

# THE MARYLAND BAR

JOURNAL

Volume XXXXI • Number 2

March/April 2008



Protecting  
*the*  
Elderly

# MARYLAND BAR

## JOURNAL

Published bimonthly by the  
**Maryland State Bar Association, Inc.**  
 The Maryland Bar Center  
 520 W. Fayette St.  
 Baltimore, Maryland 21201  
 Telephone: (410) 685-7878  
 (800) 492-1964  
 Website: [www.msba.org](http://www.msba.org)  
 Executive Director - Paul V. Carlin  
 Editor - Janet Stidman Eveleth

Design - Alter Custom Publishing  
 Art Direction - Jason Quick  
 Advertising Sales - Network  
 Publications

Subscriptions: MSBA members receive  
 THE MARYLAND BAR JOURNAL  
 as \$20 of their dues payment goes to  
 publication. Others, \$42 per year.  
 POSTMASTER: Send address change  
 to THE MARYLAND BAR  
 JOURNAL, 520 W. Fayette St.,  
 Baltimore, MD 21201.

The *Maryland Bar Journal* welcomes  
 articles on topics of interest to  
 Maryland attorneys. All manuscripts  
 must be original work,  
 submitted for approval by the  
 Special Committee on Editorial  
 Advisory, and must conform to the  
*Journal* style guidelines, which are  
 available from the MSBA headquar-  
 ters. The Special Committee reserves  
 the right to reject any manuscript  
 submitted for publication.

Advertising: Advertising rates will be  
 furnished upon request. All advertis-  
 ing is subject to approval by the  
 Editorial Advisory Board.

**Editorial Advisory Board**  
 Elizabeth M. Kameen, Chair  
 James B. Astrachan  
 Courtney Blair  
 Ann Norman Bosse  
 Marcella A. Holland  
 Louise A. Lock  
 Gary Norman  
 Victoria Henry Pepper  
 Mary Langdon Preis

**MSBA Officers (2007-2008)**  
 President - Alison L. Asti  
 President-Elect - Kathy Kelly Howard  
 Secretary - Thomas C. Cardaro  
 Treasurer - John Patrick Kudel

XXXXI • Number 2

March/April 2008

## Features

### Protecting the Elderly

Community Care for Long-Term Care Needs:  
 Medicaid Home and Community Based Waivers **4**  
*by Mindy Morrell and Laurie S. Frank*

Senior Mediation Reaching the Tipping Point **12**  
*by Robert J. Rhudy*

A Most Powerful Tool - Supplemental Needs Trust **20**  
*by Lawrence Adashek and Imtiaz Jindani*

Global Analysis: Social Insurance to  
 Pay for Long-Term Care **26**  
*by Jason A. Frank and Melissa Baum*

Medicaid Eligibility After the 2005  
 Deficit Reduction Act **32**  
*by Morris Klein*

Carrots, Sticks and Landmines: Uniform Power  
 of Attorney Act **38**  
*by Michael W. Davis and Richard F. Lindstrom*

Level of Care Standard: Maryland Medical Assistance  
 Long-Term Care and Medical Eligibility Issues **44**  
*by Melissa Baum and Jason A. Frank*

New Law School Dean Customizes Legal Education **50**  
*by Janet Stidman Eveleth*

### LAW AND LITERATURE

*A Man for All Seasons*: Heroism in "the Thickets of the Law" **54**  
*by Stephen H. Sachs*

