North Dakota Law Review

Volume 77 | Number 3 Article 1

2001

Considerations for Mediation and Alternative Dispute Resolution for North Dakota

Larry Spain

Kristine Paranica
University of North Dakota

CONSIDERATIONS FOR MEDIATION AND ALTERNATIVE DISPUTE RESOLUTION FOR NORTH DAKOTA*

LARRY SPAIN** AND KRISTINE PARANICA***

I. WHAT IS MEDIATION?

Mediation has become the catch phrase for numerous alternative dispute resolution (ADR) processes, some of which bear little resemblance to what purists might call mediation.[1] Mediation can be defined as:

> a process by which a third party neutral, whether one or more, acts as a facilitator to assist in the resolving of a dispute between two or more parties. It is a non-adversarial approach to conflict resolution where the parties communicate directly. The role of the mediator is to facilitate communication between the parties, assist them on focusing on the real issues of the dispute and generate options for settlement. The goal of this process is that the parties themselves arrive at a mutually acceptable resolution of the dispute.[2]

Other definitions offer a wider context for the actual practice of mediation:

> Mediation is the intervention into a dispute or negotiation by an acceptable, impartial, and neutral third party who has no authoritative decision-making power to assist disputing

---

* The authors would like to dedicate this article to Professor Michael Ahlen (September 16, 1943-January 4, 2000) who provided guidance and insight to the field of alternative dispute resolution through his teaching and collaboration at the University of North Dakota School of Law, in the state, and beyond.

** Larry Spain is currently an Associate Professor of Law at Texas Tech University School of Law. He was past Director of Clinical Education and Professor of Law at the University of North Dakota School of Law and past Chair of the Governing Board of the UND Conflict Resolution Center and a Mediator. He received his J.D. *cum laude* from the Creighton University School of Law in 1976.

*** Kristine Paranica is the Director of the UND Conflict Resolution Center and Adjunct Professor of Law at the University of North Dakota School of Law. She is an Associate Member of the Institute for the Study of Conflict Transformation, a think-tank operating from Hofstra School of Law, N.Y. She received her J.D. from the University of North Dakota School of Law in 1991.

Kristine and Larry would like to thank Jessica Johnson Skaare, Burtness Research Assistant, for without her assistance this would still be a work in progress.

1. *See* JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 18 (1984) (listing "persuasion, problem solving, consensus building, voting, negotiation, arbitration, and litigation" as other conflict resolution methods).

2. KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 17 (1994).

parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute.[3]

Just as there are differences in defining mediation, there are also differences in defining the practice of mediation.[4] If you asked three mediators from across the globe to describe the process they used, you might get three completely different pictures of practice. For instance, one mediator might respond by describing mediation as a process in which attorneys and clients gather in different rooms while the mediator moves back and forth negotiating a settlement, such as in the case of construction disputes.[5] This process is sometimes called "evaluative" mediation.[6]

Another mediator might describe a process where she uses a step-model of mediation, divided into different stages, and directs the parties through the process.[7] For example, she might set ground rules and enforce them, ask each party for an "opening statement," narrow the issues for the parties, and even partake in the brainstorming session.[8] This style of mediation is commonly known as facilitative mediation.[9]

A third mediator would describe his process as bringing parties together to raise opportunities for personal clarity and empowerment and also for understanding the perspective of others, or recognition.[10] This practice is known as transformative mediation and is a newer theory of mediation.[11]

There are other processes, too many to name, which have been called "mediation."[12] However, placing so many processes under the

---

3. CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 14 (1986).

4. *Id.* at 19-24.

5. HANES, SINK & WULFF, ADR: A PRACTICAL GUIDE TO RESOLVE CONSTRUCTION DISPUTES 101-14 (1994). This process is also known as "shuttle diplomacy." *See* COMMUNITY MEDIATION 287-88 (Karen Grover Duffy et al., eds. 1991) (showing shuttle diplomacy as a good forum for working out reparations contracts with less emotional strain).

6. Early Neutral Evaluation is a separate alternative dispute resolution (ADR) process, which involves the use of a "neutral" expert who evaluates the merits of the case and offers an opinion, but rarely negotiates or mediates with the parties. Rita L. Gitchell & Andrew Plattner, *Mediation: A Viable Alternative to Litigation for Medical Malpractice Cases.* 2 DEPAUL J. HEALTH CARE L. 421, 430 (1999).

7. Samuel J. Imperati, *Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation*. 33 WILLAMETTE L. REV. 703, 709-11 (1997). Although these are examples of mediation practice, many practitioners would not place themselves into any of these categories, or they may define their practice in different terms. *Id.* at 708.

8. *Id.* at 709-11.

9. *Id.*

10. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 15-27 (1994).

11. *Id.*

12. FOLBERG & TAYLOR, *supra* note 1.

umbrella of "mediation" becomes confusing for practitioners, consumers, and the legal profession.[13] Therefore, this article will set forth the basic goals of mediation; define the most prevalent processes of mediation; connect the need for defining processes to the creation of ethical rules; and discuss dilemmas faced by mediators and attorneys alike.

II. WHY MEDIATION?

A. THE ORIGINS OF MEDIATION AS A PROCESS FOR RESOLVING CONFLICT

One might assume that mediation has come about in recent years as the result of congested court dockets.[14] However, mediation as a process for resolving conflict predates formal court systems.[15] In ancient China, Confucian beliefs held that individualistic and adversarial systems destroyed cherished harmony and thus supported resolution of conflict through "moral persuasion and agreement."[16] Customs in both Japan and Africa also fostered informal conflict resolution processes where elders or wise men served as informal mediators.[17]

The New Testament speaks of the mediation tradition when Paul advises the congregation of Corinth to appoint people from their own community to settle disputes rather than going to the courts.[18] Many religious and ethnic groups and subcultures, including the Jewish Beth Din and Quakers, have valued community mediation processes as a means of resolving disputes.[19]

By the early 1970s, American society began to experience increased interest in alternative dispute resolution.[20] By that time, America was experiencing a litigation explosion, an increase in divorce, dissatisfaction with the justice system, and civil rights struggles.[21] Not surprisingly, Americans began to look for other ways to resolve their disputes.[22]

The government as well as other public or private entities responded with the forming of various agencies, such as the Community Relations Service of the Department of Justice, to settle racial and community disputes.[23] The American Arbitration Association created guidelines and

13. *Id.*
14. *Id.* at 1.
15. *Id.*
16. *Id.*
17. *Id.* at 2.
18. *Id.* at 3.
19. *Id.*
20. *Id.* at 4-5.
21. *Id.*
22. *Id.* at 5.
23. *Id.*

training for mediation and arbitration.[24] The Society of Professionals in Dispute Resolution (SPIDR) was formed and the Association of Family and Conciliation Courts began to promote the use of mediation.[25] At the same time, community mediation programs began to spring up, such as community boards and neighborhood justice centers.[26]

B. THE GOALS AND VALUES OF MEDIATION

As indicated above, the values of Confucian, Christian, and other religious and ethnic groups have promoted mediation as a means to maintain harmony and relationships through informal processes of community dispute resolution.[27] Similar values are restated in society today to encourage mediation.[28] Research conducted as to the benefits of mediation seem to espouse these values and add to the mix other goals of the process.[29]

ADR advocates encourage mediation in order to further the following goals: strengthening neighborhoods and communities; decreasing reliance on lawyers and the legal system; empowering people to create resolutions more suited to their needs; transforming long-term relationships; and providing relief for nonparties such as children.[30]

On the other hand, the goals of the justice system for encouraging mediation include: to reduce time and cost for litigants; to lighten the case load and court docket; to provide speedy settlement; to improve public satisfaction with the justice system; to increase voluntary compliance with resolutions; to provide easy access to effective processes; and to teach the public to use other means for resolving conflict apart from litigation or violence.[31]

Studies confirm the benefits described by the goals of mediation proponents.[32] Mediation participants express high satisfaction with the process, the mediator, and the outcome; therefore, the participants are more likely to comply with the agreement.[33] Ongoing relationships often see more improvement through the use of mediation than with

---

24. *Id.*
25. *Id.*
26. *Id.* at 6. One of the best known is the Community Board Program of San Francisco. *Id.* at 195.
27. *See supra* Part II.A.
28. FOLBERG & TAYLOR, *supra* note 1, at 6.
29. STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES 7 (3d ed. 1999).
30. *Id.*
31. *Id.* at 8.
32. *Id.* at 180-82.
33. *Id.*

traditional adjudication or arbitration.[34] Parties who participated in mediation had higher settlement rates and filed fewer post-decree motions.[35] However, mediation has not proven to be a "cheap" substitute for litigation, nor a quick one.[36] In other words, it is not your fast-food solution to conflicts and disputes. It may be, however, a better solution in terms of perceived fairness, party control, and cost.

