

TRANSFORMING PENNSYLVANIA INTO A MEDIATION FRIENDLY STATE

A Report of Focus Groups Conducted on
June 14, 2002 and September 13, 2002

BY THE
Alternative Dispute Resolution Committees
of the Pennsylvania Bar Association and the Allegheny County Bar Association
and the Pennsylvania Council of Mediators

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REPORT OF FOCUS GROUPS

A. Introduction/Background

In the Spring of 2002, a collaborative project to explore ways to make Pennsylvania a more mediation friendly state was initiated by the Pennsylvania Council of Mediators (PCM), the Pennsylvania Bar Association's Alternate Dispute Resolution Committee (PBA/ADR), the Allegheny County Bar Association's ADR Committee (ABCA/ADR) and the Philadelphia Bar Association's ADR Committee (PHIL/ADR).

A range of thinking from all sectors seemed to synchronistically bring the initiation of this project to fruition. During 2001, the Uniform Mediation Act (UMA) was a focal point of American Bar Association activity. The UMA became a catalyst for a reasonably lengthy and extensive dialogue among many Pennsylvania attorneys who were practicing mediators. Following the level of contact that occurred regarding the UMA many of those attorney/mediators began to see the possibility of actually energizing a much larger group of attorneys to become connected and committed to moving mediation into a more visible and active place throughout the state. Penn State Dickinson School of Law, through its Center for Dispute Resolution, was beginning to explore the possibility of renewing efforts various organizations had begun years earlier to push for the creation of a statewide office of dispute resolution that would be organized and established through the Governor or other government channels. The Pennsylvania Council of Mediators had also supported this earlier effort. In 2001 PCM adopted a strategic plan; one intended outcome of the plan was for PCM to partner with other groups for the purpose of increasing the visibility and use of mediation in Pennsylvania. As more courts began to develop individualized mediation programs, and as many courts of various states began to require mediation as the initial step for a range of cases going to litigation, the concept of institutionalizing mediation likewise emerged across other organizations and sectors of the mediation community.

This effort toward exploring institutionalization has become particularly challenging in light of the continued national debate centered on whether there is, can be or should be a single model of mediation. Many mediators were initially trained to use a fairly standard structure for any mediation process. As different people entered the field, as different programs emerged and as different trainings were developed, models began to diverge. This diversity in approach and structure is central to conversations about what mediation truly is, and while a healthy aspect of a field still in growth and definition, it makes issues related to institutionalization even more complex to address.

After initial discussions in the fall of 2001, a small coordinating group was established. It was comprised of Gale McGloin, PCM President, Robert Ackerman, a PCM Board Member and a PBA/ADR Committee Member, who also happens to be the Director of the Center for Dispute Resolution at Penn State Dickinson School of Law and Ann Begler, Chair of the ACBA/ADR Committee and a Member of the PBA/ADR Committee (and designated by the Chair as liaison for that committee). At the Fall 2001 discussion it was also the intention that the initial coordinating group include a liaison from the PHIL/ADR Committee. Due to an unintentional miscommunication during the transition of chairs of that committee the initial notices about the project were not timely transmitted to Philadelphia to ask that the Chair or another member be designated as a liaison to the initial focus group planning sessions. That gap is being rectified and the ongoing plan is clearly to include a PHIL/ADR representative in the ongoing planning stages of any collaborative efforts that emerge.

During early conversations among the coordinating group, the discussion focused on the concept of institutionalizing mediation and the possible creation of a statewide office. Discussions also included the possibility of planning for a large, statewide conference that would draw a broad range of practicing mediators for purposes of education and dialogue. It became clear in order to move in a direction that would have the most significant impact and the most lasting effect, it was critical to gain a deeper understanding about the views of a wide cross section of Pennsylvania mediators. The coordinating committee decided a first step would be to coordinate and facilitate at least two focus groups. The purpose of these groups was to begin to develop an understanding of both commonalities and differences about how mediators viewed what was needed and possible in Pennsylvania, and to identify the issues that needed expanded clarification and definition.

B. Focus group structure, format and method

Focus groups were conducted on June 14, 2002 and September 13, 2002 at Penn State Dickinson School of Law in Carlisle, Pennsylvania. This location was selected in an effort to have focus groups be accessible, geographically. In thinking about who the participants might be, the coordinating committee considered both opening the focus groups to anyone with an interest and also considered intentional selection as an option. It was clear that in order to provide an opportunity for some full discussion in a timely manner each focus group had to be limited to approximately 15 people. The coordinating committee wanted to have the groups comprised of a broad, representative range of mediators in order to assure some breadth of perspective. The coordinators decided that the process was more likely to result in more diversity and balance if some selection process was involved. A master list of mediators was put together. This list was comprised of both attorneys and non-attorneys. It included mediators who were members of all participating organizations. It included private

mediators from legal and non-legal sectors, government lawyers who were trained mediators, mediators from community mediation centers, law professors and college professors. It did not include members of the judiciary, other than one member of the minor judiciary who is also a practicing mediator. The substantive areas included in these mediation practices ranged from issues arising in the context of civil litigation, family litigation, employment litigation, neighborhood and community disputes and internal conflicts within government agencies.

Email communication was sent to all persons on the master list. It provided an overview of the project and the intent of the focus groups. It also allowed for an exploration of possible dates for convening. Ultimately, an initial focus group was set for June. Then, in an effort to broaden the perspective and provide an additional opportunity for input a second group was convened in September. Fifteen mediators attended the June 14, 2002 focus group and eleven attended the September 13, 2002 focus group (including one person by telephone). All three coordinators attended both sessions.