## Departments

### Attorney Grievance Commission

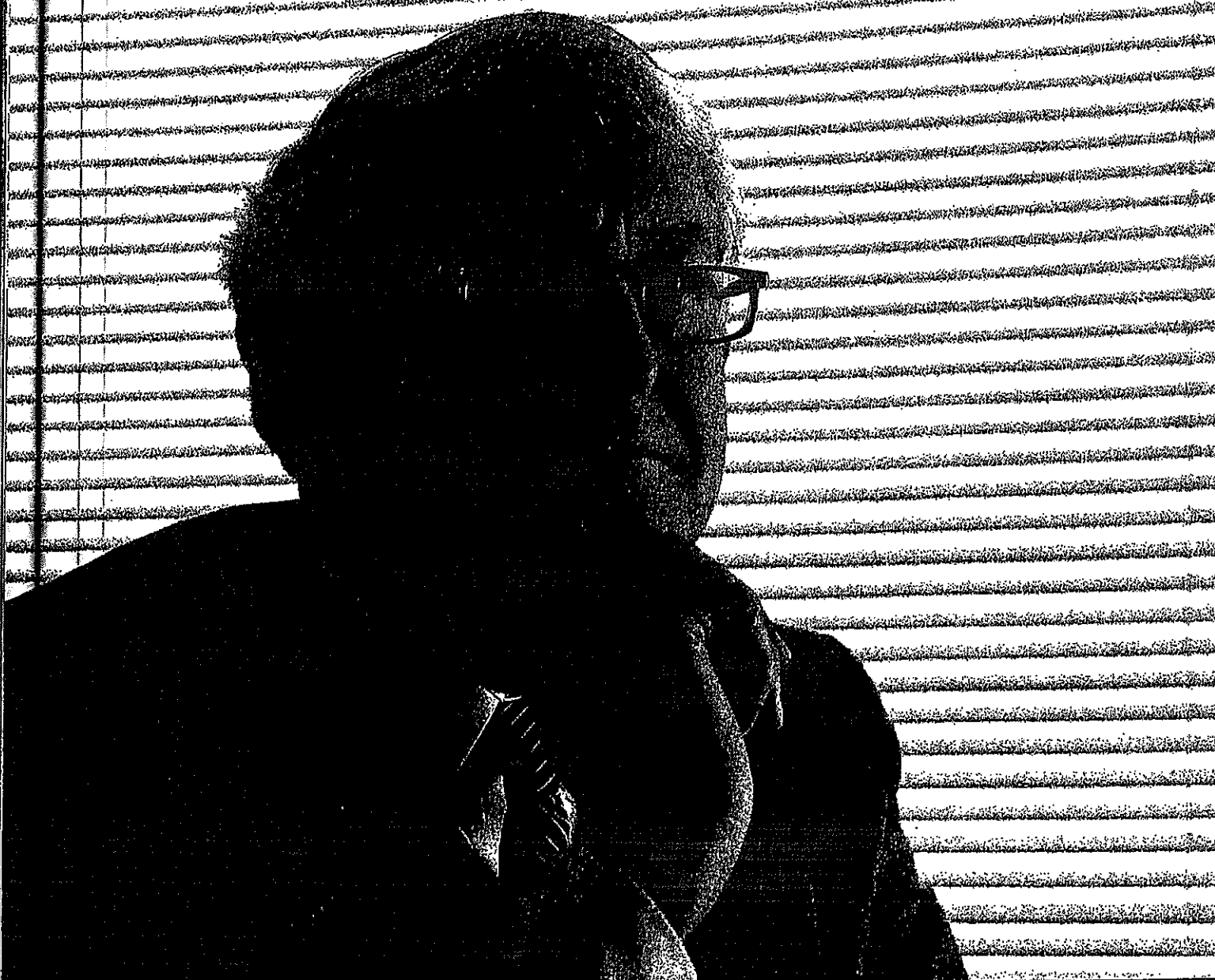
*Discipline in Other States* **59**

### Ethics Docket

*Is Ex Parte Contact with Subsequent Treating Physician a Violation?* **61**

Statements or opinions expressed herein are those of the authors and do not necessarily reflect those of the Maryland State Bar Association, its officers, Board of Governors, the Editorial Board or staff. Publishing an advertisement does not imply endorsement of any product or service offered.

# Senior Mediation Reaching the



By Robert J. Rhudy

# Tipping Point

The Maryland Department of Aging has been working since 2005 to promote the development and use of mediation and related services to help avoid, prevent and resolve conflicts involving older persons, their families and others in a wide range of issues. Persons working on the "Maryland Senior Mediation Project" have sought to define "senior" or "elder" mediation, and have provided senior mediation workshops and trainings to hundreds of persons around the state. Maryland mediators are providing services in family caregiver planning and conflicts, contested guardianship disputes, housing, assisted living, nursing home conflicts, neighbor disputes and other matters involving older persons.

