

ADR Report

Alternative Dispute
Resolution Section

Andrea Terry, *Chair*
David Simison, *Editor*

Maryland State Bar Association, Inc.

Volume Seven. No. Three
October 2010

ADR Calendar

- October 26, 2010** – Section Council Meeting
- November 16, 2010** – Pizza and Professionalism – Title 17 Rule Changes – Annapolis, Anne Arundel Circuit Court – 6:00–8:00 p.m.
- November 29, 2010** – Section Council Meeting
- December 7, 2010** – Maryland Council Dispute Resolution Quarterly Meeting
- December 10, 2010** – Maryland Mediators Convention
- December 14, 2010** – Section Council Meeting
- January 25, 2011** – Section Council Meeting

(send calendar postings to: das@daslaw.com)

Message from the Chair

Dear Colleagues,

I hope everyone had a terrific summer and, that like me, you're anticipating another great year of Section progress and activity. I'm excited and honored to serve as the Chair of this Section and am well aware of, and aspire to, the high standards set by our preceding Chairs. I would particularly like to thank our outgoing Chair Steve Shapiro who lead us in such an inspiring year last year.

I start my sixth year of service to the ADR Section and Council with hopes of growing our Section and raising the level of service and activities for our members. I believe

the best way to promote the idea that being a member of our Section is a professional asset is to provide members with service they value. For starters and towards that end, we've brought back the Section newsletter that you're now reading. In this edition you will find out what changes may be on the horizon in the field of ADR in Maryland and what your Section is doing to keep your interests before the decision makers. You'll find timely, informative articles and a calendar of events that keeps you abreast of the activities and events in the ADR community across the state.

We will continue to present our "Pizza and Professionalism"

(continued on page 2)



Outgoing Chair Steve Shapiro receives his gavel plaque from incoming Chair Andrea Terry at the 2010 MSBA ADR Section Annual Meeting in Ocean City, Maryland

Meet The Section Council

We are pleased to welcome our newest members to the ADR Section Council, Gary Norman and Cecilia (Ceecee) Paizs

Officers:

Andrea Clare Terry, Chair
aterry@msba.org

Craig Tipton Distelhorst, Vice-Chair
craigdistelhorst@msn.com

David A Simison, Secretary
das@daslaw.com

Theresa Ann Furnari, Treasurer
theresa.furnari@courts.state.md.us

Steven Allan Shapiro, Imm Past Chair
sshapiro@certus-strategies.us

Council Members:

Anita Candy Deger
acdeger@comcast.net

Daniel Preston Dozier
ddozier@presspotterlaw.com

Cornelius Helfrich
beachrd@aol.com

Eric Hardy Imperial
eric@imperiallaw.com

Ronna K Jablow
ronna.jablow@mdcourts.gov

Robert Clare Mueller
rcmediationservices@verizon.net

Gary Christopher Norman
gnorman@cms.hhs.gov

Cecilia B Paizs
Private email address

Kenneth A Vogel
kavogel@metrolegalsolutions.com

GET INVOLVED!

All section members are invited to contact the committee chairs to learn of opportunities to serve.

Nominating Committee – Craig Distelhorst

Spring Dinner Committee – Eric Imperial

Newsletter Committee – Dave Simison

Annual Meeting Program Committee – Ken Vogel

Legislative / Rules Committee – Dan Dozier

Hon. Robert M. Bell Award Committee – Neil Helfrich

Message...

(continued from page 1)

series, the informational and networking events that offer you the opportunity to learn first hand from those involved of the newest developments in ADR in Maryland and how they might affect your practice. Our first this year is November 17th at the Anne Arundel Circuit Courthouse from 6-8 p.m. and will address the proposed changes to Rule 17 that will impact those of you who mediate Circuit Court cases. We have another scheduled for May 24th (details TBA) that will address the important issue of confidentiality and the disparate combination of case law and statutes both state and federal that leave this important issue “gray” for Maryland mediators.

