2009

Dreamers and Visionaries: The History of ADR in Idaho

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DREAMERS AND VISIONARIES: THE HISTORY OF ADR IN IDAHO

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Nothing ever rose to touch the sky unless some dreamed that it could, still others believed it should, and finally others willed it would.
— Randy Lowry†

TABLE OF CONTENTS

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* Professor of Law, Director of Clinical Programs at the University of Idaho College of Law, and Director of the Northwest Institute for Dispute Resolution. I am grateful to the following persons who answered questions and helped me make sense of the history of ADR in Idaho: Denise Asper, Beverly Barker Hildegarde (Mauzerall) Ayer, Merlyn Clark, Pat Costello, Mary Daley, Bayard Gregory, Victoria Hawley, Susie Boring-Headlee, Viki Howard, Justice Byron Johnson, Judge John Judge, Le (Parker) Kelleher, Steve Kenyon, Jack McMahon, Diane Minnich, Suzanne McCorkle, Pamela Madarieta, Alex McNish, Marie Meyer, Jack McMahon, Tom Murawski, Paige A. Parker, Randall Reese, Marilyn Shuler, Frances Thompson, Patti Tobias, Justice Jesse Walters, Jr., and Judge Patricia Young. I am grateful to the following friends and colleagues for their productive discussions, edits, and comments on earlier drafts of this piece: Candy Gillis, Nancy Luebbert, Molly Laflin, and Jack McMahon. I thank Dana Johnson and Lisa Schoettger for their excellent research, writing and editing assistance throughout this process. I also want to thank Dean Donald Burnett for his support.

† BARBARA KNUDSON, PEACEFUL SETTLEMENTS 1985–1995: A STORY OF THE HISTORY OF PEACEFUL SETTLEMENTS 5 (1995).

I. INTRODUCTION

This article began as a response to a request that I write a short history of the alternative dispute resolution (ADR) movement in Idaho. Contrary to my initial expectation, the history was not simple, linear, short, or boring. Writing it has been exhilarating and overwhelming—for it has provided me with an opportunity to walk down memory lane[1]—to pull out old files, call old contacts, interview people

1. My involvement with ADR in Idaho began in 1992, a year after I moved to the University of Idaho from Philadelphia. My work has centered predominately on court-connected ADR at both the state and federal levels as well as developing training programs. I have served on many of the state and federal courts' committees on civil or criminal mediation since 1992 including the Idaho Supreme Court's Committee on ADR, Rule 16 Implementation Committee, Rule 16 Follow-up Committee, the Criminal Mediation Committee, the Evidence Rules Subcommittee on Mediation Privilege, and the Fed-

whose names I had heard bantered around in ADR circles, and try to give adequate recognition to all those who helped create the abundance of services and processes Idaho ADR has today.[2] Many of the key players have generously contributed recollections and materials to this article. Because of my own involvement in the development of state and federal civil ADR rules and procedures, some sections of this paper are written in the first person. The writing process has given me renewed appreciation for all the bright, energetic dreamers and visionaries who built Idaho ADR from a nascent grassroots volunteer movement into a complex web of dispute resolution services.

In order to make sense of the present and project the possible future of ADR in Idaho, we need to explore the past and understand how the movement has evolved over the last thirty years. This article provides a descriptive overview of some of the landmark events in civil and criminal ADR and spotlights some of the movers and shakers along the way.[3]

The story of ADR is not a linear progression; rather, it is fraught with turf wars over ownership of the emerging profession—power struggles between the judiciary and the legislature, and between the established bar and the interdisciplinary mediation community. These impassioned struggles were rooted in a commitment to creating a better system of conflict resolution. A small cadre of early "missionaries" beat the pavement and advocated for what they believed—that people in conflict needed to move past assigning blame, engage in a less adversarial process, and look forward, not backward.[4] The story of ADR in Idaho is more like a collection of stories; each one separate yet interconnected and indebted to the past.

Certain themes arise and reappear throughout the story: Who owns the profession? Will credentialing stifle the development process? Can one ensure quality in a practice that appears to still be evolving? Is an interdisciplinary approach compatible with the bench and the bar's desire for accountability? Is there a place for everyone under the umbrella? Who has the power to make change happen (the community, the bar, the bench)? How can one placate multiple organizations competing for a piece of the pie? Can such a major change

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eral Court's Arbitration and Mediation Committees. I have also directed the Northwest Institute for Dispute Resolution since its inception in 1997.

2. Given such a large undertaking, I may have missed or slighted some person or event. Any oversight is unintentional.

3. The history of family mediation is beyond the scope of this article. Moreover, Linda Pall, a Moscow-based attorney, is currently working on compiling such a history of ADR in Idaho.

4. Telephone Interview with Marilyn Shuler, former Dir., Idaho Human Rights Comm'n (Aug. 20, 2009).

in orientation to dispute resolution be sustained through volunteer efforts?

Part II of this article provides a brief history of the national forces that shaped ADR in the 1980s and 1990s. Part III shifts to ADR in Idaho and explores the early efforts looking at the Idaho Mediation Association, Peaceful Settlements, and Sounding Board. Part IV discusses the state efforts including the Governor's Task Force on ADR and the bench and bar's work in the civil and criminal arenas. Part V explores the federal court system and the significant role it has played in the development of ADR in Idaho. Part VI concludes with a look forward to the future of ADR in Idaho.

II. THE CULTURE OF ADR NATIONALLY IN THE 1980S AND 1990S

Prior to the 1980s, arbitration[5] was the most widely used form of ADR, in both private and court-ordered contexts.[6] Arbitration had ossified, however, into a more formal and structured method of settling disputes because disputants increasingly challenged the arbitration settlements in court; this in turn increased the need for discovery and legal argument within arbitration itself.[7] What was once an attractive alternative to the complexity, expense, and slowness of the traditional legal system began to look very much like the traditional legal system by the early 1980s.[8] And while lawyers and their clients still wanted the assurances of finality and settlement, they wanted a true alternative to the formality and complexity of the judicial system—an alternative that arbitration no longer provided in most cases.[9]

The ossification of arbitration made mediation[10] more attractive because its flexibility allowed disputants to create their own resolutions. By the mid-1980s, mediation had made its way to the forefront of ADR.[11] Community mediation, workplace mediation, and family

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5. Arbitration is "a process in which one or more neutrals render a decision after hearing arguments and reviewing evidence. In arbitration, the parties to a dispute relinquish their decision-making right to the neutral party, or arbitrator, who renders a decision for them." JOHN W. COOLEY, THE ARBITRATOR'S HANDBOOK 2 (1st ed. 1998).

6. Robert A. Baruch Bush, Professor of Law, Hofstra Law Sch., Keynote Address at the New Jersey Statewide Conference on ADR: Two Pictures of the Future: ADR in the New Millennium (June 1999) (transcript available at http://law.hofstra.edu/Academics/InstitutesAndCenters/ISCT/isct_bush.html) [hereinafter Bush].

7. *Id.*

8. *Id.*

9. *Id.*

10. Mediation is "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute." IDAHO R. EVID. 507(1)(a).

11. Bush, *supra* note 6.

mediation programs saw considerable growth during the 1980s.[12] Indeed, by the late 1980s more than thirty-three jurisdictions had made mediation mandatory in custody and visitation disputes.[13]

In many ways the 1980s and early 1990s were the heydays for the early ADR movement with a growth of legislative and professional support for ADR. In 1980, Congress passed the Dispute Resolution Act,[14] which was meant to provide federal start-up funding for local community mediation centers and courthouse projects throughout the United States.[15] However, the Reagan administration limited funding to only a small portion of the Act, that which authorized the creation of an information clearinghouse, the National Dispute Resolution Center.[16] Despite this setback, community mediation was spurred along by donations from the Ford Foundation, the United Way, and various religious organizations.[17] "By 1983, seventeen states had passed various ADR bills to establish informational resource centers, fund court-based initiatives, and study the possibilities of community mediation centers."[18] Concurrent with the state-originated push for increased ADR, the American Bar Association (ABA) "created a standing committee [for] minor dispute [resolution],"[19] and Chief Justice Burger, a strong proponent of ADR,[20] "stepped up his calls for [the funding of] the Dispute Resolution Act."[21]

Outreach and education campaigns began to spread the word about ADR. The National Dispute Resolution Center and later the National Institute for Dispute Resolution began a national education campaign dispensing information via newsletters and national conferences.[22] While some clinical law professors pushed for a greater professional and educational presence for the field of ADR, the idea was met with resistance from law schools, lawyers, and judges.[23] Mediators had been, up to this point, a mixture of individuals from educa-

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12. Northern Colorado Mediation Institute, History of Mediation, http://www.ncmediation.com/history.html (last visited Jan. 31, 2010).

13. Association of Family and Conciliation Courts, About AFCC: History, http://www.afccnet.org/about/history.asp (last visited Jan. 31, 2010).

14. Pub. L. 96-190, 94 Stat. 17 (1980) (codified at 28 U.S.C. §§ 651–58 (2006)).

15. *Id.*; Calvin Morrill, Institutional Change Through Interstitial Emergence: The Growth of Alternative Dispute Resolution in American Law, 1965–1995, at 21 (undated) *available at* http://webuser.bus.umich.edu/organizations/smo/protected/resources/morrill.pdf; *see* David J. Saari, *The 1980 Dispute Resolution Act*, 25 Am. Behav. Sci. 107 (1981).

16. MORRILL, *supra* note 15, at 21–22.

17. *Id.* at 21–22.

18. *Id.* at 22.

19. *Id.*

20. *Id.* at 21.

21. *Id.* at 22.

22. *Id.*

23. *Id.*

tion, social work, and counseling backgrounds.[24] Lacking in professional cohesiveness, legal professionals were concerned that ADR would not only encroach on their livelihoods but would also create a system of second-rate justice.[25]

Fortunately, the need for mediation in divorce and child custody cases provided a focal point around which the movement could organize. Domestic relations courts coined the term "family mediators" for ADR practitioners and created an established role for them within the courts.[26] The increased usage of family mediators in the divorce context prompted organized professionalization of ADR with developing technical and normative boundaries.[27] Two key codifications of normative standards in family mediation spurred the organization of ADR as a profession: the American Bar Association's Family Law Standards of Practice for Lawyer Mediators in Family Disputes (1984) ("1984 ABA Standards") and the Academy of Family and Conciliation Courts' ("AFCC") 1984 Model Standards of Practice for Family and Divorce Mediation ("1984 AFCC Model Standards").[28] Several people worked on both the 1984 AFCC Model Standards and the 1984 ABA Standards, which ensured a certain basic compatibility and consistency between the two.[29]

"The 1984 ABA Standards were primarily developed for lawyers who wished to be mediators."[30] At that time, many lawyers worried that being a mediator was incompatible with the governing standards of professional responsibility for lawyers.[31] The 1984 ABA Standards eased that concern by defining how lawyers could serve as family mediators within the ethical guidelines of the legal profession.[32]

These codifications laid a foundation for more general mediation standards.[33] Dispute resolution organizations such as the Idaho Mediation Association (IMA) promulgated their own standards of practice modeled after these standards.[34] Additionally, the newly founded organization and professionalization of ADR prompted a push for university ADR training. In 1980, George Mason University created the Center for Conflict Analysis and Resolution; by 1988, it admitted its

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24. *Id.*
25. *Id.*
26. *Id.* at 24.
27. *Id.*
28. *See* MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (2000), at i, *available at* http://www.afccnet.org/pdfs/modelstandards.pdf.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. MORRILL, *supra* note 15, at 25.
34. Telephone Interview with Bayard Gregory, Chair of the Credentialing Committee, Idaho Mediation Ass'n (Aug. 14, 2009) (stating that IMA promulgated its standards in 1987).

first class of conflict analysis and resolution doctoral students.[35] By the mid 1990s, over thirty ADR degree programs were available in the United States.[36] National organizations joined forces and developed the Model Standards of Conduct for Mediators in 1994.[37]

Meanwhile, judicial usage of ADR techniques increased rapidly. In 1983, Federal Rule of Civil Procedure 16 was amended to include settlement as one of the proper topics of discussion at pre-trial conferences.[38] This landmark change afforded federal judges express authority to facilitate settlements. Over the course of the next several years, states continued the progression of judicial ADR by enacting statutes further increasing judicial authority to mandate ADR.[39] In 1993, FRCP 16 was expanded to include "settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule."[40] The body of ADR law continued to expand and evolve into the late 1990s.

In 1990, Congress enacted the Civil Justice Reform Act[41] mandating that each United States District Court implement a civil justice expense and delay reduction plan that would "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes."[42] One of the principles to be considered in each plan was the referral of appropriate cases to alternative dispute resolution programs such as arbitration, mediation, and judicial settlement conferences.

The implementation of ADR procedures also spread to federal agencies with the adoption of the Administrative Dispute Resolution

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35. George Mason University, Entrepreneurship and the Institute for Conflict Analysis and Resolution, http://entrepreneurship.gmu.edu/icar.html (last visited Jan. 31, 2010).

36. MORRILL, *supra* note 15, at 26.

37. MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), *available at* http://www.abanet.org/dispute/docments/model_standards_conduct_april2007.pdf. The original standards, which came out in 1994, and the 2005 revised vision of the Model Standards of Conduct were the result of the joint efforts by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution (the merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network, and the Society of Professionals in Dispute Resolution (SPIDR)). *Id.* at introductory cmt.

38. MORRILL, *supra* note 15, at 26; FED. R. CIV. P. 16(c)(1).

39. MORRILL, *supra* note 15, at 26–27.

40. FED. R. CIV. P. 16(c)(2)(I).

41. Pub. L. No. 101-650, 104 Stat. 5089-98 (codified in part at 28 U.S.C. §§ 471-482 (1994)). "The Civil Justice Reform Act . . . was enacted in response to a perception that civil litigation in the federal courts costs too much and takes too long, limiting the public's access to justice." JUDICIAL CONFERENCE OF THE U.S., THE CIVIL JUSTICE REFORM ACT OF 1990 FINAL REPORT 9 (1997), *available at* http://www.uscourts.gov/ library/cjra/cjrafin.pdf.

42. 28 U.S.C. § 471 (1994).

Act,[43] enacted in 1990, which required each federal agency to adopt policies regarding the use of ADR.[44] The Administrative Dispute Resolution Act of 1996,[45] a reenactment of the 1990 Act, granted agencies the authority to utilize ADR in controversies relating to administrative programs, if the parties agreed to such a proceeding.[46] Passage of the Alternative Dispute Resolution Act of 1998[47] expanded ADR utility throughout the federal district court system by authorizing ADR for civil actions.[48]

As the use of mediation expanded, courts, administrators, disputants, the mediation community, and the legal community began looking for some quality assurances.[49] Discussion of credentialing raised two questions: (1) whether the measures adopted would in fact provide the necessary quality assurances, and (2) whether the assurances created an unnecessary barrier to the field for mediators and disputants.[50] Those opposing certification claimed that restricting the field would erect barriers to a process which had its origin in creative and innovative problem-solving.[51] They argued that certification and li-

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43. Pub. L. No. 101-552, 104 Stat. 2736 (1990) (codified in scattered sections of 5, 9, 28, 29, 31, and 41 U.S.C.).

44. U.S. Equal Employment Opportunity Commission, Federal Sector Alternative Dispute Resolution, http://www.eeoc.gov/federal/adr/index.html (last visited Jan. 31, 2010).

45. Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (codified in scattered sections of 5, 10, 28, 29, 31, and 41 U.S.C.).

46. 5 U.S.C. § 572(a) (2000).

47. Administrative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (codified in scattered sections of 28 U.S.C.).

48. *See* 28 U.S.C. § 651(b) (2000).

49. *See, e.g.*, Judith M. Filner, *New Trends: Will Mediator Credentialing Assure Quality and Competency?*, DISP. RESOL. MAG., Fall 2001, at 3 (discussing the demand for mediator credentialing); Amy J. Glass, Dale Ann Iverson & Deborah Boersman Zondervan, *Proposed Court Rules Introduce Mediation-Specific Qualifications for Neutrals Serving in Court-Annexed ADR Programs*, 79 MICH. B.J. 510, 510 (2000) ("Concerns have been raised that mediators . . . may be ill equipped to mediate disputes . . . ."); Bobby Marzine Harges, *Mediator Qualifications: The Trend Toward Professionalization*, 1997 BYU L. REV. 687, 687 (1997) ("Commentators, state legislatures, courts and others in the ADR field are asking . . . about the qualifications a person should possess before he may mediate."); Teresa V. Carey, *Credentialing for Mediators—To Be or Not To Be?*, 30 U.S.F. L. REV. 635, 636 (1996) ("[C]ertification and established standards are necessary to encourage the disputants' and the courts' confidence in the process."); Margaret Shaw, *Selection, Training, and Qualification of Neutrals, in* THE NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH 156, 157 (Susan Keilitz ed. 1994) (noting that when courts begin to encourage, promote and order mediation, then the issue of quality control looms larger); Paul F. Devine, *Mediator Qualifications: Are Ethical Standards Enough to Protect the Client?*, 12 ST. LOUIS U. PUB. L. REV. 187 (1993) (discussing the lack of consumer protection and courts concerns); Craig A. McEwen, *Competence and Quality*, 9 NEGOTIATION J. 317 (1993) (discussing the need for competent mediators).

