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# Council News

## The Newsletter of the NYSCDM

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### Letter from the Publications Committee Chair

With each issue of the Council News, the publications committee endeavors to bring useful, timely information to the membership. Although not as immediate as Twitter or Facebook, the newsletter intends to report on and reflect current topics and themes important to the mediation work of each of us. Along with the NYSCDM website, it is a public voice of the Council.

I invite you to think about how you could contribute to this newsletter with an article, a book review, an interview, or any other submission. Our membership is wide and deep with experience, knowledge and diversity. It's

very likely that something that is second nature to your practice, if put down on paper, could provide salient information for our readership. Please contribute articles for your newsletter!

articles for your newsletter!

Speaking of experience, there were seven attendees at the upstate Conference who are or have been presidents of the NYSCDM.

If you have comments or a submission you would like considered for the Council News,

please reach out to me. Thank you.

Trish Blake-Jones

[tbj@trishmediates.com](mailto:tbj@trishmediates.com).



Left to right: President, Mark Josephson, Past Presidents, Jack Heister (front), Steve Abel, Clare Piro, Dan Burns, and Tim Mordaunt.

#### New York State Council on Divorce Mediation

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Eli Uncyk, Chair Emeritus

Lauren Abramson

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Melissa Burns, Production Manager



# President's Letter

By Mark A. Josephson, Esq., CPA, CFP, CFE, CGMA



Mark A. Josephson,  
President, NYSCDM  
(2015-2017)

It is my pleasure to welcome you to this latest issue of Council News, NYSCDM's newsletter.

This issue has a variety of interesting articles. We have just held our Upstate Conference at Niagara Falls (Grand Island), New York. Great thanks again to Co-Chairs Nadia Shahram and Adrienne Rothstein Grace and everyone who worked on the successful event. In this issue's article about the Conference, you can re-live, or get, the flavor of the event, learn about the session topics, and hear about some of the socializing and networking that went on.

Other articles include Updates from the Public Awareness Committee, Ask the Ethicist, a synopsis of our Upstate Mini-Conference, Divorce Statistics, Tax Return Filing Status, and information about Core Competencies.

As always, on behalf of the whole Council, I wish to thank the Publications Committee and our production manager, Melissa Burns, for all the work in putting the newsletter together. And we have a special announcement about the Committee. Over the years, we have been blessed to have a number of dedicated members who volunteered their time (a huge amount of it!) to plan, invite authors, write, edit and produce our various publications. At the risk of overlooking someone (and please let me know if I do), over the years, Dolly Hinckley, June Jacobson and Jill Sanders-DeMott have taken major responsibility for publishing our journals. More recently, Justine Borer was involved, and the current Committee — Chair Trish Blake-Jones, Lauren Abramson and Chuck Newman — keep us in-the-know.

The special announcement is about a member of the Committee not named above, Eli Uncyk. Many of you are intimately aware of the many contributions Eli has made over many years, to the Council and to the field of divorce mediation. One of them was to publish, for over a decade, the Council's *Monthly Mailer* as a single-handed labor of love. I am pleased to announce that at the September Board meeting, we named Eli the Chairman Emeritus of the Publications Committee. Fear not. It was not just a thank-you for past service; it's to honor Eli's continued work on the Committee, and his continuing contributions to all of us.

Enjoy this issue! The Publications Committee would love your feedback; please email Trish at [tbj@trishmediates.com](mailto:tbj@trishmediates.com).



## 2015 Upstate Mini Conference

By Trish Blake-Jones

The Council's recent Upstate Mini-Conference, held Saturday, September 19th on Grand Island next to Niagara Falls, was chock-full of content and variety for the approximately fifty attendees. We extend grateful appreciation for the efforts of Nadia Shahram and Adrienne Rothstein Grace in organizing this educational forum.

The morning session opened with Carl R. Vahl, Esq., the attorney/mediator caught up in the middle of the mediator confidentiality case, *Hauzinger v. Hauzinger*, [http://www.nycourts.gov/reporter/3dseries/2008/2008\\_05781.htm](http://www.nycourts.gov/reporter/3dseries/2008/2008_05781.htm) (NY Ct Appeals 2008), a case that has been cited throughout the world. His firsthand account was fascinating and sobering. Carl mediated a divorce agreement to conclusion only to be subpoenaed to testify at an Examination Before Trial when the Wife, prior to the parties obtaining a divorce, sought to set aside the mediated agreement. The Motion to Quash the subpoena was denied. The Order denying the motion to quash the subpoena is the Order from which the *Hauzinger* Appeal was filed. After anticipating the Examination Before Trial for years, Carl's testimony took only 73 minutes. In the end, the Court refused to set aside the mediated agreement, but history had been made.

