JOINT STATE GOVERNMENT COMMISSION

General Assembly of the Commonwealth of Pennsylvania

ALTERNATIVE DISPUTE RESOLUTION IN PENNSYLVANIA

REPORT OF THE ADVISORY COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION

JUNE 2017

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REPORT

Alternative Dispute Resolution in Pennsylvania:
Report of the Advisory Committee on Alternative Dispute Resolution

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The full report is available on our website, http:/jsg.legis.state.pa.us.

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The Joint State Government Commission was created in 1937 as the primary and central non-partisan, bicameral research and policy development agency for the General Assembly of Pennsylvania.[1]

A fourteen-member Executive Committee comprised of the leadership of both the House of Representatives and the Senate oversees the Commission. The seven Executive Committee members from the House of Representatives are the Speaker, the Majority and Minority Leaders, the Majority and Minority Whips, and the Majority and Minority Caucus Chairs. The seven Executive Committee members from the Senate are the President Pro Tempore, the Majority and Minority Leaders, the Majority and Minority Whips, and the Majority and Minority Caucus Chairs. By statute, the Executive Committee selects a chairman of the Commission from among the members of the General Assembly. Historically, the Executive Committee has also selected a Vice-Chair or Treasurer, or both, for the Commission. There was also a Secretary during some years.

The studies conducted by the Commission are authorized by statute or by a simple or joint resolution. In general, the Commission has the power to conduct investigations, study issues, and gather information as directed by the General Assembly. The Commission provides in-depth research on a variety of topics, crafts recommendations to improve public policy and statutory law, and works closely with legislators and their staff.

A Commission study may involve the appointment of a legislative task force, composed of a specified number of legislators from the House of Representatives or the Senate, or both, as set forth in the enabling statute or resolution. In addition to following the progress of a particular study, the principal role of a task force is to determine whether to authorize the publication of any report resulting from the study and the introduction of any proposed legislation contained in the report. However, task force authorization does not necessarily reflect endorsement of all the findings and recommendations contained in a report.

Some studies involve an appointed advisory committee of professionals or interested parties from across the Commonwealth with expertise in a particular topic; others are managed exclusively by Commission staff with the informal involvement of representatives of those entities that can provide insight and information regarding the particular topic. When a study involves an advisory committee, the Commission seeks consensus among the members.[2] Although an advisory committee member may represent a particular department, agency, association, or group, such representation does not necessarily reflect the endorsement of the department, agency, association, or group of all the findings and recommendations published in a report.

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[1] Act of July 1, 1937 (P.L.2460, No.459); (46 P.S. §§ 65 – 69).

[2] Consensus does not necessarily reflect unanimity among the advisory committee members on each individual policy or legislative recommendation. At a minimum, it reflects the views of a substantial majority of the advisory committee, gained after lengthy review and discussion.

Over the years, nearly one thousand individuals from across the Commonwealth have served as members of the Commission's numerous advisory committees or have assisted the Commission with its studies. Members of advisory committees bring a wide range of knowledge and experience to deliberations involving a particular study. Individuals from countless backgrounds have contributed to the work of the Commission, such as attorneys, judges, professors and other educators, state and local officials, physicians and other health care professionals, business and community leaders, service providers, administrators and other professionals, law enforcement personnel, and concerned citizens. In addition, members of advisory committees donate their time to serve the public good; they are not compensated for their service as members. Consequently, the Commonwealth of Pennsylvania receives the financial benefit of such volunteerism, along with the expertise in developing statutory language and public policy recommendations to improve the law in Pennsylvania.

The Commission periodically reports its findings and recommendations, along with any proposed legislation, to the General Assembly. Certain studies have specific timelines for the publication of a report, as in the case of a discrete or timely topic; other studies, given their complex or considerable nature, are ongoing and involve the publication of periodic reports. Completion of a study, or a particular aspect of an ongoing study, generally results in the publication of a report setting forth background material, policy recommendations, and proposed legislation. However, the release of a report by the Commission does not necessarily reflect the endorsement by the members of the Executive Committee, or the Chair or Vice-Chair of the Commission, of all the findings, recommendations, or conclusions contained in the report. A report containing proposed legislation may also contain official comments, which may be used in determining the intent of the General Assembly.[3]

Since its inception, the Commission has published more than 350 reports on a sweeping range of topics, including administrative law and procedure; agriculture; athletics and sports; banks and banking; commerce and trade; the commercial code; crimes and offenses; decedents, estates, and fiduciaries; detectives and private police; domestic relations; education; elections; eminent domain; environmental resources; escheats; fish; forests, waters, and state parks; game; health and safety; historical sites and museums; insolvency and assignments; insurance; the judiciary and judicial procedure; labor; law and justice; the legislature; liquor; mechanics' liens; mental health; military affairs; mines and mining; municipalities; prisons and parole; procurement; state-licensed professions and occupations; public utilities; public welfare; real and personal property; state government; taxation and fiscal affairs; transportation; vehicles; and workers' compensation.

Following the completion of a report, subsequent action on the part of the Commission may be required, and, as necessary, the Commission will draft legislation and statutory amendments, update research, track legislation through the legislative process, attend hearings, and answer questions from legislators, legislative staff, interest groups, and constituents.

[3] 1 Pa.C.S. § 1939 ("The comments or report of the commission . . . which drafted a statute may be consulted in the construction or application of the original provisions of the statute if such comments or report were published or otherwise generally available prior to the consideration of the statute by the General Assembly").

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Patrick M. Browne

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Shawn T. Flaherty[6]

John P. Sabatina, Jr.

Michael C. Turzai

[4] Deceased December 27, 2010.
[5] Retired at the conclusion of the 2011-12 legislative session.
[6] Served as a member in 2006 only.

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June 26, 2017

To the Members of the General Assembly of Pennsylvania:

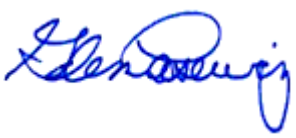
The Joint State Government Commission is pleased to present the ***Report of the Advisory Committee on Alternative Dispute Resolution***. It was written in response to 2005 Senate Resolution No. 160.

The Advisory Committee's recommendation is to create a statewide office of dispute resolution in Pennsylvania. The office would help oversee ADR practice and spread promising initiatives throughout the State, while educating the public about the advantages of ADR in terms of cost, efficiency, and greater satisfaction of disputing parties when compared to litigation. The expansion of ADR in Pennsylvania has been hindered up to this point because of a lack of direction; other states have benefitted from its widespread use. The establishment of a statewide office would be the foundation of any serious attempt to address the issues relating to ADR.

Other material the Advisory Committee considered in the course of its study is presented in the Appendices to this report. The material includes a review of scholarship on the issues related to ADR and descriptions of ADR programs in other states. The primary focus is on mediation, which is the preeminent form of ADR nationwide. The background material will hopefully serve as a sound starting point for the work of the ADR Commission and helpful background to the General Assembly and the public.

On behalf of the Joint State Government Commission, I would like to thank the members of the Advisory Committee, as well as the members of the legislative Task Force on Alternative Dispute Resolution, for their dedication to this field.

Respectfully submitted,



Glenn J. Pasewicz
Executive Director

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RECOMMENDATIONS FOR ALTERNATIVE DISPUTE RESOLUTION COMMISSION

Pursuant to the General Assembly's directive in Senate Resolution 160 of 2005 (SR 160), the Advisory Committee created under SR 160 examined in depth and deliberated at length with respect to its charge to:

- Conduct a comprehensive review of the current status of Alternative Dispute Resolution (ADR) services within the panoply of methods of conflict resolution available in this Commonwealth; [7]

- Identify relevant best practices in the delivery of ADR services locally and nationally and how to improve conflict resolution in this Commonwealth by incorporating these best practices;

- Develop a plan for educating the citizens of this Commonwealth about conflict resolution in general and ADR services in particular and ensure access to needed ADR services utilizing best practices; and

- Propose legislation as may be required to implement the proposed plan and advance the use of innovative conflict resolution methods Statewide, not only in the civil courts but also in schools, businesses, government, criminal and juvenile justice systems and other community settings.

In view of the fundamental importance of ADR, the Advisory Committee's principal recommendation is for the Commonwealth to establish an Alternative Dispute Resolution Commission (ADR Commission) to promote and oversee the development of ADR in Pennsylvania.

[7] Mediation, arbitration, and a wide variety of other methods of dispute resolution outside of litigation are referred to as "ADR."

BENEFITS OF ALTERNATIVE DISPUTE RESOLUTION

The Advisory Committee believes that it is in the public interest for the use of ADR procedures, especially mediation, to be substantially increased in Pennsylvania, so that the Commonwealth's judicial system can focus on matters that call for the remedies it is best equipped to provide. ADR procedures can thus be made more readily available as effective and cost-efficient methods for the resolution of disputes that do not require litigation. Experience, both in Pennsylvania and elsewhere, demonstrates that, in many cases, mediation and other types of ADR can resolve disputes more rapidly and less expensively than litigation, while benefitting relationships between parties. Further, the resolution provided through ADR satisfies both parties in most cases. Even when there is a clear winner and loser, the loser is typically satisfied with the ADR process. Of course, there remain a significant number of cases where litigation is the best alternative – particularly where settlement is impossible, where it is especially important that the resolution of the dispute gives rise to legal principles applicable in future cases, or where the dispute may be of such public importance that its resolution in a public forum is essential.

Today, ADR techniques are used to settle a wide variety of disputes in every institutional setting.[8] ADR is characterized as having great flexibility in how disputes can be resolved. The process takes many forms, including mediation, arbitration, negotiation, conciliation, facilitation, consensus building, early neutral evaluation, fact finding, minitrial, consensus building, conflict coaching, parental coordination, and peer review. It may utilize the services of a mediator, arbitrator, ombud, management review board, special master, or other neutral third party. Some ADR methods are long established and have proven successful in resolving conflicts between individuals and businesses, schools, and government entities.

The most prevalent form of ADR is mediation.[9] In mediation, the parties attempt to work out an agreed solution that satisfies both sides through the use of a third party neutral. As compared to litigation, mediation can reduce costs, speed resolution, permit party control of the proceedings, allow for an agreement that satisfies all parties, avoid appeals and adverse publicity, and enable parties to maintain an amicable relationship.[10] Arbitration, a similarly important form of ADR, is an alternative to mediation that can provide a quick and inexpensive resolution, but it risks dissatisfying one or more parties.

For many disputes, mediation and other voluntary and relatively informal ADR procedures may permit the parties to address their needs better than litigation.[11]

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[8] Brad Spangler, "Alternative Dispute Resolution (ADR)," in *Beyond Intractability* (June 2003), http://www.beyondintractability.org/essay/adr; Allegheny County Bar Association, "Frequently Asked Questions about Mediation," accessed May 18, 2015, http://www.acba.org/portals/0/pdf/FAQ_Mediation_ADRbrochure.pdf.

[9] Statements in this report that are not cited to published sources are supported by the experience and observations of a consensus of the Advisory Committee's members.

[10] See Commonwealth of Pennsylvania, Office of General Counsel "Mediation Handbook," 1-2.

[11] OGC Mediation Handbook, 2.

Limitations of the Judicial System

The Advisory Committee observes that, as increased demands have been placed on Pennsylvania's Courts, public dissatisfaction with the attendant costs and delays has also risen. Consequently, members of the Advisory Committee have seen two phenomena develop: the movement to resolve disputes without use of the judicial system, and the judicial system's embrace of ADR to cope with expanding caseloads.

In the Advisory Committee's experience, the public views the court system as unsatisfactory, too slow, expensive, unpredictable, and rigid. Costs borne by the parties to litigation include not only out-of-pocket expenses, but also lost productivity as cases drag on because of court backlogs and extensive discovery. Many cases exact a severe emotional toll on the parties, their families, and their friends.

In monetary terms alone, the advantage of ADR over litigation in individual cases can be dramatic. "A case costing $40,000 to $50,000 to pre-try and try might be settled in five or six hours at a cost of $2,000 to $3,000, depending on what the mediator might charge."[12] The costs of litigating tort cases range from $43,000 (automobile tort) to $122,000 (malpractice).[13] The potential exists for the public to realize substantial savings if government officials used more ADR. Statistics compiled by the federal Department of Justice on the results of its ADR program from 2010 to 2015 showed annual savings of up to $24.8 million in litigation expenses, 20,686 hours of attorney and legal staff time, and 2,692 months of litigation avoided.[14] While some research documents a high probability of cost savings with expanded use of ADR, comprehensive data on the cost of dispute resolution is difficult to obtain, partly because parties, attorneys, and ADR neutrals may be bound by confidentiality requirements, or may refuse to share information with researchers.

Judges are bound to apply laws, regulations, rules, and precedents, but when doing so do not always take into account the interests and values of the parties. This rigidity in the judicial system can lead to the parties' lack of satisfaction with the outcome, resistance to compliance, and further litigation. At the same time, litigation is more likely than ADR to yield a publicly available judicial opinion that states the law and applies it to the narrated facts of a case, thereby facilitating settlement of similar cases arising thereafter.

The judicial system's litigation process does not always result in resolutions that are responsive to the disputants' interests. In medical malpractice cases, the harm to the patient and his or her family is potentially much larger than the amount of damages that can likely be recovered from the provider. Disputes between municipalities regarding land development, public contracts, and environmental issues may lead to both parties' dissatisfaction. Further, a large class of cases that the conventional judicial system does not handle well are local disputes where the underlying

[12] Richard M. Calkins, "Mediation: A Revolutionary Process That Is Replacing the American Judicial System," 13 Cardozo J. Conflict Resol. 1, 5 (2011).
[13] Paula Hannaford-Agor and Nicole L. Waters, "Estimating the Cost of Civil Litigation," in National Center for State Courts, *Caseload Highlights* vol. 20 (January 2013).
[14] U.S. Department of Justice, Office of Legal Policy, "Alternative Dispute Resolution at the Department of Justice (February 15, 2016) https://www.justice.gov/olp/alternative-dispute-resolution-department-justice.

issues are not legal ones or court costs are prohibitive. Community-based mediation centers constitute an effective response. The centers are designed to provide free and low-cost mediation services and typically handle disputes involving neighbors, family members, friends, consumers and businesses, and landlords and tenants.

Need for ADR Commission

While the use of ADR in Pennsylvania has expanded, its development has been inhibited by a lack of coordinated leadership and institutional support. Members of the public are frequently unaware that there are highly effective alternatives to litigation that are not burdened by litigation's drawbacks. The Advisory Committee identified an obstacle to wider use of ADR as being the lack of many attorneys' and other professional counselors' knowledge and experience regarding ADR. Among the Commission's most important tasks will therefore be disseminating information to the public about the various ADR procedures and the benefits of using them in terms of economy, efficiency, and greater satisfaction of the disputing parties.

A central coordinating agency would help oversee ADR practice and spread promising initiatives throughout the state. In most states where the use of ADR is more prevalent than in Pennsylvania, institutional support has been provided by statewide entities that have promoted its sound development. Seeing the effectiveness of these initiatives, the Advisory Committee overwhelmingly agrees that the establishment of the ADR Commission as a statewide entity is needed to encourage and oversee the use of effective ADR modalities to achieve meaningful progress in the development and sound expansion of ADR.

Expenses incurred by the Commonwealth to fund the ADR Commission should be more than offset by reduced trial and appellate caseloads.[15] Community mediation centers may benefit greatly from centralized coordination afforded by a statewide commission and savings that should result from the sharing of resources. The establishment of the ADR Commission would be especially vital in order to develop ADR for business and labor disputes, consumer cases, and many other cases that typically run their course entirely outside the judicial system.

For these reasons, the Advisory Committee believes that the issues identified in SR 160 can best be addressed by the General Assembly's establishing and supporting a statewide ADR Commission.

[15] For instance, the Pennsylvania Superior Court mediation program resolved 50-70% of the cases it handled. Ann Begler, e-mail to Joint State Government Commission staff, November 16, 2016. A volunteer foreclosure mediation program in Bucks County settled 2400 cases from 2009 to 2015. Barbara Lyons, e-mail to Commission staff, November 9, 2016.

ADR COMMISSION

The Commission's purposes, duties, and governing structure are described here.

Purposes

The general purposes of the ADR Commission, as stated in section 7504 of the proposed legislation, are to:

- encourage and facilitate the development, use, coordination, support and evaluation in this Commonwealth of high-quality affordable alternative dispute resolution programs and services, including education, training and research about alternate dispute resolution; and

- recommend improvements in alternative dispute resolution programs and services.

More specifically, the Commission's purposes comprise the following:

1. To coordinate efforts to promote the resolution of public and private disputes through the use of Court-annexed, community-based, or private ADR.

2. To propose legislation and regulations to improve ADR processes.

3. To develop educational programs.

4. To develop and implement policies and procedures that will result in accessible, affordable, culturally competent and high quality ADR services. To this end the ADR Commission should (a) support research into the types of ADR services needed and where they are needed; (b) identify and disseminate best practices in service delivery; (c) approve pre-degree and continuing education programs for ADR practitioners and party advisers; (d) determine whether certification of ADR practitioners is in the public interest and, if so, how to accomplish it; (e) adopt and enforce disciplinary rules; (f) evaluate the effectiveness of various types of ADR services; (g) recommend improvements to ADR services; (h) provide accessible information and referral procedures; and (i) promulgate rules and regulations as necessary for the administration of this legislation. (Because ADR practices have been effective largely due to their innovation and flexibility, care must be exercised to avoid overregulation.)

5. To consult with the Pennsylvania Judiciary with respect to the adoption, implementation, and revision of rules for ADR procedures in Court-annexed cases.

6. To consult with State and local government with respect to adoption, implementation, and revision of ADR processes and services.

7. To assist State and local government to obtaining funding to implement their ADR activities, from sources including appropriations, grants, and fees for accreditation of training programs, certification of practitioners, and other services.

8. To advise community mediation centers and other not-for-profit providers of ADR services with respect to obtaining funding needed to make such services affordable and accessible to Pennsylvanians of limited means.

Powers and Duties

The powers and duties of the ADR Commission that are directly relevant to its purposes are listed below:[16]

1. Assist in the development, use, coordination, support and evaluation of ADR programs in judicial, governmental, educational, business and community settings.

2. Support the advancement of ADR methods.

3. Advise representatives of judicial and education systems, business and governmental entities and communities regarding alternative dispute resolution procedures and practices.

4. Collect and disseminate information and make referrals for ADR programs and related education, training and research.

5. Collect and disseminate data helpful to the purposes of the Commission.

6. Identify and encourage the use of best practices.

7. Educate the public regarding ADR programs and methods.

8. Facilitate access to ADR programs and services.

9. Facilitate the establishment of programs that provide education or training in ADR in schools, institutions of higher learning or elsewhere.

The powers and duties are to be exercised in a manner that best furthers the purposes set out above. Under the Board's guidance, the ADR Commission may set priorities among its goals and sequence its activities in its discretion as resources permit.

[16] For a complete list of powers and duties including the ministerial ones, see section 7507 of the proposed bill.

Structure

The Advisory Committee recommends an executive agency because a large number of ADR services take place outside the Courts. The governance of the ADR Commission will be the responsibility of its Board of Directors. The composition of the Board, as prescribed in section 7505, is intended to reflect the types of constituencies whose interests and concerns are likely to be most directly affected by the ADR Commission's work. The Board must consist of members whose knowledge and experience will help inform the ADR Commission's deliberations and decisions and who will explain its work to intended constituencies. The proposed bill directs appointing authorities to ensure a membership that is diverse with respect to race, ethnic origin, gender, age, occupation, and geographic residence. The Board ought to include enough members to be reasonably representative, but not so many as to inhibit effective decision making.

The Advisory Committee implemented these principles in drafting section 7505(b). In order to provide strong representation of the Judicial branch, the Board includes The Chief Justice of the Supreme Court, or another Justice of the Supreme Court appointed by him or her. The Chief Justice is given seven other appointments: a member of the Pennsylvania Bar Association, a member of the Pennsylvania Council of Mediators, a member of the administration or faculty of a Pennsylvania law school, a sitting judge of either the Superior Court or the Commonwealth Court, a sitting judge of a Court of Common Pleas, a magisterial district justice, and a member of his or her own choosing. The member representing the law schools must be a current or former dean or president of a Pennsylvania law school, or a faculty member who teaches ADR procedures.

To represent the Executive branch, the Governor is given five appointments to the Board: a member of the Philadelphia City Council, a member of the Allegheny County Council, and three members of the general public, at least two of whom must have been involved in an ADR proceeding.

To represent the Legislative branch, the Board includes a member of the Senate appointed by the President pro tempore of the Senate, a member of the Senate appointed by the Senate Minority Leader, a member of the House of Representatives appointed by the Speaker of the House, and a member of the House of Representatives appointed by the Minority Leader of the House.

The members of the Advisory Committee were emphatic in their position that the ADR Commission should be established as an independent agency within the Executive branch. Although not anticipated at this time, it would be within the realm of possibility for the Judicial branch to initiate uniform statewide ADR processes in the Courts, provided that top-down advocacy led the way and critical funding was made available, as has occurred in other states. [17] The Advisory Committee would strongly encourage the ADR Commission to cooperate with the Judiciary's efforts by helping it keep abreast of best practices and innovations being developed across the U.S.

[17] A survey of other states with some type of government-based state-wide ADR body shows that most are located within the judicial branch. See pp. 68-80 below.

BACKGROUND MATERIAL

In the course of its work, the Advisory Committee gathered a large amount of information and analysis of dispute resolution through the hard work of its six subcommittees and Joint State staff. This material appears after the chapter on the Advisory Committee's recommendation, and includes an extensive review of the scholarly literature on the issues related to ADR, descriptions of ADR services and programs in other states, and reports from the subcommittees including their recommendations with respect to the subject matter on which they focused. In accordance with SR 160, materials relating to best practices and to public information on and access to ADR are presented. The background material should serve as a useful starting point for the ADR Commission's work once it is established and functioning, as well as inform the General Assembly and the public on the issue.

PROPOSED DRAFT LEGISLATION

The draft legislation presented here illustrates one possibility for creating the ADR Commission. At a minimum, the legislation lists many of the issues that need to be addressed to create the agency structure. The members of the ADR Commission are designated to assure that they will be broadly representative and bipartisan. The ADR Commission's powers and duties are framed so as to enable it to vigorously promote the appropriate use of ADR in the Commonwealth. The draft legislation establishes a fund in the State Treasury to finance the ADR Commission's operations. Because much of the activity under the ADR Commission's responsibility will take place outside the direct purview of the judicial system, the chapter establishing the ADR Commission is proposed for Title 44 (Law and Justice) of the Pennsylvania Consolidated Statutes.

Structurally, the ADR Commission would be overseen by a board of directors. The ADR Commission's day-to-day operations are performed by its staff, led by the executive director and the associate director. The appointing authorities should select members to the board who possess the knowledge and experience that will best assist in carrying forward the ADR Commission's purposes and will closely reflect the provider and client constituencies most affected by ADR services. These include the Pennsylvania trial and appellate courts, the legal profession (through the Pennsylvania Bar Association), the law schools, county and municipal government, the mediation profession (through the Pennsylvania Council of Mediators), and members of the general public.

