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THE PROMISE OF MEDIATION FOR NORTH DAKOTA

JAMES R. ANTES, Ph.D.[†] & KRISTINE PARANICA, J.D.^{††}

The purpose of this article is to provide a history of mediation practice in North Dakota. A number of the pioneers of mediation practice in North Dakota provided interviews and a picture of the history of mediation practice. Research revealing the written record of legislation, court rules, and mediation practices in government agencies were gathered. Additionally, the experience we bring as mediators and writers was accessed as a resource for this article. Jim Antes has been involved with mediation in the state for over 20 years and Kristine Paranica has been a member of the bar in the state for 17 years and directly involved with mediation for 11 years. Both have been members of the North Dakota Joint Alternative Dispute Resolution Committee since it was formed in 2000, and Kristine chaired the recently formed subcommittee on family mediation in North Dakota. Thus, we have been aware of much of the development of mediation in North Dakota and know many of the people who have helped shape the practice in the state.

One might think that this is an easy task given the relative recency of the practice in this state and the United States, yet a full record is missing and somewhat anecdotal. The earliest we could place the practice of mediation is the early 1980s. This mirrors, and lags somewhat, the development of mediation in other parts of the country.² Presumably, events are recent enough that ample information should be available to compile the historical record. However, little written information is available about certain mediation venues, such as public schools, the community, businesses, and organizations. Thus, despite our intentions to be inclusive there may be areas of mediation practice about which we are unaware. It is also quite possible

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We would like to dedicate this writing to three important people: first former UND School of Law Professors and ND ADR supporters, Larry Spain and the late Mike Ahlen; and also to former UND President, the late Thomas J. Clifford who, along with Jim Antes and others, founded the UND Conflict Resolution Center. We also wish to thank Crystal Thorpe, Burtness Scholar and third year law student who provided research assistance.

2. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 1 (1994).

that there are gaps in this history and we encourage the reader not to consider this history as completely comprehensive.³

We begin with a chronology (with little comment) from the written record of key events in the history of mediation on North Dakota. We then proceed to describe the history in three categories: the context in which mediation takes place, mediators and mediation training, and the influences on law and policy making. Next, we discuss major themes that appear to us to characterize mediation in the state and how it has developed. Finally, we present conclusions and a glimpse of what may be the future of mediation in the state.

I. MEDIATION CHRONOLOGY

The following table was gathered from the written record of mediation practice and presents an account of events related to mediation in North Dakota. According to our interviews, the earliest practice of mediation in North Dakota was the family mediation practice of Bonnie Thompson in about 1981 through Lutheran Social Services. However, the table chronicles mostly legislation or the adoption of court rules.

3. Our disclaimer is that there may well be omissions. To those whose work in shaping mediation in North Dakota we have missed, we apologize.

Year	Event
1985	State legislature establishes a credit review board to deal with farm foreclosures.
1987	State legislature approves a law that allows courts to require mediation in contested child custody and visitation cases (NDCC 14-09.1).
1988	University of North Dakota Conflict Resolution Center is founded.
1989	State legislature amends NDCC to change the farm credit counseling program to the agricultural mediation service.
1989	State legislature approves law about the inadmissibility of evidence from mediation sessions (NDCC 31-04-11).
1989	State Supreme Court issues Administrative Rule 28, establishing qualifications for court-appointed mediators. Qualifications include at least 40 hours of certified family mediation training. Also included are education and experience requirements.
1991	State legislature authorizes the agricultural mediation service to help with any farmer-related problems.
1993	State legislature allows court to require mediation for contested visitation rights for grandparents. If mediation "fails" the court may ask the mediator to serve as arbitrator (NDCC 14-09-05.1).
1995	ND Supreme Court establishes Joint Dispute Resolution Study Committee with the charge 1. Review existing procedures to resolve legal disputes other than by court trials; 2. Evaluate the need for developing further court-annexed options to resolve legal disputes; 3. Develop suggested court-annexed options to meet various needs; 4. Make appropriate recommendations.
1995	ND State Bar Association appoints Family Law Task Force to study family law issues.
1996	State Supreme Court issues ND Rules of Court 8.5 allowing summary proceedings for domestic relations issues in two districts as a pilot project. Mediation (undefined) is included under "Hearing Procedures."
1996 (approx.)	North Dakota Human Resource Management Services begins to offer mediation services to state agencies for personnel and employee relations disputes.
1997	UND Conflict Resolution Center begins practicing transformative mediation and revises all its training to be based on transformative premises.
1998	Joint Dispute Resolution Study Committee issues final report, recommending 1. Changing ND Rules of Civil Procedure 16 to encourage consideration of ADR options; 2. A new rule of court establishing a roster of neutrals.
1998	Joint Family Law Task Force issues final report, encouraging the ND Supreme Court to 1. Explore options for establishing court-annexed mediation programs; 2. Consider adopting a code of ethics for mediators.
1999	Mediation is made available to United States Postal Service employees in the EEO complaint process under the REDRESS ^{LM} program across the U.S.
2000	State Supreme Court issues Administrative Rule 43 establishing the Joint Alternative Dispute Resolution Committee.
2000	United States District Court of North Dakota issues Rule 16.2 encouraging early participation in ADR. The primary forms of ADR offered by the court are to be "meditative court-sponsored settlement conferences" or ADR in the private market.
2001	State Supreme Court issues ND Rules of Court 8.8 (encouraging use of ADR, patterned after Rule 16.2 of the U.S. District Court) and 8.9 (establishing a roster of neutrals). Rule 8.9 supersedes Administrative Rule 28 (1989).
2001	State Board of Higher Education approves SBHE Policy 605.5 making mediation mandatory for some faculty issues, voluntary for other issues, and not available for still others.
2003	State Supreme Court ND Rules of Court 8.5 (summary proceedings for domestic relations issues) is made permanent.
2003	State Supreme Court issues Appendix to Administrative Rule 43, containing guidelines for approving training programs and continuing education coursework for ADR neutrals.
2006	State Supreme Court issues modification of ND Rule of Court 8.8, including a more complete definition of ADR, excluding judicial settlement conferences.
2007	State legislature amends NDCC to include other persons besides farmers as eligible for mediation with an agency of the USDA by the agricultural mediation service.
2007	State Supreme Court establishes family mediation pilot project requiring mediation or consideration of mediation in cases involving disputes over child custody or visitation.

II. CONTEXTS FOR MEDIATION IN NORTH DAKOTA

A. FAMILY MEDIATION

As indicated in the mediation chronology, above, family mediation was perhaps the first context in which mediation was practiced in the state. Retired Judge Bruce Bohlman reported that in the mid-1970s there was a requirement for mandatory counseling in family court where the primary goal was to save the marriage.⁴ According to Bohlman, many divorcing couples tried to avoid the mandate and received a waiver to attend counseling by the court, and the legislation was eventually repealed.⁵ This was definitely not mediation but was apparently an attempt by the court system to deal with divorce in a different way than the traditional court process.⁶ Bonnie Thompson, a social worker from the Fargo-Moorhead area, may have been the first to practice mediation in North Dakota and her practice began in the early 1980s.⁷ A few years later, in the mid- to late-1980s, Mike Liffbrig, an attorney from Bismarck, North Dakota, began conducting family mediations as part of his practice with a law firm.⁸ Both Thompson and Liffbrig attended training events out of state to learn the practice of mediation.⁹

Major obstacles faced both individuals because very little was known about mediation.¹⁰ Attorneys were skeptical for two main reasons. First, they were concerned that their clients' rights would not be well represented in mediation and second, there was some worry that they would lose business if their clients mediated their cases.¹¹ Thompson faced the additional hurdle of convincing the court and the bar of the validity of her mediation practice because she was not a lawyer.¹² Liffbrig noted that even though it may have been difficult to convince attorneys of the value of mediation, it

4. Interview with retired Judge Bruce Bohlman, Northeast Central Judicial District of North Dakota (Jan. 16, 2008) [hereinafter Bohlman Interview].

5. *Id.*

6. *Id.*

7. Telephone Interview with Bonnie Thompson (Sept. 8, 2008) [hereinafter Thompson Interview].

8. Telephone Interview with Mike Liffbrig (Aug. 18, 2008) [hereinafter Liffbrig Interview].

9. *Id.*; Thompson Interview, *supra* note 7.

10. Thompson Interview, *supra* note 7; Liffbrig Interview, *supra* note 8.

11. Thompson Interview, *supra* note 7; Liffbrig Interview, *supra* note 8.

12. Thompson Interview, *supra* note 7.

was an “easy sell” for the parties once they got to the mediation table.¹³ They saw the benefits of being able to make decisions for themselves.¹⁴

Deborah Carlson, Director of Juvenile Court Services in Grand Forks, recalls that there was a plan in the early 1980s to have Juvenile Court Probation Officers conduct voluntary custody mediations, sponsored by the state.¹⁵ Probation officers were thought to be appropriate to serve as mediators because they would understand statewide standards for the best interests of children.¹⁶ Probation officers received mediation training but the workload of probation officers was already high and the plan was never implemented.¹⁷

Reflecting a nationwide trend and responding to concerns over the consequences for the parties in many divorce cases,¹⁸ the state legislature in 1987 approved a law that allowed the courts to require mediation “in contested child custody, support, or visitation proceedings.”¹⁹ The law required the North Dakota Supreme Court to adopt rules establishing the minimum qualifications for a mediator, which it did with Administrative Rule 28 in 1989.²⁰ In an interview with Chief Justice VandeWalle, he stated that a major reason the courts supported the idea of requiring mediation in some circumstances was judicial case loads.²¹ If cases could be settled outside of court, then the court could concentrate its efforts on other cases that required a court process and the time delay would be lessened.²²

One of the concerns about mediating divorce and child custody matters that has been part of a national debate, including North Dakota, is the disadvantages that women may face in mediation that might not be experienced in the court process.²³ The argument is that with the informality of the

13. Liffbrig Interview, *supra* note 8.

14. *Id.*

15. Telephone Interview with Deborah Carlson, Director, Juvenile Court Services, Grand Forks, N.D. (Aug. 11, 2008).

16. *Id.*

17. *Id.*

18. See DONALD T. SAPOSNEK, *MEDIATING CHILD CUSTODY DISPUTES: A SYSTEMATIC GUIDE FOR FAMILY THERAPISTS, COURT COUNSELORS, ATTORNEYS, AND JUDGES* 13-17 (1983) (discussing the “volatile, hostile, and destructive” nature of custody litigation).

