NEW YORK STATE COUNCIL ON DIVORCE MEDIATION

THE REPORT

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This is the updated version of the former "Monthly Mailer". It is now being sent via email and is available on the web at www.nysmediate.org. The NYSCDM permits printing and distribution of this edition of THE REPORT.

The information, opinions, references or other materials herein should not be considered legal advice on specific subjects, but rather should alert readers to issues which are raised during mediation. Actual application of any of the matters discussed depends on the facts in each case. Readers and their clients should obtain specific advice from the most appropriate professional. The views expressed by the authors or submitters in THE REPORT are their own and do not necessarily reflect those of the NYS Council on Divorce Mediation or of the editors.

The editors of THE REPORT would like the journal to be a two-way conversation. We encourage healthy debate. In addition to classic "Letters to the Editor," we welcome your comments, feedback, criticisms, compliments and other thoughts about anything that appears in these pages. We also seek your suggestions for improvement and areas of coverage. If you would like to publish an article or any other kind of paper in THE REPORT, please send us a one-paragraph proposal. The best way to reach us is by email to cabutler@seetheotherside.com. We look forward to hearing from you.

THE REPORT is published quarterly by the New York State Council on Divorce Mediation.

Editor-in-Chief: Eli Uncyk, Esq. Editors: Carol A. Butler, Ph.D. and Charles (Chuck) M. Newman, Esq.

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President's Page

Defining Mediation

What is mediation? As the leader of the largest mediation organization in New York State, you would think this is an easy question for me to answer. This question is at the heart of one of the strategic objectives of the New York State Council on Divorce Mediation (the Council). Our Professional Advocacy Committee is working to define it right now.

Developing a definition is challenging in a field as diverse as ours. Practitioners not only come from a wide variety of backgrounds (business, education, conflict management, mental health, law, finance, etc.), they also practice in a wide range of models (evaluative, facilitative/problem-solving, transformative, narrative, etc.).

The Professional Advocacy Committee was created to fulfill the strategic objective of effectively advocating for divorce mediation in New York State. In order to do this, the first step is to develop an agreed upon definition of mediation. The Committee has undertaken a survey of our membership using the definition of mediation outlined in our Model Standards of Practice for Family and Divorce Mediators:

> Family and divorce mediation ("family mediation" or "mediation") is a process in which a mediator, an impartial third party, facilitates the resolution of family disputes by promoting the participants' voluntary agreement. The family mediator assists communication, encourages understanding and focuses the participants on their individual and common interests. The family mediator works with the participants to explore options, make decisions and reach their own agreements. Family mediation is not a substitute for the need for family members to obtain independent legal advice or counseling or therapy.

While all of our members agree to adhere to the Model Standards themselves, in reading this definition I can immediately see areas where disagreements may arise. Some may ask, "Are we really seeking 'resolution'? Is it our role to focus people on 'common interests'? Are we really driven toward 'agreements', or is the purpose of mediation broader?"

At the same time, I see a lot of areas where I believe most of our members would agree. The role of the mediator is to act in an impartial manner. The mediator is a "third" party, not a party to the conflict itself. Participation in mediation is voluntary. The mediator assists communication. Parties, if they are able or choose to, reach their own agreements.

Why is it important to have a definition we can all live with? Our membership has spoken, "loud and clear", in its desire for the Council to promote mediation for couples and families experiencing

separation and divorce. As a mediator in private practice, I feel the same way. I want to increase the number of people who seek my services, and I also want to ensure that laws are not passed which restrict or prohibit my right to practice, particularly by those who don't fully understand the practice of mediation. The Council's Strategic Plan undertakes to meet these goals in two ways: through public awareness and education and through professional advocacy.

Having a clear definition not only makes communication more effective, it also strengthens our field. Internally there is sometimes dispute about what makes someone a mediator or even who should be a mediator. As we define the core values and skills of mediation, we can begin by coalescing around a central definition which allows for the inclusion of those from differing backgrounds and theoretical beliefs. As mediators, in particular, I would anticipate high levels of acceptance and an ability to participate in constructive dialogue. I would expect a desire to question and understand not only our own beliefs, but especially those of others. As Jerome Nathanson stated, "The price of the democratic way of life is a growing appreciation of people's differences, not merely as tolerable, but as the essence of a rich and rewarding human experience."

I look forward to continuing to work together to define mediation. I encourage you to get involved--read the strategic plan posted in the Member's Area of the website, review the committee descriptions, and reach out to a committee chair to volunteer your time and talent. I am proud to represent such a dedicated group of caring professionals and I have faith that together we will develop our profession in a way that both meets our needs as mediators and the needs of those we serve.

Bobbie L. Dillon, M.S.

President, New York State Council on Divorce Mediation

Editor's Notes

Dispute resolution is an ancient practice. Most primitively, disputes were resolved by brute force. So David faced Goliath, in a variation of the concept of war between nations, and as a result, many lives were spared. However, David's victory in the Valley of Elah did not teach very much about dispute resolution, as we now practice it. On a very personal level, war is not an option for parties who have a dispute. The next closest thing to war is litigation. However, litigation to the extreme will result in one winner and one loser (not counting the attorneys who are paid instruments of the parties). In litigation, no lives are spared. It matrimonial litigation, families are involved, and even nonparties to the litigation are damaged in many ways.

Dispute resolution need not culminate in winners and losers. Mediation has taught us that there is a large probability of what is now called a "win-win" result. Reaching this result requires that the parties reframe their objectives, so that the result will not include defeating the other side of the dispute. Reframing the dispute as a joint effort to resolve mutual problems is one way that mediators help parties reach a less painful resolution than would be reached if the parties commence litigation.

