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CONFIDENTIALITY IN DISPUTE RESOLUTION

A New York Guide

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Expanding Horizons:
Practice, Theory and Research
in Dispute Resolution

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"A secret ceases to be a secret if
it is once confided -- it is like a dollar
bill, once broken, it is never
a dollar again."

Henry Wheeler Shaw (1865)

"Justice, I think, is the tolerable accommodation
of the conflicting interests of society, and I
don't believe there is any royal road to attain
such accommodations concretely."

Learned Hand (1946)

Within the broad field of alternative dispute resolution, few topics have produced as much discussion, research and literature as has the issue of confidentiality. It is generally acknowledged that the success of dispute resolution programs is inexorably interwoven with the degree to which the ADR movement is able to "tolerably accommodate the conflicting interests of society."

Since ADR hearings often uncover and seek to resolve underlying issues which may have led the parties into conflict, discussions at hearings can -- and often do -- range over a wide area. If statements or admissions made during these hearings (often in heated discussion and

without benefit of legal counsel) were to be introduced in subsequent criminal or civil proceedings, they could prove extremely damaging to one of the parties. Such disclosure, it is convincingly argued, would have a chilling effect on the entire ADR process and should, therefore, be prevented.

Certain legislative and regulatory trends, however, appear to conflict with an absolute grant of confidentiality for alternative dispute resolution. As examples, various states' "Freedom of Information Laws" (FOIL) encourage public access to certain types of "public" records; legislation or codes of ethics require certain professionals to report crimes or threatened crimes uncovered in the discharge of their duties; in the area of consumer/business disputes (including certain types of housing disputes), there is a legislative trend encouraging disclosure of information relating to patterns or trends of marketplace abuse.

Since this topic is such a broad one, the authors have made a deliberate decision to limit their discussion -- to the greatest practical extent -- to those issues, laws and cases of interest to ADR programs in New York State.

I. The Types of Programs.

As with the proverbial blind monks who were asked to describe an elephant by touch, each holding on to a different part of the animal's body, most ADR practitioners view the issue of confidentiality from their own unique perspective. It is the authors' opinion that that view is often myopic.

Unquestionably, one of the largest -- perhaps the largest -- ADR program in New York is the Community Dispute Resolution Centers Program, a project of the Unified Court System and one of the principal sponsors of the conference at which this paper is being presented. However, even if we exclude labor and commercial arbitration from our discussion, a partial listing of other programs indicates how broad the field has become.(1)

These programs subdivide into three basic types :

1) Those that are purely arbitration programs, where the neutral's sole function is to hear evidence presented by the parties and to make a decision which is normally binding on both (all) parties. (2) In these

programs, efforts at compromise are usually conducted outside the presence of the hearing officer.

2) Those that are purely mediation programs, where the neutral works with the parties (sometimes in private meetings), to produce a settlement of the dispute. This settlement is normally reduced to a formal, written "contract" which is signed by the parties.

3) Those that use a hybrid mediation/arbitration ("med/arb") model, in which the parties sign agreements to arbitrate the issues in dispute, but give the neutral (normally through the program rules) (3) the opportunity to mediate a settlement. If a settlement is reached, it is reduced to writing, signed by the parties and the neutral, and it becomes an arbitrator's "consent decision". If a mediated settlement proves impossible to achieve, the neutral retains the authority -- granted by the parties -- to issue a binding decision. (4)

While many ADR programs use one or another of these three basic models exclusively, some of the larger programs utilize different models for different types of disputes. At the BBB Foundation's Dispute Settlement Center in Buffalo, for example, arbitration is used to resolve manufacturer/consumer auto warranty disputes through Project Auto Line, mediation is used in its Juvenile/Family program (where the parties are often below the age when they can contractually bind themselves to arbitration) and the "med/arb" model is used in its Community Dispute Resolution program and its Buffalo Neighborhood Revitalization Corporation (BNRC) home improvement dispute program. A recent article in Psychology Today discusses the different models and reports some initial research results on the effectiveness of these models. (5)

II. The Principal Actors.

As there are several different types of programs affected by the broad issue of confidentiality, so there are different major groups with concerns relating to this issue. They are:

a) The disputants. Generalizing from nearly two decades of experience in the field, the authors believe that a disputant will wish to maintain the confidentiality of any aspect of his or her dispute which, if known, would prove

embarrassing or would place him or her at risk. Conversely, a disputant, in certain circumstances, will have little regard for program confidentiality if information from the dispute resolution process will enhance his or her position or status and/or will place the other party at risk. This view is equally applicable to advocates for the disputants, a category which includes public agencies, private counsel and other private, special-interest advocacy groups.

b) The ADR Programs. Much of what has been written regarding confidentiality in ADR reflects, in large part, the concerns of this group. These concerns range from broad policy considerations to practical operational limitations.

The boards and staff of various ADR programs recognize that disclosure of information obtained as a part of a mediation or arbitration hearing will have a chilling effect on the process. Successful dispute resolution requires the fullest exploration of the issues, and parties may be unwilling to participate in the process without assurances of confidentiality.

Practical considerations, too, play an important role in this group's concerns. In the absence of broad protection for the process, a "case-by-case" defense of confidentiality can swallow up large amounts of staff time, strain relationships with a variety of referral sources and prove financially draining if even infrequent court appearances are required.

c) The neutrals. Our review of the literature on this subject reveals very little written from the perspective of this group. However, in the authors' opinion, this somewhat "under-researched" perspective is pivotal to the discussion.

Many of the neutrals serving in the ADR field either serve as volunteers (without compensation) or receive a small stipend solely to cover such things as travel, parking and perhaps a lunch. According to a summary of a recent survey conducted by the New York Office of Court Administration in 1986, 1,484 individuals were serving as volunteer mediators or arbitrators for the Community Dispute Resolution Centers Program. These individuals were required to participate in a minimum of 25 hours of training prior to serving as a dispute resolver. Thirty-seven percent of

these volunteers held professional positions, 60 percent possessed bachelor or advanced college degrees and nearly that same percent reported annual incomes in excess of $25,000. (6) Better Business Bureaus across New York State utilize a substantially similar number of volunteer arbitrators in their AUTO LINE program. Our experience in Buffalo, however, suggests that there is a statistically significant crossover -- individuals who volunteer as dispute resolvers often volunteer for more than one program).

To the extent that these volunteers become embroiled in legal controversy related to their role as mediator or arbitrator -- with the attendant inconvenience, loss of work-time and possible loss of income -- there is a legitimate concern that these individuals will find less onerous ways to perform volunteer work in their communities, to the great detriment of the ADR movement.

III. Efforts at Establishing Confidentiality -- A Background.

A. Arbitrator's Immunity.

Alternative Dispute Resolution programs which use arbitration or a "med/arb" model have relied, to some extent, on the fact that arbitrators -- performing a quasi-judicial function -- enjoyed an immunity from subpoena. Writing in the Arbitration Journal, arbitrator Joel M. Douglas stated that:

> ". . .the arbitrators with whom I have discussed this problem have long believed and indeed, have practiced under the presumption that the scope of arbitrator immunity from subpoena was all encompassing and that although an award was subject to varying degrees of judicial review, the arbitrator or the notes used therein were privileged." (7)

Douglas' article recites his contrary experience when served with a subpoena to provide testimony in a criminal proceeding. During the course of an employee disciplinary hearing, Arbitrator Douglas received testimony from the grievant that his friend, not he, had committed certain alleged illegal acts -- acts which had led to the grievant's discharge. The friend -- not an employee and, therefore, not subject to discharge -- provided testimony at the arbitration which corroborated the grievant's testimony and,

according to Douglas, "included several self-incriminating statements, which, in essence, became the genesis of the subpoena."