50. See W. Lee Dobbins, The Debate over Mediator Qualifications: Can They Satisfy the Growing Need to Measure Competence Without Barring Entry into the Market?, 7 U. FLA. J.L. & PUB. POL'Y 95, 97 (1995).

51. *Id.*

censing would create a "homogenous group," eliminating diversity and scuttling the innovation and flexibility that has contributed so mightily to its growth and success.[52] Most jurisdictions addressed the issue of competence in part by establishing minimum qualifications for certification of mediators.

In 1987, the Board of Directors of the Society of Professionals in Dispute Resolution (SPIDR) established the Commission on Qualifications to examine qualifications for mediators and arbitrators. In 1989, the SPIDR Commission on Qualifications issued its first report, *Qualifying Neutrals: The Basic Principles*, establishing three basic principles or recommendations:

> 1. That no single entity, rather a variety of organizations should establish qualifications for neutrals;
>
> 2. That the greater the degree of choice the parties have over the dispute resolution process, program or neutral, the less mandatory the qualification requirements should be; and
>
> 3. That qualification criteria should be based on performance, rather than paper credentials.[53]

In 1995, the SPIDR Commission issued its second report, *Ensuring Competence and Quality in Dispute Resolution Practice*, finding that "[e]nsuring competence and quality in dispute resolution practice is a shared responsibility of practitioners, their associations, programs, trainers, parties, legislators, and other policymakers."[54]

Over the last two decades, most states and federal courts have established qualification requirements for their mediation rosters.[55] Some states require mediators faced with cases beyond their expertise to decline the cases or seek technical assistance.[56] Today six states, Washington D.C., and most federal district courts require that mediators in civil cases be licensed attorneys.[57] Of these states, five require

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52. *Id.*

53. SPIDR COMM'N ON QUALIFICATIONS, QUALIFYING NEUTRALS: THE BASIC PRINCIPLES 3 (1989).

54. SPIDR COMM'N ON QUALIFICATIONS, ENSURING COMPETENCE AND QUALITY IN DISPUTE RESOLUTION PRACTICE 19 (1995) (suggesting a seven step framework for developing qualification requirements for mediation programs); *See also* Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 701, 707 (1994) ("Although competence of the mediator is a goal, it is relatively difficult to define.").

55. Robert J. Niemic, Donna Stienstra & Randall E. Ravitz, Guide to Judicial Management of Cases in ADR 68 (2001).

56. ALA. CT. R. STANDARD 1(a)(3); FLA. STAT. ANN. §10.640 (West 2009).

57. The states include: Delaware (DEL. CODE ANN. tit. 6, §7708(b) (1995)); Idaho (IDAHO R. CIV. P. 16 (k)(13)(A)); Indiana, excluding mediators in administrative proceedings (IND. ADR R. 2.5(A)(2); IND. CODE § 4-21.5-3.5-8); Louisiana, but after January 1,

attorneys to have five years of experience prior to certification or qualification as mediators.[58] The efficacy of these measures is debatable. Some argue strenuously that professional and academic credentials are not the most reliable criteria for "good mediation."[59]

Acceptance of ADR as a professional field flourished through the 1980s and 1990s. The increased use of mediation remedied the distaste for the growing formality of arbitration and offered a cost-effective, satisfying alternative to the traditional adversarial system for resolving disputes. As recounted in *CPA Journal* concerning the adoption of the Alternative Dispute Resolution Act of 1998, "ADR, when properly accepted, practiced, and administered, can not only save time and money and reduce court burdens, but also 'provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements.'"[60]

ADR practices in other jurisdictions influenced the nature and development of ADR in Idaho, especially in the areas of community-based programs and judicially sanctioned dispute resolution practices in both family and civil matters. When looking at the history of ADR in Idaho, it is best done through examining ADR in several spheres: first, the early years—Idaho Mediation Association (IMA), Peaceful Settlements, and Sounding Board—focusing on community mediation, training, and creating an interdisciplinary movement; second, the Governor's Task Force on ADR, which systematically inventoried ADR in Idaho in the early 1990s and made recommendations for expansion; third, the development of state court rules governing credentialing and expansion of the use of ADR in the state civil system; fourth, the implementation and outgrowth of rules and procedures

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1998 has a "grandfather clause" (LA. REV. STAT. ANN. § 9:4106(A) (1999)); Montana, but only at the appellate level if parties do not select their own mediator (MONT. R. APP. P. 7(4)(b)-(e)); South Carolina (S.C. ADR R. 15(a)); and Washington D.C., where civil court mediators must be licensed attorneys (D.C. FED. CT. R. 84.3(b)). *See* ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS (1996) (surveying the rules, including some ethical requirements, of current ADR and settlement procedures in the 94 federal district courts); *see also* NIEMIC ET AL., *supra* note 55, at 74 (noting that "[i]n nearly all federal courts, membership on ADR panels requires a law degree and substantial legal experience.").

58. Delaware (DEL. CODE ANN. tit. 6, §7708(b) (1995)); Idaho (IDAHO R. CIV. P. 16(k)(A)(b)); Louisiana, including a grandfather clause for those who either had mediated 25 disputes or had 500 hours of experience in dispute resolution prior to January 1, 1998 (LA. REV. STAT. ANN. § 9:4106(A)(1)(a) (1999)); and Montana, applying the rule to appellate court mediation proceedings if parties do not select their own mediator (MONT. R. APP. P. 4(d)).

59. *See* James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 48 (1991).

60. Simeon H. Baum, *The ADR Act of 1998 Offers Opportunities for Accountants*, CPA JOURNAL 72 (March 1999) (citing Pub. L. No. 105-315, § 2, 112 Stat. 2993 (codified at 28 U.S.C. § 651 (1998)).

covering civil and criminal mediation; and lastly, the federal courts' ADR programs in the District of Idaho and the Ninth Circuit. The two most significant influences were Peaceful Settlements[61] and the adoption of Idaho Rule of Civil Procedure 16(k) establishing procedures and rules for civil mediation. From these two landmark events, ADR in the civil arena in Idaho flowed and evolved.

III. COMMUNITY-BASED ADR EFFORTS IN IDAHO

A humble and heartfelt commitment to peace spurred the origins of conflict management in Idaho.[62] Idahoans learned about the national trends, attended trainings and conferences, and returned home energized and eager to share their knowledge with others. The early pioneers were few in number, came from numerous disciplines, and focused primarily on community and domestic disputes. The cadre of movers and shakers were friends, or became friends, as their paths overlapped.

These pioneers created the Idaho Mediation Association (IMA), advocated and coordinated the Peaceful Settlement Conferences, and built a community mediation center called Sounding Board. Idaho Mediation Association provided the structural umbrella, Peaceful Settlements served as the flame which ignited and united the ADR community, and Sounding Board provided the outlet for service and practice. From these efforts came the Governor's Task Force on Dispute Resolution, Idaho Court Rules governing civil mediation, the experimental efforts at ADR in different forums, and the strong ADR community we currently have in this state.

A. Idaho Mediation Association

In 1983, three social workers—Patricia Crete Brown,[63] Dick Butcher, and Paul Ives—signed IMA's articles of incorporation.[64] The

61. Hildegarde (Mauzerall) Ayer stated, "[Peaceful Settlements] can be accurately credited with introducing and instituting alternative dispute resolution across the state—by a small (and steadily increasing) group of very committed, very intense people." E-mail from Hildegarde (Mauzerall) Ayer, to author (August 14, 2009) (on file with author).

62. BARBARA KNUDSON, PEACEFUL SETTLEMENTS FOUNDATION, A STORY OF THE HISTORY OF PEACEFUL SETTLEMENTS 2 (1995). "There was no party with money to promote the original idea of the wise people Marilyn [Shuler] and Richard [Mabbutt]; there was no single organization to support the efforts; there was no single agenda; this was an idea born out of love and concern." *Id.* at 4.

63. Crete Brown, former senior investigator with the Idaho Human Rights Commission, is the person most often cited as one of the major forces behind the creation of, and recruitment for, IMA.

organization's goal was to promote "the growth and development of non-adversarial and participatory forms of dispute management" in Idaho.[65] IMA was formed as a nonprofit and interdisciplinary organization committed to resolving disputes in a less adversarial approach. In the early years, it was a "fledgling"[66] organization consisting of a handful of people who saw its potential and created a structure from which to explore and promote their percolating ideas.

Early on, IMA assumed responsibility for the quality control aspect of dispute resolution in Idaho by promoting mediation through education and professional development. In 1987, IMA, borrowing from the 1984 AFCC Model Standards, developed standards of practice.[67] In 1993, its board of directors undertook a significant project to advance the practice of mediation in this state and ultimately in the nation. They created the credentialing committee, chaired by Bayard Gregory, which developed a professional certification program, a grievance procedure, and standards of practice.[68] Since then, Washington, Montana, and New York have each adopted IMA's certification process.[69] IMA awarded its first Certified Professional Mediator designations in 1994.[70] To date, over 272 people have been certified as Certified Professional Mediators with IMA.[71] IMA has continued to maintain its interdisciplinary focus and remains on the cutting edge of mediation issues in Idaho.

IMA grew with limited resources and a cadre of volunteers. As an example of their commitment to the organization, Mary Daley, a volunteer staff member, moved the IMA offices into a room in her home in 1995. IMA continued to be housed in Daley's home for over seven years. Nancy Daniels, IMA's first paid staff member,[72] continued to perform IMA's administrative work out of Daley's home.[73] In August 1999, IMA honored Daley by awarding her the first Crete Brown Founder's Award.[74]

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64. *See* Articles of Incorporation of Idaho Mediation Association (Oct. 13, 1983), *available at* http://www.sos.idaho.gov/tiffpilot/tiffpilot.exe?FN=\\sosimg\corp$/%2F06062002%2FCORPARTI02157154245.tif.

65. IMA, Inc., About IMA, http://www.idahomediation.org/about.html (last visited Jan. 2, 2010).

66. Telephone Interview with Beverly Barker, Consumer Assistance Supervisor, Consumer Assistance Pub. Utilities Comm'n (Aug. 23, 2009)(on file with author).

67. Telephone Interview with Bayard Gregory, *supra* note 34.

68. *Id.*

69. IMA, Inc., History, http://www.idahomediation.org/about-ima/history (last visited Jan. 31, 2010).

70. *Id. See also* IMA, INC., CERTIFICATION OF PROFESSIONAL MEDIATORS, FREQUENTLY ASKED QUESTIONS, *available at* http://www.idahomediation.org/wp-content/uploads/faq.pdf.

71. IMA, Inc., *supra* note 69.

72. Telephone Interview with Bayard Gregory, *supra* note 34.

73. Telephone Interview with Mary Daley, Volunteer, IMA, (July 29, 2009).

74. *Id.*

B. Peaceful Settlements

Idaho Governor Cecil D. Andrus supported ADR in his comments to Peaceful Settlements:

> I enthusiastically endorse the concept of settling disputes through peaceful negotiations and give and take. The time is past where we can afford as a society to suffer the time, expense and controversy of settling all disputes in front of judges. I believe that, given the chance, reasonable people can find other more productive ways of arriving at common ground. Peaceful settlements are not only possible, but highly desirable.[75]

A vision for a more peaceful future, combined with countless volunteer hours, made Peaceful Settlements what it was—"an idea that sparked the flame of passion in the hearts of many different people throughout our entire beautiful state."[76]

Two of the early pioneers of conflict management were Richard Mabbutt,[77] Director of the Research Center at Boise State University (BSU), and Marilyn Shuler,[78] Executive Director of the Idaho Human Rights Commission. In 1984, the two met for coffee to discuss conflict resolution and to encourage the use of ADR processes in Idaho. Equipped with Mabbutt's research on the cost of conflict and Shuler's experience with the successful use of ADR processes at the Idaho Human Rights Commission and the Equal Employment Opportunity Commission (EEOC),[79] the two met with a variety of state and national leaders including Governor Cecil D. Andrus, President Pro Tem of the Senate Phil Batt, State Superintendent of Public Instruction Jerry Evans, University of Idaho College of Law Dean Sheldon Vincenti, and ABA President Eugene Thomas.[80] Mabbutt and Shuler recognized the diversity of Idaho and sought to find peaceful ways to resolve conflict while honoring differences.[81] Mabbutt and Shuler en-

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75. *Families in Transition*, PEACEFUL SETTLEMENTS III (Idaho L. Found., Boise, Idaho), Nov. 1989 at 1.

76. KNUDSON, *supra* note 62, at 4.

77. E-mail from Marilyn Shuler, former Executive Dir., Idaho Human Rights Comm'n, to author (Aug. 20, 2009) (on file with author).

78. *Id.*; Telephone Interview with Marilyn Shuler, *supra* note 4.

79. Eleanor Holmes Norton was appointed by President Jimmy Carter in 1977 to chair the EEOC. During her four years with the EEOC, she advocated the use of no-fault settlements for civil rights cases and trained her staff and other human rights advocates in conflict resolution skills. Using these techniques, the Idaho Human Rights Commission was able to reduce its enormous backlog and successfully resolve many of its cases. Telephone Interview with Marilyn Shuler, *supra* note 4.

80. E-mail from Marilyn Shuler to author, *supra* note 77.

81. KNUDSON, *supra* note 62, at 1.

couraged Crete Brown and Barbara Knudson to attend a peacemaker's conference in St. Louis, Missouri. Brown and Knudson were surprised to find the Missouri conference attendees fighting (ironically) over ownership of the title "conflict managers."[82] That experience convinced Brown, Knudson, Mabbutt, and Shuler that they wanted to create "a conflict-managing pie baking[83] so big that everyone together could bake as many conflict-managing pies as possible throughout the State."[84] They named their gathering "Peaceful Settlements."[85]

As Marilyn Shuler noted, the most important aspect of Peaceful Settlements was the process of educating themselves, working together, strategizing, and persuading the power structures—legal, governmental, and community-based—of the value of settling conflicts in a more productive and peaceful manner.[86] These early "missionaries"[87] worked tirelessly to convince others of the merits of this new form of dispute resolution. Knowing that people in conflict need to move forward and are best served if they are able to design their own settlements, Peaceful Settlements advocated an approach which asked the disputants to move past finding fault and ascribing blame to one side. Shuler described that period of new advocacy as a "special time . . . . We kind of stumbled into it and were successful."[88] Their commitment carried their dream into fruition and served as the framework for much of the subsequent ADR work in Idaho.

Peaceful Settlements ultimately held a series of conferences in 1985, 1987, 1990, 1992, and 1995 that covered a wide range of topics relating to conflict resolution. The first conference, in the spring of 1985,[89] attracted almost five hundred people to Boise's Red Lion Inn "to learn about ways of honoring and dealing with differences."[90] The conference served as the catalyst which gave a framework to people's ideas and energized and expanded IMA's membership. As Marilyn Shuler noted, "You could almost feel the power pulsing in the room

82. *Id.* at 2.

83. The pie baking analogy comes from the interest-based approach to conflict resolution whereby one attempts to expand the resources and options available to the disputants. *See* Jonathan R. Cohen, *Adversaries? Partners? How About Counterparts? On Metaphors in the Practice and Teaching of Negotiation and Dispute Resolution*, 20 CONFLICT RESOL. Q. 433, 433 (2003).

84. KNUDSON, *supra* note 62, at 2. The turf wars over who owns the title of conflict managers will continue to be significant in the history of ADR in Idaho, especially as the courts begin to create educational, background-based credential requirements before candidates can be listed on the court's roster of approved civil mediators.

85. *Id.*

86. Telephone Interview with Marilyn Shuler, *supra* note 4.

87. *Id.*

88. *Id.*

89. KNUDSON, *supra* note 62, at 2 (noting that it was appropriate to have the first conference in spring as it is the season of "planting and new beginnings.").

