

Twenty Years Later, ADR Continues to Flourish in New Ways

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In celebration of the 20th anniversary of the General Assembly's passage of the mediation referral statutes, *see* Va. Code § 8.01-576 *et seq.*, the Alternative Dispute Resolution (ADR) Joint Committee of the Virginia State Bar and Virginia Bar Association highlights the significant and various ways in which

ADR is being used around the commonwealth. ADR is no longer limited to traditional mediation. Rather, ADR exists not only as an established procedure for courts and state agencies, but also as an essential resolution tool in the context of civil, criminal, and family law. The following articles demonstrate the success

of ADR in the commonwealth, not as a mere alternative to litigation or a one-size-fits-all process, but as an essential element that can be adapted to specific contexts and modern problems in innovative ways.

Alternative Dispute Resolution in the Public, Nonprofit, and Private Sector

Two Decades of Court Connected ADR

by Sally P. Campbell, dispute resolution services manager

Court connected ADR has grown dramatically in the last twenty years. Increased awareness and availability of ADR services to state court litigants resulted from legislation in the early 2000s to fund custody, visitation, and support cases; funding for mediation coordinators to act as a liaison between a court and its mediators; and the popular Judicial Settlement Conference (JSC) program.

The growth of mediation in the commonwealth is captured by data published annually by the Office of the Executive Secretary. (See Chart A on page 29.)

ADR expenditures have been gradually increasing over the years, with the past four years holding steady just below \$2 million. These expenditures are covered by the Dispute Resolution Services (DRS) budget, the criminal fund, and grant procurements. (See Chart B on page 29.)

The number of certified mediators peaked during 2000 and 2001 at 944. During the past ten years, the numbers have gradually decreased, bringing the number of currently certified mediators

to 537. A total of 2,817 individuals have received certification since 1993, and the average number of active mediators in the last twenty years was 700. Of the 321 mediators certified in 1993, 49 continue to maintain their certification. For more information on ADR use and expenditures, see charts at <http://www.vsb.org/docs/valawyer magazine/ADR-statistics-2013-10.ppt>.

For twenty years, parties have expressed satisfaction with court-referred ADR services, even when no agreements were reached. Ninety-four percent of mediation participants and 96 percent of JSC participants found the process helpful. Ninety-one percent of mediation participants and 99 percent of

JSC participants would use it again, and 95 percent of mediation participants and 99 percent of JSC participants would recommend the process to someone else.

A recent mediation client of a community mediation center stated:

The mediation process allowed us to discuss difficult topics that we'd never been able to discuss before. It placed us in a setting where we had to talk to each other, but allowed us to feel supported while talking. It felt good to say what we wanted in our own words, rather than through an attorney's words. Mediation allowed us to focus on what was most important to us personally and to brainstorm to come up with creative solutions. Mediation proved to be much more efficient and cost-effective than litigation for working through problems, because we could talk face-to-face rather than through advocates. And it allowed us to reach closure on issues that had been troubling us, which would not have been possible with a court-mandated result.

A certified mediator recently mediated an unlawful detainer case in a general district court session just before Christmas (facts changed for anonymity). The tenants—a young couple—acknowledged they owed \$2,500 in rent, and the judge entered judgment and ordered possession to the landlord by Christmas. Afterward, the mediator offered to help the tenants and landlord negotiate the details behind the judgment and possession. On the one hand, the couple shared that the wife recently lost her job but both were working and trying to get back on their feet. They described the impact this layoff had on their young children. On the other hand, the landlord shared his need for the rent and concerns about the condition of the house. The mediator helped them understand each other's needs as they resolved the situation with a three-year