Having failed to obtain a stay of the criminal court proceeding or to have the subpoena quashed, Douglas, under formal protest, was compelled to appear and produce his notes for examination.

Douglas' article concluded that:

> ". . . no privilege of immunity exists for arbitrators to give relevant testimony in a criminal trial. It is also apparent that many arbitrators believe such a privilege exists and continue to practice under the false assumption. While the doctrine of arbitral immunity from civil liability is widely accepted, the issue is not as absolute with respect to testifying or being deposed for clarifying or impeaching awards." (8)

B. Other Limited Forms of Protection.

1) No Records.

Arbitrator Douglas' notes, taken during the course of the grievance hearing, became a central issue in the subsequent criminal case. For this reason, some programs simply do not keep any records, or they keep such limited records as to be worthless in a criminal or civil action. Certainly, such a program policy affords considerable protection to the agency administering an alternative dispute resolution program. Because there are no records, and because most ADR agency directors are not participants in actual mediation or arbitration hearings, there is almost nothing to be gained by serving a subpoena on the ADR program.

However, not only does such a policy limit the program's ability to provide service to the parties, efficiently process cases and participate in future studies of various aspects of the ADR process, the absence of program records will almost certainly increase the likelihood that the neutral -- the mediator or arbitrator -- will be served with a subpoena demanding information that is not available in program records. As mentioned earlier, because so many ADR programs rely on volunteers, shifting the legal burden from the administering agency to the volunteer neutral may prove unsatisfactory.

2. Reliance on the Agreements Regarding Confidentiality.

In an effort to provide a more evident protection for the process, various programs have attempted to obtain agreements that records and information relating to mediation or arbitration are confidential.

According to an article in the Capital University Law Review, an ADR program in Newark, Ohio, uses:

> ". . . an agreement, signed by the prosecutor, promising not to seek out information from the program. . . . Through this agreement, the prosecutor in effect waives any right to use hearing information in any subsequent trial, in exchange for the parties' agreement to the same waiver. (9)

In the Better Business Bureau Dispute Settlement Center's Community Dispute Resolution (CDR) Program, the agreement to enter the mediation/arbitration process -- signed by both parties -- includes a statement designed to protect the neutrals (and the Center) from subpoena. (10)

It is unclear whether an agreement by a prosecutor in one jurisdiction is binding on a prosecutor in another jurisdiction, nor is it clear precisely what weight, if any, would be given to agreements by the parties (However, this was one factor cited in a recent "confidentiality" case before the United States District Court Western District of New York, discussed in more detail elsewhere in this article).

3. The "Privileged Communications" Concept.

Over the years, certain relationships have been determined to be unique (e.g. lawyer/client, doctor/patient, psychotherapist/patient, priest/penitent, etc.). Due to the need for absolute candor between parties to those relationships, information obtained during the course of those relationships is protected from disclosure during litigation. Federal Rule of Evidence 501 provides for these privileges (11).

In determining whether information obtained during the alternative dispute resolution process qualifies as

privileged within the Federal Courts (in the absence of any privilege that is specifically embedded in federal law), the courts must balance four factors:

> ". . . first, the federal government's need for the information being sought in enforcing its substantive and procedural policies; second, the importance of the relationship or policy sought to be furthered by the state rule of privilege and the probability that the privilege will advance that relationship or policy; third, in the particular case, the special need for the information sought to be protected; and fourth, in the particular case, the adverse impact on the local policy that would result from non-recognition of the privilege." (12)

In cases where there is no specific State rule of privilege, a privilege may be established utilizing Wigmore's four conditions:

> "(1) The communications must originate in a confidence that they will not be disclosed. (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relations between the parties. (3) The relation must be one which in the opinion of the community ought to be sedulously fostered. (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained by the correction disposal of litigation. (13)

A considerable body of literature recognizes arbitration as an essentially private process between disputants. For example, arbitrators are generally forbidden to voluntarily disclose "significant aspects of an arbitration proceeding . . . unless this requirement is waived by both parties or disclosure is required or permitted by law." (See Note 7)

Likewise, the process of mediation must be able to offer assurances of confidentiality if it is to succeed. Without it, in the authors' opinion, parties will be increasingly unwilling to enter the process, and neutrals -- with the constant threat of subpoena hanging over each case -- will grow increasingly unwilling to serve.

4. The "Offers of Compromise" Concept.

The give and take of a mediation session is essentially a negotiation of a settlement overseen by a process manager -- the mediator or mediator/arbitrator. Under Federal civil (14) and criminal (15) rules of evidence/procedures, offers of settlement -- and statements made during the course of efforts at settlement are inadmissible. The reasons for protecting these settlement discussions parallel the reasons for creating a privilege (see note 13).

C. "Confidentiality" Legislation.

1) The Federal "Dispute Resolution Act" of 1980.

In 1980, the United States Congress passed Public Law 96-190, known as the Dispute Resolution Act. The law was designed to provide ". . . to all persons convenient access to dispute resolution mechanisms which are effective, fair, inexpensive and expeditious" (16); however, it sought to realize this goal by setting minimum Federal standards for ADR mechanisms which were to be funded under the legislation. Technically, therefore, only those programs operated with Federal funds provided under the Act were required to meet the Federal criteria.

Unfortunately, while the bill passed, Congress never appropriated any funding, and generally speaking, the Act has more symbolic than practical value. Nevertheless, any program seeking a piece of Federal legislation which speaks directly to the issue of confidentiality need look no farther than the Dispute Resolution Act. Subsection 4(f) (Criteria for dispute resolution mechanisms), requires that an ADR mechanism ". . . ensure reasonable privacy protection for individuals involved in the dispute resolution process."

2. New York's CDR Centers Legislation.

As a part of the legislation establishing the Community Dispute Resolution Centers Program in 1981, the legislature included a key provision relating to confidentiality. That provision states:

> "Except as otherwise provided in this article, all memoranda, work products, or case files of a

mediator are confidential and not subject to disclosure in any judicial or administrative proceedings. Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator or any other persons present at the dispute resolution shall be a confidential communication." (17)

At the time of its passage, this section was one of the strongest, most direct legislative statements relating to the issue of confidentiality in the alternative dispute resolution process. The exceptions noted in the introductory sentence refer to the fact that a community dispute center is required to maintain ". . .a written agreement or decision setting forth the settlement of the issues and future responsibilities of each party" and to make that document available ". . .to a court which has adjourned a pending action pursuant to section 170.55 of the Criminal Procedure Law" (18). This provision addresses the need for the court to exercise judicial review over those cases which it referred into the program while ensuring that individual dispute centers have a completely confidential process.

