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THE PENNSYLVANIA COUNCIL OF MEDIATORS

REPORT

For Members and Friends Fall 2000

http://www.libertynet.org/pcounmed

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A Message From The President

by Brenda Wolfer

For many years, I have been actively trying to promote conflict resolution and mediation training for all of the school districts in the county in which I work. It has been and continues to be a challenging goal to reach, but not an impossible one. In addition to the most common challenge, funds, I have found that school administrators are faced with the monumental task of freeing up teachers' time and finding substitutes for them so that they can train with the students.

This past year, we have been able to find some funding for middle school training, which led us to train 18 students in basic mediation at a local school. The faculty and administrators were so enthusiastic about the prospect of students helping other students to resolve their conflicts, that the program started the week after we finished the training. In June, we received a report that over 130 conflicts were referred to mediation; one hundred cases actually came to the table while the others were worked out among the students, themselves.

While we found this report both exciting and affirming, what came as a bigger surprise was the report from a local police office, that they no longer had any cases for the Youth Aid Panel in that school district because the students were working things out themselves.

It is my hope that PCM members from all over the state can promote and when possible assist in helping all Pennsylvania students to become good mediators and good problem solvers. I think it is one of the greatest legacies we can leave our children.

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Upcoming Board Meetings

November 17, 2000
State College

January 19, 2001
Carlisle

March 2, 2001
Harrisburg

April 20, 2001
Conference Site

June 15, 2001
Lancaster

Directions, specific locations and addresses are included in previous meeting minutes and upcoming meeting agendas which are mailed to the Board Meeting mailing list. If you are interested in receiving the meeting notices on a regular basis contact Phoebe Sheftel.

A N N O U N C I N G

"Critical Issues In Mediation"

The 2001 Pennsylvania Council of Mediators Conference will be held on April 20 & 21, 2001, at Neumann College in Aston, PA

Keynote Speaker: Joseph Folger

Joseph P. Folger, Ph.D., is a Professor of Communication at Temple University in Philadelphia. He received a Ph.D. in communication from the University of Wisconsin and served on the faculty of the University of Michigan prior to his appointment at Temple. He is a former chair of the communication department and the former Associate Dean for Research and Graduate Studies at the School of Communications and Theater. He conducts research and teaches in the area of conflict management, mediation, group process and decision-making.

Dr. Folger has worked extensively as a third party intervenor and mediator in organizational, community and family disputes. He has been the program chair for the National Conference on Peacemaking and Conflict Resolution and has helped to establish several major conflict intervention programs. He is currently a senior consultant with Communication Research Associates where he conducts communication skills training, coaching and conflict intervention.

Dr. Folger has published extensively in the area of communication, conflict and mediation. His recent books include the award-winning volumes Working through conflict: Strategies.for relationships, groups and organizations, 3rd Edition (with S. Poole and R.K. Stutman) and The promise of mediation: Responding to conflict through empowerment and recognition (with R.B.Bush). He has also published numerous research articles as well as the edited volume, New directions in mediation (with T. S. Jones). Most recently he completed a two-year mediation training development project funded by the Hewlett and Surdna Foundations.

Model Standards for Family and Divorce Mediation Completed

The third and final Symposium on Model Standards of Practice for Family and Divorce Mediation was held in Chicago in early August. Winnie Backlund and Grace Byler represented PCM. The Chicago meeting brought to an end a two-year project that started in Orlando, Florida, in the fall of 1998.

It is the hope of the Symposium that the Model Standards will be a framework for a continuing dialogue to define and refine the profession of mediation. In Pennsylvania the Model Standards will be presented to the PCM Board of Directors for consideration and possible adoption. A full text of the Model Standards and an accompanying narrative will be published in the January 2001 issue of AFCC's journal, the FAMILY COURT REVIEW.

Standard I

A family mediator shall recognize that mediation is based on the principle of self-determination.

Standard II

A family mediator shall be qualified by education and training to undertake the mediation.

Standard III

A family mediator shall facilitate the participants' understanding of what mediation is and assess their capacity to mediate before the participants reach an agreement to mediate.

Standard IV

A family mediator shall conduct the mediation process in an impartial manner. A family mediator shall disclose all actual and potential grounds of bias and conflicts of interest reasonably known to the mediator. The participants shall be free to retain the mediator by an informed, written waiver of the conflict of interest. However, if a bias or conflict of interest clearly impairs a mediator's impartiality, the mediator shall withdraw regardless of the express agreement of the participants.

Standard V

A family mediator shall fully disclose and explain the basis of any compensation, fees and charges to the participants.

Standard VI

A family mediator shall structure the mediation process so that the participants make decisions based on sufficient information and knowledge.