19. N.D. CENT. CODE. § 14-09.1-01 (2007).

20. N.D. SUP. CT. ADMIN. R. 28, superseded by N.D. R. CT. 8.9 (2001).

21. Telephone Interview with Chief Justice Gerald VandeWalle, North Dakota Supreme Court (Aug. 7, 2008) [hereinafter VandeWalle Interview].

22. *Id.*

23. Martha Fineman, *Dominant Discourse, Professional Language and Legal Change in Child Custody Decision Making*, 101 HARV. L. REV. 727, *passim* (1988); see also *Hearing on S.B. 2490 Before the Senate Judiciary Comm.*, 50th N.D. Legis. Sess. 3 (Mar. 9, 1987) (testimony of Bonnie Palecek, Networking Coordinator for the N.D. Council on Abused Women’s Services) [hereinafter *Hearing on S.B. 2490*].

mediation process, women may have lower negotiating power compared to men and may bargain away assets and rights that they deserve.²⁴ This problem would be especially acute if the relationship had been marred by domestic violence, physical or emotional abuse.²⁵ Testimony was given against the 1987 bill that eventually was approved and became NDCC 14-09.1, by advocates for women and children concerned about the impacts associated with domestic violence.²⁶

As time has passed over the last twenty years, this debate has become more nuanced. There are fewer claims about the disadvantages to women and more and more participation by professionals in the domestic violence field in developing processes, such as screening instruments, that will limit the possibility of manipulation by the more powerful party in the mediation process.²⁷ When Administrative Rule 28 (pertaining to the qualifications of court-appointed mediators) was replaced in 2001 with North Dakota Rule of Court 8.9, the qualifications were extended to include a requirement that the mediation training in which the mediator engages must have at least two hours (out of forty) of “domestic abuse training.”²⁸

By the mid-1990s family mediation was becoming more prevalent in the state and an increasing number of attorneys and professionals from other fields were engaged in the practice of mediation. In 1995 the North Dakota Supreme Court appointed a Joint Dispute Resolution Study Committee to consider alternative resolution and mediation and make recommendations.²⁹ They issued a final report in 1998 with two major recommendations: (1) explore options for establishing court-annexed mediation programs; and (2) consider adopting a code of ethics for mediators.³⁰ Also during that time, the State Bar Association of North Dakota (SBAND) established a Family Law Task Force to consider mediation in divorce and custody cases. Between 1996 and 1998, two pilot projects emerged in the district courts in Bismarck and Grand Forks testing family mediation, but

24. Fineman, *supra* note 23, at 733.

25. *Id.*

26. *Hearing on S.B. 2490, supra* note 23.

27. FAMILY MEDIATION TRAINING MANUAL, UNIVERSITY OF NORTH DAKOTA CONFLICT RESOLUTION CENTER (2008).

28. N.D. R. CT. 8.9

29. N.D. SUP. CT. ADMIN. ORDER 6.

30. JOINT DISPUTE RESOLUTION STUDY COMMITTEE’S FINAL REPORT TO THE SUPREME COURT, PRESIDENT OF THE SBAND, AND THE BOARD OF GOVERNORS (June 30, 1998).

without any funding or mandates other than judicial order.³¹ Both pilot projects did result in mediation, but the projects were short lived.³²

In 2000, the North Dakota Supreme Court issued Administrative Rule 43 establishing the Joint Committee on ADR with appointments to serve by the court and the North Dakota State Bar Association.³³ In early 2007, the Joint Committee established a subcommittee on family mediation, naming Kristine Paranica as Chair. Shortly thereafter, the 2007 legislature funded a pilot project, proposed by Chief Justice VandeWalle of the North Dakota Supreme Court, in two judicial districts, mandating mediation in contested child custody or visitation cases in one district, and mandating a pre-mediation session and allowing for consideration of mediation in the other district.³⁴

*The mission of the Project is to explore a procedure to provide a high quality, impartial, and efficient forum for resolving disputed custody and visitation matters through mediation. The goal of the Project is to improve the lives of families and children who appear before the court by trying to resolve custody and visitation disputes through mediation in order to minimize family conflict, encourage shared decision-making, and support healthy relationships and communication among family members.*³⁵

The pilot project includes a six-mediator roster in the two judicial districts as well as a detailed, ongoing evaluation of the process.³⁶

Having moved clearly in the direction of mandatory mediation in family cases, it seems probable that if the current pilot project is successful in reaching its goal, the project will be expanded to include all judicial districts on a permanent basis, assuming that a funding mechanism can be secured and sustained. One clear message relayed from judges, lawyers, and mediators throughout the interviews was that the traditional court process does not work well in most family cases. The adversarial nature of that process leaves parties poorly prepared to work with each other to carry out the court's decisions concerning ongoing parenting relationships.

31. See *id.* at app. J (discussing the pilot projects); N.D. SOUTH CENTRAL JUDICIAL DIST. LOCAL R. 2; N.D. NORTHEAST CENTRAL JUDICIAL DISTRICT LOCAL R. 2 (expired) (establishing the pilot project in Grand Forks).

32. See Bohlman Interview, *supra* note 4.

33. N.D. SUP. CT. ADMIN. R. 43. Attorney Rebecca Thiem was named chair, and Antes and Paranica were both appointed.

34. N.D. Exec. Order 2007-16 (2007).

35. N.D. SUP. CT. ADMIN. ORDER 17 (Family Mediation Pilot Project).

36. *Id.*

Another development that has influenced the practice of family mediation in North Dakota is the presence of the UND Conflict Resolution Center (CRC). The CRC was founded as a university-based center in 1988 but quickly expanded its practice—mediation and group facilitation at first, and then mediation training and conflict management education—to the community and region. Its roster of trained mediators also has provided custody, divorce, and other types of family mediation throughout its twenty-year history.³⁷ In 1999, the CRC began the training of family mediators across the state and region, although the earliest family mediators in North Dakota received their training out of state, many in the twin cities of Minneapolis and St. Paul, Minnesota.

B. CIVIL AND COMMUNITY MEDIATION

Mike Liffbrig was mediating family cases in Bismarck in the mid- to late-1980s and estimated that he had mediated about 1,000 such cases in the first seven or eight years of his practice.³⁸ But by the early- to mid-1990s he decided to move away from family cases and began to mediate personal injury cases.³⁹ At the same time Liffbrig was mediating family cases in Bismarck in the 1980s, Steve Marquardt expanded his law practice in Fargo to include mediating civil cases, including personal injury, employment, and contract cases.⁴⁰ Another pioneer in the civil mediation arena was attorney Jack Marcil. In about 1992 other lawyers asked him if he would be available to serve as a mediator for some of their civil cases because they saw him as neutral.⁴¹ Marcil expanded his law practice to include mediation, mostly employment law and real estate cases, and he continues to mediate about 100 cases a year as well as actively litigating and arbitrating.⁴²

As with family mediation, civil mediation was not well understood or accepted at the outset. Attorneys had similar concerns about what it might mean for their businesses. An additional dynamic with civil cases was the concern that an expressed willingness to mediate might signal weakness in one's case and therefore harm the chances for a favorable outcome.⁴³ Over

37. See CRC HISTORY OF THE UNIVERSITY OF NORTH DAKOTA CONFLICT RESOLUTION CENTER (1998-2008) (unpublished manuscript) [hereinafter CRC HISTORY].

