

Iowa Supreme Court's Mediation Study Group Final Report

March 14, 2000

I. *Overview*

The Iowa Supreme Court established the Mediation Study Group in June 1999, to explore the "value, cost and requirements" of a court-annexed mediation program in family law cases in the state. The Supreme Court has recognized increasing interest in alternative dispute resolution programs around the nation and in Iowa. In 1995, for example, the Supreme Court's Commission on Planning for the 21st Century conducted a survey of more than 800 Iowa citizens using a scientifically valid sampling technique. The survey found that 80 percent of respondents expressed a preference for an alternative dispute resolution process over litigation. Given this high level of interest in Iowa, the Supreme Court asked the study group to examine family mediation programs currently in place within Iowa's judicial districts and around the nation and consider the need for legislation to implement a statewide mediation program in Iowa.

The study group consisted of fourteen members, including legislators, judges, lawyers, and mediators. (See Appendix 1.) Numerous other individuals knowledgeable in the area of mediation attended the mediation study group meetings and provided valuable input and information. The study group also received important input from various members of the bar. Research into various subjects of mediation was also conducted by members of the study group, and a committee was formed to author proposed legislation for a statewide mediation program.

The study group perceived that its primary objective was to build a proposal for a statewide family law mediation program in Iowa, and describe how it would best function if implemented. It became clear to the study group during the progress of its

work that many lawyers, judges, and interested persons question the need and viability of a court-annexed mediation program in our legal system, while many others applaud court-referred mediation in divorce cases. The report of the study group examines, then moves beyond, this debate and attempts to provide insight into how a statewide divorce mediation program would function in Iowa if adopted.

II. *Mediation: A Definition*

Throughout the United States, institutions and individuals, in both public and private sectors, are increasingly using mediation as a method of resolving disputes. Unlike the adversarial legal process, mediation facilitates the resolution of conflict by improving communication between the parties and encouraging mutual understanding to the end that the parties make their own decisions. Mediation permits the parties to participate in and control the decisions about their conflict, with the assistance of a mediator of their choice or one appointed by the court from a roster of qualified mediators. Although there are numerous definitions of mediation, the definition adopted by the study group comes from Iowa Code Chapter 679C—“Mediation’ means a process in which an impartial person facilitates the resolution of a dispute by promoting voluntary agreement of the parties to the dispute. In a mediation, the decision-making authority rests with the parties.”

It is important at this point to note that throughout this report the committee refers to its proposed mediation program as “*court-ordered*” mediation. The term “*mandatory*” mediation implies a requirement that every case, without exception, will be sent to mediation. The committee does not propose a universal mandate. Under the proposed model, courts would send only selected cases to mediation: primarily those that fail to resolve their family law disputes within a reasonable time (i.e., within 120 days after the service of process). In the sixth judicial district, which employs a model

very similar to the one proposed by the committee, less than 10 percent of dissolution cases actually go to court-ordered mediation. Because this is far from a universal mandate, the committee recommends the term “court-ordered” mediation.

III. Goals for a Court-Ordered Mediation Model for Iowa

After much discussion the work group identified 12 goals or key characteristics that should be incorporated into any court-referred mediation program in Iowa.

1. Give parties to mediation control of the decision-making process and the substance of any decisions made during mediation.
2. Provide parties full and fair access to all methods of dispute resolution, including mediation, settlement conference, or other ADR method of their selection.
3. Establish uniform standards for mediators and provide for systematic and scientifically valid evaluation of the programs.
4. Make all dispute resolution programs compatible with a fair and efficient legal system.
5. Provide a fair method for allocating the costs of the dispute resolution processes among the parties and all components of the system, including mediators, the courts, and the General Assembly.
6. Make the mediation process responsive to the needs of the parties and the lawyers who represent the parties in family law cases.
7. Insure mediation will not delay the parties’ access to the court.
8. Insure the parties are fully informed about the processes available in clear, simple language.
9. Urge parties to consult with legal counsel throughout the mediation sessions.

10. Provide rules of professional conduct which define the obligation of attorneys to inform clients about mediation and screen clients to determine whether the client is appropriate for mediation.
11. Insure attorneys will properly prepare clients to participate in any court-ordered mediation.
12. Require mediated family law agreements to be approved by counsel and the court.

IV. *The Case For and Against Mediation in Family Law Cases*

Advocates of mediation believe there are many benefits to the process. At least seven studies of divorce mediation have found that litigants who mediate their disputes are more likely to be satisfied with the outcome of their case than litigants who do not use the mediation process. *See*, National Center for State Courts, *National Symposium on Court-Connected Dispute Resolution: A Report on Current Findings* (1994). Advocates also argue that mediation produces less strain on relationships, a lower reoccurrence of litigated problems after the divorce is final, and, in some case, lower costs than the traditional litigation process. *See* Steven K. Erickson "ADR and Family Law," *Hamline Journal of Public Law & Policy* (Spring 1999). Some research also suggests that a mediated settlement helps make noncustodial parents more willing to assist in the care of the children beyond the structured obligations of the decree, and helps promote better communication between the parents. *Id.*

These benefits occur because mediation is less adversarial, and permits the parties to negotiate their own settlement rather than having it imposed upon them by a judge. Mediation increases the parties' sense of responsibility for the final decree. It also provides parties with a safe forum to express and deal with emotional issues that they often do not have the opportunity to adequately express or deal with during the

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litigation process. Mediation can further provide an opportunity for parties to learn techniques to more effectively communicate with each other directly to resolve their differences, which they must continue to do after the divorce decree is entered if there are children involved in the case.