The North Dakota Supreme Court has recently adopted rules to encourage mediation.[37] Some of the more obvious ethical dilemmas raised by these rules include:

1. Lack of definitions of mediation practices;
2. Lack of stated protection for the confidentiality of private mediation;
3. Allowance of the waiver of confidentiality by waiver of the parties or consent of the court;
4. Promoting the unauthorized practice of law by requiring the writing of settlement agreements (contracts), requiring subject-matter expertise, requiring a step process, and requiring knowledge of negotiation techniques.[38]

Many of these requirements "legalize" a process that exists more as an outgrowth of ancient community-based resolution and negotiation, which is focused on "softly" resolving conflict.[39] Thus, this issue of who "owns" mediation, the mediators or the lawyers, adds further to the confusion that ADR consumers and lawmakers face.[40]

III. WHICH MEDIATION?

As stated earlier, mediation takes on many forms, from evaluative and settlement driven, to transformative and relationship oriented.[41] The form or process often dictates whether or not any of the goals mentioned earlier reach fruition.[42] The process used must be defined not only to study the effects of mediation, but also to educate, serve, and protect the

34. *Id.* at 180.
35. *Id.* at 180-82.
36. *Id.* Studies have shown little impact on court congestion with non-mandated programs thus far. Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUST. SYS. J. 420, 426, 428 (1982).
37. N.D. R. CT. 8.8, 8.9.
38. Ira B. Lobel, *What Mediation Can & Cannot Do*, 53 DISP. RESOL. J. 44, 45 (1998) "[I]t is not important for mediators to be content experts. If they are, the parties will look to them for content advice. . . ." *Id.*; *see also* GOLDBERG ET AL., *supra* note 29, at 127 (describing the nature of the step process in which one step of the mediation process leads to the next).
39. *Id.*
40. *Id.* at 44.
41. Gitchell & Plattner, *supra* note 6, at 430-35.
42. Lobel, *supra* note 38, at 46.

consumer.[43] You need to know the name of the game, lest you show up with swords for a mere stare-down.[44]

Mainstream mediation is called "facilitative" mediation, also known as step-process or problem-solving mediation.[45] The goal is to achieve win-win results that the parties can live with.[46] As defined, the mediator in this process is expected to be totally neutral and should not offer an evaluation on the merits of the case.[47] However, this mediator will offer solutions when the parties seem unable to move forward and will usually control the process by setting ground rules, stating issues, and using various subtle means to move the parties toward settlement, which is the ultimate goal.[48]

The process used in facilitative mediation is widespread but can have some variation.[49] It usually begins with an opening statement by the mediator in which he or she describes the benefits of mediation, how the process works, confidentiality, and other important aspects, and also sets ground rules for the parties.[50] Next, the parties make their opening presentations, usually uninterrupted.[51] Facilitative mediators usually control the amount of emotion in the room but may allow for some venting by the parties, and caucus (separate meetings) occurs often when the mediator needs to control the process/parties.[52]

The facilitative mediator uses this information to learn about the parties' interests and priorities and to close the gap between the facts and perceptions of the parties.[53] This is usually followed with a statement by the mediator that emphasizes common interests and the positive aspects of the relationship,[54] a technique known as "mutualizing."[55] However, this technique has been known to create a sense of "shaming" a party into decision or settlement.[56]

The next step involves mediated negotiations through various negotiation techniques, such as focusing on cooperative interests rather

---

43. *Id.*
44. Gitchell & Plattner, *supra* note 6, at 431.
45. Samuel J. Imperati, *Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation.* 33 WILLAMETTE L. REV. 703, 709 (1997).
46. *Id.* at 710.
47. *Id.*
48. *Id.*
49. *Id.*
50. GOLDBERG ET AL., *supra,* note 29, at 127-31. This process is common among almost all forms of mediation and ADR. *Id.* at 124.
51. *Id.* at 128.
52. *Id.* at 127-31.
53. *Id.* at 128-29.
54. *Id.* at 129-31.
55. Imperati, *supra* note 45, at 710.
56. GOLDBERG ET AL., *supra* note 29, at 130.

than competing positions.[57] The mediator orders the issues and helps the parties to identify alternative solutions.[58] Should the parties reach an impasse, facilitative mediators generally use caucus to move toward agreement.[59] The agreement is often written by the mediator but is subject to review by counsel or court.[60]

Interestingly, in a survey conducted by SPIDR in 1995, most mediators claimed to use a facilitative process, yet they were reluctant to state that this style was "best."[61] At least one author has acknowledged the danger of espousing one style of mediation while actually practicing another.[62] An accurate description of the process used is necessary for the consumer to select the best process for resolving a dispute, as well as ensuring the quality of the process and the profession.[63]

Another style of mediation is called evaluative mediation.[64] The process usually starts out like facilitative mediation, but the process is often one of shuttle diplomacy, with the parties in separate rooms while the mediator uses a variety of negotiation and evaluative techniques to convince the parties to settle.[65] Relationship issues are not usually considered, with the case settling on the strengths and weaknesses of the case rather than a mutually satisfactory solution.[66] This mediator is often an attorney, a retired judge, or other person with expertise in the type of litigation or in the subject matter of the case in order to offer valuable "advice" as to rates of success at trial or in regard to the settlement value of the case.[67]

Dangers in this process, or any process in which mediator opinion and potential bias enters into the dynamics, are the loss in perception of neutrality and a loss in party self-determination or free consent.[68] The Model Standards of Ethics for mediators requires that mediation be based upon party self-determination and that the mediators maintain neutrality.[69] Once a mediator begins to urge settlement, whether through subtle measures or through his or her own opinion of the merits of the case, neutrality is compromised.[70] It is impossible to remain neutral

57. *Id.* at 129-31.
58. *Id.* at 127-31.
59. *Id.*
60. *Id.*
61. Imperati, *supra* note 45, at 711.
62. *Id.*
63. *Id.*
64. *Id.* at 711-12.
65. *Id.* at 711. This technique is often used by facilitative mediators as well. *Id.*
66. *Id.* at 712.
67. *Id.* at 711-12.
68. *Id.*
69. *Id.*
70. *Id.*

while feeling strongly about an issue or while giving an opinion, as competency becomes easily challenged when someone disagrees with that feeling or opinion.[71] However, mediators cannot detach themselves completely.[72] In other words, if a mediator advises the insurance company that it needs to raise its offer or advises the injured that he is unrealistic in his expectations, that mediator runs the risk of having her own competency challenged and of losing neutrality as she tries to convince the parties that her assessment is correct.[73] This is a natural human reaction, and can happen to the most neutral and well-meaning of mediators.[74]

For those who practice in the construction industry, in collective bargaining, or in complex civil litigation, including medical malpractice, mediation is usually an evaluative process.[75] It can represent a high-powered mediation or negotiation process in which settlement is the goal and more coercive measures are often used.[76] This type of mediation must be defined by its practitioners in order to insure quality and ethical practice and to best serve the consumer.[77]

