



PENNSYLVANIA
COUNCIL OF MEDIATORS

Report For Members and Friends

Summer 2004

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PCM Annual Conference

At the kick-off to its 17th annual conference, PCM gave its MVP (Most Valuable Peacemaker) Award to Supreme Court Justice Max Baer in recognition of his groundbreaking support of mediation in Pennsylvania.

As a judge in Family Court of Allegheny County, Baer was spurred to find a better way to resolve custody disputes by the sight of two young siblings walking into a courtroom with a look of terror on their faces. Under the custody mediation program he established, parents participate in an education session, while the kids spend time in a separate group talking and drawing pictures to help them understand their family's experience. Within five days the parties go to mediation to try to resolve their issues on their own—no attorney and no grandparents. The sessions last about two or three hours and cost the parents \$125. So far the program has shown a 73% success rate. Now Baer, in his new position on the PA Supreme Court, is building support to replicate the Allegheny mediation model in other counties. He invites mediators with input on best practices to contact him at max.baer.adr@pacourts.us.

Current Trends in Court-Connected Mediation: More, Better or Both?

PCM Conference keynote speaker Diane Kenty, Director of the Maine Office of Court Alternative Dispute Resolution, outlined both the opportunities and challenges facing the integration of mediation into the existing justice system. Offering mediation through the courts is important because it reflects the participatory nature of democracy, supports people in taking control of their own lives and avoids the suggestion of a two-tiered system of justice.

Maine started a mediation program in 1984 with a requirement that parties involved in divorce action attend a mandatory mediation session where they could learn about options for resolving their disputes. Since then, parties in small claims and civil/commercial claims have gained the option of mediation. A follow-up study reveals more civil/commercial cases settling sooner when they take advantage of mediation.

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PCM Annual Conference (continued)

Kenty sees three key areas ripe for exploring the benefits of alternative dispute resolution techniques: land use conflicts involving violations of trusts and easements, family members facing end of life decisions, and succession planning for family business or vacation properties.

State governments facing a financial crunch are reluctant to create new offices to institutionalize ADR programs. Groups embarking on this process need to be creative in developing alternative funding and support mechanisms such as university-based programs. Wherever a program is housed, mediators need to be involved in constructing the framework. This means wrestling with the issue of credentialing and supports for quality of service. Programs also need to be concerned about the delivery of justice, a primary concern of the courts. (See article entitled *Justice, Understanding and Mediation* on page 4.) Kenty suggested that organizations like PCM can add value to a program by providing such services as clinical supervision, mentoring and peer consultation for mediators.

PA Medical Malpractice Task Force

Speaking at a plenary session of the PCM Conference, former Pennsylvania Supreme Court Justice William Lamb confessed that as a trial lawyer he was initially skeptical of mediation. But challenged by Governor Rendell and the legislature to tackle the spiraling costs of medical malpractice, Lamb formed a task force in 2003 to investigate the potential for mediation to deal with the conflicts inherent in very emotional situations.

The pilot medical malpractice mediation program created by the PA Supreme Court took as its model the first hospital-based mediation program initiated in late 1995 at Chicago's Rush-Presbyterian-St. Luke's Medical Center. Under the rules established in Pennsylvania, parties to a suit are prohibited from venue-shopping and must file where the alleged act occurred; further, they need to submit a certificate of merit from a medical professional supporting the basis of the allegation.

To date, 18 counties have moved to set up a mediation program and the Jefferson Health System, Drexel University and the University of Pittsburgh Medical Center are piloting the program. Both plaintiff and defense attorneys have been trained to do the mediations. Plaintiffs get to select the two mediators. So far about 85% of the mediated cases have reached a successful conclusion. Participants have found that an apology is one of the most powerful responses to the injured party.

In fact, according to a recent article in the Wall Street Journal (*Medical Contrition—Doctors' New Tool to Fight Lawsuits: Saying "I'm Sorry"*), a genuine apology prompted a patient to drop her plans for a lawsuit after an anesthesiologist accidentally injected a painkilling drug in the wrong place, causing her heart to stop before she was revived. Increasingly insurers and hospital lawyers have been rethinking the traditional approach—"defend and deny." Some states have supported this by passing laws to protect a doctor from having an apology used against him/her in court. Conventional wisdom said that when the Veterans Affairs Hospital

in Lexington, KY, adopted a policy of "extreme honesty" in 1999, lawsuits would mushroom. Instead the hospital found that the average cost of payouts put them in the bottom quartile of comparable VA hospitals.

