

# ADR in Criminal, Civil, and Family Law

## Restorative Justice: Providing Accountability for Crimes and Resolution for Victims

by Megan G. Johnston, executive director of Northern Virginia Mediation Service

Most lawyers do not consider ADR in the criminal context. In Virginia, however, “restorative justice” has grown to complement traditional judicial processes and, in some cases, provide an early intervention alternative. Numerous courts, schools, and communities are expanding the interpretation of justice beyond judicial sanctions to include the reparation of harm and a broader interpretation of accountability.

Restorative justice processes foster accountability and repair harms by promoting resolution and satisfaction for victims while holding responsible those who caused the injury. They reach beyond punishment to encourage healing and the prevention of future offenses, while providing a safe environment for victims to be heard.

Community involvement is critical to restorative justice. While court-referred mediation comprises only those directly involved in a conflict, restorative justice includes other stakeholders, such as affected community members: police officers, court or school staff, victim and offender supporters, and family members. Each can say how they were harmed, and each contributes to an agreement to repair that harm. Restorative justice produces highly effective and creative resolutions linked directly to the offense. Accordingly, these outcomes reinforce accountability, resolve matters, and repair harms.

For example, in one case, two teenagers trespassed and defaced property by spraying graffiti on railroad trestles, their first offense. After being caught, the boys accepted responsibility,

and the juvenile court intake officer offered restorative justice as a diversion option to an administrative hearing with sanctions. The teenagers and their parents agreed to a restorative justice conference, along with a railroad representative and several residents of the adjacent neighborhood. Ultimately, the boys repaired harm to the railroad and the neighbors by cleaning the graffiti during their spring break and participating in a video sponsored by the railroad. The boys acknowledged their understanding of the graffiti’s impact to the railroad and the neighbors.

Overall, the experience of restorative programs in the commonwealth has been positive, although quantitative data is limited. These programs are gaining traction through the use of restorative justice conferences, circles, victim-offender mediation, and community boards in the commonwealth, including the Blue Ridge, Central Virginia, Northern Virginia, Piedmont, Richmond, and Shenandoah regions.

Virginia has many experienced restorative justice facilitators and program managers working to expand their services in collaboration with courts, police, schools, community groups, non-profit organizations, and local and regional agencies. Programs began in 1996, and a conservative sampling of seven programs show service of more than 3,000 cases and more than 13,000 clients to date, including 292 cases and 1,144 clients in 2012. Restorative justice in Virginia is small by the numbers, yet large in impact.

## Motions Conciliation

by Samuel S. Jackson Jr., former chair of the Joint ADR Committee, 2010 to 2012

While ADR is most often used to settle an entire lawsuit, it can also be employed to resolve parts of the suit. “Motions conciliation” is a novel process used in several northern Virginia courts in which a neutral person assists parties and counsel in resolving pre-trial motions.

Initiated more than fifteen years ago by the Fairfax Bar Association, motions conciliation has become a fixture in Fairfax County’s Circuit and JDR Court motions practices. Conciliation is also used in the courts in Prince William County.

Conciliators are experienced litigators who volunteer to help parties and their counsel resolve pre-trial motions disputes without charge to the parties. Conciliators are typically present at the courthouse during the motions docket and often available to confer with the parties or counsel by telephone prior to the day of their motion.

A typical pre-trial dispute involves discovery issues. A neutral conciliator can facilitate a fruitful discussion about whether a party really needs all of the information or documents requested or whether the objections of the other party are appropriate and will succeed in court. The conciliator can also help lower the temperature between counsel. One attorney commented that “it is harder to posture in front of a neutral, who after all is volunteering his services.”

Thus, conciliation fosters professionalism in the bar.

Conciliation also lightens the court's motions docket. Some motions are completely resolved, resulting in a consent order. The conciliator may also help reduce or narrow the issues raised in a motion, allowing the court to focus on the remaining items in contention.

Conciliation "has significantly aided in resolving many motions on my docket when I needed it the most," said Fairfax Circuit Judge Lorraine Nordlund.

Conciliation is particularly useful for pre-trial motions in family cases, such as *pendente lite* motions for support. Often, one or both parties may be pro se. These parties may want to resolve the matter, but they may not know how or may be distrustful of each other. "With the help of a conciliator," Judge Craig D. Johnston of the Prince William County Circuit Court has observed, "they can often reach a resolution not only of the matter which brings them to court on the motion, but other matters as well, and can often achieve a more creative and global solution than a judge could order."

Some disputes, such as demurrers or instances when counsel lacks settlement authority, are inappropriate for conciliation and must be decided by the court.

Like mediation, conciliation is voluntary and confidential, see Va. Code § 8.01-576.10, but conciliation is less formal than mediation and typically takes less time.

The success of these programs stems from the support of judges and volunteers. During the period of July 2005 through June 2012, there were more than 3,600 conciliations in the Fairfax County courts, and on average, 78 percent of the matters conciliated were resolved, according to Sonya M. Duchak, who coordinates that program. James Scott Krein, who heads the Prince William County program, confirms that an "overwhelming" number of conciliated motions there are resolved.

Both bars have supported volunteer conciliators through CLE programs that introduce techniques for resolution of motions and that sensitize conciliators to the ethical issues involved in serving as a neutral.

## Healthcare Mediation

by **Jeanne F. Franklin, certified mediator and attorney, EADRSolutions®; vice chair of the Joint ADR Committee**

The management of conflict and specific disputes in healthcare is absolutely essential for survival and quality of care reasons. Healthcare lawyers should be ready to lead their clients into and through early conflict resolution and problem solving processes. In fact, The Joint Commission, which accredits healthcare facilities, requires that they develop and use a conflict policy including training about how to engage it.