Transformative mediators value some of the same ideas of facilitative mediation, such as party self-determination, mediator neutrality, confidentiality, and the respect of parties' emotions, but hold as a primary premise a relational worldview.[78] Transformative mediators focus on "empowerment" and "recognition" rather than settlement or win-win results.[79] Ironically, although the transformative mediator does not focus or push for settlement, settlement rates seem to equal that of facilitative mediation processes.[80]

In *The Promise of Mediation*, the authors describe the promise as a transformation of the human interaction and focus on the relationship of the parties to "self" and to "other," as well as on the communication of the parties.[81] They look at conflict as a crisis in human interaction, which creates a relative state of mind and emotional state that make parties feel and appear incapable of solving problems.[82] By raising

71. Lobel, *supra* note 38, at 47.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 44-46.
76. *Id.* at 46.
77. *Id.*
78. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION, 242-43 (1994).
79. *Id.* at 191-92.
80. This statement is based upon the experiences of the UND Conflict Resolution Center, which practiced facilitative mediation for nine years before changing to transformative mediation for the past six years.
81. BUSH & FOLGER, *supra* note 78, at 191-92.
82. *Id.*

opportunities for empowerment of self and recognition of other(s), the mediators help the parties to become more clear and open so that they can move beyond weakness and self-absorption.[83] The goal is to help the parties reach higher levels of empowerment and recognition.[84] When that happens, parties often naturally resolve their differences creatively and mutually and, at the least, reach a deeper level of understanding of their own needs and that of the other(s), a concept the authors call "moral growth."[85]

Transformative mediation is similar to facilitative mediation in so far as the parties join together at the table to say what they need to say and hear what they need to hear (a/k/a "the opening statement").[86] However, instead of becoming directive, or the "savior" who leads the parties to peace, the mediator follows the parties' lead and focuses on raising opportunities for party empowerment, which is defined as clarity about one's point of view, awareness of one's own needs and concerns, and capability to solve one's problems.[87] The mediator also focuses on raising opportunities for recognition of others, defined as understanding the point of view of another person, imagining how another person might feel, and developing a willingness to consider the greater perspective.[88]

In transformative mediation, unlike other kinds of mediation, the mediator's job is to provide the parties an opportunity for self-determination and mutual acknowledgment.[89] Displays of emotion and nonverbal communication are respected and allowed to unfold as an important part of the mediation process.[90] Mediators allow parties to set ground rules and follow a natural progression of the dialogue regarding the conflict rather than setting forth the issues or format as a step process, often allowing the full expression of emotion and recognizing the past as having relevance to the present and future.[91]

The transformative mediator also encourages disclosure of all relevant information by the parties and encourages consideration of all possible options, including obtaining professional advice.[92] This can

---

83. *Id.* at 198.
84. *Id.* at 99-100.
85. *Id.* Note that not all conflicts are "resolvable," such as racism, religious conflicts, etc. *Id.* at 81-82.
86. *Id.* at 101.
87. *Id.* at 81-82.
88. *Id.*
89. Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role, and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 267 (1989).
90. *Id.*
91. *Id.*
92. *Id.* at 278.

cause problems when attorneys prefer that their clients not provide full disclosure, or when a party refuses to seek legal or other advice when needed.[93] However, unlike some processes, it respects the parties' need to bring in and consult with attorneys or other experts, advocates, or support persons.[94]

With transformative mediation, because party control over the process and solution is greater, the likelihood of party satisfaction with the process and solution is greater, as is commitment to the solution.[95] Furthermore, with this process of mediation, the likelihood of contamination via mediator bias is lessened, due to less mediator control of the parties and the process, as well as openness to the use of outside expertise and lack of evaluation of the case.[96] The risk of non-attorney mediators engaged in the unauthorized practice of law is also lessened with this type of mediation because transformative mediators do not draft settlement agreements, but rather help the parties to draft a summary of decisions stated in their own words.[97] Therefore, the transformative mediators leave the practice of law to the lawyers.[98]

Having described the three most commonly used forms of mediation,[99] this article now comes to its final point, which is the connection between defining the process and the ethical practice of mediation.[100] This article has already briefly examined the areas of mediator neutrality,[101] respect of the parties' right of self-determination,[102] the unauthorized practice of law, and consumer protection.[103] These are areas that must be discussed in order to provide some direction to the consumer and the practitioner.[104]

It becomes clear that the more the process becomes mediator-controlled, the more the potential for overlap of mediation and other legal processes.[105] Several commentators believe that this overlap creates a judicial-like process without the protection of the judicial system.[106]

---

93. *Id.*
94. *Id.* at 283.
95. GOLDBERG ET AL., *supra* note 29, at 180-81.
96. *Id.*
97. *Id.* at 181.
98. *Id.*
99. Imperati, *supra* note 45, at 709-12. Another widely used method is known as "Med-Arb;" in this process, a mediator attempts to negotiate a settlement, but if one is not reached, he or she then arbitrates the matter with a final decision on the merits. GOLDBERG ET AL., *supra* note 29, at 3.
100. FOLBERG & TAYLOR, *supra* note 1, at 244.
101. *See id.* at 7.
102. *See id.* at 10.
103. *See* Joshua R. Schwartz, *Laymen Cannot Lawyer, But is Mediation the Practice of Law?*, 20 CARDOZO L. REV. 1715, 1746 (1999).
104. *Id.* at 1716-19.
105. GOLDBERG ET AL., *supra* note 29, at 385-404.
106. *Id.* at 404-07.

These same concerns illustrate potentially serious ethical dilemmas for mediators, consumers, and their attorneys.[107] Furthermore, these concerns illustrate the difficulty of creating ethical standards that are inclusive of all types of mediation practice.[108] In fact, it may be impossible.[109]

IV. ETHICAL CONSIDERATIONS IN MEDIATION

A. WHERE WE'VE BEEN

In 1995, the Supreme Court of North Dakota established a Joint Dispute Resolution Study Committee with a charge to:

1. Review existing procedures to resolve . . . legal dispute[s] 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.[110]

The Study Committee found that existing statutory provisions for the utilization of ADR processes in North Dakota were quite limited; that few state trial court judges had referred cases to ADR; and that access to ADR providers and services was limited by the lack of public information on availability of these alternatives.[111]

Ultimately, the Study Committee rejected the idea of recommending court-annexed ADR,[112] but it did recommend certain changes to North Dakota Rules of Civil Procedure 16: to explicitly provide for the discussion of the desirability of ADR processes at a pretrial conference; to adopt a case management rule that would encourage the consideration of ADR at the outset of a case, as well as encourage attorneys and the court to provide information to parties about ADR options; and to adopt a new rule of court establishing a roster of neutrals.[113] The proposed amendments to the North Dakota Rules of Court were patterned after rule 114[114] in Minnesota.[115]

---

107. Bush, FLA. L. REV., *supra* note 89, at 276-77.
108. *Id.* at 273-76.
109. *Id.* at 286.
110. N.D. SUP. CT. ADMIN. ORDER 6(C) (dated October 11, 1995 and terminated June 30, 1998).
111. Joint Dispute Resolution Study Committee, *Final Report to the Supreme Court, President of the State Bar Association, and the Board of Governors* 1-2 (June 30, 1998) (on file with authors).
112. *Id.* at 8.
113. *Id.* at 10-17.
114. MINN. GEN. R. PRACTICE 114.
115. Joint Dispute Resolution Study Comm., *supra* note 111, at 10-17.