Standard VII

A family mediator shall maintain the confidentiality of all information acquired in the mediation process, unless the mediator is permitted or required to reveal the information by law or agreement of the participants.

Standard VIII

A family mediator shall assist participants in determining how to promote the best interests of children.

Standard IX

A family mediator shall recognize a family situation involving child abuse or neglect and take appropriate steps to shape the mediation process accordingly.

Standard X

A family mediator shall recognize a family situation involving domestic abuse and take appropriate steps to shape the mediation accordingly.

Standard XI

A family mediator shall suspend or terminate the mediation process when the mediator reasonably believes that a participant is unable to effectively participate or for other compelling reasons.

Standard XII

A family mediator shall be truthful in the advertisement and solicitation for mediation.

Standard XIII

A family mediator shall acquire and maintain professional competence in mediation.

National ADR Conference

by Phoebe Sheftel and Carole Green

Early June in the beautiful horse country of Lexington, KY, was the setting for the first Summit of the States on Conflict Management and Dispute Resolution. Sponsored by the Council of State Governments (CSG), the conference brought together over 250 representatives from all fifty states and four of the five territories. The goal was to find out where ADR is being used and discuss how CSG might support the states in adopting various conflict management and collaborative processes. Governor Paul Patton of Kentucky is the current president of CSG, which provides assistance to state governments relating to best practices, innovations, and efficiencies in governmental services. In 1999 CSG created the National Institute for State Conflict Management. (Check out their web site at www.csg.org.)

Participants included state legislators, judges, executive branch staff, directors of state offices of dispute resolution, non-profit organizations, and private practitioners. Seven people represented Pennsylvania at the conference: staff of the Department of Environmental Protection's Office of Training & ADR Services (Director Cheryl Peoples, Nina Huizinga, Lindy Mendelsohn, and Jennifer Neeves); Scott Roy, Chief Counsel of the PA Board of Probation and Parole and the official state conference "ambassador" designated by Governor Ridge; Phoebe Sheftel from Winsor Associates; and Carole Green, a private-practice mediator/arbitrator and president of the Board of the Montgomery County Mediation Center.

Breakout sessions over the two and a half days covered substantive areas of interest to those in state government such as environment, employment, health, criminal justice/juvenile, and contracting. There were also opportunities to hear philosophical discussions on the appropriate use of ADR, particularly mediation and facilitation, in the conflicts between state agencies, and between agencies and the public. The gathering highlighted the work of a new organization, the Policy Consensus Institute (PCI), which is following in the footsteps of NIDR (National Institute for Dispute Resolution). PCI is funded by the Hewlett Foundation to work with state leaders in fostering the use of consensus building tools in state governments. PCI is collaborating with CSG in several areas of legislative action, training and providing informational resources (www.policyconsensus.org and www.agree.org).

Getting People to the Table

Keynote speaker Harvard Law Professor Emeritus Roger Fisher, author of "Getting to Yes," discussed one problem which mediators constantly face: getting the parties to even agree to try the mediation process. He attributes this reluctance to several factors, including an expectation of bias on the part of the mediator, a fear of appearing weak by agreeing to mediation, and lawyers' subversion of the process when they counsel clients to participate in the mandatory introductory session, but not to compromise on any point.

To deal with this hesitancy and misunderstanding about the mediation process, Professor Fisher suggested that it's up to the mediator to take the first step. A mediator hearing about a potential conflict needs to create an informal forum where the parties can come together, meet the mediator and brainstorm on ways collaborative problem-solving might address their needs. The key is to present the event as a "no commitments" encounter. One effective exercise he described consists of having each party state their interests, while the other parties are asked to note down everything they learn from these statements. Then opposing interests are paired off and each person in the pair works to come up with a statement of what the other party agrees is an accurate representation of their interests.

ADR in State Governments

Currently nearly 30 states have some statewide entity that provides dispute resolution services and/or support. These programs stretch from Maine to Hawaii and Alaska to Florida. Over 12 of the programs were started with support from NIDR between 1984 and 1994. Most early programs started in the judicial branch, but more recent programs have emerged in the administrative branch. For example, here in Pennsylvania the Department of Environmental Protection has created a strong program with a roster of trained staff mediators. For an excellent overview of state dispute resolution programs, see the PCI Web site.

State agencies identified several stumbling blocks they must overcome in setting up an ADR program. The initial costs for training can be enough to discourage some. In some cases the future mediators had to assume their own costs for the training. When there is an established training program, it is important to conserve resources by carefully pre-qualifying participants to ensure that the outcome is beneficial for the agency. Trainings should be adapted to the very specific needs of the organization. Once there is a roster of trained mediators within an agency, precautions should be taken to create a strong wall between the staff doing mediation and the enforcement staff.

