



SUPREME COURT OF
VIRGINIA

RESOLUTIONS

OFFICE OF THE EXECUTIVE SECRETARY

*Department of Judicial Services
Division of Dispute Resolution*

100 North 9th Street
Richmond, Virginia 23219

Mandatory Mediation – The North Carolina Experience

In the last twelve months, mandatory mediation has been the subject of at least two exploratory presentations in Virginia, one at the Fall 2008 Virginia Mediation Network conference and another at the April, 2009 meeting of the Virginia ADR Joint Committee. Neither presentation appeared to garner significant support from those in attendance. Costs to administer the program, costs to the parties, support of the work of the Futures Commission, and a strong desire to maintain mediation as a voluntary process were among the concerns raised in response to the mandatory mediation presentations.

Mandatory mediation came up again when the DRS staff took Andy Little, the North Carolina mediator who conducted the “Mediating Claims for Money” seminar in late April, to dinner after his program. We learned that one of North Carolina’s statewide mandatory mediation programs has been in place since the mid 1990s, with a pilot in place for several years prior to that. A “perfect storm” of events led to the passing of the bill making the “mediated settlement conference” (or other settlement procedures – the parties may choose) mandatory for virtually all civil cases in the North Carolina superior courts. Both lawyers and judges played major roles in developing the procedures for the program, and in 1995 the bill passed unanimously in both legislative houses. No rule demands “good faith” participation in the mediated settlement conference. Parties select and pay the mediators. Last year, 10,185 cases entered the mandatory program. Out of those cases, 7,478 were resolved without adjudication.

When DRS commented on the striking difference between North Carolina’s ADR path and Virginia’s, Andy suggested that we could learn more from the “Green Book,” otherwise known as Alternative Dispute Resolution in North Carolina: A New Civil Procedure.

The Green Book was copyrighted in 2003 by the North Carolina Bar Foundation and the North Carolina Dispute Resolution Commission. This remarkable hardbound book (cost: \$8.00) describes the development of ADR in North Carolina and the programs in existence as of 2003. Chapter names include “Community Mediation: Laying the Groundwork for ADR in North Carolina;” “Dispute Resolution and the North Carolina

ALTERNATIVE DISPUTE RESOLUTION
IN NORTH CAROLINA

A New Civil Procedure



If you would like to purchase the Green Book, it is available through the North Carolina Bar Association. Go to <http://disputeresolution.ncbar.org/> and follow the instructions in the yellow box at the top of the page. The cost is \$8.00, including shipping (this is not a typo). Please note: because the book dates from 2003, specific rules, statutes and/or policies cited might no longer be current, and should be checked using up-to-date sources to ensure accuracy.

Bar Association: Lawyers as Peacemakers;” “The Mediated Settlement Conference Program in North Carolina’s Superior Courts;” and “North Carolina Public School Systems and Alternative Dispute Resolution Programs.”

Believing that the experience of our sister state can only help inform the continued development of ADR in Virginia, we obtained permission to reprint Chapter Thirty-One, “Policy Issues in the Use of ADR,” in this issue of Resolutions. The chapter summarizes the issues debated over two decades as ADR processes were integrated into the North Carolina court system, including mandatory versus voluntary ADR procedures. More details about the various programs and policies discussed in the chapter are found elsewhere in the book.

Many thanks to the North Carolina Bar Foundation and the North Carolina Dispute Resolution Commission for their permission to reprint Chapter Thirty-One, which follows in its entirety, beginning on Page 19 of this newsletter.



We're Thankful for All of You!

Autumn is upon us and already the landscape is transforming with the wonderful colors of the season! The Thanksgiving holiday is just around the bend, bringing with it the timeless tradition of gathering with loved ones to enjoy scrumptious food and share our gratitude for the many blessings of life.

The Dispute Resolution Services staff would like to take this opportunity to sincerely express its thankfulness for our mediators, coordinators, settlement conference judges, and parent education providers who continue to selflessly give of their time and talents to make life better for many who are dealing with troubling conflict. Where would we be without you? We are very grateful for your many contributions and recognize that our courts could not operate as efficiently without the services you provide.

It's exciting that we're working together to increase and diversify access to ADR services in Virginia, both at the state and community level. Virginia has long been recognized as a forerunner in providing ADR options and in establishing a vibrant community of excellent professionals. There is still much ground to be covered and many stones to turn in exploring new and improved ways to resolve conflict. DRS is always open to ideas and suggestions to further this exploration and growth.

As you take pleasure in the crisp fall air and the beauty of the season, may each of you be blessed with peace, joy and hope. Please accept our thanks for all that you do!



Mandy Stallings ~ A Welcome Addition To the Dispute Resolution Services Staff

Following review of a large number of employment applications from a field of highly qualified applicants, DRS conducted an intensive, multi-phased interview process for the ADR Analyst position. We are very pleased to announce that Mandy Stallings was offered and has accepted the position and began working in that capacity on September 8th. We asked Mandy to share a little about herself with our readers.

I am really excited to be joining DRS and am looking forward to working with Sally, Melanie, Deborah and Ann as well as all of you! I am from Smithfield, a small town in Southeastern Virginia that just happens to be the Ham Capital of the world and holds the Guinness Book World Record for the largest ham biscuit.

Having attended Smith College in Northampton, MA and also Christopher Newport University in Newport News, I graduated cum laude with a Bachelor of Arts degree in Political Science. Through an internship at CNU, I accidentally discovered mediation. I enjoy the creative problem solving aspect of ADR and also the positive, collaborative frame it gives conflict. As a Virginia certified mediator since 2005 and also a Mentor, I worked at the Community Mediation Center of Southeastern Virginia in Norfolk for three years before moving to Richmond, where I wrangled college students for a year before joining DRS.



In my spare time, I enjoy traveling, cooking, reading, crocheting, and my cats. I'm also looking forward to my wedding in October.

Among many other duties, Mandy will be responsible for the mediator certification and recertification review process and for reviewing applications for trainer certification for various core and continuing mediation education classes. Mandy will be assisting Sally with future mediation training workshops and presentations to judges, clerks, community organizations and the Bar.

Since emailing the mediation community of Mandy's hire, we have been receiving wonderful feedback, confirming a wise choice and applauding Mandy as a proven asset to Virginia's mediation program. We are excited to have her on board and hope you will join us in welcoming Mandy to our DRS staff. You may reach Mandy in her office at 804-371-6064 and by email at mstallings@courts.state.va.us.



A Life That Inspires Ieva Priman Cucinelli

December 12, 1931 ~ March 11, 2007



If commissioned to paint a word portrait of Ieva Cucinelli, the artist would no doubt liberally apply to the canvas such adjectives as **generous**, *adventuresome*, **INQUISITIVE**, *compassionate*, *bright*, *cultured*, **warm**, and *joyful*. Ieva was a Virginia certified mediator for about twelve years, mediating primarily small claims court and general district court cases for the Northern Virginia Mediation Service in the Arlington, Fairfax and Alexandria courts.

Responding to a request for details to feature Ieva for this column, mediator Jeannette Twomey wrote, "Ieva's was a life that inspires. I believe that you have chosen a good subject." Fellow mediator Sara Greenberg wrote, "Ieva was one of my favorite people. I looked forward to the days we mediated together. Her intellectual curiosity and ability to learn new languages never ceased to amaze me. I miss her very much."

Born in 1931 in Riga, Latvia, Ieva Priman and her sister Maija moved to Pittsburgh, Pennsylvania, after World War II. She graduated Magna Cum Laude from the University of Pittsburgh in 1953 with a degree in philosophy. It was here that she met fellow student and future husband Joseph Cucinelli. Following college, they both moved to New York City where they worked and attended classes at Columbia University.



Ieva Cucinelli with her son James and his wife Cary

Moving to Washington, DC in 1958, they married and pursued careers in the Federal Government. Ieva worked for the Federal Trade Commission as an economist for thirty years and loved her work so much that she continued to visit the offices even after her retirement to continue to "study." Post-retirement, Ieva also took advantage of George Mason University's continuing education program for adults. She called GMU her "village of happiness" and spent her time there studying languages (Russian, Spanish, Italian, French, Latin, Hebrew, Greek and Arabic), world and U.S. history, and literature. She loved the fact that she could audit classes for free as a senior citizen. Unfortunately for the professors, she liked it so much that she wanted to get her work "graded." In 1995, at age 64, Ieva earned a Masters of Science degree in Conflict Analysis & Resolution and became a court-certified mediator. She was grateful for the opportunity to assist others to find solutions to the conflicts they were experiencing.

Ieva's love for people also led her to perform volunteer work at the CrisisLink call center in Arlington. Every other Saturday for nearly 29 years, Ieva donated her time and vital support to those facing life crises. The volunteer with the longest tenure, Ieva was honored posthumously by the group at their annual awards ceremony in April 2007. She was also a volunteer ombudsman for seven years for the Northern Virginia Longterm Care Ombudsman Program. David Michael, former Executive Director of the Northern Virginia Mediation Service who also worked with CrisisLink, offered that, while Ieva did not play a lead role at NVMS or CrisisLink, she was a "quiet and persistent presence for this valuable work."

This very unique lady awoke daily before the sun rose to enjoy her ritual of studying and reading the Bible as well as a wide variety of American, Latvian, Spanish and Cuban newspapers. In her 'free time,' she tended a victory garden at Yates Garden near her home in Alexandria, shopped at thrift stores and made homemade cards and pillows for friends and family. An arts lover, Ieva was a long-time subscriber to the Washington National Opera, a supporter of local art museums and a student of the guitar. She loved to read and write poetry in several languages. She and Joe shared many common interests. Joe played the clavicord and enjoyed classical music. He also liked going to museums to see historic art and dedicated his post-retirement life to enameling, drawing and painting portraits, still lifes and river and cityscapes. He loved to read, write haikus and sail on the Potomac River.

The Cucinelli family worshipped at the Old Presbyterian Meeting House in Alexandria where Ieva participated actively as a Sunday School teacher, committee member, usher and Stephen Minister. Ieva's faith journey also led her to worship with the Alexandria Friends Quaker meeting where she enjoyed the quiet meditative services.