The report of the Joint Dispute Resolution Study Committee was referred to the Joint Procedure Committee;[116] it endorsed the recommended changes to North Dakota Rules of Civil Procedure 16, encouraging discussion at pretrial conferences of the desirability of utilizing ADR processes, but it rejected the remainder of the Study Committee's recommendations.[117] However, it did recommend that the Supreme Court refer for further study the issue of court-annexed mediation in domestic relations cases.[118]

The North Dakota Supreme Court subsequently adopted rules 8.8 and 8.9 of the North Dakota Rules of Court, relating to alternative dispute resolution, effective March 1, 2001.[119] Rule 8.8 strongly encourages the use of alternative dispute resolution in all civil cases not otherwise excluded under the rule and specifically requires lawyers to discuss ADR options with their clients.[120] Additionally, rule 8.9 requires the State Court Administrator to maintain a roster of neutrals for civil arbitration, civil mediation, and mediation in domestic relation/contested child custody proceedings.[121]

As a result of the adoption of these new rules of court, lawyers must become more thoroughly knowledgeable about the various forms of ADR available in order to properly advise their clients of what options are available and the benefits and disadvantages of each.[122] While ADR encompasses a varied group of alternatives to the traditional litigation model, mediation is the most prevalent choice of alternatives and will likely continue to be in the future.[123] Consequently, our focus will be on considerations that may enhance and promote the use of mediation as an effective ADR mechanism in North Dakota.

---

116. N.D. SUP. CT. R.P.R. 8. A standing committee of the North Dakota Supreme Court was established to study and review all rules of pleading, practice, and procedure and to propose adoption of new rules or the amendment or repeal of existing rules and orders for consideration by the North Dakota Supreme Court. *Id.*

117. Letter from Honorable Dale V. Sandstrom, Chair, Joint Procedure Committee, to Honorable Gerald W. VandeWalle, Chief Justice, North Dakota Supreme Court 2-3 (Dec. 29, 1999) (on file with authors).

118. *Id.*

119. Order of Adoption, Supreme Court of North Dakota, Supreme Court Nos. 20000199 & 20000266 (Dec. 6, 2000) (on file with authors).

120. N.D. R. CT. 8.8(a).

121. N.D. R. CT. 8.9(a).

122. GOLDBERG ET AL., *supra* note 29, at 206-07.

123. ERIC GALTON, REPRESENTING CLIENTS IN MEDIATION, at vii (1994).

B. CONSIDERATIONS FOR THE FUTURE

As a result of the action of the North Dakota Supreme Court, North Dakota joins a growing number of states[124] that, by legislation or court rule,[125] encourage or require the use of mediation in cases ranging from contested divorces, child custody proceedings and, more generally, to most civil proceedings as well as some criminal matters.[126] Additionally, many states have established state offices of dispute resolution to encourage the greater use of mediation among other forms of dispute resolution.[127]

While the promotion and increased use of mediation to resolve disputes in a variety of contexts offers promising alternatives to litigation, it also raises new concerns and procedural issues that need to be considered and resolved.[128] The remainder of this article will offer some observations, comments, and suggestions that should be considered as North Dakota joins the ADR movement.

1. *Mediator Standards of Practice*

Despite the encouragement and promotion of the use of mediation and other forms of ADR, North Dakota's new rules unfortunately fail to address a central concern identified by several commentators: the absence of clearly defined and generally accepted professional standards of practice for mediators, both in terms of professional prerequisites and ethical standards of conduct to be followed by practitioners of mediation.[129] Professional standards of conduct for mediators, including uniform ethical obligations, are essential both for increasing public confidence in mediation as a fair and impartial alternative to litigation as

---

124. *See* NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY, PRACTICE, app. B at 1-93 (2d ed. 1996) (setting forth a comprehensive listing of significant mediation legislation by state); *see also* American Bar Association Standing Committee on Dispute Resolution, Legislation on Dispute Resolution (1990 & 1990/91 Addendum) (providing a compilation of state and federal legislation relating more generally to alternative dispute resolution).

125. *See* MINN. GEN. R. PRACTICE 114 as an example of a comprehensive court rule on ADR, which requires that alternative dispute resolution must be considered for nearly all civil cases filed in district court and establishes the standards for training and qualifications of ADR neutrals.

126. ROGERS & MCEWEN, *supra* note 124.

127. *See, e.g.*, ARK. CODE ANN. §§ 16-7-101 to 16-7-207 (Michie 1999 & Supp. 2001); HAW. REV. STAT. §§ 613-1 to 613-4 (1993); KAN. STAT. ANN. §§ 5-501 to 5-517 (Supp. 2000); MASS. GEN. LAWS ANN. ch. 7, § 51 (West 1996 & Supp. 2001); NEB. REV. STAT. §§ 25-2902 to 25-2920 (1995); N.J. STAT. ANN. § 52:27E-73 (West 2001); OHIO REV. CODE ANN. §§ 179.01 to 179.04 (West 1999 & Supp. 2000); OKLA. STAT. tit. 12, §§ 1801 to 1825 (1993 & Supp. 2000); OR. REV. STAT. §§ 36.105 to 36.270 (1999); W. VA. CODE ANN., §§ 55-15-1 to 55-15-6 (Michie 2000).

128. Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1.

129. *Id.*; *see also* James J. Alfini, *Risk of Coercion is Too Great, Judges Should Not Mediate Cases Assigned to Them for Trial*, DISP. RESOL. J. Fall, 1999, at 11.

well as to provide sufficient guidance to practitioners involved in mediation.[130]

A recurring debate among private ADR providers, as well as an important policy issue, is the question of whether a sufficient public interest is involved that would justify the regulation of the practice of mediation.[131] Although mediation was initially promoted as a private, informal process, the public interest involved would be much stronger through increased use; this would be particularly true if the judicial system formally promotes, encourages, and, in some cases, mandates the use of such an alternative private process, thereby diverting the conflict from a traditional public forum for the resolution of disputes.[132] At this point, the regulation of the practice of mediation may very well become a consumer protection issue that justifies some regulation, as opposed to simply allowing regulation by the free market system as some have suggested.[133]

There are obvious challenges presented in developing a consensus on ethical standards that can accommodate the various styles of mediation practice.[134] In fact, a lack of consensus on the goals and objectives of mediation has been a principal barrier to arriving at a uniform set of standards that could provide guidance to mediators in their practice.[135] The field of ADR is unique because of its interdisciplinary nature[136] with mediators coming from a variety of professional backgrounds, many of whom are subject to their own professional rules of conduct.[137]

Scholars have offered their own views on distinguishing the varied models followed by mediators in conducting mediation and the role mediators assume in attempting to resolve conflict.[138] Achieving some

---

130. Bush, J. DISP. RESOL., *supra* note 128, at 4-5.

131. Elizabeth Rolph et al., *Escaping the Courthouse: Private Alternative Dispute Resolution in Los Angeles*, 1996 J. DISP. RESOL. 277, 279.

132. GOLDBERG ET AL., *supra* note 29, at 363-414.

133. Joint Procedure Committee, North Dakota Supreme Court, *Minutes of Meeting* 9 (May 6-7, 1999) (on file with authors).

134. Individuals engaged in mediation act in accordance with differing philosophical orientations and styles of practice. Murray S. Levin, *The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion*, 16 OHIO ST. J. ON DISP. RESOL. 267 (2001); *see also* FOLBERG & TAYLOR, *supra* note 1, at 130-46; Kimberlee K. Kovach, *Costs of Mediation: Whose Responsibility?* 15 MEDIATION Q. 13, 16-17 (1997); Robin N. Amadei & Lillian S. Lehrburger, *The World of Mediation: A Spectrum of Styles*, 51 DISP. RESOL. J. 62 (1996); Leonard Riskin, *Understanding Mediator's Orientations, Strategies, and Techniques: A Grid for the Perplexed* 1 HARV. NEGOT. L. REV. 7 (1996); GALTON, *supra* note 123, at 1-4.

