

feature article

# The Attorney's Role in Representing Clients Engaged in the Mediation Process

by Lorin Galvin



Alternative dispute resolution (ADR) and Johnny Cash may not appear to have much in common, but his song "Folsom Prison Blues," has a line that calls out the notice, "I hear a train a coming, it's coming 'round the bend." It's a refrain that may be appropriate for consideration by lawyers who have heard of ADR, but have not taken the opportunity to board one of the ADR cars that's attached to a train, (*the practice of law*) that's been "a coming" this way for 30 years; and, is now on the fast track for use by lawyers.

As early as 1976, ADR was identified as a favorable justice system approach to address both the public's and the bar's growing frustration with crowded dockets, lengthy trial

calendars, and the economic and human costs of the traditional adversarial system. At the well-known Pound Conference held in 1976<sup>1</sup>, formally named the "National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice," sponsored by the American Bar Association, the Conference of Chief Justices, and the Judicial Conference of the United States the following remarks on ADR were made: Harvard Law School Professor Frank Sander discussed the alternative process of a multi-door courthouse approach for resolving disputes; and the late Chief Justice Warren E. Burger, in his keynote address, urged the audience to design "some new—even radically new—'vehicles' to take us where we want to go"<sup>2</sup> in considering new approaches to dispute resolution.

## Lorin Galvin



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personal injury, workers compensation and mediation of domestic relations and commercial disputes in court-based programs and in pre-litigation situations. Galvin is a graduate of the University of Nebraska at Kearney and Creighton University School of Law. He was admitted to the Nebraska bar in 1977.

The American Bar Association's response to the Pound Conference was to create a Special Committee on Dispute Resolution and to follow up with the first national conference on alternative dispute resolution process in 1977, at Columbia Law School in New York City.

Several years later in 1982, Justice Berger opined that "[t]he existing judicial system is too costly, too painful, too destructive, too inefficient for a truly civilized people . . ." "Reliance on the adversarial process as the principal means of resolving conflicts is a mistake that must be corrected . . ." "For some disputes, trials will be the only means, but for many claims, trial by adversarial contest must in time go the way of the ancient trial by battle and blood."<sup>3</sup>

Nebraska has been slow to adopt and utilize these now not-so-new "vehicles, which are able to provide alternative methods

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to litigation as a means for resolving disputes. One of the earliest forays into ADR by the Nebraska Legislature was in 1987 when it first enacted the Uniform Arbitration Act providing in relevant part that "[a] provision in a written contract to submit to arbitration any controversy thereafter arising between the parties . . . is valid, enforceable, and irrevocable . . ." Subsequently, the Nebraska Supreme Court held that the statute authorized binding arbitration of future disputes and violated the Nebraska State Constitution, Neb. Const. art. I, § 13, ". . . [a]ll courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." *State v. Nebraska Assn. of Pub. Employees [NAPE]*, 239 Neb. 633, 477 N.W.2d. 577(1991).

As a direct response to the NAPE case, the Nebraska Constitution was amended in 1998 to state that "the Legislature may provide for the enforcement of mediation, binding arbitration agreements, and other forms of dispute resolution."<sup>6</sup> The amendment of the Nebraska Constitution opened the door for the Legislature to enact several new and timely statutes laying the track for alternative methods of dispute resolution.<sup>7</sup>

Since the 1996 Nebraska Constitutional amendment, there has been modest yet significant progress within Nebraska's bench and bar in responding to the challenge of Chief Justice Berger to limit reliance upon the adversarial system (*encouraging mediation in the Parenting Act, Rule 4.3 Douglas County, considering of Nebraska's courts and lawyers increasing use and referral to ADR*). However, there does seem to be reluctance by Nebraska lawyers to fully grasp the opportunities presented to better represent their clients by including consideration and analysis of an appropriate ADR process in each instance of client dispute representation. While there may not be an appropriate ADR process in every disputed case, there is a growing sense across the United States that lawyers have an affirmative obligation to actively consider those options with the client before determining that litigation is the appropriate method to address the client's interests.

