

Resolutions

a quarterly update on dispute resolution

Volume 13, Issue 1

Department of Dispute Resolution Services

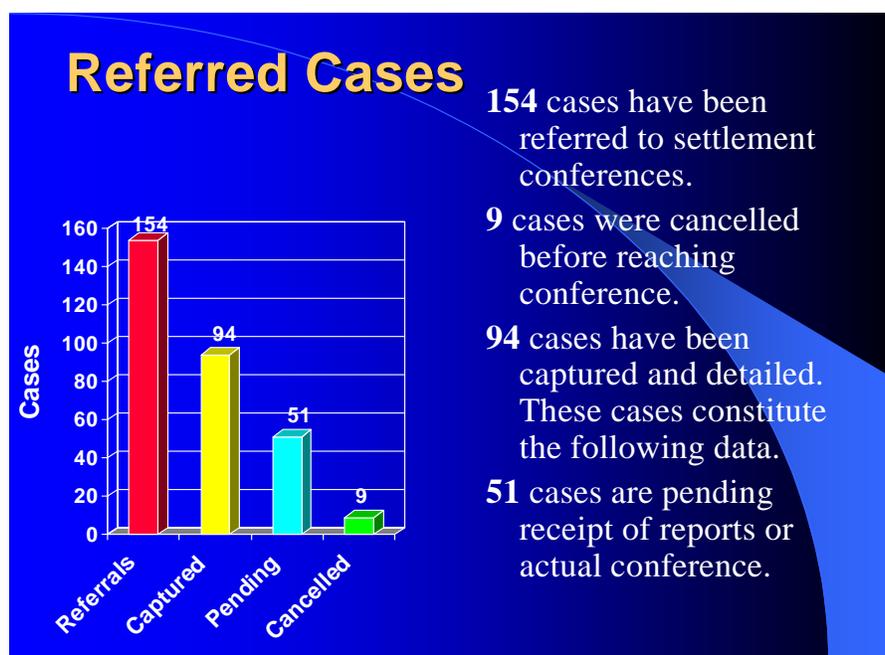
January 2005

Judicial Settlement Conference Program Update

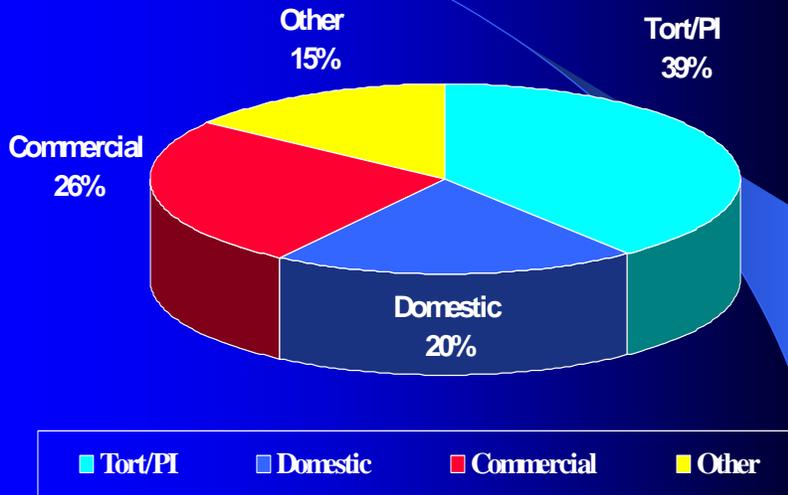
In the December 2003 issue of *Resolutions*, an article appeared announcing the pilot of a Judicial Settlement Conference Program in Virginia's circuit courts. In November of 2003, fourteen retired circuit court judges were trained to conduct judicial settlement conferences in complex cases. U.S. Magistrate Judge Karen Klein from North Dakota and U.S. Magistrate Judge William Cassady of Alabama conducted the 16-hour training.

Since the inception of the pilot program, the Department of Dispute Resolution Services has captured 154 referred cases in a database. Upon referral of each case by a circuit court, a settlement conference judge is designated and the case is entered in the database. Upon conclusion of each conference, the judge is requested to report details regarding the case, such as the case type, length of the conference, outcome, etc. That case information is added to our database so we can track the progress of the program.