90. *Id.*

when Roger Fisher opened the conference."[91] One person said the conference "took a concept and made it more of a reality."[92] By providing its participants with a smorgasbord of what was possible, Peaceful Settlements and its conferences made the whole notion of ADR more concrete.[93] Having learned about other options for resolving conflict, the ADR community wanted to learn skills. Thus, the Second Conference held in 1987 focused on skills building.[94]

"Peaceful Settlements III: Families in Transition," was a statewide, cross-disciplinary conference.[95] According to Judge Patricia Young,[96] chair of the conference, the Idaho Supreme Court's 1989 decision in *Stockwell v. Stockwell*[97] served as the impetus for the conference and legitimized the use of mediation in family law matters.[98]

The 1990 conference attracted a wide range of presenters from a variety of disciplines—law professors, social workers, counselors, community dispute resolution professionals, and others. Some of the noted presenters included Randy Lowry, Professor of Law and Director of the Straus Institute for Dispute Resolution at the Pepperdine School of Law and well-known mediation trainer;[99] Judith Wallerstein, noted researcher on the long-term effects of divorce;[100] and John Haynes,[101] founder of the Academy of Family Mediators and noted trainer on the effects of divorce on children.[102] The family focus continued in the fourth conference held in 1992, the theme of which was education and children at risk.[103]

Peaceful Settlements' last hurrah was a celebration of its work over the previous decade. On October 10–14, 1995, people came together to "celebrate ten years of learning, experimenting with, and

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91. E-mail from Marilyn Shuler to author, *supra* note 77.

92. Telephone Interview with Beverly Barker, *supra* note 66.

93. *Id.*

94. KNUDSON, *supra* note 62, at 3.

95. *Id.*

96. Senior Magistrate Judge in the Fourth Judicial District of Idaho.

97. 116 Idaho 297, 301, 775 P.2d 611, 615 (1989) (ordering mediation for the first time by the Idaho Supreme Court in a family law case).

98. Telephone Interview with Patricia Young, Senior Magistrate Court Judge, Fourth Judicial Dist. of Idaho (Sept. 6, 2009).

99. KNUDSON, *supra* note 62, at 3. *See generally* About Randy Lowry, http://www.mediate.com/library/pg93.cfm (last visited Jan. 2, 2010).

100. *See generally* Judith Wallerstein, http://www.divorceinfo.com/judith wallerstein.htm (last visited Jan. 2, 2010) (stating that Wallerstein is a psychologist and researcher who devoted twenty-five years to the study of the long-term effects of divorce).

101. *See* Carl Schneider, *The Works of John Haynes*, MEDIATION MATTERS, http://www.mediationmatters.com/Resources/res-haynes.htm (last visited Jan. 2, 2010).

102. *Families in Transition*, *supra* note 75, at 2.

103. GOVERNOR'S TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION, REPORT TO GOVERNOR CECIL D. ANDRUS app II, 10 (1993) (on file with author) [hereinafter TASK FORCE REPORT]; KNUDSON, *supra* note 62, at 4 (Hildegarde (Mauzerall) Ayer coordinated the conference).

practicing peaceful ways to resolve conflicts."[104] Randy Lowry, by then a true friend to the ADR community in Idaho, returned. Featured speaker Thomas Crum, author of *The Magic of Conflict*, taught conflict skills based on Aikido.[105] Barbara Knudson wrote *A Story of the History of Peaceful Settlements*, and Sara LaRivier wrote a song to celebrate Peaceful Settlements. People from all walks of life—community mediators, the Governor, and others—came to honor the conflict resolution skills they had learned and to celebrate.

After the 1995 conference, Peaceful Settlements was incorporated as a non-profit. Within the board of directors, however, no one was willing to take on organizing another Peaceful Settlements Conference.[106] Although the group received support from Dean Bob Sims of BSU's College of Social Sciences and Public Affairs, the volunteer group could not sustain itself and voted to dissolve within a year of its incorporation.[107]

Peaceful Settlements served as the wellspring for Idaho's ADR movement.[108] As aptly stated in the history of the movement:

> From meager beginnings came expanded membership in the Idaho Mediation Association, the development of the Sounding Board . . . more use of mediation in the courts, in the churches, in the natural resource fields, in businesses, and in the schools. Lawyers, judges, counselors, psychologists, teachers, students, administrators, employees, ministers, volunteers, and many others became trained to be managers of conflict.[109]

The conferences, however, were too much work for volunteers alone to sustain.[110] A more institutional approach was needed.

C. Sounding Board

Sounding Board, the first community dispute resolution program in Idaho,[111] was a direct outgrowth of the first Peaceful Settlements

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104. PEACEFUL SETTLEMENTS V (Idaho L. Found., Boise, Idaho), 1995 at 1 (on file with author).

105. KNUDSON, *supra* note 62, at 4; *see generally* THOMAS CRUM, THE MAGIC OF CONFLICT (Simon and Schuster 1987).

106. E-mail from Patricia Young, Senior Magistrate Court Judge, Fourth Judicial Dist. of Idaho, to author (Aug. 13, 2009) (on file with author).

107. *Id.* (noting that in January 1998, Peaceful Settlements dissolved and donated its remaining funds to the Idaho Community Foundation).

108. E-mail from Hildegarde (Mauzerall) Ayer to author (Aug. 13, 2009) (on file with author).

109. KNUDSON, *supra* note 62, at 5.

110. *See* E-mail from Hildegarde Ayer to author, *supra* note 108; E-mail from Patricia Young to author, *supra* note 106.

Conference.[112] At the first Peaceful Settlements Conference in April 1985, Raymond Shonholtz, the attorney who founded the Community Board of San Francisco, introduced participants to community mediation; his presentation helped spawn Sounding Board, a Boise-based program which began the very same year.[113] Patterning itself after the San Francisco program, a volunteer-based community group performed a needs assessment, incorporated, and wrote by-laws for Sounding Board. The group provided mediation services and training to individuals, community groups, businesses, and area schools.[114] The first Sounding Board mediation occurred in May 1986.[115] Sounding Board later accepted referrals compatible with its community-based mission from the magistrate judges in the Fourth District.[116]

There was significant overlap of active members in IMA and Sounding Board;[117] the energy from each organization fed the other. IMA sought to ensure providers were adequately trained and services were of high quality. A symbiotic relationship existed between them—the energy and enthusiasm from the community dispute resolution members needed the skills and legitimacy provided by IMA. As Victoria Hawley noted, "There weren't many of us, and we were friends and mutually supportive regardless of the mediation application."[118] The synergism worked to everyone's benefit—all Sounding Board volunteers were required to have a basic level of skill, thus providing a degree of quality assurance for all dispute resolution providers.[119] Unfortunately, although Sounding Board helped reconcile many neighbor-to-neighbor disputes, its inability to support itself financially caused its initial demise in 1995.[120]

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111. *See* TASK FORCE REPORT, *supra* note 103, app. II, at 10 (noting that Sounding Board's first officers and directors were elected in April 1986). Mary Daley, Bayard Gregory, Beverly Barker, Robyn Dane, and Marie Meyers founded Sounding Board. Telephone Interview with Bayard Gregory, *supra* note 34; Telephone Interview with Beverly Barker, *supra* note 66.

112. TASK FORCE REPORT, *supra* note 103, app. II, at 10.

113. *Id.*

114. *Id.*

115. *Id.*

116. Kendra Martinez, *Small-Claims Conflicts to Go before Idaho Student Mediators*, DESERET NEWS (Salt Lake City), Nov. 30, 1998, at A10, *available at* http://deseretnews.com/article/665829.

117. Telephone Interview with Beverly Barker, *supra* note 66.

118. E-mail from Victoria Hawley, mediator, member of the Governor's Task Force, to author (Aug. 23, 2009) (on file with author).

119. *Id.*

120. Telephone Interview with Mary Daley, *supra* note 73. Within two weeks of Sounding Board's dissolution, Randall Reese, then an intern in BSU's Dispute Resolution program, opened the new Sounding Board in the Communication Department at BSU. E-mail from Randall Reese, IMA President, to author (Sept. 6, 2009). Reese ran Sounding Board as a student organization for three years. *Id.* When he began graduate school, he moved Sounding Board off campus as a private non-profit using dispute resolution stu-

Today, we who work in the conflict management field owe a debt of gratitude to the early pioneers who worked to create the Idaho Mediation Association, Peaceful Settlements, and Sounding Board. Their contribution to ADR services, structures, and policies opened the door and guided us to where we are today.

IV. ADR IN IDAHO

While Peaceful Settlements served as a mobilizing force for those interested in community and family dispute resolution, advancements were also taking place within the judicial and executive branches of the State of Idaho. In particular, the Governor's Task Force on ADR served as the catalyst for numerous state-sanctioned and court-related efforts.

A. Governor's Task Force: Inventory, Training, and Recommendations

In response to a request from people interested in promoting ADR in Idaho,[121] Governor Cecil D. Andrus issued Executive Order 92-7 on May 18, 1992, to "provide a structure to coordinate and foster the development and use of alternative dispute resolution"[122] and to resolve controversy within judicial, administrative, and other adversarial proceedings involving Idahoans.[123] Task Force members included, among others, Supreme Court Justices Linda Copple Trout and Cathy R. Silak, as well as many other judges, attorneys, educators, corporate executives, professional counselors, and mediators.[124] The Task Force met for one year beginning in September 1992. One of

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dents as interns. *Id.* Reese pays for the phone and incidentals and BSU provides rooms to conduct the community mediations. *Id.*

121. Many of these people had been active in IMA, Peaceful Settlements, and Sounding Board. *See, e.g.*, KNUDSON, *supra* note 62; IMA, Inc., http://idahomediation.org (last visited Feb. 3, 2010); Telephone Interview with Mary Daley, *supra* note 73.

122. Exec. Order No. 92-7, 1992 Idaho Sess. Laws 1594.

123. The people who were active in ADR came "to the conclusion that the many uncoordinated ADR programs in Idaho needed a single vision and leadership if they were to reach their full potential." TASK FORCE REPORT, *supra* note 103, at 1.

124. Members of the Governor's Task Force included Laura Arment (Associate General Counsel, Micron Semiconductor, Inc.), Beverly Barker (Director, Consumer Assistance, Public Utilities Commission), Jonathan Carter (Special Assistant, Office of the Governor), J. Ray Durtchi (retired judge, attorney, Elam Burke & Boyd), Jim Gillespie (attorney), Joel Hamilton (professor, University of Idaho Martin Institute for Peace Studies), Jim Hansen (state representative, Director of Conflict Management Services, BSU), Victoria Hawley (mediator), Jim Herndon (District Judge, Seventh Judicial District), David Kerrick (state senator), Barbara Knudson-Fields (mediator), John J. McMahon (Chief Deputy, Office of the Attorney General), R. Lorraine Pearlman (Family Support Administrator for Ada County Prosecutor's Office, mediator), Lee Scharf (mediator, writer), Cathy Silak (Justice, Idaho Supreme Court), Marilyn Shuler (Director, Idaho Human Rights Commission), Bob Werth (mediator, attorney) and Patricia Young (Magistrate Court Judge, Fourth Judicial District). *Id.* at Members of the Governor's Task Force on Alternative Dispute Resolution.

its first tasks was to inventory existing ADR programs in Idaho.[125] The Task Force also sponsored major conferences in October 1992 and October 1993. It ultimately compiled its findings and recommendations in a report submitted to Governor Cecil D. Andrus.[126]

1. First Task: Inventory Existing Activities

The first job of the Task Force was to compile an inventory of conflict resolution activities in Idaho. Joel Hamilton, then Director of the University of Idaho Martin Institute for Peace Studies and Conflict Resolution, agreed to spearhead this task. His eleven-page report covered past and present conflict resolution activities in Idaho.[127] It broke the activities into various categories, including ADR as intervention in legal proceedings;[128] ADR in education issues;[129] ADR in resource conflicts;[130] ADR and other agency administrative procedures;[131] university conflict resolution programs;[132] and programs providing outreach, mediation services, and training.[133] Several projects in Hamilton's inventory are noteworthy because they served as the building blocks for civil conflict management programs developed in both the state and federal judicial systems in Idaho.

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125. Specifically the Executive Order stated, "The Task Force will provide a structure to coordinate and foster the development and use of alternative dispute resolution in Idaho and on a regional, cross-border, or intergovernmental basis." Exec. Order No. 92-7, 1992 Idaho Sess. Laws 1594.

126. TASK FORCE REPORT, *supra* note 103, at 1–2.

127. *Id.* at 2. Professor Hamilton specifically stated that "Because the field is so diverse, we make no pretense at completeness, but rather intend to indicate the nature and variety of conflict resolution activities which are developing in Idaho." *Id.* app. II, at 1.

128. *Id.* app. II, at 1–3 (including activities such as Settlement Week; Idaho Supreme Court, Mediation in Child Custody and Visitation Cases; Snake River Adjudication; and Farm Foreclosure Review Board).

129. *Id.* app. II, at 3–4 (including issues and activities such as public school contract negotiations, the Department of Education, special education issues, and conflict resolution in the classroom and on the playground).

130. *Id.* app. II, at 4–6 (listing conflicts such as those surrounding the endangered species classification of salmon and Clearwater Forest Wilderness negotiations).

131. *Id.* app. II, at 6–7 (stating that the list of activities in this category is "long and diverse").

132. *Id.* app. II at 7–9 (encompassing programs such as the University of Idaho Martin Institute for Peace Studies and Conflict Resolution, Boise State Conflict Management Services, University of Idaho Forest Policy Analysis Group, and Idaho Agricultural Extension Service).

133. *Id.* app. II, at 9–11 (listing organizations such as Peaceful Settlements, Sounding Board, Idaho Mediation Association, other organizations with an interest in ADR, and other firms and individuals providing counseling and conflict resolution services).

a. State Court Settlement Weeks

In October 1988, Judge Jim Herndon, of Blackfoot, Idaho, sponsored Idaho's first Settlement Week.[134] The success in Blackfoot also spawned programs in other districts. Soon afterwards, the judiciary used the Blackfoot model to present a workshop for district judges on conducting settlement weeks with local lawyers.[135] In May 1989, Jack McMahon, Chief Deputy Attorney General,[136] replicated the Blackfoot experience in the Fourth District.[137] Both the location of the mediations and the quality of the mediators made Settlement Week in Boise a success. The mediations were held in the Capitol after the legislature had vacated the premises, leaving numerous empty offices on the third and fourth floors. A large number of deputy attorneys general and lawyers from top private law firms served as mediators.[138]

Other districts—the First, Second, Third, and Seventh—also offered Settlement Weeks. Districts which used senior members of the bar, closed the courthouse for the week, assigned appropriate cases (ripe for mediation), and provided training for the mediators had the most success.[139] From the experience of all the districts, it became evident that holding settlement conferences once a year for a week was not sufficient.

b. The Attorney General's Pro Bono Mediation Program

The successful Settlement Week programs served as a model for the Pro Bono Mediation Program which began in Boise in May 1992. On May 1, 1992, Attorney General Larry EchoHawk announced a pro bono civil mediation program modeled on the Settlement Week programs like the Attorney General's efforts in the Fourth Judicial District in conjunction with the bench and bar. Under the pro bono mediation program, mediators were available year-round to assist with non-domestic cases on the civil calendars of both district and magistrate courts.[140] Chief Deputy Jack McMahon oversaw the implementation of this program which included sixty trained mediators, thirty-

134. *Id.* at 14.

135. *Id.*

136. Jack McMahon served as the Chief Deputy Attorney General from 1984–1994. McMahon was Bar Commissioner from July 1989 until July 1992, and was President of the Idaho Bar in 1991–1992. He also coordinated the Settlement Weeks in Boise, Idaho.

137. According to Jack McMahon, the Boise bar's enthusiastic response to Carl Burke's talk about his participation in a mediation in Chicago made McMahon believe that Boise was ready for mediation. E-mail from Jack McMahon, former Chief Deputy Att'y Gen., to author (July 16, 2009) (on file with author).

138. *Id.*

139. TASK FORCE REPORT, *supra* note 103, at 14.

140. Letter from Jack McMahon, Chief Deputy Att'y Gen., to Carl Bianchi, Dir. of the Courts (Apr. 27, 1992) (on file with author).

five deputy attorney generals, and twenty-five private sector attorneys.[141] From 1992 to 1995, the program mediated over six hundred cases.[142] In 1995, the program transitioned from a public pro bono program to the private bar when Al Lance became the new Attorney General.[143]

One additional bench and bar project, not mentioned in Hamilton's inventory, deserves comment as it represented a significant step in the development of Idaho's dispute resolution process—State Appellate Settlement Conferences.

c. State Appellate Settlement Conferences

Idaho was a pioneer in the use of ADR techniques to assist parties at the appellate level.[144] In the late 1980s, Supreme Court Justice Byron Johnson believed that parties could resolve certain appellate cases with some assistance from the Court. As he wrote in his memoirs, "[s]oon after I came to the Court, I began to see cases coming before us to be argued that cried out to be settled by the parties themselves rather than being the subject of decision[] by the Court."[145]

In October 1989, under the leadership of Justice Johnson, the Idaho Supreme Court developed a voluntary[146] Appellate Settlement

141. *Id.*

142. *See* e-mail from Jack McMahon, former Chief Deputy Att'y Gen., to author (July 13, 2009) (on file with author).