It is the goal of this article to present (a) an outline of the process a lawyer should follow to effectively represent a client utilizing one of the ADR methods, (b) to affirm that mediation is considered as an alternative to litigation; and, (c) to consider when facilitative interest-based mediation is the appropriate vehicle for resolution of a client's dispute.

### Lawyer Preparation and Practice in ADR

It is fundamental that lawyers understand that they must prepare and practice differently as an advocate in litigation than as an advocate in mediation and ADR. As stated by

Carrie Menkel-Meadow, "Litigative lawyering is not the same as mediational lawyering" and that "mediation advocacy" is an "oxymoron."<sup>8</sup> Lawyers should seriously consider that, at initial or early client conferences, it might be a failure of client representation for the lawyer to not explore and explain all procedural options, including ADR, so as to provide the client the opportunity to evaluate inherent differences between a litigation and mediation approach. Effective representation in mediation requires that a lawyer be less an adversarial advocate and more a counselor at law in considering alternative methods of dispute resolution.

In order to switch from litigation advocate to ADR/mediation counselor, the lawyer must understand that a lawyer may best serve a client by acting as a counselor within the mediation or other ADR process. Counselors use the knowledge and skills necessary to seek resolution of a dispute by working collaboratively and creatively to solve the problems at the root of a dispute.

Most mediators will tell you that the biggest hurdles to a successful and final resolution of a dispute are advocates and their clients who do not understand the mediation process. Competent participation in mediation requires both the knowledge and ability to participate appropriately in effective negotiation and mediation processes.

A lawyer, who is going to recommend, and later participate in mediation, must have a firm grasp of the tools required for the task. It is imperative that counsel self assess whether he or she is competent to undertake that task, or whether outside assistance is necessary.

### Lawyer Self Assessment as Advocate for Client in ADR

Begin the self-assessment with a review and consideration of the extent of your education and experience in terms of the following elements.

#### A. The law and court rules applicable to mediation.

Counsel must be familiar with the substantive law applications for alternatives to litigation, including the Nebraska Constitution, the basic mediation statutes and local rules. The Constitution of the State of Nebraska at Article 1 Sec 13, provides for "enforcement of mediation, binding arbitration agreements, and other forms of dispute resolution."<sup>9</sup>

The foundational Nebraska ADR statutes include the Dispute Resolution Act, Uniform Mediation Act, and Uniform Arbitration Act.<sup>10</sup> Nebraska has a number of additional statutes that provide an avenue for use of mediation.<sup>10</sup> Individual county and district courts have court rules that must be thoroughly understood.<sup>11</sup>

## B. Key concepts of negotiation and mediation

Negotiation is a specialized communication process used proactively to assist rather than impede or derail the settlement effort. Mediation includes the elements of negotiation as a participatory, creative, and collaborative problem-solving process, which requires voluntary joint efforts of the mediator, client, counsel and all necessary parties.

There are several effective methods of negotiation and mediation. If counsel has not had both the education and practice with accepted methods, then the first step is to begin the education process. Consider obtaining experienced co-counsel or a mentor who has been trained in negotiation and mediation and has practiced effectively within the processes.

While the historically well-known "positional bargaining" approach to negotiation has had its day, and is still a legitimate method, I recommend the concepts of principled negotiation as developed by the Harvard Negotiation Project and set out in "Getting to YES."<sup>11</sup>

The Harvard Negotiation Project and "Getting to YES" established principles of problem-solving negotiation with these major elements:

- Separate the people from the problem;
- Focus on interests, not positions;
- Generate options for mutual gain of all parties;
- Insist on objective criteria to resolve the dispute; and
- Do not give in to power plays and dirty tricks; always practice principled methods of negotiation.

Education and practice of effective negotiation techniques are the beginning. Counsel should also study and be familiar with basic mediation principles and practice, as well as ethical concerns in mediation.

