

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA

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Senate Bill 432

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House Judiciary Subcommittee on Courts

Room 22, Capitol Annex
Harrisburg, Pennsylvania

Tuesday, August 29, 1995 - 9:20 a.m.

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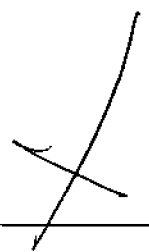
BEFORE:

Honorable Daniel Clark, Majority Chairman
Honorable Jerry Birmelin
Honorable Scot J. Chadwick
Honorable Stephen Maitland
Honorable Al Masland
Honorable Jeffrey Piccola
Honorable Thomas Caltagirone
Honorable Kathy Manderino

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ALSO PRESENT:

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C O N T E N T S

	WITNESSES	PAGE
1		
2		
3	Patricia R. Marcus, Esquire	6
4	Attorney/Mediator	
5	Larry Frankel, Esq., Legislative Dir.	40
6	ACLU of Pennsylvania	
7	Judy Shopp, Esquire	55
8	Policy Chair	
9	Pennsylvania Council of Mediators	
10	Helene Borke, Ph.D., Member	73
11	PA Psychological Association	
12	Divorce/Custody Mediator	
13	Martha Quimby, Executive Secretary	80
14	Father's and Children's Equality (FACE)	
15	Linda A. Collins, Esquire, Chair	111
16	Legal Committee	
17	PA Coalition Against Domestic Violence	
18	Honorable Esther Sylvester	128
19	Administrative Judge	
20	Family Court Div. of Common Pleas Court	
21	Edward Blumstein, Esquire	143
22	Private Mediator/Public Advocate	
23		
24		
25		

1 CHAIRMAN CLARK: Good morning. This
2 is the House Judiciary Committee, Subcommittee
3 on Courts hearing today on Senate Bill Number
4 432 which was introduced by Senator Greenleaf
5 over in the Senate. It's my understanding it
6 has passed the Senate; now waiting action in the
7 House.

8 I'm Representative Dan Clark. I
9 represent the 82nd legislative district which is
10 about an hour west of here on Route 22. I guess
11 it's considered rural Central Pennsylvania. I
12 represent one county in total and parts of three
13 other counties. We have some other House
14 members with us today. I'd like them to take a
15 moment to introduce themselves and then we'll
16 proceed with the testimony. We'll start with my
17 left.

18 REPRESENTATIVE CHADWICK: I'm
19 Representative Scot Chadwick from the more urban
20 northern tier. I have parts of Bradford and
21 Susquehanna counties.

22 REPRESENTATIVE CALTAGIRONE: Tom
23 Caltagirone, Berks County.

24 REPRESENTATIVE MAITLAND: Steve
25 Maitland, parts of Adams County and Gettysburg

1 area.

2 CHAIRMAN CLARK: As I looked over
3 Senate Bill 432, I noticed a few things that we
4 might want to concentrate and take note of
5 today. The first thing is that this bill is not
6 a mandatory mediation bill. It indicates that
7 the courts may order parties to attend an
8 orientation session to explain this mediation
9 process, and thereafter, should the parties
10 consent to mediation, then the Court may order
11 them to mediate such issues that they have
12 specified. If the Court sets up a mediation
13 program, they can order the orientation session
14 but they cannot order the parties to mediation.
15 That is only by agreement of the parties.

16 It's my understanding that some
17 judicial districts already mediate these issues,
18 so it would be interesting to find out their
19 success and how they're getting along with that
20 process.

21 Also, another area that jumped out was
22 the imposition of the additional \$20 filing fee
23 on divorce and custody complaints to be used to
24 fund the mediation program, and then the fact
25 that the Court may discuss additional costs of

1 mediation on either party. The issues raised by
2 that, is the \$20 filing fee a burden? Is it not
3 enough to fund the program; thereby, becoming an
4 unfunded mandate? Does the party shy away from
5 mediation because they may end up being assessed
6 the cost down the road? There are some things
7 for the committee to hear today and to assess in
8 the future.

9 I believe with that we'll call our
10 first individual to present testimony, and that
11 is Patricia R. Marcus, Esquire. She's indicated
12 she's an attorney and mediator.

13 MS. MARCUS: Good morning. Mr.
14 Chairman, distinguished members of the Judiciary
15 Committee: Thank you very much for allowing me
16 the opportunity to present testimony today. I
17 am going to talk about the York County custody
18 mediation program, and I've submitted a brief
19 outline about the things I'm going to speak and
20 I've also attached several documents that may be
21 of interest to you, which I will mention. I'm
22 very excited about Senate Bill 432. It contains
23 a lot of provisions that York County has already
24 implemented.

25 The York County program officially

1 started in January of 1994, and it was a result
2 of popular effort between Judge Blackwell and
3 members of the Family Law Committee of the York
4 County Bar Association. We currently have 26
5 trained mediators that mediate for the Court.
6 Those 26 individuals are attorneys,
7 psychologists, social workers with at least a
8 Master's Degree.

9 When we were setting up our program,
10 we had a lot of discussion about what we were
11 going to require for training. We decided 30
12 hours. Since we were only going to be mediating
13 custody disputes for the Court, we would only
14 require 30 hours of training, by trainers who
15 were approved by the Academy of Family
16 Mediators. The Academy of Family Mediators is a
17 national -- or an international organization
18 that focuses primarily on family mediation.

19 In that 30 hours we also included two
20 hours of domestic violence training. In York
21 County it is the mediator who trains, or who
22 screens for domestic violence. And to do that--
23 and I've attached a copy of this with your
24 materials--we use the Tolman Screening Model,
25 which is a list of questions specifically

1 developed to determine whether domestic violence
2 is an issue in a case.

3 Many of the 26 members of the panel
4 have numerous additional hours above and beyond
5 the 30, and the mediators are required to screen
6 for domestic violence prior to scheduling the
7 orientation session.

8 Now, the way our process works in York
9 County, once a custody complaint has been filed,
10 a conciliation conference is scheduled between
11 10 days or two weeks thereafter. The purpose of
12 a conciliation conference is to try and reach a
13 settlement. However, the methods of reaching
14 settlement conciliation vary greatly compared to
15 mediation. Any cases that do not settle at
16 conciliation are then required to attend one,
17 two-hour orientation session for mediation.

18 During that two hours the mediator
19 explains to the parties what mediation is, and
20 through that information process, encourages
21 them to buy into, for the lack of a better
22 phrase, the process voluntarily thereafter.

23 We don't have an additional filing fee
24 in York County. The parties themselves pay the
25 mediators. The mediators are not employees of

1 the Court. We assessed a \$150 flat fee for the
2 two hours and we ask the parties split that
3 equally. There's a variety of ways that can be
4 handled for individuals who cannot afford to pay
5 the fee.

6 If the parties are able to reach an
7 agreement in mediation, then the mediator drafts
8 what is called a memorandum of understanding.
9 That's just a document that sets forth exactly
10 what the parties have agreed upon. That
11 document is sent to the attorneys to be reviewed
12 with the parties.

13 If everything is satisfactory; if
14 there aren't any other issues for concerns that
15 happen to come up, then one of the attorneys
16 will prepare a stipulation, attach the
17 memorandum to the stipulation, and Judge
18 Blackwell signs it as a court order. So there's
19 no more hearings; there's no court appearances,
20 and the parties actually walk away from the
21 mediation process with an enforceable court
22 order the same as they would if they had to
23 attend three or four days of trial.

24 In our county, once mediation
25 terminates either by agreement or if no

1 agreement was reached, we have our mediators
2 file a report with the judge so that she can
3 keep track of her cases and know which ones are
4 settling, which ones aren't, which ones are
5 going to be coming back to her. I've also
6 attached a copy of that with your documents.

7 As you can see, it's bare bones. The
8 judge is not informed about any of the
9 discussions that take place. She's only
10 informed whether it was screened out as being
11 inappropriate; whether one of the parties or
12 both parties didn't even bother to contact the
13 mediator to schedule the mediation; whether
14 mediation resolved all of the issues, and if it
15 did not, what issues are remaining to be
16 resolved; and whether the issues were resolved
17 outside of mediation. That's all the judge
18 really gets to know about the outcome of the
19 mediation.

20 We have also asked the mediators to
21 file a report to the committee, and that's for
22 our own purposes. We've been trying to keep
23 track the best that we can of our success rate.
24 That report is also attached as a document.
25 It's called the "Custody Mediation Statistical

1 Report". Again, it's very bare bones.

2 Our committee isn't interested in the
3 content of the discussion or even the identity
4 of the parties, but we are interested in: Was
5 the case screened out as being inappropriate?
6 How many sessions did it take for the parties to
7 either reach an agreement or did they just
8 attend a few sessions and they don't reach an
9 agreement? Total number of hours. What was the
10 time span from the first session to the last
11 session?

12 Mediation, one of the benefits of the
13 mediation is that, it's far quicker than the
14 court system, and we want to know just how long
15 it's taking these people to reach an agreement
16 and get through the process. We don't want
17 mediation to be an obstacle to get to court. We
18 don't want it to be a delayed tactic because the
19 Court -- It's already anywhere from six months
20 to a year to get into court. We don't want
21 mediation to delay that any longer. So, we're
22 really trying to keep track of how we're doing.

23 Then as you can see, we just check off
24 whether mediation was successful, et cetera?
25 Whether it was referred by court order or what

1 was referred privately.

2 All of our mediations are to be kept
3 confidential. There's two ways we have of
4 notifying the parties that it is confidential.
5 One way is, in the court order that Judge
6 Blackwell signs directing the parties to attend
7 the one orientation session and that's also
8 included in your materials. It's labeled "Order
9 for Mediation".

10 As you can see, number 2, they are
11 ordered to contact mediator within 10 days from
12 date of the order to schedule a session. It
13 talks about how they're to pay for it. It also
14 talks about, there are no third parties allowed
15 in, particularly for the orientation sessions.
16 We just want the parties and the mediator.

17 However, if the mediator decides that
18 it might be helpful to have a third-party in;
19 for example, an issue involves a new spouse,
20 boyfriend or girlfriend, or whatever, the
21 parties are to cooperate with the mediator to
22 bring that person in.

23 Then number 6, that mediation is
24 private; and number 7, that it's conversational.

25 Also, as mediators, we have our own

1 forgot to mention one thing. If there are any
2 allegations of child abuse, sexual abuse, those
3 things are not held confidential. And that is
4 made apparent to the parties right upfront, but
5 the discussions are confidential. But, if
6 there's child abuse involved, we're not going to
7 keep that confidential.

8 Our program, as I said, has been in
9 existence since January of '94. Although we
10 have been keeping track of our own statistics,
11 it became apparent that that isn't sufficient.
12 We really need to know a lot more, have a lot
13 more information to determine the success of our
14 program. So, we've applied for State Justice
15 Institute Grant to hire an evaluator to come in.
16 Somebody objective; somebody trained to handle
17 the evaluations; somebody that can dig a lot
18 deeper into, for example, how many custody
19 complaints are filed with the court every year.
20 Of those complaints, how many actually get
21 referred to mediation, on and on and on.

22 We also want some follow-up with the
23 parties themselves to develop a survey that we
24 can send out to the parties, maybe immediately
25 after mediation to get their reaction on how

1 of reports that were sent in were 133. Out of
2 those, nine were rejected during the screening
3 process; 58 of those were a complete success
4 during the mediation; 19 were a partial success.

5 One thing you need to understand, we
6 also need to define what is a partial success.
7 Is resolving one issue a partial success? Is
8 just getting the parties to communicate a
9 success? I think it is, but we also need to
10 have a definition of success. And 37 or 33.9
11 percent were a complete failure. This was back
12 in January.

13 One of the statistics I'd like to
14 point out to you, the number of cases that were
15 completely resolved in one session, one,
16 two-hour session, 20.2 percent. I think that's
17 very good. I'm very proud of the statistics. I
18 got an updated report as of August of '95, and
19 we have gone up a little bit in our complete
20 successes, but we are holding around the same
21 amount, 45 to 53 percent being successfully
22 mediated.

23 But again, it would be nice to know
24 six to eight months, a year down the road, are
25 those cases going back in court or not? As you

1 are probably aware, custody cases are famous for
2 constantly going back into court. Couples just
3 constantly fighting. That's what we want to try
4 to avoid.

5 With respect to Senate Bill 432, I
6 think our program pretty much implements a lot
7 of provisions that you provided, such as, the
8 confidentiality, the fees. Again, the parties
9 are not required to pay a higher fee, and the
10 Court is not actually funding the program, which
11 I think is a unique part of our particular
12 program. I think our program has been one of
13 the first, if not the first implemented in
14 Pennsylvania. Do you have any questions?

15 CHAIRMAN CLARK: Thank you, Ms.
16 Marcus. Let me introduce some additional House
17 members that have joined us. Representative
18 Jeffrey Piccola who is Chairman of the Judiciary
19 Committee is here; Jerry Birmelin,
20 representative from northern Pennsylvania,
21 northeast, and Ms. Manderino from Philadelphia.

22 I have a few questions. You say that
23 you call this as a mandated custody mediation
24 program. My understanding is that the parties
25 are only mandated to go to the two-hour

1 orientation session.

2 MS. MARCUS: That's correct.

3 CHAIRMAN CLARK: That is a set \$150
4 fee?

5 MS. MARCUS: That's correct.

6 CHAIRMAN CLARK: If that process
7 continues with the mediator, how are the
8 mediators compensated from that point on?

9 MS. MARCUS: Each mediator has the
10 ability to contract individually with the
11 parties, so the fee may be different for
12 additional sessions. But, I think for the most
13 part we're not cutting off our noses to spite
14 our faces. The fee is just staying the same for
15 additional sessions, but I can't say that for
16 sure for all 26 mediators.

17 CHAIRMAN CLARK: But the parties pay
18 the mediators --

19 MS. MARCUS: Yes.

20 CHAIRMAN CLARK: -- and not the courts
21 or the county or someone like that?

22 MS. MARCUS: Yes.

23 CHAIRMAN CLARK: You were able to
24 implement this program without the assistance
25 from the legislature?

1 MS. MARCUS: Yes, we were.

2 CHAIRMAN CLARK: I have no further
3 questions. Ms. Manderino.

4 REPRESENTATIVE MAYERNIK: Thank you,
5 Mr. Chairman. Ms. Marcus, I don't know how
6 familiar you are with the exact language of the
7 bill.

8 MS. MARCUS: I have it in front of me.

9 REPRESENTATIVE MANDERINO: Okay. I
10 don't know how much you might have had in the
11 handling in choosing of the words. If I'm
12 asking you something that's not appropriate, let
13 me know. I'm a bit confused about the
14 permissive versus the mandatory nature of what's
15 being proposed here.

16 As I read the legislation, and
17 particularly at the top of page 2, Subsection B
18 of Section 3901, the Court can order you, as
19 Representative Clark just established, to go to
20 the mediation orientation at a cost to you, and
21 that's mandatory. But then the parties have to
22 consent to the mediation because it says,
23 thereafter should the parties consent to
24 mediation. But then it goes on to say, then the
25 Court may order them to mediate such issues as

1 the Court may specify.

2 So I'm sitting here trying to imagine
3 how it works. First they order me to go and I
4 have to go. But then the next point, if I say
5 I'm not interested, is that the end of it? And
6 it seems to be the answer is yes. If I say,
7 okay, I'm interested in trying this, then have I
8 given the Court the ability to mandate me as to
9 what issues I'll mediate; to mandate me to stay
10 in it if somewhere along the line down in the
11 future I have decided it's not working; it's
12 broken down and it's costing me too much money
13 and I'm not getting anywhere.

14 Then I'm also concerned about the
15 mandatory nature of what the Court can do,
16 because the next section underneath talks about,
17 well, the Court can't order you to go to
18 orientation or mediation if there's been child
19 or domestic abuse. Just by the very nature of
20 Court shall not order an orientation session or
21 a mediation session then confirms my notion if
22 you give this blanket consent in the beginning,
23 thereon after the Court can continue to mandate
24 you to do something that you do not want to do.

25 So I guess my question is, is that

1 your reading of it too? If that's not, what is
2 the intent so that maybe the language can
3 reflect that?

4 MS. MARCUS: I'll try to address your
5 question the best that I can. I did not have a
6 hand in the language. To be perfectly frank,
7 the provision started, thereafter the parties
8 consent to mediation the Court may order them to
9 mediate such issues as they've specified
10 troubles me as well. Normally, it's the parties
11 that define their issues with the assistance of
12 the mediator.

13 However, there may be a time when
14 parties come before a court with just one
15 particular issue. For example, transportation.
16 I'm focusing on custody here because that's all
17 we really mandate in York County is custody
18 mediation. The Court may want them to try one
19 orientation session for transportation, or
20 whatever that one issue may be. But, it would
21 be helpful for the parties themselves to define
22 their own issues because the parties are the
23 ones that are going to be designing and
24 developing their own agreement.

25 The mediator doesn't have power or

1 authority to impose anything on the parties.
2 They're going to be reaching their own
3 decisions.

4 How we handle it in York County is,
5 the mediator explains the process. In
6 explaining the process, gives the parties
7 information on how it is beneficial for them to
8 mediate rather than litigate. Then, hopefully,
9 the parties will then voluntarily buy into the
10 process and want to attend future decision
11 sessions.

12 But, nobody is sitting there with a
13 gun telling them that they have to mediate
14 certain issues or attend sessions after the
15 orientation session. But, I have found very,
16 very few decline to come at least one more after
17 that. Very few only attend the one session.
18 Some do attend one session because they reach an
19 agreement in one session.

20 With respect to ordering mediation
21 down in paragraph 2 that you are referring to,
22 it might be helpful if it read more order and
23 orientation session, because mediation is to be
24 a voluntary process. So, it would be helpful if
25 the bill expressed that, perhaps, a little more

1 clearly. Does that answer your question?

2 REPRESENTATIVE MANDERINO: Yes. If I
3 can paraphrase what you're saying to me is,
4 mandated mediation won't serve anybody purposes,
5 so therefore, we shouldn't be giving the Court
6 tools to mandate something against the wishes of
7 the parties?

8 MS. MARCUS: Well, the orientation
9 session, definitely to mandate that has been
10 very helpful because the parties don't know what
11 mediation is. They think it's meditation
12 sometimes. They really get confused. And it's
13 the mediator's responsibility to teach them what
14 mediation is all about.

15 As they learn about it, they become
16 excited about it, some, and want to then
17 voluntarily participate in it. But if they
18 don't have any desire to try and attempt to
19 reach settlement, and the Court just forces them
20 to attend five or six sessions, or whatever,
21 that might not been very productive, or as
22 productive as just getting them in there to get
23 the information and then allowing them to make
24 the decision thereafter if they want to attend
25 other sessions.

1 REPRESENTATIVE MANDERINO: The only
2 other concern that I have is, why should we
3 legislators be allowing the courts to mandate
4 people to go to something that's going to cost
5 them \$150 or something? If it was an
6 orientation session that was free so you can
7 understand what you may or may not be getting
8 into, maybe I'd have less trouble with it.