The conveners used a structured format for each focus group. The coordinators planned questions in advance, then later adapted those questions to fit more closely within the context of some initial responses given. Rather than have an open conversation, the coordinators posed a question and the participants took turns in providing a response. The coordinators asked clarifying questions. To the extent time permitted, the focus groups ended with a slightly more open format that allowed the participants to briefly respond to what various members had articulated.

Each focus group lasted slightly more than two hours. Participants included lawyers and non-lawyers. The groups were comprised of mediators who work in the private sector, within the government and as volunteers at community centers. Participants were highly knowledgeable about mediation and brought a wide range of experience. This breadth of participation included:

- Many years of practice
- Familiarity with mediation issues on a national level
- Knowledge about mediation programs in other states
- A breadth of work experience in a number of substantive areas where mediation had been used to resolve conflicts,
- First-hand knowledge about the economics of mediation
- Insight into the interplay between mediation and other professions.

Those participating in each focus group had a genuine curiosity regarding the perceptions and opinions of others. For the most part, each person, whether individually or through an organization, had a tremendous desire to directly participate in moving Pennsylvania to become a more mediation friendly state.

As previously discussed, the focus group format was successful in developing a dialogue based on very diverse perspectives. It should be noted, however, that neither focus group included representation by people of color. The absence of people of color in the groups mirrors a recognized gap among practicing mediators in the Commonwealth. There was also no significant representation of mediators who fell in a range that was under 35 years of age. There was reasonable gender balance and a reasonable balance between those who were attorneys and those who were not. There were no members of trial courts or appellate courts and there was no representation that included court administrative staff who had participated in the development and execution of court annexed mediation programs. Those absences were deliberate at this stage as the coordinators were making an initial effort to seek the viewpoints of those who actually practiced mediation. A more expanded exploration clearly needs to be part of any ongoing process

C. Emergent Themes and Findings

The dialogue that took place in both focus groups was consistent and clear themes emerged. Hopefully, these emergent themes will provide fertile ground for continued dialogue and the formation of a coordinated plan and effort to make Pennsylvania more mediation friendly.

THEME 1: PENNSYLVANIA IS A LESS FRIENDLY MEDIATION STATE THAN MANY OTHER STATES

Findings

Mediation, as a process for resolving conflicts and disputes, has grown tremendously in the United States over the last 20 years. Prior to that time mediation was a concept and process known most widely in the United States in the field of labor relations where a system of both federal and state mediators was and is used to resolve an array of public disputes. In the early 80's mediation began to gain recognition as a viable option for resolving issues related to divorce. The use of mediation quickly expanded into neighborhood and community issues, then into workplace and employment conflicts and more broadly as a tool for resolving both inter and intra-agency, business and organizational conflicts. National organizations dedicated to the use of mediation arose and grew. Bar associations began to develop special committees on alternative processes to resolve disputes, mediation being one of them. Courts began to build mediation into their own structures as first steps toward bringing litigation to an end. Some states began to develop criteria that governed mediators and certification processes. Certain state governments established statewide offices on mediation and these offices became the central focus point and clearinghouses for mediation

to become established. Judges began referring cases to mediation and the general public began making inquiries about it and using it as their own process of choice.

While many of these same activities and movements have arisen throughout Pennsylvania, the growth and acceptance of mediation in the Commonwealth has been much slower and it has taken a long time for mediation to actually gain a real foothold in the state. Opinions vary as to why that has occurred. Some members of the focus group attribute it to the lack of a centralized force that could really drive mediation in a particular direction. Others suggest the legal community has an economic goal of keeping matters in litigation. Some responses point to the genuine lack of education that exists about mediation. In their responses people noted the absence of any real judicial sanction as an inhibiting factor. Certainly, the lack of ongoing and consistent funding has resulted in the inability to get programs established and running over time. Some focus group members saw the lack of Pennsylvania's progress in embracing mediation as merely consistent with the frequently slow pace that is customary for new ideas to take form and shape in the Commonwealth.

Although the focus group responses as to causative factors varied, there was a clear consensus that mediation is very much in the background in Pennsylvania. At this point many people don't know about it and many professionals don't understand it. Its use, in public, private and non-profit sectors is sporadic, at best, with a small number of people or programs being visible and active. It should be noted that through the efforts of some lawyers and other professionals working within governmental agencies, the last several years have shown an increase in both education and use of mediation to resolve conflicts within the context of state governmental agencies and in some litigation where the state is a party.

THEME 2: THERE IS DIVERSE OPINION ABOUT WHAT THE CONCEPT "INSTITUTIONALIZING MEDIATION" MEANS.

Findings

For some participants the concept of institutionalizing mediation immediately conjures up a judicial system where every case, whether it is family, civil or estate and probate matters, first goes to mediation before entering the adversarial processes of the courts.

For other participants the concept of institutionalizing mediation is centered on the creation of a statewide office of mediation where many and varied aspects of mediation would be coordinated and funded. These activities that could potentially be coordinated by a statewide office would include exploring fundamental

issues such as the credentialing or certification of mediators, the development of mediation programs and the funding of mediation in a range of venues; and, the ongoing evaluation of mediators and issues related to quality control.