PROPOSED LEGISLATION

44 Pa.C.S. (Law and Justice) is amended by adding a chapter to read:[18]

CHAPTER 75
PENNSYLVANIA ALTERNATIVE DISPUTE RESOLUTION COMMISSION

Sec.
7501. Short title of chapter.
7502. Definitions.
7503. Establishment of commission.
7504. Purposes of commission.
7505. Board of directors.
7506. Administrative matters.
7507. Powers and duties of commission.
7508. Reports.
7509. Funding.

[18] 44 Pa.C.S. (Law and Justice).

§ 7501. Short title of chapter.

This chapter shall be known and may be cited as the Pennsylvania Alternative Dispute Resolution Commission Act.

§ 7502. Definitions.

The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Alternative dispute resolution." A process which:

(1) assists persons in a dispute to resolve or manage their differences without resorting to criminal prosecution, civil unrest, economic disruption or violence; or

(2) is intended to prevent or mitigate a dispute.

The term does not include litigation.

"Alternative dispute resolution program." A program or service that provides or encourages alternative dispute resolution. The term applies regardless of the nature of the entity which provides the program or service. The term includes the following:

(1) Arbitration
(2) Collaborative practice
(3) Conciliation
(4) Conflict coaching
(5) Consensus building
(6) Early neutral evaluation
(7) Facilitation
(8) Fact-finding
(9) Mediation
(10) Minitrial
(11) Ombuds
(12) Online dispute resolution
(13) Restorative justice
(14) Structured dialogue

"Board of directors" or "board." The board of directors of the commission established under section 7505 (relating to board of directors).

"Commission." The Pennsylvania Alternative Dispute Resolution Commission established under this chapter.

"Includes." With respect to a list of items, the provision applies to the things specifically mentioned and also to other similar things.

"Litigation." The term refers to litigation before administrative agencies as well as courts.

§ 7503. Establishment of commission.

The Pennsylvania Alternative Dispute Resolution Commission is established as an independent agency of this Commonwealth.

§ 7504. Purposes of commission.

The purposes of the commission are to:

(1) Encourage and facilitate the development, use, coordination, support and evaluation in this Commonwealth of affordable and high-quality alternative dispute resolution programs and

services in this Commonwealth.

Recommend improvements in alternative dispute resolution programs and services.

§ 7505. Board of directors.

(a) Powers and duties.--The board of directors shall manage the commission and its staff in the exercise of the powers and duties of the commission under section 7507 (relating to powers and duties of the commission) for the purposes set forth in section 7503 (relating to purposes of commission.)

(b) Membership.--The board of directors of the commission shall consist of the following members:

(1) The Chief Justice of the Supreme Court.

(2) Seven members appointed by the Chief Justice of the Supreme Court as follows:

(i) One member of the Pennsylvania Bar Association, preferably a member of the ADR Committee or a practitioner of ADR.

(ii) One member of the Pennsylvania Council of Mediators.

(iii) One member who is a current or former dean or president of a Pennsylvania law school or a designated professor who teachers ADR.

(iv) One member who is a sitting judge of the Superior Court or the Commonwealth Court.

(v) One member who is a sitting judge of the Court of Common Pleas.

(vi) One member who is a Magisterial District Justice.

(vi) One member from the general public.

(3) Five members appointed by the Governor as follows:

(i) One member who is a sitting member of the governing body of a county of the first class.

(ii) One member who is a sitting member of the governing body of a county of the second class.

(iii) Three members from the general public, at least one of whom is knowledgeable about community mediation.

(4) Four members who are sitting members of the General Assembly appointed as follows:

(i) One member of the Senate appointed by the President pro tempore of the Senate.

(ii) One member of the Senate appointed by the Minority Leader of the Senate.

(iii) One member of the House of Representatives appointed by the Speaker of the House.

(iv) One member of the House of Representatives appointed by the Minority Leader of the House.

(c) Terms of members.--

(i) Each member under subsection (b)(2) and (b)(4) shall serve a three-year term.

(ii) Each member under subsection (b)(3) shall serve a two-year term.

(iii) A member of the commission may be reappointed for one term.

(d) Successor member.--A member of the commission shall remain in office until a successor is appointed and qualified under subsection (b).

(e) Vacancies.--Notwithstanding subsection (c), if a vacancy occurs in the membership of the commission, through the death, resignation, or termination while in the office from which appointed or disqualification of a member, a new member may be appointed by the appointing

authority of the vacated member to serve the remainder of the unexpired term. The new member shall be appointed and qualified in conformity with subsection (b).

(f) Diversity.--Appointing authorities should make every effort to select members to the commission in such a manner as to ensure diversity of race, ethnic origin, age, gender, occupation and geographic residence.

§ 7506. Administrative matters.

(a) Officers of board.--The board of directors shall select a chairman from its members and other necessary officers during its first meeting in each calendar year.

(b) Quorum.--Seven members of the board constitute a quorum.

(c) Staff.--The commission shall employ an executive director and an associate director selected by the board and may employ other professional, technical and clerical staff under the supervision of the board.

(d) Expenses.--The members of the board shall serve without compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of their duties under this chapter.

§ 7507. Powers and duties of commission.

The commission has the following powers and duties:

(1) To assist in the development, use, coordination, support and evaluation of alternative dispute resolution programs in governmental, educational, business, community or other settings, and in judicial settings in concert with the Unified Judicial System.

(2) To support the advancement of alternative dispute resolution methods.

(3) To advise representatives of judicial and education systems, business and governmental entities and communities regarding alternative dispute resolution procedures and practices.

(4) To collect and disseminate information and make referrals for alternative dispute resolution programs and related education, training and research.

(5) To collect and disseminate data helpful to the purposes of the commission.

(6) To identify and encourage the use of best practices in alternative dispute resolution.

(7) To educate the public regarding alternative dispute resolution programs and methods.

(8) To facilitate access to alternative dispute resolution programs and services.

(9) To facilitate the establishment of programs that provide education or training in alternative dispute resolution.

(10) To develop an annual operating budget. The budget must be approved by the board before the start of the fiscal year of the Commonwealth.

(11) To hire and determine the salary of commission staff, which shall serve at the pleasure of the board.

(12) To establish and maintain a central office and other offices as necessary.

(13) To seek, solicit and apply for grants from any public or private source to provide for the operation of alternative dispute resolution programs in this Commonwealth.

(14) To accept the services of volunteers who agree to assist the commission without compensation. Such volunteers may be reimbursed for expenses incurred for the purposes of this chapter.

(15) To enter into contracts for goods or services, or authorize the executive director to enter into contracts as necessary to implement this chapter.

(16) To prepare reports, including those required under section 7508 (relating to reports) and other reports as necessary.

(17) To promulgate regulations and issue rules as necessary for the administration of this chapter.

(18) To set priorities for the implementation of this section in accordance with available resources and the purposes of the commission under section 7504 (relating to purposes of commission).

§ 7508. Reports.

Annual reports.--The commission shall submit an annual report to the Governor, the General Assembly and the Pennsylvania Supreme Court regarding the operations of the commission during the preceding fiscal year.

(b) Biennial reviews.--The commission shall conduct a review every two years of the use, effectiveness, fairness, cost and quality of alternative dispute resolution programs and services in this Commonwealth. The review may be included in the annual report.

§ 7509. Funding.

(a) Fund.--The Alternative Dispute Resolution Fund is established in the State Treasury to receive and disburse moneys to implement this chapter.

(b) Appropriation.--The General Assembly shall appropriate the funds necessary to implement this chapter to the Alternative Dispute Resolution Fund.

APPENDICES

Supporting Documentation

ADR is present in different forms across the spectrum of society, in schools and community mediation, in healthcare and business, in the Courts and governments, and the practice of ADR reflects the people and cultures it serves. Further, ADR methods are necessarily organically amended to the changing needs and cultural expressions of its clients.

The ADR landscape has certainly changed since the inception of SR 160. The Advisory Committee, recognizing that incremental cultural and societal movement is inexorable, chose to embrace the challenges as opportunities. The members anticipate that this background material will serve as foundational support for the establishment of the ADR Commission and will remain relevant as a jumping off point. The ways and means will change; the whys and wherefores will not.

These Appendices illustrate a landscape requiring the need for a unified approach to ADR, and clearly describe the core utility that would be served by a statewide ADR Commission. The ADR Commission would communicate, advise, and support ADR practitioners and theorists as they seek the best practices and the optimal approaches to best serve the people of Pennsylvania.

The establishment of an ADR Commission to carry out these functions was the consensus decision, albeit not unanimous, of the SR 160 Advisory Committee.

The background material contains the following appendices.

Appendix A	**SR 160 Process –** describes the proceedings of the Advisory Committee.
Appendix B	**ADR Procedures –** gives a review of the scholarly literature on ADR in general, with particular emphasis on mediation.
Appendix C	**Best Practices –** presents a summary of the concept and a brief treatment of ethical standards for mediation and arbitration, along with observations and recommendations by the subcommittees of the Advisory Committee relating to this topic.

Appendix D	**Public Education and Access –** includes brief discussions of the issues of mandatory mediation and the subcommittee's observations and recommendations on this topic. Included is the proposal that attorneys be required to discuss, as a matter of professional ethics, ADR with clients.
Appendix E	**Federal and Uniform Laws –** includes summaries of federal and uniform laws and of work done by the Uniform Law Commissioners.
Appendix F	**Development of ADR in Pennsylvania –** includes descriptions of legislation relating to ADR and programs in State and local government. **Private Programs –** describes primarily community mediation centers and university-based programs.
Appendix G	**Programs in Other Jurisdictions –** describes programs and governance structures for ADR on the federal level and in Florida, Georgia, Maryland, Minnesota, New Jersey, New Mexico, Ohio, and Texas.
Appendix H	**Subcommittee Reports –** presents summaries of the observations and recommendations of the six subcommittees of the Advisory Committee.
Appendix I	**Model Standards of Conduct for Mediators –** is the consensus document of three professional organizations. It is referred to in the chapter on Best Practices.
Appendix J	**2005 SR 160 –** presents this report's enabling resolution.
Bibliography	Lists the published sources used in this report.

APPENDIX A:
SENATE RESOLUTION 160 PROCESS

Senate Resolution No. 160 of 2005 (SR 160) was adopted on February 7, 2006, and directs the Joint State Government Commission to conduct a comprehensive review of established and nascent ADR services, identify and suggest incorporation of best practice standards for the delivery of those services, and develop a plan to educate individuals about ADR.[19] The resolution called for the development of statewide policy recommendations and proposed legislation regarding the use of conflict resolution methods in civil courts, schools, businesses, government, criminal and juvenile justice systems, and community settings. Senate and House leadership appointed a legislative Task Force to oversee the report. Senator Stewart J. Greenleaf served as chair. On October 17, 2006, the Task Force held its organizational meeting to discuss the study generally and the prospective composition of an advisory committee. Thereafter, the Joint State Government Commission appointed an Advisory Committee to assist in completing the project.

Advisory Committee members included "representatives of the principal types of groups likely to contribute useful information and make recommendations," such as "government officials, judges, lawyers, businesspeople, academics, health and human services professionals, typical users of ADR services and providers of all types of ADR services from public, private and nonprofit sectors." On February 1, 2007, the Advisory Committee held its organizational meeting. Ann L. Begler, Esquire and Winnie G. Backlund were selected as the Chair and Vice Chair of the Advisory Committee.

Advisory Committee

Because of the scope of the study and the wide range of issues, the Advisory Committee was subsequently organized into subcommittees on:

- Business, Commercial, and Personal Injury Cases, (Stephen G. Yusem, Esq., Chair);
- Community, Juvenile Delinquency, and Corrections, (Gale McGloin, Chair);
- Family, (Diane D. Hitzemann, Esq., Chair);
- Government and Public Policy, (James A. Rosenstein, Esq., Chair);
- Schools and Education, (Valerie J. Faden, Esq., Chair); and
- Workplace and Health Care, (James Wilkinson, Esq., Chair).

The subcommittees' tasks were to review specific topics, gather background information, and develop recommendations for consideration by the full Advisory Committee.

[19] The resolution is set forth at p. 100, below.

Each subcommittee began its work in the fall of 2007 and met frequently in person and by teleconference throughout the following two years. Because of the size of the Advisory Committee, the number of subcommittees, and the variety of issues under consideration, a coordinating committee was established by the chairs of the six subcommittees together with several other Advisory Committee members.

On October 26, 2016, the Advisory Committee proposed its principal recommendation: the establishment of an Alternative Dispute Resolution Commission as an independent agency within the Commonwealth's Executive branch.

Other materials and further recommendations in this document represent the dedicated work of the SR 160 Advisory Committee over more than a decade of deliberations. This report is intended to be a foundational document for the establishment of the Pennsylvania Alternative Dispute Resolution Commission.

APPENDIX B:
ADR PROCEDURES

THE JUDICIAL SYSTEM AND ADR

The Judicial branches of state and federal governments are primarily charged with resolution of disputes and it may be asked why an alternative dispute resolution system is necessary. Broadly speaking, ADR is an alternative to litigation. Litigation may be defined as a process that begins with a formal complaint filed in court by one party against another, proceeds through a fact-finding stage and culminates in a trial, followed in some cases by an appeal finally disposed of by an appellate court from which there may be a further appeal that is either dismissed or decided by U.S. or a State Supreme Court. Most cases, even those that are resolved by the judicial system, are terminated before a verdict. A large number of potential criminal and civil cases do not enter the judicial system at all, often because the parties perceive the judicial system as too slow, cumbersome, and expensive to utilize. The breadth of the perceived necessity for ADR may be seen, at least in part, as a failure of the judicial system. One critic has charged that due to its obsessive perfectionism, the judicial system primarily benefits the very wealthy and their lawyers.[20]

The judicial system has responded to public dissatisfaction with litigation by incorporating arbitration, mediation, and other ADR techniques into itself. An early proposal to introduce more flexibility into the judicial system was the "multi-door courthouse" model described by Frank E. A. Sander in a landmark address to the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice on April 7-9, 1976. "[O]ne might envision by the year 2000 not simply a court house but a Dispute Resolution Center, where the grievant would first be channeled through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to his type of case."[21] Thus, trial court would be one door in a hall that would also include doors for the screening clerk, mediation, arbitration, fact-finding, malpractice screening panel, and an ombud.[22]

Widespread recognition that many disputes can be resolved through cooperative means or, at least, a less adversarial one, has fueled the growth of ADR and has led some experts to a partial reconceptualization of litigation's sometimes limited place in resolving disputes:

[20] Paul F. Campos, *Jurismania: The Madness of American Law* (Oxford University Press, 1998), 16-26.
[21] Frank E. A. Sander, "Varieties of Dispute Processing" in *Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79, 131 (1976). This conference is often referred to in the literature as the Pound Conference, as it was inspired by a famous address Dean Roscoe Pound made to the ABA in 1906 on the same topic.
[22] *Id.*

> While the court system will always be needed, it is not the appropriate place for all types of disputes. The adversarial court system is certainly appropriate for criminal cases, and for some civil cases, but many times the adversarial process is not the most advantageous venue for the parties. A major reason for party dissatisfaction is that people need to feel that they were able to participate in the process to feel that a just resolution has been reached. The adversarial system simply does not provide this opportunity to participate. In a classic litigation setting, arguments are made by attorneys and the final decision is made either by a judge or a jury of strangers, with little opportunity for the parties to have any real hand in the resolution, making parties more likely to feel "cheated" by the outcome. Whereas, ADR is an adaptive multi-process, party-designed procedure that allows underlying interests, not technical legal issues, to structure the agreement to all parties' satisfaction. Parties are allowed to actively participate in the creation of a solution, which increases the perception of a fair process. Perception of a fair process tends to lead to greater satisfaction with the outcome, even if it is not the party's ideal result.[23]

When a dispute arises, disputants usually first attempt to resolve it by informal negotiation. Negotiation involves an interchange between parties (and possibly their legal counsels) in an attempt to reach a compromise on their own, without a neutral third party.[24] Negotiation "is the preeminent mode of dispute resolution" and "is almost always attempted first to resolve a dispute." This method allows the parties to meet to resolve the conflict, allowing the parties themselves to control the process that leads to the solution.[25] Conceptually, ADR refers to any process or service that assists individuals or organizations to manage differences without resorting to litigation, prosecution, civil unrest, economic disruption, or violence. ADR is typically characterized by more formal proceedings that take place after informal negotiation has failed, and encompasses alternatives to the classical judicial process, particularly trials to a jury or judge, and subsequent appeals to higher courts. At the same time, the outcome of a judicial proceeding frequently involves ADR or a similar mode of resolution, when a settlement is reached through court sponsored mediation or through a settlement conference, wherein the judge may often act much like a mediator in settling the dispute without a trial.

ADR, then, is arguably more suitable than litigation for many disputes:

> First, ADR is generally faster and less expensive. It is based on more direct participation by the disputants, rather than being run by lawyers, judges, and the state. In most ADR processes, the disputants outline the process they will use and define the substance of the agreements. This type of involvement is believed to increase people's satisfaction with the outcomes, as well as their compliance with the agreements reached.

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[23] Amber Murphy Parris, "Alternative Dispute Resolution: The Final Frontier of the Legal Profession?" 37 J. Legal Prof. 295, 302-03 (2013) [internal quotation omitted].
[24] ADR Services, "Conciliation / Negotiation / Facilitation," accessed May 15, 2015, http://www.adrservices.org/conciliation.php.
[25] *Id.*

> Most ADR processes are based on an integrative approach. They are more cooperative and less competitive than adversarial court-based methods like litigation. For this reason, ADR tends to generate less escalation and ill will between parties. In fact, participating in an ADR process will often ultimately improve, rather than worsen, the relationship between the disputing parties. This is a key advantage in situations where the parties must continue to interact after settlement is reached, such as in child custody or labor management cases.[26]

Some skeptical observers view this approach to bargaining as implausibly prelapsarian and see little distinction between the nature of settlement negotiation, ADR, or litigation. Robert J. Condlin argues that negotiators can legitimately take advantage of such competitive factors as deception, surprise, stamina, and force of personality to obtain a favorable deal for a client, so long as they are polite and even tempered and argue from the law and the facts.[27] "The desire to do as well as possible for oneself is as much a feature of legal bargaining as it is of social life generally and as such, it is a feature that any viable theory of bargaining must recognize and take into account."[28]

In Fortune 1000 corporations, there has been a marked trend toward using ADR techniques in preference to litigation, mostly because ADR saves time and money and permits the company to better control the process.[29] Less important, although still significant, are disputants' desires to limit discovery, preserve confidentiality, maintain the relationship between the parties, and utilize a decider with expert knowledge.[30] The literature often discusses the differentiation between court-connected and other mediation: "court-connected" refers to any mediation that is under the supervision and control of the judicial branch. For instance, after a lawsuit is filed, the court may refer the matter to a mediation program that has been created by the court. ADR is not court-connected if no lawsuit has been filed, such as where a dispute between a manufacturer and a consumer goes to arbitration under the sales contract between the parties or a collective bargaining dispute is referred to arbitration under a labor/management contract.

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[26] *Id.*

[27] Robert J. Condlin, "Bargaining with a Hugger: The Weaknesses and Limitations of a Communitarian Conception of Legal Dispute Bargaining, or Why We Can't All Just Get Along," 9 Cardozo J. Conflict Resol. 1 (2007). But see Robert J. Condlin, "Bargaining without Law," 56 N.Y.L. Sch. L. Rev. 281 (2012) (legal bargaining depends primarily on skillful legal argument).

[28] *Id.* at 83.

[29] Thomas J. Stipanowich and J. Ryan Lamare, "Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations," 19 Harv. Negot. L. Rev. 1, 37-38 (2014).

[30] *Id.* at 38.

ADR PROCESSES

Today, ADR techniques are "used to settle a variety of disputes in American institutions, including the family, churches, schools, the workplace, government agencies, and the courts."[31] The most common ADR modalities are mediation and arbitration, although the practice of ADR includes a variety of other procedures.

An ADR process can be broadly classified as being determinative, evaluative, facilitative, or transformative. In a determinative process (such as arbitration), after the parties present arguments and evidence, the neutral makes a determination.[32] During an evaluative process (such as early neutral evaluation), a neutral actively advises the parties about the issues and possible outcomes. In a facilitative process, a neutral assists the parties in identifying disputed issues, considering alternatives, and seeking to reach an agreement about some issues or perhaps the whole dispute. The transformative approach attempts to reach beyond the particular dispute at issue to improve the underlying relationship between the parties.

Mediation

Mediation is a voluntary, informal process through which an impartial mediator assists the parties in reaching a mutually acceptable resolution of their dispute. Mediation is neither adjudicative nor explicitly determinative. The parties themselves decide if they agree to resolve the dispute and, if so, to determine the terms of the settlement or other *modus vivendi*.

As of 2011, almost all Fortune 1000 used mediation to resolve a wide variety of disputes, viz., commercial or contract, individual employment, consumer, corporate finance, environmental, intellectual property, personal injury, products liability, and real estate. Use of mediation has declined in construction cases, possibly due to the effects of the Great Recession on construction activity.[33]

There is a broad consensus among observers that mediation has proven itself a very useful procedure for resolving disputes:

> Obviously, there is much to commend in court-connected mediation and what it offers to people caught up in disputes. With the help of mediators, parties may find it more feasible to reflect on their legal and extra-legal needs, prioritize among these needs, engage in open and thoughtful conversation, develop integrative solutions, and even consider the mediators' dispassionate feedback regarding positions or expectations. Proponents of court-connected mediation can also point to a multitude of accomplishments. For example, and most strikingly, many cases settle in mediation. For the vast majority of those cases, litigants

[31] Brad Spangler, "Alternative Dispute Resolution (ADR)," in *Beyond Intractability* (June 2003), http://www.beyondintractability.org/essay/adr.
[32] Zekun Xie, "The Facilitative, Evaluative and Determinative Processes in ADR," http://www.xwqlaw.com/info/c47f5ff15b464882ad5c9a7f97338652 (October 12, 2011).
[33] "Living with ADR," 45.

> express satisfaction with the process and indicate that they had the opportunity to express themselves, that the other parties heard them, that they had input into the outcome, and that they view the process as fair. Additionally, parties rarely seek to undo the settlements reached in mediation, though this sometimes occurs. Parties generally view mediation as being as satisfactory or fair as trial, and sometimes even more so. Some research indicates that mediation saves time and costs for both courts and parties. Occasionally, mediation even achieves communication and outcomes that would be unlikely in other court-connected procedures. This catalogue of achievements clearly affirms the value of mediation.[34]

Perhaps the greatest advantages of mediation are the control each party has over the process and the opportunity to fashion a solution that is acceptable to both sides. In litigation and arbitration, a third party renders a judgment, almost always in favor of one side and against the other. With mediation, the parties themselves arrive at a resolution; each may garner some satisfaction of their needs and desires. Of course, settlements worked out by opposing counsel also require compromise from both sides, but the clients usually have little direct control of the settlement terms. Litigation settlements typically involve the payment of a sum of money from one party to another and rarely include any attempt to repair a satisfactory relationship between them.[35]

Mediation may better permit the parties to address their true needs because of its voluntariness and informality.[36] Disputes frequently mediated include those involving the family (e.g., divorce, custody, or support), elder care, business relations (e.g., contract disputes), neighbors, the workplace, landlords and tenants, consumers, decedents' estates, personal injury, and professional practice.[37]

> By using an impartial third party, communication and negotiation are encouraged between the parties in a non-adversarial manner. These communications are not only privileged, but also are not subject to discovery or admissible as evidence. These factors distinguish mediation from other forms of dispute resolution and make it the preferred choice for parties interested in obtaining an acceptable outcome in a short period of time and at the lowest possible cost.[38]

Other observers advocate that mediation is often a preferable alternative to litigation through the judicial system:

> We are in the midst of a litigation crisis. The high cost and long delays associated with the trial of civil matters often make litigation an impractical method of resolving disputes. It is not uncommon for the attorney's fees, expert witness fees, jury fees, court reporter fees, and other related costs to exceed the amount in

[34] Nancy A. Welsh, "The Current Transitional State of Court-Connected ADR," 95 Marq. L. Rev. 873, 873-74 (2012).
[35] *Id.* at 879-80.
[36] "OGC Mediation Handbook," 2.
[37] Allegheny County Bar Association, "Frequently Asked Questions about Mediation," accessed May 18, 2015, http://www.acba.org/portals/0/pdf/FAQ_Mediation_ADRbrochure.pdf.
[38] "OGC Mediation Handbook," 2.

dispute. Parties increasingly find that they are spending more to litigate than the cost to settle the matter.