9 MS. MARCUS: Again, an orientation
10 session we order for two hours. You don't
11 really have any time in here for how long the
12 orientation session is to last. I'm not so sure
13 it's necessary to anyway. We've just found in
14 our experience that one hour isn't long enough
15 to get much done. Two hours with custody is
16 just about all anybody can stand.

17 You're doing more, a lot more than
18 just giving them information. You actually
19 start getting into the issues and you actually
20 start mediating. The parties actually start
21 telling you what their concerns are, what their
22 issues are. You start helping them to develop
23 options, an alternative.

24 REPRESENTATIVE MANDERINO: So, in
25 essence, what we are doing is mandating a first

1 session; not mandating an orientation?

2 MS. MARCUS: No, you are mandating an
3 orientation session because they do get an awful
4 lot of information and they are free to leave.
5 Honestly, if they don't want to pay --

6 REPRESENTATIVE MANDERINO: But they
7 pay for it?

8 MS. MARCUS: Yes.

9 REPRESENTATIVE MANDERINO: I mean,
10 that's the part that bothers me is that we're
11 giving the Court permission to mandate a
12 procedure. Now, a different county could set it
13 up so that their orientation session is free.
14 We've given a county leave to set up an
15 orientation session that could be costly to
16 parties and giving them ability to mandate that
17 first session. That's what I'm getting to.

18 MS. MARCUS: We have found in our
19 experience that if parties get something for
20 free they don't value it too much. If they have
21 to give something out of their pocket, they tend
22 to think it's something worthwhile.

23 Secondly, we haven't had anybody
24 really complain about the fee. If they can't
25 afford it, the judge is not hesitant about

1 asking us to do a pro bono, and we all do. We
2 reduce our fees for those that really just
3 cannot afford it. One of our mediators works at
4 Legal Services, so Legal Services has a trained
5 mediator right on board for those individuals.
6 So, it hasn't been a problem.

7 REPRESENTATIVE MANDERINO: Thank you,
8 Mr. Chairman.

9 CHAIRMAN CLARK: Representative
10 Caltagirone.

11 REPRESENTATIVE CALTAGIRONE: You had
12 mentioned in your opening statement that you had
13 26 trained members, attorneys, psychologists,
14 and social workers. Now, do psychologists and
15 social workers serve as a mediator in the
16 presence of an attorney, or do they also serve
17 as mediators without the benefit of an attorney?
18 I'm just curious about how you work that.

19 MS. MARCUS: They can mediate
20 individually, solely if they want, or they can
21 team up with an attorney if they want.
22 Sometimes we have two attorneys team up and
23 co-mediate together.

24 REPRESENTATIVE CALTAGIRONE: Of the
25 26, how many are actually attorneys?

1 MS. MARCUS: Off the top of my head
2 I'd have to say 17 or 18.

3 REPRESENTATIVE CALTAGIRONE: I was
4 just wondering about the acceptance of the local
5 Bar and Judges because I'm sure you know that
6 you're cutting into somebody's territory.
7 That's a turf area that in the seven years that
8 I've been Democratic Chairman of the committee,
9 this is one of the most vulnerable areas that I
10 think this committee has to deal with.

11 In divorce situations there's always,
12 it appears a winner and a loser usually. When
13 it comes to the division of property and other
14 assets, that can prolong a dissolution of a
15 marriage. How do you fit that into the scheme
16 of things, because in many situations we have
17 people that have contacted members of this
18 committee over the years that they've been
19 waiting for divorces to be finalized that have
20 seemed to drag on and on and on. Sometimes it's
21 in this state; sometimes it's unrelated with
22 other states that choose not to deal with the
23 issue or delay, it appears.

24 MS. MARCUS: First of all, let me
25 explain, York County only has the mandatory

1 custody mediation program at this time. We
2 don't mandate any divorces yet.

3 To address your concern about the
4 reaction of members of the Bar, members of the
5 Bench, for the most part it's been very
6 positive. However, there are those out there
7 that don't appreciate the process. I think it's
8 because they don't know about the process,
9 they're not educated about mediation. They
10 think it's therapy. They think it's counseling
11 or it's a bunch of fluff, and they don't
12 understand it. And yes, some are very concerned
13 about the hand that fits in their pocket, the
14 way they perceive it.

15 With respect to your question on
16 divorce mediation, I do a lot of that privately.
17 I'm having more and more attorneys refer
18 divorces to me since our custody program got
19 started, which I find exciting. Now that they
20 have had a year-and-a-half or so to see how the
21 custody mediation is working, to see that their
22 clients are being satisfied, that they're
23 walking away feeling good, they tend now to
24 start referring some of the divorces.

25 In a divorce, and even in custody, the

1 earlier you get the case the easier, more
2 effective mediation can be, but there are some
3 out there that have been snagged in the court
4 system, which I have mediated, that were
5 extremely difficult cases, but mediation can
6 still work there. We can bring in experts to
7 evaluate pensions and do all those kinds of
8 things as much as attorneys use in their
9 practice. Does that answer your question?

10 REPRESENTATIVE CALTAGIRONE: Yes, that
11 does. There's just one other issue I'd like you
12 to address. Uniform standards in other
13 counties, do other counties have something
14 similar to what you've done in York? If you
15 know that, shouldn't we have uniform standards
16 statewide, because what you'll have is a
17 hodgepodge standard from county to county
18 depending on the judge who happens to want a
19 model program?

20 MS. MARCUS: In my personal opinion I
21 would like to see it uniform. I'd like to see
22 York County as a pilot county, quite frankly. I
23 think that would be a good idea to have a
24 uniform. I know other counties have implemented
25 a program since we got ours on board, and

1 they're doing all kinds of different things.

2 For example, Lehigh County has
3 actually hired two mediators that have been
4 trained, so they are actually employees of the
5 Court. They're doing it a little bit
6 differently than we are in York County, and
7 other counties are getting on board. I know
8 that Snyder County's soon going to be getting on
9 board, Montgomery County, Philadelphia, on and
10 on. It's really starting to take hold
11 throughout the state.

12 CHAIRMAN CLARK: Representative
13 Piccola.

14 REPRESENTATIVE PICCOLA: Thank you Mr.
15 Chairman. Mrs. Marcus, I apologize that I
16 missed the beginning of your testimony, so if
17 these questions elicit repetition that's my
18 fault. As I understand the program in York
19 County, you go through a conciliation process
20 first. Could you describe that in some detail
21 about how conciliation process works?

22 MS. MARCUS: Sure. There are five
23 appointed conciliators that are employees of the
24 Court; there are five attorneys. When the case
25 of the custody complaint is filed, they get it

1 within 10 days or two weeks thereafter. None of
2 them have been trained in mediation, so it's a
3 quasi-judicial process. The parties are in
4 there with their attorneys.

5 Going through the process myself many
6 times, it's mostly the attorneys that do the
7 talking and not the parties. The parties don't
8 have near the input in that process as they do
9 in mediation. It's the attorneys that are
10 advocating if it's an advocacy process rather
11 than conciliatory process like mediation. And,
12 the conciliator has the authority of the Court
13 to enter a recommended order, something
14 temporary until they can go to court, even if
15 they haven't reached an agreement. So, it's a
16 lot of arm twisting. They are given one hour to
17 do it. That's just hardly enough time to get
18 people comfortable.

19 For example, yesterday I had a
20 conciliation. The conciliator, and this is very
21 common, brought the attorneys in first. We
22 talked with the conciliator a good half hour.
23 Then we went out and talked to the parties a
24 little bit, individually, separately; came back
25 in, just the attorneys again. Parties were

1 still sitting out there. Then finally at the
2 last minute the parties were brought in and they
3 had a little bit to say. The conciliator
4 entered the order. The parties aren't part of
5 the process in conciliation near as much as they
6 are in mediation.

7 REPRESENTATIVE PICCOLA: How does that
8 work if the conciliator has the power -- and I'm
9 somewhat familiar with that. We have a program
10 like that in Dauphin County where we have
11 conciliators that -- although I think the
12 parties are more involved. They go in sometimes
13 separately without lawyers to talk to the
14 conciliators.

15 But as you say, the conciliator has
16 the power to enter a temporary order which they
17 recommend to the judge, and they have the right
18 to go up before the judge if you don't agree
19 with it, and so forth. How does that kind of
20 system -- If the conciliator is recommending an
21 order, how does that encourage mediation?
22 Because, one side or the other presumably will
23 be satisfied with the recommended order so
24 there's not any incentive to mediate.

25 MS. MARCUS: You're right.

1 REPRESENTATIVE PICCOLA: And then you
2 have to sit through this two-hour mandated
3 session.

4 MS. MARCUS: You're right. It does
5 cause sometimes a little bit of a difficulty
6 because there's that interim step. It's not
7 like people going right into mediation right
8 after the complaint is filed. And, yes,
9 oftentimes you'll have one party that's very
10 happy with the recommended order and does not
11 have any motivation, or very little motivation
12 to the mediation.

13 Since mediation is ordered and they
14 have to attend the orientation session, then the
15 mediator has her work cut out to try and get
16 that person that's not very motivated to try and
17 settle because he or she is very happy with the
18 order, and it is work.

19 But, I have seen it over and over
20 again that parties really do -- parents really
21 do want to make decision for their children.
22 They really do want to communicate with each
23 other and try to reach their own agreements.
24 And very often the court order, even if one
25 person is happy with it, there are certain

1 things they want changed; things they are
2 concerned about that weren't addressed at all in
3 conciliation, and things that might not ever get
4 addressed in court process, but it's a concern
5 of theirs and they would like it addressed and
6 that can be done in mediation.

7 REPRESENTATIVE PICCOLA: Well, I can
8 appreciate all of that, but it seems to me if
9 you're going to have conciliation and a
10 recommended order entered, and then mediation,
11 the same process, you're doing it backwards.
12 You ought to do the mediation first, and if it
13 doesn't work then go into conciliation
14 because --

15 MS. MARCUS: I absolutely agree with
16 you.

17 REPRESENTATIVE PICCOLA: I'm sure
18 you've had some success, but it doesn't seem to
19 me from my experience once you get through that
20 conciliation process, knowing what the
21 conciliator is going to recommend to the judge,
22 the odds are, both sides have pretty much
23 decided whether they're going to live with,
24 accept, contest what the conciliator is going to
25 recommend. There's not going to be much of a

1 move for mediation, I would not think.

2 MS. MARCUS: You are absolutely right.
3 But, you have to remember the conciliation
4 process was in effect in York County a long time
5 before mediation was ever even thought of or
6 attempted, and we weren't there to try to put
7 people out of jobs. We didn't want to interfere
8 with their work with the Court. There's five of
9 them. Even though it's not the ultimate
10 situation, we're working with it because we
11 don't want to antagonize members of the Bar
12 anymore than the mediation already antagonizes
13 them.

14 REPRESENTATIVE PICCOLA: I'm an expert
15 at that.

16 MS. MARCUS: So you're right. It
17 would be nice. It would be nice if mediation
18 could happen first. I'll be frank with that.
19 But we are working with it and it is a little
20 bit more difficult this way. There's no doubt
21 about it, but it's still working.

22 REPRESENTATIVE PICCOLA: How many
23 counties have a conciliation program, if you
24 know?

25 MS. MARCUS: I don't know.

1 REPRESENTATIVE PICCOLA: It just
2 appears to me, I could see some value to it. In
3 fact, in my opinion if members of the Bar were
4 doing their job in representing their clients,
5 you wouldn't need mediation at all, but I think
6 a lot of times lawyers fail their clients, but
7 that's just my personal opinion.

8 I just think it's backwards. I think
9 you should go into mediation first. If it
10 fails, it should be voluntary mediation through
11 some sort of program that's available.

12 MS. MARCUS: Well, if you want to
13 stick that in your bill, the judge would have a
14 good reason to do it that way.

15 REPRESENTATIVE PICCOLA: Thank you.

16 CHAIRMAN CLARK: One follow-up on
17 Representative Piccola's question. Don't you
18 need that conference or court order to stabilize
19 the situation so that people know who has the
20 child when and they are not being accused of
21 kidnaping and not returning? Don't you have to
22 stabilize the situation and put some ground
23 rules on to begin with?

24 MS. MARCUS: There are some
25 situations, yes, where you would have to do

1 that. But the real emergency situations can't
2 even wait the 10 days or two weeks to get in the
3 conciliation. They need something from the
4 judge right away and it would go on the
5 emergency petition and then get their order.

6 So, yeah, there are some situations
7 where you may have to have an order immediately
8 or very quickly, but they're not as common as
9 you might like to think.

10 CHAIRMAN CLARK: Representative
11 Masland.

12 REPRESENTATIVE MASLAND: Thank you,
13 Mr. Chairman. Mrs. Marcus, good morning. I
14 apologize if this was asked and covered in your
15 testimony before I got here. The Tolman
16 screening, at what stage does that really occur?
17 Obviously, you need to screen before you have
18 both parties in there before the mediator as to
19 whether or not there are some abusive
20 situations. When do you do that?

21 MS. MARCUS: We do that when the
22 parties call in to schedule it.

23 REPRESENTATIVE MASLAND: That's over
24 the phone then?

25 MS. MARCUS: Yes.

1 REPRESENTATIVE MASLAND: Chairman
2 Piccola just left, but it strikes me that his
3 colloquy with you on the conciliation before
4 mediation, or mediation before conciliation
5 speaks for not mandating one system statewide.
6 I think you have a real problem if we put in
7 this bill and then have mediation first and then
8 conciliation, or vice versa, and then send that
9 out to 67 counties. I think we need 67
10 different testing grounds to see what works best
11 because if any of you worked as a model, you
12 don't even like the way that's set up,
13 conciliation before mediation.

14 If we're going to set it up as a may
15 as opposed to a shall, I know that there are
16 probably 65 or 67 president judges who are not
17 going to be interested in establishing anything
18 if they're told by us how it's going to be done.
19 I think we need at least 5, 10 years of testing
20 across the state to see what may work best.
21 Even then we may not want to mandate anything
22 statewide.

23 One more thing I was thinking about,
24 when Chairman Caltagirone--everybody is a
25 Chairman; chairman Birmelin--with his question

1 is for both of the parties to come out feeling
2 like winners.

3 REPRESENTATIVE MASLAND: Thank you,
4 Mr. Chairman.

5 CHAIRMAN CLARK: Thank you. Thank
6 you, Ms. Marcus. We certainly appreciate your
7 testimony and insight. The next person to
8 testify in front of the committee is Larry
9 Frankel, Esquire. He is the Legislative
10 Director from the ACLU Pennsylvania.

11 MR. FRANKEL: Thank you, Chairman
12 Clark. I will be brief because I have no
13 expertise on mediation, although we have our
14 concerns about the legislation. While mediation
15 may be an appropriate means for resolving a
16 variety of conflicts, the ACLU believes that it
17 should be up to the parties, on their own and
18 without legal interference, to seek mediation.

19 We do not think that courts should be
20 ordering parties to attend orientation sessions
21 about the mediation process. Once a court
22 indicates its support for mediation, a party may
23 feel an obligation to consent to mediation,
24 believing that, by doing so, the court will view
25 her or him more favorably. Parties can seek

1 information about mediation without court
2 orders. They should not be subject to direct or
3 indirect judicial coercion with regard to that.
4 However, we recognize that this legislation
5 rather easily passed the Senate.

6 If this subcommittee supports moving
7 forward, we would encourage you to make two
8 changes to the bill. First, we oppose the
9 imposition of an additional filing fee on all
10 divorce and custody complaints, one of the
11 issues that Chairman Clark raised at the
12 beginning of the hearing. Many parties seeking
13 a divorce already resolved all of the economic
14 issues and questions related to child custody
15 and visitation before the divorce complaint is
16 even filed. They are merely looking for the
17 Court to enter the divorce decree, if necessary
18 an order to enforce a merger, or do something
19 with the settlement agreement that they've
20 reached.

21 In other cases the parties have been
22 separated for years and they're finally getting
23 around to having the formal divorce decree
24 entered. Nobody thinks they're going to
25 reconcile. They probably have no issues that

1 they need to even discuss any further. Imposing
2 an additional fee on these kinds of parties
3 derive no benefit from the mediation program is
4 unwarranted.

5 The ACLU does not believe that every
6 party should be required to pay the additional
7 fee to obtain a divorce. This fee is
8 particularly inappropriate for victims of
9 domestic abuse who are automatically exempted
10 from the mediation program. The imposition of
11 this extra cost on an abused party would be
12 patently unfair. We recommend that the bill be
13 amended so that the mediation program will be
14 funded either through general revenues or
15 through fees paid by those who actually use the
16 services.

17 We are also aware of the possibility
18 that a court-ordered counseling mediation, or
19 whatever, can become a vehicle for the promotion
20 of religious points of view. We have been
21 representing a woman who characterizes herself
22 as a born-again Christian. The Court of Common
23 Pleas in her county has issued an order
24 requiring all divorcees with minor children
25 attend counseling.

1 Pursuant to a contract awarded by that
2 court, Catholic Charities conducts the
3 counseling in that county and the organization
4 charges a \$35 fee. Our client is petitioning
5 for an exemption to that rule. She does not
6 feel she should go to counseling conducted by a
7 religious organization that is not one that she
8 necessarily agrees with.

9 I bring that case to your attention
10 because it shows to me that your including
11 specific language to guarantee that the
12 mediation programs will not unconstitutionally
13 endorse any religion or religious point of view
14 or will not interfere with anybody's rights of
15 free exercise of their own religion. I think
16 that's some simple language that can be added to
17 make sure the courts does not contract or get
18 involved in promoting any religious point of
19 view through the mediation program.

20 Once again, I tried to be brief. I
21 thank you for inviting me to testify. If
22 anybody has any questions, I'll be happy to try
23 to answer them.

24 CHAIRMAN CLARK: Thank you.
25 Representative Chadwick.

1 REPRESENTATIVE CHADWICK: Thank you,
2 Mr. Chairman. Mr. Frankel, you may not have any
3 expertise, but I think you've hit a couple home
4 runs here. I agree with you completely on the
5 issue of ordering parties to attend these
6 orientation sessions. Having practiced law
7 myself, I think I really sense what indirect
8 judicial coercion can be. I think you're
9 absolutely right on that issue.

10 I also agree with you on the fees. I
11 think they should only be paid by those who
12 actually use it. I think there are a number of
13 situations where some are warranted and those
14 fees should not been charged. So, I think that
15 you're right on that also.

16 I'm intrigued by the last part of your
17 testimony, particularly the issue of Catholic
18 Charities conducting counseling in one of the
19 counties. Ignoring for the moment the fact that
20 counseling mediation are entirely different
21 issues and different matters, I am curious about
22 this Catholic Charities thing. Do they, to your
23 knowledge, put any kind of a religious bend into
24 their counseling?

