COMMENTS ON PENNSYLVANIA HOUSE BILL 1260
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When I was 19 years old, I bought my first car. My mother accompanied me as we looked at a second-hand Ford. In her fashion, she took the salesman aside and challenged him: "Would you buy this car for your daughter?"

In reviewing this proposed legislation, House Bill 1260, I challenge you to consider this bill as it will affect people you care about. Whether it be your mother, your father, your son or your daughter, would you want their divorce, support or custody case subject to the mediation procedures as outlined in this legislation? What if your loved one's divorce was complicated by small children, financial hardships, complicated pension issues, or emotional instability on the part of your loved one's spouse? As I review this legislation closely, I would not recommend this system to someone near and dear to me.

The overriding concern I have with this legislation is that almost any psychologist, social worker, marriage or family therapist could mediate a divorce or separation agreement, resolving complicated legal issues, without requiring legal expertise or any of the protection that our Court system is intended to provide. On the one hand, I am sure this legislation is being proposed as an alternative dispute resolution. I heartily support viable, alternative dispute resolution systems. My concern is that this legislation does not meet that goal. Instead, the system, as proposed, could be easily abused by a litigant who wants to drag out the litigation, intimidate his/her spouse, and avoid the decisiveness of Court resolution. In fact, this legislation could be viewed as one more way our system is shirking its responsibility to provide divorce litigants access to the courts, and access to prompt and fair resolution of their case.

I want you to know who I am, so you can appreciate why I am making these suggestions. I am a product of a Catholic home, and have always actively practiced my faith. I have had 12 years of Catholic school education, after which I attended the University of Delaware as a philosophy major and then attended Villanova University School of Law. I have been married for 15 years, I am raising three children, ages 3, 6 and 8. My husband and I currently supervise the Pre-Cana, (which is pre-marriage), counselling program at our parish, and we have been actively involved in this for 12 1/2 years. I have been a divorce lawyer for 13 years, starting my practice as an associate and later partner of Albert Momjian, Esquire, at Abrahams & Loewenstein in Philadelphia. I have been a member of the American Academy of Matrimonial Lawyers since 1986, and I was recently appointed to the Board of Directors of the Pennsylvania Bar Institute, which is the statewide organization which provides education and training for lawyers. I have been involved in teaching other lawyers since 1980 because I firmly believe that you cannot negotiate with a lawyer

or a party who is ignorant of the law, unaware of the scope of their rights, or unaware of the range of possible resolutions to the difficult economic and emotional problems faced by divorce litigants. I am not telling you all this to brag, but rather I want you to know that I believe in families, I work at my marriage, and twice a year I counsel engaged couples not to marry if they have doubts. My goal every day, as a divorce lawyer, is to assist my clients in easing the transition through the separation, divorce, and legal problems after divorce. In many, many cases, an easy transition is not an option. The question is "Why?", and what can be done to improve our legal system.

It is my concern that this proposed legislation is just one more band aid that is not getting to the root of the problem. I commend the legislators who are trying to develop alternative dispute resolution systems, but the approach must be much more comprehensive. Keep in mind that all good lawyers try to negotiate a resolution without litigation. All good Court-appointed hearing officers, Masters and Conciliators try to settle a case before litigation. In some counties, there is a preliminary hearing with a judge to force good-faith negotiations. Excellent mediators now currently take referrals from lawyers and litigants who want to mediate outside the Court system, but every good mediator requires and requests the input of lawyers and legal advocates. Is this legislation constructively adding to these various functioning systems for alternative dispute resolution?

In Section 3324(a), it is proposed that persons with the right to marry should also have the right to dissolve a marriage. If the issue is trying to expedite the signing of a Divorce Decree, right now, every county I practice in has stream lined forms to check off when parties want a no-fault divorce. We already have hearing officers assisting litigants in filing support, custody and abuse complaints. Why not administratively provide the man power and money, to also allow such officers to assist the parties in completing the forms, completing the notice requirements, so that a no-fault divorce can be processed without the need of a lawyer. Why would we further complicate what is already a simple system? (But who will advise the litigants if important rights are waived?) I cannot imagine the priests who marry couples want the right or responsibility to sign Divorce Decrees. The Catholic Church will not even begin annulment procedures until a civil divorce is completed, and I dare say will not want to be a participant in granting a Decree in Divorce.

But the real essence of the Bill is the suggestion that family counsellors shall assist in resolving controversies between the parties. They can do that now, but a good counsellor should not, and would not do so without encouraging the parties to obtain, independently, legal guidance before final decisions are made. Isn't the issue not who is the one to assist in the mediation, negotiation and litigation, but rather how can we best address the underlying concerns for those litigants whose cases get bogged down in the system?

