

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COMMONWEALTH OF PENNSYLVANIA
HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE

In re: House Bill 1260, Divorce Mediation

Stenographic report of hearing held in
Room 140, Main Capitol, Harrisburg,
Pennsylvania

Thursday, April 16, 1992, 10:00 a.m.

HON. THOMAS R. CALTAGIRONE, CHAIRMAN

MEMBERS OF COMMITTEE

Hon. David W. Heckler
Hon. Gerard Kosinski
Hon. Jim Gerlach

Also Present:

Hon. George E. Saurman, Prime Sponsor
Kenneth J. Suter, Esquire, Republican Counsel
Galena Milahov, Research Analyst
David Krantz, Executive Director
Katherine Em Manucci, Secretary
Martin Durkin, Legal Intern

Reported by:
Emily R. Clark, RPR
196
+ pgs

1	I N D E X	PAGE
2	SPEAKER	
3	Stanley S. Clawar, Ph.D. Psychologist, Author	5
4	Dr. Brynne Rivlin Psychologist, Author	21
5	Mr. William T. Reil Concerned Citizen	59
7	Dr. Leonard "Lee" Maliska, Jr. Christian Conciliation Services of Bucks County	82
9	Mr. Donald J. Middleman Editor and Publisher, Fathers' Rights Newsletter	127
10		
11	Stanley Levicoff, Ph.D. Director, Institute on Religion and Law	136
12		
13	Loraine Bittner, Esquire Neighborhood Legal Services Associates	152
14	Michael E. Fingerman, Esquire Philadelphia Bar Association, Family Law Section	169
15		
16	Mary Cushing Doherty, Esquire Fellow, American Academy of Matrimonial Lawyers	176
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 CHAIRMAN CALTAGIRONE: The hour of 10 o'clock
2 having arrived, we'll start the hearing, House Bill 1260,
3 divorce mediation. The prime sponsor of the bill is
4 Representative George Saurman. He's going to be co-chairing
5 the hearing with me today.

6 For the record, those that are present, we would
7 like to have them read into the record. I'm chairman Tom
8 Caltagirone.

9 REPRESENTATIVE SAURMAN: George Saurman, the
10 prime sponsor of the legislation.

11 MR. SUTER: Kenneth Suter, Republican counsel to
12 the Committee.

13 MS. MILAHOV: Galena Milahov, research analyst
14 to the Committee.

15 CHAIRMAN CALTAGIRONE: And David Krantz, the
16 executive director of the Committee, is also here with us.
17 We do expect other members to be coming in, but since
18 there's going to be some lengthy testimony here today we'd
19 like to get started.

20 As a matter of fact, I just want to reassure
21 everybody that's here that the information, as soon as it's
22 transcribed, will be shared with anybody that would like
23 copies of it, number one. And of course, as always, we will
24 make sure that the members of the Committee will get copies
25 of this, also.

1 We might as well get started. Representative
2 Saurman, if you would like to start off.

3 REPRESENTATIVE SAURMAN: Thank you very much.
4 First, I would like to thank you, Mr. Chairman, and the
5 Committee for the opportunity to have this hearing today.

6 I operate two programs, one called American
7 Opportunities Workshop, Common Sense Solutions for the
8 1990s, and another Penn Search. Both of these programs are
9 designed to encourage people to come forward with
10 suggestions and ideas and share with us the things that are
11 bothering them.

12 One of the major concerns in both of these
13 programs has been the problem of marital relations. I have
14 personally listened to hour after hour of tales of horror,
15 where women in one instance have been put out of their homes
16 because they're no longer able to make mortgage payments,
17 men have been put out of their homes because of testimony
18 that they have threatened to abuse, and years and years of
19 litigation, thousands upon thousands of dollars, dollars
20 that in my opinion should have gone to the children for
21 their food, clothing, housing and education.

22 It just seems that while the system may work in
23 some situations, there are far too many instances where it
24 just is not working, where there is just mental anguish and
25 physical consequences, or fiscal consequences, that are

1 unrecognized by those that are not in the process. So this
2 House Bill 1260 is an attempt to deal with that, but more
3 importantly, hopefully an opportunity for discussion to find
4 the solution to a problem that I think is a societal problem
5 of great magnitude.

6 Thank you, Mr. Chairman.

7 CHAIRMAN CALTAGIRONE: We'll start off with the
8 the testifants. Stanley C. Clawar, Ph.D., C.C.S., and
9 Brynne V. Rivlin, M.S.S., L.C.S.D.

10 I would like to know what those initials stand
11 for when you testify. I have an idea, but we'll put it on
12 record.

13 DR. CLAWAR: Shall we just start?

14 CHAIRMAN CALTAGIRONE: Yes. If you would
15 identify yourself for the record and your degrees.

16 DR. CLAWAR: Okay. Good morning, and thank you
17 for inviting me this morning.

18 My name is Dr. Stanley S. Clawar, and I'm a
19 certified clinical sociologist. My institutional
20 affiliationS include being an associate professor at
21 Rosemont College, where I teach clinical courses on clinical
22 sociology, foreign sociology, marriage and family studies
23 and other courses. I also have academic affiliations at St.
24 Joseph's University, graduate studies at East Stroudsburg
25 State College, and I am an adjunctive staff member of the

1 medical staff of Northwestern Institute, Western Psychiatric
2 Institute.

3 I'm also director of Walden Counseling and
4 Therapy Center, where during the past 15 years we have seen
5 about about 5,200 cases of children and their families going
6 through divorce and divorce conflicts.

7 I have published dozen of popular and scholarly
8 articles on the topics of divorce and custody, and during
9 the past 15 years have given about 50 different
10 presentations to professional and scientific societies.

11 I think the publication the Committee would be
12 the most interested in that I've done is the recent one,
13 called Children Held Hostage, which is published by the
14 Family Law section of the American Bar Association. It's a
15 study that I did in conjunction with my associate, who is
16 also here today, and it was a study of 700 families, and
17 basically revolves around children who have been programmed
18 and brainwashed by their parents to turn against the other
19 parent and to disaffiliate with them.

20 We consider this a form of child abuse, and if
21 you see the children and look at their social, psychological
22 and physical problems they have from being programmed and
23 brainwashed in terms of hating their father's side of the
24 family or their mother's side of the family, I think you
25 would concur that child abuse is not an inappropriate term.

1 During the past few years I've been traveling
2 around the United States, meeting with mediators,
3 conciliators, judges, lawyers, social workers, other mental
4 health professionals, doing training workshops and sharing
5 ideas with them concerning more humane ways of dealing with
6 some of these issues that are before the Committee.

7 At this point I would like to make some specific
8 comments in reference to the law that you proposed, and then
9 as a second level commentary, some ideas that I would like
10 to add.

11 On page 2, line 3, letter B, you have the status
12 of the communications. You mention in here that the
13 information should be confidential and inadmissible. There
14 may be some problems with this, because there may be special
15 cases that you will find, as I discovered in other states,
16 where oral or written communications might be necessary to
17 to a judge or to a guardian ad litem if there is a
18 guardian. There may be cases of abuse of the children,
19 abuse of the mother, abuse of the father, and these special
20 cases might necessitate not having the traditional
21 confidentiality and inadmissibility.

22 Additionally, the Committee may want to consider
23 the fact that parents who are litigious and like to fight,
24 not in the best of the children but because they hate the
25 other parent, need in our experience to understand there is

1 power behind the mediator. Some way of indicating to the
2 people who will be mediating that there is significant power
3 and support behind this mediation needs to be presented,
4 above and beyond the fact that information is all
5 confidential and inadmissible.

6 The second comment I would like to make has to
7 do with -- and by the way, I might add there that litigious
8 partners like to tie up systems. They enjoy tying up
9 judges, attorneys, other parents, schools, therapists, and
10 would enjoy and are skilled at tying up mediators. So there
11 needs to be some way for mediators to break this logjam in
12 terms of tie-up.

13 Second comment relates to page 2, line 7, letter
14 C. Under your category approval of agreement, it's not
15 clear to me, when you say signed by both parties, I'm not
16 sure what this means, because parents who are involved in
17 extensive conflict may be able to agree, for example, on 17
18 out of 20 issues, but suppose they disagree on three and
19 they refuse to sign one or two or three items?

20 When it says here signed by both parties, I
21 think it would be more helpful to indicate that all of those
22 areas of agreement that have been reached can be signed, the
23 outstanding areas of agreement need not be signed and can go
24 back to attorneys, can go to a judge, can go to some other
25 forum, but that we need not blow up the whole agreement

1 because one or two items can't be agreed upon.

2 We have had people who are expert at breaking
3 apart mediation sessions by spending weeks, if not months,
4 in mediation, only to find one point at the end that they
5 don't agree with and say, I will not sign the whole
6 document.

7 A third reaction is under your family mediation
8 services, page 2, line 18, item 2, it says here that the law
9 reads that the Court of Common Pleas refer all parties to
10 mediation. I would recommend, unless I misunderstand it,
11 that this be put more in terms of a mandate. I'm not clear
12 from this whether this is a mandate or a recommendation that
13 parties mediate.

14 In other states where they've been effective,
15 like California, it is a mandate and the parties must
16 mediate. There is no choice in the matter. If you give
17 high-conflict types a choice, they will often opt out and
18 return to the litigation forum.

19 The next comment I would like to make is on the
20 qualification of the mediator. This I think we need to give
21 some more detailed attention to.

22 I feel that it is not comprehensive enough as
23 stated. In California, for example, it has been specified
24 in their rewriting of the law, the 1991 rewriting, that
25 master's level people in the behavioral sciences can qualify

1 as a mediator. They also call them conciliators.

2 In the bill as it's presented here, it's too
3 limiting. There are other professionals who may be of
4 service to the courts: Pastoral counselors, psychiatrists,
5 clinical sociologists and others who have training at the
6 master's or doctoral level but not specified in the bill
7 yet. So you could generalize that.

8 Also, I would like to add here a recommendation
9 that the mediators have a minimum of 40 hours of training,
10 to start. It mentions they need some training in mediation
11 but it does not specify an hour number. At base, 40 is a
12 minimum.

13 Next comment has to do with your page 3, where
14 you mention approval by the American Arbitration
15 Association. I would like to add here that the American
16 Arbitration Association is only one organization that has
17 knowledge and expertise in this area. Actually, the
18 foremost organization in the United States is the
19 Association of Family and Conciliation Courts.

20 The Association of Family and Conciliation
21 Courts is represented in every state. They publish, in
22 fact, the main journal in the field, called The Conciliation
23 Court Review, which is considered by many conciliators and
24 mediators to be the most important journal that connects
25 legal issues to mediation issues.

1 Also, the Family Conciliation Court Association
2 has the most extensive training programs in the United
3 States in this area. They link different states together,
4 and I would propose to the Committee that they mention this
5 organization in their bill.

6 The next area has to do with knowledge of other
7 resources. This is page 3, line 8, III. I would like to
8 recommend to the Committee that more specificity be given.
9 It is important for a mediator to know other resources.
10 They should know about Mental Health, Mental Retardation
11 centers. They should know about shelters for battered
12 women. They should know about courses in parenting. They
13 should know about local educational institutions and what
14 they have to offer. So you might want to specify the kind
15 of knowledge that a mediator needs to have. This will help
16 later on if one moves toward some kind of examination
17 process for mediators.

18 The next area of comment is page 3, line 10,
19 IV. It would be very helpful to have some minimum of
20 continuing education stated. The bill does state a
21 continuing education, that continuing education is
22 recommended. I would like to go further and suggest, as in
23 California, where they have two training programs each year
24 for two days each. We just came back from California, very
25 impressed. They are up to date, they have some of the best

1 training programs we have seen. We need to institute on
2 that model a regular continuous training program.

3 There's a lot to know for mediators. They need
4 to know about child abuse. They need to know about conflict
5 resolution. They need to know about a whole host of issues,
6 and the knowledge is expanding at such a fast rate that
7 occasional or irregular continuing education will not put
8 them in the forefront of knowledge. Also, mental health
9 organizations today are offering their own programs and
10 forums for training and they could be a resource.

11 The next area I would like to comment on is
12 approval of agreement. That's your page 3, line 19, letter
13 C. I believe that it's necessary from our experience of
14 mediating hundreds of cases, to specify a time line. It's
15 been very helpful to us when judges and attorneys will say,
16 I would like to have something back in two weeks, three
17 weeks, one month. If you give high-conflicted people an
18 open-ended time line, they will take it and expand it
19 further.

20 From the date of filing of divorce to the
21 beginning of mediation to the completion of the mediation to
22 the finalization of the mediation report, some time frame,
23 some guideline should be given. This may be at the
24 discretion of the local areas, the counties or the judge,
25 but at least it should be specified in the bill that it is

1 understood that this cannot go on forever. This is a
2 Pandora's Box, and by the way, could undermine the very
3 intent that was mentioned in the opening comments.

4 Also, I would like to, under the approval of the
5 agreement, refer to the fact that you mentioned about
6 possibility of contempt of court, page 4, line 2. My
7 recommendation to you would be that this be more specific.
8 When you say contempt of court, I think people reading this
9 ought to get an idea as to what contempt can include. Our
10 experience is that if individuals know there will be
11 financial costs, there could be a change of custody or some
12 other serious action that a mediator or judge is empowered
13 to execute, if, in fact, the law is violated, they will then
14 have something very concrete in front of them.

15 It's been very helpful to me if attorneys agree
16 or a judge orders a mediation and says, these are some of
17 the parameters, these are some of the sanctions that I can
18 exercise. Those seem to get people moving a little bit
19 faster, a little bit more seriously in the mediation
20 process.

21 Next comment I would like to make is about your
22 page 4, line 3, number 3, that's confidentiality. We
23 already mentioned that at times during mediation, materials
24 may be appropriate to refer to the court. Now, at this time
25 I would like to make some additional commentary that are not

1 in the law as it's so written, but are suggestions for
2 further consideration by the Committee.

3 Number 1. I would like to suggest the Committee
4 consider the idea of a director of regional training and
5 coordination. This is a very important position, and if
6 such is not specified, it gives one the sense that there is
7 not coordination on a regional or statewide basis. Ongoing
8 training is necessary for the quality and it is a very
9 important job and a job that involves a lot of time and
10 knowledge.

11 The second recommendation I would like to make
12 has to do with fees and responsibilities. It's unclear to
13 me from the bill who's paying for this. If the state is
14 paying for all the mediation, so be it. But they may find
15 that it's a Pandora's Box, because some individuals will
16 protract the mediation so much that it may be larger than
17 you realize.

18 I would like to recommend that if individuals
19 fit within a certain time frame and come to an agreement
20 within that time frame, then there may be state or county
21 subsidy. If they go outside of that time frame, then there
22 should be a consideration of some obligation from private
23 funds.

24 The individuals themselves may need to pay some
25 of these fees. Let me mention to you a special case in

1 point.

2 In California, for example, if an evaluation is
3 required, individuals try to mediate and either do not
4 mediate because they cannot reach an agreement or somebody
5 is operating in bad faith, a mediator there has the right to
6 recommend an evaluation. The parties, however, will be
7 assessed some costs for this evaluation. Again, this
8 financial factor encourages people to be serious and they
9 recognize that there's some money that's going to come out
10 of their hide, so to speak.

11 Third recommendation is the frequency of
12 continuing education. I would like to mention that the
13 continuing education should be specified in terms of once or
14 twice or more a year.

15 The next comment I would like to make has to do
16 with training for attorneys and judges. The bill does not
17 mention, as I note, that attorneys and judges will get with
18 it in terms of knowing about the mediation process. It
19 would be a very good idea to have them in the up and running
20 stages. They will be more participatory, they will
21 understand the process, they be able to interface with this
22 procedure much more effectively.

23 Next recommendation has to do with your page 4,
24 line 7, letter D, and this is the mediation procedure. I
25 think that it's not enough to say there will be a mediation

1 procedure. I think the bill needs to suggest basics, that
2 individuals who will be carrying out this procedure will
3 have knowledge of crisis intervention, they will have
4 knowledge of conflict resolution, they will have diagnostic
5 skills and most importantly, they will have a capacity to
6 write a clear and articulated report. And that is one of
7 the cornerstones of effective mediation. If you put a
8 mediator to work and they can't abstract what they've heard
9 and organize a report for the courts or for attorneys to
10 deal with, then the process in itself is fairly useless. So
11 I would like to recommend specificity of the kind of skills
12 that the mediators would need.

13 The modification of the California law in 1991
14 cited a conciliation court review, April, I believe it was
15 April 1992, edition. I can get the exact citation for the
16 Committee. It just gave an example of the kind of skills
17 that mediators need.

18 Another recommendation would be for the
19 Committee to consider an ethics or disciplinary board. This
20 is to insure quality control. There should be some
21 grievance procedure that's available for individuals, for
22 attorneys and for others, or for other mediators to be able
23 to go to the local director. The local director, if you
24 decide to appoint a local director, which I would recommend
25 there be such, would have the capacity to serve as a

1 grievance procedure.

2 Another recommendation would be that there be
3 some consideration that there is something called emergency
4 cases. Mediators cannot deal with everything. There are
5 certain cases that involve violence, that involve other acts
6 of bad faith, certain issues that are so complicated that
7 the skills and knowledge of the mediator are not
8 appropriate.

9 I think the bill needs to consider some vehicle
10 for handling emergency cases, and I'm not talking here about
11 necessarily an accusation of abuse. We know that during
12 custody conflicts, for example, there's been an epidemic
13 around the United States of allegations of physical and
14 sexual abuse, especially against fathers. Some recent
15 research suggests that between 60 to 80 percent of these
16 allegations during custody conflicts are unfounded. So
17 mediators can be trained to handle that.

18 We're talking more here about a history, for
19 example, if a woman has a history of significant abuse, that
20 may not be a mediatable situation. Mediators need the power
21 in that case, with which the bill may need to specify, that
22 the mediator has the right to meet with a party in private.

23 We've worked with women who are afraid to sit in
24 the same room with their ex-husband or their
25 ex-husband-to-be. This can be a very serious issue.

1 Mediators do not want to do anything that will induce
2 trauma; they want to create peace. So these are emergency
3 situations, and we need to identify those.

4 A few more comments.

5 Child custody priority. It is my recommendation
6 to the Committee that even though the bill suggests that
7 mediators can do custody, property settlement and so on, my
8 opinion is that the mediator should focus first, if not
9 exclusively, on child custody. The reason for this is that
10 the children cannot be held hostage. If they mediate
11 property first or other settlement issues, the children are
12 held up in the background.

13 Whenever we've effectively mediated a case on
14 behalf of attorneys or the courts, we virtually always
15 mediate child custody first. And that brings up another
16 serious issue.

17 The training that the mediators would have to
18 have to meet the requirements of your bill would be very
19 extensive, because you're empowering them to mediate
20 financial settlements. I do not believe that most
21 mediators, including myself, have the tax knowledge or other
22 knowledge to mediate financial settlements.

23 My recommendation is that if the Committee still
24 deems it appropriate to recommend this, that they understand
25 that mediators involve attorneys in that process. Attorneys

1 should be present to help the parties understand tax
2 liabilities. Mediators are not skilled attorneys, and this
3 is an area where we do need the legal profession.

4 The next recommendation, it is my recommendation
5 to the Committee they consider using the term mediation,
6 slash, conciliation. In other words, in other states
7 throughout the United States the term conciliation is
8 sometimes used instead of mediation, and sometimes mediation
9 slash conciliation is used. It puts us in line with other
10 states and it also puts us in line with journals like The
11 Journal of the Conciliation Court. It's just a linguistic
12 recommendation.

13 Another recommendation would be that the bill
14 include some protection, some safety for the personnel. The
15 term here that's used is safety personnel on call. In
16 California they have somebody who is available for the
17 mediators if they need assistance. Some cases can bring
18 danger, not only to the parties but to the mediator. If we
19 want mediators to do the job, we have to let them know that
20 they're protected. It's an unusual scenario, but it can
21 happen, and occasionally they will need to have some
22 emergency vehicle for help.

23 Another recommendation is, as noted before, the
24 mediators have the right to set up separate sessions when
25 they deem it appropriate. Unfortunately, my experience is

1 that most custody cases do not deal with the best interest
2 of the children. The primary problems have to do with
3 parents venting their hostility, their revenge and their
4 anger. In this sense, mediation is a very good idea.

5 I think there should be three basic priorities.
6 One, the right of children to have a close and continuous
7 relationship with both of their parents. I think the bill
8 should reflect that ideology.

9 Every child that I've seen, and we're talking
10 about many at this point, has said that they were distraught
11 and upset at their divorce, and the single thing they want
12 is the conflict to stop. And virtually all children wanted
13 access to both of their parents.

14 The second ideological background for the bill I
15 think should be that it will facilitate the transition of
16 the family into a new or reorganized family.

17 The third priority would be to equalize the
18 power between the parents. Mediators should operate with
19 the concept that they're looking to help the child gain
20 access, when appropriate, to both parents, and that neither
21 parent comes in with greater power.

22 A final recommendation. It is recommended to
23 the Committee that they include in the bill the idea that a
24 mediator can request, if necessary, a guardian ad litem. At
25 times it is necessary for a child to have legal counsel and

1 representation. Mediators may need to interface with a
2 guardian for additional assistance, especially in very
3 rigorous cases.

4 We've had cases where children are near
5 institutionalization from the harassment they are receiving
6 from both of their parents in the name of love. We've had
7 children who have been institutionalized because of the
8 conflict they've experienced. They've had social, physical,
9 psychosomatic problems. In these cases a guardian may feel
10 the need for special help -- I'm sorry, a mediator may feel
11 the need for special help -- and that might be in the form
12 of a guardian ad litem.

13 Many states today support this idea, and
14 generally a guardian, of course, is legal counsel. And I
15 would recommend that the guardian, in fact, be legal
16 counsel.

17 Thank you very much.

18 CHAIRMAN CALTAGIRONE: Did you have any
19 comments?

20 MS. RIVLIN: I didn't know whether you were
21 going to ask questions or not.

22 CHAIRMAN CALTAGIRONE: After you're finished.

23 MS. RIVLIN: My name is Brynne Rivlin. I'm a
24 licensed clinical social worker practicing in the State of
25 Pennsylvania. I have a B.S. in sociology from Rosemont

1 College and my master's was earned at Bryn Mawr College.
2 I've had many years of post-graduate study, and for the last
3 12 years I've been working primarily in the area of
4 separation and divorce with custody-conflicted families. I
5 also have worked as a senior family mediator for the State
6 of California at the Superior Court.

7 I have had a chance to look through the bill,
8 although I did not have the opportunity, so if you're
9 hunting for my pages you won't find them there, I'll just
10 have to speak extemporaneously.

11 I am also the co-author, as Dr. Clawar
12 mentioned, of the book Children Held Hostage.

13 I feel that the courts and counselors alike have
14 known for a long time that custody and visitation problems
15 are not always the real issues but are methods that some
16 divorced or divorcing parents use to continue their
17 involvement with each other in unhealthy ways. Often the
18 children are the only weapon that parents can use in order
19 to retaliate against the other parent, and they do this for
20 various reasons, reasons that really have to do more with
21 prevention, their own fears of loss of the child and so
22 forth.

23 Presently in the State of Pennsylvania there
24 really is no incentive to settle, other than the threat of
25 financial ruin for some parents, and very often we see

1 children going to the highest bidder.

2 I think the fact that the bill is even being
3 proposed I think somewhat takes Pennsylvania out of the dark
4 ages from the adversarial position to enabling parents to be
5 more self-determined in what they want for their children.

6 In terms of your bill here, I'd just kind of
7 like to go through some of the areas that I think either are
8 problematic or need to be elaborated upon.

9 On page 2, line 28, B, it's stated not less than
10 five years experience in family counseling. I think that
11 it's mandatory to have that say that five, it should be five
12 years experience post master's, because this is kind of
13 nebulous. A person applying for the position could
14 conceivably utilize the years, or not the years, the short
15 term, which is usually months, of internship program rather
16 than the actual experience of the post master's.

17 I also feel that there should be a special
18 understanding of whomever is going to be hired for these
19 positions of marital dissolution problems, in also child
20 development. It's very important that these people, not
21 only their clinical training but also in their professional
22 experience, understand what's going on in these families and
23 what the children are experiencing, and the whole dynamic of
24 separation and divorce and the impact on children and
25 parents alike.

1 Going to page 3, line 7, knowledge of other
2 resources in the community to which the parties, to which a
3 domestic relations matter can be referred for assistance. I
4 think it's also important to make sure that not only are
5 there referrals for ongoing domestic relations problems
6 related to the divorce, but especially for counseling those
7 who could benefit from reconciliation counseling. We've
8 found many cases that come into our office actually end up
9 in reconciliation. I think that this is very important to
10 help people who can be diverted from the divorce process.

11 Most professionals know that the filing of a
12 dissolution action does not always represent a true desire
13 for divorce, but rather, it's a cry out of frustration or
14 for help, and this is reflected by the fact that 20 percent
15 of all divorce filings never become final.

16 Line 14, number 2, the mediator shall be
17 selected and compensated according to rules adopted by the
18 court. Compensation shall not exceed \$200 per day.
19 Mediator shall have judicial immunity in the same manner and
20 to the same extent as a judge. I think that you should add
21 to that -- my experience in California was that many of the
22 mediators felt in some ways underpaid, and just before I
23 left, they passed an order that would permit mediators the
24 right to engage in private practice in order to avoid
25 conflict of interest. However, the mediators who were

1 desirous of going into private practice were admonished to
2 not use court cases as a referral source.

3 Just in case there is a problem in terms of
4 people who are dissatisfied with salary, this would kind of
5 buttress their ability to make more money and might make
6 them a little happier. And I think, too, the fact that
7 they're not only doing the mediation, if they have a little
8 diversity, I think that that's going to insure the
9 possibility that you'll keep these employees on board
10 longer.

11 Going down to line 28, it is stated unless both
12 parties request additional periods of mediation. I think
13 it's imperative to change that to one or both parties. This
14 kind of empowers the one party possibly influencing the
15 other, when they may or may not be ready. And I think that
16 you always have to have the one, if one party requests that
17 there be additional periods of mediation, that the other
18 party be mandated to also follow through. I think this,
19 again, is going to insure the viability of the agreement; if
20 one party is desirous of that, then both should have to
21 participate.

22 On page 4, line 3, I think that it should be
23 added that mediators will not be subject to subpoena. I
24 think this will also kind of dovetail with the suggestion
25 that there not be testimony and that they should be immune.

1 I think that should also be added that they not be
2 subpoenaed.

3 In terms of what would be added to this, as Dr.
4 Clawar mentioned, the issue of domestic violence, I think
5 that there should be special consideration in cases where
6 domestic violence is alleged, that victims are not
7 necessarily capable of verbalizing their thoughts, feelings
8 and needs pertaining to child custody or support or property
9 issues while in proximity to an alleged perpetrator. In
10 these cases the mediator may have to offer the option of
11 meeting with the parties individually or in separate offices
12 on the same day. They may also want to assign a support
13 person who might be in the room, other than the person's
14 attorney.