The increasing number of lawsuits filed each year is indicative of the unwillingness or inability of parties and their attorneys to effectively utilize negotiation to resolve disputes.

Because the current legal environment discourages the early settlement of disputes, society is demanding a new approach for resolving disputes more efficiently. That new approach is mediation.[39]

American businesses and corporations should practice alternative dispute resolution by implementing mediation-approach programs into their business plans to settle customer, employee and contractual disputes in order to save money and resources beyond dollars rather than immediately resorting to traditional litigation. In-house ADR programs and policies, specifically mediation, enhance corporations' business relationships, save valuable time, and offer significant cost savings in comparison to traditional litigation.

Mediation offers disputants important advantages over litigation and even arbitration. The American Arbitration Association reported that more than 85% of all disputes that went to mediation resulted in a settlement. A 2003 AAA study concluded that "a stream of evidence has long suggested that there is a real business value to the rapid, comparative inexpensive [sic], and easily accessed alternative to the judicial system that ADR represents."[40]

A major social science study of three court programs in different parts of the U.S. provided evidence that people who are faced with a dispute and have not yet initiated a dispute resolution procedure ranked their preferences as being mediation, negotiation by attorneys with clients present, or trial to a judge over other procedures.[41] The least liked alternatives were binding and non-binding arbitration.[42]

Usage of Mediation

Many companies have formed conflict management programs or corporate ADR programs that use mediation. Comprehensive surveys of ADR usage by the Fortune 1000 corporations were done in 1997 and 2011. When survey results are combined, they show a trend toward greater use of mediation and other ADR modalities, while the use of arbitration is generally falling.

[39] Michael Roberts, "Why Mediation Works" (August 2000), http://www.mediate.com/ articles/roberts.cfm.
[40] Drew L. Mallick, "U.S. Corporations Should Implement In-House Mediation Programs into Their Business Plans to Resolve Disputes," Harv. Negot. L. Rev. (March 18, 2009), http://www.hnlr.org/2009/03/us-corporations-should-implement-in-house-mediation-programs-into-their-business-plans-to-resolve-disputes/.
[41] Donna Shestowsky, "The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures *Ex Ante*," 99 Iowa L. Rev. 637, 673 (2014).
[42] *Id.* at 676.

> As a group, corporate attorneys have moderated their expectations for ADR. At the same time, more corporations have embraced mediation and foresee its continuing use for a wide spectrum of disputes. Many companies are also employing other informal approaches to early resolution of conflict and integrated systems for addressing workplace conflict. Binding arbitration has reached its tipping point: while some longstanding concerns about arbitration processes have lessened, fewer major companies are relying on arbitration to resolve many kinds of disputes (important exceptions being consumer and products liability disputes), and they are evenly divided regarding its future use.[43]

There are several compelling reasons, then, to use mediation in a wide range of disputes. These advantages include:

- avoiding costs and prolonged litigation;
- achieving quick resolution of claims and disputes;
- permitting the parties to control the proceeding;
- greater likelihood of reaching an agreement that satisfies all parties;
- avoiding appeals or adverse publicity;
- eliminating outside counsel expenses; and
- ability of parties to develop a mutually beneficial relationship.[44]

The Advisory Committee believes that, among the different ADR procedures, mediation is the one whose development should be most emphasized at this time. Of all the ADR modes studied, mediation is the one that ordinary citizens prefer and that they best understand.[45]

Arbitration

Arbitration is "a simplified version of a trial involving limited discovery and simplified rules of evidence."[46] It "empowers a third party to make a decision that will bind the parties. In arbitration, each side presents its case, but it is the arbitrator who decides how the case will be resolved. The results of arbitration are legally enforceable and often reviewable by the courts."[47] In Pennsylvania, arbitration is regulated by 42 Pa.C.S. Ch. 73 and Pa.R.C.P. 1301–1314.

Arbitration has also been defined as an adjudicatory process in which a neutral third party is empowered to decide disputed issues after hearing evidence and arguments from the parties. The arbitrator's decision may be binding on the parties either through agreement or operation of law. Arbitration may be voluntary (i.e., where the parties agree to use it). Mandatory arbitration often applies under consumer product and labor law contracts. It is common for arbitrators to work in a three-member panel, where each side selects one arbitrator and those two select the third. In court-

[43] "Living with ADR," 5.
[44] See "OGC Mediation Handbook," 1-2.
[45] Barry Edwards, "Renovating the Multi-Door Courthouse: Designing the Trial Court Dispute Resolution Systems to Improve Results and Control Costs," 18 Harv. Negot. L. Rev. 281, 325, 327-28 (2013).
[46] GAO, "Alternative Dispute Resolution,
[47] "OGC Mediation Handbook," 1.

connected arbitration, the court selects three arbitrators at random from a pool of volunteer attorneys. In many courts, mandatory nonbinding arbitration applies to all civil cases under a certain dollar amount.[48] The losing party at the arbitration may appeal the result to the court of common pleas, but must pay costs that are not recoverable even if that party prevails.

Advantages associated specifically with arbitration include cost saving, promptness, neutral expertise, limited discovery, confidentiality, avoidance of legal precedent, and preservation of ongoing relationships. Writing in 2002, one commentator took a very affirmative view of arbitration:

> By its nature traditional litigation is very expensive, particularly if either party chooses to make it so. The cost of an arbitration, if efficiently run, can be but a fraction of the cost of traditional litigation. A ratio of three or four to one, litigation versus arbitration, is a fairly realistic estimate, and a reasonable expectation is that the cost of an arbitration will not be in excess of half the cost of litigating.
>
> Properly managed, arbitration of a simple claim may well be handled in from three to six months from filing a notice of arbitration to entry of the award. An arbitration of a complex claim, if properly managed, may well be handled in nine to eighteen months from filing notice of arbitration to entry of award. On average, the time to decision by a trial court on the same matter may well be two to three times that long, and if appeals are taken, from one to three or more additional years to reach a final judgment, no longer subject to appeal.
>
> The advantage of having a neutral arbitrator, expert in the field, with years of experience on the subjects involved in the dispute to be resolved is obvious.
>
> Depositions, document requests, interrogatories, request for admissions and the like are so often abused in the litigation process that parties assign avoidance of limitless discovery as a major reason to arbitrate.
>
> Trials in the traditional litigation process are public. Arbitration hearings and arbitration proceedings are private, and can be made expressly so in the dispute resolution clause.
>
> Recent surveys have identified the greater likelihood of amicable ongoing business relations between the disputants in arbitration as opposed to litigation as a significant reason why many parties prefer arbitration. This seems to be a reasonably based perception since litigation often degenerates to something only a little bit short of total war. Arbitration is not always a lovefest, but the weapons to wage all-out war, such as are afforded in the discovery process, either are not there or may be reined in and controlled in advance by the terms of the arbitration clause

[48] GAO, "Alternative Dispute Resolution."

in the underlying contract, or by rulings of the arbitrators in the course of the arbitration.[49]

The expansion of arbitration was assisted by Federal statutory law, assisted by the jurisprudence of the Supreme Court. The Court has read the Federal Arbitration Act[50] to embody a general public policy in favor of arbitration, and, in furtherance of that policy, the act preempts state law, despite the lack of any clear statement to that effect in the statutory text.[51] More recently, it has upheld the validity of provisions in mandatory arbitration clauses in consumer contracts that bar consumers' right to file a class action against the manufacturer.[52] Such contract clauses significantly impede consumers' ability to obtain a remedy for unfair business practices.[53] The basis for the Court's ruling is that permitting class actions undermines the pro-arbitration policy by subordinating arbitration to class action.[54]

The inclusion of mandatory arbitration clauses in contracts where the parties have unequal bargaining power, especially consumer contracts between private individuals and large corporations has generated harsh criticism from legal scholars.[55] In these settings, the corporation not only has the advantage of having drafted the contract, along with greater resources and sophistication, but also the inclination of the arbitrators to favor the repeat player.[56]

In recent years, the use of arbitration may have declined, as it has come to be viewed by some as a procedure that offers few advantages over litigation. Arbitration has evolved to take on more and more of the trappings of litigation, such as motions practice and extensive discovery. As a result, complaints have arisen that arbitration has become as slow and costly as litigation.[57] At the same time, arbitration has to some extent lost the advantage of finality, as arbitration awards can be successfully challenged in court. "At least in some states, arbitration awards may be as vulnerable to reversal as trial court judgments."[58] In part, this has reflected a tendency among businesses to expand the grounds for review in arbitration contracts.[59] Despite these problems, arbitration remains a very important form of ADR, and is unlikely to be marginalized, as court trial has become.[60]

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[49] William G. Paul, "Arbitration vs. Litigation in Energy Cases," First Annual Energy Litigation Program (Houston, Tex., Nov. 7-8, 2002), 2002PaulArbitrationVLitigationInEnergyCases.pdf.
[50] 9 U.S.C. § 1 et seq.
[51] *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). See Margaret L. Moses, "Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress," 34 Fla. St. U. L. Rev. 99 (2006).
[52] *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011). For a general discussion of Supreme Court cases on the FAA, see Ronald G. Aronovsky, "The Supreme Court and the Future of Arbitration: Towards a Preemptive Federal Arbitration Procedural Paradigm?" 42 Sw. L. Rev. 131 (2012).
[53] Jean R. Sternlight, "Creeping Mandatory Arbitration: Is It Just?" 57 Stanford L. Rev. 1631 (2005).
[54] *Concepcion*, 465 U.S. at 1750.
[55] Sternlight at 1632.
[56] *Id.* at 1648-51.
[57] Jacqueline Nolan-Haley, "Mediation: The 'New Arbitration,'" 17 Harv. Negot. L. Rev. 61, 66-67 (2012); Thomas J. Stipanowich, "Arbitration: The 'New Litigation,'" 2010 U. Ill. L. Rev. 1, 15 (2010).
[58] *Id.* at 16.
[59] *Id.* at 17.
[60] *Id.* at 5-6.

Hybrid Mediation-Arbitration Procedures

A variety of procedures have been used that combine mediation with arbitration.[61] All of them require various compromises of the ethical requirements of the avoidance of conflict of interest, impartiality, confidentiality, and fairness. It has been argued that parties should be allowed to assume the risk of ethical flaws in the interests of speed and finality if they are fully informed of the advantages and disadvantages of the proceeding they elect. Because of the issues of professional ethics, some neutrals will not participate in such proceedings and some professional organizations do not endorse them, although neither do they prohibit them.

The most prevalent is "med-arb," where the parties first attempt to mediate the dispute. If mediation fails, the dispute goes to binding arbitration. In order to save the cost of bringing in a new decision maker who is unfamiliar with the case, the mediator in the first phase usually serves as the arbitrator in the second. It has been argued that this arrangement may lead parties to not be as candid in the mediation stage and that both confidentiality and impartiality are undermined. The neutral cannot be expected to disregard the knowledge he or she has obtained in the mediation stage after the proceeding moves to the arbitration stage. If it can be argued that the award was based on information that the neutral should have disregarded, the award may be vulnerable on appeal, thereby undermining finality and cost-effectiveness.[62]

Another variation is "arb-med," in which the dispute is arbitrated first but the award is kept secret from the parties. They then attempt to mediate the dispute, using the neutral who drafted the award. The parties may feel greater pressure to come to a mediation settlement, knowing that the award may be unfavorable. If the parties fail to settle through mediation, the award goes into effect. Unlike med-arb, the neutral cannot change the award on the basis of additional knowledge he or she acquired in the mediation phase.

Other hybrid proceedings include braided med-arb (allowing the parties to stop the arbitration phase and go back to mediation) and med-arb with optional withdrawal (a party can refuse to arbitrate after the mediation phase).

Other ADR Procedures

Besides mediation and arbitration, there are numerous other procedures that are used to settle disputes outside of litigation. They show various degrees of institutionalization, but none are as well-established as mediation or arbitration, nor do they have as elaborate organizational structures, certifications, and professional codes.

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[61] See generally Richard Fullerton, "Med-Arb and Its Variants: Ethical Issues for Parties and Neutrals," 65-OCT Disp. Resol J. 52 (2010).

[62] Brian A. Pappas, "Med-Arb and the Legalization of Alternative Dispute Resolution," 20 Harv. Negot. L. Rev. 157 (2015). (This article does not address procedures where the mediation and arbitration phases are conducted by different neutrals.)

The following list is a fairly comprehensive but not exhaustive listing of these procedures.

- Conciliation: A process that involves a neutral third party to communicate with the parties as they exchange information and review settlement options.[63]

- Facilitation: This process typically involves the use of a neutral to help individuals conduct productive discussions about complex, sensitive, or potentially controversial issues. [64] It tends to be more informal than mediation.[65]

- Early neutral evaluation: A neutral is informally retained by the parties and counsel to assess the strengths and weaknesses of the parties' respective positions, often including a prediction of how the matter may be decided in court. The process helps each side view the case from the other's perspective and may assist the parties to resolve the dispute. The recommendations of the neutral may be influential but are not binding. The evaluation often occurs early in the pretrial stage.[66]

- Collaborative practice: The parties describe the nature and scope of the matter in dispute in a contract between the parties, who are both represented by counsel. The contract obligates the parties to voluntarily disclose relevant information and material and use good faith efforts to reach a mutually acceptable settlement. The contract further stipulates that the representation by both attorneys in the matter terminates if either side files a lawsuit. The parties may engage mental health and financial professionals, and their engagement also terminates if there is a lawsuit. The parties may jointly engage other experts as needed.[67]

- Fact finding: A neutral conducts an independent investigation into the cause of the disagreement. The fact finder interviews both sides, gathers additional information, and presents findings and possible solutions to the parties. The findings and recommendations are not binding, but are incorporated into the negotiations between the parties and their counsel. The fact finder usually does not directly participate in the negotiation process. [68]

- Minitrial: Parties present a limited version of the case before a neutral, usually late in the pretrial process of litigation. Also in attendance are the decision makers from both sides, who witness the presentation of trial evidence. Once the minitrial is concluded,

[63] *Id.*
[64] EPA, "What Is ADR?," accessed December 17, 2014, http://www.epa.gov/region1/enforcement/adr/whatis.html.
[65] ADR Services, "Conciliation/Negotiation/Facilitation."
[66] ADR Services, "Other Processes," accessed May 15, 2015, http://www.adrservices.org/other-processes.php.
[67] International Academy of Collaborative Professionals, "What Is Collaborative Process?", accessed November 24, 2014, https://www.collaborativepractice.com/public/about/about-collaborative-practice/what-is-collaborative-practice.aspx.
[68] *Id.*

the neutral works with the decision makers independently in the hopes of facilitating a settlement. The neutral does not, however, render a decision.[69]

- Conflict coaching: The conflict coach is a neutral who works one-on-one with an individual experiencing conflict with another person. The process enables the individual to talk about the conflict, consider options for managing it, and design an approach to discuss the conflict with the other person.[70]

- Ombud: An ombud is a "neutral third party designated by an organization to assist a complainant in resolving a conflict. He or she provides confidential counseling, develops factual information, and attempts conciliation between disputing parties." [71]

- Structured dialogue: "Structured dialogue represents a class of dialogue practices developed as a means of orienting the dialogic discourse toward problem understanding and consensual action. Whereas most traditional dialogue practices are unstructured or semi-structured, such conversational modes have been observed as insufficient for the coordination of multiple perspectives in a problem area. A disciplined form of dialogue, where participants agree to follow a framework or facilitation, enables groups to address complex shared problems." [72]

- Consensus building: Mediation of a conflict that involves many parties and numerous, complex issues.[73]

Apology Letters in Healthcare

While not strictly speaking a formal ADR procedure, in some states, apology letters have helped to resolve disputes between healthcare providers and patients, often aided by statutes that bar the letter from use in evidence against the healthcare provider:

> Healthcare providers have long been cautioned to "say nothing" about unanticipated outcomes because of the potential their statements may be used in subsequent litigation. Silence on the topic of an unanticipated outcome is often received by the patient to mean his or her healthcare provider is callous or indifferent to the situation. The fear of being named in a medical malpractice suit often makes a bad situation worse.

[69] *Id.*
[70] Mediate.com, "Conflict Coaching," accessed December 17, 2014, http://www.mediate.com/articles/AmadeiR1.cfm.
[71] GAO, "Alternative Dispute Resolution," 12.
[72] Wikipedia, s.v. "dialogue," accessed April 8, 2016, https://en.wikipedia.org/wiki/Dialogue#cite_note-32.
[73] University of Colorado, Conflict Research Consortium, International Online Training Program on Intractable Conflict, "Consensus Building" 1998, http://www.colorado.edu/conflict/peace/treatment/consens.htm.

> In an effort to open the lines of communication, removing a healthcare provider's fear of discussing unanticipated outcomes, many states have adopted what are referred to as "sorry statutes" or "apology statutes." These statutes generally prevent the admissibility of comments made by healthcare providers when expressing an apology or sympathy to a patient for an unanticipated medical outcome. By legally assuring healthcare providers their words will not be used against them, it is hoped that better communication between a physician and patient will emerge.[74]

The University of Illinois Medical Center, which implemented a medical apology program, studied 37 cases where the center admitted preventable errors and apologized and found that only one patient filed suit. Similarly, the University of Michigan health system saw its malpractice claims drop from 262 in August 2001 to 83 in August 2007, thereby reducing legal costs by two-thirds.[75] During the six-year period from August 2001 to August 2007, "the average claims processing time dropped from 20.3 months to about 8 months," and "average litigation costs have been more than halved."[76]

Restorative Justice

Closely tied to ADR is the concept of restorative justice, either as a complement or an alternative to traditional justice, particularly in the context of victim/offender dialogue in criminal and juvenile cases. Restorative justice has been described as follows:

> [All approaches to restorative justice] provide the victim, offender and members of the affected community the opportunity to have some form of encounter (meeting)—away from the traditional courtroom environment—with the assistance of a facilitator. The role of the facilitator is to promote an environment of dialogue between the participants. The scope of dialogue differs by each encounter, and can include providing the victim with answers to the "why" and "how" of the crime itself, as well as an opportunity for the victim (and many times members of the affected community) to explain the effects of the crime to the offender on a one-to-one basis, and to allow the offender to make meaningful and appropriate amends with the victim and relevant community members through an agreement reached between the parties. When these goals can be met the parties may be afforded some degree of healing and community re-integration. These types

[74] Jeffrey Segal and Michael Sacopulos, "Apology Laws: A Variety of Approaches to Discussing Adverse Medical Outcomes with Patients and Others," 13 Connections 26 (American Health Lawyers Ass'n, November 2009). \http://www.medicaljustice.com/wp-content/uploads/2012/10/ahla_and_im_sorry_laws_AC_Nov09.pdf .

[75] Marc E. Williams, "Sorry Works," 31 National L.J. 23 (Apr. 13, 2009); Richard C. Boothman, Amy C. Blackwell, Darrell A. Campbell, Jr., Elaine Commiskey, and Susan Anderson, "A Better Approach to Medical Malpractice Claims? The University of Michigan Experience," 2 J. Health & Life Sciences Law 144 (January 2009), http://www.med.umich.edu/news/newsroom/Boothman%20et%20al.pdf.

[76] Boothman, "Better Approach."

> of positive outcomes are arguably difficult to achieve using the traditional approach to criminal justice.[77]

Restorative justice thus offers an alternative to the traditional juvenile and criminal justice systems and what can be perceived as harsh school discipline processes. Rather than focusing on punishment, restorative justice seeks to repair the harm done through face-to-face dialogue. When successful, it results in a consensus based plan that meets the needs identified by the victim in the wake of a crime. In applications with youth, it can prevent suspension or expulsion from school, or contact with the juvenile justice system. Restorative justice can permit victims and their families to have a direct input in determining the outcome, while reestablishing the community's role in supporting all parties affected by crime. Several restorative models have been shown to reduce recidivism and can help to minimize the social and fiscal costs of crime.[78]

A leading proponent of restorative justice, citing social science research, argues that restorative justice produces better results in many cases than retributive justice in terms of satisfaction of victim, offender, and community, and lower recidivism rates. The advantages to the victim include his or her participation in the process, and the opportunity to confront the offender in a relatively unstructured setting. Reconciliation is often facilitated, not only by a mediator, but also by the presence of the associates of the victim and the offender. Both parties can participate in the determination of the restitution or other demonstration of remorse that the offender affords the victim.[79]

NATIONWIDE GROWTH OF ADR

The use of mediation to resolve conflicts and disputes has grown tremendously in the United States. "Prior to [the 1980s] mediation was mostly employed in the field of labor relations, where a system of both federal and state mediators was and is used to resolve an array of public disputes." Mediation was later adopted to resolve divorce issues, then quickly expanded to resolve community and employment conflicts, then more broadly to settle interagency and intra-agency business and organizational disagreements.

> National organizations dedicated to the use of mediation arose and grew. Bar associations began to develop special committees on alternative processes to resolve disputes, mediation being one of them. Courts began to build mediation into their own structures as first steps toward bringing litigation to an end. Some states began to develop criteria that governed mediators and certification processes. Certain state governments established statewide offices on mediation and these offices became the central focus point and clearinghouses for mediation to become

[77] W. Reed Leverton, "The Case for Best Practice Standards in Restorative Justice Processes," 31 Am. J. Trial Advoc. 501, 504-05 (2008).
[78] National Council on Crime and Delinquency, "What Is Restorative Justice?" accessed November 10, 2015, http://nccdglobal.org/what-we-do/major-projects/restorative-justice-project.
[79] John Braithwaite, "Restorative Justice: Assessing Optimistic and Pessimistic Accounts," 25 Crime & J. 1 (1999).

established. Judges began referring cases to mediation and the general public began making inquiries about it and using it as their own process of choice. [80]

It is necessary to focus on underlying interests rather than on hardened positions, to maintain a balance between the desire to settle and the need for fairness, and to better understand the roots of organizational conflicts.[81] In the mid-1990s, approximately 80 percent of private firms used mediation to resolve workplace disputes, 39 percent used peer review panels, and 19 percent used arbitration.[82] Mediation, peer panels, management review and dispute resolution boards, and arbitration were "useful in resolving workplace disputes, thereby avoiding more formal dispute resolution processes."[83] Success in planning, implementing, and evaluating ADR programs generally depended on the commitment of organization management in establishing and maintaining ADR as a policy, employee involvement in the programs' development, and early intervention in disputes.