Ieva and Joe were married for almost fifty years and were blessed with one son, James Edward Cucinelli, born in 1971. Ieva liked to share that, upon learning the news of her pregnancy at age 40 she felt like Sarah from the Bible and began laughing and crying at the same time because she had come to believe she would never have a child. Shortly before her death in March of 2007 at the age of 75, Ieva was delighted to learn that she would become a grandmother in late August. Her husband Joe passed away just three months after Ieva had passed, so neither experienced the joy of seeing their grandson Joseph Leopold Cucinelli ("Leo") born to James and his wife Cary.

Her son James mentioned that his mother kept everything so he has lots of letters that passed between his parents back in the fifties before they were married as well as many sentimental items he's working to organize. He hopes some day to assemble both of his parents' poetry into a collection. As expressed in one of her wonderful poems, Ieva was ever ready to embark on "the road less traveled." The tapestry of Ieva's well-lived years is beautiful and intriguing and she has bequeathed a precious legacy to little Leo.

Titled:

To Myself



*Any day
is right
to make
the turn to
the road less traveled.*



*Why not
Let it be
today?*

*Ieva Cucinelli
October 13, 2006*



"Leo"

Joseph Leopold Cucinelli

Age 2

**KULL UQDA WA
LAHA HALLAL**



**EVERY KNOT
HAS SOMEONE
TO UNTIE IT
(ARABIC PROVERB)**

Mediation is a well-known concept in Morocco. To mediate in Arabic is *metewesit*, which means to get in the middle. Also, Moroccans say *tehall al-mushkil*, meaning to open a problem. Tribal leaders filled this role in pre-colonial times. The French loosely organized regional governments with administrators and judges who served as mediators. Today, there are numerous mediation programs developing in both Morocco's commercial and civil society areas. Search for Common Ground has an office in Rabat that works with youth and women's groups and has trained attorneys and judges. Various trade and business groups are setting up mediation programs with help from both the European Union and the U.S. government as part of the effort to promote greater trade.

From September 2006 through the end of 2008, my wife Linda and I lived in Morocco's remote desert town of Figuig, serving as small business development volunteers with the Peace Corps. After writing the last of our children's college tuition checks and having successfully navigated Peace Corps' extensive medical exams, we joined 48 other volunteers and flew to Morocco on September 11th. Although we had both traveled to developing countries before, there is nothing that could have sufficiently prepared us for being immersed in a totally different culture.

Slightly larger than California and with a population of about 30 million, Morocco resides at the northwest corner of Africa – a traditional crossroad between Europe, Africa and the Middle East. Literacy is about 52% and the majority of the population is under thirty. The terrain includes coastal plains, mountains and desert. The climate is Mediterranean and more extreme in the interior. Moroccans are Arab and Berber (Amazigh) and 99.99% Muslim. There are about 4,000 Jews, mostly in Casablanca, and less than 2,000 Christians. Morocco was the last country in Africa to be colonized when the French came from Algeria in the early 1900s. Moroccans speak Arabic and several Berber dialects, and their second official language is French. Since 1956 when Moroccans achieved their independence, their government has been a Constitutional Monarchy.



Beautiful Figuig Oasis

After a few days in Rabat, Morocco's capital, getting more shots, taking care of administrative details, and a bit more orientation, we traveled by bus to the town of Azrou in the Middle Atlas Mountains. This would be our "base-camp" for nine weeks of community-based training. We learned survival Arabic and the Moroccan culture and experienced Ramadan, family traditions and Islam by living with a local family. We practiced techniques of assessing community needs and learned methods for working with Moroccan counterparts and best practices to develop sustainable projects once we moved to our respective communities for the next two years.

Perhaps because we were a married couple, Peace Corps sent us to work and live in the most remote town in Morocco, Figuig, located in the southeastern corner on the Algerian border, seven hours by bus to a major city. Albeit remote, it may be the most beautiful town in the Sahara. Figuig is an oasis with over 200,000 date palm trees surrounded by desert mountains. With a population of about 8,000, its history dates back thousands of years. Its oldest mosque was built in the 11th century, and its economy is

based on agriculture centered around the production of dates. Under the shade of the palmery and with a complex system of irrigation from its Artesian wells, locals produce wheat, olives, vegetables, and fruits such as apricots, pomegranates, grapes, and almonds.

Moroccans are extremely good-natured, but like everywhere conflicts are inevitable. As volunteers working with local artisans, cooperatives, and associations, we lived, shopped and traveled side by side with the Figuig people. We worked daily with artisan groups to help them develop business and marketing skills and, of course, all the while trying to improve our Arabic. At the grass roots level, we had front row seats and often enjoyed full participation in how Moroccans negotiate daily life and their social, family and economic concerns. We observed the impact of cultural differences in conflict situations, and some uniquely Moroccan solutions, primarily in three areas: 1) in the public sphere where there are interrelations between the *makhzen* (public officials) and average citizens; 2) in the marketplace between merchants and customers; and 3) within the family.

The Public Sphere. Because of its strategic location, many foreigners have been drawn to Morocco, including Phoenicians, Romans, Vandals, Visigoths, and Byzantine Greeks. The Arabs brought Islam at the end of the 7th century, spreading across North Africa and into Europe. Morocco has been ruled since 1649 by the Alouite dynasty, claiming descent from the Prophet Mohammed. The King has absolute authority in matters of religion and government. The *makhzen* are all the public officials who represent the King, from the ministers down to local administrators and police. Although these relations are rapidly modernizing and the King himself is constantly pushing for change, there still remains a culture of dominance that is deeply embedded in Moroccan psyche. Moroccans say, “There are three things that cannot be overcome: fire, flood, and the *makhzen*,” or “Only God and the *makhzen* can defeat you.”

When a citizen needs a document for family, business or personal matters, he or she must undertake a “game” of feigning deference toward the necessary officials and following bureaucratic procedures to seek assistance so that the red tape can be cut. Often the citizen will promise some future payment or promise of a good deed. Most citizens have no means of repaying, which creates a greater sense of dependency and patronage. This is an example of a legacy conflict dynamic, one intended to exert control by creating an environment where subjects are dependent on their rulers. Today, there are many reforms, as agencies adopt more professional practices and add technology and accountability. Elections are held every six years. There are active political parties and civil society groups pushing for reforms as Moroccans evolve from subjects to full citizens.

The Marketplace. This is the most likely sphere of Moroccan life where one can see conflicts develop within a variety of consumer relationships and often be quickly resolved. The marketplace is where one encounters the smell, the feel and the everyday life tensions of Moroccan culture. For example, there is no better way to experience Morocco than to use public transportation. The *souq* (go to market) bus is inexpensive, travels between towns, and makes frequent stops. Although old and somewhat uncomfortable, it will surely provide the observant passenger with many wonderful insights into local culture. If you prefer a faster and more intimate means of transportation, many Moroccan towns offer *un grand taxi* service.



Olive Market in Fez

It is a collective taxi that needs six passengers paying a fixed price to fill up before the *shifeur*, driver, will depart. Yes, that's right, six passengers plus the driver in one four-door sedan -- very intimate indeed, with the driver and two in the front seat and four crunched in the back!

It was one of these taxi rides that provides a classic example of how conflict creates opportunity. During January we went to visit Frank, a Peace Corps colleague who also lived in a remote desert oasis, just six hours by *souq* bus. Frank was helping us design a website (www.FiguigArtisanat.com) to help our artisans market their products to Figuig emigrants living abroad. We brought our bicycles with us on the bus and arranged to meet him for the three-hour scenic bike ride back to his town. To make the rendezvous, Frank had to take *un grand taxi*. Although taxi prices are fixed for passengers, extras like bicycle fare are not. So, when Frank presented his bike, the driver saw him, a foreigner and possibly a tourist, as an opportunity to charge more for the bike. Frank immediately expressed his outrage at the driver's suggestion. Frank had a "feel" for how this game was played and offered a much lower price. As they continued to haggle and argue, Frank insisted on the lower price and set his bike into the trunk. The argument continued for about half the taxi ride. By speaking the local language, sustaining an energized debate, and allowing humor to pepper his indignation, Frank was able to appeal to the driver's good sense of hospitality and fairness. By the time they reached our rendezvous location, their discussion had evolved to agreement and their relationship to respectful fast friends. Whenever that driver saw Frank again, he would be sure to beep his horn or stop and exchange greetings and good will. I believe they even shared a few cups of tea.



Customary hospitality rendered with tea and dates

Family Life. In the U.S. we hear, "There's no escaping death and taxes." The Moroccan proverb is, "There's no escaping death and marriage," which is viewed as the expected state of life for adults. In Morocco, there are both traditional "arranged" marriages and "love" or romance marriages. Generally, a man is five to ten years older than his bride, which stems from tradition and the need for men to demonstrate economic stability to take on family responsibilities.

It is within the context of family life that a visitor will encounter the great traditions of Moroccan hospitality. An ancient saying goes, "You will open the door to any stranger and you will bestow your hospitality on him for three days before inquiring the purpose of his visit." It is a tradition that the guests stay in the best-kept room and are served the most lavish foods. Many hours are spent exchanging stories over the national drink, strong green tea with ample amounts of fresh mint and sugar.

In many Muslim societies, it is impossible to talk about family life except in terms of Islam. Likewise, many look to family law to understand the legal status of women and for the direction that the larger society should take. This has certainly been the case in Morocco. Since the mid-1990s there has been a series of efforts to reform the *Mudawanna*, or Family Law, which was originally codified after independence from France in the mid-1950s. While struggling to free itself from France, Islamic Law played an important role. The Nationalists, Islamic reformists, and traditionalists were all united around Islamic family law in opposition to France. Since then there has been much discussion and debate about reform. In neighboring Algeria and other Islamic countries, these debates often fiercely divided the country. In 1992, Morocco's King Hassan II, determined to avoid such divisive conflicts, received representatives of various women's groups at the Royal Palace. Acting as a mediator between these reformists and traditionalists, King Hassan II forged an agreement by ordering

them to “work it out,” else he would intervene and decide it himself. Although initial reforms were limited, key were women’s right to refuse a forced marriage, more clear guidelines for maintenance and support upon divorce, and further restrictions on polygamy. Much of this was already practiced as Morocco developed its economy, but these codifications were important for the rural and remote areas.