143. *Id.*

144. *See* Robert J. Niemic, *On Appeal: Mediation Becoming More Appealing in Federal and State Courts*, DISP. RESOL. MAG., Summer 1999, at 13, 15.

145. Byron Johnson, Poetic Justice: A Memoir 156 (2003) (unpublished manuscript, on file with author). For example, in the Idaho Supreme Court case *Stockwell v. Stockwell*, 116 Idaho 297, 775 P.2d 611 (1989), Justice Robert Huntley, author of the majority decision, described the child custody case as "unusually acrimonious and expensive," and directed the parties to participate in "a mediation process wherein all concerned focus on seeking the best interests of the children." *Id.* at 301, 775 P.2d at 615.

146. *See generally* Niemic, *supra* note 144, at 15; NANCY NEAL YEEND, STATE APPELLATE ADR: NATIONAL SURVEY AND USE ANALYSIS WITH IMPLEMENTATION GUIDELINES (1999). *See also* CAROL R. FLANGO & DAVID B. ROTTMAN, APPELLATE COURT PROCEDURES 160 tbl.4.2 (1998) (in 1999, fewer than ten state courts had voluntary programs, most were mandatory).

Conference Program[147] to mediate civil appeals.[148] The court codified the program in Idaho Appellate Rule 49.[149]

In the early years, both Idaho Supreme Court justices and Idaho Court of Appeals judges presided over appellate settlement conferences.[150] The purposes of these appellate settlement conferences included "settling cases through facilitated negotiations, helping litigants obtain outcomes not otherwise available, conserving judicial resources, and improving case management. The dynamic involved in appellate mediation was substantially different from that at the trial court level, primarily because a 'winner' and a 'loser' had already been declared."[151] In the first two years of these settlement conferences, thirty cases went through the program and sixteen of them settled.[152]

In more recent years, only justices served as settlement judges.[153] From 1990 to 2008, a total of 438 appellate cases went to settlement conference of which fifty-nine percent were successfully mediated.[154] However, in the last eight years, both the numbers of cases in the

147. *See* Niemic, *supra* note 144, at 17. Ten years later Idaho was still a pioneer in the field. In 1999, only about half the states courts had appellate ADR programs, generally mediation or mediation-like settlement conferences. Of those only "Connecticut, Hawaii, Idaho, Ohio, and Oregon [had] ADR both at the supreme court and intermediate (or court of appeals) level." *Id.* at 15. In Idaho, all appellate cases are filed with the Idaho Supreme Court. After briefing, the Idaho Supreme Court assigns the case to either the Court of Appeals or the Supreme Court. The Appellate Settlement Program was designed to catch cases before the briefs were written. According to Justice Johnson, "This caused the parties to consider opting into the appellate settlement before the assignment of cases to the [Court of Appeals]." E-mail from Byron Johnson, Justice, Idaho Supreme Court, to author (July 27, 2009) (on file with author).

148. *See* TASK FORCE REPORT, *supra* note 103, at 13.

149. Although *Stockwell* was the first time the Idaho Supreme Court ordered mediation in a family case, according to Justice Byron Johnson, *Stockwell* was not the impetus for Idaho Appellate Rule 49. He stated that a family case involving property division calendared on the Pocatello calendar in early 1989 was impetus for the rule. During oral argument, Justice Huntley asked counsel whether they had considered settlement and suggested that they do so as he thought neither side would be pleased with the Court's decision. The following week, Justice Johnson approached Chief Justice Allan G. Shepard to seek authorization to develop a settlement program. Chief Justice Shepard agreed and Lon Davis, legal counsel for the Court, and Justice Johnson drafted Idaho Appellate Rule 49. The rule governs settlement conferences at the state appellate level. It provides the outline for how, where, and when settlement conferences are to be conducted. E-mail from Byron Johnson, Justice, Idaho Supreme Court, to author (July 27, 2009) (on file with author).

150. TASK FORCE REPORT, *supra* note 103, at 13.

151. Maureen Laflin & Anna E. Eberlin, Appellate Settlement Conferences Idaho Appellate Handbook 2 (unpublished manuscript, on file with author).

152. TASK FORCE REPORT, *supra* note 103, at 13.

153. Justice Jesse Walters, Jr. attributes this change to the high caseload assigned to the Court of Appeals. Telephone Interview with Justice Jesse Walters, Jr., Idaho Supreme Court (July 28, 2009).

154. E-mail from Steve Kenyon, Clerk of the Courts, Idaho Supreme Court, to author (July 27, 2009) (on file with author).

program and the settlement rate have decreased.[155] One reason for this change is that participation decreased after 2001 when the court decided, for budgetary reasons, to require all participants to go to Boise rather than having justices travel for settlement conferences.[156] Another reason for the decline is that once Justices Johnson and Walters retired from the court,[157] no one else showed the same passion for the program. A recent troubling development took place in August 2009, when the court fundamentally changed its approach to the settlement conferences; it now requires parties to affirmatively request participation and uses only retired justices to preside over the conferences.[158]

2. Second Task: Sponsor a Major Regional Conference

The second task of the Governor's Task Force was to sponsor a major regional conference under the auspices of the National Institute for Dispute Resolution (NIDR).[159] The two-day technical assistance conference, held in Boise in October 1992, focused on court-connected dispute resolution.[160] It exposed participants to the types of court-related ADR being used in various jurisdictions and instructed them on how to promote ADR.[161] Attendees included national leaders from NIDR; representatives from thirteen western states, all active in ADR activities; and thirty parties from Idaho, including a majority of the justices and judges from Idaho's appellate courts.[162] The Report to the Governor noted, "The Conference was the perfect start for the Governor's Task Force deliberations. It served to expose Idahoans to the many forms of ADR currently available nationwide and in surrounding states and to alert us to the pitfalls along the way to establishing such programs."[163]

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155. *Id.* (noting that from 2001 to 2009, 146 cases went to settlement conference, of which 47% settled).

156. *Id.*

157. Justice Walters assumed leadership of the program after Justice Johnson retired on January 4, 1999. *See* Telephone Interview with Jesse Walters, Jr., Idaho Supreme Court (July 28, 2009) (notes on file with author).

158. Telephone Message from Steve Kenyon, Clerk of the Courts, Idaho Supreme Court, to author (Aug. 27, 2009); Telephone Interview with Steve Kenyon, Clerk of the Courts, Idaho Supreme Court (Sept. 1, 2009) (notes on file with author).

159. Memorandum from the Governor's Office to the ADR Task Force Members and Interested Parties (Sept. 18, 1992) (on file with author).

160. *Id.*

161. *Id.*

162. TASK FORCE REPORT, *supra* note 103, at 1.

163. *Id.*

3. Third Task: Make Recommendations

The members of the Task Force formed five committees—ADR in Administrative Agencies, ADR in the Courts, ADR in Private Business, ADR in the Schools, and Certification and Training of Mediators.[164] Jon Carter, Special Assistant to the Governor, and Jack McMahon, Chief Deputy Attorney General, co-chaired the Task Force.[165] After a year of meetings, the Task Force's Committee on ADR in the Courts made the following recommendations:

> The Idaho Supreme Court is urged to adopt a program of mediation for all types of cases on the civil calendar. The Court's existing committee structure for the Child Custody Mediation Program has proved to be a workable model for developing and administering a program of the sort envisioned [by the Task Force].
>
> Mediation should be encouraged, but should remain voluntary in all instances. The costs of mediation should be borne by the parties wherever feasible.
>
> The program must be institutionalized in order to be successful. A statewide coordinator is essential. Regular and comprehensive training programs should be provided for Idaho judges. The Supreme Court is urged to establish standards for those who serve as mediators in court-sponsored mediation programs.[166]

Additionally, the Task Force's Committee on Certification and Training of Mediators recommended:

> [I]n light of the work done by the IMA, that any attempt to prescribe standards for mediators by the committee or the Task Force would be an effort to "reinvent the wheel." The committee realizes that standards for mediators must be flexible enough to address the efforts of mediators in many different areas of practice. Nonetheless, the committee recommends that any entity sponsoring a mediation program should look first and foremost to the standards developed by the IMA.[167]

The Task Force recommendations served as a framework for the bench and bar's subsequent work. While not all of the recommenda-

164. *Id.*
165. *Id.* at Members of the Governor's Task Force on Alternative Dispute Resolution.
166. *Id.* at 16.
167. *Id.* at 31.

tions were adopted, the Idaho bench implemented a large number of Task Force recommendations. Most significantly, the Idaho Supreme Court adopted Idaho Rules of Civil Procedure 16(k), establishing the rules and procedures for civil mediations. However, there were significant departures from the Task Force recommendations: Idaho Rule of Civil Procedure 16(k)(4) explicitly provided that courts, at their discretion, could order mediation in civil cases; the proposed statewide ADR coordinator position was eliminated for political reasons; and, rather than adopting IMA's interdisciplinary approach to mediator certification, the Idaho Supreme Court adopted credentialing provisions for mediators in civil actions patterned after the United States District Court for the District of Idaho's lawyer-only policy.

B. The Bench and the Bar's ADR Efforts

The Idaho Supreme Court strongly supported the advancement and use of ADR in the judicial arena.[168] Patti Tobias, Administrative Director of the Courts since November 1993, recalls that during her interview for the position in 1993, Justice Cathy Silak expressed her hope that the court could provide leadership in the area of ADR.[169] The legislature eliminated that hope by denying the court's first request for funding for a statewide coordinator.[170] In spite of the lack of legislative approval, the Idaho Supreme Court supported the expansion of ADR in Idaho courts and cobbled together enough money from its budget to hire Kit Fury as the Statewide Coordinator of ADR from January 1994 to June 30, 1995.[171] However, in a retaliatory move, the legislature not only refused to fund the position, but also cut the court's budget the subsequent year by the amount needed to support the coordinator and the ADR program.[172] The court has never sought funding for this position since.[173]

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168. Some people dispute whether the Supreme Court's efforts flowed from the Governor's Task Force. What is clear is that Justices Silak and Trout and Jack McMahon served on the Governor's Task Force and chaired or co-chaired the court and the bar's subsequent committees dealing with mediation.

169. Telephone Interview with Patti Tobias, Admin. Dir. of the Courts (July 23, 2009) (notes on file with author).

170. At that time, considerable tension existed between the court and the legislature and it was hard to get funding for new initiatives. *Id.*

171. *Id.*

172. *See* Idaho Supreme Court ADR Committee, Meeting Minutes 1 (April 13, 1995) (unpublished minutes, on file with author). Justice Trout reported at the ADR Committee meeting that the legislature had failed to appropriate monies for both the ADR Coordinator Position and the Idaho Supreme Court's ADR program for fiscal year 1996. *Id.*

173. After the legislature refused to fund the statewide coordinator position, the Idaho State Bar's ADR section assumed a leadership role in the implementation of an ADR program in Idaho. *See infra* Part IV.B.2.

1. Idaho Supreme Court's ADR Committee

In accordance with the Task Force recommendation, the court appointed a Supreme Court Mediation/ADR Committee consisting of twenty-four judges, lawyers, academics, administrators, and ADR providers to work with the statewide ADR coordinator, Kit Fury.[174] The committee, co-chaired by Justices Linda Copple Trout and Cathy R. Silak, first met in June 1994. The work of this committee was to explore a series of topics and make recommendations to the Idaho Supreme Court. Although the committee was short-lived, it made recommendations to the Idaho Supreme Court regarding rule changes and explored ways to implement ADR at all levels of the judicial system.[175]

As a result of the committee's efforts, the Idaho Rules of Civil Procedure 16(a)–(c) were amended on July 1, 1995, to include ADR considerations in the pre-trial process.[176] Rule 16(a) provided that ADR may be a matter for discussion at pre-trial conferences.[177] Under Rule 16(a)(6), the court could recommend or encourage "that the parties use some form of alternative dispute resolution and, in appropriate cases, order[] the parties to engage in mediation or a court conducted settlement conference."[178] The ADR theme was followed through in Rule 16(b)(5) which provided that the court's scheduling order could include "the date or dates for conference[s] to review settlement or ADR options."[179] Similarly, Rule 16(c)(7) provided that one of the topics to be considered at the pre-trial conference could be "the possibility of settlement or the use of extrajudicial procedures including alternative dispute techniques to resolve the dispute."[180] Previously, Rule 16(c) had only addressed ADR in domestic cases.[181]

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174. Committee members included Debra Alsaker-Burke, Robert Bakes, Hon. John Bengston, Hon. Gaylen Box, Steven Caylor, Ray Durtschi, Kit Fury, Hon. George Granata, Jr., Hon. James Hansen, Victoria Hawley, Hon. Jim Herndon, Ann Just, Dan Kessler, Maureen Laflin, Hon. Terry McDaniel, Hon. Duff McKee, Jack McMahon, Marie Meyer, Tom Murawski, Justice Cathy Silak, Patricia Tobias, and Justice Linda Copple Trout. Idaho Supreme Court ADR Committee, Meeting Minutes 1 (April 13, 1995) (unpublished minutes, on file with author).

175. RULE 16 IMPLEMENTATION COMMITTEE, IDAHO STATE BAR, REPORT TO THE IDAHO SUPREME COURT 1 (March 1996).

176. Memorandum from Maureen Laflin, Law Professor, Univ. of Idaho, to Paige Parker, Chair, Idaho State Bar's ADR Section (Nov. 17, 1995) (on file with author) (regarding the work of the Idaho Supreme Court's ADR Committee).

177. IDAHO R. CIV. P. 16(a).

178. *Id.*

179. *Id.* at 16(b)(5).

180. *Id.* at 16(c)(7).

181. Prior to July 1, 1995, Rule 16(c)(12) stated, "In domestic relations cases involving child custody and visitation issues, mediation of these issues must be considered." IDAHO R. CIV. P. 16(c)(12) (1993) (amended 1995).

The committee wound down its business on June 16, 1995,[182] as a result of the legislature's decision to reduce the court's budget. The court believed that due to other funding sources, work on children and family matters could continue. At its final meeting the committee "voiced its hope that the ADR Section of the Idaho State Bar would follow up" on the unfinished work of the committee."[183]

Despite the lack of legislative funding, many of the ADR Committee's recommendations have since been implemented in some manner including but not limited to: Idaho Rule of Civil Procedure 16(k) with its rules and procedures for the court's civil mediation program, small claims mediations, expansion of educational programs at both the University of Idaho College of Law and Boise State University, the Small Law Suit Resolution Act, and adoption of the Uniform Mediation Act. One committee recommendation not implemented pertained to credentialing—in that SPDR standards should be adopted instead of independently developing state-specific performance standards.[184]

2. The Idaho State Bar's Rule 16 Implementation Committee

Since the Idaho legislature refused to fund the ADR Coordinator program, the state was left to search for other alternatives. Justices Cathy Silak and Linda Copple Trout recommended that the ADR Section[185] of the Idaho State Bar sponsor the Rule 16 Implementation Committee to carry out the mandates contained in resolutions of the Idaho Supreme Court ADR Committee.[186] During the last half of 1995, the ADR Section of the Idaho State Bar created the Rule 16 Implementation Committee chaired by Jack McMahon.[187] Attorneys and jurists from all sections of Idaho sat on the committee.[188]

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182. RULE 16 IMPLEMENTATION COMMITTEE, *supra* note 175, at 3.

183. *See id.*

184. Idaho Supreme Court ADR Committee, Meeting Minutes 3 (April 13, 1995) (unpublished minutes, on file with author). The Idaho Supreme Court ultimately adopted a compromise position by following the federal court's restrictive rule limiting its roster to lawyers with five years of experience while allowing Certified Professional Mediators with IMA and other national organizations to submit their rosters to the court for circulation. *See* IDAHO R. CIV. P. 16(k)(13).

185. The ADR section was formed in 1992. Bob Werth served as the first chair of the section. E-mail from Diane Minnich, Executive Dir., Idaho State Bar, to author (July 16, 2009) (on file with author). The early pioneers of the section were Bob Werth (first chair of the section), Paige A. Parker (chair during the Rule 16 Committee work), Bruce Thomas (the quintessential organizer), and Jack McMahon (whose ADR activities appear throughout this article).

186. *See* RULE 16 IMPLEMENTATION COMMITTEE, *supra* note 175, at 3.

187. *Id.* at 3–4.