D. A Discussion of Two Recent Cases.

1) People v. Snyder (19)

In 1985, during opening remarks in a murder trial in Erie County, New York, the defendant's attorney made specific reference to the defendant's participation (with the victim) in a mediation hearing conducted by the Better Business Bureau Foundation's Dispute Settlement Center prior to the shooting.

These statements led the Erie County District Attorney's office to issue a subpoena to the Center for any and all records pertaining to the mediation between the defendant, the victim and a third party (a girlfriend). The Center, in turn, served the District Attorney's office with an order to show cause why the subpoena should not be quashed.

The issue was argued before Acting Supreme Court Justice John J. Connell, who granted the Center's motion and quashed the subpoena. At the time, there was no reported case construing subsection 849-b(6) of the Judiciary Law (the confidentiality section of the CDR Centers Law);

Justice Connell wrote a well-reasoned opinion recognizing the importance of complete confidentiality to the dispute resolution process. The issues raised in the case -- and the consideration given to those issues by the court -- provide guidance to New York programs.

a) Legislative History. First, the court discusses the legislative history of the bill (20), finding that the Legislature's goal was to provide a "quick, inexpensive and voluntary resolution of disagreements, while at the same time serving the overall public interest by permitting the criminal justice community to concentrate its resources on more serious criminal matters". To discharge this goal, the Legislature noted, parties in dispute must feel they are in an "informal atmosphere without restraint and intimidation" (21).

b) Absence of Ambiguity. Second, the court notes that the subsection 849-b(6) is clear and unambiguous.

c) Rights Cannot Be Waived by Parties. Third -- and most significantly -- the court properly held that the statute does not permit a waiver of the confidentiality provisions by the parties. In the subject case, the District Attorney had argued that the defendant, George Snyder, had waived the protections of the statute by agreeing to disclose the facts of his participation in the ADR process. The court analogized a similar case decided by the New York Court of Appeals regarding the confidentiality of information relating to sexually transmittable diseases under the New York Public Health Law (22). In that case, the Court of Appeals held that the goal of the statute cannot be defeated simply by the consent of the source to release the information. In so holding, the Court noted:

> "The requirement of confidentiality (Public Health Law Subsection 2306) is integral to a statutory scheme designed to encourage afflicted persons to seek and secure treatment, which in the case of communicable disease serves individual interests as well as those of society." (23)

These decisions holding that the confidentiality provision cannot be waived -- even by the participants -- are critical. If Justice Connell had held the confidentiality provision to be waiveable by any party, neither the disputants nor anyone else involved in the process could feel secure in engaging in the type of frank and open discussions that are essential to an effective

dispute resolution program. As discussed earlier, Arbitrator Joel Douglas relied upon a code of ethics for the National Academy of Arbitrators which held, in relevant part, that arbitrators are forbidden to disclose aspects of the proceeding unless this requirement is waived by the parties. Douglas notes that ". . . it has generally been believed that this waiver would not be readily forthcoming. This did not prove to be so in the case referred to earlier (the case regarding which Douglas was subpoenaed), as both parties promptly waived their rights in this matter and made no motion to have the subpoena quashed." (24)

d) Center's Funding is Jeopardized. Justice Connell also recognized that, under Subsection 849-b(4)(a) of the Judiciary Law, funding for community dispute resolution centers is placed in jeopardy unless the program "complies with the provisions of this article and the applicable rules and regulations of the chief administrator." (25) If the court had permitted waiver of the statutory guarantee of confidentiality, funding for the program could conceivably have been terminated.

2) United States v. Gullo (26)

In January 1986, a case involving the defendant Gullo was referred to the BBB Foundation Dispute Settlement Center's Jamestown, New York, office. In subsequent Federal criminal proceedings -- arising out of the same facts as those which were part of the mediation/arbitration case -- Gullo argued that the statements he made during the process and the results of the hearing should not have presented to the grand jury and should have been suppressed as confidential. The BBB Foundation Dispute Settlement Center was invited to and did provide the court with its position on the issue of confidentiality.

In upholding the motion to suppress, Federal District Court Judge John T. Elfvin notes several factors which may be of interest to ADR programs.

a) Confidentiality Provisions in Parties Agreements. The court notes that the "Agreement to Arbitrate" form, signed by the parties, advised the parties that "the neutral (assigned to the case) will hold all information received during the hearing as confidential and will not voluntarily divulge that information." The parties agreed that the neutral would not be subpoenaed by either party in any subsequent legal proceeding. (27)

The Court also noted that the same provision as to confidentiality and agreement not to subpoena the neutral was contained in a document entitled "Stipulation of Issues" executed by the parties on January 30, 1988.

b) Balancing of Factors. As noted earlier in our discussion of confidentiality, Federal law on recognition of privileges that are not "firmly embedded in Federal Law", requires the balancing of four factors. First, the Federal need for the information; Second, the importance of the state policy being advanced by the privilege; Third, the particular need for the information in the specific case; Fourth, the adverse impact of failing to recognize the privilege.

To the first issue, the Court recognized a strong policy in favor of full development of facts, and cites a United States Supreme Court decision which held that ". . .the need to develop all relevant facts in the adversary system is both fundamental and comprehensive." (28) The Federal District Court notes that "Suppression here would impinge on such a policy". (29)

To the second issue, the Court notes the state policy to encourage participation in the resolution of disputes in an informal atmosphere without restraint or intimidation. The Court finds that ". . .Although it is unclear whether the privilege acts . . . to encourage participation in the program, it directly serves to insure the effectiveness of the program and, thereby, secondarily, it serves to promote continued support for and existence of the program. It should be noted that abrogation of the privilege would place funding for the program in jeopardy" (30).

Addressing the third issues, the court simply notes that the United States ". . . has not shown any particularized need for the evidence." (31)

Finally, the Court finds that local (State) policy would suffer if the privilege were not to be recognized. The Court states: "In balance, this Court finds that the privilege afforded by subdivision 849-b(6) must be recognized in proceedings before this Court. All statements made during the dispute resolution process and all terms and conditions of such settlements shall be suppressed." (32)

IV. Laying the Groundwork -- Confidentiality in Daily Practice.

Unquestionably, there now exists within New York State a solid framework around which to construct legal

arguments protecting the confidentiality of the ADR process. How well or poorly that framework holds together depends -- in significant measure -- on the day-to-day policies and procedures of individual ADR centers. A Center which places emphasis on ensuring confidentiality -- with its staff, its volunteers and clients -- will find itself less frequently the subject of subpoena and better able to defend itself when the inevitable subpoena is served.

To provide assistance to ADR Centers, the authors offer the following suggestions:

A) Groundwork with Referral Sources.

In many of the cases relating to ADR confidentiality, including both Buffalo cases (People v. Snyder, U. S. v. Gullo), it is a public agency such as the District Attorney or United States Attorney seeking program records or testimony. This fact places a certain degree of pressure on the ADR center, since these same agencies often refer cases into mediation or arbitration. In the heat of a specific case, a Center may conclude (or be led to believe) that its failure to cooperate with the public agency may jeopardize its relationship with the agency.