38. See Liffbrig Interview, *supra* note 8.

39. *Id.*

40. See Interview with Judge Steve Marquardt, August 19, 2008 [hereinafter Marquardt Interview].

41. Interview with Jack Marcil (Aug. 11, 2008) [hereinafter Marcil Interview].

42. *Id.*

43. See Marquardt Interview, *supra* note 40.

time, lawyers have become much more familiar with the process—indeed Marcil reports that he sees many of the same attorneys back at the mediation table.⁴⁴ The result has been that more and more parties are willing to mediate. They see it as a way both to get the matter resolved and to limit costs.⁴⁵

At about the time that Liffbrig was engaged in family mediation practice in Bismarck and was doing civil mediation work in Fargo, civil mediation practice was beginning at the University of North Dakota (UND) in Grand Forks.⁴⁶ Following his mediation training in 1986 during a developmental leave at the University of Colorado from his position at UND in the Psychology Department, Jim Antes worked with President Tom Clifford to sponsor a mediation training event for thirty faculty and staff of the University. That mediation training event was held in January of 1988 with well known mediator and trainer Christopher Moore. The concept was that these newly trained mediators would be available to mediate workplace disputes that might occur on campus. In the summer of 1988 the CRC was founded at UND as a community mediation center to serve as the institutional unit that would coordinate mediation services.⁴⁷ The number of cases mediated was small at first but quickly expanded to mediate for clients outside the UND campus. The caseload has grown steadily over the years both on and off campus, to include the greater Grand Forks community, the region, and the states of Minnesota and North Dakota.⁴⁸

There are some important differences to note between the mediation practices described above for Liffbrig, Marcil, and that involving the CRC. First, the CRC cases are rarely cases that are being prepared for trial. They primarily involve disputes in the workplace (the workplace context includes the University) where the parties are co-workers or superiors and subordinates, non-profit agencies in the region, for-profit businesses, or units of state or local government, as well as community-based cases such as landlord-tenant disputes, neighbor-to-neighbor conflict, estate or will contests involving family members, small claims cases, and public disputes such as environmental issues.⁴⁹

A second difference is that very few of the CRC mediators are attorneys. They initially were staff and faculty from a variety of professional backgrounds who received training and mentoring as mediators. In

44. See Marcil Interview, *supra* note 41.

45. *Id.*

46. CRC HISTORY, *supra* note 37, at 1.

47. *Id.* at 4-5.

48. *Id.* at 11.

49. *Id.*

the years since 1988, many people from the Grand Forks region and the state—clergy, business people, counselors, and attorneys—have also joined the membership of the CRC and conduct mediations. A third difference is that for almost all of the mediation cases, the mediators volunteer their time on behalf of the CRC as a not-for-profit agency. The fees that clients pay go to the CRC to cover expenses such as office and overhead expenses and staff salaries.⁵⁰ These aspects of the CRC's civil mediation practice—cases not necessarily in the court system, many non-lawyer mediators, and volunteer mediators—are characteristics of the community mediation movement that emerged in the United States in the 1970s.⁵¹

Almost from the very inception of the CRC, people from the community and region were interested in learning how to mediate and to learn the associated skills in order to manage conflict more effectively at work and at home. The CRC responded by teaching others how to mediate and annually offers several public civil and family mediation training seminars as well as mediation training events contracted for specific organizations. In the twenty years of its existence, the CRC has trained hundreds of mediators who are now either engaged in the practice of mediation (some for the CRC), or using the skills in their professional and personal lives but not engaging in professional mediation practice.⁵² This training function has exerted a major influence on the understanding and practice of mediation in the state and region.

C. MEDIATION IN ORGANIZATION AND GOVERNMENT SETTINGS

1. *Department of Agriculture*

The earliest that mediation was practiced in North Dakota in a government or organization context was likely farmer-lender mediation. In response to the farm crisis of the 1980s the North Dakota Legislature in 1985 established a credit review board under the North Dakota Department of Agriculture to help deal with farm foreclosures.⁵³ In 1989 this credit counseling program was officially changed to the Agricultural Mediation Service (AMS) and the mediations served to aid farmers and lenders in making decisions that would allow the lenders to be paid and the farmers to avoid foreclosure.⁵⁴ This service has continued to serve farmers and

50. *Id.*

51. BUSH & FOLGER, *supra* note 2, at 1.

52. CRC HISTORY, *supra* note 37.

53. N.D. CENT. CODE § 6-9.10-02 (Supp. 1985).

54. *Id.* § 6-09.10-03 (Supp. 1989).

lending institutions in the state and has expanded its reach to include any farmer-related problems (1991)⁵⁵ and situations involving any person who is in disagreement with an agency of the United States Department of Agriculture (2007).⁵⁶ The farmer-lender mediation process is typically initiated by a lender's contact with AMS, which assigns a "negotiator" to help the farmer prepare for mediation. If the farmer formally requests mediation, AMS assigns a mediator who then conducts the mediation. AMS claims an agreement rate through mediation of about two-thirds.⁵⁷

2. *Human Resource Management Service*

In 1996 the North Dakota Human Resource Management Service (NDHRMS), a division of the North Dakota Office of Management and Budget, began to offer mediation services to state agencies.⁵⁸ Lee Lundberg of NDHRMS reports that about one mediation is conducted per month. The cases involve personnel and human relations issues and the mediations are conducted by NDHRMS staff, who received mediation training from an agency in Colorado.⁵⁹ Some government agencies list mediation provided by NDHRMS as a potential avenue for conflict resolution in their policies.⁶⁰

3. *Office of Administrative Hearings*

The North Dakota Office of Administrative Hearings began to offer mediation to any government agency seeking to mediate a dispute in the mid- to late-1990s.⁶¹ Administrative law judges serve as the mediators. However, to date no mediations have been conducted.⁶²

55. *Id.* § 6-09.10-03 (Supp. 1991).

56. *See* Telephone Interview with Tom Silbernagel, Director of the North Dakota Agricultural Mediation Services (discussing policy expansion).

57. N.D. DEP'T OF AGRICULTURE, AGRICULTURAL MEDIATION SERVICE: SOLVING PROBLEMS: RESOLVING DISPUTES, www.agdepartment.com/programs/ams.html (last visited Feb. 21, 2008).

58. Telephone Interview with Lee W. Lundberg, Director of North Dakota Human Resource Management Services (Feb. 22, 2008) [hereinafter Lundberg Interview].

59. North Dakota Human Resources Management Services Home Page, www.nd.gov/hrms (last visited Jan. 30, 2009); *see also* Lundberg Interview, *supra* note 58.

60. *See* NORTH DAKOTA WORKFORCE SAFETY AND INSURANCE EMPLOYEE HANDBOOK (2007), <http://www.workforcesafety.com/rfp/references/PolicyHandbook.pdf> (offering mediation to resolve workplace disputes).

61. North Dakota Office of Administrative Hearings, About OAH, www.nd.gov/oah/about.htm (last visited July 18, 2008).

62. *Id.*

4. *Department of Labor*

The North Dakota Department of Labor also offers mediation as part of its program for handling discrimination complaints. Lisa McEvers, North Dakota Department of Labor Commissioner, reported that mediation for housing and employment discrimination cases has been available since the early 1990s but no requests for it occurred until about 2000.⁶³ For housing discrimination cases, the process does not involve any formal face-to-face meetings between parties. Instead, staff from the Department of Labor serve as communicators of offers between parties.⁶⁴ With employment discrimination cases, mediation is conducted more formally with face-to-face and/or private meetings, and investigators from the Department of Labor (Department) conduct the sessions.⁶⁵ The process involves an offer to mediate the case once a complaint is filed. In about one-third of the cases, the parties agree to try mediation, and about fifty mediations are conducted each year.⁶⁶ If mediation is declined, or if the case is not settled through mediation, a formal investigation occurs and the Department issues a determination.⁶⁷ The Department also has the authority to conduct mediation sessions associated with labor/management contracts but has not done so within the last three years.⁶⁸ Parties could also request mediation from the National Labor Relations Board.⁶⁹

5. *Department of Public Instruction*

In the process of developing and implementing an Individual Education Plan (IEP) for students in special education, disputes sometimes arise between parents and school staff. According to the federal Individuals with Disabilities Education Act of 2004, there are several alternative options that may be pursued to manage these disputes, one of which is mediation.⁷⁰ Any of the affected parties may request mediation by contacting the North Dakota Department of Public Instruction.⁷¹ The mediation sessions are

63. Telephone Interview with Lisa McEvers, Labor Commissioner, North Dakota Department of Labor (July 21, 2008) [hereinafter McEvers Interview].

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. See NORTH DAKOTA DEPARTMENT OF PUBLIC INSTRUCTION, DISPUTE RESOLUTION IN SPECIAL EDUCATION, MEDIATION BROCHURE, <http://www.dpi.state.nd.us/speced/resource/conflict/mediation.pdf> (last visited Jan. 30, 2009) [hereinafter SPECIAL EDUCATION MEDIATION BROCHURE] (describing mediation as an option for resolving managing disputes).

71. *Id.*

conducted by mediators who are not Department of Public Instruction employees but who work with them on a contract basis. Mediators must have additional training in special education issues.⁷² There is no cost to the parties for mediation, with expenses covered by the Department of Public Instruction.⁷³

6. *Division of Juvenile Services*

When a juvenile in North Dakota is involved in a crime, he or she may be referred to the Restorative Justice program, which began in the late 1990s.⁷⁴ As described on the website of Lutheran Social Services of North Dakota, which carries out the restorative justice programming for the Division of Juvenile Services, “Restorative Justice is a philosophy that focuses on the harm caused by crime, rather than just the legal violation of laws and rules. Restorative Justice encourages accountability, works to repair harm done to the victim and promotes safe and secure communities.”⁷⁵ One of the options available to the victim and offender is an “Accountability Conference,” which is the term used by Lutheran Social Services for a mediation session. The Accountability Conference is voluntary for both victim and offender, and in order to participate the offender must agree to take responsibility for his or her actions and acknowledge the need to repair the harm done. The victim must allow the offender the opportunity to make amends.⁷⁶ The goal of the Accountability Conference is for the victim and offender to meet, speak with each other about the harm done, and develop a mutually acceptable agreement to repair the harm.⁷⁷ The mediators, called “facilitators,” are paid for their services by Lutheran Social Services.⁷⁸ The program is funded by the North Dakota Supreme Court.⁷⁹ The 2007 Lutheran Social Services annual report indicates that during that year, 254 juveniles and their victims participated in Accountability Conferences. Agreements resulted in \$22,732 of restitution,

72. *Id.*

73. *Id.*

74. Telephone Interview with Joel Friesz, Lutheran Social Services (Aug. 11, 2008) [hereinafter Friesz Interview].

75. Lutheran Social Services of North Dakota, Restorative Justice, <http://www.lssnd.org/restorativejustice/index.html> (last visited Mar. 5, 2008) [hereinafter Restorative Justice].

