

**POCKETS OF INNOVATION IN MINNESOTA'S  
ALTERNATIVE DISPUTE RESOLUTION JOURNEY**

Linda Mealey-Lohmann<sup>†</sup> and Eduardo Wolle<sup>††</sup>

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## I. INTRODUCTION

Conflict has always existed and human beings have long struggled with how to manage and resolve conflict. One method to resolve conflict that readily comes to mind is the use of law and the legal system. Another method is the use of alternative dispute resolution (ADR) processes. Legal practitioners use the term ADR to cover a wide variety of processes that involve a neutral third party to help resolve disputes or conflicts between people, organizations, or countries.<sup>1</sup> Generally, when one thinks of ADR processes, only arbitration or mediation comes to mind. In fact, ADR is much broader than that. Rule 114 of *The Minnesota General Rules of Practice* governs ADR for civil cases and recognizes eight specific ADR processes, as well as a ninth category of “other” (those processes that parties create by agreement).<sup>2</sup>

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† Linda Mealey-Lohmann, a former employment law attorney, works as a private mediator handling employment law disputes, as a contract mediator for the Minneapolis Office of the Equal Employment Opportunity Commission, and as an adjunct professor teaching Alternative Dispute Resolution (ADR) at William Mitchell College of Law. She also is a volunteer mediator for the Washington County and Ramsey County Conciliation Courts and the Minnesota Department of Human Rights.

†† Eduardo Wolle is the Executive Director of the Mediation Center for Dispute Resolution at Hamline University, and of the Rice County Dispute Resolution Program. He is a former mediator and arbitrator for the Minnesota Department of Labor and Industry in the area of workers' compensation. He is the Chair of the Minnesota State Supreme Court's ADR Review Board, a volunteer mediator with the Minnesota Department of Human Rights, and a family mediator. He is also a consultant regarding mediation systems in Latin America.

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1. ADR processes are called *alternative* dispute resolution processes because they are typically seen as an *alternative* to litigation and a trial. But this is a misnomer because, in reality, the majority of disputes are resolved by one of the many alternative dispute resolution processes available.

2. MINN. GEN. R. PRAC. ANN. 114.02 (2005). The rules offer the following definitions: “Arbitration” is a “forum in which a neutral third party renders a specific award after presiding over an adversarial hearing at which each party and its counsel present its position.” *Id.* 114.02(a)(1). “Consensual Special Magistrate” is a “forum in which the parties present their positions to a neutral in the same manner as a civil lawsuit is presented to a judge. This process is binding and includes the right of appeal to the Minnesota Court of Appeals.” *Id.*

This article seeks to explore the current state of Alternative Dispute Resolution in Minnesota and to answer the question whether Minnesota is progressive in the area of ADR. In analyzing this issue, the authors are using the term “progressive” to mean innovative or to make “progress.”<sup>3</sup>

Initially, the authors were skeptical that Minnesota was progressive or “moving forward” in the area of ADR or had anything of value to add to the discussion of the development of ADR processes. However, the authors quickly learned that Minnesota’s ADR journey began long ago and that Minnesota continues to move forward in this area.<sup>4</sup> Moreover, careful

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114.02(a)(2). “Summary Jury Trial” is a “forum in which each party and their counsel present a summary of their position before a panel of jurors . . . which may issue a non-binding advisory opinion regarding liability, damages, or both.” *Id.* 114.02(a)(3). “Early Neutral Evaluation” is a “forum in which attorneys present the core of the dispute to a neutral evaluator in the presence of the parties. . . . The neutral then gives an assessment of the strengths and weaknesses of the case. If settlement does not result, the neutral helps narrow the dispute and suggests guidelines for managing discovery.” *Id.* 114.02(a)(4). “Non-Binding Advisory Opinion” is a “forum in which the parties and their counsel present their position before one or more neutral(s). The neutral(s) then issue(s) a non-binding advisory opinion regarding liability, damages, or both.” *Id.* 114.02(a)(5). “Neutral Fact Finding” is a “forum in which a neutral investigates and analyzes a factual dispute and issues findings. The findings are non-binding unless the parties agree to be bound by them.” *Id.* 114.02(a)(6). “Mediation” is a “forum in which a neutral third party facilitates communication between parties to promote settlement. A mediator may not impose his or her judgment on the issues for that of the parties.” *Id.* 114.02(a)(7). “Mini-Trial” is a “forum in which each party and their counsel present its position before a selected representative for each party, a neutral third party, or both, to develop a basis for settlement negotiations. A neutral may issue an advisory opinion on the merits of the case.” *Id.* 114.02(a)(8). The advisory opinion is not binding unless the parties agree otherwise. *Id.* “Mediation-Arbitration (Med-Arb)” is a “hybrid of mediation and arbitration in which the parties initially mediate their disputes; but if they reach impasse they arbitrate any deadlocked issues.” *Id.* 114.02(a)(9). “Other” is any other ADR process that the parties create by agreement. *Id.* 114.02(a)(10).

3. Webster’s Dictionary defines “progress” as “an official journey, a moving forward, an improvement, an advance toward perfection or to a higher state.” WEBSTER’S NEW WORLD DICTIONARY AND THESAURUS 1438 (2d ed. 2002).

4. Minnesota has a long history of innovative ADR programs, and many of these programs have become the model for programs across the United States. These include programs in the areas of restorative justice victim-offender programs and mediation of delinquent agricultural debts. For example, the Minnesota Department of Corrections was one of the first in the nation to hire a Restorative Justice Planner (Kay Pranis) and implement programs for victims and offenders of crimes of severe violence. Telephone Interview with Tim Hansen, Restorative Justice Planner, Minn. Dep’t of Corr. (June 19, 2006). The Department continues to be innovative in its various Circle projects and victim-

observers can find many “pockets of innovation” throughout Minnesota today. These innovations are important because they provide a greater number of options from which people can choose for resolving disputes, options that may be better suited to either the personalities of the parties or the nature of the dispute. Thus, such innovations provide greater “access to justice” for the parties in the dispute than is available through the traditional legal system. Both the creative nature of these innovations and the sheer fact that they exist are what make Minnesota “progressive.”

This article will focus on several “pockets of innovation” found in three major subject areas: (1) Washington County Court innovations,<sup>5</sup> (2) ADR in the schools,<sup>6</sup> and (3) community mediation.<sup>7</sup> The authors hope that the innovations highlighted here can serve as valuable models to further advance the discussion about the development of ADR processes in the future. The authors also wish to emphasize that these are not the only ADR innovations in Minnesota; indeed, they are just the tip of the ADR iceberg. Further research into Minnesota’s myriad ADR programs and practices is needed in order to gain a fuller understanding of the state of ADR in Minnesota and to further the discussion and development of ADR practices.<sup>8</sup> This article is only one step in furthering Minnesota’s ADR journey.

## II. WASHINGTON COUNTY COURT INNOVATIONS

Innovation comes in many forms and follows many paths. Washington County Court Administration in Stillwater, Minnesota,

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offender programs. *Id.* In addition, Minnesota was the first state in the nation to enact legislation and provide for farmer-lender mediation. *Id.* See also Farmer-Lender Mediation Act, MINN. STAT. §§ 583.20–.32 (2000) (enacted in 1986 to institute mediation of delinquent agricultural debts). Thirty-two states now have some form of agriculture-related mediation, but the Minnesota program is still the largest in the nation. Telephone Interview with Mary Nell Preisler, Program Dir., Farmer-Lender Mediation Program (June 23, 2006). Further research is needed in the areas of Farmer-Lender Mediation and Restorative Justice in Minnesota to fully understand the contribution they are making to the field of ADR.

5. See *infra* Part II.

6. See *infra* Part III.

7. See *infra* Part IV.

8. In addition to the above-mentioned areas, there is a need to research the innovations taking place in the areas of family law, workplace conflict resolution, special education mediation, cross-cultural mediation, and court-annexed ADR programs, such as drug court and teen court, to name a few.

has four ADR programs with notable innovations.<sup>9</sup> Each of the four programs has required different approaches.<sup>10</sup> Critical to the process is the support from Court Administration and the sitting judges. This section focuses on the four programs: (1) the Conciliation Court Mediation Project, (2) the Pre-Court Self-Settlement Option Pilot Project, (3) the ENE Program, and (4) the Harassment Mediation Project. The authors have highlighted these projects to serve as models for other courts and to spark discussion about future court-related ADR innovations.

A. *Conciliation Court Mediation Project*

Washington County developed the Conciliation Court Mediation Project in 1998 using non-traditional resources. Unlike other court systems, the County did not have a non-profit community mediation organization to provide volunteers or a budget to fund such a service. Because there would be no mediation service if Washington County followed the traditional route, it became necessary to be flexible and open to new possibilities. The program resulted from a joint effort with the Hamline University School of Law in St. Paul, Minnesota. Two Hamline professors, James Coben and Kenneth Fox, directed the law students' training. First, Coben and Fox trained the students in mediation skills, and then students had the opportunity to further develop their skills by co-mediating conciliation court cases with one of the two professors until they were proficient enough to mediate on their own. This system of using volunteer student mediators continued until 2001 when, due to changes in the program at Hamline, the court arranged to bring in experienced private mediators to provide mediation services to the court on a pro bono basis.

This program continues today with six private mediators who

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9. The Washington County Court projects outlined here and throughout Part II of this article are based on information from William Funari. Interview with William Funari, Project Manager, Dep't of Court Admin. for Washington County, in Stillwater, Minn. (May 31, 2006).

10. Mr. Funari has been involved in the development of court ADR services in Washington County since 1997. He is able to use up to 25 percent of his time for court-related alternative dispute resolution program development and related volunteer coordination. These four different approaches have resulted from Mr. Funari's belief that innovation requires people to "be open and flexible and to pay attention." *Id.*

rotate to cover the entire conciliation court docket. The use of private mediators with extensive mediation experience and a strong commitment to community service maximizes results while minimizing supervision, training requirements, and turnover. The project manager and mediators make extensive use of e-mail for scheduling, group discussion of issues, and procedural updates to keep everyone up-to-date with minimal effort by staff.

A brief description of the process shows the simplicity and effectiveness of the process on a litigant's court date. In essence, there are four phases in which the court provides the parties with both information and opportunities to settle their dispute on the day of the hearing, either on their own or with the help of a mediator, before their case is called. These phases are similar to the ones developed by community mediation programs that provide services to the Hennepin, Ramsey, and Rice County Courts.

*1. Phase I – Introducing the Concept of Mediation*

The first phase is for the volunteer mediator to convey information about mediation to the litigants. After the litigants arrive in court, but before the judge takes the bench, the volunteer mediator for the day addresses all the litigants as a group for five to ten minutes. During this time, the mediator explains the nature of mediation, informs them that the process is free of charge, and describes the advantages of mediation. Although the mediator encourages the parties to use mediation, the mediator makes it clear that the option is entirely voluntary, and parties forfeit nothing if they choose to try mediation. The judge will still hear their case that day if mediation is not successful. This ten-minute "mediation speech" serves two important functions. First, it provides a chance to educate the public about an alternative method of resolving disputes that does not involve adversarial litigation, contrary to the commonly held belief that adversarial litigation is their only option at this point in the process.<sup>11</sup> Second, it provides the mediator a chance to establish some rapport with the litigants, something that is essential to the mediation process.