> Private and federal organizations alike turned to ADR to reduce their involvement in costly and time-consuming processes: lawsuits and—especially in the federal sector—formal administrative redress procedures. Private employers were adopting ADR approaches because of their concerns about the costs—in time, money, and good employee relationships –of dealing with employment-related lawsuits and discrimination complaints. Among federal agencies, the primary reason officials reported for making ADR processes available has been to avoid the costs—especially those involving time and organizational efficiency—associated with the redress system.[84]

Business and governmental entities also began to recognize the difference between position-based and interest-based dispute resolution:

> Traditional methods of dispute resolution—lawsuits in the private sector, formal administrative redress procedures in the federal sector—are predominately position-based. Simply stated, each disputant stakes out a position—such as a complaint of discrimination or a defense against a complaint—and hopes to win the case. But interest-based dispute resolution, which is the basis for some ADR techniques, focuses on determining the disputants' underlying interests and working to resolve their conflict at a more basic level, perhaps even bringing about a change in the work environment in which their conflicts developed.[85]

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[80] Ann L. Begler, "Transforming Pennsylvania into a Mediation Friendly State" (Pennsylvania Bar Association, Alternative Dispute Resolution Committee; Allegheny County Bar Association; and Pennsylvania Council of Mediators" (2003), 4.
[81] *Id.* at 4.
[82] GAO, "Alternative Dispute Resolution," 14.
[83] *Id.* at 15.
[84] *Id.* at 8.
[85] *Id.* at 10-11.

Many observers, including a consensus of the SR 160 Advisory Committee, are disappointed that mediation and other ADR techniques are underutilized in Pennsylvania. It appears to them that ADR is not applied as vigorously in the Commonwealth as it is in other states.

As ADR has grown in popularity, problems have arisen as a result. Mediation has become more like arbitration in that many mediators have taken an adjudicative approach to mediation, ignoring facilitative and evaluative strategies.[86] In part, this is because many lawyers assume their ethical standards require a litigation approach that can be inappropriate or counterproductive in a consensual process like mediation. Many attorneys approach mediation in the same adversary spirit as litigation.[87] Consequently, the advance of mediation has stalled out in many jurisdictions. Enthusiasm for mediation has waned as practitioners have failed to maintain the differences between mediation, litigation and arbitration. The consequence is the loss of "the potential of party empowerment, conciliation, informality, self-determination, creativity, and confidentiality."[88]

REGULATORY LEGISLATION

One avenue for reform of ADR proceedings is legislation directly aimed at the process itself. In this regard, the Uniform Arbitration Act and the proposed Revised Uniform Arbitration Act are useful in that they are comprised of rules that reflect the consensus of national experts in the field.

The authors of a leading treatise on mediation caution that legislation aimed at regulating the practice of mediation should be carefully considered because it is likely to be counterproductive. Their article lists six issues that should be addressed:

- Will the proposed law achieve its goals in light of mediation confidentiality?
- Will mediation participants be aware of the new law?
- Does the law conflict with deeply ingrained practices?
- Are the lines between adjudication and mediation muddied by the law?
- What are the unintended consequences of the law?
- Can the goals for the law be achieved without the law?[89]

[86] Jacqueline Nolan-Haley, "Mediation: The 'New Arbitration,'" 17 Harv. Negot. L. Rev. 61 (2012); Douglas Yarn, "The Death of ADR: A Cautionary Tale of Isomorphism through Institutionalization," 108 Penn St. L. Rev. 929, 1014-15 (2004).
[87] See Kimberlee K. Kovach, "The Intersection (Collision) of Ethics, Law, and Dispute Resolution: Clashes, Crashes, No Stops, Yields, or Rights of Way" 49 S. Tex. L. Rev. 789 (2008).
[88] Kimberlee K. Kovach, "The Mediation Coma: Purposeful or Problematic," 16 Cardozo J. Conflict Resol. 755, 765 (2015).
[89] Sarah R. Cole, Craig A. McEwen, Nancy H. Rogers, et al., "Where Mediation Is Concerned, Sometimes 'There Ought Not to Be a Law,'" *Dispute Resolution Magazine* (Winter 2014), 34-38.

APPENDIX C:
BEST PRACTICES

SR 160 mandates the study to "identify relevant best practices in the delivery of ADR services locally and nationally and how to improve conflict resolution in this Commonwealth by incorporating these best practices."[90] The term "best practices" is most established in the context of corporate business management. It is defined as "a procedure that has been shown by research and experience to produce optimal results and that is established or proposed as a standard suitable for widespread adoption."[91]

As applied to dispute resolution, the best practices concept raises a number of questions:

- Who determines what practices qualify as "best"?
- How are the best practices to be determined?
- What kinds of research and evidence are to be considered?
- What aspects of each ADR technique should best practices address?
- Should compliance with best practices be enforced? If so, how and by whom?
- Should compliance with best practices be a condition for licensure or certification?
- How should compliance by a provider be assessed?

The best practices approach to management and regulation should be employed cautiously in the ADR context. This report lists 13 different ADR processes, and this is probably not a complete list; new varieties of ADR are probably in development even as this is being written. Further, ADR is a continually evolving field. One of the most appealing features of ADR is its adaptability to various kinds of disputes and to the innumerable variations in personality and circumstance within categories of superficially similar cases. It is likely counterproductive to attempt to micromanage ADR by overly voluminous, prescriptive, detailed, and uniform practice codes.

Ethical standards for any particular field of practice often provide examples of the formalization and utilization of best practices. Ethical standards are established by a consensus of leaders in the profession. Typically, an established professional organization decides to promulgate or revise ethical standards and appoints a committee to draft them in concert with representatives from related fields. After draft standards are written, they are submitted to the organization's membership for comment. The draft is revised in light of the comments until it is formally approved by the organization.

[90] 2005 SR 160, 3, ll 6-9.

[91] Merriam-Webster, s.v. "best practice," http://www.merriam-webster.com/dictionary/best%20practice (visited April 12, 2016).

Writing in the context of restorative justice, W. Reed Leverton identifies four areas where best practice standards are needed: (1) facilitator competence and impartiality; (2) voluntary participation; (3) physical psychological, and legal safety; and (4) confidentiality.[92]

Ethical Standards for Mediation

The American Bar Association (ABA), the American Arbitration Association (AAA), and the Association for Conflict Resolution (ACR) adopted identical Model Standards of Conduct for Mediators, which were published in September 2005.[93] There are nine standards: (I) Self-Determination; (II) Impartiality; (III) Conflicts of Interest; (IV) Competence; (V) Confidentiality; (VI) Quality of the Process; (VII) Advertising and Solicitation; (VIII) Fees and Other Charges; and (IX) Advancement of Mediation Practice. These Model Standards are set forth as Appendix A.

The Association of Family and Conciliation Courts (AFCC) has adopted Model Standards for Family and Divorce Mediation that are broadly similar to the ABA/AAA Standards. The AFCC model includes additional standards that are specific to its work in the resolution of family conflicts.

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

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

- A family mediator shall recognize a family situation involving domestic abuse and take appropriate steps to shape the mediation process accordingly.[94]

The Final Report of the ACR Ethics Committee stated Ethical Principles that apply to ACR neutrals. These require that he or she "adhere to the highest standards of integrity, impartiality and professional competence in rendering her or his professional service."[95] A neutral

> must respect the principle of individual integrity by ensuring that in dispute resolution proceedings, other than arbitration or other leader-directed models of dispute resolution, decision-making authority rests with the participants. The role of a neutral shall include assisting participants in identifying issues, reducing obstacles to communication, maximizing the exploration of alternatives and helping the participants reach voluntary agreements.[96]

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[92] W. Reed Leverton, "Best Practices in Restorative Justice," 507.
[93] Model Standards of Conduct for Mediators (September 2005), http://www.mediate.com/articles/model_standards_of_conflict.cfm#LinkTarget_391.
[94] Model Standards of Practice for Family and Divorce Mediation, http://www.mediate.com/articles/afccstds.cfm.
[95] Association for Conflict Resolution, "Final Report of ACR Ethics Committee: Ethical Principals," (May 2010), http://www.imis100us2.com/acr/ACR/About_ACR/StandardsPrinciples/ACR/Resources/Standards_of_Practice.aspx?hkey=6b45cbc5-753f-45b8-87d4-f5dfb962002f.
[96] Association for Conflict Resolution, "Final Report of ACR Ethics Committee: Ethical Principals," (May 2010),

Ethical Standards for Arbitration

The ABA and the American Arbitration Association jointly published the Code of Ethics for Arbitrators in Commercial Disputes. These standards are set forth under ten canons that are similar to the standards for mediators, while including some specific to arbitration:

- An arbitrator should make decisions in a just, independent and deliberate manner.

- Arbitrators appointed by one party have a duty to determine and disclose their status and comply with this code, except as specifically exempted.[97]

Among other similar sets of standards, the AAA has a Labor Neutrals Code of Professional Responsibility.

SUBCOMMITTEE OBSERVATIONS AND RECOMMENDATIONS

In the course of deliberations for this study, some of the subcommittees made observations and recommendations relating to best practices or standards.

Subcommittee on Business, Commercial, and Personal Injury Cases made the following recommendation:

- Neutrals who participate in resolving commercial disputes and personal injury cases should be required to adhere to the best practices available for resolving such disputes, including compliance with ethical standards, providing a statement of qualifications, writing a description of the procedures of the process, and providing a written fee agreement. They should possess a level of competence and expertise that instills confidence in the parties involved in the ADR process.

Subcommittee on Community, Juvenile Delinquency, and Corrections made the following recommendation regarding community mediation centers (CMCs):

- CMCs should develop best practices standards to improve services to individuals throughout Pennsylvania. These standards should include the following:

http://www.imis100us2.com/acr/ACR/About_ACR/StandardsPrinciples/ACR/Resources/Standards_of_Practice.aspx?hkey=6b45cbc5-753f-45b8-87d4-f5dfb962002f.

[97] ABA and AAA, "The Code of Ethics for Arbitrators in Commercial Disputes," https://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_003867&revision=latestreleased.

Ethics policies. A CMC should develop its own formal, written ethics policies. Most CMCs do not have tailored policies and instead use the policies developed by the Pennsylvania Council of Mediators or the Association of Conflict Resolution.[98]

Funding sources. A CMC should attempt to maintain multiple sources of funding: state expenditures, fees for service, donations, fundraising events, and contributions from foundations, corporations, and other businesses.

Fees for service. A CMC should provide a flexible fee-for-service arrangement with a sliding scale of fees based on a party's income. However, a CMC should not turn away a client simply because he or she is unable to pay for mediation services. A CMC should consider charging higher fees for business, commercial, or congregational services.

Fees for training. A CMC that offers training in basic mediation and other conflict resolution techniques should charge a flat fee per course, with lower rates available for volunteers and early registrants.

Volunteers. CMCs generally have paid staff but rely heavily on volunteers to provide services. Volunteers should undergo training and an interview process and be subject to observation and oversight. Ongoing mentoring opportunities should also be available. Background checks for child abuse and other criminal offenses should be required for volunteers involved in cases that include minors. The amount of training required for mediation and other services should range from 24 to 40 hours.

Mediator certification. A CMC should require a mediator to complete all necessary training and continuing education. A mediator should receive a certificate of completion for verification purposes.

Screening. Referrals for mediation should be screened for appropriateness by telephone or face-to-face meetings. In cases involving couples, a CMC mediator should screen for domestic violence.

Accessibility. A CMC should be accessible to individuals with disabilities. If ADR programs and services are not held within a CMC office, they should be should be available in convenient locations, such as local community centers, churches, or other public meeting spaces.

Language barriers. Programs and services should assist non-English speakers, especially those whose native language is Spanish. Interpreters should be available for individuals who do not speak English or who speak English as a second language.

[98] The National Association for Community Mediation (NAFCM) and the Maryland Mediation and Conflict Resolution Office (MACRO) provide other comparable models of best practices.

Cultural considerations. A CMC should respect and understand the culture of, and the problems and experiences arising within Pennsylvania's diverse communities, in light of the increasing use of mediation by persons from different demographic groups. A CMC should optimally demonstrate cultural competence, or at least cultural sensitivity.[99] A CMC should maintain appropriate statistics in order to better serve individuals of different cultures.

Exit surveys. A CMC should use exit surveys to evaluate services and measure client satisfaction.

Subcommittee on Family Law made the following observation:

> There are no standards of practice regarding training, qualifications, accountability, and experience for private individuals conducting ADR in domestic relations matters (other than the minimum requirements for custody mediators in court-referred cases).

The Subcommittee recommended:

- Conditions for qualification as a mediator in custody actions should include successful completion of at least 40 hours of basic divorce and custody training, including a minimum of four hours on domestic and family violence and child abuse.

- Ethical standards and best practices should be established for ADR in discrete populations, such as the elderly.

Subcommittee on Schools and Education made the following recommendations:

- The Pennsylvania Office of Dispute Resolution (ODR) should revise confidentiality policies and rules to conform to 42 Pa.C.S. § 5949.

- ODR regulations and policies should incorporate best practices standards, along with the mediation requirements set forth in 34 C.F.R. § 300.506 and the procedural safeguards under 20 U.S.C. § 1415.

[99] "Cultural competence" is defined as the ability to understand, appreciate, and interact with persons from cultures or belief systems other than one's own. The Free Dictionary, http://medical-dictionary.thefreedictionary.com/cultural+competence.

APPENDIX D: PUBLIC EDUCATION AND ACCESS

SR 160 directs the study to "develop a plan for educating the citizens of this Commonwealth about conflict resolution in general and ADR services in particular and ensure access to needed ADR services using best practices." The advisory committee believes the ADR Commission on Dispute Resolution and Conflict Management recommended in this report is better able to complete this task than the Advisory Committee itself. The committee offers the following for the guidance of the ADR Commission on the topics addressed.

Mandatory Mediation

A sometimes contentious issue raised in conjunction with court-attached mediation is whether courts should have the option of ordering the parties to a lawsuit to mediate. At first glance, such a proposal would seem anomalous: mediation is promoted as a means to afford the parties greater control over their resolution of their dispute, yet the court mandates their participation in mediation whether they want it or not.[100] As noted above, some observers strongly object to mandatory mediation.[101]

One reason mandatory mediation is proposed is that voluntary mediation has a low participation rate.[102] Parties are reluctant to propose mediation (or any other settlement option) first, because doing so is likely to be perceived as a sign of weakness.[103] Some studies have shown, however, that a party's initial reluctance to mediate makes no difference in settlement rates.

Advisory Committee chair Ann Begler, a veteran mediator, describes how a mandatory mediation program utilized by the Pennsylvania Superior Court assisted that Court:

> Mandatory mediation can be a highly valuable way to approach mediation. While the field certainly supports the voluntary nature of mediation, the difficulty is that even at this date many people, including many attorneys, still do not understand the process, what their role is, or how to best participate. The program developed by the Superior Court is evidence that mandatory mediation is highly successful where the programs are appropriately structured, some selection discretion is given to the mediator, and the mediator comes with a cross section of experience in process management. In the Western District, alone, resolutions ranged from 56 to 70% and were far above average when looking at national statistics. The benefit to the Court went well beyond the issues actually mediated. In many instances, mediators were able to resolve related issues still pending in the

[100] Edwards, "Renovating the Multi-Door Courthouse," 335-36.
[101] See 122-23, above.
[102] Edwards, "Renovating," at 333.
[103] *Id.* at 333-34.

trial court. This created considerable savings for the litigants and the Court through the prevention of ongoing litigation at both a trial and appellate level.[104]

Another way to nudge parties toward mediation is to mandate their attendance at an orientation session that explains the mediation process, leaving it up to the parties whether to pursue that option. Of course, if a party balks at making the first move toward settlement, it is likely to reject mediation after the orientation session. A more subtle technique is for a court officer (other than the judge) to inquire confidentially of each party whether he or she is willing to mediate. If one or both parties declines, all that is disclosed to the parties and the judge is that the parties did not agree to mediate.[105]

Mandatory Arbitration

One of the major issues that has arisen in the field of ADR is what is alternately called "Pre-Dispute Arbitration Clauses" or "Mandatory Arbitration Clauses." These are clauses inserted into contracts long before any issues have arisen, and provide that, either prior to going to court or in lieu of going to court, the parties must submit their case to arbitration. There may be no problem if both parties are sophisticated and at arms' length. However, often the parties are not equally positioned to arbitrate, as could be a case involving a major corporation and a consumer. The provisions for arbitration are not always fair—sometimes, for example, the parties have no idea they are giving up their right to go to court. Consumer contracts, credit card contracts, nursing home contracts, and some labor contracts are a just a few of the areas where problems have arisen. A growing number of court cases involve what turn out to be unfair "contracts of adhesion." Mandatory arbitration merits investigation and recommendations for further legislation that could be an early subject of the ADR Commission's activity.[106]

Attorney Responsibilities

A related issue that has been debated within the legal profession is whether attorneys should be under a professional duty to discuss ADR with their clients. Requiring lawyers to do this would increase awareness of ADR in a manner that focuses on individuals whose need for awareness is greater than the general public's. At present, there is no such specific duty under the Pennsylvania Rules of Professional Conduct. However the Rules do require the lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished."[107] This may create an implicit requirement to consult the client regarding ADR, but ambiguities are likely to arise concerning when such a duty arises, how the duty can be satisfied, and what sanctions should apply to a lawyer who fails to meet the duty.[108] For example, the rules do not specify whether sharing a brochure describing ADR procedures is sufficient or if the lawyer must engage in a detailed discussion of the possible applicability of the ADR procedures at the outset of representation.

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[104] Ann Begler, Email to Commission staff, November 16, 2016.
[105] Edwards, "Multi-Door Courthouse," at 336.
[106] Judge Richard Klein (ret.), Email to Commission staff, January 26, 2017.
[107] Pa. R. Prof. Cond. 1.4(a)(2).
[108] See Marshall J. Breger, "Should an Attorney Be Required to Advise a Client of ADR Options?" 13 Geo. J. Legal Ethics 427 (2000).

SUBCOMMITTEE
OBSERVATIONS AND RECOMMENDATIONS

The Subcommittees created under this study made observations and recommendations regarding public access and education.

Subcommittee on Business, Commercial, and Personal Injury Cases made the following recommendations:

> *Public awareness***.** Greater efforts should be made to educate the business and professional community (including nonprofit entities), the legal community, consumers, and the general public about the benefits of ADR. Multiple media outlets and professional organizations should be used to accomplish this goal and disseminate the necessary information, through social media and websites, public service announcements on television and radio, pamphlets available at public libraries, face-to-face and web-based presentations to professional groups and individual practitioners, continuing education programs (including continuing legal education programs and programs for engineers, accountants, physicians, real estate brokers, and other professionals), and articles in popular media, business and professional journals.
>
> *Continuing Legal Education.* The Supreme Court of Pennsylvania Continuing Legal Education Board should consider CLE requirement on ADR and also consider allowing an ADR course to qualify as an ethics credit.

Subcommittee on Family Law made the following observations:

> *Public perceptions.* Because the public is accustomed to litigation, mediation is a largely unknown process. Resistance to ADR by the courts and some attorneys strongly inhibits the expansion of its use.

Subcommittee on Government and Public Policy made the following recommendation:

> *Education*. The Commonwealth should develop educational and outreach components that address the benefits of ADR and promote its use. A user-friendly website should be established and maintained as an ADR resource.

Subcommittee on Schools and Education made the following observation:

> Although efforts have been made by school administrators and faculty, organizations, and individuals to implement school-based peer mediation programs, the public generally is not well-informed about them.

Subcommittee on Workplace and Healthcare made the following recommendation:

> Background information regarding successful ADR programs should be more readily available for consideration in developing or expanding ADR services.

APPENDIX E: FEDERAL AND UNIFORM LAWS

FEDERAL LAWS

Federal Arbitration Act

The Federal Arbitration Act (FAA), enacted in 1925, provides a general framework that is applicable throughout the U.S. [109] In large part, FAA was enacted to countermand state laws that disfavored arbitration. The FAA is further discussed at pp. 26-27, above.

UNIFORM LAWS

Uniform Arbitration Act

The Uniform Law Commissioners (ULC) adopted the Uniform Arbitration Act in 1955, and it proved a great success, as it was enacted in 49 states. [110] Pennsylvania enacted the UAA as 42 Pa.C.S. § 7301—7320 by the act of July 9, 1976, P.L.586, No.142.

> A primary purpose of the 1955 UAA was to insure the enforceability of agreements to arbitrate and the finality of arbitration awards in the face of often hostile state law. Like the FAA, the UAA is a succinct procedural framework governing enforcement of arbitration awards, appointment of arbitrators, method of arbitration hearing, means of compelling testimony and evidence at the hearing, and reviewability of arbitral awards.[111]

The ULC adopted a Revised Uniform Arbitration Act (RUAA) in 2000. The RUAA expands the procedural rules from the UAA to reflect the growth in the use of arbitration and explicitly states that it is a default act, the terms of which may be changed by agreement. Provisional remedies can be imposed by court order before the arbitrators are selected, and can be imposed by the arbitrator during the course of the arbitration at those points when they could be imposed by a court in a judicial proceeding. Provision is made for consolidation of arbitration proceedings. A prospective arbitrator is required to disclose any facts that may bear on his or her impartiality, and an award may be vacated if this is not done. The arbitrator is given immunity

[109] 9 U.S.C. § 1 et seq.
[110] The ULC is also known as the National Conference of Commissioners on Uniform State Laws.
[111] Timothy J. Heinsz, "The Revised Uniform Arbitration Act: Modernizing, Revising, and Clarifying Arbitration Law," 2001 J. Disp. Resol. 1 (2001)

from civil liability to the same extent as is a judge. The arbitrator is empowered in the manner he or she "considers appropriate to the fair and expeditious disposition of the proceeding." The arbitrator may grant punitive damages or other exemplary relief.[112] Eighteen states and the District of Columbia have adopted the RUAA.[113] Pennsylvania has not enacted the RUAA.[114]

Uniform Mediation Act

The ULC drafted its proposed Uniform Mediation Act in 2001 in cooperation with the Dispute Resolution Section of the ABA; amendments were approved in 2003.[115] The act largely pertains to protecting the confidentiality of the mediation process, and thus covers similar ground as 42 Pa.C.S. § 5949, although in far greater detail. Eleven states (Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington) and the District of Columbia have enacted this legislation.

The overwhelming focus of the UMA is on protection of confidentiality through the establishment of a privilege against disclosure of mediation communications for the parties, the mediator, and other mediation participants (§§ 4–10). The privilege is carefully defined as to each of these classes of mediation participants, and rules are included as to who may assert the privilege and the circumstances where the privilege does not apply. There is also a provision for mediator disclosure of conflicts of interest, giving attorneys and other representatives the right to participate, adopting the Model Law on International Commercial Conciliation for international mediations, and defining the Act's relation to the Electronic Signatures in Global and National Commerce Act (§ 12), encouraging uniformity of construction and application (§ 13).