Critical to the success of establishing a state program is having a strategically placed "champion" of the cause. In several states the governor has assumed this role, while elsewhere other influential leaders have guided

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Community Corner

Mediation is now being offered at The Middleton Center

As part of a comprehensive offering of counseling services, The Herbert H. Middleton Jr. Center for Pastoral Care and Counseling is providing mediation through the Montgomery County Mediation Center.

The Middleton Center is a ministry of the Bryn Mawr Presbyterian Church, 625 Montgomery Avenue, Bryn Mawr. The Center opened just a year ago on the campus of the church and has experienced a steady increase in number of clients seen as well as in the variety of services it is able to offer. Therapists from Penn Council for Relationships provide traditional counseling to individuals, couples, and families. Individuals and families with substance abuse problems are seen by therapists from OATS (Outpatient Addiction Treatment Services). One of the more unique services provided by the Middleton Center is spiritual direction, an ancient Christian discipline examining a person's spiritual journey. Bereavement counseling is offered by a therapist specializing in grief and loss therapy. Three different counselors with three different approaches offer career and vocational counseling.

This fall The Middleton Center is offering support groups for individuals suffering from depression, for fifth and sixth grade girls struggling with peer issues, and for adults and children experiencing separation or divorce. In addition, workshops are scheduled for career management, prayer, parenting, and stress management.

The Middleton Center provides a comfortable and confidential setting for mediation. The Bryn Mawr setting is convenient for people from the Main Line area who are seeking resolution of conflicts in divorce, community, and employment situations. Winnie Backlund of the Montgomery County Mediation Center comes to the Middleton Center to see clients.

This past summer, The Middleton Center hosted two training sessions related to mediation. The first was organized by the Victim/Offender Conferencing of Montgomery County and trained community volunteers to facilitate mediation between victims and their juvenile offenders. The second session provided mediation training to lawyers and other professionals from a geographic area spanning New Jersey to western Pennsylvania.

For more information about the services of The Middleton Center, call the center director, Karen A. Dunkman, at (610) 525-0766.

Good Shepherd Mediation Program's Board of Directors President has resigned and joined the Program's staff as Mediation Coordinator/Manager

Dorothy (Dotty) Davis has been President of Good Shepherd Mediation Program's Board of Directors for eight years and a volunteer mediator since 1989.

Dorothy became a staff member in April 2000 after Clarice Bivens resigned from her position as Mediation Case Manager.

Dorothy brings a wealth of valuable experience to the program. In addition to her experience in the program as a mediator and board president, Dorothy is a retired Philadelphia Police Officer/ Investigator of 26 years. After retirement she worked as a Drug and Alcohol Counselor for seven years. She also coordinated a program for parents and children, interacting with the court system, Department of Human Services, and other social service agencies. Dorothy is a mother of three adult children, a grandmother to five grandchildren, and a great grandmother of one.

The Good Shepherd Mediation Program welcomes Dorothy to the staff. All communications regarding mediation services should be directed to Dorothy at 215-843-5413.

Contributing to the Newsletter

The Pennsylvania Council of Mediators publishes its Report to members four times a year. As a regular publication, we are able to share information about current issues in mediation across the state of Pennsylvania and the United States on a timely basis.

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.

The deadline to submit articles for the next issue of the newsletter is February 15, 2001. Looking forward to hearing from you.

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Mediation Regulation: The Good, The Bad and The Ugly

by Robert A. Creo

As mediation becomes more commonplace so does the urge to define and refine it even at the risk of confining and confounding its practitioners. You can't pick up a newsletter or open an email without stumbling across the "definition du jour" of mediation. Drat, some people, mostly lawyers who have never attended a mediation, even think it is the practice of law. Some think it is meditation, which must be performed alone in a sitting position. Many believe mediation is in fact closer to meditation than to the legal profession. Who knows and who really cares?

Well, I care. Many reflective moons ago, I purposefully transformed my law practice into a mediation and arbitration calling. I loved the freedom—the ability to roam the country laying alternative seeds without licenses, certifications and formal credentials. Bobby Settlement Seed was I, doing my work clearing the dense underbrush of the law unnoticed in the wilderness. Well, like all frontiers, success clears the wilderness and mainstreams alternatives. Acceptability and legitimacy breeds civilization and an inevitable thirst for conformity, consistency, airness, regularity and predictability. In the name of public safety and protection, barriers, first in the form of stop signs, then traffic lights and, finally citations which might result in violations called "unauthorized practice," are erected. The mediation community and legal society is struggling where to plant the signposts of our growing dispute resolution landscape. Here is what's happening.