Mediation at any point of a dispute, including during litigation, can do much to relieve the pain and reduce the costs of families in crisis. Mediation panels are being created in courts on a regular basis. One of the problems that mediators face is that court-connected mediation does not pay enough to support mediators. If parties enter a mediation before an inordinate amount of money is spent on lawyers (whether they deserve the fees or not), mediators are able to bill a fair amount for the time they invest.

This is not to suggest that there is no place for lawyers in disputes. Just as mediators need a full toolbox, so, too, do lawyers. However the tools used to help parties in mediation are assembled with a view towards a constructive resolution, rather than a view towards waging war.

Just as it is fair for lawyers to say that sometimes mediators do not have enough background in matrimonial law to advise their clients, it is fair for mediators to say that sometimes lawyers do not have enough mediation or conciliation skills to help parties resolve a dispute with less rancor or expense. Mediators must accept that there will be many instances in which they need to acknowledge to the parties that another professional must be introduced. While mediators may tout the lower expense of mediation, as compared to litigation, parties must acknowledge that they need to pay for the specialized skills and knowledge required to construct a settlement or agreement in mediation, as well as in litigation. Mediators should insist on the support of professionals, when needed, at the risk of constructing a faulty structure which will fall under the weight of errors in law, fact or practicality. If the professional brought into mediation understands that the skills and background he or she brings are intended for use constructively, then that professional will be useful. The same professional, brought in to work on a litigated matter, will beat his or her plowshares into swords.

We read everything that crosses our computer screens or desks, whether it relates directly to mediation or litigation, so that we can all learn how much we do not know, and occasionally learn something we can use. Family mediators may have a combination of skills and training, including mediation and law, mediation and finances, mediation and mental health or mediation and life experience, just to mention a few.

I hope The Report brings some measure of information and encouragement to mediators who are regularly faced with problems requiring specialized skills or information outside their own realm of knowledge or experience. Tell the parties you need, as a team, to get the proper tools and knowledgeable practitioners to help use those tools.

Eli Uncyk

INTERVIEW

DIVORCE: COURTS AND MEDIATION COHABITING

A Conversation with Justice Jeffrey Sunshine

By Charles M. Newman

Justice Jeffrey Sunshine

*Hon. Jeffrey S. Sunshine has been the Supervising Justice for Matrimonial Matters of New York State Supreme Court, Kings County since 2007, the first jurist ever appointed to that position in Kings County. A life-long Brooklyn resident, he is a proud product of the New York City public schools, a graduate of Brooklyn College (*summa cum laude*) and Hofstra Law School. Before becoming a judge, he was the principal law clerk for a Brooklyn Supreme Court Justice, and then a sought-after divorce lawyer with offices in Brooklyn. A well-known Bar leader, he has been President of the Brooklyn Bar Association (the first matrimonial lawyer to head that association in its then-123 year history); the Chair of its Family Law Section; a member of the New York State Bar Association's House of Delegates and of its Special Presidential Task Force on Family Law; and a member of the Brooklyn Women's Bar Association, the Columbian Lawyers Association of Brooklyn, and the New York City Bar Association.*

In 1998, Justice Sunshine was appointed as a Judge of the Kings County Family Court, where he presided over a hybrid custody/child protective part. He sat in the matrimonial part in Richmond County Supreme Court from 2001 to 2003, where he eliminated a multi-year case back-log. He has sat in Kings County Supreme Court since February 2003. He was elected to a 14-year term on the Supreme Court in 2010.

Justice Sunshine serves as a member of the Statewide Advisory Committee on Matrimonial Practice, and as a member of the New York State Office of Court Administration Statewide Family Violence Task Force. He served as a member of the "Matrimonial Commission" established by former Chief Judge Judith Kaye. Judge Sunshine was the co-chair of the Commission's subcommittee on "The Role & Function of the Judiciary and Court Administration". He also served as a member of the "Best Practices Committee for Matrimonial Judges". He is the recipient of numerous awards from a variety of organizations committed to law and the judicial system.

With over 70 published opinions, some of which were the first to address issues arising from changes in legislation, Justice Sunshine is widely regarded as a learned, careful and compassionate judge. He has presented over 70 lectures and/or panels for judicial training seminars and various bar associations throughout New York State. He was kind enough to agree to be interviewed for this article about family and divorce mediation and litigation. The conversation focused on court-annexed mediation, not mediation that spouses pursue privately either before or during a divorce action.

Justice Sunshine, continued

"I'm your worst alternative," Justice Jeffrey Sunshine sometimes tells divorce litigants when he first meets them. "I'm the stranger in black robes who's going to decide about your lives if you don't decide for yourselves." Informally, he reports that he is "a tremendous advocate of mediation." Yet he believes that no matter how much the parties can resolve without a Judge, divorces should continue to require Court review at least at the end, even though the Courts are badly strapped for resources with budget cuts and the loss of valued staff. To square these different thoughts, it helps to understand Justice Sunshine's approach to divorce, and the increasing role court-annexed mediators can play — and have been playing — in helping couples end unsuccessful marriages in safe, sane and helpful ways.

In Justice Sunshine's view, mediation, whether private or court-annexed, is frequently helpful in resolving the issues, and often makes the results better for the spouses, their families and the Court system than the Courts could order in a litigated divorce. Mediation is frequently helpful in resolving disagreements over essential or smaller issues, and often improves outcomes. However, he thinks that all divorces, whether fully litigated or resolved with the help of good lawyers and ADR professionals, need the careful review of Court staff and Judges to assure that the results meet minimum legal requirements and protect the parties and any unemancipated children a couple may have.

Justice Sunshine realizes how foreign it is for people to be in divorce court. He analogizes to an emergency room: the patients and their loved ones are frightened to death to be there, while the nurses and doctors are drinking their coffee, just another day at work. As familiar as the divorce process is for Judges and Court staff, that is how scary it is for litigants. He sees mediation as a way to reduce that sense of estrangement from the process. Mediation, he thinks, can help keep people on track in addressing the real issues and disputes that they have. Even when mediation does not result in a complete resolution, the mediation can reduce the number of actual disputes between the parties. Mediations in which few or no specific agreements are reached can often turn out to be big contributors to settlements later on.