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11. From 2004 through April 2006, 2,711 people have been "educated" about the mediation process in this conciliation court setting. WASHINGTON COUNTY CONCILIATION COURT, CONCILIATION COURT SCHEDULE 2004-06 (2004-2006) [hereinafter CONCILIATION COURT].

### 2. *Phase II – Conveying Information About the Mediation Process*

The second phase begins after the mediator's speech. Roll call is taken; the judge takes the bench and conveys further information about the mediation option in a short statement. He speaks to the parties about the conciliation court process and emphasizes the value of trying to resolve the matter themselves before they approach the bench for trial. The judge also emphasizes that this is their last chance to control the outcome of their dispute. He informs everyone that he will soon send all of the parties for the contested cases (those cases in which both the plaintiff and the defendant are present) out of the courtroom to talk with each other before he hears any cases. A key to this part of the process is that the judge specifically requires each party to show the other what documents she intends to use in court (so there are no "smoking gun" exhibits) and to talk with the other in a final attempt to resolve the case themselves or with the use of the mediator.

This part of the process serves several important functions. First, it gives the parties permission to start talking again. This is important because many conflicts are the result of a breakdown in communications, a breakdown that the parties cannot restart on their own. Second, it empowers the parties to be creative and remain in control as they seek their own solution, which may be more mutually satisfying and effective than a court-imposed solution. Third, the court has recognized that people are more likely to comply with an agreement they make themselves than with a decision imposed by a third party. If a party wins in front of a judge, she may walk away with a decision that has the potential for appeal; if a party settles, she may walk away with a check or a chance to protect her credit record.<sup>12</sup>

### 3. *Phase III – Self-Settlement Phase*

The third phase is the "self-settlement" phase, which begins when the judge actually sends all of the parties for the contested cases out of the courtroom to talk with each other while he hears the default cases. Once the parties leave the courtroom, they go into the hall, find the opposing party, and begin a conversation.

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12. It also serves to make clear that litigation by ambush is for television entertainment, not for a real court.

During this time, one typically observes parties huddled together, discussing documents and legal positions. Because it is conciliation court, no attorneys are present. Depending on the mediator, as long as the parties are speaking civilly to each other, she may stand to the side without interrupting their opportunity for “self-settlement.”

After giving the parties a reasonable time to converse, the mediator circulates among the litigants and creates a list of those parties who have reached a settlement, if any, and those who are interested in trying mediation. For those parties who have reached an agreement, the mediator uses a tripartite settlement agreement form, created by the court, to help the parties write up their agreement. Then the mediator takes the parties and the signed agreement to the court clerk, who will call that matter next for the judge’s review and approval. The mediator then turns her attention to those parties interested in mediation.

#### *4. Phase IV – Mediation Phase*

The fourth phase is the actual mediation phase.<sup>13</sup> The mediator sometimes conducts these mediations just outside the courtroom in a quiet hallway corner and other times in a private room, depending on the parties’ needs. The mediator helps the parties to communicate clearly, to listen to the other side’s perspective, to understand their interests and concerns, and to focus the discussion toward reaching a mutually satisfying resolution. Typically, the mediator meets with both parties at the same time, although meeting in caucus is an option if needed. If they reach a resolution, the mediator helps the parties complete the tripartite settlement agreement form and then takes the parties and the agreement back in to the courtroom for the judge’s approval.

Whether the parties reached a settlement on their own or with the help of a mediator, the judge will call the matter and confirm with both parties that they have agreed to the terms of the agreement. The judge will sign the document and give a copy to the parties. As stated in the agreement, the court stays judgment in the matter for one year. Further, the parties agree that if either

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13. If there is more than one case in which the parties are interested in trying mediation, the mediator makes a list and begins mediating with the parties in order.

side does not perform, the other party need only file an affidavit about the non-performance to obtain a judgment, without the need to file a new lawsuit. This saves time and money for the litigants, the court, and the court staff. In the event the parties are not able to resolve the matter with the help of the mediator, the parties return to the courtroom and the judge will call and hear their case in the normal course.

The court has designed a simple one-page evaluation form that is completed by all parties who try mediation (whether the matter settles or not), and the parties send it directly to court administration. The court believes that customer satisfaction is more important than settlement rates. The use of this evaluation form ensures that the court provides services in accordance with that philosophy.

On any given day, the percentage of all cases appearing for conciliation court that were contested was 29 percent in 2004, 32 percent in 2005, and 26 percent in the first five months of 2006. Thirty percent of the contested cases in both 2004 and 2005 elected to use the services of the mediator, and 45 percent did so in the first five months of 2006.<sup>14</sup> It is noteworthy that from 2004 to 2006, the volunteer mediators consistently settled 78 percent of the cases that chose the mediation option. This means that offering the mediation option reduced the conciliation court caseload of contested cases requiring a hearing by approximately 25 percent in both 2004 and 2005 and by 35 percent in the first five months of 2006.<sup>15</sup> This statistic, along with continuing high litigant satisfaction, shows the value of offering mediation services to litigants before having the case heard by a judge.

#### *B. Pre-Court Self-Settlement Option Pilot Project*

Keeping an open mind to new methods of settling such disputes, court administrators developed the Pre-Court Self-Settlement Option in December 2005 as a response to recent developments in the field. An analysis of the statistics in the previous section showed a notable increase in parties appearing for

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14. The reasons for the increase in the use of mediation in 2006 require further study to determine whether it is due to improvements in the mediator's "sales pitch," a general increase in public awareness of the mediation option, or other reasons.

15. See CONCILIATION COURT, *supra* note 11.

contested cases. Observation at court and discussions with litigants showed that when the judge sent parties for contested cases out of the courtroom to talk to each other on the day of trial, more parties were able to resolve their dispute on their own or with minimal help from the mediator. Many of these cases involved simply setting up a payment plan for the uncontested amount of money owed. Creators of the option believed that if the court could offer self-settlement to litigants before they came to court, all participants in the process could save time and money.

As a result, the Pre-Court Self-Settlement Option Pilot Project was established.<sup>16</sup> The heart of this pilot project is a notice describing in plain English the self-settlement option (Notice) and a settlement agreement form that captures the parties' understanding (Agreement).<sup>17</sup> During the pilot project, when a plaintiff files a claim in conciliation court, she receives copies of this Notice and is required to serve a copy on defendant(s), along with the plaintiff's Statement of Claim and Summons. As the Notice explains, the parties have the option of trying to resolve the matter on their own, and if they do, they do not need to appear for trial. The Notice also states that the Agreement will have the same effect as if the parties had appeared in court, and that defendants can avoid having a judgment entered against them. The Notice invites the parties to do three things: (1) negotiate the terms of the Agreement on their own, (2) write the terms on an attached settlement agreement form, and (3) sign the form and submit it to the court for approval by the judge at least three business days before their court date. The settlement agreement form includes language stating that the parties acknowledge the final, binding effect of the Agreement, that signing the agreement may adversely affect their legal rights, and that they have the option of consulting with an attorney.<sup>18</sup>

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16. Mr. Funari discussed the self-settlement idea with several of the judges, and they agreed it was worth trying. Based on the judges' support, he received permission from court administration to try out the service as a pilot project to find out if it would actually work. Interview with Funari, *supra* note 9.

17. One of the judges reviewed the proposed notice and form. Because of her suggestions and support, much of the legalese was converted to plain English. This pilot project will be presented for formal approval in September 2006. As such, these forms are subject to change.

18. As with the tripartite mediated settlement agreement form discussed *supra* Part II.A.3-4, self-mediated agreements provide for a one-year stay of entry of judgment and the right to simply file an affidavit to obtain a judgment in the

Although it is too early to declare this pilot project a success, it does appear to make a difference. The year-to-date statistics show that this pre-court self-settlement option helped resolve nine percent of cases that would have been contested.<sup>19</sup> This represents a significant savings in time and money for the litigants who did not have to take time off work to appear in court, as well as savings for the court and court staff.

*C. Early Neutral Evaluation (ENE) Program*

A male/female team representing a non-profit organization developed the Early Neutral Evaluation (ENE) Program in 2005 when one of the judges expressed an interest in creating a service for the early neutral evaluation of dissolution cases with children.<sup>20</sup> Since there was no money or staff time to develop and operate the service, it was necessary to be flexible and open to alternative methods of accomplishing this goal. The team wrote a proposal for a pilot project and presented it to the judge, who directed her staff and Mr. Funari, the court administrator, to work out the details of implementation for the judge's cases.<sup>21</sup>

The goal of this project is to create a process resulting in a plan satisfying all the parties' needs, fostering the ongoing relationship between the parties, and eliminating the need for the parties to return to court. In essence, this is a confidential, early-intervention process for party discussion and case evaluation. It supports the prompt resolution of family court matters. It also involves a facilitated settlement discussion with the parties and their attorneys and a prompt evaluation of any remaining issues by the neutrals. It satisfies the needs of the judge and the parties by

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event of non-compliance.

19. E-mail from William Funari, Washington County Court Adm'r, to author (June 1, 2006) (on file with the *William Mitchell Law Review*).

20. Information about this program was obtained from William Funari, Interview with Funari, *supra* note 9, and PROGRAM DESCRIPTION, WASHINGTON COUNTY, EARLY NEUTRAL EVALUATIONS (on file with the *William Mitchell Law Review*) [hereinafter PROGRAM DESCRIPTION].

21. Mediators Lee Woolery and Kathleen Vadnais wrote the proposal and function as the evaluation team. As of this writing, the project is in an evaluation phase and has not been endorsed or approved by the other judges. E-mail from William Funari, Washington County Court Adm'r (June 5, 2006) (on file with the *William Mitchell Law Review*). Two other judges became involved indirectly because attorneys involved in two of their cases, based on their previous successful pilot project experience, asked these two judges to have an ENE performed on their cases. These two judges, however, are not a part of the pilot project. *Id.*

giving them the flexibility to create a plan that makes sense for parties with children.

A judge may initiate the ENE process as early as the Initial Case Management Conference, which is generally scheduled within sixty days of filing.<sup>22</sup> At the Conference, the judge learns more about the case and determines whether it is appropriate for ENE.<sup>23</sup> If it is appropriate for ENE, the judge refers the parties and their attorneys to the ENE process. Similar to options previously discussed, ENE is a voluntary process that the court encourages. But if attorneys already represent the parties, and the litigants choose the ENE process, their attorneys are required to participate.<sup>24</sup> The court assigns an experienced team of two mediators, one male and one female, to the case. The attorneys are required to contact the neutrals within seven days to set up the ENE.<sup>25</sup> The participants must complete the ENE by the date designated in the scheduling order negotiated at the Conference, generally within thirty days after the assignment.<sup>26</sup> The parties pay the ENE team based on a sliding fee scale.<sup>27</sup>

During the ENE, both custody/parenting-time issues and financial/property issues may be addressed. The ENE generally lasts two to four hours and takes place in a conference room at the courthouse, rather than at a participating attorney's office. The process mandates this location in order to preserve neutrality.<sup>28</sup> Each attorney or *pro se* party presents the important issues in the case and everyone discusses settlement options.<sup>29</sup> If the parties are not able to reach a satisfactory settlement, the ENE team may determine whether the group needs additional information.<sup>30</sup> Only after it becomes clear that the parties cannot reach settlement does the ENE team provide an evaluation of each party's case and

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22. E-mail from Funari, *supra* note 19.