25 MR. FRANKEL: I don't believe they do.

1 I tried to get more information about this
2 particular case, but the attorney who handles it
3 was on vacation. My understanding is that, the
4 woman objected because it was an organization
5 run by a religious group other than her own; not
6 because of the content of the counseling.

7 However, it strikes me that unless the
8 legislature is very clear or the courts are
9 very clear in their guidelines, you could end up
10 with mediators; not just counselors, but
11 mediators who do have a religious point of view
12 and religious views on appropriate ways to raise
13 children, or even the appropriateness of
14 obtaining a divorce. That should not
15 interfere -- I'm not saying it necessarily
16 would, but that should not interfere with the
17 duties that the mediator has, which is not to
18 impose that.

19 REPRESENTATIVE CHADWICK: Do you know
20 whether or not that county's courts have any
21 guidelines regarding what counseling --

22 MR. FRANKEL: I do not know. I can
23 try to obtain that information if it would be
24 helpful.

25 REPRESENTATIVE CHADWICK: You peaked

1 my curiosity. Thank you very much.

2 CHAIRMAN CLARK: Representative
3 Chadwick, if I could follow that up. You were
4 concerned that if a judge ends up with a case in
5 front of him, the first thing that triggers in
6 the back of his mind is, why didn't these guys
7 get this done in mediation? Is that what you
8 indicated as far as mandating orientation
9 session?

10 REPRESENTATIVE CHADWICK: Particularly
11 in a small county where there may only be one
12 judge and a heavy workload, I think many of us
13 who practiced in situations like that appreciate
14 the fact that a judge may be sympathetic to
15 attorneys who don't put him to more work than
16 necessary. The attorney, while nothing is ever
17 said, expressly may indirectly feel that if he
18 doesn't regularly take his cases through
19 mediation first, I think the judge may be
20 annoyed with him and that it may some day show
21 up, consciously or subconsciously, in the way
22 he's treated by the judge. So, I agree with Mr.
23 Frankel on this issue.

24 MR. FRANKEL: I would just like to add
25 two points. Having practiced in an urban county

1 the workload is the same problem. I think that
2 many lawyers are reluctant to put their judges
3 to work too hard in Philadelphia.

4 In addition, the concern is over the
5 party rather than the attorney and their
6 perception. This judge ordered me to go to this
7 session. This judge must think this is a good
8 thing and this is important. Even though I
9 don't really want to go through mediation and
10 maybe my lawyer is saying it isn't going to make
11 a difference, I still feel that there's some
12 pressure there. That's where the issue I raise
13 stands. I agree with Representative Chadwick.

14 CHAIRMAN CLARK: Representative
15 Masland.

16 REPRESENTATIVE MASLAND: Thank you.
17 As you were talking to Representative Chadwick,
18 it struck me that we, I believe, have to be
19 careful how far we go with this or any
20 legislation dealing with the courts, because
21 certainly we can tread on the court's
22 jurisdiction and they'll say, you've gone too
23 far. That's our bailiwick. You're the
24 legislature. We're the courts. We write the
25 rules of court and that's it.

1 We do have -- and I wished I had
2 checked the rules, but I believe maybe in
3 statute, I know it's in the rules insofar as the
4 court-order counseling as to when you can
5 require court-order counseling. Is that in
6 statute? It is in statute and rules. But
7 basically we leave that up to the Court as to
8 how they are going to do that in any given
9 county.

10 The courts in a county will have a
11 list of counselors that one party or both
12 parties can agree upon who they're going to go
13 to. But I don't know that we can with the
14 mediation be too specific as to how that's going
15 to run. We might get into problems there.

16 MR. FRANKEL: Well, the way I read the
17 bill, I don't think there's a lot of specificity
18 for that. The State Supreme Court is supposed
19 to develop guidelines and each county can elect.
20 It really gives a lot of discretion, which then
21 triggers the concern about the filing fee
22 because that's what, in essence, the legislation
23 ends up doing more than anything because
24 counties get to elect whether they want to.

25 If they do elect, then the legislature

1 has therefore imposes additional filing fee on
2 every divorce case or county that's elected to
3 proceed. From the previous witness it's clear
4 the counties can adopt mediation programs
5 without this legislation. They don't need this
6 legislation to do so.

7 REPRESENTATIVE MASLAND: They can
8 decide how much it's going to cost if they're
9 going to charge.

10 MR. FRANKEL: If they're going to
11 charge, I would submit if the county were not to
12 waive any fee they do charge and require that
13 fee to be paid in order to file the divorce
14 complaint, then you may run into a issue to be
15 raised about access to the courts in that
16 county.

17 But, this legislation is permissive in
18 almost every respect with regard to the counties
19 except for dictating how it's to be paid for.
20 That I think, if you ask me my organization's
21 biggest concern, it's that imposition of that
22 fee.

23 REPRESENTATIVE MASLAND: Just one
24 other comment about -- I think everybody up
25 here, everybody in this room would agree that

1 mediation is going to work best when the parties
2 willingly, voluntarily agree that this is where
3 we should go. We shouldn't go to court
4 adversarially. But there are situations where,
5 sometimes, the nudge in the right direction does
6 make a difference, as with court order
7 counseling. Everybody can lead a horse to
8 water, but you can't make it drink.

9 In all my divorce practice, which I'm
10 glad I'm in the legislature now because I don't
11 have it anymore. That was very, very trying. I
12 advised all my clients of their right to seek
13 counseling. I had a couple cases where you have
14 a party that really wants counseling and the
15 other party doesn't. You say, well, we're going
16 to require it. There are going to be three
17 sessions. Maybe the counselor will have you
18 together for three; maybe the counselor will
19 have you separate for each separate one and then
20 together for the third; who knows how it's going
21 to work.

22 Sometimes it worked and the parties
23 got back together. I consider that a win, even
24 though I didn't have to go on with the case and
25 get a huge fee as they charge in Cumberland

1 County. I think that in the case of the
2 mediation, maybe that will work too. I'm sure
3 there's going to be some people, I really don't
4 think we should go to court. If my husband or
5 wife would just sit down and talk, maybe we
6 could work this out. I feel there are going to
7 be some situations where it is actually going to
8 make a big difference. Although I'm generally
9 opposed to forcing people to do anything, this
10 might be one way of doing it.

11 MR. FRANKEL: There may be situations
12 certainly where mediation forced on a reluctant
13 party is helpful. Do we want a broad-based rule
14 imposing that, or giving a lot of authority for
15 courts to impose that? I think that in some
16 essence is the question about, even though this
17 is permissive and maybe the legislation should
18 be looking at what they can do to help counties
19 want to adopt mediation programs, what resources
20 they need, what assistance they need so they can
21 go voluntarily.

22 I don't see this legislation enacting
23 broad rules that are the same on a county by
24 county basis. I think that we have to be
25 careful. You have to be careful that you're not

1 imposing burdens uniformly across the states
2 that may be inappropriate in a large number of
3 cases; that the Commonwealth is not forcing
4 people to go through a process that's going to
5 be useless to them. There may be instances
6 where it's appropriate; maybe the Court should
7 have some authority to exercise some discretion.

8 But, in terms of general policy for
9 every county in the Commonwealth, I think there
10 needs to be caution, a certain wariness to do so
11 because this should be a voluntary process, but
12 people should voluntarily seek to solve these
13 kinds of conflicts because, even in a forced
14 mediation situation the party that is reluctant
15 to go may have very good reasons for not doing
16 so, and maybe, being forced into mediation may
17 alter a certain imbalance of power that already
18 exists between the parties that they seek to
19 remedy through normal court action and don't
20 want mediation to interfere with rights that
21 they may have.

22 REPRESENTATIVE MASLAND: Thank you.

23 Thank you, Mr. Chairman.

24 CHAIRMAN CLARK: All right.

25 Representative Birmelin.

1 REPRESENTATIVE BIRMELIN: The only
2 point I want to make was in response to Mr.
3 Frankel's latter illustration of the counselor
4 that was opposed to by the woman who described
5 herself as a born-again Christian. I don't
6 think counseling is the subject of this
7 legislation. It's mediation.

8 I was looking through the information
9 that Ms. Marcus gave us on the standards for
10 American Academy of Family Mediators. One is
11 that the mediator has a duty of disclosure to
12 reveal any biases that he or she has relating to
13 the issues to be mediated. So that upfront, if
14 the mediator feels very strongly about
15 something, which often happens as a result of a
16 religious point of view, that is made known to
17 people who he or she is mediating for.

18 As opposed to counseling which I
19 think, really, it's a situation where you are
20 trying to impose your views or trying to sway
21 them that your views are a solution to the
22 problem that you are facing. So while I can
23 appreciate your pointing that out in the
24 illustration that you gave, I don't think it's
25 appropriate to this legislation.

1 Parenthetically, I might say that I'm
2 a little surprised that the ACLU has ever
3 defended or represented a born-again Christian.
4 Usually you're attacking them. I do thank you
5 for that illustration. I don't think it's
6 appropriate for this legislation.

7 MR. FRANKEL: I would disagree about
8 appropriateness. I acknowledge counseling but
9 not mediation. And until and unless certain
10 specific standards are incorporated, one has to
11 be careful that the mediation program is -- and
12 the mediators are not bringing certain values
13 in.

14 I think that if the legislature at
15 least looks at the issue, may decide not to put
16 anything in it because they're satisfied with
17 the standards of the association, and we've
18 talked about what we complied with, that is
19 fine. But, there's no guarantee in this
20 legislation that those standards will be
21 incorporated.

22 REPRESENTATIVE BIRMELIN: Thank you,
23 Mr. Chairman.

24 CHAIRMAN CLARK: Thank you, Mr.
25 Frankel. The next person to testify is Judy

1 Shopp. She is an attorney and is the Policy
2 Chair of the Pennsylvania Council of Mediators.

3 MS. SHOPP: Before I start with my
4 remarks, I just want to address a few items that
5 were brought up to this point. I'm a York
6 County custody mediator also in that program. I
7 helped to design the program in York County.
8 One of the things that we found over the last
9 year and a half is that none of the parties when
10 they paid for, paid a fee to participate in the
11 process; that it also did what we were trying to
12 accomplish by the program, having the parties
13 take responsibility for resolving their own
14 conflicts as opposed to a Court imposed or we
15 imposing a decision on them. We have found that
16 has, in fact, changed. What we'd like to say is
17 that the paradigm of win/lose more to a win-win
18 process, and we're watching that evolve and
19 develop in York County.

20 One of the other issues that
21 Representative Chairman Caltagirone brought up
22 was the participation of attorneys in the
23 process. In York County we do not encourage.
24 In fact, we ask that the attorneys do not attend
25 the orientation process, but we work very hard

1 to include the attorneys in representing their
2 clients during the mediation process. We work
3 to train them and teach them how to do that
4 because the skills are different than in the
5 adversary process, and we actually invite them
6 to participate by physically coming to the
7 mediations if they want to.

8 That in itself is an education program
9 for the Bar Association, which as Attorney
10 Marcus says, it then ends up having attorneys
11 refer cases to mediation sometimes even before
12 the custody complaint is filed, because we have
13 a referral list that is a rotating list unless
14 the parties choose someone, choose a mediator
15 and because some mediators are more skilled than
16 others, we find that the attorneys are sending
17 the clients to mediation prior to the complaint
18 being filed or simultaneously.

19 One of the other issues that was
20 brought up was the process, the order of
21 conciliation and mediation. What we know
22 nationally is that educating parents and custody
23 there's a program called Children First. It's
24 instituted in Dauphin County and in several
25 other counties in this state. If the parents go

1 through the brief seminar of training, focusing
2 on their children's needs and their own
3 responsibility to create a parenting arrangement
4 that benefits their family and their children,
5 then the next step in the process best to go to
6 is the mediation process.

7 Again, Attorney Marcus explained our
8 dilemma in York County. But, in addition in
9 York County the conciliators, if there is not an
10 agreement reached by the parties just enter an
11 order as status quo. So whoever has the child,
12 basically the status quo continues to trial. In
13 York County we don't get to trial for 18 to 24
14 months. So, there is a real other need or
15 interest for the parties to participate in this
16 interim process because it takes so long to get
17 to trial.

18 Another point I want to make is that
19 conciliation, even though we described the
20 conciliation process and we have it in many
21 counties of this state, every process is
22 different. Sometimes it is quasi-mediation. In
23 York County it is not mediation. In Dauphin
24 County it's more quasi-mediation and Cumberland
25 County, I believe, it is more of a mediation

1 process with input of the parties as opposed to
2 counsel. So, it's important to define what
3 process you're using when you just refer to it
4 so you understand that.

5 As it's been explained, I'm Policy
6 Chair of Pennsylvania Council of Mediators. The
7 Pennsylvania Council of Mediators is an active
8 professional association of public policy,
9 community and family mediators in Pennsylvania.
10 It develops statewide policies supporting
11 mediation, promotes cooperative conflict
12 resolution through public education and
13 technical assistance, and maintains a support
14 and information network among its members. As I
15 understand our directive today was to discuss
16 mediation in general, and Senate Bill 432
17 specifically.

18 Mediation is a process in which a
19 neutral third-party, the mediator, assists two
20 or more disputants to reach a voluntary,
21 negotiated settlement of their differences. The
22 process is unlike arbitration or litigation, in
23 that the mediator does not impose a resolution
24 on the parties. Rather, the mediator promotes
25 communication, explores the parties' interests,

1 and helps develop options for settlement. The
2 great majority of mediated cases settle,
3 allowing the parties to resolve their disputes
4 in an efficient, humane manner relieving the
5 courts of burdensome litigation. There is a
6 nationwide documented success 80 to 90 percent
7 success rate in a pure mediation process going
8 to mediate to litigation.

9 Again, in York County 65 percent of
10 our cases are resolved in conciliation. Then
11 half of the remaining cases are resolved in
12 mediation. So, although Attorney Marcus said 15
13 percent of half of the cases that went to
14 mediation were resolved, we resolved through
15 conciliation or mediation in York County 85
16 percent of the cases.

17 In regard to a general discussion of
18 mediation, I would like to take the opportunity
19 to remind the committee that House Judiciary
20 hearings were held on September 29, 1994, in
21 regard to, at that time, House Bill 2960 which
22 was reintroduced this term on January 20, 1995,
23 as House Bill 141, a bill which I believe is
24 presently in this committee.

25 A similar Senate Bill, Senate Bill

1 951, has been introduced on the Senate side.
2 This bill would establish a statewide office of
3 dispute resolution and conflict management.
4 Pennsylvania Council of Mediators has formed a
5 coalition to establish a statewide office in
6 1992. The coalition consists of key individuals
7 and groups across a variety of sectors; legal,
8 business, labor, education, government and
9 civic, who support the concept of a statewide
10 office.

11 Why do we need a statewide office?

12 While disputes are inevitable and people are
13 increasingly frustrated over how best to resolve
14 them, mediation as an alternative method for
15 problem solving in Pennsylvania remains
16 underused. Creating a state office would
17 provide the organizing force, information, and
18 recognition necessary to ensure that innovative
19 dispute resolution approaches reach all
20 Pennsylvanians. Close to 20 states have reached
21 this conclusion and have created state offices
22 or are in the process of doing so. Each is
23 organized differently depending on that state's
24 needs.

25 The coalition proposed and the House

1 and Senate versions of the bills reflect the
2 coalition's vision of a statewide office's
3 duties and projects which are as follows:

4 1. Serve as an information and
5 referral clearinghouse for dispute resolution
6 and conflict management services, such as
7 mediation, arbitration, conciliation, and
8 facilitation;

9 2. To establish a dispute resolution
10 service available to the General Assembly,
11 Commonwealth and local agencies to address
12 public policy controversies;

13 3. Administer a funding program for
14 establishing and operating community dispute
15 settlement centers;

16 4. Encourage and support the
17 establishment of peer mediation programs in
18 school districts; and,

19 5. Support the development of court
20 programs in cooperation with the Court and Bar
21 for referral of appropriate cases to dispute
22 resolution.

23 The Pennsylvania Bar Association
24 executed a resolution in support of the
25 statewide office concept, and in my position as

1 Vice-Chair of the dispute resolution committee
2 of the Pennsylvania Bar Association, I continue
3 to support this effort on behalf of the P.B.A.

4 At the hearings held in September of
5 1994, representatives from the many areas of
6 mediation in Pennsylvania testified and
7 submitted written testimony.

8 Tricia Jones, who is chair department
9 of communications at Temple University and
10 specializes in research in ADR areas talked
11 about the research that has happened in
12 Pennsylvania.

13 Phil Schuller, President of the Board
14 of the Neighborhood Dispute Settlement of
15 Dauphin County reflected the community volunteer
16 mediation perspective.

17 Marie Hamilton of Center Peace in
18 Bellefonte and Police Chief Richard Shaffer of
19 Harrisburg explained the benefits of mediation
20 in the criminal justice area.

21 The National Institute of Dispute
22 Resolution submitted testimony on the national
23 efforts and support given to states in their
24 efforts to create statewide offices.

25 Two environmental mediators, Wendy

1 Emrich of Pennaccord in Philadelphia and Eleanor
2 Winsor of Winsor Associates in Ardmore,
3 presented the efforts of mediation in the
4 environmental dispute areas of Pennsylvania.

5 Good Shepherd Community Neighborhood
6 House mediation program in Philadelphia
7 explained the work done in Philadelphia school
8 districts with peer mediation.

9 Ed Blumstein and Pat Marcus, both of
10 them will testify today, described the custody
11 mediation programs in York and Philadelphia
12 Counties.

13 Bob Garraty, formerly of the Milrite
14 Council, gave the outlook of labor in the field
15 of mediation.

16 Robert Ackerman, professor of law at
17 the Dickinson School of Law, presented the
18 position of the P.B.A. on mediation. And the
19 Honorable Abraham Gafni, formerly a Philadelphia
20 Common Pleas Court judge and now a professor of
21 law at the Villanova School of Law, described
22 for the committee the innovative work in the
23 Philadelphia court system utilizing alternative
24 dispute resolution processes.

25 In Pennsylvania, and elsewhere,

1 mediation has been increasingly employed as a
2 means of resolving disputes.

3 One aspect of mediation that makes it
4 so effective is the promise of confidentiality.
5 Mediation works best when the parties feel free
6 to engage in frank, unfettered discussion,
7 without fear that statements may be used against
8 them in litigation. Disputing parties are
9 therefore usually asked to agree to
10 confidentiality when they enter into mediation.
11 In the absence of statutory protection, however,
12 there is no guarantee that such agreements will
13 be honored by the courts.

14 Therefore, some people are reluctant
15 to enter into mediation for fear that their
16 statements may come back to haunt them. Others
17 may participate in mediation, but may hesitate
18 to engage in frank discussion of the issues.
19 Statutory protection would allay these concerns.

20 Senate Bill 619, the mediation
21 privilege statute, provides such protection.
22 The Senate passed this bill and it is now in the
23 House Judiciary Committee for consideration. It
24 allows parties to air their differences and
25 resolve their disputes without fear that frank

1 discussions will rebound to their detriment.