The next presenter departed entertainingly from the typical divorce mediation subject areas, speaking about the nature of storytelling, about which he has spent his career researching and writing. Professor Bruce Jackson, writer, filmmaker and professor at SUNY Buffalo, regaled the crowd with amusing and serious stories of how "the story" often will change over time, either knowingly or unknowingly, by the storyteller. He reinforced what we know as mediators: that extracting the truth from various narratives is an art, not science, and that for each storyteller, his or her story really is his or her truth.

A common topic raised during many mediation sessions is college costs and who will pay them. Steve Abel provided a comprehensive summary of questions and possible answers relating to this important topic, including the oft-used SUNY cap limit for tuition and other college expenses. Steve called attention to the importance of such issues as specifying which SUNY will be used to cap the limit, e.g. Albany, Binghamton, etc., determining whether room and board costs would or would not reduce child support payable, and whether making a provision for payment of college costs, when the children are still young, is realistic or necessary.



Board Member, Kate Bar-Tur (left) with Board Member and Conference Co-Chair, Nadia Shahram



Conference Co-Chairs, Nadia Shahram (left) and Adrienne Rothstein Grace, present at the 2015 Upstate Mini-Conference.



Paul Pearson (left), Krista Gottlieb, and Lewis Bigler, present a mock mediation at the 2015 Upstate Mini-Conference.

## 2015 Upstate Mini Conference, continued

The Grey Divorce, widely understood to be a growth area in mediation, was cleverly presented through a role-play between older spouses. The script, written by Adrienne Rothstein Grace, helped illuminate the twists on asset division and spousal maintenance that can present with these cases. The influence of adult children, new partners and the pressures of imminent retirement were key factors in the role-play.

After lunch, Kathleen Bar-Tur and Deborah Wayne presented on Pre-Nups, Post-Nups, and No-Nups, which for mediators can present both legal and emotional/ethical challenges. Pre-marriage agreements can strengthen the bonds between couples because they open the communication about finances and other issues pertinent to their partnership. Similarly, for partners who choose to live together, but not marry, such agreements can support clear understanding about decisions and plans they will make throughout their relationship. While these agreements have legal validity, mediating with couples, who down the road may dispute the fairness of such agreements, requires mediator sensitivity to the “human” components, not just the legal.

Nadia Shahram educated all in the room about the role and importance of the “mehr” in Muslim marriages, which is a mandatory payment from the husband to the wife. A mehr may be money or jewelry, real property, furniture. It is often paid in part at the commencement of marriage with the remainder promised or assumed to be paid upon death of the husband, or upon divorce. In western courts, the enforcement of the mehr is considered to be similar to a pre-nup agreement, that is, an enforceable contract.

Midway through the afternoon, the conference pacing changed as the video titled “What Makes a Good Mediator?” was presented. The video was comprised of about a dozen member mediators in the NYSCDM, with candid videos and unscripted responses to that question. Krista Gottlieb and Bridget O’Connell then broke the attendees into small groups to discuss — and later to share with everyone — skills that are associated with the attributes of a good mediator.

The conference ended with Barbara Stark and Steve Sugarman summarizing the upcoming changes to NYS Domestic Relations Law Section 236, including post-divorce spousal maintenance formulas, duration guidelines, maximum earning cap, etc. [Editors’ note: The law was signed by Governor Cuomo after the Conference. The new law governing temporary maintenance goes into effect on October 25, 2015, with the remainder of the changes in effect January 23, 2016.]



Conference attendees at the 2015 Upstate Mini-Conference.



We would like to thank our sponsors, Family Law Software and Our Family Wizard, for their ongoing support.



Steve Abel, presenting at the 2015 Upstate Mini-Conference.

## Third Party Special Needs Trusts: Planning for a Child's Future

By Lauren B. Abramson, Esq.

When working with parents who have a child with a disability or incapacity explore with them the idea of setting up a third party Special Needs Trust. More often than not, securing the child's future is an issue parents can rally around despite their differences. The parent who has "primary physical custody" usually finds relief in understanding that all of the financial burden will not fall upon them once the child turns 21. It also can take the pressure off of siblings to know there is a plan in place.

