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## Specialty Law Columns Alternative Dispute Resolution Column

*Alternative Dispute Resolution: ADR in Colorado: Past and Present*  
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*This month's article was written by the Honorable Steve C. Briggs of the Colorado Court of Appeals, (303) 861-1111. He is a member of the CBA ADR Forum Committee's Executive Council and a former mediator and mediation trainer. He is also one of that most dangerous of breeds, a zealous convert.*

The story of alternative dispute resolution ("ADR") emerged in Colorado long before the Fountain of Youth was a twinkle in the eye of the first European visitor. Our Native American residents had already developed a highly effective method of resolving disputes, known as "peacemaking." Today, we call a very similar ADR process "mediation." For the Centennial issue of *The Colorado Lawyer*, this article picks up the story of ADR in Colorado a few centuries later, as it began to attract the attention of the Colorado Bar Association ("CBA").

### **CBA's Role**

The story of ADR had reemerged in Colorado by the 1970s, with the CBA taking a leading role. In 1976, CBA President Dan Hoffman appointed a "blue ribbon" committee to look for alternatives to the growing costs of litigation. Although the term "ADR" was not yet in common use, it fits the many alternatives the committee began to explore.

The following year, the new CBA President, Carlos Lucero, organized an *ad hoc* ADR Committee, co-chaired by David Ebel and Howard Kirshbaum. With a generous grant from Sam Gerry's Piton Foundation, the committee tackled several ADR projects. The first, the Denver Custody Mediation Project, was developed in conjunction with the CBA Subcommittee on Child Custody and Visitation and was directed by Jessica Pearson. According to a final report, the 60 percent settlement rate provided "cause for optimism" about the mediation process. The success of a second undertaking, the Landlord-Tenant Mediation Project, with Lynn Smith as the project coordinator, planted the seeds for the Colorado Pledge, which would come into bloom a dozen years later.

### **Emergence of ADR in Boulder**

During the 1980s, the Boulder valley was fast becoming known for its innovations in ADR. In addition to the many projects undertaken by the Boulder County Bar Association's active ADR Committee, the Boulder City Council, with a nudge from City Attorney Joe De Raismes, pioneered the Boulder Community Mediation Service. While the initial focus was on reducing chronic tension between landlords and tenants, under Director Judy Mares-Dixon, the focus was broadened. Today, with the original director, Kon Damas, back at the helm, volunteer mediators help resolve a wide variety of community disputes.

Also in Boulder, Richard Dana in 1984 retired as a District Court Judge and, with Boulder's former District Court

Administrator, Jerry Lockwood, formed the Judicial Arbiter Group ("JAG"). JAG was based on the crazy notion that some litigants, frustrated with the justice system provided by the state, would pay good money for a private judge to conduct a settlement conference or decide a case through arbitration. JAG is now composed of sixteen retired judges, who have handled cases out of virtually every state west of the Mississippi, and several east.

Boulder in the 1980s became the home of many prominent ADR organizations, not the least of which was CDR Associates. With Christopher Moore, Bernie Mayer, Susan Wildau, and Mary Margaret Golten merging their talents and energies, CDR quickly became a national leader in ADR training. In the 1990s, it has quietly undertaken ADR projects in South Africa, Bulgaria, Indonesia, Israel, Poland, Sri Lanka, the Philippines—and Rocky Flats.

## ***Other Developments***

Back in Denver, the American Arbitration Association had opened its doors in 1981. Despite the name, Regional Vice-President Mark Appel and his staff molded AAA into a resource center recognized statewide for its mediation training and services. Today, under the leadership of D. Breckenridge (Breck) Grover, AAA is one of three locations in the world for the Court of Arbitration for Sport ("CAS").

Although ADR was spreading throughout the state, until 1983 there was no statewide association of mediators. That gap was filled with the formation of the Colorado Council of Mediators and Mediation Organizations, Inc. ("CCMO"). Its goals are to develop the mediation profession, provide opportunities for professional development and networking, and educate the public. The Colorado Mediation Project, now a separate organization, is an outgrowth of CCMO's educational efforts. In addition to producing a Mediation Resources List, CCMO annually presents a spring and fall conference. CCMO is currently involved with the Colorado Attorney General's office and the CBA ADR Forum Committee in a study of the need for, and possible content of, ADR provider qualifications.

Also in 1983, the General Assembly recognized that ADR encompasses more than arbitration with its enactment of the Dispute Resolution Act. The culmination of hard work by many in the CBA, the Act for the first time authorized judges to refer cases to mediation. Amendments in 1988 gave courts more specific authority to refer parties to public or private ADR providers.