Yet for other participants the institutionalization of mediation is removed from both courts and statewide offices. It centers much more on the climate and culture that would be pervasive in Pennsylvania. For those focus group members having mediation be institutionalized would mean that mediation is a generally accepted, frequently used and often thought about concept. It would be part of everyday language and the process most people would first think of if they had a conflict or dispute that had to be resolved.

Whether supporting a state office, court programs or general education focus group member agreed that all of those efforts were basically tools. The real result that people were searching for was how to make a true cultural shift, an actual paradigm shift that would result in mediation being central to the resolution of conflicts in Pennsylvania.

Not only are there significant divergent thoughts about what the institutionalization of mediation might be, what it might look like and where it might fall, there are equally divergent thoughts about whether any type of institutionalization is even a desired outcome. Many participants expressed strong reservation about the concept of institutionalization, highlighting fears that institutionalization will most likely result in a loss of creativity, excessive regulation, barriers to entry, and, in many ways, replication of philosophy and attitudes that are now embedded in the adversarial system. While some mediators see institutionalization as the key that will support a growth of business in the private sector, others fear it will inhibit the economy of private practice through the creation of mandatory pro bono projects.

It's noteworthy that while there is a widespread and deep desire to have mediation as a mainstay of the culture, the fears that were expressed were just as deep and just as wide. This diversity highlights the need for clear and committed conversations and explorations before any system is put into place to allow for a unified effort to define the critical issues and a unified effort to produce answers that both foster collaboration and expand and maximize opportunities in the field.

THEME 3: THERE ARE MANY ATTORNEYS AND MEMBERS OF THE PUBLIC WHO DON'T TRULY KNOW WHAT MEDIATION IS, HOW IT WORKS AND WHAT IT HAS TO OFFER.

Findings

There was a general consensus throughout the focus groups that the public has little knowledge about mediation. Although some mediation programs are court sponsored, and although some attorneys have participated in the mediation of their cases, there is a general lack of knowledge and understanding among attorneys.

Many people had a shared experience that often mediators talk more to themselves and not enough to the general public. Another difficulty is some courts sponsor programs they call and label as mediation, yet those programs don't fall within any generally accepted definition of actual mediation. This gives the public an inaccurate perception of what mediation truly is.

There was strong sentiment that a marketing campaign was important and at the same time recognition of the incredible dollars needed to do a major marketing and branding effort. It doesn't appear that funds are available for such a widespread effort. Some people noted that the national funding that had been directed to the Association for Conflict Resolution (ACR) was being re-routed to other issues and, thus, the problem of exposure persists in a parallel process at a national level, as well. It was noted that the marketing dollars available to ACR were not significant compared to the marketing dollars needed. Thus, it is extremely unlikely that Pennsylvania will benefit from any type of coordinated marketing approach on a national level.

THEME 4: COURT ANNEXED MEDIATION PROGRAMS BRING A METHODOLOGICAL, STRUCTURED AND CREDIBLE WAY TO MAKE MEDIATION MUCH MORE INTEGRAL TO RESOLVING CONFLICTS AND AT THE SAME TIME COURT ANNEXED MEDIATION PROGRAMS PRESENT CHALLENGES TO THE FIELD AS THEY OFTEN LIMIT WHICH MEDIATORS CAN PARTICIPATE AND ESTABLISH CRITERIA THAT OFTEN HAVE HAD NO SIGNIFICANT INPUT BY PEOPLE ACTUALLY FAMILIAR WITH MEDIATION.

Findings

One of the major tensions that emerged at the focus groups was the tension between both wanting and resisting more court annexed mediation. On one hand more court annexed mediation and court mandated mediation serves as one channel that creates a stronger presence for mediation, generally. These programs, assuming they

don't rely on voluntary mediators, also create and/or support paid work for mediators. Given those factors several people strongly favored more court intervention to promote mediation and to create work. This direction was more strongly supported by lawyers who were present.

Several people, however, including lawyers, spoke about the difficult issues presented in court-annexed mediation. Court programs typically define who is qualified to serve as a mediator, what training is needed, and employ parameters that vary from program to program and that can even deviate from more nationally accepted standards around issues such as confidentiality. Another issue that arises in the context of court-annexed mediation is whether one must be a lawyer to mediate in those programs.

The issues that are inescapably raised through the adoption of court programs are even more sensitive as they also revolve around issues that still remain open to extensive debate in the wider field, not only through Pennsylvania, but nationally. The issue of certification, credentialing, training, educational backgrounds all remain the focus of ongoing conversations and dialogues at national mediation meetings and conferences.

Any rapid development of court-annexed programs, by their nature, removes much of the philosophical resolution of these issues from the community of mediators and lets that resolution rest with the courts or court committees. It is not unusual for these court committees to be comprised of people who are not from the field of mediation, or who have limited mediation experience.

Court-annexed programs also can end up resulting in disparities based upon substantive areas of the law. Thus, programs that provide mediation in matters related to civil litigation may be the same or different from programs in family law. Again, whether sameness or difference is desirable and the philosophical implications of those decisions remain open discussions in the mediation community itself.

Having recognized these difficulties, many members of the focus group also reported about many successful programs in states such as North Carolina where mediation is mandatory in some areas such as civil litigation, where private mediators are supported by the program and where there are minimum, but not maximum hourly rates of compensation for mediation through those court programs. Many Pennsylvania attorneys who have made transitions in their practice from law to mediation have had a difficult time building a sufficient practice, and hold firmly that the only way to move against what sometimes appears to be an entrenched bar is to have a widespread mandate from the courts.

