

Sixth Judicial District Family Mediation Program History & Policy Document

October 2016

Johnson County. In the fall of 1995, the Iowa Supreme Court awarded an ADR grant to the Sixth Judicial District to establish a Court-annexed family mediation program. The District Court Administrator appointed a Mediation Advisory Committee to oversee the design and implementation of the program. The committee includes members of the judiciary, the Johnson County bar, local mediators, the court administrator, the Child Advocate, a consultant and the program director.

Linn County. In the fall of 1995, a Linn County Bar Association committee of similar and overlapping membership began meeting in Linn County, though, without grant assistance.

Both committees met to consider the use of mediation in family law cases and the court system should respond to this promising method of dispute resolution. In 1994, the legislature authorized courts to order mediation in dissolution of marriage proceedings.

The program was implemented by the judges of the Sixth Judicial District, and has been administered by a Program Director and the District Court Administrator.

The judges created a Mediation Advisory Committee consisting of judges, the court administrator, a deputy clerk of court, mediators, and attorneys to monitor the program and advise the judges of needed changes.

Purpose

The Mediation Program makes mediation available as an alternative to litigation for resolving family disputes. The Program's objectives are to:

- Encourage parties to make their own decisions on issues that will affect their lives and those of their children.
- Increase parties' satisfaction and compliance with final decrees.
- Reduce the burden of the Court of the family law caseload.
- Reduce the time required to complete cases.
- Save litigants and the judicial branch time and money.
- Reduce stress experienced by family law lawyers.
- Encourage parties to develop the working relationship they will need to enable them to parent their children effectively after the final decree.
- Reduce the trauma endured by children affected by family law cases.

Mediation Defined

Mediation is significantly different from litigation and arbitration.

Litigation is a process in which the facts are decided by an agent of the government, a judge or jury, and a result is imposed on both parties.

Arbitration is similar to litigation, but the facts are decided and the result is imposed on both parties by a neutral third party who is typically not an agent of the government.

Mediation, as defined by Section 679C.102, is "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching voluntary agreement regarding their dispute." Mediation is a confidential process for resolving disputes in which a solution is developed by the parties with the assistance of a neutral person, the mediator, who has no power to impose a solution. The mediator assists the disputing parties to talk together, clarify understandings, define the issues, develop options, and reach a mutually acceptable agreement. The mediator does not give legal advice or make recommendations to the Court.

Mediation respects the parties' rights to self-determination and encourages them to develop the working relationship they will need to enable them to parent their children after the final decree. Mediation can help the parties develop tools to resolve future disputes on their own, thus reducing the need for modification and

contempt proceedings. Whether children are involved or not, mediation can help the parties move on with their lives.

In mediation, the parties themselves are deeply involved in the fashioning of details of the final agreement, whether represented by counsel or proceeding without counsel. In cases where the parties are represented, lawyers serve more as advisors and less as adversaries yet the role of lawyers remains central to the management of those cases. The Court reviews the parties' agreements and, if the court approves, incorporates them into orders and decrees.

Most people report greater satisfaction with mediation and its outcome than with litigation, since they feel more involved in the decision-making.

Overview of Court Annexed Mediation

National overview:

Responding to increasing caseloads and delay, Courts in various locations in the United States began to use alternative dispute resolution methods in the Court annexed programs in the early 1970's. In 1987 the Conference of State Court Administrators and the National Center for State Courts (NCSC) conducted a survey and found 700 alternative dispute resolution programs in the United States. These Programs provided a wide range of services including mediation, arbitration, fact-finding and summary jury trials, and they dealt with all kinds of civil cases and minor criminal cases.

The survey found that Courts most commonly uses mediation for domestic relations cases. 201 programs in 37 jurisdictions reported offering divorce mediation. At that time most programs were local, though six states had statewide programs. Twelve states had programs in only one trial Court.

The survey examined 118 divorce mediation programs and found that 37% of them had fewer than 100 cases per year; 25% handled 100-500 cases per year; 4% handled 500-1000 cases per year and only 14% of the programs handled over 1000 cases per year.

NCSC has not replicated that study; however, it estimates there are currently over 2000 ADR programs in the United States.