Dispute resolution courses offered by the Nebraska Office of Dispute Resolution Training Institute and Nebraska Mediation Center Association educate lawyers in mediation and other ADR theory and processes.<sup>12</sup>

Education of ADR philosophy, models and methods offers lawyers an opportunity to learn how to identify and resolve individual problems within a dispute. In learning why dispute resolution techniques work and how to use them, a lawyer should come to understand why and how adversarial conduct can be both inefficient and harmful to a client's interests, which are not the same as a client's legal positions.

## C. The ethics of negotiation and mediation

To be familiar with the ethical considerations of mediators, counsel should consult the Model Standards of Conduct for Mediators.<sup>14</sup>

## D. Types of mediation

The two predominant types of mediation used in Nebraska are the facilitative and the evaluative methods. The training offered by the Nebraska Office of Dispute Resolution Training Institute and Nebraska Mediation Center Association is based upon the facilitative model known as *interest based mediation*. This model is similar to the negotiation model developed by The Harvard Negotiation Project, which is known as *problem solving negotiation*.

The facilitative model is a method of assisting the parties in shifting their focus from positions taken in the legal analysis to an examination of the needs and interests at root of a dispute. In this model, both the issues and the parties' relationship, whether business, community, or family, have been deemed a priority; hence, the practice of utilizing joint sessions rather than separate caucuses. The parties are asked to generate creative options for settlement while early on, remaining non-judgmental of the practicality of the options during the process. The mediator then assists the parties to evaluate these options in light of their interests and ability to realistically implement the resolution. This creative interactive process forms the basis for a cooperative, consensual problem-solving which provides an opportunity for the parties to hear each other as they search for a mutual, fair and final settlement.

The evaluative model may use many of the strategies and methods of the facilitative model but is generally more inclined to provide risk analysis and assessment of possible results based upon factual and legal analysis by an "expert" mediator, who is selected for his or her substantive legal knowledge and experience in the dispute area. The evaluative model is more inclined towards use of the caucus (*private individual meeting*) method to explore settlement options after a brief initial joint session with all counsel and clients present.

Assuming that counsel has the education and experience to effectively participate in a mediation session, or is in the process of acquiring the knowledge and has associated with a mentor or mediation experienced attorney, it is time to consider the steps necessary to prepare the case and then the client, for mediation.

## Lawyer's Role in Preparing the Case for Mediation.

There are thousands of books, articles, and checklists that can provide guidance for preparation of a case for trial. If the case is being prepared for a mediation session while the case is in litigation, then the initial preparation can follow those trial preparation procedures. ➡

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Even when litigation has not commenced, the litigation preparation is an appropriate place to begin to establish the legal merits of your client's case. It is beyond the purview of this article to review trial preparation techniques; the focus here will be to look at the process necessary for effective representation in the pre-mediation preparation and mediation participation.

When the legal analysis of the case has been fully reviewed, including basic research of the cause of action, identification of elements of the cause of action, obtaining the documentation or other evidence necessary to support the cause of action, determining damages or other requested relief, an assessment of the risks if settlement is not reached, and consideration of other client options, then it is time to shift your mental focus from litigation advocate to mediation counselor.

### Determine a mediation time line

- Mediate at the earliest possible time after the case is ripe to avoid wasting time and money.
- Determine that you have all information and documents necessary to mediate.
- Determine if a brief is necessary to help client and counsel organize the factual and legal issues and determine its strengths and weaknesses.
- Determine that the necessary parties have been identified and are available.
- Is a standstill agreement or an order to mediate necessary?
- Are there confidentiality concerns that require a written agreement?<sup>15</sup>

### Prepare to select an appropriate mediator

- Determine whether facilitative or evaluative mediation is the best method.
- Is an evaluation of positions and facts the best method for the type of case?
- Is continuation of a relationship at stake?
- Is a facilitative, face-to-face process the best method for the type of case?