"In 18 years of practicing law and almost 14 years on the Bench, I've learned that no two cases are the same. One of the most important jobs of a divorce judge is to sit and listen." (Does any of that sound familiar to your mediation practice?) Judges, he firmly believes, have to figure out, and do, what's needed on a case-by-case basis. But Justice Sunshine is keenly aware that other people, inside and outside the Court system, contribute greatly to the outcomes of divorce cases.

The clerks and officers who serve in the Courtrooms of Divorce Parts, for example, have special duties and need special sensitivities. The Judge generously praises his own staff, including his Court Attorneys. Their skill and experience multiply his ability to assure that parties and lawyers are properly heard, that cases progress well, and that decisions are made as quickly and fairly as they can be under the circumstances. Justice Sunshine also readily credits the work of non-Court employees in the divorce process, including mental health professionals, parenting coordinators, and, of course, the lawyers for divorcing spouses. He seems to be concerned that in the current economy, the pressures on lawyers make it increasingly difficult for them to devote as much time and attention to cases as they would like. And he has noticed recently that, perhaps out of economic necessity, there are more lawyers appearing in matrimonial parts who are not as well-versed in divorce law as they should be.

He is pleased with the contributions that lawyers in the organized Bar make to the entire Court system. As both a Bar leader and a Judge, he has seen that every time the Courts needed help, the Bar has said, "What can we do?" And the

Justice Sunshine, continued

lawyers do it. He feels it is important for mediation organizations to continue to make themselves and their members available to the Courts in the same way, as they often have in the past. He thinks that increased *pro bono* contributions by mediators to the Court system and to divorcing couples generally would also be an excellent marketing opportunity for the profession, to help the public become more aware of mediation and what it can do. "Spread the word," he says.

Where do mediators and mediation fit in litigated divorce cases? Justice Sunshine lauds the processes of mediation and the dedication and results that many mediators bring. He notes that timing and the circumstances of the case can be important in deciding when to ask parties to mediate. For example, he feels Court-annexed mediation is better when both sides have become open to its possibilities and have enough information to make knowledgeable choices about their finances and futures. He discussed the differences between mediation and what normally happens when his Court Attorneys hold settlement conferences. "Mediators let parties get to where they have to be." Mediators can take far more time with parties than the Court Attorneys are able to give in a settlement conference. Court Attorneys are completely versed in matrimonial law and practice. They see a great volume of cases and routinely stay on top of developments in the law, including their own Judge's thinking and opinions and appellate rulings. Judge Sunshine never discusses with his Court Attorneys his view of how a case should come out before the Court Attorney holds a settlement conference. Neither a mediator nor Court Attorney will decide any litigated issues, but divorce counsel and parties naturally understand that when they are talking with a Court Attorney, they are talking to a close confidant of the Judge, the one person who will rule on the issues about which the parties cannot agree. By contrast, the spouses and lawyers know when they are talking to a mediator that they are talking to someone with no connection to the Judge.

While Justice Sunshine is a fan of mediation, he carefully notes it is not for all cases. Until recently, he had the blanket view that couples with domestic violence issues should never be mediated. Lately, though, he is opening his opinion to the possibility that *with proper safety training, standards and precautions*, there may be some domestic violence cases that can benefit from mediation. Even so, he feels that a Judge must be actively involved in resolving all proceedings seeking orders of protection, rather than simply approving a settlement arranged without Court personnel.

Thinking about violence led Justice Sunshine to a brief discussion of power imbalance generally. He feels it is important that in all mediations, the mediator be sensitive to all general and specific power imbalances between the parties, and to make sure the imbalances are ameliorated during the process and in the outcome.

Dealing with power is just one of many skills a mediator must have. The quality of mediation outcomes depends importantly on who the mediator is. The Judge feels strongly that divorce mediators need a great deal of training and they must be fully familiar with all the types of issues that can come up in divorce. In particular, he says it is crucial that mediators understand all the financial issues of divorce to assure good, lasting, mediation results.

Justice Sunshine noticed that mediation is becoming popular more quickly in the rest of the country and in Upstate New York than it seems to be in the Downstate area. He also notes that there are other valuable forms of divorce ADR, including, for example, a neutral evaluation program being re-introduced in New York County. (Currently in formation, the new Manhattan neutral evaluation program is designed to allow both sides in a contested divorce to present

Justice Sunshine, continued

arguments about finances or other discrete issues to an outside experienced divorce lawyer, who would serve without pay. The neutral could offer a non-binding assessment of what the likely outcomes might be if those issues were fully litigated, and may otherwise assist in settlement.) But Justice Sunshine feels we are just on the cusp of mediation and other ADR being added as standard features in Judges' toolboxes. Why?

There are two kinds of reasons. One, necessity is the mother of invention. Under current State budgets, the Courts have been severely hit with reductions of resources. For example, the Matrimonial Parts have lost many exceptionally qualified and experienced Judicial Hearing Officers (JHO's) and Referees, partly because their positions have been eliminated and partly because many of the remaining ones are needed in other kinds of cases, such as foreclosures. With shrinking resources, the Courts have to do more with less. This makes the use of outside resources — like mediators and mediation organizations — ever more important.

While resources have shrunk, the demands have increased. Judge Sunshine offered a few examples from Kings County. Case filings have risen sharply. In the one year from 2010 to 2011, the number of Requests for Judicial Intervention in contested divorces rose by 74% in his County. (RJI's are the documents that ask, for the first time in a case, that a Judge be assigned to handle something.) The number of Orders to Show Cause filed in Brooklyn divorce cases rose from 781 to 1,238 in the same period. (Orders to Show Cause are most often used to bring on motions that have to be heard especially quickly or which seek some immediate relief from the Court, so they tend to require extra judicial attention.) Emergency applications are up. The number of Brooklyn uncontested divorces has increased 44% at the same time the number of clerks has been reduced. It may not be surprising in this economic climate that Judges have had to decide an increased number of special preference requests, including applications to waive court fees because a party cannot afford them. It is sobering, though, that the increase in Brooklyn from 2010 to 2011 was 36%.

