2002 Traveling Seminar

Alternative Dispute Resolution

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Materials prepared by:
Terry D. Parsons
Olsen & Parsons
College & 29th Streets
Cedar Falls, IA 50613
319-277-7936
Fax: 319-277-0799

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Prepared by Terry D. Parsons
Olsen & Parsons
College & 29th Streets
P.O. Box 809
Cedar Falls, IA 50613
(319) 277-7936 Telephone
(319) 277-0799 Fax

INTRODUCTION

Alternative Dispute Resolution is generating a great deal of attention from the Court, Legislature, and the general public. It tends to be a controversial topic among Iowa attorneys. If you sat in on a discussion by proponents of ADR in Iowa, you would in all likelihood hear one recurring theme: attorneys pose one of the greatest obstacles to the growth of Alternative Dispute Resolution in the State of Iowa. Whether the negative attitude of some attorneys toward ADR arises from territorialism, caution, mistrust, or misunderstanding, it is an attitude that fights a national trend of using alternative means to settle disputes that during our lifetimes have been traditionally resolved by clients hiring attorneys to utilize our court system.

In this segment of the program, we are going to deal with what ADR is, how it fits into the modern practice of law, and try to give you some rudimentary tools to deal with ADR issues that will continue to arise in your legal practice.

WHAT IS ADR?

ADR Defined: ADR has become a buzzword. In the popular vernacular, ADR denotes use of a means to resolve a conflict with legal elements

without resort to trial by court or jury. Examples of ADR include mediation, arbitration, and negotiation. None of the concepts or means of conflict resolution are new. The new twist is more extensive formal adoption of these means of problem resolution into our established legal system through mandating their use or offering their use as an adjunct to the court system.

Arbitration: Arbitration uses a neutral third party to resolve a dispute by imposing a resolution on the parties after being provided with information about the dispute in a set format. It is sometimes casually referred to as "rent a judge." In many ways our court system is a highly stylized form of arbitration. In practice, the arbitrator frequently is chosen because he or she has some basic knowledge of the technical subject matter underlying the dispute. Arbitration is sometimes mandated by statute or by contract. Common disputes where arbitration is used to obtain a resolution are labor - management problems and contract problems.

Negotiation: Negotiation generally falls under one of two categories. Either the parties resolve a dispute by direct discussions to reach an agreed resolution of the issues, or the parties resolve a dispute by their representatives (such as lawyers) having discussions to reach an agreed resolution. We use negotiation in our private lives on a daily basis to resolve disparate wants and needs. Formal negotiation is a common tool used by attorneys to resolve their

client's legal problems.

Mediation: Facilitated by a neutral third party, the parties to a dispute resolve their differences by direct discussion to reach an agreed resolution of the issues . A variation is to have the parties use representatives (such as lawyers) during the process of reaching an agreement.

Summary: Both the formal court system and arbitration resolve problems by having a third party impose a solution. Negotiation and mediation resolve problems by having the parties agree to a solution and may utilize the expertise of third parties in presenting their point of view or in assisting the participants in exploring settlement options in a controlled setting. Any means of problem resolution outside a formal courtroom trial is considered ADR.

WHY IS ADR GROWING IN POPULARITY?

The search for and systemization of ADR reflects the general public's disenchantment with the traditional legal system and interest in exploring the most effective means of solving problems. Despite aggressive reform efforts, the American legal system continues to be slow and frustrating to consumers in a fast food, instant information access age.

The last decades have seen extensive research into the nature and means of conflict resolution. The results of that have become part of the common culture. The

Harvard Negotiation Project's principled negotiation model rode into the common culture with the 1981 national bestseller *Getting to Yes, Negotiating Agreement Without Giving In* by Roger Fisher and William Ury. Just this year the Academy Award Winning film *A Beautiful Mind* brought to the attention of the general public John Nash's game theory concept of the highest probability of personal success being attained by each member of the group taking the action that is best for the group rather than taking the action that appears best for the individual. School children are taught to look at conflict in an analytical fashion. Many schools train peers to mediate disputes between their playmates. Managers are trained in conflict resolution to avoid costly disputes among workers and to avoid employee turnover.