Activities to promote and develop senior mediation began over twenty years ago around the United States, but with limited success until very recently. Maryland is currently one of the leading states in the country in senior mediation development, and appears to be approaching the point where the use of mediation and related services in matters affecting older persons will become more common

and wide spread. Recent experience indicates that mediation can be a very useful tool to help with very difficult, complex and emotional decisions involving the conflicts that confront older persons, their families and others, and the attorneys and other professionals who serve them.

This article will briefly describe senior mediation. It will discuss the development of senior mediation nationally, describe the Maryland Senior Mediation Project and identify activities underway in other parts of the country to promote senior mediation. The article will provide some framework for elder law and other attorneys who have substantial contact serving older persons and to use when deciding whether, when and how to assist their clients in considering the use of mediation in appropriate circumstances.

## Mediation's Growth in Maryland

While most lawyers have at least some general understanding of mediation

and other related "alternative" dispute resolution approaches, there is still limited public knowledge about the field. In 1998, Chief Judge Robert M. Bell, Maryland Court of Appeals, created and chaired a Maryland Alternative Dispute Resolution Commission of lawyers, judges, mediators, professors, legislators, government officials, business leaders and others to review the status of alternative dispute resolution in Maryland, examine "best practices" around the country, and issue a report of findings and recommendations on how to advance the appropriate use of alternative dispute resolution in the state.

Chief Judge Bell and the Commission issued its report, *Join the Resolution: The Maryland ADR Commission's Practical Action Plan*, in December 1999, following extensive public presentations and hearings through the state. The report made nearly one hundred recommendations to advance the use of mediation and other ADR processes in courts, schools, neighborhoods, businesses,

government agencies and other areas. In early 2000, Chief Judge Bell established and chaired the Maryland Mediation and Conflict Resolution Office (MACRO) as an agency of the Maryland Judiciary to implement the recommendations of the Commission and otherwise promote ADR in the state. Maryland Mediation and Conflict Resolution Office, *Consumer's Guide: Alternative Dispute Resolution (ADR) Services in Maryland*, 3rd Ed., 2007, p. 11.

MACRO's *Consumer's Guide* defines mediation as "a process in which a trained neutral, a mediator, helps people in a dispute communicate and understand each other, and if possible, to reach agreement." (p. 8) Mediation is further described as a voluntary and confidential process which resolves around the principle of self-determination. The *Guide* indicated that the cost of mediation varied depending upon the program or source of services. In some court, government and community programs, fees were either free or based on a sliding fee schedule. However, in some court programs and in private mediations, the cost will likely be on an hourly basis and typically divided among the participants.

Since the creation of MACRO in 2000, the use of mediation and other ADR approaches have expanded very substantially in many conflict areas involving family matters, business disputes, civil claims, juvenile and criminal justice, neighborhood conflicts and other issues. Prior to 2005, however, neither the ADR Commission nor MACRO made mention of or took action regarding the promotion or use of mediation relative to older persons as a class or in issues of particular relevance to older persons.

## Why Senior Mediation?

In September 2004, this writer began

investigating whether mediation was being used by older persons or encouraged in any significant way in Maryland. The investigation centered on conversations with leading private mediators, directors of community mediation centers, leading elder law attorneys, various judges and staff of the Administrative Office of the Court, and staff at the Maryland Department of Aging (MDoA). There had been little effort to promote mediation to older persons, and research indicated that seniors were using mediation to a much lesser extent than younger adults.

Beginning in the early 1980s, there had been various efforts by a few persons and leading organizations around the country to promote and provide senior mediation services. Such work principally involved persons at AARP, the American Bar Association's Commission on Legal Problems of the Elderly (renamed the Commission on Law and Aging), The Center for Social Gerontology (Ann Arbor, Michigan), and the Montgomery County (Pennsylvania) Community Mediation Center's Elder Mediation Project.