15 We found that if there is a history of
16 intimidation and threat and so forth, that these people are
17 very easily manipulated, and whatever they would agree to
18 would not really be in their best interest.

19 Another new addition would be future conflict
20 resolution, that these couples know that the order can be
21 modified through mediation if, again, not if both parties
22 desire it but if one only so desires, that the other party
23 must manditorily participate.

24 And that's about it.

25 CHAIRMAN CALTAGIRONE: Thank you.

1 Questions now from the panel.

2 First of all, I would like to ask both of you if
3 you would comment on -- evidently you have a wealth of
4 knowledge and experience that you've been able to accumulate
5 and gather together from around the country. This is one of
6 the things that we certainly have been searching out for.
7 We spoke with Paul Charbonneau from the State of Maine with
8 his services. He had indicated in conversation to me that I
9 had a few weeks back that they've had their mediation
10 service on board I guess in the State of Maine for the last
11 10 years. They've cut their backlog of divorce cases
12 approximately 50 percent.

13 I would like you to comment on what your
14 experience has been both in California and any of the other
15 states that you might know where they practice the mediation
16 services, number one.

17 And number two, grandparents and grandparents'
18 rights. We've had a piece of legislation that has come over
19 to us from the Senate indicating that grandparents feel left
20 out of this whole situation and feel that that has to be
21 addressed somehow, too. If you would care to comment on
22 those two areas, I would appreciate it.

23 MS. RIVLIN: In terms of my experience at the
24 Superior Court in California, their percentage rate right
25 now is 60, what did they say? I'm trying to remember. Is

1 it 60/40? And they've also instituted a new idea, some of
2 the counties have instituted a new idea that when these
3 couples come in and agree to a certain number of points in
4 their custody matters, visitation matters, because
5 California does not really get into support and alimony and
6 property settlement at all, they focus just on child custody
7 and visitation. The rest is left for attorneys to do.

8 But what they have done now is for the
9 outstanding issues, they have something that is called early
10 resolution, and this gives people a second opportunity to go
11 back, but with attorneys and with the mediator and often in
12 front of the judge. So it will be the mediator, the two
13 parents and the two parents' attorneys, to try to give them
14 a second opportunity before litigating, to get these matters
15 resolved. And that has added, well, I should say actually
16 lessened the burden on the court itself, because these
17 people have then, I guess they probably assume that there's
18 some pressure by having a judge physically present.

19 And very often these judges -- we had a
20 situation here recently where a couple, the judge on the
21 bench mentioned to the couple, he said, do you love your
22 children, to the mother, do you love your children, to the
23 father, and both said, of course, you know, are you crazy?
24 We love our children. And the judge said very emphatically,
25 well, I don't. I want you out of this office and I want you

1 to try to resolve this. You're people who are very
2 embroiled over a protracted period of time. The judge was
3 pretty much fed up so he sent them back to try to mediate.
4 So this is kind of the concept where the couples have an
5 opportunity again to meet.

6 Your other question concerning grandparents, in
7 our own office we have very many grandparents who are very
8 concerned about losing contact with the grandchildren. We
9 have a case right now where the mother threatens the
10 grandparents with not seeing the children if she ever would
11 inform the father that the child is even with them. And he
12 now is in a tremendous conflict with his own parents, and
13 this woman has kind of set this in motion.

14 So yes, I think that the grandparents absolutely
15 should have a say in what goes on. We frequently meet
16 grandparents and extended family or extraneous people who
17 might be able to offer us more information when we're in a
18 state of confusion, when you have "he says she said" and you
19 kind of need to have somebody else participate.

20 I think that rather than bogging down the
21 system, the more information a mediator can have about the
22 family dynamics, the better it is for the children and for
23 the parents in the long run as well.

24 DR. CLAWAR: Just to follow up on that, we've
25 had children say to us who have been referred for therapy as

1 a result of the divorce, "I'm not crazy, my mother is, my
2 father is, they should be in therapy. And by the way, I want
3 to go live with my grandparents."

4 What they're really saying, many children, is
5 the only neutral turf, assuming the grandparents haven't
6 also taken sides and become embroiled in the programming and
7 brainwashing. We find many grandparents have not. All they
8 want to do is see their grandchildren, be with them, spend
9 time with them, know them in their later years. And for
10 some children this is the only peaceful turf that they
11 have. It is crucial for their social development, it's
12 crucial for their development and of linkage with ancestry,
13 for many with their religion, with their ethnicity, with all
14 the social facts of their life that they can tie in with
15 their grandparents and be able to share this.

16 It is absolutely brutal to see these children
17 after divorce, cut off and often, by the way, in
18 sole-custody situations where one person has almost all the
19 legal decision-making rights. This is not uncommon to see.
20 This is one of the downsides of sole-custody arrangements.

21 Even though the Pennsylvania law is called
22 Grandparents' Rights Visitation Act, we see it every week
23 violated. If there's anything that you could do in terms of
24 strengthening that through the mediation process, indicating
25 that it will be required they consider access frequency and

1 quality of access not contaminated by a parent, not
2 brainwashed or programmed against that grandparent, they
3 have a right, a peaceful right to see and be with these
4 children, you would be making a tremendous contribution to
5 these children.

6 CHAIRMAN CALTAGIRONE: Questions? There's going
7 to be plenty, I'm sure. You want to start off? The prime
8 sponsor.

9 REPRESENTATIVE SAURMAN: I certainly appreciate
10 your comments and suggestions with regard to the particulars
11 of the bill, and obviously, that's what hearings are all
12 about. And the reason for starting with some legislation is
13 then you start from a point and go to others and improve.

14 I guess that the specific questions that I have
15 have somewhat been resolved. I wonder about the last
16 comment in California where there's a kind of an in-between
17 step from mediation into an outright court battle.

18 Don't all of the factors that would result in
19 the conflict also present themselves if each party is
20 represented by counsel?

21 Or is there somehow a change of heart on the
22 part of the counsel to come in and do they, in other words,
23 try to work with the mediation in order to have this
24 happen?

25 Or are they, again, as it seems to be from

1 hearing testimony that I've heard up till now, have a very
2 self-vested interest in the outcome of the dispute?

3 MS. RIVLIN: I think historically -- California
4 has been doing this since 1939, and I can understand that
5 some attorneys in the State of Pennsylvania might see this
6 as somewhat threatening to their practices.

7 I think that in California my experience was
8 that the attorneys encouraged their clients to cooperate by
9 every means possible. The attorney would come in and meet
10 initially with the conciliator/mediator for about a half an
11 hour, both attorneys with the mediator sans parents. The
12 attorneys would then leave but could be available by phone.

13 What happened from then is that the mediator
14 would spend maybe an hour and a half to two hours, and then
15 schedule a new appointment for a following time, the
16 following week. Sometimes if the calendar were more or less
17 clear you could have a marathon with these parents and go
18 for six hours out of the day. At the end of the agreement,
19 what happens is that it is written up and the clients take
20 that agreement with them on that very day.

21 What I would like to suggest in Pennsylvania is
22 that you do something differently that would probably flush
23 out the people who are going to be noncompliant. I would
24 suggest that these people take home whatever they have
25 agreed upon in terms of custody and visitation and try it

1 out for, say, a six-week period of time, and then get in
2 touch with the mediator and let the mediator know whether or
3 not they think it's going to be viable.

4 I think in a period of six weeks you'll have
5 whatever emotions are going to be aroused in terms of not
6 wanting to share or things not working out logistically or
7 the child problems. I think within a period of six weeks
8 that might give everybody an opportunity to see whether or
9 not it's going to be workable. I think that that would kind
10 of circumvent immediately going to court.

11 I think that the attorneys should always look
12 over whatever agreement it is, because, again, mediators are
13 mediators and not attorneys, and these people do hire
14 attorneys for advice. In California, the attorneys always
15 see the finished agreement and then tell their clients
16 whether or not they think it's in their best interest.

17 REPRESENTATIVE SAURMAN: Do I understand what
18 you're saying, then, that every case is represented, every
19 individual is represented by counsel whether there's
20 mediation or not?

21 MS. RIVLIN: That's correct.

22 DR. CLAWAR: Effective mediation should
23 involve -- we will not do mediation unless both parties have
24 legal representation. Now, the legal representation does
25 not have to be in the room at that time. At times it may

1 be.

2 Lawyers serve a very crucial function. I think
3 the goal of mediation by some is to eliminate attorneys. We
4 happen not to agree with that. We think that most attorneys
5 we've worked with operate in good faith. There are lots of
6 war stories about attorneys pumping up the fees and trying
7 to make the case last long and so on, and it does occur.

8 Our experience is that primarily the quality
9 attorneys are not doing that. They are there, they're
10 giving their clients information, they will try to help
11 settle cases. In fact, at times our greatest resource is to
12 turn to an attorney and say, look, we've worked this far,
13 can you talk to your client? Often at this point in time
14 the only person the client trusts is their attorney, not
15 necessarily a new mediator.

16 So yes, attorneys play an important function in
17 this process. They consult, they give advice, they draft
18 agreements, they may appear before the judge, they may come
19 back again before the mediator.

20 The important concept here I think that we have
21 to get is what is called institutionalizing mediation; if
22 the legislature says we want it, because we want to protect
23 the children from conflict, if the local judges say it's
24 going to be, if the mediators are effective and well
25 trained, if the attorneys get on board and are trained. In

1 the state you have what's happened in other states, it
2 becomes an institution, and parents know that that's what
3 you do.

4 In some counties in California, 80 percent of
5 the cases never get to a judge. Only 20 percent see
6 litigation. Now, California has a mix. About 60 percent of
7 the mediators can go to a judge. And by the way, I'm not
8 bound by confidentiality. And about 40 percent of the cases
9 they cannot to go a judge, and it's like your bill is
10 proposing, they have a split system within their own state.

11 But the important concept is that it is
12 supported from the top down and the bottom up, and people
13 know that when you get divorced that you're going to
14 mediate. So the whole question as to whether it works is a
15 moot issue. It works if there's massive support and
16 direction that that's the process that's going to have to
17 take place.

18 REPRESENTATIVE SAURMAN: The question then that
19 occurs, you see mediation and you've said this in terms of
20 support or, yeah, custody and visitation, and what the goal
21 then would be to take the children out of the hostage role;
22 is that correct?

23 DR. CLAWAR: That's correct. In fact, in some
24 states where they do this regularly, children are only seen
25 in 30 percent of the cases. A child is not necessarily seen

1 in every case. The reason for that is parents who have
2 programmed and brainwashed a child extensively, and our
3 research shows it's very common, march the child in and say,
4 tell the therapist, tell the evaluator, tell the judge, and
5 now, tell the mediator.

6 Mediators need discretion to be able to decide
7 when and how they will see the children. In California, for
8 example, in Los Angeles County, a figure that I just heard
9 from being there was only three out of ten cases do they
10 actually see the children. That's important, because if
11 you're really getting the kids out of the middle, then the
12 parents deal with the issues.

13 And by the way, as part of this process, parents
14 come in, they see films, they see videos, they're given
15 written publications, so you get what is called a culture of
16 mediation. You start to educate parents statewide as to
17 what it is that they are doing that's damaging their
18 children.

19 Some parents are not aware that it's damaging.
20 Some are, by the way, and don't care, because the ultimate
21 goal is worth it, and that is the destruction of the other
22 parent, their reputation, their image, their capacity to
23 parent. Those are the more serious cases. They tend to
24 diminish as the state continues its history with mediation
25 because they become visible. They start to stand out. And

1 the high-conflict types, the litigious types, the assaultive
2 types, start to be seen as more deviant, whereas in many
3 states now it's the norm; if you want to be very litigious
4 over the children, it's quite fine.

5 So what you're really looking to do by the bill
6 I think is to change the culture and to say, the culture of
7 divorce now is a culture of peace, it's a culture of
8 settlement, within reason.

9 To go back to your point about the custody, I
10 think it's very important to start the mediators out
11 focusing on custody and visitation. If you give them too
12 much, number one, you're not going to find your crew that's
13 trained. Lawyers have told me that it's taken them years to
14 learn custody, visitation, taxation, property settlement and
15 so on. I think it's biting off too much.

16 I think it's going to also elongate the
17 mediation process, and if the key issue is to get the kids
18 out of the middle, the custody issue isn't settled because
19 people don't want to sign an agreement until the whole show
20 is wrapped up. So in a sense I think it's going to
21 perpetuate the length of time and, therefore, the duress
22 that the children are experiencing.

23 I think the goal is to get in fast, and that's
24 why I want a time line when you file for divorce, or
25 somebody files for divorce: Within X-amount of days there's

1 an appointment that has to be made with a mediator; within
2 X-amount of days, an agreement is worked on, and there's
3 some kind of time frame here looking over your shoulder at
4 the effects on the children.

5 If you do it fast and you do it well, the
6 children don't have that long history of six months, a
7 year. We have cases two years, three years, five years.
8 These are enormative in the State of Pennsylvania. A child
9 can be caught up in litigation for five years or more. By
10 the way, those are the kids we see back for therapy. It's
11 what the therapist sometimes called the basket cases.
12 That's the damage cases that you see.

13 So if you can do anything in this bill to
14 shorten that time frame and create, even as Brynne has
15 mentioned, an experimental, and that doesn't mean, that's
16 not a negative term, by the way, a healthy experimental
17 arrangement where the child maximizes contact with both
18 parents, given the conditions that are there, and not all
19 conditions lend to that, you'll be doing a lot for the
20 children.

21 The important thing is to do anything that you
22 can that doesn't allow them to be held hostage by time, by
23 money, by ruses, by false allegations. All these patterns
24 help to embroil the children further.

25 REPRESENTATIVE SAURMAN: Let me just ask one

1 other question, then. With that issue out of the way, do
2 the other issues resolve themselves more quickly and more
3 equitably?

4 Do you have any idea of comparison, for
5 instance, of the cost in California with regard to the cost
6 in Pennsylvania, or the potential cost?

7 MS. RIVLIN: The cost to the parents?

8 REPRESENTATIVE SAURMAN: The divorce, to either
9 parent or both parents. Currently, and what the second part
10 of the complaint that I hear, first of all, the damage to
11 the child is the most important, obviously. Beyond that,
12 however, and it goes back to the effect on the child is the
13 cost, and what I'm hearing is that the cost accelerates to
14 the point of 50, 60, a hundred thousand, and that takes the
15 money, no matter who gets custody and there's nothing left
16 to take care of the child with.

17 MS. RIVLIN: Absolutely, yeah. Well, California
18 has, it's free. Mediation is free in California, and the
19 cost of that is funded through marriage licenses and
20 whatever charges are incurred through divorce. That goes
21 directly, that becomes funneled back into the whole
22 conciliation court process. So that is totally free.

23 California also has an evaluation department in
24 each of their counties, so if there are problems, if there
25 is a problem that's perceived by the mediator with a

1 parent's mental health or other areas that have presented a
2 tremendous dilemma or impasse, the case is then sent over to
3 the custody evaluation department.

4 There is a charge of \$150 to the couple in
5 total, unless they need to be seen by a psychiatrist. And
6 they have psychiatrists who are not staff psychiatrists but
7 they're referred out, and, of course, the couple then has to
8 pay that private individual.

9 But it's totally free to the parents and the
10 monies are taken out of the state from other services.

11 DR. CLAWAR: The other way you reduce monies is
12 many parties who come into mediation begin to see, because
13 not everybody operates in bad faith, that they can do
14 something they didn't think they could do, because parents
15 will often say, well, if we're disaffiliated, if we're
16 getting a divorce at a time when we want less to do with
17 each other, how can we be cooperative?

18 The interesting thing about mediation is that it
19 can work, and it does. So they may come to learn that they
20 can create settlements in ways they didn't think they
21 could. So in the future, by returning quickly to mediation
22 and not litigating, you reduce the legal costs, transcribing
23 costs, judges' costs, bailiffs' costs, all the other costs,
24 and it's a substantial reduction in costs, not only to the
25 couple, but overall to the state.

1 Now, initially the start-up charges are
2 significant, but they would have to be amortized over the
3 course of the program.

4 You could probably get those figures, Brynne,
5 would you think, from Hugh McIsaac. Hugh McIsaac is the
6 director in Los Angeles, and he probably could give you the
7 exact financial scope of what it is.

8 We have heard continuously on our travels that
9 in the long run mediation is cheaper.

10 REPRESENTATIVE SAURMAN: Thank you.

11 Thank you, Mr. Chairman.

12 CHAIRMAN CALTAGIRONE: Representative Gerloch?

13 REPRESENTATIVE GERLOCH: Thank you, Mr.

14 Chairman.

15 Just two questions. First with regard to the
16 California experience that you related here today, I take it
17 from what you're saying, if mediation is not successful and
18 the matter then moves into the court system in California,
19 that that court case then is de novo? It's a de novo
20 proceeding in terms of taking testimony, taking evidence as
21 to the positions of the parties on child custody, support,
22 et cetera? Is that pretty much the case?

23 MS. RIVLIN: Well, very often you'll find that a
24 judge refers the couple back to mediation, not just one time
25 but maybe three times or four times, rather than hear the

1 case. It's only the very serious conflicted cases that wind
2 up in court.

3 REPRESENTATIVE GERLOCH: If the judge refers
4 back, at some point is a record made of the proceeding
5 before the mediator? In terms of either a court reporter
6 taking down testimony or documents being made part of the
7 records that the judge ultimately, if there's still
8 outstanding issues, is able to refer to any of those
9 materials as part of the record in making a decision?

10 MS. RIVLIN: That is really kept confidential.
11 However, in some counties -- every county is somewhat
12 different. There are some counties where the mediator can
13 approach the judge and mention the outstanding issues, and
14 that's all that's discussed, and then they will go in to a
15 hearing over those particular issues.

16 DR. CLAWAR: Isn't it true, also, Brynne, that
17 in some other counties I heard that -- we were just out
18 there recently -- in some other counties they can actually
19 make a recommendation to a judge; in others they may not,
20 and their private notes are dead, so to speak. So it varies
21 by county. You have different policies.

22 REPRESENTATIVE GERLOCH: That's what I'm getting
23 up to. In Pennsylvania we have the masters that many times
24 make recommendations after taking testimony and receiving
25 evidence who are court-appointed, and invariably the courts

1 may or may not accept the master's recommendation but to my
2 understanding they usually do. But nonetheless, those
3 documents are part of the court record and are utilized by
4 the judge in rendering a determination, and sometimes when
5 an opinion is attached to that order, the basis for that
6 opinion.

7 I'm wondering, in the mediation system, before
8 the case gets before the court where the court has active
9 oversight of that proceeding, is any of that information
10 utilized as part of the record ultimately if the case can't
11 be resolved in the mediation process?

12 DR. CLAWAR: It's just defined regionally.
13 Mediators' files can be closed, as in the 40 percent of the
14 counties that I mentioned, or in the other 60 percent where
15 they have access, they can bring their records in and my
16 understanding is speak from in the records. So I think
17 that's discretionary by county.

18 REPRESENTATIVE GERLOCH: Okay.

19 MS. RIVLIN: One other thing that I might
20 mention is that it is up to the couple to decide whether or
21 not they have rapport with a particular mediator, and if
22 they don't like somebody, they can request a different
23 mediator as well.

24 REPRESENTATIVE GERLOCH: Under this bill on page
25 3, down at the bottom, line 29, if the court finds that

1 either party failed to make a good faith effort to mediate,
2 the court may refer the parties to additional periods of
3 mediation.

4 Is that essentially what you found in
5 California? The court can keep sending them back to the
6 mediator.

7 MS. RIVLIN: Yes, um-hum.

8 REPRESENTATIVE GERLOCH: To continue to try to
9 hammer out issues that are outstanding?

10 MS. RIVLIN: Yes.

11 REPRESENTATIVE GERLOCH: That's right? I take
12 it at some point if the court makes a determination that one
13 or both parties are not acting in good faith, since at that
14 point a divorce action had already been filed, there is
15 going to have to be some record of evidence undertaken to
16 establish that either party did not exercise good faith in
17 the mediation process. Is that correct?

18 In other words, testimony would have to be taken
19 in open court on some sort of petition, I would think, and
20 at that point a record is created about what's happening in
21 that mediation process. Is that right?

22 MS. RIVLIN: Yes, that can happen.

23 DR. CLAWAR: But it does not have to say which
24 party blew it up. A mediator can be empowered to say the
25 mediation did not work and needs to either to go evaluation

1 or litigation.

2 REPRESENTATIVE GERLACH: Bringing both parties
3 before the court.

4 DR. CLAWAR: Without saying "mom did it," "dad
5 did it."

6 On the other hand, if you write a bill that says
7 it's a county discretion, then that mediator may be able to
8 go to the judge and say, look, I want you to know I tried
9 four times and the father is really a very, very difficult
10 character in this regard.

11 So that, again, is a discretionary issue. And
12 many mediators you're going to hear, you probably already
13 did before the Committee, that are mediators who are
14 committed to these positions like a religion. There are
15 some mediators who say, to do my job I absolutely have to
16 have confidentiality and the parties need to know that.

17 Others that I recently met in California said, I
18 really think the fact that I can go to a judge makes me
19 almost never have to go to a judge, because there's a
20 pressure there for them to negotiate with some power behind
21 the mediator.

22 You're going to hear these very strong
23 commitments from the different schools of mediation.

24 MS. RIVLIN: I think in some ways it can be a
25 situation of muddy waters, because I've known a number of

1 mediators who have been overzealously involved in cases and
2 have taken sides, and these are not mediators that you want
3 to have approaching a judge because they send -- some of
4 them are very narrowminded and absolutely form biases that
5 are unfair and grossly off the mark. And for these
6 mediators to have access to a judge where they may be able
7 to influence a judge's opinion or recommendation or decision
8 is not necessarily a good thing.

9 REPRESENTATIVE GERLOCH: That's what I'm
10 saying. Under this phrase in this section, if the court
11 finds either party failed to make a good faith effort to
12 mediate, it would seem to me the court's going to need to
13 have some factual basis to make that determination, whether
14 it's a mediator sitting in front of the judge saying, I'll
15 keep both sides confidential but one of them isn't coming
16 when he or she should be coming, or that person -- it seems
17 to me there's going to have to be a factual basis for the
18 court to render that decision.

19 I'm wondering if it may not be better to simply
20 indicate that either party can continue to request continued
21 mediation, or the mediator may request continued mediation,
22 and the court may grant that as, compared to having the
23 judge having to find a bad faith effort on the part of
24 either party, in which case may then start to even color in
25 the judge's eye if that case continues to proceed through

1 the court system and the judge ultimately has to make a
2 decision on that case, it may ultimately cut away how that
3 judge is going to decide that matter.

4 DR. CLAWAR: The only caveat there would be some
5 time frame. I hate to bore the Committee and keep
6 mentioning this concept, but there are people who really
7 want to drag the process out. So if you can structure that
8 and say within a given time frame and then if there is not,
9 you know, a mediation agreement reached within that, some
10 other decision is going to have to be made, either an
11 evaluation is going to have to be made or going before the
12 court is going to have to be made, involving the attorneys
13 more directly in terms of helping. They can be very helpful
14 at this point.

15 REPRESENTATIVE GERLOCH: One other question.
16 From what you're saying, what's happening in California
17 where many times the judge keeps sending them back to
18 mediation, and then ultimately are you saying about 80
19 percent of the cases are resolved through that mediation
20 process without even going through the litigation process?

21 MS. RIVLIN: Yes.

22 REPRESENTATIVE GERLOCH: Would that then
23 necessitate, well, maybe necessity is not the right word.

24 Because of sending back continuously into the
25 mediation process, I would think then that would cut at the

1 backlog of cases that might have been there in domestic
2 relations matters, in which turn the court system would not
3 need to rely upon a master system which was evolved out of
4 the fact that there was such a backlog and the judge's
5 needed assistance in having people taking testimony and
6 making some recommendation on resolution of these issues.

7 It would seem to me that that would then in turn
8 result in cutting away of the need for a master system.

9 MS. RIVLIN: Yeah.

10 REPRESENTATIVE GERLOCH: So that's happened?

11 MS. RIVLIN: Yes, that's what happened. What
12 has happened now is there is a huge overload that the
13 conciliators now have. They have a tremendous backlog.

14 DR. CLAWAR: You solve one problem, you get
15 another. In Pennsylvania it's difficult, because you have
16 masters operating, and we've had many people say to us, I'm
17 going through the procedure, the master's not a judge, I'll
18 hear what they have to say and if I don't like it, I'm going
19 to the judge.

20 So for some people the master's level work,
21 which can be quite rigorous, we just saw a case that took a
22 year and a half to two years through a master and when it
23 was over, bounced right to the judge.

24 REPRESENTATIVE GERLOCH: How are the mediators
25 selected throughout? Does the court appoint a particular

1 mediator off a list of qualified individuals? Or do the
2 parties have to agree on the mediator, much like a private
3 arbitration system?

4 MS. RIVLIN: Are you talking about when a couple
5 comes in for mediation? Or the hiring process itself?

6 REPRESENTATIVE GERLOCH: The actual hiring of a
7 mediator. Who determines who that mediator is for that
8 particular couple that has already filed a domestic
9 relations action?

10 MS. RIVLIN: I see what you mean. There is
11 nobody who is assigned. There is a list and whoever has
12 free time gets whatever couple comes in.

13 REPRESENTATIVE GERLOCH: So it's assigned
14 through some sort of administrator in the court system?

15 MS. RIVLIN: Yeah. Usually somebody who is in
16 more or less a secretarial position who just sets up the
17 calendar for the mediators.

18 REPRESENTATIVE GERLOCH: So Mr. and Mrs. Jones
19 file today and they come in for a mediator, and the next on
20 the list that's available is --

21 MS. RIVLIN: That's correct.

22 REPRESENTATIVE GERLOCH: Whatever, Fred Brown or
23 whatever.

24 MS. RIVLIN: And frequently you have attorneys
25 who will come in and they like particular mediators and want

1 that mediator for their client, so you'll get that. But
2 that doesn't usually happen. It's usually whoever has the
3 opening.

4 REPRESENTATIVE GERLOCH: Okay.

5 MS. RIVLIN: And if they do come back for
6 additional mediation or if they come for modification, they
7 usually do go back to that initial mediator, unless it was a
8 problem, and at that point they're not beholden to have to
9 see that person if they do not so desire. They can have
10 somebody new.

11 REPRESENTATIVE GERLOCH: Did you say at some
12 point what the typical or average time frame is for a
13 typical mediation? How long do they last before there's
14 some resolution in those 80 percent of cases that end in the
15 mediation process?

16 MS. RIVLIN: Depending on how conflicted the
17 couple is, it can last from an hour and a half to six hours
18 or more, if they need additional days to come in in the
19 future for modification or just to do some fine tuning.

20 The mediators there write up the agreement
21 there, right then and there. The mediators have computers
22 in their offices and they usually type it out on their
23 computers and the people go off with their order and then
24 take it to their attorneys and then give the okay or not,
25 and then the judge usually signs it.

1 REPRESENTATIVE GERLOCH: So if it goes beyond a
2 day's worth of time, when is the next day scheduled? Many
3 times in our current proceedings they'll do a day of
4 testimony, then the next continuation of the proceedings is
5 not for three or four months down the road.