THE GOOD: PROPOSED MODEL RULES OF LAWYER PROFESSIONAL CONDUCT

The American Bar Association appointed the ABA Ethics 200 Commission (www.aba.net.cpr) to review and revise the ethical standards established for lawyers by state courts and bar associations. Many lawyers have established a dispute resolution practice offering services both as a neutral while continuing a traditional advocacy role. In Pennsylvania and other jurisdictions, others have marketed their neutral service as "attorney-mediators." This dual professionalism creates difficult ethical, business and other issues.

After some earlier drafts attempting to regulate lawyers while they were serving in neutral capacities such as mediators and arbitrators, the Commission revisited this approach to conclude that professional codes of conduct which govern lawyers should limit disciplinary infractions to those times the lawyers are essentially functioning in a representative capacity. The early drafts were so frightening and harmful to mediation, that I went to Florida in December 1999 to make a presentation at the drafting session to the group of judges, professors and lawyers serving on the commission. The International Academy of Mediator (www.iamed.org) sponsored the trip and drafted a strong critic of the proposed rule which was presented by me. The Commissioners and the Reporter, Professor Nancy Moore of Boston University School of Law, listened and responded thoughtfully and appropriately. The April 18, 2000, draft, revised slightly in October 2000, is a major overhaul of earlier approaches.

PROPOSED RULE 2.4 LAWYER SERVING AS THIRD-PARTY NEUTRAL, (OCTOBER, 2000 DRAFT)

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator, or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

The scope of the rule is limited to unrepresented persons to assure that any expectations of a representational relationship are eliminated.

The other draft provision which addresses the neutral who is also a lawyer is Proposed Rule 1.12 of the April 18, 2000, draft, also revised in October 2000.

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter which the lawyer participated personally and substantially as a judge, or other adjudicative officer, or law clerk to such person, or as an arbitrator, mediator or third-party neutral unless all parties to the proceeding give informed consent, confirmed in writing. No lawyer in a firm with which that lawyer is associated who knows or reasonably should know of the lawyer's disqualification may undertake or continue representation in such a matter, unless the appropriate party or parties give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjunctive officer, or as an arbitrator, mediator or other third party neutral. A lawyer serving as a law clerk to a judge, or other adjudicative officer, may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, or other adjudicative officer.

(c) If a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

The Rule regulates the representational activities of the lawyer and does not harm the mediation process. Mediators often are exposed to sensitive information or strategies when in private caucus. There is no expectation from the party that this information will be used against that party by the mediator who later acts as an attorney for another party. For example, I often mediate serious personal injury and death claims involving the same products across the country; I should be precluded from approaching plaintiff counsel in other cases and acting to serve as co-counsel by marketing the confidential information obtained in my role as mediator. The Rule regulates the representational activities of the lawyer

and protects the reasonable expectations of the parties.

The ABA has taken a minimalist approach and does not attempt to define mediation nor insert its own views. The role of impartiality or the scope of other mediation practices are left to the self-determination of the parties and mediators.

THE BAD: UNIFORM MEDIATION ACT

Recently the National Conference of Commissioners on Uniform State Laws undertook a revision of the Uniform Arbitration Act. The UAA has been adopted in Pennsylvania and most jurisdictions for many years. This revised draft is now completed (www.pon.harvard.edu/guests/uma). At the same time, the NCCUSL decided to appoint a committee to draft a Uniform Mediation Act with a target date for approval by the delegates of July 2000. When faced with strong criticism from the mediation community, the final product was delayed for one year until July 2001.

One of the rationales for the UMA is stated in the Prefatory Note (under 3). Ripeness for a uniform law:

> At the same time, as the use of mediation becomes more common and better understood by policymakers, states are increasingly recognizing the benefits of a unified statutory environment that cuts across all applications, and the uniform act that may provide the means for doing so. Shared standards and understandings will ease the practice of mediation for both mediators and disputants, helping to shape and reinforce reasonable expectations of participants in those processes.

The explanation and comments cite the fact that there are hundreds of federal, state and local statutes addressing mediation in the United States. This is presumed to be bad. Lack of uniformity, however, is not bad at all. The diversity in mediation practice and models should be celebrated as a triumph of principles of self-determination, recognition and empowerment. These lure factors of mediation are in danger of being regulated away. The UMA does not apply to the mediation of disputes arising from a collective bargaining relationship or peer mediation in schools.

Because of opposition, the recent drafting meetings resulted in a revised interim draft scheduled for consideration at the Committee's meeting scheduled for December 1-3, 2000, at the Trade Winds Hotel, 5500 Gulf Blvd., St. Petersburg Beach, Florida 33706.

SO WHAT'S WRONG?

Few, if any, of the members of the drafting committee are practicing mediators or arbitrators. The early drafts reflected hostility to confidentiality and privilege in mediation. This was reflected in board exceptions to confidentiality wherein a judge could effect a balancing test to limit confidentiality and compel testimony if the need for the evidence created a "manifest injustice" to one of the parties. The mediation community spoke with one voice against this manifest intrusion and was successful in eliminating this loophole from the current draft.