### Investigate possible mediators

- Determine mediator's training, philosophy, session style, and experience.<sup>16</sup>
- Will the mediator complete a conflict of interest check of all parties and counsel before accepting the mediation?<sup>17</sup>

- Does the mediator request a pre mediation questionnaire, memo, documents, pleadings, phone conference or meeting?
- What is the mediator's position regarding the Model Standards of Conduct for Mediators and confidentiality of information shared in caucus, in light of the Uniform Mediation Act, and if applicable in light of the Nebraska Dispute Resolution Act?<sup>18</sup>
- Is an agreement to mediate necessary and will there be a written agreement for fees and expenses?
- Where will the mediation occur?
- What are the mediator's expectations for opening statements by counsel or client?
- What procedural steps makeup the mediator's normal process? Can joint sessions be expected or a caucus style?
- Is the mediator prepared to write a final settlement agreement or are counsel expected to prepare settlement documents?

### Prepare a mediation brief

The purpose of a mediation brief is not to argue or persuade but to provide factual information, identify legal issues, and help change the focus from positions to the parties' interests and needs. Preparation of the brief will require consideration of the factual and legal issues and provide client and counsel with a blue print to consider positional strengths and to start discussion of the clients' needs and interests. The brief should include:

- A summary of the procedural history and status of the case including whether any motions are pending that would resolve outstanding issues.
- Set out the status of discovery and whether any party owes documents prior to mediation.
- Identify disputed issues of liability and damages.
- Identify a time line of factual and legal issues.
- Describe any important non-legal issues including expected costs of continuing litigation.
- Provide pertinent pleadings and exhibits if requested.
- Review history of any settlement negotiations including why settlement has not occurred.
- Identify strengths and weaknesses of each party's positions.
- Provide a concise statement of needs and interests for each party, if known.
- Include a confidential letter to the mediator if appropriate to discuss problems with the client's case and any confidentiality issues that require attention.<sup>19</sup>

- Identify who will be present, relationship to the case, and who has settlement authority

### Preparing the Client

**Educating the client about mediation**—As a mediation-educated and experienced lawyer knows, there are dramatic differences between the adjudicative processes of litigation and the consensual processes of negotiation and mediation. It is essential to educate clients about alternatives to litigation and it is imperative that the client understands the differences between trial options and mediation options so the client can effectively participate with counsel in the mediation process.

The first step is to educate the client about the difference between the adversarial nature of litigation and the non-adversarial nature of mediation. This will help the client understand that the mediation process changes the conflict context from a competitive win-lose arena with a judgment-based result to an opportunity for a cooperative consensual based result in a win-win arena. The educational process should consider:

- comparison of benefits and limitations of mediation versus litigation;
- negotiation and mediation methods;
- mediation processes;
- pre-mediation preparation;
- mediation session participation; and
- the closing process for successful final resolution.

**Comparison of benefits and limitations of mediation versus litigation**—Generally mediation is voluntary and non-binding until a settlement agreement is signed. The client cannot be forced to participate and any party may pause, or withdraw if the process is not being productive, or terminate the process at any time prior to settlement. If a solution or resolution is not reached there is no prejudice to the litigation process. In a litigation process, one is unable to control the process once a trial has commenced.

- The parties have an opportunity to select their own mediator, compared to having a judge selected for them.
- The parties own the process and are participatory, directly involved in creating a resolution of the problem, compared to observing what is often viewed as an attorney staged and scripted process and with a third party, a judge or jury deciding the result for them.
- The process has the opportunity for creative settlement options where resolution is not limited to the damages or relief requested in litigation pleadings.
- The process has more flexibility, is much quicker and more attentive to the time constraints of the client and

other parties, compared to being dependent upon the court's progression standards and availability for trial dates.

- Emotional and financial costs are generally much less than costs extracted by litigation.
- The resolution may include provisions for payment or settlement guarantees may be part of a settlement, compared to the traditional problems of using additional legal processes to enforce and collect a judgment.
- There is a greater opportunity to preserve or improve ongoing relationships, compared to the destructive litigation process.
- The process is confidential, with privilege protections, compared to the public exposure of pleadings and trial.
- There is no legal precedent resulting from the mediation, compared to the possibility that a litigated result may result in a legal precedent for or against the client.