Optimizing the Use of Mediation to Resolve Employment Discrimination Disputes

Based on a presentation at the PCM Conference by Nancy Kraybill, University of Pennsylvania Law School

Staff of community dispute settlement centers daily experience the frustration of explaining the benefits and options of mediation to disputants, only to have a minority of intakes actually result in a mediation. Parties who come to a district court expecting the judge to hear their arguments for vindication often approach the idea of mediation with a negative mindset when the judge, instead, delays the hearing for a time and suggests the disputants try mediation. Resisting to the end, some confess to the center intake staff that they are agreeing to go through with the mediation just so they will appear compliant when they return to the judge later for the "real" process that will secure the justice they are seeking. Imagine their surprise when the mediation turns out to respond to their needs and produces an acceptable result.

While the average community dispute settlement center does not have the resources to study the reasons behind parties' reluctance to try mediation, the US Equal



Employment Opportunity Commission has done extensive research into the question. Nancy Kraybill's presentation of the study's conclusions offers some useful insight for practitioners in various fields of mediation. (For the full text of the report, see McDermott, Jose & Obar—*An Investigation of the Reasons for the Lack of Employer Participation in the EEOC Mediation Program*, www.eeoc.gov/mediate/study3/index.html)

Offered the opportunity to reach a settlement through mediation, over 85% of the charging parties in EEOC cases opted for mediation, but only 30% of employers were willing to engage in the process. Despite their opposing views about the value of mediation going in, when the parties did come to the table, slightly more employers (96%) than employees (90%) were satisfied with the results.

Each party had a good understanding of the possibilities

of mediation on an intellectual level, but over half the employers declined to participate because they felt they would be forced to offer a monetary settlement, clearly not a required element of every case. This suggests that not only do mediators need to help the parties get creative in structuring an outcome, but intake staff might meet disputants' objections to the process with questions to elicit the range of appealing solutions the parties might imagine going into the process.

By far the most critical determinant for employers rejecting mediation was their perception that the case had no merit and that they would easily win through litigation. They further feared that accepting mediation was an indicator of weakness and culpability on their part. And some admitted that they just could not bring themselves to face the complainant across the table.

Project PEACE: Anti-Violence Training for Schools

Attorney General Jerry Pappert and Pennsylvania Bar Association President Thomas M. Golden hosted participants from 12 Pennsylvania elementary schools as part of the fifth annual Project PEACE (Peaceful Endings through Attorneys, Children and Educators) training conference this March. Pennsylvania is the second state in the nation to feature this program in an effort to reduce school violence.

Project PEACE was developed by the LEAP Kids program to teach elementary school children how to peacefully resolve conflicts with fellow students. Teams of principals, educators, parents, counselors and attorneys participated in the two-day training.

Over the past four years Project PEACE has shown that it can make a difference in Pennsylvania schools. Participating schools have reduced violence and conflict and their students have gained important life-skills that promote self-esteem and problem-solving.

This year's program included schools from Philadelphia and Pittsburgh, as well as Chester, Cumberland, Delaware, Lancaster, Luzerne, Lycoming, and Montgomery Counties. Since Project PEACE was brought to Pennsylvania five years ago, nearly 60 elementary schools have implemented the program to resolve conflicts in their schools.

Membership Information

If you are interested in joining other mediators statewide and becoming a member of PCM, check out the web site at www.pamediation.org where you'll find a membership application and other information.

If you haven't visited the site recently, you'll be pleasantly surprised by the new look and wealth of information. Remember that PCM members can be listed on the web site for \$15 in addition to the regular membership fee. (To get more information on a listing, contact Phoebe Sheftel at pasheftel@attglobal.net.)

Justice, Understanding and Mediation: When Talk Works, Should We Ask for More?

Adapted from an article by Grace E. D'Alo, Attorney/Mediator

How you view mediation's benefits and goals—or as some would say the “value added”—affects how you evaluate success in meeting those goals. Grace D'Alo, former director of the Pennsylvania Special Education Mediation Service, has investigated this premise by looking at the expectations and outcomes of mediations conducted to resolve parent/school disputes related to education plans for a special needs child.

What is the value added to mediation in a special education context? There are, of course, many pragmatic reasons to value mediation. Parents may choose the mediation process for their own emotional, financial, or personal reasons. School districts may choose mediation because litigation is such an unattractive option. The time it takes to prepare witnesses, hold a hearing, and coordinate class coverage is a diversion most school administrators would prefer to avoid.