In Iowa, the sixth judicial district has operated a court-ordered mediation program in domestic relations cases for three years. During this period less than 10 percent of all dissolution cases actually went to mediation, but the program has dramatically decreased (by 60 percent) the number of temporary custody hearings held in district court. In turn, this has resulted in a significant redistribution of the district court workload. The time formerly devoted by judges to temporary custody hearings has been shifted to criminal and civil cases. The district court in Polk County recently implemented a similar court-referred mediation program in domestic relations cases and has noticed an immediate dramatic reduction in temporary custody hearings.

Another benefit of mediation realized in the sixth judicial district is that fewer dissolution cases are scheduled for trial by the court administrator, and these cases are more likely to go to trial on the scheduled trial date. Greater predictability in trial scheduling is a benefit to judges, court staff, attorneys and litigants. In addition, judges in the sixth district report that, although the number of trials has not decreased, cases that have gone to trial in the past three years tend to involve fewer issues, so the trials are shorter.

On the other hand, court-referred mediation has generated some criticism. (See Phyllis Gangel-Jacobs, "Some Words of Caution about Divorce Mediation," *23 Hofstra Law Review* 825, 1995; Penelope E. Bryan, "Killing Us Softly: Divorce Mediation and the Politics of Power," *Buffalo Law Review*, 1992). The critics assert that mediation involves resolution of a dispute without legal principles. *Id.* The legal process, they argue, has a benefit beyond the immediate case, and mediation cannot capture that benefit. They

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say that the legal process establishes standards for everyone to follow as a society, and without these rules, some litigants, women in particular, will be disadvantaged. They further note that there is often a power imbalance in the relationship between husbands and wives in traditional marriages, which may give an advantage to the husband in mediation.

Critics also point out that many divorces involve legal complexities that cannot be understood and fairly resolved without expert legal advice. In addition, some parties might not understand their legal rights under family law and might unwittingly give up those rights in mediation. Moreover, critics fear that mediation might enable one spouse to use child custody as a bargaining chip to force the other spouse to unnecessarily compromise on economic issues.

The committee is sensitive to these concerns and believes the proposed model adequately addresses them. Trained mediators can effectively handle power disparities among the parties. Furthermore, the major concerns identified by critics (power imbalances among the parties; a party's lack of understanding of legal rights or the legal complexities of a case; and the use of child custody as a bargaining chip to extract unfair compromises on economic issues) can be adequately and fairly addressed through ongoing involvement of legal counsel. The committee's proposed model, indeed any good mediation program, stresses the value of lawyers as advisers and counselors. The program proposed by the study group ensures that all parties to mediation will always have access to their lawyers. Lawyers will be educated and urged to adequately prepare their clients for mediation, and to consult with them about—and possibly recommend changes in—agreements reached in mediation. And, of course, judges will continue to provide a final review of all family law decrees. (This will be an especially critical role in cases involving mediated agreements between parties that are not represented by attorneys.)

Some opponents of court-ordered mediation also question its economic value to the legal system. They point out that in many court-referred mediation programs 85 to 90 percent of divorce cases settle before mediation even begins, and only a small percentage of divorce cases are actually tried even in jurisdictions with no court-referred mediation program. Research, for example, has shown that mediation programs usually have little or no effect on the trial rate in divorce cases. *See*, National Center for State Courts (1994).

Again, the committee recognizes this concern, but believes that the proposed model addresses the issue. As indicated above, the court-ordered mediation programs in the sixth district and Polk County have produced significant reductions in judicial time spent on temporary custody hearings and some reduction in judge time spent in trials, which tend to be shorter because mediation often reduces the number of issues to be resolved at trial. So even if the number of trials remains the same, there are likely to be benefits to the courts.

The committee recognizes that mediation is not a panacea for the courts or all litigants. Research in other states and the experience in the various judicial districts in Iowa shows that family mediation programs do not impact all cases in the divorce process. The experience in Iowa, however, suggests that the benefits outweigh the potential detriments, and that the critics' concerns can be properly addressed through the proposed model.

Finally, the proposed model does not promote settlement merely for the sake of settlement. The model encourages and provides a means for parties to take greater responsibility for determining the best way to resolve their personal disputes and to pursue the best interests of their children. By encouraging mediation, rather than just settlement, the model offers a process and safe forum that allows expression of emotions and interpersonal issues that energize the parties' conflict, but which are not effectively

expressed or handled through the formal legal process. In many family law cases, this type of communication and dispute resolution is likely to occur only with the assistance of a mediator. Mediation may further provide the parties a model for dealing appropriately with future conflicts. To successfully implement this model and achieve these important goals, mediators need initial and ongoing training.

Popular misconception about mediation including divorce mediation abounds. Among these misconceptions are the following:

1. Access to justice—mediation denies parties the right to a trial by a court of law. While a judge in this proposal may order mediation, parties can still gain access to the courts if they do not agree.
2. Lack of legal protections—parties will make agreements which ignore legal protections. While there are programs where parties do not use attorneys, the Iowa experience suggests that parties should maintain separate counsel. Additionally, judges will review agreements to ensure that legal dynamics are not ignored.
3. Additional costs absorbed by the parties—parties pay the costs of mediators as well as the costs of attorneys. While some cases exist where this occurs, the national experience is the opposite, as clients resolve more issues amicably. Pro bono case work and sliding scale fees make this very unlikely.
4. Lawyer abuse by using mediation as free discovery—Iowa law mandates discovery activities, and mediation will not impact. While parties may freely disclose pertinent data, it is unlikely that it would result in free discovery. Historical experience does not suggest this is a real concern.