It seems like the drafting will continue for many more months. That is bad news too since each session brings radical changes by creating new provisions which are injurious to mediators and mediation itself. Unique notions of "impartiality" and a homogenous approach to mediation are being considered for insertion into the UMA by a provision which would eliminate confidentiality if a mediator was not "impartial." This is very bad. This micro-management by broad and ambiguous language will reverse the trend to use mediation as the first option to resolve conflict.

The Privileges & Its Exceptions under Current Pennsylvania Law

The current law of mediator privilege is found in a simple, yet elegant, 1996 amendment to Title 42 of the Pennsylvania Consolidated Statutes which added Section 5949, Confidential mediation communications and documents. The current rule provides for protection for all mediation communications and documents with these limited exceptions:

1) For a settlement document to enforce the settlement agreement expressed in that document but not fraudulent communications that were material to obtaining a settlement;

2) In criminal matters, for a "threat that bodily injury may be inflicted on a person"; and

3) "Conduct during a mediation session causing direct bodily injury to a person."

The narrow exceptions, including protection for property damage less than the felony level constitute a clear policy choice which promotes mediation. This broad rule reflects the determination that confidentiality is so integral to successful mediation that the balance should be struck in favor of allowing free communications even at the expense of "evidence" being unavailable for litigation. These limited exceptions are consistent with privilege extended to other professionals such as attorneys, medical and mental health professionals, spouses and clergy. Society protects as privileged even admissions of past criminal wrongdoing to further essential relationships and goals. Information in civil litigation is no less deserving of protection.

The Pennsylvania statute does not require "impartiality" nor formal credentialing or licensing of mediators. A mediator is a person intentionally retained to intervene in a dispute.

The Pennsylvania statute is working. To date, there is little or no evidence that judges are not interpreting and enforcing its provisions in a sound and consistent manner. The public is being served and is in no danger because of the mediation privilege. On the contrary, since its enactment great strides have been made in promoting mediation at all levels of society and commerce.

The Privileges & Its Exceptions under the Draft UMA

The UMA excludes from evidence and discovery mediation communications in a civil proceeding before a judicial, administrative, arbitration, juvenile court or tribunal or in a criminal misdemeanor (but not felony) proceedings if the privilege is not waived or stopped nor subject to an enumerated exception.

Section 5 of the Act is consistent with mediation practice and is nothing new.

> Section 5. Exclusion From Evidence and Discovery
>
> (a) A mediation communication is not subject to discovery or admissible in evidence in a civil proceeding before a judicial, administrative, arbitration, or juvenile court or tribunal, or in a criminal misdemeanor proceeding, often it is privileged under Section 6 or 7, the privilege is not waived or precluded under Section 8, and there is no exception that prevents its disclosure under Section 9.

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Mediation Regulation: The Good, the Bad and the Ugly (continued)

(b) A mediation communication that is otherwise admissible or subject to discovery does not become inadmissable or protected from discovery solely by reason of its use in a mediation.

Section 6. Party Privilege

A party has a privilege to refuse to disclose, and to prevent any other person from disclosing, mediation communications in a civil proceeding before a judicial, administrative, arbitration, or juvenile court or tribunal, or in a criminal misdemeanor proceeding.

Section 7. Mediator Privilege

A mediator has a privilege to refuse to disclose, and to prevent any other person from disclosing mediation communication of the mediator in a civil proceeding before a judicial, administrative, or juvenile court or tribunal, or in a criminal misdemeanor proceeding. A mediator also has a privilege to refuse to disclose evidence of mediation communications in such a proceeding.

Section 8. Waiver and Preclusion of Privilege

(a) The party privilege in Section 6 may be waived, but only if expressly waived by all parties, either in a record or orally during a judicial, administrative, or arbitration proceeding. A party who makes a representation about or disclosure of a mediation communication that prejudices another person in a judicial, administrative, or arbitration proceeding may be precluded from asserting the privilege, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

(b) The mediator's privilege in Section 7 may be waived, but only if expressly waived by all parties and the mediator, either in a record or orally during a judicial, administrative, or arbitration proceeding. A mediator who makes a representation about or disclosure of a mediation communication that prejudices another person in a judicial, administrative, or arbitration proceeding may be precluded from asserting the privilege, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

Section 9. Exceptions to Privilege

(a) There is no privilege or prohibition against disclosure under Section 5, 6, or 7:

(1) for a record of an agreement between two or more parties;

(2) for a mediation communication made during a mediation that is required by law to be open to the public;

(3) for a threat made by a mediation participant to inflict bodily harm or unlawful property damage;

(4) for a mediation participant who uses or attempts to use the mediation to plan or commit a crime;

(5) for a mediation communication offered to prove or disprove abuse, or neglect, abandonment, or exploitation in a judicial, administrative, or arbitration proceeding in which a public agency is protecting the interests of a child, disabled adult, or elderly adult protected by law.

