ALTERNATIVE DISPUTE RESOLUTION PILOT PROGRAM
WISCONSIN COURT OF APPEALS

Hon. Daniel P. Anderson
Wisconsin Court of Appeals, District II
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This report reflects a belief that there should be an on-going search for improvements in appellate justice that should include promising concepts such as appellate level alternative dispute resolution. Likewise, the introduction of ADR at the appellate stage of litigation is a natural evolution in ADR that has the potential to enhance justice by furnishing an alternative to adversarial resolution at the appellate level.

Background

The workload of the Court of Appeals has exceeded the projections of 100 appeals per judge made when the court was established during Court Reorganization of 1978. Although the number of cases filed during 1999 was 8%, less than those filed in 1998, there still were 205 appeals filed per judge. Unfortunately, the increase in judges and support staff has not matched in the increase in filings. The large number of filings has a negative impact on the time required to dispose of an appeal; in 1999, it took 335 days to dispose of a three-judge appeal as compared to 291 days in 1991. This delay in disposing of appeals prevents parties from achieving closure and prolongs the disruption in their lives precipitated by the litigation.

The workload of the Court is not the only dynamic moving it toward offering ADR. Since the 1976 Pound Conference, many people have been championing the multi-door courthouse concept, the attempts of courts to offer preferable alternative dispute resolution processes in addition to traditional litigation and appellate processes.[1]

Program Goals

Goals that the ADR program should achieve include:

- Reduce the amount of time for the appeal process
- Reduce the overall cost
- Provide creative ideas for settlement

[1] Susan A. FitzGibbons, *Appellate Settlement Conference Programs: A Case Study*, 1993 J. DISP. RESOL. 57, 58-59.

- Improve communications between the parties and attorneys

Instituting ADR at the appellate level requires a program that will overcome unique roadblocks. In appellate level ADR, the parties, or at least one of them, originally decided against settlement and opted for the adversarial resolution of the dispute in court. The parties have gone through discovery, pretrial preparations and a trial. During this process, the rules of evidence and procedure were followed and rulings on motions as well as the outcome of trial were dictated by rules of law. The appeal is being prosecuted because one or more of the parties did not like the result in the trial court. The ground for the appeal will likely be an alleged error of law. At the moment the appeal is docketed, the parties are likely to be decidedly less friendly than they were before litigation commenced.

There are many different forms of ADR; WIS. STAT. § 802.12(1) defines ten different forms.[2] Not all of these forms are easily adaptable to appellate litigation. Mediation appears to provide the tools that will work the best at the appellate level.[3] It is the nonadversarial nature of mediation that is attractive. The goal of mediation to focus on essential issues of the dispute to reach a resolution will require the parties to abandon their adversarial stances. The neutral in mediation should be able to help the parties to forget who won and who lost and to focus their attentions on what issues continue to divide them.

There are two forms of mediation[4]. In **facilitative mediation**, the role of the mediator is to assist the disputing parties in evaluating their own situations instead of evaluating the merits of disputes for them. The parties participate in problem-solving activities in a manner that features party choice. The principal mission is to clarify and to enhance communication between the parties in order to help them decide what to do. The facilitative mediator does not give advice, legal or otherwise; does not provide opinions on the relative value of a party's case or individual issues within the matter; and does not make predictions on the possible outcome of the action should the parties fail to reach agreement and proceed to

[2] The ten forms of ADR include, "binding arbitration," "direct negotiation," "early neutral evaluation," "focus group," "mediation," "mini-trial," "moderated settlement conference," "nonbinding arbitration," "settlement alternative" and "summary jury trial."

[3] Mediation is defined in § 802.12(1)(e): "'[m]ediation' means a dispute resolution process in which a neutral 3rd person, who has no power to impose a decision if all of the parties do not agree to settle the case, helps the parties reach an agreement by focusing on the key issues in a case, exchanging information between the parties and exploring options for settlement."