2 The bill includes exceptions for
3 threats of bodily injury or felonious property
4 damage or which are extremely rare, but worthy
5 of protection. It therefore represents a
6 reasoned, balanced approach that should result
7 in expeditious settlements, greater consumer and
8 litigant satisfaction, and a more peaceful
9 Pennsylvania.

10 In March of 1995, representatives of
11 the Pennsylvania Bar Association, the
12 Pennsylvania Council of Mediators, and the
13 Pennsylvania Coalition Against Domestic Violence
14 met and reached consensus on language protecting
15 participants in mediation from fraudulent
16 communications, oral and written, made during
17 mediation that result in a fraudulent agreement.

18 Under Section 3(b)(3) the amended
19 language states that the privilege therefore
20 does not apply to a fraudulent communication
21 during mediation that is relevant evidence in an
22 action to enforce or set aside a mediated
23 agreement reached as a result of that fraudulent
24 communication.

25 Pennsylvania Council of Mediators and

1 the Pennsylvania Bar Association urges the House
2 Judiciary Committee to move this bill to the
3 House for a vote.

4 In addressing Senate Bill 432, I would
5 like to state the general reasons for promoting
6 alternative dispute resolution processes in the
7 court system:

- 8 1. To reduce the court's backlog or
9 decrease the court's docket in general;
- 10 2. To speed the pace of cases to
11 resolution;
- 12 3. To decrease the cost of resolving
13 conflict for the court;
- 14 4. To handle certain cases more
15 effectively;
- 16 5. To free judicial resources to
17 handle more complex cases;
- 18 6. To provide litigants with more
19 options or better results;
- 20 7. To increase litigant satisfaction
21 with the court system;
- 22 8. To save litigants time and/or
23 money;
- 24 9. To lower the return rate of
25 disputes in the same cases;

1 10. To improve the relationship
2 between the disputing parties; and,

3 11. To respond to political or
4 legislative directives.

5 The Pennsylvania Council of Mediators,
6 the Pennsylvania Bar Association, and the
7 Pennsylvania Coalition Against Domestic Violence
8 again met in March of 1995 to reach consensus on
9 provisions of Senate Bill 432, Section
10 3901(c)(2) pertaining to spousal and child
11 abuse. The revision agreed to states as
12 follows:

13 The Court shall not order an
14 orientation session or mediation in a case where
15 either party, or child of either party, is or
16 has been a subject of domestic violence or child
17 abuse at anytime during the pendency of action
18 under this part or within 24 months preceding
19 the filing of any action.

20 On June 5, 1995 the Senate passed this
21 bill 50 to nothing.

22 There are presently three mandatory
23 custody mediation programs in Pennsylvania:
24 York, under the direction of the Honorable Penny
25 Blackwell, which Pat Marcus has described for

1 you; Philadelphia, under the direction of
2 Honorable Esther Sylvester, which she and
3 Attorney Edward Blumstein will describe to you
4 later this morning; and Lehigh County under the
5 direction of the Honorable Robert K. Young.

6 In Lehigh County the Court has
7 appointed two attorneys who are trained family
8 mediators and members of the Academy of Family
9 Mediators with practitioner's status to hear the
10 custody mediation cases. These mediators sit
11 one day a week. The Court pays for the services
12 of the mediator at no cost to the parents.

13 One of the purposes of Senate Bill 432
14 is to authorize the counties to impose an
15 additional \$20 fee to divorce and custody
16 complaints to defer the costs of mediation
17 programs. This will most certainly encourage
18 county courts to consider implementation of this
19 important process for the resolution of custody
20 matters.

21 One of the items that were brought up
22 in the discussion earlier was the mandatory
23 program across the state. I agree with
24 Representative Masland, in that, at the present
25 time it is probably better to have each county

1 adapt the program for their own needs. Because,
2 as you will see in the description of
3 Philadelphia County program, that the Bench and
4 the Bar work together with the psychologist and
5 child development people in that custody
6 community to develop a program that maximizes
7 the voluntary resources of the people in the
8 community and the professionals in the
9 community, as well as the financial resources.
10 For the time being, I think that is the most
11 effective way to make sure that the programs
12 meet the needs of the people within the
13 community.

14 I have attached an article to my
15 testimony written by Attorney-Mediator Deb Gaber
16 who is one of the mediators in Lehigh County
17 which further explains the advantages of
18 mediation in custody. This article was
19 published in the May 1995 issue of the
20 Pennsylvania Lawyer.

21 As a custody mediator in York County I
22 have been involved in the process of obtaining
23 the SJI Grant or attempting to obtain the SJI
24 Grant which, I believe, this panel is aware that
25 most State Justice Institute Grants are only

1 given to statewide programs and statewide court
2 programs.

3 We have had success with this State
4 Justice Institute because they are extremely
5 interested in the outcome of custody mediation,
6 particularly the efforts in Pennsylvania to see
7 mediation as a shift in the paradigm of how we
8 handle child custody matters. We do expect that
9 we will receive that grant sometime by the
10 beginning of 1996.

11 One of the problems that judges face
12 in mediation in Pennsylvania is, not only the
13 first time filings, but the families that return
14 to court because of dissatisfaction. Unlike
15 other court matters, parents stay involved with
16 their children for a long period of time, as
17 many times over the age of 18. An order that is
18 effective or valid or a parenting arrangement
19 that's valid when the child is a toddler needs
20 to be amended and changed to meet the needs of
21 the child, the parents and the family as the
22 child grows.

23 One of things that we find in
24 mediation, the research shows is that, in that
25 mediation process the parents learn skills to

1 resolve these conflicts on their own and they
2 take those problem-solving methods home to work
3 out the conflicts. We find that they choose
4 then to come back to mediation when they can't
5 work out the resolution themselves.

6 That process then begins to, perhaps,
7 even set itself up outside of the court system.
8 Even though the Court initiates it through the
9 mandatory orientation process, they will
10 voluntarily return to the mediator, either with
11 their lawyers consent and encouragement or
12 separate from their lawyer's consent and
13 encourage, because they realize it is a more
14 peaceful process and it's a process that meets
15 their own needs of interest as a family unit.
16 That's all I have.

17 CHAIRMAN CLARK: Thank you very much.
18 Do we have any questions? Representative
19 Masland.

20 REPRESENTATIVE MASLAND: Thank you,
21 Mr. Chairman. On the fees and costs which seem
22 to be one of the sticking points in this
23 legislation, on page 2 of the bill it says that
24 the Court shall impose an additional \$20. I was
25 looking at that and I'd like your reaction to

1 changing that if we were going to say that the
2 Court may impose an additional fee up to an
3 amount of, say, \$25, \$30, \$35 and give the Court
4 a discretion as to how much they want to charge.

5 Because, if the Court is going to
6 charge it in every case, then they'll probably
7 set it low because there's going to be some
8 cases that aren't going to go to mediation or
9 won't need that. They will subsidize, in
10 effect, those that do go to mediation. However,
11 if the Court is going to only have you pay the
12 fee if you go to mediation, then they might need
13 to charge a little bit more, such as \$35,
14 something like that in order to cover that cost.

15 MS. SHOPP: I think that's a very
16 helpful suggestion. We weren't involved in
17 drafting the language to this bill. But, as we
18 moved around the state and talked to the
19 different judges, we realized that the judges
20 need some additional tools to help them
21 implement this program when they realize it's
22 something that's important for their county and
23 people in their county. I think the structure
24 that you discussed that they may impose it up to
25 a certain amount of money would be very helpful

1 for the judges.

2 REPRESENTATIVE MASLAND: Thank you.

3 CHAIRMAN CLARK: Thank you. The next
4 individual to testify before the committee is
5 Helen Borke.

6 MS. BORKE: I'd like to begin by
7 thanking you, Chairman Clark, and the members of
8 the Subcommittee on Courts of the House
9 Judiciary Committee for giving me the
10 opportunity to testify today. My name is Elaine
11 Borke and I live in Pittsburgh. I have a Ph.D.
12 Degree in psychology and have been a divorce and
13 custody mediator for the past 13 years.

14 I am a practitioner mediator of the
15 Academy of Family Mediators, which has been
16 mentioned earlier as providing guidelines for
17 training mediators, and an officer of the Family
18 Mediation Council of western Pennsylvania. I'm
19 speaking as a representative of the Pennsylvania
20 Psychological Association in support of Senate
21 Bill 432 on mediation in divorce and custody
22 matters.

23 I thought I'd start by discussing what
24 divorce and custody mediation is. Divorce and
25 custody mediation is a cooperative problem-

1 solving process during which a professionally
2 trained mediator helps couples agree on issues
3 of spousal and child support, custody, and
4 division of property. Custody mediation focuses
5 primarily on the parenting arrangements for the
6 children. That's what this bill is focused on.

7 The goal of divorce custody mediation
8 is to reach agreements that are in everyone's
9 best interest.

10 I'd like to interject here a comment
11 about the bias of the mediator. I think that
12 this is an unnecessary fear if one considers the
13 process itself. In the process, not only is it
14 voluntary, and that, of course, have been upheld
15 by this particular law, but the decisions are
16 made by the parents. The decisions are not made
17 by the mediator. So this idea of bias and
18 imposing a point of view simply doesn't occur as
19 far as I've been able to see, because it's the
20 parents' perspective that really determines what
21 the final memorandum will be.

22 The mediation helps divorcing couples
23 to communicate more clearly with each other
24 about their needs and their children's needs.
25 When children are involved, a healthy growth is

1 threatened if divorce destroys the family. I
2 think we have to consider this a very serious
3 social problem today when one out of two
4 families are getting a divorce and 80 percent of
5 these families have children.

6 Mediation nurtures the development of
7 the post-divorce family so that the parents
8 continue to co-parent their children.

9 The goal of the parents is to divorce
10 one another; not to divorce the children.
11 Through mediation it is possible to have a
12 constructive divorce which leads to better
13 adjusted children.

14 What are the advantages of mediation?
15 Mediation is a non-adversarial process that
16 helps couples avoid bitter litigation and stay
17 in charge of their own lives. Mediation takes
18 less time and costs less money than going to
19 court. Mediation reduces the burden on the
20 judicial system for resolving divorce and
21 custody issues. Mediation benefits the children
22 by helping to nurture and preserve parent-child
23 relationships after divorce.

24 I would like to mention here this
25 question of the \$20 fee and how part of the

1 people going to court would support just those
2 members, or those people, the population that
3 has mediation. I think what's not considered
4 with that objection is that, it is very
5 cost-effective; mediation is very cost-effective
6 for the entire judicial system. There's a lot
7 of research that indicates that.

8 How many states have passed mediation
9 laws? One of the other questions that was
10 raised earlier was, are we infringing upon the
11 judge's right to make a decision about whether
12 they want mediation or not. At the present time
13 over 20 states have enacted laws legalizing
14 court programs for divorcing couples. Some of
15 these states are California, Colorado,
16 Connecticut, Florida, Hawaii, Indiana, Maine,
17 New Jersey, North Carolina, and our neighbor
18 Ohio. The most recent state to pass such
19 legislation for family law cases is Rhode
20 Island.

21 Family court Chief Judge Jeremiah S.
22 Jeremiah of Providence was the prime mover
23 behind this legislation. He apparently did not
24 think that the state was infringing upon his
25 rights as a judge. Judge Jeremiah said he

1 supported mediation because of reports he had
2 read of the success of mediation programs in
3 other states and because of his own conviction
4 that, quote, people who participate in their own
5 settlement tend to cooperate and comply. This
6 is in the ABA Journal, March 1995.

7 Why should the House Judiciary
8 Committee support Senate Bill 432? Senate Bill
9 432 permits family courts to establish mediation
10 programs for resolving custody issues. The
11 State would not be required to fund these
12 programs. Instead, the bill provides that a
13 county where the Court has established a
14 mediation program can fund the program by
15 imposing an additional \$20 filing fee on all
16 divorce and custody complaints brought to the
17 attention of the court. The Court may also
18 assess additional mediation costs on each party.

19 Senate Bill 432 further states that
20 judges may order parties to attend an
21 orientation session to explain the mediation
22 process. I see this as primarily an educational
23 approach. Considerable research, and there was
24 a study that was published in 1988 by Pearson
25 and Thonnes, which found that when mediation is

1 purely voluntary it was not used very much.
2 When there was some part of it mandated, then
3 they found that it was highly cost-effective and
4 helpful to the courts.

5 By this means, divorcing parties will
6 become aware that mediation is a viable
7 alternative to litigation and a constructive
8 option for resolving child custody issues. At
9 the same time, Senate Bill 432 exempts family
10 from being ordered to attend an orientation
11 session if spousal or child abuse has been
12 reported within the previous two years.

13 Qualifications and mediators,
14 confidentiality and other matters related to the
15 administration of the mediation program will be
16 determined by local rule. I concur with that.
17 I think it's a good idea. Senate Bill 432
18 further provides that the Supreme Court of
19 Pennsylvania shall monitor the mediation
20 programs established by Courts of Common Pleas
21 throughout the State of Pennsylvania and shall
22 set up procedures for evaluating the
23 effectiveness of these programs.

24 I now would like to talk about
25 confidentiality and mediation, except for what's

1 already been mentioned. Why should
2 confidentiality of mediation communication and
3 documents be guaranteed? Although the committee
4 is not currently considering Senate Bill 619, I
5 would like to note that this bill provides for a
6 confidentiality of mediation communications and
7 documents. Except for certain specified
8 situations, Senate Bill 619 establishes the
9 privileged nature of all mediation
10 communications and documents. It's my under-
11 standing that this particular law is supported
12 by the Pennsylvania Bar Association.

13 Since mediation is an alternative to
14 legal action, and, if unsuccessful, might result
15 in a court hearing or trial, it is essential
16 that all mediation communication and mediation
17 documents be considered confidential except for
18 those situations specified in Senate Bill 619.
19 This confidentiality should apply to both court-
20 ordered and private mediation. The assurance
21 that nothing said in mediation can be used in
22 subsequent court action is of the utmost
23 importance to ensure the free exchange of
24 opinions and information essential to arrive at
25 a meaningful and satisfactory mediation

1 agreement.

2 Based on my professional experience as
3 a mediator, I am convinced that mediation is the
4 best way to resolve divorce and custody issues.
5 By providing a forum to communicate and make
6 decisions, mediation not only helps people to
7 take charge of their own lives, but it also
8 helps to ensure the long term well-being of
9 their children. Therefore, I urge you to
10 support Senate bill 432.

11 This concludes my testimony. I thank
12 you again for the opportunity to appear. I am
13 available to answer any questions you might
14 have.

15 CHAIRMAN CLARK: Thank you very much.
16 Any questions from the membership?

17 (No audible response.)

18 CHAIRMAN CLARK: Hearing none, we want
19 to thank you very much for coming today and
20 presenting your testimony. We are running
21 considerably ahead of schedule. Is Martha
22 Quimby here? Well go ahead and have your
23 testimony.

24 MS. QUIMBY: Thank you, Chairman
25 Clark, and members of the committee for inviting

1 me here today to testify concerning Senate Bill
2 432. I represent Fathers' and Children's
3 Equality. FACE is an all volunteer, non-profit
4 children's advocacy organization and a self-help
5 and support group for non-custodial parents and
6 the extended families of non-custodial children.

7 We are organized in Pennsylvania, New
8 Jersey and Ohio. In Pennsylvania, we are
9 organized in 47 of the 67 counties. Statewide
10 our help-lines receive an average of 12,000
11 requests for help during a year. In Central
12 Pennsylvania, since FACE has become active here,
13 we have received 100 requests from non-custodial
14 parents, primarily fathers, per month.

15 On March 28th of this year I testified
16 before the Joint Legislative Task Force on
17 Domestic Relations Law. I expressed FACE's
18 qualified support for Senate Bill 432 as part of
19 a package of proposed changes to Title 23. We
20 support mediation as the best means to settle
21 the issues surrounding family dissolution. Some
22 couples are able to negotiate and settle the
23 issues themselves, and go before the Court only
24 to have their arrangement approved. We wish
25 this happened in all of the cases, and sadly

1 this is not so. For those couples who cannot
2 agree, the adversarial system in use in
3 Pennsylvania, more often than not, only worsens
4 the situation for all involved, especially the
5 children.

6 I have included with my written
7 testimony a graduate research paper recommending
8 the use of mediation to settle divorce issues.
9 The social research done in divorce settlement
10 shows over and over that both the participants
11 who volunteer and the participants who are
12 ordered by the Court to mediate their cases are
13 more satisfied with the outcomes than couples
14 who used the traditional court processing.

15 Studies by Kelly in California, 1983
16 and '85, Bautz and Hill in California and
17 Kansas, Pearson and Thonnes in Colorado, and
18 then on the second setting in California,
19 Conneticut, Colorado and Minnesota, and the
20 State Justice Institute in Florida, Nevada,
21 North Carolina and New Mexico, all have similar
22 rates of satisfaction with the outcomes,
23 approximately 70 percent for mediation as
24 compared to 20 to 30 percent for traditional
25 court processing.

1 The individuals in Joan Kelly's
2 longitudinal study who chose either mediation or
3 court processing shows few initial differences
4 in levels of marital conflict, the level of and
5 difficulties with marital communication, or a
6 unilateral decision to divorce. Put another
7 way, those that chose to mediate were no less
8 angry, or more friendly or cooperative than
9 those who didn't. Summary tables of her results
10 published in 1989, and a copy of the discussion
11 section from the journal article from which the
12 tables were excerpted are also included with my
13 written testimony.

14 When you study the tables you will see
15 that while both the men and women in both
16 examples felt the mediator or the attorney
17 handled their case in a skillful manner,
18 significantly more of the mediating couple rated
19 the mediator as highly skilled than the
20 adversarial clients rated their attorney.
21 Mediating women of all the groups were most
22 likely to feel that the mediation process helped
23 them to stand up for themselves, especially so
24 in financial affairs.

25 The longitudinal study found a

1 significant difference in the impact on the
2 post-divorce spousal relationship. Seventy-six
3 percent of the mediating women and 62 percent of
4 the mediating men believed that mediation helped
5 them become more reasonable in their dealings
6 with each other. With traditional processing,
7 the percentages were 29 percent for the women
8 and 39 percent for the men.

9 In satisfaction with custody, there
10 were no significant gender differences, 72
11 percent of the mediating mothers, and therefore
12 the fathers, felt that the arrangements were
13 beneficial to all of the family members while
14 only 51 percent of the traditional process
15 custody cases felt that all of the family
16 members benefited with the custody arrangements.

17 Mediators were viewed as significantly
18 more helpful in identifying useful ways to
19 arrange custody and visitation. Those who
20 mediated also felt that the mediation process
21 itself increased their understanding of their
22 children's psychological needs.

23 Bautz and Hill found that couples who
24 used mediation missed fewer child support
25 payments, and mediating non-custodial parents

1 saw their children more often than their
2 traditional court-processed counterparts.