76. *Id.*

77. *Id.*

78. Friesz Interview, *supra* note 74.

79. *Id.*

working 98 hours for the victim, and working 270 hours for the community.⁸⁰

7. *Department of Corrections*

In the late 1990s a Victim Services division of the North Dakota Department of Corrections was established. Amy Vorachek, Victim Services Coordinator, reported that she has been trained in mediation but there is no formal victim-offender mediation program.⁸¹ She indicated that there has been little interest on the part of victims to participate in mediation because the crimes are often violent and because in rural communities the victim and offender often know each other.⁸² She also indicated that because of her role in Victim Services in which she represents victims she is not a neutral party between victim and offender.⁸³ She indicated that victims often want questions answered about the crime, and often believe that “mediation” sounds more like reaching a “resolution.” A “resolution” is often viewed as an unreasonable response to criminal behavior and the harm inflicted upon victims.⁸⁴

8. *Public Higher Education*

In 2001, the North Dakota Board of Higher Education approved a policy for faculty (not classified staff, administrators, or coaches) at all eleven state-supported institutions of higher education that made mediation mandatory for certain situations, voluntary for others, and not available for still others.⁸⁵ Mediation is mandatory in the cases of “faculty grievances,” which involve allegations of a violation of a State Board of Higher Education institutional policy, procedure, or practice relating to the employment relationship.⁸⁶ Mediation is voluntary, upon agreement of the parties to participate, in cases of faculty sanctions, nonrenewal, and termination.⁸⁷ Mediation is not available in cases of dismissal for cause.⁸⁸

80. Restorative Justice, *supra* note 75; *see also* LUTHERAN SOCIAL SERVICES OF NORTH DAKOTA, ANNUAL REPORT 7 (2007) (listing yearly statistics).

81. Telephone Interview with Amy Vorachek, Victim Services Coordinator, North Dakota Department of Corrections (Feb. 26, 2008).

82. *Id.*

83. *Id.*

84. *Id.*

85. N.D. State Bd. of Higher Educ. Minutes, Nov. 15-16, 2001, *available at* <http://www.ndus.nodak.edu/sbhe/default.asp?ID=312>.

86. N.D. STATE BD. OF HIGHER EDUC. POLICIES §§ 605.5, 612.

87. *Id.* §§ 605.3, 605.5.

88. *Id.*

9. *United States Postal Service*

In 1999, the United States Postal Service (USPS) completed the nationwide implementation of a mediation program that is part of its Equal Employment Opportunity complaint process.⁸⁹ USPS offices in North Dakota are full participants. Under the program, called REDRESSTM for Resolve Employment Disputes Reach Equitable Solutions Swiftly, employees who allege discrimination may opt for mediation prior to pursuing the complaint more formally.⁹⁰ For the supervisor against whom the allegation is made, participation is mandatory. The USPS acknowledged the value involved when employees and supervisors speak about their concerns; the process permits discussion of any issues during mediation, not just those associated with the discrimination complaint.⁹¹ Mediators practice from the transformative theory of mediation and are not employees of USPS, but are chosen to be on a roster following training in Transformative Mediation through the REDRESSTM program, and then mediate on a contract basis.⁹² Nationwide, thousands of mediations are conducted annually and statistics indicate great success of the program, as indicated by several factors, including satisfaction of the participants, “closure rates” (percent of cases that do not proceed to the formal complaint stage), as well as “upstream effects” that suggest that relationships within USPS are positively impacted as a result of the opportunity to mediate in this manner.⁹³

10. *Transportation Security Administration*

In 2000 all agencies of the federal government were required to make available to their employees an alternative dispute resolution process for both the pre-complaint and complaint stages of the Equal Employment Opportunity complaint procedure.⁹⁴ The Transportation Security Administration (TSA) was formed in late 2001, following the September 11 attacks,

89. Cynthia Hallberlin, *Transforming Workplace Culture*, 18 HOFSTRA LAB. & EMP. L.J. 375, 378-81 (2001).

90. *Id.*

91. *Id.*

92. *Id.*; see also ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 26-27 (rev. ed. 2004) (discussing the decision of USPS to use transformative mediation).

93. Jonathon F. Anderson & Lisa B. Bingham, “*Upstream Effects From Mediating Workplace Disputes: Some Preliminary Evidence From the USPS*”, 48 LAB. L.J. 601, 601-15 (1997).

94. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *FEDERAL EEO COMPLAINT PROCESSING PROCEDURES*, www.eeoc.gov/federal/fedprocess.html (last visited Oct. 30, 2008).

and patterned its EEO complaint process after that of USPS.⁹⁵ Like USPS, TSA employs mediators on a per-case contract basis and the mediators practice transformative mediation.⁹⁶ TSA has a presence in North Dakota though no information was available on the number of cases mediated annually.

III. THE MEDIATORS AND MEDIATION TRAINING

Discussing the history and the context of mediation practice in North Dakota naturally leads to the question: Who are the mediators, and whom do they serve? Interviews with several key people involved in mediation in the state were conducted to determine the answer to these questions. Four categories of mediators emerged from our findings: private mediators, government and public agency mediators, community mediators, and judicial mediators. Mediation training and the primary styles from which mediators choose to practice are discussed generally.

A. CATEGORIES OF MEDIATORS

1. *Private Mediators: Lawyers and Others*

Private mediators have long dominated mediation practice in the United States and come from a diverse background including business professionals, lawyers, social workers, therapists, conflict resolution specialists, and others.⁹⁷ Private mediators have practiced for the longest period of time in North Dakota providing mediation in the state since about 1981. Bonnie Thompson⁹⁸ began mediating family disputes twenty-seven years ago after hearing about the mediation process in a class at Moorhead State College. She pursued mediation training out of state and began mediating through Lutheran Social Services of North Dakota and the Village Family Services in the Fargo-Moorhead area, where she mediated cases involving failed marital counseling.⁹⁹

As a non-lawyer mediating in the legal context of divorce, Thompson shared many of the challenges mediators faced around the country in the early 1980s. At that time, the legal profession was skeptical about

95. *Id.*

96. *Id.*

97. Ass'n for Conflict Resolution, Frequently Asked Questions, <http://www.acrnet.org/about/CR-FAQ.htm> (last visited Nov. 28, 2008). About 20,000 private mediators practice in the United States according to the Association for Conflict Resolution. *Id.*

98. Thompson Interview, *supra* note 7.

99. *Id.*

mediation and alternative dispute resolution, perhaps more so coming from a non-lawyer. Thompson faced much skepticism, and even accusations that she was practicing law without a license.¹⁰⁰ However, she built a strong practice with the assistance of a mentor who was a retired federal mediator, and a few attorneys who began to see the benefits of her work with their family law clientele.¹⁰¹

As mentioned earlier in the context of family mediation, many mediators are also practicing attorneys. One such mediator, Mike Liffbrig,¹⁰² began mediating in the mid-1980s and described his attraction to mediation through the heartache of divorce litigation, stating “this is no way to go” for parents with custody disputes. He received divorce mediation training in Minneapolis and began practicing primarily in Bismarck, mediating between 1000-1200 custody cases over a seven to eight year period.¹⁰³

Another early mediator/attorney, Steve Marquart,¹⁰⁴ now a district court judge, recalls learning and practicing mediation in the mid- to late-1980s. He discussed some of the challenges at that time as “the old litigation mentality when settlement was viewed as a sign of weakness.”¹⁰⁵ Unlike his colleagues, Marquart began mediating in the insurance arena including employment, personal injury, and contract cases. Now, from his perspective on the bench, he recognizes some shifts in the opinions about the mediation process in the legal community and attributes the change to three primary things: (a) new lawyers have been educated in law school about mediation and alternative dispute resolution processes for several years; (b) the mindsets related to litigation and discovery tactics have changed and have become more cooperative; and (c) success stories from the mediation table have increased trust in the process and in the mediators.¹⁰⁶

By the 1990s, family mediation was on the rise. In 1987, the North Dakota State Legislature passed a law allowing courts to require mediation in contested child custody and visitation cases.¹⁰⁷ This effort led to an increase in private mediators, particularly lawyers looking for a better way to help people divorce and co-parent. One of those mediators was Mel

100. *Id.*

101. *Id.*

102. Liffbrig Interview, *supra* note 8.

103. *Id.*

104. Marquart Interview, *supra* note 40.

105. *Id.*

106. *Id.*

107. N.D. CENT. CODE § 14-09.1 (2007).

Webster¹⁰⁸ of Bismarck. He attended divorce mediation training in the early 1990s and mediated many cases referred by the court and by practicing family lawyers.¹⁰⁹ He participated in a family mediation pilot project in the late 1990s in the Burleigh County Court.¹¹⁰ Webster felt that “mediation was the only hope for bringing some sanity to family law,” noting the high burnout rate for family lawyers due to the stressful nature of managing such cases.¹¹¹ He experienced a softening in attitudes among lawyers and judges as the legal community began to act more as joint problem-solvers in family cases instead of as adversaries. Parenting plans that were created in mediation sessions provided better results for cooperative parenting.¹¹²

In the 1990s, civil litigation began to see a rise in mediation usage in North Dakota. One of the best known civil mediators in the state has been Jack Marcil,¹¹³ who began mediating in 1992 and attended training in the mediation process through the American Arbitration Association. Marcil describes his practice of mediation starting more casually, with fellow lawyers contacting him to help settle civil cases, especially in the areas where he had a successful law practice as a litigator.¹¹⁴ During this time frame, Minnesota was busy creating more laws requiring alternative dispute resolution, and as a lawyer on the ND/MN border, he paid attention to this movement.¹¹⁵

It is difficult to tell how many private mediators are currently in the state of North Dakota. The CRC indicates that hundreds have been trained in the past 10 years.¹¹⁶ The North Dakota Mediation Roster currently lists 61 mediators who privately practice mediation in the state, with 48 stating that they practice in the civil arena, and 25 stating they practice family mediation.¹¹⁷ However, since inclusion on the roster is not required to mediate privately, it is likely that the total number of private mediators is higher.