Uniform Collaborative Law Rules and Act

The Uniform Collaborative Law Rules and Act, originally promulgated in 2009 and amended in 2010, provides a comprehensive statutory framework for amicable, non-adversarial dispute resolution that promotes problem-solving and settlement outside of the litigation or arbitration process. The uniform act provides for, among other things, minimum requirements for collaborative law participation agreements, the collaborative law process, the enforceability of collaborative law agreements, disqualification of collaborative lawyers, screening requirements, confidentiality, and privileged communications. Ten states and the District of Columbia have enacted this act. [116]

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[112] Uniform Law Commissioners (ULC), "Arbitration Act (2000) Summary," http://www.uniformlaws.org/ActSummary.aspx?title=Arbitration Act (2000).

[113] Laura A. Kaster, "The Revised Uniform Arbitration Act at 15: The New Jersey Story," *Dispute Resolution Magazine* (Winter 2016), 38. States include Alaska, Arizona, Arkansas, Colorado, Florida, Hawaii, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, Washington, and West Virginia.

[114] 2015 House Bill No. 34 was the latest legislative attempt to adopt the RUAA in Pennsylvania.

[115] ULC, Uniform Mediation Act with Prefatory Notes and Comments (2003), http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf (December 10, 2003).

[116] ULC, Uniform Collaborative Law Rules and Uniform Collaborative Law Act, (2010), http://www.uniformlawcommission.com/Act.aspx?title=Collaborative Law Act. States include Alabama, Hawaii, Maryland, Michigan, Nevada, New Jersey, Ohio, Texas, Utah, and Washington.

APPENDIX F:
DEVELOPMENT OF ADR IN PENNSYLVANIA AND PRIVATE PROGRAMS

As a response to an increasingly overburdened court system and in an attempt to increase efficiency in resolving conflicts and reduce the cost of traditional litigation, advocates have attempted to initiate and strengthen ADR efforts in Pennsylvania over the last several decades. Legislation has been introduced to encourage the use of ADR, and focus groups have examined ways to make Pennsylvania a more ADR-friendly state. The Pennsylvania Office of the Governor, universities, bar associations, and the courts have all explored the possibility of expanding the use of ADR across the Commonwealth. Without coordination at the state level and accompanying statutory authority, however, past ADR efforts have not been sustainable and have proven to be largely ineffective. The many sustainable ADR efforts are mainly attached to large commercial entities like law firms or businesses. Mainstream culture perceives ADR in a piecemeal fashion, and has little sense of its culture. There remain wide differences in practices, and systemic support for its growth and development is lacking.

The Advisory Committee submits that ADR is generally faster and less expensive than pursuing a traditional lawsuit; it enables disputing parties to exercise more control over the proceedings and assists in reducing the adversarial nature of the court system.

In some states, ADR processes are fragmented; in other states, they are well-established and well-coordinated, with centralized organizations and influence that permeate many areas of society. The key to success is having statewide leadership receptive to ADR and the willingness to fund ADR services and programs, working together with a public relations campaign that raises public awareness of ADR's benefits.

In Pennsylvania, a number of ADR initiatives by individuals, groups, the courts and the government have achieved only limited success, due primarily to the lack of a comprehensive approach to ADR in the Commonwealth. The Advisory Committee believes that a statewide ADR Commission is needed to enable mediation and other ADR processes to expand and reduce costs for disputants and the government, ease an overburdened judicial system, resolve conflicts in a timelier manner, and lessen the negative effects of an adversarial system by replacing it with a more collaborative system.

PENNSYLVANIA LEGISLATION

Pennsylvania Uniform Arbitration Act (PaUAA)

Pennsylvania enacted the 1956 version of the Uniform Arbitration Act as part of the Judicial Code.[117]

Mediation Confidentiality

The Judicial Code provides an evidentiary privilege protecting confidential mediation communications and documents.[118] These are protected from disclosure by discovery or other process and are not admissible as evidence in any proceeding, including arbitration and administrative proceedings as well as judicial proceedings. Exceptions are provided for the settlement document in actions to enforce it, criminal matters involving bodily injury or damage to property, fraudulent communications that are relevant evidence in an action involving a mediated agreement, and documents existing independent of the mediation.

Benevolent Gesture Legislation

In 2013, Pennsylvania enacted the Benevolent Gesture Medical Professional Liability Act. Broadly, the legislation renders inadmissible in evidence in a medical professional liability action any "benevolent gesture" made by a health care provider before the commencement of the lawsuit. The "benevolent gesture" is an apologetic or compassionate action "emanating from humane impulses" and responding to the patient's "pain, suffering, injury, or death," and connected with medical treatment or failure to treat.[119]

Labor Relations

The Administrative Code of 1929 directs the Department of Labor and Industry to send a representative of the department to attempt to mediate disputes between management and labor.[120] If mediation is unsuccessful and the parties elect to arbitrate the dispute, and are unable to agree on a neutral, the department is directed to name an impartial person as chair of the arbitration board.

The Public Employee Relations Act authorizes the parties in a dispute under the act to mediate if the dispute has lasted 21 days or more.[121] The parties must submit the dispute to the Pennsylvania Board of Mediation if the dispute has not been resolved within 150 days after the budget submission date.

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[117] 42 Pa.C.S. Ch. 73 (Arbitration), Subch. A (Statutory Arbitration) (42 Pa.C.S. §§ 7301-7320).
[118] 42 Pa.C.S. § 5949, added by act of February 7, 1996, P.L.7, No.3.
[119] Act of October 25, 2013, P.L.665, No.79; 35 P.S. §§ 10228.1–10228.3.
[120] § 2206; 71 P.S. § 566.
[121] § 801; 43 P.S. § 1101.801.

The Labor Mediation Act authorizes parties to a labor-management dispute to utilize mediation and arbitration and provides for confidentiality.[122] The Department of Labor and Industry is directed to mediate the dispute at the request of either or both parties and to use its best efforts to settle. If mediation fails, the parties may agree to arbitration.

Municipalities Planning Code

The Code provides that parties to disputes may mediate them, except that the zoning hearing board may not participate or act as a mediator. The municipality is required to assure that the mediation agreement include certain necessary terms and conditions.[123]

County planning commissions are required to offer a mediation option to any municipality that believes that its citizens will experience harm as the result of an applicant's proposed subdivision or development of land in a contiguous municipality if the municipalities agree.[124]

Local Tax Collection

The Local Tax Enabling Act provides for mediation of disputes between political subdivisions and local tax collection authorities by the Department of Community and Economic Development. [125] Mediation is mandatory if the dispute involves a difference of more than ten percent of the previous year's revenue and optional in other cases.

Board of Vehicles

The Board of Vehicles Act requires a dealer or distributor to mediate a dispute with a manufacturer or distributor before commencing any legal action against the latter. [126] This requirement does not apply to motorcycle dealers or to dealers seeking to open a second franchise or to relocate. Licensees may agree to submit the dispute to binding or nonbinding arbitration under the Uniform Arbitration Act.[127] Mediators and arbitrators acting under this section are presumed to act in good faith, which can be rebutted only by clear and convincing evidence.

Domestic Relations

Title 23 of the Pennsylvania Consolidated Statutes provides for voluntary mediation of child custody disputes. [128] The court may order the parties to attend an orientation meeting where the mediation process is explained to them. If the parties agree to mediate, the court may refer them to the mediation program. Mediation does not apply if a party or a child of either party has been the subject of domestic violence or child abuse during the action's pendency or within 24

[122] Act 177 of 1937 (P.L.674); 43 P.S. § 211.31–211.39.
[123] § 908.1; 53 P.S. § 10908.1
[124] § 502.1; 53 P.S. § 10502.1.
[125] § 505(k); 53 P.S. § 6924.505(k).
[126] § 11; 63 P.S. § 818.11.
[127] 42 Pa.C.S. Ch. 73.
[128] 23 Pa.C.S. Ch. 39.

months before the action was filed.[129] The Supreme Court has promulgated rules to implement these provisions.[130]

PROPOSED LEGISLATION

The following major pieces of legislation had been introduced in the Pennsylvania General Assembly:

ADR Commission

From time to time, legislation has been introduced to create an administrative agency with responsibilities related to ADR. House Bill 2960 of 1994 and Senate Bill 951 of 1995 would have created a Commission on Dispute Resolution and Conflict Management "for the purpose of developing, coordinating or supporting dispute resolution and conflict management education, training and research programs within this Commonwealth." This report recommends the creation of a similar commission.

Revised Uniform Arbitration Act

The Uniform Law Commissioners proposed the Revised Uniform Arbitration Act in 2000 to modernize the Uniform Arbitration Act. It was introduced as 2015 House Bill 34 and was passed by the House, but not the Senate during the 2015-16 legislative session.

The goals of the RUAA drafting committee were 1) to maximize party autonomy within basic notions of fundamental fairness, mainly by making its provisions subject to contrary agreement of the parties wherever possible; 2) to preserve arbitration's advantages with regard to speed, cost, and efficiency; and 3) to maximize finality by limiting grounds for appeal to cases of clear unfairness or denial of justice.[131]

> The RUAA includes provisions on such matters as utilizing new means of electronic communications in arbitration; whether courts or arbitrators decide arbitrability; provisional remedies; arbitrator disclosure of interests and relationships; immunity of arbitrators and arbitration organizations; the arbitrator's power to order prehearing conferences and decide dispositive motions; discovery; court enforcement of pre-award rulings by arbitrators; punitive damages, attorney's fees, and other remedies; court awards of attorney's fees to arbitrators, arbitration organizations and prevailing parties in litigation involving an arbitration matter; which sections of the RUAA are waivable; and a phased-in effective date for when the RUAA will apply to all arbitration agreements.[132]

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[129] 23 Pa.C.S. § 3901(c)(2).
[130] Pa. R.C.P. 1940.1–1940.9.
[131] Timothy J. Heinsz, "The Revised Uniform Arbitration Act: Modernizing, Revising, and Clarifying Arbitration Law," 2001 J. Disp. Resol. 1, 3 (2001).
[132] *Id*. at 2-3.

The model law addresses the following issues that have arisen under the current Pennsylvania UAA:

- how a party can initiate arbitration
- whether arbitration proceedings may be consolidated
- whether arbitrators must disclose facts reasonably likely to affect impartiality
- whether arbitrators or representatives of arbitration organizations may be required to testify in another proceeding
- when a court may enforce a pre-award ruling by an arbitrator
- grounds for enforcing or invalidating agreement to arbitrate
- procedure for determining whether there is an agreement to arbitrate
- determination of venue

The RUAA ends the presumption under the current PaUAA that all arbitrations are governed by common law unless the parties have provided in writing to the contrary. Instead, all arbitrations are governed by the RUAA unless the parties have expressly agreed in writing to the contrary.

The RUAA maintains the existing language of the PaUAA relating to collective bargaining agreements. The subchapter applies to agreements to arbitrate controversies between employers and employees (or their respective representatives) only to the extent that such arbitration is consistent with any other statute regulating labor and management relations. In addition, the RUAA ends the PaUAA's requirement that a reviewing court "modify or correct" awards contrary to law in certain mandatory arbitration and labor/management cases. Experience with arbitration has shown that such protections are unnecessary, and they are inconsistent with a key goals of arbitration: finality and avoidance of the costly and time consuming judicial process. Because the RUAA applies only where the parties have agreed to arbitrate disputes, arbitrations prescribed and required by state statutes and rules are not covered by the RUAA.[133]

Executive and Independent Agencies

Absent an ADR Commission, the lack of statewide consistency in the ADR process will continue to hamper its development and deprive the Commonwealth and its residents of the benefits that ADR can deliver. Some ADR processes, described by Advisory Committee members as "isolated," have been initiated in various locations and times in the Commonwealth. Some initiatives found traction and moved toward successful use of ADR, but overall, the scattered steps forward have fallen short of meeting ADR's potential.

[133] Bill Summary, House Bill 34 (P.N. 1201), April 21, 1915. Points 15, 16, and 17 are included in P.N. 3639, the most recent draft of the legislation.

Office of the Governor

The Governor's office adopted a formal policy of integrating mediation into state government. Executive Order 2002-7 provides that each department, board, commission, council, and agency "become familiar with mediation, where and how it might be used and regularly explore, encourage, and facilitate its use."[134] Agencies were directed to designate a mediation coordinator mandated to "encourage and facilitate the use of mediation" and report thereon to a designated officials.

Following the issuance of this order, the Commonwealth developed a mediation program through the Office of General Counsel (OGC), which "is available to individuals and entities and to Commonwealth agencies and their employees who have a dispute with a state agency."[135] Under the program,

> most disputes can be mediated, and it is not necessary to have pending litigation to enter the mediation process. Mediation is most appropriate where there are recurring disputes, a need for an ongoing relationship between the disputants, communication breakdowns, workplace disputes, controversies involving governmental bureaucracy, bankruptcy or potential bankruptcies, industry-wide disputes, Equal Employment Opportunity Commission claims and those cases where there may be a need for privacy and confidentiality that is not available in a public forum.[136]

Mediation, therefore, "is available at the request of any Commonwealth agency under the Governor's jurisdiction, any OGC attorney, any Commonwealth employee, or any party engaged in a dispute with a Commonwealth agency."

If the parties agree to submit their case for mediation, a Request for Mediation form is completed and submitted to OGC. After mediation is approved for a particular case, OGC provides the parties with a list of trained mediators from which they select an individual to mediate their case. The list provides background information on each potential mediator. Once selected, OGC sends the mediator an appointment letter. Prior to the mediation, the mediator sends a letter to the parties explaining that they must be fully prepared to discuss the dispute and offer possible resolutions, take turns speaking and listening, try to understand the other party's interests, refrain from engaging in negative behaviors, explore creative resolutions, and have a representative with settlement authority present or readily available. The mediator looks for areas of agreement and works to build on those areas to reach a resolution that the parties find satisfactory.[137] At any time during the mediation process, a party may seek legal counsel, and a party may choose to end the mediation at any time.

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[134] The Order was signed by Governor Mark S. Schweiker on June 4, 2002.
[135] "OGC Mediation Handbook," 2, 8.
[136] *Id.* at 4.
[137] *Id.* at 2-3.

An OGC mediator facilitates communication among the parties in a non-confrontational manner and promotes respect between the parties so that all participants have an equal opportunity to be heard. The mediator has a duty of impartiality and works to identify areas of agreement between the parties and alternative ways of thinking about the dispute and possible solutions. The mediator does not make decisions and has no authority to impose a settlement on the parties, nor does the mediator provide legal advice or counseling to either party.

The mediators under the program "are OGC attorneys who represent a wide range of experience and expertise. Among their practice areas are contracts, labor and employment, licensure, permitting, procurement, and education law. Many of the mediators have extensive litigation experience both in administrative tribunals and before state and federal courts." They received mediation training from the Dickinson Center for Dispute Resolution or through an equivalent mediation training. "OGC is continuing to train attorneys specially selected for their backgrounds and expertise to ensure that the Commonwealth can meet the demand for mediators."

The communications regarding mediation are confidential, except in limited circumstances.[138] Confidentiality does not apply to documents that exist independently of the mediation, the settlement document itself is not confidential to the extent it is introduced to enforce the settlement, and communications of threats that constitute crimes and fraudulent communications relevant in an action to enforce or set aside a mediation agreement are not subject to confidentiality. Therefore, mediation communications and documents are privileged and not discoverable and cannot be submitted as evidence in a court proceeding.

There is no charge for this mediation, unless the mediator must undergo significant travel expenses. However, each party must pay for the party's own counsel and other costs. Commonwealth facilities are normally used for the mediation. If both parties wish to incur the cost of another meeting facility, they must determine how the costs will be shared.[139]

Public Utility Commission

The Pennsylvania Public Utility Commission (PUC) utilizes ADR to a greater extent than other agencies in the Commonwealth. Mediation is voluntary, confidential, and non-binding for PUC matters. The Office of Administrative Law Judge (OALJ) manages the program. "[OALJ] provides conflict resolution by independent administrative law judges. Judges preside at formal hearings in contested matters before the PUC, gather all the facts relating to an individual case, prepare written decisions outlining the issues, and recommend resolutions to the disputes. The OALJ includes a mediation unit and a mediation coordinator."[140]

[138] *Id.* at 4.
[139] *Id.* at 2-8.
[140] Commonwealth of Pennsylvania, Public Utility Commission (PUC), "Bureaus and Offices, Office of Administrative Law Judge," http://www.puc.state.pa.us/about_puc/bureaus_and_offices.aspx.

Department of Education

Through the Office for Dispute Resolution (ODR), the Pennsylvania Department of Education provides special education mediation, due process hearings, and other processes under the applicable federal legislation.[141] The aim of this program is to help parents and local school districts to resolve educational disputes involving children served by the early intervention system, students with disabilities and students who are gifted. Pennsylvania has been recognized as an "exemplar state" by the U.S. Office for Special Education Programs and the Center for Appropriate Dispute Resolution in Special Education because of its array of quality services offered by ODR. The vast majority of post-mediation evaluations "indicated satisfaction with the services of ODR and the mediators, and the process itself." [142]

Office of Victim Advocate

The Victim Offender Dialogue (VOD) Program through the Pennsylvania Office of the Victim Advocate (OVA) offers a safe, secure, and structured way for crime victims or surviving family members to ask questions and express their feelings directly to the individual who caused harm to them and their loved ones. A victim-initiated program, VOD is "an opportunity for the victim/survivor to ask questions about the crime, tell the offender how it affected their lives and can empower the victim/survivor to hold the offender directly accountable...The offender may also benefit by being able to accept responsibility and recognize the real person(s) they have affected. The offender's participation is voluntary and has no effect on their institutional or parole status."

Trained volunteer facilitators extensively prepare the victim and offender for the face-to-face meeting and are present during the meeting. They also provide subsequent meetings. A meeting may be held in the offender's home, state correctional institution, or in a safe, private setting within the community. If an individual is unable or does not want to meet the offender face-to-face, indirect dialogue or letter writing is available, and a facilitator will assist with composing, exchanging, and reading any letter. However, no letter is sent directly to the victim or offender; the letters go through the OVA.[143]

Juvenile Delinquency Programs and Services

In order to document the availability of mediation and restorative justice programs in the juvenile justice system in Pennsylvania, Joint State compiled a survey that was sent out to the County Juvenile Probate Chiefs and to non-profit organizations serving youth. The survey gathered background information within the juvenile justice system to address two issues: (1) How restorative justice processes (primarily victim-offender mediation, conferencing or dialogue), community accountability panels, and circle processes can be made available to juvenile offenders, assuming that such techniques, when used at an early stage of youth involvement in criminal activity, may assist in stopping the escalating spiral of violence and preventing future punishment

[141] The Individuals with Disabilities Education Improvement Act of 2004 (IDEA) (P.L. 108-446, 118 Stat. 2647).
[142] Commonwealth of Pennsylvania, Department of Education, Office for Dispute Resolution, "Annual Report (2013-14)," 1, http://odr-pa.org/wp-content/ uploads/ pdf/2013-2014-Annual-Report.pdf.
[143] Commonwealth of Pennsylvania, Office of the Victim Advocate, "Victim Offender Dialogue Program," accessed February 3, 2016, http://www.ova.pa.gov/Documents/Dialogue%20English.pdf.

and incarceration; and (2) the extent and effectiveness of preventive ADR programs and services for youthful offenders.

Thirty-six counties and 45 nonprofit agencies responded. The results revealed that most of the responding county juvenile probation offices use one or more types of restorative justice processes, community accountability panels, and circle processes. Nineteen counties responded that they used a variety of activities aimed at restorative justice, including family group decision-making, school circles, restitution work programs, victim impact panels, victim community awareness classes, and apology letters.

With respect to the nonprofit organizations that responded to the survey, nearly one-third did not offer restorative justice programs to youth offenders. Six conducted victim-offender mediation, conferencing, or dialogue, three conducted community accountability panels, 12 offered circle processes, and 16 provided other restorative justice-related programs, such as restitution work programs, victim impact panels, victim community awareness classes, and apology letters.

Slightly more than half of the county juvenile probation offices and nonprofit youth organizations offered youthful offenders training in ADR or restorative justice processes. The most common training involved anger management, life skills, victim sensitivity and impact, conflict resolution, and verbal communication skills. Other training concerned mediation, aggression replacement, peacemaking circles, goal setting, family group decision-making, restorative discipline and group conferencing, crisis management, suicide prevention, sex offenders and victimization, and victim/community awareness.

However, most of the county juvenile probation offices and nonprofit youth organizations did not regularly offer mediation, arbitration, or consensus building. The referral rate to these types of ADR programs and services was low, with only eight county offices and seven nonprofit organizations referring clients to these programs and services; nearly all such referrals were voluntary.

Department of Corrections

Joint State sent surveys to the Department of Corrections, the Board of Probation and Parole, and the County Chief Adult Probation and Parole Officers Association of Pennsylvania to obtain information regarding conflict resolution processes in the area of corrections, particularly with respect to inmates in state correctional institutions and parolees.

The survey results from the Department of Corrections were inconclusive, perhaps because ADR techniques are not widely used by the department, although some employees may attempt to resolve conflicts on an individual basis. The Board of Probation and Parole appeared to have a greater interest in ADR techniques to prevent recidivism and teach convicted offenders to resolve conflicts in a nonviolent manner for when they re-enter society. Fewer than half of the members of the County Chief Adult Probation and Parole Officers Association responded to the survey.

Two responding counties (Jefferson and McKean) noted that they offered their clients access to ADR processes. McKean County used both mediation and arbitration to resolve disputes between the offender and his or her family, spouse, or significant other. Jefferson County used only mediation services provided by the county parole office.

Approximately half of the adult probation officers referred their clients to restorative justice processes, such as victim/offender mediation, conferencing, or dialogue; victim impact panels (e.g., for DUI offenders); victim impact classes; community service; circle processes; community accountability panels; competency accountability programs, restitution; and family group decision-making. Domestic violence groups to divert adult offenders and anger management programs for parolees were also noted.

Clearfield, Lehigh, McKean, Somerset, and Venango Counties responded that they offered staff training in ADR or restorative justice practices, including training in verbal communication and victim sensitivity. McKean County further mentioned its extensive training regarding mediation, anger management, life skills, and conflict resolution. Somerset and Venango Counties highlighted their conflict resolution training, and Lehigh County highlighted its mediation training. However, approximately two-thirds of the responding counties reported that they did not provide such staff training.

Seven counties responded that they offered ADR or restorative justice services to offenders: Beaver, Blair, Clearfield, Cumberland, McKean, Somerset, and Venango. Most of the cited services included anger management, life skills, conflict resolution, and victim sensitivity. Victim impact classes and cognitive restructuring classes are also provided.

Judiciary

Thus far, there has not been a unified way to move ADR into the court system. Initiatives begun in the Commonwealth's judiciary that show promise include new Orphans' Court rules, rules governing custody disputes in domestic relations cases, the establishment of a Mediation Program in Commonwealth Court, and various rules adopted by Courts of Common Pleas.

Orphans' Court

The Supreme Court of Pennsylvania adopted Orphans' Court Rule 1.6, effective September 1, 2016, states:

> Rule 1.6. Mediation by Agreement, Local Rule, or Court Order
>
> All parties having an interest in a matter may participate by written agreement, or the court by local rule or order in a particular matter may provide for the parties to participate, in private mediation or in court-supervised mediation.

