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# ALTERNATIVE DISPUTE RESOLUTION IN WISCONSIN: A COURT REFERRAL SYSTEM

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## INTRODUCTION

Effective July 1, 1994, Wisconsin entered a new frontier with respect to how disputants and litigants approach and resolve conflict. With the passage of section 802.12 of the Wisconsin Statutes, the Wisconsin Supreme Court has incorporated alternative dispute resolution (ADR) into the Wisconsin civil court system. This new court rule will permit judges to refer cases and litigants to neutral third parties who will help parties settle their disputes through one of the enumerated settlement alternatives.

Other states have approached court-connected ADR systems in a variety of ways. Some have passed legislation under the guise of "court reform". Two such states are Florida and Texas. The Texas statute<sup>1</sup> is the closest model to our Wisconsin court rule. It includes a variety of processes such as mediation,<sup>2</sup> mini-trial,<sup>3</sup> moderated settlement conference,<sup>4</sup> summary jury trial,<sup>5</sup> arbitration,<sup>6</sup> and authorizes the court to order

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1. TEX. CIV. PRAC. & REM. CODE ANN. § 151.001 (West Supp. 1995).

2. *Id.* § 154.023.

3. *Id.* § 154.024.

4. *Id.* § 154.025.

parties to participate in a nonbinding settlement process. One unique feature of the Texas legislation is Chapter 155, which sets up settlement weeks in counties with a population of greater than 150,000 persons.<sup>7</sup> The courts are directed to "facilitate the voluntary settlement of civil and family law cases" during this week.<sup>8</sup> In other respects, the Texas legislation is substantially similar to the Wisconsin referral rule.

Likewise, Florida passed legislation that has had a substantial impact on the judiciary and legal profession in that state. It is now not only a common practice for litigants and their lawyers to participate in mediation, but in many instances it has become a routine step in the pretrial litigation process. The growth of ADR in those two states has drawn nationwide attention.

It is important to understand that many of the federal district courts around the country, including the Eastern<sup>9</sup> and Western<sup>10</sup> Districts of Wisconsin, have implemented some form of court rule that either gives litigants notice of the availability of ADR or empowers the court to require litigant participation in a process selected by the court. The authority for the creation and implementation of ADR referral systems comes from the court's general rule-making authority to administer justice in an efficient and effective manner.

Minnesota amended its ADR statute<sup>11</sup> in 1993. The two major changes made by the Minnesota legislature lowered the limit of the amount in controversy from \$50,000 to \$7,500 before a judge can "direct the parties to enter nonbinding [ADR],<sup>12</sup> and changed the wording of the statute from "shall . . . direct" to "may . . . direct."<sup>13</sup> Both changes will give judges in Minnesota more discretion in the cases that are referred to ADR in their state.

Colorado legislation is similar to the Wisconsin Statute in that "any case" may be referred by a judge as long as it does not involve physical or psychological abuse.<sup>14</sup>

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5. *Id.* § 154.026.

6. *Id.* § 154.027.

7. *Id.*

8. *Id.* § 155.001.

9. E.D. Wis. R. § 7.12.

10. W.D. Wis. R. Civil Justice Expense and Delay Reduction Plan.

11. MINN. STAT. ANN. § 484.74 (West Supp. 1994).

12. *Id.*

13. *Id.*

14. COLO. REV. STAT. ANN. § 13-22-305 (West Supp. 1994).

In general, states that became interested in ADR during the early 1980s, such as Michigan and Illinois, tended to emphasize arbitration. Usually, they include provisions that provide a *de novo* review of the award. The Michigan rule<sup>15</sup> provides that a party who does not ultimately prevail on the merits must pay the other side's costs and attorney's fees. Thus, there is a disincentive placed upon a party seeking review. However, statutes and court rules that were enacted in the late 1980s and early 1990s generally emphasized the least coercive ADR processes, such as mediation. Mediation is preferred because studies indicate that court-connected arbitration does not necessarily yield any true savings to the litigants or to the system.<sup>16</sup>