Sixth Judicial District overview:

The Sixth Judicial District program has benefitted the courts, the parties and the people of Iowa. Since the program was implemented in 1996, nearly 3300 cases have mediated. In over 66% of the cases, parties have reached agreement on some or all issues. 82% of the parties have spent three hours or less mediating.

1. **Reduction in temporary hearings:** The number of hearings on temporary custody and visitation dropped 60% in the first year, a considerable savings of time for court staff and the judges.
2. **Shorter trials:** In Linn County, the number of days per trial dropped significantly since the program started. Before the program was implemented, at least 25% of the trials lasted 3-5 days. After the first five years, more than 85 % last from 1 hour to 2 days, due to the parties reaching agreement on some of their issues in mediation.
3. **Fewer modifications in cases with mediated agreements:** Research on 150 Linn County cases (50 cases which had mediated an agreement, 50 where the parties stipulated/reached agreement without mediation, and 50 where the parties went to court for a decision) showed that divorced parents who had mediated their divorce decisions were 7-8 times less likely to return to the court for further decisions on custody and visitation issues.

Need for Mediation in Family Law Cases

Both the Iowa Legislature and the Iowa Supreme Court have taken strong positions regarding the benefits of mediation in family law matters and the importance of establishing mediation programs for Iowans. In 2000, the Legislature amended Iowa Code 598.7A to include the language "The supreme court shall establish

a dispute resolution program in family law cases that includes the opportunities for mediation and settlement conferences” The Intent Section of that legislative measure (House File 683) included the following:

“Because research demonstrates that parental conflict may result in emotional and psychological damage to parties and their children, the general assembly finds that mediation should be utilized to the greatest extent possible in the resolution of domestic relations disputes in this state.”

The Supreme Court, then, established the Iowa Supreme Court Mediation Study Group chaired by Justice Mark Cady. At the conclusion of their work the 14 member Group said, “The Supreme Court’s Mediation Study Group unanimously recommends that the Supreme Court adopt the proposed statewide mediation program model for family law cases set forth in this report.” In its subsequent report to the Legislature and in support of the Study Group’s findings, the Supreme Court concluded:

“Family law mediation will provide a direct benefit for litigants and children involved in family disputes and provide an indirect benefit for all Iowans. The program will reduce parental conflicts for the overall benefit of children, and plant the seeds for reduced conflict in non-family disputes.”

The Iowa State Bar Association has also acknowledged the benefits of mediation in family law matters. The **ISBA Task Force for the Delivery of Enhanced Legal Services throughout Iowa** included the following language in their Interim Report dated September 25, 2009 Expansion of Mediation (page 10):

Family law matters, particularly dissolution cases, consume a significant amount of judicial officer resources. In dissolution cases, mediation offers strong potential benefits not found in other cases.

Mediation fosters dialogue and communication among the parties, which is critical when children are involved and the parties need to communicate regularly after the case is resolved. Mediation not only increases communication, but it helps avoid the heightened tensions between parents that can result from a trial. Mediation does add a new cost for litigants, particularly when mediation is unsuccessful.

Mediation in the 6th District and in Polk County, where it is required, has been shown to successfully resolve issues, negating the need for trials or sharply reducing the length of trials.

Expanding mandatory mediation throughout the state for dissolution cases should be explored. Limiting meditation to dissolutions involving children may be an appropriate step if concern exists to extending mediation to all dissolutions. Maintaining judicial involvement regarding child custody and support orders is very important.

Statutory Authority

Section 598.7 provides authority for mediation: “The district court may, on its own motion or on the motion of any party, order the parties to participate in mediation in any dissolution of marriage action or other domestic relations action.” So the court may order mediation in any divorce proceeding under chapter 598, but also in any other domestic relations action, mainly non-marital custody cases.

The same section contemplates that the Supreme Court will establish a dispute resolution program involving mediation and settlement conferences, and gives the court authority to set rules, subject to some restrictions found in 598.7(4).

That latter section defines “participation” as including “attendance at a mediation session with the mediator and the parties to the action, listening to the mediator’s explanation of the mediation process, presentation of one party’s views of the case and listening to the response of the other party. Participation in mediation does not require that the parties reach an agreement.”

598.7 also provides that no mediation agreement is enforceable until approved by the court.

