



# ADRreport

## Alternative Dispute Resolution Section

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Cecilia B. Paizs, *Co-Editor*

Maryland State Bar Association, Inc.

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### MEET THE ADR SECTION COUNCIL

#### **ADR SECTION COUNCIL OFFICERS 2016-2017**

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richard.melnick@montgomerycounty  
md.gov

Please see page 2 for contact  
information for the remaining ADR  
Section Council members.

### **MESSAGE FROM THE CHAIR**

by Mala Malhotra-Ortiz

This Fall flew past – it is hard to believe that we are welcoming 2017! I’m happy to have this opportunity to serve my colleagues as the 2016-2017 ADR Section Council Chair. In the cold winter months, the Council will be busily developing a variety of programs and events for our members. This Fall we held an ADR Council retreat to refine the ADR Strategic Plan. Our top priority remains to serve our membership, so if you have thoughts about what we can do for you, please reach out to me or your other Council representatives.

The annual Spring Training/Dinner and Chief Judge Bell Award for ADR, programming for the MSBA’s Annual meeting in Ocean City, partnering with the Prince George’s Orphans’ Court in developing a new ADR Initiative, and developing a premier video presentation called, “ADR in a Box” are some of the biggest projects of the year. “ADR in a Box” is a production of vignettes describing various ADR processes in collaboration with Anne Arundel Community College. Keep your eyes peeled – once the project is completed it will be posted on our website.

**SAVE THE DATE:** APRIL 13, 2016 – SPRING TRAINING AND DINNER – Location TBD: Our trainer this year is Kenneth Cloke who is a mediator, arbitrator, attorney, coach, consultant and trainer. He has worked on a local and international level facilitating conflict, managing organizational change, and teaching conflict resolution skills. Find out more about Ken Cloke and the books he has written:

<http://www.kennethcloke.com/biography.htm>.

The Chief Judge Robert M. Bell Award for Outstanding Contribution to ADR will be presented at the Spring Dinner by Chief Judge Bell and remarks will be given by Chief Judge Mary Ellen Barbara. For more information on the Call for Nominations for the Chief Judge Robert M. Bell Award see page 6. The deadline for nominations is February 1, 2017.

## THE ADR SECTION AT THE 2016 MSBA ANNUAL MEETING



The ADR Section and current ADR Section Council Chair, Mala Malhotra-Ortiz, recognizes Immediate Past Chair of the ADR Section Council, Suzy Lynn Eckstein for her outstanding contributions and dedicated service as Chair of the ADR Section at the Maryland State Bar Association Annual Meeting in Ocean City, MD on June 2016.

*Photos by Cecilia B. Paizs*

## ADR IN PROBATE, ESTATES AND TRUSTS, AND FIDUCIARY LITIGATION

On Thursday, June 16, 2016, the Alternative Dispute Resolution Section sponsored an educational program entitled "Sibling Wars -- Alternative Dispute Resolution in Probate, Estates and Trusts, and Fiduciary Litigation. Circuit court judges, orphans' court judges, private attorneys, mediators, court ADR administrators, and collaborative practitioners discussed the current status of ADR in probate, estates and trusts, and fiduciary litigation (e.g., adult guardianship, will contests) . Thank you to our program speakers: Kathy Brissette-Minus, Esq., Suzy Eckstein, Esq., Judge Juliet Fisher (pictured below left), Byron Macfarlane, Esq., (pictured below right); Mala Malhotra-Ortiz, Esq., Kelly M. Preteroti, Esq. (pictured below right), Judge Steven I. Platt (Ret.), Judge Gale Rasin (Ret.), Jeff Trueman, Esq., Judge Pamela White (pictured below left), Judge Thomas Ross (pictured below left), and to the program chairs Judge Thomas Ross and Mala Malhotra-Ortiz, Esq.



## SETTLEMENT CONFERENCES: WHAT ARE ATTORNEYS LOOKING FOR?

By Cecilia Paizs

Litigation can be a long, grueling process, with opportunities to use alternate dispute resolution to resolve the issues. Often, these processes narrow the issues and focus the discussions even in those cases that do not settle. The last opportunity to settle a case in a formal setting may be the settlement conference. The question becomes, how can a settlement conference, which is another form of alternate dispute resolution (ADR), be used to assist lawyers and their clients to settle their cases short of trial?

