V.

REPORT OF THE COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION

A. BACKGROUND

Alternative Dispute Resolution ("ADR") is the umbrella term used to cover various alternatives to litigation in the resolution of legal disputes. Generally, ADR is a method of resolving disputes utilizing a third-party neutral and may permit parties to actively participate in determining the outcome of the dispute. ADR procedures are intended to be less costly, more efficient, and more flexible than litigation. The most common forms of ADR are mediation, arbitration, and the settlement conference.

ADR is expanding because it can be effective.[1] While the economic impact is difficult to assess, it is clear that ADR allows existing resources to be used more efficiently in some instances. At best, ADR can avoid protracted litigation; and even if it does not resolve a dispute, it may clarify the issues between the parties and thereby increase the pace of subsequent litigation.

The Committee, therefore, operated under the premise that the use of ADR should be expanded, but in a manner that has little or no fiscal impact on Colorado State government. It has attempted to make recommendations that could be implemented by action of the Colorado Supreme Court and the Governor, without the need for legislation. Consequently, most of the Committee's recommendations utilize existing resources, although its recommendations regarding educational efforts might require additional funding.[2]

There are increasingly signs that ADR is coming of age in Colorado. In its report issued August 10, 1999, the Colorado Supreme Court Committee on County and District Court Civil Jurisdiction and Access Issues adopted specific working criteria in its examination of a limited-money-claim action. The Supreme Court committee concluded that "costs of a case can be controlled best if the claims can be resolved, or be put in a position to be resolved, in the early stages of litigation." Recommendations included non-binding ADR pursuant to the Colorado Dispute Resolution Act;[3] allowing parties to determine which method of ADR best meets their needs in claims involving $50,000 or less; and making ADR available through the judicial system statewide. In its review, the Committee built on the work of the Supreme Court Committee and its development of Rule 26.3 of the Colorado Rules of Civil Procedure.[4]

B. RECOMMENDATION FOR USE OF ADR IN COURTS

The Committee recognizes that ADR is not appropriate for every case that comes before the courts. However, we believe that parties to all types of cases should be made to actively consider the use of ADR, at least at the initial stages. If ADR is to be implemented in a particular case, all of the parties must agree upon its use and upon the form of ADR to be used, which form should in fact be appropriate to the dispute. To be able to make such decisions, the parties need to understand what forms of ADR are available to them. The question becomes what process can be implemented in the courts to ensure that these considerations have been made, without adding undue burden or costs to the courts or litigants.

1. *Requiring ADR Advice*

The Committee determined that such a process should assure each party has affirmatively reviewed and honestly considered available ADR options before filing any civil litigation — whether seeking monetary relief or another remedy — or before answering any complaint. A party's initial court filing should include its assessment of the appropriateness of ADR for its case and make a recommendation for some form, or against all forms, of ADR based on that review. Presently, Rule 2.1 of the Colorado Rules of Professional Conduct (which are binding rules that establish the ethical obligations of lawyers) provides, "In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought." The Committee recommends that the rule be modified to *require* such advice.

2. *ADR Disclosure Form*

The Committee recommends that each litigant, whether *pro se*[5] or represented by counsel, and whether plaintiff or defendant, be required to include an "ADR Disclosure Form" with its initial court filing. A proposal for such a form is attached to this Report as EXHIBIT 6. The ADR Disclosure Form would require the litigant to review certain objective factors that support the use of ADR; indicate whether those factors are present in the case; state whether ADR is recommended; and, if ADR is recommended, state which type of ADR might best be applied. If a party recommends that ADR not be used, the party would be required to give an explanation for that decision. The judge would review the parties' disclosure forms, approve or disapprove the recommended action, and enter an order to implement the judge's determination. This procedure is fair because it gives all parties an opportunity to be heard, and it permits litigants a variety of options while assuring that ADR options are honestly considered. The determination to mandate ADR would depend on the court's objectives in the particular case. The Committee notes that, under the Colorado Dispute Resolution Act, the *parties* are already empowered to select the services or programs.[6]

Such mandated disclosure of parties' ADR options would obviously need to respect their constitutional right to seek relief for their grievances through the civil court system. Accordingly, it would be sufficient for a party to indicate by way of an "explanation" for not choosing ADR that the party preferred to proceed directly to court. An ADR Disclosure

Process is still valuable, however, because it helps inform parties of alternative ways to resolve their disputes – alternatives of which they might not otherwise be aware.

3. *Increased ADR Services*

The Committee also recommends that mediation services attached to the juvenile courts provide immediate access to conflict management tools and assistance to parents and guardians who have been unable to effectively influence a juvenile's behavior. Mediated agreements could be entered as part of the rehabilitation programs for juveniles and their parents or guardians.

More generally, each judicial district should have on staff one or more persons whose sole responsibility is to coordinate and implement ADR activities within the district and in cooperation with other districts. The Committee believes such an effort would promote judicial efficiency by reducing the number of cases that require formal courtroom proceedings. Multi-door court programs[7] are an established system for dispute resolution and conflict management in some judicial districts. An ongoing evaluation of the effectiveness of such programs are necessary.