In this climate, the traditional legal system finds itself being criticized for being slow, costly and limited in scope. Clients are less willing to leave their fate in the hands of impartial strangers and more motivated to be an active part of the problem resolution process. Just as they are being trained to seek innovative solutions in their personal businesses, they seek innovative solutions to their legal problems.

The court system finds itself trying to meet the needs of more and more litigants with dwindling financial resources. Particularly in the area of family law, judges express frustration with the difficulty of imposing effective solutions to problems that are in truth more practical than technically legal. The needs of the system itself calls for change.

Using alternative dispute methods gives the legal system increased flexibility in meeting the needs of disputing parties and can reduce the strain on the court system. By taking the steps to incorporate those alternatives into the existing structure with requirements like mandatory case settlement conferences and mandatory mediation,

the court systems will be able to maintain quality control while better meeting the needs of persons with legal problems.

WHY CONCERNS ARE RAISED ABOUT ADR?

Given that context, what concerns are raised by attorneys about ADR? One factor is that we are comfortable with the existing court system as the best system for problem resolution. It is our default paradigm: you have a legal problem, you file suit and take it to the court for determination. We are trained in it. We believe in it. We believe it works well. Hundreds of years of wisdom and experience have developed a very stylized ritual for presenting the problem, gathering information about the problem, and resolving the problem. We believe that with all of our training and expertise, the formal legal system can provide the best possible solution to the conflict. In the context of our own rigorous training, we question the training and skills that mediators and problem solvers will bring to ADR.

As a group we tend to accept change slowly. With the innovations in technology in the last two decades, we have seen dramatic changes in the way we prepare documents, do research, and communicate with our clients and the courts. Anyone who has argued, convinced, and strong-armed senior partners into the transitions to computers, faxes, e-mail, cell-phones, voice messaging, and web-pages can testify to the degree to which we tend to resist change. If the trend toward ADR is perceived as a suggestion that we change the basic nature of how we resolve conflict, it is not surprising that suggestion is met with caution and scepticism.

And finally, we cannot underestimate the impact of viewing ADR as a further erosion of the functions we perceive as reserved exclusively for attorneys. Loss of status. Loss of work. Loss of revenue.

THE CASE FOR ADR

But when the buzz words and the hype are stripped away, the current trend toward ADR is not a threat or even that distinctive a change. It is a natural evolutionary step in our fast-paced and highly educated society. It allows us as attorneys to offer our clients another means of resolving their problems when those alternative means will result in a better solution under all of the circumstances.

When we examine the facts, lawyers have always used methods other than litigation for problem resolution. Informal negotiation is the prime example. Most cases are settled, not tried. Whether by exchange of letter, fax, telephone call or through face-to-face meetings, on a daily basis attorneys represent their clients in negotiations to resolve disputes. To be an effective, successful attorneys, we have always needed to be good negotiators.

Interjection of a neutral into the negotiation setting is not new. A pointed reminder from the trial court on the date set for trial that the parties are probably going to be happier if they work something out than if they leave it to the court has facilitated last-minute settlements for years. Mandated case settlement conferences were introduced many years ago to allow the court to facilitate negotiations and assure settlement had been seriously discussed. Some courts have a judge who will not be

the presiding judge participate in the settlement conference to encourage the parties to be realistic and open in their discussions about the case. Interposing a neutral private mediator, arranged by the parties, who encourages the parties to carefully consider the limitations of their cases and the benefits of an assured resolution and who acts as a go-between to keep the negotiations flowing is a small step from a case settlement conference.

Arbitration has been a staple in the area of employment law for decades. Administrative procedures resolve many disputes and prevent them from reaching the court system. Use of an arbitrator with technical knowledge can streamline presentation of the case and use of a privately selected and scheduled arbitrator can avoid the parties being at the mercy of the clogged court dockets. Most attorneys are comfortable with arbitration because it is formal and follows specific rules. On close inspection, the administrative law system is a form of ADR utilizing judges with specialized knowledge to resolve disputes.