The Supreme Court encouraged the Orphans' Courts to enact local rules to encourage mediation in the orphans' court divisions of the courts of common pleas. The ADR Committee of the

Pennsylvania Bar Association drafted a recommended Model Local Orphans' Court Rule 1.6, which has been adopted by several courts.

Domestic Relations

The Supreme Court has promulgated rules implementing the provisions of Title 23 relating to mediation of custody disputes.[144]

Commonwealth Court

The Commonwealth Court established a Mediation Program on December 7, 1999.[145] The program applies to all cases on the Court's docket, except for pro se cases and appeals from the Board of Finance and Revenue. The Court screens cases. Those determined to be suitable for mediation are assigned a mediation judge.

Courts of Common Pleas

A number of Courts of Common Pleas have adopted rules regarding mediation and arbitration in civil actions. For example, the Dauphin County local rules of court provide:

> Rule 1001. Mediation
> a. General applicability.
> Every civil action, except protection from abuse matters, filed in the Dauphin County Court of Common Pleas is eligible for mediation. Prior to filing suit and whenever practicable thereafter parties and their counsel are encouraged to consider and to pursue mediation options.
>
> b. Procedure for Mediation in Non-Jury Civil Trials, Civil Jury Trials and Cases Subject to Arbitration
> Parties and their attorneys in all civil cases which will result in a non-jury civil trial, civil jury trial or arbitration may mutually elect to pursue mediation at any point before a case is listed for trial or arbitration. Status conferences conducted by the Court in accordance with Dauphin County Local Rule 215.3 shall include a discussion of the likely success of mediation and the appropriate point in the life of the case for mediation session(s) to be scheduled.
>
> c. Mediation Programs
> Parties and their attorneys are encouraged to use mediation to resolve disputes either through the Civil Dispute Resolution Program administered by the Dauphin County Bar Association or any other mediation program acceptable to the parties.[146]

[144] Pa. R.C.P. 1940.1–1940.9. See p. 32 above.
[145] Pa. Commw. Ct. Internal Operating Procedures, § 501.
[146] Dauphin County. Local Rules of Court, Rule No. 1001, http://www.dauphincounty.org/government/Court-Departments/Local-Rules-of-Court/Pages/default.aspx.

The goal is "to bring disputes to conclusion economically and expeditiously. While mediation is voluntary, the Court may feel strongly that the use of mediation will conclude pending litigation."[147]

Other notable mediation programs operate in Allegheny County,[148] the orphans' court division of Bucks County,[149] the orphans' court division of Chester County,[150] Cumberland County,[151] the family court in Lackawanna County,[152] Montgomery County,[153] and in Philadelphia County through the Philadelphia Commission on Human Relations.[154]

Public Schools

Peer mediation is "a form of conflict resolution in which trained student leaders help their peers work together to resolve everyday disputes."[155] School-based peer mediation is a very popular, and arguably the most effective, approach to resolving disputes in schools. It "encourages students to apply conflict resolution skills when it matters most—when they are in conflict."[156] A successful peer mediation program requires administrative support, where the administrator works proactively to overcome attitudinal and structural resistance within the school and where the administrator in charge of discipline is willing to make referrals and support student mediators' efforts. The programs also depend on peer mediation coordinator adults who oversee all the programs' aspects and have the appropriate skills, commitment, and time during the school day to act as a coordinator.[157]

In light of the 500 school districts and more than 3,000 schools throughout the Commonwealth, identifying peer mediation programs in Pennsylvania is a daunting task. While some school officials are keenly interested and well-versed in peer mediation, others may not categorize a certain program as a peer mediation program or may not have knowledge or interest in any such program. A peer mediation program may be the creation of a particular faculty member and therefore may terminate if the faculty member retires or if funds become scarce.

Although Pennsylvania provides peer mediation programs in public and private schools, the programs are not uniform. Because the breadth and depth of these programs vary greatly, peer mediation has not been institutionalized statewide.

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[147] *Id.*, Comment to Rule No. 1001.
[148] Allegheny County. Bar Association, "FAQ about Mediation."
[149] See http://www.bucksbar.org/?page=MediationProg (last visited Nov. 7, 2014).
[150] See http://www.chesco.org/DocumentCenter/View/9909 (last visited Nov. 7, 2014).
[151] See http://www.cumberlandbar.com/ADR.aspx (last visited Nov. 7, 2014).
[152] See http://www.lackawannabar.org/index.php?id=32 (last visited Nov. 7, 2014).
[153] See https://montgomerybar.org/mba/ddrc/adr.php (last visited Nov. 7, 2014).
[154] See http://www.phila.gov/HumanRelations/PDF/DRPBrochure.pdf (last visited Nov. 7, 2014).
[155] Richard Cohen, School Mediation Associates, "Quick Guide to Implementing a Peer Mediation Program," accessed December 8, 2014, http://www.schoolmediation.com/pdf/Quick-Guide-to-Implementing-a-Peer-Mediation-Program.pdf.
[156] *Id.*
[157] *Id.*

In 2008, a review of 102 private schools in the Commonwealth (58 secular and 44 parochial) indicated that approximately half were conducting some type of peer mediation program. Among those providing programs were the Milton Hershey School, the Miquon School, the Montgomery School, and Newtown Friends School. The established programs at these institutions allow students to develop skills, discover talents, form friendships, resolve conflicts, and seek solutions to problems.

Also in 2008, the Pennsylvania Association of Intermediate Units, representing the 29 intermediate units (IUs), gathered information on the extent of peer mediation in the public schools. This survey found that 19 IUs had no knowledge of school-based peer mediation in schools under their jurisdiction, 10 IUs had programs, and several had wide appeal. Promoting Alternative Thinking Strategies (PATHS), School-Wide Positive Behavioral Support (PBS), Student Problem Identification and Resolution of Issues Together (SPIRIT), and Peaceful Endings through Attorneys, Children and Educators (Project PEACE) were among the most popular.

EFFORTS TO EXPAND ADR

PCM Focus Group

In 2002, the Pennsylvania Council of Mediators, the Pennsylvania Bar Association's (PBA) Alternate Dispute Resolution Committee, the Allegheny County Bar Association's ADR Committee, and the Philadelphia Bar Association's ADR Committee jointly initiated a collaborative project to explore ways to make Pennsylvania more mediation friendly. The development of the Uniform Mediation Act became "a catalyst for an extensive dialogue among many Pennsylvania attorneys who were practicing mediators." [158] The medical malpractice crisis led the Pennsylvania Supreme Court to begin consideration of alternative procedures. Consequently, many of these attorney-mediators saw the possibility of "moving mediation into a more visible and active place throughout the state." [159]

At the same time, the Pennsylvania Council of Mediators (PCM) renewed efforts by various organizations to create a statewide office of dispute resolution. The ultimate goal was a partnership of groups to increase the visibility and use of mediation. "As more courts began to develop individualized mediation programs, and as many courts of various states began to require mediation as the initial step for a range of cases going to litigation, the concept of institutionalizing mediation likewise emerged across other organizations and sectors of the mediation community." However, judicial culture has long recognized considerable autonomy within the trial court system, and efforts toward greater integration of mediation inhibited into the dispute resolution system were inhibited by difficulties in standardizing the mediation process.

[158] In 2001, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved and recommended for enactment the Uniform Mediation Act. Two years later, NCCUSL approved amendments.
[159] Begler, "Transforming Pennsylvania," 1.

In 2002, these organizations convened two focus group meetings at the Penn State Dickinson School of Law.[160] The members found that the growth and acceptance of mediation in Pennsylvania has been much slower than in other states, due to lack of leadership, the preference of lawyers and judges for litigation, lack of education about mediation in the legal community and the public at large, absence of meaningful incentives, and lack of funding. Suggestions for increasing and improving the use of mediation included referring cases to mediation before the commencement of the judicial process, marketing initiatives, and establishing a statewide mediation office. This office would coordinate and fund mediation efforts, credential or certify mediators, develop mediation programs, evaluate the performance of mediators, and maintain quality control.

The Commonwealth has supported the development and use of mediation within state agencies, by training state employees as mediators. Although this validates and increases awareness of mediation, it may impede mediation services that could be handled by the private sector.

Pennsylvania Bar Association

The Pennsylvania Bar Association (PBA) formed the Alternative Dispute Resolution Committee, in order to:

- address current issues of mediation, arbitration and other ADR processes, including mediation and arbitration of private and court connected ADR programs;
- conduct professional education programs in ADR;
- study and recommend standards of practice for neutrals; and
- propose and monitor legislation regarding ADR.[161]

On April 11, 2013, the PBA's Legal Services to the Public Committee and the ADR Committee initiated a pilot pro bono mediation project in partnership with the Pennsylvania Legal Aid Network, Inc. (PLAN), a statewide consortium of independent legal aid programs. Under this project, legal services organizations or pro bono attorneys refer low income clients to PBA mediator-members and community mediation centers. The project's goal is to expand clients' access to justice by encouraging and empowering them to resolve disputes more effectively and efficiently, and to promote the use of mediation throughout the Commonwealth. The pilot project seeks to accomplish these goals through attorney-members of the ADR Committee acting as pro bono mediators, in disputes involving small claims, landlord-tenant, and custody matters. [162]

[160] *Id*. at 2-3.
[161] PBA, Alternative Dispute Resolution Committee "Mission Statement," accessed May 21, 2015, https://www.pabar.org/public/committees/ALT02/about/mission.asp.
[162] PBA, Pro Bono Mediation Project, "Summary & Background," accessed May 21, 2015, http://www.pabar.org/public/probono/PilotPBAProBonoMediationProjectSummaryBackground.pdf.

PRIVATE PROGRAMS

Private Mediators

Individual attorneys and law firms of various sizes offer mediation services as independent practitioners or form organizations separate from their firms for this purpose. Several large, well known organizations practice in the field, including the American Arbitration Association (AAA), JAMS, a worldwide consortium of providers that was established in 1979, and Resolute Systems, a consortium of practitioners in the U.S., Canada, and Puerto Rico established in 1988.

Community Mediation

The growth in ADR over the past decades has been due in part to the efforts of community mediation centers (CMCs). Community mediation first emerged in the 1970s as part of a movement that advocated for social transformation and personal growth as well as dispute resolution services.[163]

> Community mediation is a grassroots, neighbor-to-neighbor form of alternative dispute resolution that has seen growing acceptance nationwide since its inception in the mid-1970s. The premise of community mediation is simple: to provide the public with a voluntary way to resolve conflict in a productive, collaborative manner that relies primarily on self-determination.[164]

CMCs have reported full or partial agreement in 70 to 98 percent of cases, and two-thirds of participants fully complied with the agreements arrived at through the process.[165]

The National Association for Community Mediation (NAFCM) describes several necessities for the continued success of community mediation. Mediation services should be conducted by a private non-profit or public agency or program with mediators, staff, and a governing or advisory board representative of the diversity of the community served.[166]

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[163] Christine B. Harrington and Sally Engle Merry, "Ideological Production: The Making of Community Mediation," 22 Law & Soc'y Rev. (1988).
[164] Wendy E. Hollingshead Corbett and Justin R. Corbett, "Community Mediation in Economic Crisis: The Reemergence of Precarious Sustainability," 11 Nev. L.J. 458 (2011).
[165] *Id*. at 462-63.
[166] "Overview of Community Mediation," accessed November 12, 2015, http://www.nafcm.org/?OverviewofComm.

Since the economic recession of the early 2000s, CMCs have been challenged by financial difficulties. The membership of NACFM has decreased from over 500 to roughly 300 because many centers have closed their doors due to lack of funding.[167] CMCs have struggled to adapt by adopting such strategies as "transference of services to outside organizations, joint ventures, staff sharing arrangements, adopted subsidiary statuses, and mergers."[168] However, the leaders of the CMC movement are undaunted.

> Despite these challenges, the field will undoubtedly right itself by the informed efforts of its dedicated professionals and marshal peacefully onward. And as the maelstrom subsides and optimism alongside opportunity greens, community mediation will phoenix from these recent economic ashes as vibrant and relevant as it has ever been.[169]

Community Mediation Centers

Large and small CMCs are found throughout Pennsylvania, but many of them are not adequately funded. Most receive funding through a combination of state expenditures, fees for service, donations, fundraising events, and contributions from foundations and businesses. An informal survey in 2008 by Joint State of several CMCs around Pennsylvania indicated that government support for CMCs ranged from 16 percent to 96 percent of their operating budgets, and fees-for-service constituted from 10 percent to 90 percent of budgets. Although some CMCs do not charge for mediation services, others provide fee-for-service arrangements, though, no client is turned away due to the inability to pay.

The Joint State's survey found that CMCs in Pennsylvania operate as nonprofit organizations. All CMCs offered some form of family mediation. Most provided basic mediator training, but several offered more in-depth training regarding custody and divorce. The survey found that little consistency existed in practice, procedures, or screening for domestic violence cases, and program structures varied considerably. Attendance rates at CMCs were also unpredictable.

To a large extent, CMCs in Pennsylvania operate under the concept of restorative justice.[170] CMCs offer many restorative justice services and programs for juvenile offenders. Restorative justice techniques include victim-offender mediation, conferencing, or dialogue; youth aid panels; youth diversion programs; and circle processes.[171]

University-Based Programs

Several university based ADR programs exist throughout Pennsylvania, including those at the Pennsylvania State University, Drexel University, the University of Pittsburgh, and Temple University.

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[167] Hollingshead Corbett, "Economic Crisis," at 459.
[168] *Id.* at 468.
[169] *Id.* at 480.
[170] Restorative justice is described at p. 27, above.
[171] Overview of Community Mediation.

Penn State University

The Dickinson Schools of Law of Penn State University (known separately as "Dickinson Law" and "Penn State Law") strongly support training in, and utilization of, ADR. Both law schools offer courses in negotiation, mediation, arbitration and dispute resolution more generally. Currently, students at both law schools serve as law student editors for the ABA Section of Dispute Resolution's Dispute Resolution Magazine and serve on the student-edited Yearbook on Arbitration and Mediation. (In the future, only students at Dickinson Law will serve as law student editors for the Dispute Resolution Magazine, while only Penn State Law students will edit the Yearbook.) Dickinson Law also offers its students a certificate in Litigation and Dispute Resolution and the opportunity to participate in a Negotiation Marathon that includes mediation. Penn State Law has the Institute for Arbitration Law and Practice and the student-run Penn State International Arbitration Group.

Penn State University also has several centers or institutes located in other parts of the university that deal with dispute resolution and conflict management. These include: the McCarthy Institute for Democracy, World in Conversation, the Center for Democratic Deliberation, and the Center for Teams and Negotiation.

Drexel University

The Drexel University Office of Equality and Diversity, which has a mediation program to resolve complaints regarding discrimination, harassment, retaliation, and the workplace. The office "offers informal conflict coaching and collaborative conflict resolution training that integrates the best of facilitative, transformative and restorative justice practices. Coaching and training focuses on diversity leadership and practical strategies and techniques to resolve, or at least manage, conflict quickly, peacefully and constructively." Consistent with the "core values of equality, diversity and inclusion, activities focus on improving cross-cultural communication and preventing the escalation of conflict." [172]

The Drexel University College of Medicine was the first health care facility in Pennsylvania to develop a mediation program to resolve health care disputes, to be used if a patient is not satisfied with the health care (or the explanation of the care) received. The established agreement to mediate health care disputes specifies that (1) a patient will not take legal action against Drexel until there is an attempt to resolve the dispute through the mediation program, and (2) if the patient is not satisfied with the results of mediation, the patient may still seek a legal remedy.[173]

[172] Drexel University, Office of Equality and Diversity, "Conflict Coaching and Conflict Resolution," accessed November 14, 2014,
http://www.drexel.edu/oed/conflictResolution/overview/Conflict%20Coaching%20and%20Resolution/.
[173] Drexel University College of Medicine, "Agreement to Mediate Health Care Disputes," accessed December 16, 2014,
http://www.drexelmedicine.org/~/media/Files/agreementtomediatehealthcaredisputes.pdf.

University of Pittsburgh Medical Center

The University of Pittsburgh Medical Center emphasizes the benefits of conflict management in strengthening relationships, increasing effectiveness, maintaining employee performance, reducing stress, improving morale, and saving time and energy. A five-stage model for conflict resolution was adopted, recognizing that "no approach is always right or wrong. Sometimes, it is appropriate to try more than one approach over time, if the desired results are not immediate." Conflict resolution strategies involve avoidance (delaying events or a decision, to avoid likely public confrontation or physical violence), accommodation (complying with another's wishes or needs), competition (winning and losing), compromise (finding middle ground and to at least reach a partial resolution to the conflict), and collaboration (finding a win/win solution to the conflict, where each party is willing to learn and understand the needs of the other party to help in the process of finding a resolution). [174] UPMC has an established panel of mediators who, as part of the early intervention program, facilitate conversations between the medical care providers, patients, and family members. As part of its consent to treatment, UPMC requires mediation before the filing of a lawsuit.

Temple University

Temple University has established a statement of principles that specifies, among other things, that an orderly grievance procedure should exist to protect a student against a prejudiced or capricious evaluation by a faculty member (i.e., an infringement of the student's academic rights). Under the grievance procedure, if a student alleges a violation of academic rights that cannot be resolved between the faculty member and the student—or if the student does not feel comfortable discussing the matter directly with the faculty member—the student may bring an informal complaint to the student ombudsperson to effect an informal resolution through mediation. If a resolution satisfactory to the student is not so obtained, the student may submit a formal, written grievance to the dean, who may then attempt informal resolution through discussion with the student and faculty member. If a mutually agreeable resolution is not achieved at this level, the dean must refer the matter for consideration in accordance with the established procedures for resolution of student grievances. The dean must consider the recommendation of the student grievance committee and issue a written decision and remedy, with appropriate precautions developed to safeguard the confidentiality of the proceedings. The decision may be appealed to the provost.[175]

[174] University of Pittsburgh Medical Center (UPMC), "Horizon Orientation Manual," 27 (on file with the Joint State Government Commission).

[175] "Final Report of the Select Committee on Academic Freedom in Higher Education," (November 4, 2008), available at http://www.studentsforacademicfreedom.org/news/2656/final-report-of-the-select-committee-on-academic-freedom-in-higher-education. This report was drafted in response to 2005 House Resolution No. 177.

APPENDIX G:
ADR PROGRAMS IN OTHER JURISDICTIONS

Each state provides for ADR services and programs in some manner, through a statewide ADR office created by statute, through executive order, through court rules, through the development of systems within state universities, or through private nonprofit entities. The Federal Government has also extensively provided for ADR.

This section of the report highlights the development of ADR and experiences at the national level and in Florida, Georgia, Maryland, Minnesota, New Jersey, New Mexico, Ohio, and Texas.

FEDERAL GOVERNMENT

Federal Courts

The United States District Courts for the Middle and Western District of Pennsylvania has pioneered an ADR program. The Western District's Local Rule No. 16.2 notes that the court "recognizes that full, formal litigation of claims can impose large economic burdens on parties and can delay resolution of disputes for considerable periods" and ADR "can improve the quality of justice by improving the parties' understanding of their case and their satisfaction with the process and the result." The purpose of the rule is "to make available to litigants a broad range of court-sponsored ADR processes to provide quicker, less expensive and potentially more satisfying alternatives to continuing litigation without impairing the quality of justice or the right to trial."[176] The ADR policies and procedures contain specific provisions governing the qualifications and duties of the ADR coordinator, qualifications of neutrals mediation, compensation of neutrals, early neutral mediation, arbitration processes, and confidentiality.

[176] U.S. District Court, Western District of Pennsylvania, Alt. Dispute Res., Local Rule No. 16.2, http://www.pawd.uscourts.gov/Applications/pawd_adr/Pages/ADRInfo.cfm?Submit2=+ADR+Program+Information+ (nonworking link, February 3, 2016); U.S. District Court, Middle District of Pennsylvania, Court-Annexed Mediation Program, Local Rule 16.8, http://www.pamd.uscourts.gov/sites/default/files/local_rules/LR120112.pdf.

Administrative Dispute Resolution Act of 1996

The Administrative Dispute Resolution Act of 1996 requires each agency to adopt a policy that addresses the use of ADR and case management and provide regular training for individuals involved in implementing the policy. [177] The training must encompass the theory and practice of negotiation, mediation, arbitration, or related techniques.[178] Among other things, the act provides for the circumstances where an agency is permitted or forbidden to use ADR to resolve an issue, requirements for service as a neutral, and confidentiality rules.

Assistance for the Education of Children with Disabilities

The U.S. Department of Education has promulgated regulations for assistance to states for the education of children with disabilities. Under the regulations, each public agency must ensure that procedures are established and implemented to allow disputants to seek resolution through mediation. The mediation process must be voluntary on the part of the parties, may not be used to deny or delay a parent's right to a hearing on the parent's due process complaint (or to deny any other specified rights), and must be conducted by a qualified and impartial mediator trained in effective mediation techniques.

A public agency may establish procedures to offer to parents and schools that choose not to use the mediation process. The state must maintain a list of qualified mediators who are knowledgeable in laws and regulations regarding special education and related services. Mediators are selected on a random, rotational, or other impartial basis. The state must bear the cost of the mediation process. If the mediation resolves the dispute through mediation, the parties must execute a legally binding agreement setting forth the resolution of the matter. Discussions during the mediation process are confidential and may not be used as evidence in any subsequent civil proceeding.[179]

OTHER STATES

Florida

Florida Dispute Resolution Center (DRC)

ADR has been utilized by the Florida Court System to resolve disputes since the creation of the first citizen dispute settlement (CDS) center in Dade County in 1975. The Florida Dispute Resolution Center (DRC) was established as the hub of the court-connected ADR program in 1986 by the Chief Justice of the Supreme Court of Florida and the Dean of the Florida State University School of Law. The DRC was the first statewide center for education, training, and research in ADR. It provides staff assistance to four Supreme Court of Florida mediation boards and committees; certifies mediators and mediation training programs; provides basic and advanced

[177] Pub. Law No. 104-320, 110 Stat. 3870 (5 U.S.C. §§ 571-584).
[178] See Pub. Law No. 101-552, § 3(c); 5 U.S.C. § 571.
[179] 34 C.F.R. § 300.506.

county mediation training to volunteers; and assists the local court systems throughout Florida as needed.[180] The Florida judiciary claims "the most comprehensive court-connected mediation program in the Nation."[181]

The Florida State Court System consists of 20 judicial circuits that encompass Florida's 67 counties. Prior to July 2004, ADR programs in Florida were funded by the counties. This resulted in large variations of ADR services across the state. Generally, single county circuits provided litigants with access to a wide variety of programs, while in multi-county circuits, services were offered in some but not all of the counties. Under a constitutional amendment implemented on July 1, 2004, the funding for the state court system became the responsibility of the state. The goal was for litigants to have generally uniform access to "essential" services regardless of where they live in the state; included among those essential services are mediation and arbitration.