There appeared to be consensus that if there is a strong movement to court-annexed programs that the development of these programs should include lawyer and non-lawyer mediators from the earliest stages. There was also support for the concept that court action needs to be directed from the highest level of the judicial system to support an expanded dialogue and consistent efforts across the state to avoid significant disparities in programs, which would also mean there would or could be wide disparity in underlying philosophies.

THEME 5: THE LACK OF ONGOING AND SECURE FUNDING HAS INHIBITED THE GROWTH OF MEDIATION, WHETHER THAT FUNDING IS MONEY TO SECURE A STATE OFFICE, MONEY CHanneled TO THE COURTS FOR PROGRAMS OR MONEY USED TO FUND COMMUNITY MEDIATION CENTERS ALONE AND/OR IN PARTNERING RELATIONSHIPS WITH PRIVATE MEDIATORS.

Findings

Whatever sphere of practice one came from there was a firm acknowledgement that a major inhibiting factor in the growth of mediation is the lack of committed funding. Several years ago the movement to create a statewide office of mediation generated hope that a large and long term funding commitment was going to be put into place to strengthen statewide mediation efforts and growth. At this point, however, for diverse reasons ranging from political ones to simple budgetary ones, the movement for a statewide office has not received strong executive support. There has been some indicated support by legislative leaders. At the same time there has also been legislative reluctance to move forward given the perception there would likely be opposition from the Executive branch to the creation of any new agencies. Many focus group members opined that the fall elections might possibly serve to create a shift in support and direction within the Executive branch.

Likewise, even where court programs have been initiated there has been little funding. In many federal court programs that use private mediators, the work is done on a pro bono or very low fee basis. At trial court levels, the rates of compensation that are set are frequently well below a market rate for services. Few courts employ mediators as part of the paid staff, and where mediators are actually employed they are few in number.

While community mediation centers have received and do receive some public monies, mostly on a local level, and some private foundation money, the legislature has not yet moved in a direction that provides any stream of secure funding for community mediation centers.

This lack of funding for programmatic support, lack of funding to support private mediation and lack of funding at community levels, when coupled with no marketing money, leaves a wide gap and an extensive need if mediation is truly going to become part of a paradigm shift in conflict resolution whether as an adjunct or not to court processes.

THEME 6: THERE IS A NATURAL ECONOMIC TENSION AMONG MEDIATORS WHO ARE MAKING AN EFFORT TO SECURE A PRIVATE LIVING THROUGH MEDIATION, LAWYER-MEDIATORS WHO PROVIDE PRO-BONO OR SIGNIFICANTLY LOW FEE MEDIATION FOR COURT- OR BAR-SPONSORED PROGRAMS, MEDIATORS WHO ARE GOVERNMENT EMPLOYEES WHO MEDIATE AS PART OF THEIR REGULAR EMPLOYMENT AND BOTH LAWYER AND NON-LAWYER MEDIATORS WHO VOLUNTEER FOR COMMUNITY MEDIATION CENTERS.

Findings

For many years in the mediation field there appeared to be a natural tension between mediators who are lawyers and those who are not. That conflict often centers on the fact that many court-annexed programs will not permit mediators who are not lawyers to work in those programs. There have also been ongoing and somewhat unresolved issues about the boundaries between law and mediation and where the line is that crosses into the unauthorized practice of law.

When money is scarce and everyone has a vital interest in work this type of conflict is clearly exacerbated. A good example arises in the area of mediation of guardianship issues related to the elderly. Many volunteer mediators who work through community mediation centers are interested in this work. Many are not lawyers; some are lawyers. Mediating issues related to the guardianship of older or impaired people can be done by volunteers, lawyers or not, at a community mediation center. It can also be done by mediators who are part of a court panel in a court-sponsored program. Who should do it and where should the funding go to support it? In one situation funds are paid to private mediators who provide the service. In the other funds are paid if at all, to an organization that then uses volunteers to do actual mediation work. This tension does and will arise in any mediation program that could take either direction and be a viable program.

Similar economic tensions arise among lawyers who are mediators in the private sector and those lawyers who work for the Government. The Commonwealth has been taking larger strides to support the development and use of mediation within state agencies. The trend thus far has been to train state employees as mediators and to

have mediations done by these internal state employees. That format strongly supports the presence of mediation, knowledge and education about mediation, broader use and acceptance of mediation and is a beneficial tool of early conflict intervention. At the same time, many of the issues mediated within state agencies could also be mediated by private mediators who are trying to make a living at mediation. Thus, the resulting tension between whether or not to support more growth of internal mediation at state levels, or whether to try to shift that work into the private marketplace.

What appeared to become more clearly visible through the focus groups was not necessarily the tension between lawyers and non-lawyers. What came more clearly into focus was the dichotomy between paid mediators and unpaid mediators. Given the strong desire to move mediation forward quickly, there is an accompanying risk that this sense of urgency will actually foster and deepen the existing conflict or potential conflict. Those acting to move a mediation agenda forward clearly face the substantial challenge of recognizing these tensions and managing them in ways that support the overall growth of mediation and expanded opportunities for all mediators.