**Negotiation and mediation methods**—The effective use of mediation settlement knowledge and skills is dependent upon both counsel and client understanding basic negotiation and mediation tenets and their application to the specific requirements of the mediation process. Counsel should discuss the information set out previously regarding negotiation and mediation methods and types.

**Mediation process**—It is important that counsel introduces and educates the client about the process of a mediation session. Clients need to be prepared for the new experience of the mediation process. Clients who are prepared for the process and understand negotiation and mediation techniques should be more pleased with their representation whether a settlement is accomplished or not.

A client who understands the stages of a mediation session will not be surprised by the process and will be more comfortable while participating in a mediation session.

Explain how the mediation session begins with the mediator's introduction and greeting of the parties and their counsel. The mediator will begin to establish a rapport with counsel and all parties while explaining the mediation process in a respectful, professional, and impartial manner. The mediator's introduction of the process will include an explanation of its confidentiality, privilege, the ground rules, and a request for the client's commitment to a voluntary process. If there is a confidentiality agreement, it will be signed before opening statements are made. Questions will be invited and answered. All participants will be provided equal time and opportunity to make opening statements.

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Prepare the client for the mediator's use of structure to control and balance the parties opportunity to tell their stories; the use of open-ended questions to discover and clearly identify the needs and interests of the parties; use of active listening, reframing, acknowledging and summarizing techniques to clarify and establish that statements were accurately heard by all participants; and expressions of impartial concern for the feelings of all parties.

**The individual role of client and counsel in the preparation, conduct, and completion of mediation**—It is important for the client to understand the different roles of client and counsel during the mediation session. To be effective, counsel and client must understand that whenever possible, while in the mediation session, the dispute should be controlled by the client, not counsel. The preparation for mediation, participation in mediation, and conclusion of the mediation requires significant client decision-making at each step of the process. Client participation should begin with the selection of the mediator. Counsel has the responsibility to provide information about available mediators and advise the client about the mediator's methods and include the client in the selection decision when a mediator hasn't been assigned.

**Pre-mediation strategic preparations**—Re-interview your client using a communication method directed at a comprehensive interview in preparation for the mediation. One technique is referred to as listening mindfully rather than knowingly. This process is not aimed at informing and educating the client, but rather at listening very carefully and deeply to the client's story, then asking questions that get to the heart of the client's needs and interests, not the legal positions, then summarizing what you have heard to confirm for the client that counsel understands those issues, needs, and interests. Counsel's use of this process will prepare counsel while helping the client prepare to communicate better in the mediation by familiarizing the client with mediation techniques and assisting the client in appreciating the difference between interests and legal positions.

- Establish a negotiation plan with your client that shifts the client focus away from "this is the best I can do, take it or leave it." The client's focus should be on a consideration of all possible settlement options.
- Identify and discuss the strengths and weaknesses of your client's and the opponent's case and compare the legal positions with the interests identified by your client that need to be discussed in the mediation. List and review the interests and goals being sought in the mediation, especially noting the identifiable mutual interests of all parties.

- Identify and discuss with your client the alternatives to settlement including the risks, uncertainties and costs of continuing the litigation process.
- Explain to the client that you will be present at all stages of the mediation and that the client can consult with you in private at any time.
- Remind the client that the mediator is not there to judge the parties and does not have the power to force a settlement or dictate any terms of an agreement. Emphasize that only the parties have the power to make decisions.
- Ask the client to consider and express any feelings and emotions that are the result of the dispute and litigation. Encourage the client to express those emotions so counsel is prepared before the mediation, to assess their possible impact on the mediation process. If necessary obtain permission from the client to discuss confidentially with the mediator about what emotions to expect during mediation and to determine if the mediator is confident and skillful enough to help the client manage the emotions and their appropriate expression during the mediation.
- Discuss communication styles that are not confrontational and adversarial in nature. If you have access to a videotape of a mediation session, ask the client to watch it, paying particular attention to the communication style of the mediator and parties that are most effective.