V. *Mediation Programs in the United States: The National Experience*

There are more than 200 mediation programs throughout the United States, most at a local or district level. Some states have statewide court-ordered mediation programs, including Minnesota, California, Wisconsin, Ohio, Florida, and Maine. Most states, including Iowa, authorize trial courts to order mediation in particular cases. *See* Iowa Code § 598.41; Nancy H. Rogers and Craig A. McEwen, *Mediation (Law Policy and Practice)* § 7:02 (West 1994). The Missouri Supreme Court is currently looking into court-ordered mediation in family law cases. Alabama is also considering a statewide pilot project. California began court-ordered mediation in 1980, and established a statewide coordinator in 1986. This program is now involved in a host of other family court services in addition to mediation. In Arizona, mandatory mediation is primarily done in the largest counties through state-operated conciliation courts, which are funded through a surcharge on the filing fee for a divorce case. There is no direct fee to the parties. However, the parties can elect to attend private mediation at their own expense. Arizona has no statewide certification for mediators, although the state only hires master-level behavioral health professionals and requires mediators to complete an approved mediation course.

Iowa has no mediator certification system, and the committee takes no position on this matter now. The committee feels strongly, however, that no mediation program or method of certifying mediators should restrict entry based on other professional licensure. In other words, mediation should not be limited to lawyers. This and other issues like mediator competency will need to be addressed in the reasonably near future. The committee recommends that the Supreme Court continue to study the issues in consultation with Iowa's alternative dispute resolution community.

Researchers have conducted numerous studies of mediation in family law cases in a variety of states over the past 15 years. These studies offer at least three findings that

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are especially relevant to the deliberations of this committee. First, voluntary mediation programs consistently fail to attract many cases into mediation. Court-ordered mediation programs, as one might expect, result in substantially more cases going through mediation. *See*, National Center for State Courts (1994). Second, research in this area consistently shows that litigants who go through mediation are more satisfied with the final decree than those who do not go through the mediation, and the differences are statistically significant. *Id.* Third, litigants who are ordered to go to mediation and those who go to mediation voluntarily tend to be equally satisfied with the process. *Id.* These findings suggest that a court-ordered mediation program is most likely to produce the broadly based benefits of mediation, including improving the satisfaction of many family law litigants in Iowa's courts.

VI. *Mediation Programs: The Iowa Experience*

A. Sixth Judicial District

Since August, 1996, the sixth judicial district has operated a court-order mediation program in family law cases. Under the program, the court orders the parties to mediation when: (1) any party requests a temporary custody hearing and (2) in any family law case in which issues are unresolved after 120 days from the filing of service of process (which is the time allowed in the Supreme Court time standards for completion of uncontested family cases).

The family mediation program has been generally accepted by local judges and lawyers and is considered successful. Based on a survey of litigants who have completed the mediation process, a substantial majority report overall satisfaction with the mediation process; eighty-five percent report that they were satisfied with the mediator.

In the sixth district, parties use private mediators who the parties select and compensate. The fee arrangements are private and not regulated by the court, except

that all mediators agree to do some pro bono mediations as a condition of being on the court's roster of mediators. If the parties do not resolve all issues by the pre-trial conference, they must attend an initial mediation session but may decline further mediation. If the case is not wholly resolved in mediation then the parties can seek a trial date.

The parties may select anyone they wish as a mediator. If the parties fail to select a mediator, the court appoints one from a roster of mediators. All roster mediators, regardless of their profession of origin, must: 1) have 40 hours of divorce mediation training, 2) maintain mediator malpractice insurance, 3) comply with a continuing education requirement, 4) agree to do some pro bono mediations, and 5) agree to abide by the Academy of Family Mediators Standards of Practice for Family and Divorce Mediation (which were adopted by the sixth district). Mediators who are lawyers must also abide by the Rules Governing Standards of Practice for Lawyer Mediators in Family Disputes.

Less than 10 percent of dissolution cases filed each year are actually mediated in the sixth judicial district because nearly 90 percent of the cases are settled or otherwise dismissed before mediation begins (approximately four months after the service of process). Some cases are also exempt from mediation. The number of cases mediated is slightly less than the number of dissolution trials. Yet, the program's director reports that one-third of the cases reach agreement on all issues, and one-third reach agreement on some issues. Even partial agreements are very useful, however, because although the number of trials has not changed, trials are generally shorter than before the mediation program began. Moreover, as indicated earlier, the number of temporary custody hearings has declined by 60 percent as a consequence of the mediation program, allowing the district court to reallocate the time judges previously spent on these types of hearings to other important matters before the court (i.e., civil and criminal cases).

B. Second Judicial District

The second judicial district began a court-ordered mediation pilot project for dissolution cases in Story County in 1996 under the auspices of the Center for Creative Justice. The judges encountered problems with the program, including compliance by the parties and lawyers with the court order for the parties to attend mediation. Additionally, only one-fifth of the cases were successfully mediated. One of the problems might have been that the program lacked strong, consistent administration. After two and one-half years of what was described by one judge as "lackluster results," it was converted to a voluntary mediation program. A court-referred mediation project recently began in Marshall County, and it appears to be more successful than the program in Story County. (Both programs are in judicial subdistrict 2B.) In addition, a family law mediation program has been developed in Cerro Gordo County (judicial subdistrict 2A), which uses lawyer mediators. It is relatively new and has not been evaluated at this point.

