



Practice Tip:

By Jonathan S. Rosenthal+

Mediations and settlement conferences have at least two things in common: they both might have caucuses (sometimes referred to as *private sessions*) and they both have confidentiality implications, although to different degrees. And both of those elements are the subject of this edition of Practice Tips.

In District Court ADR programs, our practitioners, whether conducting a mediation or settlement conference, may decide that a caucus is an appropriate or necessary as part of the ADR process. And when used, at some point the practitioner will have to describe the caucus to the participants. It is during this description that “confidentiality” within the framework of a caucus should be discussed. Two questions, then, are **when** should confidentiality be explained in the context of a caucus, and **what** should be said in the explanation?

The When - We believe that confidentiality in caucuses should be mentioned several times during the ADR process. First, when the concept of caucusing is initially broached, either at the beginning of the session (during the neutral’s opening) or immediately preceding the caucus itself. Some practitioners prefer not to mention the possibility of a caucus until it seems one is needed or desired. In that case, confidentiality in a caucus needn’t be mentioned until that moment. If, however, during your opening to the process you prefer to mention the possibility of a caucus, you should at least cursorily mention that there is another layer of confidentiality beyond that which you

have described about the process as a whole. It might sound something like, “and if a caucus is used, we can talk about confidentiality as it applies to caucuses before we actually move into the caucus,” or something to that affect. The idea is that even as you mention confidentiality in the general sense in your opening, you should still note that there is an added layer of

attorneys, if represented), and for the benefit of the neutral. Just what should be said is covered next.

The What - From our perspective, there are two choices. One possibility, and my preferred choice, is to explain that *everything* said in the caucus **may be shared except what the participant wants kept confidential**. This option presumes that all information discussed in the caucus *may be shared* unless *expressly identified* and asked to be kept confidential.

The other option is to explain that *everything* said in the caucus **will be kept confidential except** the thing(s) specifically identified by the participant that may be shared. This option presumes that all information discussed in the caucus *may not be shared* unless *expressly identified* as points to be shared with the other participants.



confidentiality within the caucus itself. Explaining confidentiality prior to moving into a caucus cannot be ignored.

There are two other moments when the neutral should provide an explanation of confidentiality in a caucus, and both of those are during the caucus itself; once as you open the separate session with each participant, and once as you are about to close the caucus with each participant. It is critical that the participants understand what they have given the neutral permission to share *and* not share, with the other side. This is both for the benefit of the participants (and their

Note the difference. In the first option, participants identify the *specific items to keep confidential*, and everything else is free to be shared, thus creating the likelihood that more information may be “shared information” when the participants reconvene in a joint session. In the second scenario, participants identify the *specific items to share*, and keep everything else confidential. The former permits the neutral to utilize her/his skills and experience to determine what, if anything should be shared or held back in order to move the process and the conversation forward. The later is more likely to

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Confidentiality in a Caucus

restrict the neutral in terms of not being able to freely use everything s/he thinks might be helpful in moving the conversation forward. In either case, the participants are involved in determining what to keep confidential.

Surely there is so much more to say about caucusing and confidentiality without a caucus, and space does not allow for the full conversation here. But there may come a time in the near future when a

brown bag lunch or a teleconference may be used to expound on these topics. We hope you'll join us in these discussions.

+ It should be noted that the author mediates from the facilitative framework. This practice tip might not be applicable in the same way for inclusive and transformative mediators.



Upcoming Events

Brown Bag Lunches

Looking for a venue to talk with other ADR practitioners about your experiences? Want to bounce ideas off of your peers? Want to hear from other practitioners about their challenges, strategies, and best practice tips? Well, pack your lunch.



The Brown Bag Lunch series offers our ADR practitioners an opportunity to share their stories. These lunches will last one hour and will be held at a variety of locations throughout the state.

Join other ADR practitioners and ADR staff members for these casual yet informative conversations.

Currently scheduled are:

September 26, Howard County District Court

September 30, Calvert County District Court

October 4, Baltimore City District Court

Peace Walk

Please join the District Court of Maryland ADR Office and the Maryland Mediation and Conflict Resolution Office (MACRO) in a 3k walk around the Inner Harbor of Baltimore to promote the use of conflict resolution in our communities.

“Join the Resolution: Walk for Peace in Our Communities” will help us kick off Conflict Resolution Month in October. This family friendly event is designed to raise awareness about the benefits of using mediation, community conferencing, and other conflict resolution processes. Join us for music, snacks, and fun!

When: October 1, 2011
from 9 a.m.– 12 p.m.

Where: Rash Field,
Baltimore City

* Parking is available at
Rash Field.



Walk for PEACE
in our communities

Walk for Peace, Register at www.tinyurl.com/adwalk