Our Section has been progressive in reaching out to other ADR practitioner groups and MSBA sections, and we will continue to do so. I’ve already agreed with leaders of many of the other ADR practitioner groups in Maryland to participate in upcoming meetings where we will discuss our common interests and how we can help each other to succeed while benefiting from our varied perspectives. We are planning to partner with other MSBA sections for the educational programming we will present at the MSBA annual meeting in June, and have agreed to partner with the Administrative Office of the Courts in their upcoming, reduced price collaborative law training, for which ADR section members will be among the first invited for the limited seats available. Our legislative/rules committee will monitor legislation that might affect our practice area and we will keep the section informed and seek your feedback as we plan any response. Finally, we will update and add to the webinar library available to members on our section website as another way of providing important information addressing diverse topics of interest to ADR practitioners. It will be a busy year and I look forward to sharing it with all of you.

Best regards,

Andrea Terry



CHIEF JUDGE ROBERT M. BELL AWARD FOR OUTSTANDING CONTRIBUTION TO ALTERNATIVE DISPUTE RESOLUTION IN MARYLAND

PURPOSE

The Chief Judge Robert M. Bell Award for Outstanding Contribution to Alternative Dispute Resolution (ADR) in Maryland, is 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 which seek excellence through educational programs, outreach programs and which demonstrate a commitment to utilize ethical standards in their ADR programs and practices; and
3. Encouraging individuals to become catalysts for change and to demonstrate exemplary ADR best practices and approaches.

PROCEDURE

The Award is open to any individual, agency, business or entity to submit nominations. The due date for nominations is December 15, 2010. A letter, which documents how the candidate or organization meets the three objectives of the award, is required. A resume, biography, or corporate profile must 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: Neil Helfrich, 31 E. Lee Street, Bel Air, Maryland 21014
P: (410) 838-8338, F: (410) 838-1017, beachrd@aol.com

Confidentiality Task Group Report

By Richard Melnick

I submit this report to you, as the ADR Section representative of a Confidentiality Task Group ("Task Group") that was recently established to identify issues related to confidentiality and privilege applicable to mediation proceeding, the mediating parties, and the mediator. The Task Group met on July 13, 2010, and October 25, 2010. Included among others who have participated in the Task Group, as representatives of various mediator organizations, are: Roger Wolf, Toby Guerin, Richard Bohn, Lorig Charkoudian, Dan Dozier, Nancy Hirschman, Cheryl Jamison, Marvin Johnson, Rob Ketchum, Martin Kranitz, Bob Rhudy, Jonathan Rosenthal, Tara Taylor, Julie Linkins, and Barbara Williams. I extend my sincere apologies to anyone I may have inadvertently omitted here.

The meetings have focused on identifying preliminary confidentiality and privilege issues for consideration, and ex-

ploring potential solutions to protect the mediation process, parties, and mediators. The Task Group also discussed the need to address the issues in various forums (court-ordered, not court-related, etc.) and contexts (e.g. Family, Community, Business, and Employment). It brainstormed options regarding the form by which this effort would take shape (i.e. Rule; Evidentiary statute/rule; general statute; case law), but reached no final conclusions.

The Task Group emphasized keeping the discussion inclusive, transparent, efficient, workable, focused and clear. The Task Group noted the importance of conducting preliminary research and focusing the discussion, before expanding the conversation to, and receiving input from, other selected stakeholders, including: consumers,

(continued on page 8)

"Change on the Way for Circuit Court Mediators – Learn All About It!"

The MSBA ADR Section invites you to an informative and interactive panel discussion addressing the proposed changes to Rule 17. Join The Honorable Thomas G. Ross, chairperson of the Council for Circuit Court Judges ADR Committee and member of the ADR subcommittee of the judiciary's Rules Committee, and MACRO Executive Director Rachel Wohl as they explain the proposed amendments, and get your questions answered about how the changes might affect your practice. Seating is limited so reserve your seat today!

When: Wednesday, November 17, 2010 from 6:00 – 8:00 p.m.

Where: Anne Arundel County Circuit Courthouse, ceremonial courtroom

Cost: Free to ADR section members - \$5 (cash) at the door for non-members

RSVP: Theresa Michael at tmichael@msba.org or 410-685-7878

Collaborative Law Versus Mediation

~ A Mediator's View ~

By Cecilia B. Paizs

With the rise in collaboratively trained professionals in Maryland, the question as to the better route for parties involved in a dissolution of their marriage to take adds an option. With the National Family Resiliency Center indicating that a fully litigated divorce action, with custody, finances and property distribution contested, costs each party an average of \$50,000 in fees and costs, a less expensive resolution process is often sought. This article hopes to point out the similarities and differences between the processes of mediation and collaborative law.