The Supreme Court of Florida, through the DRC, offers certification for mediators in the areas of county court, family, circuit court, dependency and appellate cases. In most cases, parties select the mediator of their own choice. However, certified mediators may receive appointments from the court when the litigants are unable to select their own mediator. Certified mediators and those individuals who are not certified but who mediate court-ordered cases are bound by the ethical standards contained in the *Florida Rules for Certified and Court-Appointed Mediators, Part II*. Mediators must renew their certification every two years and must complete 16 hours of continuing mediator education for each practice area certified. The Supreme Court does not certify arbitrators, but court-appointed arbitrators are bound by the *Florida Rules for Court-Appointed Arbitrators*. As of August 2012, 6,360 individuals were certified as mediators. The breakdown by certification is 2575 county mediators, 2165 family mediators, 3599 circuit mediators, 221 dependency mediators, and 371 appellate mediators.

The Supreme Court has created four standing ADR Committees or Boards, all staffed by the DRC:

> The Florida Supreme Court *Committee on Alternative Dispute Resolution Rules & Policy* (ADR R&P) is charged with monitoring and making recommendations to improve and expand the use of court-connected ADR (not limited to mediation) through the recommendation of the adoption of statutes, rules, policies, and procedures;
>
> The *Mediator Ethics Advisory Committee* (MEAC) issues formal advisory ethics opinions to certified and court-appointed mediators. These opinions are posted on the DRC website for use by mediators as well as courts, attorneys and the general public;
>
> The *Mediator Qualifications Board* (MQB) is responsible for hearing grievances filed against certified mediators for violations of the ethical standards and reviewing mediator good moral character (GMC) issues;

[180] Florida State Courts, "Alternative Dispute Resolution," accessed December 16, 2014, http://jud18.flcourts.org/gen_public/ adr/brochure.shtml.
[181] Florida State Courts, Annual Report, 2014-15, 32 http://www.flcourts.org/core/fileparse.php/248/urlt/annual_report1415.pdf.

The *Mediation Training Review Board* (MTRB) reviews complaints against certified mediation training programs and training program principals.

A variety of other ADR programs are operating successfully. Summary jury trials are utilized on an ad hoc basis in some circuits. There are numerous ADR programs within the executive branch, including those provided by the Department of Insurance, the Division of Mobile Homes of the Department of Business and Professional Regulation, and the Workers Compensation Division of the Department of Labor and Employment Security. Most recently, the DRC has focused on parent coordination, "a child-focused ADR process in which mental health or legal professionals with mediation training assist parents in creating and implementing their parenting plan."[182]

Statutes. Florida's most important legislation on ADR was enacted in 1987. [183] It granted civil trial judges the statutory authority to refer cases to mediation or arbitration, subject to rules and procedures established by the Supreme Court of Florida. Since then, the statute has been revised several times, and procedural rules, certification qualifications, ethical standards, grievance procedures, training standards, and continuing education requirements for mediators have been implemented.

The enabling legislation for Florida's court-connected ADR program declares that court-ordered mediation be conducted under rules of practice and procedure adopted by the Supreme Court. The rules must "refer to mediation any filed civil action for monetary damages, provided the requesting party is willing and able to pay the costs of the mediation or the costs are equitably divided between the parties (Fla. Stat. § 44.102). Exceptions are provided for (1) landlord and tenant disputes that do not include a personal injury claim; (2) debt collections; (3) medical malpractice; (4) small claims; (5) cases proper for referral to nonbinding arbitration; (6) cases where the parties have agreed to binding arbitration, expedited trial, or voluntary trial resolution. The court may refer other civil actions to mediation. Where the circuit court has a family or juvenile dependency mediation program, the court is directed to refer a dispute to mediation except for family cases where there has been a history of domestic violence.

The circuit court must maintain a list of certified mediators who have registered with the Supreme Court. Cases are referred to volunteer mediators, who may receive reimbursement for expenses. Non-volunteer mediators are compensated in accordance with Court rules. If the mediation has reached an impasse or the mediator reports failure to agree, a party may submit an offer of settlement or an offer or demand for judgment (§ 44.104(4), (b)). The Supreme Court is directed to "establish minimum standards and procedures for qualifications, certification, professional conduct, discipline, and training for mediators and arbitrators" (§ 44.106). Mediators, mediator trainees, and arbitrators are afforded judicial immunity, which does not apply to acts "in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property" (§ 44.107).

[182] Florida State Courts Annual Report 2014-15, 33.
[183] Fla. Stat. §§ 44.102—44.104, 44.106—44.108.

The court may order nonbinding arbitration under applicable Supreme Court rules, subject to statutory requirements (§ 44.103). Parties may submit the dispute to binding arbitration or voluntary trial resolution (§ 44.104).

Mediation and arbitration are available to parties regardless of need. A filing fee of one dollar is levied on all proceedings in local courts to fund the program. Fees are provided for mediation services, reduced for parties whose combined income is less than $ 50,000. Residential evictions of indigent parties and small claims cases are exempt from these fees (§ 44.108).

A Citizen Dispute Settlement Center may be established by the chief judge of a judicial circuit upon consultation with the county commissioners and the approval of the Chief Justice. A council appointed by the chief judge of the circuit creates the rules controlling the operations of the center and appoints its director. The council is directed to "formulate and implement a plan for creating an informal forum for the mediation and settlement of disputes" (Stat. § 44.201).

Georgia

Georgia's statewide framework (Ga. Code § 15-23-1—12, and GA R ADR Rules) for court-connected ADR enables any superior, state, probate, magistrate or juvenile court to offer ADR processes to its litigants. The statewide framework includes the Supreme Court's ADR Rules; the Georgia Court-connected ADR Act (filing fee surcharge legislation which supports the administration of local ADR programs); a permanent policy-making Commission on Dispute Resolution; and an Office of Dispute Resolution. Almost all the more populated counties have court-connected ADR services available in one or more trial courts. These programs have been developed within the framework of the Georgia Supreme Court ADR Rules and demonstrate the local initiative and variation that the rules encourage. Since use of ADR programs is discretionary with the courts, some courts have no programs at all, while others may have full-blown multi-door programs that include all the allowed mechanisms.[184]

Maryland

Maryland has alternative dispute resolution programs (ADR) in every jurisdiction in the state and in four of the five levels of courts (District Court, Circuit Court, Court of Special Appeals, and Orphans' Court). The ADR programs vary in the processes available, type of neutrals, and program structure. The program encompasses a variety of ADR, including any process or combination of ADR processes, such as mediation, settlement conferences, arbitration, and community conferencing, among others.

In 1998, Chief Judge Robert M. Bell created and chaired the Maryland Commission, which collaborated with over 700 stakeholders to develop a strategic plan for advancing mediation and other conflict resolution processes statewide. The work of the Commission led to the development of a court-related agency, the Maryland Mediation and Conflict Resolution Office (MACRO). MACRO has become a nationwide model for its ambitious scope in implementing ADR both within and beyond court-related proceedings.

[184] Douglas H. Yarn, *Georgia ADR Practice and Procedure*, § 12-20.

> While Chief Judge Bell appreciates that ADR processes like mediation and settlement conferences may take cases off of the courts' dockets and promote judicial efficiency, unlike many jurists, his commitment to ADR expands beyond court-based programs. He recognizes that unresolved conflict often makes its way into the courts. By using the broad reach of the court to educate the public about conflict resolution and expand the use of ADR, people can resolve their own disputes in their communities and prevent the escalation of conflict. Under his leadership, community mediation centers have multiplied across the state and community conferencing is increasingly being used by police departments, courts, and the Department of Juvenile Services.[185]

Programs have developed to meet the need for ADR services within jurisdictions. The larger case volume jurisdictions such as Baltimore City, Baltimore County, and Montgomery County, offer the most variety of ADR processes at all levels of court. All 24 local jurisdictions (viz., 23 counties and Baltimore City) provide at least one ADR process.

The most prevalent use of ADR exists among domestic cases in the circuit courts. All 24 jurisdictions provide mediation for child access cases. Currently 20 counties offer mediation for child welfare cases. Parties with marital property cases can engage in court-connected mediation in 18 counties. Other ADR processes for domestic matters include settlement conferencing provided in 14 counties; facilitation, offered in six counties; and a combined communication skills counseling-mediation process in St. Mary's County.

General civil circuit court mediation is provided in Baltimore City and 13 counties as of 2013. Fourteen of the 24 jurisdictions offer pre-trial/settlement conferences for circuit court, general civil domestic cases. Twelve of the 14 jurisdictions offer both mediation and settlement conferences for appropriate cases.

Baltimore City and Baltimore County remain the only two jurisdictions offering ADR, specifically mediation, within the Orphans' Court. The programs, funded by local government, use a roster of mediators who work on a fee-for-service basis.

Eight jurisdictions, expanding to ten, offer ADR opportunities for delinquency matters involving juvenile offenders. The most common process available for juvenile matters is community conferencing, although the juvenile division within Montgomery County State's Attorney's Office also offers mediation for delinquency cases. Community conferencing expanded in 2010 as a result of a partnership between the Judiciary's Department of Family Administration and Community Conferencing Center of Baltimore City. The partnership provides funding for operational support and training of conferencing facilitators. Participation in the process is voluntary and provided at no charge to the participants.

[185] Deborah Thompson Eisenberg et al., "Alternative Dispute Resolution and Public Confidence in the Judiciary: Chief Judge Bell's 'Culture of Conflict Resolution,'" 72 Md. L. Rev. 1112 (2013).

The processes of collaborative law and parent coordination represent two emerging ADR practices for family law matters. Starting in 2011, the Department of Family Administration began to promote the use of collaborative law to assist parties in the out-of-court settlement of domestic issues. Since that time, that department has supported extensive training sessions feeding the pro bono project for collaborative law. Parent coordination is commonly employed in high-conflict custody cases, using a facilitator who has conflict resolution and mental health credentials.

At the District Court level, civil ADR exists in 15 counties. The District Court of Maryland ADR Office provides day of trial and pretrial mediation and settlement conferences for civil cases throughout the state. Through partnerships with local community mediation centers and the Mediation Clinic at the University of Maryland, Francis King Carey School of Law, litigants in eleven locations may engage in pretrial mediation. State's Attorney's Offices in twelve counties offer ADR for certain misdemeanors. Mediations are provided directly by staff mediators within the State's Attorney's Office or through a partnership with local community mediation centers.

The Maryland Court of Special Appeals (COSA) began a pilot mediation program, which was initially funded by MACRO. By August 2012, the COSA formally incorporated its ADR Division into its own budget and case management system. Cases that require a civil report by the litigant are routinely reviewed and ordered to a settlement conference or mediation. Since 2010, the ADR Division has managed 10 – 15 percent of COSA's civil docket. These services are provided at no charge to the appellants.

The State's Attorney's Offices in twelve counties provide for the mediation of certain misdemeanors. All except two criminal ADR programs use partnerships with community mediation center volunteers to conduct the mediation sessions. All mediations through the District Court ADR Office or State's Attorney's Offices are provided at no charge to the participants.

The Maryland Judiciary has historically supported the majority of ADR programs. Most domestic mediation programs and pro bono collaborative projects operate entirely from annual grants provided by the Department of Family Administration. These grants support the salaries of the family support services coordinators, fee waivers, and other program-related expenses.

The Maryland Mediation and Conflict Resolution Office (MACRO) also provides supplemental grant funding for domestic and general civil circuit court ADR programs as well as criminal mediation through the State's Attorney's Offices. On an annual basis, MACRO funds community mediation centers through its Community Mediation Performance-based Grants. Community mediation centers partner with courts, state, and local government agencies, among other community-based organizations, to provide ADR services free of charge to the parties. In 2012, community mediation centers conducted 1,330 mediations of court-affiliated cases.[186]

[186] State of Maryland, Administrative Office of the Courts, "Alternative Dispute Resolution Landscape: An Overview of ADR in the Maryland Court System" (April 2014), http://marylandmacro.org.

Community Mediation Maryland (CMM)

CMM is focused on supporting the reentry of prison inmates into the community. Reentry mediation provides an opportunity for an inmate and family members, and other support people, to meet with a mediator before the inmate's release to prepare for the transition back into the community. The mediation allows those involved to discuss their experiences, and establish a plan to move forward to resolve or prevent conflicts.[187] CMM and member centers have provided reentry mediation services to inmates since 2008. Since February 2009, CMM centers have collected comprehensive data on all inmates who requested mediation, and have collected valuable data on the effect of mediation on recidivism rates.[188]

Minnesota

In 1991, Minnesota enacted legislation establishing an ADR program under the Minnesota Supreme Court.[189] In its current form, the legislation[190] directs the court to adopt rules requiring the use of nonbinding ADR processes in all civil matters except family law matters and cases exempted from ADR "for good cause shown by the presiding judge." The rules must include equitable means for the payment of fees and expenses for their use. The ADR procedures must include "arbitration, private trials, neutral expert fact-finding, mediation, minitrials, consensual special magistrates including retired judges and qualified attorneys to serve as special magistrates for binding proceedings with right of appeal." The Court was authorized to include other types of proceedings.

On July 1, 1994, the Minnesota Supreme Court adopted Rule 114 to implement this program.[191] In every civil case, attorneys are required to promptly confer about ADR with the client and opposing counsel, and include their conclusion about which ADR process they will apply, if any, in the case management statement otherwise required by court rule. The court may require the parties to use a non-binding form of ADR, even if neither side wants it.

A Code of Ethics was promulgated as an appendix to Rule 114, and third-party neutrals who participate in that capacity in ADR proceedings impliedly consent to be bound by it.[192] There are about 1,300 neutrals currently active on the state roster. In order to act as a neutral, a person or organization must be approved by the ADR Ethics Board, appointed by the Supreme Court, and the Board also handles complaints against neutrals. The Board is comprised of 15 volunteers, six of whom are judicial representatives. The members receive free parking, but no other reimbursements. The ADR program contracts with one attorney with ADR expertise, who assists

[187] Shawn M. Flower, "Community Mediation Maryland: Reentry Mediation Recidivism Analysis," 1 (April 18, 2013), http://re-entrymediation.org/PDFS/CMM_Recidvism_Final_04_18_2013.pdf.
[188] Choice Research Associates, "Re-entry Mediation: Evaluation Results," accessed December 16, 2014, http://re-entrymediation.org/index.php/general-information/re-entry-mediation-evaluation-results/.
[189] Barbara McAdoo and Nancy Welsh, "Does ADR Really Have a Place on the Lawyer's Philosophical Map?" 18 Hamline J. Pub. L. & Pol'y 376 (1997).
[190] Minn. Stat. § 484.73.
[191] Minn. Gen. R. Prac. 114.
[192] Rule 114—Appendix Code of Ethics

the state administrator and the Board with complaints and other correspondence. As of FY 2016-17, the budget for the program is $57,000, funded by user fees.[193]

A survey of 1,000 Minnesota lawyers, conducted not long after the adoption of Rule 114, made the following observations:[194]

1. Use of ADR increased after Rule 114, especially mediation, but the use of other mediation procedures did not.[195]

2. Many attorneys use ADR because they believe the court will order it even if they object. Some judges treat Rule 114 as a mandatory ADR rule, even though it requires only consideration of ADR.[196]

3. Rule 114 has not affected the timing or amount of discovery.[197]

4. About half of the respondents reported mediation saving litigation time, costs, or both. Most attorneys ignore such intangible benefits of ADR as client satisfaction and control, creativity of settlement terms, and preservation of the relationship between parties. [198]

5. Settlement rates have increased; most are exclusively monetary.[199]

6. Most practicing attorneys favor the evaluative mediation over facilitative or transformative approaches. They prefer to use mediators who are experienced litigators in the same field of law as the case. If the mediation comes to an impasse, the parties' attorneys want the mediator to give his or her opinion on the probable litigation result.[200]

7. At least in Hennepin County (Minneapolis), mediators encourage parties to participate and help them communicate effectively.[201]

McAdoo and Welsh observe that mediation appears to helps parties reach settlements earlier than they otherwise would, and parties are generally more satisfied with ADR than traditional litigation. Nevertheless, ADR is less helpful than it should be, largely because the process remains under the control of lawyers who perceive mediation in terms of litigation only. Further, mediation is less cost-effective than it can be because the parties engage in excessive discovery. ADR attorneys are narrowly focused on the legal outcome, largely ignoring client

[193] Telephone conference and e-mail to Commission staff by Renee Y. Salmon, Legal Assistant, Minnesota State Court Administrator's Office, ADR Program, August 17-19, 2016.
[194] McAdoo and Welsh, "Philosophical Map," 384-89.
[195] *Id.* at 384.
[196] *Id.* at 385-86.
[197] *Id.* at 386-87.
[198] *Id.* at 387-88.
[199] *Id.* at 388.
[200] *Id.* at 390.
[201] *Id.* at 391.

satisfaction and voice, as well as the benefit ADR can yield toward improving ongoing relationships between parties.[202] The statute seems to require mediation unless there is a showing of good cause. In practice, judges often defer to the parties' attorneys regarding the use of mediation in particular cases.[203]

New Jersey

Office of Dispute Settlement (ODS)

The New Jersey Office of Dispute Settlement (ODS), under the Office of the Public Defender, provides mediation and arbitration services and claims to have "saved the state, businesses and private parties millions of dollars in litigation costs." ODS mediates complex civil litigation and public disputes, designs and manages dispute resolution programs, and provides training in negotiation and mediation. [204]

Center for Negotiation and Conflict Resolution (CNCR)

Created in 1986, CNCR serves Rutgers University as a resource both inside and outside New Jersey for those interested in ADR. The Center is part of a consortium of 18 conflict resolution centers at such universities as Harvard, Michigan, Minnesota, Penn State, Northwestern, Stanford, Syracuse, and Wisconsin. These centers collaborate through joint research projects and workshops, seminars, and conferences. The Center concentrates its activities in training, ADR services, research, public education, outreach, and support.[205]

Complementary Dispute Resolution (CDR)

The New Jersey Judiciary's Complementary Dispute Resolution (CDR) programs help litigants resolve their disputes outside of the courtroom through the voluntary settlement of their claims, mediation, or arbitration. The programs are available for a wide range of conflicts, including child custody and visitation, matrimonial, personal injury, automobile accident, small-claims, neighborhood, and landlord-tenant disputes. (The New Jersey Judiciary uses the modifier "complementary" instead of "alternative" because it views dispute resolution processes as complements to the traditional trial processes rather than as alternatives.)[206]

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[202] *Id.* at 392.
[203] Bobbi McAdoo, "All Rise, the Court Is in Session: What Judges Say about Court-Connected Mediation," 22 Ohio St. J. on Disp. Resol. 377, 400-02 (2007).
[204] New Jersey Office of Public Defender, "Office of Dispute Settlement," accessed December 18, 2014, http://www.state.nj.us/ defender/ods.shtml.
[205] Rutgers University, Edward J. Bloustein School of Planning and Public Policy, Center for Negotiation and Conflict Resolution, "About Us," accessed December 18, 2014, http://cncr.rutgers.edu/about-us/.
[206] New Jersey Courts, "Complementary Dispute Resolution," accessed December 18, 2014, http://www.judiciary.state.nj.us/ services/cdr.htm.

New Mexico

Enacted in 2007, the New Mexico "Governmental Dispute Prevention and Resolution Act"[207] created the Office of Alternative Dispute Prevention and Resolution within the Risk Management Division of the Department of General Services. The Alternative Dispute Resolution Advisory Council was also created to advise the Office. The core duties of the Office are to "organize and manage ADR programs for agencies, employees, vendors, businesses regulated by government entities and other interested parties" "coordinate the use of neutral parties to facilitate ADR for interested parties and training for agency staff" and "implement development and use of ADR strategies."[208]

The Office promotes the use of ADR "by and within state governmental agencies as an efficient way to save money and conserve resources" with "early, 'in-house' dispute resolution and positive collaboration among state employees, supervisors, managers and agencies through the development and support of effective and efficient programs and policies." The Office maintains a network of skilled mediators to respond to requests for direct assistance, manages a centralized collection of information and resources, consults on program design, implements outreach presentations and public education initiatives, provides skills training, and offers assistance to other state dispute prevention and resolution efforts.[209]

The Office handled 104 ADR requests in Fiscal Year 2015, 38 of which were information requests and 21 were for presentations or training rather than case resolution. The 45 mediation cases were either employer/employee or employee/supervisor cases. A growing part of the Office's work is described as Citizen Participation / Public Dispute Management, of which there were 146 matters in Fiscal Year 2015. The Office assisted agencies in handling 49 EEOC mediation cases pursuant to an agreement between EEOC and the state. The Office estimated that its successful mediation of 87 out of 141 cases saved the state more than $ 5.2 million.[210]

In addition, New Mexico has enacted the Uniform Arbitration Act and a Mediation Procedure Act. [211]

Ohio

The Ohio Commission on Dispute Resolution and Conflict Management was created by statute in 1989. [212] It consisted of twelve volunteer members appointed by the Governor, Chief Justice of the Ohio Supreme Court, the President of the Senate and the Speaker of the House. The Commission focused its efforts in four areas – schools, courts, communities and government. With a small staff it provided training and consultation services to agencies within state and local

[207] N.M. Stats. § 12-8A-3—12-8A-8.
[208] N.M. Stats. § 12-8A-8 B. (1), (2), and (3).
[209] New Mexico General Services Department, "Risk Management," accessed December 18, 2014. http://www.generalservices.state.nm.us/ riskmanagement/Overview.aspx.
[210] State of New Mexico, Alternative Dispute Prevention & Resolution Advisory Council, FY15 Annual Report (2015).
[211] N.M. Stat. §§ 44-7A-1—44-7A-32 and N.M. Stat. §§ 44-7B-1—44-7B-6.
[212] http://disputeresolution.ohio.gov

government. It also provided facilitation and mediation services and aimed to spread the use of ADR services throughout government.

In 2011, the Commission on Dispute Resolution was reconstituted under the Supreme Court as an advisory committee charged with advising the Court on the following:

- the promotion of statewide rules and uniform standards concerning the use of dispute resolution in Ohio courts;
- the development and delivery of dispute resolution education and professional development activities for judges, magistrates, court personnel, attorneys, and court-affiliated dispute resolution professionals;
- the development and delivery of dispute resolution services for disputes arising among state, county, and local public officials throughout Ohio; and
- the consideration of any other issues deemed necessary for the development, and delivery of dispute resolution programs and services[213]

The basic framework for the Commission is provided by rules promulgated by the Court.[214] The Commission provides consulting, training, and limited funding to mediation programs in the trial and appellate courts. There is no statewide licensure or certification of mediators. The Court has established guidelines for qualifications of family court mediators and has certified the advanced family mediation training that is required under the rules governing such mediation.[215] The Commission on Dispute Resolution conducts mediations upon request of the parties. The courts of Ohio's 88 counties have a large degree of autonomy in their practice and procedure, including their respective ADR programs.

Texas

Texas ADR Procedures Act

This Act sets forth the procedural law generally applicable to ADR proceedings.[216] It declares the state's policy to "encourage the peaceable resolution of disputes, with special consideration to disputes involving the parent-child relationship . . . and the early settlement of pending litigation through voluntary settlement procedures." (§ 154.002) Courts are authorized to refer disputes to ADR on their own initiative or on motion of a party, including referral to a dispute resolution organization or "a nonjudicial and informally conducted forum for the voluntary settlement of citizens' disputes through the intervention of an impartial third party, including those [ADR] procedures described [in the Act.]" The specifically authorized procedures are mediation (§ 154.023),[217] mini-trial (§ 154.024), moderated settlement conference (§ 154.025), summary jury trial (§ 154.026), and arbitration (§ 154.027).