Some of the early interest in senior mediation focused on aging persons with various kinds of disability. The likelihood of having a disability increases with age. In 1999, the U.S. Administration on Aging reported that more than half of the population of persons aged 60 or older reported having at least one disability, and one-third had at least one severe disability. In 1988, in *The Coming of Age*, the American Bar Association's Commission on Legal Problems of the Elderly reported on studies as early as 1980 that recommended the potential value of mediation in matters affecting disabled older persons.

In 1990, Congress encouraged the use of alternative dispute resolution approaches for resolving Americans

with Disabilities Act disputes. (41. U.S.C. Section 12212). In 1995, the AARP, with support from the ABA Commission and others, produced a guide to mediation named, *Stop! You're Both Right*, authored by seniors, and in that same year, the AARP and the Washington, D.C.-based Dispute Resolution Coalition on Aging and Disability sponsored a national conference, "Collaborative Approaches: Disability, Aging and Dispute Resolution."

In 1997, the ABA Commission reported on a three-year project supported by the AARP Foundation and other private foundations to use mediation in resolving care conflicts in nursing homes. Naomi Karp & Erica Wood, *Keep Talking, Keep Listening: Mediating Nursing Home Care Conflicts*. Projects were initiated during this same period to test mediation in resolving bioethical disputes in acute care settings and resolving consumer disputes with managed health care providers, among other areas.

In 1998, the ABA Commission used funding from the William and Flora Hewlett Foundation to promote the development of four state or regional collaborations on aging, disability and dispute resolution. In Naomi Karp & Erica Wood, *Building Coalitions in Aging, Disability and Dispute Resolution* (2000), the Commission reported:

With the "graying of America" and the increased incidence of disabilities, conflicts involving the elderly and disabled populations will multiply. ... Dispute resolution resources offer great potential for assisting older persons and persons with disabilities in resolving conflicts in humane, lasting, expeditious, cost-effective and often empowering ways. (Executive Summary, p. vii)



Of the four pilot projects evaluated, the Elder Mediation Program of the Montgomery County Mediation Center, Norristown, Pennsylvania, has had the greatest, continuing success. See, M. Mathes & K. Mariani, "Elder Mediation: A Community Mediation Center's Initiative, 5 ADR Report 8 (2001).

The Center for Social Gerontology (TCSG), Ann Arbor, Michigan, was established in 1972 to promote research, program support and policy development on the needs of older persons. Since 1985, it has served as a national consultant to the U.S. Administration on Aging. In the early 1990s, TCSG began developing, supporting and evaluating pilot projects in seven locations around the country to provide mediation in contested, adult guardianship proceedings. In *Evaluating Mediation as a Means of Resolving Adult Guardianship Cases* (2001), a report submitted to the State Justice Institute, TCSG stated:

In court, the question is whether there is sufficient evidence to show that the party meets the legal definition of incapacity. In mediation, a legal finding of capacity or incapacity is not the issue. Rather the issue may be whether there are ways that a person can reduce risks to health and safety within a context of dignified autonomy. (P. 8)

TCSG reported that, based on its evaluations of adult guardianship mediation programs in four jurisdictions (Ohio, Florida, Wisconsin and Oklahoma), it found that agreements were reached in 50 percent to 75 percent of the cases mediated, and that the parties in mediation, as well as their attorneys and court representatives, indicated a generally high level of satisfaction with the process. (*Ibid.*) Beginning in 2001, TCSG

expanded its scope to promote the use of mediation in family caregiver decision-making and conflict resolution in model projects in several states in an effort to help seniors and families arrive at collaborative arrangements rather than resort to court-ordered guardianships.