Both the collaborative law process and mediation require full disclosure by both parties, which is often resisted by participants. In the collaborative process, the parties are making financial disclosures to a financial neutral, and often understand that it is in the best interest of each to provide all the information necessary to work the matter out to the benefit of both parties. Likewise, when working on child custody issues, a child specialist, a neutral, is listening to each parent's desires and concerns, and working with them to develop a custody plan that works for each of them, as well as takes the needs of the children into consideration. The parties then bring this information back to a four way

meeting with their lawyers present to work out final details. While the considerations of the statutory provisions can be made, the focus is not on what the court would do, but on what is actually needed by each party and their family as a whole. While the lawyers take a less directive role in the process, they are present to provide legal advice to the parties at all times so that his/her client understands exactly what he/she may be compromising on to make the agreement work. Everyone is focused on the outcome of the process being as fair to both parties as possible.

In family law mediation, unlike commercial mediation, lawyers are often not present during the child custody portions of the mediation. In addition, since the mediator's role is to facilitate a conversation between the parties, the outcome sought is not focused on the fairness of an agreement, but in reaching the agreement itself. This can result in a lopsided agreement depending on the personalities of the parties and the ability of the mediator to guide them away from an unfair agreement through the use of questions. (Remember, fairness, like truth and beauty, are in

(continued on page 5)

Collaborative Law...

(continued from page 4)

the eyes of the beholder.) In the end, even if the mediator believes it is an unfair agreement for one party, his/her role is to assist the participants in reaching agreement and not to advise the parties as to the fairness of the agreement. This can also be true in a mediation related to financial or property issues if the attorneys are not present. The mediator can suggest that the parties' consult his/her attorney related to certain issues as "homework", which can assist the parties in reaching a more balanced agreement, but it can also create an additional step for the parties. This is less true when the parties' attorneys are present at the mediation, but can lead to less productive mediation as the attempts by lawyers to zealously represent their clients during mediation can create obstacles in themselves to the resolution of certain issues.

The collaborative process can provide a holistic approach to resolving family law issues between parties, one that can take into consideration many factors and elements of a solution that a court would not be able to craft for parties. It sets a tone of working together to resolve the issues between the parties and focusing on the positives of each party, rather than the negatives that result from preparing for trial. The parties have access to mental health and financial professionals who can assist them in crafting a joint solution to problems, rather than having dueling experts. Mediators can be used to assist the participants, including the attorneys, manage the collaborative process, or to mediate some of the final issues, when obstacles arise between the participants in the process.

Following the collaborative process can, however, take a longer period of time to complete the resolution process, as you are now attempting to arrange meetings in accordance with multiple professionals' schedules. The process itself is designed to move slowly, so that the parties themselves can work with the mental health professionals and other professionals to design a plan that is unique to their situation. Also, if the process itself breaks down, the parties are required to retain new counsel and new professionals to resolve the situation through litigation, which can delay the resolution of the family difficulties further. And since the process itself includes multiple professionals, as well as the fees for multiple meetings of multiple professionals, it can result in more cost for each of the parties. As a result, the process can be viewed as being unaffordable for many.

Mediation can set the same tone of working together to resolve the issues, and a mediator can refer participants to other professionals for assistance. (I first refer them back to

their attorneys for names of mental health and/or financial professionals that the attorney may prefer to work with.) In such cases, the holistic approach can be accomplished, just not in as efficient a manner as having those professionals on board from the beginning. However, the mediation process often takes fewer sessions to cover the issues, and can result in a less expensive resolution process for the participants if they use attorneys for review of the final points of agreement rather than having the attorney's present throughout the process.

As a practitioner in both processes, I feel that there is a place for both in the family law arena. It is important to assist the participants in choosing the process which best fits their needs and will have the greater likelihood of success. Discussion of a client's needs at the time of the initial consultation is key to determining whether that person and his/her spouse are candidates for the collaborative process or mediation. Ensuring that the participants are invested in the process they chose to follow will make success of either process more likely.

