will then be to assist in removing the barriers in the interaction of the parties so as to assist them with exploring their underlying needs chosen.

6. “...and, upon request, record points of agreement reached by the parties.”

Title 17 embraces that mediators are often scribes for drafting agreements as well as the expanded role of recording “points of agreement” which may include terms of agreement or may include idea summaries or points of agreement about process, again an expanded view of the outcomes of mediation, beyond mere settlement. A transformative relational framework promotes this expanded view and role of the mediator. This has greatly expanded the use of mediation for many business negotiations and disputes as well.

7. “While acting as a mediator, the mediator does not engage in arbitration, neutral case evaluation, neutral fact-finding, or other alternative dispute resolution processes and does not

recommend the terms of an agreement.”

This language is a sea change from earlier versions of mediation, specifically evaluative mediation, or what may be referred to as settlement conferences. Now not only do “the parties know best”, with the Maryland Courts leading the way in this approach through the choice of language of Title 17, but also the drafters of Title 17 took the bold move of distinguishing mediation from a settlement conference or a neutral case evaluation. Mediation is neither. Nor should it be either. Each process is unique and separate and distinct from the others. Mediation is guided by a specific set of ethical standards though, while the others are not.

Happy Tenth Year Anniversary, Title 17! You’ve Come a Long Way, Baby!

As the language of Title 17 has been amended, it is helpful to note what has been taken out. In 2001, the phrase “to help parties reach agreement” was removed since that is no longer the assumed goal for the mediator until parties desire this themselves, voluntarily. Also in that same year, the Rules Committee responded to concerns that the role of the mediator was widely misunderstood, and that the original language of 1998 was only helping to perpetuate what was either purposeful or unwitting abuse of the mediation process by some mediators who practiced as mere agreement brokers, or used many bullying or deceptive tactics all in service of getting people to agree. Today Title 17 is clear in setting forth that the mediator does not recommend terms of agreement and tell parties what to do. Although this “new” language is almost seven years old, it is still “new” for many judges and lawyers with a litigation background. While this standard may be difficult to live by for many attorney mediators who are used to judging, analyzing, evaluating, advising, and questioning, it was necessary to breathe life into the ethical concept of party self-determination and to set mediation apart from other methods of Alternative Dispute Resolution.

Over the years the Rules Committee has listened and heard the voices of consumers and mediator practitioners, and will continue to do so as the field and practice continue to develop and evolve. And as it has over the last ten years, the Maryland Judiciary will continue to lead the way in providing a better process for a better outcome.

Louise Phipps Senft is founder of Louise Phipps Senft & Associates/Baltimore Mediation and was voted “Baltimore’s Best” Mediator 2003. She teaches in Harvard’s Program on Negotiation Insight Initiative, University of Maryland School of Law and Johns Hopkins University School of Medicine and Carey Business School. For questions and comments, she can be reached at 443-524-0833 or www.BaltimoreMediation.com.

Calendar of ADR Events

- June 4th: MCDR Quarterly Meeting, “Peacebuilding: Living Room Dialogue”. Howard County Central Library Meeting Room 6:30 – 9:00 p.m. call 410-672-2237 or mcdm@yahoo.com
- June 18th (pre-conference), 19th & 20th: Center for ADR 2008 Annual Conference: Managing Conflict and Removing Barriers to Collaborative Decision Making, Martin’s Crosswind, Greenbelt MD
- September 24th – 27th, 2008: Association of Conflict Resolution 8th Annual Conference: “Aspirations, Possibilities and Realities: Expanding Principles Practice and Research – A Changing World”. Hilton Austin, Austin, Texas
- December 5th, 2008: Maryland Mediators Convention, Maryland Maritime Institute