#### I. INADMISSIBILITY-WISCONSIN STATUTE SECTION 904.085

The Wisconsin Supreme Court, at the request of the State of Wisconsin Judicial Council, enacted section 904.085 of the Wisconsin Statutes by Supreme Court order 93-03 dated October 15, 1993. This statute was developed by the ADR Committee of the Judicial Council as a necessary prerequisite to the enactment of section 802.12 of the Wisconsin Statutes. As is often stated, "confidentiality is the glue that holds mediation together." Because a privilege can be waived by one who owns it and confidentiality can be achieved by contract, section 904.085 is a rule of admissibility rather than one of privileged communication or even of confidentiality in the legal sense. The purpose of section 904.085, entitled "Communication in Mediation," is to "encourage the candor and cooperation of disputing parties, to the end that disputes may be quickly, fairly and voluntarily settled."<sup>17</sup>

The statute defines "mediation" as any "statutory, contractual, or court-referred process facilitating the voluntary resolution of disputes."<sup>18</sup>

This is a broad and sweeping definition that includes existing statutory mediation efforts such as section 767.11,<sup>19</sup> involving mediations for actions affecting the family, and chapter 655,<sup>20</sup> involving the medical malpractice mediation system.

The statute prohibits any "oral or written communication relating to a dispute in mediation made or presented in mediation by the mediator

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15. W.D. MICH. R. 43(j)(4).

16. See DEBORAH R. HENSLER, COURT-ANNEXED ARBITRATION IN THE STATE TRIAL COURT SYSTEM 6-11 (1984).

17. WIS. STAT. § 904.085(1) (1993-94).

18. *Id.* § 904.085(2)(a).

19. *Id.* § 767.11.

20. *Id.* Ch. 655.

or a party" from being admitted "in evidence or subject to discovery or compulsory process in any judicial or administrative proceeding."<sup>21</sup> In other words, what goes on in mediation remains private and protected. Additionally, neither the mediator nor any organization with which the mediator works may be subpoenaed.<sup>22</sup> There are three important exceptions contained in the statute: First, the rule does not apply to "any *written* agreement, stipulation or settlement"<sup>23</sup>. Occasionally, parties will have to enforce the agreement pursuant to mediation. The Judicial Council felt that it would be necessary to impose a requirement that such agreement be in writing in order to suspend the rules relating to communications in mediation. Second, the reporting of child abuse is also excepted from inadmissibility,<sup>24</sup> and there is no prohibition on evidence that is otherwise discovered, even though it was presented in the course of mediation.<sup>25</sup> This last exception is designed to address the problem of the "fruit of the poisonous tree." That is, the search for the truth that is ongoing in any piece of litigation should in no way be thwarted by the strong language in this new rule of inadmissibility. Without the exceptions, this rule may have been excessively protective of the process and those rendering the service.

## II. WISCONSIN COURT REFERRAL RULE

### A. *Judicial Council Input/History*

The genesis of the Wisconsin ADR Court Referral Rule was a committee formed by the Wisconsin Judicial Council.<sup>26</sup> This committee's mission was to conduct a comprehensive review of court connected ADR systems. To that end, the committee reviewed the law of Florida, Texas, Missouri, Colorado, California, and other states that have enacted legislation connecting ADR to the courthouse. It also looked at court rules, most notably the Northern District of California and the Eastern and Western Districts of Wisconsin. The committee reviewed research provided by the State Justice Institute, National Institute of Dispute

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21. *Id.* § 904.085(3)(a).

22. *Id.* § 904.085(3)(6).

23. *Id.* § 904.085(4)(a)(emphasis added).

24. *Id.* § 904.085(4)(d).

25. *Id.* § 904.085(4)(c).

26. The Judicial Council is a nineteen member committee created and governed by section 758.13 of the Wisconsin Statutes. The duties of the council include observing and studying the rules of pleading, practice, and procedure, and advising the supreme court of any changes which in the council's judgment will simplify procedure and promote a speedy determination of litigation upon its merits. WIS. STAT. § 758.13(2) (1993-94).