6 MS. RIVLIN: That never happens. That would be
7 the following week or week after. There's never more than a
8 three-week period of time.

9 REPRESENTATIVE GERLOCH: That's very important.

10 DR. CLAWAR: The low end that I heard the other
11 week when I was out there was one to three hours for a low
12 end case, and 10 to 15, but it rarely reaches that. So
13 Brynne's saying somewhere in the max of six would be
14 unusual.

15 In fact, some mediators out there say that if
16 they didn't hit an agreement possibility within the first
17 one to three hours, that there was probably something else
18 going on. But again, we're talking about a system that's
19 been doing it for a while; they're trained, they're skilled,
20 they're tooled.

21 So the tool-up phase here is going to be real
22 important. The danger is if it's not tooled up properly,
23 you get people who have disaffiliation and then the
24 naysayers will say, see, I told you it doesn't work, and it
25 does work. But a lot of this is going to fly on the

1 training and qualifications and selection process of the
2 initial mediators.

3 REPRESENTATIVE GERLOCH: Is there any counter
4 arguments that because it could be a very fast process, that
5 after reflection, a few weeks or a month or six months down
6 the road, someone that signed an agreement said, hey, I was
7 real pressured in that process to get an agreement in the
8 first couple hours, and as I think back, I got screwed and
9 you know, I really don't like this?

10 Is there any appeal process that anybody has
11 after signing such an agreement that there was collusion or
12 fraud or, you know, some other actionable conduct by which
13 those kinds of agreements can be overturned in the court
14 system?

15 MS. RIVLIN: What would happen, the process
16 would be that whomever is dissatisfied, that's why I added
17 that the caveat in your bill, is that if one or both, you
18 have both, if both people want to come in for some sort of
19 modification. If only one wants to come in, then they're
20 both beholden to come in for a modification, and the door is
21 never closed. They can come back as many times as they
22 like.

23 REPRESENTATIVE GERLOCH: Good. Thank you very
24 much.

25 CHAIRMAN CALTAGIRONE: There's some more.

1 You've mesmerized our members of the panel.

2 Counsel Suter?

3 MR. SUTER: I'm a little bit confused with when
4 an agreement is not reached and at that point can you go in
5 and testify? Or does that vary from county to county?

6 DR. CLAWAR: The latter. It varies from county
7 to county, in the state we're referencing here, California.
8 Some you can go directly talk to a judge. Others, Brynne
9 mentioned a model of going in with the mediators and kind of
10 having a joint conference of judge, lawyers, clients,
11 mediators.

12 Others you cannot because there's a
13 confidentiality inadmissibility, which you have in the bill
14 which says, no, I can't do that. So at that point it may go
15 to the evaluation stage where the evaluation department
16 would be notified, they would do their home visits and go
17 through what we identify in this state as a custody
18 evaluation, which would then be getting geared up for
19 litigation.

20 However, at that stage, even once the evaluation
21 is finished, a judge still maintains the practice of moving
22 it back for another discussion.

23 The cornerstone here is the culture that one way
24 or another, you're hopefully going to settle. The last
25 resort, quote, the court of last resort, is the litigation,

1 and that's the atmosphere that's really been developed.

2 MR. SUTER: One of you made the comment that you
3 wish to amend the bill at the bottom of page 3 so that if
4 one party requests mediation, even after good faith effort,
5 the mediation would continue.

6 Wouldn't that prolong the process? Because if
7 somebody comes in, they make a good -- both of them make a
8 good faith effort at mediation, and then one of the parties
9 decides they want to prolong the process, they can just
10 request mediation and drag this out before it finally ends
11 up in court. Once a good faith effort has been made, maybe
12 they should be going into court and the judge ordering them
13 back to mediation or just having, litigating it out.

14 MS. RIVLIN: That has not been my experience.
15 What usually needs modification is it's not usually
16 something -- it's not usually the whole agreement. It's
17 usually one or two items that need refining. Somebody may
18 be dissatisfied, somebody may not feel that -- maybe
19 somebody felt that they were coerced, that they maybe
20 weren't ready to mediate.

21 That is I think one of the most inherent
22 problems in the whole mediation process. But it's also a
23 problem in the divorce proceedings and litigation itself,
24 that you have one person who's ready to move on with his or
25 her own life, and the other one who is kind of dragged

1 behind, you know, who has just been told I don't want to be
2 married anymore and, by the way, I'll take the kids and
3 goodbye, I'm off to wherever.

4 So you're always going to have people who are
5 not totally either ready to mediate or litigate. So I think
6 that for the most part, the overall thing that happens in
7 California is that if something does return for
8 modification, it's usually fine tuning and not to go and
9 then redo the whole order.

10 DR. CLAWAR: There is a provision, if I could
11 just add to Brynne's comment, I'm quoting here from the
12 Family and Conciliation Court Review, April 1992, this is a
13 summary of the 1991 clarification of the California law.
14 There's a provision in here page 226, number 3, "when to
15 terminate mediation." Later on in the provision it says the
16 mediator should use his or her best efforts to effect the
17 balanced discussion between the parties, but when the
18 discussion or behavior of one or both parties makes this
19 impossible, mediation should be terminated.

20 So the mediator has the option of terminating
21 mediation on ethical issues, mental health issues and safety
22 issues, as well as common sense issues. And that is a
23 discretion that the mediator maintains.

24 MR. SUTER: And they take advantage of that,
25 then?

1 DR. CLAWAR: Yes. They may simply say, this is
2 not going -- this does not seem to be happening in this way,
3 these are some other options we can try once more. If not,
4 these options are open, evaluation, litigation and so on,
5 and I'm prepared, I'm getting close to recommending
6 termination of mediation, is there anything you want to
7 try.

8 There are all different ways to pose it but
9 mediators themselves can, if they have somebody who is a
10 professional procrastinator, they can call that shot.

11 MR. SUTER: I think you're right, that attorneys
12 need to be involved in this process. I think that the
13 parties will actually be happier in the end if there's
14 somebody there to explain to them, these are your rights, so
15 that they know their options at that point, and I think the
16 agreement will last longer if they know what was available
17 at that time. I think that's a key thing that this
18 legislation is missing.

19 Another important point about the legislation
20 is, and I know that you mentioned this, is that this
21 legislation is much broader than the system in California.
22 Under this legislation, the mediator could deal with
23 equitable distribution and alimony, and there are far more
24 complex legal issues than child custody, and perhaps child
25 custody does belong with the mediators because you're

1 looking out for the child. That's what you should be
2 looking out for first, is the child's best interest. But
3 there are many other things involved with these other
4 issues, and I don't necessarily think that mediators are
5 trained to complete that task.

6 DR. CLAWAR: No. We clearly don't, and I just
7 might add to that if a mediation process is instituted and a
8 custody settlement agreement is made in the mediation,
9 visitation is clarified, decision making is clarified, that
10 that should not then be held up because of the property
11 settlement, because you can get a bifurcated system here and
12 you get parents who say, sure, I'll agree to that but I
13 can't sign off on the whole deal because the house isn't
14 settled. The house could take two years to settle. In the
15 meantime, we've undermined the whole basis of the bill,
16 which is to create peace and harmony for the children.

17 So if you're going to limit mediation, limit it
18 to custody. Custody should be the priority. Custody should
19 be completed and then when it is, it should be hammered out
20 and to be instituted.

21 MR. SUTER: If the parties want to agree to
22 property issues, consult with their attorneys and most
23 judges would be happy if they walked in with an agreement
24 and say, we've decided, you know, this is what we're going
25 to do with the property. But I don't necessarily think that

1 the mediator should have the authority to go ahead and
2 mediate those issues.

3 MS. RIVLIN: Unless the mediator happens to be
4 an attorney, and that's another option, just to make
5 everybody an attorney. But then --

6 MR. SUTER: That would be similar to our master
7 system now.

8 DR. CLAWAR: Michael Fingerman is here and he's
9 going to address this issue very directly, and so I think
10 you're going to hear more on this.

11 MR. SUTER: Thank you very much.

12 CHAIRMAN CALTAGIRONE: Researchers? Galena?

13 MS. MILAHOV: No, thank you. I'll defer.

14 CHAIRMAN CALTAGIRONE: We do have two other
15 members of the panel that have joined us, if they would like
16 to introduce themselves.

17 REPRESENTATIVE HECKLER: I'm Representative Dave
18 Heckler from Bucks County.

19 MR. DURKIN: I'm Martin Durkin, legal intern to
20 the Judiciary Committee.

21 CHAIRMAN CALTAGIRONE: Any other questions?

22 (No audible response.)

23 CHAIRMAN CALTAGIRONE: I want to thank you very,
24 very much for your testimony, and I might add that we may
25 have need to refer back to you again when this legislation

1 starts to move.

2 DR. CLAWAR: And let us thank you for having the
3 opportunity to be here, because if this can help reduce some
4 of the severity of the kinds of cases we're dealing with, we
5 would be very grateful. Thank you.

6 CHAIRMAN CALTAGIRONE: The next testimony
7 already William T. Reil.

8 MR. REIL: Good morning, Mr. Chairman,
9 Representative Gerloch, other members of the Judiciary
10 Committee and Representative Saurman. I appreciate the
11 opportunity to come here. My name is William T. Reil,
12 R-E-I-L. I'm a resident of Chester County, at 235 Jeffries
13 Road in Downingtown, Pennsylvania.

14 I'm on the other end of the spectrum. I'm a
15 victim, victim of the divorce and custody process, as is my
16 family, over the past two and a half years, and I greatly
17 appreciate the opportunity to come and share some thoughts
18 with you based on my experience of going through the process
19 and the tragedy, the true tragedy our daughter. She has, in
20 fact, been, as the previous witnesses testified, the victim
21 of mental abuse, brainwashing and programming to a very
22 tragic degree.

23 The experiences I've had is that I'm an honest
24 man caught up in this devisive process as I've experienced
25 it, since 1989. And our daughter did, in fact, become a

1 major pawn in that process, because the court awarded her
2 custody to me initially in early 1990 because of her problem
3 of obsessive/compulsive disorder and the inability of my
4 wife to deal with that.

5 Through this struggle and since that award, our
6 daughter has been caught up in this struggle and used by the
7 attorneys, by psychologists, by the judge, to enforce and to
8 change this child's position to the point where now there's
9 total alienation.

10 We are all victims of the process. The cost to
11 us has been certainly the damage, and foremost the damage to
12 our daughter; the destruction of our family; over a hundred
13 thousand dollars in legal fees; and frankly, my reputation,
14 all to the purpose of the attorneys and the judges and the
15 process to gain custody and gain a position of dominance in
16 the divorce process.

17 Since I was asked to put together this
18 presentation by Representative Saurman, I've struggled with
19 how to compress two and a half years of devastating
20 experience into a short time to share it with you, and I
21 found that task to be impossible. The pain, the agony, the
22 detail.

23 As a previous executive, I learned very soon or
24 early in my career that it's very important to document and,
25 therefore, have done that in this process. Quite uniquely,

1 I might add. And I made those documents available to the
2 Judiciary Committee in another action which I brought forth
3 in February of this year as an impeachment process against
4 the sitting judge in our case, prior to his final ruling.

5 I would suggest or request that those documents
6 that are now before the Judiciary Committee in that
7 impeachment process serve as the detail as to what has
8 really happened in our particular case and not to go through
9 that today. I find it much more important to dwell on the
10 children and the suffering and the loss in our society that
11 this process that we now have in Pennsylvania extracts. So
12 I would ask that those documents, which are extensive, be
13 either included in this record or referenced, at least, so
14 that if anyone wants to have the detail, wants to question
15 my credentials or experience or credibility in this matter,
16 that they could be referred to.

17 I wish that I could invoke the feelings and the
18 pain. In fact, as I was listening to the first testimony, I
19 cried several times. I wish I could help those who are
20 involved in this process to understand how tragic it is to
21 see a child suffer. Some of you have gone through the
22 process, and with a 54 percent divorce rate in America
23 today, just about everyone knows someone who has gone
24 through it, and so we experience it in maybe a remote way.
25 But it is a tragedy, and our society is paying a tremendous

1 price. The families are destroyed, and more importantly,
2 the children are destroyed. So I can say without any doubt
3 and great certainty that what we have today doesn't work,
4 for whatever reason.

5 In my particular case I can show you without a
6 doubt that my wife's attorney has been at least 75 percent
7 of the problem since he was retained. That today, our
8 daughter doesn't want to talk with me; who has, in fact,
9 though she was symptomfree from obsessive/compulsive
10 disorder in April 1990, is worse off today and has
11 tremendous fear of me because of what my wife has done and
12 her attorney and the process and the validation of those
13 behaviors by the legal system, particularly the judge,
14 insofar as going to reverse the position that was taken in
15 in January of '90, to give custody of the child in February,
16 February 12th, 1990, to her mother in Virginia, having not
17 read the testimony, having taken a position that that was
18 what he was going to do from the beginning of the case, in
19 February, perhaps even January of 1990.

20 And the process has involved a multitude of
21 professionals, some good, some very bad. And there needs to
22 be very tight regulations on who, in fact, can be involved
23 in the lives of children, because the damage can be done by
24 a lot of people, not only just the parents.

25 I wholeheartedly, wholeheartedly support the

1 position that was taken by Dr. Clawar and Brynne Rivlin. I
2 knew what was going on in our relationship. I had Elizabeth
3 put into therapy with one of the world's best
4 obsessive/compulsive psychologists, who just happens to live
5 in Chester County. And as I said, the child was symptomfree
6 in April of '90. But the process of brainwashing and
7 programming and the attempts to get custody of that child
8 started from early January when, in fact, my wife brought
9 the police to our house the 1st of January and demanded that
10 she return to Virginia with her, and then tried to sneak
11 through a custody order without my attorney being involved,
12 through her attorney.

13 So the process can be contaminated and distorted
14 and manipulated and abused by unethical individuals easily.
15 And unfortunately, the checks or the balances that are in
16 place in the rules of court and other documents implemented
17 by the Supreme Court and by this body and the Senate are
18 abused.

19 I know that, because financially in February of
20 1991 I was forced to represent myself pro se. I had two
21 attorneys, and I spent approximately \$30,000 in the
22 process. It was an expensive learning experience. But most
23 of the time was spent not on dealing with in the marital, in
24 the divorce custody problem, the divorce process. It was
25 dealing with property rather than was there, in fact,

1 grounds for divorce. The upfront efforts were how are we
2 going to divide this and how are we going to divide that,
3 hours and hours on end, instead of getting to the real issue
4 of are there grounds for divorce here and can this be
5 solved? It just simply got diverted from what was the
6 pragmatic, that was priority, that was the child, our
7 child, and trying to resolve the conflict that existed.

8 I support wholeheartedly mediation as opposed to
9 litigation. I think the evidence is overwhelming that that
10 process works. It needs to be mandatory mediation,
11 however. I don't agree with the bill as it is as a
12 voluntary process. And I say that with experience, because
13 all of the psychologists involved with our case, which
14 represents in the area of \$20,000 in doctor bills, and I
15 have no problem with that, getting experts to help the
16 child, but everyone said that the war had to stop, that
17 counseling or mediation or family therapy, whatever the term
18 wanted to be, was absolutely mandatory for the health of the
19 child.

20 That recommendation was made to the court on the
21 9th of February 1990 and ordered by the court on February
22 23rd, 1990. And because my wife's attorney knew that once
23 my wife got into mediation, based on an experience that we
24 had in counseling in January of 1990, that the truth would
25 be on the table, that someone would know it and his case

1 would be blown, the petition for divorce and the subsequent
2 litigation has been totally fabricated and fraudulent, and
3 that's been proven.

4 What the bottom line is, there wasn't a chance
5 for counseling or mediation. There wasn't, because of the
6 actions, the deviant and deceptive and unethical actions, I
7 might add, of my wife's attorney in an attempt to salvage
8 his case.

9 And in fact, I repeatedly tried to effect that
10 therapy, as did the doctor treating Elizabeth, our
11 daughter. The recommendation on February 23rd that the
12 doctor made, Dr. Paul McCarthy, was that mediation or
13 counseling was an important part for Elizabeth's recovery
14 from obsessive/compulsive disorder.

15 Because my wife was not able or willing to
16 participate in my daughter's therapy, she was restricted
17 access during the behavior modification process in February
18 and March of 1990, and the child recovered. Dr. McCarthy's
19 letter of April 4th, the child is symptomfree, but he again
20 insisted that for the health of the child, that my wife and
21 I, but I was totally willing to do this, go in to mediation,
22 if you will, or joint counseling, therapy, doesn't matter
23 what the name is that you call it, but a resolution of the
24 problems that we had as adults.

25 And from the outset my wife was not willing to

1 admit that she had any problems. Did not, in fact, even say
2 to the child that it wasn't her fault, when I tried to get
3 her to do that in November of 1989. My wife continued to
4 avoid the mediation.

5 And I concur completely with the fact that it
6 needs to be immediate, with an immediate time frame and with
7 objectives to be obtained. Without those guidelines,
8 without that enforcement, that encouragement and, therefore,
9 and also the consequences of not participating, the
10 mediation isn't going to succeed. The person who doesn't
11 want to participate will not.

12 Unfortunately, the conciliator on our case,
13 which really isn't conciliation, in Chester County I can
14 tell you that it's a meeting of attorneys to keep the
15 parties outside and insulated and in essence protract the
16 system, and also to hide evidence from the hearings, which
17 did, in fact, occur in our case. But the judge as well does
18 not believe in mediation or conciliation, if you will,
19 relative to custody. And in fact, so ordered in his opinion
20 in February that it would not have succeeded and that I was
21 simply trying to control my wife and take time away from her
22 limited visitation with our daughter, which was never the
23 case. All of the professionals, all of the professionals
24 insisted that this therapy was absolutely required.

25 The judge does not understand what brainwashing

1 and manipulation and, in fact, the harm that can be done to
2 children in this process. And unfortunately, I did. I
3 recognized that early on, and all of the events that
4 occurred through the last two and a half years prompted by
5 my wife, her attorney and others, have led though this
6 disastrous situation where our daughter came back from
7 Christmas 1990 with a relapse in her obsessive/compulsive
8 disorder because my wife had been working on her so hard.
9 And then Dr. McCarthy again recommended with a letter that
10 it was absolutely mandatory that this consulting go on. And
11 again, my wife and her attorney refused.

12 The condition got worse, to the point where in
13 March of 1991 because I had filed a petition for of
14 contempt, having failed on two previous counter petitions to
15 resolve this issue, filing a petition in March 1991 opposing
16 counsel deleted the requirement in the earlier order
17 unilaterally, with full intention to prevent my wife from
18 going to counseling. And that order was in March 27th of
19 '91.

20 So unless the parties, that citizens and judges
21 and psychologists, are trained and informed and take a
22 position, a positive position, the system won't work, and
23 that's why mandatory mediation is absolutely necessary.
24 There needs to be encouragement and consequences in this
25 behavior, as in all.

1 As I said, yes, I fully understand all the
2 nuances of the brainwashing and programming that goes on in
3 the custody and divorce battle. I knew what was happening
4 to our daughter, I saw it, and worked very hard to prevent
5 it. Not until March of this year did I read in Dr. Clawar's
6 and Brynne Rivlin's book, Children Held Hostage, and as I
7 read through that book I saw what was going on in our family
8 almost on every page. The tragedy, the pain, the effect,
9 the manipulation and destruction and alienation, all of the
10 things that are contained in that book happened and were
11 encouraged by the process.

12 So I would recommend that everyone on the
13 Committee read the book and do everything you can to have
14 all those who are involved in this process learn what mental
15 abuse is really like in divorce and custody. The children
16 are the victims.

17 I'm a victim. My reaction to what I heard this
18 morning with going on and as I hear these things, the
19 tragedy of children brings tears to my eyes.

20 As to the bill that's before you, this 1260, as
21 I said, I believe that voluntary mediation is better than
22 litigation, but mandatory mediation is absolutely
23 essential. I believe voluntary mediation just lends itself
24 to overtly and covertly to be avoided and misused, and I
25 would strongly encourage, based on my personal experience,

1 that that not be the case.

2 There are, as was testified, the system in
3 California, which I have researched to some extent, and it
4 has a great deal of detail, obviously experience and I think
5 merits the Committee's investigation at great length.

6 I was represented by counsel, as I said, from
7 January 2nd through April 8th, April 2nd of '90 through
8 April 8th of '91, and in that process, while I was
9 represented, I felt that my life was totally out of control,
10 that I had no way of involving, because I was insulated and
11 isolated from the process to the point of not even being in
12 the custody conciliation conferences, up until March 15th of
13 1991, the first time that my wife or I were in those
14 conferences at Chester County. And then only to be told the
15 results of the meeting of the attorneys.

16 So when I began to represent myself in April of
17 '91, I did, in fact, have an opportunity to go into
18 conciliation and, therefore, my wife did and the process
19 began to be productive.

20 And frankly, having to deal with all of the
21 issues that occurred was tremendously frustrating, because
22 we weren't moving toward a solution in the best interest of
23 anybody except the attorneys and the lawyers and the
24 system. We were dealing with how to extract money out of
25 the litigants, if you will, to keep it going on.

1 Facts and truth didn't seem to matter. The
2 process seemed to be the most important thing. And when we
3 started arguing for hours, I mean, the preparation and the
4 procrastination, as was indicated, one court case scheduled
5 today, one hearing and then two months having another, and
6 then two months later or three months later have another,
7 simply lent itself to the abuse of our family and our
8 child. It did, in fact, allow all of these abusive things
9 to occur which in the evidence, the overwhelming evidence
10 would suggest that this child should not be in the custody
11 of her mother. But that was totally ignored.

12 Only until I began to represent myself in April
13 of '91 did I have an opportunity to participate in the
14 process. And frankly, that was great therapy. I had an
15 opportunity to question my wife and have discussion with my
16 wife for three days while she was on the stand, half in
17 divorce and a half in custody, and in custody would have
18 been much longer had the judge not cut it off. He just
19 didn't want the evidence put into the record. But it gave
20 me an opportunity to have a discussion with my wife that we
21 hadn't had in 19 years. And she couldn't run away or avoid
22 the fact. She had to deal with the issues. Tremendous
23 therapy for me. Unfortunately, my wife didn't get a chance
24 to participate in it because she again was alienated by the
25 process, protected by her attorney, and coached extensively

1 to say just what she had to, or say, I don't remember.

2 But I had an opportunity to get the issues on
3 the table, which again, supports the feeling that, the
4 commitment that I have that mediation is absolutely
5 mandatory in trying to save the health and welfare of our
6 children and frankly, I think to save a lot of marriages.
7 Evidence indicates that. 80 percent of the cases don't go
8 to litigation in California. Over 75 percent of the parties
9 involved state afterwards that they are satisfied and
10 pleased with the results. You won't find that in any
11 litigant situation, I don't believe.

12 So I think if, in fact, the process had been in
13 place during our marriage and our divorce and custody, to
14 separate the custody issues immediately, because Elizabeth
15 was and is used as a pawn, and it's not unique, our case is
16 more the norm than the exception. Children are used as
17 pawns to manipulate, to control, to gain more money, to keep
18 the battle going on, to hurt the other party who doesn't
19 have custody.

20 Last night after being restricted from talking,
21 having any contact with our daughter for 60 days by the
22 ruling of this judge, unjustified totally, my first call to
23 our daughter last night, when my wife answered the phone and
24 I asked to talk with her, she coached the child not to talk
25 to me and to hang up, as my wife always does, if she felt

1 anything uneasy at all, and guess what the child did. She
2 created a -- provoked a situation, and I tried to explain
3 the truth to her, which was another brainwashing attempt by
4 my wife not too long ago, she got upset and hung up.

5 That's the result. Total alienation, of a
6 situation where the child chose to stay with me voluntarily
7 because of my wife threatening to kill me twice over the
8 Christmas holidays of 1989, chose to stay with me and not
9 return with her mother to Virginia. And you can look at the
10 documents, you can see where the mental abuse and changes
11 occurred.

12 But I had an opportunity to get into therapy. I
13 did pay for therapy. My wife went to counseling on her own,
14 but unfortunately, that counselor, and she spent a lot of
15 money and time with those people in Virginia, didn't have
16 any input from anyone else except my wife. Totally
17 nonproductive in basis and often counterproductive.

18 There needs to be a close coordination, parties
19 in the same room or at least as was suggested, maybe because
20 of the adversarial position or the animosity or whatever's
21 gone beyond the parents, that occurs, that maybe there needs
22 to be initially sessions in different rooms. But the same
23 therapist or mediator or counselor, whatever, needs to be
24 involved so they see both sides of the story, because
25 frankly, if one or more parties is a great liar, and learn

1 that through a whole lifetime of experiences, they can be
2 very convincing. My wife is an expert. And unfortunately,
3 she's now taught our daughter to be the same way.

4 As I indicated, I have talked with Hugh McIsaac,
5 the manager and director of the family court services in
6 California, and he has sent me information. I've read most
7 of it. That system has been working since 1981
8 effectively. It is, in fact, funded by a \$4 cost, according
9 to the documents from the copies of marriage licenses and
10 the final divorce decrees. And even if it wasn't and you
11 put the burden of cost with some reasonable restraint, not
12 \$80 an hour, in the case of attorneys \$200 an hour, it would
13 be worth every penny of it to parents who care and can't
14 pay. And it would be a lot less expensive. But you need to
15 make them go to mediation.

16 Other states have implemented various systems
17 with varying degrees of success based on what I found.
18 Arizona, Maryland, Washington state, the list goes on and
19 on. In fact, as I understand it, in Washington state they
20 also require that the parents and maybe, in fact,
21 implemented in California now, I'm not sure, that the
22 parents must, in fact, participate in parenting classes
23 before it goes to litigation, and that they, in fact, must
24 develop joint consistent parenting plans for their
25 children.

1 One of the problems that we have is that my
2 wife's parenting style is permissiveness, mine is productive
3 consequence and rewards and responsibility of the child to
4 grow into a responsible member of society. Totally
5 different. Whatever Elizabeth wants, her mother will do, to
6 the point of even threatening to sue the psychologist, the
7 psychiatrist who evaluated Elizabeth in January of 1990 and
8 said, we need to evaluate this child.

9 She was on Prozac. We need to look and see
10 what's going on in her blood. The child was put on Prozac
11 by her mother in November in Virginia, and then in December
12 was threatening to use Lithium to accelerate the effects of
13 the Prozac because it wasn't working. Threatened to sue the
14 psychiatrist if Elizabeth had a blood test because Elizabeth
15 didn't want it.

16 So there needs to be rationale, and I think that
17 you can get people to come to some reasonable solution if
18 they can effectly talk.

19 The parenting styles are very important. There
20 are also lots of organizations, and Dr. Clawar alluded to
21 some of them. The Academy of Family Mediation in Eugene,
22 there are many, many others who are established and
23 experienced and able to help Pennsylvania. In fact, Hugh
24 McIsaac in California indicated to me openly and voluntarily
25 that they would encourage people from Pennsylvania who are

1 in this process to visit California, to get all the
2 information. They're more than willing to help us
3 understand mandatory mediation and, in fact, would come and
4 work with us, obviously for reimbursement, and have done so
5 in other cases.