Creating a third party Special Needs Trust should be considered by the parents if there is a possibility that their child may receive a means-tested government benefit in the future. Once a child reaches the age of eighteen (18) she or he becomes eligible for public benefit programs. At that time, the income and resources of family members are no longer counted even if the child continues to live at home. However, if the parents have not planned ahead, and the child has assets of his or her own, then he or she may be disqualified from receiving such benefits. For example, in the State of New York, child support usually continues until a child reaches twenty one (21) years of age. If child support is not paid into a Trust once the child reaches the age of eighteen (18), it will be considered income to the child and may disqualify him or her from receiving public benefits. The same issues arises if a parent passes away leaving the child life insurance benefits.

Before addressing the issue of a third party Special Needs Trust, assess the family dynamics around the child to see if there is a major conflict about the "disability". There are times when one parent has not yet been able to accept that his or her child has special needs, or the parents have differing views as to the child's capabilities and the services he or she requires. These issues need to be addressed before discussing the child's future needs after reaching the age of eighteen (18).

A third party Special Needs Trust provides future funds for the child that will not affect his or her ability to receive government benefits such as Supplemental Security income ("SSI") and Medicaid. The funds from the Trust may be used for purchase of major items such as a home, supplemental aid not provided by Medicare, education expenses, or for such everyday things as things as movies, trips, transportation expenses, or the purchase of a computer.

While public benefit programs only provide for a child's basic needs, they are of immense value. The provision of basic needs by parents can be costly. If the basic needs of the child can be met through a public benefit program, any funds the parents or other third parties can provide for the child through a third party Special Needs Trust will provide economic security and services that will enhance that child's quality of life.

The Trust should be set up and established by an experienced Trust & Estates Attorney. The Trustees should include a family member who is familiar with the child and his/her physical, emotional and medical needs, likes and dislikes, in combination with a professional trustee who understands the laws and regulations that apply to the Trust and public benefit programs so continued eligibility is not jeopardized.

To ensure the best for a child with a disability or incapacity, parents should be encouraged to explore options to address the future needs of their child.

### Helpful Resources:

See the Continuing Ed program about special needs kids listed in "Upcoming Events" on p. 12.

New York City Bar Association

<http://www.nycbar.org/get-legal-help/article/wills-trusts-and-elder-law/trusts/supplemental-needs-trust/>

The Special Needs Alliance, <http://www.specialneedsalliance.org/>

Legal Guide for the Seriously Ill --Seven Key Steps to Get Your Affairs in Order, American Bar Association Commission on Law and Aging for the National Hospice and Palliative Care Organization, Copyright © American Bar Association and National Hospice and Palliative Care Organization, 2009

**Impact of Separation or Divorce on Special Needs Children, by** Susan L. Pollet, New York Law Journal (Copyright ©) August 06, 2010

## Tax Return Filing Status in Divorce Situations

By Mark A. Josephson, Esq., CPA, CFP, CFE, CGMA

Divorce mediation clients are often in the dark about the details of how to file tax returns during the mediation and after they're divorced. Selecting the appropriate filing status is important as this will impact the client's tax burden and legal liability for taxes. Choosing a filing status can be confusing and there are many variables that should be considered to determine the available and most beneficial filing status. This discussion may not address all situations, but it will provide mediators with a quick guide to present to their clients during the mediation process.

### Determining Filing Status

The Internal Revenue Service provides for five filing statuses. They are married filing jointly, married filing separately, single, head of household and Qualifying Widow(er) with Dependent child (not addressed in this article). Choice of filing status will depend on whether a couple is deemed to be married or divorced ("unmarried"). Marital status is determined as of the last day of year. Couples that are divorced on December 31st are considered not married for the entire year.

The filing status for those who are not married on December 31st must be either single or head of household. In addition to being unmarried, other criteria regarding support of a household and a qualifying person must be met to be eligible to file as head of household. Typically filing as head of household will generate a lower tax burden than filing as single. A married individual who lives apart from their spouse can qualify to file as head of household if certain requirements are met and the married individual is "considered unmarried" (a tax term, which you can find in the IRS publications noted below).