The Dispute Resolution Act also authorized the creation of the Office of Dispute Resolution ("ODR") within the Judicial Department. Beginning with Judith Zieger as its first director, ODR took shape over the next few years and, with Ed Zimny taking the reins in 1986, expanded rapidly. By 1988, fifteen mediators were under contract and were achieving a settlement rate of 70 percent. Over the six years from 1986 to 1992, ODR's caseload increased tenfold.

In contrast, an experiment in mandatory arbitration did not survive. Although an independent review and analysis of the project was generally favorable, the Mandatory Arbitration Act was controversial and, on a close vote, was "sunsetting" by the legislature in 1990.

By 1984, ADR had caught the attention of the state's executive branch. For example, the Colorado State Personnel Board in that year created a nonstatutory, flexible program for the early resolution of disputes in the state personnel system. Its success led to an expanded role for ADR, including grievances and whistle-blower complaints.

Other agencies soon followed suit. The Division of Administrative Hearings, in coordination with the Department of Regulatory Agencies and the Colorado Attorney General, has implemented a successful mediation project in the Division of Registrations, the umbrella organization for twenty-five professional and occupational regulatory boards. In the Public Utilities Commission, staff members mediate complaints by consumers about utility services. In the Workers' Compensation Division of the Department of Labor and Employment, administrative law judges hold prehearing and settlement conferences, while three mediators in the office provide their distinct services when requested.

## **Colorado's Law Schools**

It was in the 1980s that Colorado's law schools began incorporating ADR into curriculum and clinics. At CU Law School, the popularity of Professor William Renfro's course on negotiations and ADR led to the addition of other sections taught by lawyers in the Boulder community with ADR experience, including Pete Rogers. In the meantime, the school's former dean, Professor Don Sears, was building a national reputation as a major-league baseball arbitrator.

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In the fall of 1988, Cynthia Savage began the Mediation-Arbitration Center at DU College of Law. Students trained in ADR engage in supervised co-mediations of Denver county civil cases, Denver Career Service personnel grievances, and Denver neighborhood disputes referred by the City Attorney's Office. In 1994, the College of Law added a mediation component to its required first-year course in Lawyering Process.

## **Closing Out the 1980s**

In 1988, the CBA ADR Committee, by then a "standing" committee, began its specialty law column in *The Colorado Lawyer*. Edward Dauer, then dean of the Denver College of Law, provided the inaugural article. The next year, *The Colorado Lawyer* devoted its May issue to ADR.

The General Assembly in 1988 enacted the Health Care Availability Act as part of the "tort reform" movement. The Act encourages patients and their health care providers to enter into agreements to arbitrate any professional negligence dispute and specifies the requirements for such an agreement. The legislature in that year also amended the Workers' Compensation Act to provide that parties could request a settlement conference, with the rules of procedure likewise amended to provide for mediation of specified disputes. Three years later, the legislature again amended the Workers' Compensation Act to create a state agency ADR program, with its own Dispute Resolution Section.

In 1989, the Denver District Court and Denver Bar Association ("DBA") joined forces to create a memorable Settlement Week. Shannon Robinson chaired the Settlement Week Committee, and Janet Adams in the Clerk's office handled much of the logistics. Volunteers with experience in mediation selected and trained 289 lawyers, who then settled 297 cases—half of those selected—for a savings of approximately 900 trial days.

That same year, Leslie Lawson and Dan Himelspace, from the DBA ADR Committee, teamed with Denver District Judge William Meyer to create an ADR program called Early Neutral Evaluation. Patterned after a program instituted by the U.S. District Court for the Northern District of California, the project uses volunteer lawyers to assist litigants in simplifying and expediting cases, with settlement not an unusual, nor unwelcome, result.

## **The Early 1990s**

In 1990, Chief Judge John McMullen announced the Denver District Court's new "Order of Reference." This was a pilot project in which a standard order required parties to engage in some form of ADR or show good cause why the requirement should be modified or the parties exempted. The DBA ADR Committee also instituted a Settlement Assistance Program, which continues today. Volunteers mediate a variety of cases involving indigent parties and provide similar services for Family Law Day each month in Denver, Jefferson, and Arapahoe Counties.

In 1991, the national news media was abuzz about the Colorado Pledge. The project was the brainchild of the CBA ADR Committee, chaired by Julian Izbiky, and came to fruition in large part due to the energy and guidance of CBA President Jerry Conover. The gist of the Pledge was that the members, all Colorado businesses, agreed to turn to negotiation and ADR techniques before pursuing litigation. Cosponsors included the CBA, the Greater Denver Chamber of Commerce, the Colorado Association of Commerce and Industry, Club 20, Colorado Plains,

Inc., and the National Federation of Independent Business.