135. Bush, FLA. L. REV., *supra* note 89, at 253-54.

136. Symposium, *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. DISP. RESOL. 95.

137. FOLBERG & TAYLOR, *supra* note 1, at 250-51.

138. *See* Michael Moffitt, *Casting Light on the Black Box of Mediation: Should Mediators Make Their Conduct More Transparent?* 13 OHIO ST. J. ON DISP. RESOL. 1, 3-6 (1997) (referencing several commonly cited models of mediation style and practice).

level of consensus on proper standards of conduct regarding what is and is not permissible in mediation practice will require an ongoing dialogue within the mediation community and will require a collaborative effort to arrive at standards that will promote the fairness and integrity of the process.[139]

However, care must be taken that the standards of conduct for mediators, as well as the design of a court-connected mediation program, do not favor a single mediation style to the exclusion of others.[140] Some commentators have suggested that court-connected mediation programs that are focused on outcome-measures favor a problem-solving approach to mediation and fail to accommodate the practice of a transformative mediation style.[141] It is important to note that the new rule of court in North Dakota that specifies those topics that must be covered to qualify for approved training, which is required for placement on the civil mediator roster, may unintentionally favor a problem-solving orientation to mediation and exclude or inhibit a transformative approach.[142] The rule may place undue emphasis on problem solving skills and negotiation techniques[143] as well as the "[c]omponents in the mediation process, including an introduction to the mediation process, fact gathering, interest identification, option building, problem solving, agreement building, decision making, closure, drafting agreements, and evaluation of the mediation process."[144]

Various national professional organizations have developed ethical standards of conduct for mediators to follow in their practice.[145] In addition, many statewide professional organizations of mediators have promulgated their own standards of practice or ethical codes for their membership.[146] Such standards address the ethical responsibilities to the

---

139. *Id.* at 4-5.

140. GOLDBERG ET AL., *supra* note 29, at 372.

141. Patricia L. Franz, *Habits of a Highly Effective Transformative Mediation Program*, 13 OHIO ST. J. ON DISP. RESOL. 1039, 1040-41 (1998).

142. N.D. R. CT. 8.9(b)(2)(B).

143. *Id.*

144. N.D. R. CT. 8.9(b)(2)(C).

145. *See, e.g.*, MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, Symposium on Standards of Practice (Discussion Draft), *available at* http://www.abanet.org/ftp/pub/family/fcccrdraft.doc (Aug. 2000); NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS, standard 8.0, Center for Dispute Settlement, The Institute of Judicial Administration (1998) (on file with authors); MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *available at* http://www.abanet.org/ftp/pub/dispute/modstan.txt (last visited Nov. 9, 2001) (being developed by the American Arbitration Ass'n, the American Bar Ass'n Section of Dispute Resolution, and the Society of Professionals in Dispute Resolution); STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, Academy of Family Mediators, *available at* http://www.mediators.org/afmstnds.html (last visited Nov. 9, 2001); ETHICAL STANDARDS OF PROFESSIONAL RESPONSIBILITY (1986), Society of Professionals in Dispute Resolution, *available at* http://www.acresolution.org/research.nsf/articles/390CECB8DDAE8ABE85256A1F0069BC38 (last visited Nov. 9, 2001).

146. *See, e.g.*, STANDARDS OF PRACTICE FOR MEDIATORS, Texas Association of Mediators, *available*

parties, to the mediation process, and the profession by performing three principal functions: providing guidance to mediators in their practice of mediation; providing information to parties involved in mediation; and promoting public confidence in mediation as an alternative process for the resolution of disputes.[147]

Among state-specific standards of conduct for mediators, Florida's rules are likely the best developed.[148] In 1992, the Supreme Court of Florida adopted Standards of Professional Conduct for Certified and Court-Appointed Mediators.[149] Florida is now a model that other states have looked to for guidance in developing their own dispute resolution programs, and Florida has a long history of integrating ADR into the judicial system.[150]

Once ethical standards for mediators are adopted, there must be some method for enforcing the standards.[151] Many of the existing state rules and standards of conduct for mediators either do not discuss the consequences of noncompliance or, alternatively, indicate that the standards are merely guidelines and are, therefore, aspirational.[152] However, some states have established procedures for disciplining certified and court-appointed mediators[153] that may provide various sanctions ranging from reprimands to suspension and de-certification.[154]

A question that is frequently asked is whether there are special ethical dilemmas presented for the attorney-mediator.[155] As mediation has been recognized as a law-related activity, lawyers who serve as mediators may very well be subject to the rules of professional responsibility, raising conflict of interest issues and claims of unauthorized

---

at http://www.txmediator.org/codeof.htm (last visited Nov. 9, 2001); MEDIATORS REVISED CODE OF PROFESSIONAL CONDUCT (1995), Colorado Council of Mediators, *available at* http://www.coloradomediation.org/codeofconduct.htm (last visited Nov. 9, 2001).

147. *Standards of Conduct for Mediators, Text of Agreement between AAA, ABA & SPIDR*, 50 DISP. RESOL. J. 78 (1995).

148. Sharon Press, *Institutionalization: Savior or Saboteur of Mediation*? 24 FLA. ST. U. L. REV. 903, 906 (1997). Florida enacted comprehensive court-connected ADR legislation in 1987 providing for mandatory mediation for many disputes and has been officially encouraging the use of mediation and other forms of alternative dispute resolution since that time. *Id.* at 907.

149. FLA. MEDIATOR R. 10.010-10.300 (1992) (subsequently amended and renumbered as FLA. MEDIATOR R. 10.200-10.730).

150. Sharon Press, *Building and Maintaining a Statewide Mediation Program: A View from the Field*, 81 KY. L.J. 1029, 1041-1065 (1993).

151. *See, e.g.*, FLA. STAT. ANN. R. 10.830 (laying out sanctions and procedures for mediator misconduct).

152. *See, e.g.*, KAN. R. RELATING TO MEDIATION 903; TENN. SUP. CT. R. 31 app. A(1)(a).

153. *See, e.g.* FLA. STAT. ANN. MEDIATOR R. 10.700-10.900 (establishing the Florida Mediator Qualifications Board, the disciplinary body for mediators); MINN. GEN. R. PRAC. 114 app. (establishing the procedure for the ADR Review Board to receive and act on complaints concerning a violation of the Code of Ethics); TENN. SUP. CT. R. 31 § 15.

154. FLA. STAT. ANN. MEDIATOR R. 10.830; MINN. GEN. R. PRAC. 114 app. III(A).

155. *See, e.g.*, VA. R. PROF'L CONDUCT 2.11, cmt 7 (prohibiting legal advice by the lawyer-mediator, and allowing legal information).

practice of law for non-lawyers.[156] Some states have sought to address the difficult issues arising when attorneys act as third party neutrals and as mediators by adopting explicit rules in their Rules of Professional Conduct for attorneys.[157] This is an issue that North Dakota will need to address as more attorneys act as mediators in an increasing number of cases.

2. *Unauthorized Practice of Law*

Another question often asked regarding mediation, is whether mediation is the practice of law.[158] In addition to ethical concerns, attorneys often have expressed concerns as to whether non-attorney mediators are engaged in the unauthorized practice of law, particularly with respect to divorce/child custody mediation.[159] North Dakota Rules of Professional Conduct 5.5 does not contain a precise definition of what constitutes the "practice of law," indicating that such activity is established by law and varies from jurisdiction to jurisdiction.[160]

Nevertheless, a lawyer may not assist a non-lawyer "in the performance of activity that constitutes the unauthorized practice of law"[161] arising out of an obligation to protect the public from the provision of legal services by unqualified individuals.[162] Consequently, attorneys who have an obligation under rule 8.8 of the North Dakota Rules of Court to discuss and encourage the use of alternative dispute resolution with their clients may understandably be concerned as to whether referring their clients to mediation may constitute a violation of North Dakota Rules of Professional Conduct 5.5.[163] How, then, can both attorneys referring parties to mediation as well as mediators providing mediation services avoid complaints of the unauthorized practice of law when engaged in the practice of mediation?[164]

The particular style of mediation practiced may influence the degree to which a mediator may be engaged in the unauthorized practice

156. Office of the Executive Secretary, Supreme Court of Virginia, *Guidelines on Mediation and the Practice of Law* 1 (1999) (on file with authors).