C. Seventh Judicial District

The seventh judicial district does not currently have court-ordered mediation, but does require settlement conferences in dissolution cases. These conferences are conducted by a district court judge and are attended by the parties and counsel. The judges employ some mediation techniques, but they also exercise legal judgment on the merits of certain disputed issues. The judges involved in the settlement conferences believe it is very valuable and find them to be successful in settling cases prior to trial.

D. Iowa Mediation Service, Inc.

The Iowa Mediation Service, Inc. has provided mediation to the State of Iowa since 1985. While its initial focus was to provide mandatory mediation to farmers and creditors (over 30,000 cases with 19,000 successful outcome), the organization has also provided family mediation throughout the state, including a pilot project in Spencer.

IMS staff has also worked closely with DHS in providing mediation services to divorcing families, and it has done extensive training of mediators throughout Iowa and the Midwest.

E. Iowa Peace Institute

The Iowa Peace Institute has provided mediation services to the State of Iowa since 1986. IPI's initial focus was international peace, but in recent years the organization has refocused on resolving conflicts peacefully, particularly interpersonal disputes such as family disputes. IPI provides its mediation and family services statewide. IPI is also recognized for its training and educational programs and has worked with the Department of Education in resolving special education disputes and disputes with young people. IPI also developed a family mediation pilot project in Iowa's eighth judicial district, and although the pilot project no longer receives grant funds, some judges continue to refer cases to mediation as a consequence of their experience during the project.

F. Polk County

For approximately six years, the Polk County Bar Association has sponsored a District Court Mediation Program which includes family law mediation. Beginning in January, 2000, district 5C adopted a family law mediation program modeled after the program in the sixth judicial district. Although the program has operated only two months, judges and staff in 5C have reported outstanding results in parties reaching agreement on temporary custody matters, substantially reducing court time for these matters.

G. Other Programs

Other programs have been developed in Sioux City and the Council Bluffs area.

H. Small Claims Court

While the study group has focused exclusively on family law mediation, it should be noted that the mediation programs in the sixth judicial district and Polk County have resulted in other benefits to the court system, chiefly in the area of small claims court mediation. In addition to coordinating family law mediation programs, the coordinators in the sixth judicial district and Polk County also manage a small claims court program. In these programs, trained volunteer mediators conduct day-of-trial mediations, so there is no cost to the district court or the parties. The director of the sixth judicial district family mediation program, also supervises the small claims program in Johnson County. In 1999, they mediated 93 small claims cases of which 63 or 67% settled. This represents 61% of all cases eligible for mediation (they do not allow mediation of FED cases). Ninety-two percent of the people who participated indicated satisfaction with the mediation and 96% rated their mediator as excellent or good. The supervisor of the District Court Mediation Program in Polk County, also supervises the Small Claim Court Mediation Program. In 1999, 1533 small claim cases went through mediation and 1346 or 88%, settled. Fully one-half of all trial ready cases in Polk County are settled through mediation.

VII. Mediators

A. Judges as Mediators

Early in its deliberations the study group discussed whether judges would have a role as mediators in a statewide program. The Iowa Code of Judicial Conduct, however, prohibits a judge from acting as an arbitrator or mediator. *See*, Canon 5(E). In addition, true mediation envisions a process in which the parties, with assistance of a neutral facilitator, determine what issues are important and how they will be resolved. Judges who handle settlement conferences, however, play a more authoritative role in getting

the parties to reach a settlement. At settlement conferences, judges will often focus on legal rights and suggest to the parties what a court would do in certain circumstances if the case goes to trial. A judge's settlement techniques, therefore, will often have a more coercive effect on the parties and the outcome than the facilitation strategies used by a non-judicial mediator.

This is not to say that judges cannot employ mediation techniques in settlement conferences in family law cases. In fact, some mediation techniques may be useful in conducting settlement conferences and the study group is aware that some Iowa judges have received mediation training. It should also be noted that the empowerment of parties to reach their own settlement in no way diminishes the responsibility of the court to review any proposed agreement before entry of a decree or order, as is done under the current system.

B. Trained Mediators

The most important element to producing a qualified mediator is proper training, both initially and on a continuing basis. Research shows that profession of origin is unrelated to success as a mediator—lawyer mediators are not more effective at mediation than those of other backgrounds. All mediators, however, need training on certain aspects of family law so they understand the legal process.

Most state programs require a minimum of 40 hours of initial training for roster mediators. Mediator training should include education about the nature of domestic abuse, abusers, and abuse victims; and about the impact of abuse on a victim's ability to effectively engage in the mediation process. *See*, Final Report of Iowa Supreme Court Mediation and Domestic Violence Work Group (December 1999). In addition, like other professions, mediators will also be required to participate in continuing education. We recommend at least 7 hours of continuing education credits per year.

Questions arise as to whether training alone should allow a mediator to qualify to be placed on the roster of a court annexed program. Some models suggest that mediators be certified and that the certification program require the mediator to perform a minimum number of mediations and co-mediate with or experienced mediator before certification.