The section gives the court authority to prescribe qualification for mediators, though the court cannot require that mediators be licensed to practice any particular profession; i.e., the court could not restrict mediation to lawyers.

Mediations are conducted in accordance with the provisions of chapter 679C, the Uniform Mediation Act, which deals with privileged statements and confidentiality. Many mediation statements are privileged pursuant to section 679C.104. In most legal proceedings:

- a. A mediation party may refuse to disclose, and may prevent any other person from disclosing a mediation communication.

- b. A mediator may refuse to disclose a mediation communication and may prevent any other person from disclosing a mediation communication of the mediator.
- c. A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the non-party participant.

The Program

The program includes all dissolution of marriage cases under Chapter 598 of the Code and all other equity cases in which a child custody or visitation order could be entered, except domestic abuse cases under Chapter 236 and contempt of Court actions under Section 598.23. [Cases to establish, modify or adjust child support and cases to establish temporary alimony only are not included. Cases involving determination of post high school educational support are included.]

1. **The Program requires all parties to attend a Mediation Education Class.** This class explains the mediation process and to encourage the parties to seek legal counsel.
2. **Parties are ordered to attend a mandatory course for divorcing and separating parents concerning the effects on children of parents separating, and receive the Mediation Education Class as part of that program.** Parties without children must attend only the Mediation Education Class. The Mediation Education Class is also available online at mediateiowa.org. The schedule of the classes is provided by the Clerk of Court at the time the dissolution of marriage case is filed.
3. **The Court orders parties to participate in mediation in the following circumstances:**
 - a. **Upon the filing of all dissolution of marriage cases, all modifications of custody or visitation and all equity cases involving child custody or visitation**
 - b. **Upon the filing of any request for temporary custody, visitation or spousal support.** The court will require that no affidavits in support of or in resistance to any application for temporary custody or visitation be filed until mediation has been completed.
 - c. **At a status conference, conducted by a judge, upon the determination that the parties have failed to mediate within 90 days of filing.**
 - d. **Even if a party has already attended a mediation session in connection with the pending case, either party may request mediation and the court retains authority to order it.**
 - e. **On the court's own motion or the motion of any party, as provided by Section 598.7, the Code.**
 - f. **If both parties certify that they have reached a settlement of all issues, including custody, visitation, child support, spousal support, property and debts by the time of the trial setting conference, the order to mediate is considered automatically waived.**
4. **Parties ordered to mediate must participate in the initial actual mediation session and are encouraged to continue with mediation as long as progress is being made.**
5. **No agreements are signed in mediation. Proposed agreements are submitted to the parties' attorneys, whether directly or through the client for review. Any final agreement must be signed by both parties outside of mediation and then submitted to the court for review and approval.**
6. **The Court Administrator will not schedule a trial until the parties have participated in mediation or the Court has excused them from participation in mediation.** The Court will make all efforts to insure that Court-ordered mediation will not impair compliance with the Supreme Court's Time Standards for Case Processing.

Issues for Mediation—Excuses from Mediation

The Parties may mediate any issue relevant to or arising out of a petition before the Court, except that no mediator shall mediate the issue of whether domestic abuse has occurred, and all mediations concerning the issue of child support shall be conducted in light of the Iowa Supreme Court Child Support Guidelines.

The court, upon receipt of a written application showing good cause, may excuse a party from participating in an ordered mediation session. **Good cause includes, for example, (1) a history of domestic abuse or violence or substance abuse so severe that mediation would be inappropriate; (2) cases where the parties have already contracted for mediation services or have already mediated in connection with the pending petition or application; (3) where the respondent is genuinely in default. In cases where the parties have already resolved all issues by written stipulation, no written application is necessary.**

The party seeking to be excused shall file an application setting forth the grounds and the Court may, in its discretion, require a hearing on the issue. **(Link to application can be found at mediateiowa.org homepage.)**

Domestic Abuse Screening

Although the court may order mediation, mediation is not appropriate in every case.

The time of separation for a couple with domestic violence is the time of greatest risk for serious violence. This is often the time when mediation is ordered in divorce and custody cases. Batterers are more likely to stalk, harass, batter, injure or kill their intimate partners when the victim takes steps to end the relationship. **The rate of intimate partner victimization (per 1000 persons) is 31.9% for divorced and separated women and 6.2% for divorced and separated men. Domestic abuse can affect nearly 40% of the cases.** It is not safe to bring both parties to the same location before determining whether there are safety risks and whether both parties have the capacity to use the process.