Total Number of Certified Mediators Each Year: 1993 - 2012

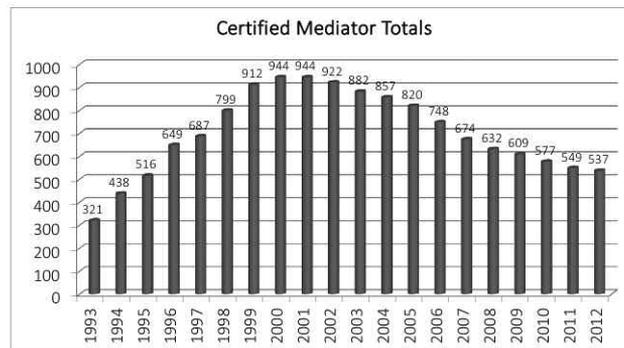


Chart A

Court-Referred ADR Expenditures

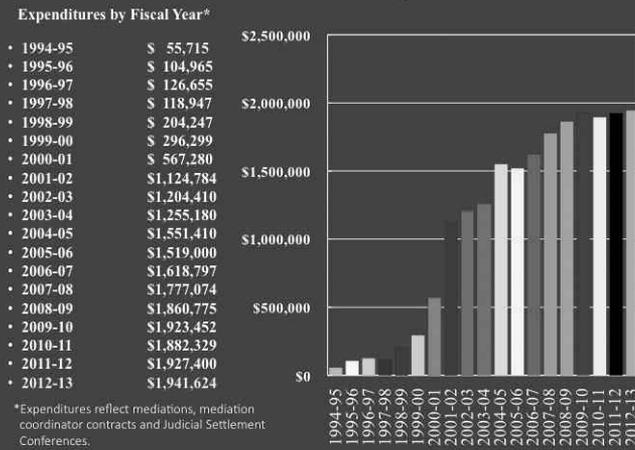


Chart B

payment plan and an offer of \$600 cash to help the wife go back to tech school.

This story highlights how adjudication does not necessarily meet all the parties' needs. Litigants constantly express their appreciation for how mediation is flexible, promotes open communication, recognizes interests, and leads to meaningful settlement.

Richmond Juvenile and Domestic Relations Court

by Carol A. McCue, director, Richmond JDR Dispute Resolution Office

The Dispute Resolution Office at the Richmond Juvenile and Domestic Relations Court (JDR Court) was established as a pilot program in 1994 as a result of a recommendation of the Commission on the Future of Virginia's Judicial System and enabling legislation passed by the Virginia General Assembly and signed by the governor. The office is the only one of its kind in the commonwealth. It works closely with the clerk's office of the JDR Court to offer a variety of dispute resolution services, including mediation for a variety of family issues for the court and truancy mediation in Richmond's public, middle, and high schools.

From 1995 through December 2012, the Dispute Resolution Office mediated almost 8,800 custody, visitation, support, dependency, parent/child, truancy, and other family matters. Mediation keeps cases off busy dockets and provides families with the opportunity to make their own decisions and determine a framework for their future. It also saves judicial time and court resources. The office also assisted the Richmond Department of Social Services in the initial phase of its program to offer team decision-making meetings (TDM) for teenage foster care children in congregate settings. Between July 2008 and February 2009, TDM-trained mediators conducted sixty such meetings and facilitated the development of plans by families, caregivers, social workers, and service providers to place children in the least restrictive foster care environment possible.

Workers' Compensation Commission

by Deborah Wood Blevins, deputy commissioner, Virginia Worker's Compensation Commission

Mediation has had a dynamic life in the Virginia Workers' Compensation Commission (VWC). Since 1999, voluntary mediation has been offered to parties involved in workers' compensation claims. The program has grown over time and is projected to continue growing.

Workers' compensation mediation is a free service. From the outset, mediation has assisted the parties in resolving disputed claims, decreased docket congestion, and improved communication between the parties and the commission. By 2004, mediation was offered in all regions of the commonwealth, with a high percentage of claims resolution.

In its current configuration, formal mediation is available on a regular basis with five deputy commissioners who have been certified to mediate by the Supreme Court of Virginia. These mediators also conduct hearings. In this way, they are akin to federal magistrates who sit both as trial judges and as mediators in cases not on their dockets. Between 300 and 400 cases are mediated by the commission every year.

In November 2012, the VWC began a pilot project of offering issue facilitation or mediation by phone. For three months, cases with discrete, defined issues were referred to the project in an attempt to make ADR convenient and affordable. The pilot project was very successful, and resulted in cost savings to the commission as well as the parties. The program is expected to grow, given its history of success.

Employment Dispute Resolution

by Amanda M. Monaco, EDR mediation program director

The Virginia Department of Human Resource Management's (VDHRM) Office of Employment Dispute Resolution (EDR) offers a free statewide mediation program to state agency employees. It is a cost-effective tool for resolving both common (miscommunication, management/work styles) and difficult (termination, harassment) workplace conflicts.