While there are some differing views on the study group, the majority believes that the training requirement is sufficient at this time. Our model allows the parties and their attorneys to select their own mediator. The experience of the sixth and fifth judicial district programs has been overwhelming satisfaction with the mediators, and very few problems have been raised. As the use of mediation becomes more prevalent in our state, the study group recommends that the issue of standards for certification of mediators be revisited.

C. Ethical Standards for Mediators

Attorneys who serve as mediators in family law matters are governed by rules adopted by the Iowa Supreme Court. The sixth judicial district requires all mediators to meet the ethical standards adopted by the Academy of Family Mediators. (See Appendix 2.) The rules in the sixth judicial district provide that where there is a conflict between the Academy Rules and the Supreme Court Rules that an attorney mediator is bound by the Supreme Court Rules.

VIII. *Costs of Family Mediation*

A. Costs to the Judicial Branch

Projected costs of a statewide mediation program can be estimated by considering the sixth judicial mediation program (which has been funded primarily by grants). The current director of the program estimates that a district-wide court-ordered mediation program (for at least family law and small claims cases) would require an annual budget

of approximately \$75,000 per year for a full-time district coordinator and at least a part-time secretary (including benefits, but excluding the cost of office space). A fully-developed statewide program could involve as many as 14 mediation coordinators (one in each judicial election district or subdistrict), at an annual cost of \$975,000. A less ambitious strategy might include eight district coordinators (or nine, if 5C would have its own coordinator). A program with eight district coordinators would cost \$600,000 annually. The committee recommends that the Supreme Court phase in the proposed model over three or four years. In the first year, the Supreme Court might anticipate the need for three district coordinators at a cost of approximately \$225,000. In addition, some districts might not choose the court-ordered mediation model (at least in the first few years), but would opt instead for judicial settlement conferences, which would not require additional staff. It is possible, therefore, that the state would not need eight or nine district coordinators for several years (or more). During the interim phase the courts may contract out the development of family mediation to a mediation organization that has functioned on a state-wide basis.

Some states hire a full-time mediation program director, who works for the state court administrator, to oversee and coordinate activities throughout the state. A statewide program director and a secretary would cost approximately \$85,000 annually.

The study group strongly believes a statewide mediation program must be adequately financed to succeed. Without adequate funding and administration, it will be doomed to failure.

B. Other Costs

Other costs of a court-ordered mediation program include the costs of employing mediators. In the proposed model these costs would be borne by the parties, not by the state or county. Mediators would be required to provide some pro bono services to those litigants who are indigent. Experience in Iowa suggests that mediators' fees vary

from about \$40 per hour to \$100 per hour or more. The mediation program provides parties a list of its roster mediators, including information on their fees. Mediation fees could be taxed as costs.

IX. *Proposed Statewide Mediation Model for Iowa*

The study group committee proposes a structure for a statewide model that is derived largely from the goals identified, existing district court programs, and proposed legislation. The study group committee also considered programs in other states.

The proposed model for mediation in family law cases places the Supreme Court in control of court-referred mediation by permitting the Supreme Court to establish a mediation system in each district and direct when in the litigation process the district court would order parties to participate in mediation. The Supreme Court would establish the specific rules but would be governed by a more general mediation chapter separately established by the legislature. The proposed model would also clarify the specific authority of the district court to order mediation upon its own motion (*sua sponte*) or upon a motion by a party. It would also confirm the authority of the district court to order settlement conferences.

Court-ordered mediation in this model would require the parties to participate in mediation by attending an initial session. If a party does not choose to pursue mediation, the process would immediately end and the case would return to court for eventual trial. Thus, the only obligation imposed by the court-ordered mediation is attendance at this one session. Further participation would be a matter for the parties to decide. The district court could, on application, excuse the parties from mediation upon a showing of good cause, such as a history of domestic abuse, alcohol or substance abuse, or any other factor impairing the ability of a party to be an autonomous decision maker.

See, Final Report of Iowa Supreme Court Mediation and Domestic Violence Work

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Group (December 1999). Attorneys will have the initial obligation to screen for domestic abuse, and mediators will also screen for domestic violence before the parties meet in mediation. Any mediator may decline to proceed if the mediator concludes that anyone is unable to mediate because of past abuse. Even if mediation is waived, the court may still order a settlement conference to explore alternatives.

The parties could agree to mediate at any time. The two most common times when the court would order mediation would be when a party makes a request for a temporary custody order or a request for a trial date.

Because time is of the essence in temporary matters, the court, on receipt of an application for temporary custody or visitation immediately sets a hearing and orders mediation. The parties are free to select their own mediator, but the order to mediate includes a “default” roster mediator for them to use, in the absence of agreement. Experience in the sixth judicial district program and in Polk County’s new program indicates that an order to mediate temporary custody matters leads to a dramatic reduction in temporary custody hearings.

Under the proposed model, the court would schedule a pretrial conference approximately 120 days after the service of process. This time period allows sufficient time for complete discovery and gives counsel a reasonable period of time to settle the case. If the case is still unresolved at 120 days, the district court would order the parties to mediation. [In the sixth district’s program, less than 10 percent of dissolution cases actually go through court-ordered mediation.] Parties will be encouraged to select their own mediator, but if they cannot, the court would appoint one, on a rotating basis, from the roster of qualified mediators maintained by the district court administrator.

Agreements reached in mediation would not be enforceable until presented to counsel and approved by the court. If the parties do not reach agreement on all issues, the case would be scheduled for trial and/or settlement conference.