Resolution, the American Bar Association, and the Rand Corporation. It invited guest speakers with national and local expertise and looked at bar association volunteer programs such as the Milwaukee Bar Association's and the Dane County Bar Association's volunteer case mediation programs. The committee acknowledged the growing interest in ADR by corporations and industries such as the insurance industry. The committee was also aware that approximately ninety-five percent or more of all civil cases filed are settled without a trial.

The committee, having digested much of this information over approximately two years, drew certain conclusions. Of the two types of systems, the referral system as used in Texas and the Eastern District of Wisconsin and the "notice" type of system as used in Missouri and the Western District of Wisconsin, the consensus was that the court referral type of system was the most effective. The committee took the view that the judge was in the best position to determine which cases should be referred and when. The prevailing view was that the least coercive processes, those which emphasize voluntariness, were the most effective. Therefore, an important factor was the amount of control that the parties themselves had over the outcome as well as the selection of both the process and the service provider.

Much of the literature and studies available to the committee, along with the discussion that takes place among everyone having an interest in ADR, revolves around two well-known themes. The "cool theme" deals with quantitative issues, such as more efficient case management, lower cost case administration, speedier dispute resolution, lowering of transactional costs to litigants, and less dependency on a public system that may be congested and create delays. The other side of the discussion revolves around a "warm theme" or qualitative considerations, such as how participants feel about their experience with ADR.<sup>27</sup> Generally, proponents may argue that there is higher "user satisfaction" and greater compliance with stipulations than court orders because all parties consent. Proponents also argue that the nonbinding nature of many ADR processes allows parties to participate in the settlement of their own cases in a relatively risk-free, nonadversarial, less confrontational environment.

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27. See JOHN S. MURRAY, ET AL., PROCESSES OF DISPUTE RESOLUTION (1989).

### B. Definitions

Section 802.12 of the Wisconsin Statutes defines nine types of ADR "settlement alternatives"<sup>28</sup> to which parties may be referred. They are binding arbitration,<sup>29</sup> mediation, direct negotiation, early neutral evaluation, focus group, mini-trial, moderated settlement conference, nonbinding arbitration<sup>30</sup>, and summary jury trial. Arbitration and mediation are by far the most popular ADR choices. They will be discussed and compared in detail following the discussion of the other settlement alternatives.

#### 1. Direct Negotiation<sup>31</sup>

Direct negotiation is a dispute resolution process that does not utilize the services of a neutral third party. As such, it is not considered to be much of an "alternative" process. Although the statute refers to direct negotiation as an exchange of offers and counter offers or a discussion of the merits of the case, many emerging, more sophisticated techniques have been referenced in popular books such as *Getting to Yes*.<sup>32</sup> In addition, law schools and business schools, such as the Harvard Business School, are now requiring courses in negotiation skills. The literature available describes many different and unique styles of negotiation. The

28. WIS. STAT. § 802.12(1)(i) (1993-94).

29. The term "binding arbitration" is defined as:

(a) "Binding arbitration" means a dispute resolution process that meets all of the following conditions:

1. A neutral 3rd person is given the authority to render a decision that is legally binding.
2. It is used only with the consent of all the parties.
3. The parties present evidence and examine witnesses.
4. A contract or the neutral 3rd person determines the applicability of the rules of evidence.
5. The award is subject to judicial review under ss. 788.10 and 788.11.

*Id.* § 802.12(1)(a).

30. The term "nonbinding arbitration" is defined as:

a dispute resolution process in which a neutral 3rd person is given the authority to render a nonbinding decision as a basis for subsequent negotiation between the parties after the parties present evidence and examine witnesses under the rules of evidence agreed to by the parties or determined by the neutral 3rd person.

*Id.* § 802.12(a)(h).