If a couple is married on the last day of the year they can file as married filing jointly, or married filing separately. Typically a joint filing status will produce a lower tax liability. However, depending on the couples income and available deductions and credits, this may not always be the case. When filing a joint tax return both spouses are held jointly and severally liable for taxes, interest and penalties associated with that return. Accordingly each client's circumstances must be reviewed carefully before choosing a joint or married filing separate status.

State law governs whether two people are married or divorced. In New York, a couple living under a separation agreement, but without a judgment of divorce, is considered married. Even if the couple lived separately for the whole year, but without a written agreement, they are married for income tax filing status purposes unless there's a divorce by December 31st. A divorce decree that is in the process of being appealed, and a divorce decree against which there is a motion to vacate pending at the close of the tax year, have been held sufficient to terminate married status for tax purposes.



## Tax Return Filing Status in Divorce Situations, continued

Some clients may want to get rather creative in order to save taxes. If a couple obtains a divorce in one year for the sole purpose of filing tax returns as unmarried individuals, and at the time of divorce intend to remarry each other and do so in the next tax year, the couple is considered married in the year the divorce is entered. However, if a couple gets a valid divorce but intends to continue living together without getting remarried, the IRS has privately ruled that it would not object to their filing as unmarried individuals as long as no other factors indicate that the couple should not be considered as unmarried.

### Amending Returns to Change Filing Status

A separate return can be amended to a joint return within the three-year statute of limitations period. However, a joint return cannot be amended to separate returns after the due date. The statute of limitations is generally three years (including extensions) after the date the original return was filed.

### Annulled Marriages

If a judgment of annulment is obtained which holds that no valid marriage ever existed, the couple is considered unmarried even if they filed joint returns for earlier years. Mediators don't frequently run into annulment cases, but if you do, your clients should understand that they must file amended returns, claiming single or head of household status for all tax years that are affected by the annulment and are not closed by the statute of limitations for filing a tax return.

*For more information regarding the filing status on tax returns in divorce situations, please refer to the Internal Revenue Service's Publication 501 (2014), Exemptions, Standard Deduction available at <http://www.irs.gov/pub/irs-pdf/p501.pdf> and "Filing Information" in Publication 504 (2014), Divorced or Separated Individuals (available at <http://www.irs.gov/pub/irs-pdf/p504.pdf>). All IRS publications are available at <http://www.irs.gov/publications/>.*



**Mark A. Josephson, Esq., CPA, CFP, CFE, CGMA** is a .... Well, the number of letters after his name is a clue to how my professional hats Mark wears. He's a lawyer, accountant, forensic accountant, financial planner and mediator. Then after lunch, he gets busy. He serves on many professional and community organizations, including NYSCDM's President. Mark is past Treasurer and Board member of the Family and Divorce Mediation Council of Greater New York (FDMC). He practices in Manhattan as a partner in Murray & Josephson CPAs, LLC, [www.murrayjosephson.com](http://www.murrayjosephson.com). He can be reached at (212) 644-2100 x202 or [mark@murrayjosephson.com](mailto:mark@murrayjosephson.com).

## Public Awareness Committee

We are excited to announce that the Public Awareness Committee has written a completely new set of **Frequently Asked Questions (FAQs)** for the Council's website. They were approved by the Executive Committee and are now on our website. We encourage you to use this new resource by linking it to your website and/or directing couples to this page:

<http://nyscdm.org/resources/frequently-asked-questions/>

We want to thank all the members of the Public Awareness Committee who devoted much of their time and knowledge to complete a new set of FAQs that reflect changes in society and the law. It was a true collaborative effort by a group of professionals with differing experiences and opinions. The result is a new resource that we hope well serves our members and the public.

If you would like to join our dynamic group, we encourage you to do so by contacting PAC Chair-person Susan Ingram at [susan.ingram.esq@gmail.com](mailto:susan.ingram.esq@gmail.com).

As always, the Public Awareness Committee is seeking new/unpublished articles for the council's blog. Articles can be short (about 250 words) and should help the public gain a better understanding of divorce mediation. Feel free to focus on one aspect of the process. For topic ideas, please review recent articles at <http://nyscdm.org/category/blog/>. We will link the blog article to your website and share via the council's Facebook and Twitter accounts. If you have any questions, please contact Patty Murray ([Patty@MurrayPublicRelations.com](mailto:Patty@MurrayPublicRelations.com)).

To access free **Marketing Tools**, visit the **Resources Page** in the **Members Area** of [www.nyscdm.org](http://www.nyscdm.org).