23. *Id.*

24. PROGRAM DESCRIPTION, *supra* note 20.

25. E-mail from Funari, *supra* note 19.

26. PROGRAM DESCRIPTION, *supra* note 20.

27. *Id.*

28. Telephone Interview with William Funari, Project Manager, Dep't of Court Admin. for Washington County, Minn. (May 31, 2006). Providing the service at the courthouse also makes it possible to obtain a quick ruling from the judge if the parties become stuck on an issue that will require the judge's decision.

*Id.*

29. PROGRAM DESCRIPTION, *supra* note 20.

30. *Id.*

recommendations for settlement.<sup>31</sup> If the ENE team identifies areas where it needs more information, it may gather as much as necessary by interviewing the parties and their children or by collecting limited collateral data.<sup>32</sup> The attorneys and parties may meet a second time with the ENE team to hear the team's assessment based on the additional information and to engage in further settlement discussions.<sup>33</sup>

If the case settles, the parties and attorneys may request the ENE team to inform the judge of the settlement terms.<sup>34</sup> Alternatively, the attorneys may draft stipulations for submission to the judge at a later date.<sup>35</sup> If the case does not settle, the ENE team may identify some issues that need further study, and will report the non-settlement to the judge without comment about the reasons for failure to reach a settlement.<sup>36</sup> However, there is one exception to this no-comment policy—the ENE team may communicate with the judge for the limited purpose of facilitating case management.<sup>37</sup> Then, the judge will consult with the parties or their attorneys to decide the next step, which could be mediation, expedited evaluation of the remaining issues, or a full custody evaluation.<sup>38</sup>

Because this is a new program, judges have only referred eighteen cases to the ENE process to date.<sup>39</sup> Nine of those cases settled through the ENE process, five did not settle, three cases withdrew prior to ENE, and the judge rejected one case as not amenable to ENE. Among the nine cases that settled, three cases resolved all marital issues, including custody, parenting time, and property. These statistics appear very promising, but further research is needed to determine whether ENE helps to eliminate the situation of parties returning to court.

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31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* Members of the ENE team may not be called as witnesses with respect to any information obtained or recommendations made during the ENE process.  
*Id.*

38. *Id.*

39. The statistics cover the period from June 2005 (when the pilot project started) to May 2006. PROGRAM DESCRIPTION, *supra* note 20; Email from Lee Woolery, mediator, to Linda Mealey-Lohmann (June 29, 2006) (on file with *William Mitchell Law Review*).

*D. Harassment Mediation Project*

The Harassment Mediation Project began in 1997 by offering voluntary mediation in civil harassment cases on the day of the court appearance.<sup>40</sup>

To implement the project, the court contracted with a facilitative mediator who was experienced in the area of victim-offender, community, and family mediation to handle these mediations.<sup>41</sup> The process begins when the court administrator reviews the Petition for a Harassment Restraining Order, determines whether the matter would be appropriate for mediation, and notifies the mediator of the time set for a hearing.<sup>42</sup> At the hearing, if there are no restraining orders or “no contact” orders in other cases involving the parties that would prohibit mediation, the parties meet with the mediator. She assesses the parties’ willingness and ability to mediate, helps them understand the issues and their interests, and helps them work through the underlying basis for the dispute to find a mutually satisfactory resolution.<sup>43</sup>

The court found that voluntary mediation for civil harassment matters reduced the number of contested hearings by twenty-five percent.<sup>44</sup> Qualitatively and quantitatively speaking, it provides a great method for settling disputes involving business relationships,

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40. William A. Funari, *How Does Mediation Get a Place on the Litigant's Philosophical Map and What Happens When It Gets There?*, 20 *HAMLIN J. PUB. L. & POL'Y* 325, 332 (1999). The impetus for this project was a judge who had two families appear before him for a hearing on a civil harassment case. One family wanted a restraining order for their child against the child of the other family. The children were in kindergarten. Email from William Funari, Washington County Court Adm'r, to Linda Mealey-Lohmann (June 22, 2006) (on file with *William Mitchell Law Review*). The judge felt there had to be a better way and consulted with a local mediator who suggested using volunteer mediators. The judge made the request to the court administrator, who assigned the project development to Mr. Funari. Mr. Funari's analysis indicated that the service should not be performed by volunteers in Washington County, because there was not enough work to ensure that the volunteers would be able to develop and maintain the necessary expertise to consistently provide a good service. Ultimately, the program was developed because the judge and court administration were open to that analysis and willing to try the unique approach described below. *Id.*

41. Funari, *supra* note 40, at 332.

42. *Id.* at 333–34.

43. *Id.* The goals and mechanics of this process are described in greater detail in Funari's article. *Id.* at 325.

44. *Id.* at 337.

disputes between juveniles, and disputes between neighbors.<sup>45</sup> Indeed, the program has high satisfaction and settlement rates.<sup>46</sup>

There are several interesting observations with regard to the mediation of civil harassment matters. First, when the conflict involves intra-family disputes, where mediation would be particularly valuable, the court has noted that the parties are more likely to decline mediation.<sup>47</sup> Second, the court has observed that in the domestic abuse context, some petitioners choose to file for a Harassment Restraining Order rather than a Domestic Abuse Order for Protection.<sup>48</sup> These cases present a unique challenge and require particular attention by a mediator trained and experienced in dealing with domestic abuse. The mediator must have absolute discretion and support for declining cases where the impact of the domestic abuse can adversely affect a party's ability to negotiate. Third, the nature of the caseload has changed over the years. There are an increasing number of domestic and dangerous harassment cases. Thus, fewer cases are appropriate for mediation, and there is a reduced impact on the number of cases requiring a contested hearing. As another commentator has noted, continued study is needed to further analyze how best to put mediation on litigants' "philosophical map," and to determine whether there is a higher satisfaction rate and compliance rate for those who choose mediation over litigation when seeking a restraining order for harassment or domestic abuse.<sup>49</sup>

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45. *Id.*

46. *Id.* at 337–39. Because settlements are so common, the rates are no longer tracked. The rate, if tracked, would be near one-hundred percent. This is due to the skill of the mediator, as well as making the use of the service absolutely voluntary by both parties and giving the mediator authority to screen out questionable cases. The goal is a durable, satisfactory agreement, not settlement *per se.* *Id.* at 340.

47. *Id.* at 346.

48. Note that the court distinguishes between civil harassment cases and domestic abuse cases. The form for a restraining order in the domestic abuse context is detailed and difficult to fill out, while the form in the civil harassment context is much simpler and easier to complete. Moreover, the standard for granting a temporary restraining order in the civil harassment context is lower than for an *ex parte* restraining order in the domestic abuse context. The consequences for violating either order, however, are similar. A judge also has discretion to convert a domestic abuse case to a civil harassment case and vice versa. *See id.* at 329–30. Cases involving escalating domestic abuse, however, are screened out of the mediation process.

49. *Id.* at 325.

### III. ADR IN THE SCHOOLS

In examining the state of ADR in Minnesota, it is also useful to look at what Minnesota schools are doing to educate students about alternative dispute resolution processes at all educational levels. As it turns out, individual schools and organizations serve youth in many innovative ways. Schools ranging from elementary to graduate levels teach peace education and conflict resolution skills to their students. Because it is beyond the scope of this article to report comprehensively on what is happening in every school in Minnesota, this section will focus on several innovative programs at the elementary school level and high school level, and set forth the ADR education curriculum at the law school level.

#### *A. Elementary School Level – Peace Education and Conflict Resolution Skills*

##### *1. Community Mediation Services, Inc.*

Community Mediation Services, Inc. (CMS) is a non-profit organization, established in 1983 in Brooklyn Center, Minnesota, which provides mediation services to suburban Hennepin County, a community growing in size and diversity.<sup>50</sup> One key obstacle to success in schools is many students' lack of social skills, which leads to missed homework assignments, truancy, suspensions, and expulsions. CMS has several innovative projects in the area of conflict resolution at the elementary and secondary school levels to remedy this obstacle. One example is the partnership CMS created with Homeless and Refugee Children, Inc. (Homeless) during the 2005–06 school year to work with refugee West African students at the Earle Brown Elementary School in Brooklyn Center, Minnesota.<sup>51</sup>

The goal of this project is to teach first- through sixth-graders conflict resolution skills in order to live a more peaceful life. Six adults worked with the students to make this partnership effective:

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50. Interview with Beth Bailey-Allen, Director, Cmty. Mediation Servs., Inc. (CMS) (formerly N. Hennepin Mediation Program, Inc.), in St. Paul, Minn. (June 19–20, 2006). CMS is a member of the National Association for Community Mediation (NAFCM). *Id.*

51. Many of these students have lived their entire lives in countries where civil war closed their schools and turned them into child-soldiers.

one from the school, four from CMS (which includes three AmeriCorps members), and one from Homeless.<sup>52</sup> The role of the school is to identify students who could benefit from additional academic and life skills and to track their progress. The role of CMS is to provide conflict resolution skill building activities to the students. The role of Homeless is to provide volunteer tutors for academic skills.<sup>53</sup>

Another example of the innovative work CMS is doing is the On-Site School Mediation Services Program. The program started three years ago at a middle school in the greater-Minneapolis-area Robbinsdale Area Schools district.<sup>54</sup> The school saw a need for a process that would handle conflicts too serious for attention from the school's peer mediators, but not serious enough to involve a juvenile police officer and the juvenile court system. The goal was to be proactive and catch those conflicts before they resulted in assault charges, truancy, suspension, or expulsion.<sup>55</sup> The role of the school counselor is to identify students who might benefit from this program.<sup>56</sup> The role of CMS is to provide a team of adult volunteer mediators to the school one day per week. These mediators hold mediations between students and groups of students identified by the school counselor. An important component in the program is that the mediators follow up with the students two weeks after the mediation. A key to the success of this program is that the school worked with CMS to design the program initially and that the school continued to support CMS by providing an on-site staff person.

A third example of the innovative work CMS is doing is a project with one class in the Osseo School District. The students in

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52. CMS serves youth by hosting AmeriCorps members at both the national and state level. AmeriCorps is a program of the Corporation for National and Community Service, an independent federal agency. AmeriCorps State provides grants to public and non-profit organizations, such as CMS. *See* AmeriCorps\*State Program, <http://www.americorps.gov/about/programs/state.asp> (last visited Sept. 11, 2006). Statewide, Minnesota has received 60 positions for AmeriCorps members, whose focus is to tutor and mentor youth to help reduce the academic gap. *Id.*

53. Interview with Bailey-Allen, *supra* note 50. The latest project that these students completed was a peace mural, which consisted of the students' drawings and paintings. *Id.* This mural will travel around the community as a "peace ambassador" and will be on display at local libraries and community centers. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

that class created a book about non-violence called *Pass the Peace*.<sup>57</sup> Teams of students conducted research on a topic related to violence and created their own pages with the help of CMS and AmeriCorps members.<sup>58</sup> The book deals with topics such as bullying, gangs, gossip, illegal drug use, peer pressure, revenge, and weapons.<sup>59</sup>

## 2. *Valley Crossing Community School*

Valley Crossing Community School (VCCS) is a public school that also exemplifies innovation at the elementary school level.<sup>60</sup> VCCS, located in Woodbury, Minnesota, is committed to building responsible, global citizens who can think, solve problems, and make their school, their community, and their world a more peaceful place.<sup>61</sup> To that end, VCCS weaves peace education and conflict resolution skills on many different levels into the students' academic curriculum.