The need to find help outside the Courts' budgets, however, is only one of the drivers behind the increased use of mediation, according to Justice Sunshine. The other is simpler, and much more encouraging. Mediation doesn't just save money. It works well. "Mediation is a good in and of itself," the Judge says. It's true that "sometimes parties have to hear it from the Judge," and the black robe can enhance his ability to forge settlements. This is because lawyers and parties understand that a Judge has the power to decide, so his statements and clues in settlement discussions can be a predictor of what might happen without settlement. Mediation, on the other hand, supports the parties figuring out for themselves what makes the most sense for them. Just as Judges can show the way to a substantive settlement, they can sometimes show the way to a better process. He finds that in many cases where he has asked reluctant lawyers or clients to mediate their disputes, they later report that the mediation was a great success. Judges' leadership, Sunshine feels, includes encouraging more lawyers and litigants to be open to the advantages of mediation.

Chuck Newman helps resolve disputes for people with business or family conflicts. He is a lawyer, mediator and arbitrator practicing in Manhattan. He is a co-editor of THE REPORT.
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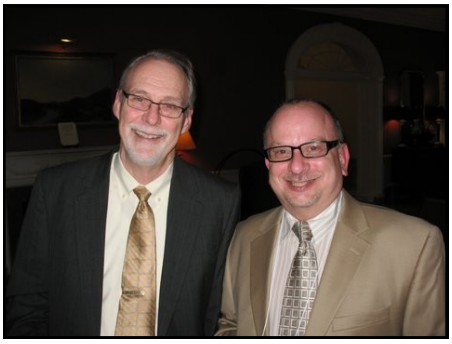
THE 2012 ANNUAL CONFERENCE

by Conference Co-Chairs

Daniel Burns and David Louis



Dan Burns and David Louis

Conference Co-Chairs

The title of the New York State Council on Divorce Mediation's 2012 Annual Conference, **"Making Divorce Mediation Work for You**," was designed to shine a light on the *business* of Divorce Mediation. While all of us love what we do, many are not able to earn a living at it and this limits our ability to grow as a profession. The Conference was held on May 4th and 5th at the historic Gideon Putnam Resort in Saratoga Springs.

Of course, in order to make a living as a Divorce Mediator we must be able to provide quality service to our clients, and this starts with having the knowledge to help couples arrive at the decisions that they must make when they are ending their marriage.

Steve Abel and Dolly Hinckley

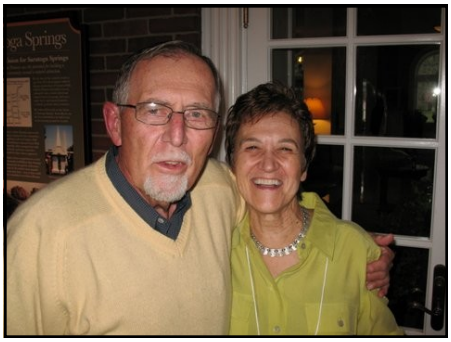
First up was an outstanding Pre-Conference presentation on May 3rd by **Carolyn A. D'Agostino, Esq**. and **Robert Guarnera, MAAA** (Member, American Academy of Actuaries) on "**What to Consider When Dividing Retirement Benefits**," which is certainly something that we all deal with on a regular basis. Carolyn and Robert explained a very complex topic in an understandable way, and they kept us all awake with their engaging style. The only complaint we heard afterward was that we need more of this topic since it was only possible to scratch the surface in the six hours that were devoted to pensions!

The 29th Annual Conference began with a cocktail hour and dinner on Thursday night that honored our past presidents. This was followed by the presentation of the 1st Annual Abel Award, named after **Steve Abel, Esq**., a past president and one of our founders who exemplifies what it means to give of himself to our organization. Steve was quite surprised that the Board of Directors had decided to name what had previously been called the "Insider Award" after him, but Steve was, well, Abel to present this year's award to **Dolly Hinckley.** She is a long-time member who has given a lot of her time and energy to the organization for many years without fanfare. In fact, when presenting the award, Steve offered that he could not think of anyone more deserving.

Marta Hanrahan, Jennifer Safian,

Ada Hasloecher and Sandy Balick

Conference Report, continued



Jack Heister and Diane Neumann

Next up was our Keynote presentation by **Diane Neumann, Esq**. who outlined the path that led her to becoming one of the top divorce mediators not only in Massachusetts but in the country. In fact, before she spoke, the New York State Council on Divorce Mediation presented her with the "Lifetime Achievement Award" in recognition of her contributions to the field of mediation.

On Friday morning Diane opened the conference with a Plenary on "**One-Stop-Shopping Divorce Mediation,**" where she outlined how she provides mediation services to her clients that include everything they need from mediation to the preparation of all of their legal documents.

During her first breakout Diane demonstrated how she addresses power imbalances, which led to a great deal of discussion both during and after the session. Diane was clear about demonstrating *her* technique while acknowledging that others may not practice in the same way that she does – illustrating the diversity of practice within the profession.

Ron Heilmann, Tim Mordaunt and Bobbie Dillon

Those who did not wish to hear about power imbalances had a choice of two other programs. **Steve Linker, CPA** discussed how "**Not All Assets or Income are Created Equal,**" which suggested that a mediator needs to consider the nature of the various marital assets and the financial, tax and even the sentimental value of them. **Mark Bullock** was also on hand to show us "**How to Make a Living as a Divorce Mediator,**" which demonstrated how to use marketing and branding to manage and grow your business as well as how to manage your time and technology.