An ADR Center can never entirely avoid this possibility; it must be willing to run this risk to preserve the confidentiality of its records. However, the authors suggest that individual centers meet with their referral sources, following up with a letter -- ideally, before a specific case actually arises. The meeting (and subsequent letter) should outline the Center's policies on confidentiality and forward a copy of the CDR Centers legislation and copies of the Gullo and Snyder cases. The letter should stress that subsection 849(b)-6 specifically prohibits disclosure of information and 849(b)-4 places program funding in jeopardy if a Center fails to comply with the law.

Most public agencies, laboring under significant caseloads, will be grateful for the information -- particularly if they receive it before a difficult case actually arises. Once a subpoena has been issued, however, it may be difficult for the agency to reverse its position.

B. Groundwork with Legal Counsel.

Every ADR Center should have quick access to its own legal counsel, in the event that problems arise. However, an attorney is best able to represent the interests

of the ADR program if he/she has had time to gain familiarity with the various issues which may be involved in a case. A program should not expect the best representation of its interests from an attorney who has had only a few minutes to prepare.

Programs which have not already done so should -- at a minimum -- provide their legal counsel with copies of subsection 849(b) and the two New York cases mentioned in this article. The information -- and footnoted sources -- in this paper should also help. If a program does not have legal counsel, we recommend selecting one with trial experience before the need arises.

C. Groundwork with Volunteer Neutrals.

ADR Centers should provide their volunteers with basic background information on confidentiality. At the very minimum, the authors believe this should include:

1) A "Code of Conduct" or "Code of Ethics" which includes specific provision(s) regarding the confidentiality of the proceedings.

2) An briefing sheet on confidentiality in the law (subsection 849[b]-6) and the program's responsibilities.

3) Instructions that -- if contacted by anyone regarding the specifics of any case (including even the existence of the case) -- neutrals should refer any questions to the Center. If requested (or subpoenaed) to appear in a case, neutrals should immediately contact the Center for guidance.

D. Groundwork with the Parties.

The authors believe that the parties should be informed of the Center's policy on confidentiality, and we believe that information can best be documented by asking the parties to sign a statement agreeing that the program will not disclose any information relating to case other than that which it is required to disclose by statute. Such a statement could be included as a part of some other form which the parties may be required to sign.

E. Groundwork with the Program Staff.

Up to this point, the suggestions we have made

are relatively easy to accomplish. Send information on confidentiality to referral sources, legal counsel, neutrals and include a sentence or two on a form the parties sign. Once accomplished, it is necessary to take additional action only when a new public official is elected or appointed, when changing legal counsel and when training new neutrals.

We believe, however, that the struggle to protect program confidentiality takes place on a daily basis. Lax staff procedures can gradually erode a program's confidentiality to the point where it no longer exists in fact. And a court cannot be expected to uphold in principle what does not exist in fact.

1) Staff and Program Records. Rules issued by the New York State Office of Court Administration's Community Dispute Resolution Centers Program require that program records be maintained in locked files. This is a sound requirement for any ADR program. Records which are readily accessible to office visitors, cleaning and building maintenance are something less than confidential.

The one exception to the confidentiality of program records outlined in subsection 849(b)-6 is found at 849(b)-4(d). This section provides that the program must produce a written agreement or decision in each case and that this written document must be available to a court which has adjourned a case into the CDR program under section 170.55 of the criminal procedure law. Staff should be instructed to ensure that only this written agreement/decision (and any written submission agreements, if a part of the program) is referred to the court, not other program records or the case file. Obviously, cases which were not referred by the court should not be discussed with court personnel.

Finally, staff should ensure that any statistical studies or summaries prepared from case files exclude any information which might tend to identify a party or the specifics of a particular case.

2. Staff and the Telephone. It is relatively easy, in the press of day to day business, for program staff to forget the importance of confidentiality when working on the telephone. Many programs routinely take calls from clients who don't remember their case number, can't remember when they are scheduled for a hearing, can't remember the

name of their neutral or are genuinely confused about the specifics of their case. It is, therefore, important to periodically remind staff members that information regarding specifics of a case (including whether a case exists with the center) should never be disclosed over the telephone unless the identify of the caller can be positively verified.

V. And in Conclusion.

All of the background, statutes, case law and program practices we've mentioned have, at their root, the goal of preserving the confidential relationship which must exist among disputants, neutrals and ADR program administrative staff.

Locked file cabinets and basic staff procedures should protect program records (and individuals' recollections) from the eyes and ears of the mildly curious. However, given the types of cases handled by ADR programs, there will come a time in the life of each program when it will be forced to defend its records, staff and/or neutrals from subpoena.

When this happens, competent legal counsel and the laws and cases cited in this paper should combine to present a strong case for confidentiality. However, that case can be seriously, if not fatally, weakened by the introduction of evidence that -- in practice -- the particular program has surrendered any claim of privilege. If it can be shown that the program staff regularly discussed details of cases with referral sources, generally acknowledged the names of parties to disputes over the telephone and occasionally assisted television or newspaper reporters in producing stories (however lauditory) regarding specific program cases, the job of a program's counsel becomes significantly more difficult.

The privilege of confidentiality may cease to exist if it is breached. Like Henry Wheeler Shaw's dollar bill . . .

. . .once broken, it is never a dollar again.

Accompanying Notes
Confidentiality in Mediation

Several of the sources cited in this article were compiled into a resource book, "Confidentiality in Mediation: A Practitioner's Guide". The Guide was produced by the American Bar Association's Alternative Dispute Resolution Committee, Special Committee on Dispute Resolution, in 1985. The authors highly recommend this practitioners guide both for ADR program administrators and legal counsel. For information on this publication, and the work of the Special Committee, contact: American Bar Association, Special Committee on Dispute Resolution, 1800 M Street N.W., Washington, DC 20036.

1. In addition to the CDR centers now serving 60 counties in New York State, the authors note that many disputes are currently diverted from the New York civil court system into an alternative arbitration program under Section 3504 of the Civil Practice Law and Rules (CPLR) and Part 28 of the Rules of the Chief Judge. Better Business Bureaus across the State provide both general consumer arbitration programs and a specialized automotive arbitration program, AUTO LINE, designed to arbitrate disputes involving manufacturers' responsibilities under car warranties. New York BBB's are now participating in a pilot arbitration program for product-related disputes involving manufactured housing. Bar associations in many jurisdictions now administer fee dispute arbitration programs to resolve problems between attornies and clients. The American Arbitration Association currently administers a "lemon law" arbitration program in New York under contract with the New York State Attorney General's Office. Many New York nursing homes and other health care facilities utilize mediation or arbitration processes in resolving disputes with patients and families. The list is much longer.

2. New York Civil Practice Law and Rules (CPLR) Article 7501 - 7514.

3. "Rules for Community Dispute Resolution", BBB Foundation Dispute Settlement Center, 1984.

4. See Note 3 supra

5. "Solutions, Not Winners", Dean G. Pruitt, Psychology Today, December 1987, p. 58 - 62.

6. The Community Dispute Resolution Centers Program Annual Report -- April 1, 1986 to March 31, 1987, State of New York Unified Court System, pp. 67 - 71.

7. "The Scope of Arbitrator Immunity", Joel M. Douglas, 36 Arbitration Journal 35, June 1981, p. 35.