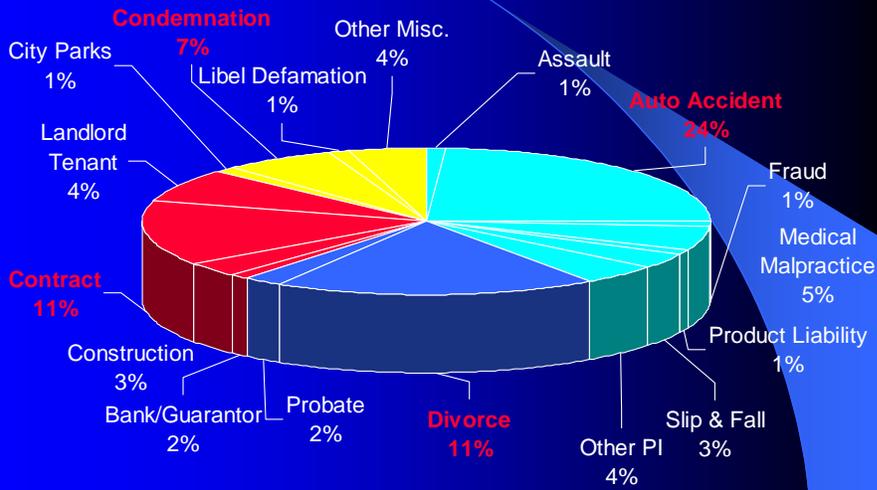
The charts that follow provide an overview of the cases referred to date, particularly those for which final reports have been received. As the volume of cases being referred to the settlement conference program is growing, we are planning to offer another training program to interested retired circuit court judges March 2-3, 2005 in Richmond. For more information, contact Geetha Ravindra at 804-786-6455.



Categories of Case Types

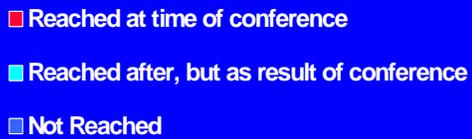
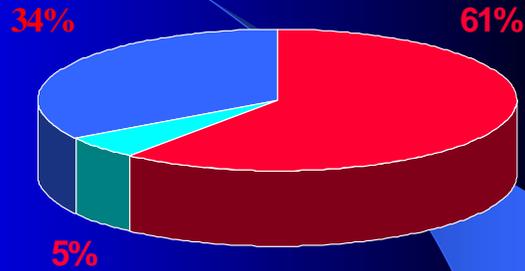


Types of Cases



Agreement Rate

- **66%** of referred cases successfully reached an agreement either during or soon after the conference

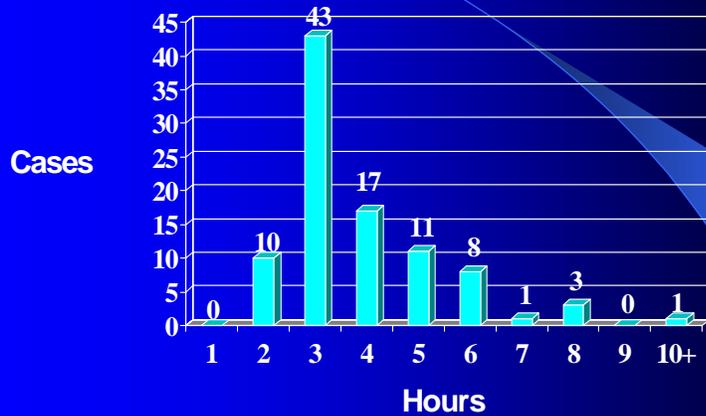


Note: This does NOT include Pending cases

Counsel

In **97%** of settlement conferences, counsel was present for both sides.

Length of Conferences



The average length of a conference is **3.86** hours.