The most significant reforms of the *Mudawanna* came in 2004. When Hassan II’s son, Mohammed VI, came to the throne, he was clearly more willing to allow greater liberty. The young King with his modern-looking wife and their two children sought to publicly show a new side to the Moroccan monarchy. At the same time, the King has taken the various civil-society groups under his wing and worked to balance the concerns of the more conservative Islamic traditionalists. This resulted in a new *Mudawanna* Family Code, which seeks to reconcile universal human rights principles and the Islamic heritage of its society. It has created an ongoing negotiation between these groups. Now, various ministries are challenged to train judges and administrators and educate women, families, and civil societies, especially in rural areas.

A final word about U.S./Morocco relations and the Peace Corps - Morocco was the first country to recognize the independence of America from Britain in 1777 and has the longest treaty still in force. Tangier is the home of the oldest U.S. consulate. Peace Corps has been active in Morocco since 1963, and today there are nearly 200 volunteers working in the four sectors of Health, Youth Development, Environment, and Small Business Development. Peace Corps is actively recruiting volunteers in the 50-plus age group as well as its continuing tradition of recruiting recent college graduates. To learn more about the Peace Corps, go to www.PeaceCorps.gov.



Rest
Break
in the
Sahara

As for the Arabic proverb that serves as a title for this article, it is encouraging to recognize this is a universal truth. No matter the culture, there are those individuals and organizations who possess the creativity, the skill-set, the temperament and the passion to diligently do their best to untie the knotty issues inevitably created by conflict.



KULL UQDA WA LAHA HALLAL

Article submitted by Bob Glover, who served as the Executive Director of the Community Mediation Center of Southeastern Virginia and was the Co-Founder and Past-President of Virginia’s Association for Community Conflict Resolution. You can reach Bob at bobglover54@aol.com.

University of Richmond Law Students Declared Champions in 2009 National ABA Representation in Mediation Competition

The Tenth Annual National Representation in Mediation Competition was held in conjunction with the American Bar Association Section of Dispute Resolution Annual Conference in New York City on April 15-16, 2009. The annual competition consists of law student teams who role-play as attorneys and clients to model appropriate preparation for and representation of clients in mediation.

Law schools across the country held intramural competitions, from which 104 teams from 57 schools were chosen to move forward to compete in nine regional competitions. From there, ten top teams were invited to compete at the national competition. The teams represented Arizona State University College of Law; Rutgers University – Camden School of Law; Faulkner University – Thomas Goode Jones School of Law; University of Tennessee College of Law; Ohio State University – Moritz College of Law; University of Utah – S. J. Quinney College of Law; Washington University School of Law (St. Louis); Suffolk University Law School; University of Richmond School of Law; and Seattle University School of Law.

After two preliminary rounds at the national competition, teams from Arizona State, Ohio State, Richmond and Washington (St. Louis) advanced to the semi-final round. Finally, the Richmond and Washington teams won the right to compete in the championship round, in which University of Richmond students Faith Alejandro and Paul Falabella defeated Washington students Sadena Thevarajah and Gordon Spring. We extend hearty congratulations to Faith and Paul for their victory and outstanding performance. You made Richmond and all of Virginia proud!



Paul, a third year law student, did his undergraduate work at the University of Richmond before entering their School of Law. He's Treasurer of the Alternative Dispute Resolution Society and Articles Editor for the Richmond Journal of Global Law and Business. He's working toward meeting the requirements to become a Virginia certified mediator.

The Office of Dispute Resolution is especially excited for Faith, who during the summer of 2004 served as a student intern here. At the time, she was a rising senior and honor student at the University of Virginia, where she served as Coordinator of University Mediation Services. She was also employed for a while at Commonwealth Mediation Group in Richmond. Currently, Faith is a third-year law student at the University of Richmond, where she continues to be active in mediation and to excel. She serves as Executive Editor for Law Review and works with the Family Law Society.

We wish Faith and Paul success in their Bar exams and employment search as graduation looms over the horizon.

Reflections on the Tamarisk Tree

We huddled in the shade of a tamarisk tree at Tel Beersheba, Israel to avoid the searing heat of the sun listening to our tour guide Hannah read the story of Abraham's treaty with Abimelech. We had all come for different reasons—pilgrimages, vacations, cultural tourism. I had come as a preparation. Within the year, a sabbatical leave would provide me the time to write a book on conflict resolution in which I plan to consolidate and extend the ideas I have gleaned from 23 years of teaching Resolving Conflict through Communication at Shippensburg University.

I was drawn to Israel from preliminary research for the book. In investigating the Program on Negotiation at Harvard Law School, I discovered that William Ury was a driving force behind the project called Abraham Path (www.abrahampath.org). (See *Tension Tamer*, an interesting profile of Mr. Ury.) William Ury is the Director of Harvard's Program on Negotiation and coauthor with Roger Fisher of one of most influential books in negotiation, *Getting to Yes, Negotiating Agreement without Giving In*, a book I have used in my course since its inception in 1986. His career has included the founding of the Global Initiative and his approach uses interest-based bargaining to resolve international disputes. The Arab-Israeli conflict is the pinnacle of international conflict and I had come to experience it first hand.

Why Abraham and why a path? Abraham is widely-accepted as the patron of monotheism and patriarch of half of the world's peoples—Muslims, Christians, and Jews. During his life he wandered from the place of his birth in present-day Iraq through Turkey to Israel. As its website remarks, "... the Abraham Path provides a place of meeting and connection for people of all faiths and cultures, inviting us to remember our common origins, to respect our cultural differences, and to recognize our shared humanity. The path also serves as a catalyst for sustainable tourism and economic development; a platform for the energy and idealism of young people; and a focus for positive media highlighting the rich culture and hospitable people of the Middle East." (<http://www.abrahampath.org/about.php>)

As I listened to Hannah describe Abraham's treaty, I pondered the lessons. The treaty was simple—the swearing of an oath. It was symbolic—the giving of a gift and planting of a tree. It was enduring—the record of Abraham living there for a long time, presumably in peace. Was this the first treaty between two people groups—the secular Philistines and the soon to become descendents of Abraham? Would it be naïve to apply this lesson to a model of peace we should pursue?

I reflected on my preparatory research for my Israel trip. My study of the nation's history revealed complexity and intrigue in sharp contrast to the simple story of Abraham. Instead of a story easily understood, I found a story of hope and determination challenged at every point by deception and treachery. I dug

The Treaty at Beersheba

Genesis 21:22-23, The Good News Bible

At that time Abimelech went with Phicol, the commander of his army, and said to Abraham, "God is with you in everything you do. So make a vow here in the presence of God that you will not deceive me, my children, or my descendents. I have been loyal to you, so promise that you will also be loyal to me and to this country in which you are living.

Abraham said, "I promise."

Abraham complained to Abimelech about a well which the servants of Abimelech had seized. Abimelech said, "I don't know who did this. You didn't tell me about it, and this is the first I have heard of it."

Then Abraham gave some sheep and cattle to Abimelech, and the two of them made an agreement. Abraham separated seven lambs from his flock, and Abimelech asked him, "Why did you do that?"

Abraham answered, "Accept these seven lambs. By doing this, you admit that I am the one who dug this well."

And so this place was called Beersheba [meaning "Well of the Vow"] because it was there that the two of them made a vow.

After they had made this agreement at Beersheba, Abimelech and Phicol went back to Philistia.

Then Abraham planted a tamarisk tree in Beersheba and worshipped the Lord, the Everlasting God.

Abraham lived in Philistia for a long time.

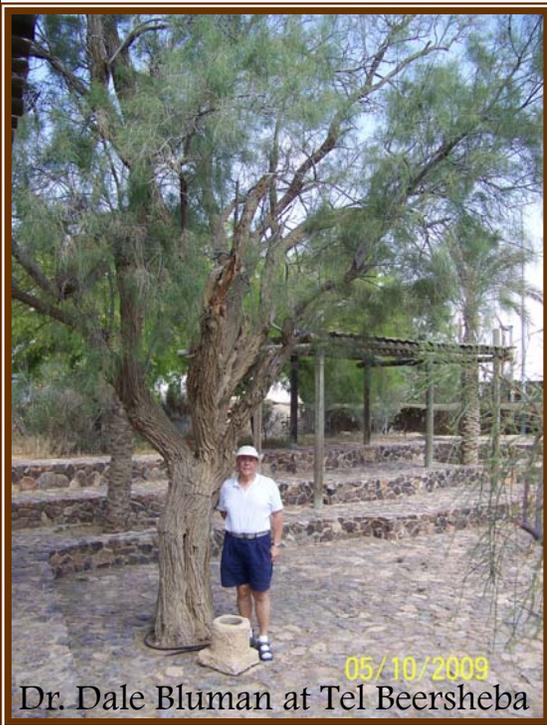
further into the details and realized that the many and varied perspectives prevent a unified narrative. So I turned my thoughts to the people I met. After all, I had come to experience this place and its people first hand.

First, I focused on our tour guide Hannah—a Russian Jew now living in Jerusalem. Born in Moscow, she “made aliyah” in 1995. The term is Hebrew for “going up,” which refers to a Jew who has returned to Israel. I asked her why she had immigrated to Israel. She said, “After communism fell, it became easier for Russians to leave the country. Gradually, I became convinced that it was my destiny to return to my mother country.” She is fluent in Russian, Hebrew, and English, and she treats her work as a tour guide as a mission—to provide visitors the experience of Israel. She is a blend of an historian, a geographer, an archaeologist, a geologist, and theologian. And she is devoted to her new nation.

Then, my thoughts turned to Kamel, our bus driver—a secular Arab living in Nazareth. Kamel is pleasant, speaks little English, and is skilled in the art of tour bus driving. He is equally effective in narrow city streets and twisting mountain passes. Kamel’s regular greeting is, “My friend.” He has two large photos of his only son posted over the driver’s seat in the front of the bus. He is imminently likeable.

I ask Hannah, “Are you friends with Kamel?” She responds, “Oh yes.” I probe further, “Would you extend hospitality (a high value in the Middle East) to each other?” Again the answer is, “Oh yes.” I probe further. “What about your differences?” The answer comes, “We don’t talk about them.” Then there is a pause followed by a qualifier. “Of course, if another war should come, I don’t know what would happen. We have different allegiances.”

