REMARKS TO R.I. MEDIATION ASSOCIATION
April 24, 2009

The art of dispute resolution through agreement has always been a valued commodity in every society across time; the role of mediator in effecting such agreement of special importance. And when you think about it, you can easily understand why this is the case: all the other alternatives are far worse for those involved in the dispute whether the operative principle is force, dictation, etc. Is it any wonder that the bible itself calls "the peacemakers"; that is, society's mediators, 'the children of God"? When you think about it, the very order and peaceful interaction of individuals who live in community with one another rests on the avoidance of disputes that threaten such order and peace or at least, the quick and reasonably amicable resolution of such disputes by agreement with mediators playing the role of neutral middleman who points the way to settlement to the disputants. So what we do is both valued and valuable. It is, of course, not the only "civilized", that is, peaceful way to settle disputes that the parties themselves can't resolve. The alternative, indeed, the traditional alternative is dispute settlement through trial before a judge and/or a jury. But if this is the case, how do you account for the dramatic growth of mediation as an adjunct to court dispute settlement by trial. If trials by jury or by a judge did the trick, why do courts increasingly utilize mediation as a settlement tool and why do businesses and a growing number of individuals with the wherewithal to afford it opt to avoid courts and trials and opt for mediation instead?

I think the answer is simple: first, with our courts handling far more cases, especially criminal cases, with the resources to do so lagging far behind, the time from the commencement of a case to case disposition still remains far too long or at least longer than those who have opted out of the civil court system are willing to wait and in the best of scenarios, that wait is still two years or more.

Second, the bottom line is that taking a dispute to court costs more than bringing the matter to a skilled mediator for resolution; that is especially the case, in the weightier matters that are tried before the general jurisdiction courts across the nation.

Third, in cases where the resolution of the dispute does not end the contact or necessary interaction of the disputants, the winner take all consequence of the usual trial leaves the parties with bad feelings towards one another, in many cases, feeling the case decision, the case deciders erred unintentionally-and in some cases due to inherent bias. Think of a neighborhood dispute over land use-or alleged misuse, think about a will contest between siblings, think about a contested divorce case. I could go on but you get the point. A successful mediation of any of these types of cases is more accepted, more acceptable by the disputants because the case resolution wasn't the result of the action of a third party but rather the shared consensual decision of the parties to the dispute themselves. In sum, mediation assists the parties to exercise the authority, the right and the power to work out the differences they have among themselves, through give-and-take, through mutual compromise so that both sides feel responsible for the results-and more willing to view it as something they wanted to do because it was in their best interests to agree as they did. And as experience has shown, such agreements are more intellectually and emotionally satisfying. .

Fourth, trials by their very nature, can and often do lead to unexpected results and by nature, human beings dislike uncertainty in their lives; that is especially, the case involving disputes that can/often do affect the disputants in significant ways.

Fifth, unlike arbitration, a mediation that fails still allows a resolution of the dispute in the courts; oftentimes with the advantage of having settled a number of the disputed facts/issues which can cut down the time before the case is reached

for trial, the time it takes to try the case, the amount of money expended for legal expenses.

Well, if it so obvious that mediation is a better dispute resolution tool than dispute disposition through trial, why do so many cases still end up clogging calendars in our courts, why are some attorneys and some litigants still so resistant to mediation?

On the part of lawyers, I think the answer is unfamiliarity and the sense that mediation in lieu of trial would somehow cut out the attorney from the equation and thus cost him or her income and/or the opportunity for earning income. On the part of parties or as they should be called, court users, I think the answer is unfamiliarity too but also a concern about the fairness and professionalism of mediators and the mediation process itself.

Having said this, the reality is that resistance to mediation for these reasons is less and less of a factor with each passing day for the simple reason that mediation has proven to be an effective dispute resolution tool, parties have come to realize that mediation is a faster, cheaper, as effective method to resolve their differences and lawyers have learned that mediation doesn't take business away from them but can add to it and make their payday come sooner rather than later, with their clients as satisfied at least as when their cases were disposed in court.

Courts too have adopted formal mediation in a big way in recent years, learning that every case settled by agreement saved court time and resources, allowing judges to focus on the still growing criminal calendar that has become the norm in most states.

An example of court/-annexed mediation that works involves the program initiated by our Superior Court in Providence. Every December for two weeks, the civil jury calendar is closed down and attorneys conference their pending cases with a judge to see if

a settlement can be reached. To add incentive to this process, cases that don't settle are given a fast track to trial. The result? More than half of those cases conferenced are settled.