In the realm of ADR, the use of a mediator is often the point where attorneys balk for a variety of reasons. When mediations are conducted without counsel present, the attorney may be afraid that the client will give away too much and not get as "good" a result as the attorney could obtain on their behalf. The meetings are sometimes not viewed as being sufficiently structured. The whole concept seems "touchy-feely" and soft to some attorneys. The fact that some mediators are trained in communication facilitation, but not trained in law may be bothersome. Some attorneys are skeptical that mediation can resolve cases that are not otherwise settled through negotiation. And although a mediated settlement is akin to a negotiated settlement

inasmuch as the resolution of issues is agreed to rather than imposed, many lawyers are uncomfortable with the concept of the problem resolution being taken out of their personal control. Most of those concerns are born of lack of familiarity with the process.

Mediation actually covers a broad styles of facilitating dispute resolution. In the personal injury area, mediations are frequently caucus-based with a facilitator practicing shuttle diplomacy as a go-between among the plaintiffs and defendants attempting to find a workable settlement figure and terms. Lawyers are generally present and very vocal.

Family law mediation is often different. As Annie Tucker points out in her article *"Family Mediation in the Sixth Judicial District — You Can Benefit from What We've Learned" The Iowa Lawyer* Volume 62, Number 2, February 2002 family law mediation is often not caucus-based but is frequently facilitative or transformational. In a face to face neutral setting, spouses and former spouses have the opportunity to confront their problems, have a forum to explain their view of them, and work toward a mutually acceptable solution. The very process of the mediation session may have a beneficial impact even if not all of the problems are resolved. In contrast to family law trials, especially custody trials, which are notorious for escalating negative feelings between the parties, mediation has a strong potential for de-escalating the hostilities by giving the parties a controlled and neutral setting where they have a chance to vent and to recognize mutual goals for the future. Mediation offers a very different type of problem resolution than trial. Rather than taking a you against me approach to resolving the issues, it takes the approach that "we" have a mutual problem and we need to find a

solution that both of us can live with and make work.

The Sixth Judicial District has compiled statistics which Annie Tucker sets out in her article *"Family Mediation in the Sixth Judicial District — You Can Benefit from What We've Learned" The Iowa Lawyer* Volume 62, Number 2, February 2002. In summary, mediated cases were less likely to be subsequently modified, and if modifications were filed, were less likely to require court time to resolve or to appeal from a trial court resolution. In the time period surveyed, there had been a sixty percent drop in hearings on temporary custody and visitation and at least a ten percent drop in the number of family law trials which required more than two days of court time. Participants report a significantly higher rate of satisfaction with the mediation process than the trial process.

Mediation is a process that can address highly emotion-charged disputes and defuse them. But it is a process and takes time and effort by the participants and the facilitator. The facilitator must be able enable the participants to identify the actual issues and to address workable solutions to those issues that are subject to resolution. It is not an easy process, but it is capable of producing a mutually acceptable solution that both parties have an investment in making work. It is capable of resulting in a better resolution than one imposed by the court by the very fact of it being reached by agreement and acceptance. And in the case of a married couple who has a history of reaching agreements on large and small issues over the course of years of marriage, it is very likely that some agreement can be reached that the parties view as fair.

Concern about the source of trained mediators is legitimate, but can be overcome. Although attorneys historically received their only training in negotiation

techniques on the job, that training is becoming more formalized through our law school curriculums. We question the training of mediators, particularly non-lawyer mediators. As a practical matter, where mediation has been formally recognized and required through the court system, the legal system has the ability to stipulate what it will accept for qualified mediators. That provides a necessary safe guard.