But how do we determine whether or not the mediation process facilitates those goals? In special education mediation and other forums, satisfaction surveys are often the acknowledged “voice” of the participant. In many cases, however, these surveys may not be aggregated, analyzed or constructed in a way that gives programs or mediators feedback related to specific interventions. Based on available research, disputants are generally thought to be looking for three benefits from a dispute resolution system:

- Dignified and respectful treatment, exemplified in acknowledgement of their voice
 - Achievement of personal and emotional goals, such as reconciliation; or at least a result that does not leave them feeling worse, emotionally and psychologically. (Sternlight, “ADR is here: Preliminary reflections on where it fits in a system of justice,” *Nevada Law Journal* 3, 2003, p. 299)
- Mediator skills often focus on meeting the procedural justice, personal, and emotional goals. But for D'Alo a nagging question remains—what about the substantive result? Is it important to screen mediated agreements through some filter of substantive fairness? Or should we accept the untested proposition that substantive justice flows as naturally as water over Niagara Falls when a dispute resolution system is procedurally just and leaves the party no worse off emotionally and psychologically? Substantive justice concerns are both important and easily overlooked when we observe mediator performance and develop quality assurance measures.
- Author Susan Silbey has described one special education mediator whose style and high agreement rate (70%) seems to endorse the effectiveness of his near exclusive focus on the procedural aspects of mediation. (“Patrick Davis; To Bring Out the Best...To Undo a Little Pain” in *Special Education Mediation*,” in Deborah Kolb, *When Talk Works*, 1994). What is striking and compelling about Mr. Davis's mediation style is that it seems to have developed from within. Davis does not claim to

have an expertise in state laws and regulations governing special education or in the programs and services that may be available in an individual school district. He is also not specifically interested in techniques or an ideology of mediation. “He is a lover of people, not processes,” concludes the author (Silbey, p. 102). From this genuine love of people, Davis has developed a way of mediating that acknowledges the parties' voices, treats the parties with dignity and respect, and leaves the parties in a better place emotionally and psychologically.

Taking all these skills and factors together—the ability to channel the powerful dynamics inherent in special education disputes, the rate of mediated agreements, the benefits that the mediated agreements confer on all the parties, as well as the children at the heart of the dispute, and the potent attraction of mediation methods based on valuing people over process—it is clearly in every state's best interest to find, support, and hold dear mediators like Mr. Davis.

But the mediation profession may be in a perilous position if substantive justice concerns are overlooked in favor of procedural values. And, in light of the dedication, devotion, and skill of the many wonderful mediators in this field, it is easy to overlook some difficult questions and project disputants' voices rather than listen to them.

Silbey deduces from observation of numerous mediations conducted by Davis that exposing the parents' pain and celebrating the child are the parents' primary goals in



special education mediation. She supports this conclusion partly through her analysis of transcripts of the mediations, pointing to the fact that the word “pain” is mentioned more than any other word. The reader does not know, however, whether the word “pain” is used by the parties or by the mediator; or if the discussion of pain is prompted by the mediator’s direction or even by his subtle insistence. In contrast, Silbey interprets the lack of words relating to rights or statutes in the transcripts as evidence that legal rights and entitlements are not the primary focus of the parties. This conclusion does not appear to take into account Davis’s admitted lack of knowledge or interest in these technicalities. If the mediator subtly or directly moves the parents toward a discussion of their frustrations and fears, and as a willing and informed listener encourages such expression, it is likely to be valuable and important conversation. But is it the goal of the parents in the mediation session?

Similarly, the lack of discussion of rights in this case may have reflected the mediator’s acknowledged lack of legal expertise, or the reluctance of a non-attorney mediator to refer to legal standards for fear of being charged with the unauthorized practice of law. It is also possible that the parties’ failure to refer to the law reflects their desire to have a conversation with each other that is not premised on the implied threat of litigation. Not wanting to frame a discussion in terms of lawsuits and legal battles is not necessarily the same thing as wanting to put aside those rights in the context of a negotiation.

Despite raising these issues, D’Alo thinks it is very simple to see how Patrick Davis delivers mediation at its best in terms of procedural justice and other personal and emotional goals. But if the

participants also want a system that provides a substantively fair and just result, where is that analysis? Do we need to even concern ourselves with it? D’Alo would argue that we must.

