



## WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 4

TO: MEMBERS OF THE STUDY COMMITTEE ON ACCESS TO CIVIL LEGAL SERVICES

FROM: David Moore, Senior Staff Attorney, and Rachel E. Snyder, Staff Attorney

RE: Options for Expanding the Use of Mediation

DATE: November 7, 2016

At the September 14, 2016 meeting of the Study Committee on Access to Civil Legal Services, Kristy Bradish, Retired Executive Director of the Winnebago Conflict Resolution Center (Center), delivered a presentation to the committee on the Center's mediation services. Ms. Bradish explained to the committee that the Center provides mediation services for a variety of different issues, including the following types of cases: small claims; some large civil claims; evictions; probate; divorce and post-divorce property division; adult guardianship; and harassment restraining orders. According to Ms. Bradish, the benefits of mediation through the Center are that it is generally free to the parties, faster than the formal legal system, less formal, and not limited by legal remedies.

Committee members expressed an interest in expanding the use of mediation programs, such as the one used in Winnebago County, to provide an avenue for individuals to resolve legal issues or disputes that does not depend on the parties being represented or assisted by an attorney. This Memo describes options for expanding mediation services in Wisconsin and highlights issues for further committee consideration.

### **BACKGROUND**

Mediation, throughout the state, is mandatory in two circumstances. First, under certain circumstances, a judge may order parties in a case to select a "settlement alternative," such as mediation. Second, referral to mediation is required in family law cases involving contested legal custody or physical placement of a child.

## **Alternative Dispute Resolution**

State law authorizes judges to order parties to select a settlement alternative<sup>1</sup>, such as mediation, if the judge first determines that the particular action or proceeding is suitable for alternative dispute resolution. Mediation is defined as: “a dispute resolution process in which a neutral 3rd person, who has no power to impose a decision if all parties do not agree to settle the case, helps the parties reach an agreement by focusing on the key issues in a case, exchanging information between the parties and exploring options for settlement.” [s. 802.12 (1) (e), Stats.] The parties may choose the mediator and the manner of compensating the mediator, but, if they cannot agree, the judge may appoint a mediator and direct the parties to pay the mediator’s reasonable fees and expenses. [s. 802.12 (2), Stats.]

Judges in some counties have used this authority to require, by local court rule, that all cases of a certain type first proceed via mediation. With judicial support, counties may provide mediation services in addition to those required by state law, may require that such services be utilized, and may generally establish funding mechanisms as they deem appropriate. As an example, all contested small claims cases in Winnebago County and Waukesha County are first referred to mediation.

## **Mandatory Mediation for Legal Custody and Physical Placement**

### **Family Court Services**

State law requires each county to designate a director of family court services who must provide mediation services regarding child custody and physical placement. Counties may provide mediation services in the following ways: (1) by providing direct mediation services; (2) by entering into cooperative agreements with other counties for the provision of mediation services; or (3) by contracting with any person or entity located within the county or a contiguous county for mediation services.

Unless a court finds that attending mediation would cause undue hardship or would endanger the health or safety of one of the parties, a court must refer parties to an action affecting the family to mediation if it appears that legal custody or physical placement is contested. Upon referral, the director of family court services must assign a mediator to the case or the parties may contract with a private mediator, at their own expense. The parties must attend an initial mediation session for screening and evaluation to determine whether the case is appropriate for mediation and whether both parties wish to continue with mediation.

### **Mediator Qualifications**

Mediators assigned to a case by the director of family court services must have at least 25 hours of mediation training or at least three years of professional experience in dispute resolution. Assigned mediators must also have specific training on the dynamics of domestic violence and the effects of domestic violence on victims and children. A private mediator,

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<sup>1</sup> State law specifically recognizes alternative dispute resolution and defines “settlement alternative” as binding arbitration, direct negotiation, early neutral evaluation, focus group, mediation, mini-trial, moderated settlement conference, nonbinding arbitration, or summary jury trial. [s. 802.12 (1) (i), Stats.]

selected by the parties, must satisfy the statutory definition of “mediator,” but does not have to satisfy the same conditions as an assigned mediator.<sup>2</sup>

### **Funding**

Family court services, including mediation, are funded by required civil action filing fees and fees charged for services. Specifically, a \$20 fee, in addition to the general civil action filing fee, must be paid if the civil action is an action affecting the family.<sup>3</sup> That additional fee and 50 percent of the fees charged to file a petition, motion, or order to show cause for the post-judgment revision of a legal custody or physical placement order must be used to support the statutorily required family court services, including mediation. Currently, 50 percent of the fees charged for post-judgment revisions amounts to \$25 per filing.