Here you will find:

- NYSCDM Membership Logos for use on your websites
- Customizable PowerPoint slides – *Is Divorce Mediation Right for You and Your Family?* – which you can use as is or update for your presentations
- A one-page, print-quality flyer – *The Divorce Mediation Quiz* – for use with your marketing efforts
- Tips on how to secure a speaking engagement.



## Ask the Ethicist

By Rachel Fishman Green, Esq.

Dear Ethicist,

I had an initial mediation session with Jim and Susan last week. Jim hardly said a word – in fact, during the session, the most I heard from Jim was at the beginning, when I was filling in my file, and asking the couple for their dates and places of birth, levels of education, etc.

For the rest of the session, Jim sat there, hardly looking up, and doodling. He is an artist – for all I know he was sketching me!

Susan appeared to be the reporter for the couple. She recited to me, “Here is what we agreed to.” She gave me a detailed schedule for the children, and talked about her and the children’s expenses. Jim had moved out, and is sleeping on the sofa in a friend’s home, and spending time with the children in the apartment where the couple had lived, with Susan (mostly) present. They have few assets to divide.

My question is whether mediation should continue, if Jim remains so silent?

Marshall Mediator

Dear Marshall,

You are right to question whether mediation can continue without some change in the dynamics of communication for this couple. Mediation only works when there are two voices in the room, so that the discussion, input, and results of the mediation reflect the needs and interests of both people.

Standard I of the Model Standards of Practice for Family and Divorce Mediation states:

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

**A. Self-determination is the fundamental principle of family mediation. The mediation process relies upon the ability of participants to make their own voluntary and informed decisions.**

**B. The primary role of a family mediator is to assist the participants to gain a better understanding of their own needs and interests and the needs and interests of others and to facilitate agreement among the participants.**

During your discussion, did either Jim or Susan gain a better of understanding of their own needs and interests, or the needs and interests of each other? It sounds as if Susan came in, expecting you to act as a ‘scribe,’ rather than as a mediator, when she told you, ‘This is what we agreed to.’

It sounds as if Jim is withdrawn, and the crucial question is – why.

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

## Ask the Ethicist, continued

The problem is that you don't understand where Jim is coming from – whether or not he has participated in coming up with the terms as reported by Susan. From what you describe here, you have not been able to assess Jim's capacity to mediate.

Standard III continues:

**A. Before family mediation begins a mediator should provide the participants with an overview of the process and its purposes, including:**

**informing the participants that reaching an agreement in family mediation is consensual in nature, that a mediator is an impartial facilitator, and that a mediator may not impose or force any settlement on the parties.**

Is Jim silent because he feels guilty, for some reason? Is he depressed? Is he capable of discussion with Susan in the room and capable of reaching true agreement? Or is he being bullied by Susan, in some way, feeling that – this is the cost of freedom, and he will pay it, to have this end?

Any of these are possible – and it may be that they did, indeed, have full discussion, and come up with these terms for their agreement. But the fact that Jim is sleeping on a friend's couch, may be another example of unbalanced power and communication.

Mediation works best when you work transparently with a couple, so that they understand and own their mediation process. In your next session, I recommend that you discuss with Jim and Susan how the mediation process is supposed to work. Bring your concerns to the table and see how far you and they get. If you have a sense that there is a vast power imbalance between them, or some bullying dynamic, then you might explore some kind of caucus – or, if you have an assistant, have that person reach out to Jim to see if he/she can get a better sense of what is going on with him – or send him to a reviewing/consulting attorney.

Finally, Standard III says:

**C. The family mediator should be alert to the capacity and willingness of the participants to mediate before proceeding with the mediation and throughout the process. A mediator should not agree to conduct the mediation if the mediator reasonably believes one or more of the participants is unable or unwilling to participate.**

The most important piece of ethical mediation practice is to listen to your gut. If you are not able to get a sense of Jim's willingness to participate, then you should not continue with mediation.