188. Committee members included Ken Adler, Robert Bakes, Jannell Burke, Curtis Brettin, Peter Desler, Judge George Granate, Judge Gary Haman, Judge Jim Hern-

The goal of the Rule 16 Implementation Committee was to create a civil mediation program beyond the family law mediation that already existed. To achieve this, two near-term tasks were set:

> 1. To draft, implement, insure the actual utilization of and evaluate a mediation program, and
>
> 2. To make recommendations regarding qualification standards and certification, if any, for mediators . . . .[189]

The committee also committed itself to the long-term goal of proposing programs implementing other forms of ADR in the state courts.[190] Consistent with this, the committee adopted the goal of making "recommendations regarding qualification standards and certification, if any, for these other service providers . . . ."[191]

The committee determined that it was beneficial to the bar members to pattern the state program after the federal program as closely as possible.[192] The committee began with mediation. Its goals were:

> 1. To draft a mediation program for the Idaho state courts similar to the United States District Court for the District of Idaho and to take steps to actually accomplish implementation, widespread utilization and evaluation of the state mediation program; and
>
> 2. To make recommendations regarding qualification standards and certification procedures for mediators in the state mediation program.

The Rule 16 Implementation Committee met as a whole four times over six months with numerous subcommittees meeting to prepare drafts.[193] In March 1996, it submitted to the court for its consideration a report entitled, "Report to the Idaho Supreme Court from

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don, Lee (Parker) Kelleher, Maureen Laflin, Judge Duff McKee, Jack McMahon, Hugh Mossman, Tom Murawski, Paige A. Parker, Richard St. Clair, John Sahlberg, Justice Cathy Silak, Bruce Thomas, Justice Linda Copple Trout, Judge John Varin, Bob Werth, and Dan Kessler. *Id.*

189. *Id.* at 4.

190. *Id.*

191. *Id.*

192. *See* Subcommittee on Mediator Credentialing, Rule 16 Implementation Committee, Recommendation Submitted to the Rule 16 Committee at its 12/15/95 Meeting 1 (December 15, 1995) (unpublished report, on file with author).

193. RULE 16 IMPLEMENTATION COMMITTEE, *supra* note 175, at 4. "The full Committee discussed, debated and redrafted the resulting work products line-by-line, word-by-word. Finally, the two work products [from the subcommittee drafting guidelines for administration of a mediation program for Idaho civil cases and the subcommittee drafting qualifications for credentialing of mediators] were condensed and combined into a single proposed amendment to Rule 16, as well as minor amendments to IRCP 40(b) and IRE 507." *Id.* at 5.

the Rule 16 Implementation Committee of the ADR Section of the Idaho State Bar."[194] The report contained proposed Idaho Rule of Civil Procedure 16(k), setting forth procedures to implement a mediation program for civil cases; Idaho Rule of Civil Procedure 40(b), amended to include mediation as a consideration at the time trial is requested; and Idaho Rule of Evidence 507, amended to expand mediator privilege to general civil mediation.[195] The Court adopted the committee's recommendations and the rules became effective July 1, 1996.[196]

The most contentious issue the committee faced concerned resolving the long-standing issue of credentialing, for example, who could serve as mediators in the civil court arena. As noted earlier, the turf war regarding ownership of the burgeoning profession began in the early 1980s and continued into the 1990s. IMA had adopted a broad, interdisciplinary approach creating qualifications for its certified professional mediators based on training and experience, not educational background.[197] It established standards of practice as well as grievance procedures.[198] The Governor's Task Force had recommended that in developing standards for civil mediators, the committee should "look first and foremost to the standards developed by IMA."[199] The District of Idaho, in contrast, had adopted a lawyer-only rule for its mediation program.[200] The Rule 16 Implementation Committee adopted a compromise version.[201]

The committee of judges, lawyers and non-lawyer mediators created two subcommittees: one which drafted the procedural guidelines for administrating a mediation program for Idaho's civil cases, and the other which looked at the issue of qualifications. The final recommendation regarding credentialing was a compromise position, but it adopted predominately the federal court rule that people on the

194. *Id.* at Cover Page.

195. *Id.* at 6–10; Letter from Paige A. Parker, ADR Section Chair, Idaho State Bar, to Justice Cathy Silak, Idaho Supreme Court (March 20, 1996) (on file with author). Although certain members of the committee, including the author, strongly recommended a full revision of IRE 507 regarding mediation privilege, the committee was not ready to tackle such a large challenge. Truthfully, its members had already devoted countless hours to the committee and were tired. A radical revision to IRE 507 came as a result of the efforts of the subcommittee established to assess Idaho's mediation privilege rule in light of the Uniform Mediation Act. *See In re*: Adoption of New Idaho Rule of Evidence 507 (2008), *available at* http://www.isc.idaho.gov/rules/IRE_ord108.pdf.

196. IDAHO R. CIV. P. 16(k), 40(b); IDAHO R. EVID. 507.

197. Idaho Mediation Ass'n, The Application Process (2009), http://www.idahomediation.org/wp-content/uploads/CPMapplprocess.pdf.

198. Idaho Mediation Ass'n, Standard Operating Procedures for Professional Certification (2009), http://www.idahomediation.org/wp-content/uploads/sop.pdf.

199. TASK FORCE REPORT, *supra* note 103, at 31.

200. Gen. Order 121 (1995), *amended by* Gen. Order 130 (1996), *available at* http://www.id.uscourts.gov/docs/GENOR130.pdf.

201. RULE 16 IMPLEMENTATION COMMITTEE, *supra* note 175, at 6–9.

"court-appointed list" must be lawyers with five years of experience.[202] Certain committee members vociferously advocated for a broader, more interdisciplinary approach, raising their concern about how the public could access non-lawyer mediators, for example people on IMA's list of Certified Professional Mediators and other lists. As a compromise provision,[203] Rule 16(k) included a provision that allowed any public or private dispute resolution organization to make its "roster of mediators available to the Administrative Director of the Courts for distribution" to the various courts in Idaho.[204] Unfortunately, dispute resolution organizations have not, to date, taken advantage of the compromise provision.[205]

3. Rule 16 Follow-up Committee

Several years after the Rule 16 Committee report, the Bar's ADR Section created the Rule 16 Follow-up Committee to evaluate the implementation of Rule 16(k) and assess the current status of ADR in Idaho. The Rule 16 Follow-up Committee held its first meeting in June 1998.[206] Its goal was to determine what more could be done to encourage the use of ADR throughout the civil court calendar in Idaho and to determine whether it should create rules and procedures for other forms of ADR.[207] The committee disbanded after resolving that the bench and bar had accomplished all that it could at that time.

4. Outgrowth from Rule 16 Committee

As noted previously, some of the major developments following the adoption of Rule 16 include:

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202. IDAHO R. CIV. P. 16(k)(13)(A).

203. The author proposed the compromise position after realizing that neither the committee nor the court would deviate from the lawyer-only rule.

204. IDAHO R. CIV. P. 16(k)(13)(B). It is important to note that if the Idaho Mediation Association had not previously crafted a well thought out set of qualifications and procedures, the compromise position would not have been available.

205. Based on the author's discussions with several IMA officers and members at the September 2009 Annual IMA conference about this issue, IMA's Board of Directors is following up with the court.

206. Letter from Jack McMahon, Idaho Chief Deputy Att'y Gen., to author (April 9, 1998) (on file with author) (inviting people to attend meeting). At the meeting, Kristie Browning discussed her master's thesis which was based on a survey of district judges and attorneys. See Kristie Browning, Use of Mediation in Idaho Civil Cases: Findings and Implications for Court Practice (Nov. 1997) (unpublished M.A. thesis, Boise State University) (on file with author).

207. Letter from Jack McMahon, Idaho Chief Deputy Att'y Gen., to author (April 9, 1998) (on file with author).

a. Small Claims Mediation

Latah County implemented the first small claims mediation program in 1996. When first approached with the idea of a pilot project using law students to mediate small claims cases, the magistrate court responded coolly, concerned that law students did not know enough law to effectuate a settlement. In time, the court came to better understand the role of the mediator and also recognized how much time the small claims docket consumed. Ultimately, with the full support and encouragement of Magistrate Judge Bill Hamlett, Sheri Russell created and coordinated the Latah County Small Claims Project.[208]

In April 1996, the mandatory small claims mediation program officially began in Latah County. The program's goals were:

> (1) to allow small claims litigants a chance to resolve their own disputes with the help of a neutral third-party; (2) to lighten the caseload of magistrate judges by eliminating the need to hear every small claims case; and (3) to provide "mediators-in-training" (persons having a basic forty hour mediation training but with little or no actual mediation experience) with the opportunity to co-mediate with experienced mediators.[209]

In the first two years of the program, 171 small claims cases were mediated in Latah County. Of these, 118 reached a mediated agreement, and only 12 were not complied with. Thus, the project had a 69% success rate in reaching mediated agreements, with a 90% success rate in compliance with those agreements.[210] It also met its objectives—allowing parties to resolve their own disputes in a non-adversarial setting, freeing judges' time for other duties, reducing the number of judgments and the number of writs of execution which sheriff's execute, and providing mediation training to inexperienced mediators.

The Latah County Small Claims Mediation Program received a small grant in 1998 from the Idaho Law Foundation to help establish similar programs in other jurisdictions.[211] On November 6, 1998, members of the Latah County Small Claims project shared their success with other magistrate judges at the Magistrate Judges Institute

208. Ms. Russell served as the volunteer project coordinator for over two years. Frances Thompson and Maureen Laflin served on Russell's steering committee.

209. Sheri L. Russell, *Latah County Small Claims Mediation Program Is a Success*, THE ADVOCATE, Nov. 1998, at 17.

210. *Id.* at 18.

211. *Id.* at 19.

in Boise, Idaho.[212] The Seventh Judicial District, along with Ada, Blaine, Boise, Nez Perce, and Valley counties have since implemented similar programs[213] while Bannock County requires that appeals from small claims cases be mediated.[214]

The Ada County Small Claims Mediation Program was implemented in 1997 and was modeled after the Latah County program.[215] From 1997 until 2004, Boise State University (BSU) dispute resolution students served as mediation coordinators receiving academic credit but no compensation.[216] Data on the success of the use of mediators in Ada County led Judge Patricia Young to request and receive funding for an ADR coordinator so the program could be sus-

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212. Brochure for Magistrate Judges Institute (Nov. 4–6, 1998) (on file with author). The author presented the information on the Latah County Small Claims project at the Institute. *Id.*

213. *See* E-mail from Keith Saks, CPM and Att'y, to author (Sept. 11, 2009) (regarding Blaine County) (on file with author); Interview with Gary Schreiner, CPM and Idaho Mediation Ass'n Sec'y, at IMA Annual Conference in Boise, Idaho (Sept. 12, 2009) (discussing the Jefferson County project and Bannock County); E-mail from Pamela Madarieta, to author (Aug. 12, 2009) (on file with author) (regarding Ada, Boise, Blaine, and Valley counties); Interview with Pamela Madarieta and Patricia Young at IMA Annual Conference in Boise, Idaho (Sept. 12, 2009) (relating the story of Pamela Madarieta and a car load of other volunteer mediators driving to Boise County once a month to mediate small claims cases) (notes on file with author); *Clinic Mediators Broaden Scope of College of Law Mediation Service*, CLINIC CHRONICLE (Univ. of Idaho College of Law), Sept. 2006, at 2, *available at* http://www.law.uidaho.edu/documents/the%20clinic%20chronicle%20fall%202006.pdf?pid=95696&doc=1 (regarding the Nez Perce Tribal mediation program).

Christine Starr, then a third-year law student at the University of Idaho College of Law and president of Law Students for Alternative Dispute Resolution (LSADR), started the Nez Perce County Small Claims project in 2002.

Twin Falls, Gooding, and Minidoka Counties implemented small claims mediation programs, but they discontinued them after two years. Some people hope they will reinstate the programs. E-mail from Barbara Corwin, CPM, to author (Sept. 11, 2009) (on file with author); Telephone Interview by Lisa Schoettger with Linda Wright, Fifth District Trial Court Adm'r (Sept. 11, 2009) (notes on file with author).

214. Interview with Gary Schreiner at IMA Annual Conference in Boise, Idaho (Sept. 12, 2009) (notes on file with author).

215. The program in Boise began shortly after Judge Patricia Young took over the small claims calendar. A BSU intern, Bettina Yore, volunteered to mediate small claims cases, Judge Young accepted the offer and the program began. E-mail from Judge Patricia Young to author (Aug. 12, 2009) (on file with author); E-mail from Pamela Madarieta to author (Aug. 12, 2009) (on file with author).

216. In 1997, Judge Patricia Young, working with Bettina Yore, began processing small claims cases through mediation. In 1998, Randall Reese, an IMA Certified Professional Mediator, processed small claims cases for Judge Young's court through the Community Sounding Board. During Fall Semester 1999, Joshua Wickard completed his senior practicum mediating in this small claims program and in January 2000, Pamela Madarieta, a certified professional mediator trainer, began supervising the Ada County Small Claims Mediation Program. E-mail from Pamela Madarieta to author (Aug. 12, 2009) (on file with author).

tained and expanded.[217] The Fourth District Magistrate Court currently uses advanced BSU interns[218] not only in small claims but also in other civil matters when requested, and it receives over 1,500 hours of service work annually from BSU student mediators.[219]

Thus, the use of mediation in small claims matters has evolved from a suggestion of the Supreme Court's ADR Committee to an integral part of the judicial system in many Idaho counties. The courts have also come to recognize that both lawyer and non-lawyer mediators can assist parties in resolving their own disputes.

b. University of Idaho College of Law's Northwest Institute for Dispute Resolution

The University of Idaho College of Law established the Northwest Institute for Dispute Resolution (NWI) in 1997[220] to meet the growing demand for high-quality dispute resolution training in the Northwest.[221] Each year, the Institute offers basic forty-hour family and civil mediation courses as well as a variety of "Topics in Dispute Resolution" designed to satisfy the twenty hours of continuing education required for both family and civil mediators.[222] Students, practic-

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217. The program has been tremendously successful. In 2005, a total of 1078 contested cases were processed in mediation during the scheduled court days. This represents 19% of the 5731 cases filed in Ada County Small Claims Court. A consistent settlement rate of 56% was maintained with a 95% compliance rate of the mediated agreements. Idaho Fourth Judicial District Court, Ada County Small Claims Court Mediation Program (undated) (unpublished presentation, on file with author).

218. *Id.* All mediators who participate in the Ada County Small Claims program are required to pass a criminal background check and provide evidence of a minimum of sixty hours of approved mediation training. *Id.* Many of the mediators are BSU interns from the Boise State University Dispute Resolution Certificate Program. *See id.* The Dispute Resolution Certificate Program is housed in the College of Social Sciences and Public Affairs, supervised by the Dean of the College, and managed by the Director of the BSU Conflict Management Services. Boise State University, College of Social Science and Public Affairs, http://sspa.boisestate.edu/centers-and-institutes.shtml (last visited Feb. 3, 2010); Boise State University, Dispute Resolution Program, http://ppa.boisestate.edu/mediation/ (last visited Feb. 3, 2010).

219. E-mail from Suzanne McCorkle, Co-Chair, Dep't of Pub. Policy and Admin., Dir., Office of Conflict Mgmt. Servs. and Dispute Resolution Certificate Program, BSU, to author (Aug. 11, 2009) (on file with author).

220. Having taken an active role in establishing the qualifications for mediators at the state and federal court level, this author believed that the College of Law had an obligation to provide consistent, quality training for mediators in the region.

221. The Institute was co-sponsored with the University of Idaho's Martin Institute for its first two years. *See* Martin Institute for Peace Studies and Conflict Resolution, 1997 Annual Report, http://www.uiweb.uidaho.edu/LS/College/AnnRpts/annrpt07/mart97.html.