As a result of preparation with the mediator, counsel will be able to explain to the client the philosophy, method and stages of the process to be expected in the mediation.

The client must consider and understand the difference between a lawyer's participation and control in a deposition or courtroom and the client's participation and control in mediation.

## The Lawyer's Role at the Mediation Session

It is generally accepted that the client will be asked to actively participate in the mediation if the client is able to do so. The client should be prepared to listen, to negotiate, to discuss the strengths and acknowledge the problems of the case. While counsel listens silently, the client must be prepared to discuss the parties' interests and make decisions about the case even when those decisions are at odds with counsel's previous advice based on legal positions. The mediation process will provide the client with the opportunity to seek counsel's advice and an explanation of the legal implications of a proposed decision, but prior discussion in the preparation stage

will provide the client with the confidence to cooperate with the mediator while remaining in charge during the mediation discussion of resolution options.

Counsel will have reviewed the introductory and opening process including the nature of counsel's opening remarks and the opportunity for the client to tell his story and to listen thoughtfully and carefully to other parties tell their story, each without interruption.

The mediator's role as facilitator seeking a thorough examination of the needs and interests of each party, the brainstorming session to generate options, and the mutually cooperative efforts to arrive at a final, satisfactory, resolution should be thoroughly understood by the client.

The other party and the mediator will need to hear from the client, not just counsel, in order to move the dispute toward final resolution. The client should be encouraged to speak candidly about what is most important to him, including how he feels about the issues presented, while remembering to work on the problem and not attack the other party. Remind the client that the process is not about revenge or getting even but about solving the problem in a way that meets each party's needs and interests.

In discussing counsel's role in mediation, explain that counsel will protect the client from overreaching by opposing counsel, but that you must be perceived in mediation as being fair and will use a conciliatory tone. Explain that to be effective you cannot be adversarial or argumentative during the sessions and will not confront or interrogate the other party as you would and are prepared to do at trial. Effective communication in a cooperative manner with the mediator and other participants is necessary to resolve the dispute and that resorting to litigation tactics would destroy the opportunity for settlement in mediation.

**The closing process for successful final resolution—**  
In anticipation of a successful mediation, counsel should prepare drafts of any necessary releases, proposed settlement agreement and order. In Nebraska, under the Uniform Mediation Act, an oral settlement reached in mediation is not a final settlement.<sup>20</sup>

The mediator will direct the closure of the mediation by either preparing and presenting an agreement identifying the elements of settlement for signature by all parties and counsel, or if that is not possible because of an adjournment of the session to complete a draft of the agreement, then prepare for signatures a memo of understanding clearly setting out any unresolved issues if agreement in settle is not finally reached. The written memo should clearly set out what remains to be finalized, what steps remain to be completed, delegate responsibility for drafting, and establish a due date for all documents.

Prior to signing carefully review and make certain that both you and your client understand the terms of any final agreement reached in the mediation.

## Conclusion

Finally, complete the preparation with the reminder that mediation is a no-risk, confidential process that should be approached with a positive attitude and knowledge that client and counsel are thoroughly prepared to work cooperatively with the mediator and all parties in an effort to reach a fair and final settlement of the dispute. ■■■