157. *See, e.g.*, VA. R. PROF'L CONDUCT 2.10-2.11.

158. For a general discussion of this topic, see ROGERS & MCEWEN, *supra* note 124, at § 10.05; Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407 (1997); Joshua R. Schwartz, *Laymen Cannot Lawyer, But is Mediation the Practice of Law?* 20 CARDOZO L. REV. 1715 (1999).

159. David A. Hoffman & Natasha A. Affolder, *Mediation and UPL*, DISP. RESOL. J., Winter 2000, at 20.

160. N.D. R. PROF. CONDUCT 5.5 cmt.

161. *Id.* R. 5.5 (b).

162. *Id.* R. 5.5 cmt.

163. *Id.* R. 5.5.

164. *Id.*

of law.[165] Since the provision of legal advice is generally considered to be an essential function constituting the practice of law, anything that resembles the rendering of legal advice is generally prohibited absent status as an attorney.[166] The "evaluative mediation" model is patterned, to some extent, on a judicial settlement conference in which the mediator provides advice to the parties, evaluates the merits of their positions, and predicts likely outcomes—all with a view of facilitating the ability of the parties to reach a resolution that approximates the legal or expert assessment of the mediator.[167] When a mediator, in the course of a mediation, provides an assessment of the strengths and weaknesses of the position taken by a party through the application of legal principles to the particular circumstances presented, he or she is engaged in the practice of law.[168] In the mediation context, the primary areas in which claims of unauthorized practice of law arise are the drafting of settlement agreements resulting from mediation and the providing of legal information or advice.[169]

In an attempt to address the issue of unauthorized practice of law when mediating disputes, the Department of Dispute Resolution Services of the Supreme Court of Virginia, with funding provided by the State Justice Institute, undertook a national research project in order to create a clear set of guidelines for mediators to avoid claims that they were engaged in the impermissible practice of law while mediating disputes.[170]

In an attempt to distinguish between providing legal information, which would be permissible, and rendering legal advice, which would constitute the unauthorized practice of law, the Department of Dispute Resolution Services of the Supreme Court of Virginia arrived at several guidelines with explanatory comments and examples for mediators that included the following:

- A mediator may provide legal resource and procedural information to disputants.
- A mediator may make statements declarative of the law.
- A mediator may ask reality-testing questions that raise legal issues.

---

165. *See* Imperati, *supra* note 45, at 719 (addressing the need to give legal advice when using the evaluative method, and such advice cannot be given by a nonlawyer mediator).

166. Donald T. Weckstein, *Limitations on the Right to Counsel: The Unauthorized Practice of Law*, 1978 UTAH L. REV. 649, 652-654.

167. Murray S. Levin, *The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion*, 16 OHIO ST. J. ON DISP. RESOL. 267, 269 (2001).

168. Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 428 (1997).

169. Hoffman & Affolder, *supra* note 159, at 22.

170. Supreme Court of Virginia Guidelines, *supra*, note 156, at 1.

- A mediator may inform the disputing parties about the mediator's experience with a particular court or type of case.
- A mediator may inform the disputing parties about the enforceability of a mediated agreement.
- A mediator may not make specific predictions about the resolution of legal issues or direct the decision-making of any party.[171]

In defining the proper role of a mediator in preparing written agreements, the following guidelines were established:

- Acting as scrivener, a mediator may prepare settlement agreements and memoranda of understanding for the parties.
- Unless required by law, a mediator should not add provisions to an agreement beyond those specified by the disputants.
- Mediators may use a court-approved form when preparing a written agreement.
- A mediator may include standard provisions in written agreements relating to the mediation process itself.[172]

The difficulties of providing clarification and accommodating various interests through a rule defining the relationship between rendering legal advice and promoting a fair and impartial process for mediation practice is perhaps best exemplified by the Florida Rule on Professional Advice or Opinions, which was recently revised as follows:

(a) *Providing Information*. Consistent with standards of impartiality and preserving party self-determination, a mediator may provide information that the mediator is qualified by training and experience to provide.

(b) *Independent Legal Advice.* When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the party of the right to seek independent legal counsel.

(c) *Personal or Professional Opinion.* A mediator shall not offer a personal or professional opinion intended to coerce the parties, decide the dispute, or direct a resolution of any

171. *Id.* at 15-21.
172. *Id.* at 24-28.

> issue. Consistent with the standards of impartiality and preserving party self-determination however, a mediator may point out possible outcomes of the case and discuss the merits of a claim or defense. A mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.[173]

The question then arises whether such rules and guidelines provide sufficient direction for a mediator as to what is permissible and what is not, for both the lawyer-mediator as well as the mediator not trained in the law. These examples of other states' efforts to provide guidance to mediators in avoiding complaints involving the unauthorized practice of law should encourage North Dakota to consider these issues as well. In fact, one could argue that North Dakota Rule of Court 8.9 unintentionally encourages the unauthorized practice of law by requiring that mediation training will include topics such as problem-solving and drafting agreements[174]

3. *Duties to Inform and Disclose*

Some commentators have argued that lawyers have a duty to inform and advise their clients of ADR options.[175] The new rules of court have left some lingering issues. Is there a duty to disclose to parties the type of mediation orientation practiced by a mediator? Should the roster of neutrals require such a disclosure? What is the required level of knowledge that an attorney must have, and how much information regarding ADR processes will the attorney be required to provide to his or her client?

Mediation has come to be a generic term embracing a varied group of approaches, orientations, and styles of mediation practice.[176] However, all mediators are not alike.[177] While a number of mediation standards direct a mediator to provide parties with an overview of the mediation process at the outset of mediation, the Virginia Standards of Ethics and Professional Responsibility for Certified Mediators specifically require a mediator to "describe his style and approach to mediation."[178]

---

173. FLA. R. Civ. P. 10.370.

174. N.D. R. Ct. 8.9.

175. Frank E.A. Sander, *At Issue: Professional Responsibility: Should There be a Duty to Advise of ADR Options?*, 74 A.B.A. J. 50, 50 (1990).

176. *See generally* Imperati, *supra* note 45.

177. GALTON, *supra* note 123, at 1-2.

178. VA. STANDARDS OF ETHICS & PROF'L RESPONSIBILITIES FOR CERTIFIED MEDIATORS D(1)(c)

Lawyers, in particular, will be expected or required to discuss with and advise their clients about ADR options as part of their client counseling obligation.[179] An attorney counseling a client about mediation must be aware of the various mediator styles in order to recommend a mediator, prepare the client for mediation, and create expectations regarding the results of mediation.[180]

With regard to knowledge of and familiarity with various ADR processes, a survey of North Dakota attorneys in 1990 by the Alternative Dispute Resolution Committee of the State Bar Association of North Dakota disclosed that sixty-eight percent of attorneys had never utilized mediation in their practices, and only fifty-six percent believed that their practical understanding of mediation, arbitration, and mini-trials allowed them to properly advise their clients on using these alternatives.[181] Many commentators have suggested that attorneys are generally poorly informed about ADR.[182]

Research has established that a key factor in an individual's choice of available ADR processes is his or her attorney's recommendation, and the factor having the most influence on whether an attorney advises her client to utilize mediation or other forms of ADR is the attorney's prior experience in a case that used such an alternative.[183] Although attorneys are more familiar with the variety of available ADR mechanisms than a decade ago, difficulties still remain regarding their inability to recognize the distinctions among the range of ADR processes that are commonly referred to in practice as "mediation."[184]

Some jurisdictions have made the obligation to be informed of, and advise clients of, ADR an explicit requirement of their rules of professional conduct.[185] Even when such an obligation is not explicit, the rules of professional conduct imply such a duty.[186]

It may be questionable whether a court rule either encouraging or requiring lawyers to discuss ADR options with their clients will have any noticeable effect on the increased utilization of ADR, at least without the support and encouragement of the private bar.[187] In fact, studies have

---

available at http://www.courts.state.va.us/soe/soe.htm (last modified Feb. 22, 2001).