On a foundational level, VCCS has adopted the "Responsive Classroom" philosophy to teaching and learning.<sup>62</sup> This approach fosters an environment where students and staff care for and support one another, and is based on practical strategies for bringing both social and academic learning into the classroom.<sup>63</sup> Under this approach, students take responsibility for creating a

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57. *Id.* RUSH CREEK ELEMENTARY 6TH GRADERS, *PASS THE PEACE* (2006) is available by contacting CMS at [director@mediationprogram.com](mailto:director@mediationprogram.com). The students also created a traveling peace mural, which has been on display at CMS and at the 2006 Minnesota State Fair. Interview with Bailey-Allen, *supra* note 50.

58. *Id.*

59. RUSH CREEK ELEMENTARY 6TH GRADERS, *supra* note 57. The students have now published the book and are selling it. The proceeds are going to two non-profit organizations the students have selected. Interview with Bailey-Allen, *supra* note 50.

60. Telephone Interview with Pam Sullivan, Admin. Assistant, Valley Crossing Cmty. Sch. (VCCS), Woodbury, Minn. (June 6, 2006).

61. Gregory Gentle, 2006 Boyer Best Practices Entry Form (January 2, 2006) (unpublished grant application) (on file with the *William Mitchell Law Review*).

62. *Id.*

63. *Id.* See also *Responsive Classroom: Principles and Practices*, <http://www.responsiveclassroom.org/about/principles.html> (last visited Sept. 11, 2006) (discussing strategies and practices the Responsive Classroom program uses to create its supportive learning environment). Among the seven basic principles underlying this approach is the principle that the social curriculum is as important as the academic curriculum; children need this set of social skills in order to be successful academically and socially. These skills include cooperation, assertion, responsibility, empathy, and self-control. *Id.*

peaceful, caring environment that promotes a feeling of belonging and respect. To that end, at the beginning of the school year, students write and share their hopes and dreams about what they want to accomplish academically and socially.<sup>64</sup> These are posted and provide intrinsic motivation for each student to care for self, others, and environment throughout the entire school year.<sup>65</sup> Students also develop rules for their individual class that will govern how they work and learn together during the school year.<sup>66</sup> Each school day begins with a “morning meeting” that is held in a circle and has four parts intended to strengthen the classroom community.<sup>67</sup>

On a curricular level, VCCS has a peace education curriculum that teaches students specific conflict resolution skills throughout the school year. For example, the teachers use the “Talk It Out” curriculum for primary-school-age students (grades K–3) (developed by Barbara Porro)<sup>68</sup> and intermediate school age students (grades 4–6) (developed by Naomi Drew).<sup>69</sup> This curriculum is based on five lessons that focus on: (1) the idea of conflict resolution and problem solving, (2) strategies for dealing with anger and frustration, (3) how to talk about feelings using “I messages,” (4) listening skills, and (5) Win/Win Guidelines for conflict resolution.<sup>70</sup> The lesson concludes with the development of a corner or space in the room where students can sign up for a Talk It Out session with the teacher when needed.<sup>71</sup>

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64. See Gentle, *supra* note 61.

65. *Id.*

66. *Id.*

67. *Id.* The four parts include the greeting, sharing time, an activity, and a news and announcement chart. *Id.*

68. E-mail from Gregory Gentle, Lead Teacher, Valley Crossing Cmty. Sch., Woodbury, Minn., to author (June 27, 2006) (on file with the *William Mitchell Law Review*). See BARBARA PORRO, TALK IT OUT: CONFLICT RESOLUTION IN THE ELEMENTARY CLASSROOM (1996).

69. E-mail from Gregory Gentle, *supra* note 68. See Naomi Drew, THE KIDS’ GUIDE TO WORKING OUT CONFLICTS: HOW TO KEEP COOL, STAY SAFE, AND GET ALONG (2004).

70. E-mail from Gregory Gentle, *supra* note 68. The Win/Win Guidelines, adapted from Naomi Drew, allow each person in the conflict to state their feelings, to say how they are responsible for the problem, to brainstorm solutions, to choose a solution that is a win/win for both parties in conflict, and to put the plan into action. See Valley Crossing Community School’s Peer Mediation PowerPoint Presentation Materials (on file with the *William Mitchell Law Review*).

71. E-mail from Gregory Gentle, *supra* note 68. In 2006, Valley Crossing Community School (VCCS) invited Climb Theatre for a special performance for the primary students, called “Bud and the Bully.” *Id.* Following the performance,

On the process level, VCCS offers at least three different venues for students to resolve conflicts: "Peace Tables,"<sup>72</sup> the Trained Peer Mediation Program, and the adult-guided "Problem-Solving Process."<sup>73</sup> The Trained Peer Mediation Program, created six years ago, is a proactive approach based on a belief that students are capable of working out their normal, everyday conflicts themselves.<sup>74</sup> VCCS teaches all intermediate and primary students about the peer mediation program and how to use it.

The students who serve as peer mediators are intermediate students nominated by their peers and teachers based on specific criteria, including the ability to keep confidences, their neutrality, their listening skills, their commitment to fairness, and their responsibility. The students selected are trained to follow a structured problem-solving process and document the problem and solution.<sup>75</sup> In six years, VCCS has trained 180 students as peer mediators.<sup>76</sup>

The Peer Mediation Process is very simple and easy for students to access and administer. In order to initiate the process, a student (or an adult witness) need only complete a Referral Form and deposit it in one of the specially marked envelopes located throughout the school. The form allows the person to identify the students involved and briefly describe the conflict. Once the peer mediators receive a referral form, they set up a time and place for the mediation, notify the parties, and conduct the mediation. Peer mediators can only mediate conflicts between students, typically

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Climb Theatre visited each primary classroom to extend the performance and facilitate discussion about the topic of bullying with students. *Id.* See also Creative Learning Ideas for Mind and Body, [www.climb.org](http://www.climb.org) (last visited Sept. 11, 2006) (Climb Theatre website).

72. E-mail from Gregory Gentle, *supra* note 68. Peace Tables is a program that provides space for students to sit together and resolve conflict peacefully within the classroom. *Id.* Peace Tables was created through a grant from the Peace Makers Foundation. *Id.* VCCS is a three-year recipient of this grant. *Id.*

73. Students use the adult-guided process for those conflicts that become physical or that warrant adult intervention.

74. The peer mediation program was created in 2000 by VCCS Social Worker Katie Hoffman and VCCS teacher Lisa Boland-Blake.

75. The training is based on two books. The first is FRAN SCHMIDT, ET AL., *MEDIATION FOR KIDS* (2d ed. 1992). This book is a step-by-step guide to train students in the mediation process, which includes practical tips and realistic mediation scenarios. The second is NAOMI DREW, *THE KIDS' GUIDE TO WORKING OUT CONFLICTS* (2004).

76. E-mail from Katie Hoffman, Valley Crossing Cmty. Sch. Soc. Worker, to author (June 14, 2006) (on file with the *William Mitchell Law Review*).

involving arguing, teasing, name-calling, rumors, etc. Conflicts that become physical do not use peer mediators.

On the organizational level, VCCS reinforces its commitment to peace education and non-violent conflict resolution through its status as one of World Citizen, Inc.'s International Peace Site schools.<sup>77</sup> In connection with being an International Peace Site,<sup>78</sup> VCCS students began to participate in the Nobel Peace Prize Festival in 2003.<sup>79</sup> One of the missions of the Festival is to instill in students the belief that peace in the world is something they can contribute to and that it begins within themselves.<sup>80</sup>

VCCS is just one example of innovation demonstrating that even at the elementary school level, peace education and conflict

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77. World Citizen, Inc. is a non-profit organization that empowers the education community to promote a just and peaceful world through activities for children; its first dedication of an International Peace Site in Minnesota was in 1988. World Citizen: Connecting Educators Working Toward Peace, <http://www.peacesites.org> (last visited Sept. 11, 2006). As of 2001, there were 211 Peace Sites in Minnesota and over 750 in the world. *Id.* It is the belief of World Citizen that in order to achieve real peace in the world, the focus must be on the children. *Id.* World Citizen promotes three programs for young people: the Peace Education Project, the International Peace Site Program, and the Nobel Peace Prize Festival. *Id.*

78. All International Peace Sites must be committed to upholding the following five principles:

1. Protect the environment.
2. Promote intercultural understanding and celebrate diversity.
3. Seek peace within yourself and others.
4. Reach out in service.
5. Be a responsible citizen of the world.

Each year, VCCS focuses on a different principle and creates activities to bring the principle into the curriculum. In 2005–06, VCCS focused on the environment, and the students gave extra attention to the school's beautiful Peace Garden. *Id.*

79. This program educates students about the work of previous Nobel Peace Prize recipients. The Tenth Annual Peace Prize Festival held in 2006 honored the 2004 Nobel Peace Prize Laureate, Wangari Maathai, the first African woman to win the Nobel Peace Prize. *Id.*

80. See Augsburg College, *Nobel Peace Prize Festival: News: 2005 Festival*, <http://www.augsburg.edu/peaceprizefestival/news> (last visited Sept. 17, 2006); Augsburg College, *Nobel Peace Prize Festival: History*, <http://www.augsburg.edu/peaceprizefestival/history> (last visited Sept. 17, 2006). The VCCS school grounds also have a Peace Pole and a Peace Garden. The Peace Pole is a wooden pole that displays "May Peace Prevail on Earth" written in many different languages (including sign language and a Braille English version) to reflect the languages spoken by VCCS students at the time it was unveiled. As part of the original dedication ceremony in 2002, VCCS unveiled its Peace Pole, one of 200,000 planted around the world. The VCCS Peace Garden is used as a quiet and inspirational place for teachers to bring their Literacy classes to work on a wide variety of writing projects.

resolution can be a part of the curriculum. Programs such as this can teach students personal responsibility, self-discipline, and the ability to resolve conflict in nonviolent ways. Because of VCCS's pro-active and multi-level approach, VCCS has never had to suspend a student in its ten years of operation.<sup>81</sup>

*B. High School Level – Boys to Men Circle Group*

St. Louis Park Senior High School runs the innovative Boys to Men Circle for African-American boys in grades 9 through 12 at the school.<sup>82</sup> Oscar Reed started this Restorative Justice Circle three years ago. Mr. Reed continues to run the Circle, which is financially backed by the school and supported by the school's teachers, administration, social workers, and school board.

During the 2005–06 academic year, twenty-three high school students participated in the weekly Boys to Men Circle.<sup>83</sup> Teachers and administrators identify students who would benefit from the program and invite those students to join the Circle. The high school currently has a waiting list for students who want to join the Circle, which is limited to twenty-five students. In total, more than one hundred students have participated in the program and learned conflict resolution skills.