### Maryland Senior Mediation Project

This writer received substantial support from the ABA Commission, the AARP, TCSG, and the Montgomery County (Pennsylvania) Mediation Center's Elder Mediation Project in developing a proposal for MDoA to submit to MACRO in November 2004, to establish the "Maryland Senior Mediation Project." The MDoA proposal stated:

The purpose of this project is to expand the provision of mediation and other appropriate alternative dispute resolution services to senior citizens in Maryland. Persons 60 years of age and over constituted approximately 15.12 percent (801,036) of the state's population as of the 2000 census, and this population is projected to grow substantially (26.67 percent, 1,709,921) over the next twenty-five years. Seniors have conflicts in numerous areas that could potentially be assisted or resolved through mediation and alternative dispute resolution.

Many types of conflicts involving seniors are shared with the general population, such as general family, neighbor, consumer, employment, public agency, and rental housing disputes. Others are more specialized to the senior population, such as caregiver and family living decisions, guardianship alternatives and determinations, grandparent issues (visitation following divorce, grandparents as

custodians or guardians with conflicts with local schools, medical care, and supervision of grandchildren), advance directive decisions, age discrimination, health care, and other decisions. MDoA, Grant Application to MACRO, P. 2, November 19, 2004.

The MDoA grant application included commitments of support from the Maryland Association of Area Agencies on Aging, the Maryland Association of Community Mediation Programs (renamed Community Mediation Maryland), the Legal Aid Bureau and The Center for Social Gerontology (with support from the U.S. Administration on Aging). The project proposed expanding senior mediation through "increased collaboration with involved public and private organizations, publicity, information and referral, development, and provision of training to referral organizations and mediation providers (community mediation centers and others), and oversight and evaluation to determine how such increased publicity, referral, and mediation approaches are working and need to be amended." (Grant Application, p. 1)

MACRO provided \$49,000 to MDoA for the project for 2005-2006, followed by a second grant to MDoA of \$40,000 in 2006-2007. Starting in November 2007, MACRO has continued support for senior mediation development through a grant of \$51,900 to Senior Mediation and Decision-Making, Inc. (SMDM), a new Baltimore-based nonprofit organization created to promote senior mediation and related services in Maryland and around the country.

MDoA convened a "Maryland Senior Mediation Project Stakeholder Workshop" in Columbia, Maryland on May 16-17, 2005 for fifty stakeholder representatives throughout Maryland. Groups represented included state and local departments

of aging, mediators, social services agencies, courts and public and private elder law attorneys. The goals of the workshop were to collaboratively develop a shared vision for a high quality Maryland senior mediation system that is accessible to all persons regardless of income and resources, and to collaboratively develop a working plan to achieve that vision.

The workshop deliberations produced a work plan to develop and provide appropriate senior mediation training, information and referral systems, public education and information, court and bar relations, and other activities to advance and evaluate the provision and use of senior mediation in appropriate circumstances.

In seeking to develop a high quality senior mediation service, the Maryland project developers have given particular attention to the "Model Standards of Conduct for Mediators," adopted and promulgated jointly in August 2005 by the American Bar Association, the American Arbitration Association and the Association for Conflict Resolution. Particularly relevant standards include (among others):

(1) "A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome." (Standard I. A.)

(2) "A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the party. ... A mediator should attend educational programs and related activities to maintain and enhance the mediator's

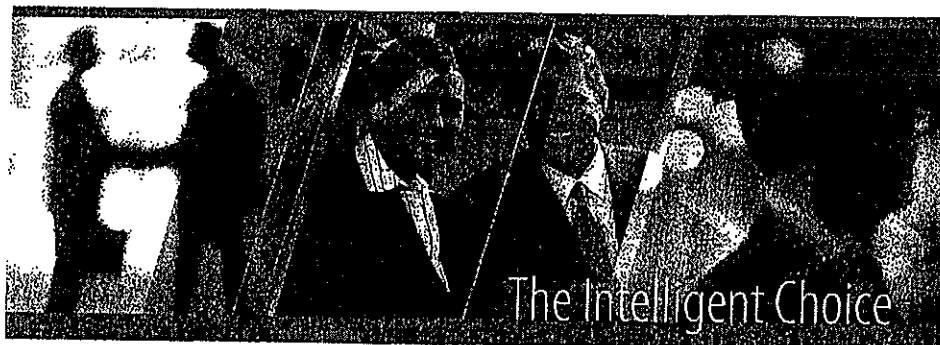
knowledge and skills related to mediation." (Standard IV. A.)