222. Northwest Institute for Dispute Resolution, http://www.uidaho.edu/law/academics/clinicsprofessionalskills/nwinstitutedisputeresolution.aspx (last visited Feb. 2, 2010).

ing lawyers, judges, social service providers, psychologists, and others participate in the trainings. The mix of participants makes the course experience richer.

c. BSU Dispute Resolution Certificate Program

Although not a direct outgrowth of the Rule 16 committee, Boise State University's commitment to dispute resolution has been important to the growth and development of ADR in Idaho, particularly on the education and apprenticeship front. BSU has taken an active role in dispute resolution training since the early 1980s, when it provided support to Peaceful Settlements. In the mid 1990s, BSU created a twelve-credit undergraduate certificate program in Dispute Resolution, focusing on mediation.[223] Recently, BSU added a twelve-credit graduate level certificate in Conflict Management in order to meet the needs of managers and businesses.[224]

Over the years, BSU has created a series of partnerships that have advanced training opportunities and expanded mediation in Idaho. BSU's Conflict Management Program has partnered with the juvenile justice department to perform juvenile victim-offender mediation, and has also partnered with the Fourth District Court in Ada, Boise, and Valley Counties to assist parties in resolving small claims disputes. [225]

d. Small Lawsuit Resolution Act

The Supreme Court Committee on ADR recommended that ADR processes be used to assist the parties to resolve small civil cases.[226] The legislature agreed and the Idaho Small Lawsuit Resolution Act[227] became effective for civil cases filed on or after January 1, 2003, where the sole relief sought is a money judgment totaling less than or equal to $25,000.[228]

The Act is designed to reduce the expense of litigation and encourage civil litigants to resolve their disputes through ADR.[229] Parties are allowed to select their own mediator or evaluator.[230] The ADR procedures are intended to be "as informal as practicable" to accomplish the objectives of "swift, fair and cost-effective resolution of dis-

223. E-mail from Suzanne McCorkle, Co-Chair, Dep't of Pub. Policy and Admin., Dir., Office of Conflict Mgmt. Servs. and Dispute Resolution Certificate Program, BSU, to author (Aug. 11, 2009) (on file with author).

224. *Id.*

225. *Id.*

226. RULE 16 IMPLEMENTATION COMMITTEE, *supra* note 175, at 1.

227. IDAHO CODE ANN. §§ 7-1501–1512 (2004); IDAHO R. CIV. P. 85.

228. IDAHO CODE ANN. § 7-1503 (2004); IDAHO R. CIV. P. 85(b).

229. *See* IDAHO CODE ANN. § 7-1502 (2004).

230. *Id.* § 7-1504; IDAHO R. CIV. P. 85(d).

putes."[231] Discovery is limited.[232] The evaluator determines whether to apply the rules of evidence,[233] issues a written decision regarding all issues raised in the pleadings, and determines damages.[234] Any party who appeals from an evaluation and fails to improve its position at the trial de novo by at least fifteen percent is assessed costs and reasonable attorney's fees.[235]

e. The Idaho Uniform Mediation Act of 2008

In 2008, the Idaho Legislature adopted the Uniform Mediation Act (UMA),[236] thus updating and expanding upon the Rule 16 Committee's work on mediation privilege in 1997.[237] A subcommittee of the Idaho Supreme Court's Evidence Rules Committee met from 1999 until 2007 to study mediation privilege, evaluate whether Idaho should adopt the UMA, and draft new mediation privilege rules for Idaho.[238] Idaho was the eleventh state (including the District of Columbia) to formally adopt the UMA.[239] An additional four states—

231. IDAHO CODE ANN. § 7-1502 (2004).
232. *Id.* § 7-1507(3).
233. *Id.* § 7-1508(7).
234. *Id.* § 7-1509(1).
235. *Id.* § 7-1509(5).
236. IDAHO CODE ANN. §§ 9-801 to 814 (2008). The Idaho Supreme Court adopted the UMA on January 3, 2008, amending Idaho Rule of Evidence 507. Order Adopting New Rule, *In re*: Adoption of New Idaho Rule of Evidence 507 (Jan. 3, 2008), *available at* http://www.isc.idaho.gov/rules/IRE_ ord108.pdf.
237. Although the author strongly advocated for a complete revision of Idaho Rule of Evidence 507, the Rule 16 Committee was not ready for it. In 1999, a committee was formed to begin exploring mediation privilege in light of the work being done nationally on the Uniform Mediation Act (UMA).
238. From about 2000 until 2002, the committee took no action as it waited for the final enactment of the UMA. The Mediation Privilege UMA Committee members included Merlyn Clark (chair), Heidi Fisher, Maureen Laflin, J. Robert Alexander, Craig Lewis, Hon. John Stegner, Hon. Randy Smith, Susan McCorkle, Denise Asper and Hon. Duff McKee. *See also* Justin Kelly, *Idaho Adopts the Uniform Mediation Act*, ADR-World.com (2008) ("Richard C. Reuben, a professor at the University of Missouri School of Law and a reporter for the UMA drafting committee, lauded Idaho's adoption of the UMA, adding that the process used to achieve enactment in was thorough and well thought out. He explained that Idaho's legal and mediation communities studied the UMA for a couple of years before it was introduced in the legislature, comparing it to current law and seeing why it treats mediation communications better than the previous law did."). *Id.*
239. States that have formally adopted the UMA: District of Columbia, D.C. CODE §§ 16-4201–4213 (Supp. 2007); Illinois, 710 ILL. COMP. STAT. 35/11–35/99 (2004); Iowa, IOWA CODE §§ 679C.101–115 (2005); Nebraska, NEB. REV. STAT. §§ 25-2930–2942 (2003); New Jersey, N.J. STAT. ANN. §§2A:23C-1 to 13 (West Supp. 2004); Ohio, OHIO REV. CODE ANN. §§ 2710.01–2710.10 (LexisNexis Supp. 2007); South Dakota, S.D. CODIFIED LAWS §§ 19-13A-1–15 (Supp. 2007); Utah, UTAH CODE ANN. §§78B-10-101 to 114 (Supp. 2007); Vermont, VT. STAT. ANN. tit. 12, §§ 5711–5723 (2006); Washington, WASH. REV. CODE §§ 7.07.010–7.07.904 (2006); Idaho, IDAHO CODE §§ 9-801–814 (2008), IDAHO R. EVID. 507 (2008).

Hawaii, Maine, Massachusetts, and Rhode Island—have since introduced the UMA for adoption.[240]

The UMA[241] is the result of a collaborative effort by the National Conference of Commissioners on Uniform State Laws (NCCUSL), the American Bar Association, and the Association of Conflict Resolution (ACR).[242] It is intended to promote candor, encourage resolution of disputes, provide structure and predictability to the mediation experience, and create uniformity among the states.[243]

The most controversial issue for Idaho was whether to grant a privilege to the mediator and non-party participants.[244] As opposed to the other commonly recognized privileges (priest-penitent, attorney-client, doctor-patient),[245] under the UMA, all mediation participants, including the mediator, hold the privilege to varying degrees.[246] The most contentious of these provisions was the mediator as holder of the privilege.[247] In fact, the decision to make the mediator a holder of the privilege almost derailed the adoption of the UMA in Idaho.[248] However, through the deft guidance of committee chair, Merlyn Clark, in the final vote committee members acquiesced in the approval of the UMA.[249]

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240. *See* National Conference of Commissioners on Uniform State Laws (NCCUSL), A Few Facts About The . . . Uniform Mediation Act (2001)(2003), http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uma2001.asp (last visited Feb. 2, 2010).

241. NCCUSL, Uniform Mediation Act (2003), *available at* http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf.

242. *Id.* at 13. The ACR actively participated in the drafting process, having two members involved in the drafting meetings and advocating the importance of the ACRs principles. *See generally* Gregory Firestone, *An Analysis of Principled Advocacy in the Development of the Uniform Mediation Act*, 22 N. ILL. U. L. REV. 265 (2002) (discussing in detail the eleven principles behind the creation of the UMA).

243. NCCUSL, *supra* note 241, at prefatory note.

244. E-mail from Merlyn Clark, Chair, Evidence Rules Advisory Committee, Mediator Privilege Subcommittee, to author (Aug. 2, 2009) (on file with author). This author served on the committee from October 1999 to 2008. Two members of the drafting committee strongly objected until the final vote, when they agreed to acquiesce in the approval of the Rule and the UMA.

245. Maureen E. Laflin, *The Mediator as Fugu Chef: Preserving Protections Without Poisoning the Process*, 49 S. TEX. L. REV. 943, 960–61 (2008) (discussing the UMA's application to subsequent criminal cases).

246. *Id.* at 961.

247. *Id.*

248. Notes from the Evidence Rules Subcommittee on the UMA (on file with the author). *See generally* Mindy D. Rufenacht, *The Concern Over Confidentiality in Mediation—An In-Depth Look at the Protection Provided by the Uniform Mediation Act*, 2000 J. DISP. RESOL. 113, 119 (discussing the mediator as holder of the privilege).

249. Final Report of the Deliberations and Actions of the UMA/Rule 507 Subcommittee of the Evidence Rules Committee of the Idaho Supreme Court, Merlyn W. Clark, chairperson (on file with author).

5. Mediation in the Criminal Realm

The Idaho Supreme Court's ADR committee briefly discussed how ADR could play a role in the criminal field.[250] From those early discussions, criminal ADR efforts in Idaho have taken root in several arenas—criminal mediation of misdemeanors and felonies, community justice under the leadership of Judge Patricia Young, and juvenile justice under Judge Varin's guidance.

a. Criminal Mediation

In Idaho, mediating criminal cases is no longer a vague concept limited to juvenile cases, non-serious adult cases, and victim-offender programs. An increasing number of judges and attorneys in Idaho are using mediation as a method of resolving felony cases, ranging from major murders to average possessions.[251]

The most significant person in the development and use of ADR in Idaho criminal cases was Judge Monte Carlson of the Fifth Judicial District.[252] During his tenure on the bench,[253] Judge Carlson mediated a spectrum of criminal cases from murder to malicious destruction of property. As of spring 2001, he had personally mediated seven homicides—with six resulting in plea agreements—in addition to cases involving rape and conspiracy to commit murder.[254] However, some judges became over-zealous in their use of mediation. Attorneys report that some trial court judges "in the early part of this century strongly encouraged mediation, treating it as 'a prerequisite to trial' for many cases on their criminal calendars."[255]

Cognizant of the increased use of mediation in the criminal arena, the Idaho Supreme Court created an ad hoc Criminal Mediation Committee in May 2001.[256] The committee drafted a proposed

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250. ISC Committee, Meeting Minutes 1 (Apr. 13, 1995) (unpublished materials, on file with author).

251. Maureen E. Laflin, *Remarks on Case-Management Criminal Mediation*, 40 IDAHO L. REV. 572, 575 (2004) [hereinafter Case-Management Criminal Mediation]; *See* Maria R. Volpe, *Promises and Challenges: ADR in the Criminal Justice System*, DISP. RESOL. MAG., Fall 2000, at 4, 4–5.

252. Judge Monte Carlson passed away on June 3, 2007. Nick Coltrain, *Judge Carlson dies*, THE TIMES–NEWS (Twin Falls, Idaho), Jun. 6, 2007.

253. Judge Carlson was on the bench from September 25, 1998 to June 3, 2007. E-mail from Patti Tobias, Admin. Dir. of the Courts, Idaho Supreme Court, to author (Jul. 23, 2009) (on file with author).

254. Cathy Derden, *Criminal Mediation*, THE ADVOCATE, Feb. 2002, at 25.

255. Conversation with various participants of the "Mediating the Criminal Case" seminar, Northwest Institute for Dispute Resolution, University of Idaho College of Law (May 2003) (notes on file with author); *see* Laflin, *supra* note 251.

256. Memorandum from Cathy Derden, Idaho Supreme Court Staff Attorney, to Chief Justice Trout, Justices Schroeder, Walters, Kidwell, Eismann, Idaho Supreme

rule for criminal mediation in felony, misdemeanor, and juvenile cases.[257] The committee decided that the rule should address the court's authority to refer cases to mediation, issues regarding privilege and confidentiality, and mediator qualifications.

The court sent the proposed rule[258] to various stakeholders and found widespread opposition. The main criticisms from both prosecutors and defense counsel were that the court could order mediation,[259] that the victim could be allowed to participate,[260] and that confidentiality needed to be addressed more specifically in the rule, especially in light of the victim's possible participation.[261] Therefore, the Committee drafted a second rule addressing these concerns.[262] However, the Court ultimately opted to maintain the status quo by not promulgating a criminal mediation rule.

While criminal mediation poses many thorny ethical, procedural, and constitutional questions,[263] training in the use of traditional or case-management mediation is rare.[264] In May 2003, the University of Idaho College of Law's Northwest Institute for Dispute Resolution offered a two-day seminar entitled "Mediating the Criminal Case."[265] It was the first of its kind addressing the parties' fundamental concerns—prosecutors' fear of giving up control of their case, along with defense counsel's fears about giving up the rights of their clients. Participants looked at questions such as:

> When in the process should mediation be considered: pre-charge, pre-trial, or post-conviction? What style of mediation is most appropriate for the case? How to select the right mediator? Who are the stakeholders at the table? What role should the victim and the offender play in the process? Should you ever seek sentencing input from the trial judge? How does

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Court (April 30, 2002) (on file with author) [hereinafter Derden Memo] The Criminal Mediation Committee was an ad hoc committee formed out of the Administrative Conference. The author was a member of the committee. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. Although the victim's right statute does not require the victim's participation in mediation, there was much concern about how the confidentiality of the proceedings might be affected by allowing victim participation.

261. Derden Memo, *supra* note 256.

262. *Id.*

263. *Id.*

264. *See* Laflin, *supra* note 251.

265. Maureen E. Laflin, *University of Idaho College of Law's Seventh Annual Northwest Institute for Dispute Resolution Scheduled for May 19–23, 2003*, THE ADVOCATE Mar. 2003, at 32. The course was team-taught by Judge Monte Carlson, Professor Mary Ellen Reimund, Director of the Law and Justice Center at Central Washington University SeaTac Center, and Professor Maureen E. Laflin, Director of the University of Idaho College of Law's Northwest Institute for Dispute Resolution.

confidentiality and privilege apply in the context of criminal mediation?[266]

The training was better attended by defense attorneys than prosecutors. Although a similar course has not been taught again, it is likely that one will be in the future.

b. Community Justice

Judge Patricia Young helped advance another form of ADR in Idaho by focusing her efforts on developing community justice programs.[267] Community justice is a concept that has influenced criminal, family law, and juvenile matters. As explained and advocated by Judge Young in an *Idaho Law Review* article:

> Community Justice is fundamentally about rethinking how we achieve genuine public safety. It rests on the notion that most of us "obey the rules" not because we fear "the system" but because our life is basically good and we fear losing the respect and affection of those whom we respect and admire. And so we look to "producing" those same motivations for others who may lack them; children and young people who lack opportunities and hope; adults who need help to create a good life for themselves and their children; communities themselves that feel powerless to change their conditions—whether housing, bars, parks, or other things that degrade a community and its safety. The corollary principle, however, is that this definition of public safety implies that the criminal justice system cannot itself generate safety—but rather must rely on community members pulling together, working together, and working with its agencies to generate the conditions that create safety.[268]

Community justice made its appearance in Boise County in 1997, when Judge Patricia Young and Roch Clapp, the county's juvenile probation officer, began holding community meetings.[269] The two formed a skill-building community service program, established the Boise County Community Justice Steering Committee, and hired a home visitor to provide support for teen parents and their children.[270] In 1998, a team from the U.S. Department of Justice (DOJ) visited

266. *Id.*

267. *See e.g.*, Patricia Young, *Community Justice: Exploring Possibilities*, 42 IDAHO L. REV. 307 (2006).

268. *Id.* at 307–08.

269. *Id.* at 308.

270. *Id.*

Boise County as part of a project identifying community justice initiatives in rural counties. It selected Boise County as one of four "Resource Sites" for the DOJ.[271]

The DOJ provided funding to Boise County for annual workshops. When these funds ran out, the Idaho Supreme Court stepped in with more funding to continue the workshops for teams of judges, public officials, and community volunteers to explore community justice approaches in other Idaho counties.[272] Boise County, Elmore County, and Lincoln County are all working on community justice programs. Boise County is focusing heavily on juvenile diversion and home visitor programs for newborns; Elmore County is focusing heavily on maintaining youth recreation sites, community service programs, and community forums; and Lincoln County is focusing on local methamphetamine abuse and after-school programs.[273]

c. Juvenile Justice

Juvenile justice must be viewed in a historical context in order to fully comprehend the current system. In the early 1900s, Idaho recognized that juveniles were different than adults and founded the Idaho Industrial Reform School for the Commitment of Wayward Youth[274] to educate and treat delinquent juveniles.[275] In 1987, the legislature appointed a committee to evaluate the juvenile justice system,[276] and in 1989 the Juvenile Reform Act was enacted.[277] Needing more comprehensive legislation, in 1995, the legislature enacted the Juvenile Corrections Act[278] which focuses on the balanced approach model and restorative justice.

The judiciary in Idaho was initially reluctant to accept ADR in the juvenile area. Judge John Varin, known as one of the creative forces behind many innovative juvenile projects, admits he initially was uncomfortable with the idea of mediation because it conflicted with his vision of the judicial system, of making serious decisions affecting people's lives.[279] After attending mediation training, however, he realized that mediation would work well in the juvenile justice sys-

271. *Id.*

272. *Id.* at 309.