D. Recommendations (general and not in order of priority)

1. Conduct a statewide inventory of legislators and judges and identify who is knowledgeable and supportive of mediation so that allies are noted early on and before processes are underway. Identify mediators and others who are allies for purposes of contact and ongoing support.
2. Seek support from the Pennsylvania Supreme Court to formally explore possible ways to expand the use of mediation throughout the state court system and have this done in a way where the process of exploration is done primarily by mediators and includes non-lawyer representation.
3. Explore and build support within the Executive and Legislative branches of the Commonwealth.
4. Put together an informational report about all mediation efforts that are occurring throughout the state, both outside and inside the courts, so that information about programs is readily accessible, can be examined, compared and used as groundwork for further exploration.
5. Have additional joint meetings to more clearly define what institutionalization of mediation would consist of, how it can be developed in ways that account for the difficult issues, such as credentialing, that remain and in ways that support co-existence rather than exacerbate natural tensions.

6. Put a structure in place that will provide a coordinated effort between attorneys and non-attorneys to move the designated agenda forward.

7. Have a larger conference sponsored by the state bar association, local bar associations, universities and the Pennsylvania Council of Mediators to focus on the issues, to create a broader energy and excitement and to make the movement to expand mediation more focal.

8. Examine how other states have expanded mediation and become mediation-friendly, and determine next steps and strategic approaches to use in Pennsylvania to develop "best practices."

9. Work with the Bar Association and the Court to change the Rules of Professional Conduct to require attorneys to discuss mediation with clients.

10. Work to get organizations such as the Junior League and Rotary behind a movement to expand mediation

11. Work with the League of Women Voters to host a series of town meetings through Pennsylvania to education the public about mediation

E. Summary

Both focus groups were comprised of a diverse population in terms of geography, professional background, mediation training and mediation practice. The lack of diversity present was notably race and identifiable cultural diversity.

All attendees shared a common desire to see the use of mediation expand in such a way that it becomes the first option of choice for people in conflict. This expansion is envisioned to occur at multiple levels. It would make mediation more extensively available in both less structured and more structured programmatic ways. Ideally, attention to how and where certain issues get directed would be part of an overall plan serving to reduce tensions between unpaid and paid mediators, and in ways that expand the pie of available resources for people who want mediation.

This universal movement toward mediation would mean a major cultural shift over time. It would also be done with enough short-term movement that the use of mediation actually becomes a viable way to make a living, whether through employment at an organization that is adequately funded, or practicing in the private sector.

The development of programs to support the expanded use of mediation will also carry certain restrictions and limitations. Ideally, these would be restrictions that came

after thought and input from a wide community of mediators and that are consistent with national efforts, thus supporting a more global consistency in the field.

While there was some skepticism and frustration present in the groups as many present had been part of similar conversations over time, there was also a vital and renewed energy that came from an expanded group with experience and diversity, and a general sense of commitment to move this issue and the joint agenda forward. The time taken by attendees represented considerable time from regular work and those who attended evidenced a strong desire to remain involved and integral to the efforts being made.

ADDENDUM A

REPRESENTATIVE SAMPLE OF STATEMENTS MADE BY FOCUS GROUP PARTICIPANTS WHEN ASKED WHAT IT WOULD MEAN TO INSTITUTIONALIZE MEDIATION

- An educational element and perhaps financial or institutional support of existing efforts whether community based or private.
- Anyone suddenly in conflict and unable to work it out thinks first about mediation; making mediation part of our culture, the way we approach conflict
- Expanding pie for all of us; people recognize mediation as a viable option expanding financial support.
- Broadening it so it is not automatically associated with the court system; put in process to do it before going to court.
- Incorporate ADR into institutions
- Institutionalization within Pa courts, but real mediation, not morphed version a la court-ordered settlement conferences. If so, other institutions and population in general will become aware of what it is, it will become more broadly based. Settlement conferences are dominated by lawyers and more coercive; prefer that disputants take the central role and lawyers are not dominant
- Every attorney knows what mediation is and is comfortable talking about it. They use it before getting involved in court process. Disputants too.
- State office with high level support e.g. governor that empowers agencies, commissions and boards to engage in dispute resolution practices, incl facilitation, pro-active DR and consensus building.
- A network of practitioners that is encouraged will result in culture change, educational component.
- ADR first level; Institutionalized in court system so ADR is thought of first.
- Seen as a paid profession not a pro bono activity.
- Different styles of mediation recognized including when you do it as a volunteer and when you get paid.
- Universal acceptance of process; support to get that acceptance.