31. The term "direct negotiation" is defined as:

"a dispute resolution process that involves an exchange of offers and counteroffers by the parties or a discussion of the strengths and weaknesses or the merits of the parties' positions, without the use of a 3rd person."

*Id.* § 802.12(1)(b).

32. ROGER FISHER & WILLIAM URY, *GETTING TO YES* (1991).

method of negotiation in *Getting to Yes* is referred to as "principled negotiation." Other styles include the competitive style and the problem solving style.<sup>33</sup> Suffice it to say that there is much attention being paid to how we approach conflict resolution both with and without the assistance of a neutral third party.

## 2. Early Neutral Third Party Evaluation<sup>34</sup>

The key words in the statute relating to early neutral third party evaluation are "initial appraisal."<sup>35</sup> This process is one of evaluation in which the neutral party forms an opinion with respect to the relative merits of each party's case. This process has not been highly used, but has potential to be very useful in certain cases. For example, if the main issue in the case was the value of a piece of real estate or the interest of a minority shareholder in a corporation, it might be useful to have an "appraisal" done by a third party who would give an objective opinion. Such an opinion would subsequently be inadmissible into evidence at trial under section 904.085 of the Wisconsin Statutes<sup>36</sup> unless the parties stipulated otherwise.

## 3. Focus Group<sup>37</sup>

Focus groups have been utilized in the past by advertising agencies, marketing organizations, and jury consultants. Within the last decade litigators have started to use focus groups in the form of pretrial issue or case assessment, or even a shadow jury which may occur during the pendency of a trial to assist the party in trial strategy development. The level of formality of the focus group may range from a small number of individuals picked from a "down the hall" group to a demographically

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33. See generally MURRAY, ET AL., *supra* note 29, at 75-101.

34. The term "early neutral evaluation" is defined as:

a dispute resolution process in which a neutral 3rd person evaluates brief written and oral presentations early in the litigation and provides an initial appraisal of the merits of the case with suggestions for conducting discovery and obtaining legal rulings to resolve the case as efficiently as possible. If all of the parties agree, the neutral 3rd person may assist in settlement negotiations.

WIS. STAT. § 802.12(1)(c).

35. *Id.*

36. See *supra* note 23 and accompanying text.

37. The term "focus group" is defined as:

a dispute resolution process in which a panel of citizens selected in a manner agreed upon by all of the parties receives abbreviated presentations from the parties, deliberates, renders an advisory opinion about how the dispute should be resolved and discusses the opinion with the parties.

WIS. STAT. § 802.12(1)(d).

correct, randomly selected group of individuals from a particular community. Also, the issues dealt with could be singular in nature or a projection of how the entire case may be resolved by a jury. For example, because many attorneys believe that jurors reach their decision on the final verdict of a trial during or immediately after the opening statement,<sup>38</sup> focus groups can be effective in objectively evaluating the content of an opening statement, as well as the attorney's personal style and physical appearance.

This writer has served as a moderator of several focus groups, one of which included a severely injured minor. In that case, only one side of the case utilized the focus group, without the other side present (contrary to section 802.12(d) where both sides would be present). Three focus group sessions, each lasting four hours, were conducted. The focus group members were given individual special verdict forms to complete after role play presentations were made. Then the entire focus group, consisting of six to nine persons per group, was asked to deliberate and complete a group special verdict form. Their deliberations were videotaped and viewed by the defense team. Such viewing by the attorneys on one side is commonly done either by videotape or by a see-through wall mirror. This tool is very helpful to prepare a litigation team, usually in major cases, both criminal and civil. In this instance, the amount in dispute was between four and ten million dollars. After expending only a few thousand dollars in costs for the focus group, the insurance company involved used the opinions of the focus groups to help them settle the case for a few million.