Sincerely,

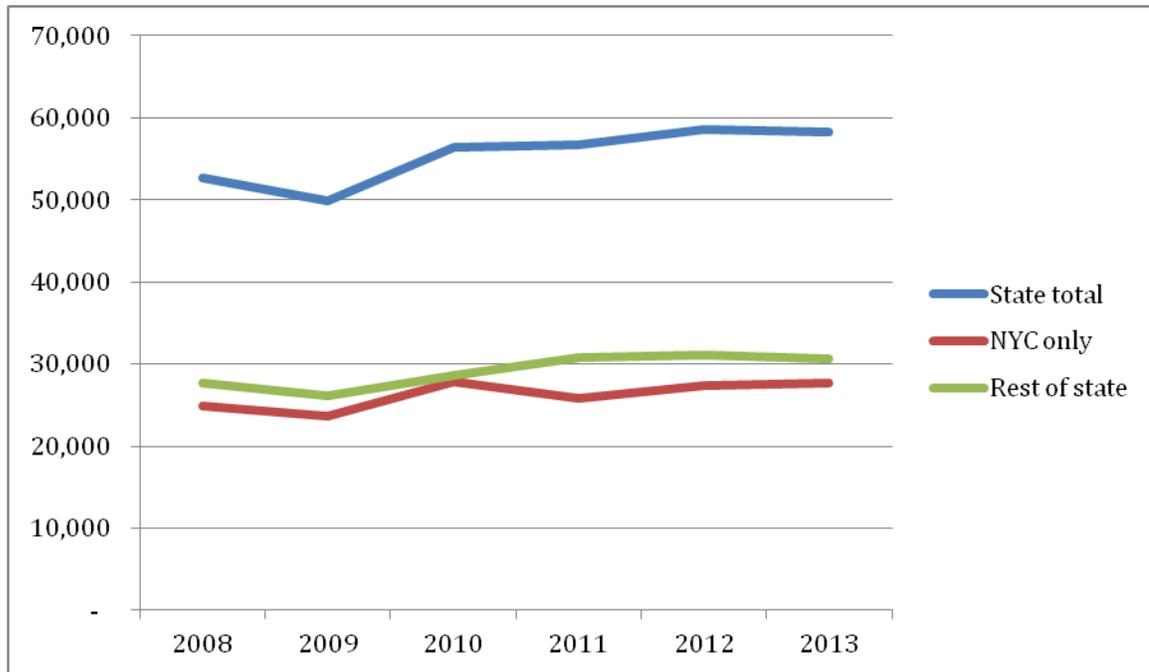
The Ethicist.



*Rachel Fishman Green, Esq., is a principal of ReSolutions, a mediation and legal services firm with offices in Brooklyn, Manhattan and Long Island. She is the Chair of the Joint Ethics Committee of the NYSCDM and the Family and Divorce Mediation Council of Greater New York. She can be reached at (718) 965-9236 or*

*[rachel@mediate2resolution.com](mailto:rachel@mediate2resolution.com); her website is <http://www.mediate2resolution.com/>.*

## Divorce Statistics for New York State (2008-2013)



Year	State total	NYC only	Rest of state
2008	52,619	24,965	27,654
2009	49,816	23,698	26,118
2010	56,382	27,833	28,549
2011	56,717	25,896	30,821
2012	58,556	27,379	31,177
2013	58,313	27,671	30,642

Source: New York Department of Health

[https://www.health.ny.gov/statistics/vital\\_statistics/2013/table51.htm](https://www.health.ny.gov/statistics/vital_statistics/2013/table51.htm)



**585 Stewart Ave., Suite 610**  
**Garden City, NY 11530**  
**Phone: (516) 227-2595**  
**Email: [questions@nyscdm.org](mailto:questions@nyscdm.org)**

## NYSCDM's Mission Statement:

- To promote the highest professional standards for divorce mediation.
- To assist and encourage mediator excellence and success.
- To increase public awareness of the financial and emotional benefits of a mediated agreement.
- To promote mediation as the first choice when couples separate, divorce or face family conflicts.

Check out our blog: <http://nyscdm.org/category/blog/>

## Upcoming Events:

**November 2, 2015:** The Family and Divorce Mediation Council of Greater New York (FDMC) Continuing Education Series: "Special Needs in Mediation: What Mediators Need to Know When Working with Parents of Special Needs Children."

For more information and to register, see <https://fdmcgny.org/events/#!event/2015/11/2/-quot-special-needs-in-mediation-what-mediators-need-to-know-when-working-with-parents-of-special-needs-children-quot>

**December 5, 2015:** The New York State Council on Divorce Mediation (NYSCDM) Annual Downstate Symposium: "Calm the Chaos: Navigating the Emotional, Financial and Ethical Complexities of Divorce Mediation"

For more information, see <http://nyscdm.org/conferences/>

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