(b) There is no privilege or prohibition under Section 5, 6, or 7 if a judicial, administrative, or arbitration tribunal or court finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the importance of the [Act's] policy favoring the protection of confidentiality and:

(1) the evidence is introduced to establish or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator, a party or a representative of a party based on conduct occurring during a mediation;

(2) the evidence is offered in a judicial, administrative, or arbitration proceeding in which fraud, duress, or incapacity is in issue regarding the validity or enforceability of an agreement evidenced by a record and reached by the parties as the result of a mediation, but only if evidence is provided by a person other than the mediator of the dispute at issue; or

(3) for a mediation communication that evidences a significant threat to public health or safety.

(c) If a mediation communication is admitted under subsection (a) or (b), only the portion of the communication necessary for the application of the exception for nondisclosure shall be admitted. The admission of particular evidence for the limited purpose of an exception does not render that evidence or any other mediation communication, admissible for any other purpose.

The UMA starts out looking good but quickly turns bad when reaching the exception portion. The Reporter's Comments notes that "the Act adopts a bifurcated approach, providing that both the disputants and the mediators may assert the privilege regarding certain matters." Therefore, in Section 6, Waiver and Estoppel "the privilege may be waived by all disputants" but the mediator must join in to waive the Section 5 privilege above.

At the risk of breaching confidentiality, I confess, I have no idea what these sections mean and how they apply in the real world. It is my strong opinion that these exceptions harm the principle of confidentiality and injure the reasonable expectations of the parties. They are far too broad and complex. This hinders one of the goals of mediation which is to limit the role of counsel by empowering participants themselves. A thicket of lawyers are required to apply the UMA. Pennsylvania and many states have permitted exceptions to address enforcement of a settlement agreement obtained in mediation and prevention of harm to others. The question must be asked, if the Pennsylvania statute is operating properly, why change it for the sake of perceived uniformity with other jurisdictions?

The Committee added Section 9(b)(3) providing an exception for communications involving significant threats to the public health and safety. This is bad. Broad language of this nature introduces uncertainty into the mediation process. Frequently personal injury cases, especially product liability cases, involve allegations that a product is defective or otherwise dangerous. During the course of mediation expert reports, manufacturing processes and other proprietary information may be communicated in a joint session or private caucus. Often millions of these products are on the market place functioning without incident on a daily basis. My own experience after mediating hundreds of product cases, including those involving personal injury and death, is that liability is rarely clean cut and many contributing factors, often misuse by the consumer, are involved in an accident. These are difficult cases to resolve and, whether negotiated directly between the parties, or in the context of a mediation session, confidentiality of settlement is universally accepted by all parties. Confidentiality permits the mediator to explore issues with corporate defendants in product liability, medical malpractice and other cases in a candid manner; this ultimately benefits not only the litigants but society as a whole by permitting resolution of matters and behind the scenes changes rather than forcing a decision to fight and defend in public forums, at all costs, a challenge to the integrity of a product or service provider. The "public health and safety" language of the proposed draft chills the ability of the mediator to offer an environment which encourages candid disclosures and revisions in future design and practices. There are many who oppose confidentiality of settlement in the basis that the public has a right to know for its own protection. Many laws, such as the Consumer Product Safety Act of 1974 the key federal legislation in product cases, govern these relationships. Policy debates and determinations on the right to know should be resolved elsewhere and not by a back door approach via legislation such as the UMA.

The UMA violates commonly accepted principals of self determination in sections 10, 11 and 13. These provisions squeeze out all the life and vitality from mediation in favor of a misinformed desire for uniformity and predictability.

Section 10. Disclosure, Non-Disclosure by the Mediator

(a) Before commencing a mediation, a mediator shall make an inquiry that is reasonable under the circumstances to determine whether there are facts that a reasonable person would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and any existing or past relationships with a party or foreseeable participant in the mediation. The mediator shall disclose any such fact known or learned by the mediator to the parties as soon as is practical.

(b) A mediator may not provide a report, assessment, evaluation, recommendation, or finding regarding a mediation to a court, agency, or authority that may make a ruling on or investigation into a dispute that is the subject of the mediation, other than whether the mediation occurred, a report of attendance at mediation sessions, whether the mediation has terminated, and whether settlement reached, except as permitted under Sections 8 and 9.

(c) If asked by a party, a mediator shall disclose the mediator's qualifications to mediate a dispute.

Section 11. Party Choice of Accompanying Individual

A party has the right to have an attorney or other individual designated by the party attend and participate in the mediation. A waiver of this right may be rescinded.