#### 4. Mini-trial<sup>39</sup>

The key language in the statute is that presentations "are made to a panel of persons selected and *authorized* by all of the parties to negotiate."<sup>40</sup> In other words, critical to the success of a mini-trial is that the panel consist of individuals with full authority to settle the case.<sup>41</sup>

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38. DONALD E. VINSON & PHILIP K. ANTHONY, SOCIAL SCIENCE RESEARCH METHODS FOR LITIGATION 446, (1985).

39. The term "Mini-trial" is defined as:

a dispute resolution process that consists of presentations by the parties to a panel of persons selected and authorized by all of the parties to negotiate a settlement of the dispute that, after the presentations, considers the legal and factual issues and attempts to negotiate a settlement. Mini-trials may include a neutral advisor with the relevant expertise to facilitate the process, who may express opinions on the issues.

Wis. STAT. § 802.12(1)(f).

40. *Id.* (emphasis added).

41. See ERIKA S. FINE, CPR LEGAL PROGRAM MINI-TRIAL WORKBOOK 25 (1985).

The mini-trial is typically utilized by corporate disputants. A decision-making executive of each corporate party to the litigation or dispute serves on a panel along with a "neutral advisor."<sup>42</sup> The parties' lawyers then will make presentations to the panel in summary fashion. These presentations may include key witnesses and other important evidentiary matters. After the presentations are made, the executives of the corporation will meet with the neutral advisor and attempt to negotiate a settlement. In the event a settlement is not reached, the neutral advisor may be asked to render an opinion. Like most ADR processes, the mini-trial is a creature of contract. As such it may include a provision with "teeth" in it, meaning a party who does not accept the neutral's decision and who does not ultimately prevail on the merits may have to pay the other side's costs and attorney's fees incurred in taking the case to trial. The mini-trial is often considered to be a settlement tool for complex litigation.

#### 5. Moderated Settlement Conference<sup>43</sup>

One of the key characteristics of a moderated settlement conference is that presentations are made to "one or more neutral 3rd persons."<sup>44</sup> They are typically nonevidentiary in nature, unlike arbitration which usually consists of evidentiary submissions. Also, the moderated settlement conference does not require the neutral third party to mediate the dispute. The third party is typically asked to make a recommendation or render an opinion as to the subject matter in controversy. Thus, the moderated settlement conference is an evaluative process whereby the neutral is expected to "render an advisory opinion in aid of negotiation."<sup>45</sup> A good example of a moderated settlement conference is the proceeding typically utilized by a court commissioner or hearing examiner. After hearing presentations by each side, the commissioner or hearing examiner will make a recommendation. In some counties throughout Wisconsin, if such a recommendation is not appealed for a *de*

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42. WIS. STAT. § 802.12(1)(f).

43. The term "moderated settlement conference" is defined as:

a dispute resolution process in which settlement conferences are conducted by one or more neutral 3rd persons who receive brief presentations by the parties in order to facilitate settlement negotiations and who may render an advisory opinion in aid of negotiation.

WIS. STAT. § 802.12(1)(g).

44. *Id.*

45. *Id.*

*novo* review within ten to twenty days, the commissioner's decision becomes the decision of the court.

## 6. Summary Jury Trial<sup>46</sup>

Summary jury trials take place in our public courtrooms and utilize a judge along with a small jury (usually six members) selected from the regular jury list maintained by the clerk of courts. The summary jury trial is presided over in many instances by the trial judge and is one of the three ADR processes under section 802.12 that cannot be ordered by the court without consent of the parties. One of the first times the summary jury trial was used was by the Honorable Thomas D. Lambros, a judge of the United States District Court for the Northern District of Ohio. He created the summary jury trial in 1980.<sup>47</sup> Judge Lambros stated:

[I]f only the parties could gaze into a crystal ball and be able to predict, with a reasonable amount of certainty, what a jury would do in their respective cases, the parties and counsel *would* be more willing to reach a settlement rather than going through the expense and aggravation of a full jury trial.<sup>48</sup>

Summary jury trials have been employed both in the Eastern District of Wisconsin and in some of our state courts. There is disagreement whether such a summary jury trial should be open to the public since the courts traditionally have used public courtrooms. However, settlement alternatives are typically not open to public scrutiny. This is a less important issue in the state of Wisconsin because, in order for a summary jury trial to take place, it must be consented to by all the parties.