6 I am sure that the remaining witnesses can
7 address mediation and the process because they've been
8 involved in it from that perspective better than I can. All
9 I can say is it works.

10 I would suggest to the Committee that addressing
11 only the custody and divorce issues and particularly
12 custody, doing it up front like was suggested and getting
13 children out of the battle is extremely important. But the
14 legal process needs to be addressed as well. Ultimately
15 it's going to have to be reduced to writing.

16 I take exception to the confidentiality issue.
17 As I said, it can, in fact, foster the elimination of
18 critical evidence in the case. I would suggest that
19 anything that's reduced to writing could and should be
20 entered or have the ability to be entered into a hearing.

21 I know that confidentiality in discussions in
22 trying to resolve issues are extremely important for a sense
23 of candor, but I don't believe that truth needs to be hidden
24 anywhere, and that what happened in our case was the deceit,
25 the system, the process was used deceptively to hide

1 information from the court, and I find that extremely
2 destructive.

3 I think the Committee and Judiciary Committee
4 and the legislative bodies, both bodies can do a lot to help
5 the health and welfare of marriages and the children,
6 particularly if you address other issues such as judicial
7 ethics, confidentiality as it relates to the performance of
8 lawyers and judges, to discipline of judges.

9 There are many, many issues that the legislative
10 body needs to address in conjunction with the divorce and
11 custody process, because ultimately the worst cases will, in
12 fact, go to litigation. The financial issues, support,
13 alimony, should I believe be addressed by the courts after
14 the important issue, and that's the custody and the health
15 and welfare of the child or children. And even after there
16 could be a determination of whether it will even go
17 forward.

18 As I said, I believe in our case, had there been
19 a candid dialogue, we could have resolved our issues. Had
20 there been training for parenting and communications and
21 other skills that frankly my wife doesn't have, and I have
22 been battered pretty well over the years so I know I've
23 overreacted and not done all the proper things all the
24 time. So that would have been very helpful, and frankly, I
25 think our marriage could have survived.

1 But ultimately it's going to get to the legal
2 process. And so without having judges and lawyers who are
3 following the rules of court, who are of highest ethics,
4 who, in fact, act in the best interests of the children and
5 the parties, not themselves, who, in fact, move the process
6 forward for the resolution of the problems rather than the
7 exacerbation of the problems, it's absolutely essential if
8 you're going to address the real cause of why our system is
9 in trouble.

10 Basically the laws aren't too bad. It's the
11 implementation and the people involved in the process that
12 ruin it and have, in fact, hurt our daughter beyond belief.

13 In conclusion, I think that the bill as before
14 you now, it needs to be really expanded and enhanced, better
15 defined, and I believe if voluntary mediation was
16 implemented at this point it may, in fact, worsen the
17 problem, simply allowing for another extension of the
18 process without a result that we all want.

19 Sadly, what has happened in our case, and I have
20 talked with many, many parents, both mothers and fathers
21 over the last two years, and particularly since November of
22 last year, and the tragedy that's occurred in our case is
23 far too proliferant. And the results are the abuse of
24 children, and we've just got to stop that.

25 The House of Representatives has been

1 investigating the situation for some time, and I would
2 suggest that one of the processes that the Judiciary
3 Committee could, in fact, exercise is to move forward on the
4 impeachment request that I had made, because until we
5 address the fact that this system is abused by those inside
6 of it, it won't begin to be corrected.

7 It's well past the time to solve these problems,
8 in my opinion. There are proven alternatives, there are a
9 variety of them. I believe California is in the lead as far
10 as experience and thoroughness. The people in California
11 are ready, willing and able to help us, and other
12 organizations are as well, and individuals.

13 So I would ask in closing that this Committee
14 moved forward expediently, with most haste, as fast as
15 humanly possible to get a process of mandatory mediation
16 with the encouraging caveats and the teeth to make it
17 happen, to the extent of if you don't work in good faith,
18 there's fines or jail sentences or whatever it takes to
19 motivate people to get off the dime and solve problems and
20 stop the coverup.

21 I appreciate the opportunity to share my
22 thoughts with you, and I stand willing and able to help you
23 in any way I can.

24 REPRESENTATIVE SAURMAN: Thank you very much.

25 Chairman Caltagirone had to leave and he'll be

1 back, but he had to make a phone call.

2 One question, if I might. If there were a
3 mandatory mediation process that would have resolved the
4 custody situation, in a time line as has been recommended,
5 would that have affected the outcome of your situation? Do
6 you think that it would have helped in resolving it? Or
7 were the circumstances such that it still would have wound
8 up in a litigation situation, do you think?

9 MR. REIL: It would have helped Elizabeth, and
10 that's the important thing. She was symptomfree in April of
11 '90. And the destruction of this child is evident, and so
12 whatever the other costs or the situation doesn't matter.
13 If the divorce had dissolved as it has, and the marriage
14 dissolved as it has, that is insignificant to the health of
15 this child. And so yes, it would have absolutely kept this
16 child from being so harmed. And I don't know what we have
17 to do, but we need to do it now.

18 REPRESENTATIVE SAURMAN: Thank you.

19 Representative Gerloch?

20 REPRESENTATIVE GERLOCH: Yes. Bill, I don't
21 have any questions for you but I just did want to make a
22 couple comments.

23 It's clear from the materials you've presented
24 to me as well as what you've presented to the House
25 Judiciary Committee, and we don't need to comment at this

1 point on the other matter before the Committee, but it seems
2 clear to me in relating what's in Representative Saurman's
3 bill and the comments prior to yours on the mediation
4 process and the need for that in Pennsylvania, I'm glad you
5 answered the question affirmatively to Representative
6 Saurman's question if it could have helped in your instance,
7 because as I apply what you had presented to me in your
8 situation with this language of the bill and other comments
9 related to that, I think as well that that would have been a
10 very positive and very important piece that would have
11 perhaps lessened the pain and the frustration and the anger
12 that you have gone through in this whole process. If that
13 is the case, it's certainly worth Pennsylvania doing for you
14 and those many others in Pennsylvania that are going through
15 similar experiences in our domestic relations process.

16 So I appreciate the fact that you've taken your
17 time to come before the Committee and discuss this
18 particular legislation, in light of what your experiences
19 have been, and clearly I think it's a very important piece
20 of legislation and one which hopefully through this
21 Committee and ultimately through the House it will receive
22 the kind of attention that it deserves, not later, but now,
23 and I appreciate you coming up and testifying in this
24 regard.

25 MR. REIL: If I might augment my earlier comment

1 relative to that. As I indicated, the court did, in fact,
2 recommend and order counseling, but the court failed to
3 enforce it. The court, in fact, eventually the judge said
4 that it didn't happen.

5 We've got to get, as was indicated, the judges
6 and lawyers on board to what really goes on here and stop
7 the prejudice position, prejudging cases.

8 The idea that dad is bad has got to stop. And
9 that's what is happening, and it happens in our court too
10 often. I think it has to be, there has to be a neutral, a
11 gender neutral position.

12 I wholeheartedly take the position and support
13 the position that a presumption of equal or joint, not equal
14 but joint custody is absolutely necessary as a starting
15 point to get the child out of the war, to get her away from
16 being a pawn by the mother, father, lawyers, anybody. So
17 yes, if we can stop and solve the custody issue up front,
18 and then deal with the other issues, I think that will go a
19 long way to help the children, and that's what this is all
20 about.

21 REPRESENTATIVE GERLOCH: Thank you.

22 REPRESENTATIVE SAURMAN: Are there other
23 questions from the panel? Dave?

24 (No audible response.)

25 MR. REIL: Thank you very much.

1 REPRESENTATIVE SAURMAN: Thank you very much for
2 all your testimony.

3 I would like to ask now Reverend Lee Maliska,
4 Jr. To come forward.

5 If you'll give your name for the record.

6 REV. MALISKA: My name is Leonard K. Maliska,
7 Jr. I go by the nickname of Lee. I thank you for the
8 opportunity to be here. I guess I'm probably the swing
9 person dealing with the pastoral aspect of Bill 1260.

10 I have enjoyed listening to the testimony so
11 far, and my observations are very similar as a mediator and
12 a counselor. I realize that what you said, Mr. Saurman, was
13 very important, both the adversarial system and what it
14 creates. We have even depicted it as like a funnel and two
15 people come in at the top desiring to amicably settle a
16 marital dispute or to have a final marital settlement, and
17 as they each are advised by legal counsel, they go down
18 through the funnel and they come out at the end in an
19 adversarial position which started out in many cases to be
20 an attempt for a reasonable settlement.

21 I would in jest say that I would like to see the
22 California tax base with free education for any resident,
23 college and free mediation, and I don't know if you propose
24 that here I would be all for that, if the tax base is going
25 to go up, especially after I sent my membership dues in

1 yesterday and am enjoying what I'm paying for. And I have
2 to admit, Dave, that this is a lot more beautiful than
3 Republican headquarters in Bucks County. But I appreciate
4 being here.

5 As an introduction I would like to give a little
6 bit of my background. Mr. Saurman requested that it be
7 verbalized, and I remember what a fellow said once, if you
8 start to believe the things that people say about you,
9 you're in trouble. So I hesitate but I will give a little
10 bit of my background.

11 I'm an ordained pastor. I asked to be ordained
12 as a pastoral counselor and I was. I have a doctorate in
13 counseling from Westminster Seminary and master's of
14 divinity from Grace Seminary in Winona Lake, and a business
15 administration degree from Husson Business College in
16 Bangor, Maine.

17 The reason I think I may be the swing person,
18 there are some things that I want to agree with in the bill
19 and some things I want to disagree with in the bill.

20 I really am excited, quite frankly, about the
21 fact that the bill is on the docket. I don't know if that's
22 the right term, but it's come before this House, because we
23 have been struggling for a long time trying to mediate
24 settlements and have had very little court support as far as
25 what the religious community would like to help people do

1 and the court system is often viewed as separate, and in
2 some regards they should be.

3 There are times, I've included under the
4 abstract section kind of a summary of what I believe. I
5 started conciliation counseling and mediation counseling
6 with three lawyers approximately eight years ago, and we
7 were pulled into it because we saw the necessity to try to
8 keep people from having to enter the court system and
9 demolish what I believe to be the emotional stability of the
10 family as much as possible, and the financial matters that
11 are always on the forefront, and we formed the Christian
12 Conciliation Services of Bucks County under our corporation
13 as a fictitious name.

14 I'm hesitant now to get involved with mediations
15 anymore. The reason why I'm hesitant to get involved in
16 mediations anymore is because we've had several very
17 thorough, very thought-out mediation contracts made,
18 settlements agreed to, and then when they are taken to the
19 court for approval, one person, like was mentioned earlier,
20 may agree to 17 out of 20 points and they won't sign, and
21 then the evidence is entered to the court system and it's
22 summarily dismissed for one reason or another. So the whole
23 process has been undercut by the court system in some
24 cases. I'll talk about that a little later.

25 It's basically my opinion that the widespread

1 response to Bill 1260 may be perceived as an intrusion of
2 separation of church and state, where it speaks to the
3 pastor having the ability or anybody who has the right to
4 solemnize a wedding would have a right to solemnize a
5 divorce. That may be viewed as a separation of church and
6 state.

7 With certain qualifications, I don't necessarily
8 believe that. I guess you could put me in the, if you want
9 to put me in a camp, put me in the conservative religious
10 camp as far as my beliefs, but with certain qualifications I
11 don't believe that that necessarily would have to exist.

12 The qualifications as they are spoken of here,
13 in my opinion, if a minister or a pastor or a justice of the
14 peace, a mayor or others qualified to solemnize marriages
15 are to have marital family counseling training, and B, be
16 qualified as a mediator, and C, be certified on a regular
17 basis on Pennsylvania law as it pertains to matters
18 concerning the elements of legal settlement, then there is
19 no breaking of that perceived wall of separation.

20 The minister-pastor, if he chooses to be
21 involved in mediation, which I have, is not being certified
22 as a minister, he's being certified as a mediator. And I
23 could see that possibly, if it's worked right, of not
24 breaching that perceived wall of separation. And any
25 agreements that would emanate from mediation between the

1 marital parties should be drafted and sent to the court with
2 proper jurisdiction to be made an order of the court. And I
3 think the bill deals with that. I have several questions on
4 how cohesive it is, and if it's pulled together or if it can
5 be interpreted differently.

6 The conclusion that I believe is within my
7 theological understanding is that a minister-pastor should
8 not be empowered as a civil law implementer to sign marital
9 dissolution documents. I would not be in favor of that at
10 all, and I think that the majority of the pastors that I
11 know would not be in favor of taking the place of civil
12 law. Nor, if would we want that to happen, because that
13 could be viewed as a breaking down of the wall of
14 separation.

15 We agree that divorce is a social problem, and
16 it's viewed by most pastors as a serious enough problem that
17 it is viewed -- and I'm sorry that there's a typographical
18 mistake there, when I finished this last night at 11 o'clock
19 my secretary obviously had gone home and I missed it, my
20 eyes were crossed -- that is viewed as we are, our feeling
21 called to be in the conciliation process and the
22 reconciliation process, and this would place us in a
23 different odd position; take us out of the peacekeeper
24 mode. The pastoral dissolution of marriage would be viewed
25 as an oxymoron. They can't exist together.

1 In a bad-to-worst case scenario, as I was
2 thinking this through, it seems like if too broad a power is
3 given to, I keep using the word pastor but, Mr. Saurman,
4 I'll include all the other ones that come underneath these,
5 state law, that would also be able to solemnize marriage,
6 that if that's okay, in a worst case scenario it could open
7 the door to widespread misuse, abuse and even charlatanism.

8 My first thoughts were I know when I went
9 through reconciliation training quite a while ago they said
10 if you want to make new friends in mediation, don't get
11 involved. If you want to make money, don't get involved.
12 And I have accepted that in my mediatorial role, that this
13 is not a making-gain situation. But I could see the door
14 opening for people, if it's not regulated very closely, to
15 make money off of that particular privilege. And that may
16 be the sole resolution for it.

17 It would rid the court of a domestic backlog,
18 that's for sure. But at the same time it may make us rival
19 to Nevada for quick divorce, and I don't think that's what
20 we want to do. I don't think that's what you want to do in
21 this bill, and I just throw it in as that that could be an
22 outcome.

23 To empower a pastor to submit a mediation
24 agreement, a final settlement and any signed stipulation
25 would rule out the above dangers and the abuses. I can see

1 pastors going through the training, negotiating, mediating,
2 and having parties sign final marital settlements and sign a
3 stipulation and so forth so that it becomes part of the
4 court process and it's ratified by the courts rather than to
5 solemnize the divorce.

6 Severe misapplications could I think really have
7 a bad effect on what appears to Mr. Saurman's Bill 1260, if
8 it is not handled properly. I believe that that bill is
9 intended to right some traumas and change some troubles that
10 have existed in the divorce process, that now exist, and to
11 cut some of the battles presently being waged in the
12 Pennsylvania court.

13 I made a sarcastic comment about the only winner
14 seems to be the lawyers in many of these cases, and the
15 people are left with very little resources. I would have to
16 say that the lawyers that I'm involved with agree to that
17 statement so I don't think it's completely sarcastic.

18 The background, having been involved in
19 counseling for over ten years and mediation for eight, I've
20 realized that whatever it was that you gentlemen or if you
21 weren't here, the gentlemen who came up with the no-fault
22 law, whatever was intended, whatever that was intended to
23 solve, somehow has been lost. This is on the background
24 information on page 2. Somewhere it got lost, and where I
25 think it got lost is it got lost in a maze, a complexity and

1 overburden in a busy court system.

2 I was going to share this at the end, but as I
3 was listening to Mr. Reil's testimony, it reminded me of a
4 child custody case that I sat in on where the judge did an
5 amazing job, just absolutely amazing job. I don't mean this
6 in a bad way, but I think sometimes that lawyers must go to
7 acting school before they learn law, because the theatrics
8 that I observed were really good. But during the process,
9 and I know some of you are lawyers, don't take it personal,
10 but during the process there was two lawyers came in and
11 said, oh, judge, we have reached a resolution to the case,
12 and so he says, okay. He brings it down, this case and he
13 says, all right, here is the agreement between you, and you
14 go do this, and that interrupted this child custody
15 hearing. And then after a while another case would come in,
16 we've reached an agreement. And I understand why, because
17 the docket's full, but there wasn't much continuity to what
18 was taking place in the room.

19 What amazed me in the whole process was that I
20 think the conclusion that he came to was absolutely
21 beautiful, but I concluded that I think he must have done it
22 from the written documents that had been given to him
23 beforehand, because he couldn't possibly have come to such
24 good judgments based on what was taking place in the
25 courtroom itself, because it was controlled but it was

1 chaos.

2 I think that's a pretty good picture of what's
3 taking place. It's not their fault necessarily. We have
4 too many people doing too many things in the court system.

5 So I think that this bill is a -- I'm excited
6 about the step that we're trying to take and to correct.
7 I'm not going to read all this material, but many marital
8 parties have testified that they were too hasty oftentimes
9 as the situation where because of the advice that they're
10 being given, they see themselves in a courtroom sitting
11 across the room from each other, saying why are we involved
12 in this? We don't want this to happen. But how do you get
13 it stopped once it's rolling? That's a problem.

14 One judge expressed what I believe is the
15 reality of life when it comes to divorce. He said, to call
16 me a judge is something of a misnomer. I am really a sort
17 of a public mortician. In the past 11 years I've presided
18 over the final obsequies of 22,000 dead marriages. The
19 trouble is, I have buried a lot of live corpses. There was
20 no sure way to discover and resuscitate the spark of life
21 that surely remained in many of them.

22 I think that's the way a lot of us feel when we
23 see the process and how it operates, and in counseling I
24 feel that way in mediation. I feel that way, but I sure
25 enjoyed the privilege of being in the place of a mediator at

1 different times because I have the last shot to try to bring
2 about a reconciliation, and in some cases we have.

3 Even children feel the feelings. I'm reminded
4 of a statement that I often think about when I'm thinking
5 back on cases myself, which as I listened to Mr. Reil I
6 started to feel a little uncomfortable, because if you're
7 involved in a mediatorial way and a counseling way, there's
8 a lot of hurt that you absorb that people sitting in front
9 of you have, too. But the kids don't get divorced, they
10 still have parents, and that has to be maintained.

11 The prime sponsor of this bill I think put it
12 well when he said, both men and women have complained
13 bitterly about a system which appears to be replete with
14 inequity and where justice appears to be replaced by an
15 adversarial contest to see which party can inflict the
16 greatest punishment on their estranged spouse.

17 And there's a lot of pride and a lot of ego and
18 a lot of those kind of problems that exist. I'm not sure
19 you can have an easy divorce. I haven't seen one. I don't
20 know if anybody else has, but I don't believe it exists.

21 The Christian Counseling Center sponsors a
22 program called Fresh Start, just to give a you an idea of
23 our volume, which is a seminar for the separated and
24 divorced, and we do two a year. The center also sponsors a
25 support group on every single Tuesday night, and there are

1 between 20 and 30 people every Tuesday night at this support
2 group, and they either are experiencing separation or they
3 are in the process of divorce.

4 One recurring theme is an expression of personal
5 emotional and financial abuse, the financial abuse that has
6 taken place by the legal system. Now, I have to acknowledge
7 and I think everybody would have to acknowledge that we all
8 have our self-serving bias, and when I hear cases, I realize
9 there's another side to every story, but apart from that
10 self-serving bias, many of the stories are heart-rending,
11 and even if only a portion of it is true, what's happening
12 to these people, their financial situations, their emotional
13 stability, and what's happening to the children for the next
14 generation, we could almost call that emotional abuse.
15 What's going to happen, I fear, for the next generation if
16 we don't aid this process, and mediation I think is an
17 answer.

18 The system needs to be sensitized, and it's
19 not. And it is just too wieldy and it's too crowded. In
20 many cases, what the intent of dispassionate justice was
21 intended to give out in many cases ends up being uneven or
22 not being evenhanded.

23 The court has asked for, in our area has asked
24 for mediation services, so we responded five years ago and
25 started mediation services. Now, there are problems that

1 exist that need to be taken care of. The court asked for,
2 it ought to get a mediation network to take some of the clog
3 out of the court system.

4 Now, to involve church leaders as mediators to
5 meet the general requirements seems almost analogous to
6 pastoral care, and sounds like I'm saying that in a
7 sarcastic way, but I don't see any problem with a pastor
8 being a mediator. We do it every day. And in an
9 irretrievable marriage situation, it is another aspect of
10 pastoral care. Some may opt not to be there, not to do
11 that, not to empower themselves to do that, but we're all
12 involved in reconciliation and peace making so I don't see a
13 problem in the definition of the words.

14 I do have a problem if we break down the wall
15 that exists. While church leaders may be involved with the
16 smallest segment of the community, which we are, I could not
17 see some of the same kind of problems that maybe secular
18 mediators would see, but I do see quite a few bad kinds of
19 problems. But that's all right.

20 There is a place also for pastoral involvement
21 in mediation where you don't need to bring in your belief
22 systems or your theology. The outcomes don't require it.
23 You can mediate, and I think a pastor's ideally mentally set
24 for that and I don't see a problem.

25 I may hesitate once in a while when I make these

1 statements because by themselves, and this would not be
2 perceived by many conservatives in the religious field as
3 something that they want any part of, and they might even be
4 uncomfortable with me being here, and this is a
5 controversial position, but that's okay. I want to help
6 families, too. Mediation's well within any definition that
7 I can find in Judeo-Christian ethics and more generally
8 overall pastoral responsibility.

9 Even for the most conservative pastor,
10 protection is a primary motive. That's what I keep hearing
11 here, too, is that mediation is to provide protection for
12 all family members against whatever it is that we perceive
13 as being the evil, and so I have no problem with being
14 involved in mediations.

15 I will say that my primary job is
16 reconciliation. I got dragged into mediation to protect
17 families, and if you wanted to give me a choice of careers I
18 would not pick mediation as a career. I would do it as an
19 adjunct, because I believe that there needs to be a buffer
20 between divorced or separated people and the court system,
21 and I will help to facilitate that.

22 As a member of such a conservative ministerium
23 in our area, I've experienced as we started to introduce the
24 concept of mediation and conciliation, we call it mediation
25 and arbitration, and I'll explain that a little bit later,

1 but there was a reticence that I found there. Do we really
2 need this kind of thing in the church? I mean, do people
3 have this kind of problem? Well, if you look hard enough,
4 it's not hard to find in the church that the same kind of
5 legal disputes that people have outside of the church
6 exist. And the divorce, while our percentages in the church
7 are a little lower than the national average, we're gaining,
8 and we're gaining because of whatever social influences that
9 you want to put on it. But we're gaining, and there needs
10 to be something from the church point of view that can aid
11 in this process.

12 Those who choose to become mediators or not to
13 be become mediators, I'm speaking of pastors now, sticking
14 in that realm where anybody who can solemnize a wedding
15 could solemnize a divorce, they should have that right.
16 Living in accordance with one's calling, I wouldn't want to
17 make all pastors do that, that's not the intent I don't
18 believe of 1260. But it does give some broad parameters for
19 somebody in with a pastoral degree, and I want to question
20 some of that.

21 So let's move on, then, and I'm skipping over
22 some stuff.

23 In my sincere opinion, both in my practice and
24 experience, a pluralistic mediation system, which I think is
25 what you're driving at in 1260, is a religious

1 community-based one and a secular-based one, all working
2 together and a network should be available. Some of the
3 reasons why we can't accomplish what we want to accomplish
4 in the mediations is because there's no link between the
5 two. I'm not talking about walls of separation, I'm talking
6 about no links between what actually ends up happening and
7 what ends up what was mediated.

8 There are aspects of Bill 1260 that raise
9 concerns for me, and I hope this will help to clarify how
10 they could come together. Maybe I've misunderstood 1260,
11 and if I have, I'll be more than glad to be informed of
12 that, but it appears that those who are qualified to
13 solemnize marriages are able to negotiate issues of
14 equitable distribution, spousal support, child support,
15 child custody, alimony and alimony pendente lite -- it took
16 me five years to figure out what that was -- without the
17 training and qualifications mentioned in section 3325, part
18 B. Now, that's what it appears like to me.

19 There's a separation in the numbering system and
20 it doesn't appear like the next sections apply to the
21 pastors, or those who are able to solemnize marriage and
22 divorce, and I think that link needs to be made, because
23 I'll share a mediation contract, at the end that says
24 basically that the people agree to do this, and we do do
25 that in mediation. We've run into difficulty, not because

1 they don't think we have the -- court doesn't think we have
2 the right, they just don't acknowledge the mediation
3 process. They want to keep it to themselves.

4 Now, the qualifications of a mediator, that is
5 in section B, if the case would be detrimental to the
6 mediation process, because like you mentioned earlier, would
7 have in the case of those who are defined by 3324, you would
8 have people who have no training being able to mediate those
9 kind of issues.

10 I would disagree with you a little bit, if you
11 don't mind, and say that I'm not sure you have to be a
12 lawyer to understand financial concepts and to get
13 appraisals and to find out a value on a pension fund. I
14 think you can learn how to do that, because I have had to
15 learn how to do that. And I'm not trying to disagree with
16 you, but I don't think it necessarily has to be just within
17 the legal field. There are good organizations and networks
18 that could be set up to do that. I may not have all those
19 abilities but I could find somebody to help me do that. So
20 that could be part of that.

21 Any pastor or any other person able to solemnize
22 a marriage, according to the Pennsylvania consolidated
23 statutes, includes local, state or federal judges, court
24 justices, mayor of any city or borough in the Commonwealth,
25 minister, pastor, priest, rabbi, of any regular established

1 church or congregation. So you could see that that first
2 section is pretty broad. Anybody that can solemnize a
3 marriage can solemnize divorce and can go through, this
4 states can go through what we just said, which is usually
5 restricted to the legal network. I agree that there needs
6 to be a connection between the two, the training needs to be
7 for those people.

8 Section 3324 A, B and C seem separate from the
9 conditions of 3325 A and B. There seems to be some -- it
10 may just be in my mind, I hope so, but it needs to go all
11 together.

12 In my opinion, any ordained pastor should be
13 required to, if he desires to mediate, and when I use
14 ordained pastor I'm restricting it to my bailiwick. You've
15 got all those other ones that the law would provide to
16 solemnize both cases, too, and that could apply to that. If
17 he desires to mediate in such a fashion, he should request
18 by application mediation training in a compatible
19 organization. It doesn't necessarily have to be the thing
20 that was mentioned this morning or the one that's in the
21 bill. Christian Conciliation Services is a national
22 organization. Christian Legal Society has a whole branch
23 that trains people to mediate. The Mennonite denomination
24 has a mediation training process that deals with the same
25 kind of things but would incorporate the religious concepts

1 that we want to have as pastors. So that's why I used the
2 compatible organization, and I think the bill does say
3 something similar to that effect.