Later in the trip, I would visit Kamel’s hometown of Nazareth. In the middle of the Galilee region, the present city has over 300,000 inhabitants, the majority of whom are Arabs. The atmosphere there is radically different from the cities of the West Bank. Noticeably absent are Israeli Army Reservists with assault rifles slung over their shoulders. Ancient bakeries stand next to shops offering contemporary European fashion. I inquire how the Arab-Israeli relationships work there. I get the answer, “We do business with one another. We have respect.”



Do these methods of cooperation have promise for Israel at large? The study of conflict resolution shows us that the most fundamental choice we make in conflict is whether or not to engage in it. Could Israel raise a generation who ignore the differences in their cultures and focus their energies on their mutual problems? (The first principle in William Ury’s *Getting to Yes* is “Separate the People from the Problem.”) Could Arabs and Jews discover that they have mutual interests that would be better served by “doing business” with one another rather than by engaging each other with violence? (Ury’s second principle is “Focus on Interests, Not Positions.”)

As we got ready to depart from Tel Beersheba, I ask Hannah if we could make a side trip to Hebron—another stop on the Abraham Path, home to the Tomb of the Patriarchs, and the place where Abraham is said to be buried. Hannah responds, “Oh no. It is much too dangerous. As a Jew, I cannot go there. You’d need an Arab tour guide and an armed guard on the tour bus.”

I take a moment to drink in the atmosphere of the ancient site before we depart. Suddenly, the silence is broken by the thunderous roar of an Israeli military jet on training maneuvers. Immediately I look to the sky trying to locate the jet. But it is perfectly disguised against the desert sky.

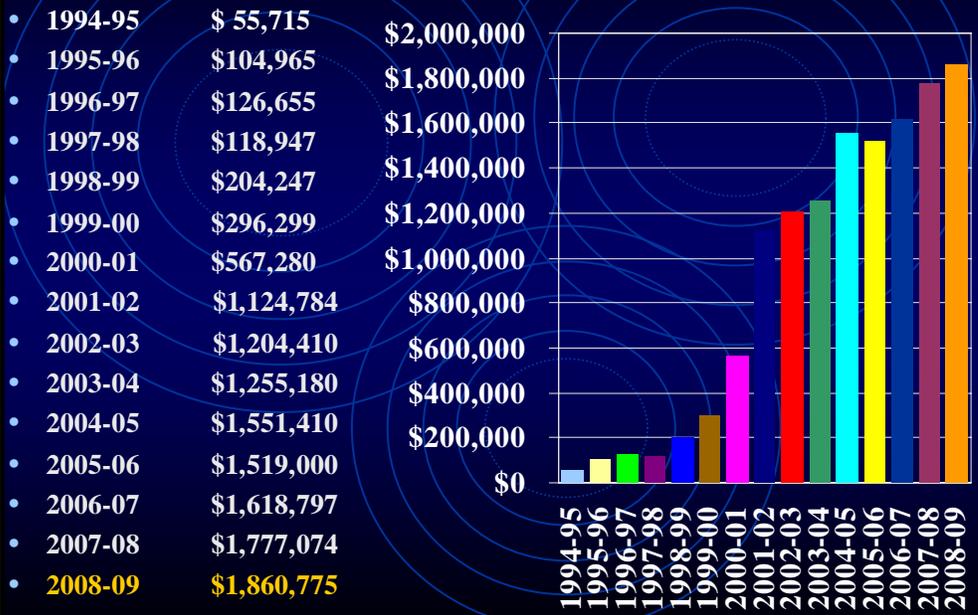
Instead of the jet, my eyes fall on the branches of the tamarisk tree.

Court-Referred ADR Program Statistics Through the 2008-09 Fiscal Year

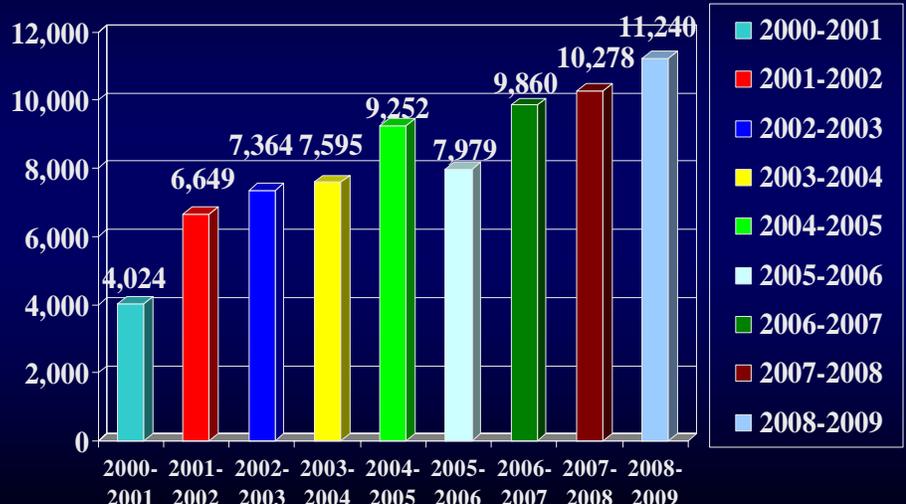
It has been our practice to annually make available through this newsletter statistics that track the progress and growth of ADR in Virginia's courts. The first chart illustrates the fact that Virginia courts continue to support and expand alternative dispute resolution programs for its citizenry. These figures include expenditures for mediation services contracts, mediation coordinator contracts, custody, visitation and support mediations, and judicial settlement conferences.

Court-Referred Mediation Expenditures

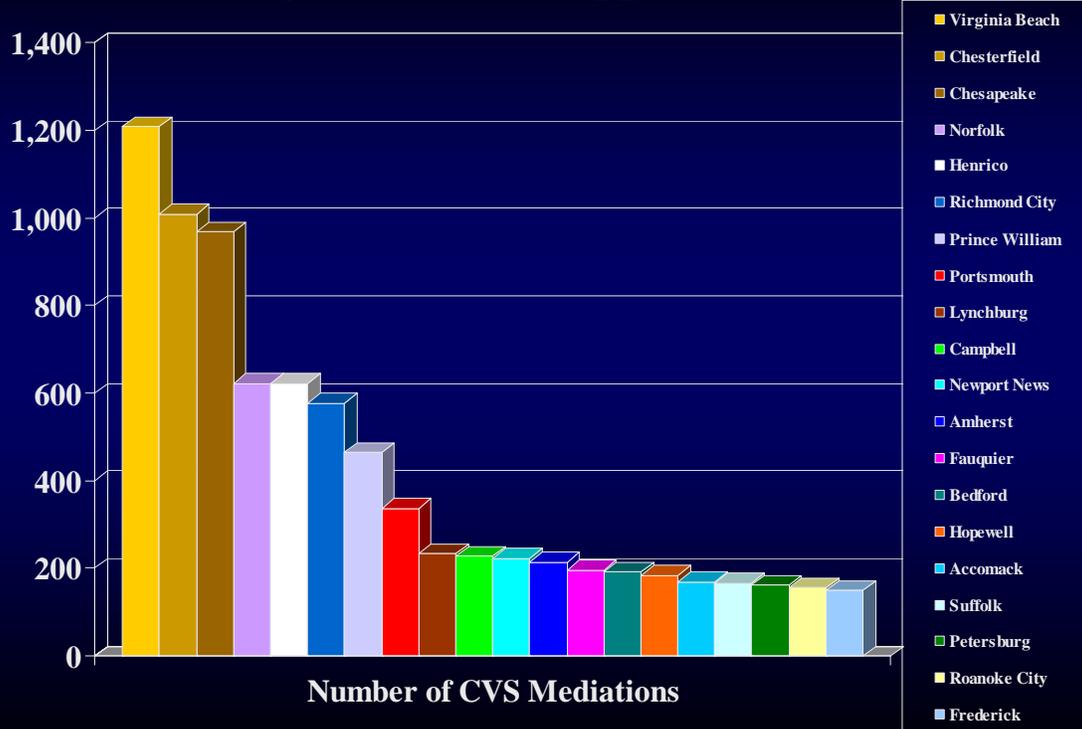
Expenditures by Fiscal Year



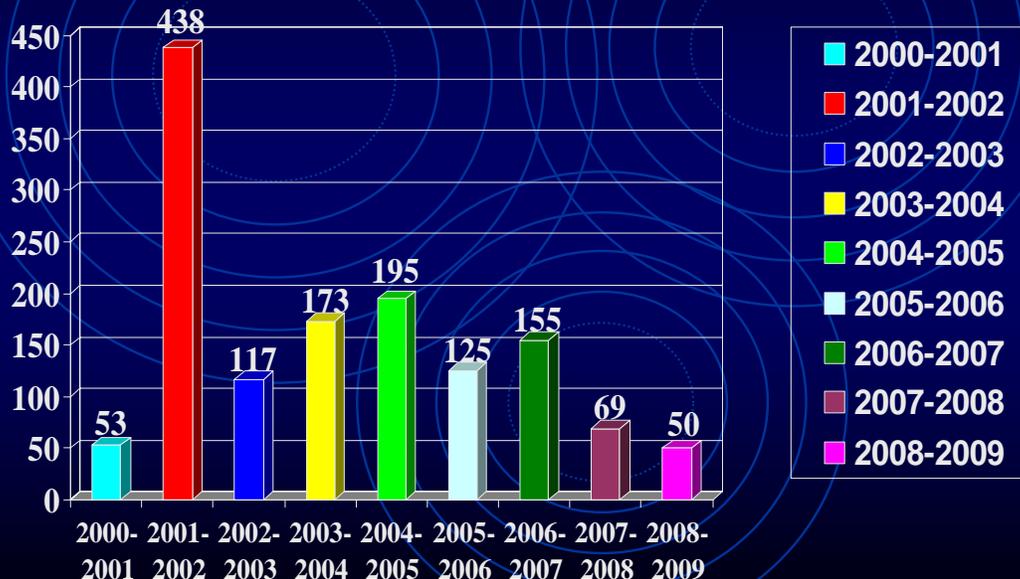
Custody, Visitation & Support Mediations Conducted