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X. *Legislation*

A. General Intent of Proposed Legislation

The study group envisions a statewide program that provides all Iowa citizens access to high-quality, affordable mediation services in family law matters. At the same time, the study group recognizes that not all judicial districts may want to use a court ordered mediation model and/or that it may not be economically feasible to adopt an entire state-wide program all at once.

Basically, the statute gives the Supreme Court the authority to establish the model of a mediation program to be implemented in judicial districts. The statute sets some parameters as to what the program must contain—e.g. the right of parties to choose the mediators, the right of parties to have the advice and presence of counsel. The statute however, preserves to the Court the flexibility to determine other requirements by rule – e.g. the training requirement for mediators.

The legislation provides that if the judicial district adopts a mediation program it must meet the Supreme Court standards. The study group believes that if a judicial district does not adopt a mediation program that the district should provide the opportunity for a court supervised settlement conference. In that way, parties will either have the opportunity for a settlement conference or mediation.

Finally, the study group is aware of the costs of this proposed legislation and the potential impact on the court's budget. It may be necessary to phase it in over several years, perhaps starting with judicial districts 6 and 5C where most of the elements are already in place and one or two other districts. The estimated annual cost to operate the

program in four districts would be approximately \$300,000 . The program may also reach a point where the Court would want to add a state-wide coordinator to the Court Administrator's Office as has been done in other states. As previously noted, this would add approximately \$85,000 to the annual cost of program operation.

B. Proposed Legislation

SECTION 1. INTENT OF THE GENERAL ASSEMBLY. It is the intent of the general assembly that parties to family law cases shall (1) maintain responsibility for their decision-making (2) improve their communication concerning their children, and (3) be committed to the decisions they reach. The best interests of children are normally served through maintaining maximum contact with both parents with a minimum of parental conflict.

Since research demonstrates that parental conflict may result in emotional and psychological damage to parties and their children, the general assembly finds that mediation should be utilized to the greatest extent possible in the resolution of domestic relations disputes in the state.

SECTION 2

Section 598.7A of the code is amended by deleting the current section and substituting in lieu thereof the following:

598.7A MEDIATION

1. District court authority.

The district court may, on its own motion or on the motion of any party, order the parties to participate in mediation in any dissolution of marriage action or other domestic relations case. All mediations pursuant to this section are governed by chapter 679C. This provision shall not apply to any domestic abuse cases under Chapter 236. This provision does not effect a judicial district's or court's authority to order settlement conferences pursuant to the Rules of Civil Procedure. The court shall, on the application of a party, grant a waiver from any court ordered mediation, if the party demonstrates a history of domestic abuse as defined in section 598.41(3)(j).

2. Dispute resolution programs in dissolution of marriage and other domestic relations cases.

a. The Supreme Court shall establish a dispute resolution program in family law cases that includes mediation and settlement conferences. Any judicial district may implement such a dispute resolution program, subject to the rules promulgated by the Supreme Court.

b. The Iowa Supreme Court shall establish rules for any such mediation program, including when the district court shall order participation in mediation.

c. Any district dispute resolution program shall comply with the following standards:

1. Participation in mediation or participation means to attend a mediation session with the mediator and other party, to listen to the mediator explain the process, to present the party's view of the case, and to listen to the other party. Participation does not require that the parties reach an agreement.

2. In court-ordered mediations the parties may choose the mediator, or the court shall appoint a mediator. Any court-appointed mediator shall meet the qualifications set by the Supreme Court.

3. Parties in mediation shall have the right to the advice and presence of counsel at all times.

4. The parties shall present any agreements reached in mediation to their attorneys, if any, and the agreements shall not be enforceable until approved by the court.

5. The costs of mediation shall be borne by the parties, as they agree, or as ordered by the court, and may be taxed as costs. Mediation shall be provided on a sliding fee scale for parties who are indigent pursuant to Section _____.

d. The Supreme Court shall prescribe qualifications for court-appointed mediators no later than January 1, 2001. The qualifications shall include specification as to the ethical rules to be observed by mediators. The qualifications may not include a requirement that the mediator be licensed to practice any particular profession.

XI. *Conclusion and Recommendations*

The Supreme Court's Mediation Study Group unanimously recommends that the Supreme Court adopt the proposed statewide mediation program model for family law cases set forth in this report. In the development, implementation, and operation of the program, the Supreme Court should pursue the goals set identified in section III.

The plan provides sufficient time (four months from service of process) for parties to settle their disputes without mediation or other court intervention. Parties ordered to mediation will be required to attend an initial mediation session, after which they may continue in mediation or return to the regular litigation process. Based on the three years of experience in the Sixth Judicial District, Iowa's court can expect approximately 10 percent of dissolution cases to actually go through one or more court-ordered mediation sessions. They can also expect a notable reduction in the number of cases with a temporary custody hearing.

In addition, attorneys will be urged to prepare their clients for mediation and to consult with their clients throughout the mediation process to ensure that parties understand their legal rights and the legal complexities of their particular cases. Indeed, clients retain the right to have their attorneys present during mediation (though this seldom occurs in the Sixth District). Attorneys will review all agreements before they are signed by their clients. And judges will review all agreements before they are deemed final judgments.

To ensure that Iowa's citizens receive high quality mediation services, the proposed model would require a mediator who wishes to be listed on the court's roster of qualified mediators to successfully complete training requirements established by the Supreme Court (e.g., 40 hours of training, and possibly some supervised or co-mediation experience). Parties, however, would be free to select their own mediator, including someone who is not listed on the roster (e.g., their minister or priest). Roster mediators would be required to provide some pro bono services for indigent litigants.