4 And be required to be certified, and recertified
5 as mediator, having taken or having access to those who are
6 aware of the domestic relations matters that you're
7 concerned with, training in the procedures used. And the
8 domestic relations is similar to training given those
9 conducting domestic court master's hearings.

10 I heard that word and I was trying to think what
11 kind of training would I like to have as a mediator that I
12 don't necessarily have now that I have had to go to other
13 people and taught me, and I've bounced off of walls in order
14 to get this training. I would like to have master's
15 training, the same kind of training that a master has, that
16 enables him. And I believe that most masters are not
17 required to be lawyers. Okay. So it would be a very
18 similar kind of training.

19 First I thought, well, maybe it's like training
20 for a district justice, would that be district court
21 justice? I'm trying to think what Bob is. That's what he
22 is.

23 REPRESENTATIVE HECKLER: Yes.

24 REV. MALISKA: That kind of training, which is
25 not like a big judgeship, it's a little judgeship. We don't

1 need big training, we need little training. Then we can go
2 to other resources to get the other things that we need.

3 But master's level, master's training and
4 certification and recertification, ongoing education as the
5 law changes would be very -- I would sign up for it today if
6 it was available. If I could do it, I would sign up today
7 and I would do it twice a year and I would be certified as a
8 mediator, because I know that you're not certifying me as a
9 pastor, you're certifying me as an mediator and those things
10 would have some bite to them and have some teeth that I've
11 heard talked about here when it goes to the court system,
12 which we don't have, by the way, at this point.

13 The implications of Bill 1260 seems to give
14 untrained clergy and others civil law capabilities, power.
15 It needs to be linked, those sections need to be linked.

16 I must reiterate, and I just did, that I would
17 see this as nonthreatening to the church-state issues
18 because you're certifying somebody to mediate, not
19 certifying them as a pastor.

20 Most ministers and pastors regard civil law as
21 ratification of the marriages they perform. And in that
22 vein, many, most I would say, would not want to use civil
23 law by having the ability to ratify or solemnize a divorce.
24 By its appearance the bill gives members of the clergy the
25 authority to determine matters of civil law. And I've said

1 that before, we don't want to do that.

2 And that may be deemed as unconstitutional, I
3 don't know. I'm not a constitutional specialist, but I know
4 some people that are coming that are going to see a problem
5 here, and I hope we don't have a problem.

6 Now, if they choose, and they're allowed to
7 enter legal agreements to introduce, as mentioned in section
8 3325 of part C, if a pastor is certified to mediate and then
9 he can document and take that to the court, as it states in
10 3525 C, there's a link there in what he can do. There
11 should be a link in the training, and it's very necessary
12 from my point of view that if a pastor is going to mediate,
13 that those documents be considered legal contracts.

14 It amazes me on how legal contracts can get
15 diced when you go from the mediation process into a court
16 litigation system. It is simple as this. I mean, that is
17 how much regard many of the mediation agreements, which take
18 a lot of time, are given in the court system.

19 For the bill's success it would be recommended
20 that parties both be able to request mediation from a
21 qualified pastor or others, that you've listed, or the
22 system that's supplied by the court, depending on their
23 orientation and where they want to go, that they should be
24 able to request that, not just have it mandated. And I'll
25 say why in just a minute. I believe if that's done, then

1 you won't have any wall problems with separation.

2 Now, procedural problems. Pastors by nature of
3 their study usually have training in family counseling, so I
4 don't have a problem with that section being in there
5 because we're trained in that. They did not have, though,
6 the training that they need for civil law.

7 And where it speaks of trained in family
8 counseling, is it correct to assume that pastoral training
9 is adequate to fulfill that requirement, but for the others
10 that are also able to solemnize marriages and divorce, that
11 they would also need to have family counseling training?
12 And I don't know if I could answer that question by reading
13 the bill. I think that would need to be clarified.

14 In the section where it speaks of certain
15 information being inadmissible, I have the same problem that
16 the first speaker had. I believe that -- and I understand
17 the reason why it's put in there, I've read it many times
18 and I think I get the intent there, is that some of the
19 private conversations that take place in the mediation
20 process may not necessarily be appropriate to go on to the
21 next level, if it has to. But one of the problems we've had
22 is that we need to be able to admit the agreements that are
23 given, the agreements that are signed, not necessarily the
24 negotiating process and all the little notes, unless it's
25 relevant.

1 But I would have the same problem as the first
2 couple that were here, that that information, if it's
3 necessary and needed, when mediation breaks down that it be
4 admissible as evidence. There's a section in there that
5 says unless both parties agree otherwise, then it could be
6 admissible. And in our mediation contract we say that it
7 can be admissible, and I think it should be assumed, and I
8 have a copy of that in the appendix.

9 I believe that setting compensation that cannot
10 exceed \$200 a day actually antiquates the bill as soon as
11 it's passed, because it establishes an artificial limit and
12 it does not consider the variables that may exist in the
13 mediation process.

14 Now, I've already said that I don't think we've
15 turned this into a money-making venture, but I think once
16 you put a dollar figure on it, if it did pass, three years
17 after the bill you would still have this imposed \$200
18 limit. You're going to have to keep playing with limits.
19 But I think there would need to be another way of doing
20 that.

21 I've included a price structure in what the
22 court requires and what lawyers have given me as figures for
23 preparing documents. In our mediation the lawyers do
24 prepare the documents and there's a list in the back and so
25 we can actually estimate what the mediation process is going

1 to cost and we tell people in the first meeting.

2 In section 3325, part C, returning the case to
3 its regular docket, appears to me to assume that a petition
4 of divorce has already been entered prior to mediation.
5 Now, that's what it appears to me. I hope it doesn't mean
6 that, because there's many cases that have been referred to
7 here today that I think it's important that in the mediation
8 process, reconciliation often comes about. Maybe often is
9 too broad a word. Sometimes we are able to turn that into a
10 reconciliation process.

11 I would not like to have a system where whoever
12 is the mediator, the no-fault has already been filed. I
13 think that's taking a jump too quick, and I'm not sure of
14 the rationale behind it, but it assumes that that has taken
15 place.

16 In many cases, when we get involved in
17 mediation, people come and say, we have an irretrievable
18 marriage problem, we're not, my wife has not, she's going to
19 take the two-year limit, I think that's still in effect, the
20 two-year limit, she's not going to consent to the divorce.
21 So what we want to do is we want to mediate an interim
22 agreement, and then when it comes to the end of the two
23 years, we want to mediate a final marital settlement.

24 Well, see, if this is the assumption that
25 they've already filed the papers, they may or they may not

1 have filed the papers at the time that they come into the
2 mediation process. So if that could be cleared up, I would
3 be much happier with the language.

4 I also mentioned that it could, it should be
5 possible to make a request for mediation from the court
6 prior to any decision for a petition to divorce. Many times
7 people want to negotiate in what was just talked about, a
8 child custody, or financial arrangement. People do
9 separate, they need to have something, unless they could
10 completely trust each other, which would make me wonder why
11 they got to where they were in the first place, financial
12 matters. And that could be mediated, and we have a contract
13 that enables them to do that.

14 Flexibility, along with the seriousness of the
15 court's involvement I think the court's involvement is
16 really an important issue, but flexibility needs to be
17 there, too, for mediation, and the seriousness of the court
18 being involved needs to be there as well.

19 I gave a case here -- we need the weightiness of
20 the court behind the mediation process. I gave a little
21 short excerpt from a case that's been appealed and it's a
22 very important case, and it's a very important case to Bill
23 1260 and I have a copy of the appeal. But what happened is
24 we went through the whole mediation process of the signed
25 contracts for the mediation process, marital settlement

1 agreement, the custody agreement, all the pendente lites and
2 all that, we covered them all, and then we had it drafted
3 and then the husband decided -- after a year we were going
4 to review the custody arrangements. He agreed to come back
5 to mediation again because there was a change in
6 circumstances. And we mediated that, we mediated that
7 settlement, it was agreed to, signed, and then when the
8 compliance time came, he said, bag the process, he didn't
9 like point 17 or whatever it was, and went to the court.
10 And they expended approximately \$10,000, neither of which
11 they have, to straighten out the custody issue.

12 Here's what was said basically by the court on
13 why it was appealed: Looking to the court for relief, the
14 mother filed a petition to enter the marital settlement
15 agreement as an order of court and later a petition for
16 contempt. A hearing was held, and I deleted the name, on
17 both petitions, the sole issue being custody. That was the
18 sole issue.

19 The mother argued that the marital settlement
20 agreement should be entered as an order of court and that
21 the parties were bound by the arbitrator's -- this was
22 agreed upon previous that they would do this, if we needed
23 to have an arbitration panel; we did, we had three members
24 that arbitrated it, and they agreed on each one of the
25 arbitrators -- decision to award her custody.

1 Father agreed that the marital settlement
2 agreement should be entered as an order, but argued that the
3 provision of the agreement calling for binding arbitration
4 was against public policy.

5 I don't know if you can tell me what that is.
6 But it was appealed on that basis because we don't know what
7 that means. And we hope the judge is going to be able to
8 tell us what she means as far as the issue of custody was
9 concerned.

10 The court summarily brushed aside two agreements
11 on custody, stating it was against public policy. The case
12 is under appeal. And Bill 1260 helps us with whatever that
13 public policy, I call it the garbage can, where you just
14 throw something and use a nice word, but it was done like
15 this. It was like, who do these self-appointed judges think
16 they are? This was three mediators, two of them are trained
17 and one is a pastor, who do they think they are, taking --
18 this is the lawyer's presentation -- taking the place of a
19 court judge decision? A court judge knows better what is
20 right for a child than this group of self-appointed judges.
21 It was brushed aside based on public policy.

22 I think it was more egocentric than it was as a
23 matter of law, and the people that are involved in that
24 mediation were much closer to this family than that judge
25 will ever get.

1 I hope that 1260 or some revision of it -- I'm
2 almost done -- will rectify some of those problems.

3 Agreements, both mediated or arbitrated, must
4 have the strength and the finality that is spelled out in
5 Bill 1260. In the case mentioned above, the final paragraph
6 of the appeal is penetratingly appropriate to the discussion
7 here today, and here is the appeal statement:

8 If the entry of the arbitrated agreement as an
9 order of the court was not against public policy as to the
10 custody provisions contained therein -- everything else was
11 approved, by the way, just that custody -- then it follows
12 that the trial judge's excision of those custody provisions
13 from the agreement must be reversed, since the agreement was
14 an integrated whole.

15 The court in this case became part of the
16 problem, in my mind, and 1260 helps to rectify that.

17 People under the present attitude of many courts
18 are unable to enforce agreements negotiated in mediation and
19 then drafted by legal professionals. Bill 1260 or revisions
20 will spell out clearly the boundaries of the agreements and
21 clear up arbitrator decisions by judges who may innocently,
22 and I'm not assuming malice aforethought here, innocently
23 become part of the problem.

24 In the case mentioned, a very poor mother and a
25 stubborn father have spent over \$10,000. In another case, a

1 father has had to spend \$60,000 to protect constant attacks
2 by the mother, who really doesn't want him to see the
3 children. That's the primary motive. And I know what child
4 abuse is and I know what violence is, because I deal with
5 those cases, too. But this is not one of them. And one of
6 the allegations was child abuse. That was never, ever
7 substantiated. The next one was sexual abuse, which was
8 never, never, never, never substantiated by anybody.

9 And the assumption, I know the difficulties
10 here, the assumption is how do we find out who's telling the
11 truth. But the court is finally starting to realize that
12 this woman is in a blocking mode, and this has nothing to do
13 with it, but she came from an alcoholic background and she
14 decided to leave with a fellow that she met at AA. It has
15 nothing to do with that particular case, but it has to do
16 with her as a person, and he has had to spend \$60,000 to try
17 to see his children because of allegations that I believe
18 are unfounded. You have to take my word for that.

19 The problem is what do you do when you don't
20 have \$60,000? I don't know how to answer some of those
21 questions. And these people that go to support group who
22 are poor, they don't have the money to use the legal
23 system. What do they do? Mediation I think is an answer.

24 In conclusion, I believe that mediation services
25 of Bill 1260 have basically two faces, and I hope we can

1 bring the two together. A clergyman or one of the others
2 can do, that can solemnize, with all the rights of a civil
3 law master in domestic court, that's basically what I see
4 the first part of it. And pastors who want to get that
5 training could service, similar to master's. And then I see
6 another face, a court-run system that with each local area
7 regulating what takes place in the court system.

8 In the first place, the latitude granted to the
9 pastor is too broad without the training. And if it's not
10 merged with the second part or the second part without the
11 first, what the court system is going to have is basically
12 going to be too narrow. There needs to be some work. I
13 hope they can solve that problem.

14 I don't think pastors will accept the enforcer
15 of civil law position. They should be given, if chosen, the
16 means to exercise conclusively mediation and arbitration if
17 necessary.

18 The traditional pastoral ministry will find the
19 Bill 1260 repugnant on the face. They don't want any part
20 of it. As a conflict resolver and a mediator, a traditional
21 pastor may desire the opportunity to be involved. I could
22 see that as being why some would want to be, is to have the
23 possibility of reconciliation. I don't want to be involved
24 if I am only involved because I want to help protect the
25 family. And if it wasn't for that, somebody else could have

1 it.

2 But the system that exists now in our court is
3 too costly, it's adversarial, it's too slow and in some
4 cases it's brutally unfair, and I don't know how they -- I
5 would never want to be a judge, I don't think, to try to
6 judge between what people are saying. I wouldn't want to do
7 it because everything sounds so good. But it's brutally
8 unfair in some cases and it's emotionally traumatic.

9 In brief, then, in the appendix I've included a
10 sample mediation arbitration contract, and we won't take the
11 time unless you want to, but it's a pretty tight contract
12 that the people agreed to prior to getting involved in the
13 mediation process. The reason we came up with it is because
14 when somebody wants mediation, there are certain things that
15 we're interested in, but we want them to be serious and we
16 want the end result to be tight. Not tight in a personal
17 sense but we want it to be a done deal. We don't want to
18 play games and then have somebody bail out at the last
19 minute. So we devised a mediation arbitration contract, and
20 I'll define arbitration for you.

21 If we get 17 out of 20 that they agree to, and
22 we start off the process by saying, give us a list of the
23 things you agree on and the things that we need to work on.
24 When we have a final agreement, I have somebody else draft
25 it. I just have given them the 20 points, and they put it

1 into legal format. But the people agree prior to that if we
2 have like three issues like were spoken of this morning that
3 can't be dealt with, we're not bailing out of the whole
4 process, we're going to have an arbitration panel. In our
5 case we usually involve three, and they're approved by the
6 two individuals, and then if we could not negotiate in that
7 session, then a reasonable compromise is arbitrated.

8 The most expensive mediation we've ever done was
9 a thousand dollars. When people say, how much is it going
10 to cost, I say, it's going to cost as much as you want it to
11 cost. If you want to settle and negotiate -- I like to use
12 the word negotiate because I'm helping them to negotiate an
13 agreement between the two of them, I'm not trying to tell
14 them what to do, but to negotiate a contract between the two
15 of them, an agreement, as fast as you want to go, we're out
16 of here, because I have other things to do, you have other
17 things to do. So as quick as you can get that process
18 done. It could cost you \$150 plus filing fees and whatever
19 it takes for the court system. It could cost as high as a
20 thousand dollars or more if you decide to bog down the
21 system, and then if you decide to go into litigation, here's
22 what you could be looking at.

23 So it's not a high profit margin situation in
24 our case, it's a facilitation effort, facilitation, whatever
25 we believe is necessary to help people. The parties agree

1 to abide by the board finding if it comes down to
2 arbitration, and then that is submitted as evidence in the
3 court.

4 There is a phrase in the back of that mediation
5 arbitration contract that applies to what was talked about
6 this morning, about this admissible evidence, and I can't
7 remember how it's worded, but it basically says that I do
8 not have to be present or called in as a witness for this to
9 be entered as evidence in a court and wouldn't be given
10 great weight.

11 The problem we've had you've identified in 1260,
12 is the court has been reticent to give great weight to
13 mediation contracts, and so therefore, our motives I think
14 are fine, but our effectiveness rate has been cut down
15 because there's no link between, no networking,
16 philosophical networking between the court. They almost in
17 some regards I think view us as alien to the process. In
18 other cases we've had different judges that you take in the
19 agreements and the appendix A and B, which is the mediation
20 process, and you give them to the judge and it's ratified.
21 So you always think about the worst cases, and we've had
22 good ones, too.

23 So I think that if the first section is linked
24 to the second section in the bill, 3324 is linked to 3325,
25 that the concept of a pastoral mediator is a real

1 possibility, as long as we didn't break down that invisible
2 wall, whatever it is, between church and state.

3 I appreciate the opportunity to bring this to
4 you.

5 CHAIRMAN CALTAGIRONE: I just want to mention
6 that Representative Jerry Kosinski from Philadelphia was
7 present and had to step out, but I think he might be back.

8 Representative Heckler?

9 REPRESENTATIVE HECKLER: Thank you, Mr.
10 Chairman.

11 Mr. Maliska, thank you very much for being with
12 us today. I want to thank you in particular for some of the
13 what I think are common sense comments about the division of
14 roles which needs to exist to the extent that for this to be
15 a viable concept.

16 I would like to ask you, in the mediations you
17 do presently, say, pursuant to the contract which you shared
18 with us, in what percentage of those situations are the
19 parties already, have the parties already consulted counsel
20 and have some orientation to what their potential rights may
21 be and what the courts may do with them if they choose to go
22 straight to litigation?

23 REV. MALISKA: That's an interesting question
24 that I had taken a note on. I'm not necessarily positive
25 that I think that each side needs to be represented by

1 counsel. We always, I go through the mediation process with
2 them, I say, you could be represented by somebody, and you
3 can be represented by somebody, and I usually do it
4 separate, because many times these people don't communicate
5 very well in a group setting. So I do it separate, I
6 explain the mediation contract line for line. If there's a
7 question like was mentioned, we bring in a lawyer to
8 explain.

9 We have three lawyers dedicated to the mediation
10 process, and what I said as I was listening this morning, is
11 that what needs to happen I think with lawyers is they need
12 to change their philosophy. To be effective in mediation
13 they have to change their philosophy from being competitive
14 and being winners, to being part of the solution, and that's
15 going to require an attitude shift. We have three lawyers
16 in Doylestown that are dedicated to that process.

17 So I say what I would like to do is I would like
18 to refer you to this lawyer and you to this lawyer, if you
19 want to be represented. And each one of them will, they are
20 familiar with this process, they're dedicated to this
21 process and they realize that what we're not trying to do is
22 to prove who has got the most prowess in the legal field but
23 we are trying to bring you to a negotiated settlement
24 between the two of you and they will facilitate that
25 process.

1 Now, if they should choose somebody outside of
2 that little group, because they may perceive that, well,
3 this is an inhouse deal, and that there are different
4 agencies, by the way, because we don't want to have any
5 conflict of interest.

6 REPRESENTATIVE HECKLER: That would be required,
7 yeah.

8 REV. MALISKA: Conflict of interest. But
9 similar philosophy, I mean, they helped me to draft these
10 things, and we sit down and we talk on how best to serve
11 those particular people. But if they choose to have a
12 lawyer that's outside that circle, that's fine. All we ask
13 them is would you make that lawyer aware of what we're
14 trying to get done.

15 You're a lawyer. If I give you this piece of
16 paper and say, is this a legal document? The automatic
17 answer is probably no, with 33 different reasons why we need
18 to change it. Now, I'm just playing, but in a sense that's,
19 I mean, critique is usually part of the game.

20 But if the parameters of the mediation are,
21 unless you see something really glaringly wrong with what we
22 come up with, what I want you to do, I'm role playing, the
23 person that chose somebody outside, because I want you to
24 tell me if there's anything glaringly wrong but if it's
25 okay, it's okay.

1 Now, there are cases where people have opted to
2 do the agreements, to, I guess free advice in many cases
3 from the lawyers that are involved and allow a neutral
4 lawyer who represents me, in a way, I don't know if that's
5 exactly right, but to draft the documents, and they choose.
6 One of them has to be represented, naturally, in the
7 petition for divorce, and you've got a plaintiff, whatever.

8 But they agree -- one of them may choose to
9 agree not to be represented. Now, I neither discourage that
10 or encourage that. If they want to, it's fine, it's all
11 part of the system and it's part of the explanation in the
12 beginning. And if they want the telephone numbers, we give
13 them to them in the first meeting.

14 REPRESENTATIVE HECKLER: Thank you. One of the
15 difficulties with all of this is that I think, and it's one
16 I think has been helpful about your testimony, because you
17 are actually involved in the process, you have a case with
18 the real world. I think that this Committee has heard from
19 quite a number of people who have their personal individual
20 experience upon which to base their testimony, and given the
21 nature as you've discussed and other witnesses have of the
22 divorce process, it tends to be unfortunately too often a
23 competitive one and it tends to be a very wrenching personal
24 matter of personal identity.

25 My perception is that the same is true with

1 divorce lawyers. There are those who are simply interested
2 in getting their clients to a bottom line which approximates
3 what they believe the court will do ultimately after lengthy
4 litigation, and if you get two of those lawyers together in
5 a case it gets resolved even and frequently after
6 considerable, let's say, remonstrating with their client who
7 may be inclined to be aggressive or unaccepting or obviously
8 dealing with this wrenching personal experience.

9 REV. MALISKA: That's a good observation. I
10 just pictured one as you were saying it. There was a lawyer
11 and a client downstairs, and you know the building I'm
12 talking about, and the one in my office upstairs and I'm
13 doing the sales rep back and forth between the two. It took
14 three hours but we got an agreement.

15 So I don't see having a negative feeling about
16 lawyers being involved, as long as the role is redefined and
17 the attitudes modified just a tinge.

18 REPRESENTATIVE HECKLER: And again, the problem
19 is that like clients, like lawyers, there are lawyers who
20 seek that, take that kind of approach, and there are lawyers
21 who certainly take the view that everything is best
22 litigated to the limit, and --

23 REV. MALISKA: And there's a perception also in
24 the public that was addressed earlier that mediators were
25 born yesterday, okay? That we have some kind of -- we don't

1 live in reality, that the law system lives in reality.

2 Well, I can tell you in what I do, I'm very much in reality,
3 and I know what's going on as far as the counseling-related
4 issues here, and I wasn't born yesterday.

5 I was just going to say that the presumption
6 can't be that mediation's something lesser than going to
7 court, because if you go to court you're going to get a
8 better deal, and that is a reorientation process.

9 REPRESENTATIVE HECKLER: And the difficulty is
10 that unless we have some specific sanctioning in which the
11 court is directly accepting, shall we say, of, in my
12 judgment at the outset of this concept, you're going to have
13 that situation, you are going to -- and the difficulty is
14 you're not going to be able to offer finality to the people
15 who participate in the process.

16 So that hopefully what will come out of this
17 process is the creation of a viable, again, my judgment
18 would be that it would have to be voluntary on the part of
19 the participants as it is now in your situation, but that it
20 be viable from the standpoint that if people make that on an
21 informed basis, make that choice, proceed in that fashion,
22 that the results that are produced will be enforceable, to
23 the extent that they would be with the court decision.

24 Obviously, there are issues primarily involving
25 children and child support that even when a judge rules, it

1 is understood that at least changed circumstances
2 subsequently will put that issue into play again.

3 REV. MALISKA: We assumed when we started that
4 contract law would be enough. It's not enough.

5 REPRESENTATIVE HECKLER: Yeah, and I think
6 you're right to be concerned. I had seen that reported
7 decision in the Bucks County advance sheets, and I think it
8 will be interesting to see where the appellate courts go
9 with it. Although, as you say, we may be able to
10 shortcircuit it with this legislation hall.

11 REV. MALISKA: And where it goes next. But the
12 problem was, we assumed that a contract, a legally binding
13 contract between two individuals would hold. It hasn't
14 held. 1260 would take care of some of that.

15 REPRESENTATIVE HECKLER: Uniquely, as to child
16 custody, which is as we've heard this morning, it seems to
17 me maybe the area where this kind of effort can be most
18 useful. A lot of the rest is number crunching, which as you
19 say, I would agree, you don't have to be a lawyer to do that
20 number crunching. Most of the folks who do it for the
21 courts are not lawyers, although they have additional
22 training.

23 But one other -- and I know we're running I'm
24 sure way too long -- one other comment that I would make is
25 I have a bill which I will be introducing shortly

1 establishing a domestic relations judge's commission, and I
2 think that one of the difficulties that we have throughout
3 this process is, the individual outcome is very, very
4 susceptible to the skill, the personal skill and the
5 learning of the people who are actually conducting the
6 process, whether that's a judge, a master or domestic
7 relations officer or a counselor, mediator outside the court
8 system. I think trying to get some uniformity of training
9 and entity for ongoing training is one of the best things we
10 we can do for this.

11 REV. MALISKA: The mediation reorientation is
12 coupled with another problem, too, that exists, is if the
13 perceived separation of church and state is a problem, the
14 court is going to have to reorient itself and say -- we're
15 saying it's not a problem, I put it aside and said it's not
16 a problem if it's structured correctly.

17 The court is going to say, now the Christian
18 Conciliation Services of Bucks County, all right? That's a
19 religious-based organization, 501(c)(3), nonprofit
20 corporation, and we've got Homer and Jethro over here who
21 are not religious based, we're going to refer people over
22 there because we don't want people going to that particular
23 service.

24 There's going to have to be some kind of an
25 understanding and say, okay, if people want to voluntarily

1 or by assignment to use our services, we're not imposing
2 necessarily Christian beliefs unless they ask for
3 counseling, but could be part of that mediation network
4 without jumping over that wall of separation, because the
5 people at that organization have got expertise, they've been
6 through the master's training, whatever.

7 REPRESENTATIVE HECKLER: And that's where I see
8 this going in terms of having an entity at the state level
9 to standardize the training that would be available. I
10 think you're on the right track with the idea that whatever
11 the religious orientation might be, there is a secular,
12 there are a set of secular standards that any of these
13 individuals must meet, and the fact of their adherence to a
14 set of religious beliefs, whatever they may be, is not the
15 --

16 REV. MALISKA: We don't have a religiously based
17 guideline for support. We have the state guidelines for
18 support of the -- that I pilfered from one of my lawyer
19 friends. But you understand what I'm trying to say.
20 There's a connection there, and it would have to be a
21 workable connection, and I would like to be part of it.
22 That's why I contacted your office when I heard about this,
23 and I really hope that -- this is something exciting,
24 because right now not just with our organization but with
25 mediation in general, there doesn't seem to be any binding

1 aspect to it and that has to be put in.

2 REPRESENTATIVE HECKLER: Thank you. I don't
3 have any other questions.

4 REPRESENTATIVE SAURMAN: Anyone else have any
5 questions?

6 (No audible response.)

7 REPRESENTATIVE SAURMAN: I have just one, maybe
8 two questions. The first one is that if I understand what
9 you're saying, really, you're saying that if pastors and so
10 forth are to be allowed to be mediators, that the
11 qualifications for being a mediator have been met the same
12 as for anyone else?