Referral Time

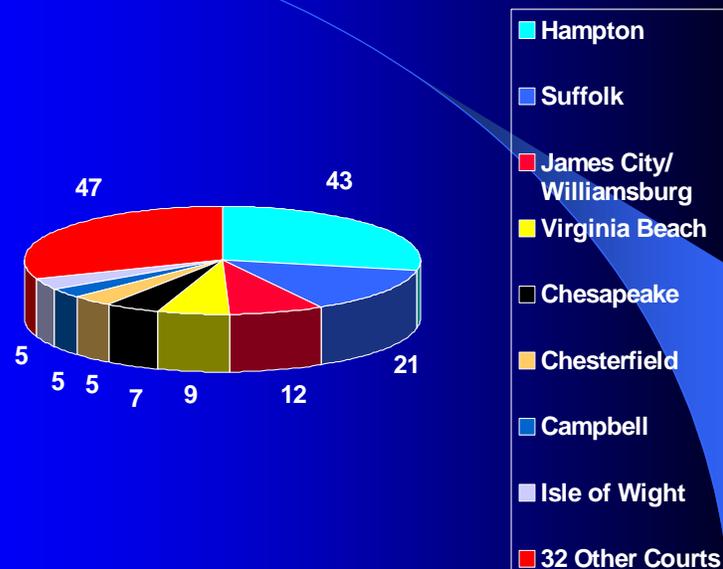
The average time between referral date and conference date is approximately **3-4 weeks.**

Note: Referral time approximation obtained through general consensus of judges.

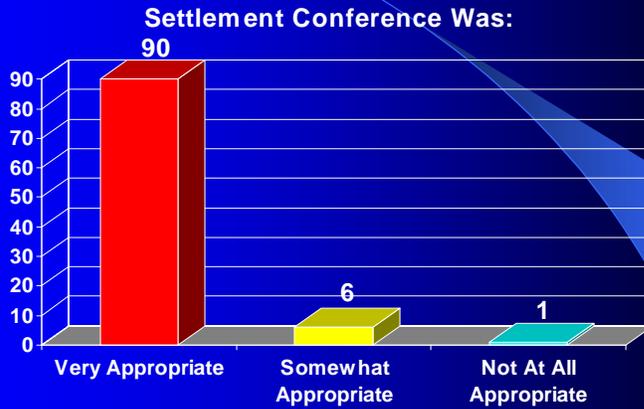
Referring Circuit Courts

- Hampton has referred 28% of the 154 cases captured to date.
- 62% of all cases have been referred by courts in the Tidewater Area (Hampton, Suffolk, James City/Williamsburg, Virginia Beach, York and Chesapeake).
- 38% of the 154 cases captured have been referred by 34 other courts across Virginia.
- A total of 40 circuit courts have referred cases.

Number of Cases Referred By Court

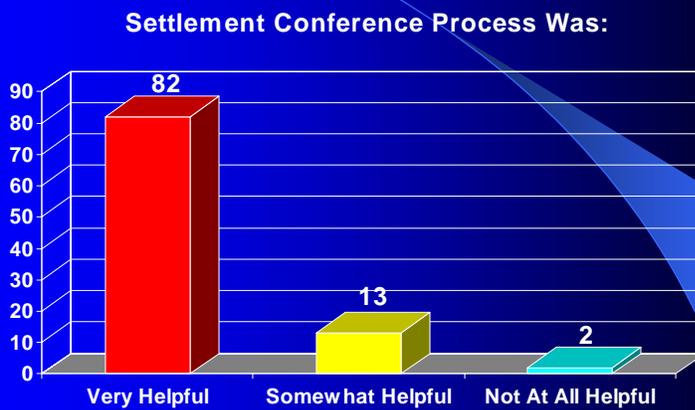


Client Satisfaction



Data reported from 97 client evaluations received to date.
99% of clients viewed settlement conference as appropriate.

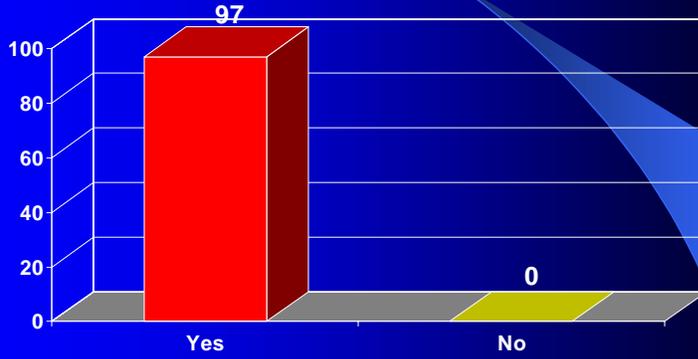
Client Satisfaction



Data reported from 97 client evaluations received to date.
98% of clients viewed conference as very or somewhat helpful.