If parties are referred to mediation, a county must provide the first mediation session at no cost, and must charge a single fee of \$200 for subsequent sessions, no matter how many sessions are held. In lieu of utilizing the statutory fee structure, a county may instead establish a sliding fee schedule that requires payment for services provided, instead of a single fee applicable without regard to the number of sessions provided, and that considers parties’ ability to pay when determining the fee amount. If a county establishes a sliding fee schedule, it must ensure that no fee is charged for an initial mediation session conducted upon referral.

Ultimately, a county must provide family court services, including mediation, even if both parties are unable to pay, although a court must grant a judgment for the amount of any unpaid fees, including mediation fees, in favor of the county and against the party or parties responsible for the fees. [s. 767.405, Stats.]

### **OPTIONS FOR EXPANDING THE USE OF MEDIATION**

The following represent options for expanding the use of mediation in Wisconsin. These options are presented in order to assist the committee in its discussion. The committee is not limited to these options, nor are these options mutually exclusive.

#### **Option 1: Expand the Types of Cases Subject to Mandatory Mediation**

The committee could consider expanding the types of cases that are subject to mandatory mediation. Examples of types of cases the committee might consider suitable for mediation are:

- Divorce and post-divorce property division.
- Small claims.

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<sup>2</sup> By definition, a mediator is a person with special skills and training in dispute resolution. [s. 767.405 (1) (b), Stats.]

<sup>3</sup> An action affecting the family is any of the following actions: (1) to affirm marriage; (2) annulment; (3) divorce; (4) legal separation; (5) custody; (6) child support; (7) maintenance payments; (8) property division; (9) to enforce or modify a judgment or order in an action affecting the family; (10) periodic family support payments; (11) concerning periods of physical placement or visitation rights to children; (12) to determine paternity; and (13) to enforce or revise an order for support. [s. 767.001 (1), Stats.]

- Harassment restraining orders.
- Foreclosure.
- Probate.
- Adult guardianship.

If the committee wishes to expand the types of cases that are subject to mandatory mediation, the committee might also consider addressing how mediation services would be funded. Funding options include any combination of the following:

- Provide no additional funding and instead require counties to absorb the costs into their current budgets.
- Establish a court filing fee on certain cases for the purpose of funding mediation services.
- Assess a fee to participate in the mediation.
- Establish and charge an hourly rate for mediation services.
- Direct the use of federal funds to provide services for individuals who are eligible to receive federal assistance. Eligibility would depend upon the federal funding source.

The committee might also consider the following issues:

- Whether mediators for an expanded program would be required to satisfy certain training conditions, such as those conditions imposed upon current legal custody and physical placement mediators.
- Whether the committee would require the appointment of a mediation coordinator in each county, like the currently required director of family court services; regional coordinators; or a statewide coordinator.

### **Option 2: Establish a Mediation Pilot Program**

The committee could consider establishing a mediation pilot program. In considering whether to establish a mediation pilot program, the committee might consider the following issues: (1) types of cases that would be subject to mediation in the pilot program; (2) pilot program location and participation; (3) selection or eligibility criteria; (4) program funding; and (5) oversight, reporting, and evaluation.

#### **Types of Cases That Would be Subject to Mediation in Pilot Program**

As discussed above, there are several types of cases that may be appropriate for referral to mediation. The committee should consider whether a mediation pilot program will focus only on one or more case types or will be open to any case type as long as a judge deems a particular case suitable for mediation.

### **Pilot Program Location and Participation**

A pilot program would operate in a specific county or counties. The committee should consider where the pilot program would operate and whether participation would be voluntary.

### **Selection or Eligibility Criteria**

The committee should consider how it will select counties for participation in a mediation pilot program. Selection or eligibility criteria could include the following:

- Open only to counties in which a specific type of mediation does not already exist.
- Open only to counties that provide a certain amount of matching funds.
- Open only to counties with a certain volume of cases appropriate for mediation.

### **Program Funding**

The committee may also wish to address how a pilot program might be funded. The committee could consider any combination of funding options, as discussed in the first option above. Whether or to what degree funding should be provided may depend upon whether county participation in the pilot program will be voluntary or mandatory.

### **Oversight, Reporting, and Evaluation**

In considering whether to establish a mediation pilot program, the committee might also consider how it will answer the following questions:

- Who would oversee the selection of counties, the granting of funds, and the implementation of the mediation pilot program?
- Who would be responsible for reporting the progress of the pilot program, and what information must be included in the report? How often would reports need to be made and to whom?
- How long must the pilot program run before its success is evaluated?
- How would the pilot program be evaluated? What indicators or results would indicate success?

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