The healthcare industry involves many moving parts, and there is not a uniform culture among its stakeholders. There are honest and often valid differences of opinion. Creating alignment and collaboration among these stakeholders as implicitly called for by health reform begs for more effective resolution of conflict. Cultural differences within the medical community and with consumers can affect the substance of medical care decision-making, end of life issues, communications, teamwork and outcomes, and patient satisfaction. Interest-based mediation skills are increasingly valuable to address a range of healthcare disputes, not simply medical malpractice claims. For example, they can enhance quality negotiations during purchase of a physician practice with potential for a more enduring employment relationship. A health system merger may be followed by recognition that the medical staffs have significantly different outlooks; using such skills and process can promote better alignment. The greater the credibility and skill of those facilitating transparent, good faith communications, the more

likely that essential adjustments will slowly take root. Trust and buy-in take time to build.

Effective skills training within healthcare organizations is key. It empowers those who must exercise leadership, practice problem solving, and maintain effective communications. Interdisciplinary training (bringing together administrators, board members, physicians, nurses, and health lawyers in an immersion-like course) introduces groups that must work together to the concepts of mediation, conflict management, and improved communication, and allows practice in simulated "real-life" healthcare disputes. Familiarity, confidence, and trust in the idea helps leaders build conflict management into daily operations.

## Veteran Benefits from Mediation

by **Merri L. Hanson, certified mediator, Peninsula Mediation & ADR**

As veterans return stateside in increasing numbers, so does their need to resolve legal disputes in a manner that understands their experiences and capacities. One of the core principles of mediation is that participants ultimately know best how to resolve their own problems. This is the principle of self-determination, which is not just for the unusually bright and self-controlled, but hinges on capacities that we each have. Many veterans suffer from physical and psychological injuries that impede their ability to communicate clearly, particularly in court. Mediation, with its focus on self-determination, is particularly beneficial to veterans in any conflict, whether it relates to domestic relations, health care, landlord/tenant disputes, or other issue. Indeed, many mediation companies and centers have necessarily become adept at handling veterans as clients.

Mediators can employ the process to overcome or remove barriers to participation in mediation, whether they be physical, communication, or cognitive,

(i.e., PTSD or TBI). A skilled mediator can facilitate higher quality communication between disputing parties than they could otherwise achieve on their own. Where litigation can demoralize and make veterans with disabilities feel further marginalized and out of control, mediation can shape conflict outcomes in a collaborative way. This is particularly important for situations where veterans need to have ongoing relationships with others in the dispute.

## Collaborative Practice

by Kimberly P. Fauss, attorney and mediator, Richmond; Joint ADR Committee council member

Collaborative practice (CP) has become available throughout the commonwealth. Lawyers, financial specialists, and mental health professionals trained in CP work in teams to assist clients with the legal, financial, and emotional aspects of family law and other civil matters. This year the statewide organization, Virginia Collaborative Professionals (VaCP), partnered with the Collaborative Practice Training Institute to offer the first Virginia statewide collaborative basic team training, which added another seventy professionals to the hundreds already trained in the state. VaCP supports nine regional practice groups and will be offering its sixth annual program this November in Charlottesville. Virginia reflects the growing movement worldwide with the International Academy of Collaborative Professionals reporting 5,000 members in twenty countries.

Clients are informing themselves and desire meaningful participation in the restructuring of their lives. The collaborative process provides this opportunity. The collaborative team, selected by the clients, works with each client to help understand the issues, evaluate creative options, and develop a customized, future-oriented plan. The commitment

of collaborative professionals to withdraw if the matter falls into litigation keeps the team focused. Interest-based settlement agreements are achieved in more than 90 percent of cases.

The ABA issued Opinion 07-447 in 2007 on the ethical validity of CP. Two years later, after a rigorous drafting process, the Uniform Law Commission produced the Uniform Collaborative Law Act (UCLA), which sets forth the basic elements and protections of CP. To date, six states and the District of Columbia have adopted the UCLA, two more states have other laws on collaboration, and the UCLA is on the legislative agendas in another four states this year. VaCP works with bar organizations, as well as professional associations of financial and mental health practitioners, to ensure the competent, responsible, and effective representation of clients. The next horizon is to educate referral sources for clients in need of dispute resolution services on the viability of the collaborative option.

## Elder Mediation

by Morna P. Ellis, attorney and certified mediator, CMG Foundation; Joint ADR committee council member

The elderly face difficult decisions as they live longer. They must decide on their future care and living arrangements, and grapple with inheritance and estate planning for their children and the impact of these decisions. They must balance their safety with their independence. These tough choices often cause family friction. As with most family disputes, emotions run high, issues are complex, and a “one-size-fits-all” solution never fits.

Many families turn to elder mediation to resolve these issues. The process is confidential, and its goal is to preserve family ties. The mediator facilitates a healthy dialogue that encourages families

to listen and hear each other, including the voice and wishes of the elder. A skilled mediator can also prevent relatives from “pushing each others’ buttons” and constructively focus on the underlying issues. This encourages out-of-the-box thinking and problem solving. Mediation is a creative process that can address the complexities of family dynamics along with the legal and financial intricacies.

As baby boomers grow older, the elder population will continue to increase, as will the number of elder disputes. Mediators who specialize in elder issues are ideal for helping families solve their disputes and preserve these important family ties.

### Family Law: Cross-border Mediation

Globalization has encouraged partnerships between people from different cultures, different customs and faiths, and across different borders. This has added a new dimension to family law and increased its complexity. Cross-border mediation targets the intricacies of custody and visitation concerns for this new global family and focuses on the well-being of the child. Because of its flexible nature, mediation can balance tough cultural issues, legal complexities, and help give voice to domestic violence victims. The Hague increasingly encourages its use in international parenting kidnapping cases and their prevention.