(3) "If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination." (Standard VI. A. 10.)

In brief, the essence of high quality senior mediation requires a mediator to develop an understanding of aging, including an awareness of ageism and age discrimination. A central objective of mediation is to provide a process and a setting to promote the greatest possible participation of all involved parties in coming to informed

decisions and agreements. The mediator should be aware of any possible circumstances, including mental, physical, emotional, cognitive or other factors that any party may have, that may limit his or her ability to participate and seek to provide appropriate accommodations (time, place and duration of mediation; visual and hearing aids, support persons and surrogates, etc.) to support maximum participation. The mediator should develop an adequate substantive understanding of the matters under consideration to assist the parties in developing the information they need to reach informed choices.

Since the project began in February 2005, project staff and partners have provided a large amount of senior mediation training, beginning with a 3-day "Maryland Adult Guardianship and Family Caregiver Mediation Training" on December 12-14, 2005 presented to 34 mediators and court



## Business Valuations Investigative Accounting Commercial Damages Forensic Litigation Support



For more information, contact:

Barry Bondroff @ 410-512-3000 or [bbondroff@smartgrp.com](mailto:bbondroff@smartgrp.com)

Chuck Faunce, ASA, CDBV @ 410-512-3110 or [cfaunce@smartgrp.com](mailto:cfaunce@smartgrp.com)

Barrie Drum @ 410-512-3167 or [bdrum@smartgrp.com](mailto:bdrum@smartgrp.com)

Accounting and Assurance | Business Advisory | Business Consulting | Compensation and Benefits | Financial Advisory | Tax

[www.smartgrp.com](http://www.smartgrp.com)

and aging service leaders based throughout Maryland. During 2006 and 2007, project staff provided half-day AARP-supported "Mental and Physical Aspects of Aging" training to approximately 120 community and private mediators at four locations around the state, and several one-day training sessions to mediators,

community mediation center intake staff, state and local department of aging staff, judicial staff and others.

Project staff have made a very substantial number of presentations to numerous other aging, mediation, and bar groups and meetings, including a workshop in June 2006, jointly sponsored by the Maryland State Bar

Association's Elder Law Section and the Alternative Dispute Resolution Section at the MSBA Annual Conference, to the MSBA Elder Law Section and the MSBA Alternative Dispute Resolution Section. Other workshop presentations included one at the National Aging and Law Conference in November 2006, and the American Bar Association's Annual Alternative Dispute Resolution Conference in May 2007. Project activities and goals have further been publicized in numerous publications, including R. Rhudy & C. Rodis, "Expanding Mediation for Seniors and Their Families," 4 *ACResolution* 30 (Washington, D.C., Summer 2005), and R. Rhudy, "How Senior Mediation Can Help Your Clients," *MSBA Elder Law Newsletter* (Maryland State Bar Association, April 2006). In late 2007, MDoA distributed 30,000 brochures entitled "Mediation Services for Older Adults" which describe how to get services to local departments of aging, senior centers and other locations around Maryland.

In June 2006, the Circuit Court for Baltimore County began to routinely refer parties in contested adult guardianship cases to mediation. The Howard County Circuit Court has also used mediation in contested adult guardianship cases beginning in 2006, and the Baltimore City Circuit Court is working with staff from the Maryland Senior Mediation Project, Baltimore City's Community Mediation Program (CMP), and Baltimore's Commission on Aging and Retirement Education to promote mediation in appropriate guardianship and related proceedings.

In late 2007, The Baltimore Community Foundation and the Stulman Foundation made grants to CMP to support increased senior mediation services in Baltimore. Surveys conducted by the project staff





have confirmed that mediations involving older persons and their families have increased fairly substantially over the past three years in Maryland.