The work group believes the proposed model will effectively address the concerns raised by critics of court-ordered mediation programs, while providing substantial

benefits to Iowa's citizens and courts. Some of the primary benefits that can be expected as a consequence of the proposed program include:

- Reduction in parental conflict in family law cases.
- Increase in compliance with family law decrees.
- Increased litigant satisfaction with the legal process.
- Increase in parties' responsibility for the way their disputes are resolved.
- Reduction in family law workload per case.
- Shorter duration from filing to trial for most cases.
- Lower reoccurrence of litigated problems after the final decree.

To implement the proposed model, the Supreme Court will have to consider staffing, training, administration, and budget issues. To that end, the study group recommends the following:

- ❑ The Iowa Supreme Court should maintain control over all court-ordered mediation.
- ❑ Employ a full-time coordinator and adequate support staff in each judicial district that adopts the proposed court-ordered mediation program.
- ❑ Establish a multi-year phase-in for any statewide program.
- ❑ Approve training requirements and standards of professional conduct for mediators.
- ❑ Employ a state-level director of court-ordered mediation programs, under the supervision of the state court administrator, after several districts have implemented the proposed court-ordered mediation program. (The Supreme Court should consider hiring this statewide director early in the process if the Court plans to require adoption of the court-ordered mediation program in all districts.)

- Work with the Iowa State Bar Association and other professional organizations to inform and educate attorneys about the family law mediation program and the critical role of attorneys throughout the mediation process.

Appendix I

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Appendix 2

Academy of Family Mediators

STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION

I. Preamble

Mediation is a family-centered conflict resolution process in which an impartial third party assists the participants to negotiate a consensual and informed settlement. In mediation, whether private or public, decision-making authority rests with the parties. The role of the mediator includes reducing the obstacles to communication, maximizing the exploration of alternatives, and addressing the needs of those it is agreed are involved or affected. Mediation is based on principles of problem solving that focus on the needs and interests of the participants; fairness; privacy; self determination; and the best interest of all family members.

These standards are intended to assist and guide public, private, voluntary, and mandatory mediation. It is understood that the manner of implementation and mediator adherence to these standards may be influenced by local law or court rule.

II. Initiating the Process

A. *Definition and Description of Mediation.* The mediator shall define mediation and describe the differences and similarities between mediation and other procedures for dispute resolution. In defining the process, the mediator shall delineate it from therapy, counseling, custody evaluation, arbitration, and advocacy.

B. *Identification of Issues.* The mediation shall elicit sufficient information from the participants so that they can mutually define and agree on the issues to be resolved in mediation.

C. *Appropriateness of Mediation.* The mediator shall help the participants evaluate the benefits, risks, and costs of mediation and the alternatives available to them.

D. *Mediator's Duty of Disclosure*

Biases. The mediator shall disclose to the participants any biases or strong views relating to the issues to be mediated.

Training and Experience. The mediator's education, training, and experience to mediate the issues should be accurately described to the participants.

III. Procedures

The mediator shall reach an understanding with the participants regarding the procedures to be followed in mediation. This includes but is not limited to the practice as to separate meetings between a participant and the mediator, confidentiality, use of legal services, the involvement of additional parties, and conditions under which mediation may be terminated.

- A. *Mutual Duties and Responsibilities.* The mediator and the participants shall agree upon the duties and responsibilities that each is accepting in the mediation process. This may be a written or verbal agreement.

IV. Impartiality and Neutrality

- A. *Impartiality.* The mediator is obligated to maintain impartiality toward all participants. Impartiality means freedom from favoritism or bias, either in word or action. Impartiality implies a commitment to aid all participants, as opposed to a single individual, in reaching a mutually satisfactory agreement. Impartiality means that a mediator will not play an adversarial role. The mediator has a responsibility to maintain impartiality while raising questions for the parties to consider as to the fairness, equity, and feasibility of proposed options for settlement.
- B. *Neutrality.* Neutrality refers to the relationship that the mediator has with the disputing parties. If the mediator feels, or any one of the participants states, that the mediator's background or personal experiences would prejudice the mediator's performance, the mediator should withdraw from mediation unless all agree to proceed.
- C. *Prior Relationships.* A mediator's actual or perceived impartiality may be compromised by social or professional relationships with one of the

participants at any point in time. The mediator shall not proceed if previous legal or counseling services have been provided to one of the participants. If such services have been provided to both participants, mediation shall not proceed unless the prior relationship has been discussed, the role of the mediator made distinct from the earlier relationship, and the participants given the opportunity to freely choose to proceed.

- D. *Relationship to Participants.* The mediator should be aware that post-mediation professional or social relationships may compromise the mediator's continued availability as a neutral third party.
- E. *Conflict of Interest.* A mediator should disclose any circumstance to the participants that might cause a conflict of interest.

V. Costs and Fees

- A. *Explanation of Fees.* The mediator shall explain the fees to be charged for mediation and any related costs and shall agree with the participants on how the fees will be shared and the manner of payment.
- B. *Reasonable Fees.* When setting fees, the mediator shall ensure that they are explicit, fair, reasonable, and commensurate with the service to be performed. Unearned fees should be promptly returned to the clients.
- C. *Contingent Fees.* It is inappropriate for a mediator to charge contingent fees or to base fees on the outcome of mediation.
- D. *Referrals and Commissions.* No commissions, rebates, or similar forms of remuneration shall be given or received for referral of clients for mediation services.