## Endnotes

- <sup>1</sup> Johnny Cash, "Folsom Prison Blues," Columbia Records.
- <sup>2</sup> 40 *American Law Review* 729 (1906), 35 F.R.D. 273(1906), Rosee Found
- <sup>3</sup> 70 R.D.R. 79 (1976).
- <sup>4</sup> Warren E. Burger, "Isn't There a Better Way?," 68 ABA J. 274 (1982)
- <sup>5</sup> Uniform Arbitration Act, 25-2601 et seq., (1987).
- <sup>6</sup> Neb. Const. art. I, § 13.(1998).
- <sup>7</sup> See Notes 9 and 10.
- <sup>8</sup> "Commentary: And Now A Word About Secular Humanism, Spirituality, And The Practice of Justice and Conflict Resolution," 28 *Fordham Urb. L.J.* 1073, 1081, 1088.
- <sup>9</sup> Dispute Resolution Act Sections 25-2901 to 25-2921; Uniform Mediation Act Sections 25-2930 to 25-2942; Uniform Arbitration Act Sections 25-2601 to 25-2622.
- <sup>10</sup> Prior to the amendment of the Nebraska Constitution in 1996, the legislature enacted: the 1976 Uniform Act on Inverstate Arbitration and Compromise of Death Taxes, 77-3301 to 77-3316; the 1987 State Administrative Departments Personnel statute providing that if the parties in labor contract negotiations do not reach a voluntary agreement by January 1, the dispute shall be submitted to a mediator mutually selected by the parties or appointed by the Federal Mediation and Conciliation Service, 81-1381; the 1988 Farm Mediation Act, providing consensual mediation, 2-4801 to 2-4816; in 1993 the Parenting Act authorized voluntary mediation of parenting plans 43-2901 to 43-2919; the 1993 Nebraska Fair Employment Practice Act, authorizing the Commission of Industrial Relations to attempt to eliminate unfair employment practices by means of conference, mediation, conciliation, arbitration, and persuasion, 48-1117; in 1995, Commission of Industrial Relations, where the employer is a school district, an educational service unit, or a community college, the commissioners may order additional mediation if necessary, 48-811.02 and 48-816; and in 1997 the Parents and Public Assistance Welfare Reform Cash assistance statute provided it is the intent of the Legislature that an independent mediation appeal process be developed as an option to be considered, 68-1723.
- Subsequent to the amendment of the Constitution in 1996, the legislature enacted: in 1998 the Uniform Partnership Act authorizes mediation to settle winding up disputes, 67-441; in 2000 the Irrigation and Regulation of Water provision for an instream appropriation application mediation or nonbinding arbitration, 46-2117; in 2001 the Tax Equalization and Review Commission Act authorized the mediation of valuation disputes between the county and the owner of the property, 77-5009; in 2003 the Uniform Mediation Act 25-2930 to 25-2942; and in 2003 the Juvenile Code gave County Attorneys the option to make juvenile offender and victim mediation available as part of juvenile diversion agreements, 43-245 et seq.
- <sup>11</sup> For the current version of Douglas County District Court Rule 4.3D, see local rules at [www.dca4dc.com](http://www.dca4dc.com).
- <sup>12</sup> "Getting to YES," (2nd ed. 1991, 1st ed.1983) by Roger Fisher, William Ury and Bruce Patton.

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- <sup>11</sup> For training information from the NMCA/ODR Training Institute, see [www.nmediation.org](http://www.nmediation.org).
- <sup>12</sup> For a current version of the Model Standards of Conduct for Mediators, see [www.abmc.org/dispute](http://www.abmc.org/dispute).
- <sup>13</sup> Uniform Mediation Act Section 25-2937 provides that parties can make their own agreements about confidentiality. Confidentiality, as distinguished from privileged under the UMA, refers to matters that cannot be disclosed outside of court.
- <sup>14</sup> Uniform Mediation Act Section 25-2938 establishes obligations of the mediator. This section requires disclosure of the mediator's qualifications

to mediate.

- <sup>15</sup> Uniform Mediation Act Section 25-2938 establishes obligations of the mediator, and requires inquiries and disclosures by the mediator to avoid conflicts of interest, requires a mediator to be impartial unless the parties agree otherwise.
- <sup>16</sup> Uniform Mediation Act Section 25-2937 provides that parties can make their own agreements about confidentiality.
- <sup>17</sup> See note 15.
- <sup>18</sup> Uniform Mediation Act Section 25-2935 Exceptions to privilege includes a written agreement signed by all parties to the agreement.