13 REV. MALISKA: Absolutely.

14 REPRESENTATIVE SAURMAN: And in reverse of that,
15 I had attorneys call me and say that they felt that just
16 because they were attorneys they should not be barred from
17 being mediators, on both ways. If the certification is for
18 the purpose of mediation, then it really becomes less of a
19 major item as to the origin of that individual because the
20 training will be standardized, is that --

21 REV. MALISKA: I'm not sure necessarily. I
22 mean, granddaddy clauses and based on a person's
23 professional ability, demonstrated ability, could be in lieu
24 of. But keeping up with law and so forth could be something
25 that people involved in mediation are required to do.

1 I think the only -- I was trying to, under 3324
2 trying to link that with the other ones. Not all of that
3 has to apply, but more than that's in the 3324 needs to be
4 apply, because I'm not qualified without outside help, or
5 haven't been for eight years, and I'm probably getting
6 pretty good at it right now, but in some of the areas that
7 have been granted are the same things that the court deals
8 with, and without some kind of training or access to people,
9 consultants who can do that, which is fine, that's what
10 we've done, is we use a lawyer for that, for that part.

11 I would like to see somehow that link so that we
12 don't even -- if my perception is wrong, I hope it is wrong,
13 but if my perception of 3324 is wrong, then it's not a big
14 deal.

15 If my perception is right, then it would need to
16 be changed just a little teeny bit so that you don't have
17 this big umbrella that anybody that can solemnize marriage
18 can solemnize divorce and settle all these issues with no
19 legal consultation, with anything, draw up a contract on a
20 piece of toilet paper and submit it to the court and it's
21 okay. Now, that's a ridiculous illustration, but that was
22 my only concern.

23 REPRESENTATIVE SAURMAN: Just as the court
24 currently uses those same kind of resources, anyone that
25 would have the responsibility for this would certainly,

1 should take advantage of any assistance. But I think it's
2 important to make certain, anyhow, that the language does
3 away with any perceptions that might.

4 The other thing had to do with the \$200
5 antiquating figure, and I understand your comment with
6 regard to that. The purpose of putting in some limit is
7 that we continue to perpetuate the high costs, which
8 currently are destructive, and I don't know the mechanism
9 to do that.

10 Do you have any suggestion as to how to do
11 that? Your appendix I was looking at.

12 REV. MALISKA: It's easy to critique things but
13 it's not necessarily easy to come up with solutions. I
14 don't know what dollar figure you would put on it.

15 We have put a, like if we do an arbitration
16 session with three people, \$15 an hour per person limit and
17 in one case, two cases, two people volunteered, died. I
18 didn't know how to exactly follow up their time and I
19 volunteered my time. I don't know how you put arbitrarily a
20 figure on it.

21 The variable that I just spoke of is important,
22 because if you say \$200 a day, what if you had three people
23 involved in the mediation? Well, that would mean that if
24 they wanted the lawyer present and the mediator and another
25 objective third party and another lawyer, that \$200 divided

1 by the number of people in the room gets kind of small and
2 you can't even justify. So I mean, we don't even break
3 even.

4 REPRESENTATIVE SAURMAN: So you need a way that
5 would set a limit or set some way that it doesn't get out of
6 control. I'm not too sure how to do that.

7 REV. MALISKA: I don't know how to do that,
8 either, but I would be glad --

9 REPRESENTATIVE SAURMAN: Your point is well
10 taken.

11 REV. MALISKA: I'd be glad to think about it and
12 give your office a call if I come up with a brain storm.

13 REPRESENTATIVE SAURMAN: Thank you for your
14 comments. We appreciate it.

15 (Recess taken from 1:15 until 1:22 p.m.)

16 REPRESENTATIVE SAURMAN: We're going to resume
17 with the hearing. People will be coming and going, as
18 frequently happens with our hearings, but I would ask that
19 Mr. Middleman would come and testify at this time. Because
20 of the number of persons yet to testify, we would appreciate
21 it if everyone would attempt to keep to the 15-minute
22 limit. We certainly have gone beyond that, and we will keep
23 our questions brief as well. So if you do that we would
24 appreciate it.

25 Mr. Middleman?

1 MR. MIDDLEMAN: I was going to mention that
2 first off, Representative, that your invitation to me was to
3 speak for 15 minutes, and I think my remarks are well within
4 those parameters.

5 REPRESENTATIVE SAURMAN: Thank you very much.

6 MR. MIDDLEMAN: Some of my remarks may have some
7 emotional content, but I think they're things that have to
8 be expressed.

9 I'm Donald Middleman, long-time divorce reform
10 activist and current editor and publisher of The Fathers
11 Rights Newslite. Our services include publication of a
12 bi-monthly newsletter and telephone counseling for divorced
13 and separated fathers, their second families and their
14 parents. We also network with similar groups across the
15 country. The Fathers Rights Newslite circulates chiefly in
16 Pennsylvania. The telephone counseling is chiefly in the
17 five-county Philadelphia region.

18 I am, in addition, former secretary of the
19 National Congress for Men and Children, and a member of the
20 National Council for Children's Rights, a Washington-based
21 organization.

22 My experience is based on either meeting with or
23 speaking with some 10,000 people over the past 25 years.

24 Some seven years ago a leader of a Montgomery
25 County mothers' group and I went to Senator Greenleaf with

1 the idea for divorce mediation. I believe we were pioneers
2 in that. Since then, he has introduced mediation bills into
3 every session, and of course, we're delighted that his bill
4 has finally passed the Senate, and here we are in the House
5 and that, of course, is very gratifying.

6 I wanted to add that that group of people I went
7 with, that ad hoc committee to Senator Greenleaf there, were
8 both men and women in that group. This is not a male
9 chauvinist plot.

10 Once it becomes law, your House Bill 1260 will
11 put Pennsylvania on the way towards a humane and equitable
12 divorce plan which will spare countless families the
13 emotional and financial holocaust which the present divorce
14 system often imposes.

15 Following study, we would urge that changes be
16 made to House Bill 1260 in two areas. The first is on page
17 2, section 3325, under establishment, which provides that a
18 court may establish a family mediation service. We feel
19 that this is a serious weakness. This will almost
20 guarantee, should the bill pass unamended, that the divorce
21 mediation for most, if not all Pennsylvania families, will
22 arrive along with the next ice age.

23 It is imperative, we urgently recommend that the
24 paragraph be changed to read: The courts shall establish
25 family mediation service by such and such a date.

1 Legislators, of course, are concerned as to
2 whether a mediation program would add new tax burdens. The
3 answer is that mediation has a potential for saving tons of
4 money, public money and private money. This is borne out by
5 a 1979 Los Angeles study indicating that costs for a number
6 of court actions in which there was litigation was some
7 \$398,000, but for a comparable number of conciliations, the
8 costs were \$117,000. That's a savings of some 70 percent.
9 There was also a Denver study which tended to bear out those
10 figures.

11 An important factor also is the matter of what
12 finally settles a case. Some time ago I heard Joyce
13 Mozenter, a well-known Philadelphia attorney and mediator,
14 she cited percentages. According to her, 60 percent of
15 mediated domestic relations cases never come back. They're
16 settled once and for all, finally. And that compares with
17 only 18 percent of court cases where you've got winners and
18 losers, and the one who loses, he's going to sit there
19 figuring how he's going to bring that case back to court.

20 Upwards of 70 percent of litigated cases, in
21 other words, constantly are back in court, eating up \$1500
22 or more in public funds for court costs, plus the family
23 resources that are thrown away and fanning hatreds that are
24 corrosive to all the family members.

25 Turning back to House Bill 1260, we applaud that

1 wording in section 3325 and we urge, strongly urge that it
2 be retained, which names mediation for use in resolving all
3 controversies, including equitable distributions, spousal
4 support, alimony and alimony pendente lite.

5 It just seems, what word do I want, destructive
6 or working against your goals to have mediation for custody
7 and then turn around and let the fur fly in a battle over
8 alimony or equitable distribution.

9 With both lawyers sitting in the mediation or
10 the fact that the litigants -- not the litigants -- the
11 mediating parties have to take back the agreement to their
12 attorneys, there is no reason why these other matters cannot
13 be litigated. And also, there may be some very complicated
14 cases that require outside experts. But to a great extent a
15 lot of these cases can be resolved without, it's not sine
16 qua non lawyers must be involved in settling property.

17 Also, I've seen cases where lawyers work on
18 contingencies, so their interests are in getting as much for
19 their clients as they can, naturally.

20 We consider it a serious error further that
21 under section 3325 mediation only would be an option. The
22 reading in paragraph A 2 states that courts may refer
23 parties to mediation. This is at variance with law in the
24 Commonwealth of Maine, where mandatory divorce mediation has
25 worked well for more than 10 years. Under Maine law,

1 mediations's not an option and judges are obligated to refer
2 for mediation when parents have minor children.

3 Before leaving Maine, I want to add, by the way,
4 that the lawyers there are encouraged to come into the
5 mediation, and where the lawyers once were hostile,
6 initially were hostile, in the past couple years the Maine
7 Bar Association bestowed awards, public service awards on
8 each of the mediators in the court mediation program.

9 We have some question as well about provision D
10 on page 4, which would leave formulation of mediation
11 procedures up to local option. Our preference would be for
12 a statewide rule which would help uniformity.

13 Turning to page 3, paragraph C 2, we favor the
14 provision requiring parties to mediate in good faith, but we
15 feel it falls short. What is lacking is a penalty for
16 parties not mediating in good faith. Such parties we feel
17 should be assessed court costs or be required to pay the
18 legal fees of the other party. And there is ample precedent
19 for that.

20 At a recent meeting in Arlington, one of the
21 speakers was Maryland Judge David Gray Ross, and he said
22 several interesting things. First of all, when custody
23 cases arrive in court it's not the mother is the plaintiff
24 and the father is the defendant or vice versa, but that the
25 suits are filed on behalf of the children and both of the

1 parents are defendants.

2 But getting back to what I was trying to point
3 out, he said that the counties where there are frivolous,
4 where you've got litigious people filing frivolous motions,
5 the courts will order those people to pay court costs.

6 To sum up, we feel that mediation has great
7 potential for easing much of the disasterous legal fighting
8 which engenders the bitter hatreds that scar families for a
9 lifetime, fighting which ultimately robs children of needed
10 family funds for their education or to give them a start in
11 life.

12 That the legal system is grotesquely
13 inappropriate for ending a marriage is not just our idea.
14 Perhaps the most eloquent protest has been uttered by
15 Justice Donald Alexander of the Maine Superior Court. It
16 was his voice perhaps more than any other which appealed to
17 the sympathies and consciences of the Maine legislators
18 persuading them to adopt mandatory divorce mediation.

19 I shall not take your time to read all of the
20 justice's statement. I have a paragraph, however, that I
21 think is especially important. His statement, by the way,
22 is part of my statement and I hope that if you throw
23 everything else out, that you would take a look at that.

24 The justice says: A process that calls itself
25 adversary, promotes confrontation, labels the other party a

1 hostile witness and ultimately produces a winner and a
2 loser, could not be worse for resolving how separating
3 parents will continue to have the best possible relationship
4 with the child and the necessary communication with each
5 other that the child requires.

6 In support of the justice's words, I would like
7 to expand a bit on some intangibles involved in litigated
8 domestic relations matters which fan estranged spousal
9 hatreds, and certainly to the children's detriment.

10 Figures which we read a few years ago were that
11 some four and a half million fathers avoid paying
12 court-ordered child support. Since then, the nation has
13 moved towards becoming a police state and vast federal and
14 state bureaucracies have been established to crack down on
15 so-called deadbeat daddies. In reality, the predominant
16 number of these people are from poverty neighborhoods. Many
17 or most never had married nor had a conventional family life
18 and are marginal income earners with no tradition for
19 supporting children.

20 But what about the group that did have
21 conventional marriages and who had supported their children
22 generously and unstintingly when living with them? What
23 happened? Why, following a divorce, do they suddenly become
24 reluctant to pay?

25 Well, it's easy to put your foot into these

1 fellows' shoes. The point is that fathers' emotional
2 suffering and the impact of the divorce system often are
3 overlooked. As reasonable as it may seem fathers should pay
4 support, it must be recognized that the logic and law can be
5 meaningless to a father with a perception that he has been
6 robbed by lawyers, wrongfully deprived of his children, with
7 his parental rights largely extinguished, who feels he has
8 suffered a grievous sex discrimination in an authoritarian
9 court, and who now is ordered to pay so-called child support
10 to someone whom he considers his worst enemy.

11 This imperfect sketch may help convey just a bit
12 of the hostility that large numbers of fathers feel.
13 They're filled with resentment and bitterness, contributed
14 to in large part by our present divorce system. Under such
15 circumstances, how can it be expected that they will pay
16 child support graciously? Child support which ex-wives will
17 use without accountability to anyone, possibly to support
18 themselves and even a live-in boyfriend.

19 Our answer is that mandatory divorce mediation
20 would give both spouses important voices in shaping their
21 post-divorce relationships and would help reduce hostility
22 and bring them to face their responsibilities realistically,
23 and finally, would ease the child support collection
24 problem.

25 I think just a matter of having people sit down

1 in mediation is therapeutic, where people talk. I don't
2 care how much hate is passed between them; if they're forced
3 to sit down, it's not going to work at every case, but there
4 will be some therapy there.

5 In sum, Fathers Rights Newsletter feels that
6 mediation has great potential for helping structure
7 post-divorce cooperation which will benefit all family
8 members, especially children. Its use is spreading in
9 jurisdictions across the country. It is time that
10 Pennsylvania join in.

11 You will find that with my terms also a
12 statement from Paul Charbonneau, deputy director of the
13 State of Maine's Court Mediation Service. I had the
14 resources to bring Mr. Sharbino to testify at the Senate
15 Judiciary Committee hearings in 1989 but unfortunately I do
16 not have those resources at present or I would have done my
17 best to bring him. In his absence, therefore, I have
18 appended his Senate committee testimony to my own statement,
19 and you'll find it an excellent distillation of the
20 jurisdiction's lengthy experience with mediation.

21 I shall conclude my statement as Paul
22 Charbonneau concluded his, in urging the adoption of divorce
23 mediation. He describes it as a gift to children. A gift
24 to children. The ability to bring that gift to
25 Pennsylvania's children, ladies and gentlemen, is now in

1 your hands and the hands of the Pennsylvania legislature.

2 We want to thank Chairman Caltagirone and the
3 Committee for this opportunity to speak to you today.

4 REPRESENTATIVE SAURMAN: Thank you very much.

5 Are there any questions?

6 MR. SUTER: Just one question. In the State of
7 Maine do you know, do they mediate just child custody? Or
8 do they mediate other issues as well?

9 MR. MIDDLEMAN: They mediate other issues as
10 well. Now, that's sort of a mixed bag. The emphasis is on
11 child custody. Charbonneau has told me that very frequently
12 they will get into other aspects of the settlement.

13 MR. SUTER: Thank you.

14 REPRESENTATIVE SAURMAN: Thank you very much. I
15 have no questions. There are a whole lot of questions, but
16 in the interest of time I think I'm going to forego those
17 and I'll be in touch personally. Thank you very much.

18 MR. MIDDLEMAN: Thank you.

19 REPRESENTATIVE SAURMAN: I would like to ask now
20 Dr. Steve Levicoff, director of the Institute on Religion
21 and Law. Dr. Levicoff?

22 DR. LEVICOFF: Good afternoon, Mr. Chairman, Mr.
23 Saurman, members of the Committee and staff, ladies and
24 gentlemen. I would like to thank you for the opportunity to
25 share with you today a few minor concerns about one

1 particular section of the bill.

2 My name is Steve Levicoff and I'm the director
3 of the Institute on Religion and Law in Plymouth Meeting,
4 Pennsylvania. I am also visiting lecturer in law at
5 Biblical Theological Seminary, which is a regionally
6 accredited graduate school in theology in Hatfield,
7 Montgomery County. There I teach, among other things,
8 church-state issues, conciliation and mediation, including
9 alternate dispute resolution, as well as counseling law,
10 pastoral law and medical ethics.

11 I would note for the record that I'm not a
12 lawyer but an academic professional, holding a doctor of
13 philosophy degree from the Union Institute in Religion and
14 Law, as well as a master's in theology and law from Norwich
15 University.

16 Additionally, I'm the author of "Christian
17 Counseling and The Law," as well as several journal
18 articles, most recently "The Inclusion of Law in the
19 Christian Education Curriculum," and "The Impact of
20 Licensure on Pastors and Professional Christian Counselors
21 in Pennsylvania," which appear in the current issues
22 respectively of the Christian Education Journal and The
23 Evangelical Journal.

24 Today I wish to express a few concerns about the
25 potential ramifications of House Bill 1260, and will

1 specifically be addressing section 3324. That would be from
2 page 1, line 8, through page 2, line 10, inclusive, which
3 would grant clergy qualified to solemnize marriages, the
4 right to legally dissolve those unions. I'll be addressing
5 this from the perspective of church-state and constitutional
6 issues, general legal principles as well as pastoral
7 ethics.

8 In pertinent part, this section of the bill
9 notes that in addition to the court, it will be lawful for
10 any person qualified to solemnize marriages and trained in
11 family counseling, to grant divorces where both parties have
12 determined the marriage is irretrievably broken; that any
13 agreement signed by the parties will be reduced to writing,
14 signed by the parties and presented to the court for
15 approval as a court order.

16 Representative Saurman noted, I think very
17 nobly, when he first introduced similar legislation back in
18 1990, I'm quoting: Both men and women have complained
19 bitterly about a system which appears to be replete with
20 inequity, and where justice appears to have been replaced by
21 an adversarial contest. Sadly, innocent children are
22 thoughtlessly trampled in the process.

23 I frankly could not agree more. However, in
24 speaking about section 3324 of the Act, I believe that it
25 contains several weaknesses, both legal and ethical, and

1 would like to address those at this time, because I think it
2 could result in at least this portion of the Act being found
3 unconstitutional.

4 The primary difficulty of the so-called clergy
5 dissolution section is that it entangles religion in
6 government. The United States Supreme Court held in Lemon
7 versus Kurtzman back in 1971, that for any statute, whether
8 federal or state, to pass constitutional muster, if you
9 will, it must be able to pass a triparte or three-pronged
10 test.

11 First, the act must have a secular purpose.
12 Second, there must be a primary effect of neither advancing
13 or inhibiting religion, and finally, the statute must not
14 foster excessive government entanglement with religion. If
15 the act fails any part of the Lemon test, it is then
16 declared unconstitutional.

17 Additionally, the federal court held in 1990
18 that laws that are neutral on their face are constitutional,
19 even though they might have a significant negative impact on
20 religion. The language of House Bill 1260 would suggest
21 neutrality insofar as a marriage can be dissolved by anyone
22 who is authorized to solemnize marriages. That would
23 include, among others, state or federal justices or judges,
24 the mayor of any city or borough in the Commonwealth of
25 Pennsylvania, or minister, priest or rabbi of any regularly

1 established church or congregation.

2 I would note off to the side that the phrase
3 established church or congregation is usually used to bar
4 so-called mail order ministers from having such abilities,
5 and I have no problem with that, frankly.

6 I would suggest, however, that based on
7 legislative history of the Act, the bill is specifically
8 geared toward empowering clergy to engage in dissolution of
9 marriages, and that is evidenced in part by the question
10 we're addressing today, which Representative Saurman posed
11 in the Ambler Gazette, quoting: With more than half of the
12 marriages in the nation winding up in divorce courts, should
13 those members of the clergy qualified to solemnize marriages
14 be permitted to legally dissolve the union?

15 Therefore, as neutral as the bill appears in its
16 written form, it's not addressed to the empowerment of
17 justices, judges or even mayors, but clearly of clergy and,
18 therefore, the Act could be construed to fail the primary
19 effect prong of the Lemon test and would appear to
20 impermissibly advance religion.

21 Religion is also advanced insofar as clergy
22 might be naturally predisposed to act in favor of their own
23 religious or denominational teachings. This is especially
24 the case in interfaith marriages, which are increasing in
25 society every day. Imagine, if you will, a typical scenario

1 of a Roman Catholic spouse married to a Jewish spouse. Now
2 they're getting divorced. Regardless of which clergy person
3 they seek, priest or rabbi, there's going to be a natural
4 predisposition, especially vis-a-vis the religious rearing
5 of children, on the part of the clergy person.

6 The adjudication of divorce agreements generally
7 requires the courts consider the church-state ramifications
8 of decisions, especially with regard to religion, and even
9 these decisions haven't been without controversy. In a
10 recent case, for example, a trial court removed children
11 from the custody of their father and awarded to mother
12 solely because it disapproved of the father's enrolling the
13 children in a fundamentalist Christian school and his
14 fundamentalist beliefs.

15 The Superior Court reversed the trial court
16 ruling, holding that the trial judge had abused his
17 discretion, and for lack of a better term, had acted
18 subjectively rather than objectively.

19 The point here is simple. There is a great
20 dilemma for clergy to be predisposed to their own
21 teachings. We don't see that in the court system where, for
22 example, if a judge is familiar with either party to a
23 divorce, he or she would very likely remove themselves from
24 the case in order not to provide a biased perspective.

25 We would submit, then, that the act would result

1 in one religion being preferred over another in the divorce
2 proceedings. This results in a violation of principles
3 enumerated by the Supreme Court in Everson versus the Board
4 of Education, in which the court noted that the
5 establishment of a religion-only clause means, among other
6 things, that no state can pass laws which aid one religion
7 over another or aid all religions, or prefer one religion
8 over another.

9 Additionally, the Act also vests clergy with
10 authority to determine matters of civil law. This would
11 appear to violate the entanglement prong of the Lemon test.
12 In the case of Larkin versus Grendel's Den, Chief Justice
13 Warren Burger at the time noted that a statute which allowed
14 Roman Catholic churches and other churches to veto liquor
15 licenses, quoting: By delegating a government power to
16 religious institutions, that the statute inescapably
17 implicated the establishment clause.

18 We note that the dissolution of marriages has
19 traditionally been reserved to the courts, and to extend
20 that right to the clergy would be likewise to impermissibly
21 entangle government and religion.

22 Finally, I would note that the provision that a
23 person qualified to solemnize marriages be trained in family
24 counseling insofar as section 3324 is concerned, is
25 ambiguous, insofar as no specific training or certification

1 is mandated.

2 For better or worse, usually worse, training can
3 run the gamut from a legitimate certification offered by,
4 say, the American Association of Marriage and Family
5 Therapy, to so-called credentials which are sold by mail by
6 degree mills, some of which have been known to operate in
7 Pennsylvania.

8 Second, there's no legal standard for what
9 constitutes a pastor. Essentially under the law, a pastor
10 is someone who does pastor stuff, regardless of what the
11 religion or denomination is involved. That would include
12 conducting baptisms, weddings, funerals, et cetera. If
13 someone does that, whether or not he or she is ordained,
14 whether or not he or she has had a seminary or a Bible
15 college education, that person legally is authorized, among
16 other things, to solemnize marriages.

17 Also, many religious bodies have some scruples
18 against certain types of marriage and family counseling,
19 specifically, those which operate from a secular
20 perspective.

21 And finally, training in marriage and family
22 counseling, even at the seminary level, does not necessarily
23 include training in mediation or in divorce counseling.

24 I would note on the side that section 3325 does
25 address the qualifications of a mediator more

1 comprehensively, so I'll leave that particular issue there.

2 You'll note, incidentally, that I've
3 concentrated for the most part on federal cases and federal
4 constitution. There are similar clauses in the Pennsylvania
5 constitution and there have been many Pennsylvania cases.
6 One of the reasons we use the federal cases is that they are
7 applicable to the Commonwealth of Pennsylvania through the
8 incorporation doctrine of the 14th Amendment as enumerated
9 by the court in the Gitlow and later cases.

10 In terms of other legal considerations, the Act
11 would appear to place clergy in a position where they're
12 engaging in what's traditionally the unauthorized practice
13 of law, insofar as legal practice by nature traditionally
14 involves three primary types of activity: Representing
15 persons before a judicial or administrative body, advising
16 persons on specific legal problems on a regular basis and
17 for a fee, and the drafting of legal instruments.

18 Notwithstanding the fact that few clergy are
19 trained in mediation, vis-a-vis divorce counseling, or that
20 a minister, priest or rabbi might be predisposed to his or
21 her own religious teachings, it would appear that if a
22 minister, priest or rehab, in fact, drafts that instrument,
23 he or she is, indeed, drafting a legal instrument which
24 would constitute unauthorized practice.

25 Finally, it's important to note I think that

1 solemnizing of a marriage is performed by a member of the
2 clergy after a license has been issued by the state. In
3 order to have a clergy person counsel couples on divorce and
4 actually come up with a divorce agreement, prior to
5 government recognition there would be some ethical as well
6 as legal question there, I think.

7 Insofar as marriage is viewed as an ordinance or
8 a sacrament as far as religious teachings go, but it's a
9 civil contract as far as the law goes. Marriage in
10 Pennsylvania, for example, doesn't require solemnization by
11 a third party such as clergy person. People can essentially
12 take their own vows as long as there are a few witnesses to
13 sign off on the certificate or license.

14 And also, common law marriages are very much
15 legal in Pennsylvania. If, in fact, a couple lives together
16 as if married, they functionally are married under the law
17 and, therefore, there could be some legal questions which,
18 quite frankly, the clergy would not be in a position to
19 determine matters of law on in that area.

20 Finally, in terms of ethical considerations, I
21 would note that the Act does create an ethical dilemma, and
22 again, I'm specifically referring to section 3324. From the
23 Jewish perspective, for example, the ethics of divorce have
24 been disputed for thousands of years. In one school of
25 thought, for example, the school of Shammai, they were

1 taught that the only ground for divorce was adultery or
2 infidelity. Hillel, on the other hand, stated that a man
3 could divorce his wife for anything at all, including
4 burning his food.

5 In contemporary society, Jewish divorces are
6 normally adjudicated by a beth din, or rabbinic court. The
7 rabbi issues a get, or religious bill of divorce. But even
8 in these situations, the divorce must go before a civil
9 court in order to be recognized by civil law.

10 From the Christian perspective, marriage is
11 ordained as a permanent institution to the extent that a
12 scripture verse from Matthew, "what God hath joined together
13 let no man put asunder" is a standard included in the
14 marriage ceremony; likewise, the traditional vow is that
15 people will remain married, quote, until death us do part.

16 We maintain, therefore, that it is clearly the
17 job of clergy to advocate the healing of interpersonal
18 problems in an attempt to reconcile the relationship and not
19 to assist in its dissolution.

20 Representative Saurman is certainly correct when
21 he notes that over half of today's marriages end in
22 divorce. This results in emotional scars both for the
23 spouses as well as for their children and for other family
24 members. It's a very painful time during which a person is
25 very likely to turn to his or her pastor, priest or rabbi,

1 and we believe that to place the clergy in a position where
2 they actually help initiate the legal proceeding will
3 create, at the minimum, a significant chilling effect in the
4 relationship.