[4] The differences between facilitative mediation and evaluative mediation are discussed in Scott H. Hughes, *Facilitative Mediation or Evaluative Mediation: May Your Choice Be a Wise One*, 59 ALA. LAW 246 (July 1998).

litigation or arbitration. Facilitative mediation is based upon three fundamental assumptions:

- The disputants are reasonably intelligent and potentially able to work with each other if placed in a neutral and safe environment.
- The parties, after being properly counseled by their attorneys, are capable of understanding their situations better than the mediator and, perhaps, better than their lawyers.
- The clients can develop better solutions than any mediator might create.

In **evaluative mediation**, the mediator does what the facilitative mediator does not; he or she may give advice, make assessments, propose fair and workable resolutions to one or more issues, press the parties to accept a particular resolution, and state opinions, including opinions on the likely outcome. This manner of dispute resolution has several other labels: neutral evaluation (or, early neutral evaluation depending upon its timing), settlement conference, and settlement-oriented mediation. Evaluative mediation rests upon two fundamental premises:

- The parties want and need the mediator to provide guidance on the law and the relative merits and values of their respective positions.
- The mediator is qualified to give such guidance by virtue of training, experience and objectivity.

Program Description – District I

Since October 1991, District I and the Milwaukee Bar Association have been conducting a pilot mediation program. Data through April 30, 1999 provides evidence that ADR at the appellate level is a viable alternative to continuing the litigation. Roughly 608 civil and family appeals were identified as being amenable for ADR, 113 appeals proceeded to non-binding mediation and 42 appeals, 37%, were settled prior to an appellate decision[5].

In District I, the local staff attorney screens all docketing statements to select civil and family cases that have the potential to settle; the court does not have any written criteria to apply during the selection process. Any appeal in which there is a pro se litigant is excluded. Attorneys are notified that their case has been

[5] This settlement rate compares favorably to the experience in other intermediate appellate courts that have initiated some form of ADR. For example, between 1983 and 1989, 1,350 cases were processed by the Missouri Court of Appeals, Eastern District and 41% were settled. *See* Susan A. FitzGibbons, *Appellate Settlement Conference Programs: A Case Study*, 1993 J. DISP. RESOL. 57, 103.

selected for the program and have five days in which to respond. If all of the parties agree to mediation, the court selects a neutral from a panel of volunteers.

All of the neutrals are volunteers and veterans of the Milwaukee County Circuit Court mediation project. The neutrals have expertise in insurance, construction, family, business disputes and personal injury. At the start of the program, training was provided by the MBA. The Court selects a neutral with the appropriate expertise and requires that the first mediation session be conducted within thirty days of appointment. To encourage participation and reduce costs, the Court automatically enters an order staying preparation for filing of the transcript for thirty days.

From descriptions of the program, it appears that evaluative mediation is the predominant form of mediation that is used. The mediation hearing begins with counsel for each party making a brief oral presentation. Thereafter, the mediator will conduct discussions with counsel and the parties, both jointly and separately. The emphasis is on comparing the case to potential outcomes in litigation or to the neutral's expert guidelines of similar cases.

If the hearing is successful, the mediator is required to render a written report within five days and the parties are required to complete the appropriate stipulations and proposed orders. Counsel and an agent with settlement authority represent all parties.

Program Description – District II

The District II ADR program will permit the assigned volunteer neutral to select either facilitative or evaluative mediation. It is anticipated that evaluative mediation techniques will be used when the neutral believes the parties want and need some guidance as to the appropriate legal grounds for settlement. If evaluative mediation is used the neutral will be expected to provide assistance as a result of his or her training, experience and objectivity.

The neutral can employ facilitative mediation techniques when he or she believes that the participants are thoughtful, able to collaborate with their adversaries, capable of understanding the complexities of their situations and qualified to decide what to do..

The pilot program will begin on July 1, 2001 and run for three years.

Rules Changes Required

The Judicial Council is sponsoring an amendment to WIS. STAT. RULE 809.17 to permit implementation of ADR. The amendment will be included in the petition to the Supreme Court to update the rules of appellate practice.

It is an unanswered question whether the Court of Appeals' Internal Operating Procedure (IOP) will have to be amended to accommodate this pilot project. Conventional wisdom suggests that the IOP should be amended to include a general reference to the court's discretion to refer appeals to ADR.