- Concern about what happens when court annexed, controlled, defined. Ownership issues scare me. If it brings about definitions and credentialing, who does it?
- Fears around implementation; many questions are raised especially as a non-attorney. Tension between lawyer owned and operated and mediation profession owned and operated.
- When I hear the word, institutionalization, I get a twinge in my gut that it means rigidity, bureaucracy, "inside the box" whereas we're trying to work outside the box.
- Institutionalization means something beyond mediation. Not a mediation purist. Sees mediation within a wide range of dispute resolution techniques e.g. judicial conferences, mediation, facilitation. Whatever parties want is fine. Think of statewide office providing support, training, information, education, etc. Some branch or branches of government provide leadership.
- Have reservations about changing the paradigm just to mediation, see a continuum of conflict resolution strategies.
- Has been sold to courts as a case management tool, need acknowledgment of different models of mediation being practiced.
- 3 components providing base for institutionalizing/success of ADR in particular jurisdictions: (1) Cultural - Grass-roots support and educated consumer. (2) Judicial support and understanding of difference between mediation and settlement conferences. Willingness of judiciary to allow non-adjunctive DR services thrive. Refer to private cadre outside the courts to provide different services. (3) Legislative - Firm statutory support. Statewide office of DR; commitment of agencies, departments, etc.
- Initial impression is that it would be restrictive. Institutionalization means defining it which could eliminate creativity and flexibility; that might narrow it and restrict it
- Having trouble defining institutionalization; the field is in flux with a lot of variety. Someone will get left out.
- Different perspective; see a body that serves as clearinghouse, does research, any mediator can go to it for help. Get it funded. Distinguished from license or certificate.
- Acceptance by society of use of mediation as one of the alternatives for conflict resolution. So it is in the body of society to look to mediation.
- Recently created a mediation group in the OGC attempting to institutionalize concept of mediation. Struggling with acceptance by parties (to OGC, government, clients) of process. Currently using an educational process to gain acceptance. Have found it to be tough sell w/ our clients; private bar readily accepts concept. Clients troubled with concept.
- Creating climate for ADR processes focusing here on mediation. Focus group requires users to participate; otherwise just talking to ourselves. Change Rules of Professional Conduct to require that mediation be offered to all clients.
- From victim/offender arena, it's been a selling one client at a time process. Sit individually with clients. Service is free. Within bigger picture, concerned about integrity of the product. There is general acceptance from juveniles to the federal government of dialogue as the means.

- Where I live people don't know whether we offer mediation or meditation. Institutionalization would mean offered by police, courts, etc. Then people would have a way to know about it. E.g. NY State model.
- Conversation has been largely among ourselves. Idea of general acceptance is critical. Also critical is belief among participants that justice is being done in mediation. People trust the legal system because they think there is built-in protection. Until participants are part of the discussion and treated fairly, skepticism will always be there. Nothing to hang my hat on to say this (med) is fair process. Have to involve participants in that discussion, and then we'll get buy-in. Conversation among ourselves is also reflected in research in the field; few conversations with users.
- When somebody's in conflict, they use mediation as often as they'd use litigation or avoidance.
- Culture is not used to considering mediation in a broad way. How do you make a cultural change? Something that broad. People aren't accustomed to considering an alternative. Huge, uphill battle. Real, core issues to consider.

ADDENDUM B

REPRESENTATIVE SAMPLE OF STATEMENTS MADE BY FOCUS GROUP PARTICIPANTS WHEN ASKED HOW IT MIGHT BE POSSIBLE TO CREATE CULTURAL SHIFT WITHOUT UNDUE RESTRICTIONS

- Don't find institutionalization to be restrictive; if not institutionalized, it is difficult to reach people short of marketing, newspaper articles etc. Even if there is institutionalization, still see the mediation process taking place outside institutions.
- If we want field to grow, must work within institutions. Should look at states where mediation is institutionalized and happening in a responsible way: E.g., Ohio, Maryland. Both have state offices. In Ohio, it is a joint venture of the three branches, spun off but connected. Partnering means that no one institution controls it.
- Have to look at the mediation field and ask what does it mean when we talk about it as a profession? Very wide open now without a lot of limits, which is both good and bad, some stuff we wouldn't approve of is going on. So profession means limits and boundaries.
- We are raising a generation that understands conflict resolution, starting in preschool. CR must be internalized. It cannot all be done from top down where courts or police force people to go to mediation
- Creating the definitions, it is important to be careful. Definitions get hijacked to define a group of people who get access to clients and money. This group of people will be called mediators, and they will get this work, this pot of money. Need to keep institutions from hijacking what it means to be a mediator.
- Acceptance of conflict resolution is a combination of top down and bottom up. Top down is telling people how to resolve disputes. Bottom up takes the types of conflict resolution out there into account. Acceptance of CR by groups is less restrictive than a dispute resolution office or courts telling people this is how they should resolve disputes.
- Need a broader base for funding so community mediation centers don't compete with each other, as in PA.
- Government institutions provide largest institutions for influence and as source of funding e.g. Ohio where all branches of government are involved.
- Don't view mediation as credentialed profession but rather as a structured process used by everyone from international peacekeeper to businessperson to teacher. Need to be true to criteria of process.
- Importance of education and marketing campaign. Don't get hung up on the word, institutionalization. Not against organization. What do we mean by institutionalization?

- In mental health field, institutionalization meant putting someone under someone else's control. Better view is multiple levels of entry to create community, professional and cultural change. Needs to be in learning curriculum for children
- Concept of state office should be a collaborative effort, not from one place. If creating a new institution, must be new. If housed in someone else's building, that will influence what the new structure will do. Need organizational point / system. Has to be more grassroots.
- Get professions who use mediation to be collaborative. Lawyers refer only to mediator attorneys who do a certain type of law. Go beyond professions to people who use in referring to broad forums
- The best way is to get a culture shift. Working in state government, the only way was to institutionalize the culture change. Otherwise kept hitting walls
- Need something to empower us to keep going to get the culture shift, Scary to think of an institution or housing only in the judicial branch. Needs to be broader than the legal realm.
- Scares me to house mediation within legal paradigm
- Training is not adequate with standards but since sponsored by Bar, it is accepted and promoted, institutionalizing mediocrity and insularity.
- Restrictions are inherent in creating a system that is fair. If we want acceptance, we must create restrictions. Shouldn't bother people if we want a system that is fair. People trust legal system because judges don't shoot from hip and go out and hang people.
- You want some restrictions. You don't want coercion as part of the process. At the other end of the spectrum, constantly adapt to do the job. Can't just call forth a formula (as a mediator) and do your job.
- Restrictions are inherent in most definitions of institutionalization; if we could get agreement on some basic principles (e.g., non-coercive process) rather than technique, it might be a little safer.
- Trouble defining restrictions. Do you mean pass a test? Certain skills? In favor of having qualified mediators. Want qualifications, but I don't have definition. Another restriction regarding process, again not sure. Believed at the beginning that it should be totally voluntary. Sometimes if court mandated mediation (can't make them agree), once get together, things start to gel. So in some cases, mandating is good. Have to be boundaries drawn. It's hard because it's amorphous. Need to know what institutionalization means before you can be afraid of it.
- Have to ask what is mediation before you talk of restrictions on it. Lots of perceptions of mediation. Concerned about restrictions. Who owns process, institution or disputants? In transformative model: Disputants own process and define what it looks like. If imposed restrictions w/o disputant involvement, might be alien to them. Reality is that disputants should own / define the process and mediator works within it.