D’Alo cites as an example a situation in which a mediator in the Pennsylvania Special Education Mediation Program once called her during a break in a mediation session in which “mainstreaming” was the issue. The parents wanted their eight-year-old child, who had always been educated in a special education classroom in a building separate from the regular school, to be integrated into the regular third grade classroom. The district’s position in the mediation was that the child was successful in her current segregated placement and that it would not be appropriate to change her Individual Education Plan. The child was well behaved, successful in her setting, and a pleasure to be around. The mediation appeared to be at an impasse when the mediator called D’Alo. The mediator was unaware of the standards for determining whether a child should be included in a regular education class. On the phone, D’Alo was able to give the mediator a broad outline of the questions established by the controlling case on the issue. These were the questions that the school district would have to answer if the case went to court.

When the mediator reconvened the session, she posted these questions on a flip chart. The school district immediately acknowledged and recognized that the questions represented the controlling standard. The first prong of the standard is to ask what previous attempts the district had made to integrate the child. Since there had been no attempts to integrate the child, the district had a legally indefensible position. Within a short time, the mediation ended

with the school district agreeing to the parents’ request. In this case, there were no obvious additional costs associated with the district’s yielding to the parents’ preference for a regular classroom placement, and yet the district had chosen to maintain a legally indefensible position. If the standard had not been introduced into the discussion, the mediator felt certain the mediation would have ended without agreement.

For many parents, mediation may be the only available formal dispute resolution process. Statistics in Pennsylvania indicate that the increasing use of mediation does not result in fewer hearings, which suggests that parties opting for mediation are not necessarily following along a continuum with respect to dispute resolution alternatives. But even with the limited data available from participant interviews, it is clear that the benefits parties are seeking are not an either/or proposition. They want to be heard, be part of a dignified process, be acknowledged, build better relationships, repair trust in each other, and resolve the problem in a substantively fair way. When parents reach agreements in mediation without legal representation, should we be concerned if such agreements are potentially unfair in substance? As long as there is little objective scrutiny of the mediator’s performance or substantive knowledge, D’Alo thinks it is a critical concern.

The question D’Alo raises is a simple one and applies to mediations in any setting—can mediation be both a people-based process that provides procedural justice and enhances the likelihood of achieving personal emotional goals, as well as a rights-based process that balances legal rights and responsibilities? D’Alo hopes the answer is yes.

New PCM Board Members Elected

- **Valerie Faden, Esq.**
A volunteer mediator for the Neighborhood Dispute Settlement Program (Harrisburg) and member of the PA Bar Association and the Dispute Resolution Section of the American Bar Association.
- **Mark Taffera**
Director of the Rose Center in Scranton since January 2004.
- **Bonnie Millmore**
Director for 19 years of the Center for Alternatives in Criminal Justice in State College.

New Members

Michelle Baggette; Cherry Hill, NJ
Sheila Bennett; Philadelphia, PA
Maribeth Blessing; Rockledge, PA
Chanel N. Broadus; Philadelphia, PA
Debbie Drezner; Wexford, PA
Valerie J. Faden, Esq.; Camp Hill, PA
Grayfred B. Gray, J.D.; Lancaster, PA
Martha Harty; Pittsburgh, PA
John D. Hendricks, Esq.; Pittsburgh, PA
Kimberly Lavin; York, PA
Catherine J. Morrison; Lancaster, PA
Marilyn J. Rischmann; Philadelphia, PA
Mary E. Schellhammer; Somerset, PA
Judith Teeter; Pittsburgh, PA
Jolene Tyson; New Castle, DE
Kathleen Vaughan; Staten Island, NY