179. Robert A. Baruch Bush, *"What Do We Need a Mediator For?": Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 2 (1996).

180. John W. Cooley, *Mediation Advocacy, in* NATIONAL INSTITUTE FOR TRIAL ADVOCACY 18-19 (1996).

181. Memorandum from Mike Liffrig, to ADR Committee of the State Bar Association of North Dakota 1 (Feb. 18, 1991) (on file with authors).

182. Frank E.A. Sander, *The Future of ADR*, 2000 J. DISP. RESOL. 1, 6.

183. Roselle L. Wissler, *Attorney's Use of ADR is Crucial to Their Willingness to Recommend it to Clients*, DISP. RESOL. J., Winter 2000, at 36.

184. Levin, *supra* note 134, at 267.

185. *See, e.g.*, COLO. R. PROF'L CONDUCT 2.1; HAW. R. PROF'L CONDUCT 2.1.

186. Suzanne J. Schmitz, *Giving Meaning to the Second Generation of ADR Education: Attorney's Duty to Learn About ADR and What They Must Learn*, 1999 J. DISP. RESOL. 29, 33.

187. Robert F. Cochran, Jr., *ADR, The ABA, and Client Control: A Proposal That the Model Rules*

demonstrated that the way in which a lawyer presents ADR options to his or her client is likely to influence whether the client chooses to use ADR.[188] In a 1990 survey of North Dakota attorneys, only twenty-seven percent of the attorneys surveyed favored providing courts with the authority to order parties into ADR procedures.[189]

4. *Mediation vs. Settlement Conferences*

Under North Dakota Rules of Court, parties are now provided with a choice of participating in court-sponsored mediative settlement conferences and domestic relations mediation or ADR through a private neutral.[190] Unfortunately, there is a lack of clarity and definition of what is encompassed by the term "court-sponsored mediative settlement conference."[191] This clarity and definition is crucial in establishing expectations of participants and permitting informed decisions to be made among various dispute resolution options.[192] In fact, many in the mediation field may argue that it is erroneous to refer to any form of settlement conference as mediative and that the designation of such a process is a misnomer.[193]

The confusion created by the choice of terminology used to describe ADR processes can significantly affect both public policy discussion as well as the manner in which ADR is implemented.[194] There should be some uniformity and predictability of the process the rule makes reference to for the benefit of the parties to the dispute, their counsel, the court, and other interested parties, including ADR providers.[195] Settlement conferences may consist of a variety of differing approaches and structural formats.[196] For example, will the form and structure of the settlement conference vary from judicial district to judicial district or will there be some uniformity assured?[197] Are we to assume a mediative settlement conference would be similar to a

---

Require Lawyers to Present ADR Options to Clients, 41 S. TEX. L. REV. 183, 200 (1999).

188. Jessica Pearson et al., *The Decision to Mediate: Profiles of Individuals Who Accept and Reject the Opportunity to Mediate Contested Child Custody and Visitation Issue*, 6 J. DIVORCE 17, 29 (Fall/Winter 1982). For example, a study of individuals choosing whether or not to utilize mediation for child custody disputes concluded that their lawyer's recommendation was the key factor in their decision. *Id.*

189. Liffrig, *supra* note 181, at 2.

190. N.D. R. CT. 8.8(c).

191. *Id.*

192. *Id.*

193. Deborah R. Hensler, *Science in the Court: Is There a Role for Alternative Dispute Resolution?* 54 LAW & CONTEMP. PROBS. 171, 185 (1991).

194. Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument that the Term "ADR" Has Begun to Outlive its Usefulness*, 2000 J. DISP. RESOL. 97, 104.

195. *Id.* at 110.

196. JAY E. GRENIG, ALTERNATIVE DISPUTE RESOLUTION WITH FORMS §§ 18.40-18.44 (2d ed. 1997).

197. *Id.*

moderated settlement conference, for example, as provided under the Texas Dispute Resolution Procedure Act and which is described as "a forum for case evaluation and realistic settlement negotiations"?[198]

In general, there are significant differences between mediation and settlement conferences.[199] The intent of North Dakota Rule of Court 8.8 must have contemplated something fundamentally different than what most would consider mediation, as the rule itself refers separately to domestic relations mediation as the other form of ADR to be offered by the district court,[200] suggesting it is something significantly different from other forms of mediation.[201]

A "mediator" conducting a settlement conference, although possibly using some mediation techniques, is likely to take a more directive, settlement-driven role than in more traditional forms of mediation.[202] He or she will focus primarily on settlement through evaluative approaches as opposed to addressing the interests of the parties or facilitating their own decision-making for resolution of their dispute.[203] If mediative settlement conferences are, in fact, fundamentally different from traditional methods of mediation, this will have the effect of denying access to mediation for those unable to afford access to ADR providers in the private marketplace, except possibly in domestic relations matters.[204]

Unlike many forms of mediation, the primary focus of a settlement conference is directed toward settlement of the conflict.[205] Calling a settlement conference mediation, with the "mediator" directing the settlement conference rather than a judge, may indeed promote the goal of judicial efficiency; however, it will surely undermine active party participation in a collaborative process to achieve a resolution of conflict with the benefit of a neutral third party.[206] Mediative settlement conferences may also provide a process whereby parties are advised and urged to settle their disputes by non-judges or "unqualified" court staff without any judicial protection of their rights.[207] It is imperative that

198. TEX. CIV. PRAC. & REM. CODE ANN. § 154.025(a) (Vernon 1997).

199. FORREST S. MOSTEN, THE COMPLETE GUIDE TO MEDIATION, THE CUTTING-EDGE APPROACH TO FAMILY LAW PRACTICE 119-20 (1997).

200. *See* N.D. R. CT. 8.8 (c).

201. *Id.*

202. GRENIG, *supra* note 196 § 18.42.

203. *Id.*

204. Marc Galanter & Mia Cahill, *"Most Cases Settle:" Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1369 (1994).

205. Leroy J. Tornquist, *The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry*, 25 WILLAMETTE L. REV. 743 (1989); Galanter & Cahill, *supra* note 204, at 1341; Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 507 (1985).

206. Galanter & Cahill, *supra* note 204, at 1388.

207. *See id.* at 1390 (suggesting review of settlement by a third party or by judicial hearing).

terminology in the rules be clarified so that parties, lawyers, and courts are informed and aware of what court-annexed processes will be utilized.[208]

Based on the earlier discussions with respect to differences in mediation style and orientation, the question of what will be the orientation of court-sponsored domestic relations mediators becomes an obvious value choice.[209] Other questions also arise. How will court-sponsored forms of ADR differ from what is available in the private sector?[210] Will court personnel be required to receive training in mediation, and if so, what form of training will be required?[211]

Early critics of mediation claimed that such informal processes represented "second class justice,"[212] diverting the poor and disadvantaged from a rights-based forum where they had procedural rights.[213] However, in the intervening years with the growth and institutionalization of mediation, many would now argue that mediation provides "first class justice,"[214] transforming the issue to one of assuring that low-income persons have the same access to these alternatives as those with the ability to pay.[215]

The use of judicial officers or employees to conduct mediative court-sponsored settlement conferences and domestic relations mediations will necessarily limit the disputes that can be accommodated[216] as well as narrow the diversity of the pool of mediators by race, personal background, and gender.[217] This diversity is often critical to promoting an impartial process.[218] Other options should be studied for providing access to dispute resolution services for those unable to pay, which could be a combination of public funding,[219] pro bono services,[220] or the use of volunteers through dispute resolution centers.[221] The rule should also

---

208. Craig A. McEwen & Laura Williams, *Legal Policy and Access to Justice Through Courts and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 865, 869 (1998).