Mr. Reed describes the process as “simple and basic, an ancient and timeless process to resolve conflict and strengthen the community by giving all an equal voice.”<sup>84</sup> The Circle uses an egalitarian approach in which each individual is of equal status to all other members and has personal responsibility and accountability to himself and to the group. It is based on the principles of mutual respect, personal empowerment, equality,

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81. E-mail from Gregory Gentle, Lead Teacher, Valley Crossing Cmty. Sch., Woodbury, Minn., to author (June 20, 2006) (on file with the *William Mitchell Law Review*).

82. Telephone Interview with Oscar Reed, Co-Founder, Life's Missing Link, (June 19, 2006) (notes on file with the *William Mitchell Law Review*). Mr. Reed, a former Vikings football player, is also involved with a number of other schools as a co-facilitator for the Circle process, including Lincoln Elementary School, Harrison Education and Community Center, and Anwatin Middle School, all located in north Minneapolis, Minnesota. See also St. Louis Park Public Schools, *St. Louis Park Senior High School African American Support Services*, <http://www.slp.schools.org/afam.html> (last visited Sept. 16, 2006).

83. The Circle program is also held at the elementary school (nine students) and, as of next year, will be held at the middle school.

84. Telephone Interview with Oscar Reed, *supra* note 82.

honor, and inclusiveness. Mr. Reed conducts the Circle by following basic guidelines agreed upon in advance by the Circle members. One of the key guidelines is the use of a “talking piece,” which permits only the person holding it to speak. The guidelines help create an environment where respectful and constructive dialogue can take place. The goal is to teach the students respectful communication and provide a weekly forum where they can talk about school successes, barriers, and needs, in order to enhance academic performance and social skills, as well as to support students with personal issues.<sup>85</sup>

In addition to the weekly Circle, which lasts several hours, the high school Circle members take on a mentor role and meet with the elementary age Circle members in a weekly Circle to play games with them.<sup>86</sup>

Each school year the high school Circle members also take a field trip, which has included a visit to the chambers of Minnesota Supreme Court Associate Justice Alan Page. The program has been a success, as measured by significant improvement in grades and fewer referrals for discipline. The Circle members are proud of themselves and the program; they frequently present at the Department of Education Summer Conference and at other educational events.

### *C. ADR Education at the Law School Level*

Minnesota has four law schools: Hamline University School of Law, William Mitchell College of Law, University of Minnesota Law School, and University of St. Thomas School of Law.<sup>87</sup> Each law school shows a commitment to ADR education and places its own unique emphasis on the teaching of ADR. This section describes the current state of ADR education at the law school level. As discussed below, nearly 500 law students took a course directly related to ADR during the 2005–06 academic year. This is in sharp contrast to the legal education that many currently practicing attorneys had when they were in law school; many of them never took an ADR course and are still unclear about what ADR options

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85. E-mail from Oscar Reed, Co-Founder, Life’s Missing Link, to author (June 20, 2006) (on file with the *William Mitchell Law Review*).

86. *Id.* Mr. Reed emphasizes that they are very proactive and try to involve students at a young age. *Id.*

87. Approximately 3,100 students were enrolled in these four law schools during the 2005–2006 academic year.

are available.

1. *Hamline University School of Law*

Hamline University School of Law's curriculum has twelve organized tracks of study, one of which focuses on Alternative Dispute Resolution.<sup>88</sup> The ADR focus area balances traditional classroom teaching with simulations and clinical opportunities. During the 2005–06 school year (excluding summer session), Hamline offered nine different ADR courses<sup>89</sup> and three different negotiation courses, as illustrated in Table 1.<sup>90</sup>

**Table 1.** Hamline University School of Law 2005–06 ADR Course Offerings

Students	Course	Credits
24	Arbitration	2
7	Clinic Mediation (1 section each in fall and spring)	3
29	Dispute Resolution Practices	2
34	Mediation	2
24	Mediation Skills	2
3	Philosophy of Mediation	1
25	Theories of Conflict	2
13	Selected Topic/ADR and Technology	2
23	Selected Topic/Restorative Justice	3
13	Advanced Negotiations	1
27	Negotiation	2
22	Selected Topic/Negotiations	2

In sum, out of a student body of 710 law students, 182 took a course directly related to ADR and an additional sixty-two students

88. Hamline's ADR program ranks fifth in the nation. *America's Best Graduate Schools 2007*, U.S. NEWS AND WORLD REP. (forthcoming, 2007). See also Hamline University School of Law, Dispute Resolution Institute, [http://www.hamline.edu/law/adr/dispute\\_resolution.html](http://www.hamline.edu/law/adr/dispute_resolution.html) (last visited Sept. 12, 2006).

89. These included Arbitration, Clinic Mediation, Dispute Resolution Practices, Mediation, Mediation Skills, Philosophy of Mediation, Theories of Conflict, Selected Topic courses in ADR and Technology, and Restorative Justice.

90. E-mail from Roberto Koch, Registrar, Hamline Univ. Sch. of Law, to author (July 10, 2006) (on file with the *William Mitchell Law Review*).

took negotiation-related courses.<sup>91</sup>

In addition to the core courses, Hamline established a Dispute Resolution Institute in 1991, which coordinates additional courses during the January and Summer terms.<sup>92</sup> In 1996, the Institute established a Certificate Program in Dispute Resolution.<sup>93</sup> This is a 14-credit course that focuses on conflict theory and dispute resolution processes.<sup>94</sup> Currently over sixty law students, lawyers, and professionals are enrolled. The Dispute Resolution Institute also runs the EC-US ADR Fellows Program, which allows students from selected European and American universities to study ADR at another participating institution for one semester.<sup>95</sup> Finally, the Institute manages the Mediation Case Law Project, which is a systematic examination of mediation litigation trends.<sup>96</sup>

Hamline also offers students two clinical opportunities in ADR.<sup>97</sup> Through its Employment Discrimination Mediation Representation Clinic, students gain experience in providing representation for alleged victims of discrimination during mediation. Students can also gain experience as a mediator by providing mediation services for conciliation court cases. With regard to moot court opportunities, students have previously participated in the Mediation Advocacy Competition, the Vienna International Arbitration Moot Court Competition, and the International Competition for Online Dispute Resolution.<sup>98</sup>

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91. *Id.*

92. *Id.* Specifically, the Institute includes five ADR study abroad programs, as well as thirty domestic and international ADR courses in the January and Summer terms of 2006. *Id.* The Institute's mission is to teach students the full range of conflict resolution theory and skills. *Id.* The courses offered include Mediation, Theories of Conflict, Philosophy of Mediation, Family Mediation, International Trade Dispute Resolution, and Arbitration. *Id.*

93. Hamline University School of Law, Dispute Resolution Institute, *A Leader in Law School ADR Clinics*, [http://www.hamline.edu/law/adr/Semester\\_Courses\\_and\\_Clinics/a\\_leader\\_in\\_law\\_school\\_clinics.html](http://www.hamline.edu/law/adr/Semester_Courses_and_Clinics/a_leader_in_law_school_clinics.html). (last visited Sept. 17, 2006) [hereinafter Hamline, *Leader*].

94. *Id.*

95. *Id.*

96. See James Coben and Peter Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006).

97. Hamline's ADR clinical opportunities began with a federally funded ADR clinic in 1990. Hamline, *Leader*, *supra* note 93. Hamline was the first law school in the country to contract with the Equal Employment Opportunity Commission to provide representation for alleged victims of discrimination in EEOC-sponsored mediations. *Id.* Hamline is in its thirteenth year of providing student mediators for conciliation courts. *Id.*

98. See Hamline University School of Law, *Dispute Resolution Institute, National*

Hamline's ADR programming also includes the *Hamline Journal of Public Law and Policy*<sup>99</sup> and the Hamline Law School Chapter of the ABA's Section of Dispute Resolution (formed in 1999).<sup>100</sup>

Finally, the Mediation Center for Dispute Resolution—affiliated with Hamline University's Law and Graduate Schools since 1998—has a panel of fifty mediators providing conflict resolution services, including workplace mediation and family mediation.<sup>101</sup> Further, it provides the only low-cost mediation service in the area of family mediation, with a panel of family mediators.

## 2. *William Mitchell College of Law*

William Mitchell College of Law also emphasizes the area of ADR in its course offerings. During the 2005–06 school year (excluding summer session), the school offered five different ADR courses<sup>102</sup> and one negotiation course, as illustrated in Table 2.<sup>103</sup>

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*Moot Court Finalists*, [http://www.hamline.edu/law/adr/Semester\\_Courses\\_and\\_Clinics/moot\\_courts.html](http://www.hamline.edu/law/adr/Semester_Courses_and_Clinics/moot_courts.html) (last visited Sept. 16, 2006).

99. The *Journal* publishes a biennial ADR symposium issue.

100. The Hamline ADR program is supported in general by the conflict resolution programs throughout the University, including the Undergraduate Conflict Studies Program and the Graduate Concentration in Conflict Management.

101. The Mediation Center was originally founded as a private non-profit organization in 1981. Hamline University, *Mediation Center for Dispute Resolution*, <http://www.hamline.edu/law/center> (last visited August 6, 2006). It offers consulting and training services to a wide variety of clients, including business organizations, law firms, and judicial clients. *Id.*

102. These included an ADR certificate course, a Family Mediation certificate course, an Advanced ADR course, an independent mediation externship option, and an arbitration course. William Mitchell currently is looking at ways to expand its ADR offerings. The Family Law Mediation Externship Course was added for the Fall of 2006 and an ADR Mediation Externship Course (in a non-family law setting) is also under consideration. E-mail from Nancy Ver Steegh, Assoc. Professor of Law, William Mitchell Coll. of Law, to author (September 21, 2006) (on file with the *William Mitchell Law Review*).

103. E-mail from Renate Behrendt, Admin. Coordinator, Academic Affairs, William Mitchell Coll. of Law, to author (June 6, 2006) (on file with the *William Mitchell Law Review*).

**Table 2.** William Mitchell College of Law 2005–06 ADR Course Offerings

Students	Course	Credits
195	ADR certificate course (3 sections in fall and 4 sections in spring) <sup>104</sup>	3
29	44-Hour Family Mediation certificate course <sup>105</sup>	2
14	Advanced ADR course <sup>106</sup>	3
8	Family Mediation Externships (Independent Clinic)	Varies
7	Introduction to Commercial Arbitration <sup>107</sup>	1
36	Negotiating and Drafting Business Agreements	2
369	WRAP <sup>108</sup>	6

Students who complete a certificate course are listed as “qualified neutrals” on the Minnesota Supreme Court’s ADR-Rule 114 Neutrals Civil Law Roster, or Family Law Roster, respectively. In sum, out of a student body of 1,117 students, 253 students took a course directly related to ADR, another thirty-six students took a negotiation course, and the legal writing course introduced an additional 369 first-year students to ADR concepts.