Cecilia B. Paizs, Esquire, is a commercial and family law mediator who mediates at The Mediation Center, in addition to providing trainings in mediation (www.agreeonit.com). She is a collaboratively trained attorney with a legal practice that focuses on family law (www.paizslaw.com)

Long-Range ADR Calendar

(send calendar postings to: das@daslaw.com)

February – Newsletter

February 22, 2011 – Section Council Meeting

March 22, 2011 – Section Council Meeting

April 7, 2011 – Spring Dinner Tentative/
Council Meeting

May – Newsletter

May 17, 2011 – Section Council Meeting

May 24, 2011 – Pizza and Professionalism –
Location TBD – Topic Confidentiality

June, 2011 – ANNUAL MEETING

Safe Harbor Agreement-Drafting Initiative

By David Simison

Section and non-Section members met recently at the offices of Cecilia Paizs in Ellicott City to discuss creating a “safe harbor” through Rule change or Code change to allow a mediator to draft binding terms of agreement. The ten mediators who met have diverse practices across the state.

This meeting was not a Section sanctioned activity but arose from a Drafting Roundtable in Annapolis earlier in the year hosted by David Simison / Annapolis Mediation Institute.

There is disagreement in the mediation community over the propriety of mediator drafted settlement agreements and the Section Council has not taken a position on the issue, however, this group met to determine what if anything can be done to address the current uncertainty in this area.

Several mediators attending the meeting acknowledged a regular practice of drafting settlement documents during mediation and all recognized the pitfalls and perils of doing so and the need to advise mediation participants to always seek the advice of legal counsel before signing any such document.

The Rules of Procedure and practices in the Courts are at seeming variance. Rule 9-205 (d) seems to state mediators may only note “points of agreement” but may not create a binding document and yet Courts across the state regularly

provide parenting plan forms to be completed during mediation by the mediator and the parties. Even Rule 9-205 (d) and the corresponding Committee Note seem in prima facie conflict with each other; the Rule mentions creating a document for subsequent review and signature, which sounds like an agreement, but the Committee Note states that mediators should not draft legal memoranda. Similarly in Rule 17-102(d) it is noted that a mediator, may, “upon request, record points of agreement reached by the parties.” All of this can seem like so much word parsing, as in when is an agreement different from “points of agreement” and different from “legal memoranda.”

The MSBA Ethics Committee in Dkt #2007-19 failed to mention these Rules and practices of the Courts when it opined that drafting of agreements by mediators violated the Conflict of Interest provisions in the Code of Professional Responsibility relying in large measure upon a pre-mediation case from 1988, *Hale v. Hale*, 74 MD App 555.

After extended discussion, the group decided to seek a modification to the Rules of Professional Conduct to permit drafting under certain clearly defined circumstances. The group is researching those jurisdictions that permit drafting by mediators to learn how the Maryland Rules might be modified and how to get a Rule change through the process.

Comic-Reel from the Annual Meeting



Above: Dan Dozier and Roger Wolf check out John Bickerman's new iPad at the Panel Discussion on Confidentiality in Ocean City

Below: Panel Members Trish Miller, Rob Ketcham and Steve Shapiro don't have new iPads.



Humanizing the Mediation Process Can Work Wonders

By Louise Phipps Senft

[Editor's Note: This article was published in her monthly column "The Negotiating Table" in *The Daily Record*, March 2008]

People coming to mediation often have tried repeatedly to resolve their conflict or dispute without success. For them to be able to resolve it within the mediation room, some thing or things have to change. It may be how they had gone about addressing their conflict or not addressing their conflict; how they had negotiated or not negotiated; how they had dealt with emotional barriers or created emotional barriers; whether they had identified mutual goals or only their own goals; and so forth.

Some change is necessary. The mediator, however, does not seek to change people, but rather fosters the opportunities or creates the environment where change can take place. And, with the assistance of the mediator, the parties do manage to make necessary changes.

Parties do so because they inherently want to resolve the conflict, especially a difficult one that is wearing them down. This is especially so for people in business. What they often need most is a special setting and opportunity and some help that a mediator and the mediation process can provide.

In civil mediation, a different kind of change is sometimes necessary or at least useful. We refer to it as "humanizing." A lawsuit, for example, can be more easily settled when a plaintiff becomes seen and recognized as a person who has been harmed or damaged in some way.