3 Another study that dealt exclusively
4 with identifying high conflict parents found
5 that at two and three years post-divorce, there
6 was a marked decrease in the expressed hostility
7 and conflict with mediating couples.

8 None of these studies addressed the
9 cost and the length of time it takes to settle a
10 case. The State Justice Institute study in 1992
11 undertook to address these issues, in addition
12 to the satisfaction with the outcomes in four
13 states. As I stated before, the satisfaction
14 ratings were not significantly different than
15 the other studies.

16 The costs and the time to settlement
17 were not less for mediation, but neither was the
18 cost or time greater. In all of the books and
19 journal articles that I have read--and a
20 bibliography is included with the package--none
21 were opposed to mediation. The worst that could
22 be said was that the results were no worse than
23 found in traditional court processing.

24 I have to ask, why then doesn't Senate
25 Bill 432 make mediation mandatory? California

1 requires mediation. Washington requires parents
2 to sit down together with a trained third-party
3 to work out a parenting plan which is then filed
4 with the Court. The only exception should be
5 cases where there's prolonged violence and abuse
6 in the relationship. But it should be up to the
7 abused individual to opt out by requesting an
8 exemption from the Court. FACE strongly objects
9 to the language in this bill that automatically
10 exempts from mediation a case in which a spouse
11 or child has been the subject of domestic
12 violence in the past 24 months.

13 Bevard County, Florida, grants
14 exemptions only when one or both parties have
15 been ordered for counseling, social service
16 agencies are involved in the custody case, or
17 there is evidence of continued and prolonged
18 domestic violence.

19 In Las Vegas County, Nevada, the
20 presence of violence is noted in the original
21 filing. The court can still order mediation.
22 The mediation, however, is accomplished not face
23 to face, but at a different time and place.

24 Our objections are both to the
25 exemption and the language. In Senate Bill 432

1 there is no definition of domestic violence.
2 Will an allegation of abuse keep a case from
3 mediation? More allegations of physical and
4 sexual abuse are made at the time of separation
5 and divorce than at any other period. Research
6 indicates that only about half of them appear to
7 be well-founded.

8 In one review of 9,000 disputes over
9 custody and visitation, investigators discovered
10 there 169 allegations of sexual abuse. They
11 determined that the abuse probably did occur in
12 50 percent of those cases, and did not, did not
13 in 27 percent of those cases. They could reach
14 no firm conclusion in the other 23 percent.
15 Nancy Thonnes, a sociologist who has conducted
16 extensive research on the American way of
17 divorce, and Leona Kopetsky, a child custody
18 evaluator, came to the similar conclusions on
19 the percentages. A quarter of the allegations
20 are false.

21 Nowhere in this legislation is there
22 any remedy for the 25 percent of the cases where
23 the allegations are false. In fact, in the
24 total of Title 23, there are no remedies or
25 recourse for that 25 percent of the parents,

1 overwhelmingly fathers, who are denied access to
2 their children because of the false allegations
3 of abuse. And here again, in this legislation
4 that oversight is repeated.

5 The solution, in the collective
6 opinion of our organization, is to eliminate the
7 language, shall not, substituting instead;
8 language allowing the Court to order mediation
9 at a different time, or if there is evidence
10 that the abuse is continued and prolonged, to
11 exempt the parties from mediation.

12 Mandatory mediation is important for
13 another reason. In what has become known as
14 parental alienation syndrome, one parent
15 encourages a child to reject the other parent.
16 This syndrome has no agreed-upon set of
17 criteria. Scientific research has not yet
18 documented its existence or completely described
19 its manifestations. Yet, it is very real. It
20 occurs when one parent convinces a child that
21 the other parent is not trustworthy, lovable, or
22 caring; in short, not a good parent.

23 Over time, parental alienation carries
24 very high risks. It can seriously distort a
25 child's developing personality and later life

1 adjustment. The sooner it is identified and
2 appropriate interventions are implemented, the
3 better are the child's chances of avoiding its
4 worse long-term effects.

5 The traditional adversarial court
6 process is not set up to identify or intervene
7 when this destructive behavior occurs. Indeed,
8 the entire process of divorce in Pennsylvania
9 supports and encourages it. By its very nature,
10 litigation determines blame and punishes guilty
11 parties. A strategy of alienating parents is to
12 convince an authority, the courts, to pronounce
13 them worthy and their ex-spouses as bad parents.

14 If they loss, and if an allegation of
15 abuse is involved, they rarely do, the
16 alienating parent is likely to escalate the
17 conflict and the children are likely to remain
18 in the middle of their parents battle.

19 Garrity and Baris who work exclusively
20 with high conflict parents say that even a
21 well-trained professional will have difficulty
22 identifying parental alienation syndrome.
23 During the first year after a divorce all
24 parents express doubts about the ex-spouse's
25 child-rearing ability. However, there are signs

1 that parental alienation is occurring. There
2 are questions that mediators can ask to aid them
3 in identifying it.

4 Attorneys and judges are not trained
5 to pick up on the clues, nor do they spend much
6 time with both parents. Mediators are trained
7 and they spend time with both parents in a
8 non-threatening situation.

9 If this legislation could be changed
10 to allow the mediator to recommend court ordered
11 counseling for one or both parents when serious
12 alienation is occurring, the best interest of
13 these at-risk children would be served.

14 The same Garrity and Baris relate an
15 example from their practice with these high
16 conflict divorces. The mother of a nine-year
17 old girl was asked to name all of her objections
18 to visits between the girl and her father. She
19 listed 15 areas of objections of varying
20 importance.

21 After discussing them, the therapist
22 asked whether she would consent to visits once
23 the 15 obstacles had been cleared away. The
24 mother was speechless. She could not say yes.
25 She realized that when her complaints had been

1 remedied, she would no longer have a legitimate
2 reason to refuse visitation. Ultimately, for
3 this mother, visits with the father were totally
4 unacceptable under any circumstances.

5 The current adversarial system,
6 hearing the 15 objections, would grant this
7 mother custody. She will deny access. The
8 police will not enforce the custody order, and
9 the father involved will contact FACE wondering
10 what he can do to see his kids again.

11 FACE's final objection to this
12 legislation as it is written, and actually there
13 are two, relate to the establishment and the
14 administration of mediation. The courts are to
15 adopt local rules regarding qualifications of
16 mediators, confidentiality and any other matters
17 deemed appropriate. FACE requests that the
18 legislature establish statewide rules for
19 mediation and the qualification for mediators.

20 I am not a native Pennsylvanian. My
21 experience as a teacher of political science was
22 in another state whose legislature was willing
23 to establish ground rules in important matters
24 for the entire state. It has always amazed me
25 that Pennsylvania centralizes the bookkeeping

1 task of issuing driver licenses and license
2 plates, but decentralizes all the important
3 issues.

4 Certainly, there is a greater number
5 of divorces and the pathologies may be more
6 extreme in Philadelphia or Allegheny County than
7 in Potter or Washington County, but the issues
8 and pathologies are the same in all the 67
9 counties of the Commonwealth.

10 There are Commonwealth courts that
11 refuse to release transcripts of divorce
12 hearings; that alter transcripts; that allows a
13 judge to hear domestic relations cases on appeal
14 from his hearing officer son-in-law. There is
15 one county where a judge hears divorce cases in
16 which his wife is an attorney for one of the
17 litigants. The word on the street is that,
18 whichever party gets to her first wins the case.

19 In a time when competition among
20 attorneys is great, this arrangement certainly
21 guarantees the income for this family. Not all
22 courts are corrupt. There are judges in our
23 experience who are fair and open minded.

24 The second concern is assigning to the
25 Supreme Court the task of monitoring and

1 evaluating the effectiveness of mediation. We
2 have the recent example of our Supreme Court in
3 one of its justices, and it's a Supreme Court
4 that most average citizens can't locate on a
5 given day. We have in Pennsylvania a court
6 system that even some members of this body
7 characterize as operating in the 19th Century.
8 Again, FACE wants the legislature to establish
9 by legislation model guidelines for all the
10 Commonwealth courts.

11 When the system is to be evaluated,
12 assign the task to the Joint Legislative Budget
13 and Finance Committee, a group of professional
14 evaluators and auditors who, by definition, will
15 be independent and have no vested interest in
16 the success or the failure of mediation. Place
17 in the legislation a minimum standard for the
18 mediators.

19 The Committee on Professional
20 Licensure in both Houses of this legislature is
21 considering establishing standards and license
22 requirements for marriage and family therapists.
23 In the House it's House Bill 1861. Allowing an
24 attorney or therapist to enter this very
25 delicate area of divorce mediation will not

1 serve anyone's best interest, let alone those of
2 the children whose interests Title 23 is
3 designed to protect.

4 One author had this to say about the
5 training needed for mediators: Psychotherapists
6 and social workers experienced in working with
7 families are well-suited for training as
8 mediators. Lawyers and others with legal
9 experience have much to offer, but skill in
10 behavioral science is generally lacking.

11 The author went on to say that it was
12 generally easier for one trained in the
13 behavioral sciences to acquire legal knowledge
14 than for the legally-trained person to gain
15 knowledge and a feel for behavioral science and
16 counseling skills. This is a biased statement
17 from a psychologist. However, as more mediation
18 programs are adopted, more mediators are trained
19 at the graduate level in both law and
20 psychotherapy.

21 The point I am making is that, the
22 legislature, by law, should define for
23 professionals trained in each of these fields
24 the minimum requirement in the other field
25 necessary to be certified as family mediators.

1 At the very minimum, they should be required to
2 be members of a professional organization for
3 family mediators. We would also recommend that
4 mediators be selected on a rotating schedule,
5 rather than by the free choice of a domestic
6 relations court officer or judge. Our members
7 have been victimized too often by a custody
8 evaluator who is chosen to evaluate all the
9 cases heard by a particular judge.

10 In closing, let me summarize, that
11 FACE supports divorce mediation. However,
12 Senate Bill 432 is not adequate. Mediation must
13 be made mandatory except for the most serious
14 cases of violence and abuse. The legislature
15 should exercise leadership by establishing, by
16 law, statewide guidelines for a mediation
17 program and minimum qualifications and training
18 for mediators.

19 Again, thank you for allowing me to
20 appear and I will entertain any questions from
21 the committee. I can address any of the issues
22 raised by anyone prior.

23 CHAIRMAN CLARK: Thank you very much.
24 Questions from the membership? Representative
25 Masland.

1 REPRESENTATIVE MASLAND: Obviously,
2 based on my previous statement, you probably
3 know how I feel as to whether or not we should
4 have statewide rules or make this system
5 mandatory. I think that would not be
6 appropriate. I think that if we did establish
7 in this legislation a system for statewide rules
8 and if we did establish the model guidelines and
9 took things out of the hands of our Supreme
10 Court, our Supreme Court would turn around and
11 tell us that was an unconstitutional
12 infringement of their powers. It would be all
13 or not. If we tried that it would not work.

14 Maybe, and I don't know what the
15 Supreme Court is doing, if anything, but it
16 strikes me that to a certain extent the
17 legislature is taking the lead and in effect
18 prodding the Supreme Court to take some action.

19 I think this is a basic guideline or
20 ground rules, and I think this is about as far
21 as we can or should go in trying to establish
22 it.

23 As far as statewide, again, I think
24 that the incubator approach of allowing the
25 counties the ability to work things out based on

1 their own particular situations might result in
2 solutions that everyone else picks up on, but to
3 start off with a one-size-fits-all would be very
4 difficult in a state as diversified as ourselves.

5 MS. QUIMBY: As I said in my
6 testimony, the issues and the pathologies are
7 the same statewide. We aren't concerned with
8 courts that, quite frankly, are corrupt; that do
9 alter transcripts, and if you allow these kinds
10 of courts to establish rules, we are concerned
11 that they are not going to be any better than
12 the courts that are establishing them.

13 REPRESENTATIVE MASLAND: If they're
14 corrupt, this legislation and any legislation
15 isn't going to change that. They are still
16 going to be able to do whatever you say whether
17 they establish the rules or we establish the
18 rules. Our rules are only going to go so far.
19 It's still going to implemented by them. If
20 your problem is that if you feel there are a lot
21 of corrupt judges out there, that's not going to
22 be resolved if the legislation from us crosses
23 all the T's and dots all the I's.

24 MS. QUIMBY: You're going to have a
25 basic minimum model that they have to follow.

1 That's what we're concerned about. I can
2 appreciate that you want all of the 67 counties
3 to be incubators. There are states that already
4 have mandatory mediation programs statewide.
5 There are models to study and examine and take
6 what you feel best fits Pennsylvania. Doctor
7 Borke mentioned several. The models, the
8 guidelines statewide are there it just takes,
9 and at the risk of alienating everybody on the
10 panel, legislators that have the courage to do
11 it.

12 REPRESENTATIVE MASLAND: Well, I have
13 some courage so I will respond to that. I don't
14 think it takes courage. I think it takes
15 foresight. I think it takes proper
16 deliberation. I think in our deliberative mode,
17 many of us feel that it is not proper for the
18 state to impose mandatory programs on all 67
19 counties. Many of us feel that on a number of
20 issues. Many of us feel if it's going to be
21 effective, it's going to have to come from those
22 counties as opposed to us in Harrisburg telling
23 people in Snyder County and Cumberland County,
24 York and Philadelphia, this is how you will do
25 it. That won't be effective.

1 MS. BORKE: Okay. If I can see that,
2 can you -- The bottom line of what we want is
3 mediation to be made mandatory. The local
4 counties can develop then their programs.
5 Eventually they will be evaluated, and yes, they
6 can be an incubator, but the bottom line is,
7 mediation should be made mandatory except in
8 cases of extreme and prolonged abuse.

9 REPRESENTATIVE MASLAND: Thank you.

10 CHAIRMAN CLARK: Excuse me. When you
11 say mandatory, then you're talking mandatory
12 orientation sessions, mandatory mediation,
13 mandatory issue, resolution, and basically, not
14 having a judge involved at all other than
15 signing an order at some point in time?

16 MS. BORKE: No. When I asked for
17 mandatory mediation, and it's in the details
18 that the difficulty arises, that mediation "x"
19 number of sessions or at the discretion of the
20 mediator; and if there's an agreement with all
21 parties that the mediation is not working, then
22 the recourse is to the court system as it is
23 known.

24 But, what I'm requesting is that
25 mediation be mandated that an attempt be made by

1 the two disputing parents to resolve their
2 issues in mediation.

3 A trained mediator has the ability, a
4 capable trained mediator has the ability to
5 recognize when mediation is no longer working.
6 They can raise that in a session and mediation
7 is terminated. There are jurisdictions where
8 mediation in the court system work more or less
9 in tandem where couples will mediate the issues
10 that they can mediate. When they cannot agree
11 on the other issues, those issues are taken to
12 court.

13 I wish I could have found the cite,
14 but in those cases the participants were more
15 satisfied with the mediating process, even
16 though they didn't resolve all of their issues
17 there and they were followed in the court.

18 CHAIRMAN CLARK: So you enforce
19 mediation to mediators that this is what we can
20 get and this is what we can't get --

21 MS. BORKE: Yes.

22 CHAIRMAN CLARK: -- and then he steps
23 out of the process?

24 CHAIRMAN CLARK: Also you raise an
25 issue that I thought about and it wasn't raised

1 previously is the language about not having
2 orientation sessions when the child of either
3 party is or has been, and then the wording here
4 is, a subject of. You question the definition
5 of a subject of as opposed to a found incident,
6 a found report, or something like that.

7 MS. BORKE: It concerns us very much,
8 because we quite often are victimized by an
9 allegation.

10 CHAIRMAN CLARK: Additionally, as far
11 as funding the program, do you have a position
12 on that; that it should be a fee if people use
13 the program? I guess you would force everyone
14 to use the program, so how would you perceive it
15 best be funded?

16 MS. BORKE: In models in use in the
17 other states, in the four states the State
18 Justice Institute did their research and it was
19 funded at the county level. In a perfect world
20 that would happen in Pennsylvania. It is not
21 likely to happen here.

22 Using the logic of, I pay for the
23 schooling of children in Harrisburg School
24 District for the benefit of society, I think
25 everyone who files for divorce, and I would even

1 be as radical as to say anybody who files for a
2 marriage license, should pay an extra fee to
3 support the dissolution of a marriage. I
4 realize that is radical, but I do not see that
5 only those who use to mediate--if it's mandated
6 everybody's going to be using it--should not pay
7 an extra fee.

8 In reality, the members of FACE pay
9 for a lot of the divorce costs anyway for both
10 parties. That's ordered. We pay the attorney
11 fees for our ex-spouses. That's court ordered.
12 Attaching \$20 onto that divorce filing fee to me
13 seems legitimate cost for a mediation program.

14 CHAIRMAN CLARK: Representative
15 Manderino.

16 REPRESENTATIVE MANDERINO: Thank you,
17 Mr. Chairman. I want to pick up again on the
18 cost information because that's one of my
19 concerns. The \$20, if I understood the prior
20 testimony -- and I apologize I had to leave for
21 awhile, I have two committee activities going on
22 at the same time.

23 The \$20 filing fee is proposed to
24 cover only the cost of setting up a structure
25 for the mediation program and not to pay the

1 cost of the mediators. So, I'm suspecting that
2 in your suggestion of the four states that do
3 have a mandatory mediation, their counties are
4 paying for the full cost of the mediation
5 program; not just setting it up, but also for
6 the mediator's time?

7 MS. BORKE: That's correct.

8 REPRESENTATIVE MANDERINO: The reality
9 of Pennsylvania, and I just say this because I
10 know it as a fact that -- I don't know how I
11 feel about this particular piece of legislation,
12 but I know this particular legislation would go
13 nowhere in Pennsylvania legislature if we were
14 mandating another cost on the county governments
15 for a court function when they're fighting with
16 us now about how we're not fully funding the
17 courts to begin with.

18 So given that reality--and it is a
19 reality--do we still mandate this counseling in
20 the face of literally mandating people to pay
21 out of their pocket, what we heard testimony --
22 probably York County is probably average for the
23 county of the State of Pennsylvania, \$150 per
24 session?

25 MS. BORKE: Funding is not my area of

1 expertise.

2 REPRESENTATIVE MANDERINO: I guess my
3 question is, would your organization's position
4 about mandatory mediations being a key component
5 of what you want to see be the same if the cost
6 of that mandatory -- of us mandating that is
7 bore by the individuals?

8 MS. BORKE: Yes. As I said before, we
9 pretty much pay for the entire cost of the
10 divorce in many of our instances, because we are
11 ordered by the Court to pay our ex-spouse's
12 attorney's fees, whatever they may be; how high
13 they are; how often she calls; how much time she
14 devotes to that case. We are quite often
15 ordered to pay them. So, yes, it would be the
16 same. Mandatory mediation will probably wind up
17 paying for both sides anyway.