8. Ibid, p. 37.

9. "Protection of Confidentiality in the Mediation of Minor Disputes", Eileen P. Friedman, 11 Capital University Law Review, 181, 1981, p. 34-35.

10. The Center's "Agreement to Arbitrate" form includes a statement, signed by the parties, which reads: "I agree the neutral/s will not be subpoenaed in any subsequent legal proceeding". The Center's "Stipulation of Issues" form, completed and signed by the parties at the commencement of the hearing, includes a statement which reads: ". . . we repeat our understanding that the neutral will hold all information received during the hearing as confidential and that the neutral will not be subpoenaed by either party in any subsequent legal proceeding."

11. Federal Rules of Evidence, 501, states:

> "Except as otherwise required by the Constitution of the United States or provided by an Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason or experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law." (11)

12. United States v. King, 73 F.R.D. 103, 105 (E.D.N.Y. 1976).

13. J. Wigmore, Evidence ss 1061-62 (3d ed. 1940).

14. Federal Rule of Evidence 408.

15. Federal Rule of Criminal Procedure 11(e)(7).

16. Public Law 96-190, February 12, 1980, 94 Stat. 17, subsection 2.(b).

17. Section 849-b(6) of the New York Judiciary Law.

18. Ibid, Section 849-b(4)(d).

19. People v. Snyder, 129 Misc. 2d 137, 492 N.Y.S. 2d 890, 892 (s.Ct., Erie Co. 1985). (See also APPENDIX A)

20. 1981 McKinney's Session Laws of NY, at 2630.

21. L. 1981, ch 847, subsection 1.

22. Matter of Grattan v. People 65 NY2d 243.

23. Ibid, p. 245.

24. See Note 7, p. 37.

25. See Note 17, Section 849-b(4)(a).

26. United States v Gullo, No. CR-87-54E; USDC WNY, 8/17/87 (See also APPENDIX B).

27. See also Note 10.

28. United States v Nixon, 418 U.S. 683, 709 (1974).

29. See Note 26, Memorandum and Order, p. 7.

30. Ibid, p. 8.

31. Ibid.

32. Ibid, p. 9.

A P P E N D I X A

People v. Snyder

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THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, v GEORGE SNYDER, Defendant.

Supreme Court, Erie County, July 29, 1985

HEADNOTE

Disclosure — Material Exempt from Disclosure — Records of Community Dispute Resolution Center

A subpoena seeking any and all records of the Community Dispute Resolution Center pertaining to mediation between defendant, who is charged with murder in the second degree and criminal possession of a weapon in the second degree, and his victim, involving a third person is quashed; Judiciary Law § 849-b (6), designed to assure confidentiality to the parties involved in dispute resolution and thereby encourage their full, frank and open participation, specifically excludes disclosure from any judicial or administrative proceeding; the items sought are by definition "confidential communications" and the statute guarantees the confidentiality of all such records and communications; moreover, even if defendant can be found to have waived the confidentiality of the records pertaining to the mediation sessions in which he was involved, the statute, as drafted, permits no such waiver.

APPEARANCES OF COUNSEL

R. Scott Atwater, Assistant District Attorney, for plaintiff. *Phillips, Lytle, Hitchcock, Blaine & Huber (Michael B. Powers* of counsel), for Better Business Bureau. *Robert Murphy* for defendant.

OPINION OF THE COURT

JOHN J. CONNELL, J.

The above-named defendant was indicted by the Erie County Grand Jury on charges of murder in the second degree and criminal possession of a weapon in the second degree involving an alleged incident on August 16, 1983, in which William Fugate was shot to death by the defendant.

In the case at bar, the defense, both in the voir dire and opening statement to the jury, had raised the defense of justification claiming that the defendant shot and killed William Fugate in self-defense. Mention was also made by defense counsel in his opening statement of the victim and defendant's participation with the Community Dispute Resolution Center prior to the fatal shooting. Because of these statements the District Attorney subpoenaed any and all records pertaining to such mediation between the defendant and the victim and involving a third person, Deborah Nelson.

Attorneys for the Better Business Bureau Foundation which

administers the Community Dispute Resolution Center program in Erie County served an order to show cause on the District Attorney's office, signed June 7, 1985 and made returnable on June 10, 1985, seeking that the said subpoena be quashed pursuant to CPLR 2304. On the return date arguments were heard from the attorney for the Better Business Bureau Foundation, the District Attorney's office and defense counsel for George Snyder. Subsequent to the oral argument, and after review of the paper submitted in support of and in opposition to the motion, and upon review of the applicable statutory law, the motion to quash the subpoena was granted. There appears to be no reported case construing Judiciary Law § 849-b (6).

The Community Dispute Resolution Center's program was established in 1981 by the New York State Legislature to enable the creation of community dispute centers to resolve neighborhood and interpersonal disputes. The goal of the Legislature in creating these centers was to provide a "quick, inexpensive and voluntary resolution of disagreements, while at the same time serving the overall public interest by permitting the criminal justice community to concentrate its resources on more serious criminal matters." (1981 McKinney's Session Laws of NY, at 2630.) It was the feeling of the Legislature that in order for such programs to be successful, the parties availing themselves of the services of these forums must feel that they can air their disputes "in an informal atmosphere without restraint and intimidation." (L 1981, ch 847, § 1.)

In order to assure confidentiality to the parties involved, and thereby encourage their full, frank, and open participation, Judiciary Law § 849-b (6) was enacted as follows: "Except as otherwise expressly provided in this article, all memoranda, work products, or case files of a mediator are confidential and not subject to disclosure in any judicial or administrative proceeding. Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person present at the dispute resolution shall be a confidential communication."

In spite of the first sentence in this statute, there appears nowhere else in the article an exception to the restrictive language of the statute.

I find that even if the defendant can be found to have waived the confidentiality of the records pertaining to the mediation sessions in which he was involved, the statute, as

drafted, permits no such waiver. The items sought by the District Attorney are by definition "confidential communications."

Confidential communications are, by their very nature, guided by rules of exclusion. Most commonly rules of exclusion are drafted to prevent evidence being presented to a jury that is of no probative value or of a kind that may unfairly prejudice one of the parties or misdirect the jury's attention from the primary issue at hand. The confidentiality of certain communications, however, is meant to nurture very specific interpersonal or professional relationships that the courts, society and the Legislature deem desirable. (Fisch, New York Evidence § 511, at 335 [2d ed].)

The Court of Appeals recently strictly construed Public Health Law § 2306 which relates to information concerning sexually transmittable diseases. That section reads as follows: "All reports or information secured by a board of health or health officer under the provisions of this article shall be confidential except in so far as is necessary to carry out the purposes of this article." In *Matter of Grattan v People* (65 NY2d 243), the court held that the goal of the statute cannot be defeated simply by the consent of the source to release the information. "The requirement of confidentiality (Public Health Law § 2306) is integral to a statutory scheme designed to encourage afflicted persons to seek and secure treatment, which in the case of communicable disease serves individual interests as well as those of society." (*Matter of Grattan v People, supra*, at p 245.)

Section 849-b (6) is even more restrictive in its language by specifically referring to excluding disclosure from "any judicial or administrative proceeding."