Friday afternoon began with a **Facilitated Discussion on the Institute** led by master facilitator **Ewan Malcolm** who helped us understand and explore the proposals of the Steering Committee for the proposed New York State Council's Institute designed to enhance training and professionalism.

Lenard Marlow and Clare Piro

During this time, others of us heard from **Katherine Webster-O'Keefe, Esq**. who led a workshop on how to "**Preserve Agreements with Clarity**" by asking couples the hard questions of how they would decide issues related to parenting, support, education, insurance, and real estate if things came up in the future. By dealing with these and other issues now, before the agreement is concluded, Katherine suggested that we could help them avoid problems in the future.

Conference Report, continued

Friday's work sessions ended with our own **Steve Abel, Esq**. giving us, in his own inimitable way, an "**Update on the Law**" that was not only informative and entertaining but, at least to many of us, far too short. Next year we need to give Steve more time, perhaps an entire day!

On Friday night we were treated to a lively and fun live auction conducted by, who else, Steve Abel. After the auction we had a raffle of various gift baskets that contained everything from sweets to wine. Many walked away happy with what they received and were even happier a bit later when they sampled what was in their basket! The evening ended with DJ Al Frankel providing some lively entertainment by "spinning" some "oldies" he had collected that gave everyone a reason to dance.

June Jacobson and Chris Sorensen

Saturday began with **Ada Hasloecher** telling some of us how to "**Build and Manage Your Practice**". All those who attended were in for a real treat when they heard how Ada built a divorce mediation practice despite the fact that she was not an attorney and had little knowledge of the law when she began. Clearly Ada is a maven when it comes to marketing.

Jill Sanders-DeMott and Kate Bar-Tur

Those who did not attend Ada's presentation had the option to hear from **Dr. Paul Marcus** on "**Developing Appropriate Parenting Plans.**" In fact, at the end of his session, one of our long-term members said Paul was the single most interesting presenter we have ever had. Negotiations are currently underway to bring him back next year.

Those who missed **Teresa Calabrese, Esq**. and **Katie Cole, Esq**. speak on "**The Marriage Equality Act**" at the one-day Downstate conference last December had an opportunity to hear from them at the Annual Conference. The most common comments heard after were that there was not nearly enough time to hear all that one needs to know to understand this very timely topic.

Kathy Jaffe, Bill Hoefer,

Mark Josephson and Loretta Miraglia

Conference Report, continued

Rita Medaglio-Barrera, Gloria Ciolli and Steve Linker

Al Frankel, Chris Hickey,
Will Wiesner and Sydell Sloan

Jamie Block, CPA provided a two-session summary of "**Tax Issues in Divorce**" that was a replay of her very successful presentation last year at our Upstate One Day Conference. Those who missed it last September were treated to a thorough analysis of the tax issues we should all be aware of so we can alert our clients to potential issues.

Past-President **Lenard Marlow, Esq**. led a lively discussion when he asked if "**Divorce Mediation is Just a Halfway House on the Road to Collaborative Family Law**" and gave those in attendance something to think about. At a simultaneous workshop, many heard our newest board member, **Nadia Shahram, Esq**., lead a very well-received presentation on "**Mediating with Islamic Families.**" Again, those who attended all wished she had had more time.

In addition to the "formal" activities, many of our members took advantage of the beautiful grounds to walk, network, get a spa treatment, take a trip into downtown Saratoga or just relax in the lounge with friends.

We are currently working on the program for next year's conference, which will also be held at the beautiful Gideon Putnam. If anyone has any ideas for speakers or topics you would like to hear, please contact one of us at Daniel@burnsmediator.com or dmlouis@mhcable.com. And for those who missed the conference this year, we hope to see you next year for what is shaping up to be "the Best Conference Ever"!

Dan Burns is an attorney and mediator in the Albany area, is the Immediate Past President of the NYS Council on Divorce Mediation and has either chaired or co-chaired five Annual Conferences.

David Louis is a Divorce and Family Mediator and also works as a Neutral Facilitator in Collaborative Practice in the Capital Region. He is on the Board of Directors and serves as Treasurer for the NYS Council on Divorce Mediation.

WHO WILL BEST REPRESENT FAMILY MEDIATORS IN THE FUTURE?

By Carol A. Butler

An open letter went out to family mediators in mid-March 2012 inviting us to "return to our roots" by joining a new national organization, the Academy of Professional Family Mediators (APFM's website can be found at www.professionalfamilymediators.org). In the event that you haven't seen the letter, it can be found here: www.apfmnet.org/docs/OpenLettertoFamilyMediators.pdf.

The founding board of the organization, some of whom are members of NYSCDM and/or the family section of the national Association for Conflict Resolution (ACR), opined in the letter that the enthusiasm we felt as members of the Academy of Family Mediators (AFM) has greatly diminished since 2001, when AFM was one of three organizations that merged to form ACR. "Since the merger, we seem to have lost our focus and identity as a Family Mediation field," write the APFM founders. APFM proposes essentially to undo the merger, although they pledge to be cooperative and inclusive.

For those of you who became mediators since 2001 and have no history with AFM, I can assure you those early days were full of enthusiasm. AFM was an interdisciplinary organization in which we were determined to create a firm footing for the growing field of family mediation. AFM published a journal, a newsletter, held conferences, and provided many member benefits. Mediation organizations received considerable support at that time from the Hewlett Foundation, and it was that foundation that encouraged the merger of AFM with the Conflict Resolution Education Network (CREnet) and the Society of Professionals in Dispute Resolution (SPIDR) into ACR. Hewlett is said to have contributed a million dollars to lubricate the merger and, although the membership of AFM had mixed feelings about our organization disappearing, the merger occurred with the blessing of AFM's Board.