273. *Id.* at 309–10.

274. Act of Feb. 16, 1903, 1903 Idaho Sess. Laws 12.

275. IDAHO DEPARTMENT OF JUVENILE CORRECTIONS, PERFORMANCE MEASUREMENT REPORT 1 (2006), http://dfm.idaho.gov/cdfy2008/publictions/PerfReport/perfrpt_juvenile.pdf.

276. *Id.* This committee was co-chaired by Senator Denton Darrington and Representative Dean Sorenson.

277. IDAHO CODE §§ 20-501–549 (2009).

278. IDAHO CODE §§ 20-501–549 (2009).

279. *See generally* Interview by Lisa Schoettger with Judge John Varin, in Moscow, Idaho (Aug. 20, 2009) (notes on file with author).

tem.[280] Since then, Judge Varin has been instrumental in the implementation of juvenile mediation programs around the state of Idaho.[281] He believes mediation works well within the juvenile justice system because the families "have a need for an on-going relationship."[282] From his experience, having a child come into court only creates more problems.[283]

Unlike the adult system where the goal is retributive, the juvenile justice system seeks to resolve problems and return the juvenile to the community.[284] The goal of returning the juvenile to the community can be successfully achieved through parent-child mediation or victim-offender mediation. As Judge Young has noted, "Mediation is the heart and soul of restorative justice." [285]

i. Parent-Child Mediation

In Idaho, parent-child mediation has been used since the 1990s to resolve conflicts between parents and their children who have committed status offenses.[286] In 1998, Twin Falls County received a grant for parent-child mediation overseen by the Idaho Juvenile Justice Commission.[287] Parent-child mediation improves communication between the parents and the child and thus the parent-child relationship as a whole.[288]

While improving communication within the parent-child relationship is an important goal of mediation, the ultimate goal is to pre-

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280. *Id.*

281. *Id.* Judge Varin was directly involved in establishing the Status Offender Program, specifically the parent-child mediation component, in the Fifth District. Judge Varin has served as a member of the Idaho Juvenile Justice Commission conducting research for the victim offender mediation programs around the state. He now serves as the Juvenile Justice Director for the Idaho Supreme Court. *Id.*

282. John F. Varin, Tammy Clark, and Luverne E. Shull, *Mediation Between Parents and Children: Part of the Twin Falls County Status Offender Program,* THE ADVOCATE, Nov. 1998, at 10 [hereinafter Varin, Clark, and Shull].

283. Interview with Judge John Varin, *supra* note 279; *see also* Glenda L. Cottam, *Mediation and Young People: A Look at How Far We've Come,* 29 CREIGHTON L. REV. 1517,1526 (1996).

284. *See generally* Interview with Judge John Varin, *supra* note 279.

285. Boise County, Community Justice Department, http://www.boisecounty.us/Courts_Justice.aspx (last visited Jan. 2, 2010) (quoting Patricia Young in 2001).

286. *See* Tracy J. Simmons, *Mandatory Mediation: A Better Way to Address Status Offenses,* 21 OHIO ST. J. ON DISP. RESOL. 1043, 1046 (2006) (noting that a juvenile commits a status offense when he or she commits "a non-criminal act that is considered unacceptable solely because of their age."); *see also* Varin, Clark, and Shull, *supra* note 282, at 10 (stating that status offenses may lead to criminal behavior in the future and are considered "gateway offenses").

287. Varin, Clark, and Shull, *supra* note 282, at 10.

288. *Id.*

vent the status-offending youths from engaging in more serious criminal activity in the future.[289] A neutral third party[290] facilitates the discussion between the parents and children and strives to lead them to an agreement that both the parents and the children feel is fair and realistic.[291] The parent-child mediation program continues to serve parents and children in the Fifth District in resolving family conflict and "focuses on developing partnerships between community and court programs."[292]

ii. Victim-Offender Mediation for Juveniles

Victim-offender mediation (VOM) for juveniles allows victims to speak to the juvenile who committed a crime against them. While other mediation programs focus on a settlement, VOM follows a humanistic model in which the goal of mediation is to provide a healing process to the victim, accountability for the juvenile offender, and restoration of losses.[293]

VOM for juveniles has been implemented throughout the state of Idaho. With grant funding, Idaho began training mediators in several counties to conduct VOM for juveniles.[294] VOM programs have been implemented in Ada, Boise, and Kootenai counties.[295] These programs assist both juveniles and victims to "repair . . . the tear in the fabric of the community."[296]

From 1994, when the Idaho Supreme Court ADR Committee began meeting, until today, Idaho's ADR efforts in the judicial arena have grown significantly. Ideas bantered around in the abstract have taken root and become part of the fabric of our legal system.

V. ADR IN THE FEDERAL SYSTEM

289. *Id.*

290. *See id.* at 13 (noting that while the mediator cannot balance the power between parents and children because of the parents' authoritative role, the mediator can assist the process by allowing both parties' equal opportunity to speak uninterrupted, and by curtailing any name calling, belittling, and blaming).

291. Melinda Smith, *Conflict Resolution for Children, Youth, and Families*, 3 DISP. RESOL. MAG. 11, 13 (1996).

292. John Varin & Sharon Burke, *The Unique Philosophy and History of Juvenile Courts*, THE ADVOCATE, Sept. 2003, at 22, 23.

293. For more information on VOM, see Mary Ellen Reimund, *Mediation in Criminal Justice: A Restorative Approach*, THE ADVOCATE, May 2003, at 22 [hereinafter Reimund].

294. E-mail from Jennifer Poole to Lisa Schoettger (Aug. 24, 2009) (on file with author).

295. *Id.* E-mail from Pamela Madarieta to author (Aug. 14, 2009) (on file with author). Judge Patricia Young was also an integral part of establishing other mediation programs in Boise County. *Id.*

296. Reimund, *supra* note 293, at 25.

One cannot talk about ADR in Idaho without mentioning the key developments in ADR in the federal courts in Idaho. The Ninth Circuit Court of Appeals and the United States District Court for the District of Idaho have taken the lead in ADR matters both regionally and nationally.[297]

A. Ninth Circuit Court of Appeals

The Ninth Circuit Court of Appeals implemented its mediation program, broadly based on Federal Rule of Appellate Procedure 33,[298] in 1984.[299] The program significantly expanded under the tenure of Chief Judge Clifford Wallace (1991–96). The focus of the program is to help parties communicate, clarify their understanding of the underlying interests and concerns, identify strengths and weaknesses of legal positions, explore the consequences of not settling, and generate options.[300] Chief Judge Alex Kozinski advised that "[t]he court offers this service, at no cost, because it helps resolve disputes quickly and efficiently."[301] The program staff currently consists of a chief circuit mediator and eight circuit mediators who all work exclusively for the Court of Appeals.[302] Most of the mediators are resident in the court's San Francisco headquarters; one is resident in the court's Seattle office.[303] Nearly 1200 cases have settled through the Ninth Circuit's Mediation Program.[304]

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297. *See generally* JUDITH A. MCKENNA ET AL., CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS 26–32 (Federal Judicial Center 2000) (indicating that the Ninth Circuit Court of Appeals was one of the first U.S. Courts of Appeals to establish a mediation program).

298. FED. R. APP. P. 33 ("The court may direct the attorneys . . . to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including . . . discussing settlement.").

299. *See* MCKENNA ET AL., *supra* note 297, at 30.

300. *See* The Mediation Process, http://www.ca9.uscourts.gov/mediation/mediation_c.php (last visited Jan. 2, 2010).

301. Alex Kozinski, A Message From the Chief Judge, Mediation in the United States Court of Appeals for the Ninth Circuit, http://www.ca9.uscourts.gov/mediation (last visited Jan. 2, 2010).

302. The Ninth Circuit Mediators, http://www.ca9.uscourts.gov/mediation/mediators.php (last visited Jan. 2, 2010). The Ninth Circuit mediators are non-judicial court employees who "are highly experienced and qualified attorneys from a variety of practices and have extensive training and experience in negotiation, appellate mediation, and Ninth Circuit practice and procedure." Kozinski, *supra* note 301.

303. The Ninth Circuit Mediators, *supra* note 302.

304. Telephone Interview with Claudia L. Bernard, Chief Circuit Mediator, U.S. Court of Appeals for the Ninth Circuit, in Moscow, Idaho (July 27, 2009).

B. Federal District Court Program

The United States District Court for the District of Idaho began its ADR efforts with the use of judicial settlement conferences in the 1980s. ADR expanded with the introduction of an arbitration program in 1993, and a more robust mediation program in 1995. Changes in federal legislation and the Federal Rules of Civil Procedure provided the impetus for change.[305] Additionally, the District of Idaho's ADR coordinator's vision and hard work have enabled the court to develop a dynamic ADR program.[306] Currently, the District of Idaho's ADR program includes (1) arbitration, (2) early neutral evaluation (ENE), (3) judicially-supervised settlement conferences, (4) mediation, and (5) visiting-judge hosted mediation.[307]

The District of Idaho decided early on that ADR efforts would be voluntary and non-binding and that they should include settlement weeks, arbitration, and early neutral evaluation.[308] Interestingly, in the early 1990s, mediation was not even discussed as an option in the District of Idaho, perhaps because Idaho lawyers during this time perceived mediation as a threat to the legal system and their livelihoods.[309]

1. Settlement Weeks

Following the lead of Idaho state courts, which had first sponsored Settlement Weeks in 1988, in 1992 the federal court decided to periodically offer a settlement week using neutral attorneys (defined as settlement masters or mediators) who were both specially trained

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305. *See* FED. R. CIV. P. 16 (1993); Civil Justice Reform Act § 103(a), 28 U.S.C. §§ 471–842 (1990); Alternative Dispute Resolution Act § 901(a), 28 U.S.C. §§ 651–58 (1988).

306. Tom Murawski, coordinator from 1990 to 1995, shepherded through the initial rules and procedures for the court's arbitration and mediation programs. Le (Parker) Kelleher, coordinator from 1995 to 2002, gave the ADR program wings with the addition of trainings and the *Roster Rap*, the court's ADR newsletter. Denise Asper, coordinator from 2002 to 2008, expanded the use of ADR processes especially in the prison context. Susie Boring-Headlee, although only officially in the position since January 1, 2009, has brought her organizational skills to the job, increased the use of ADR processes, and begun a collaborative educational partnership with the NWI.

307. Susie Boring-Healee, U.S. Dist. Court for the Dist. of Idaho, ADR/Pro Bono Report and Request for Robust Staffing Factor (2009) (unpublished report, on file with author) [hereinafter 2009 Federal Court ADR Data].

308. U.S. Dist. and Bankr. Courts for the Dist. of Idaho, The Civil Justice Reform Act of 1990 Expense and Delay Reduction Plan 12 (1991) (on file with author) (recommending all ADR programs be voluntary, binding, and confidential).

309. E-mail from Tom Murawski, ADR Coordinator for the U.S. Dist. Court for the Dist. of Idaho, to author (Aug. 10, 2009) (on file with author); Telephone Interview with Tom Murawski, ADR Coordinator for the U.S. District Court (July 29, 2009) (on file with author).

in the state court settlement program[310] and familiar with federal court cases. The Settlement Weeks program lasted for several years, but it was gradually supplanted by other forms of ADR. By 1995, the district used three forms of ADR: settlement conferences, arbitration, and mediation.[311]

2. Judicially-Supervised Settlement Conferences

United States Magistrate Judges have conducted settlement conferences in Idaho since the late 1980s.[312] At that time, the District of Idaho Local Rule 16.1 authorized the use of judicially-supervised settlement conferences.[313] Since the court currently has four magistrates—two newly appointed and two on senior status,[314] it has more resources to devote to settlement conferences. The magistrates travel throughout the state to conduct settlement conferences. Between July 1, 2008, and June 30, 2009, the magistrate judges conducted forty settlement conferences, with sixty percent of the cases settling.[315]

3. Arbitration

After the passage of the Civil Justice Reform Act in 1990, the district court's first real foray into ADR was to establish an arbitration program.[316] In 1992, the court created the Arbitration Advisory Com-

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310. The state courts sponsored the first Settlement Weeks beginning in 1988 in Blackfoot, Idaho. Task Force Report, *supra* note 103, at 1–2.

311. *See* LE PARKER, CJRA ANNUAL EVALUATION REPORT UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO JANUARY 1992–DECEMBER 1995 at 54–55 (1995).

312. Telephone Interview with Michael Williams, Senior Magistrate Judge, U.S. Dist. Court for the Dist. of Idaho (on file with author). Judge Williams began doing settlement conferences in about 1986-87. *See* PARKER, *supra* note 311, at 4 (noting that the two full-time magistrate judges conducted the settlement conferences).

313. Telephone Interview with Tom Murawski, ADR Coordinator, U.S. Dist. Court for the Dist. of Idaho (July 29, 2009) (notes on file with author).

314. Judge Candy Dale filled Judge Michael Williams' vacancy on the District Court of Idaho and began work on March, 30, 2008. Judge Ron Bush filled Judge Larry Boyle's vacancy on the District Court of Idaho and began work on September 30, 2008. Judges Williams and Boyle are on senior status. Press release, U.S. Dist. Court for the Dist. Of Idaho, Two New Federal Judges Named (Nov. 26, 2007) *available at* http://www.ce9.uscourts.gov/press%20releases/2007/MagJudWPictures.pdf.

315. 2009 Federal Court ADR Data, *supra* note 307.

316. Arbitration Program, Gen. Order No. 92 (May 5, 1993), *available at* http://www.id.uscourts.gov/docs/genor92.pdf [hereinafter Gen. Order 92]. According to Tom Murawski, no one remembers exactly why the court attempted an arbitration program first. One suggestion is that the original CJRA Committee predominately consisted of judges, partners of large law firms, successful litigators, the U.S. Attorney for the District of Eastern Washington and Idaho, and others. No one had much first-hand experience with mediation. In the summer of 1991, the legal culture in Idaho perceived most ADR processes as threats to the system and their livelihood. One exception was a judi-

mittee.[317] On December 8, 1992, the District Court held its first ADR training focusing on arbitration. The early arbitration program was voluntary and covered all civil cases (excluding prisoner cases), regardless of dollar amount. The court adopted Arbitration Rules and Procedures in May 1993,[318] but the arbitration program was never really utilized.[319]

In 1994, the court sent a survey to attorneys in an effort to understand the federal bar's apparent reluctance to use arbitration.[320] The survey questioned attorneys about their familiarity with, and past use of, various ADR programs as well as their preferences for the programs.[321] The survey results showed that 65% of respondents had used mediation; 55% judicially-hosted settlement conferences; 47% arbitration; 47% settlement weeks with neutral attorneys/settlement masters; and 8% early neutral evaluation. Only 13% of the respondents reported having no experience with any type of ADR.[322] When asked which alternative dispute resolution programs they would most likely use in future federal civil litigation[323] respondents selected as follows: 61% of respondents would likely use judicially hosted settlement conferences; 48% mediation; 29% early neutral evaluation; 19% settlement weeks using neutral attorneys/settlement masters; and only 8% arbitration.[324] The survey results were consistent with the bar's reluctance to use arbitration and triggered the adoption of the federal court's mediation program.[325]

4. Mediation

On November 7, 1995, the District Court signed General Order No. 121 adopting a mediation program.[326] "All cases filed after November 6, 1995, were subject to 'presumptive' mediation, meaning the

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cially conducted settlement conference. E-mail from Tom Murawski, ADR Coordinator, U.S. Dist. Court for the Dist. of Idaho, to author (July 29, 2009) (on file with author).

317. Non-court members included Tom Chandler, Peter Desler, Stephen Dunn, Alan Markizon, and the author. Tom Murawski served as the chair of the committee.

318. Gen. Order 92, *supra* note 316. As part of the first phase of the court's implementation of ADR programs in the federal court, it offered a one-day formal arbitration training program. Neal Blacker, Northwest Regional President of the American Arbitration Association, conducted the training. Approximately forty people from throughout the state participated in the training. Materials are on file with author.

319. PARKER, *supra* note 311, at 55.

320. Telephone Interview with Tom Murawski, ADR Coordinator, U.S. Dist. Court for the Dist. of Idaho (July 29, 2009) (notes on file with author).