5 The fact is that divorce has been historically a
6 matter for the courts to adjudicate. Representative Saurman
7 is certainly correct when he observes that the legal system
8 is traditionally adversarial in nature, and I am delighted
9 that we're beginning to look at alternative dispute
10 resolution as a means of mediating divorces. However,
11 divorce in itself is an adversarial process, and changing
12 the venue from a court into a church or a synagogue will
13 neither make the result more conciliatory or the process any
14 less painful.

15 The Act could damage the nature of the pastoral
16 ministry, and by virtue of vesting civil authority to
17 dissolve marriages with the clergy, its constitutionality
18 will be called into question.

19 That concludes my statement. I'll be delighted
20 to entertain any questions.

21 **REPRESENTATIVE SAURMAN:** I will take the liberty
22 of taking just a couple moments. First of all, you did
23 describe that the marriages can be common law and so forth,
24 but nevertheless, there is a degree of legality that exists
25 when the church performs a marriage and, therefore, I would

1 fear that under the premise that you've presented, that at
2 some time we will separate the church and the state and no
3 longer allow the church to do that because of this
4 maintaining that separation. That's a fear that I might
5 have and one that goes quite deep.

6 In terms of practicing law, mediators are not
7 lawyers, and yet, they're able to do it. So that I would
8 think that if a clergy person is a rabbi, whomever,
9 certified as a mediator, that they, in fact, and if we as
10 legislators indicate that they're going to be able to do
11 this, unless as I understand it it interferes with the rules
12 of court, in which case maybe the court will exercise its
13 now superior position and throw out whatever we do, anyhow,
14 but under those circumstances, I have a problem.

15 The next thing I have a problem with whether or
16 not we, as you said, we put the church in a bad position,
17 because their primary purpose is to heal. I thoroughly
18 agree with that, and I think the point of first impact is
19 very important for that church. There would be no
20 obligation for anyone to be sent to a church in which they
21 have no affiliation, obviously. And so they would be
22 working with their pastor, and it's already been described
23 by other persons who have testified, if it is the first
24 opportunity, conciliation should be the first consideration
25 and it would pursue from that.

1 But if 54 percent of the marriages do wind up in
2 divorce, it would seem to me, and it has been true of those
3 persons of the cloth that I've talked to, that they would
4 like to be able to be a part of an attempt to reconcile, and
5 if reconciliation is not the end result, then to be able to
6 help to heal a broken family which is a bad situation.

7 DR. LEVICOFF: If I might address for a moment
8 two of the statements. Fortunately I don't share the fears
9 quite yet that marriage will be taken from churches.

10 You did note, sir, that clergy persons who are
11 certified as mediators would, in fact, be able to mediate,
12 and that certainly conforms with section 3325 of the bill,
13 which again, is more specific.

14 I'm certainly not suggesting that the clergy not
15 be permitted to act as mediators, which will be
16 unconstitutional under Article 6 of the federal
17 constitution, I don't have the Pennsylvania reference
18 offhand, as well as to Katz v. Watkins.

19 In terms of clergy liking the bill, I've had
20 mixed reaction, having gotten feedback from quite a few
21 clergy. I think it's important to note that, again, we
22 might be splitting hairs in terms of religious or religious-
23 political themes, if you will, that is, conservative versus
24 liberal. In some liberal Christian denominations such as
25 the Methodists Church and the United Church of Christ, they

1 have actually gone so far as to have divorce ceremonies or
2 liturgies of divorce, where they actually perform the
3 ceremony right in church as they did a marriage ceremony,
4 and they end up having then a divorce party afterwards.
5 That would certainly not comport with some of the more
6 orthodox or conservative denominations, though, some of
7 which actually are against divorce to the point, and I'm not
8 saying this in agreement, that they will actually
9 disfellowship divorced persons, and therefore, as a matter
10 of priority they do try to heal the marriage whenever
11 possible.

12 So again, there is certainly no objection to
13 clergy serving as mediators under section 3325, but it would
14 appear that based upon, again, legislative history as well
15 as other factors, that section 3324 might not hold up quite
16 as well.

17 I might, you know, if I could, urge the
18 Committee to consider the deletion of section 3324, knowing
19 the clergy who are or become qualified mediators will be
20 enabled to act as mediators under 3325.

21 REPRESENTATIVE SAURMAN: Well, I think that
22 there's no question but there's a need to make certification
23 and the training of pastors. I don't know about deleting
24 the section as such.

25 One of the things that the intention of the bill

1 was to bring to the attention of the clergy the fact that we
2 do have a situation that needs to be looked at very
3 carefully and to encourage them to become more involved in
4 the conciliation aspect of it, but also the healing process
5 afterward. So I think that those things certainly will be
6 looked at.

7 DR. LEVICOFF: I would note, incidentally, and
8 this is from a religious perspective for observation
9 purposes only, since it really couldn't even be considered
10 as a matter of law, but in many denominations, especially in
11 the Christian church that use First Corinthians, chapter 6,
12 verses 1 through 8, basically, that is often interpreted in
13 such a way that it precludes Christians from suing each
14 other. Therefore, if both parties to an irretrievably
15 broken marriage profess Christianity, in theory they could
16 not litigate against each other in a civil court system.

17 So certainly, mediation, especially vis-a-vis
18 Christian Conciliation Services such as that spoken by Dr.
19 Maliska earlier, have helped there tremendously, and that
20 could certainly have support.

21 REPRESENTATIVE SAURMAN: Fine. Thank you very
22 much.

23 DR. LEVICOFF: Thank you very much.

24 REPRESENTATIVE SAURMAN: Thank you for your
25 testimony.

1 I would like to ask now Loraine Bittner,
2 Pennsylvania Coalition Against Domestic Violence.

3 Would you state your full name for the record?

4 MS. BITTNER: Yes. My name is Loraine Bittner.

5 Good afternoon, Representative Saurman, members of the
6 Committee and staff.

7 I am the chief attorney for the family law unit
8 at Neighborhood Legal Services in Pittsburgh, Pennsylvania.
9 I'm here on behalf of our poverty law program and the
10 Pennsylvania Coalition Against Domestic Violence to offer
11 testimony today.

12 I feel compelled, after listening to the
13 testimony this morning, to say briefly, yes, I am an
14 attorney. No, I don't charge an hourly rate. I have no
15 personal interest in extending cases, but I do want to say
16 that in, and maybe this is unnecessary, but in a nutshell,
17 and the reason I'm here today is that my role as an attorney
18 and surely as is the role of all attorneys, is to insure
19 equal access to the courts for my clients, and to make sure
20 that their rights under the statutes that this legislature
21 has enacted are protected.

22 In any event, I would like to thank you for the
23 opportunity to address you, and so does the Coalition
24 Against Domestic Violence.

25 Obviously, the piece of legislation that we're

1 considering this morning proposes a fundamental change in
2 the juris prudence for divorce in this Commonwealth and it
3 will require your close scrutiny and consideration.

4 By way of background, in addition to those
5 statistics that you've already heard today, I would like to
6 offer several for your consideration.

7 First, the rate of divorce in America has
8 doubled since the 1950s. The national debt indicates that
9 most women and children suffer a sharp decline in their
10 standard of living as a consequence of divorce. The Bureau
11 of Census reports that in 1988, of the 16.5 million
12 ever-divorced women, only 5.3 million, or 31.8 percent,
13 receive a settlement of marital property. Likewise, of the
14 19.3 million of divorced or currently separated women, only
15 16.8 percent were awarded spousal maintenance or alimony.

16 Except for the short-term rehabilitative or
17 compensatory award, studies show courts have almost entirely
18 stopped awarding alimony, even where marriages have been of
19 long duration and wives unable to adequately provide for
20 their own economic needs.

21 Since women remarry at only about 60 percent of
22 the rate that men do, the households of women after divorce
23 are typically supported by one income rather than
24 potentially by two.

25 Also, experts predict that as many as 60 percent

1 of the children born in the '90s will live in a
2 single-parent family, usually mother-headed household,
3 before they reach the age of 16.

4 The reference citations for these stastics are
5 provided in the written testimony.

6 Based on my experience representing poor clients
7 in western Pennsylvania, and based on the experience of the
8 Coalition working with battered women across the state,
9 these statistics do illustrate the reality of the impact of
10 divorce on our clients here in Pennsylvania. While the
11 change in the divorce code in 1980 and the amendments of
12 1988 did remove some of the barriers to the actual divorce,
13 they did little to protect, in our estimation, the
14 vulnerable spouses and children from financial abandonment
15 and descent into poverty. For us, it's our assessment that
16 the primary reason for this is that there is a lack of
17 access to the courts for the economically dependent spouses
18 to litigate or to put forth their economic claims.

19 The general practice in this state, and you'll
20 hear from other attorneys, I suppose, following me, but the
21 general practice in this state and certainly in Allegheny
22 County is that costs for the judges, costs for the masters
23 and apparently in some counties even the judges have to be
24 paid up front before there can be litigaton of economic
25 claims. To us, this is the heart of the problem and the

1 heart of why there is not more economic justice under the
2 divorce code.

3 Recently in Allegheny County, I'll give you an
4 example, there was a case where there was a \$3,000 marital
5 estate and the parties were required to put up \$1500, or the
6 equivalent of half of the estate, to pay for a master before
7 there could be any disposition of their economic claims.

8 This kind of upfront costs, payment of costs is
9 not required in other areas of the court. Corporations, for
10 example, don't have to pay for the judges who litigate their
11 claims under contracts. Landlords don't have to pay for the
12 judges who litigate their claims for rent and so on and so
13 forth.

14 When we examine this Bill 1260, we can see that
15 it can certainly be argued that it is designed to provide
16 opportunities for expeditious resolution of the economic
17 claims and custody issues. It's critical to us that it is
18 not providing better access to the courts of Pennsylvania,
19 rather, it's providing an alternative system.

20 It's our belief that the alternative system set
21 forth under this legislation will not well serve
22 economically dependent spouses and their children. We base
23 this conclusion on several points that are set out in my
24 written testimony that I'll just briefly highlight.

25 First, this House bill in essence totally

1 deregulates the marriage dissolution system. In our
2 experience, deregulation over the past 10 years, it's been
3 very popular, has not been kind to consumers and
4 particularly not to the clients we serve. We have no reason
5 to think that in the divorce reform movement, deregulation
6 would serve them any better.

7 Secondly, there is no requirement in this
8 legislation that the dissolution practitioners under section
9 3324 have any knowledge of the domestic relations law that
10 was enacted by this legislature, or that they have any
11 knowledge of the economics of divorce or the circumstances
12 that promote successful adjudication of children after
13 divorce. They only need to have some type of family
14 counseling training at some point in their careers.

15 Third, the bill creates a dissolution system
16 that is devoid of standards, be they legal, moral, economic
17 or therapeutic. And without standards, training
18 accountability, we submit that this will deprive the
19 vulnerable spouses and children of even the most rudimentary
20 justice.

21 Fourth. There is no provision in the
22 legislation that would lend integrity and accountability to
23 the dissolution systems, and possibly divorce mills that
24 would be engendered by this legislation. I mean,
25 essentially for the dissolution practitioners, who will they

1 be answerable to? What standards will they be held to?

2 What accountability will there be?

3 When I testified here in September of 1991
4 before this Committee, there were three days of hearings
5 related to family court. I heard horrible stories from a
6 myriad of different kinds of people regarding their
7 individual cases, and one of the common themes that I heard
8 was that there was great concern that the judges that we
9 have now, many of the judges are not more accountable.
10 These judges that we have hearing the cases now obviously
11 are required to honor the statutes, case law and standards
12 of judicial ethics in the Commonwealth, and if they deviate
13 from these guidelines, there are appeal procedures and
14 methods to deal with their deviation. Their deviation has
15 to be explained and they're held to standards in the
16 statutes that we've enacted.

17 The dissolution practitioners that are proposed
18 under this, at the beginning part of this statute would not
19 be held accountable even to the extent that the judges are.
20 So my concern is that the concerns that you heard during
21 those three days of testimony will be magnified over and
22 over again and will be escalated greatly by this sort of a
23 procedure.

24 In addition to the fact that these dissolution
25 practitioners would not be held accountable under this piece

1 of legislation, they would in addition to that they would
2 require judicial immunity. So not only would they not be
3 held accountable or would there not be standards, but these
4 practitioners would be immune from liability. That causes
5 us great concern.

6 Fifth. Child and spousal support would be
7 issues for the private dissolution proceedings or mediation,
8 but there's no provision that the mediator facilitates
9 support that are consistent with the state's support
10 guidelines, or that they have to explain any deviation.
11 This problem would also be true in the area of custody and
12 divorce.

13 The statutes that we've enacted in these areas I
14 think are good pieces of legislation. They've been refined
15 by case law over the years. If we have divorce
16 practitioners that can resolve these issues without having
17 to respect these laws and comport with the mandated case
18 law, then I'm concerned about justice under this system
19 tremendously.

20 Sixth. The bill doesn't provide for the
21 appearance of an attorney or an advocate in the private
22 dissolution or mediation sessions. States with the most
23 experience at alternative dispute resolution in the context
24 of divorce permit the participation of attorneys and
25 advocates.

1 I think we heard testimony this morning from
2 both Dr. Clawar and from Brynne Rivlin, that they don't
3 mediate without the presence of attorneys, and I think they
4 explained better than I can the technical assistance that
5 lawyers can offer and the protections that they can offer
6 for their clients. So I would just ask that you consider
7 carefully their testimony from the point of view of their
8 experience in this whole process and the fact that this is a
9 serious defect in the legislation.

10 Seven. This legislation, two points about this
11 legislation. One, it does not require that an agreement
12 entered be based on full financial disclosure and that the
13 facts upon which any resolution is based be articulated in
14 detail in the agreement. Coupled with that is the fact that
15 all of the communications related to the dissolution
16 proceeding are deemed to be confidential and inadmissible as
17 evidence in any subsequent legal proceeding.

18 Our concern is that this will promote unjust and
19 inequitable dissolution agreements, because often the
20 economically dependent spouse does not have knowledge of
21 assets, no notion of the assets of the couple. And without
22 such a mandate for disclosure, justice would also be
23 seriously jeopardized under this system.

24 Number eight. The bill does not authorize
25 evaluation by the courts of the propriety of the agreements

1 presented to them, either by the private dissolution
2 practitioner or by the mediator. Without such an
3 authorization, it appears that the intent of the legislation
4 is that the courts will automatically approve the orders.
5 There will be no way, once the order's approved, there's no
6 record, there will be no way for appellate review. There
7 will be no record. And the concern then is obviously that
8 one of the fundamental judicial safeguards is appellate
9 review, the right to appeal, and under this system it would
10 essentially be impossible.

11 I guess one point, another point is that, and
12 we're not trying to say that the assistance of clergy or
13 mediators is not significant and cannot be helpful, but I
14 guess the point I would like to make today is that that
15 assistance is available on a voluntary basis, and it's
16 something that people can avail themselves of. We're not
17 saying that that shouldn't be a voluntary option. It's
18 something that exists now and we encourage people for whom
19 it's appropriate to avail themselves of it.

20 Which leads to one of the main points that I
21 would like to make, is that it is our position that
22 alternative dispute resolution should be voluntary, and I
23 would like to address that briefly.

24 There was testimony provided to you on this
25 issue about alternative dispute resolution on August the

1 29th, 1989, on Senate Bill 229, given by Carol Bruch, Dabney
2 Miller, Elizabeth Bennett, Barbara Hart, and I would direct
3 that testimony to your attention for consideration again at
4 this point. Those individuals testifying, as most
5 professional mediation associations, are in consensus that
6 alternative dispute resolution processes should be
7 voluntary.

8 This legislation obviously anticipates a
9 nonvoluntary, more coercive process where mediation can be
10 ordered, at least that's what it appears to me from reading
11 the statute, that it could be ordered on motion of either
12 party or by the judge. So it obviously would not be a
13 voluntary process. Under this legislation, then, a person
14 who hasn't chosen to mediate could be held in contempt and
15 potentially incarcerated indefinitely if he or she is deemed
16 to be not participating in good faith.

17 One issue on the good faith inclusion as a
18 provision is that due to the inadmissibility of evidence, if
19 there is a good faith allegation and someone is charged to
20 be held in contempt, they have no way of offering evidence,
21 there's no way to offer evidence as to the underlying
22 motives or why they acted the way they did, if everything
23 that occurred in the mediations inadmissible, confidential
24 and inadmissible, and that really would create an
25 unconscionable Catch 22 type situation.

1 It appears that the states who have experience
2 with mediation have removed good faith provisions.

3 I understand in Maine where they still
4 incorporate good faith language, participants in the
5 mediation have the option to terminate rather than continue
6 if they don't feel it's been successful.

7 So I think that's it's important to look at the
8 states that have been involved in mediation already, which I
9 understand and appreciate that you are doing, and I think
10 consideration has to be given to the determinations that
11 they've come up with in the area of this good faith issue.

12 Another point that we think is critical is that
13 this legislation doesn't address the fact that domestic
14 violence occurs in as many as 50 percent of all marriages,
15 and that domestic violence often escalates at a time when
16 the marriage is disintegrating. That these cases that
17 include a history of domestic violence are special and
18 deserve special treatment, I think was testified to earlier
19 in the day by the mediators, by Dr. Clawar and by Brynne
20 Rivlin.

21 We submit that the omission from this
22 legislation of some special consideration or exemption for
23 domestic violence cases is really untenable, and that based
24 on the experience of other mediation systems, cases where
25 domestic violence is an issue should be exempt from any

1 mediation system, should be strictly voluntary, and to the
2 extent that domestic violence victims do participate, there
3 should be safeguards built into the process for them.

4 I would like to list a few things that --
5 recently a study was done by the Maine Court Mediation
6 Service and they made recommendations that include the
7 following.

8 Participation in the mediation process must be
9 voluntary and based on informed consent. Courts authorizing
10 mediation must provide for a safe environment, for the
11 presence of third-party supporters, and the ability of the
12 abused party to terminate mediation at any time.

13 Agreements, if reached, must be based on full
14 disclosure of information. The facts upon which the
15 agreement was based also must be included in the agreement.

16 All domestic relations cases being considered
17 for mediation must be screened for abuse. If the screening
18 cannot instituted, mediation services must not be offered.
19 And mediation must be terminated if abuse occurs subsequent
20 to screening or during the mediation process.

21 There are a series of states who, including
22 Maine, New Hampshire, North Dakota, Oregon and Wisconsin,
23 who now create waivers of mediation or exclude cases from
24 mediation in the context of domestic violence or child
25 abuse. We would submit that that would be the path that

1 Pennsylvania should also take, to the extent that mediation
2 becomes institutionalized.

3 In closing, I would just like to read from
4 written testimony a closing paragraph. This House Bill 1260
5 privatizes divorce, moving it out of the public domain,
6 outside of the realm of public policy into private,
7 noncompetitive dissolution services. The public policy of
8 this Commonwealth is that families should be preserved. If
9 the family unit of economically dependent spouses and
10 children is to be preserved and sustained upon divorce,
11 marital dissolution processes must assure economic and
12 social justice.

13 The interest that the public has in justice
14 related to the dissolution of marriages, let alone the
15 interests that dependent spouses and custodial parents have
16 in equitable distribution of marital assets and economic
17 viability, and that battered spouses have in safety and
18 autonomy, will become marginalized and become subservient to
19 the interests of the marriage dissolution systems that would
20 surely emerge pursuant to the passage of 1260.

21 For all of those reasons, we would respectfully
22 urge the Committee to reject the proposal, and I would be
23 happy to answer any questions if you have any.

24 REPRESENTATIVE SAURMAN: Any questions?

25 MS. MILAHOV: No, I don't.

1 REPRESENTATIVE SAURMAN: I would just like to
2 make a brief statement, and we don't have the time to debate
3 it, obviously. But first of all, I would assume from your
4 comments that you believe that two people can't sit down and
5 resolve differences. You're saying that it has to be done
6 in accord -- there has to be attorneys.

7 Actually, in mediation, we would have the first
8 opportunity for those two individuals to sit down and talk
9 things over personally, and the system as it currently
10 exists, each person is represented and in most cases neither
11 one is allowed to represent themselves or their own
12 feelings.

13 The testimony that I've heard over and over and
14 over again is that whenever they've tried to express
15 themselves or to tell their side of the story, the judge
16 says, sit down, I don't want to hear it. Even when
17 represented by counsel, that frequently happens.

18 So when you talk about the inequity of the
19 access, the ability of people to go to court, it's very
20 true, first of all, that those who can't afford it, will not
21 be represented, and about 53 percent of those persons who
22 need legal help are unable to get help because they can't
23 afford it. Under a situation like this, they would have the
24 opportunity to sit down.

25 It seems to me that two people that have lived

1 together and dealt with all the circumstances that life has
2 thrown at them should have the ability, should have the
3 common sense, should have the ability with someone who, a
4 neutral person, be able to sit down and discuss those things
5 and come to a logical conclusion, rather than have the
6 adversarial situation which currently exists, tear them
7 apart.

8 So I think there's a basic difference of
9 philosophy here, one of which is the basis, really, for
10 several institutions of impeachment proceedings against
11 judges who as individuals are to be listening in a very
12 unbiased way, have, indeed, acted, at least according to
13 those persons who have instituted these actions, in less
14 than a biased way, or in perhaps in a biased way is a better
15 way to describe it.

16 It seems to me that mediation will turn back the
17 process of resolving individual problems between the two
18 people so that they can, in fact, do that without having
19 someone else tell them how they should, in fact, resolve
20 that, according to whatever standards. I find that that's a
21 basic philosophical difference.

22 But it just seems to me that the courts,
23 government have interfered too much with peoples' lives.

24 One of the basic reasons for saying if someone
25 can marry somebody, then why couldn't they dissolve the

1 marriage, the concept is that two people who are living and
2 have made a decision to join together, want to be able to
3 under most circumstances and with some assistance work out
4 something that's fair to both. But when it gets into a
5 situation apart from that, where they're not even allowed to
6 represent themselves or to say what they want to say and
7 they're told by their attorneys, I'll do the talking for
8 you, and they come back and they tell me that their
9 attorneys make statements for them that they don't believe
10 in, sign statements that they never took part in, that
11 there's something very seriously wrong.

12 This is an attempt to at least turn back some of
13 our lives to a process that allows people to represent
14 themselves and to seek equity without the assistance of a
15 process that actually in my opinion robs them of both their
16 individuality and in many cases their financial security and
17 that of their children.

18 MS. BITTNER: I know we don't have time to
19 debate. I just want to respond very briefly.

20 I don't disagree with a lot of what you're
21 saying, and I think that the goals are commendable, and I do
22 think that people should be able to sit down and work things
23 out. But I think the hard reality is that frequently that's
24 not possible, and I don't think that's just because you have
25 lawyers. Sometimes it is me, but I think that what's being

1 proposed here is an alternative system that's not the
2 courts, and you're going to now add a new cadre of
3 individuals into this picture where we already have
4 questions about accountability in a system that's not
5 standardized or regulated.

6 My only comment would be if we have alternative
7 dispute resolution forms, let them be voluntary. Let them
8 be voluntarily, but let's expand the access of the courts.
9 I mean, we have ways to expand this system, improve it, make
10 it more accessible, make it more expedient. That would be
11 the direction that I would urge the legislature to go to,
12 rather than create a whole new institutionalized alternative
13 resolution system.

14 REPRESENTATIVE SAURMAN: I would like at some
15 time for you to give to the Committee some of these access
16 opportunities, because in just one instance, a woman was
17 charged with harassment by telephone by her estranged
18 husband and she was told to appear in court on a certain day
19 and she had to have a lawyer, and she was given a list of
20 lawyers who would charge her only \$300 for being there. She
21 had to be there or she was going to jail.

22 Now, if this is justice, then, you know, it
23 throws a whole new thing into what our lives have been in
24 the past, and I think we need an alternative.

25 Yes, sir?

1 MR. SUTER: Representative Saurman, we've heard
2 over and over again that there is a problem in the courts,
3 particularly in the family law area, and the problem that we
4 have heard through our family lawyer hearings is cost, in
5 terms of the state is not willing to provide for additional
6 judges, it's not willing to pay for the cost of filing fees
7 and other expenses involved in divorce litigation that is
8 provided free in criminal proceedings. So it's really a
9 very big problem in terms of the state budget situation and
10 access to the courts.

11 REPRESENTATIVE SAURMAN: The process that
12 develops in pseudo lawyers, because many of the people that
13 I've dealt with, and that's not all of them, certainly, but
14 they're more astute in terms of the law than anyone that
15 I've ever seen, and it's because they can't afford to defend
16 themselves anymore and they've had to go and introduce and
17 learn the law themselves and try to represent themselves.
18 And it may be an admirable thing for them to do, but the
19 reason for it is that they're bankrupt.

20 Thank you.

21 MS. BITTNER: Thank you.

22 REPRESENTATIVE SAURMAN: Michael Fingerman?
23 Philadelphia Bar Association.

24 MR. FINGERMAN: Good afternoon, Representative
25 Saurman, members of the Committee and staff. I'm honored to

1 be here.

2 I have sitting next to me Mary Cushing Doherty,
3 an attorney friend of mine and the next speaker on the
4 list. Considering the lateness of the hour and in order to
5 expedite matters, and considering that a lot of our comments
6 are coincident, we thought we would come up here together.

7 REPRESENTATIVE SAURMAN: Thank you.

8 MR. FINGERMAN: I'm an attorney practicing
9 exclusively family law and have been doing so for 15 years.
10 I'm a member of the Board of Governors of the Philadelphia
11 Bar Association, former chair of the family law section of
12 the Philadelphia Bar, a fellow of the American Academy of
13 Matrimonial Lawyers, and a frequent lecturer and author,
14 teacher at Temple Law School and Paralegal Institutes and
15 Family Law. That's all I have done for 15 years.

16 It's been most interesting sitting here all day
17 and listening to the testimony of everyone. And after
18 hearing particularly Dr. Clawar and Brynne Rivlin this
19 morning, I urge the Committee to take heed to their advice,
20 especially with regard to procedures, voluntariness,
21 expediency and maybe most importantly, the qualification of
22 mediators.

23 I've submitted my written comments to you, and
24 the first page of those written comments is a resolution
25 from the family law section of the Philadelphia Bar,

1 opposing this legislation. So I'll now direct my comments
2 directly to my main problem, and that is, that legislation
3 of this type must be limited to custody and visitation
4 issues.

5 Family law has historically been considered a
6 stepchild of legal practice and to some extent a stepchild
7 of the court system. But especially since the passage of
8 no-fault divorce, particularly laws relating to equitable
9 distribution of property and alimony, family law now
10 involves numerous complex issues. I can't imagine that the
11 legislature would suggest that antitrust, environmental,
12 merger and acquisition, partnership dissolution matters be
13 mediated between laypersons before a person qualified to
14 solemnize marriages or a master in social work.