108. Telephone Interview with Mel Webster (Aug. 7, 2008) [hereinafter Webster Interview].

109. *Id.*

110. N.D. SOUTH CENTRAL JUDICIAL DIST. LOCAL R. 2.

111. Webster Interview, *supra* note 108.

112. *Id.*

113. Marcil Interview, *supra* note 41.

114. *Id.*

115. *See* MINN. CT. R. 114 (amendment effective July 1, 1997).

116. CONFLICT RESOLUTION CENTER, MEDIATORS TRAINED 1998-2009 (2009).

117. STATE COURT ADMINISTRATORS OFFICE, NORTH DAKOTA STATEWIDE ADR NEUTRAL ROSTER (2009), available at <http://www.ndcourts.gov/court/adr/roster.htm> [hereinafter ADR NEUTRAL ROSTER].

2. *Community Mediators*

The National Association for Community Mediation (NAFCM) has defined community mediation as follows:

The roots of community mediation can be found in community concerns to find better ways to resolve conflicts, and efforts to improve and complement the legal system. Citizens, neighbors, religious leaders, and communities became empowered, realizing that they could resolve many complaints and disputes on their own in their own community through mediation. Experimental community mediation programs using volunteer mediators began in the early 1970[s in several major cities. These proved to be so successful that hundreds of other programs were founded throughout the country in the following 2 decades. Community mediation programs now flourish throughout the United States.

Community mediation is characterized by, and/or committed to (1) the use of trained community volunteers as the primary providers of mediation services; volunteers are not required to have academic or professional credentials; (2) a private non-profit or public agency, or program thereof, with a governing/advisory board; (3) mediators, staff and governing/advisory board are representative of the diversity of the community served; (4) providing direct access of mediation to the public through self referral and striving to reduce barriers to service including physical, linguistic, cultural, programmatic and economic; (5) providing service to clients regardless of their ability to pay; (6) initiating, facilitating and educating for collaborative community relationships to effect positive systemic change; (7) engaging in public awareness and educational activities about the values and practices of mediation; (8) providing a forum for dispute resolution at the early stages of the conflict; and (9) providing an alternative to the judicial system at any stage of the conflict.¹¹⁸

The first and only community mediation center in the state, the Conflict Resolution Center, was established in 1988 at the University of North Dakota in Grand Forks. The mission of the CRC was “to facilitate fair and just resolution of conflict between disputing parties.” The range of services included conflict analysis, fact finding, conciliation, meeting facilitation, mediation and public education, and to be available to clients within the

118. National Association of Community Mediation, Overview of Community Mediation, <http://www.nafcm.org/pg5.cfm> (last visited Oct. 2, 2008).

University as well as those not connected with the University. The service would depend on the nature of the conflict and the training and experience of the CRC personnel available. The importance of mediator neutrality was emphasized. Assistance would be offered to any entities within the University for any academic, research, or service activities related to conflict resolution.¹¹⁹

The CRC reported directly to the President of UND without any request or pressure to disclose confidential information or to resolve cases in any particular manner.¹²⁰ The CRC's governance was led by a board of mediators that determined appropriate operating procedures, assisted in hiring and evaluating the Director, and reviewed the financial operations of the CRC. Volunteer mediators and staff with a variety of backgrounds and educational experiences mediated conflicts on campus and in the community, state, and region. The requirements to mediate for the CRC included many hours of training, mentoring, and ongoing education and service. Currently, the CRC operates in much the same way, and has over 200 volunteer members of which approximately 35 actively serve as mediators and facilitators.

3. *Government and Public Agency Mediators*

The advent of new federal laws and policies primarily created mediation opportunities in our government offices and public workplaces.¹²¹ These mediators are "in house" or staff mediators who mediate particular matters in the course of their employment and/or manage mediation programs. The earliest mediation program was in the area of farm foreclosures, discussed earlier. This federal program operates in many states including North Dakota and is known as "Agricultural Mediation Services."¹²²

In other areas of government and public service, staff mediators have been providing mediation for the past two decades. North Dakota Labor Department staff has mediated since the 1990s in employment discrimination cases, and formerly provide labor/management contracts until three years ago.¹²³ Staff mediators work with housing discrimination cases,

119. *Id.*

120. Although for most of its twenty-year history, the CRC has reported directly to the UND President's Office, in Sept., 2007 the CRC was moved directly beneath the University Provost's Office.

121. Alternative Dispute Resolution Act, 28 U.S.C. § 651 (2006).

122. N.D. CENT. CODE § 6-09.10 (2007).

123. McEvers Interview, *supra* note 63.

although negotiation is more commonly used in these cases. Department statistics show that 50-100 cases are mediated by staff each year.

A roster of private mediators is used by the Department of Public Instruction (DPI) to offer mediation pursuant to requirements of the federal government and the Federal ADR Act.¹²⁴ Staff members of DPI manage the mediation program that offers mediations to parents whose children are engaged in programs of special education. This office also offers training and continuing education to its mediators regularly.¹²⁵

Finally, North Dakota's Administrative Hearing Officers have offered mediation in order to settle cases that have come before them since the 1990s. They also offer binding arbitration for disputes involving payment of attorneys' fees.¹²⁶ While other state agencies may have formal or informal programs offering mediation services, our research has not revealed any others.¹²⁷

4. *Judicial Mediators*

The North Dakota Judiciary has been a long-standing provider of mediation services. Prior to the first legislation for family mediation, the courts in North Dakota were considering ways to eliminate some of the negatives created in family litigation. Chief Justice VandeWalle¹²⁸ notes that the Supreme Court of North Dakota began to watch what Minnesota courts were doing with mediation in family cases and in their appellate courts in the early 1980s.¹²⁹ Despite the early skepticism of the mediation process, many North Dakota judges had been using mediation and negotiation techniques to settle civil cases before trial.¹³⁰

Former Judge Bruce Bohlman¹³¹ was one of the earliest advocates of family mediation from his position on the bench. When the North Dakota State Legislature passed a law¹³² allowing the courts to order mediation in cases where child custody and visitation were in dispute, some judges began to require mediation and refer cases to mediators, or mediate family

124. 28 U.S.C. § 651; SPECIAL EDUCATION MEDIATION BROCHURE, *supra* note 70.

125. SPECIAL EDUCATION MEDIATION BROCHURE, *supra* note 70.

126. North Dakota Office of Administrative Hearings, *supra* note 61.

127. While there may be other programs within state and local government and public agencies that provide mediation services, we did not find others in our research to date.

128. VandeWalle Interview, *supra* note 21.

129. *See* MINN. CIVIL MEDIATION ACT § 572.31 (1984) (outlining early attempts in Minnesota to establish mediation in civil proceedings).

130. N.D. CT. R. 16.2.

131. Bohlman Interview, *supra* note 4.

132. N.D. CENT. CODE § 14.09.1 (2007).

cases as part of the pretrial process.¹³³ Judge Bohlman offered mediation often in cases involving child custody, visitation, and divorce, typically in cases where another judge presided. Later, the North Dakota Supreme Court issued an administrative rule¹³⁴ establishing qualifications for family mediators, which prompted some interested members of the judiciary to seek professional training.¹³⁵

In 2001, the court created new rules that not only gave judges more power to mandate mediation, but also created a judiciary-led process called “mediative settlement conferences” and a roster for private mediators.¹³⁶ Although all judges were encouraged to participate, only a few actively mediated cases. Some judges were reluctant to mediate, given their role as decision-makers.¹³⁷ Lawyers, mediators, and judges alike were somewhat skeptical and critical of mixing the judicial duties and powers with a process that highly values self-determination, cooperation, and participation. Eventually, significant changes in these rules effectively placed mediation outside of the district court.¹³⁸ Nevertheless, some judges favor mediation as a form of settlement and will use the techniques of the process in their pre-trial process, or will require parties to litigation to try mediation with private mediators before trial.¹³⁹

However, this is not the complete story of judicial mediation. The federal court system in the United States and in North Dakota was on another track, and a strong mediator and advocate of the process emerged with Chief Magistrate Judge Karen Klein. She has seen many changes in the federal courts’ case management system in her twenty-three years on the federal bench.¹⁴⁰ While the Federal Rules of Court had required judges to encourage early settlement of cases,¹⁴¹ the Federal Alternative Dispute Resolution Act¹⁴² mandated that every federal court offer a form of alternative dispute resolution pursuant to its own local rule. As a Magistrate Judge, Karen Klein began to provide mediation as a means to settle cases before trial. She has mediated hundreds of cases and is highly regarded in

133. N.D. CT. R. 16; *see also* Bohlman Interview, *supra* note 4 (noting practices in the Northeast Central Judicial District).