104. The additional section was added in the spring to accommodate student demand. *Id.* This course examines all the non-judicial routes to resolving disputes listed under Rule 114 and focuses on the development of skills through simulations, exercises, readings, and class discussion. *Id.*

105. Family Mediation teaches students about conflict resolution and emotional issues surrounding divorce, specific techniques for mediating custody and property disputes, and techniques for identifying families experiencing domestic violence. *Id.*

106. Students in this course work together as teams to develop a dispute resolution program for an actual client. *Id.*

107. This course teaches students the basics of commercial arbitration, including skills in drafting arbitration agreements and preparing for all phases of the arbitration process. *Id.*

108. “WRAP – Writing and Representation: Advice and Persuasion” is the first-year legal writing course at William Mitchell. It introduces all first-year students to the concept of ADR and includes participation in a simulated mediation and a simulated contract negotiation. E-mail from Jim Sevens, Registrar, William Mitchell Coll. of Law, to author (June 20, 2006) (on file with the *William Mitchell Law Review*).

### 3. *University of Minnesota Law School*

During the 2005–06 school year (excluding summer session), the University of Minnesota Law School offered only one course focused on dispute resolution and three courses that were related to negotiation, as illustrated in Table 3.<sup>109</sup>

**Table 3.** University Minnesota Law School 2005–06 ADR Course Offerings

Students	Course	Credits
23	Alternative Dispute Resolution <sup>110</sup>	2
49	Negotiation Seminar	2
21	Interviewing, Counseling, Negotiating course (2 sections)	3
12	International Contracts Seminar	3

The only change that the University of Minnesota anticipates for the 2006–07 academic year is to offer one additional section of the Interviewing, Counseling, and Negotiating course.<sup>111</sup> In sum, out of a student body of 884 students, twenty-three students took a course directly focused on ADR and an additional eighty-two students took courses with a negotiation component.<sup>112</sup>

### 4. *University of St. Thomas School of Law.*

During the 2005–06 school year (excluding summer session), the University of St. Thomas School of Law offered one ADR survey course and one Negotiation course, as illustrated in Table 4.<sup>113</sup>

109. E-mail from Debbie Nelson, Special Assistant to Assoc. Dean, Univ. of Minn. Law Sch., to author (June 19, 2006) (on file with the *William Mitchell Law Review*).

110. The ADR course does not qualify students for Rule 114 certification. See generally Providers of ADR Courses, [http://www.courts.state.mn.us/documents/0/Public/Alternative\\_Dispute\\_Resolution/Provider\\_List.doc](http://www.courts.state.mn.us/documents/0/Public/Alternative_Dispute_Resolution/Provider_List.doc) (last visited Sept. 1, 2006) (providing list of organizations that offer courses needed to qualify for Rule 114 certification).

111. E-mail from Debbie Nelson to author, *supra* note 109.

112. *Id.*

113. E-mail from Jerome M. Organ, Assoc. Dean of Academic Affairs, Univ. of St. Thomas Sch. of Law, to author (June 16, 2006) (on file with the *William Mitchell Law Review*).

**Table 4.** University of St. Thomas School of Law 2005–06 ADR Course Offerings

Students	Course	Credits
30	ADR Survey course <sup>114</sup>	3
70	Negotiation course (2 sections in fall, 3 sections in spring) <sup>115</sup>	3

In addition to these two courses, St. Thomas offers many substantive courses that emphasize a problem-solving approach to lawyering and expose the students to mediation through role-play exercises.<sup>116</sup> In sum, out of a student body of 415 students, thirty students took an ADR course and some seventy other students took a negotiation course.

We can see that Minnesota’s law schools expose a large number of students to ADR concepts during their legal training. It is also evident that student demand for ADR courses is increasing and the law schools are taking steps to satisfy that demand. However, because of the increasing role that alternative dispute resolution options play in the resolution of disputes and in the practice of law, even more can be done in the law schools to educate future attorneys about all of the ADR options available. This in turn will further contribute to Minnesota’s ADR journey.

#### IV. COMMUNITY MEDIATION SERVICES

Community mediation can be characterized as both progressive and innovative in the twenty-plus-year period since it first appeared in Minnesota. If one were to award a “Little Engine That Could” award to these programs, it would be for their sheer determination in doing much with little, overcoming adversity, and providing an invaluable service to the courts and the communities

114. The ADR survey course does not qualify students for Rule 114 certification. E-mail from Jerome M. Organ, Assoc. Dean of Academic Affairs, Univ. of St. Thomas Sch. of Law, to author (June 20, 2006) (on file with the *William Mitchell Law Review*).

115. St. Thomas added a section in the spring semester due to student demand. *Id.* In addition, St. Thomas has a student team that participates in a Negotiation Competition. *Id.*

116. *Id.* St. Thomas will be expanding its ADR offerings with the addition of a new faculty member for the 2006–07 academic year, who will teach the ADR survey course, as well as two new courses in the Spring, Mediation and Community Advocacy. *Id.*

they serve.

Community mediation programs in Minnesota are defined under the Minnesota Statutes as programs that can provide dispute resolution services, subject to certain exceptions, such as cases relating to divorce, violence against a person, vulnerable adults, and termination of parental rights.<sup>117</sup> There are seven programs that have chosen and have been accepted by the State Court to be guided by the Statutes.<sup>118</sup> This section will explore five of the above programs.

These community mediation programs handle a wide variety of cases, including cases in conciliation court, harassment, unlawful detainer (housing), post-decree, parenting time expediting, and restorative justice, to name a few. Last year, the six mediation programs served more than 30,000 people through their services.<sup>119</sup> Unlike other non-profit programs that provide mediation services, the above community mediation programs rely on unpaid volunteers to perform their mediations.<sup>120</sup> Volunteers come from all walks of life, and include attorneys. Operating budgets for these programs vary from \$30,000 to over \$200,000.

Community mediation programs must be innovative to survive. Some of the programs have developed unique approaches in providing services to the public. This section will provide an overview of several new approaches being implemented and a more in-depth look at one approach developed last year by one of the

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117. MINN. STAT. §§ 494.01–.03 (2004). Section 494.015 authorizes the Minnesota state court administrator to certify community dispute resolution programs that meet certain statutory guidelines. MINN. STAT. § 494.015 (2004). This definition is used for the purpose of receiving funds through the state court.

118. The programs are (1) Mediation Services for Anoka County, (2) Minneapolis Mediation Program, (3) Community Mediation Services, Inc. (serving North Hennepin County), (4) Dispute Resolution Center (serving Ramsey County), (5) Rice County Dispute Resolution Program, (6) Southeastern Minnesota Mediation Program (serving Rochester), and (7) Mediation Center of Southern Minnesota (the newest program).

119. Interview with Michelle Gullickson Moore, Executive Dir., Minneapolis Mediation Program, at the Minnesota Ass'n for Cmty. Mediation Meeting, Minneapolis, Minn. (July 6, 2006).

120. See Community Mediation Services, Inc., [http://mediationprogram.com/\\_wsm/page9.html](http://mediationprogram.com/_wsm/page9.html) (last visited Aug. 28, 2006); Dispute Resolution Center, <http://www.disputeresolutioncenter.org/volunteers.html> (last visited Aug. 28, 2006); Mediation Services for Anoka County, <http://www.mediationservice.org/prospectiveclient.pdf> (last visited Aug. 28, 2006); Minneapolis Mediation Program, [http://www.mplsmediationprogram.org/about\\_mmp.htm](http://www.mplsmediationprogram.org/about_mmp.htm) (last visited Aug. 28, 2006); Southeast Minnesota Mediation Services, <http://www.semnmediation.org> (last visited Aug. 28, 2006).

programs.

A. *Mediation Services of Anoka County (MSAC)*

Created in 1987, MSAC provides an assortment of ADR services to the clients it serves.<sup>121</sup> One service is the Restorative Mediation Program (RMP), which is funded through a grant from the Minnesota Department of Public Safety Office of Justice Programs. This program provides mediation services to victims of general property crimes and to both adult defendants and juvenile respondents.<sup>122</sup>

RMP is a unique collaborative program between MSAC and the Anoka County Attorney's Office Victim/Witness Division. These two collaborative entities share a Restorative Justice Specialist, who manages the victim/offender mediation caseload.<sup>123</sup>

To initiate the Restorative Mediation process, the Restorative Justice Specialist gives information to victims after the criminal case is over and offers the option of participating in a Victim/Offender meeting. The Specialist then invites the offender to participate in the Victim/Offender meeting and works closely with both the victim and offender to prepare them for the meeting. In other cases, the Specialist may receive requests for Victim/Offender meetings through the probation department, police department, schools, or community. In some cases, especially those involving juveniles, or when a victim requests mediation prior to the offender's disposition, the meeting will be used in place of court and may become a condition of probation or, more often, a condition of a diversion program. The Victim/Offender meeting uses a restorative mediation approach that allows the affected parties to meet face to face in the presence of two mediators and to

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121. See Mediation Services for Anoka County, <http://www.mediationservice.org> (last visited Aug. 28, 2006). MSAC is located in Coon Rapids, Minnesota, and offers services in the area of community mediation, shared parenting/parenting time expediting, and restorative justice. *Id.*

122. The majority of juvenile cases referred to MSAC come from the Anoka County Corrections Department, although other referrals come from various other sources including local law enforcement agencies, local schools, and community members.

123. The Specialist splits her time between the MSAC office (where she informs victims of the mediation process, makes contact with both victim and offender, and organizes victim/offender meetings) and the Anoka County Attorney's Office (where she informs victims of the court process and the option of victim/offender mediation).

discuss how they have been harmed by a crime and how the harm can be repaired. The process allows those involved the ability to express their feelings and play a role in what is happening. This restorative justice approach gives victims a voice while holding the offender accountable for the harm he caused. It allows offenders an opportunity to apologize with the goal of giving everyone a chance to heal.<sup>124</sup>

MSAC also collaborated on a grant from the Department of Justice for National Crime Victims' Rights Week with four victim service agencies and was awarded funds in 2006 to create an original performance targeted at youth and youth victim resources. The funding was to promote community awareness and crime victim outreach activities.<sup>125</sup>

*B. Minneapolis Mediation Program and Community Mediation Services, Inc.*

Both the Minneapolis Mediation Program (MMP) and Community Mediation Services, Inc. (CMS) are experimenting with innovative approaches to create a balanced and fair process to expedite cases involving non-payment of rent and other landlord/tenant issues.<sup>126</sup> In order to encourage its use, the new Landlord/Tenant Mediation Project has been created to be as convenient, neutral, and user-friendly as possible. The project provides for on-site mediations outside of the court system at locations such as the tenant's building or a nearby community center. This makes the process convenient for tenants and, because mediations are arranged at regularly set times and dates, convenient for landlords.

This project builds on the previous experience that MMP and CMS had with the committee that created the Housing Court Pre-

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124. Telephone Interview with Kelly Kegley, Restorative Justice Specialist, Mediation Servs. of Anoka County (July 13, 2006).

125. It was one of sixty-two projects selected for funding in 2006. The original performance was presented at Mercy Hospital and will be performed in the community during the 2006–07 school year. Email from Ann Wallerstedt, Executive Dir. of Mediation Servs. of Anoka County, to Eduardo Wolle (June 20, 2006) (on file with the author).

126. MMP and CMS were both founded in 1983. See Minneapolis Mediation Program, <http://www.mplsmediationprogram.org> (last visited Aug. 28, 2006); Community Mediation Services, Inc., <http://www.mediationprogram.com> (last visited Aug. 28, 2006).