209. GOLDBERG ET AL., *supra* note 29, at 374.

210. *Id.* at 372-85.

211. *See, e.g.*, Menkel-Meadow, *supra* note 205, at 513 (stating that judges participating in settlement conferences require a new socialization process).

212. McEwen & Williams, *supra* note 208, at 865.

213. *Id.*

214. *Id.* at 868.

215. *Id.*

216. *See* N.D. R. CT. 8.8(h) (limiting court-sponsored ADR options to available resources).

217. Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715, 743 (1999).

218. *Id.*

219. For example, ALASKA STAT. § 25.20.80(e) (Michie 2000) provides that in child custody matters the costs of mediation can be ordered to be paid by the state if both parties are indigent.

220. For example, TENN. SUP. CT. R. 31 section 16 requires that any individual desiring to be listed as a qualified mediator must be willing to conduct three pro bono mediations per year, not to exceed twenty hours total.

221. For example, the Nebraska Office of Dispute Resolution, established in 1991 under the

provide more direction regarding how ADR programs will be implemented, monitored, and evaluated, which will promote uniformity and allow for some means of statewide comparison rather than leaving it to the discretion of each judicial district.[222]

5. *ADR Roster and Mediator Qualifications*

States have taken a variety of approaches in establishing qualifications for mediators, particularly regarding those providing mediation in domestic relations matters.[223] While some minimum level of training and experience is necessary to ensure the competency of those engaged in mediation, there is considerable debate[224] as to the necessity of requiring a particular professional background or educational degree.[225] The consensus of most ADR scholars is that a particular educational degree does not automatically correlate with skills and performance necessary to be an effective mediator and should not be a requirement.[226]

Although North Dakota Rule of Court 8.9 repealed Administrative Rule 28,[227] which had established qualifications for court-appointed mediators in contested child custody proceedings, it unfortunately retained specific educational background and professional experience requirements as essential criteria to be a qualified mediator for placement on the roster.[228] The incongruity of the requirement of educational background and professional experience is demonstrated by the exception allowing those rostered in Minnesota within sixty days of the effective date of the rule[229] to be placed on the North Dakota Domestic Relations Mediator/Contested Child Proceedings Mediator Roster, even though Minnesota contains no similar educational or professional background requirements for its family law facilitative neutrals roster.[230]

Administrative Office of the Courts with state appropriations, oversees and supports six regional nonprofit dispute resolution centers that provide mediation services throughout the state with the extensive utilization of volunteers. *See Eighth Annual Report, July 1999–June 2000*, at 4-5, Nebraska Office of Dispute Resolution, *available at* http://court.nol.org/odr/report.html (last visited Nov. 11, 2001).

222. *See* N.D. R. CT. 8.8(f).

223. *See, e.g.*, Timothy Lohmar et al., Student Projects, *A Survey of Domestic Mediator Qualifications and Suggestions for a Uniform Paradigm*, 1998 J. DISP. RESOL. 217; Bobby Marzine Harges, *Mediator Qualifications: The Trend Toward Professionalization*, 1997 B.Y.U. L. REV. 687; Norma Jeanne Hill, *Qualification Requirements of Mediators*, 1998 J. DISP. RESOL. 37, 39-43.

224. Press, *supra* note 148, at 1036.

225. Hill, *supra* note 223, at 41.

226. *Id.*; *see also* GOLDBERG ET AL., *supra* note 29, at 181. In a number of studies conducted as to mediator qualifications, "only experience (having mediated more than 15 cases) even approached a statistically significant relationship with settlement." *Id.* The authors mention that only "attorneys . . . were impressed with the competence of mediators with substantive expertise in the legal issues of the dispute." *Id.*

227. N.D. SUP. CT. ADMIN. R. 28 (1989) (repealed 2001).

228. N.D. R. CT. 8.9(b)(3).

229. N.D. R. CT. 8.9(b)(4).

230. MINN. GEN. R. PRACTICE 114.13(c).

Such requirements for particular educational or professional backgrounds may unreasonably prevent otherwise qualified individuals from engaging in mediation, resulting in a lack of diversity among the pool of mediators in terms of race, culture, and life experiences.[231] The requirements of educational degree and professional experience appear particularly unnecessary when the mediator is not being certified under the rule and when there is a particular disclaimer that the listing of a neutral does not imply that the mediator has the necessary skill or competency for a particular matter.[232]

Training requirements, particularly with respect to continuing education in a professional field that continues to evolve rapidly and where skill development is essential, may also need to be reconsidered. The nine hours of continuing education required every three years to remain on the mediators' roster is half of what will be required of neutrals on Minnesota's roster under recent amendments to the General Rules of Practice for the District Court in Minnesota.[233]

6. *Confidentiality*

The effectiveness of mediation depends upon the ability to satisfy the expectations of the parties that the mediation process is confidential and that all communications will be protected against disclosure; this promotes the free and complete communication necessary to resolve the parties' conflict.[234] This necessarily requires a strong public policy and legal protections promoting the confidentiality of the mediation process.[235]

For more than three years, the National Conference of Commissioners on Uniform State Laws and the American Bar Association Section on Dispute Resolution have been working jointly[236] to draft a Uniform Mediation Act (UMA)[237] designed to simplify the law and address the wide variations in definitions and procedural mechanisms promoting confidentiality in mediation among and within states by offering a uniform statute to address these issues.[238] An example of the variations

231. Brazil, *supra* note 217, at 744-45.

232. N.D. R. CT. 8.9(f).

233. MINN. GEN. R. PRACTICE 114.13(g). It is also much less than required by most community mediation centers for their volunteer mediators. N.D. R. CT. 8.9(f).

234. GOLDBERG ET AL., *supra* note 29, at 419-31.

235. *Id.*

236. Gregory Firestone & Dennis Sharp, *Uniform Mediation Act: Are We There Yet?*, ASS'N FOR CONFLICT RESOL. NEWS, Winter/Spring 2001, at 17.

237. The June 2001 draft of the UNIFORM MEDIATION ACT can be found at http:www.mediate.com/articles/umaJune01draft.cfm (last visited Nov. 11, 2001).

238. *Id.* § 2.

even within states as to the confidentiality provisions with respect to mediation is shown by comparing North Dakota Rules of Court 8.8(b) with the general mediation confidentiality statute in North Dakota.[239] The latest draft of the uniform statute provides broad confidentiality of communications in the mediation process, not just prohibitions of disclosure in subsequent court proceedings.[240]

V. CONCLUSION

To facilitate the greater integration of mediation in North Dakota and to improve its effectiveness will require ongoing study and review. As the Report of the Joint Dispute Resolution Study Committee so aptly concluded: "As courts embrace ADR systems, further comprehensive planning, evaluation, and revision of policy and procedures will be necessary."[241] Wisely, the North Dakota Supreme Court granted a petition filed by the State Bar Association of North Dakota to establish a Joint Standing Committee on Alternative Dispute Resolution[242] and appointed committee members.[243] It is hoped that this committee will continue the work begun by the Joint Dispute Resolution Study Committee to offer ongoing recommendations for the design, implementation, and evaluation of ADR processes in North Dakota.

---

239. *Compare* N.D. R. CT. 8.8.(b) (providing protection for court sponsored ADR) *with* N.D. CENT. CODE § 31-04-11 (1996) (providing protection generally for all mediation processes).

240. Firestone & Sharp, *supra* note 236, at 17.

241. Joint Dispute Resol. Study Comm., *supra*, note 111, at 17.

242. Order re Proposed Administrative Rule on Joint Standing Committee on ADR, *available at* http://www.court.state.nd.us/court/docket/20000266.htm (Jan. 1, 2001).

243. *Id.*

* * *