AFM's new home was the ACR family section. After the merger, the section started out with two full-time staff members, and was the largest section in ACR with a membership of approximately 4,000. ACR made a series of poor financial decisions over the next few years and the section suffered, eventually being basically without support staff and unable to muster much enthusiasm. The section even skipped its biennial conference in 2010 after a poor showing at the 2008 gathering. A meeting of the Family Section was held in 2011 in Minneapolis, but it was weakly promoted and poorly attended. Membership had dwindled to about 1,000.

The result of this decline was an increased urgency to rescue family mediation by pulling away from ACR and starting a new national organization that would vigorously represent family mediation and insure that it would be credible, respected, and recognized on a national level.

A controversial aspect of APFM's stated mission is its determination to develop a competency-based certification process leading to a "*more advanced* level of accreditation" (italics added) "which will require meeting the

Representing Family Mediators, continued

criteria with a practicum series for family and divorce mediation practice, and will delineate the experience and continuing education requirements and ethical standards needed for accreditation."

I reached out to the dynamic Ericka Gray, the executive director of AFM from 1995 to 1998, with whom many of us worked enthusiastically and productively (and with whom I produced AFM's first membership directory.) Ericka is a licensed psychologist and has been a dispute resolution professional since 1985. She presently teaches mediation and other conflict resolution courses and is the founder of Disput*Ed* (www.disputed.com), a group in Massachusetts that provides a full range of assessment, consulting, intervention, training, mediation and coaching services.

Ericka reminded me that AFM developed eight core areas of competency that formed the curriculum for the basic family and divorce mediation training that is offered today. She recalled that ACR's family section initially appeared to be greatly interested in certification but "… then certification seemed to disappear from the ACR map. …As ACR developed and tried to serve the needs of all ADR practitioners, they decreased staff support to the sections. Over the years, ACR was challenged by frequent staff changes, physical moves, significant financial issues, and changes in direction." Referring to the merger of AFM into ACR, she commented that "the honeymoon didn't last long and the divorce is now final."

On April 2, 2012, the advisory committee members of ACR's family section circulated a letter to their members that addressed the issue of the new organization. I had contacted them to ask for their comments for this article, and they alerted me about the forthcoming letter. I am still a member of the family section and so I received the letter. It can be found here:

http://us1.campaign-archive1.com/?u=665a76d1081c871ca8077ffb7&id=74c0ef0d08&e=d62bdf9e78

In the letter, the advisory committee acknowledged that there have been differences within the Family Section about "how broadly we should define our mission," and they expressed frustration at trying to serve an increasingly diverse membership that "has been evolving at a rapid rate." The letter is very gracious. "We wish those at APFM well in their endeavor with our hopes that it will enrich the field and the work to which we have all been committed…The formation of APFM has now freed the Family Section to move forward more gracefully and enthusiastically." This last part perplexed me, and was not really clarified by their statement that "the Family Section will now be able to serve the broad range of family conflict resolution practitioners…." Why is that easier now?

In a bold move, the Section plans to adopt the Academy of Family Mediators name "within the Family Section as we proceed to offer new national certification for divorce practitioners…. AFM branding will help

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consumers identify qualified practitioners and trainings." I hope someone involved with the family section will write to this newsletter and clarify why the establishment of APFM has apparently liberated the section and clarified its mission.

I contacted several experienced family and divorce mediators and asked them to share their reactions to the formation of APFM for this article. Most of them, attorneys, cautiously offered only "no comment" replies. I did find a few people who were willing to discuss their reactions anonymously, and their feelings were surprisingly similar. These mediators have roots in AFM, and it is possible that newer (OK, younger), post-AFM mediation professionals would have a different point of view. I hope some of them will send in their comments so we can broaden this discussion in the next issue of this newsletter.

The people I heard from, including at least one former AFM board member, had all been opposed to the absorption of AFM into ACR, and they eventually felt disappointed with and became disconnected from ACR's Family Section as well as from ACR's Greater New York chapter. They were in agreement in support of a new national organization focused exclusively on family mediation, but they expressed serious reservations about its emphasis on certification. There was concern that an elaborate certification process in such a diverse field would not necessarily provide evidence of actual competency. The feeling seemed to be that NYSCDM's accredited member level — which is based on continuing education and the AFM-derived training — does not need to be replaced. It could be "tweaked", as has been done in the past. I am an advanced practitioner member of ACR's Family Section and their requirements are similar to those of NYSCDM accredited member level. In a confusing contrast to the lofty "more advanced" certification goals laid out in the APFM announcement letter, an APFM founding member pointed out to me that their website indicates that people who have "AFM/ACR Advanced Practitioner Status" are already qualified for advanced mediator status in the new organization. The omission of this nuance from the announcement letter may have caused some of the negative reactions I heard in my interviews for this article.

One colleague pointed out that you can presently get "certified" simply by paying for a website on www.mediate.com and meeting their list of qualifications. In what seems to me a bizarre twist, there was an advertisement for that site on the home page of the APFM site when I visited it in April.

This issue of exclusivity, credentialing, and proof of competency is complex and emotionally loaded. I know that some of our most established, well-qualified and active colleagues have never bothered to apply for accredited membership in NYSCDM. I myself only applied when I was co-chairing a peer group and realized that the presence of an accredited member was required in order for other attendees to get CE credit. I recognize that this

Representing Family Mediators, continued

lack of rigor with regard to accreditation as a family mediator is one aspect of the intensity of the wish to establish solid credentials that was expressed in the APFM founders' letter.

One of the founding members of APFM with whom I spoke emphasized his personal focus on the value of a national organization to give family mediation credibility and acceptance. He offered the national certification for financial planners as an example of a meaningful credential, but I wonder if the value of APFM may be more like that of the national organizations for physicians, attorneys, and psychologists: powerful and helpful groups whose members are credentialed by expert bodies in the individual states.