Types of Cases

With exceptions, all civil and family cases will be screened by the in-house staff attorney for inclusion in the mediation program.[6] The screening determine will the nature of the underlying dispute, the relationship of the issues on appeal to the underlying dispute, the availability of incentives to reach settlement or limit the issues on appeal, the susceptibility of these issues to mediation, the possibility of effectuating a resolution, the number of parties and the number of related pending cases.

The following types of appeals are considered unsuitable for mediation:

- Cases involving pro se litigant(s)
- Cases involving a prisoner, as defined in Wis. Stat. § 801.02(7)(a)2.
- Cases involving commitments under Wis. Stat. chs. 51, 55 or 980
- Writs for supervisory relief
- Writs for extraordinary relief
- Cases involving child custody because the State's concern for the best interest of the child is implicitly involved.
- Cases involving child support because statute and administrative code establish the amount owing.

Counsel may also volunteer to be included in the mediation program. A letter from counsel asking to be included in the program must accompany the docketing statement.

[6] For public policy and due process reasons, all juvenile delinquency, criminal and traffic regulation cases are inappropriate for mediation.

When the district staff attorney reviews a docketing statement for eligibility as an expedited appeal, he or she will identify all appeals that meet the basic criteria for inclusion in the mediation program. The goal will be to identify 250 appeals per year for possible participation in the program.[7]

The staff attorney will send letters to counsel for all parties inviting them to participate in the mediation program. The letter will explain that participation is voluntary, all parties must agree to mediation, no additional fees will be charged the parties, the neutral will be selected by the Court from a list of qualified attorneys, and, the first mediation session will be conducted within 30 days of the appointment of the neutral. The letter will also briefly describe both facilitative mediation and evaluative mediation and inform the parties that the neutral will select which method to use after assessing the case and the needs of the participants Counsel will be required to respond in writing, within five days of the date of the invitation.

District I and District II will use the same screening process to promote integrity of statistical data and program evaluations.

If all parties agree to mediation, the district staff attorney will immediately select a neutral from a list of all qualified attorneys. The district staff attorney will determine whether the neutral perceives any potential conflicts of interest and can conduct the mediation sessions within thirty days.

Within fifteen days of the selection of a case for mediation, counsel are required to submit a position paper, not to exceed five pages, to the mediator. The position paper will outline the key facts and legal issues in the case and will include a statement of motions filed and their status. Position papers are not briefs, are not filed with the Court and need not be served on the other party unless the mediator so directs.

In theory, mediation occurs before the parties incur the expenses of transcripts or briefing. Consequently, the time for filing the transcripts will be extended, by Court order, for thirty days. If transcripts are not needed, the time for filing the record is extended. The extension of time does not apply to the filing of the statement on transcript. Therefore, it will be incumbent upon the appellant to

[7] Based upon the experience in District I, 18.6% of appeals identified as amenable for mediation opt to participate. A random sample of 250 appeals per years should yield 46 appeals that will go to mediation.

arrange with the court reporter to delay working on the transcripts during the mediation program.

The Presiding Judge will issue an order appointing the selected neutral. The neutral will immediately schedule a mediation session to take place within thirty days of the order.

Within ten days of the successful completion of mediation, counsel for the parties will prepare and execute all documents necessary to memorialize the settlement and initiate a voluntary dismissal of the appeal.

Mediation Format

It is not necessary to prescribe the nuts and bolts of the mediation process because each neutral should be permitted to use a process that fits the issues, the parties and the neutral's personal style.

Before the session begins, the neutral will explain that the sessions are confidential. All participants will be required to complete a confidentiality agreement consenting to be bound by the provisions of WIS. STAT. § 904.085. The neutral will secure an agreement from he parties at each conference that nothing said by the participants, including the mediator, is disclosed to anyone on the Court of Appeals or any other court that might address the case's merits.

Counsel for the parties must attend all mediation sessions. All parties will be strongly encouraged to attend each session. Each party represented at the sessions must have someone present with actual authority to enter into a settlement agreement during the session. In the case of governmental bodies and public institutions, the procedure for securing approval of a settlement must be clear to the neutral and the parties attending the session. In rare cases settlement authority by "telephone standby" will be permitted.