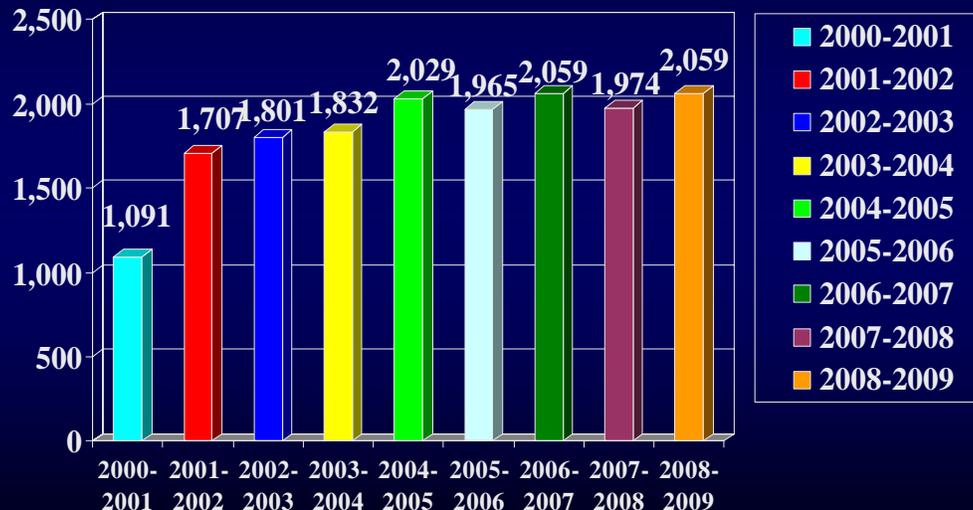
Top 20 Juvenile Courts – 2008-09 Fiscal Year Custody, Visitation & Support Mediation



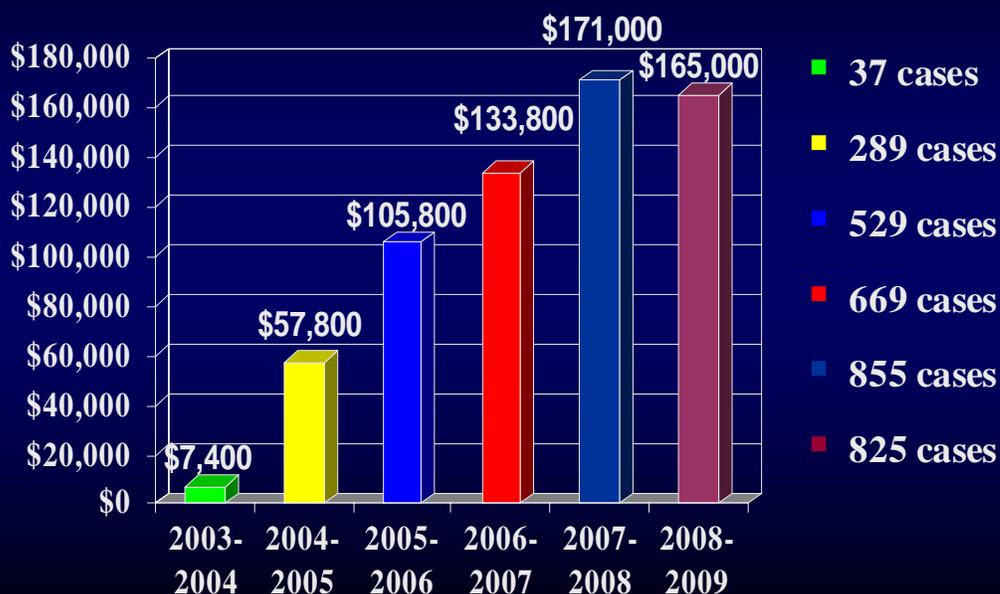
J&DR Non-CVS Mediations



General District Court Mediations Under Contracts



Settlement Conference Expenditures



Good Morning America to Feature Mediation Center of Charlottesville's Co-Parenting Class

On Thursday, September 10, 2009, **Good Morning America** sent a producer and crew to tape our Co-Parenting class and to interview instructors and participants. GMA is planning a series of spots on children and divorce as an adjunct to the *Jon and Kate* story. We are pleased our program was the one that was recommended to be featured.

After ABC contacted the Mediation Center of Charlottesville, we notified all students that a TV crew would be at the class. If parties objected to being filmed, we rescheduled them for another class. Producer Sandy Hausman interviewed instructors Judy Morton and Bonnie Brewer before the class. Her questions were right on target and dealt with the essence of our co-parenting philosophy - the importance of keeping children from being exposed to parental conflict.

The crew was hardly even noticed once the class was underway. Afterwards, several participants volunteered to be interviewed regarding how they felt about the class. It was especially reaffirming to see the crew nod their heads at comments made by the children in the video and parents in the class. As usual, the paraphrasing exercise drew the most attention and class evaluations were very positive.



At the time of publication of this article, we have not yet learned when the program will air. The hold-up is that ABC had hoped to interview both parents in a couple who have taken the class. For various reasons (privacy mostly), we have not yet been able to accommodate this request. This situation, however, points out a reality in co-parenting. There are varying degrees of cooperation among parents, and sometimes only one parent in a fractured family unit is willing to focus on what is best for the children. We would hope the message to a larger audience is that if you must "co-parent" alone, the class will give you the tools to do so for the benefit of your children.

Submitted by Bonnie Brewer, instructor for Co-Parenting: Making It Work classes offered by the Mediation Center of Charlottesville. Bonnie is also a Virginia certified J&DR and CCF mediator and Chairperson of the Center's Board of Directors.

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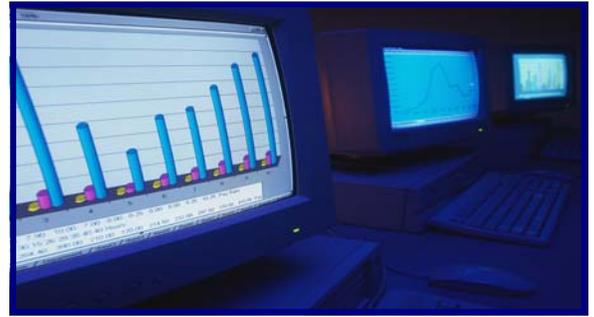
540-347-6650

Lawrie Parker, Executive Director

KEEPING YOU INFORMED

~ A DRS Update ~

Greetings from Dispute Resolution Services. We have a few things going on here that we want to be sure you know about.



Mediator Feedback Sought for Proposed Document Revisions ~ Deadline Extended

On September 9th, DRS posted five draft documents on the mediation web page and asked our Virginia certified mediators to review the governing documents and email feedback to DRS by September 25th. Due to mediator requests, **the deadline has been extended through October 30, 2009**. The Ethics Committee will then reconvene to consider the comments received.

Distinguished Ethics Committee members include Sam Jackson, John McCammon, Frank Morrison, Lawrie Parker, Jeannette Twomey and Paula Young. We are extremely appreciative for all the hours expended by the committee to combine their expertise to make this project successful.

The final Ethics Committee draft documents will undergo an internal review by the Office of the Executive Secretary. DRS anticipates presenting revisions approved by the Office of the Executive Secretary to the Judicial Council of Virginia for adoption at its first meeting in 2010.

Legislative Changes – Child Support Requirements

Several months ago, a communication was sent from DRS to all J&DR and CCF certified mediators regarding changes to the child support statutes that went into effect July 1, 2009. Please find below a description of the pertinent changes.

(To view the code sections discussed below, go to <http://leg1.state.va.us/000/src.htm>; enter the code section number in the search box and click “submit”; then click on the code section in the list created by the search.)

(To view the final Senate bills, which italicized the changes to the statutes so they are easier to see, go to <http://leg1.state.va.us/lis.htm> under the “2009 Session” heading click on “Bills and Resolutions”; enter “sb” and the bill number in the search box and click “go”; then under the “Full text” heading click on “Governor: Acts of Assembly Chapter text.” To print a bill without cutting off text, click “pdf” in the upper right hand corner before printing.)

1) Senate Bill 1059 amended Virginia Code § 20-60.3, “Content of support orders.” This code section addresses the “notices” that must be included in court orders for child support and for spousal support where there are minor children. Different courts around the state use different models for turning a mediated agreement into a court order, thus the location of the required notices varies from court to court. In some courts, the mediated agreement is the actual court order once the judge signs it. In others, the mediated agreement is incorporated into a separate court order. Mediators should be aware of whether their court’s procedure requires the mediator to provide the notices with the mediated agreement, or whether a separate court document provides the notices. If you are not certain about this responsibility, please check with your court. If you provide the notices with your mediated agreement, you should review the amended § 20-60.3 and make certain you incorporate all the notices now required by the section into your document.

2) Senate Bill 1237 amended numerous Virginia code sections. A significant change for child support calculations is that as of July 1, 2009, health care costs actually paid by a parent's spouse are included in the basic child support obligation. (In the past if a parent's spouse provided health care coverage for the child, that amount could not be included in the child support guidelines calculations; now it should be included.) This change is found in § 20-108.2 (E) and (G)(1). The District Court Form child support worksheets and instructions have been updated in conjunction with the statutory change. Following are links to the worksheets that have been changed to comply with this amendment:

Sole custody: <http://www.courts.state.va.us/forms/district/dc637.pdf>

Split custody: <http://www.courts.state.va.us/forms/district/dc638.pdf>

Shared custody: <http://www.courts.state.va.us/forms/district/dc640.pdf>

3) Senate Bill 1237 also introduced the concept of “cash medical support,” defined in Code § 63.2-1900, to the child support statutes (see § 20-108.1 (C) and § 20-108.2(G)(1)). It is not clear how the courts will interpret this amendment. We recommend that you request guidance from your court regarding the use of “cash medical support” in your child support mediation cases.

Mediator Recertification Due for Many

Approximately half of our court-certified mediators are due for recertification on October 31, 2009. The purpose of certifying mediators is to serve the court system. Therefore, we encourage you to participate in training in substantive areas appropriate to your certification levels as well as in mediation skills/process areas in order to provide competent, knowledgeable, and professional mediation services to the court system.

Forms and Instructions

You will find the most recent [instructions and forms for recertification](#) on the court website. These forms specify the requirements and the types of evidence required to document training and mediation cases. Please do not send more documentation than is necessary to meet the minimum recertification requirements and be sure to keep a copy for your files. DRS scans the application forms for the electronic record, but discards supporting documentation.

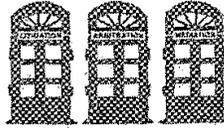
If the information in your online profile has changed, please complete and enclose an updated *Mediator Profile Form, ADR-1005* (PDF or Word).