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46. The term "summary jury trial" is defined as:

a dispute resolution process that meets all of the following conditions:

1. Attorneys make abbreviated presentations to a small jury selected from the regular jury list.
2. A judge presides over the summary jury trial and determines the applicability of the rules of evidence.
3. The parties may discuss the jury's advisory verdict with the jury.
4. The jury's assessment of the case may be used in subsequent negotiations.

WIS. STAT. § 802.12(1)(j).

47. Note, *Constitutional Law/Alternative Dispute Resolution — Summary Jury Trials; Should the Public Have Access?*, 16 FLA. ST. U. L. REV. 1069 (1989) (hereinafter PUBLIC ACCESS).

48. *Id.* at 1070 n.4 (emphasis in original) (quoting Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution, A Report on the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461, 463 (1984)).

After the presentations and case summaries have been made by the attorneys, the jury is given an abbreviated set of jury instructions by the judge. Typically the jurors selected do not know that their “advisory verdict” is nonbinding.

## 7. Mediation and Arbitration

In making a comparison of mediation and arbitration, it is helpful to itemize the main features of each:

### *MEDIATION V. ARBITRATION*

<u>Mediation</u>	<u>Common Elements</u>	<u>Arbitration</u>
• Mediator has no power to decide	Confidential	• Arbitrator has power to make a binding decision
• Nonbinding	Voluntary, Private, Flexible Informal	• Arbitrator hears the evidence and decides
• Mediator helps the parties come to a mutually acceptable decision	Uses Neutral Trained Professional Chosen by the Parties	• Arbitration is governed by rules
• Mediation is an expanded negotiation	Quick	• Arbitration is a form of adjudication

Mediation and arbitration are the two most popular ADR techniques. They are often confused with each other. Although many lawyers and judges have used the words interchangeably, these two processes are really opposites.

On the one hand, in arbitration the arbitrator has the power to make a binding decision. The arbitrator will receive evidence, hear arguments, and make a decision. Arbitration is typically governed by a set of rules. For example, the American Arbitration Association has a set of rules governing a variety of different types of disputes including commercial disputes.

Sections 788.10 and 788.11 of the Wisconsin Statutes provide limited rights on appeal. One of the perceived advantages of arbitration is the finality of the arbitral award. Essentially the parties have contracted for a nonreviewable or nonappealable decision.

Unlike other nonbinding, voluntary ADR processes which arguably do not replace or supplant civil justice, an agreement to arbitrate does waive a serious constitutional right, the Seventh Amendment right to a trial.<sup>49</sup>

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49. U.S. CONST. amend. VII.

There are many forms of arbitration. Usually they are informal with relaxed rules of evidence and no specific provisions for discovery. Typically in arbitration a record is not made and the neutral third party is not required to make a written decision. Exceptions include labor law and some international dispute resolution organizations that require reasoned decisions and public disclosure in some instances. Some variations such as "last best offer" or "last final offer" are prevalent in public employee situations and some sports, such as baseball. The arbitrator in such instances may not compromise either side's position with her decision and is restricted to side with one or the other. There are also unique forms by agreement known as high-low and "night baseball," which basically establish ceilings and floors in an effort to control the range of outcomes that the parties are willing to accept.