First, it is helpful to note the differences between mediation, the process ordered most frequently in litigated matters, and a settlement conference. In mediation, an impartial third party provides a neutral setting for parties to negotiate with the assistance of the mediator. In mediation, self determination is a central concept. The parties make their own determinations related to points of agreement, even if the agreement is to disagree. The mediator should not render an opinion about a participant's case or issues, instead using a question based format to elicit information that could assist in agreement between the parties. If an opinion is rendered, it moves the mediator away from neutrality and towards one party's position over the other's. Further, it can impose pressure on a party to settle in a way he/she might not feel is what they want, but the only way to get it resolved. Self determination can be negatively impacted in a situation where a mediator is evaluative. While resolution is normally the goal in court ordered mediated settings, partial resolutions and narrowing the issues are also goals, allowing for preparation for further settlement discussions and/or litigation to be more focused.

Participants often attend mediations with no intent to move off of his/her/their positions, and if he/she/they hold strong views on the strength of his/her/their case, it can be difficult to work through some of the issues in the mediation process. Sometimes, a participant simply "wants his day in court". It is not enough for his story to be told to a mediator, since the mediator is neutral and impartial and does not respond with support for his position. If mediation leaves some issues unresolved, the next opportunity for settlement is usually the settlement conference which is presided over by a retired judge, or in some cases, a magistrate. By this point, discovery is completed (hopefully) and parties are gearing up for litigation, making their positions clear and often stubbornly holding on to them. The question is, what can occur in a settlement conference that could not happen in a mediation that would be likely to lead to settlement?

One legal definition of settlement is the act of adjusting or determining the dealings between persons without pursuing the matter through trial. In a settlement conference, settlement is a central theme. While most settlement officers/judges use mediation skills to develop the conversation between parties and attorneys, in the end, how can they help move the matter towards settlement? One of the things that attorneys may be looking for from a settlement officer/judge is an evaluation of the case, with the settlement officer/judge rendering an opinion about how he/she might rule if the matter were before him/her. Such a statement can assist the attorneys in gauging how to resolve the issues in a case and how to advise the client about settlement.

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**(Settlement Conferences)**  
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For example, if a party believes that his case is worth a lot of money, and a settlement judge states that he/she does not believe that damages would be awarded in the amount believed, giving reasons, that party may rethink his position and be more open to reducing his risk through settlement rather than trial. Or in a family law case, even though his/her attorney told him/her that alimony was not likely to be ordered under the facts of his/her case, having a settlement judge confirm that can assist the attorney in moving his client towards a more reasonable settlement option.

While neutrality and impartiality are often used interchangeably in ADR discussions or literature, one, neutrality, is a noun and the second, impartiality, is an adjective. The definition of neutrality is the state of not supporting or helping either side in a conflict, disagreement, etc. or the absence of decided views, expression, or strong feeling. Impartiality, on the other hand, is the description of the person acting, and is defined as not partial or biased; fair; just and not preferring the benefit to one person over another for improper reasons. I believe that, in a settlement conference setting, the settlement officer/judge can stop being neutral by rendering an opinion which could support or help one side in a conflict, but can continue to be impartial, as he/she is using objective criteria and not preferring to benefit one person over the other. And again, the benefit to rendering an opinion about a particular issue's potential outcome can lead to more focused and reasonable discussions about settlement.

So what are we seeking from settlement conferences? In most cases, we are seeking assistance in the form of bargaining style mediation while moving towards a more evaluative process. If all else fails, stating what he/she might do if the case was before him or her can provide a basis for settling the matter in lieu of the risk of the results at trial being similar to that described by the settlement judge. Neutrality can be lost to some extent as long as the parties believe that the settlement judge did not favor either side for inappropriate reasons but simply objectively weighed the facts and applied the law.

*Cecilia "Ceecee" Paizs practices mediation through The Mediation Center (www.agreeonit.com), located in Ellicott City, Maryland. She also provides mediation trainings and is collaboratively trained.*

## **NEW ADR SECTION COUNCIL MEMBERS APPOINTED**

Congratulations to the Honorable Thomas L. Craven, George Wadie Hermina, Esquire, and Cynthia May Lifson, Esquire on their recent appointment to the Maryland State Bar Association's Alternative Dispute Resolution Section Council. For a listing of the ADR Section Council Officers see page one.

## OPINION

### **Give the People What They Want: It's Time for "Mediation" in Maryland to Simplify and Move Forward**

By Jeff Trueman, Esq.