With MACRO grant funding beginning November 2007, Senior Mediation and Decision-Making, Inc. (SMDM), intends to provide additional senior mediation training, continue working with courts, local departments of aging and community mediation centers to develop screening, referral and intake systems, and begin working with Adult Protective Service offices to increase the use of mediation. By early 2008, SMDM will produce and distribute a "consumer's guide" to senior mediation in Maryland to help older persons, their families, attorneys and others understand senior mediation, identify mediation resources and select local qualified mediators.

### Has Senior Mediation Hit the "Tipping Point?"

Erica Wood, assistant director of the ABA's Commission on Law and Aging and a long time advocate on behalf of senior mediation development, was a presenter at the workshop entitled, "Coming of Age: Senior Mediation in Maryland," on June 26, 2006 at the MSBA Annual Conference in Ocean City. At the conclusion of her presentation, she questioned whether efforts to promote senior mediation services have yet reached the "Tipping Point" of acceptance by the public, bench, bar and other relevant stakeholders. This writer believes that the answer is finally "Yes!"

Maryland and New York are currently in the forefront of activities to implement statewide programs to promote the appropriate provision and use of senior mediation, with work underway in many other parts of the country. The Office of Alternative Dispute Resolution

Programs, New York State Unified Court System, began work in 2005 to promote senior mediation through grants and supportive services to community dispute resolution centers throughout the state. See, Alice Rudnick & Jeff Shepardson, "Elder Dialogue and Mediation: Meeting Intergenerational Needs," *The New York Mediator*, Fall/Winter 2006, p. 8. In 2005, New York Chief Judge Judith S. Kaye established a model guardianship court in Suffolk County, New York, which (among numerous other features), is exploring the use of mediation as a tool to facilitate the resolution of conflicts in such cases. Hon. H. Patrick Leis, III, "The Model Guardian Part—A Novel Approach to Protecting the Interests of Incapacitated Persons," 78 *New York State Bar Association Journal* 3 (June 2006).

In February 2006, The Center for Social Gerontology convened a 2-day conference in Atlanta, Georgia, that led to the establishment of the National Elder Mediation Network (NEMN). To date, NEMN has developed an annotated bibliography of books, law review and mediation journal articles, publications, brochures and other materials concerning senior mediation, and has promulgated draft training standards on senior mediation. See, <http://www.tcsg.org>, on "Senior Mediation."

In 2006, the American Bar Association published the *Legal Guide for Americans Over 50*. The *Guide* recommends that "Many disputes can be addressed through mediation or other means of dispute resolution. ... If mediation does not work, you can still bring an action in court." (293.)

Perhaps the strongest indication that the "Tipping Point" has been achieved is the media's discovery, around 2004, of senior mediation. Newspaper articles

include Nathan Bierma, "Mediators Dealing with More Elder Care Issues," *Chicago Tribune*, March 17, 2004; John Schwartz, "For End of Life, Hospital Pairs Ethics and Medicine," *New York Times*, July 4, 2005; Andrea Siegel, "Mediators from Across the State Learn Ways to Settle Conflict Related to Aging," *Baltimore Sun*, December 14, 2005; Maggie Jackson, "Mediators Base Decisions on Elders," *Boston Globe*, December 3, 2006; and "Mid-Shore Mediation Center offers elder mediation," *The Star Democrat* (Easton, MD), May 16, 2007.

Recent, national television coverage includes "Mediation Resources for Caregivers," CBS *Evening News with Katie Couric*, CBS Television Network, New York, February 20, 2007; "Love, Care and the Inevitable Arguments: Mediators Can Provide a Welcome Rational Approach to Realities of Elder Care," *World News Tonight with Charles Gibson*, ABC Television Network, New York, June 28, 2007; and "A New Approach to Caring for the Elderly," *ABC News Online*, August 23, 2007.

### Conclusion

Since the beginning of the Maryland Senior Mediation Project in 2005, the provision and use of mediation by older persons and their families has been expanding around our state. Maryland is a leader in developing senior mediation services, which are expected to continue to grow in this state and around the country as the aging population grows, and as courts, attorneys, aging organizations and the public understand how mediation can assist in planning, decision-making and conflict resolution in a wide range of issues.