Section 849-b (4) (a) places funding for the dispute centers in jeopardy unless "it complies with the provisions of this article and the applicable rules and regulations of the chief administrator". The intent of the Legislature to provide forums for the resolutions of disputes as alternatives to structured judicial settings is, therefore, clearly defined in the statutory language itself as well as the funding provisions for the dispute centers.

To grant the District Attorney's request to review the records of the Community Dispute Resolution Center would subvert the Legislature's clear intention to guarantee the confidentiality of all such records and communications.

Accordingly, the subpoena is hereby quashed.

A P P E N D I X B

United States v Gullo

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

-vs-

JOSEPH GULLO, JR.
and DAVID LIPARI

CR-87-54E

MEMORANDUM

and

ORDER

The abovenamed individuals ("the defendants") have been charged in a one-count Indictment with participating in the use of extortionate means to collect, or attempt to collect, an extension of credit in violation of 18 U.S.C. §§874 and 2. The defendants have submitted wideranging pretrial motions.

Gullo has moved for dismissal of the Indictment, to suppress certain evidence, for disclosure of matters occurring before the grand jury, to compel disclosure of "Brady material", to compel disclosure of so-called "bad act evidence," for disclosure of the government's intention to use any evidence he might be entitled to discover under Fed.R.Cr.P. rule 16 and to compel law enforcement officials to preserve any and all notes, memoranda, resumes and synopses. Lipari has also moved, albeit on other grounds, to dismiss the Indictment. He also seeks severance pursuant to Fed.R.Cr.P. rules 8 and 14, disclosure of Brady material and disclosure of and a determination as to admissibility of any co-conspirator statements.

Gullo's motion to dismiss the Indictment arises out of his participation, as a party, in an arbitration hearing. In January 1986 he received from the Community Dispute Resolution Settlement Center ("the CDR Center") a notice indicating that a complaint or grievance had been lodged against him. The subject matter of the complaint was directly related to the events leading to the present Indictment. The complaint or grievance form identified the grievant, the nature of the dispute and the settlement sought, noted that the grievance had been referred to the CDR Center by the Jamestown (N.Y.) Police Department and described the CDR Center as

> "a project of the Better Business Bureau Foundation of Western New York, Inc. under contract with the Better Business Bureau of Western New York, Inc., the Unified Courts System of the State of New York and County Youth Services and grants from the Erie County Legislature, and the City of Buffalo." Exhibit C to Memorandum in Support of Motion to Suppress attached to Gullo's Notice of Motion dated May 8, 1987.

The grievance form further states that

> "BY SIGNING THE AGREEMENT, YOU ARE INDICATING YOUR WILLINGNESS TO TRY AND RESOLVE YOUR DISPUTE WITHOUT COURT ACTION. THIS FORM DOES NOT BIND YOU TO THE PROCESS OR GUARANTEE YOUR CASE WILL BE RESOLVED. THE CDR CENTER WILL CONTACT YOU ABOUT ARBITRATION IN THE MATTER." Ibid.

Gullo apparently executed the document and a second document, executed January 20, 1986, entitled "Agreement to Arbitrate." The latter document generally restates the nature of the dispute and the nature of the settlement sought. It advises that agreement to arbitrate would result in an attempt by a neutral to reach settlement through

mediation and, if mediation failed, in binding arbitration. Id. at Exhibit B. It further states that the party agreeing to such dispute resolution understood that

> "the neutral [assigned to the case] will hold all information received during the hearing as confidential and will not voluntarily divulge that information. [The Parties] agree that the neutral will not be subpoenaed by either party in any subsequent legal proceeding." Ibid.

This provision as to confidentiality and the agreement not to subpoena the neutral was reiterated in a document entitled "Stipulation of Issues" executed by the arbitrating parties January 30, 1986.

During the course of the dispute resolution process Gullo made certain statements. He now claims that those statements were involuntarily made in violation of his rights under the Fifth and Fourteenth Amendments and that the statements should not have been presented to the Grand Jury. He argues that the Indictment should be dismissed for these reasons or, in the alternative, that the statements made and the arbitration result should be suppressed.

The CDR Center operates pursuant to the Community Dispute Resolution Centers Program established July 27, 1981 by sections 849-a to 849-g of New York's Judiciary Law. The statute states in part that there existed a

> "compelling need for the creation of dispute resolution centers as alternatives to structured judicial settings. Community dispute resolution centers can meet the needs of their community by providing forums in which persons can participate in the resolution of disputes in an informal atmosphere without restraint and intimidation. *** Community dispute resolution centers can serve the interests of the citizenry and promote quick

and voluntary resolution of certain criminal matters."

The program is to be administered and supervised under the direction of the chief administrator of the courts. It provides funds for the establishment and continuance of dispute resolution centers. Grant recipients are defined as non-profit organizations organized for the resolution of disputes or for religious, charitable or educational purposes. To be eligible for funding, the Act provides that the neutral mediators have certain qualifications, that only certain costs be assessable to participants, that agreements or decisions be written, that monetary awards, which may not in any case exceed a certain amount, may be assessed only upon consent of the parties and that the dispute resolution center may not hear certain types of disputes of a more serious criminal nature. The centers are selected by the chief administrator of the courts from submitted applications. The state share of any center's costs may not exceed fifty percent. The statute also imposes certain reporting requirements upon grant recipients. Importantly, the Act creates a privilege of confidentiality for the mediation of arbitration proceedings and decisions. Section 849-b, subdiv. 6.[1]

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[1] That subdivision provides:

"Except as otherwise expressly provided in this article, all memoranda, work products, or case files of a

(Footnote continued)

The Fifth and Fourteenth Amendments are implicated, however, only if the arbitration process is found to be government action. Colorado v. Connelly, ___U.S.___, 107 S.Ct. 515, 520, 521 (1986). "The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause." Id. at 521. Here, if the mediation/arbitration proceeding out of which Gullo's statements emanate had been private and not state action, the Fifth and Fourteenth Amendments would not serve as vehicles to dismiss the Indictment or to suppress statements made.

The CDR Center is a private organization staffed by its own personnel. It is under contract to New York to provide certain services and has agreed to abide by the applicable statutory and regulatory requirements. In the present case, the issue for arbitration had assertedly been referred by the Police Department. Charges had not been brought against Gullo and this Court does not know whether such would have been brought absent Gullo's agreement to arbitrate.[2] This

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(Footnote continued)

mediator are confidential and not subject to disclosure in any judicial or administrative proceeding. Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person present at the dispute resolution shall be a confidential communication."

2 Nothing has been presented to this Court suggesting that the (Footnote continued)

Court finds, however, that the CDR Center's contract with Ntw York, its receipt of funding from that state and its resolution of the conflict between Gullo and the complainant fail to establish it as a state actor.

This Court does not find that Gullo's statements had been made involuntarily. Importantly, any compunction or coercion had been promoted by a non-government source. See United States v. Solomon, 509 F.2d 863, 871-872 (2d Cir. 1975). Here, as in that case, there was no certainty as to what penalty, if any, Gullo would have received had he declined to speak. Unlike that case, it is not clear that Gullo's decision to speak had been made after consultation with counsel. Nevertheless, finding involuntariness here is unwarranted.[3] The obtainment and use of Gullo's statements is not found to have violated his constitutional rights.