Lawyers have the primary responsibility to screen their clients for domestic abuse and to file the appropriate request with the Court if they believe that mediation is not appropriate. Mediators are also responsible for screening for abuse, regardless of whether anyone else does.

Mediators, or their trained employees, are required to have a screening discussion with both parties separately, by telephone or in person, to help the parties and the mediator determine whether mediation is appropriate, based on assessing the parties' capacity and their actual and perceived sense of safety. The screening discussions must occur before the parties arrive at the mediator's office for mediation. Mediators are required to take the *Introduction to Mediation and Domestic Abuse* course. The trained employee must take the *Introduction to Mediation and Domestic Abuse* course to become eligible to provide the screenings. Further training is recommended.

If a mediator determines that mediation is not appropriate and an application for waiver has been denied or a party requests that the mediator do so, the mediator may write a letter to the court stating that s/he has determined that mediation is inappropriate based on the program guidelines. Judges will accept that letter and provide a waiver.

If mediation is appropriate despite the existence of a no-contact order the parties are responsible to obtain a modification of that order to permit their mutual participation. If the parties wish to mediate but their presence together in mediation is unsafe there are process alternatives including phone mediation, mediation from separate rooms, mediation at separate times or mediation in the courthouse.

Mediation Education Classes and Program Funding

All parties in divorce and custody cases are ordered to the Mediation Education Class. Most people are unfamiliar with mediation. The Mediation Education Class informs the parties about the process of mediation as a means of communicating and resolving disputes and explains the value of a non-adversarial approach to dispute resolution in reducing trauma to the children and encouraging a future parenting relationship between the parties. The session provides information about domestic abuse and its effect on mediation and how to apply for a mediation waiver. The program encourages all participants to consult with a lawyer.

The one half hour Mediation Education Class is conducted by the providers of the mandatory course for divorcing and separating parents (Iowa Code Section 598.15) as part of that class, for the convenience of the parties. The Petitioner shall complete the education class within 45 days of the date of the petition and the

Respondent shall complete it within 45 days of the date of service of the original notice and petition, unless the parties are ordered to complete it earlier in connection with a request for temporary custody.

Mediators are strongly urged to have the parties attend the Mediation Education Class before they come to their initial mediation session.

Mediation Services of Eastern Iowa is responsible for evaluating the content of all mediation education classes offered by approved providers of mediation education classes in the District.

Program Funding

The Sixth Judicial District generates funds for administering its family mediation program by requiring the providers of the course mandated by Section 598.15 to provide a half-hour mediation education component in the course, and by assessing a separate fee for that component. That fee (currently \$20 per person) is collected by the provider and 85% (\$17.00 per person) is remitted to Mediation Services of Eastern Iowa (MSEI), the 501(c)(3) agency which manages the mediation program. The agency providing the class retains 15% of the fee, or \$3 per person. MSEI has developed and provides a video to the course providers and meets with them annually.

Court Ordered Mediation Session

The Court ordered mediation session gives parties in eligible cases the opportunity to “try” mediation and to make an informed decision whether mediation is appropriate for them. Unless the requirement of mediation is waived, parties ordered to mediation must participate in one mediation session and are encouraged to continue attending sessions voluntarily until they have resolved all or as many issues as possible. Parties pay all mediation fees at the rate they and the mediator agree upon. Any agreement about fees shall be in writing. Pro bono mediators will be available for indigent parties upon application and approval by the Court.

The mediator shall explain the mediation process and goals. The mediator must decide whether mediation is appropriate. The mediator will encourage each party to hire a lawyer and consult with the lawyer after each session.

The mediator shall notify the Court Administrator after the first session whether the parties attended. The notice shall only state whether the parties attend.

Program Mediators

The Program Director will maintain a Roster of Program Mediators available at the program website: mediateiowa.org. Each roster mediator has a page which includes information regarding the mediator’s credentials, experience, fees, and policies in attorney and third party participation and other pertinent information.