Filing Program in Hennepin County.<sup>127</sup> Under the Pre-Filing Program, when a landlord goes to court to file an unlawful detainer action, he can choose to mediate instead. In that case, the court does not file the paperwork, and the landlord's filing fee check is held pending the outcome of mediation between the landlord and the tenant. If the parties are able to reach an agreeable settlement during the mediation, the court returns the paperwork and filing fee check to the landlord, and the tenant avoids a record of an eviction action being filed, which could have a negative effect on the her ability to rent for up to ten years.<sup>128</sup>

Based on the potential of that program, MMP and CMS sought to create another program that would be available even earlier in the process—a pre-filing mediation process that would be available before the landlord has to go to court to initiate the filing. Under the Landlord/Tenant Mediation Project, MMP and CMS invited approximately forty large landlords from a list of frequent filers in the Fourth Judicial District to participate in the program.<sup>129</sup> Instead of going to court, these landlords first contact MMP and CMS to set up a mediation between them and the tenant. If a landlord files more than three unlawful detainers in one month for a specific apartment building, MMP and CMS schedule a specific time and date each month in that building to hold mediations.

The innovation provided by this project is that the location is a significant element to the success of the project. Court is not a neutral location to anyone who is not consistently using it.<sup>130</sup>

The purpose of this program is to create an environment that:

- Is balanced and neutral
- Is convenient to both parties

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127. The Pre-Filing Program originated in response to legislation proposed a few years ago to make mediation mandatory prior to any housing court eviction. That legislation never passed, but people connected to Housing Court in Hennepin County saw merit to using the process to reduce the court's caseload.

128. Telephone Interview with Michele Gullickson Moore, Executive Dir., Minneapolis Mediation Program (July 13, 2006).

129. Hennepin County created a list of landlords who were "frequent filers" in housing court. MMP and CMS then created a list of approximately forty landlords and invited them to participate in this program.

130. For example, the immigrant populations—the fastest growing Housing Court population in Hennepin County—would probably not see the courthouse as a neutral location.

- Helps the tenant come prepared to offer something in mediation by giving them information about legal advice and emergency services in advance of the mediation session (which comes from a third party neutral organization)
- Reduces the problem of “no-shows” to the mediation process (if they are close to home/office, they are more likely to show up)
- Helps landlords by being at a location that will reduce landlord’s staff time running between locations or to downtown
- Helps with immigrant populations in that it will lessen the fear of being in a court setting and unfamiliar environment
- Uses mediators who are highly trained (in excess of Rule 114 standards) and who are constantly evaluated as to their performance in mediation, thus creating a constant quality control not present in any other mediation panel<sup>131</sup>

MMP and CMS have carefully considered every aspect of the process so that it would not be perceived as giving either side an advantage. MMP and CMS believe that if this project is to succeed, they will have to remain diligent in maintaining neutrality.

*C. Community Mediation Services, Inc. (CMS)*

CMS has a number of innovative ADR initiatives involving the West African community in Minnesota. First, CMS received a grant from the National Association for Community Mediation (NAFCM) to provide mediation training for West African residents seeking to build their skills for personal, professional, and community development.<sup>132</sup> Second, CMS has continued to provide programs

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131. Minneapolis Mediation Program, Untitled document (on file with the *William Mitchell Law Review*).

132. This grant provided mediator training for ten adults from the West

to the West African community, most recently through the Minnesota AmeriCorps project.<sup>133</sup> CMS provides an after-school program for West African students and teaches conflict resolution skills to elementary students, including Circle processes. Third, CMS has been in communication with the Chair of the Liberian Truth and Reconciliation Committee (TRC) in Liberia in an effort to involve Liberians living in Minnesota in part of the reconciliation process.<sup>134</sup> For the first time in history, a TRC process will include citizens living elsewhere, including those living in Minnesota.<sup>135</sup> Fourth, CMS has also been raising awareness in the ADR community regarding the West African roots of community mediation practices. This has been mostly through presentations to statewide groups.<sup>136</sup> Finally, CMS has focused on Restorative Mediation, which concentrates on repairing harm, as opposed to reaching agreement or negotiating interest. Restorative Mediation has similar goals to restorative justice, but the process is slightly different. It is a four step process focusing on (1) what happened, (2) the impact of the incident, (3) how to repair harm, and (4) if faced with a similar situation in future, how might a different decision be reached.<sup>137</sup>

#### *D. Dispute Resolution Center (DRC)*

DRC is the first community mediation program created in the State of Minnesota. It was created in 1982 as a pilot project co-sponsored by the Ramsey County Bar Association, the City of St.

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African community.

133. See *infra* Part III. A. 1.

134. Both Brooklyn Park and Brooklyn Center have a large population from a number of war-torn African countries, but mainly from Liberia. The new Liberian Government has authorized the TRC, which was launched on June 29, 2006. It is modeled after the South African process.

135. This will be a historical process. The first stage will be documenting the stories of Liberians. "Statement collectors" will be trained sometime in late-summer 2006. CMS has asked the Minnesota Advocates for Human Rights (the organizer) to include volunteer mediators with the volunteer attorneys who will serve as statement collectors. There may also be a need for safe and neutral spaces in which statements can be taken. Finally, as the process moves from the truth part to the reconciliation part, there may be a role for some kind of restorative mediation process.

136. These presentations included the Palava Hut presentation. The Palava Hut is a community-owned place in every village where community members and elders gather to resolve disputes in the community.

137. Telephone Interview with Beth Bailey-Allen, Executive Dir., Cmty. Mediation Servs., Inc. (June 21, 2006).

Paul, and the Minnesota Supreme Court. In 2005, the DRC conducted an audit of the demographics of the community and of the agency's clients and volunteers. Those results indicated that DRC had not kept pace with the community's growth.

As a result of this audit, DRC developed a Diversity Initiative<sup>138</sup> and was awarded a small grant from the National Association for Community Mediation (NAFCM). The grant will allow DRC to reach and assist underserved populations by the creation of a strong, diverse, and cross-trained panel of DRC volunteer mediators and facilitators who are representative of the changing demographics in St. Paul.

As part of the audit and the creation of the Diversity Initiative, DRC's Board of Directors accepted an offer by the St. Paul Public Housing Agency (SPPHA) to co-locate at one of its community centers. Over the past two decades, DRC has partnered with SPPHA in a variety of ways by providing mediation services, training for staff and residents, and restorative processes. In recent months, the SPPHA has seen an increased need for alternative dispute resolution processes, particularly among residents. Many of the disputes among residents are intercultural.<sup>139</sup>

#### *E. Rice County Dispute Resolution Program*

The Rice County Dispute Resolution Program (RCDRP) was created in 2001.<sup>140</sup> Like many of the other community mediation programs, RCDRP provides services to the community and to the court, including mediation services in court in the areas of conciliation court claims and post-decree issues. In June 2005, the RCDRP created a new approach to addressing cases in conciliation

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138. The Diversity Initiative will (1) assist the DRC in diversifying its governing board through recruitment and participation of underserved populations, and (2) build alliances and partnerships in the community with the long-term goal of impacting social issues.

139. In one case between a Hmong family and a Somali family, DRC used a facilitative process to assist the parties in this intergenerational dispute to come to an understanding and develop the ability to live as neighbors. Telephone Interview with Jeanne Zimmer, Executive Dir., Dispute Resolution Ctr. (June 30, 2006). *See also* Dispute Resolution Center, <http://www.disputeresolutioncenter.org> (last visited Sept. 18, 2006).

140. The program has a part-time director, Eduardo Wolle, and a roster of eighteen volunteer mediators. *See also* Rice County Dispute Resolution Program, <http://www.rcdrp.com> (last visited Sept. 18, 2006).

court—the Conciliation Expedited Program.<sup>141</sup>

Currently, the Minnesota state court system is faced with few options to meet the demands that will be placed on it through budget reductions and expanding caseloads. Yet this is a time for the state courts to become innovative and progressive. One of the decisions the court faces is the fate of conciliation court. There are those who would eliminate conciliation courts in different judicial districts. There are also those who would change the dollar amount that can be brought in dispute to conciliation court. In the end, the loser would be the citizen who cannot access services or who has fewer services available.

### 1. *DOLI's Administrative Conference Option*

In an attempt to design a program to address this critical issue raised by the Minnesota Supreme Court, RCDRP looked to the Minnesota Department of Labor and Industry (DOLI), Division of Workers' Compensation, for inspiration. DOLI uses various processes for resolving disputes. One of those processes is an Administrative Conference.<sup>142</sup> It might best be described as an

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141. An understanding of the historical context that led to the creation of this program is useful. In 2001, the Legislative Auditor's Office issued a report evaluating the state's trial court system. The report's findings included the "verification of the lack of resources to keep pace with caseloads and the inadequacy of time to effectively address the problems brought to courtrooms around the state." Press Release, Supreme Court of Minnesota (Jan. 26, 2001) (on file with the *William Mitchell Law Review*). The impact of the budget cuts to state courts over the past few years is becoming evident as courts wrestle with fewer financial resources to fund positions, the visiting retired judges program, and public defenders, and face the possible elimination or reduction of conciliation courts. Supreme Court of Minnesota, Judicial Branch Mission, *The Judicial Branch Strategic Plan for the Year 2005* (2005) [hereinafter *Strategic Plan*]. In its Strategic Plan, the Minnesota Supreme Court set forth its mission, vision, and core values. *Id.* The court's mission of achieving "equal access for the fair and timely resolution of cases and controversies" will be sorely tested, as access to conciliation court and other essential court services are curtailed. *Id.* The Supreme Court of Minnesota also set forth certain "Core Values" it sees as important to attaining and sustaining its mission and vision. Among these core values are "customer focused—internal and external, accessible, commitment to effective communication, and innovative and self-analytical." *Id.*

142. Administrative Conferences are established under the Minnesota Statutes: An administrative conference is a meeting conducted by a commissioner's designee where parties can discuss on an expedited basis and in an informal setting their viewpoints concerning disputed issues arising under section 176.102, 176.103, 176.135 or 176.239. If parties are unable to resolve the dispute, the commissioner's designee shall issue an

arbitration/mediation (as opposed to mediation/arbitration) where parties present their case to the mediator/arbitrator and that decision maker might either make a decision or assist the parties in resolving their dispute. DOLI has used this process for over twenty years.

The Administrative Conference uses skilled “arbitrators” from different backgrounds and expertise who have training in mediation and decision making. After an “arbitrator” issues a decision, the aggrieved party may request a *de novo* hearing at the Office of Administrative Hearings (OAH). If an “arbitrator” assists parties in resolving their conflict, the “arbitrator” issues an Order on Agreement.

Administrative Conferences have a high level of acceptance among attorneys and insurance companies as they present their case before an “arbitrator.” It is an opportunity for both sides to check the viability of their case through a decision. Many decisions are not “appealed” because the party felt either (1) the decision was fair and reasonable, or (2) moving it forward might cost more than the dispute is worth. It also provides a forum for both sides to meet face-to-face and reach an agreement.<sup>143</sup>

Together with mediation, another of DOLI’s dispute resolution processes, Administrative Conferences provide parties with alternatives for what can amount to costly disputes if not used. Without the availability of this system of alternative dispute resolution, there would also be a cost to the judges at the Office of Administrative Hearings in terms of time and number of cases.