In general, the neutral will conduct the conference in a series of joint sessions and caucuses. The neutral will begin the conference by inquiring whether any procedural question or problems can be resolved by agreement. Each side will then discuss their perspectives on the conflict. How the neutral conducts the balance of the session(s) will depend upon his or her assessment of whether the parties will profit from facilitative or evaluative mediation.

Neutrals – General Qualifications

In an evaluative mediation program, neutrals are selected for their expertise in areas of the law and are assigned to appeals that take advantage of their exper-

tise. The neutral may give advice, make assessments, propose fair and workable resolutions, press the parties to accept a particular resolution and state opinions, including opinions on the likely outcome.

In contrast, neutrals for facilitative mediation will not give legal advice, provide opinions on the value of the cases or issues, or make predictions on possible outcomes if the case proceeds through the appeal process. The role of the facilitative neutral is to direct the parties in problem-solving activities with the goal to clarify and enhance communications between the parties that will permit them to develop a creative solution to the dispute.

Neutrals – Selection

To form the first panel of neutrals the court will make a general announcement to all attorneys within the twelve counties served by District II.[8] The announcement will briefly describe the program, emphasize that neutrals will not be compensated for their services, and announce that all neutrals will be provided with CLE approved training before the start of the program. The Court will reserve the right to select up to thirty-six candidates from all applications received.

The general qualifications will require at least five year's active practice of law and participation in three or more appeals. Preference will be given to applicants with formal training in mediation and/or more than three years of an active mediation practice. Neutrals will be selected for his or her expertise, listening skills, people skills and negotiation skills.

Neutrals – Compensation

Neutral will serve without compensation or reimbursement of out-of-pocket expenses.

Neutrals – Training

As an inducement for participation, neutrals will be provided training cosponsored by the Court of Appeals, State Bar ADR Section and State Bar Appellate Practice Section. The neutrals selected to attend will not be charged a fee for the training but will be required to pay all of their incidental expenses, *e.g.*, mileage, meals and lodging.

[8] Kenosha, Racine, Walworth, Waukesha, Washington, Ozaukee, Sheboygan, Fond du Lac, Green Lake, Winnebago, Calumet and Manitowoc.

The program agenda has not been finalized; however, the training will stress listening skills, negotiation theory and ethical considerations. Professor Geske has generously offered to assist in developing the training program.

If the training exceeds two full days, it will be broken up into segments so that the volunteer are not away from their own practice for more than two days at a time. Court of Appeal Judges will be encouraged to attend to equip them with first hand knowledge of how the program is designed to operate.

Whether there will be recurring annual training has not yet been determined. An annual one-day seminar should be considered to refresh the skills of the volunteer neutrals and to allow them share their experiences in the program.

Neutrals – Training Costs

The estimated cost of the training will not exceed $5,000.

Program Budget

The day-to-day expenses of the program will likely be absorbed in the Court of Appeals biennial budget. Because the district staff attorney will screen all appeals, select appeals for inclusion in the program, prepare necessary orders and maintain record keeping, there is no need to hire additional staff.

The Court's biennial budget request includes a proposal for an additional district staff attorney. A second in-house staff attorney is desirable because it will give the attorney assigned to the program additional time to monitor the program.

Program Evaluation

The successes and failures of the program must be documented. "Periodic review of the settlement rate and user satisfaction will indicated where changes are necessary, identify resources saved and/or indicate if the program goals were attained."[9]

The first effort will be to accumulate statistical data – total number of cases filed, total number of cases eligible for participation in the program, cases offered the program, cases actually diverted into the program and the settlement rates.

The second effort will be to have counsel and neutrals complete anonymous questionnaires to obtain their experiences and perceptions of the program. Both

[9] Nancy Neal Yeend, *State Appellate ADR: National Survey and Use Analysis with Implementation Guidelines*, The John Paul Jones Group (1999), P-17.

will be asked to evaluate the program in general and not the specific mediation of their appeal. In addition, to check on the effectiveness of the neutrals, counsel will be asked to rate the assigned neutral. The questionnaires will be designed to preserve the confidentiality of the mediation sessions and will not be available to the members of the court.

The same data will be collected for both District I and District II to provide a comprehensive look at the success of ADR.

Program Result

The program was never initiated because of the lack of qualified attorneys volunteering to serve as neutrals.