Mediators are required to abide by the 2005 Model Standards of Conduct for Mediators, maintain mediator malpractice insurance, meet the continuing education requirements, screen for domestic violence, and provide pro bono services as assigned by the Court on a rotating basis.

Mediators may draft a memorandum of understanding and give it to the parties. Parties do not sign any agreement in mediation. **The memorandum of understanding is a draft and shall not be considered an agreement unless both parties have signed it outside of the mediation session and, preferably, after consultation with counsel. The parties and their lawyers, if any, shall prepare all documents submitted to the Court, incorporating any agreement.**

Mediators are not employees of the State of Iowa or the Judicial Branch. They operate as independent contractors available for selection from the Roster furnished by the Court. **Their written agreement to mediate, to be signed by the parties before mediation commences, shall include the language: “I understand that [name of mediator], my mediator, operates as an independent contractor. I have contracted with him/her directly as an independent contractor for mediation services. She/he is not an employee of the State of Iowa or of the Judicial Branch.”**

Roster mediators may place themselves on the roster for counties where they do not have an office. If mediation is court-ordered and if a mediator is the court-appointed default mediator, the mediator must determine whether it would be a financial hardship for the parties to travel to his/her home office. Where travel would result in a hardship for the parties, the mediator should travel to the parties' county and in those cases the mediator cannot charge the parties for his /her travel time and/or transportation costs related to traveling to the parties' county for mediation. Mediators may arrange to use court house space for mediation in the four rural counties.

Selection of a Mediator

The mediator may be selected by the parties or by the Court in the Default Mediator List. Parties are encouraged to make their own selection.

By the Parties. The parties may agree to and privately retain any person they wish as their mediator. They may also select someone from the Roster maintained at the Court. The parties shall select a mediator within the time specified in the order mandating mediation.

By the Court. In every case, the Court appoints a default mediator from the roster on a rotating basis. If the parties are unable to agree on a mediator within the mandated time, the parties must mediate with the appointed default mediator.

Reduced fee mediators. A party may apply for a reduced mediator by completing an application and, if needed, the financial affidavit form used to apply for Court appointed attorneys and filing them with the Court. (Found on the home page at mediateiowa.org) Parties apply individually, not jointly. For indigent parties, the Court will appoint a reduced fee mediator from the roster on a rotating basis. All roster mediators are required to provide reduced fee mediations. Indigence for purposes of this provision has the same meaning as in Sec. 815.9, The Code. (As of October 2015, a reduced fee-qualified party pays \$10 an hour. The other party, if not pro bono status, pays ½ of the mediator's hourly fee. If the mediator charges an administrative fee, a reduced fee-qualified party pays \$10 for the administrative fee.)

Qualifications of Mediators

The Program Director will place any mediator applicant on the Roster of Mediators who meets the following qualifications:

1. Mediation Training.

Any person who has received 40 hours of an Association for Conflict Resolution-certified divorce and custody mediation.

ACR-certified divorce and custody mediation trainings require 15 identified training outcomes, six of which deal with helping trainee mediators develop the skills to help the parties communicate, and the requirement for a minimum of 6 hours of supervised mediation role plays. Not all professional 40-hour mediation trainings emphasize gaining the skills to help people have a difficult conversation, an ability that is particularly important in mediating family issues. The mediation profession recognizes role plays as vital to gaining skills.

2. Continuing Education

- a. **General Continuing Education Requirement. Roster mediators are required to complete 7 hours of relevant continuing education each year.** In addition to the required courses on domestic violence and mediation issues, relevant topics include divorce mediation, mediation, divorce-related issues, family law, child development, family dynamics, etc.
- b. **Required Introduction to Mediation and Domestic Abuse course:**
 1. Mediators who can document having had 2 full hours of training on mediation and domestic abuse issues in their 40-hour divorce and custody mediation training must take the 2-day

Introduction to Mediation and Domestic Abuse course within the first six months on the roster.

2. Mediators who cannot document having had 2 full hours of training on domestic violence and mediation issues in their 40-hour mediation training must take the 2-day Introduction to Mediation and Domestic Abuse course before they are put on the roster.
3. As part of the 2-day Introduction to Mediation and Domestic Abuse course, MSEI offers a 4-hour role play-based training on situations with domestic abuse or power imbalances.