134. N.D. SUP. CT. ADMIN. R. 28, superseded by N.D. R. CT. 8.9 (2001).

135. Bohlman Interview, *supra* note 4.

136. N.D. CT. R. 8.8, 8.9.

137. Bohlman Interview, *supra* note 4; VandeWalle Interview, *supra* note 21.

138. N.D. CT. R. 8.8.

139. Bohlman Interview, *supra* note 4; VandeWalle Interview, *supra* note 21.

140. Telephone Interview with Chief Magistrate Judge Karen Klein (Aug. 11, 2008) [hereinafter Klein Interview].

141. N.D. CT. R. 16.2.

142. 28 U.S.C. § 651 (2006).

the legal community as an effective mediator. She is also considered a pioneer as a mediator from her position on the bench, and now trains other federal judges in mediation skills.¹⁴³

B. MEDIATOR TRAINING

Related to who our mediators are is the manner in which they practice. At this point in the evolution of mediation practice, theories and skill sets for mediation practice create room for multiple models.¹⁴⁴ For centuries, mediation has been part of human conflict resolution practice from tribal beginnings to modern communities and under various labels and rubrics.¹⁴⁵ Labor/management mediation and community mediation long preceded what is known as court-annexed mediation as part of an alternative dispute resolution process, meaning alternative to litigation. As court-supported mediation increased in the 1970s, an increase in lawyers practicing mediation changed the landscape by adding new procedures, laws, and rules to a once informal practice.¹⁴⁶ As the work of important authors such as Roger Fisher and William Ury from Harvard's Project on Negotiation was applied to the mediation process, new standards for training and educating mediators developed.¹⁴⁷

One of the most common forms of mediation became known as Facilitative Mediation, where a neutral mediator helped to facilitate communication and negotiations between people in conflict in order to achieve a mutually satisfactory outcome.¹⁴⁸ In Fisher and Ury's language, mediation sought to achieve a *win-win solution*.¹⁴⁹ In terms of control over the process and the outcome by the parties themselves in support of the critical mediation tenet of self determination, the facilitative model of mediation allowed for significant party control with moderate interference by the mediator who guided the process.¹⁵⁰

However, this facilitative model was stretched in the direction of mediator control, particularly by attorney-mediators, and into a form of

143. Klein Interview, *supra* note 141.

144. CARRIE MENKEL-MEADOW ET AL., *MEDIATION PRACTICE, POLICIES, AND ETHICS* 113 (2006); *see also* BUSH & FOLGER, *supra* note 2, at 15-16 (describing the predominant models of mediation used in the United States).

145. BUSH & FOLGER, *supra* note 2, at 97.

146. *Id.* at 97-99.

147. *See* ROGER FISHER & WILLIAM URY, *GETTING TO YES* *passim* (2d ed. 1991) (setting forth interest-based negotiations, which were later applied to the mediation setting).

148. MENKEL-MEADOW ET AL., *supra* note 144, at 114-17.

149. FISHER & URY, *supra* note 147.

150. MENKEL-MEADOW ET AL., *supra* note 144, at 114-17.

mediation often called Transactional or Problem Solving mediation.¹⁵¹ Though the lines between these models are unclear, and some authors would say they are one in the same, others would argue that transactional mediators practice the kind of mediation commonly used to settle civil litigation.¹⁵² Typically, the mediator begins by asking for written statements by the parties or their attorneys in advance of mediation in order to make early decisions about the process.¹⁵³ At the first mediation, parties are offered the opportunity to provide an opening statement, much like in litigation or arbitration, and then are often separated into different rooms as the mediator expertly negotiates a settlement based on the tangible legal issues in the case.¹⁵⁴ Sometimes, this mediator might weigh in on the value of the case or the likelihood of success at trial in order to achieve settlement.¹⁵⁵ In this model of mediation, the tenet of self-determination seems to be limited to the parties' willingness to participate and come to an agreement.

Another model that emerged is Evaluative Mediation, based in part on the transactional model of mediation and a process known as Early Neutral Evaluation (ENE).¹⁵⁶ ENE had been used for many years in highly technical cases in order to settle litigation between parties where the key issue rested on determining the monetary or intrinsic value of the items or issues in question. Coupled with transactional mediation, an evaluative mediator offers a much higher degree of technical advice related to the substantive issues than simply the likelihood of litigated outcome. It is a highly directive form of mediation where persuasion is used to convince the parties of the mediator's knowledge of the substantive issues.¹⁵⁷

The form of mediation used by many mediators and agencies including the USPS, the TSA, and the CRC, is Transformative Mediation.¹⁵⁸ This non-directive style of mediation is based on a relational view of human nature, as opposed to an individualistic view, and holds that human beings have equal needs to experience strength of self and connection to others.¹⁵⁹ Therefore, the theory behind this practice recognizes the fundamental nature of the experience of conflict itself as creating a sense of weakness and self-

151. *Id.* at 130-32.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 114-17

157. *Id.*

158. BUSH & FOLGER, *supra* note 2, at 87-112.

159. *Id.*

absorption for all people. If mediators can support movement from weakness to strength, and self-absorption to compassion, then the parties also regain the resources they need to make decisions and the conflict interaction between the parties is transformed from destructive to constructive.¹⁶⁰

Mediators practicing from this orientation typically support and facilitate dialogue between the parties together at the mediation table, instead of separately, trusting in the clients' ability to achieve their goals for the process and giving clients more control over how they wish to communicate, negotiate, argue, consult, and decide the issues most important to them. Ironically, the authors of this form of mediation, one a lawyer and one a professor of communication, began writing about this theory for the mediation field in response to an increasingly alarming shift in the field away from party self-determination and toward evaluative and strong-arm techniques used for a singular goal: to secure settlements; all the while losing sight of the parties at times, and moving far from the origins and early intentions of mediation practice. The Promise of Mediation took the field aback for a long and thoughtful look at itself, and it since has significantly moved to a more client-centered focus with a renewed commitment to the value of self-determination, and to the *promise* of mediation as a process where people can own their conflict, find themselves and each other, create shared meaning and understanding, make decisions, and settle their disputes as they wish.

IV. INFLUENCES ON MEDIATION LAW AND POLICY IN NORTH DAKOTA

Many factors, some already mentioned, have influenced mediation law and policy in North Dakota. National and local trends in the legal profession both support and occasionally undermine ethical mediation practice. Pressures from the bench and bar to settle cases fairly and before trial in order to alleviate heavy dockets and long delays have existed for decades. Attempts and processes to settle cases quickly are frequently employed and mediation has been part and parcel of that pressure.¹⁶¹ The American Bar Association has a strong Dispute Resolution Section that supports the practice of mediation in the legal community.¹⁶²

160. *Id.*

161. Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization*, 6 HARV. NEGOT. L. REV. 1, 4-5 (2001).

162. ABA Dispute Resolution Home Page, <http://www.abanet.org/dispute/> (last visited Dec. 1, 2008).

However, the largest influence over mediation practice nationally, globally, and in North Dakota comes from the *conflict resolution field* of which mediation is a part and which intersects with other academic and professional fields including law. The field of conflict resolution has, for decades, developed mediation theory and practice in the world.¹⁶³ The influence of the field is evidenced within the American Bar Association's Dispute Resolution Section, and in newer policies including the more recent Uniform Mediation Act. The field is marked by regular self-evaluation and reflection, with volumes of research and publication on theory and practice within a multitude of contexts. Codes of ethics, standards of practice, best practices, multiple models for practice, and standards for assessment and evaluation continue to be developed, debated, and honed. A multitude of professional associations and membership organizations have supported mediators and mediation organizations for many years.

The strongest voice from the conflict resolution field heard in North Dakota has been that of the CRC. Due to factors such as the professional diversity of its members, its academic connections, its long and varied practice of mediation, and the education and training of mediators as well as research, writing, and service in national professional mediation organizations, the CRC has provided a strong voice for mediation law and public policy in the state. Encouraged by many supporters including former UND School of Law Dean W. Jeremy Davis, former law professors Michael Ahlen and former Legal Aid Clinic Director Larry Spain, the CRC was invited to help survey the mediation landscape and serve on committees to consider laws, rules, and legislation related to the practice of mediation since the mid-1980s. Since 2000, CRC board member Jim Antes and Director Kristine Paranica have served on the Joint Committee on Alternative Dispute Resolution, and Kristine serves as the chair for the subcommittee on family mediation which was instrumental in creating the protocol for family mediation for the pilot project of the North Dakota Supreme Court.