Client Satisfaction

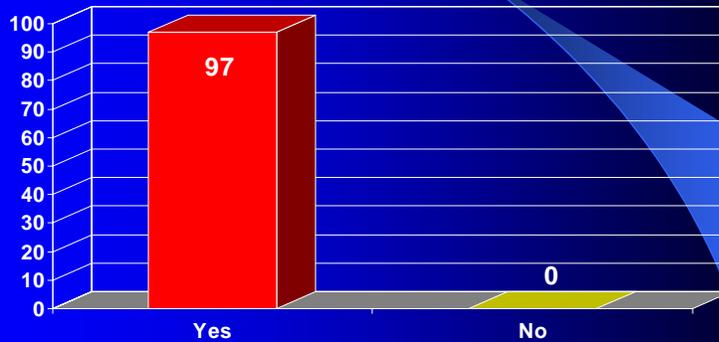
Would You Request a Conference Again?



Data reported from 97 client evaluations received to date.
100% of clients would request a settlement conference again.

Client Satisfaction

Would You Recommend Settlement Conference?



Data reported from 97 client evaluations received to date.
100% of clients would recommend settlement conference.

Rappahannock Mediation Center Selects New Executive Director

Rappahannock Mediation Center in Fredericksburg is pleased to announce its recent appointment of Ronald Harris McLean as Executive Director. Ron makes his home in Midland, Virginia, and has an extensive background in administration, management, and development. He is also an ordained minister and professional mediator and operates a family-owned business in financial services.



Ron's educational background includes: a Bachelor of Science Degree from Livingston College in Salisbury, NC; a Master of Public Health Degree from the University of North Carolina at Chapel Hill, NC; a Mediation and Dispute Resolution Certificate earned from Harvard Law School, Program on Negotiation; Chaplaincy training at Boston City Hospital, MA; Master of Divinity at Andover Newton Theological School, Newton Centre, MA; and Doctoral Studies in Communications and Family Systems Theory, also at Andover Newton Theological School.

RMC's Director has served with the American Peace Corps in India, with North Carolina's State Office of Economic Opportunity, as Director of the Social Planning Division of the City of Raleigh's Department of Human Resources and Community Development, as President and Executive Director of the Ecumenical Commission of Massachusetts, as Associate Conference Minister for both the Massachusetts Conference and the Central Atlantic Conference of the United Church of Christ, and most recently as Interim Pastor for the Midland Church of the Brethren in Virginia. Much of Ron's community involvement and employment history has been in the area of conflict resolution. Other organizations in which Ron has been involved are Boy Scouts of America, United Way, Roxbury Comprehensive Health Center, Habitat for Humanity, International Development and Mission Board, Heifer International, and Heifer International Foundation. Ron is also an Independent Registered Representative with World Group Securities and World Financial Group Insurance Agency.

Welcome aboard, Ron!

Credentialing for Mediators Will One Size Fit All?

The issues surrounding the process for credentialing mediators have surfaced nationally with the now collaborative initiative by the American Bar Association's ("ABA") Task Force on Credentialing (Interim Report http://www.abanet.org/dispute/taskforce_report_2003.pdf) and the Association for Conflict Resolution ("ACR") Task Force Report on Mediator Certification (Report March 31, 2004, <http://www.acrnet.org/pdfs/certificationreport2004.pdf>). David Hart, Esq. the Executive Director of ACR, was a panelist at the Virginia Mediation Network (VMN) Annual

Meeting in the session on credentialing on October 28, 2004. The ABA Task Force originally published a draft report with guidelines the various state credentialing entities might follow with respect to establishing credentials for their mediators. However, the ACR approach is to establish a National Mediator Certification program wherein a separate entity related to ACR would serve as the administration and credentialing authority. The ABA is reviewing this approach and working with ACR (and some other organizations) to determine the ultimate degree of participation in this national model.

The ACR national model provides that participation would be open to ACR members and non-members, would be voluntary, and applicants could seek “certification” by submitting a portfolio showing years of experience and successful completion of a written assessment (test). The certification would be valid for three years, and then re-application would be necessary for re-certification. Waivers of some requirements could be obtained upon a showing of good cause. An application fee would be charged to permit the entity to be self-financing.

The ACR criteria for assessment of the applicant’s experience is generally set forth in the report, but it would appear to have some subjective elements—and apparently there is expected to be some “grandfathering.” Indeed, the inclusion of a performance-based component by observing the applicant in a mediation was determined to be “not desirable.” How the “general certification” level would fit into other ACR membership categories is for future development, and perhaps to be delegated by existing ACR Sections and Chapters. The ABA model varies somewhat because, as a model for guidelines to be used by state certification entities, there are no subjective elements and no grandfathering, except as approved by adopting states.