3. Other conditions of being on the roster

- a. **Every person listed as a mediator on the Roster shall maintain malpractice insurance, which specifically covers mediation.**
- b. Every person listed as a mediator on the Roster shall agree to **do a limited number of mediations on a reduced fee basis.** They will be assigned as pro bono mediators on a rotating basis by the Court. “Reduced fee basis” means the mediation is free or done on a sliding scale, with a nominal fee for the poorest participants. The program will insure that no one is denied mediation services for financial reasons.
- c. **Every person listed as a mediator must attend the Roster Mediator Orientation,** which shall include, among other things, training on screening for domestic abuse, child support guidelines, program procedures, confidentiality, standards of practice, and the legal system.

4. Standards of Practice and Ethical Rules.

The program has adopted the 2005 Model Standards of Conduct for Mediators. Every Roster Mediator shall comply with these standards. Lawyer mediators shall also abide by the Rules Governing Standards of Practice for Lawyer Mediators in Family Disputes, and in the event of a conflict, the mandatory rules of the Supreme Court govern lawyers’ conduct. Other mediators’ profession of origin standards of practice will inform their practice.

Confidentiality of Mediation, Mediator Privilege and Mediator Immunity

Iowa Code Chapter 679C provides as follows:

679C.2 Confidentiality.

If a mediation is conducted pursuant to a court order, a court-connected mediation program, a written agreement between the parties, or a provision of law, all communications and mediation documents are privileged and confidential and not subject to disclosure in any judicial or administrative proceeding except under any of the following circumstances:

1. *When all parties to mediation agree, in writing, to disclosure.*
2. *When a written agreement by the parties to mediate permits disclosure.*
3. *When disclosure is required by the statute.*
4. *When a mediation communication or mediation document provides evidence of an ongoing or future criminal activity.*
5. *When a mediation communication or a mediation document provides evidence of child abuse as defined in section 232.68, subsection 2.*
6. *When a mediation communication or mediation document is relevant to the legal claims of a party against a mediator or mediation program arising out of a breach of the legal obligations of the mediator or mediation program.*
7. *When a mediation communication or mediation document is relevant to determining the existence of an agreement that resulted from the mediation or is relevant to the enforcement of such an agreement.*

670 9C .3 Mediator privilege

If a mediation is conducted pursuant to a court order, a court connected mediation program, a written agreement between the parties, or a provision of law, a mediator or a representative of a mediation

program shall not testify about a mediation communication or mediation document in any judicial or administrative proceeding except under any of the following circumstances:

The statute then goes on to repeat all of the exceptions listed under 679C .2 (above) with the exception of item 7, which is omitted here.

679C .4 Mediator immunity

A mediator or mediation program shall not be liable for civil damages for a statement, decision, or omission made in the process of mediation unless the act or omission by the mediator or mediation program is made in bad faith, with malicious purpose, or in a manner exhibiting willful or wanton disregard of human rights, safety, or property. This section shall apply to mediation conducted before the workers compensation commissioner and mediation conducted pursuant to Chapter 216.

Disputes and Conflicts About the Program

Iowa law provides no grievance procedure for mediators who may feel they have been badly treated by the program. Similarly, there is no grievance procedure for parties who feel they have been badly treated by a mediator, except for the Grievance Commission that can deal with lawyer mediators. **Since the premise of the program is that mediation is the method of choice for dispute resolution, the program provides mediation as the mechanism for the resolution of these complaints.**

The Program Director reviews the qualifications of roster candidates and makes a recommendation to the District Court Administrator who decides whether candidates are placed on the roster. Any person denied admission to the Roster or removed from it may file an appeal with the chief judge. The chief judge's decision is final.

Any party who feels that a mediator has done something improper may submit a grievance to the Program Director or the District Court Administrator. All unresolved grievances will be mediated with a mediator mutually acceptable to both parties.

Evaluation of Program

Mediation Services of Eastern Iowa (MSEI) collects data through program forms completed by the mediators and the parties. The mediators are responsible for filing these forms and for providing an evaluation form to each of the parties.

MSEI maintains a database on the program mediations and uses it to analyze the adequacy and effectiveness of the program. MSEI reports findings to the Court and the public at least annually.