The laws enacted by the federal government and the leadership of other countries around the world to develop alternatives to litigation and violence have also influenced the practice of mediation.¹⁶⁴ Familiar headlines over the past three decades highlight the importance of mediation. Examples include the federal ADR Act, the adoption of mediation as an informal measure by various federal or state agencies, the use of mediation in

163. MENKEL-MEADOW ET AL., *supra* note 144, at 4-6.

164. *See, e.g.*, 28 U.S.C. § 651 (2006) (establishing ADR programs in the federal government).

national forums including the union/management disputes in the airlines,¹⁶⁵ environmental disputes,¹⁶⁶ and mediation of disputes of global scale by international diplomats and by the United Nations.¹⁶⁷ These activities have influenced mediation law and policy and normalized the process of mediation for consumers and law makers. Many of our consumer contracts in the United States require mediation as a first step before litigation can commence, demonstrating impact on business practices.¹⁶⁸

The influence on mediation law and policy can also be felt in the steadfast work of the mediators mentioned throughout this article who have and continue to mediate for citizens of North Dakota with a commitment to quality mediation and the integrity of that process. As anecdotal stories of success in mediation are told and retold throughout the state to law makers, their influence is seen in the legislative history, laws, rules, and in the memories of lawyers, judges and mediation clients. Ethical codes that support and encourage best practices in mediation are followed by these mediators as they influence new law and policy. The value of self-determination, often thought to be the hallmark of mediation, has been supported by our mediators, felt by their clients, and experienced by many as mediated agreements stand the test of time. Laws supporting broad protections of confidentiality and guarantees of neutrality have given the process of mediation added value, needed trust, faith for the process, and an important distinction from other settlement practices. Families, neighbors, business people, government employees, and many others have been able to salvage relationships through mediation and make better decisions for themselves and those in their care.

165. See Jennifer Sondiele, *Hawaiian Airline Pilot Seeks Mediation Over Stalled Contract*, HONOLULU STAR BULLETIN, Sept. 18, 2008, available at <http://archives.starbulletin.com/2008/09/18/business/story04.html>.

166. See Patrick L. Thimango, *MSD Heads to Mediation in Environmental Dispute*, ST. LOUIS BUS. J., Aug. 22, 2008, available at <http://stlouis.bizjournals.com/stlouis/stories/2008/08/25/story13.html>.

167. See U.N. News Centre, *Under Intensive UN Mediation, Nigeria and Cameroon Sign Accord Ending Border Dispute*, <http://www.un.org/apps/news/storyAr.asp?NewsID=18825&Cr=cameroon&Cr1=nigeria> (last visited Dec. 1, 2008) ("The presidents of Nigeria and Cameroon today signed an agreement settling a decades-old, sometimes violent, border dispute over the oil-rich Bakassi Peninsula following intensive mediation over the weekend by United Nations Secretary-General Kofi Annan, seeking to avert a potential crisis flashpoint in already troubled West Africa.").

168. JAMS, GUIDE TO DISPUTE RESOLUTION CLAUSES FOR COMMERCIAL CONTRACTS 3, available at <http://www.jamsadr.com/adrtips/clauses.asp> (last visited Nov. 13, 2008).

V. MAJOR THEMES IN NORTH DAKOTA MEDIATION HISTORY¹⁶⁹

In the interviews with many of the pioneers of mediation in North Dakota, examination of available written materials, and consideration of our own extensive experiences of mediation in the state, six themes have emerged that characterize the development of mediation in the state.¹⁷⁰ The authors present those themes as declarative statements and describe the information identified that led to the classification of each theme.

A. THEME 1

The use of mediation is growing in North Dakota, both in terms of the numbers of agencies and organizations employing it and the types of situations in which mediation is employed.

Mediation began in the state in the early 1980s in the family arena in the Fargo-Moorhead area when Bonnie Thompson began her practice for Lutheran Social Services. Interest in family mediation spread to other parts of the state, notably to the Bismarck-Mandan area with the practice of Mike Liffbrig. The mid-1980s saw the development of farmer-lender mediation practice, brought on by a severe economic crisis in farming. During the latter part of that decade mediation practice entered the civil arena with the mediation practice of Steve Marquart in the Fargo-Moorhead area. With the founding of the Conflict Resolution Center in 1988, mediation entered the community and workplace arenas. During the 1990s increasing numbers of state agencies began to offer mediation, including the Human Resource Management Service, Office of Administrative Hearings, Department of Labor, Division of Juvenile Services, and Department of Corrections. The trend continued into the next decade, with the Department of Public Instruction and North Dakota University System and also with federal-related agencies, including the United States Postal Service and Transportation Security Administration. The North Dakota courts and the legislature have become increasingly involved during these last two to three decades in establishing rules and laws governing the practice of mediation. As an indication of the extent of mediation practice in the state as of late 2008, there are currently 48 civil mediators and 25 family mediators on the Statewide ADR Neutral Roster as published by the State Court

169. Much of this section reflects the authors' thinking and organization of relevant themes based upon the research cited throughout the material, including interviews. See *infra* Parts V.A–F.

170. By “theme,” the authors mean a regularity or pattern seen in the information examined.

Administrator's Office.¹⁷¹ Furthermore, the CRC has more than 250 mediators who are volunteer members, and approximately 75% reside in the state.¹⁷²

B. THEME 2

*There has been increasing acceptance
of mediation by lawyers and increasing awareness of its value.*

Two of the pioneers of mediation practice in North Dakota—social worker Bonnie Thompson and attorney Mike Liffri—noted that a major early challenge to the practice of mediation in the state was resistance by the Bar. As noted earlier, two major concerns were that their clients' interests would not be well represented in mediation and they would lose business. Other mediation pioneers in the state, including attorneys Steve Marquart, Jack Marcil, and Mel Webster identified similar resistance. Everyone interviewed who was involved with mediation in North Dakota as early as the 1980s or early 1990s reported that there has been a dramatic reduction in resistance to mediation, and increase in acceptance, in more recent years. Chief Justice VandeWalle noted that attorneys began to see how beneficial mediation could be for their clients. Jack Marcil noted that attorneys began to see how efficiently and effectively the mediation process was at getting cases settled. Steve Marquart, in addition, described how mediation success stories spread among attorneys and that younger lawyers entering the field had much more complete background in alternative dispute resolution processes. An indication of the acceptance of mediation by attorneys is the observation that about two-thirds of the mediators on civil mediation Statewide ADR Neutral Roster and two-thirds of the mediators on the family mediation roster are attorneys.¹⁷³

C. THEME 3

*The North Dakota Supreme Court and the CRC
have had significant effects on the understanding and
practice of mediation in North Dakota.*

The North Dakota Supreme Court and the judiciary have had a long history of influence on the practice of mediation in the state as that practice relates to the courts. Administrative Rule 28 in 1989 established

171. ADR NEUTRAL ROSTER, *supra* note 117.

172. CRC HISTORY, *supra* note 37.

173. ADR NEUTRAL ROSTER, *supra* note 117.

qualifications for court-appointed mediators as a result of the 1987 law that allowed courts to require mediation in contested child custody and visitation cases.¹⁷⁴ The court and judiciary have been especially proactive, establishing two study committees in 1995, one to make recommendations about court-annexed alternative dispute resolution options and the other to study family law issues. They established the Joint Alternative Dispute Resolution Committee in 2000 and obtained legislative funding in 2007 for the family mediation pilot project. They have paid attention to the recommendations of the committees formed and adopted, or have modified rules in response, including Rules of Court 8.8 and 8.9 and Administrative Rule 43. Furthermore, champions of mediation such as Bruce Bohlman and Steve Marquart, and others have encouraged mediation along the way.

As the only mediation organization in North Dakota, the CRC has exerted influence through its professional training seminars and its support of ethical practices for mediators, and conflict resolution education throughout the state and region. For fifteen years, the CRC has offered civil, family, and advanced mediation training, and hundreds of mediators in the state have learned to mediate and have advanced their skills as a result of its training events. Another source of its influence is the policy-related efforts of Paranica and Antes (Paranica has been Director of the CRC for nine years and Antes is a former Director and long-time member of its Governing Board). Both have served on the statewide Joint ADR Committee since its founding, with Paranica chairing the Family Law Subcommittee that authored the procedures for the family mediation pilot project. Antes also served on the North Dakota University System (NDUS) committee that developed the NDUS mediation policies.

D. THEME 4

*The definition of what constitutes
mediation is becoming more precise.*

The early references to mediation in state law (for example, NDCC 14-09.1) and in court rules (for example, Administrative Rule 28) did not provide definitions of mediation. Administrative Rule 28 (1989) included a requirement that mediators receive forty hours of family mediation training "... certified by a national organization which certifies training in alternative dispute resolution." Rule of Court 8.5 on Summary Procedures, first issued in 1996 as a pilot project and made permanent in 2003, identifies

174. N.D. SUP. CT. ADMIN. R. 28, *superseded by* N.D. R. CT. 8.9 (2001).

mediation as one of several possible “hearing procedures,” but is not defined further. In discussing their work from the bench, judicial mediation pioneers Chief Magistrate Judge Karen Klein, on the federal bench, and retired Judge Bruce Bohlman, from the state court system, use the term “mediation” to apply to their efforts during pre-trial judicial settlement conferences. When North Dakota Rule of Court 8.8 was adopted in 2001, encouraging early consideration of alternative dispute resolution, the primary form of alternative dispute resolution offered was “mediative court-sponsored settlement conferences.” This is consistent with the practices of Chief Magistrate Judge Klein and Judge Bohlman. Thus it appears that during the first two decades of experience with mediation in North Dakota, the definition of mediation was either assumed, deferred to certified organizations, or implied to be informal processes in which a third party (often a judge) interacts with the disputing parties to promote settlement.