Iowa has the ability to provide for mediation training to support court approved mediation programs. Several districts have active and effective programs in place at the present time in the area of family law. Nearly a decade ago, the Iowa State Bar Association brought in trainers and sponsored mediation training programs for Iowa attorneys. The Association for Conflict Resolution (a merger of the Academy of Family Mediators with CREnet and SPIDR) recognizes the Iowa Peace Institute in Grinnell as an entity that provides training for conflict management including mediation skills. As the work becomes available for mediators, there is a broad-based network of mediation training resources.

Consistent with the legal model for training attorneys, in most cases the courts require a combination of formal education and specific training before accepting persons as mediators. Most certifying groups that come from a counseling or health care profession model also require a number of supervised mediations before accepting persons as mediators who are qualified to mediate on their own. As a practical matter, most of us find that in addition to education and training, some persons seem to have an innate ability to help people reach consensus. Like all professional services, as mediation grows in Iowa, word of mouth will help us locate the best qualified mediators to facilitate resolution of our clients' problems.

Where Iowa is incorporating ADR as part of the legal process, the specter of loss of legal work is generally just that. A specter. Attorneys continue to negotiate and represent their clients in arbitration. In mediations attorneys still play an integral part in identifying and narrowing issues, gathering information, evaluating options, preparing the necessary documents and obtaining the necessary orders to implement the agreements of the parties. The use of ADR allows us to offer our clients multiple options to resolve their problems so that they may obtain the best possible result. Good results mean happy clients. And happy clients are both more likely to pay their bills and to return to you to represent them when they have a legal problem.

THE FUTURE OF ADR

Whether we like it or not, ADR is the wave of the future. As practicing attorneys, we are well prepared to utilize settlement conferences and similar adaptations which require us to negotiate on behalf of our clients. Arbitration procedures are similar to trial procedures. Preparing our clients for mediation may be more of a stretch for our adaptive facilities, but in fact, preparing for mediation entails the same steps as preparing any case for litigation.

PREPARING YOUR CLIENT FOR MEDIATION

Your client needs to know what to expect during the mediation process. In most situations the mediation session will proceed somewhat along the following lines:

1. Introduction of the mediator, including an explanation of his or her credentials and his or her role in the process.

2. Explanation of the mediation process.

3. Signing of the Agreement to Mediate (unless done prior to the meeting).

4. Opening statements by each party giving them the opportunity to state the issues they wish to address in the mediation process and their general position on those issues.

5. Mutual agreement on the issues to be addressed.

6. Work on potential resolution of the issues.

7. Tentative agreement as to resolution of issues, subject to review with counsel.

8. Review of the terms of tentative agreement and completion of necessary legal paperwork by legal counsel.

9. Entry of an Order by the Court approving any agreements.

Prior to the first mediation session, the attorney needs to have the case ready to mediate. That process is virtually identical to the process used to prepare a case for any other negotiation or trial:

1 Information gathering. No case can be resolved without the factual basis to make a decision. Prior to mediation discovery, whether formal or informal, should be completed and any necessary summaries or exhibits prepared. For example, in a family law case a complete family financial statement should be prepared with income and expense information for both parties, including

any costs that will change as a result of termination of the marriage, such as separate housing or the cost of medical insurance coverage under COBRA. Child support guideline worksheets should be prepared. In a personal injury action itemized lists of out-of-pocket expenses should be compiled, including information as to any Subrogation rights.

2. Goal analysis. Determine what the client wants to accomplish in practical, and if possible, quantifiable prioritized terms. For example in mediation of a sexual harassment complaint through the Civil Rights Commission, the complainant's top priority may be an apology from the alleged perpetrator or it may be to be transferred to a department where he or she will not have any contact with the alleged harasser. What do you perceive as the other party's goals? In the same sexual harassment case, the top priority of the defendant company may be to avoid the publicity which could result from a failure to resolve the case through mediation and moving on to a public forum, or to avoid an actual acknowledgment of any wrong-doing.

3. Legal analysis. What are the applicable legal principals? What are

the strengths and weaknesses of your case under the law? What facts will need to be proved to prevail at a trial? How strong is the other side's case? What facts will they need to prove to prevail?