Let's continue discussing these issues in our next newsletter. It would be great to have feedback. Are *you* satisfied with the status quo? Do *you* crave more credentials? Do *you* think we need better credentials to improve our public image? What are your thoughts about joining APFM? We also hope that founding members of APFM will comment and clarify their goals, and of course we welcome comments from all of our NYSCDM members and from ACR's family section. I have done my best to convey the impressions I obtained from my interviews, but I am sure there are errors and I welcome corrections.

Note: On May 15, 2012 the co-chairs of ACR's Family Section sent a message to their members addressing the question of whether family mediators should stay with ACR or join the new group. We are interested in your reactions to their discussion of what went wrong with AFM and why the merger was unsuccessful. Their message can be found here: http://us1.campaign-archive2.com/?u=665a76d1081c871ca8077ffb7&id=c386971d84&e=d62bdf9e78

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MEDIATION OF RELOCATION OF A PARENT AND CHILDREN

By Eli Uncyk

This article is an adaptation of a presentation made by Eli Uncyk at a NYSCDM Manhattan Peer Group Meeting on April 30, 2012.

One of the most difficult kinds of disputes for family and divorce courts and mediators to address is the relocation of children with one parent over the objections of the other parent. Unfortunately, these disputes do not lend themselves to "win-win" results. There will inevitably be a loser in any relocation dispute.

The *Tropea* case, decided by New York's highest court in March of 1996, created a new paradigm for evaluating whether relocation with an unemancipated child or children should be permitted by the courts. *Tropea v. Tropea*, 87 NY2d 727 (1996), available at http://courts.state.ny.us/history/cases/tropea.htm. The Court of Appeals discarded several older standards that lower courts had applied when determining whether relocation would be permitted. The rejected standards required a threshold showing that "the requested relocation would not deprive respondent of 'regular and meaningful access to his children'." Under the old standards, only if the proposed relocation could pass this threshold test would the trial courts go on to determine whether there were "exceptional circumstances" justifying a move, such as a "concrete economic necessity." If so, it was only then that courts would consider whether the move "would be in the best interests of the children."

The *Tropea* decision prescribed a different approach. The Court of Appeals stated:

> In reality, cases in which a custodial parent's desire to relocate conflicts with the desire of a noncustodial parent to maximize visitation opportunity are simply too complex to be satisfactorily handled within any mechanical, tiered analysis that prevents or interferes with a simultaneous weighing and comparative analysis of all of the relevant factors and circumstances.

The Court of Appeals enunciated what appeared to be a single standard to apply in making relocation determinations. However that single standard is a deceptive one, because it invites and requires an analysis of many factors that affect every case uniquely. The Court acknowledged that

> …each relocation request must be considered on its own merits with due consideration of all the relevant factors and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child.

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Relocation, continued

The Court still recognized that the rights of the custodial and noncustodial parents are

> …significant factors that must be considered …, [but] it is the rights and needs of the children that must be accorded the greatest weight, since they are innocent victims of their parents' decision to divorce and are the least equipped to handle the stresses of the changing family situation.

The Court of Appeals enunciated several factors to be considered when determining "the rights and needs of the children" so that the "predominant emphasis… [is] what outcome is most likely to serve the best interests of the child." The standard of proof which the court imposed is "a preponderance of the evidence." This analysis must be made by "weigh[ing] the effect of the quantitative and qualitative losses that naturally will result against such other relevant factors." The Court described the factors in the opinion.

Not surprisingly, when relocation is disputed, each parent measures each of the factors differently, and would have reached a result different from the other parent's conclusion. Phrasing the search for an answer in terms of a mere "preponderance of the evidence" is inviting subjective opinion.

In the interests of avoiding litigation, which inevitably brings out the most negative aspects of the parents' relationship (and which likely may have led to the divorce in the first instance), courts have recognized that mediation is a far better method of achieving the best results.

There is some literature regarding how mediators may address this conflict, but the Court of Appeals guidance needs to be given greater consideration, because failed mediation will result in litigation and the judicial standards will become the measuring sticks, however subjective they may be. In the mediation, the parties can explore the larger context of their disputes and introduce subjects which very likely would not have been sufficiently explored in court.

In mediating divorce agreements for families with children, the issue of relocation is frequently addressed as part of the overall settlement. In general, there is some limitation on relocation in the agreement, which may be distance-related, a health-related restriction, or other relevant specific criteria. Sometimes an agreement may provide an absolute prohibition against relocation, but attorneys reviewing these agreements often insist that a phrase such as "without the prior consent of the Court" be included. I do not know what the litigated outcome would be if the prohibition against relocation was absolute and did not include language giving the court a review role at the time the specific relocation issues become known.

Some of the literature I have listed at the end of this discussion will be helpful in mediating settlement agreements where the issue of relocation is still hypothetical or theoretical. In mediating situations in which relocation is

Relocation, continued

either imminent or accomplished, mediators need guidance in helping the parents reach conclusions. See, *e.g.*, Cuniberti, Gilles, "Washington Declaration on International Family Relocation," March 28, 2010 International Judicial Conference on Cross-Border Family Relocation, Washington, D.C., United States Of America, co-organized by Hague Conference on Private International Law, International Centre for Missing and Exploited Children, with the support of United States Department of State. It is available at http://www.hcch.net/upload/decl_washington2010e.pdf

If the mediator opens any mediation of the subject with a frank statement that pain will be inflicted, whatever the result, it may be that the parties will work on minimizing the pain, rather than increasing the conflict or trying to win.