C. Recommendation for Education

In order to facilitate the use of ADR, both the bench and bar must understand ADR options, uses and benefits. The Committee believes that ongoing legal education increases understanding of ADR processes and enhances the effective use of ADR. Thus the Committee recommends that ADR be an element of initial training for judges and lawyers. In addition, continuing legal education program providers should be encouraged to include ADR as an element of substantive programs. Additional resources to support the training of judges and court administrators in the appropriate use and effective implementation of various forms of ADR to augment judicial processes should also be considered.

Other possible educational options include: allocation of funds for public service announcements about the availability of ADR and how to select an ADR professional; an annual conference to focus on benchmarking the use of ADR in the State; mediation and conflict management training for school teachers, administrators and staff; and the expansion of community mediation services provided by non-profit organizations and local governments.

D. Recommendation for Expansion of ADR in State Government

An ADR program is increasingly viewed as a favorable alternative to traditional, adversarial methods of dispute resolution involving governmental agencies. A number of federal agencies, communities, and courts are currently utilizing this option. ADR can also be applied effectively both internally and externally by State Government. ADR is already used by several State agencies to help resolve internal, personnel disputes. Likewise, some State agencies use ADR to help resolve external disputes with customers or contractors. The Committee thus recommends all State agencies be made aware of the availability and benefits of ADR.

Several Colorado administrative law judges ("ALJs") have received training in ADR and serve as mediators in appropriate cases. Permitting ALJs to serve as mediators in administrative hearings can be another avenue for dispute resolution. The State should continue to support the use of ADR by State agencies in administrative hearings, and it should encourage the expansion of ADR within its government processes. In furtherance of this objective, the State should establish a government-wide program to provide a template for the use of ADR in its various agencies. The template would be a standard model on which a department or agency could base its own ADR programs, modifying the template to meet its specific needs and budgetary constraints. This would afford consistency, minimum standards of training and qualifications for those involved in the program, and a vehicle to seek out evaluations of the program. The evaluations would confirm the public's interest in such an alternative. The Committee recommends that the Governor and General Assembly take steps to integrate alternative dispute resolution into State government based on the practical lessons and experiences gained through the development and use of this template by the respective departments.

Finally, in order to ensure the continuing viability of the services it provides to the public and to give it greater ability and flexibility in establishing ADR programs throughout the State, the Committee recommends that the Office of Dispute Resolution within the Colorado State Judicial Department receive a budgeted allocation to permit it to assist State agencies with the implementation of ADR and in developing agency ADR policies.

E. CONCLUSION

The expanded use of ADR is already paying dividends both inside and outside Colorado State government. By identifying and building upon the successful use of ADR in resolving selected disputes more quickly and at reduced cost, Colorado can continue to strengthen the quality and responsiveness of our civil justice system.

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[1] See "Summary of Selected Studies of ADR Effectiveness," EXHIBIT 7 to this Report. The American Arbitration Association reports that its caseload for 1999 reached an all-time high of 140,188 cases, of which 137,250 were arbitration cases and 3,575 were mediation cases. The association notes that its caseload grew only slightly from 1990 through 1994, but then "exploded" from 1995 onward. American Arbitration Association *Dispute Resolution Times*, April 2000, p. 1.

[2]The Colorado Bar Association is establishing a website to list ADR providers, which includes information on training, experience, and whether a listed provider adheres to the Model Standards of Conduct for Mediators. Those standards have recently been developed and endorsed by the Colorado Judicial Department, the Colorado State Department of Law, the Colorado Office of Dispute Resolution, the Colorado Council of Mediators and Meditation Organizations, the Colorado Bar Association, and the Colorado Judicial Institute.

The Committee considered recommending the promulgation of ADR provider qualifications but determined that the question of qualifications is a complex one given the many kinds of disputes that can be submitted to ADR and the wide range of expertise neutrals can bring to the process. In any event, we found that standards of conduct are already being addressed by various organizations through the publication of voluntary standards. The Committee is encouraged by these developments, for it believes that ADR professionals should meet some minimum standard of education and training.

[3]Section 13-22-301 *et seq*, Colorado Revised Statutes.

[4] Rule 26.3, Colorado Rules of Civil Procedure provides in pertinent part:

(e) ADR

The parties in a case governed by this rule shall attend a non-binding ADR pursuant to the Colo. Disp. Res. Act, C.R.S. Section 13-22-301 et seq., within 120 days of the date the case is at issue. The parties may agree to a binding form of ADR. This time may not be extended except by order of the court, and no extension shall be granted absent extreme hardship. Each party shall bear its own costs for the ADR. The parties shall certify to the court that ADR has occurred.

[5]See Part IV of this Report for the report of the Committee on *Pro Se* Parties and Civil Justice Reform.
[6]§ 13-22-305(2), C.R.S., provides, "Persons involved in a dispute shall be eligible for the mediation services set forth in this section before or after the filing of an action in either the county or the district court."
[7]§ 13-22-302(4.5) of the Colorado Dispute Resolution Act defines "multi-door courthouse concepts" as follows:

"Multi-door courthouse concepts" means that form of alternative dispute resolution in which the parties select any combination of problem solving methods designed to achieve effective resolution, including, but not limited to, arbitration, early neutral evaluation, med-arb, mini-trials, settlement conference, special masters, and summary jury trials.

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End of Report
Appendices and Exhibits Follow