- Institutions and institutionalization are very different. Each mediation has an unexpressed major premise—how one deals with people in front of you. Institutions have major premises eg. EEOC, USPS, PUC etc. Context of mediation may limit process. E.g., Philadelphia Common Pleas mediators must tell judge where parties stand. Don't care whether that's really mediation, so long as parties know what will happen. Any process that works is fine. Many of the legal processes start by people going to a representative. But people can't go to an individual mediator as their mediator; it biases process. How do you get over this to get process started? Parties must agree unless institution requires it. To lawyers, asking for mediation means you don't have a case at law, and you need equitable form of justice. People don't see mediation as greater than court. Everyone has to be creative to do that.
- People who do believe in mediation need to get together, be on journey of exploration as to what it means to us, to community, to disputants; I've change as a result of reading, especially about transformative mediation. W/restrictions, at international level with VOMA, there is continuous dialogue about what product we have. Mediators need to explore.
- Want to see standards. Money spent for training must be well spent; Important to have standards of training. Consumers have right to know mediator has proper training. Need not reinvent the wheel; e.g., NY system does 45,000 mediations per year with wonderful standards and practices. Current situation in PA is a scandal
- Research has led me to believe that restriction is required. Worked collaboratively with special education mediators to develop a set of scales to evaluate mediators. Special Ed scales revealed surprising results. Self-evaluation by mediators indicated that they thought they'd been facilitative, built relationships. But evaluator scored them low on relationship-building. Didn't follow up on openings. We delude ourselves. Mediators become converts, but are we delivering what we think we're delivering? Just because we believe in process doesn't mean we shouldn't apply some rigor to our performance. Tension between problem-solving and transformative approach. In education, stakes involve children. Has transformative aspects but people want to solve the problem. Maybe approaches are so different that they require parallel streams.
- Mediation changes depending on the circumstances, qualifications are different e.g., neighborhood mediation vs. *Microsoft*. Mediation can change within structure. Restrictions could depend on the situation and level of judgment required. Mediators train like Lincoln trained as lawyer. But as we go on, more formal training will be required in certain areas, and mediators will have to prove qualifications / competence. But hope community mediators will be able to go on just doing it. Other levels more formalized, qualifications, more prestigious.
- Need ways to create a cultural shift. Begins with each of us promoting mediation. So many people call themselves mediators or think they are. Once people have bad experience with mediation, that's their mindset. Some people have had negative experiences because of mediators. Cultural shift would mean not only promoting concept, but research, evaluation, making sure people don't have negative experiences. Broader culture might be influenced by TV shows, e.g., if *The Practice* portrayed mediation. Fundamental starting point—continuing education on all levels. Anyone can call self a mediator.
- Has had experience as a practitioner w/ Commonwealth Court mediation program. Nothing close to what I thought mediation was. But experienced great success w/ program. So perhaps not so concerned about their use of term. Like idea of different restrictions for different programs if restrictions imposed for the right reasons. Can be comforting to participants. Traditional DR very structured.

ADDENDUM C

REPRESENTATIVE SAMPLE OF STATEMENTS MADE BY FOCUS GROUP PARTICIPANTS WHEN ASKED WHAT MOST STANDS OUT FOR THEM FROM THE TOTAL FOCUS GROUP DIALOGUE

- Concern for restriction. Don't want to lose flexibility.
- Concern that institutionalization doesn't mean that it gets eaten up by legal field. Control, standards, etc. Paradigm shift from adversarial to collaborative process difficult, especially for lawyers.
- How can we be professional? I have toothache, I go to dentist; I have conflict, I go to mediator; Clearer perception of what we do.
- Does our desire for flexibility confuse public?
- Fear of institutionalization?
- Differences in room about how mediation is used. Use of ADR interchangeably with mediation; Some see as profession and others see as broader.
- Field as broad continuum with definition and structure for each process. If government is involved needs to be all 3 branches; needs educational component; partnering.
- In Maryland it turned out the consensus was we're closer to a guild than a profession.
- Each style makes person unique in terms of what mkt will accept. 4500 certified meds in Florida and 200 get all the business.
- Impressed with the dynamic of this process.
- Group dropped out of ACR discussions because of fear that professionalism movement would leave no room for them.
- Is social justice ideal compromised by professionalism? Legal process casts shadow on rest of continuum.
- We're together, and working collaboratively.