18 CHAIRMAN CLARK: I was going to say,
19 there's a distinct possibility on the bottom of
20 page 2 that you will end up paying the
21 mediation. If that doesn't work, you will end
22 up paying for the litigation, if you believe
23 that there's a chance of getting a lot of this
24 resolved through the mediation process.
25 Representative Piccola.

1 REPRESENTATIVE PICCOLA: Thank you,
2 Mr. Chairman. I was interested in some of the
3 allegations that you made on page 6 of your
4 testimony. You indicated there are courts in
5 the Commonwealth that refuse to release
6 transcripts of divorce hearings. Are these
7 Common Pleas Courts?

8 MS. BORKE: Yes.

9 REPRESENTATIVE PICCOLA: Do you care
10 to share the circumstances, if not the counties
11 or the judges, that are doing this?

12 MS. BORKE: I would rather do that
13 privately.

14 REPRESENTATIVE PICCOLA: Okay. Were
15 the circumstances because they simply did not
16 transcribe the proceedings?

17 MS. BORKE: No.

18 REPRESENTATIVE PICCOLA: In other
19 words, the proceedings were transcribed and
20 sealed by the Court?

21 MS. BORKE: Yes.

22 REPRESENTATIVE PICCOLA: The parties
23 didn't have access to them?

24 MS. BORKE: That's right.

25 REPRESENTATIVE PICCOLA: I would

1 really appreciate having specifics on those
2 allegations because it would have to be some
3 extraordinary circumstances for the Court to
4 prevent transcripts of open hearings being
5 released.

6 You also made an allegation that the
7 transcripts are altered. Do you have specific
8 cases where --

9 MS. BORKE: I have one.

10 REPRESENTATIVE PICCOLA: One case
11 where a transcript was altered by the Court?

12 MS. BORKE: Yes.

13 REPRESENTATIVE PICCOLA: Do you feel
14 that you have evidence that a judge either
15 ordered or participated in a scheme to alter
16 transcripts in a divorce proceeding?

17 MS. BORKE: I have only the testimony
18 of the individual involved.

19 REPRESENTATIVE PICCOLA: Was that
20 individual a party to the proceedings?

21 MS. BORKE: Yes.

22 REPRESENTATIVE PICCOLA: The
23 allegation where you indicate there is a county
24 where the judge or a judge hears divorce cases
25 in which his wife is an attorney for the

1 parties, would you care to tell us what county
2 that is?

3 MS. BORKE: Franklin.

4 REPRESENTATIVE PICCOLA: Franklin
5 County. And the wife represents one of the
6 adverse parties before that particular judge or
7 before another judge in the county?

8 MS. BORKE: Before that judge.

9 REPRESENTATIVE PICCOLA: Does this
10 happen on more than one occasion?

11 MS. BORKE: Yes.

12 REPRESENTATIVE PICCOLA: Which judge
13 in Franklin County would be?

14 MS. BORKE: I have it in my notes but
15 I didn't bring it with me.

16 REPRESENTATIVE PICCOLA: There are
17 only two or three of them.

18 MS. BORKE: Our organization is not
19 that active in Franklin County. We do not
20 have -- Actually, our representative in Franklin
21 County basically says I will help people down
22 there, but please don't publish my name because
23 of the fear of the court system.

24 REPRESENTATIVE PICCOLA: It would
25 appear to me that it goes without saying that if

1 a spouse--I don't care if it's a divorce
2 proceeding or anti-trust litigation--a spouse
3 has counsel to one of the adverse parties in a
4 proceeding before a judge would automatically
5 raise the specter of recusal. That judge would
6 have to step aside as a judge in a particular
7 case where his spouse is representing one of the
8 parties. I would like to see the court
9 documents that you might have indicating that
10 this proceeding went before that judge.

11 MS. BORKE: Okay.

12 REPRESENTATIVE PICCOLA: It seems to
13 me that issue should be raised with the
14 appropriate discipline authorities which we have
15 established under our Constitution.

16 Sort of as a side light, and you may
17 comment or not comment, but I just wanted to
18 make you aware of this. Representative Masland
19 indicated that he felt if this legislature
20 adopted some sort of mandatory mediation rules
21 to be imposed on the courts, that Supreme Court
22 would likely step in and suspend that statute
23 because it impinged on their rule-making
24 authority.

25 I'm not necessarily endorsing or

1 opposing mandatory mediation procedures. That's
2 one of the issues I think we're discussing, but
3 I do agree with Representative Masland and I
4 suspect that's the reason this bill was not
5 drafted the way you would have liked it to be
6 drafted, because I think presently constituted
7 the Supreme Court would do just that.

8 However, this is an area of law that
9 has been of concern of the General Assembly for
10 a number of years, the courts suspending our
11 statutes because they claim they have a rule
12 making. In response to that concern, we are
13 going to be considering in the next month or so
14 House Bill 10 which is a constitutional
15 amendment, part of which will eliminate the
16 court's right to suspend statutes because they
17 impinge on the rule-making authority.

18 I'm not suggesting that that was
19 introduced in response to specifically this
20 issue. It's not. But, it would free the
21 legislature to act more specifically, possibly,
22 in this area and to give more direct and more
23 mandatory guidance to the Court in these kinds
24 of areas. Whether we would do it or not, of
25 course, is another issue. I might point out to

1 you that House Bill 10, a constitutional
2 amendment, might be something that you might
3 want to indicate your support for.

4 In addition, House Bill 10 will create
5 a judicial council which will be primarily
6 responsible for promulgating court rules to be
7 approved by the Court, but not initiated by the
8 Court. We feel that would be a more responsive
9 body since the Court is supposed to be involved
10 in deciding cases before it. They have not
11 gotten involved to any great degree in their
12 administrative function; certainly not to a
13 degree that many of us feel they should be,
14 including the adoption of rules responsive to
15 the needs of Pennsylvanians. This would allow a
16 separate body to be involved in the
17 administrative aspects of the Court and rule-
18 making aspects of the Court.

19 I would urge your organization take a
20 look at that legislation. I think it has
21 potential for making some of your concerns more
22 addressable, if that's a word, by the General
23 Assembly. Right now we are handicapped by the
24 current Constitution it seems.

25 MS. BORKE: I'm aware of that.

1 REPRESENTATIVE PICCOLA: Pardon me?

2 MS. BORKE: I am aware of that.

3 REPRESENTATIVE PICCOLA: Again, I
4 would like, to whatever degree you feel
5 comfortable, receiving the information about
6 these allegations on page 6 in the greatest
7 specificity you can because I think you raised
8 serious allegations, potentially serious conduct
9 by members of the judiciary. Thank you, Mr.
10 Chairman.

11 CHAIRMAN CLARK: Thank you,
12 Representative Piccola. We thank you very much
13 for your testimony. The next individual to
14 testify in front of the committee is Linda A.
15 Collins, Esquire, Chair of the Legal Committee
16 of the Pennsylvania Coalition Against Domestic
17 Violence.

18 MS. COLLINS: Thank you for the
19 opportunity this morning to testify in front of
20 you on Senate Bill 432. I speak to you today as
21 Chair of the Legal Committee of the Pennsylvania
22 Coalition Against Domestic Violence. Another
23 hat that I wear, I'm also a director of a
24 shelter for abused women in Montgomery County,
25 and I also have practiced as a family law

1 attorney.

2 The Pennsylvania Coalition Against
3 Domestic Violence supports the premise in
4 Section 3901(c)(2) that battered women should be
5 exempt from court referral or compulsory
6 mediation. The stakes at issue for battered
7 women are safety, welfare, and, perhaps, the
8 survival of herself and of her children.
9 Batterers understand that custodial access may
10 be the only vehicle for continuing control over
11 the battered women and may be an effective way
12 to retaliate for her termination of the
13 relationship.

14 Battered women may be at the most
15 acute risk of lethal retaliation from the moment
16 they separate from the abuser until the abuser
17 decides not to further retaliate, or until the
18 abuser concludes he is no longer interested in
19 this relationship.

20 Abuse of children by batterers may
21 also be likely when the marriage is dissolving.
22 The couple has separated and the husband and
23 father is highly committed to continued
24 dominance and control of the children.
25 Witnessing the abuse of their mother can produce

1 behavioral or emotional problems in children. I
2 see this daily in the shelter that I work in.

3 Women fear, and it's a true fear to
4 have, that male children who witness their abuse
5 of their mothers will become batterers
6 themselves. Mothers also have the fear of child
7 abduction this time. Every year more than
8 350,000 children are abducted by parents.
9 Fifty-four percent of these abductions involve
10 custody orders. Most of these abductions are
11 perpetrated by fathers. I think about it when I
12 sit at my breakfast table in the morning and I
13 look at the milk carton of the faces with
14 children on it and I think, these are children
15 that are involved, the majority of them, in a
16 custody battle.

17 Another fear of the mother is child
18 homicide. Women and child abuse are commonplace
19 in families where children are killed. I
20 personally have been acquainted with families of
21 six children killed in Montgomery County,
22 ranging in ages from 5 to 12 years. In all
23 cases involved, the mother had been abused in
24 that relationship. During the mediation process
25 a mother might even jeopardize her own safety in

1 coming to an agreement for fear of losing
2 custody of her child or children.

3 Mediation holds the promise of
4 amicably setting aside one's differences to
5 collaborate in working out a mutual agreement on
6 parenting. Proponents of custody mediation
7 describe it as a process of dispute resolution
8 that seeks to facilitate cooperative interaction
9 between divorcing or separating parents to
10 enhance their capacities to fully participate in
11 the rearing of their children.

12 In theory, the neutral mediator would
13 assist parents in designing a fair agreement.
14 The process would involve voluntary
15 participation by both parents, and they would
16 have equal power in it. The idea of equal power
17 is not new. The goal of fairness is central to
18 mediation philosophy and it serves as the base
19 for equal power to the parties in mediation.

20 When batterers enter the mediation
21 process it breaks down. There is no equality of
22 power between batterers and their wives. On the
23 contrary, the battering relationship is based on
24 the imbalance of power between the two parties.

25 As I previously stated, effective

1 mediation requires voluntary participation,
2 relatively equal bargaining power, similar
3 quality of representation and approximately
4 equal investment in the outcome. However, a
5 battered woman frequently is already susceptible
6 to pressure to make economic concessions in
7 exchange for favorable custody arrangements.
8 She comes to the negotiations with unequal
9 bargaining power, usually without
10 representation, terrified of the potential
11 consequences of disagreeing with the batterer;
12 and yet, expected to negotiate with the batterer
13 whose abuse is overlooked or deemed irrelevant.

14 Domestic violence does not necessarily
15 cease when the victimized family is separated or
16 divorced. In fact, the violence often
17 escalates. Child custody and visitation becomes
18 the new forum for the continuation of the abuse.
19 Coercion and intimidation in the mediation
20 process invariably produces an agreement which
21 affords the abuser opportunity for unprotected
22 access to the family, frequent contacts with the
23 family. We believe mediation is dangerous and
24 ineffective because the batterer and the victim
25 are at unequal positions at the bargaining

1 table.

2 The inequality of power between
3 abusers and abused persons has been extensively
4 documented. Men batter their wives to achieve
5 power and control over them. These inequalities
6 are brought to the mediation process. The
7 abused spouse comes to the table in a position
8 of fear, dependence and weakness. No mediator
9 can offset the sharp disparity of power between
10 men who batter and the women they abuse. The
11 wife who disagrees with her battering husband or
12 fails to defer to his preference risks
13 retaliation by her abuser.

14 At a meeting of the American
15 Sociological Association in 1989 it was reported
16 that a number of divorcing women were fearful of
17 their spouses and forfeited legal rights because
18 of their fear of property destruction,
19 psychological abuse or violence.

20 Recently in a research project which
21 was published in January 1995 out in Portland,
22 Oregon, funded by the State Justice Institute,
23 it studied custody mediation and domestic
24 violence. It reported that abused women
25 perceived their partners to have more decision-

1 making power than nonabused women indicated for
2 their partners. Over half of the women
3 indicated that their partner had control over
4 important areas such as finances, social
5 relationships, sex, and childraising.

6 It was found that especially
7 problematic for the mediation process was the
8 abuser coming in contact with the victim and the
9 potential suppression of the ability and
10 willingness to effectively express his or her
11 needs and interests. Forty-five percent of
12 abused women thought physical harm was likely if
13 they went through the process compared to 5
14 percent of the nonabused women.

15 Therefore, mediation must exclude
16 custody disputes in the context of domestic
17 violence. Policy makers in states with the most
18 experience in mediating custody disputes are
19 concluding that mediation of custody should not
20 occur in families where there has been woman or
21 child abuse. To assure that the exemption is
22 appropriately available to victims of domestic
23 violence, screening for violence within the
24 family has been instituted in some
25 jurisdictions.

1 Section 407(1) of the Model Code on
2 Domestic and Family Violence from the National
3 Council of Juvenile and Family Court Judges
4 requires mediators to screen for domestic
5 violence. The immediate basis for exemption
6 from mediation that we're looking at should be
7 the self-declaration of an abused adult or the
8 declaration of one parent about the abuse of the
9 child. There need not be court proceedings,
10 police reports or other independent
11 corroboration for the exemption to be activated.

12 To expedite screening, attorneys might
13 be required to advise the court in written
14 pleadings or orally if abuse has or has not
15 occurred during the pendency of the proceedings
16 or within the preceding 24 months. Where
17 parties are pro se, court staff should screen.

18 It's important that screening
19 personnel be competent and trained in domestic
20 violence. Too few mediators and court personnel
21 are trained in domestic violence, but there are
22 preliminary screening tools that have been
23 generated by mediators, scholars and advocates
24 for battered women.

25 Section 3901(d) states the Supreme

1 Court shall develop model guidelines for the
2 implementation of mediation programs with the
3 consultation of experts on mediation and
4 domestic violence. I have attached for you on
5 the back of this testimony a list of experts on
6 mediation and domestic violence for you to look
7 at. I would like to note that collaboration
8 among the stakeholders is necessary for an
9 informed product to be produced.

10 The Pennsylvania Coalition Against
11 Domestic Violence that you heard in earlier
12 testimony has collaborated with the Pennsylvania
13 Council Mediators and with the Pennsylvania Bar
14 Association on working on issues in reference to
15 mediation.

16 The Pennsylvania Coalition Against
17 Domestic Violence in the staff has a long
18 history of collaboration with the legislature,
19 courts, the Bar, mediators in developing policy
20 and practice guidelines for this legal process.

21 The Pennsylvania Coalition Against
22 Domestic Violence has been involved in
23 developing, for example, the model code on
24 domestic and family violence and it has been
25 involved in writing the guidelines to the Maine

1 Court Mediation Services, to name a few.

2 I would like to state that the
3 Pennsylvania Coalition Against Domestic Violence
4 and the staff are available for the necessary
5 collaboration in the implementation of this
6 legislation.

7 I would like to thank you for the
8 opportunity to speak to you here this morning.

9 CHAIRMAN CLARK: Thank you. Are there
10 any questions? Representative Piccola.

11 REPRESENTATIVE PICCOLA: Thank you,
12 Mr. Chairman. As you read the bill, how do you
13 define domestic violence or child abuse as it
14 appears on line 15 and 16 of page 2 of the bill?

15 MS. COLLINS: I'm sorry. I don't have
16 a copy with me right now.

17 REPRESENTATIVE PICCOLA: Here you go.
18 Now, the reason I ask the question, does it
19 require the filing of Protection From Abuse
20 Action or does it require some sort of legal
21 finding from the Court?

22 MS. COLLINS: At this point I'm saying
23 no. I'm going on self-declaration because a lot
24 of times abused women cannot go to the courts in
25 dealing with -- they just try to get out by via

1 a divorce. One of things I mentioned in my
2 testimony, if they're with an attorney, that
3 they've gone to see an attorney first before the
4 mediation, that the attorney advise the Court if
5 there is any domestic violence involved.

6 REPRESENTATIVE PICCOLA: Okay. So
7 then, your reading of this bill would be that
8 merely the allegation of domestic violence --

9 MS. COLLINS: Self-speculation.

10 REPRESENTATIVE PICCOLA: -- or the
11 allegation of child abuse would be sufficient to
12 relieve that party from proceeding through the
13 mediation process?

14 MS. COLLINS: And then I think, which
15 I had not at hand here, is that the screening
16 tools that are used would have questions on it
17 that would bring that out more.

18 REPRESENTATIVE PICCOLA: For due
19 process purposes, should we not simply say,
20 rather than -- Assuming that we're going to move
21 this legislation, should we simply not say that
22 one party or the other can relieve themselves of
23 the mediation requirement simply by raising the
24 issue of domestic violence? Because, the way
25 this is written now, it would appear that if the

1 Court does not order the orientation session,
2 there is a de facto finding of domestic violence
3 or child abuse.

4 MS. COLLINS: I think --

5 REPRESENTATIVE PICCOLA: You probably
6 have the person guilty before you have gone
7 through a legal proceeding to determine whether
8 they are guilty of domestic violence.

9 MS. COLLINS: I think what it does, it
10 provides a safeguard and you're not second
11 guessing whether the person or the parties are
12 going to safe -- involved in the mediation
13 process; and that they also have available the
14 litigation process to them so they're not being
15 denied any process.

16 REPRESENTATIVE PICCOLA: I understand
17 that, but your reading of this Section C(2) is
18 that, that either party simply declares that
19 they are the victim of domestic violence or that
20 the child is a victim of child abuse, that would
21 relieve them of mandatory aspects of this
22 section; am I correct?

23 MS. COLLINS: At this point, yes.

24 REPRESENTATIVE PICCOLA: Why should we
25 simply not say that? That either party can

1 relieve themselves of this requirement simply by
2 saying that I am the victim of domestic violence
3 or child abuse involved and that gets them out
4 from underneath the requirements of this
5 mediation?

6 MS. COLLINS: I think one needs to do
7 is look at what model guidelines are going to
8 come down in reference to the implementation of
9 the legislation and look at what screening tools
10 are going to be written and put together.

11 Then if the self-declaration comes
12 through on this -- For example, when you look at
13 the pro se, how would it be on the pro se? When
14 some type of form is going to have to be written
15 with reference to if a person is going in pro se
16 in a custody procedure, is it going to be--this
17 is just my guessing--is it going to be a check-
18 off point? Is court personnel going to be
19 trained enough to ask a lot of questions?

20 I think it has to be, at this point,
21 left up. Instead of like narrowing the bill is
22 left up to developing guidelines, developing
23 screening tools to how you would screen whether
24 the person is -- the allegation is true or not.

25 REPRESENTATIVE PICCOLA: But you're

1 still allowing someone other than a court of law
2 under appropriate due process to make a finding,
3 even a preliminary finding, that that person is
4 the subject of domestic violence or child abuse
5 which could have a -- it's a finding. I think
6 you should allow either party to get out from
7 under it simply by saying we are making the
8 allegation.

9 Once you get involved in someone other
10 than the Court making the finding, I think you
11 raise all kind of due process questions if
12 you're going to require these people to get
13 involved in mediation.