4. Practical analysis. How likely do you see the case to succeed on the merits? Can the client's objectives be effectively accomplished at trial? For example, an apology is not a goal that can be accomplished through a trial. What will be the cost of going to trial in terms of uncertainty, delay, public disclosure, and out-of-pocket expense? Where are the points for your client where it is better to settle than to proceed to trial? Can the opposing party's probable objectives be effectively accomplished through a trial? What will the cost be to them? At what point will the other side probably be better off to take a chance at trial than to accept a mediated settlement.

5. Client education. Even more completely than a case that is to be tried to the court, the client needs to understand the case and work through the analysis of the benefits and pitfalls of leaving the problem to be resolved at trial. The client needs to know what to expect of the mediation process and to be prepared to participate

in the process. It is counter-productive to go into the mediation with an agenda set in concrete, but the client needs to have a clear understanding of what issues he or she wants to resolve in the mediation and the point at which he or she would prefer to leave the issue to the court. For example, if there is a dispute over the level of child support to be paid by a self-employed individual because of a dispute over his or her income level, going into the mediation both parties should have a firm grasp of the probable maximum and minimum level of income and child support that a trial court would be likely to find given the available evidence. If the issue is custody, the client should be aware that true shared placement is very unlikely to be imposed by the trial court and is probably a result that may only be obtained outside the courtroom setting.

6. Follow-up — If a full or partial agreement is reached, it is imperative to get the necessary paperwork completed, filed, and approved in a timely manner.

The case handling is still fundamentally the same. The difference is that the client has a sense of maintaining personal control over his or her own problem and has greater ownership in both the process and the result. It is a different process.

ETHICAL OBLIGATIONS CONCERNING ADR

As Jan Rutledge noted in *Mediation: an alternative whose time has come, it's time to tell clients about it The Iowa Lawyer* Volume 62, Number 2, February 2002 family law mediation, failure to advise a client that mediation is an option for resolving their dispute could be considered an ethical violation.

There are general ethical issues that arise in the use of mediation as well. Mediation is to be used as a tool to resolve the problem, not as an informal means of obtaining information about the other party's case or a means of interposing delay. Like any other settlement discussion, it is not to be disclosed at trial.

SUMMARY

Alternative Dispute Resolution is not a threat to the legal community. Despite our public reputation, we are in fact a service profession. We have an obligation, and frankly a strong desire, to resolve our clients' problems in the best possible manner. The legal community's systematic adoption of alternative means of dispute resolution is merely a reflection of that desire and further proof of the adaptability that has been the strength of the American system of law.

Appendix

Sample Mediation Agreement

AGREEMENT TO MEDIATE

The parties agree they shall participate in mediation on the following terms and conditions:

7. **Issues to be Mediated:** The parties wish to mediate the following issues:
   A. Custody: _____
   B. Physical Care: _____
   C. Schedule for contract with each parent: _____
   D. Support:
      i. Child Support: _____
      ii Medical Support _____
      iii Educational Support _____
      iv Spousal Support _____
   E. Property:
      i. All property: _____
      ii. Limited property as follows: _____
      _____
      _____
   F. Debts:
      i. All debts: _____
      ii. Limited debts as follows: _____
      _____
      _____
   G. Other:
      _____
      _____

2. **Mediator.** Terry D. Parsons shall serve as the mediator for the designated issues.

3. **Good Faith.** The parties agree to mediate in good faith to attempt to procure a resolution of the issues listed above.

4. **Mediation Sessions.** The parties agree to participate in the following sessions:
   1. Initial Session _____ for up to 2 hours;
   2. If determined to be necessary and appropriate, follow-up Session on a date to be determined for up to 2 hours;
   3. Additional sessions if so agreed by all participants in advance.

4. **Respect of the Parties and the Process**. Each party shall treat the

other party with respect during the mediation process. Each party shall treat all ideas and proposals with respect during the mediation process.

5. **Fees for mediation.** The fee for mediation shall be $_____ per hour, to be paid one-half by each party unless otherwise agreed in advance. Fees are to be paid within thirty days. The fee for scheduling and advance review of information provided shall not exceed one hour of billable time.