Note: The PDF forms are revisable, allowing you to complete your information and then print the completed forms from the website. You will not be able to save the completed forms to your hard drive. Forms are also provided in Word format, allowing you to use the “File, Save As” feature to save them to your hard drive, complete your information and print the finished forms for submission.

Review Process and Extensions

The instructions posted with the forms explain the review process and how to request an extension if you will be unable to meet requirements for a timely submission. Please understand that an extension DOES NOT extend your mediator certification, but merely means that we will keep your file open beyond the October 31st due date. Even with an “extension,” your certification lapses on October 31, 2009.

While you are operating under a recertification extension, because you are not certified you should co-mediate any court cases rather than mediating solo. You may not hold yourself out as a certified mediator; and if you have mentor status, you may not mentor others. If you are a certified trainer of a course that requires your certification to be current, you may not train until you are recertified.



Policy Issues in the Use of ADR

“The courts of this country should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried.”

—United States Supreme Court Associate Justice Sandra Day O’Connor

Policy issues concerning the conception, design, and implementation of settlement procedures in the courts of North Carolina have arisen over the past two decades as alternative dispute resolution (ADR) processes have been integrated into the court system. Some of these issues were identified, discussed, and debated in the early stages of design and development, while others, not viewed as issues initially, arose as the programs were being introduced and implemented. Many of the issues tackled by the North Carolina Bar Association (NCBA) and judicial personnel over the years are summarized here, in the hope that other states might benefit as they consider whether and how to include ADR procedures in their systems as settlement procedures.

Mandatory Versus Voluntary

One of the first debates about the development of ADR in the North Carolina court system revolved around the question of whether ADR procedures should be mandatory or voluntary. The NCBA’s efforts to investigate ADR began in 1983 with the creation of its Task Force on Dispute Resolution. The Task Force recommended in its 1985 report that the NCBA sponsor an experiment with non-binding arbitration in small civil cases. (A similar court-annexed arbitration program was being explored in the United States District Court for the Middle District of North Carolina.)

The question of whether or not arbitration would be mandatory was both a case management issue and a philosophical issue. It was a case manage-

ment issue because of the court's need to monitor and administer the arbitration, and a philosophical question as to the nature of ADR processes. At that time many people believed that there was something inherent in ADR processes that militated against their inclusion in the court system as mandatory procedures. Those people felt that ADR procedures should remain voluntary in all respects.

It was eventually decided that the non-binding arbitration program would be mandatory. Many people felt that inclusion of arbitration on a voluntary basis would result only in a state-sponsored public education effort about the benefits of ADR. Furthermore, they believed that mandatory participation in a non-binding procedure was not a significantly coercive process.

Several Task Force members believed that the mandatory use of ADR would increase attorneys' exposure to those processes, thereby increasing the use of ADR on a voluntary basis. There is, however, little evidence to indicate that its mandatory use has increased the voluntary use of non-binding arbitration prior to trial. Yet there is evidence that the mandatory program of mediation later implemented in the superior courts created a significant increase in the use of mediation on a voluntary basis.

"Fitting the Forum to the Fuss"

One important policy issue that is being hotly debated at the present time first surfaced in North Carolina with the 1995 legislation authorizing statewide implementation of mediated settlement conferences in the superior courts. Prior to that legislation, all existing ADR programs employed a single ADR procedure, such as mediation in superior court or non-binding arbitration in district court. They did not require anyone to choose among ADR procedures.

In 1995 the NCBA's Dispute Resolution Section recommended to the Supreme Court Dispute Resolution Committee that the superior court should have a menu of ADR processes from which the parties could choose. The notion of a "menu approach" to ADR was not entirely new. In fact, Florida's circuit court mediation program, which served as a model for North Carolina's program, included both arbitration and mediation as ADR processes. The North Carolina delegation that visited Florida in 1990 was instrumental in drafting the 1991 legislation for mediated settlement conferences in superior court, and they wrote the statute so that mediation would be the only choice available to litigants in superior court. The members of the dele-

gation made this choice based on their beliefs that non-binding arbitration would seldom be used, and based on Florida's overwhelming success with mediation.

However, during the pilot program for mediated settlement conferences in the superior court between 1991 and 1995, it became apparent that a broader range of procedures would be needed. Attorneys occasionally expressed the belief that mediation was not appropriate for their clients, and that there should be a choice of a procedure in which a neutral could render opinions about the value of the case and make recommendations about how the case should be settled. Therefore, the drafters of the 1995 statewide expansion legislation included a paragraph that allowed the use of "other settlement procedures" rather than mediated settlement conferences, if the parties agreed and if the senior resident superior court judge authorized it.

One of the fiercest debates concerning the development of ADR in the North Carolina court system began in January of 1995 and has continued to this day. The debate does not center on whether or not a "menu" of ADR processes should be included. In fact, there appears to be unanimity that there should be a range of choices in most court-related ADR programs (with the exception of child custody cases). Rather, the debate centers on the question of who should decide which ADR processes will be used by the parties.

The notion of including a range of optional processes in court-ordered ADR programs was often called "fitting the forum to the fuss." The model for making that choice in the early 1980s and 1990s was the so-called "multi-door courthouse" programs in Tulsa, Houston, and Washington, D.C. Those programs implemented a system of case management wherein the court, through its "ADR experts," decided which ADR processes were appropriate for particular cases and for certain classes of cases. In those programs the court, through its administrative structure and personnel, made the decision. The notion that "the court knows best" was supported by the then-current wisdom that particular types of ADR processes were best suited to particular types of cases.

The majority view in the literature in the mid-1990s was that some cases are more suited to arbitration than mediation, such as declaratory judgment actions or cases involving substantial statutory or constitutional questions. Some programs developed complex triage systems to aid in deciding which case went where. By 1995, the "current wisdom" about this matter was being questioned by those most active in the development of the mediation program in superior court. The drafters of that legislative proposal, begin-

ning first with the NCBA's Dispute Resolution Section, believed that the parties and their attorneys were best able to determine which cases and which parties were best served by a particular ADR form. Based on experience with the superior court pilot program, the drafters developed a firm belief that, for instance, it was impossible to predict which cases would settle in mediation and which cases would not. The belief was that those closest to the case—the parties and their attorneys—were those best able to make that judgment. Furthermore, it was not the type of case, but the parties' attitudes about the case, that usually drove or hindered settlement.

The debate which ensued on this subject in 1995 began to uncover policy differences which continue to exist to this day, particularly between attorneys on the one hand and administrators and law professors on the other. Lawyers have generally taken the position that the parties and their attorneys are in the best position to know which process is appropriate for their case. Law professors and administrators have generally taken the approach that court processes should be governed by the chief judicial official involved with case management, and have been more inclined to believe that certain types of cases are appropriate to some ADR models and not to others. Judges are often split in their approach to this subject. The majority, however, have sided with the approach advanced by the attorneys, based largely on their experience during the pilot program of mediated settlement conferences in superior court. Many of them, after experience with trying to predict by the nature of the case or the identity of the parties which cases would settle and which would not, began to shy away from trying to make those assignment decisions. Since 1995 there has been a trend in the development of ADR in North Carolina toward creating a menu of settlement procedures from which the parties and their attorneys may choose the process they think is most appropriate.

Which ADR Process Should Be the Default Procedure?

Closely related to the question of who should choose the ADR procedure used by the parties is the question of whether one of the processes should be designated as the default position within the menu of approaches, and if so, which mechanism should be chosen for that position.

Driving the notion that a default proceeding is needed in a design which includes a menu of ADR options is the belief that, without the designation of a default procedure, a mandatory program will devolve into a voluntary one. In other words, without a default ADR process or settlement proce-

cedure, the choice of ADR will be left up to the parties who will quickly fall back into old patterns of not utilizing settlement procedures. The use of a default mechanism in a menu system is crucial to moving cases through the court system and keeping them from languishing, which is a traditional benefit of incorporating ADR processes.

If there has to be a default settlement procedure, which process should occupy the default position? Heated debates have occurred since 1995 about the appropriate mechanism to occupy that position. Once again, the debate has fallen along professional lines. Lawyers tend to suggest that mediation should be the default mechanism, while administrators tend to like arbitration for a wide variety of reasons.

Lawyers argue that mediated settlement conferences, or facilitated negotiations, are the least restrictive and least adjudicatory of the processes since they focus on direct negotiations between the parties. In other words, the focus is not on preparing for a hearing, whether that hearing is abbreviated or cheaper than litigation or not; the emphasis is on direct negotiations and settlement.

Administrators, on the other hand, tend to like the quicker time frames that the non-binding arbitration program operates on, and therefore believe that the goal of case disposition is better accomplished by arbitration than mediation. They also believe that neutrals, who tend to be selected by the courts in many arbitration programs, are more reliable, inasmuch as they are supervised by elected court officials. Mediators, however, are selected and paid for by the parties, and administrators fear undesirable results due to a lack of mediator supervision in a system which arguably includes some element of pecuniary gain motivation.

The resolution statistics for each procedure are basically the same. Studies have shown that seventy-one percent of cases resolve in arbitration,¹ while sixty-eight percent of cases resolve in mediation.² The overall trial rate in the two programs is also comparable: 94.8% of cases in the court-ordered arbitration program³ and 91.1% of cases in the mediated settlement conference program⁴ resolve prior to trial.

Through the years, lawyers representing the NCBA in discussions regarding a default settlement procedure have argued that the two settlement processes are fundamentally different. Arbitration is an adjudicatory process; mediation is a negotiation process. Anecdotal evidence indicates that practicing attorneys tend to like the latter for themselves and their clients. Therefore, mediation has been pushed by the NCBA as the preferred default position in a menu approach to settlement procedures.

Exclusion by Case Type

In every dispute resolution program that has been developed in North Carolina there has been a question of whether certain types of cases should be included or excluded from the program. Sometimes the answer has been one of practicality, and sometimes the question has been decided on philosophical grounds.