14 MS. COLLINS: No. The way I look at
15 it is, I'm looking at the safety of whichever
16 adult party is involved in this procedure.

17 REPRESENTATIVE PICCOLA: I agree with
18 your position. I don't disagree with your
19 position. But I'm just concerned about how you
20 define or make the finding of domestic violence
21 or child abuse.

22 Take it another step, you have, I
23 think, legitimately raised the issue of,
24 particularly women, who are the victims of
25 domestic violence being at a disadvantage in the

1 mediation process, you have outlined the reasons
2 for that. I think this raises the whole
3 question of requiring people to go through
4 mediation.

5 Would you not agree that parties in a
6 divorce proceeding or custody proceeding that
7 would be created here always go in, even if
8 there isn't domestic violence per se, they don't
9 go in as equals in a mediation process? Doesn't
10 mediation require equality to begin?

11 MS. COLLINS: Yes, it does, in theory.

12 REPRESENTATIVE PICCOLA: Theory?

13 MS. COLLINS: Theory, yeah. And that
14 the mediator would be trained and is supposed to
15 be neutral in watching for the imbalances of
16 power. I think in a divorce process where there
17 is no domestic violence, I think the people can
18 be involved in hating each other's guts, but
19 still have the special interest of their
20 children at heart, the best interest of their
21 children at heart, and could sit down and
22 mediate an agreement of parental agreement in
23 working out a plan for the children.

24 With the imbalance of power is severe
25 in domestic violence cases that, you know, it

1 would not even have come about. A good
2 agreement wouldn't even come about.

3 REPRESENTATIVE PICCOLA: Thank you.
4 Thank you, Mr. Chairman.

5 CHAIRMAN CLARK: Thank you.
6 Representative Manderino.

7 REPRESENTATIVE MANDERINO: Thank you.
8 Just one question. Ms. Collins, can I take it
9 from the way your testimony was framed that your
10 organization doesn't have a position one way or
11 another about whether or not we should have or
12 pass Senate Bill 432? But what you're saying to
13 us is, if you do and it's a component of it is a
14 mandatory mediation session, then you have to
15 have Section C of 3901 to protect my clients?
16 In essence, is that what you're saying?

17 MS. COLLINS: We support the mediation
18 bill with C(2) in it, yes.

19 REPRESENTATIVE MANDERINO: Okay. If
20 the whole mediation bill was permissive, and I'm
21 not quite sure why we would need the bill; if
22 the whole bill was permissive, then you wouldn't
23 necessarily need -- I'm not trying to trick you
24 here. I'm just trying to understand. Then C(2)
25 you wouldn't necessarily need because a person

1 could just say, I'm not going? It's because of
2 the mandatory nature that you're saying we need
3 this safeguard that says if there's violence
4 involved you can't order it?

5 MS. COLLINS: I think it's just that
6 violence involved, it's just no involvement in
7 it at all.

8 REPRESENTATIVE MANDERINO: Thank you.
9 Thank you, Mr. Chairman.

10 CHAIRMAN CLARK: Any additional
11 questions?

12 MS. COLLINS: Excuse me. May I add to
13 this also? I think, as in some other states
14 where the person wants to go to mediation and is
15 abused, that's that person's choice. There's no
16 one saying, you know --

17 REPRESENTATIVE MANDERINO: The problem
18 is forcing someone.

19 MS. COLLINS: The mandatory.

20 REPRESENTATIVE MANDERINO: Yeah, the
21 mandatory part that makes the requirement for
22 3901(c)(2).

23 CHAIRMAN CLARK: Thank you very much.
24 Judge Esther Sylvester is the next individual to
25 testify. She's the Administrative Judge of the

1 Family Court Division of the Common Pleas Court.

2 HONORABLE SYLVESTER: Thank you very
3 much. I drove up with Attorney Ed Blumstein who
4 is in the courtroom. We're here and that will
5 conclude your list. We really thank you for the
6 opportunity to come up here to discuss your
7 proposed Bill 432. We adopted in Philadelphia
8 County a mediation program, I guess less than a
9 year after I became the Administrative Judge.
10 That would have been in about April of 1993.

11 It's interesting because, we address
12 that same question that you had, Representative
13 Piccola, like when -- what qualifies you to get
14 into the mediation program. We excluded three
15 classes of cases. We said, wherever there's an
16 outstanding Protection from Abuse Order
17 involving a child or spouse they would be
18 excluded; where there's evidence that clearly
19 establishes substance or alcohol abuse; and the
20 third classification was, just what the previous
21 speaker was talking about where the anger and
22 discord is of such intensity that people refuse
23 to communicate.

24 I would just like to address your last
25 question because Ed and I were sitting there

1 saying, the reality is, the only thing we could
2 compel is the orientation session, which is
3 good. But, if one of the parties refuse to
4 talk, that's the end of the mediation. That's
5 the reality.

6 I'm here to support the bill, to say
7 that our mediation program in Philadelphia
8 differs from your Senate Bill in only two
9 respects; and that is, we do not have a general
10 orientation session. We do not assess the costs
11 against the parties because the Court is very
12 fortunate to have volunteers from the family law
13 section and the mental health professionals who
14 have agreed to be trained and were trained and
15 work as a team. That's the model that we have
16 in place. It's been working very, very well.

17 As I indicated to you, we did exclude
18 the domestic violence, but in our discussions in
19 Philadelphia with Mr. Blumstein who's here, we
20 had talked about what's going on in the area of
21 custody mediation when there is abuse; not to
22 say that you can mediate abuse. Nobody is
23 suggesting that, but there is some research that
24 there are cases that appear to be appropriate
25 for the mediation model. Mr. Blumstein will

1 talk about that research.

2 Based on it though, what we did in
3 Philadelphia is join with two professors from
4 Temple University, Professor Joseph Folger and
5 Professor Trisha Jones along with Ed Blumstein.
6 We all signed a grant application to the State
7 Justice Institute to conduct a study on these
8 kinds of cases. In other words, whether where
9 there has been some abuse that they are
10 appropriate for this mediation model.
11 Unfortunately, we haven't heard anything from
12 the State Justice Institute, but we certainly
13 are interested in participating in any kind of
14 research in this area.

15 We had in 1993 before this program
16 started 6,000 cases, petitions, new petitions
17 filed in Philadelphia, with just custody
18 petitions, with another, over a thousand cases,
19 1100 cases for custody, modifications. In 1994,
20 we had 5,800 new petitions with a thousand
21 modifications, petitions for modification. We
22 had 72 mediation cases in the programs first
23 year. Then for the first half year from January
24 to June 1995, we had 3,100 new petitions filed;
25 700 for modifications. There was an increase.

1 We had 53 requests for this mediation.

2 As you can see, it's without the
3 support of your bill. We're in a mode where we
4 have to rely on parties agreeing to the
5 mediation process. So it would be really nice
6 to have the legislature endorse each county
7 having a mediation program and having it -- and
8 I also agree that these plans have to be
9 evaluated. I think it's important that the
10 Supreme Court generate guidelines and then
11 evaluate each of the programs.

12 We're especially happy to urge you
13 that you closely study the need for child
14 custody mediation in particular.

15 CHAIRMAN CLARK: Thank you very much.
16 Now, is it my understanding that the system that
17 you have in Philadelphia is all voluntary?

18 HONORABLE SYLVESTER: Yes. Yes, we
19 have done that on a volunteer -- It gets to the
20 stage where it's involuntary is when the case
21 gets to a judge. A judge under this system, the
22 attorneys can agree. We have an intake of
23 custody officers do some preliminary work on
24 these cases to see if they can't get an
25 agreement. Those custody officers can sometimes

1 get the parties to agree to go to mediation.

2 Basically it's volunteer, except that
3 the judge orders it. But the reality is, when
4 the case gets before the judge, the judge in 99
5 percent of the cases is going to hear the case
6 rather than put the case in mediation. So, it
7 would be nice to have the upfront orientation
8 mediation program before it actually gets into
9 the court system.

10 CHAIRMAN CLARK: And your program also
11 involves the other issues surrounding divorce,
12 or is it just custody?

13 HONORABLE SYLVESTER: Just custody.

14 CHAIRMAN CLARK: Just custody?

15 HONORABLE SYLVESTER: Yes.

16 CHAIRMAN CLARK: Okay, because this
17 bill goes further --

18 HONORABLE SYLVESTER: I realize that,
19 yes. I realize that, and I think that the
20 thought is that, it's good for the parties to
21 make a determination on their own, what their
22 needs and interests are and try to get them to
23 agree. Certainly, the Court has no objection to
24 your extending it to the divorce cases.

25 My feeling, though, is that, the Court

1 has traditionally sat back and waited for cases
2 to be filed and then you dispose of them in
3 order. I really think what we've got to do is
4 start managing the cases better overall. I do
5 think that if we started putting deadlines, you
6 know, like on cases, and we did that here.

7 We have a window of opportunity there.
8 I think we've given them 60 days and if they
9 can't mediate it, then the case gets a priority
10 back in front of the judge. I think that's what
11 you have to do. You can't let the cases
12 languish out there.

13 CHAIRMAN CLARK: Has there been any
14 thought or move to involve the other issues
15 surrounding the force in through mediation
16 process?

17 HONORABLE SYLVESTER: It's really a
18 cost. You know, it's a problem. We have so
19 many pro se cases. Seventy-eight percent of
20 these custody cases, I mean, people come in
21 without attorneys. In many of the cases because
22 of their financial play, we have to waive the
23 actual cost of filing the petition. So, I guess
24 I have hesitated, ah-h- --

25 Because we had the volunteers on the

1 custody mediation we adopted that, but I don't
2 really know how to fund the other thing because
3 you're going to have to pay somebody to do the
4 training of the parties in the divorce cases. I
5 just didn't think that we had, being on a zero
6 budget, that we didn't have the wherewithal to
7 do it.

8 CHAIRMAN CLARK: Okay. Then there is
9 no cost to any of the parties for the custody
10 resolution?

11 HONORABLE SYLVESTER: That's correct.

12 CHAIRMAN CLARK: The proposal in this
13 bill is to impose an additional filing fee in
14 order to fund a mediation program. And there
15 was also testimony given earlier today that the
16 parties should fund that, I guess if they are
17 able. In your situation you have a great deal
18 cases that aren't.

19 HONORABLE SYLVESTER: But it will
20 develop a fund for this. I think that's the key
21 piece here. And I think that -- You know, I
22 certainly couldn't do it or our court couldn't
23 do it. I think if the legislature adopts this
24 as a policy and says it's going to be \$20 to
25 develop mediation fund, at least you have a fund

1 there. Maybe you can employ people to do the
2 training that it takes in this divorce piece of
3 it. I think people should try to resolve their
4 own problems before getting into that
5 adversarial mode.

6 CHAIRMAN CLARK: There was also an
7 opinion expressed earlier about the Supreme
8 Court and its schedule and wherewithal to
9 monitor these mediation programs and whether
10 they could -- given their resources, whether
11 they can do that efficiently and effectively;
12 or, is there some other independent agency? I
13 forget which independent agency was spoken about
14 to monitor that. Or, is this a situation where
15 probably the Supreme Court will go out and hire
16 a consultant to monitor the program? Any
17 thoughts on that?

18 HONORABLE SYLVESTER: I was trying to
19 think where this -- where designing the
20 guidelines would lie. I certainly can't, you
21 know, read their minds. They might do that, but
22 they do have a Domestic Relations Rules
23 Committee which handles the rules and
24 regulations and guidelines for every aspect of
25 domestic relations practice, including

1 protection from abuse. I would think that that
2 would be the group that they would look to to
3 design a program.

4 Now, funding, getting in some experts
5 to detail what it would look like, you know, is
6 an issue. I guess all these mandates are --
7 There are funding issues with all these
8 mandates. There's an already made body of
9 lawyers and judges throughout the Commonwealth
10 who I think could at least deal with this.

11 The evaluation piece is another piece.
12 That's a harder thing. Ed Blumstein is here and
13 he has been involved in this for over 15 years,
14 so he can get a sense of like what programs work
15 or not.

16 This is a new program in Philadelphia.
17 We just decided at our last meeting with the Bar
18 Association that we should be doing some exit
19 surveys to see how people feel about
20 participating in the program to get, you know,
21 some sense of whether the process was good or
22 bad.

23 CHAIRMAN CLARK: One last question.
24 If you've already been able to institute a
25 program on your own, why is this legislation

1 necessary to you if you've already been able to
2 accomplish these things?

3 HONORABLE SYLVESTER: Well, no. You
4 see, I just think it's just by the good graces.
5 I mean, we're getting away with it. Suppose
6 somebody just challenged it. I think they
7 could, absolutely. And I said to Ed coming up,
8 I mean there are -- Like, I would love to be
9 able to say if you want to file a modification,
10 well, before you do that you're going to do a
11 mediation.

12 You know there are things that you'd
13 like to do but you really can't without the
14 benefit of having a legislative piece that says,
15 this is the mode that we'd like to work in.
16 Then it gives us the flexibility not to rely on
17 agreements where then we could actually say this
18 is the law. You've got to go through this
19 process. I think we'd like to have that as a
20 tool.

21 CHAIRMAN CLARK: Thank you.

22 HONORABLE SYLVESTER: We thank you
23 very much.

24 CHAIRMAN CLARK: Any questions?

25 REPRESENTATIVE MANDERINO: Thank you.

1 Judge Sylvester, I have expressed some concern
2 about the proposal particularly from the cost
3 point of view. I'm less troubled by how
4 something like what's proposed in this Senate
5 Bill would operate in Philadelphia given the
6 model that you're using, because the mandatory
7 first orientation session that the Court could
8 say to me as a party you must to this. The cost
9 of my going to that is not an additional cost
10 that the Court is assessing on me; am I correct?

11 HONORABLE SYLVESTER: That's right.

12 Again, funding is going to be a problem.

13 REPRESENTATIVE MANDERINO: Again, one
14 of the earlier models we heard about first thing
15 this morning was a model program in a different
16 county where the cost is bore by the individuals
17 participating in the mediation. So I was
18 troubled by the notion, particularly knowing
19 that the people in my county in my ports and the
20 number of indigent or lower-income families that
21 you must see before you of mandating another
22 \$150, or whatever cost on those families.

23 Would your position on mandating that
24 first orientation be the same if we were
25 mandating the cost borne by the individuals that

1 the Court's ordering to go?

2 HONORABLE SYLVESTER: I hear you. I
3 too am sensitive to that problem. It may be
4 that those who can -- Well, let me just, if we
5 were free to design our own orientation session,
6 perhaps it doesn't have to be to individual
7 couples. It could be to a group. So in that
8 sense, those who can afford it might be funding
9 that orientation program. That's the only thing
10 I can add to it.

11 Otherwise, if you say we have to
12 design an orientation program for, you know,
13 like every couple, we probably have to do it
14 individually, but you've given us like broad
15 flexibility in this bill. So, I think we could
16 design one that is applicable to multiple
17 couples.

18 REPRESENTATIVE MANDERINO: How does it
19 work right now with regard to the Court's
20 ability to waive any costs or fees to -- You
21 mentioned earlier that sometimes you have to
22 waive either court costs or other. Does it make
23 sense -- How does that work now? What mechanism
24 in law gives you the ability to do that?

25 Does that make sense if we choose to

1 move forward with Senate Bill 432 to have that
2 as a safeguard in there too that -- I guess my
3 ability to buy into the concept seems to be
4 directly proportional to a cost of putting on an
5 individual that they may -- My ability to grasp
6 the notion of mandating something is directly
7 related to my ability to grasp possession, and
8 I've also mandated an extra expense on the
9 individuals. I'm trying how to reconcile that
10 and what mechanisms we perhaps have to do that?

11 HONORABLE SYLVESTER: Particularly
12 when I indicated to you that 78 percent of the
13 people coming in filing petitions are pro se.
14 So, it's harder for a judge to handle these
15 cases because they're not attorneys.

16 We have something in Philadelphia --
17 two things, I'm sorry. We have something in
18 Philadelphia called Kids Cap. Ed's familiar
19 with it also. We've got attorneys supervising
20 law students; just talking with these people who
21 come in on these petitions to see what their
22 financial situation is. If the person is
23 indigent, we have a petition that they file
24 saying what their income is and we'll waive the
25 cost.

1 That's just how we do it, because we
2 feel that we've got to give these people access
3 to the courts. It's the right thing to do.
4 Now, I don't have the numbers on how many
5 petitions we do have, but I can get that for you
6 if you are concerned to see how many cases we
7 have where they can't afford it.

8 REPRESENTATIVE MANDERINO: I'm not
9 sure you need to go through the work of pulling
10 those numbers together. I'm just wondering, do
11 we build in something specifically into this
12 legislative proposal that makes it clear that
13 you can't mandate these costs on people who
14 can't afford it?

15 HONORABLE SYLVESTER: That's right.
16 That's right, and I think if you put something,
17 you know, in there, then it's the obligation of
18 each county to come up with a program that's
19 going to permit them to access the same type of
20 program. The reason we put this Kids Cap in,
21 it's interesting, because --

22 COURT REPORTER: Are you saying Kids
23 Cap?

24 HONORABLE SYLVESTER: I'm sorry. I
25 apologize. K-i-d-s and then C-a-p. The program

1 was initiated because the attorneys who
2 represented parties could access an emergency
3 judge for any emergency. Yet, these people had
4 no way of knowing what they had to do in order
5 to get before the emergency judge in our court,
6 so these lawyers help them out. It's giving
7 them equal access to the system.

8 I agree with you. I'm sorry, I don't
9 have the answer. I'm hedging. What I'd like to
10 do is go back and talk to our court
11 administrator.

12 REPRESENTATIVE MANDERINO: That would
13 be helpful. You say the Court is going to give
14 you an option of whether or not you want to have
15 one of these programs. So, the Court gets to
16 make the decision, can I afford it? Can I
17 delegate the personnel to it? Can I get it up
18 and running? Will the \$20 filing fee be enough
19 to cover? What will I put together for that \$20
20 filing fee?

21 But, it doesn't go the next step of
22 saying -- But it says, and if you set that up
23 it's voluntary for you to set it up, which the
24 legislature is concerned about your costs, but
25 if you choose to set it, up you can mandate that

1 people participate in it and we haven't made any
2 provisions about whether you're mandating people
3 who are participating in it is making a
4 financial burden on them; that they can't afford
5 that --

6 HONORABLE SYLVESTER: I hear you.

7 REPRESENTATIVE MANDERINO: -- is what
8 I'm getting to.

9 HONORABLE SYLVESTER: All right. I'll
10 try to get something for you.

11 REPRESENTATIVE MANDERINO: Thank you.
12 Thank you, Mr. Chairman.

13 HONORABLE SYLVESTER: Thank you very
14 much.

15 CHAIRMAN CLARK: Thank you very much.
16 the last person to testify before our committee
17 today is Edward Blumstein, Esquire. He is a
18 private mediator and public advocate. It's nice
19 to have you here with us today.