News from the Mediation Centers

- The Lancaster Mediation Center recently welcomed Kimberly Lavin as its new Executive Director. Kim graduated from Temple University with a focus on conflict resolution. She has worked closely with retiring Director Grace Byler to smooth the transition. Kim invites people interested in the Center to contact her for more information about the program and training opportunities. PCM extends its best wishes to Grace for exciting new directions in her life—no quiet retirement for this woman!
- This past January, Mark Taffera assumed the role of Director at The Rose Center in Scranton. He holds a Master's degree in Social Work and Theological Studies and has taken extensive training in several specialized areas of mediation—Family and Divorce, Peer, and Victim/Offender Conferencing. Former Director Marty Thomas-Brumme has moved on to a position in the development office for Elizabethtown College. PCM thanks him for his valuable service to the organization.
- Neighborhood Dispute Settlement (NDS) in Harrisburg celebrated 25 years of providing community mediation services at its annual meeting in April. Harrisburg Mayor Stephen R. Reed gave a keynote address affirming the city's support for NDS' local peacemaking efforts. As part of the celebration, NDS mediator Rudy Yandrick compiled a history of the organization. Begun in 1979 to provide mediation services in Dauphin County as part of the Human Relations Council of Greater Harrisburg, NDS has become an independent organization and expanded to serve Cumberland County. NDS has two staff people and over 50 volunteer mediators on its roster. Since 2001, Executive Director Deborah Ritchey has worked to strengthen NDS' partnerships with local police departments, district justices, and the local bar associations. NDS welcomes dialogue with other members of PCM about how community mediation centers can effectively make their local community more aware of the availability of mediation services. If you have successes you would like to share, contact NDS at 717-233-8255 or concillatn@pa.net.
- The Lancaster Area Victim Offender Reconciliation Program (LAVORP) graduated its 10th anniversary class of youth justice mediators on May 22. Thirteen newly certified volunteers join an existing roster of over 50 mediators to assist victims and juvenile offenders in addressing the harm that results from crime. The Lancaster County Community Foundation has helped to underwrite the cost of training. LAVORP is a faith-based mediation program that receives more than 300 referrals annually. Most youthful offenders who complete LAVORP mediation do not commit crimes again. LAVORP Executive Director Jon Singer estimates that its alternative justice programs save Lancaster County taxpayers more than \$150,000 annually.

Training Opportunities

Separation & Divorce: Understanding the Impact of Grief and Loss in Family Mediation

Advanced training for practicing mediators or those who have completed basic mediation training.

Montgomery County Mediation Center at the Montgomery Bar Association, 100 West Airy Street, Norristown

June 29, 8:30 a.m.–12:30 p.m.

\$80; \$111 with 4 CLEs

Contact: Sheryl Richman,
610-277-8909 or
mcmcpeace@aol.com.

Basic Mediation

July 16–18 & October 29–31

Lancaster Mediation Center

\$370; \$345, if received by June 25
Call 717-293-7231 for information

Basic Mediation

July 29–31

Good Shepherd Mediation Program, Philadelphia

\$245 or \$495 with 19.5 PA CLE credits

Call 215-843-5413 for information

Basic Mediation

August 10–13

Montgomery County Mediation Center at the Bryn Mawr Presbyterian Church, Bryn Mawr

Contact: Sheryl Richman,
610-277-8909 or

mcmcpeace@aol.com.

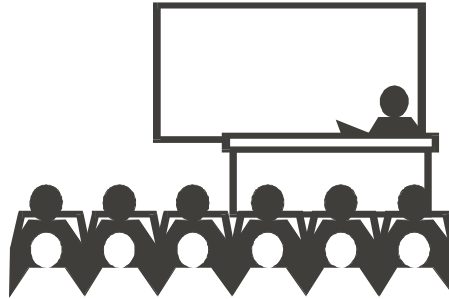
Disability-Related Disputes

August 26–27

Good Shepherd Mediation Program

\$300/\$325 with 15 PA CLE credits

Call 215-843-5413 for information



Family Mediation: Divorce and Custody

October 8–12

Montgomery County Mediation Center

Contact: Sheryl Richman at
610-277-8909 or email
mcmcpeace@aol.com.

Victim Offender Conferencing

October 14–16

Good Shepherd Mediation Program

\$375 for volunteers/\$425 with 19.5 PA CLE credits

Call 215-843-5413 for information

Basic Mediation

October 21–23

Good Shepherd Mediation Program, Philadelphia

\$245 or \$495 with 19.5 PA CLE credits

Call 215-843-5413 for information

Basic Mediation

October 29–31

Lancaster Mediation Center

\$370; \$345, if received by Oct. 1

Call 717-293-7231 for information

Contributing to the Newsletter

The Pennsylvania Council of Mediators publishes its Report for Members and Friends. We are able to share information about current issues in mediation across the state of Pennsylvania and the United States. We welcome your input and ideas! Please send training information, program highlights, educational articles, book reviews, or any other information useful to our readers. Submissions will be printed as time and space allow. Send submissions to:

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Institute for the Study of Conflict Transformation, Inc.
at Hofstra University School of Law

Mark your Calendar!

First National Conference on Transformative Mediation

Looking Back, Looking Forward

Transformative Practice Ten Years after
“The Promise of Mediation”

For more information contact
Jennifer Jorgensen by phone
(845) 452-7843, or email at
jenniferjorgens@earthlink.net

November 7 & 8, 2004 • Philadelphia, PA

Join us for a chance to Network and Learn

Watch for the conference brochure and visit our website at
www.transformativemediation.org



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