A second example is the R.I. S.Ct's Appellate Mediation Program which was initiated a few years ago by former CJ Frank Williams. Frankly, when he asked me to participate as a program mediator, I was skeptical it could work as were a large number of the members of the bar whose cases were referred to me and the other judges who agreed to participate in the program. Keep in mind that in order to be worthwhile, attorneys and parties who had been declared the winner in the case decided by the jury would have to give back, at least, some of what they had won at trial and I thought this was unlikely, if not altogether impossible to expect. As you may know or surmise, I was dead wrong. The Program not only worked, it worked as well as the Superior Court's pre-trial mediation program did. And in anonymous exit interviews, the attorneys and the parties that participated in the mediation sessions gave rave reviews to the mediators and the process-even if their own case had not been resolved.

I am also happy to say that my own court, The R.I. District Court was a pioneer in the use of formal mediation. Mediators from the Community Mediation Center of R.I. volunteered to mediate disputed small claim disputes in the several D.Cts and contested landlord/tenant cases in Providence-and again, these efforts met with great success.

I imagine you are thinking that is all well and good but what does this mean to me? Is there a future in mediation as a career for me, especially if I am not an attorney?

I went into a bit of history about the use of formal mediation in R.I. as a framework to what I will tell you now. Because of the history of the successful use of mediation, much of the resistance to the

process by disputants and attorneys and judges has disappeared, opening the door to the more widespread use of mediation inside and outside of the setting of a court. If the example of what is happening across the country is replicated here, more and more parties to a dispute will opt to resolve their differences through mediation. To be frank, lawyers and retired judges will have the edge over non-law trained mediators in attracting such business and such cases. In California and in much if the American Southwest, mediation is a veritable cottage industry for both bench and bar and the earnings for those attorneys who specialize in mediation are so great that judges are resigning their offices and hanging out their shingles as mediators at a record rate. Here in R.I., I know of two retired Family
Court judges who have/are setting up mediation businesses to deal with contested divorce and other disputed family law cases. I predict they will do well and that other judges will follow their lead in this and in other areas of the law. The good news for non-judges and non-lawyers is that for this type of venture to work as well as the prospective clients will expect, non-lawyer mediators and field experts will need to be hired. This has been the experience of those judges and attorneys who have set up mediation centers in the west and elsewhere across America. And the truth is among the most financially successful, busiest mediators nationwide include many non-law trained individuals with in-depth training and experience in negotiations and in compromise building and structuring; in other words, people like many of you.

But what do you need to do to be a certain part of what I predict will be a growing occupation here in R.I.?

The first step is one all of you here have already taken. You have formed and/or joined an Association of Mediators whose goal is to spread the further use of mediation here in this state-and to

increase your mediation skills so you will be ready when this happens.

Second, at some point soon, mediation standards and an accreditation process needs to be set up that qualifies a person to be a mediator. The Association could be the instrument used to establish/adopt these standards and it can be the accrediting authority as well. The ABA's ADR Section is just one of the national organizations that have been involved for a long time in this area and the standards and the accreditation process they have devised can be easily adopted for use here.

Third, such organizations like the ABA can provide you with information of those states where licensure of mediators by government has been implemented. While there are a whole bunch of reasons why licensure should be careful weighed and considered before you get on board, the advantages of licensure is that it lends credibility to the mediation process by screening the qualifications of those who hold themselves out as mediators, by validating the performance standards governing the actions of mediators and by holding those who fall short of those standards accountable.

Fourth, in conjunction with licensure, "mediation colleges" should be formed to insure the proper training of all professional mediators. Here in R.I., The Community Mediation Center of R.I. could fill this need but so can our network of community and state colleges, so can a training program this organization might set up.

Let me conclude by saying that mediation in R.I. as a full-time profession is in its infancy. To succeed, I suggest the steps I have recommended should be seriously considered by those of you who want to make a career of it in this field. Like every good thing, mediation as a business must be conducted in a professional way with accountability standards that are enforced to protect the public and you as mediators as well from the charlatans that are always

present when the possibility of good money exists. But having said this, I tell you mediation in R.I. is here to stay. It will grow in popularity. It will provide a great public service and it will provide a good and honorable living to those trained, professional mediators who will provide such service. And the fact that you are here, already involved, gives you a leg up on those that follow. I commend you and wish you well.