(The opinions expressed are those of the author only.)

**"Mediation is a facilitated negotiation with a trusted neutral." <sup>1</sup>**

This is not the definition of mediation under the Maryland Rules of Civil Procedure ("Maryland Rules" or "Title 17")<sup>2</sup>. Under the Maryland Rules, mediators are restricted from sharing their opinions about possible trial outcomes or recommending settlement terms even when asked to do so by people who are paying for the service.<sup>3</sup> If a mediator is asked to express an opinion about the terms of a proposed settlement, the "mediation" presumably stops and another process begins such as a settlement conference or neutral evaluation.<sup>4</sup> From a practical perspective, and in this author's experience, no one thinks about or handles dispute resolution this way, especially in the heat of the moment.

Title 17 should not redirect parties who are in mediation to a "settlement conference" just because they want an evaluative opinion – it is an unnecessary imposition on the information needs of the lawyers and the parties. Rather than narrow its application by pre-determining which kinds of conflict can or should be mediated, the Maryland Rules should facilitate wide use of mediation and permit the parties to get the information they want.<sup>5</sup> "Self-determination" is a bedrock principle of mediation.<sup>6</sup> Some parties want a therapeutic discussion.<sup>7</sup> Others want to bargain and strike a deal.<sup>8</sup> Quality mediators do both and good mediation process can deliver both.<sup>9</sup>

It is no exaggeration to point out that an enormous body of litigants is affected by Title 17's restrictions on deal-making mediators. Consider tort litigation. Many thousands of tort claims are filed across Maryland each year. Where there is an automobile collision, there is a tort claim. And where there is a tort claim, there is a dispute over whether someone pays money. Many Maryland circuit courts refer these disputes to court-appointed mediators who, as explained above, are not supposed to recommend terms or express opinions about possible trial outcomes. Attorneys and insurance companies hire private mediators, however, because they will evaluate, express opinions, and recommend settlement terms – all the while calling the process "mediation."

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# ADR SECTION of the Maryland State Bar Association

## *Call For Nominations for*

### **CHIEF JUDGE ROBERT M. BELL AWARD**

*Deadline for Nominations is February 1, 2017*

The Chief Judge Robert M. Bell Award for Outstanding Contribution to Alternative Dispute Resolution (ADR) in Maryland is awarded each year by the ADR Section to honor the vision and accomplishments of Chief Judge Robert M. Bell for his work in promoting the use of ADR in the Maryland judiciary, schools, government and communities by:

1. Recognizing Maryland organizations and individuals, both within the legal community and beyond, that are creating and providing innovative and effective ADR services and programs;
2. Supporting entities that seek excellence through educational and outreach programs, and demonstrate a commitment to utilize ethical standards in their ADR programs and practices;
3. Encouraging individuals to become catalysts for change and to demonstrate exemplary ADR best practices and approaches.
4. The award is presented at the MSBA ADR Section spring dinner scheduled for April 13, 2017.

#### NOMINATION PROCEDURE:

Any individual, agency, business or entity may submit nominations. A letter which documents how the candidate or organization meets the objectives of the award is required. A resume, biography or corporate profile should also be provided. The nominating individual or organization should identify itself and address the relationship of the nominee to the nominator. The Section Council will consider the nominations and select the award recipient.

Nominations should be sent to:

Mala Malhotra-Ortiz, Chair  
MSBA ADR Section Council  
361 Rowe Boulevard, 3rd Floor, COSA ADR Division  
Annapolis, MD 21401  
or to [mala.ortiz@mdcourts.gov](mailto:mala.ortiz@mdcourts.gov)

For questions or more information call Mala Malhotra-Ortiz at 410-260-3715

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## OPINION:

Confusion continues to grow over what is and what is not considered mediation because other terms are used for what appears to be the same process.<sup>10</sup> The general public has no trouble understanding what doctors, accountants, and lawyers do despite innumerable distinctions they maintain within their individual professions and sub-specialties. The ADR community cannot say the same for itself, as many practitioners over-emphasize and attach themselves to particular process distinctions.<sup>11</sup> Albeit unintentionally, the ADR community in Maryland has institutionalized this confusion by creating a different, more-restricted form of mediation under Title 17 than is practiced commercially. In this author's opinion, the longer confusion persists over what is and what is not considered mediation, the longer it will take for the wider public to understand and embrace mediation as a valuable way for people to resolve their own disputes.<sup>12</sup>