[213] Supreme Court of Ohio and Ohio Judicial System, "Commission on Dispute Resolution," accessed December 18, 2014, https://www.sconet.state.oh.us/Boards/disputeResolution/.
[214] Ohio Sup. R. Rule 16.
[215] "Dispute Resolution FAQs"
[216] Tex. Civ. Prac. & Rem. Code Ch. 154.
[217] There is a special provision (§ 154.028) for mediation following application for expedited foreclosure.

Provisions are included to regulate impartial third parties in the following respects: appointment (§ 154.051), qualifications (§ 154.052), and standards and duties (§ 154.053), compensation (§ 154.054), and immunity (§ 154.055). Written settlement agreements are enforceable as contracts and may be included in the court's final decree (§ 154.071). Confidentiality of communications pertaining to an ADR proceeding is generally mandated (§ 154.073). The responsibility for statistical reporting of disputes referred to ADR is delegated to the Texas Supreme Court (§ 154.072).

Government Dispute Resolution Act

This Act authorizes governmental entities to employ ADR to resolve public disputes. The key provisions include the following items:[218]

- declaration of policy that entities use ADR procedures in appropriate operations and programs
- budgetary authority to entities to pay for implementation
- authority to obtain ADR services from other governmental entities, agency pooling agreements, dispute resolution centers, and private providers
- application of Texas ADR Procedures Act standards and duties to governmental neutrals, including 40-hour training requirement
- extension of ADR Procedures Act confidentiality provisions to governmental ADR
- authority of Office of Administrative Hearings to conduct ADR proceedings and refer contested cases to ADR[219]

Center for Public Policy Dispute Resolution

The Center for Public Policy Dispute Resolution of the University of Texas School of Law was created in 1993 to promote the appropriate use of ADR in Texas government. The Center provides a neutral, non-political site for assisting the state and local governments with ADR. It "provides a number of ADR services to governmental entities, policymakers, and others involved in public disputes. Training and conferences also play a role in the Center's mission to promote and increase the appropriate use of ADR processes in Texas government."[220] The services are provided through staff and qualified subcontractors, and include consultation and assistance in designing ADR systems for managing recurring disputes, referrals, conflict assessments, program evaluations, coordination, public education events, and assistance with legal research.[221]

[218] Tex. Gov't Code Ch. 2009.
[219] Texas Law, Center for Dispute Resolution, "Texas ADR Statutes," accessed August 11, 2016, https://law.utexas.edu/cppdr/resources/texas-adr-statutes/.
[220] School of Law, University of Texas at Austin, Center for Public Policy Dispute Resolution, "About Us," accessed December 18, 2014, https://www.utexas.edu/law/centers/cppdr/about/.
[221] *Id.*, "Services," accessed December 18, 2014, https://www.utexas.edu/law/centers/cppdr/services/.

APPENDIX H: SUBCOMMITTEE REPORTS

The Advisory Committee conducted much of its work through six subcommittees:

- Business, Commercial, and Personal Injury Cases
- Community, Juvenile Delinquency, and Corrections
- Family
- Government and Public Policy
- Schools and Education
- Workplace and Health Care

Their observations and recommendations are presented in this chapter. Those that relate to best practices and to public education and access are included in the chapters relating to those topics, respectively. Recommendations are primarily directed toward the proposed ADR Commission unless otherwise stated.

SUBCOMMITTEE ON BUSINESS, COMMERCIAL, AND PERSONAL INJURY CASES

Recommendations

- ADR processes. Private, nonprofit, and governmental entities at the local, regional, and state levels should be encouraged to develop and implement ADR processes to resolve commercial and personal injury disputes.

- Skills and training. Regardless of the area of conflict or method chosen for resolution, practitioners of ADR programs and services should master the skills necessary for competent and neutral performance in providing these services and programs.

SUBCOMMITTEE ON COMMUNITY, JUVENILE DELINQUENCY, AND CORRECTIONS

This Subcommittee conducted meetings in person or by teleconference on ten occasions between October 2007 and February 2010. The Subcommittee researched ADR within communities for the general public, and among juvenile delinquents and prison and jail inmates. Much of the research dealt with the concept of restorative justice. These recommendations stem from an analysis of various surveys conducted in 2008 within these three communities.

Recommendations

- Community Mediation Centers. The Subcommittee believes that the statewide office of conflict resolution should focus on community-based conflict resolution, restorative justice conflict resolution practices, and other ADR programs and services. This type of administrative structure could result in the creation or expansion of regional or community conflict resolution centers aimed at to providing community-based conflict resolution services (including mediation training and victim-offender conferencing). This network created should provide information sharing opportunities and shared technical assistance, training, and funding.

Recommendations

- Community-based centers and services. Community-based regional centers should be established or expanded to provide juveniles, their families, and victims of juvenile crime with community-based conflict resolution services, including community mediation and restorative justice conflict resolution practices. Such services should exist in relevant institutional settings, such as courts and schools, without regard to physical or mental limitations, language barriers, or confinement in a juvenile or correctional facility location, or a party's ability to pay. A sliding scale of fees based on income may be considered. Community-based centers and services should be established or expanded in the rural counties.

- Mandatory and voluntary services. Parties should be informed of community-based conflict resolution services and mandated to participate in an orientation session on those services. However, a party's involvement after the orientation session should be voluntary and based on the willingness of the victim to participate further and the juvenile's acceptance of responsibility for his or her actions.

- Model standards and training. Model standards and training for programs and services involving restorative justice conflict resolution should be established. State and county corrections and probation employees should receive this training.

- Restorative justice techniques for juveniles. Restorative justice options for juveniles should be promoted, either as a substitute for judicial proceedings or in conjunction with adjudication of delinquency.

- Restorative justice techniques for adults. County adult probation offices should encourage restorative justice processes.

- Victim Offender Dialogue Program. County adult probation and parole offices should implement or expand the Victim Offender Dialogue Program through the Pennsylvania Office of Victim Advocate.

SUBCOMMITTEE ON FAMILY LAW

In order to better understand ADR in family settings, the Subcommittee distributed a survey to CMCs, the Department of Aging, and private practitioners.

Observations

The Subcommittee reported an absence of a consistent understanding and application of ADR within the court system, that the processes varied widely by county, and many counties struggled with the cost of providing ADR services.

- Elder care services. ADR in disputes involving the elderly has been a neglected area in Pennsylvania, despite a growing elderly population. ADR could address some disputes involving older adults that may occur within the family and in long-term care, acute care, home health care, and the community. It can help participating older adults communicate their values and wishes, whether or not they are physically present at the dispute resolution session.

- Court system. There is little consistency among counties regarding who may mediate, the existence of programs, location of proceedings, compensation of mediators, co-parenting programs, procedural issues (such as whether there conciliation should occur before mediation, or vice versa), terminology, local rules and administration, and how attorneys should be involved in the process.

- ADR processes. A bias exists in favor of attorney mediators against other qualified mediators.

Practitioners use transformative, facilitative, and evaluative models of mediation. Collaborative practice is expanding as a dispute resolution method for disputes involving marriage separation and dissolution, family, business, and other matters.[222]

Recommendations

The Family Law Subcommittee recommends provisions for dispute resolution within the field of family law for consideration by the ADR Commission:

- Orphans' Court. If an ADR Commission is established, it should monitor the progress of mediation rules under Rule 1.6 and consider expanding mediation programs to include support actions as well as child custody.

- Uniformity. A greater effort should be made to standardize court and ADR family law procedures.

[222] Collaborative practice is described at p. 27, above.

- Domestic relations matters. In divorce and custody disputes, ADR should not be conducted while a protection from abuse order is in effect.

- Health care. The Department of Health should require health care providers to offer DR services to resolve disputes regarding the health care of a patient and put policies and procedures to implement these services.

Training prerequisite to medical licensure should emphasize the importance of communication of a patient's wishes regarding the delivery of services. The Department of Health and the Department of Aging, perhaps in conjunction with medical schools, should lead the development of best practices regarding this communication.

- Judicial ADR Programs. The Supreme Court should consider mandating an ADR program established for domestic relations matters. It should require parties to attend an orientation session to explain the ADR process, after which the parties may consent to the use of ADR to resolve any or all of the outstanding disputes. Legislation implementing this recommendation is included in this report.

The Judiciary should also consider requiring by court rule that family law mediators successfully complete a 40-hour basic divorce and custody training course, including at least four hours on domestic violence and child abuse.

- Department of Health. The department should require health care providers to offer ADR services as a condition of licensure to resolve disputes regarding the health care of a patient, along with policies and procedures to implement these services.

- Department of Aging. The use of ADR services by the department be increased, particularly in the area of end-of-life decision-making, discharge planning, and placement in a facility. Specialized training in ADR services should address problems faced by the elderly population. Intake procedures should protect elderly adults from physical hazards before any ADR process commences.

- End of Life. Mediation to resolve health care disputes, particularly those involving end-of-life situations, should be implemented or expanded.

- Program Improvements. Finally, the following statewide initiatives should be developed to support program improvements across the Commonwealth:
    - policies and procedures for the provision of services
    - a funding stream for development and implementation of local programs
    - training, continuing education, and evaluation
    - outreach and orientation, including public education referral services

These improvements would be especially valuable for racial, ethnic, and cultural minorities, the elderly, and other population groups.

SUBCOMMITTEE ON GOVERNMENT AND PUBLIC POLICY

The Subcommittee on Government and Public Policy generated the following report.

Observations

Government bodies across the country appear to report consistently that there are substantial benefits, including cost-effectiveness and time-efficiency, in using various ADR processes, whether at the state, county, or municipal levels in appropriate situations.[223] These benefits include developing public policies that are effective and enduring because of the meaningful engagement of interested parties,[224] and resolving disputes and other conflicts involving governmental bodies without the need to resort to judicial intervention. However, in Pennsylvania many of the same types of governmental bodies have been reluctant to adopt appropriate ADR processes—perhaps due to a lack of understanding of their potential benefits or out of concern that their officials lack express authority to use them, or just because of bureaucratic inertia (including resistance to change).

Recommendations

One or more government-based bodies (such as a state-wide conflict resolution office)[225] should be established and adequately funded to provide the gravitas, knowledge, expertise and financial support that would enable governmental officials and the public to expand ADR in Pennsylvania by taking necessary initiatives, including the following:

- Becoming knowledgeable about the various types of ADR processes, when they are likely to be useful (whether or not a governmental body is involved directly) and how to use them.

- Developing and enacting legislation and regulations that would encourage and support the use of ADR in appropriate situations in both public and private sectors.

- Initiating, funding, and evaluating a variety of ADR programs and services (as pilot projects, or otherwise) in order to identifying best practices and policies.

[223] See, for example, the Florida Dispute Resolution Center (www.flcourts.org/resources-and-services/alternative-dispute-resolution); the Office of Court Alternative Dispute Resolution of the Maine Administrative Office of the Courts (courts.maine.gov/maine_courts/adr/index.shtm); the District Court of Maryland's Alternative Dispute Resolution (ADR) Office (www.courts.state.md.us/district/adr/home.html); and the Office of Alternative Dispute Resolution of the New York State Unified Court System (https://www.nycourts.gov/ip/adr/aboutus.shtml).

[224] See S. L. Carpenter & W.J.D. Kennedy, "Managing Public Disputes," Jossey-Bass Publishers (1998).

[225] For example, the Maryland Alternative Dispute Resolution (ADR) Office, also known as the Mediation and Conflict Resolution Office (which is housed in the Administrative Office of the Maryland Courts, but has a mandate that extends into the private sector as well as the public one) has proven to be quite effective.

SUBCOMMITTEE ON
SCHOOLS AND EDUCATION

Observations

While peer mediation has proved beneficial, attempts to implement it have been scattered, uncoordinated, and ephemeral, and it has faced impediments, such as reduced funding for programs and training, increased emphasis on basic academic studies, and other educational priorities.

There are model programs to help elementary-school teachers and students learn nonviolent ways of resolving conflicts, prevent violent situations, and promote intercultural understanding.

Studies of cost savings regarding mediation in special education disputes in Pennsylvania are rare, despite increased interest.

Recommendations

- The Department of Education should promote statewide implementation of peer mediation and other ADR programs in the public schools through (1) distributing peer mediation and other ADR promotional materials, events, and training programs and (2) providing resources and technical support to establish a peer mediation program coordinator position in each school district or intermediate unit.

- Schools should use available resources, including state and federal grant monies to implement and maintain peer mediation and other ADR programs, including training for teachers and administrators.

- Institutions of higher education, including law schools, should promote mediation for disputes between and among students and faculty members, through collaboration with CMCs, private mediation practitioners, or local bar associations. These institutions should explicitly include ADR options as part of their administrative policies, to resolve conflicts between students, faculty members, and staff members. They should offer ADR classes, training, and certification programs as part of the normal curriculum, and develop and maintain ADR internship opportunities for students.

- Students should be encouraged to participate in mediation and other ADR programs to obtain practical knowledge and experience with ADR techniques as part of their education by (1) volunteering with or observing a K-12 peer mediation program, a local CMC program, or a local bar association mediation program, or (2) collaborating with a CMC or private mediation professionals to develop annual internship opportunities.

- Mediation in special education disputes should continue to be vigorously encouraged and made readily accessible, using local bar associations, other professional association conferences, and continuing education events.

- School districts, the Department of Education, and the Office for Dispute Resolution (ODR) should disseminate educational materials and advertise the availability of mediation to parents and their counsel for special education disputes. The information should address the benefits of mediation and point out the variety of qualified providers.

- Parties should be permitted to invite an advocate, attorney, or conflict resolution coach into mediation sessions in special education disputes.

SUBCOMMITTEE ON WORKPLACE AND HEALTH CARE

The Subcommittee studied national and state surveys, statistics, and summaries. It reviewed employer ADR programs, and interviewed employees responsible for employer ADR programs.

Observations

ADR is a mature and accepted process in unionized workplaces and is growing in acceptance in non-unionized workplaces in the Commonwealth. A pertinent observation is that non-union private employers may be affected by federal legislation that make employment arbitration agreements invalid.

Personal injury disputes, from basic tort liability to complex medical issues, may be resolved through a variety of ADR methods. Arbitration and mediation are most commonly used. If the parties are clearly identifiable, the issues can be clarified through discovery. Accepted forums for independent dispute resolution are available, the process is less costly than litigation, and final resolution can be obtained more quickly. However, without a legislative or judicial mandate to explore ADR, parties usually pursue litigation.

Professional liability insurers promote ADR in appropriate cases, and mediation is readily accepted. However, mediation is not consistently used throughout the Commonwealth. Some counties, for example, have court-ordered mediation, while others only encourage it.

Obstacles to ADR in medical malpractice cases include a lack of professional mediators, the difficulty in adopting a less adversarial mindset, and the fear of leaks of confidential information.

With respect to health care ADR, there often is no clear relationship between or among the various parties that mandate, or even provide, a forum for an expeditious resolution of disputes.

Although patients are provided information regarding ADR, the ADR process itself is seldom expedited, is multi-layered, and is too complex for a patient to easily represent him- or herself, especially if the dispute turns on medical necessity, coverage, or accepted standards of care.

Issues can quickly arise between patients and medical staff, patients and insurers, patients and families, and patients and institutions involving medical and nursing treatment, quality of care services, end-of-life decisions, family grievances, cultural differences, or liability issues. Complicating the situation are various federal and state laws that mandate certain types of coverage or prohibit certain types of treatments or medications. Preemption by laws and regulations is also a factor. Because of the time and expense involved in litigation, the parties may craft an inferior resolution simply for the sake of responding in some fashion.

Mediation of health care disputes can improve communication, lessen stress for patients and families, and decrease litigation. It can be used to address conflicts involving older adults, their families, and their care providers. Elder mediation provides older adults with an opportunity to actively participate in the decisions that affect their lives. Accommodations can be made for the elderly person to be in the room or for the presence of an advocate or support person who will be part of the mediation and represent the elderly person's wishes. In this way, the voice of the elderly person will be heard in these decisions, despite any impairment in the patient's ability to understand and voluntarily participate in the process. The recent rapid development of elder mediation reflects the growth of the elderly population, as well as a growing appreciation of mediation's usefulness in these cases.

Elder mediation is of interest to many stakeholders, including older adults, families, caregivers, private community and court-based mediators, agencies serving the aging population or providing adult protective services, private and nonprofit social service agencies, governmental social service agencies, geriatric case managers, elder law attorneys, community legal service organizations, orphans' court division personnel, health care providers, long-term continuing care and assisted living providers, educational institutions, social workers, geriatric healthcare personnel, and others who serve older adults.

CMCs with an interest in elder mediation collaborate productively with entities such as the Department of Aging, the Center for Advocacy for the Rights and Interests of the Elderly, the Alzheimer's Association, the American Association of Retired Persons (AARP), and local Area Agencies on Aging.

Recommendations

- Healthcare providers should be required to offer ADR services as a condition of licensure.

- Development of a comprehensive ADR strategy or policy must account for the numerous issues involved in the disputes and must be tailored to the needs of specific sectors. For example, the resolution of workplace disputes involves different considerations from healthcare disputes.

APPENDIX I:
MODEL STANDARDS OF CONDUCT FOR MEDIATORS

The American Bar Association (ABA), the American Arbitration Association (AAA), and the Association for Conflict Resolution (ACR) adopted identical Model Standards of Conduct for Mediators, which were published in September 2005.[226] There are nine standards: (I) Self-Determination; (II) Impartiality; (III) Conflicts of Interest; (IV) Competence; (V) Confidentiality; (VI) Quality of the Process; (VII) Advertising and Solicitation; (VIII) Fees and Other Charges; and (IX) Advancement of Mediation Practice.

STANDARD I. SELF-DETERMINATION

A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

   1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.

   2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

STANDARD II. IMPARTIALITY

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.

[226] Model Standards of Conduct for Mediators (September 2005), http://www.mediate.com/articles/model_standards_of_conflict.cfm#LinkTarget_391.

1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.

2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.

3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.

C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

STANDARD III. CONFLICTS OF INTEREST

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.

C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.

D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.

E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature

of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

STANDARD IV. COMPETENCE

A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.

2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.

3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.

B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.

C. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication, or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.

2. A mediator should not communicate to any nonparticipant information about ho\v the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.

3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.

B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.

C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.

D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

STANDARD VI. QUALITY OF THE PROCESS

A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.

2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.

3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.

4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.

5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.

7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.

8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.

9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from, or terminating the mediation.

10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.

B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from, or terminating the mediation.

STANDARD VII. ADVERTISING AND SOLICITATION

A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.

1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.

2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.

B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.

C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served "'without their permission.

STANDARD VIII. FEES AND OTHER CHARGES

A. A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.

1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.

2. A mediator's fee arrangement should be in writing unless the parties request otherwise.

B. A mediator shall not charge fees in a manner that impairs a mediator's impartiality.

1. A mediator should not enter into a fee agreement, which is contingent upon the result of the mediation or amount of the settlement.

2. While a mediator may accept unequal fee payments from the parties, a mediator should not use fee arrangements that adversely impact the mediator's ability to conduct a mediation in an impartial manner.

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:

1. Fostering diversity within the field of mediation.

2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.

3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.

4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.

5. Assisting newer mediators through training, mentoring and networking.

B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.

PRINTER'S NO. 1112

THE GENERAL ASSEMBLY OF PENNSYLVANIA

SENATE RESOLUTION

No. 160 Session of 2005

INTRODUCED BY GREENLEAF, COSTA, LEMMOND, ORIE, EARLL, RAFFERTY, O'PAKE, FERLO, ERICKSON, ARMSTRONG, WONDERLING, WASHINGTON AND BOSCOLA, SEPTEMBER 19, 2005

REFERRED TO JUDICIARY, SEPTEMBER 19, 2005

A CONCURRENT RESOLUTION

Directing the Joint State Government Commission to establish a bipartisan task force with an advisory committee to conduct a comprehensive review of the current status of alternative dispute resolution (ADR) services within the panoply of methods of conflict resolution available in this Commonwealth, to identify relevant best practices in the delivery of ADR services locally and nationally and how to improve conflict resolution in this Commonwealth by incorporating these best practices, to develop a plan for educating the citizens of this Commonwealth about conflict resolution in general and the use of ADR services in particular, as well as ensuring access to all needed ADR services, utilizing best practices and to propose legislation as may be required to implement the proposed plan and advance the use of innovative conflict resolution methods Statewide in the civil courts and in schools, businesses, government, criminal and juvenile justice systems and other community settings.

WHEREAS, Interpersonal and intergroup conflicts occur in every segment and age group of the population and in every type of organization in this Commonwealth; and

WHEREAS, If not expeditiously resolved through the use of traditional processes such as negotiation and litigation, these conflicts frequently result in substantial monetary and productivity losses as well as emotional distress and even

violence; and

WHEREAS, While recognizing that litigation and direct negotiations will always be available as viable methods of conflict resolution, there are many other ways that individuals and groups can resolve conflicts in timely, productive and empowering ways utilizing trained, impartial third parties, including through ADR services such as mediation, facilitation, structured dialogue, consensus building, neutral case evaluation, arbitration and minitrials; and

WHEREAS, With increased knowledge and ability to employ a range of ADR services, the citizens of this Commonwealth may experience a more peaceful and civil society, resolution of interpersonal and intergroup conflicts lawfully and peacefully with greater control over outcome, increased public access to justice, a more efficient and user-friendly legal system that reduces burdens on the courts and substantial reduction in the human and financial costs of interpersonal and intergroup conflict, including interference with productivity; and

WHEREAS, Educating the citizens of this Commonwealth about how and when to use ADR services and ensuring access to ADR services requires cooperation and collaboration among State, county and municipal governmental bodies, the judiciary and the private sector, including for-profit and nonprofit entities, and requires legislation to support and advance the use of innovative conflict resolution methods Statewide, not only in the civil courts but also in schools, businesses, government, criminal and juvenile justice systems and other community settings; therefore be it

RESOLVED (the House of Representatives concurring), That the General Assembly direct the Joint State Government Commission to

establish a task force of members of the Senate and members of the House of Representatives to:

(1) Conduct a comprehensive review of the current status of ADR services within the panoply of methods of conflict resolution available in this Commonwealth.

(2) Identify relevant best practices in the delivery of ADR services locally and nationally and how to improve conflict resolution in this Commonwealth by incorporating these best practices.

(3) Develop a plan for educating the citizens of this Commonwealth about conflict resolution in general and ADR services in particular and ensure access to needed ADR services utilizing best practices.

(4) Propose legislation as may be required to implement the proposed plan and advance the use of innovative conflict resolution methods Statewide, not only in the civil courts but also in schools, businesses, government, criminal and juvenile justice systems and other community settings; and be it further

RESOLVED, That the President pro tempore of the Senate and the Speaker of the House of Representatives each appoint two members of the task force and the Minority Leader of the Senate and the Minority Leader of the House of Representatives each appoint two members of the task force; and be it further

RESOLVED, That the task force be authorized to create an advisory committee to assist it, to include representatives of the principal types of groups likely to contribute useful information and make recommendations, such as government officials, judges, lawyers, businesspeople, academics, health and human services professionals, typical users of ADR services

and providers of all types of ADR services from public, private and nonprofit sectors; and be it further

RESOLVED, That the task force report its findings and recommendations to the General Assembly as soon as possible.

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