The issue first emerged during the development of the non-binding arbitration program between 1985 and 1989, where it ultimately was decided that certain types of cases would be included and certain cases excluded. Included in that program were cases involving civil litigation with amounts in controversy not greater than \$15,000. Implicit in that decision was the notion that ADR ought to be started in North Carolina as a case management tool for smaller claims. Other types of cases were excluded because they were considered to be "fast-tracked" in the existing system. Still others were excluded for policy reasons. For example, claims for injunctive relief or family law cases could not easily be resolved with a monetary award, and such cases involved matters which some argued as a policy matter should be decided by a duly elected judge. Therefore, they were excluded. There was also recognition that a one-hour hearing and a \$75 arbitrator's fee did not lend themselves to cases requiring significant findings or complex judgments to resolve.

The question of inclusion or exclusion of cases based on case type became more complicated with the development of the mediated settlement conference (MSC) program in 1992. The drafting committee which was reviewing the Florida model discovered a fairly long list of exclusions by case type in the Florida statute. After considerable discussion and debate it was decided to have as few exclusions as possible. This was based partly on Florida's experience with its MSC program, in which many of the excluded cases were settled before trial.

When the MSC rules were drafted in 1991, they excluded only cases involving claims for extraordinary relief, such as petitions for writs of habeas corpus and mandamus. In 1995 the rules were amended to exclude appeals from motor vehicle drivers' revocations as well. By that date, the general view was that claims involving injunctive relief and issues of law could be negotiated to resolution based upon the parties' underlying interests, and therefore should be included when mediation was the procedure ordered by the court.

Another example of the inclusion/exclusion by case type issue occurred in the district court settlement procedures program for equitable distribu-

tion cases. In such cases, judges are frequently called upon to order mediation in situations where there have been allegations of domestic violence. A substantial body of literature has developed over the last decade on the issue of mediating cases in domestic violence situations. Many authors and organizations have come out against mediating in that context, arguing that the abused spouse occupies an inherently weakened negotiating position and cannot compete on a level playing field. On the national level, it has been accepted in some circles that a party who has made an allegation of domestic violence should not be ordered to attend mediation. North Carolina has taken a slightly different view on this subject, however. Acknowledging that safety is a primary concern and that allegations of domestic violence should be taken seriously, while at the same time recognizing that victims of domestic violence often reach negotiated settlements after having secured proper advice and legal representation, the rules of the district court program do not require judges to exclude family financial mediation where domestic violence is alleged. Instead, allegations of domestic violence are considered valid grounds upon which a party may successfully move to dispense with the required settlement procedures. The basic policy decision made here was that the proper analysis in cases where domestic violence is alleged is whether the parties feel—and in fact are—protected enough to participate, not simply whether there has been an allegation of abuse. Rather than making a blanket rule, the rules allow the court to decide on a case-by-case basis whether ordering settlement procedures is appropriate.

Who Should Administer ADR Programs?

An issue that must be resolved in the design and development of ADR in the court system is the question of the officer or official who will administer the program, issue orders, and enforce deadlines. For the most part, that question has been answered in North Carolina by designating the chief judicial official in the district to supervise the operation of ADR programs.

In the child custody and visitation mediation program and the court-ordered arbitration program, the chief district court judge is the responsible official. In superior court the senior resident superior court judge is the chief official, and in the district court family financial settlement program the chief district court judge has authority (and can issue local rules which control most aspects of the program). In that program, however, a variation has been created. Inasmuch as case management authority for equitable distribution cases varies from district to district, and frequently is handled by a judge other than the chief district court judge (or by many different

judges during the life of the case), all district court judges have the authority to enter orders for settlement procedures in such cases.

A related issue is the question of whether ADR processes will be mandated uniformly across the state, or whether each district through its chief judicial officer will be allowed some local option in that regard. On this issue attorneys and administrators have been more closely aligned. Both groups generally feel that all eligible cases, by Supreme Court rule, should be eligible for and ordered to ADR processes. They have argued that the provision in the court's rules allowing judges to exempt matters on a case-by-case basis affords the judiciary sufficient authority and discretion.

However, in superior court in particular, some judges have seen this as an erosion of their authority. They tend to prefer rules which give them the sole discretion to send a case to mediation or other settlement process. The judges' view has generally prevailed. As a result, there is currently a hodgepodge of administrative processes throughout the state. In some counties, all cases are ordered to mediation. In other counties, the judge will order settlement processes only where one party requests it. In still others, the court will not order an ADR process unless both parties request such an order. It has been the NCBA Dispute Resolution Section's position that ADR should be ordered in all cases, so that settlement processes become routine and expected throughout the court system, and so that case management systems will be strengthened.

Qualification and Selection of Neutrals

North Carolina began its ADR experiments in civil courts with non-binding arbitration. It was always assumed that the neutrals or arbitrators in that system would be attorneys. Thus, no great thought was given to opening up the qualification process to anyone other than attorneys. But with the advent of the mediated settlement conference program in superior court in 1992, the issue of the qualification and selection of neutrals emerged.

The first set of rules dealing with the qualifications of mediators in the MSC program clearly authorized only attorneys to be certified as mediators, although anyone could be selected by the parties if the court approved the selection. There was a strong feeling among the attorney and judge members of the drafting committee that such a strategy was necessary in order to gain acceptance by the bar and the bench of a brand new and potentially controversial program. Non-lawyer members of the drafting committee and lawyers who had been trained in the community mediation programs had misgivings about this decision, but at the time the need to have this new pro-

gram accepted by the constituents of the court system was of paramount consideration. While some believed that lawyers would be more easily supervised and disciplined by the courts because they were members of the North Carolina State Bar and deemed to be "officers of the court," others viewed this as a violation of fundamental fairness and sought legislation to allow non-attorneys to be certified as mediators. Ultimately the rules of the Supreme Court were amended to make it possible for non-lawyers to qualify as mediators, and those rules were later changed to expand the ways in which non-attorneys may qualify for certification.

There continues to be much debate nationally about the proper credentials for mediators. Certain groups within the ADR profession have made clear policy statements against professional and educational prerequisites for certification. For example, non-lawyers have been well represented in the ranks of arbitrators for decades, particularly in the area of voluntary, binding arbitration. In the field of arbitration, non-lawyer arbitrators with a certain area of expertise are seen as being qualified to render substantive decisions in such areas. In mediation it is not so clear that particular subject matter expertise is related to mediator competence.

In the design of a court-ordered ADR program, there is always the issue of who will select the neutral, whether the neutral be an arbitrator, mediator, or neutral evaluator. The rules for non-binding arbitration in North Carolina allow the parties to choose their arbitrator from among those who have been approved for such service by the chief district court judge. The MSC program in superior court makes it clear, however, that the court will appoint mediators only in the event that the parties do not choose within a certain time, or cannot agree upon the selection of the mediator. This "party selection" preference was written into the statute and rules authorizing MSCs by the drafting committee, which believed that part of the success of the model program in Florida was the fact that the parties could choose their own mediator.

Another issue that grew out of the pilot program experience for MSCs in superior court was the method by which the court chooses a mediator, in the event that the parties are unable to or do not choose a mediator within the time allowed. During the pilot program some mediators complained that senior resident superior court judges were using a "short list" of mediators (whom they deemed specially qualified) from which to select the neutral.

Most of the judges who used a "short list" justified it on the basis that they wanted to have confidence in the mediators they appointed. Mediators not on the list complained that they were not given equal chance to prove their merit, even though they had been certified under standards set by the

Supreme Court rules implementing the program. Those mediators also believed that the "short list" method of judicial appointment was discriminatory to those less well known in the bar, particularly women and minority attorneys. Although the court appointment rules were changed to prescribe a random judicial selection process, the "short listing" of mediators by judges has not completely disappeared.

Implicit in this question of mediator qualification is the issue of how a system which depends upon a cadre of private providers of mediation services (as opposed to a system of state-hired and state-supervised mediators) ensures the quality of the mediators. The decision of the drafters of the MSC program was to rely upon the experience of the mediators, their training in mediation, and, most importantly, the "market system" of selecting mediators. The theory supporting this "market approach" is that the parties will choose those mediators who have a good track record and who have built a measure of respect among those who are doing the selecting. The most important quality control device in the MSC program is thus the ability of the parties to select their own mediator.

One of the concerns of the NCBA's Dispute Resolution Section regarding the tendency of judges to appoint mediators from a "short list" was that it undercut a major method of securing qualified mediators. If judges appoint only those they deem most qualified, the parties will be less inclined to exercise their right to select. This would also place more of a burden upon judges to exercise supervision, something which they have neither the time nor the training to do effectively. Thus, the Section has opposed selection of mediators from a judicial "short list" on the grounds of fairness and as an incentive to the parties to select their own mediators. As the appointing courts have moved in that direction, the percentage of cases in which parties select their mediators has steadily risen, providing the kind of quality control system that the drafters intended.

The establishment in 1995 of the Dispute Resolution Commission (DRC) was an important step in improving the effectiveness of mediators. The DRC is charged with certifying and decertifying mediators and with regulating their conduct. Standards of Professional Conduct for certified mediators were recommended by the DRC in 1997, and later promulgated by the Supreme Court of North Carolina. The Standards echo the model standards of conduct written by Robert A. Baruch Bush, a professor of alternative dispute resolution at Hofstra School of Law, for the National Institute of Dispute Resolution.⁶ As of this writing, there has been only one allegation of mediator misconduct filed with the DRC, and it was resolved in the mediator's favor. Currently, no mandatory continuing education requirements

have been enacted by the DRC. However, the DRC has recently encouraged the voluntary reporting of continuing education efforts by mediators, and the voluntary distribution of an evaluation form to settlement conference participants. The evaluation is returned to the mediator for his or her review. (It is not sent to the DRC.) The DRC will continue to study whether or not continuing education requirements and distribution of evaluation forms should be mandated, rather than simply encouraged.

Financing ADR Programs

When the NCBA began its experiment in non-binding arbitration, it did so with the legislature's mandate that the pilot program not cost the state money. Over half a million dollars was raised by the NCBA to fund the operation and study of that program. When the program proved successful, the General Assembly in 1989 approved legislation to expand non-binding arbitration statewide, as funds became available. At the current time approximately one million dollars is being spent each fiscal year on the program, with about fifty percent of the cost allocated to administrative personnel to assist with the scheduling of hearings and handling of paperwork. The arbitration program has grown slowly since 1989. At this writing, it has been enacted or established in about three-quarters of the judicial districts in the state.