The VMN had previously conducted a one-day colloquium on quality and credentialing in 2002, and last year at its annual meeting it had an extended session on credentialing with panelists who were in the administrative functions for credentialing in three fairly sophisticated state programs in Florida, Texas, and Georgia. Those models differed substantially, with Florida having a certification process principally accomplished through the court programs wherein most mediators were layers; Texas adopted a independent mediator credentialing association separate from the courts wherein mediators were certified at different levels of experience based on an affidavit of background (almost all mediators are lawyers); and in Georgia, a system based on a model for objective evaluation of a list of “job skills” as the criteria for certifying mediators is in place.

The writer was involved in each of these VMN sessions and, as a Virginia Certified Mediator, drew some preliminary perspectives as to the credentialing procedure generally, and how the Virginia process might be adapted or modified. The initial reaction, given the expansive numbers and difficult state and federal jurisdictional requirements, was “could one size established by the ABA/ACR model fit all?” In some states such as Texas and Florida, almost all of the mediators are lawyers. The judges refer an enormous number of cases to mediators, but since those mediators are lawyers, they bring training in many substantive areas of the law to the mediation. In a state such as Virginia, there are probably as many non-lawyer mediators as lawyer-mediators with varying substantive training, and to a certain extent the mediations conducted may be different in kind and scope, i.e. non-court based school, community and administrative issues; small claims court versus circuit court neutral case evaluations; large communal disputes or disaster damage evaluation; family and consumer oriented cases with specific statutory provisions and requirements, etc.

To perform court-annexed mediation, certification is necessary, but private mediations by agreement of the parties can be done by non-certified mediators. Work-place mediations for private companies or government agencies may not require certification, and the New York Stock Exchange (NYSE) and National Association of Securities Dealers (NASD) have their own training requirements not connected with Virginia certification (although certification may be of value). Many of these different types of mediation have an inferred advanced skill requirement, yet there is no substantive advanced certification in existence (except by number of hours, different courts and extent of CLE Course completion). Nor does the ABA/ACR model attempt to address this advanced skill level for certain kinds of mediation. Indeed, it would appear that, in many instances, the market place of client users of mediation probably determines the choice of a mediator, regardless of whether he or she is certified.

One peripheral observation was made at the VMN session. Is there a similarity between the training of lawyers/mediators and screen television actors? In fact, don't both develop and apply basic skills for different roles/practices taught by accredited law schools and mediator training entities? Indeed, the "trainers" are not certified—it is the entity and its program which is evaluated. With respect to actors, ultimately it is the public which determines the success of the movie or TV program by larger attendance. And it appears to be the clients and users of mediation and their lawyers who decide on the ultimate skill and experience of a mediator they choose, wherein different needs and expectations are relevant to that choice. Retired insurance claims representatives and attorneys are sought to mediate insurance disputes; product liability lawyers to mediate complex manufacturing issues; securities lawyers to mediate for claims against brokerage horrors and personal injury lawyers to perform neutral case evaluations, etc.

There may certainly be a professional cache for certification by a national entity such as that contemplated by the ACR model similar to some of the attorney advanced court certification for civil trials; International Association of Barristers, American College of Trial Lawyers etc.; but without some hierarchy of special substantive skill contact, the ABA/ACR initiative appears diluted. Indeed, the certification process in Virginia is as sophisticated as any in the United States and, with some additional tinkering to establish some substantive skill certifications, it might surpass the ABA/ACR model. Also, with certification by the highest court in Virginia, certification may have a reciprocity in other states which the ABA/ACR model would not enjoy. Also maintaining the quality of mediators with an available sanction of de-certification by the same Supreme Court which admits lawyers is a positive element. It would appear that the only sanction for the ABA/ACR model would be loss of membership/certification in an entity which does not transcend any state system and which is not a necessary credential to perform mediations.

For these and other reasons, it was the view of many attendees at the VMN program featuring the ACR/ABA panelists that, although there may be some good ideas in the published reports by ABA and ACR, the need or usefulness of that model in Virginia is not apparent at this time. Re-visitation of this issue might be a future project for the Virginia System and the ABA/ACR activity will be followed by the VMN.