15 Again, with regard to only one issue incident to
16 a divorce, equitable distribution of property, are the
17 parties who are lay people and are the mediators, as
18 suggested in this piece of legislation, knowledgeable and
19 trained to deal with the myriad financial and other
20 considerations necessary to make proper, informed, just,
21 reasonable and equitable judgments, including with regard to
22 tax ramifications, bankruptcy, pension, trust and estates,
23 corporate law, valuation issues, including appropriate dates
24 for valuation, accounting methods, valuation of good will
25 and other intangibles, the income capital gain, recapture,

1 personal property and transfer tax ramifications, incident
2 to not only the transfer and sale of property, but also all
3 above noted areas, equitable reimbursement for the other
4 parties' attainment of an educational degree or license to
5 practice, federal laws dealing with Social Security, the
6 continuation of health insurance coverage, pursuant to the
7 Consolidated Omnibus Budget Reconciliation Act, federal laws
8 dealing with life insurance, designations, pursuant to COBRA
9 and REACT, and the numerous laws of military rights and
10 benefits, and I could continue ad infinitum.

11 I've been doing this for 15 years. I feel
12 personally that I know about as much family law as anybody
13 in the state, and I learn something every day. I can't
14 imagine that a person qualified to solemnize marriages, an
15 MSW psychologist or a psychiatrist, is going to know all of
16 those ramifications in a divorce case.

17 A myriad of other and different considerations
18 apply in determining net income with regard to child
19 support, spousal support, alimony and alimony pendente lite,
20 including, for instance, adding-back depreciation,
21 investment tax credit and other paper deductions, and then
22 appropriately tax-effecting those add-backs; the value of
23 perquisites, consideration of capital gains and losses,
24 nontaxable income, mandatory versus discretionary
25 deductions, including retirement plans, insurance and

1 charitable contributions, requirements for making the
2 payments includable or deductible for federal tax purposes
3 or for state income tax purposes, or includability and
4 deductibility of payments to third persons for recipient's
5 benefit, recapture of front-end-loaded alimony payments,
6 allocation of dependency exemptions, tax filing status, and
7 I could also continue ad infinitum.

8 The fact is that the simplest case dealing with
9 the financial issues is no longer simple. If I just have a
10 house and a bank account of equal value, and I give one
11 party the house and one party the bank account, if I haven't
12 considered the selling costs, the transfer taxes, the
13 capital gains tax, potential recapture taxes, brokerage
14 commissions, I may be giving one party an item that's valued
15 at a hundred thousand dollars, the bank account, and the
16 other party something valued at \$50,000. That's the
17 simplest case I can think of.

18 The one item that's extant in the majority of
19 divorce cases is the defined benefit pension plan, just a
20 pension plan. Take, for example, a middle manager at AT&T.
21 Assuming a mediator would know to get a benefit statement
22 from the employee, assuming someone hired an actuary to get
23 a valuation, assuming the actuary knew the appropriate date
24 evaluation, and assuming a proper valuation was done based
25 on the benefit statement, the other spouse would only be

1 getting 40 percent of the value of the retirement plan
2 because they would be missing the cost-of-living increase
3 value, the AT&T savings plan, which doesn't appear on the
4 benefits statement, the employee stock ownership plan, which
5 doesn't appear on the benefits statement, and the incentive
6 deferred award program doesn't appear on the benefit
7 statement.

8 The bottom line of what I'm saying is if you
9 want to talk about mediation by persons other than attorneys
10 or judges, please do so only with regard to custody and
11 visitation issues.

12 Finally, I just want to tick off very quickly
13 some notes I made with regard to other peoples' testimony
14 this morning.

15 With regard to grandparents' access, as we know,
16 we have a Custody and Grandparents Visitation Act in this
17 state, and grandparents do have rights to custody and
18 visitation. If you're going to contemplate a mediation
19 statute, I would urge you to include grandparents having
20 access to those processes, also.

21 I can tell you in Philadelphia County, which is
22 where I come from, if you talk to the judge, they will tell
23 you that about 50 percent of the custody cases they hear
24 involve grandparents because mommy or daddy, one of them
25 aren't around, usually because of crack.

1 With regard to litigation, I've heard 20 and 80
2 percent bandied around a lot. I can tell you from my
3 experience, and again, this is all I've done now for 15
4 years, less than 20 percent of my cases are, or cases in my
5 firm, and there are six attorneys and all of us do only
6 domestic relations, less than 20 percent do any of the
7 people ever see a courtroom. We settle most of them. I
8 would say if we litigate one to two fullblown custody cases
9 a year, it's a lot.

10 So you'll hear the war stories, but they're the
11 cases where the parties just aren't able to settle. Most of
12 them settle. That doesn't mean that there shouldn't be a
13 mediation procedure for those that don't.

14 With regard to equal access between the sexes,
15 again, as your Committee is well aware, our state
16 constitution has an Equal Rights Amendment for over 20 years
17 now, if I'm not mistaken, with regard to a master's system
18 or some alternative dispute resolution mechanism for
19 domestic relations issues. As your Committee I'm sure is
20 also aware, at least in the five-county area, we have master
21 systems in place which are relatively effective and
22 expeditious with regard to the financial issues that I'm
23 addressing.

24 Next, I urge the Committee not to confuse
25 mediation with arbitration. I hear the words

1 interchangeably, and it scares me. Mediation is a process
2 whereby a third party helps the parties come to an
3 agreement. Arbitration is a process whereby a third party
4 makes a decision binding on both parties.

5 If we're talking about mediation, and we are,
6 make sure we're not talking about arbitration, where it's
7 either mandatory or binding upon the parties if they don't
8 agree.

9 With regard to confidentiality, and these are
10 just my own thoughts, I know that negotiations are not
11 admissible in court. I don't think the mediation processes
12 either should be admissible. By keeping things confidential
13 it will allow the parties to speak freely.

14 The reason why negotiations are not admissible
15 in court is because it gets parties to come to an
16 agreement. If you keep what these people say in a mediation
17 setting not admissible in court, God willing, it will help
18 them come to an agreement, too.

19 Now I'll let Mary talk.

20 MS. CUSHING DOHERTY: Thank you, Michael.

21 My name is Mary Cushing Doherty. Just so you
22 understand my background, sometimes I introduce myself and I
23 tell people my grandmother's turning over in her grave to
24 look at her good Irish Catholic girl being a divorce lawyer
25 now for 14 years. But I went to University of Delaware and

1 I was a philosophy major. And listening to the different
2 people today, I realize how many different aspects of my
3 life I bring to these issues.

4 I am a philosophy major. I went to Villanova
5 University School of Law. I teach at the Pennsylvania Bar
6 Institute, and I'm flattered to have been named to their
7 Board of Governors. That is the teaching arm of the
8 Pennsylvania Bar Association.

9 Teaching lawyers is important to me, because a
10 worthy advocate is an intelligent advocate, intelligent
11 adversary. Without the knowledge of the law, I feel like
12 I'm at a disadvantage to settle any case.

13 I am a member of the American Academy of
14 Matrimonial Lawyers and I have been a fellow for six years.

15 I also have for 13 years been a Pre-Cana
16 counselor. That means that twice a year my husband and I
17 meet with engaged couples before they marry and talk to them
18 about what marriage means, and we encourage them, if they
19 have doubts about their marriage, they should delay it,
20 reconsider it. And sometimes I laugh, because by doing
21 Pre-Cana counseling I'm taking away my business because
22 they'll never get divorced if they don't get married, but I
23 would rather have it that way.

24 I have been a family lawyer for 14 years. I've
25 been married for 15 years. I believe in family. I juggle

1 my practice -- I'm a solo practitioner in Montgomery
2 County. I have three children ages three, six and eight.
3 So my life is very full. I only go into work four days a
4 week because I'm not in this just for the money. If I
5 wanted to make more money I would work more hours. But I am
6 in this to try to help people through the trauma of divorce
7 and through a difficult system, and many times I cannot help
8 them with the trauma but I will do my best to help them with
9 the system.

10 I do have a problem with the legislation
11 proposed today. I want the panel to know, Committee to know
12 that I will do anything to settle a case so long as it's a
13 fair settlement. I have a client now who has been separated
14 from her husband and two weeks ago she said, I can't discuss
15 this with my husband, we get along too well, you talk to the
16 lawyer. So letters pass back and forth. She called me up,
17 she said, I'm ready to sit down and talk this out. I want
18 to understand from him what his priorities are in the
19 settlement and I want him to know mine. So I told her to go
20 ahead with my blessing. I wrote to opposing counsel. I
21 said, these people are going to sit down. That's terrific.

22 Many lawyers look for alternative dispute
23 resolution, any alternative to going into court. I don't
24 care if they go to a pastor or social worker or their
25 brother-in-law, but I do want my client to agree to a

1 settlement based on informed consent.

2 To me, I tried to come up with a checklist, and
3 you'll notice I'm not following my written comments, but at
4 the top of page 3, I came up with my summary of check
5 lists.

6 Do the parties know what the law provides? You
7 can see between the lines there that I do think legal advice
8 is important for the parties to reach a settlement.

9 Do both sides appreciate the needs and goals of
10 the others? Sometimes lawyers are good at this. I am best
11 in settling a case when I understand where the other side is
12 coming from. I have a difficult time with opposing counsel
13 if they don't choose to see where my client's coming from.
14 Absolutely, a third-party mediator or someone that can get
15 to those people and say, understand this is what your wife
16 needs or your husband needs, is helpful.

17 But next, number 3, are the economic facts and
18 figures available to both sides? I firmly believe that the
19 biggest problem in settling any economic aspect to divorce
20 cases is having the facts and having the figures. And as
21 Mike said, most mediators are not capable of doing the
22 financial analysis. Many, many times we are dependent
23 unfortunately on the courts to get financial information.

24 Now, this legislature tried to legislate full
25 discovery in matrimonial cases, but as we know, the Supreme

1 Court rules committee has overturned that and we have very
2 restricted discovery in matrimonial cases. Maybe this helps
3 the lawyers, but I would rather see open discovery, let the
4 clients have ready access. I don't want to file petitions
5 over discovery. It's not my priority to file petitions, but
6 we don't have ready access to financial information.

7 I have a couple now who are in mediation. The
8 husband asked for mediation, he's paying for mediation. Six
9 months ago we asked for financial information. I have yet
10 to have my client's accountant sit down with him and his
11 accountant. It is a farce. We don't have the power of a
12 court order. The man says, yeah, yeah, I'll do it, but he
13 hasn't done it. So what is he doing? He's taking the time
14 and delay of mediation. He is incurring the costs which
15 could be better spent on his children, and he is causing
16 time, delay, and aggravation to my client. She's paid me
17 and I'm still going to have to court. Those are my fears
18 and concerns.

19 Fourth. Are the husband and wife dealing
20 honestly? If the parties aren't dealing honestly, then you
21 have to root out what are the true facts, and sometimes
22 that's exactly what a judge is needed for, to dig down, find
23 out, to decide who's lying and make a decision on that
24 basis.

25 Without honesty, I don't think any couple can

1 mediate any issue. I think that's the root problem with
2 some of the things that Loraine Bittner was talking about.
3 If the parties aren't dealing honestly with each other, if
4 the wife thinks the husband's lying, how can she mediate
5 with him? If she doesn't think he's talking with integrity,
6 he's not being open and honest with the mediator. Without
7 that honesty, I think the mediation will fail and I think
8 that negotiation becomes difficult, if not impossible.

9 Sometimes the attorney provides a buffer zone.
10 Sometimes an attorney can better enlighten the other side as
11 to what the goals are, or maybe can better appreciate what
12 the goals are to achieve an overall settlement. Sometimes
13 an attorney can say, hey, I know my client's not credible,
14 but look at the good points she's making, and let's focus on
15 those and settle this case.

16 I want to emphasize that I will and do support
17 mediation available, readily available, and I like the
18 terminology of Dr. Clawar, institutionalized mediation.

19 I agree that mediation starting in the custody
20 area is probably the best, because if you're in custody,
21 then of my four questions, what the law provides is less
22 complicated and much more subtle. Under custody the law
23 provides the best interests of the children, and how best
24 for the parents to participate in the interpretation of that
25 legal decision. And in a custody case don't have the

1 economic complications that Mike has referred to.

2 The problems I have, just briefly touching on
3 them, with the Clawar proposal, is that it's hard for me to
4 envision the mandatory or mandated mediation. What I see is
5 I see dependent spouses, I have a man in this position and I
6 have a woman in this position right now, both of whom are
7 emotionally, intellectually intimidated by their spouse.
8 They have a very hard time speaking up for themselves. They
9 have a very hard time verbalizing what their priorities
10 are. It's hard for me to envision that kind of dependent
11 personality benefitting from mediation.

12 Perhaps with the protection of attorney support,
13 perhaps with the suggestions of Dr. Clawar, I think he's
14 more insightful than most, where he is suggesting that if
15 someone has misgivings they can come back, that's a
16 wonderful opportunity, and maybe there's a way to circumvent
17 the problems I envision, but that I see is a real challenge,
18 whatever final legislation there may be.

19 Another problem occurred to me today, and I want
20 to throw this out. In my toughest custody cases, the
21 deepest underlying fear of one of the parents is that the
22 other one is going to snatch the child and disappear, go to
23 Arizona, go to the Islands, go to Europe. My concern in any
24 of those cases is to get some sort of quick protective
25 custody order.

1 Do we want in our system an immediate order
2 before you go to mediation and delay further? Do we want an
3 immediate order, just simply that the child shall not be
4 removed from the jurisdiction, pending final order of this
5 court?

6 I have seen the horror stories where the father
7 comes to our office and says, my wife works in the military,
8 she's being transferred to Germany, I think she's leaving
9 this week, what can you do? Or, I think she's leaving next
10 week or next month. We file the petition, we get an
11 emergency hearing. We don't have proof she's going, and a
12 court says, look, this is going to take a lot of time, and
13 boom, she's gone, she's in Germany. We have no court order
14 saying that the child has to be returned. So after the
15 fact, we're rushing around trying to get a court order.

16 Again, quick access to the court can give you
17 quick order. Is that the best resolution? I'm not sure,
18 but if we have another alternative delay, mediation delay,
19 what about the risks of the snatch?

20 I think my underlying problems with the proposal
21 have already been treated today. One is the abuse of the
22 system in order to achieve delay. Like I say, the gentleman
23 that I see doing that, he's delaying so he doesn't have to
24 give financial information.

25 Secondly, I think asking any one mediator to

1 handle all those variety of issues is inappropriate. It may
2 well be that mediation of economic cases becomes available
3 with lawyer-lead mediators, with the trained mediators, a
4 court employee. Most of our masters, and Mike referred to
5 this, are masters in the five-county area of the eastern
6 part of the state, they are very well versed in the law and
7 they will, if they have more time and more staff support,
8 they may be very good candidates for a permanent mediation
9 system in the economic areas.

10 I think we have to keep in consideration if
11 mediators are going to reach agreements and mediators are
12 going to propose these to the court, keep in mind the Semion
13 decision out of our Supreme Court. Semion was that
14 prenuptial case where the nurse married the doctor and on
15 the eve of the wedding the doctor put the agreement in front
16 of her and said, here, honey, sign it. It might have even
17 been that he gave it to her that morning, and the guests
18 were due to arrive that afternoon in their home. And she
19 under some duress went ahead and signed it. Later, the
20 doctor said, you saw it before. She said, well, I don't
21 think so. There was a dispute as to whether she had seen
22 it.

23 Clearly, this woman had not been represented by
24 counsel. Clearly, the doctor had put down a financial
25 disclosure. The wedding was that afternoon. And our

1 Supreme Court said a contract is a contract and you'll live
2 with your agreement whether or not you had legal advice.

3 Well, query. If we now allow mediators to reach
4 these comprehensive agreements, and we do not advise or
5 require or recommend, clearly recommend attorney support,
6 then again, people will be living by contracts that they may
7 live to regret.

8 If nothing else, when the lawyers are involved
9 they have someone to go back and answer to, and the
10 protection is if the lawyer makes a bad mistake, that person
11 can go in for malpractice and maybe get some other relief
12 from the system.

13 Without the lawyer's advice, you don't have that
14 benefit of malpractice, and here I am, a lawyer
15 encouraging -- but I would rather have the checks and
16 balances. I would rather have to withstand the risk of
17 malpractice, because that keeps me a good lawyer. And I
18 think there's nothing to be afraid of in that.

19 I come back to my philosophic background, and as
20 I look at this, the momentum created by the legislation, and
21 this legislation's been in this form or another for a period
22 of time because I know it's come back a couple years in a
23 row, and I hope to encourage the Committee to go back to the
24 platonic method of revising or perhaps rewriting this bill.

25 I think I hear a lot of people today saying

1 alternative dispute resolution is good, it can be terrific.
2 This is not the proper medium.

3 There are many lawyers like myself that are pro
4 alternative dispute resolution with protections, with the
5 kind of back-up support that we're talking about.

6 So I encourage the Committee to go, look for
7 input from Clawar and Rivlin, look for input from those
8 lawyers. There are pro-mediation lawyers, there are
9 anti-mediation lawyers. There are often very articulate and
10 they may well have a good point. And by collecting the best
11 of those opinions and redrafting the legislation, you may
12 have legislation that most lawyers will support and that
13 most women's groups will support.

14 I think the need is there. I think the seeds
15 are of change are there. Look at our economic mediators. I
16 look the custody conciliator in Montgomery County, the
17 support hearing officers and the support master in
18 Montgomery County where I practice. They're all settling
19 most of those cases. The economic conciliator in Montgomery
20 County is settling 90 percent of cases. So we have the
21 seeds of change in our system. It may be as simple as
22 going, looking at what we have, trying to support it,
23 improve it and try to improve access to those systems.

24 But the biggest problem with our economic
25 conciliator in Montgomery County right now is the four- to

1 six-month backlog, and it's stretching to six to eight
2 months. If we can reduce that backlog, then -- justice
3 delayed is justice denied. If we can reduce that backlog,
4 reduce the delay, we reduce the pain and hopefully reach a
5 more satisfactory solution more quickly.

6 I thank you.

7 REPRESENTATIVE SAURMAN: Questions of either?

8 Well, again, we certainly thank both of you. I
9 think there's no question what the reason for hearings is to
10 examine proposed legislation and to make changes that make
11 it function.

12 The only question that I would have, I guess,
13 is, and if I had the answer to it I could certainly satisfy
14 any number of people who come to me regularly, and that is,
15 how do you bring a malpractice suit against an attorney or
16 against a judge? There seems to be no resolution. The
17 instances where attorneys have misled or misstated
18 situations, which would appear to be malpractice in my
19 opinion, at least, sent to the legal or the disciplinary
20 board are sent back with, we've looked at your thing and
21 there's no, it's unfounded.

22 I mean, people are very -- people that come to
23 me are very, very upset about what they consider to be
24 nowhere to go, with the court system as it stands.

25 And as I mentioned before, and let me just tell

1 you of one situation very quickly. A husband brought an
2 alleged violation of visitation rights. The facts of the
3 matter were that he was supposed to have their daughter over
4 the Christmas holidays. The daughter said, I would like to
5 bring a girlfriend of mine, home to her mother, can I stay
6 with you. She said, I can't do that, your father has
7 visitation rights. If you're going to do that, you're going
8 to have to get his permission. She called and got that
9 permission. And then at the time the other girl went back,
10 she went to visit her father.

11 Immediately after the holidays the father
12 brought action against her for violation of his visitation
13 rights. She was called in to -- notified to come to the
14 courthouse, which she did. The sheriff called the judge
15 involved and said, Mrs. So and So is here. He said, I can't
16 see her now, put the handcuffs on her. She was handcuffed.
17 Later in the day they called again at lunch time. He said,
18 I have a luncheon appointment, I can't see her.

19 At the end of the day he still couldn't see
20 her. She was then taken to Montgomery County Prison and
21 locked up, and at that time, eight o'clock at night, she's
22 first allowed to call home and make arrangements for her
23 father to pick up her children, or to at least notify them
24 as to where she was. She was not allowed to communicate in
25 any way.

1 The next day she was brought back from the
2 courthouse or from the jail to the sheriff's office, and
3 there was a hearing at 12 o'clock. Her father in the
4 meantime had secured an attorney, and the attorney told her
5 when you go into court, just agree with whatever the judge
6 says or you're going back to jail.

7 Now, if there's a system of justice, I don't
8 personally want to see access to it improved. Whereas, I
9 think that sitting down, and I would feel far safer to go to
10 a rabbi, and I'm not Jewish, than I would going to someone
11 like that, because I just have lost confidence where that
12 kind of a thing can happen. And that's not as though -- I
13 attended a dinner with all of the judges and explained what
14 happened, and some of them looked at each other and said,
15 oh, this can't happen. Some says, oh, it does. And I
16 talked to the prison warden and he says it does happen.

17 Now, how do you deal with something like that?
18 How do you convince people who come to you with those kinds
19 of problems, that we have a system of justice that allows
20 them to have freedom and, you know, it's just frightening.

21 MS. CUSHING DOHERTY: I can't justify that. I
22 can't endorse it. I think that's horrible, and I agree with
23 you.

24 That's not to say that change isn't needed. I
25 just don't think that this particular format is the right

1 format.

2 REPRESENTATIVE SAURMAN: I understand, and I
3 hope we can find a format. As I said, as a prime sponsor of
4 this bill I really am not concerned with how it happens, but
5 I am concerned with a system at the moment that seems to me
6 has created some very, very serious problems. It's not an
7 isolated case. On one occasion I had 15 women in my home at
8 one time that were all with similar stories. And then the
9 men's side comes. So it's not sexually oriented, it just is
10 for some reason an abortion of justice, and something needs
11 to be done.

12 There are excellent attorneys, and I've talked
13 to a number of them and they've made some recommendations,
14 but I just hope that out of hearings like this and out of
15 the Judicial Committee, who have I think the best interests
16 certainly of everyone, and particularly the number one
17 situation I think is the children that are hurt most, and
18 often it is because the parents are.

19 Dave? You looked like you wanted to say
20 something?

21 REPRESENTATIVE HECKLER: Well, I did kind of --
22 you got my attention with that horror story. And I just to
23 inject a note of balance, if nothing else.

24 I really think that it's important to remember,
25 number one, that any system is only as good as the people

1 who staff it.

2 Now, I don't know what the particular facts were
3 of this situation you described with the judge just plainly
4 being too arrogant to do what he or she was supposed to do
5 during the course of the day.

6 REPRESENTATIVE SAURMAN: That was just one
7 illustration. I won't go into the others with other judges.

8 REPRESENTATIVE HECKLER: Frankly, and again, I
9 keep finding myself in the position of being kind of
10 defensive and snooty about Bucks County. I happen to think
11 we have an excellent system. I've thought for years that
12 aside from the Orphan's Court, I didn't think much of an
13 awful lot of the folks in Montgomery County, and I would
14 find it absolutely not credible that such a story would
15 occur in Bucks County, unless there was a failure to
16 communicate to the judge.

17 I can believe that we've got people of different
18 levels of diligence, but I can't believe any judge would go
19 home at the end of the day with a woman who had been
20 scheduled to come in on a contempt matter still in custody,
21 without making some determination, without having a
22 hearing.

23 But the fact remains, and what I really wanted
24 to, the point that I wanted to make is, that we don't solve
25 that problem by creating another system.

1 Now, you heard my comments earlier. I think
2 there may be some merit to on a voluntary basis for correct
3 subject matter, once folks are properly informed of what
4 they're getting into, to make -- arbitration is available to
5 them on an all-voluntary basis for economic issues, and to
6 make it available, as I think some of the witnesses have
7 agreed.

8 But to suppose that a system involving the
9 clergy or involving trained counselors or anything else
10 won't be subject to the same kind of bias, potential bias
11 questions, won't be, you know, that we wouldn't be having
12 hearings 10 years from now about the scandals of these
13 mediators who are taking, you know, if you know which
14 mediator to get to, you know that this one's a wife's
15 mediator, that's a husband's mediator. I mean, the problem
16 lies with human conflict.

17 First of all, you're never going to have people
18 emerge from a divorce -- probably if either party emerges
19 less than somewhat grumpy, they're exceptional people.

20 But the answer quite frankly is to embarrass, or
21 worse, the judges who conduct themselves that way. It is to
22 improve the quality of justice within the system.

23 And you know, I think it goes in Montgomery
24 County to the one-party system, if we're letting our hair
25 down, you've got to have viable people from both parties.

1 Being a judge has got to be something very special. And
2 that's the solution for that problem, and not creating
3 another system that may or may not be staffed with people of
4 the same kinds of mixed competence or mixed integrity in
5 terms of their seriousness about the job they're supposed to
6 do. But certainly we need to keep chipping away at the
7 process.

8 REPRESENTATIVE SAURMAN: Let me just say that
9 Montgomery County is not alone in this, and I can show you
10 testimony in Delaware County, I think I could show you
11 instances in Bucks County, I can show you in western
12 Pennsylvania, right here in Harrisburg. So when I mentioned
13 Montgomery County, it's because I live there and that's
14 where my constituents are. But because of this legislation,
15 I've been contacted by people from all over the state, so
16 it's not a Montgomery County issue. I want to clarify that
17 one.

18 REPRESENTATIVE HECKLER: I understand, although
19 most, an awful lot of the grumpiness we've heard in these
20 ongoing hearings has been out of Montgomery County, and I've
21 taken some trouble to take a look at the people who have
22 complained about Bucks County and I've satisfied myself that
23 they're not accurate in their assessment that their case was
24 not fairly handled. They may not have liked the result, but
25 that's a different kettle of fish.

1 MR. FINGERMAN: If I could follow up for one
2 minute. Let me say first that Mary and I both happen to be
3 residents in your constituency, and there's good judges and
4 bad judges in some of all of the counties. What we don't
5 want to have happen is have good mediators and bad
6 mediators. So it's important that we properly define the
7 qualifications, it's important that we properly limit their
8 duties solely to custody and visitation and not to the very,
9 very complex financial issues involved in a divorce.

10 And finally, doing this exclusively for 15 years
11 because it's all I do all day, five days a week, whereas you
12 do some other things, too, I hear war stories all day.
13 You're going to hear a lot of them. It just comes with the
14 territory. I can get someone the best result in the world.
15 They're still unhappy because these are unhappy people.
16 They're going through a divorce.

17 REPRESENTATIVE SAURMAN: I think I realize that
18 they're going to be unhappy. But when something like that
19 happens, it seems to me to be a violation of a person's
20 constitutional rights. I get very disturbed.

21 MR. FINGERMAN: No doubt about it. But we also
22 learn that there's one side to a story and sometimes there's
23 another side we don't hear.

24 REPRESENTATIVE SAURMAN: All right. Any further
25 questions?

1 (No audible response.)

2 REPRESENTATIVE SAURMAN: We appreciate your
3 being here and your comments. And as I say, I think there's
4 no doubt that any action that's taken on this piece of
5 legislation will certainly take into consideration all of
6 the comments that have been made, and they've been very
7 helpful, very insightful, and we appreciate your testimony
8 and those of everyone, and your patience. It's been a long
9 day. Thank you.

10 MR. FINGERMAN: Thank you.

11 (Whereupon, the hearing was adjourned at
12 3:00 p.m.)

13 *****

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the within proceedings, and that this copy is a correct transcript of the same.



Emily Clark, RPR, CP, CM
Court Reporter-Notary Public