- Humbled being in same room with you. I'm not in private practice, I'm dealing w/ state agency. Institutionalizing/inculcating practices. I'm not in profession. We're seeking champions; Plan to go to all state agencies; influence new administration. Encouraging to hear others talking of broader approach
- From lawyers and non-lawyers hearing different terms, views. See mediation as adjunct to litigation system. But such a big part of mediation outside court system; Don't see what's happening in court system as impacting what's happening outside; To what extent should court system be referent?
- If mediation is institutionalized, (1) folks would see value, (2) resources would be more readily available. Strings are always attached to \$. Need to partner with important social institutions. Lag in institutionalization in PA allows us to learn from others' mistakes and successes.
- Earnestness of this group. Frustration at lack of common language. What have others done previously in PA?
- We haven't had interest based discussion as profession. We're not walking the talk. And consumer hasn't been brought into discussion. We talk about protecting mediation w/out disclosing our own interest.
- I don't hear anything new around table today. It's not so much what needs to be done as who's going to get off duff and do it.
- Public must see that there's alternative to litigation. To back that up you need qualified mediators, support of judiciary.
- Who's going to get off their duff and do it? May not be useful to go out to general public, most of whom currently have no use for DR.
- We don't do enough hard looking at our performance and how perceived.

ADDENDUM D

REPRESENTATIVE SAMPLE OF STATEMENTS MADE BY FOCUS GROUP PARTICIPANTS WHEN ASKED WHAT THEY MIGHT ENVISION NEXT STEPS TO BE

- Follow-up with same group of people, perhaps having provided some of the factfinding information from some other states; would be interested to look at those and organize them; happy the conversation is happening in here as opposed to having it come from a non-collaborative mode.
- Continue this; before we have any ideas of where to go we need more information and need to talk more.
- I agree we can learn from other states...example, MD has a web site, and I've gotten more ideas from leads on the MD website than from anywhere else...lack of coordinated information is what happens here, and it's what makes other states successful; that's what it takes to make this into a business
- Need to do more thinking and learning re next steps; fact that credentialing didn't happen isn't so bad, in terms of PA legislature, first let's make sure they do no harm.
- Continued discussion in this group, historical perspective. Some of us have been around since the 80's and were part of that discussion and told directly there will be no funding for state office and that takes wind out of sails.
- We need judicial angel.. we need a judicial kickstart....states that have done it have done it from the judicial end and then other things start to arise
- One thing that did come out of credentialing conferences in PA some years back was that PCM did create recommended credentialing, best practices and ethics for PCM..some people faded after that but we did have some outcome...next steps, keep momentum going and get higher level voices...also, forgot labor mediation...seeing who's missing from here.
- Keep momentum, include more people in addition to the champions, all represented.
- I agree we need to keep dialogue going.; we kept minute and detailed minutes and in the process of developing credentialing all of the input was taken into consideration and that's how I see this process will help us in the future, let's us see all paradigms and how we're thinking.
- Look at where mediation is being used, what are court programs, what are state agencies, what are community centers, identify those entities helps us further refine an approach.. somewhat of fact finding- get to table, or keep informed
- Identify the champions, people in this group do information gathering to bring back to this group and as this group expands

- Like idea of inventory of current use of mediation; need to look at Supreme Court
Why not invite head of Maryland Commission?
- Once focus group gets done need to get some institution to put together a mission statement to start working priorities.
- Like inventories and inclusiveness, but there's a danger in getting too big; better for those of here to go out and get it and bring it back; in terms of champions, getting the judicial champion here, and also identifying other champions; .get someone from Rendell camp and Fisher camp here...get champions to be broader group.
- Schedule next meeting around availability of the people who can help in the gathering of information.
- Define top priority item and have everyone work at that to get something done and move for outcome.
- I want it now, want to be able o make a living; focus should be in some area that has an immediate impact; just like civil rights laws had impact to start process, it will then filter down into the community; judiciary and bar need to be convinced that mediation is a process of conflict resolution; focus of energy on the judiciary to understand what mediation is, acknowledge it requires skilled workers who need to be compensated.
- Several judiciary conferences that put on programs and that want speakers; this is not a ground up movement; in this state we need to make this a top down movement; the courts are struggling, at least in Philadelphia, with more to do and fewer folks to do it and if they can recognize that some of their disputes could be handled in ways consistent with goals and objectives they won't be threatened.
- See PCM and PBA have a joint project including Greenleaf and PA Commission on Crime and Delinquency with pilot project funded at about \$500,000 - about ten of them across the state - to show the effectiveness of mediation
- Need more structured effort to get to the issue of what the priority is for people who need the service; would like to approach judiciary and see if we can meet with them in small groups across the state; what will it take to move you forward on this and do that before we set our priorities.
- Need money to develop the "what" of what we're going to do...hundreds of thousands of dollars.
- Figure out who else we need to be talking to; what other people do we need to bring to the table in this broader discussion.
- Need to start at the top of the food chain; need to start with lawyers and judges as they get the most conflicts and they can set a high image; effect change in culture there so attorneys say before we go to the judge and have the judge order us to go let's try it first.
- Needs to happen like Civil Rights; happened because Marian Wright Edelman did research, and we have to do many things at the same time an in an orchestrated way; these things happen together.....
- Top down and bottom up is not just a split in this group; if we can pick an area and we each take on our constituents and we work on the same type of point in coordination at rotary clubs and judicial chambers we might make something...