The mediator may want to start a discussion by asking the parent who is planning to relocate about the arrangements that parent contemplates in order to achieve the continued, consistent and necessary contact with the other parent, or what can be done to replicate or substitute for the existing general stability and continuity that will be interrupted. If the relocating parent has not given this sufficient thought, the first step would be to ask for that analysis to be made, even before addressing the need to relocate. Going right to the issue of the need for relocation leads to an out-of-context conflict which may simply be irreconcilable, because analysis is so subjective. It is preferable for the mediator to ask the parent who wishes to relocate to address the impact of the relocation and how to ameliorate any negative results that can be anticipated. Then, comment and feedback from the other parent should be invited to address any perceived deficiencies, or to suggest alternatives which might be acceptable, without making that parent feel as though s/he may be helping to make the other parent's argument in favor of the relocation. There is a delicate balance which mediators must feel and intuit, and there may be no amount of formal training that would be sufficient to guarantee a mediated outcome acceptable to everyone. Rather, the parties may simply agree that this is the best they can do, and do it, rather than putting the family through a litigation whose outcome is entirely uncertain and chosen by a stranger, albeit a stranger with the title "Judge".

Some relocation disputes center on economic issues. Whether or not that is true, relocation and economic issues co-exist in many families (if for no other reason than that so many families have economic issues). Without forcing an explicit admission that economics bear on relocation, the mediator may be able to focus on reducing the conflict if the economic issues are addressed early and the non-relocating parent can see the economic benefits (or, more gently stated, the lower economic demands and stress) which will accompany the relocation. These economic considerations may enable the non-relocating parent to achieve objectives that would duplicate, as much as practical, the circumstances that existed before the relocation. This may involve a change in vacations and holiday schedules, as well as other economic adjustments.

Relocation, continued

Another major issue in relocation will be the physical, emotional and familial resources available to the child that are already in place, as compared to the resources available to the child after relocation. These could include quality of schools, family connections, and, in each individual family, a wide array of other considerations.

Painting a picture of the family after the relocation that includes adjustments for the potential negative results of relocation, including economic adjustments, may be an effective exercise that helps both parties see the impact of relocation in a full context. It may be that, after such an exercise, the relocating parent may reconsider; or the non-relocating parent may find it easier to address the other parent's need for relocation.

This brief presentation is by no means the last word on the subject. A number of additional resources are listed below. The discussion is in response to questions that have arisen over time, and should be taken only as jumping-off points for your own reasoned analysis of how to approach the mediation of relocation. If I have accomplished only encouraging you to analyze the subjects I've raised, whether you agree or disagree with the approaches, I believe the exercise of analysis will be of benefit in your practice.

Selected Additional Materials on Relocation

New York Cases

Ramirez v. Velasquez, 91 AD3d 1346 (3rd Dept., 2012).
http://www.nycourts.gov/courts/ad4/Clerk/Decisions/2012/01-31-12/PDF/0159.pdf

Ramirez v. Velasquez,74 AD3d 1756 (3d Dept., 2010).
http://www.nycourts.gov/courts/ad4/Clerk/Decisions/2010/06-11-10/PDF/0629.pdf

Saperston v. Holdaway, 940 NYS2d 728(4th Dept., 2012).
http://www.nycourts.gov/courts/ad4/Clerk/Decisions/2012/03-23-12/PDF/0208.pdf

Schneider v. Lascher, 899 NYS2d 479 (3rd Dept., 2010).
http://www.nycourts.gov/reporter/3dseries/2010/2010_03503.htm

Other State Statutes

Indiana Code 31 17 2.2, Chapter 2.2. Relocation.
http://www.in.gov/legislative/ic/code/title31/ar17/ch2.2.html

Wisconsin Relocation Statute, §767.327.
http://www.lrcvaw.org/laws/WIrelocation2.pdf

Relocation, continued

Other References

Colorado Child Custody, Relocation, and Visitation Law summary. www.Coloradodivorcemediation.com

Florida Supreme Court Approved Family Law Form Instructions. 12.950 (D), Supplemental Petition to Permit Relocation with Minor Child(ren) (09/10). http://www.flcourts.org/gen_public/family/forms_rules/index.shtml#petsup

Washington Declaration on International Family Relocation. Gilles Cuniberti, March 28, 2010. International Judicial Conference On Cross-Border Family Relocation. Washington, D.C. http://www.hcch.net/upload/decl_washington2010e.pdf22

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In Your Child's Best Interests, A Handbook for Separating/Divorcing Parents. Missouri Court System http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CFgQFjAA&url=http%3A%2F%2Fwww.courts.mo.gov%2Ffile.jsp%3Fid%3D1783&ei=Wj3XT_mGBuH20gGY0cWZAw&usg=AFQjCNHMHmrpt7PMYZ2W5sjlPLfC13KkMw, pages 14-15 .

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Mediation/Settling Out of Court. *United States Department of State*. http://travel.state.gov/abduction/solutions/mediation/mediation_3853.html

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CONNECT!

Susan Ingram and Helene Bernstein report that Bryan R. Adams has been hired to work with the Public Awareness Committee to enhance the Council's profile in the social media realm. Since the new year, the Council has been more active on Twitter, Facebook, LinkedIn and the blog.

Please take the time and visit all of these platforms and join. We don't expect you to dive right in on all of them, but please make sure you are aware of these tools. Currently, LinkedIn is the place where a lot of information and dialogue is happening between the members.

In terms of blog content, Bryan has been taking past articles/interviews from Council members and pushing them out to the larger community. So by promoting the knowledge of the Council members, we are promoting the Council. On Twitter, we are slowly gathering an audience of professionals outside of the state, who have been re-tweeting the articles to their audiences. All this means is that the work of the Council is spreading. Greater recognition will come as well as more opportunities for members.

So, please send more content to Bryan. If any of you have some articles, video or audio interviews, blog posts that tout the virtues of mediation, please send them to him at bryan@fab-inc.biz.

LinkedIn Group: http://www.linkedin.com/groups?home=&gid=4274271&trk=anet_ug_hm

Twitter: http://twitter.com/nysmediate

Facebook: http://www.facebook.com/NYSMediate

The Blog: http://nysmediate.posterous.com