The same can be true when a defendant becomes seen and recognized as a person who may have been negligent or careless, but who is otherwise a decent human being. It is easier for people to agree to pay money to a "person" than to a "plaintiff" since "plaintiffs" are sometimes seen as people who are only out to get money.

And it may be easier for a person to accept a lesser amount in a settlement in which that person is satisfied with the interaction and the humanity that was genuinely shown from a "person" rather than a "defendant." "Defendants" can sometimes be seen as bad or uncaring people who are not concerned about other people, and some defendants can

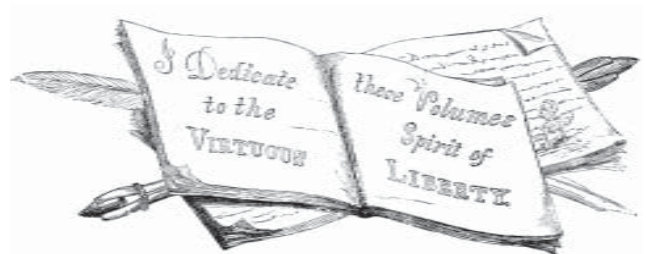
sometimes view themselves as the victims and perpetuate the same negative self-absorbed cycle. When people are humanized, all interactions become easier.

How can this humanizing come about? It comes about when parties are invited and encouraged to speak to each other and with each other. Sounds simple, but it is often true. Counsel often talk to the mediator. It's much more effective and moving when the parties speak to each other.

Counsel also talk about legal issues and matters of evidence and proof, and properly so, but parties seldom talk about that. They tend to talk about what has happened to them and about difficulties they are faced with, including personal difficulties. They may express regret over what has happened. They may explain why certain things happened – not excuses, but explanations. And as the parties talk to each other and hopefully listen to each other, they understand each other a little more. They are not going to damage their lawsuit by talking about their concerns and difficulties. Mediation confidentiality protects against that in Title 17.

Such talking may just make it easier for them to get together, resolving their conflict in a less painful manner. It's not just reaching a settlement, but how it came about and how the parties feel about it that makes them satisfied. If the parties are satisfied, so are their lawyers.

Counsel, you may try to prepare your clients for the experience of talking directly with the other party about whatever is important to be discussed. Notice the difference this makes and how much more satisfied the client is with your representation as well. Better process...better outcome.



Report on Mediation Confidentiality...

(continued from page 3)

courts, mediators, attorneys, administrative agencies (Office of Administrative Hearings, etc.), the Attorney General's Office, roster managers, shared neutrals, corrections and rehabilitation agencies, and federal, State, and local governments.

The Task Group discussed: Title 17 of the Md. Rules (both the current Circuit Court Rules and the proposed District Court Rules); the State Administrative Procedures Act; the Uniform Mediation Act ("UMA"); Md. Rules of Procedure; the Md. Rules of Evidence, the Courts & Judicial Proceedings Article (related to privilege), the Business and Occupations Article (related to obligations in practicing law or other relevant, regulated professions), and other laws of confidentiality and privilege applicable to testimony, communications, and documents, that may (or may not) apply to particular circumstances in Maryland. The group also alluded to a recent case in which a party to the mediation subpoenaed a mediator to testify in court regarding the communications that took place during the mediation. While that case settled before the mediator was compelled to testify, the case presented factual and legal issues for future consideration.

Discussion also dealt with whether any privilege related to a party or the mediator should be "absolute" or "qualified", who holds any privilege or right to confidentiality, and the parameters for determining when a communication should be held confidential or privileged in a court or administrative proceeding. The group recognized the need to delineate when a communication may be released by agreement of all the parties, and/or the mediator.

The Task Group plans to conduct a "side-by-side" comparison of: (1) the UMA, (2) comments/actions by various jurisdictions regarding each provision of the UMA, and (3) the present status of Maryland rules and law. The Task Group emphasized that the UMA, or some version of it, may or may not be what Maryland should adopt; however, it recognized that reviewing the UMA provisions and other jurisdictions' adaptations of it, as a piece of a much larger process, may be helpful to inform the discussion. The Task Group plans to undertake further research, analysis, and discussion to frame the issues, reach out to identified stakeholders, and develop a thoughtful plan to properly address the confidentiality and privilege issues surrounding mediation in Maryland.