20 MR. BLUMSTEIN: Thank you, Mr.
21 Chairman. Thank you. Representative Manderino,
22 before I get in to my prepared remarks, I could
23 offer you a solution to the issue of cost.

24 There are federal and perhaps state
25 guidelines dealing with who qualifies for legal

1 services. It would seem to me that an easy test
2 for who gets to pay for mediation and who
3 doesn't would be those guidelines. They're
4 already there. They're in place. They can be
5 adapted. There's one rule. If that isn't
6 acceptable, the procedure that Judge Sylvester
7 talked about the in forma pauperis petition that
8 gives the judge discretion whether costs should
9 be waived or not.

10 REPRESENTATIVE MANDERINO: Just on
11 that particular issue, is that something that
12 needs to be specified or is that something that
13 will be taken into consideration, even if the
14 legislation is finalized because that's
15 something that the Court has to take into
16 consideration every time a client comes before
17 them and there's costs involved? Do you
18 understand my question?

19 MR. BLUMSTEIN: Yes. I think the
20 courts presently have the power to determine
21 whether or not a fee should be waived. In many
22 of the cases, 78 percent of the cases that are
23 filed are pro se and a lot of those cases we
24 believe are poverty line cases. I don't have
25 the figures either, but I've seen them and I've

1 looked at them. Maybe even 70 percent of those
2 pro se cases are poverty cases, and a number of
3 those cases they file them under mediation
4 custody cases.

5 REPRESENTATIVE MANDERINO: So you're
6 saying the safeguard is already in the law?
7 That addresses my concern.

8 MR. BLUMSTEIN: Yes. And if out of
9 budget costs we felt that we needed to make it
10 clear, you could say that the same standards
11 apply to people who request legal service under
12 the legal service program should meet the
13 standards of that. The same are similar, or you
14 could say the courts should take into
15 consideration the existing standards and giving
16 them discretion. There are ways to deal with
17 that.

18 Although I serve as the Chairman of
19 the Philadelphia Bar Association Family Law
20 Section and the Family Mediation Association of
21 Delaware Valley, today I do present myself as a
22 family law attorney and a mediator and somebody
23 who is concerned in the interest and welfare of
24 the children of our Commonwealth.

25 I'm concerned about the devastating

1 effect, as I'm sure you are because you're
2 holding these hearings, that the breakup of a
3 family has on these innocent victims. I'm not
4 talking about people who are necessarily only
5 married. There are a lot of parenting
6 arrangements in Pennsylvania and elsewhere,
7 where parents don't have to be married. I'm
8 also concerned about the cost to them and to
9 society as a whole.

10 Judith Wallerstein, whose name you may
11 have heard in other remarks, is a researcher, a
12 writer and a family therapist. She makes her
13 point in a book called Second Chances which I
14 think was one that made the best seller list for
15 awhile, a year or so ago, a New York Times
16 Bestseller.

17 She argues that children, even adult
18 children, pay a price when parents divorce or
19 separate. When they pay that price, that is
20 earlier in life or later in life and how much
21 they pay emotionally is directly related to the
22 method that their parents choose to resolve the
23 disagreements and manage conflict over their
24 children. Really, managing conflict is what
25 mediation is all about.

1 There is a researcher, professor, a
2 writer named William Ury. He is most known
3 because he coauthored a book called Getting to
4 Yes with a man named Roger Fisher. That's a
5 primer really on conflict resolution. Ury in
6 other writings have reduced the methods of
7 resolving conflict, really for three methods.
8 He says you can resolve conflict through the use
9 of power. You can resolve conflict through the
10 adjudication of rights, or you can focus on
11 needs and interests. Use of power as you heard
12 before has resulted in spousal abuse, child
13 abuse and, obviously, is unacceptable.

14 What we have up until now in
15 Pennsylvania and most states is relied on the
16 process which allows our citizens to adjudicate
17 their rights in their children. What this means
18 though, because we have been so comfortable with
19 the system and because it's taught in law
20 schools, is that parents go to war in a court of
21 law in order to prove that one is right and the
22 other is wrong.

23 They carry over their distastes for
24 each other into their discussions about child
25 welfare and most efforts up to now to improve

1 our system have really been directed to make the
2 procedure to try custody cases in our courts
3 more user friendly through changes in law and
4 procedure.

5 Although the best judges, and we have
6 some of them in Philadelphia as you can tell
7 from listening to Judge Sylvester, and the most
8 enlightened courts in our Commonwealth have
9 attempted to focus on what is the best interest
10 of the child. We have gotten away from
11 doctrines such as the tender years doctrine, so
12 forth. We're focused on the best interests of
13 the child. The result really suggests that one
14 parent is best and the other is not. One parent
15 wins and the other one loses. And most of all
16 the child in our present system is in the
17 middle.

18 This result comes about in an era in
19 history when our legislature has created a
20 no-fault divorce, and recognizes that all
21 marriages are not made in heaven or meant to
22 last. So, with the best of intentions, even
23 though change has been attempted, up until now
24 parents are still forced into a forum that
25 results in a win-lose situation.

1 In the last 10 or 15 years as the
2 study of conflict resolution is developed,
3 techniques have been identified which focus on
4 needs and interests as contrasted to the rights
5 of the parties involved. And translated, what
6 this means is that, the parents who are moreover
7 their children with the help of a trained,
8 neutral professional can be guided into
9 cooperative or collaborative problem solving and
10 away from fighting over children.

11 Senate Bill 432 provides the
12 opportunity for courts to use mediation in
13 custody cases. The Court is permissive and it
14 permits counties to order parties to an
15 orientation session.

16 In effect it says, courts, you can
17 screen all custody cases, because that's really
18 what an orientation session is all about; screen
19 them for suitability for mediation. The parent
20 or parties and the mediators assess the
21 suitability in this particular case for proper
22 problem solving. Some cases must go to court
23 especially when there's an ongoing domestic
24 violence or child abuse, or their parents are so
25 stuck in their position that mediation can't

1 help.

2 Parenthetically, Paragraph (c)
3 prohibits an orientation session if the subject
4 of domestic violence -- Well, I think you
5 changed it from a complaint to some other
6 language.

7 Now, there are a lot of experts who
8 address the issue of domestic violence, and
9 you've heard an earlier speaker discuss that.
10 The State of Maine has done a tremendous job in
11 studying the issue. The outcome of that study,
12 and I can make it available to this committee,
13 is really two-fold: On the one hand there is a
14 feeling that there never should be mediation if
15 there has been domestic violence between the
16 parties.

17 On the other hand, there is a group
18 equally strong, a committee of the task force
19 that studied this equally said that mediation
20 can never mediate domestic violence, but it can
21 mediate collateral issues in appropriate cases,
22 which means that you have to have some sort of
23 intervention, perhaps Protection from Abuse
24 Order.

25 You have to have the opportunity for

1 people to become involved in supports groups if
2 that's what it takes. You have to be able to
3 provide safety for the people when they come to
4 the mediation session, and you have to have
5 mediators who are trained in domestic violence
6 screening and the handling of domestic violence
7 before you allow it to go back.

8 The safer course as Judge Sylvester
9 has mentioned to you that in our voluntary
10 program in Philadelphia excludes those cases.
11 But, I and Joe Folger and Chris Jones have
12 proposed to Judge Sylvester and the Court that
13 we attempt to get some funds from the State
14 Justice Institute.

15 By the way, they have approved our
16 preliminary grant proposal. Although we were
17 supposed to know this month, we still haven't
18 learned whether the full proposal will come
19 about. What that study would do, would look at
20 those cases where there are custody petitions
21 filed and where there is an existing PFA order.
22 Our plan is to look at those cases 6 months
23 post-via petition, 9 months to a year to
24 determine whether that collateral issue still
25 exists and whether or not those cases can be

1 mediated; again, after giving training to our
2 volunteer mediators.

3 We want to find out whether or not
4 there should be through a controlled study,
5 there should never be an opportunity for these
6 cases to be mediated or where they should be
7 excluded summarily.

8 So, therefore, I would not, in your
9 bill, eliminate any case where there has been
10 domestic violence. What I would suggest would
11 be that the bill should indicate that there
12 needs to be screening and to allow the media --
13 if there has been domestic violence, that the
14 mediator need to be trained to handle that, so
15 that you could open up the opportunity for those
16 cases which are appropriate.

17 Judge Sylvester has had a task force
18 in domestic violence in Philadelphia. I was
19 privileged to talk about mediation and its
20 appropriateness. Some of the judges said, you
21 know there are domestic violence cases and there
22 are domestic violence cases. And I don't want
23 to diminish that for a second or say that that
24 should not be taken seriously. But there are
25 cases where, if the parties had a forum; we

1 talked about how the kids were going to be
2 handled and raised, there might not be domestic
3 violence. What we want to do is give them the
4 opportunity and option to do that if it's
5 appropriate.

6 But, you know, most cases go to court
7 today with issues of day-to-day parental
8 management. Should Johnnie go with dad when dad
9 hasn't shown an interest in Johnnie since birth?
10 Should Sally be with mom when mom is living with
11 her boyfriend? What school should the parents
12 attend or how many days and months with each
13 parent?

14 My sole concern with the bill is that
15 the permissive language, first permitting the
16 Court to establish a mediation program and
17 permitting it to order mediation doesn't take
18 into consideration the fact that the successful
19 programs after an appropriate screening for
20 domestic violence require the orientation before
21 litigation.

22 For example, if you look at Florida,
23 Maine or California, even Texas which I think is
24 an extremely conservative state, or Virginia,
25 all these cases require a mediation of custody

1 cases before litigation. I agree that no
2 citizen should be deprived of his or her right
3 to have the issues decided by a court if it
4 turns out that mediation is inappropriate. I am
5 not arguing that all cases are suitable for
6 mediation, but I am urging the cooperative
7 techniques be used before the competition breaks
8 out.

9 Now, the bill calls for the adoption
10 of local rules regarding confidentiality and
11 mediator qualification. While I believe that
12 each county should be able to choose its own
13 mediators, it would be better if qualifications
14 were standardized on a statewide level.

15 I know Judy Shopp was here today to
16 speak before you and she's involved with the
17 whole issue of credentialing, not only here in
18 Pennsylvania but also in an organization called
19 the Academy of Family Mediators which is a
20 national organization dealing with family
21 mediation including custody. Judy and I are
22 working on the issue of credentialing.

23 There's also an organization called
24 Society for Professionals and Dispute
25 Resolution, a national organization dealing with

1 mediators of all kinds. They have just
2 published a book dealing with their study of the
3 kinds of things, court programs or private
4 mediators or trade associations or organizations
5 should deal with regarding credentialing.

6 So, I think that there should be some
7 statewide credentialing qualifications. It
8 could be in the Supreme Court. I know,
9 Representative Manderino, you said where else.
10 Well, there has been a bill previously before
11 the Senate talking about a statewide office. It
12 might be there. It's not for me to choose what
13 the committee thinks, but there are resources
14 available.

15 In deference to Judge Sylvester, I'm
16 not so sure that at this point the State Rules
17 Committee is sufficiently familiar with the
18 whole issue of mediation to give it to them. I
19 would want to see that whoever decided
20 credentialing had some background on mediation
21 and some specific qualifications.

22 Confidentiality is also a likewise
23 issue that cuts across all cases. I think that
24 the Senate has already passed Senate Bill 619,
25 or at least maybe it's gotten out of committee,

1 and that grants the privilege of confidentiality
2 to mediators. That's really an important issue,
3 because we should not be able to report to any
4 court what happens in the privacy of a mediation
5 session. People will not be candid or share
6 their honest and open feelings and thoughts.

7 I would suggest that this body would
8 be best served to adopt that bill or something
9 similar.

10 The bottom line is, make a mediation
11 orientation session mandatory in custody cases
12 and give the parents of our Commonwealth an
13 opportunity to cooperate rather than to
14 litigate.

15 Thank you for the opportunity to
16 present our remarks.

17 CHAIRMAN CLARK: I thank you very
18 much. When we talk about making, or when you
19 talk about making those orientation sessions
20 mandatory, then are we likewise talking about
21 funding them with the \$20 filing fee, or --

22 MR. BLUMSTEIN: Well, I personally
23 don't have a problem with the \$20 filing fee. I
24 also don't have a problem with Representative
25 Manderino's suggestion that some people might

1 not be able to pay that. I think that built
2 into that would be appropriate for some in forma
3 pauperis opportunity for people not to have to
4 pay that.

5 In Pennsylvania now, there's a
6 mandatory filing fee for divorce cases. If you
7 file an IFP Petition, which is really a two-page
8 form, fill in the blanks, you don't have to pay
9 that. That's a rule that the Supreme Court
10 employs.

11 CHAIRMAN CLARK: One of our problems
12 is, when you mandate an orientation and then you
13 say, well, 70 percent of the people will be
14 waived from paying the fee, then how are the
15 people who conduct the orientation sessions
16 going to be compensated? Then you get into the
17 fact, well, I guess local government is going to
18 pay that. Then they are less than pleased with
19 the action of the legislature. That's something
20 that --

21 MR. BLUMSTEIN: Well, we --

22 CHAIRMAN CLARK: -- we need to work
23 through and discuss up here.

24 MR. BLUMSTEIN: Being mindful of the
25 fact that there are people that can't -- and

1 being mindful of the fact that the burden might
2 have to fall on those who can pay, I would say
3 to you and suggest to you that the cost of
4 society and the cost to our Commonwealth would
5 be less if somehow either through funding with a
6 filing fee or funding through appropriation or
7 custody mediation took place.

8 I think all the studies show that when
9 people can get into mediation, they start
10 thinking differently about how they're managing
11 their kids. Their kids turn out differently.
12 The cost of those kids emotionally and socially
13 is different, and also for the cost of the
14 Commonwealth in terms of juvenile delinquency.
15 In terms of all of the anti-social behavior that
16 we know comes about with juveniles and sometimes
17 adults has the chance of being reduced and
18 ultimately the cost of society is less.

19 I mean, I have to believe Judith
20 Wallerstein when she says everybody pays. It's
21 just how much and when and what you can do; what
22 we know you can do to reduce that cost in
23 dollars and in emotions is to give people an
24 opportunity. Not everybody will take advantage
25 of that opportunity, but at least give them the

1 opportunity to mediate.

2 We don't even know this Commonwealth
3 whether 25 percent of the people will stay in
4 mediation or 75 percent. We do know in the
5 cases that we've had and Judge Sylvester has
6 talked about, we've had between 80 and 90
7 percent success rate in all the cases that had
8 gone to mediation--pitifully few.

9 You know, I'm reminded of a mediator
10 who is involved in toxic tort cases speaking to
11 a group that I was part of. What he said was
12 that, he was lobbying really with the senior
13 vice-president of a major insurance company to
14 get those complex cases into mediation. There
15 were multiple parties; there were complicated
16 issues, discovering that whatever it cost the
17 insurance company a fortune, and it wasn't
18 working for the injured people or communities,
19 or whoever was involved.

20 The vice-president of the company
21 said, you know, we've been thinking about it and
22 we're in favor of an alternative resolution to
23 mediation as an appropriate alternative
24 resolution. We are waiting for the right case
25 to make that happen. So the mediator said, how

1 many cases have you had? He said, we have 3,000
2 cases but we're waiting for the right one. And
3 I'm gonna -- I think that's what's happening in
4 Pennsylvania. There are right cases and there
5 is no (voice trails off).

6 CHAIRMAN CLARK: In the end you said
7 that you went through a lot of issues, you know,
8 where Johnnie should go with his dad. How much
9 does the issue revolve around who is going to
10 pay support and how much support is going to be
11 paid, and what is the spouse going to get the
12 support because the child doesn't have new
13 school clothes? Where's the money going? I
14 don't mind paying support, but the child doesn't
15 seem to be benefiting from this.

16 And on the other hand, they forgot to
17 send the support check this week. Therefore,
18 they don't get to see the child. Go check on
19 the child. Is that pervasive in this process,
20 in this mediation, you know, help to sort
21 through that?

22 MR. BLUMSTEIN: Well, first in our
23 program in court in Philadelphia, we only deal
24 with custody issues. We don't deal with support
25 issues. That doesn't come in any of those

1 cases.

2 CHAIRMAN CLARK: You mean you're
3 sitting there talking to the parents as to why
4 they're doing this or something like that, they
5 don't say, well, you are not going to spend the
6 money on them? You think the conversations will
7 avoid --

8 MR. BLUMSTEIN: No, I won't say that.
9 Certainly, how money is spent is discussed.
10 What the children are eating is discussed. He
11 goes to your house and eats pizza all the time
12 or McDonald's, why don't you give them a real
13 meal? Usually, that conversation is a symptom
14 of the underlying frustration and anger that
15 parties have with each other.

16 When you get them to focus on what
17 their needs and interests and teach them certain
18 communication techniques, what mom is concerned
19 about is that, when mom is with dad, that dad
20 sees to it that the kids get some sort of
21 appropriate nutrition. What dad is concerned
22 about is that, he has the control over his kids
23 when he has control and gets the respect from
24 mom that he has the appropriate judgment.

25 Sometimes in a case like that, and

1 we've done it a number of times, we get them to
2 think about bringing in a third party so that
3 neither of them becomes right or wrong. They go
4 to the doctor, for example, and say, you know,
5 we've been talking about the meal planning for
6 Johnnie. Dad seems to be giving him hamburgers
7 and Mom seems to be giving him lettuce. Talk to
8 us about what's appropriate; give us some
9 nutritional information. Go to a psychologist
10 or somebody else who can provide an appropriate
11 intervention.

12 So, when we hear those kinds of
13 argument, we generally recognize that the
14 argument have some other basis. There's another
15 way you can approach that particular issue.

16 In my private mediation practice, I
17 don't think--since 1982 I have been doing this--
18 I don't think that I have had more than a
19 handful of cases where there's even the
20 suspicion who had the parenting rights was
21 directly related to how much support was being
22 paid. There's a balancing act.

23 When dad knows he's getting an
24 opportunity to be with the kids, dad is not
25 going to be complaining about mom using the

1 money on a dress or whatever it is that she is.
2 Mom is not going to be complaining about that.
3 When mom knows that dad is not going to take the
4 child away from her and fighting in court about
5 that, then mom is not so concerned maybe that on
6 Sunday it's hamburger night at McDonald's.

7 CHAIRMAN CLARK: I have no further
8 questions. Thank you very much.

9 MR. BLUMSTEIN: Thank you.

10 CHAIRMAN CLARK: That concludes the
11 hearing for today.

12 (At or about 12:30 p.m. the deposition
13 concluded.)

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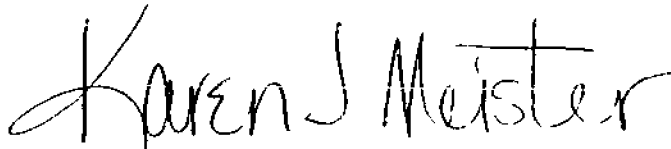
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