6. **Closed Sessions.** The mediator may meet with either party or with his or her attorney in a separate, closed session if in the sole judgment of the mediator it is necessary to the free transmittal of information and if it will serve to facilitate settlement of the issues to be resolved.

7. **Confidentiality.** The mediation sessions shall be strictly confidential. The mediator shall be bound not to disclose to any third party any statements made in the course of mediation, unless such disclosure is required by law, without the prior consent of the participants to the mediation. The parties further agree not to subpoena the mediator or the records of the mediator in any future proceedings and agree not to disclose statement made in the mediation in any subsequent adversary proceeding.

8. **Disclosure.** The parties agree to make honest and complete disclosure of all factual information relevant to the issues being mediated. Each party shall keep all information obtained during the process of the mediation confidential to the mediation process and shall not disclose or repeat the information obtained without the express consent of the other party.

9. **Independent Counsel.** The parties acknowledge the Mediator will not give them legal advise and that they should have independent legal counsel for advice and that counsel should be consulted throughout the mediation process as required.

10. **Attorney Review.** The respective attorneys of the parties shall be entitled to review all of the factual documentation provided by the participants in the mediation process.

11. **Proposed Agreement.** Any proposed Mediation Agreement which is prepared in the mediation process shall be reviewed by each party's attorney before signing. The parties acknowledge if a full or partial settlement is reached, the agreement is intended to be binding on all parties to the agreement. Certain documents may need to be filed with the Court and certain cases may require Court approval of the settlement. The parties agree that once signed by all parties, a Mediation Agreement may be presented to the Court for approval or may be introduced as

evidence in further legal proceedings, but that is shall not be referred to or introduced in evidence if it is not signed by all parties.

12. **Role of the Mediator.** The parties acknowledge they understand the role of the mediator is solely to facilitate the parties reaching an agreement between themselves; the mediator shall not impose a resolution on the parties even if asked to do so by the parties during the process.

13. **Representation by the Mediator.** The parties warrant they have not previously been a client of the mediator or her law firm, and acknowledge that during the process of the mediation and for a period of three years following the termination of the mediation process, neither the mediator nor her law firm shall be permitted to represent him or her in any legal matter regardless of whether it is related in any way to the matter being mediated.

14. **Expansion.** The parties agree that should they decide during the process of mediation to expand the scope of the issues to be resolved, all of the terms and conditions set out in this agreement shall apply to the expanded scope of the mediation without the need for formal amendment of this Agreement.

15. **Fax.** Fax signatures shall be sufficient to indicate the approval of Counsel.

16. **Exclusions.** This Agreement shall not prevent or excuse the Mediator from any duty she may have under the laws of the State of Iowa or ethical codes to report such matters as crimes, or threats of imminent harm to the parties or their children. This Agreement shall not prevent or excuse the Mediator from being subpoenaed to testify as to the validity of a signed Mediation Agreement, nor shall it prevent the Mediator from filing with the Court or other designated entities a certification that the parties have participated in mediation or that the parties refused to participate in mediation after signing an Agreement to Mediate.

_____ _____

Dated _____ Dated _____

Approved:

_____ _____

Dated _____ Dated _____

Counsel for _____ Counsel for _____

STEPS IN MEDIATION

- Review process and sign Agreement to Mediate.
- Define issues to be resolved.
- Determine Mutual goals.
- Discuss alternatives.
- Reach an oral mediation agreement.
- Prepare a written agreement.
- Review Agreement with Attorneys
- Sign Agreement.
- Provide Agreement to attorneys who prepare documents and obtain court approval.

MEDIATION IS:

- ★ an opportunity for parties to find their own solutions
- ★ a controlled environment for problem resolution

MEDIATION IS NOT:

- ★ a third party resolving the issues
- ★ therapy or counseling

GUIDELINES FOR MEDIATION:

- ★ treat all participants with respect
- ★ treat all ideas with respect
- ★ keep an open mind