I can identify at least four criteria for fairly settling a case out of Court, whether by mediation or negotiation:

1. Do the parties know what the law provides?
2. Do both sides appreciate the needs and goals of the other?
3. Are all the economic facts and figures available to both sides?
4. Are the husband and wife dealing honestly?

Looking at those four criteria under the mediation model proposed by this legislation, there is no requirement that mediators work with lawyers, or be trained as lawyers so the parties are getting the benefit of informed advice. In terms of appreciating the needs and goals of the other side, a mediator may well have the skills to help identify those desires, but how can the mediator evaluate if those expectations are realistic, without an understanding of what the law can and will provide to a divorcing spouse? As for collecting the economic facts and figures, this is one of the most serious challenges faced by any lawyer, and therefore, any litigant in a divorce case. A good family lawyer needs to be apprised of tax consequences, pension and actuarial issues, business matters, real estate transactions, etc. These issues come up in many of the most modest economic cases. Finally, until the husband and wife are dealing honestly with each other, mediation will not be effective. The mediator can only assist parties who are operating in good faith, and have put all the cards on the table. In reality, divorce litigants are often bitter, hurt, angry and due to emotional concerns or the pressure of self protection. To expect honesty with the other party and the system is not realistic.

I think a mediation system can be effective with the right litigants. I think we have several mediation-type models available now. The proposed mediation model is fatally flawed, particularly because of the provisions set forth in Section 3325(a)(2) and 3325(c)(2). How can any court, on its own, refer the parties to mediation, or how can one party demand mediation when the other party is not comfortable with participating in the same? Mediation by definition requires participants to make a joint commitment to resolve their differences, agree to participate on equal footing, and assist the mediation process by putting all the facts and figures on the table as quickly and expeditiously as possible. If one side believes that all the information is not available, what is there to discuss? If one side believes the other is lying, how can they be expected to negotiate in good faith? If one side is at a psychological disadvantage because of past emotional or physical intimidation, how can they feel free to express themselves? Furthermore, how can the party who refuses to participate be accused of bad faith if they simply cannot trust the other side? To force mediation, means that one party can force the case to be delayed, avoid going to Court, avoid independent determination of the honesty of one or the other side, avoid the responsibility to produce information

We need to improve our system so litigants can get to Court faster. I urge you to consider whether unilateral no-fault divorce cases should be delayed for two year separation, or whether it is now time to reduce this to a one year separation. Justice delayed is justice denied.

I think the Court should have the authority to pursue the uncooperative litigants with the threat of real sanctions. The imposition of Court fines, litigation and preparation costs (such as accountants, real estate appraisals, business appraisers, and even award of counsel fees) should be used as a carrot/stick. It must be clear that if a spouse is uncooperative in providing financial information, there will be a punishment in order to deter these delay tactics. Right now, counsel fees may not be awarded to the cooperative spouse unless it can be proved that he/she is economically unable to pay his/her fees. Even if that person is able to pay, should they have to pay if the problems are caused by the other side?

Finally, I urge you, do not allow a mediation model which will divert couples from court intervention in the event one or both feel they cannot deal on equal footing. This will only delay the overall resolution.

If legislators want to propose a statewide mediation model, then I challenge you to review the experience of pilot programs as suggested by Philadelphia and other counties. But we have to be prepared to fund the mediation as the Courts fund the Masters and other hearing officers. It is critical that the mediators sanctioned by the Court, have ready access to legal advice, as well as the level of experience and training that you would want if someone you love was meeting with that mediator to resolve these thorny problems.

Consider if your son was losing contact with your grandchildren and your daughter-in-law demanded mediation. Would you want him to be duty bound to attend mediation sessions with a social worker, or would you want your son to have a well-informed lawyer to advocate on his behalf? What if the mother was depriving him of contact with his children? What if the mother accused him falsely of abusing his children? What if she successfully delayed Court intercession while she demanded mediation, and further mediation sessions after your son refused to participate as he felt they were a farce? Doesn't he deserve his day in Court? Doesn't he deserve a prompt hearing before a judge? Doesn't he deserve that she be required to testify, under oath, and be subject to cross examination and rebuttal testimony regarding his role as a father? Wouldn't you want this for your son? I urge you, do not relieve the Court of its responsibility to resolve the tough cases. Every county has incorporated alternative dispute resolution and mediation in its system. If you want to encourage the expansion of these programs, then look at the number of staff available, look at the delay in the Court's ability to reach cases, and let's deal with those practical issues before we open another Pandora's box.

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