With the amendment of Rule of Court 8.8 in 2006, the North Dakota Supreme Court defined mediation (as a court-related ADR process) as “a process in which a non-judicial neutral mediator facilitates communication between parties to assist the parties in reaching voluntary decisions related to their dispute.”¹⁷⁵ This represents considerable change and greater specificity than the implicit definition described earlier. Several features merit identification. First, the neutral is to be “non-judicial,” thus ruling out judicial settlement conferences. Second, the primary purpose of the mediator is to facilitate communication between parties. And third, the goal of that facilitative work is to help the parties make voluntary decisions related to their dispute. There is no statement that the goal of mediation is settlement. The party decisions may involve settling the dispute but they may not; decisions could be to carry the dispute to the court process, for example, or to drop the case. The definition of mediation adopted by the North Dakota Board of Higher Education, adopted five years earlier in 2001, is very similar: “‘Mediation’ means a process in which a mediator facilitates communication between parties to assist the parties in reaching voluntary decisions related to their dispute.”¹⁷⁶

175. N.D. Ct. R. 8.8.

176. N.D. STATE BD. OF HIGHER EDUC. POLICY § 605.5.

E. THEME 5

*North Dakota has often followed Minnesota's
lead in adopting mediation policies and practices.*

In our interview with Chief Justice VandeWalle, he indicated that Minnesota had developed mediation programs before North Dakota and the North Dakota Supreme Court studied Minnesota's experiences in considering policies in North Dakota. Jack Marcil made a similar observation about the tendency of those interested in mediation in North Dakota to look to the east for their experiences. As a specific illustration, the section of North Dakota Rule of Court 8.9, established in 2001, relating to the training required for mediators to be included on the civil mediation roster, is almost identical to the language used in Minnesota General Rules of Practice 114.13, implemented in 1993, also describing training requirements for inclusion on a civil mediation roster.¹⁷⁷

It is natural for North Dakota to look to Minnesota given that state's earlier and more extensive experiences with mediation. It may also be a consequence of the well-known mediation training organizations in Minnesota, which provided the mediation training of some of the pioneers of mediation in North Dakota, including Bonnie Thompson and Mike Liffbrig. The authors submit that it is also wise for North Dakota to determine for itself how well policies and practices from elsewhere apply in North Dakota. An example of a policy borrowed from Minnesota that may deserve additional consideration is the one described in the preceding paragraph regarding training required to be included on a civil mediation roster. The Minnesota policy was written during a time when there was much less clarity than there is today in the mediation field about the existence of multiple orientations to mediation. The Minnesota policy is written from the perspective of only one of those orientations.¹⁷⁸

177. N.D. CT. R. 8.9; MINN. CT. R. 114.

178. Minnesota Court Rule 114.02(a)(7) defines mediation as "[a] forum in which a neutral third party facilitates communication between parties to promote settlement. A mediator may not impose his or her own judgment on the issues for that of the parties." MINN. CT. R. 114.02(a)(7) (2005). This definition and declaration of the goal (to promote settlement) have primary hallmarks of facilitative mediation as being settlement-driven while at the same time not telling (directly) the parties what they ought to do, and differs from other models, including the transformative model of mediation.

F. THEME 6

*The practice of mediation in North Dakota,
like that in other states, is multi-disciplinary, involving
practitioners from many different professions.*

It is evident from the first decade of mediation practice in North Dakota that professionals from many different fields had an interest in mediation and developing expertise in its practice. Many had legal backgrounds, including Chief Magistrate Judge Klein, Judge Bohlman, Mike Liffbrig, Steve Marquart (now Judge Marquart), Jack Marcil, and Mel Webster. But many came from other professions, including social worker Bonnie Thompson and many of those who formed the CRC, such as psychology professor Jim Antes, sociology professor Janet Moen, and student affairs professional Donna Turner Hudson (several of the CRC founders had legal backgrounds, including then-Law School Dean W. Jeremy Davis and Associate Dean Barry Vickrey, now Dean of the University of South Dakota Law School). When several state agencies began to offer mediation, many agencies sent their own in-house professional people for mediation training, including Department of Labor, Department of Agriculture, and Human Resource Management Service.

Recognizing the diversity of backgrounds of mediators, the North Dakota Supreme Court included a degree in behavioral science or a license to practice law in its Administrative Rule 28 (issued in 1989 and superseded in 2001 with Rule of Court 8.9) on the qualifications for court-appointed mediators. With Administrative Rule 43 concerning the establishment of the Joint Committee on Alternative Dispute Resolution, the court stipulated that three of the eleven members should be “lay members.” The practice has been to include among those appointees, some who are mediators from non-legal backgrounds.

The consequence, of course, is that there are interests from multiple disciplines involved whenever laws, policies, or procedures related to mediation are developed or modified. It is important during such deliberations that these multiple interests—potentially conflicting—be duly and thoughtfully considered.

IV. THE FUTURE OF MEDIATION IN NORTH DAKOTA: OPPORTUNITIES AND CHALLENGES

There are many new opportunities that support the growth of mediation in North Dakota, most paired with interesting challenges. Much credit for the growth in mediation may be given to the judiciary and the legal community in their support of mediation, the growing number of contexts for mediation practice, the amount of education about mediation in our state, and the increased number of agencies and organizations using and funding mediation. There are hundreds of people who have been trained in mediation skills who are mediating formally or informally in our communities and who are familiar with and interested in trying mediation before taking grievances to formal venues. More lawyers are using mediation for their clients and joining the mediation movement in addition to or instead of their law practice. An area of legal practice that is supportive of mediation is also gaining attention in the state, known as “collaborative” law.

Today, we are experiencing more mandatory mediation than before, and while the results of the corresponding research are not complete, there is evidence of success. One of the effects of the new family mediation pilot project is that people who would never have afforded mediation are having an opportunity to mediate in order to save time and money, and maintain constructive parenting relationships in support of their children. The opportunity lies in the continued support, financial and other, of the project throughout the state.

There are still areas in the state where mediation has been only lightly tested, including victim-offender mediation in the adult criminal system. While these programs are successful in reducing recidivism and promoting reconciliation and community healing in other states and countries, the lack of experience and adequate funding and support in North Dakota has prevented this approach. The same is true of peer mediation and other conflict resolution programs in our public school systems where students are given the skills to mediate and support their peers who experience conflict in school. While programs have started in a few schools across the state, the lack of funding and support have left most programs dry.

Opportunities and challenges reside in the development of laws and policies that define and create ethical boundaries for mediation. While we have become more clear at drawing lines that underscore what constitutes mediation and what does not (for example, case evaluation, settlement conferences, arbitration, etc.), we have been challenged as a field to define standards of practice, ethics, assessment processes, and best practices while providing room for various styles of mediation practice.

Challenges are also experienced in pressures from the bench and bar which often place contradictory demands on mediators to either: (a) avoid practicing law and giving legal advice at the table, leaving this important work to the parties' lawyers; or alternatively, (b) create legally binding agreements which could be construed as the unauthorized practice of law despite the ethical dilemmas for mediators who do so, and their clients. Challenges can come from public policy makers who want an answer to issues involving low-income populations who often need legal advice or protection from violence or power imbalance, in the form of the suggestion that the mediator wear all hats—lawyer, therapist, mediator, accountant, and arbitrator, in the hope of curing some of what ails our judicial system.

This particular challenge can also play out in the form of the value placed on the outcome of mediation, or what mediation can deliver. While many see settlement as the ultimate positive outcome of mediation, the mediators, the clients, and the field of conflict resolution continue to collectively experience other important benefits resulting from mediation. These benefits include: cost and time savings; increased decision-making capacity; increased ability to communicate constructively; empowerment of parties; offers of reconciliation and apology; repair to long-standing relationships; increased capacity for empathy and perspective taking; higher quality decisions and outcomes; less future conflict and acrimony; and violence prevention. These benefits present both an opportunity and a challenge for all of us to consider. If mediation is considered too narrowly as only a tool for reducing court congestion and seeing binding agreements as the ultimate goal, we create a process that fits a fast-food analogy: cheap, quick, and of low, long-term value. If we can expand our view of success and our understanding of the potential for parties in mediation, we have an opportunity to reach the goals mentioned above. We can place a higher value on the intrinsic opportunities that the *process* offers over a single outcome of agreement, trusting that decisions will surely be made by those who own the conflict and need resolution.

In 1977, Nils Christie, a Norwegian criminologist and philosopher, analyzed conflict as property, and considered the question: Who *owns* conflict? Nils Christie concluded that the individuals who were experiencing conflict were the rightful owners.¹⁷⁹ The question was critical of the service professions of law, mediation, and social work, accusing them of taking conflict away from their rightful owners, reshaping and reorganizing it often with little participation of the owners, and then returning it to

179. Nils Christie, *Conflicts as Property*, 17 BRITISH J. OF CRIMINOLOGY 1, 1-15 (1977).

them unrecognizable.¹⁸⁰ He wondered if the owners were well served by these processes that protected them from themselves and from each other, but did little to support self-determination and self-empowerment, or reconciliation and justice.¹⁸¹ Did it teach them to become responsible, resilient and independent, or did it have the opposite effect? He concluded by supporting processes that *involved* the owners of the conflict in ways that increased self-determination and transformation.¹⁸² As authors, we agree with this fundamental premise. Our hope for mediation in North Dakota is that it continues to grow in this direction so that we may realize the promise that the process of mediation offers our citizens and our communities.

180. *Id.*

181. *Id.*

182. *Id.*