Submitted by Carroll E. Dubuc, attorney and President of Carroll E. Dubuc & Associates in Fairfax, Virginia. Mr. Dubuc is also a mediator and arbitrator, certified in the Virginia court system, Circuit Civil, Circuit Family who works on court-referred and private mediations.

Virginia Restorative Justice Symposium

The first Virginia Restorative Justice Symposium and Training held on December 6th & 7th, 2004 in Richmond was a great success! The symposium was sponsored by RJAV-The Restorative Justice Association of Virginia.

THE MISSION OF RJAV is to provide leadership, support and advocacy for Restorative Justice principles in Virginia's justice system, schools and communities.

RESTORATIVE JUSTICE begins with the understanding that crime harms victims, offenders, their families and communities. This concept requires that we address victims' harms and needs, hold offenders accountable to put right those harms, and involve victims, offenders and communities in this process.

The conference plenary included a presentation by Dennis Maloney from Bend, Oregon. Dennis is responsible for many award winning juvenile justice programs in the United States and is a leader in juvenile justice reform around the world. The plenary also included a panel discussion featuring six successful Restorative Justice (RJ) programs in Virginia, and a live demonstration of an RJ family group conference.

Workshops included *Starting an RJ Program*, *Evaluation and Research of Local and International RJ programs*, a discussion on *The Victim's Perspective* and *The Criminal Justice Professional's Role in RJ*.

The lunchtime speaker was Mary Achilles, victims' advocate for the State of Pennsylvania, appointed by then Governor Tom Ridge. Mary also offered an afternoon workshop on the victim's perspective on RJ.

There were 110 people in attendance at the symposium. We anticipate that this will be the first of many events RJAV will offer across the state to encourage understanding of the concepts of Restorative Justice and promote use of restorative practices in dealing with wrongdoing in Virginia's juvenile and adult courts, schools and communities.

A two-day RJ conference facilitator training was also offered during the symposium. Twenty-nine (29) trainees participated in the extended symposium training.

*Submitted by Vickie Shoap. For more information about Restorative Justice, please contact:
RJAV - The Restorative Justice Association of Virginia
9309 Center Street, Suite 301
Manassas, VA 20110
703-792-4073*

Bioethics Mediation: A Guide to Shaping Shared Solutions *A Book Review*

Consider the following scenario. A smart, caring middle-aged man is diagnosed with AIDS. For the next five years, he is in and out of the hospital for treatment of various illnesses threatening his weakened immune system. Today, he is also diagnosed with cancer. The oncologist examining his case now recommends a highly aggressive treatment. Meanwhile, the internist who has worked closely with the patient since the onset of AIDS cautions against such potentially painful treatment. The man's family opposes the oncologist's recommendation. Imagine that this man is your son, your father, your husband, or your cousin. How do you reconcile opposing and complex positions when the stakes are life and death? As a family member, how can you tell which decision is the best?

According to Nancy N. Dubler, Director of the Bioethics Division at Montefiore Medical Center, and Carol B. Liebman, Clinical Professor at Columbia Law School, bioethics mediation provides the best way to resolve such medical conflicts. *Bioethics Mediation: A Guide to Shaping Shared Solutions* understands that even the most complex, emotional, and ethically-challenging medical decisions are essentially conflicts. To those who associate the term "bioethics" with abstract theories appealing only to those on a pre-med track, this book is a must-read. It refreshingly breaks down complex problems of medical advances and difficult moral questions into real-life situations the average reader can grasp. The authors find that "risk-managers and litigation experts increasingly agree that poor communication with the patient and family is hazardous in terms of later possible litigation." Thus, they advocate mediation as a tool to promote open and effective communication.

Enlightening Ethics

Displaying their expertise in medicine, Dubler and Liebman use their experience in the medical and the mediation fields collaboratively. Together, they provide an informative, insightful, and practical guide to those interested in bioethics mediation. They emphasize that mediators must understand basic bioethics: patient autonomy, beneficence, non-maleficence, and distributive justice. Additionally, the best bioethics mediators also understand the administrative and political systems in place.

A clear and informative style makes the text accessible even to those with no more than a textbook understanding of mediation. The pragmatism employed empowers the reader to think through various cases alongside the writers. A frank discussion of the mediation process in case studies elucidates the weight of their experience. Throughout the text, diagrams provide further definition and emphasis. Text boxes such as "The Importance of the Chart Note" and "Issues and Interests" assist non-mediators and non-medical professionals without detracting from the overall discussion.