Before 1991 little thought was given to the idea that neutrals and court-ordered ADR programs could be funded by the parties themselves. ADR programs throughout the nation were publicly financed. The Florida model studied by the NCBA's drafting committee broke that mold, establishing a model of litigant financing in which the parties themselves (instead of the taxpayers) pay for the neutrals who assist them as mediator, arbitrator, or evaluator.

North Carolina's superior court mediated settlement conference pilot program ran from 1991 to 1995, and the legislation authorizing it specified that it would not be financed through the use of public funds. There was great skepticism about the "party-pay" method of financing. However, since the pilot was only a test, it was decided that it could move forward. Many court officials today still adhere to the philosophy that any program ordered by the court should be paid for by the state, as a part of the financing of the General Courts of Justice.

The study conducted on the MSC Program during the pilot phase indicated that the program saved the litigants money, but that the savings were not statistically significant. However, the study also demonstrated that liti-

gants did not spend more than in traditional litigation, even though they were bearing the costs of the mediated settlement conference.⁵ The only logical explanation was that savings realized as a result of mediation offset the cost of paying for a share of the mediator's fee. Whatever the explanation, complaints about payment of mediators by the parties have been few. "Party-pay" financing enabled the superior court program to spread to every judicial district within two years of statewide authorization in 1995.

As of this writing, North Carolina is experiencing a large budget shortfall which is projected to last for at least another year. As a result, the notion of party-pay financing is being examined anew for ADR programs in addition to the MSC program. Another form of party-pay financing is being discussed which would involve the payment of an ADR fee as part of the court costs in certain types of proceedings. Thus, while the general population would not be taxed for ADR programs, those who use the court system would bear that burden by way of additional court fees.

The notion of party-pay financing for ADR programs has been very controversial in this state, often pitting one portion of the court community against another. Once again lawyers and administrators have had wide-ranging and often contentious discussions about this issue. However, even proponents of party-pay financing recognize that ethical dilemmas arise for mediators who operate within this system. Pressures that are not brought to bear on court officials (who are paid by the state) are often brought to bear upon mediators, and certainly will be felt by arbitrators if they are party-paid in the future. Neutrals are currently feeling pressure not to conduct settlement conferences in cases that parties believe will not settle. There are also pressures on mediators to excuse from attendance persons who are required to attend the settlement conference. These pressures raise ethical issues inherent in the party-pay method of financing that are real and should not be overlooked.

Another issue that has arisen as a result of the party-pay method of financing is the way in which indigent litigants are handled by the court system. One way of resolving this issue is to not require settlement procedures for those cases in which at least one party is indigent. Believing, however, that there was no good policy reason for excluding indigents from a useful settlement process, the drafters of the MSC Program devised ways in which indigent litigants could participate in those programs without having to bear the financial burden of the process. The North Carolina Industrial Commission handles this issue by requiring defendant-employers or their insurers to

pay the entire fee of the mediator, and then to deduct the plaintiff's portion from any settlement proceeds paid by the defendant to the plaintiff, or from any award that ultimately may be due. Otherwise, the defendant or its insurer bears the expense.

In the MSC Program the problem was handled by requiring mediators to forgive that portion of the fee which was charged to the indigent litigants. In the district court settlement procedures program in equitable distribution cases, additional methods were devised, including a cost-shifting mechanism between the parties in the event that one party is able to pay and the other party is not. Mediators have been called upon to bear the burden of pro bono work built into the rules, but the number of cases in which indigent litigants have appeared has not been great, and the responsibility for uncompensated service has been shared by certified mediators throughout the state.

Attendance at ADR Processes

Related to the issue of whether court-ordered ADR processes are voluntary or involuntary in nature is the question of what the parties are required to do when they participate in those procedures. In North Carolina's court-ordered ADR programs, the parties are only required to attend. They are required to appear, but they are not required to present evidence, to negotiate, or to reach agreements unless they deem it in their best interest to do so.

A different type of attendance question arose in the MSC Program in the superior courts and in workers' compensation cases, where insurance companies rather than parties have the ability to settle insured claims. In order to get the attendance of the real parties in interest (those who can make a decision about the settlement of litigation), it was decided that insurance representatives should be required to be present.

How that could be accomplished in North Carolina was a source of some debate, the result being that the 1991 and 1995 legislation authorizing MSCs in superior court (and the 1994 legislation authorizing MSCs in workers' compensation cases) required attendance by insurance company representatives at the mediated settlement conference. Although this has greatly affected the practice of insurance companies, challenges to the legislation have not materialized. The reasons for that fact are subject to debate, but insurance companies appear to have found it in their interest to participate in the MSC program.

Style of Mediation

It has often been said that mediation in a court-ordered context conducted with lawyers present is not true mediation. This view is bolstered by the perception that in superior court mediation the parties are frequently separated from each other and the mediator often conducts “shuttle” mediation. There has been great debate within the mediation community about whether this is good mediation and, if so, how a mediator can perform his or her services effectively and with due regard to the Standards of Professional Conduct.

It is generally accepted among superior court mediators that the style of mediation in that program is decidedly different from mediations conducted in other contexts. But most believe that this is not the result of being taught that the “shuttle diplomacy” style is a better way of mediating. Rather, the view is that “shuttle” mediation results from the nature of the claims that trial court mediators are called upon to mediate. As with mediation in the child custody and visitation context, the nature of the claim often dictates a different set of techniques and different styles. Civil litigation commonly involves insured claims in which money is the currency of settlement. In that context, the parties usually seek the sanctity and safety of private sessions, so that they can discuss their bottom and top lines, how to move toward settlement, and how to make proposals within their range of acceptable outcomes. Such a setting is very different from a family and divorce context, in which the parties are seeking to work out ways to raise their children together while separated or divorced.

Another criticism of the type of mediation that occurs in superior court MSCs is that it is “evaluative” as opposed to “facilitative.” Superior court mediators tend to agree that the mediation process is inherently evaluative, in the sense that a great deal of attention is paid to risk (or case) analysis. The fact that attorneys are present (whose job is at least in part to remind their clients of the “value” of their case), and that many of these claims arise between strangers and are settled only through the payment of money, means that the mediation-negotiating process is inherently evaluative by nature.

On the other hand, the prevailing view among superior court mediators is that they should not be “directive” in their approach towards mediation. The Standards of Professional Conduct clearly prohibit this kind of approach. However, many of the attorneys who represent clients in MSCs want their mediators to tell their clients “what their case is worth.” In recognition of this fact, the NCBA’s Dispute Resolution Section has long advocated neutral evaluation as an optional procedure in the menu of settlement procedures

available to litigants. Litigants who want a more directive approach as an aid to settling their case would then have a choice of approaches.

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Impartiality and the Courts

The professional literature often discusses the fact that it is difficult for a mediator to be impartial when he or she is reporting to, and is effectively an arm of, the court. The drafters of the mediation programs in North Carolina have been careful to address this criticism, and have done so in part by making it a violation of the Standards of Professional Conduct to include any information in the mediator's report to the court that is not statistical in nature. Therefore, in North Carolina it is unacceptable for a mediator to report to the court on the behavior of the parties, other than the facts of whether or not they attended the conference, whether they settled the case, how long the negotiation took place, and how much the mediation cost the parties.

Should ADR Be Required Before a Lawsuit May Be Filed?

The drafters of the settlement programs in North Carolina have believed that once cases are in the court system, every effort should be made to insure that parties have in fact engaged in some bona fide settlement effort. That, of course, does not address the question of whether there should also be a pre-litigation ADR requirement. In other words, should one have to get his or her "ADR ticket punched" before being allowed to file a suit in court?

Some people have suggested that, in addition to creating ADR procedures within the court system, the goals of ADR would best be served by requiring some form of dispute resolution before a lawsuit can be filed. There are many responses to this issue, a number of which have been discussed from time to time by members of the North Carolina Bar Association.

As a philosophical matter, it is hard to understand why people who are seeking injunctive relief or other lawful process should have to wait for an ADR process to take place. As a practical matter, court-ordered settlement processes now in operation are generally handled within a well-prescribed and well-known structure within the judge's office. If pre-litigation ADR processes were required, the certification that there has been pre-litigation mediation or other ADR process would fall squarely upon the shoulders of the clerk's office as the case is filed. Clerks of court across the state would have to be educated about ADR processes and brought into the ADR administrative framework.

The legislature has enacted two pieces of legislation which adopt the pre-litigation mediation requirement: the pre-litigation mediation of farm nuisance cases and the pre-litigation mediation of Year 2000 (Y2K) cases (described in Chapters 14 and 15, respectively). With regard to the farm nuisance mediation requirement, the NCBA Dispute Resolution Section took a position against the pre-litigation condition, believing that there would be greater safeguards and that procedures would be better understood if the case were first filed and then taken through the superior court MSC process. However, there is a public perception (or perhaps a legislative perception) that mediation and other ADR methods are a great way to keep cases out of court, and that the requirement of pre-litigation mediation is an effective way to achieve that result. That perception must be balanced against the fact that pre-litigation mediation seldom affords sufficient discovery to enable negotiation of a well-informed settlement.

The question still remains whether the NCBA and other forces in the North Carolina court system should seek to reduce the number of conflicts that reach the court by requiring pre-litigation ADR, or whether similar goals should be accomplished by building ADR processes within the dispute resolution structures of clubs, businesses, professional organizations, and other societal associations. Whatever the method, the goal is the same: to make the courts of North Carolina a place of last, rather than first, resort.

NOTES

1. *North Carolina Courts 2000–01 Statistical and Operational Summary of the Judicial Branch of Government*, N.C. Administrative Office of the Courts 51–53; *North Carolina Courts 1999–2000 Statistical and Operational Summary of the Judicial Branch of Government*, N.C. Administrative Office of the Courts 50–52.

2. Report of the N.C. Dispute Resolution Commission for Fiscal Year 2000–01; Report of the N.C. Dispute Resolution Commission for Fiscal Year 1999–2000.

3. *North Carolina Courts 2000–01 Statistical and Operational Summary of the Judicial Branch of Government*, *supra* note 1; *North Carolina Courts 1999–2000 Statistical and Operational Summary of the Judicial Branch of Government*, *supra* note 1.

4. Stevens H. Clarke et al., *Court-Ordered Civil Case Mediation in North Carolina: An Evaluation of Its Effects* (Institute of Government, The University of North Carolina at Chapel Hill, 1995).

5. *Id.* at 45–46.