In 1989, the General Assembly charged EDR with administering a statewide mediation program for the state government workplace to resolve employment disputes in a less expensive and less adversarial manner. The mandate applies to each executive agency of the commonwealth. EDR provides agencies with a broad range of workplace dispute resolution tools, including facilitation, training, confidential AdviceLine consultations, and the commonwealth's grievance procedure.

Thirty-nine volunteer workplace mediators (69 percent are state employees, 31 percent are private sector mediators) implement this program. In 2009, Virginia Tech University's Office for Equity and Inclusion's Conflict Resolution Program became the first agency to partner with EDR to increase the availability of workplace mediation to state employees in southwest and western Virginia.

During the past ten years, EDR conducted nearly 500 mediations (70 percent in Richmond, 20 percent in the Tidewater area, 10 percent across other regions). Last year, 93 percent of mediations resulted in agreement, and 100 percent of participants rated their overall mediation experience a success.

This service has improved employee morale and teamwork, enhanced work

performance and productivity, and developed skills to resolve future disputes. One employee observed that mediation repaired her relationship with a colleague: “We now understand how the dynamics were affected by outside forces and are now more open with our communications with each other.” Another employee noted how the mediators’ expertise and positive energy helped the employees “grow to appreciate and heal towards a better working relationship.” Likewise, a state agency mediation coordinator affirmed her appreciation for EDR’s efforts to “make peace through its incredible program management” in a particularly sensitive conflict.

Department of Professional and Occupational Regulation

by Carol A. Mitchell, director of the ADR Program, DPOR

The Department of Professional and Occupational Regulation (DPOR) regulates more than thirty occupations and professions through seventeen policy boards. It licenses/certifies more than 300,000 individuals and businesses ranging from engineers and architects to cosmetologists and wrestlers. For the 2012–13 fiscal year, DPOR received more than 3,500 complaints.

Often, consumers file complaints hoping a regulatory board will force a licensee to resolution. However, regulatory boards cannot require an individual or business to refund money, correct deficiencies, or provide other personal remedies. Accordingly, since 2001, DPOR has offered collaborative problem-solving, facilitated communication, negotiation, mediation, and conciliation to assist parties in resolving disputes.

For example, the Virginia Fair Housing Office (FHO) investigates hous-

ing discrimination complaints for the Virginia Fair Housing Board and the Virginia Real Estate Board. These boards administer and enforce the Virginia Fair Housing Law, which mandates conciliation/mediation efforts, if feasible. When the FHO assigns a fair housing complaint for investigation, it simultaneously forwards a copy to the ADR Section. If conciliation resolves a fair housing complaint, the parties must enter into a conciliation agreement, which closes the complaint.

For fiscal years 2011–12 and 2012–13, the ADR Section received 264 regulatory and fair housing cases for mediation. Parties in 146 of these cases participated, and 95 settled. Settlements included monetary relief, housing, reasonable accommodations/modifications, parking spaces, and training. In addition, settling fair housing cases has prevented parties from enduring lengthy court processes.

Department of Education

by Art K. Stewart, coordinator, Virginia Special Education Mediation Services

In September 1999, the Virginia Department of Education (DOE) began a special education mediation program in response to a federal mandate to address pervasive issues over the identification and provision of services for students with special needs. DOE mediators are familiar with the Individuals with Disabilities Education Improvement Act (IDEA), supporting state law and regulation, Section 504 of the Rehabilitation Act of 1973, and the best practices for educating students with disabilities. DOE mediates about 140 cases per year.

To illustrate, in one case, the parents of a special needs student were generally pleased with their daughter’s current program but thought her past needs were underserved and argued, by counsel, that the IDEA’s standard of free and

appropriate public education had not been met. When the parents asked for nearly 1,000 hours of private compensatory services, the mediator reminded that “[p]eople sometimes focus on good solutions and think only one way is possible.” Concerned that alternative state assessments, which disqualify students from standard diplomas, would limit their daughter’s educational and employment opportunities, the parents happily received information about an array of post-secondary opportunities from the DOE transition coordinator.

In a private caucus, the mediator facilitated the school’s development of a proposal to substitute the parents’ expectations of a private vendor. The mediator encouraged the parents to fully weigh the school’s offer by asking, “What assurance would you need for the fidelity of their program?”