Please reply to: Andrea C. Terry, Esq.
Section Chair

The Honorable Thomas G. Ross
Conference of Circuit Court Judges (CCCJ)
ADR Committee
100 Court House Square
Centreville, MD 21617

Dear Judge Ross:

The Alternative Dispute Resolution Section of the Maryland State Bar Association writes to provide comments and concerns about the CCCJ ADR Committee draft of Maryland Rule 17 (The Rule). We understand that the CCCJ ADR Committee is considering whether to recommend changes to the Rule including one that would address mediator fees in mediations ordered by the Circuit Courts.

The Section appreciates your efforts to improve the use and efficacy of court-ordered mediation and recognizes the importance of these issues. As we are sure you agree, these important changes to the Rule should not be decided without input from all stakeholders including the consumers and providers of these services. The Section shares many of the concerns expressed by members of the CCCJ ADR Committee and others regarding how to protect the public interest. We also agree that changes in the Rules should improve the quality of ADR services to parties ordered to mediation. We strongly believe that these concerns can, and will be met in ways that achieve the interests of the Courts, the parties, their counsel and ADR practitioners. With this in mind, we offer some suggestions for the Committee to consider. We also ask to meet with the Committee to discuss these issues.

The draft Rule in Section 17 – 108 would, for the first time, establish a policy that the mediation fee set by the Circuit Court in a particular case would apply to “that entire ADR proceeding” – that is, to the session ordered by the court (most Circuit Courts provide in their Orders to Mediate that the parties participate in a mediation session for two hours) as well as to extended mediation or additional mediation sessions that the participants, with the mediator’s consent, agree to continue beyond the ordered period of time. The draft of the Rule permits an increased fee for time beyond the initial session only if the mediator provides notice of the possible increase, secures the participants’ written approval, and obtains approval of the county administrative judge, all prior to the mediation. The Committee’s intent, as stated in a Committee note, is that “[d]eviations from the fee schedule are anticipated only under special circumstances. The fee schedule adopted by the court is presumptively appropriate.”

Respectfully, for the reasons discussed below, the Section submits that it is not in best interest of the public, the participants, or the courts to cap a mediator’s fees for extended mediation or additional sessions that may be below market level or below the mediator’s usual

private fee. Additionally, the Section wants to take this opportunity to offer to the Committee our views as to several specific aspects of the proposed draft rule that may be awkward or counterproductive in practice.

As a predicate, the Section believes that it is in the public and participants' interests to specify or limit the time parties are required to participate in mediation, in light of the additional costs to the parties including attorneys' fees in many instances as well as the mediator's fee. We also believe that it is in the public and participants' interests to permit the parties to decide to extend mediation beyond the mandatory session (given that parties always retain the right to decline to participate in additional mediation). For the mediation process to have an opportunity to work, parties must be free to devote enough time to see if settlement is possible, yet not be required to participate beyond the point at which their economic interests prohibit such participation.

Several factors argue against a proposal that would require a mediator to offer mediation services for an extended and indefinite length of time at a fee that may be below what he/she might normally charge. Although there are several reasons why mediators may offer services to the court at fees lower than the mediator typically would charge in a private setting, those reasons may be outweighed if the mediator knows that he or she may be entering into an indeterminate commitment of time at that reduced rate. Also, best practice requires mediators to go into mediations adequately prepared, which typically involves hours of time in scheduling, setting up files and other administrative tasks, as well as reading pre-mediation statements, for which the mediator is not compensated. In light of the time the mediator already contributes without compensation, the proposed fee restrictions on the extended or additional session hours would be oppressive, and may seriously discourage experienced, high quality mediators from accepting court assignments. It is not in the public or the courts' interests to unnecessarily erect such a disincentive and, thereby, potentially limit the roster of mediators available to the court for assignments.

The Section does agree that mediators should not be permitted to move from the court-established fee to a higher rate abruptly and without advance notice to the parties. The rule should require the mediator to advise the participants, in writing prior to the start of the mediation, of any potential fee increases for additional hours of mediation, coupled with other provisions providing recourse for participants who may not agree to such an increase. Specifically, if parties do not agree to such an increase, they could ask the court to appoint a different mediator; or the participants could consider the potential increase in making their decision that it was not in their best economic interests to continue mediation beyond the initial ordered session unless they are prepared to settle. The Section would welcome the opportunity to work with the Committee to draft language in the Rule or in the comments to the Rule to address this issue.