Gullo also asserts that the privilege established by subdivision 849-b.6 applies and, therefore, the Indictment should be dismissed because confidential material had been divulged to the Grand Jury or, alternatively, that all information obtained from and arising out of the arbitration proceeding should be suppressed. Federal Rules of Evidence

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(Footnote continued)
conflict had been referred to the CDR Center pursuant to sections 170.55 and 215.10 of New York's Criminal Procedure Law.

[3] Gullo also claims that his statements should be suppressed because they occurred during plea negotiations. However, absent some charge or negotiation with government officials, no plea negotiation is found to have occurred.

rule 501 leaves privileges to statutory and common law development "in the light of reason and experience." To determine whether to recognize specific privileges that are not "firmly embedded in federal law" requires balancing four factors:

> "first, the federal government's need for the information being sought in enforcing its substantive and procedural policies; second, the importance of the relationship or policy sought to be furthered by the state rule of privilege and the probability that the privilege will advance that relationship or policy; third, in the particular case, the special need for the information sought to be protected; and fourth, in the particular case, the adverse impact on the local policy that would result from non-recognition of the privilege." United States v. King, 73 F.R.D. 103, 105 (E.D.N.Y. 1976).

As to the first factor, there is a strong policy in favor of full development of facts and admissibility in criminal cases. United States v. Chiarella, 588 F.2d 1358, 1372 (2d Cir. 1978); United States v. King, supra, at 106. As the United States Supreme Court has stated "[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive." United States v. Nixon, 418 U.S. 683, 709 (1974). Suppression here would impinge on such policy.

Secondly, the policy sought to be furthered by the state promulgated privilege is the encouragement of participation in "the resolution of disputes in an informal atmosphere without restraint and intimidation." The confidentiality outlined under subdivision 849-b.6 is core to establishing an atmosphere "without restraint and

intimidation." Although it is unclear whether the privilege acts in any primary sense to encourage participation in the program, it directly serves to insure the effectiveness of the program and thereby, secondarily, it serves to promote continued support for and existence of the program. It should be noted that abrogation of the privilege would place funding for the program in jeopardy. Subdivision 849-b.4; People v. Snyder, 129 Misc.2d 137, 492 N.Y.S.2d 890, 892 (S.Ct., Erie Co. 1985).

With respect to the third factor, the United States has not shown any particularized need for the evidence. In fact, it concedes that, even without the evidence in dispute, the Grand Jury had more than enough evidence upon which to base its finding of probable cause. Government's June 8, 1987 Response to Defendant's Motion dated June 4, 1987, p.3.

The final factor for consideration concerns the impact on local policy from not recognizing the privilege in this case. The privilege generally serves to foster participation in the program and serves to promote candor by those participating. Although, this Court grants that few potential parties will likely forego participation in the program because of knowledge that evidence adduced therein would be subject to presentation in a federal prosecution, the effectiveness of the program will nonetheless be reduced by compelled disclosure and its very funding will be called into question.

In balance, this Court finds that the privilege afforded by subdivision 849-b.6 must be recognized in proceedings before this Court. All statements made during the dispute resolution process and all terms and conditions of such settlement shall be suppressed.

The revelation of privileged matters to the Grand Jury does not lead inexorably to the conclusion that the defendants have been wrongfully prejudiced or that the Grand Jury's function has been impaired to a degree calling for the very serious step of dismissing the Indictment. See United States v. Bein, 728 F.2d 107, 113 (2d Cir. 1984); United States v. Rogers, 751 F.2d 1074, 1077 (9th Cir. 1985); United States v. Broward, 594 F.2d 345 (2d Cir.), cert. denied, 442 U.S. 941 (1979); United States v. Mackey, 405 F.Supp. 854, 860-863 (E.D.N.Y. 1975). The preferable remedy -- that chosen in this instance -- is to exclude such evidence at trial. See United States v. Bein, supra, at 113.

Gullo also seeks disclosure of matters occurring before the Grand Jury. However, the Indictment is valid on its face and the government's having presented evidence now found to be incompetent to the investigating body is not found to constitute grounds either to dismiss the Indictment or to order disclosure of the minutes of its proceedings. United States v. Weinstein, 511 F.2d 622, 627 (2d Cir. 1975).

Gullo has also sought certain Brady material. The government has responded by providing certain material and by indicating that certain other material, if it exists, will be disclosed at a later time. This Court finds no cause to set a specific date or time period by which Brady material must be disclosed. Rather, it is the prosecution's responsibility to divulge such information in ample time for the defendant's use of it in preparation for trial.

Gullo also moves to have this Court remind the prosecution of its continuing duty to disclose rule 16 material. The prosecution, in response, notes that it is well aware of its responsibility. No need is found to further remind the parties of their statutory duties.

Further, Gullo has moved, pursuant to rules 12(d)(1) and (2) to require the prosecution to give notice of its intention to use specified evidence at trial and to require the prosecution to notify him of its intention to use at trial any evidence which he may be entitled to discover under rule 16. The government responds by stating that Gullo may assume that all items provided by it pursuant to rule 16 will be used by the government at trial. One of the purposes of rule 12(d) is to obviate the need for defendants to make motions against evidence which will not be introduced at trial. Here, although the government has not narrowed the scope of evidence it intends to use at trial and, if its intentions are to only introduce some of the evidence discoverable under rule 16, may have breached the

spirit of rule 12(d), the government's answer to Gullo's motion is responsive. No order is found to be necessary at this juncture.

Finally, Gullo has requested this Court to order the government agents to retain rough, handwritten notes, resumes, synopses, etc. taken during the course of investigation. The government has responded that the agents are currently under an administrative responsibility to do so. Nevertheless, the defendant's motion is granted.

Lipari has moved to dismiss the Indictment on the basis that its factual allegations fail to conform adequately to the requirements of Fed.R.Cr.P. rule 7(c)(1). This Court has reviewed the Indictment and considers that it meets the requirements of rule 7 in that it is sufficiently detailed to permit the defendants to prepare their defenses and to permit them to "plead acquittal or conviction in bar of future prosecution for the same offense." United States v. Tratta, 525 F.2d 1096, 1098 (2d Cir. 1975), cert. denied, 425 U.S. 971 (1976).

Lipari also seeks a dismissal due to irregularity in the Grand Jury's proceedings. No specific irregularity is cited but he seeks specific information concerning the proceedings. Because no specific grounds to dismiss have been put forward the motion to dismiss will be denied without prejudice. In essence, however, Lipari's request is simply for information. The government has responded in

some fashion to each request. No cause is found to question here the adequacy of such government response.

Lipari has moved to sever under rules 8 and 14. Rule 8(b) permits the joinder of two or more defendants in the same indictment "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." As was held in United States v. Bledsoe, 674 F.2d 647, 656 (8th Cir.), cert. denied sub nom. Phillips v. United States, 459 U.S. 1040 (1982):

> "Rule 8(b) requires that there be some common activity involving all of the defendants which embraces all of the charged offenses even though every defendant need not have participated in or be charged with each offense. See United States v. Ford, 632 F.2d 1354, 1372-73 (9th Cir. 1980), cert. denied, 450 U.S. 934, 101 S.Ct. 1399, 67 L.Ed.2d 369 (1981). In order to be part of the 'same series of acts or transactions,' acts must be part of one overall scheme about which all joined defendants knew or in which they all participated. United States v. McKuin, 434 F.2d 391, 395-96 (8th Cir. 1970), cert. denied, 401 U.S. 911, 91 S.Ct. 875, 27 L.Ed.2d 810 (1971)."