Just as Administrative Conferences and mediations at DOLI relieve the Office of Administrative Hearings from some of its burden of cases, the RCDRP felt that such an approach would provide an answer to the Minnesota state courts’ dilemma of providing access to conciliation court for Minnesota’s citizens in a time of declining financial resources for the court. Citizens want access to justice that is fair, customer-focused, affordable, and

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administrative decision under section 176.106 or 176.239. MINN. STAT. § 176.011, subdiv. 27 (2004).

143. Anyone familiar with workers’ compensation laws can appreciate the knowledge the “arbitrator” must bring to bear on complex issues by sifting through the information provided by the parties and either reaching a decision or assisting the parties in resolving their dispute(s). While not arbitration in the strictest sense, Administrative Conferences allow for a less formal and sometimes less confrontational approach to dispute resolution in the often tense field of workers’ compensation.

efficient. The Rice County Dispute Resolution Program has helped meet those needs and expectations at no cost to the court.

## 2. *RCDRP's Conciliation Expedited Program*

In early 2005, the RCDRP proposed an expansion of its services in court to include Conciliation Expediting in the area of conciliation court claims, to be administered by the RCDRP.<sup>144</sup> A Conciliation Expediting Conference is similar to the DOLI's Administrative Conference described above. But in this case, "appeal" is to the District Court, rather than to the OAH.

To date, the RCDRP has conducted nineteen Conciliation Expediting cases; the remaining cases have gone through mediation. A party sees a judge only if the case is not contested, parties do not reach agreement in mediation, or a party requests a *de novo* hearing (after a Conciliation Expediting decision is issued). This process has freed up more time for Rice County judges to concentrate on other cases, because they are now only in Conciliation Court for approximately ten minutes (a process which used to take one to two hours depending on the number of cases).<sup>145</sup>

In reviewing the need for development of the Conciliation Expediting Program, the RCDRP took into account four factors: (1) the court needed assistance in providing services and access to citizens; (2) the people conducting the Conferences would be volunteers, some with legal training, others without; (3) this approach is not an arbitration in the strictest sense as set forth in Minnesota Statutes Section 572; and (4) Minnesota Statutes Section 491A, which governs Conciliation Court procedures and judges, does not explicitly provide for Conciliation Conferences in Conciliation Court.

With regard to the first factor, the program seeks to satisfy the

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144. The RCDRP has worked with retired Judge Terry Dempsey and Rice County Court Administration to develop protocols and training of volunteers to carry out Conciliation Conferences. Under these protocols, parties choose which process they wish to use, either mediation or Conciliation Expediting. If parties cannot agree on a process, then mediation is the default process.

145. As noted by the Honorable William Johnson: "I think it's a tremendous value to people to have a cost-effective way to resolve their disputes. I like the option of another system in Court because people have choices with either mediation or conciliation expediting." Telephone Interview with the Hon. William Johnson, Chief Judge, Third Judicial Dist. & Dist. Court Judge of Rice County, Minn. (June 30, 2006).

Minnesota Supreme Court's core values of customer focus, accessibility, commitment to effective communication, innovation, and self-analysis.<sup>146</sup> One important component of Conciliation Expediting is its role in providing access to communities not traditionally served by the court. Hispanics, Blacks, Hmong, Somalis, and others do not often see faces on the bench who reflect the diversity of Minnesota. Providing these types of conferences with a diverse cadre of Conciliation Expeditors opens access to those who might fear or not understand court proceedings, or who want nothing to do with court.

As for the second factor, the RCDRP determined that those who conduct the Expediting Conferences would be volunteers from the community and that legal training was not required. The RCDRP uses trained volunteers to carry out mediations as prescribed under Minnesota Statutes Section 494. Legal training, however, is not necessary to carry out the functions of an arb/med approach.<sup>147</sup> The use of community volunteers enhances the participants' perception of fairness in the process.

Regarding the third factor, the RCDRP recognized that the Expediting Conference, although based on the DOLI's arb/med model, is not a true arbitration under Minnesota Statutes Section 572, which governs arbitrations and the selection and use of an arbitrator. The RCDRP, however, determined that in the context of this approach, a formal arbitration process would not benefit the court or the parties since it would pose a delay to parties having to choose and pay an arbitrator.

With respect to the fourth factor, the RCDRP noted that even though Minnesota Statutes Section 491A does not explicitly authorize Conciliation Conferences, courts frequently go beyond the statutory framework and try innovative approaches to providing access to justice for clients in Conciliation Court.<sup>148</sup> Moreover, even if Section 491A does not explicitly authorize Conciliation Conferences, Rule 114 of the Minnesota Supreme Court provides sufficient authority.<sup>149</sup>

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146. Supreme Court of Minnesota, Strategic Plan, *supra* note 141.

147. DOLI and its staff have proven this. As of the date of this article, only one mediator/arbitrator conducting such Conferences at DOLI is an attorney.

148. For example, some jurisdictions use law clerks as mediators in conciliation court.

149. Rule 114 authorizes mediators in Conciliation Courts, and explicitly recognizes ten methods of dispute resolution, one of which is the catch-all "other process" category that allows parties to create their own ADR process by

Because the Conciliation Expediting Program has only been in existence for one year, its impact is still being measured. It has, however, provided a critical link for the court with its main clientele, Rice County citizens, by continuing to provide access to citizens to dispute resolution through an expedited hearing process, and by using citizens like themselves to hear cases and help resolve the dispute.

*F. The Future of Community Mediation*

Judge Kevin Burke, former Chief Judge of the Hennepin County District Court, wrote recently, "Courts cannot perform their work in a social vacuum. To operate most effectively, we must stay connected to the communities we serve and more fully understand their needs."<sup>150</sup> Judge Burke is correct in his assertion that the court needs to remain connected to the community. As indicated earlier, community mediation programs exist in seven communities across the State of Minnesota. These non-profit programs work in their communities assisting individuals to resolve their disputes through mediation. They all use volunteer mediators from the community. These same programs also have a unique link to the courts in their areas; they provide mediation services to courts through referrals from the court and, in four of the programs, directly in court.<sup>151</sup>

In the final analysis, while these programs have been innovative and progressive, the environment in which they exist does not always reward or nurture such progress. Funding for these programs through the Minnesota State Courts has remained at levels established in the early 1990s.<sup>152</sup>

The programs have banded together in a loose association, the Minnesota Association of Community Mediation Programs, to better support their efforts in providing services to the

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agreement. MINN. GEN. R. PRAC. ANN. 114 (2005). *See also supra* note 2 and accompanying text.

150. Kevin S. Burke, Editorial, *Measuring Justice*, STAR TRIB. (Minneapolis), Feb. 23, 2003, at D4.

151. Four of these programs also offer restorative justice access for community members involved in crimes.

152. In fact, the original funding of \$110,000 per year divided amongst the programs has been reduced in recent years to \$100,000 through cuts passed along by the court. Financially strapped cities and counties have also reduced funding in recent years to the various programs. *Community Mediation: 20 Years of Managing Conflict*, STAR TRIB. (Minneapolis), Jan. 3, 2003, at 14A.

communities they serve.<sup>153</sup> Through this association, the programs have received grants from the Otto Bremer Foundation and the National Association for Community Mediation Program to strengthen their collective work through partnerships. This has included developing a database of cases, an Association website, and a series of educational meetings between staffs to share information on program development and management, including fundraising, working with diverse populations, the nurture and care of volunteers, and other topics of interest to the programs.

These programs have been truly progressive by tapping into the needs of the community to have a forum for justice, which is not the exclusive domain of the attorney or the court, but of citizen volunteers, some of whom may be attorneys. If Minnesota is to be truly progressive, then every effort should be made to replicate community mediation programs across the State of Minnesota.

#### V. CONCLUSION

As highlighted above, Minnesota has a number of innovative ADR processes being used at the county court level and at the community level. Also, many Minnesota schools, such as those highlighted above, are teaching conflict resolution skills to students at all levels, from elementary school to law school. Based on the creative nature of these ADR processes and the fact that they provide greater access to justice for many Minnesota citizens, the authors conclude that Minnesota has been innovative and “progressive” in the area of ADR. Innovative programs and education about ADR processes, however, are but two keys to unlocking the promise that is ADR. More is needed.

A friend once asked, “There are so many issues people are dealing with. While mediation is all well and good, can it put food on the table? Can it cure diseases? Can it stop racism? What good is mediation in the long run and why should government divert monies from other needs to fund mediation?” This is a good question, one the law books don’t talk about. The programs that exist, just in Minnesota alone, could be used to address many of the problems society faces. Yet their potential remains limited and untapped, not for lack of those wishing to provide the services, but because the assistance of corporations, government, and citizens is

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153. See Minnesota Association of Community Mediation Programs, <http://www.minnesotacommunitymediation.org> (last visited Aug. 30, 2006).

necessary in order to move ahead.

Our friend's intention in asking the question was to prompt bigger questions. How is mediation valued and by whom? Is it our responsibility in society to fund these types of programs or should they rely more on a "boot-strap" approach? In this article, the authors have outlined innovative programs that in many cases are working on a shoestring budget. Because of the funding issue, the majority of the subjects of this article would disagree with the authors and conclude that Minnesota has not been progressive in providing support, either financial or developmental.

Thus, in answer to our friend's questions, the authors offer the following observations about the future of ADR. When one views ADR as a whole, it *can* help put food on the table when used in various situations.<sup>154</sup> ADR might not end hunger now, but it can impact and arrest its spread.

As for curing diseases, ADR might be an indirect contributor as new approaches for health-care mediation are being developed around the nation. Some of these types of mediations work to resolve conflicts that may arise over care-of-patient issues or the distribution of monies to combat a disease, such as HIV.<sup>155</sup> ADR's impact on health care is just beginning to surface.

Mediation is also being used to address issues surrounding racism.<sup>156</sup> While the eradication of racism is many years away, ADR, specifically mediation, can have an impact in the long run. A participant in a recent conference regarding race, mediation, and dispute resolution indicated the following: "I was struck by the observation that mediators can be healers. First rule: heal thyself. I have come to realize through my work in dispute resolution that whenever people of color are involved, race is an issue (although a matter of degree)."<sup>157</sup>

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154. For example, in farm foreclosures, where a family might have lost the farm outright with no means of subsistence, the issue is now being addressed through mediation. Through farm mediation, what might have been a long drawn out court fight—or worse, an outright foreclosure—farmers and their families have been able to keep food on the table. Mediation has also helped in situations where a family might lose their housing in towns and inner cities through eviction.

155. Policy Consensus Institute, *Allotting Resources for HIV Prevention*, <http://mediate.com/articles/pciCS2.cfm?n1=93> (last visited Sept. 12, 2006).

156. For example, the Minnesota Department of Human Rights employs volunteer mediators to work with parties on issues surrounding race, as well as discrimination.

157. Conference at the Hamline University School of Law Dispute Resolution

By strategically allocating monies to ADR, government can use it to meet society's problems head-on. ADR might not cure a disease or end racism in the short run, but over time, it can make a deeper impact on how people communicate with each other and how they make the shift to addressing society's problems. Minnesota has a good start, but an increase in the support for current services, as well as a continued increase in different types of innovative ADR services is needed. These will be the final keys to unlocking the promise that is ADR and to securing Minnesota's reputation as being "progressive" in the area of ADR.