In contrast to arbitration is mediation. Mediation has been referred to as the sleeping giant of ADR. It is the most frequently utilized ADR process in the United States. It is simple, uncomplicated, and requires little or no preparation. There are many definitions of mediation.<sup>50</sup> Wisconsin has chosen its definition as follows:

"Mediation" means a dispute resolution process in which a neutral 3rd person, who has no power to impose a decision if all of the parties do not agree to settle the case, helps the parties reach an agreement by focusing on the key issues in a case, exchanging information between the parties and exploring options for settlement.<sup>51</sup>

Clearly, Wisconsin emphasizes the idea that the mediator must help the parties come to a mutually acceptable decision. Mediation in Wisconsin includes a discussion of the case and perhaps can be understood when described as an expanded negotiation with the assistance of a neutral. Since the mediator has no power to decide, and it is the parties who control the outcome, it is inadvisable for the mediator to give an evaluation where the end result would be the rendering of an opinion or recommendation. Although such a practice of rendering an opinion is not prohibited, in "pure mediation" the mediator may control the process, but the parties control the content.<sup>52</sup>

The classic model of mediation is one which consists of a session that is scheduled with the mediator and all parties and their counsel pres-

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50. See KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 16-17 (1994).

51. WIS. STAT. § 802.12(1)(e).

52. See generally, KOVACH, *supra* note 50.

ent.<sup>53</sup> First, the parties typically meet in a "joint session" to exchange their relative views and statements of the case. Then the parties break into confidential caucuses with the mediator where further analysis of their respective positions takes place and settlement options are explored.<sup>54</sup> It is during the confidential caucuses that the parties generally move from their original positions, thus closing the gap between the original offer and demand, therefore settling all or some of the case. This "classic" model mediation is most often used in general civil calendar cases.<sup>55</sup>

One caveat is that mediation is not "a search for the truth." Thus, undisclosed or concealed information may require formal discovery in order for mediation to be effective and useful to litigants. Also, since it is a process of expanded negotiation, a more skillful or knowledgeable litigant may have an advantage over a weak party, resulting in a power imbalance. It may therefore be an inappropriate process for domestic abuse cases or other situations involving violence or threats of violence.

### C. Referral Process

The ADR referral process is a two step process in Wisconsin. The first step allows either party to petition the court for an order that the parties select one of the settlement alternatives as a means to attempt settlement.<sup>56</sup> Perhaps more importantly, the statute allows the judge to order the parties to select one of the settlement alternatives *without* a motion having been filed by either of the parties.<sup>57</sup> The second step is a judicially imposed selection of both process and provider if the parties are unable to agree.<sup>58</sup>

An ADR referral order may include "a provision that the parties must personally participate, presumably to facilitate the success of the process, but also to assure that full authority to settle" is present at the mediation session.<sup>59</sup> However, as will be discussed below, there is no requirement that the parties negotiate in good faith. Any party ag-

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53. 6A EDWIN E. BRYANT ET AL., WISCONSIN PLEADING AND PRACTICE 426-27 (3d ed. 1994).

54. *Id.*

55. *Id.*

56. Wis Stat. § 802.12(2)(a).

57. *Id.*

58. BRYANT ET AL., *supra* note 53, 429-31.

59. *Id.* at 429-30.

grieved by an order under the statute is entitled to a hearing to show cause why the order should be vacated or modified.<sup>60</sup>

In the second step, there are certain restrictions placed on referrals. If the parties cannot agree on a settlement alternative, the court shall specify the "least costly settlement alternative that the judge believes is likely to bring the parties together in settlement."<sup>61</sup> Also, the court may not order the parties to attempt settlement through binding arbitration, nonbinding arbitration, or summary jury trial, or through more than one process, except for direct negotiation.<sup>62</sup> In other words, multiple ADR referral orders that utilize neutral third parties are prohibited.<sup>63</sup>

Although the new section 802.12 was designed to be a general civil calendar, large claims, extrajudicial, private-ordering referral system, it attempted to introduce arbitration and some of the other processes from the "menu" into actions affecting the family. Focus group, mini-trial, and summary jury trial are not available as settlement alternatives for actions affecting the family. Even though section 767.11 currently provides for mediation pertaining to custody and physical placement of minor children, the provisions of section 802.12 will apply, other than as noted, to actions affecting the family.