Section 13. Effect of Agreements: Nonwaiveable Provisions

(a) The parties cannot by agreement expand the scope of the [act] defined in Section 4.

(b) The parties and mediator cannot by agreement expand the protections of the privileges provided in Sections 6 and 7.

(c) The parties and mediator can by agreement waive the mediation privilege protections of Section 6 and 7, as provided in Section 8.

(d) The parties cannot by agreement waive the exceptions to the mediation privilege provided in Section 9.

(e) The parties and mediator can by agreement expand the nondisclosure of mediation communications, except as disclosure is required by a court, administrative agency, or arbitration under Section 5, 6, 7, 8 and 9, or is required under contract law.

(f) The parties by agreement may vary the requirements of Sections 10(a) and (d), but not vary the requirements of subsection 10(c) and Section11.

Many of these provisions would preclude initiatives undertaken in the design and delivery of many successful mediation programs.

For a good history and current updates on the status of the UMA visit www.ronkelly.com.

Mediation should be flexible and not uniform. Mediation programs evolve in a local manner to address the interests and culture of the community and the particular substantive area of a dispute. The same confidentiality rules need not apply across the board even in the same jurisdiction. For example, court sponsored custody programs have different dynamics and public policy considerations than a commercial dispute between two Fortune 500 companies. Courts have interpreted statutes and created common law to deal with a particular problem in a specific case. We should trust our judges to apply the Pennsylvania statute and common sense. Mediation, and mediators, will be compromised if seduced by the Siren of Uniformity.

THE UGLY: CREDENTIALING AND STATE-WIDE UNIFORM REGULATIONS

As mediators struggle to evolve into a profession unto itself, the question of qualifications, licensing, credentialing and the protection of the public has moved to the forefront of the debate. There is a natural tension between the flexibility of mediation on one hand, and the expectations of both the emerging profession and the end-users of mediation on the other hand. My own view is that the attractiveness of mediation is that there is plenty of room for diversity of style, philosophy and state of the art "technology" utilized in mediation practice. Transformative models are alive and working for their constitutions as are evaluative, directive and problem-solving models for their proponents. The principle of self-determination of the parties is paramount. Therefore, legislatures or courts should avoid stifling creativity and free choice by regulation.

All disputes are not created the same or even equally. Mediators and mediation practices effective in interpersonal conflict by community mediators are not always fungible to commercial disputes or "deal-making" transactional mediation. Arbitration, and arbitrators, have flourished for centuries without formal certification, licensor or uniformity of qualifications. An arbitrator is empowered by the parties themselves for a particular dispute. Legislators and courts have supported arbitration, including quasi-judicial immunity. This has for the most part been left to the private sector and the free market. Organizations such as the American Arbitration Association, CPR Alternatives for Dispute Resolution, and government agencies, such as Federal Mediation and Conciliation Service, and the Pennsylvania Bureau of Mediation, have established models to provide ADR services without national or state-wide credentialing. There is no reason to make a radical departure from this approach in Pennsylvania.

Formal degrees may be helpful in one area but worthless elsewhere. Voluntary mediation progress, court case management projects, statutory enactments and private litigants should have freedom of choice to establish qualifications for mediators to suit. Each program can establish its own goals and implement its own criteria. Statewide regulation or credentialing is inefficient and counter-productive. How many hours of training and its specific contents may vary from program to program. Some people are "naturals," others are not, nor will ever be effective. Formal education and forty hours of training does a professional make! Private groups or government agencies may elect to accredit mediators for specific purposes and these "seals of approval" may gain acceptance in the marketplace. For example, this has proven to be effective in labor arbitration where membership in the National Academy of Arbitrators is deemed to be an indication of competency and professionalism. There is nothing wrong with this ad hoc approach at this stage in the evolution of mediation.

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MEMBERSHIP APPLICATION for New Members

Name/Organization Name: ______________________________

Designated Representative (for Organization Member only)*: ______________________________

Address: ______________________________

City: ______________________ State: __________ Zip Code: __________

Home Phone: ______________________ Work Phone: ______________________

Fax Number: ______________________ E-mail Address: ______________________

Mediation Employment: ______________________________

Mediation Volunteer Work: ______________________________

County/Counties where you work/volunteer: ______________________________

❐ Statewide ❐ Central PA ❐ Eastern PA ❐ Western PA

Areas of Mediation Practice (check all that apply):