The efforts of a task force assembled in 1991 by the Real Estate Commission, under the leadership of Director Michael Gorham and with the assistance of Kent Levine and the CBA Real Estate Committee, led to a standard mediation clause in real estate listing and buy/sale contracts. The Commission's Forms Committee is now considering whether an arbitration clause should be added. On another front, the ADR Committee's Financial Institutions Subcommittee, chaired by A. Bruce Campbell, in 1991 developed a recommended arbitration clause for use by financial institutions and presented educational programs on ADR for the financial industry.

The Tenth Circuit in 1991 commenced its settlement program, headed by Dave Aemmer and tailored after the Sixth Circuit's pre-argument program. Cases are selected randomly, although any party on a confidential basis can request inclusion. The settlement rate of the selected cases is more than double the rate achieved before the program commenced.

In that same year, the ADR Committee initiated an effort to have the Model Rules of Professional Conduct, when adopted, include an ADR rule. David Ebel led the charge on behalf of the CBA. Rule 2.1, as eventually adopted after some controversy, did not contain the mandatory language the CBA had recommended, but did include the "aspirational" statement that a lawyer "should" advise the client of alternatives that might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.

To assist lawyers with their new ethical responsibilities, the CBA ADR Committee, under the leadership of Joan McWilliams, in 1992 published a *Manual on Alternative Dispute Resolution*. It includes descriptions of various types of ADR. The Committee also published a brochure for the public, entitled *What in the World is ADR?* CCMO and the ADR Committee joined forces that year to produce a directory of ADR providers, and the two jointly issued *Guidelines for Mediator Education and Training* to assist consumers by establishing recommended education and training standards for mediators.

The Colorado Judicial Institute ("CJI") in 1992 announced the results of its Alternative Dispute Resolution Project. CJI is a long-established, independent, citizen-based organization working to improve our system of justice. The Project was a two-year study of ADR, conducted by Connie Talmage and supervised by CJI's ADR Advisory Committee. It produced the first inventory of ADR in the court system, an independent assessment of the value of ADR in resolving lawsuits, and a resource guide to ADR.

Partly as a result of recommendations by the CJI Advisory Committee, the Dispute Resolution Act was again amended in 1992. In addition to giving judges discretion to refer a greater variety of cases to ADR, the amendments added definitions for various types of authorized ADR, such as "early neutral evaluation," "mini-trial," "med-arb," "summary jury trial," and "multi-door courthouse concepts." The amendments also expressly provided for the confidentiality of all ADR proceedings.

After the appointment of Connie Talmage as director in 1992, ODR continued to expand its programs and educational efforts. By 1995, sixteen of the twenty-two judicial districts had an ADR program in place or in the planning stages. In 1996, more than 2,000 cases were mediated by ODR's thirty-one contract mediators.

The Colorado Judicial Branch in 1992 sponsored a project to assess citizens' needs and expectations of the courts in the year 2020. The project brought together a group of ninety Colorado citizens whose efforts resulted in the report, "Vision 2020: Colorado Courts of the Future."<sup>1</sup> The report recommended, among other things, that the courts of the future provide different forums for settling disputes other than "going to court" and that various forms of ADR be offered "in a community-center concept."

By 1993, the Department of Transportation had burst on the ADR scene with the implementation of "partnering" as part of its road construction projects. Representatives of those with a stake in a contract meet at the beginning of a project and regularly thereafter to review any problems before they become insurmountable, with periodic evaluations of the process itself. In Denver, the use of partnering brought the Broadway/Speer renovation in ahead

of schedule and under budget.

## ***Moving into Mid-Decade***

In 1994, Colorado Rules of Civil Procedure ("C.R.C.P.") Rule 16 was amended to require parties to explore settlement within thirty-five days after a case is at issue and, in their proposed Case Management Order, to affirm they have discussed settlement and to set forth their plan for future efforts to settle. The amended rule supplements C.R.C.P. 121, § 1-17, which permits any party to request a settlement conference, to be conducted by any available judge other than the assigned judge.

Also in 1994, the CBA ADR Committee became the ADR Forum Committee, its activities ever increasing. The next year, its Government Task Force, chaired by Marshall Snider, and the Colorado Attorney General, represented by Deputy Attorney General Merrill Shields, presented an introductory program on partnering to state agencies. The task force is now working on a proposal for a partnering workshop that would be included in the overall training of all state employees involved in the contracting process.

Other current projects of the ADR Forum Committee include revitalizing the Colorado Pledge, promoting the concept of partnering to private businesses, developing an employment dispute manual, encouraging the use of ADR to resolve disputes within state government, and, with CCMO, publishing an updated directory of ADR providers.

In 1995, the U.S. Attorney's Office in Denver adopted a policy and implemented a new program on ADR, in response to Attorney General Janet Reno's order announcing an ADR initiative for the entire Department of Justice. The policy creates a set of criteria to be used in identifying cases appropriate for ADR and requires ADR training for all attorneys handling civil matters.