### Footnotes:

1. Michael Leathes, *Stop Shoveling Smoke! Give Users a Classic Definition of Mediation*, September 2011. (<https://immediation.org/stop-shovelling-smoke>) (last visited Nov. 23, 2016).
2. Md. Rules 17-101, et seq.
3. Md. Rules 17-102(g) and 17-103.
4. Md. Rules 17-102(I) and (I).
5. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harv. Negot. L. Rev. 7, 12 (1996).
6. *The Md. Standards of Conduct for Mediators*, approved by the Md. Mediator Excellence Council, April 20, 2006. See also Tim Hedeem, *Ensuring Self-Determination through Mediation Readiness: Ethical Considerations*, Mediate.com (<http://www.mediate.com/articles/hedeemT1.cfm>) (last visited Nov. 23, 2016).
7. Cecilia B. Paizs, *Commentary, Mediation: What Are We Looking For?* BAR BULLETIN (Md. State Bar Association), September 2016, at 6, 20.
8. *Id.*
9. John Bickerman, *Giving Mediation Clients What They Want*, The Nat'l L. J., Nov. 16, 2009 (available at <http://www.bickerman.com/news/story/publications-1>) (last visited Nov. 23, 2016); Leonard L. Riskin, *Decisionmaking in Mediation: The Old and New Grid and the New Grid System*, 79 Notre Dame L. Rev. 1,14 (2003).
10. *Id.* Riskin, *supra*, note 5. See also Stephen K. Erickson and Marvin E. Johnson, *ADR Techniques and Procedures Flowing through Porous Boundaries: Flooding the ADR Landscape and Confusing the Public, Practical Dispute Resolution*, (Volume 5, No. 1 January 2010).
11. *Id.*
12. See Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation*, Mediate.com (<http://www.mediate.com/articles/zumeta.cfm>) (last visited Nov. 23, 2016).

## OPINION: LOOK FOR A COUNTER-POINT IN OUR NEXT ADREPORT NEWSLETTER

### ADR SECTION COUNCIL MEMBERS 2016-2017

|                       |                      |                         |
|-----------------------|----------------------|-------------------------|
| Kathy Brissette-Minus | Hon Thomas L Craven  | Andrew Fontanella       |
| George Wadie Hermina  | Jose Barron Knight   | Connie Lee Kratovil     |
| Cynthia May Lifson    | Eden Osler Terenzini | Jeffrey Anthony Trueman |
|                       | Jolie Beth Weinberg  |                         |

See ADR Section Council Officers and contact information on page one.



Jonathan S. Rosenthal, Esq., Executive Director, Mediation and Conflict Resolution Office, Administrative Office of the Courts, Maryland Judiciary and Mala Malhotra-Ortiz, Esq., Director, ADR Division, Maryland Court of Special Appeals discuss Court ADR: What Works and Why It Matters at the 2016 MSBA Annual Meeting.

Photo by Ceceila B. Paizs

## COURT ADR: WHAT WORKS AND WHY IT MATTERS

On Friday, June 17, 2016, the ADR Section offered a program at the MSBA Annual Meeting sharing the results from the largest ADR study to use live observation and behavioral coding to explore the impacts of practitioner strategies and participant responses and comparing ADR to traditional court processes in District and circuit court cases. Thank you to the speakers: Judge Julie R. Rubin, Circuit Court for Baltimore City; Judge Dorothy Wilson, District Court of Maryland, Baltimore County; Tim Sheridan, Esq., Court Administrator, Circuit Court for Baltimore County; Mala Malhotra-Ortiz, Esq., Director, ADR Division, Maryland Court of Special Appeals; Jonathan S. Rosenthal, Esq., Executive Director, Mediation and Conflict Resolution Office, Administrative Office of the Courts, Maryland Judiciary; Connie Kratovil-Lavelle, Esq., Executive Director, Department of Family Administration, Maryland Judiciary; Maureen A. Denihan, JD, Executive Director, ADR Programs, District Court of Maryland; Jamie Walter, PhD, Director of Court Operations, Administrative Office of the Courts, Maryland Judiciary; Toby Treem Guerin, Esq., Managing Director, Center for Dispute Resolution at the University of Maryland Carey School of Law; Nick White, PhD, Evaluations and Research Director, Mediation and Conflict Resolution Office, Administrative Office of the Courts, Maryland Judiciary, and to the Program Chair Mala Malhotra-Ortiz, Esq.