- ❐ 1. Community/Neighborhood
- ❐ 2. Family/Divorce/Child Custody
- ❐ 3. Landlord/Tenant/Fair Housing
- ❐ 4. Groups/Organizations
- ❐ 5. Environmental/Land Use/Public Policy
- ❐ 6. Small Claims
- ❐ 7. Labor/Business/Civil
- ❐ 8. Special Education
- ❐ 9. Victim–Offender/Corrections
- ❐ 10. AIDS
- ❐ 11. Training Adults
- ❐ 12. Training Schools
- ❐ 13. Training, Cultural Bias/Awareness
- ❐ 14. Farm Credit
- ❐ 15. Employment
- ❐ 16. Religious Institutions
- ❐ 17. Real Estate
- ❐ 18. Health Care
- ❐ 19. Securities

Please provide a 25- to 30-word description of your involvement in the field of mediation

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Mediation Category: ❐ **General/Professional $50** ❐ **Student $30** (enclose copy of student ID)
❐ **Organization $50** ❐ **Volunteer $30**

Web Page Listing: ❐ **$15 additional** ... check it out: http://www.libertynet.org/pcounmed

Please indicate your interest in involvement in the work of PCM:

- ❐ Steering Committee
- ❐ Policy Committee
- ❐ Newsletter
- ❐ Qualifications Committee
- ❐ Conference Planning
- ❐ Organizational Committee
- ❐ Membership Committee
- ❐ Ethics Committee

I agree to abide by the Ethics and Standards of Conduct of the Pennsylvania Council of Mediators.

Signature ______________________________

*Organization members should designate one person as their representative; this person is entitled to the Member Rate for conference registration.

Completed applications should be mailed to Phoebe Sheftel at 414 Barclay Road, Rosemont, PA 19010.

National ADR Conference (continued)

the effort. In Maryland the Chief Judge of the Court of Appeals sponsored a comprehensive public consultation and outreach effort by the ADR Commission that resulted in a Practical Action Plan. It outlines specific steps like creating guidelines for ADR trainers, obtaining funds to train the Attorney General's staff in negotiation and mediation, and educating the public about the benefits of criminal and juvenile mediation (see www.courts.state.md.us/adr.html).

Evaluating the Effectiveness of ADR

Statewide dispute resolution programs cost money. Public officials charged with expending public funds want to know the bottom-line return—what are the benefits of using an ADR process? One of the most significant barriers to gaining support for a state program is the lack of cost-benefit analyses of the ADR process (See "Report on Barriers to the Use of ADR in States and Approaches for Overcoming Them" on www.agree.org/articles/barriers.html). At a conference breakout group discussion on ADR research, participants agreed that this information is important not only to help "sell" the ADR process, but also to help the field improve its practices. Good information would help practitioners know whether they met goals and where to improve the practice.

A review of existing research explodes several generally accepted ideas about the advantages of using ADR. ADR usually does not cost less and shows variable results on saving time. The most secure benefit of ADR comes from the parties' feelings of being treated fairly and having a real chance to tell their story. The research on cost savings took into account "hidden" costs such as the mediation program's administrative costs and the fees for lawyers to prepare clients for the mediation. The views on timesavings tend to vary from parties who frequently feel as though the ADR process is speedier, to environmental disputes, which can involve a lengthy ADR process. A review of court ADR programs shows a benefit in the reallocation of time, rather than an overall time savings. Starting the ADR process early in the life of the dispute directly correlates with the length of time it takes to resolve the dispute.

Conclusion

It was apparent that conflict management and traditional ADR have a long way to go to become universally accepted tools within state governments. Some states are well along the way and have not only an Office of Dispute Resolution, but also knowledgeable legislators and employees. Others have scattered programs but no mechanism for the systematic use or evaluation of ADR. The conference provided plenty of information and motivation for the twenty states without existing programs to take up the effort and reap the rewards.

REQUEST FOR PROPOSALS:

"Critical Issues In Mediation"

DEADLINE: JANUARY 15, 2001

The Annual PCM Conference will be held on April 20 & 21, 2001, at Neumann College in Delaware County, PA. You are invited to submit a workshop proposal to the conference committee for consideration. All workshops will be two hours.

Proposals are to be sent to: Richard Conrad, Conference Chairman
50 Hollybrooke Drive
Langhorne PA 19047-5752.

EACH PROPOSAL SHOULD INCLUDE:

1. A brief biographical sketch of the presenter(s).
2. A description of the workshop for inclusion in the conference program booklet. Please limit the description to fifty words.
3. An outline of your proposed workshop which includes the goals and objectives of the session and any supporting information that will help the program committee understand your presentation and how it is relevant to the conference theme.

Session Title: ____

Presenter: ____

Address: ____

Telephone: ______________________ Fax: ______________________

E-mail: ______________________

Experience level of participants:

- ❑ Suitable for all levels
- ❑ Introductory
- ❑ Intermediate
- ❑ Advanced

Orientation:

- ❑ Program design
- ❑ Theory
- ❑ Skills and techniques