In addition to the concerns about the proposed fee cap, the Section believes that several aspects of the proposed Rule warrant special comment as to workability. For instance, the Rule is ambiguous regarding a limit on the mediator fees in cases where the parties select a private neutral, whether or not listed on the court's roster. Rule 17-103(c)(4) provides that, when a person who is willing and able to conduct the mediation is proposed as a substitute by the

participants, “the court shall designate that person.” This could be read to incorporate such a mediator within the proposed fixed fee structure both for the initial session and for any extended period or additional sessions. However, Rule 17-108 also states that the court’s fee structure applies to a “person designated by the court, other than with agreement of the parties.” It could be argued that the draft Rule does not limit mediator fees if the parties privately select a mediator, whether or not that mediator is on the court’s roster. If the fee of such a privately recruited mediator is not limited even for the initial period of mediation, much less for extended periods, that only exacerbates the impact of the rule on mediators who have offered their service to the courts, whether on a single case or on a regular basis.

Moreover, for mediators to charge their usual fee after the initial two-hour period, mediators must get the county administrative judge’s permission prior to the start of any mediation. This process is cumbersome because it requires a mediator to speculate, before the mediator even meets the participants, whether the mediation will extend beyond the initial period ordered. This would lead to the perverse incentive, for mediators to protect against an eventuality, to request permission in MOST assigned cases – leading to a plethora of requests filed with administrative judges, despite the Committee’s Comment that it envisions such a request to be granted only rarely. The need for this awkward process would be eliminated if the Rule is modified, as suggested above.

In conclusion, the Section offers the following draft for the Committee’s consideration to modify the proposed changes to Rule 17-108. The Section believes this suggestion satisfies the underlying concerns and objections the Section and others have expressed about the current proposal, while addressing the public interest sought to be served in the original proposal. It is the Section’s request that this suggestion serve as a possible basis for further discussions and exchanges between the Section, the Committee and other stakeholders to develop a workable and acceptable Rule.

PROPOSAL: Rule 17-108 should be amended to provide as follows:

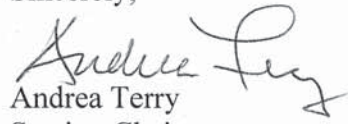
- A circuit court’s order assigning a case to a mediator shall state the minimum number of hours in which the parties are ordered to participate and the hourly professional fee that will be paid by the participants to the mediator for those hours as established by the Court.
- If the mediator intends to increase the court’s fixed fee for any extended hours of mediation or additional sessions as agreed to by the participants, the mediator must so advise the participants in writing of the increased hourly rate prior to the start of the initial session. If the mediator does not do so, the mediator shall be bound by the court’s fee cap for all additional mediation time in that case.
- If the parties do not agree to the mediator’s proposed fee increase, they shall notify the court, which may appoint a different mediator.
- Finally, the order shall state that, as the time for the initial session approaches expiration, the mediator must so advise the participants and ask whether they want to extend the mediation or want to schedule additional sessions; and further shall remind the participants that extended mediation or additional sessions shall be at the previously agreed upon increased rate. This exchange may be a factor in each participant’s decision

as to whether to continue mediation and in the mediator's decision whether to adhere to the increase or to continue mediation at the court's fixed fee.

Under this proposal, the tasks of speculating as to the time of the entire mediation session and case by case consideration by the county administrative judge will have been eliminated. Further, the mediator would be required to be transparent with the participants regarding fees by advising them at the outset what fee the mediator would expect if the mediation extends; participants will be able to consider this advice in deciding whether to proceed with the assigned mediator; and both the participants and the mediator could consider the matter of fees in deciding whether to continue the mediation beyond the initial time ordered.

The Section thanks the CCCJ ADR Committee for its interest in and hard work toward developing important clarity in this aspect of Rule 17-108. The Section will continue to support this effort and is anxious to participate in the development of an amendment on this point as it evolves. We appreciate this opportunity to offer comment and suggestion.

Sincerely,


Andrea Terry
Section Chair

cc: Rachel Wohl, Esq., Staff to Committee
Julie Linkins, Esq., Staff to Committee
Connie Kratovil-Lavelle, Esq., Staff to Committee
Richard Montgomery, Director of Legislative Relations, MSBA