Colorado Lawyers for the Arts added an Arts Mediation Service in 1996. Volunteer mediators provide their services to help resolve disputes involving the art community.

In that same year, Chief Judge Alan Sternberg initiated a new settlement program in the Colorado Court of Appeals, using senior judges with mediation training to provide ADR services in selected cases. Initial indications are that, with adequate funding and a full-time director, the program could achieve the same success as that in the Tenth Circuit.

## ***Currently***

The Colorado Attorney General has adopted its own policy requiring that, when a case is assigned, the Assistant Attorney General must first determine whether ADR is appropriate before proceeding with another process such as litigation. The district attorneys in some judicial districts are now offering victim-offender mediation. The process is most often helpful in resolving less serious crimes committed by juveniles, but in appropriate cases can be extended to adult felonies.

Mediation programs are currently in place in the local offices of many federal agencies, such as the Bureau of Reclamation, the Environmental Protection Agency, and the Department of Justice's Community Relations Service. The Federal Mediation & Conciliation Service, originally created fifty years ago to help resolve labor disputes, now provides its services to other federal agencies, including the EEOC and the Department of Social Services.

More and more school districts are implementing mediation programs to resolve conflicts involving students, teachers, staff, and administrators. The Colorado School Mediation Project, under Co-directors Bev Cole and Randy Compton, holds an annual conference on school mediation that draws hundreds of teachers, school administrators, community leaders, and student peer mediators. Schools implementing mediation programs for

students have witnessed a substantial drop in discipline problems, especially fighting.

Today, with Cynthia Savage as director, ODR keeps fighting to expand ADR despite the lack of funding. Plans in the works call for expanded mediation services for dependency and neglect cases and a pilot project for domestic relations cases that would provide more options than just mediation.

With ODR's assistance, our judicial districts continue to expand their use of ADR. In the Twenty-First Judicial District, with Chief Judge Charles Buss firmly in charge, the number of domestic relations cases mediated has doubled over the past three years. The Fourth and Eighteenth Judicial Districts are continuing their successful Settlement Weeks and their pilot projects in dependency and neglect cases. In the First Judicial District, volunteer mediation services are offered through Jefferson County. In Denver, the Senior Attorney Settlement Assistance Program recruits retired lawyers with experience in ADR to conduct settlement conferences free of charge. The Twentieth Judicial District in April of this year began referring parties to ADR in all civil cases.

No ADR project in recent years has generated more interest in the legal community than the Multi-Door Courthouse in the Eighteenth Judicial District, being nurtured by Chief Judge Kenneth Stuart. If a settlement plan submitted pursuant to C.R.C.P. 16 appears insufficient, the presiding judge issues an "ADR Plan Order" requiring that the parties develop a supplemental plan. When necessary, a case-screening conference is scheduled with a senior judge trained in ADR to help create the plan.

The CJI ADR Coalition, a broad-based association of citizens, lawyers, judges, former judges, legislators, business leaders, and private providers of ADR, guided by Jim Windlinger and Larry DeMuth, has completed its preliminary study on the immediate need for ADR in the courts. It has recommended that the Colorado state legislature fully fund a pilot project for an expanded multi-door courthouse in at least two judicial districts, one metropolitan and one rural, under ODR's administration. Each district would have a full-time local ADR coordinator in the courthouse who would be responsible for, among other things, screening settlement plans (thus relieving busy judges from the task); assisting litigants in selecting an ADR option; if appropriate, varying the schedule of pretrial discovery to facilitate settlement (subject to *de novo* review by the court); and recruiting and coordinating ADR providers of *pro bono* services to the indigent. The Coalition is convinced that a multi-door courthouse in every judicial district is a matter not of "if," but of "when."

In addition to those already mentioned, certain names on our CBA roster recur in ADR's history. In just the Denver area they include, among many others, Ben Aisenberg, Robert Appel, Sr., George Bentley, the late John Bush, Donald Campbell, Christine Coates, Phil Dufford, Jack Kelly, Steve Meyrich, W. David Pantel, Frank Plaut, Wendy Whicher, and Mike Williams. With the resolute effort of these and our many other CBA volunteers, the very meaning of ADR is evolving—from "alternative" to "appropriate" dispute resolution. It is through the rearview mirror of our CBA history that we can glimpse just how far in the ADR journey we have come.

## **Conclusion**

Voltaire said, "I was ruined but twice in my life: Once when I lost a lawsuit. Once when I won a lawsuit." We now know that a less ruinous and more enlightened form of dispute resolution existed right here in Colorado—several centuries ago. Perhaps the peacemakers are returning just in time.

## **NOTE**

1. See Boersema, "Vision 2020: Building a Strategic Plan for Colorado Courts," 22 *The Colorado Lawyer* 11 (Jan. 1993).