VI. Confidentiality and Exchange of Information

- A. *Confidentiality.* Confidentiality relates to the full and open disclosure necessary for the mediation process. A mediator shall foster the confidentiality of the process.
- B. *Limits of Confidentiality.* The mediator shall inform the parties at the initial meeting of limitations on confidentiality, such as statutorily or judicially mandated reporting.

- C. *Appearing in Court.* The mediator shall inform the parties of circumstances under which mediators may be compelled to testify in court.
- D. *Consequences of Disclosure of Facts Between Parties.* The mediator shall discuss with the participants the potential consequences of their disclosure of facts to each other during the mediation process.
- E. *Release of Information.* The mediator shall obtain the consent of the participants prior to releasing information to others. The mediator shall maintain confidentiality and render anonymous all identifying information when materials are used for research or training purposes.
- F. *Caucus.* The mediator shall discuss policy regarding confidentiality for individual caucuses. In the event that a mediator, on consent of the participants, speaks privately with any person not represented in mediation, including children, the mediator shall define how information received will be used.
- G. *Storage and Disposal of Records.* The mediator shall maintain confidentiality in the storage and disposal of records.
- H. *Full Disclosure.* The mediator shall require disclosure of all relevant information in the mediation process, as would reasonably occur in the judicial discovery process.

VII. Self-Determination

- A. *Responsibilities of the Participants and the Mediator.* The primary responsibility for the resolution of a dispute rests with the participants. The mediator's obligation is to assist the disputants in reaching an informed and voluntary settlement. At no time shall a mediator coerce a participant into agreement or make a substantive decision for any participant.
- B. *Responsibility to Third Parties.* The mediator has a responsibility to promote the participants' consideration of the interests of children and other persons affected by the agreement. The mediator also has a duty to assist parents to examine, apart from their own desires, the separate and individual needs of such people. The participants shall be encouraged to seek outside professional consultation when appropriate or when they are otherwise unable to agree on the needs of any individual affected by the

agreement.

VIII. Professional Advice

- A. *Independent Advice and Information.* The mediator shall encourage and assist the participants to obtain independent expert information and advice when such information is needed to reach an informed agreement or to protect the rights of a participant.
- B. *Providing Information.* A mediator shall give information only in those areas where qualified by training or experience.
- C. *Independent Legal Counsel.* When the mediation may affect legal rights or obligations, the mediator shall advise the participants to seek independent legal counsel prior to resolving the issues and in conjunction with formalizing an agreement.

IX. Parties' Ability to Negotiate

The mediator shall ensure that each participant has had an opportunity to understand the implications and ramifications of available options. In the event a participant needs either additional information or assistance in order for the negotiations to proceed in a fair and orderly manner or for an agreement to be reached, the mediator shall refer the individual to appropriate resources.

- A. *Procedural Factors.* The mediator has a duty to ensure balanced negotiations and should not permit manipulative or intimidating negotiation techniques.
- B. *Psychological Factors.* The mediator shall explore whether the participants are capable of participating in informed negotiations. The mediator may postpone mediation and refer the parties to appropriate resources if necessary.

X. Concluding Mediation

- A. *Full Agreement.* The mediator shall discuss with the participants the process for formalization and implementation of the agreement.
- B. *Partial Agreement.* When the participants reach a partial agreement, the mediator shall discuss with them procedures available to resolve the

remaining issues. The mediator shall inform the participants of their right to withdraw from mediation at any time and for any reason.

- C. *Termination by Participants.* The mediator shall inform the participants of their right to withdraw from mediation at any time and for any reason.
- D. *Termination by Mediator.* If the mediator believes that participants are unable or unwilling to participate meaningfully in the process or that a reasonable agreement is unlikely, the mediator may suspend or terminate mediation and should encourage the parties to seek appropriate professional help.
- E. *Impasse.* If the participants reach a final impasse, the mediator should not prolong unproductive discussions that would result in emotional and monetary costs to the participants.

XI. Training and Education

- A. *Training.* A mediator shall acquire substantive knowledge and procedural skill in the specialized area of practice. This may include but is not limited to family and human development, family law, divorce procedures, family finances, community resources, the mediation process, and professional ethics.
- B. *Continuing Education.* A mediator shall participate in continuing education and be personally responsible for ongoing professional growth. A mediator is encouraged to join with other mediators and members of related professions to promote mutual professional development.

XII. Advertising

A mediator shall make only accurate statements about the mediation process, its costs and benefits, and the mediator's qualifications.

XIII. Relationship with Other Professionals

- A. *The Responsibility of the Mediator Toward Other Mediators/Relationship with Other Mediators.* A mediator should not mediate any dispute that is being mediated by another mediator without first endeavoring to consult with the person or persons conducting the mediation.
- B. *Co-mediation.* In those situations where more than one mediator is

participating in a particular case, each mediator has a responsibility to keep the others informed of developments essential to a cooperative effort.

- C. *Relationships with Other Professionals.* A mediator should respect the complementary relationship between mediation and legal, mental health, and other social services and should promote cooperation with other professionals.

XIV. Advancement of Mediation

- A. *Mediation Service.* A mediator is encouraged to provide some mediation service in the community for nominal or no fee.
- B. *Promotion of Mediation.* A mediator shall promote the advancement of mediation by encouraging and participating in research, publishing, or other forms of professional and public education.

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