Guided Communication

Most of the accessibility lies in the book's structure. Organized essentially into five parts, the book flows logically, giving the reader the basic tools necessary to understanding more complex case studies. First, Dubler and Liebman make the case for mediation – here they provide their basic definitions and insights into the advantages of mediation over traditional forms of conflict resolution. Specialization aside, this first part is a condensed basic mediation guide, establishing the principles of mediation as it applies to general conflict. Mediation best suits the family of patients who often feel

disadvantaged in the world of medicine, left out of the conversation and uninformed to make proper decisions. Because the value of mediation lies in the process, families benefit from collaboration meant to develop higher understanding of their difficult situations. By restoring the relationship between caregivers and families, patients benefit from increased trust and informed decision-making.

The authors then provide their “Practical Guide to Bioethics Mediation”, careful to explain the similarities and differences from traditional mediation. Bioethics mediation spends a lot of time in the preparation phases, and then in the clarification of issues. Unlike traditional mediation, where agreements are not mandatory, a resolution for the problem must and will be reached, unilaterally if necessary. Time becomes an obstacle and confidentiality is not a chief concern of the process, particularly in the clarifying issues stage. Bioethics issues involve multiple parties, which often do not include the patient in question. While the book recognizes the limits of mediation, it advocates the flexibility of mediation to provide the best source of ethical resolution. Further, the focus on the patient and the patient alone helps the decision-makers determine interests.

Next, the authors move into case analyses of past situations. After narrating the situation, they describe the role of the mediator and the different interests and considerations that were taken into consideration. In doing so, readers receive an in-depth look into the successes of bioethics mediation. This portion is nicely followed by role-plays for practice and transcripts of other mediated bioethics cases. These last two sections of the book provide readers with maximum utility, setting up real life situations to be practiced. Here, the text fully emerges as a guide with substantial tips and techniques.

Highlights of *Bioethics Mediation*

One of the positions the guide takes is in advancing nurses as the best employee to mediate medical conflicts. Their intimate involvement with the patient gives them insight into the patient’s interests, while their everyday knowledge of the medical system advances their ability to understand complex medical care.

Case studies bolster the authors’ ability to argue for the use of mediation. Displaying not only their extensive familiarity with real-life mediations, but also their story-telling skills, the authors depict the many positive experiences mediation brings to the hardest of medical cases.

The experience they share as mediators and bioethics specialists underlies the foresight into potential problems and benefits of mediation. This is seen most clearly in the thorough explanations they give of each mediation step and definition. Experience lends itself to an inner knowledge of the future of medicine, as they understand the growth of consultants within the medical structure; in the same vein, they suggest the growth of bioethics mediators as consultants to preserve the impartial but skillful nature of the process.

In terms of policy, it seems clear that Dubler and Liebman would support more funding and time for hospitals to have bioethics mediators trained and on hand for the hospital. The book’s frequent mention of hospital understaffing applies here; yet reality lends itself to the recommendation that nurses provide these services.

Overall, *Bioethics Mediation: A Guide to Shaping Shared Solutions* practically leads its readers to consider other ways mediation may be used to assist medical and moral conflicts. An

essential guide to anyone working on a bioethics committee, this book renders itself equally important to well-informed mediators as it affirms the growing success and role of mediation across the nation.

Submitted by Faith A. Alejandro, a senior and honor student at the University of Virginia, where she serves as the Coordinator of University Mediation Services. Faith served as an intern for the Department of Dispute Resolution Services the summer of 2004.

Peace License Plate Expected to be Available Soon!



The Virginia General Assembly is shortly expected to authorize the production of the Peace Plate license plate. The cost of the plate will be \$25 in addition to normal registration fees, \$15 of which will go to the Virginia Association for Community Conflict Resolution (VACCR) to benefit community peace-building efforts across the Commonwealth of Virginia. VACCR needs 350 vehicle owners to agree, in advance, to purchase the plate before the DMV can begin to manufacture them.

To be one of the first to get this plate, just send an email to peaceplate@vaccr.org with your name, address, phone, email, and number of sets you would like. You'll be notified as soon as they are available. More information is available online at: <http://www.vaccr.org/peaceplate.htm>