In this case the charges in a single-count indictment clearly represents a single transaction in which both defendants are claimed to have participated and of which they are claimed to have had knowledge. No basis for severance pursuant to rule 8 is found.

The decision whether to grant or deny severance pursuant to rule 14 is within the broad discretion of the trial court. United States v. Weisman, 624 F.2d 1118 (2d Cir.), cert. denied, 449 U.S. 871 (1980). Ordinarily, persons who have been jointly indicted should be jointly

tried. United States v. Ramirez, 710 F.2d 535 (9th Cir. 1983). A defendant seeking severance on the ground that he will be prejudiced by a joint trial bears

> "a 'heavy burden' of showing that he will suffer 'substantial prejudice' from a joint trial. Substantial prejudice does not mean merely a better [worse?] chance of acquittal. The prejudice must be of such a degree that the defendant's rights cannot be 'adequately protected by appropriate admonitory instructions to the jury' and such that, without a severance, he would 'not receive a fair trial.' Absent such a showing the defendant's request for a separate trial must give way to the public interest in avoiding unnecessary duplicative efforts, trial time and expense." United States v. Potamitis, 564 F.Supp. 1484, 1486 (S.D.N.Y. 1983), aff'd, 739 F.2d 784 (2d Cir.), cert. denied sub nom. Argitakos v. United States, 469 U.S. 918 (1984).

Lipari claims that "Gullo, if tried separately from defendnat [sic] LIPARI, would, upon information and belief, state that defendant LIPARI was in no way involved in the alleged extension of credit nor in the use of threats or violence allegedly used to collect the extension of credit." Affidavit of Herbert L. Greenman, Esq. (sworn to May 18, 1987) attached to Notice of Motion dated May 18, 1987, ¶19. It is later stated by Lipari's attorney that Gullo "will unequivocally state that defendant Lipari had no part in the alleged crime." Id. at ¶21. It is further averred that Lipari has been informed that Gullo will not testify if the defendants are tried together. Further, it is alleged that a joint trial will preclude Lipari from cross-examining Gullo as to statements Gullo made before the CDR Center. Here, the recitation that, upon information and belief, Gullo would testify at a separate trial, and, presumably

thus waive his Fifth Amendment privilege, fails to establish that Gullo would in fact testify at a separate trial. See United States v. Finkelstein, 526 F.2d 517, 523-525 (2d Cir. 1975), cert. denied sub nom. Scardino v United States, 425 U.S. 960 (1976). The parties have not addressed whether Gullo's testimony would be cumulative and whether it would be subject to substantial, damaging impeachment. Id. at 524. Clearly, judicial economy would be served by a joint trial. Given the arguments asserted, this Court finds that Lipari has not established that a joint trial would substantially prejudice him. Severance will not be granted.

Lipari also seeks to have the government disclose whether it, pursuant to Fed.R.Evid. rule 404, intends to utilize witnesses or evidence to establish other "bad acts" or "similar course of conduct" and, if so, the identification of the witnesses and the evidence. The government has responded by providing certain information requested. Given the government's disclosure, no order is found to be presently necessary.

Lipari seeks pretrial disclosure of statements made by his co-defendant and a hearing to determine the admissibility of any such statements against him. However, this Court finds it best to determine the admissibility and attribution of any such evidence at trial.

The government, noting that the two defendants are represented by attorneys from the same law firm has moved for a hearing to determine any conflict of interest. The

defendants' attorneys assert that they are of the opinion that no conflict exists but they do not oppose inquiring into the matter. A hearing will be ordered.

Accordingly, it is hereby ORDERED (1) that Gullo's motion to dismiss the Indictment is denied, (2) that all communications, memoranda and work products arising out of the action before the CDR Center are suppressed as provided in New York's Judiciary Law, (3) that Gullo's motion for disclosure of grand jury matters is denied, (4) that Gullo's motion for disclosure of Brady material is denied without prejudice, (5) that Gullo's motion for discovery is denied without prejudice, (6) that the government's agents are to preserve any and all notes, memoranda, resumes, synopses and the like associated with this action, (7) that Lipari's motion to dismiss the Indictment is denied, (8) that Lipari's motion to sever is denied, (9) that Lipari's motion to compel disclosure of so-called "bad-act evidence" is denied without prejudice, (10) that Lipari's motion for disclosure of co-conspirator statements, if any, and for a determination of their admissibility vel non is denied and (11) that the government's motion for a hearing to determine conflict of interest vel non is granted. The parties shall appear at 2:00 p.m. August 24, 1987 to set a date for such hearing.

Dated: Buffalo, N. Y.
August 14, 1987

John T. Elfvin
U.S.D.J.

APPENDIX C

CDR Centers Legislation

§ 819-b. Establishment and administration of centers

1. There is hereby established the community dispute resolution center program, to be administered and supervised under the direction of the chief administrator of the courts, to provide funds pursuant to this article for the establishment and continuance of dispute resolution centers on the basis of need in neighborhoods.

2. Every center shall be operated by a grant recipient.

3. All centers shall be operated pursuant to contract with the chief administrator and shall comply with all provisions of this article. The chief administrator shall promulgate rules and regulations to effectuate the purposes of this article, including provisions for periodic monitoring and evaluation of the program.

4. A center shall not be eligible for funds under this article unless:

(a) it complies with the provisions of this article and the applicable rules and regulations of the chief administrator;

(b) it provides neutral mediators who have received at least twenty-five hours of training in conflict resolution techniques;

(c) it provides dispute resolution without cost to indigents and at nominal or no cost to other participants;

(d) it provides that during or at the conclusion of the dispute resolution process there shall be a written agreement or decision setting forth the settlement of the issues and future responsibilities of each party and that such agreement or decision shall be available to a court which has adjourned a pending action pursuant to section 170.55 of the criminal procedure law;

(e) it does not make monetary awards except upon consent of the parties and such awards do not exceed one thousand dollars; and

(f) it does not accept for dispute resolution any defendant who has a pending felony charge contained in an indictment or information arising out of the same transaction or involving the same parties, or who is named in a filed accusatory instrument (i) charging a violent felony offense as defined in section 70.02 of the penal law, or (ii) any drug offense as defined in article two hundred twenty of the penal law, or (iii) if convicted, would be a second felony offender as defined in section 70.06 of the penal law.

5. Parties must be provided in advance of the dispute resolution process with a written statement relating:

(a) their rights and obligations;

(b) the nature of the dispute;

(c) their right to call and examine witnesses;

(d) that a written decision with the reasons therefor will be rendered; and

(e) that the dispute resolution process will be final and binding upon the parties.

6. Except as otherwise expressly provided in this article, all memoranda, work products, or case files of a mediator are confidential and not subject to disclosure in any judicial or administrative proceeding. Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person present at the dispute resolution shall be a confidential communication.

(Added L.1981, c. 847, § 3.)