As an agreement developed, the administrator suggested an independent and comprehensive evaluation of the daughter at the school’s expense. This created a welcome new opportunity to shed light on the contrasting views of the student’s progress, and the mediation resolved to everyone’s satisfaction.

Community Mediation Centers

by Lawrie S. Parker, director of Piedmont Dispute Resolution Center

In a 2012 Mediation Month address, Virginia Supreme Court Justice William C. Mims credited the Mediation Center of Charlottesville for its positive impact on society. Because culture steers legislation, and because the community mediation center’s work changes the way people interact with one another, he stated that the center drove social norms and social policy. Indeed, community mediation centers are the backbone of

Mediation continued on page 35

Mediation continued on page 31

mediation in Virginia, having played a key role in the early development of ADR, and continuing to influence its trajectory today.

In 1982, Virginia's first nonprofit mediation organization, Harrisonburg's Community Mediation Center (now The Fairfield Center), was created. Today, nine nonprofit community mediation centers exist across the commonwealth, most of which pre-date, and advocated for, the 1993 dispute resolution statutes. Many of today's certified mediators owe their first mediation training and experiences to at least one of these centers.

The term "community mediation" suggests a limited focus on the traditional mediation process. Virginia's centers, however, encompass a broad range of services ranging from consensus building and conflict coaching to large public dialogues and organizational-wide dispute systems design, to preemptive high-risk violence interruption, to restorative and reconciliation processes. These services have developed in response to environmental scans, collaborative partnerships, specialized training, and stakeholder feedback. They target specific populations and address local needs. Early conflict prevention services, as well as court-referred and private-referred mediation enable community members to pursue a range of decision-making strategies, which eases the burden on the judiciary. This incorporates a broad range of neighborhood, community, and workplace perspectives, which help parties reach resolution.

By 2001, the centers joined together to form the Virginia Association for Community Conflict Resolution (VACCR). Together, these centers provide education and conflict resolution services to increase the capacities of families, individuals, youth, organizations, and neighborhoods to effectively resolve conflicts themselves.

Community Mediation Centers

Apple Valley Mediation Network—
Woodstock
Fairfield Center—Harrisonburg
Northern Virginia Mediation Service—
Fairfax
Piedmont Dispute Resolution Center—
Warrenton
Mediation Center of Charlottesville—
Charlottesville
Peaceful Alternatives Community
Mediation—Madison Heights
CMG Foundation—Richmond
Conflict Resolution Center—Roanoke
Better Agreements—Blacksburg

Mediation in the Private Sector

by John B. McCammon, attorney, president, and founder of The McCammon Group, Richmond

It seems like only yesterday that "mediation" was confused with "medication" or "meditation." When The McCammon Group opened in June 1995, the bar worried that mediation would impede the attorney-client relationship. The McCammon Group handled a whopping four cases that first month.

After that slow start, the pace quickened. By 2004, McCammon's case numbers exceeded the number of jury trials in the circuit courts. Since 1995, the total settlement amount of McCammon cases approximates \$5 billion. This illustrates how fast ADR has evolved in the private sector. These developments, in turn, have profoundly affected the public sector by freeing up judicial resources.

Several factors motivated this sea change.

First, Chief Justice Harry L. Carrico set the tone through the Futures Commission by establishing ADR in our legal system. The Supreme Court of Virginia responded to this mandate by promulgating training standards, ethics, and mediator certification.

Second, the quality of ADR processes provided by private sector professionals has been significant. Mediation can salvage or improve relationships, enhance lawyer negotiation skills, and foster greater understanding of unsettled cases for subsequent disposition. The underlying reason for the transformational impact of mediation is simple: it works. However, it takes a strong mediator and process to make that happen consistently. The McCammon Group, for example, settles 83 percent of its cases.

Third, the professionalism of the bar has been critical. Because Virginia lawyers recognize that a quality mediation process can produce settlements at a substantial rate, they have embraced this tool to serve their clients' increasing needs and demands.

Today, mediation is a cornerstone of the legal framework within which people, businesses, and governmental entities resolve their disputes. As the population grows and the complexity of society increases amid today's concerns about debt reduction and cost-cutting at the federal, state, and local levels, there will be more constraints on judicial resources. Accordingly, the private sector will have increasing opportunities to provide the excellent service that has fueled the dramatic growth of ADR.