For the first time in Wisconsin, section 802.12(3)(a) now allows for arbitration in actions affecting the family. Previously, family law practitioners debated whether "divorce by contract" through arbitration was prohibited. Now subject to sections 788.10 and 788.11, arbitration is a permissible process to resolve matters pertaining to the financial issues such as maintenance and property division. Further, arbitration is available for matters regarding "custody, physical placement, visitation rights, support or other interests of the ward."<sup>64</sup> However, the arbitral award must set forth "detailed findings of fact" and the arbitrator must certify that other applicable statutory requirements under chapter 767 of the Wisconsin Statutes have been satisfied.<sup>65</sup> Simply put, the court will retain supervisory control over arbitration awards as they affect children, presumably to promote the public interest.

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60. *Id.* at 430-31.

61. Wis. Stat. § 802.12(2)(b).

62. *Id.*

63. BRYANT ET AL., *supra* note 53, at 430.

64. Wis. Stat. § 802.12(3)(b)

65. *Id.* § 802.12(3)(e).

### III. NOT INCLUDED IN STATUTE - MATTERS YET TO BE RESOLVED

#### A. *Good Faith Requirement*

Section 802.12 of the Wisconsin Statutes is silent with respect to whether the parties participating in a settlement alternative must act in good faith. For instance, in the state of Texas many judges required good faith participation. However, in *Decker v. Lindsay*<sup>66</sup> the Court of Appeals prohibited trial judges from requiring that parties act in good faith during participation in ADR proceedings. In that case it was held that “[a]ny inconsistencies in [the Texas referral statute] can be resolved to give effect to a dominant legislative intent to compel referral, but not resolution.”<sup>67</sup> In other words, the court held that a party cannot be ordered, despite its own objections, to negotiate a settlement when it prefers to go to court.

Although the Judicial Council considered whether to include a good faith requirement in section 802.12, the consensus was that this may very well add another layer of disputes to failed mediations and give rise to bad faith allegations by one or more parties. There was no evidence to show that bad faith participation was a serious problem in other states that have enacted court connected ADR rules and legislation.

#### B. *Certification and Training*

Some states, such as Florida and Minnesota, have included training requirements as a prerequisite to certification as a mediator. In Florida, forty hours of training is required, and a potential neutral must be a lawyer in order to serve as a mediator on large, court-referred civil claims. North Carolina recently required a law license to serve as mediator, and Minnesota requires at least thirty hours of training for prospective mediators. This issue has yet to be addressed in Wisconsin. It is anticipated that the Judicial Council, the State Bar, the Wisconsin Supreme Court, or other official organizations will take up this controversial issue in the near future.

#### C. *Ethics for Attorney Mediators*

Ethics for both attorney and nonlawyer mediators is a complex matter. Currently, the ABA has a new section which is taking up this issue and is working with other organizations such as SPIDR (Society for Professionals in Dispute Resolution) and other national organizations to de-

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66. 824 S.W.2d 247 (Tex. Ct. App. 1992).

67. *Id.* at 251.

velop ethical rules that would apply to both attorneys and nonlawyers. Currently Wisconsin's code of ethics is lacking with respect to specific sections dealing with attorney mediators.

#### *D. Immunity*

The *Howard v. Drapkin*<sup>68</sup> case in California addressed the question of court-connected individuals essentially acting as adjuncts to the court in the administration of justice and awarded those people immunity from civil suit. Chapter 655 of the Wisconsin statutes, dealing with medical malpractice, incorporated the concept of immunity for the mediator. The concept of immunity was not included in the court referral statute. It was discussed by the judicial council, but it was thought best to leave it for another day.

#### CONCLUSION

Much has been accomplished with the passing of section 802.12. What essentially has happened is a fundamental shift from private sector voluntary dispute resolution practices to public court connected policy and procedures. This was truly a bench and bar acknowledgment that lawyers and judges are now willing to try new and emerging ways of solving problems. ADR's fundamental offering does not supplant the civil justice system, but merely provides alternatives that accelerate the settlement process or telescope events.

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68. 271 Cal. Rptr. 893 (Ct. App. 1990).