321. PARKER, *supra* note 311, at 58.

322. *Id.*

323. More than one answer could be selected. *See id.*

324. *Id.*

325. *Id.*

326. Mediation Program Procedures, Gen. Order No. 121 (1995), *amended by* Mediation Programs Procedures, Gen. Order No. 130 (1996), *available at* http://www.id.uscourts.gov/docs/genor130.pdf [hereinafter Gen. Order 130].

parties [were] required to give reason at the Rule 16 Scheduling Conference why their case should not go to mediation."[327] The rule also provided that mediators on the court's roster must be an attorney: "admitted to practice for not less than five years or possess a particular expertise, training, or background in mediation;"[328] be a member of the federal bar or "a retired or non-practicing attorney or judge;" and have participated in a forty-hour basic mediation course.[329]

Le (Parker) Kelleher, the District Court's ADR coordinator from 1995–2002, took the nascent mediation program and gave it life. Through her efforts, the court offered training for mediators and advocates.[330] The Court's initial mediation roster contained twenty-seven lawyers, most of who had participated in court-sponsored two and a half day mediation training in 1994.[331] The Administrative Office of the Courts funded this training on the conditions that all mediators must remain on the roster for one year and agree to do one of their first mediations pro bono.[332]

The court recognized that education and knowledge were the keys to building a successful program.[333] As such, every other month the court published a newsletter, the *Roster Rap*, and distributed it to authorized roster members. The *Roster Rap* kept mediators and judges in the district apprised of the "various training activities, state-sponsored [civil mediation activities], general news of the mediation world, and other miscellaneous items of interest."[334]

During Denise Asper's tenure as ADR coordinator, mediation expanded even more, especially in the area of prisoner cases.[335] Mediation referrals increased from about 20 cases per year to over 150.[336]

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327. PARKER, *supra* note 311, at 55.

328. Gen. Order 130, *supra* note 326, at 5.

329. *Id.*

330. Telephone Interview with Le (Parker) Kelleher, Former ADR Coordinator, U.S. Dist. Court for the Dist. of Idaho (Sept. 11, 2009) (noting that Sam Imperati and Jeff Abrams of the Institute for Conflict Management, Inc. of Portland, Oregon, conducted the initial training).

331. *Id.*

332. *Id.*

333. *See* PARKER, *supra* note 311, at 55–56 ("Advocacy training (how to represent your client in a mediation) [was] conducted . . . by the Institute for Conflict Management, Inc. The comments received from this training ranged from 'This is the best training I have ever received' to '[n]ow I know why a mediation takes time . . . [i]t's great to finally understand the process.'").

334. *Id.* at 56.

335. *See* E-mail from Julie Glass, Human Resources Director, U.S. Dist. Court for the Dist. of Idaho, to author (Aug. 24, 2009) (on file with author) (stating that Denise Asper was ADR Coordinator from Sept. 30, 2002, until she left in Dec. 2008); E-mail from Denise Asper to author (Aug. 12, 2009) (on file with author) (stating that one-half of the funding for her position came from an allocation based on prisoner case filings, the other half came from the Clerk's Office for her work as the ADR Program Director).

336. *See* E-mail from Julie Glass to author, *supra* note 335.

The court used a combination of privately paid mediators, pro bono mediators, Ninth Circuit panel mediators, visiting circuit and district court judges, and Idaho state court judges to settle cases.[337] Today, most of the civil cases in the District of Idaho involve contract and commercial disputes, civil rights claims, and claims regarding personal injury and property damage, including intellectual property matters. In the past year, thirty-nine cases were mediated by non-judicial mediators with a success rate of seventy-two percent.[338]

5. Early Neutral Evaluation

In 2009, the United States District Court Magistrates began conducting Early Neutral Evaluations (ENEs). Early Neutral Evaluations are designed to provide a reality check for clients and lawyers and to position the case for early resolution by settlement, disposition motion, or trial. It can be a cost-effective substitute for formal discovery and pre-trial motions as it may assist with the informal exchange of key information. The district's ADR coordinator is working closely with the magistrate judges and the bar to ensure that more practitioners become aware of this service.[339]

The use of ADR has significantly expanded over the years. Of the 360 civil cases filed or reopened between July 1, 2008, and June 30, 2009, 236 cases, or 66 percent, were involved in some form of ADR.[340] The one civil area in which mediation is notably absent is bankruptcy. Although mediation is an available option in bankruptcy cases, no bankruptcy litigants are currently using it.[341] The District of Idaho continues to innovate and implement new mediation programs. It recently created a pilot program in which it pays mediators a reduced hourly rate from its non-appropriated funds to mediate cases involving indigent pro se prisoner litigants.[342] The District Court's ADR program will no doubt expand even further under the direction of Susie Boring-Headlee.

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337. *See* E-mail from Denise Asper to author, *supra* note 335. Due to the heavy caseload in the district, the court used visiting judges to mediate cases. Interestingly, two visiting jurists came from California—United States District Judge David Carter from the Central District of California and Judge William Shubb from the Eastern District of California. Ninth Circuit Court of Appeals Judge Randy Smith who had a strong track record of settling civil and criminal cases when he was a state district court judge also mediated cases for the court. *Id.*

338. 2009 Federal Court ADR Data, *supra* note 307, at 10.

339. *Id.*

340. *Id.* (excludes prisoner and Social Security cases as well as 28 U.S.C. § 2254 and 28 U.S.C. § 2255 motions).

341. *Id.*

342. *Id.*

VI. CONCLUSION—WHAT HAVE WE LEARNED AND WHERE ARE WE HEADING?

A. What We Have Learned

ADR has deep roots in Idaho and is here to stay. Compiling this history has reinforced to me how indebted we are to the early pioneers at the community, family, criminal, and civil levels. ADR evolved and developed through collaborative efforts of the community, the academy, the bench, and the bar. Community-based programs have found a home at BSU and other locations throughout the state. *Stockwell v. Stockwell*[343] legitimized family mediation and gave Judge Patricia Young and others the impetus to move forward and develop an intricate web of ADR options for families in conflict.[344] Although family mediation was not explored in this paper, we owe a debt of gratitude to Judge Patricia Young, Sue Flammia, Patti Tobias, Victoria Hawley, Marie Meyers, and Viki Howard who have given life to the Idaho Supreme Court's endorsement of ADR in the family area.

In the civil arena, the bench and bar collaborated in the creation and implementation of Rule 16(k) in spite of legislative obstacles. This collaborative effort shows the strength of bringing the bench and the bar together to forge ties and create needed rules and procedures for the development of ADR. As one participant noted, the 1980s and 1990s were "an exciting period. [ADR] seemed so daring and controversial at the time. Now, it's part of the landscape and a necessary tool in every lawyer's bag of tools."[345] ADR is part of the judicial fabric in civil cases in this state.

We have struggled with ownership, power, and critics. Over time, the bar and the judiciary have embraced ADR. One judge commented, "ADR is here to stay. It is cost-effective compared to litigation and it reduces collateral damage. It also gives people control over their lives. We should also be mindful that we do not force folks to abandon their rights in pursuing systemic efficiency."[346]

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343. 116 Idaho 297, 775 P.2d 611 (1989).

344. *See, e.g.*, Parenting Coordinator Statute, IDAHO CODE. ANN. § 32-717D (2009); Hildy Mauzerall, et al, *Protecting The Children of High Conflict Divorce: An Analysis of the Idaho Bench/Bar Committee to Protect Children of High Conflict Divorce's Report to the Idaho Supreme Court*, 33 IDAHO L. REV. 291 (1997); Patricia G. Young, *Community Justice: Exploring Possibilities*, 42 IDAHO L. REV. 307 (2006); Benjamin R. Simpson, *Informal Custody Trial: An Alternative Child-Focused Model*, THE ADVOCATE, Jan. 2009, at 14.

345. *See* E-mail from Jack McMahon, Pro Bono Program Dir., Univ. of Idaho Coll. of Law, to editors, Idaho Law Review (Nov. 6, 2005) (on file with author).

346. E-mail from John Judge, Judge, Latah County Magistrate Court, to author (Aug. 13, 2009) (on file with author).

B. Where We Are Heading

Voluntariness of mediation. Mediation in Idaho will remain voluntary at the state and federal level. While some individual state court judges pressure parties in civil cases to attempt mediation, I do not foresee Idaho courts ordering mediation prior to trial.[347] The libertarian streak in the state would defeat such a proposal. While the federal court has a presumption that parties will attempt some form of ADR before trial, this presumption is rebuttable and therefore not as draconian as a requirement to mediate. It is unlikely this rebuttable presumption will change. At the same time, most litigants in the District of Idaho do select either mediation or a judicial settlement conference,[348] which shows the attractiveness of these two options.

ADR coordinator positions at the state and federal levels. History has shown the ADR movement cannot be sustained long-term on the backs of volunteers. For ADR to continue to grow, the state and federal courts must increase the resources devoted to it. It is time for the Idaho Supreme Court to revisit the need for a statewide coordinator. Florida, whose supreme court in 1986 created the first statewide center for ADR education, training, and research, provides an excellent example of how institutional support can enable an ADR program to flourish.[349] Sufficient time has passed that the issue may again be ripe for discussion with the Idaho legislature. In the federal courts, the ADR program has increased significantly over the past thirty years. Thus, the federal court should consider expanding its ADR Coordinator position from a half-time position to a full-time position.

Areas ripe for future expansion. Environmental and natural resource issues will consume the twenty-first century. Researchers, journalists, politicians and academics flood the airways with information about energy, water scarcity, climate change, loss of biodiversity, urbanization, and environmentally sustainable food systems. These issues raise serious policy questions and necessitate facilitated discussions and collaborative research.[350] The area is ripe for ADR.[351]

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347. Merlyn Clark agrees with this assertion. *See* E-mail from Merlyn Clark, Partner, Hawley Troxell Ennis & Hawley LLP, to author (Aug. 2, 2009) (on file with author).

348. *See* 2009 Federal Court ADR Data, *supra* note 307.

349. *See* Florida State Courts, Alternative Dispute Resolution, *http://www.flcourts.org/gen_public/adr/brochure.shtml* (last visited Jan. 2, 2010). The Florida program flourished under the direction of Sharon Press, who served as its director from 1991 until July 2009 when she became the Director of Hamline University School of Law's Dispute Resolution Institute. *See also* Press Release, Hamline University School of Law, Hamline University School of Law Names Sharon Press New Director of Dispute Resolution Institute (Jan. 27, 2009), *available at* http://www.reuters.com/article/pressRelease/idUS182218+27-jan-2009+PRN20090127.

350. An excellent example of this can be found in the work currently being done by Professor Dale Goble of the University of Idaho College of Law and others. *See e.g.*,

Criminal mediation. Heavy criminal dockets at the state and federal level will force the courts to examine—or, in the case of the state courts, to re-examine—the need for a rule covering criminal mediation that addresses the concerns of prosecutors and defense lawyers. Criminal mediation is already being used in Idaho and elsewhere.[352] Ethical and constitutional issues need to be addressed before the practice expands much more.[353]

Livelihood. Making a living as a neutral engaged in full-time ADR work is difficult in Idaho. It is my hope that as the story about mediation continues to be told, more people will opt into mediation or other less adversarial processes before plunging into litigation, thereby allowing more ADR providers to follow their passion and make a living serving as a neutral.

Northwest Institute for Dispute Resolution. The University of Idaho College of Law's Northwest Institute (NWI) will need to continue and expand its statewide offerings. Since 2006, the NWI has partnered with the Conflict Resolution Center to offer advanced family mediation programs in Coeur d'Alene, Idaho, each fall. In 2009, the NWI offered its first advanced civil mediation course in Boise in conjunction with the federal court's ADR program. The partnerships between the Conflict Resolution Center in Coeur d'Alene, the NWI, and the federal court's ADR program will continue and undoubtedly expand in response to the bench and bar's needs.

THE ENDANGERED SPECIES ACT AT THIRTY: CONSERVING BIODIVERSITY IN HUMAN-DOMINATED LANDSCAPES (Dale Goble et al. eds., 2006).

351. *See, e.g.*, Rosemary O'Leary & Susan Raines, *Alternative Dispute Resolution and Enforcement Actions at the U.S. Environmental Protection Agency: A Letter to Christine Todd Whitman*, 7 ENVTL. L. 623 (2001) (urging Administrator Whitman to implement the use of ADR techniques and practices in EPA enforcement actions); Joseph A. Siegel, *Alternative Dispute Resolution in Environmental Enforcement Cases: A Call for Enhanced Assessment and Greater Use*, 24 PACE ENVTL. L. REV. 187 (2007) (arguing for the increased use of ADR in environmental enforcement cases); LAW OF ENVTL. PROT. § 9:134 (Envtl. Law Inst. 2009) (discussing frontier issues and new directions in environmental enforcement); Barbara Cosens, *Water Dispute Resolution in the West: Process Elements for the Modern Era in Basin-wide Problem Solving*, 33 ENVTL. L. 949 (2003) (discussing the use of ADR to resolve water rights disputes).

352. *See generally* Jack Hanna, *Mediation in Criminal Matters*, DISP. RESOL. MAG., Fall 2008, at 5–8, (discussing criminal mediation programs in various states).

353. See, e.g., Laflin, supra note 251; Larysa Simms, Note, *Criminal Mediation is the BASF of the Criminal Justice System: Not Replacing Traditional Criminal Adjudication, Just Making It Better*, 22 OHIO ST. J. ON DISP. RESOL. 797 (2007); Shawn P. Davisson, *Balancing the Scales of "Confidential " Justice: Civil Mediation Privileges in the Criminal Arena—Indispensible, Impracticable, or Merely Unconstitutional?*, 38 MCGEORGE L. REV. 679 (2007); Mary Ellen Reimund, *Confidentiality in Victim Offender Mediation: A False Promise?*, J. DISP. RESOL. 401 (2004).

Technology and ADR. Advances in technology will significantly influence how ADR is conducted in the future.[354] Mediation has traditionally taken place face-to-face, allowing parties to take advantage of the sometimes subtle, non-verbal cues during the process.[355] Current technology makes it possible to mediate without being present in the same room.[356] However, the subtle cues are lost if the parties cannot visibly see each other.[357] As technology continues to improve, parties and mediators will be able to interact in a virtual mediation as if they were in the same room.[358]

ADR will become more of a multi-disciplinary process. While Idaho is not new to the idea of multi-disciplinary mediation,[359] the expansion of collaborative law and the complex inter-disciplinary nature of environmental disputes will see an increase in the use of inter-disciplinary, co-mediation models. The use of multi-disciplinary practice "provide[s] a more holistic form of client service[s]."[360] Multi-disciplinary practice allows attorneys to work with other professionals and learn to see the case from another perspective.[361]

The history of ADR has ebbed and flowed over the last thirty years. ADR is currently in a state of stasis. In order to infuse it with energy, more resources must be devoted at the state and federal levels. Peaceful Settlements once ignited the flame. It is time the State of

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354. *See e.g.* Fred Galyes, *Virtual Justice as Reality: Making the Resolution of E-Commerce Disputes More Convenient, Legitimate, Efficient, and Secure*, 2009 ILL. J.L. TECH. & POL'Y 1 (2009); *see also* Harry N. Mazadoorian, *Introduction to the Sixth John A. Speziale Alternative Dispute Resolution Symposium*, 27 QUINNIPIAC L. REV. 767, 771 (2009).

355. *See* David A. Hoffman, *The Future of ADR Practice: Professionalization, Spirituality, and the Internet*, DISP. RESOL. MAG., Spring/Summer 2008, at 7 [hereinafter Hoffman, Professionalization].

356. David A. Hoffman, *The Future of ADR: Three Hopes, Three Fears, and Three Predictions*, NEGOTIATION J., Oct. 2006, at 467, 470–471 (noting that today we already use e-mail, voice mail, conference calls, web boards, and teleconferences, although not as much as face-to-face mediation).

357. *See* Hoffman, *supra* note 355, at 7.

358. *See Id.*

359. The NWI worked in conjunction with the Conflict Resolution Center in Coeur d'Alene to present information on attorney-mediators working with therapist-mediators in the family mediation setting. University of Idaho College of Law, NW Institute for Dispute Resolution, http://www.uidaho.edu/law/academics/clinicsprofessionalskills/nwinstitutedisputeresolution.aspx (last visited Feb. 4, 2010).

360. Hoffman, *supra* note 356, at 471.

361. *See generally* David A. Hoffman, *Colliding Worlds of Dispute Resolution: Towards a Unified Field Theory of ADR*, 2008 J. DISP. RESOL. 11. The NWI has offered several courses using inter-disciplinary teams of trainers. In October 2008, NWI offered a two day training entitled, Product vs. Process: The Psycho-Legal Approach to Advanced Family Mediation taught by an attorney and therapist team, Grace K. Lee and Tara Fass from Peace Talks Mediation Service in California. *Acknowledgements*, REG. FAC. & STAFF NEWSL. (Univ. of Idaho), Feb. 20, 2009, at 4.

Idaho recognizes the value of ADR and devotes the necessary resources to carrying forth the vision of a less adversarial approach to disputes at all levels.