Mediation: An Analysis of Indiana's Court-Annexed Mediation Rule

JOHN R. VAN WINKLE*

Mediation is the primary focus of the adopted Rules for Alternative Dispute Resolution (ADR Court Rules) which went into effect in Indiana on January 1, 1992.[1] The rules describe mediation as a process in which a neutral third person acts to encourage and to assist in the resolution of a dispute. The ADR Court Rules also provide for arbitration, mini-hearings, summary jury trials, and private judges. Because of the specific emphasis on mediation, however, this paper will concentrate on that method of dispute resolution and examine both the development of the ADR Court Rules generally and the specifics of the mediation aspect of the Rules.

I. HISTORICAL BACKGROUND AND DEVELOPMENT OF ADR COURT RULES

The ADR Court Rules had their origin in a 1985 request from the President of the Indiana State Bar Association (ISBA) to the Young Lawyers Section of that Association. The possibility of an examination of alternative dispute resolution methods was raised in a regular column in the February 1985 issue of *Res Gestae* entitled *Alternative Dispute Resolution—Has Its Time Come?*[2] The Young Lawyers Section was subsequently asked to organize a committee (YLS Committee) to investigate the feasibility of ADR in Indiana. The YLS Committee began work in late 1985 and researched various forms of ADR in effect or proposed in other jurisdictions. In October of 1986, the YLS Committee presented an overview of its initial research to the ISBA. The ISBA House of Delegates directed the investigation of ADR to continue by converting and expanding the YLS Committee into a special committee of the ISBA (ISBA ADR Committee). In April of 1987, the ISBA ADR

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* Mr. Van Winkle, a partner in the Indianapolis law firm of Bingham Summers Welsh & Spilman, graduated with honors from the Indiana University School of Law in 1970 where he was Associate Editor of the Indiana Legal Forum. Mr. Van Winkle currently serves as Chairman of the Alternative Dispute Resolution Committee of the Torts and Insurance Practices Section of the American Bar Association. Mr. Van Winkle wishes to acknowledge the assistance of Tara L. Becsey, Esq. in connection with this paper.

1. The Indiana Alternative Dispute Resolution Rules [hereinafter IND. A.D.R. RULE] are printed at 580 N.E.2d XCII (Dec. 4, 1991).

2. Ted B. Lewis, *Alternative Dispute Resolution—Has Its Time Come?*, 28 RES GESTAE 411, 413 (1985).

Committee's report to the ISBA House of Delegates indicated that a proposed rule had been formulated based on the court-annexed procedures established in Michigan.[3] At that time, the ISBA ADR Committee focused on court-annexed, non-binding arbitration for civil cases, with liability or sanctions for attorney's fees and costs for parties who rejected the arbitration evaluation but who did not obtain more favorable results at trial.

Drafting of the proposed rules began after an organizational meeting of the ISBA ADR Committee.[4] Although the basis for the contemplated Rules was the rules in Michigan,[5] different committee members drafted the various sections of the proposed rules.[6] The first draft of the ADR Rules prepared by the ISBA ADR Committee was presented to the ISBA Board of Managers in July of 1989 (First Draft).[7]

The major thrust of the First Draft was court-annexed arbitration. Although those proposed rules provided that "a court may select any civil plenary case for arbitration,"[8] the experience in Michigan (and the expectation for the Indiana rules) was that the majority of cases would be submitted to arbitration. The First Draft provided for a panel of three arbitrators to conduct an informal hearing and arrive at a written evaluation.[9] If a plaintiff rejected or refused to accept the written arbitrator's evaluation, and the ultimate verdict was not at least ten percent greater than the evaluation, the plaintiff could be assessed defendant's costs and attorney's fees "for services rendered as a result of the plaintiff's rejection of the arbitration evaluation."[10]

Likewise, if a defendant rejected the evaluation, he could be assessed costs and fees if the ultimate verdict was not at least ten percent less

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3. Excerpt from transcript of Report from E. Spencer Walton, Jr., former Chairman of the Young Lawyers Section of the Indiana State Bar Association [hereinafter ISBA] and current Chairman of the Indiana Alternate Dispute Resolution Committee of the ISBA [hereinafter ISBA ADR Committee] to the ISBA House of Delegates (Apr. 9, 1987).

4. Minutes of meeting of the ISBA ADR Committee (Feb. 25, 1987).

5. MICH. COMP. LAWS ANN. §§ 600.4951 to -.5001 (West 1991); MICH. CT. R. 2.403.

6. Interview with E. Spencer Walton, Jr., Chairman of the Indiana Alternative Dispute Resolution Committee of the ISBA, in Indianapolis, Indiana (Jan. 1992) [hereinafter Walton Interview]; Interview with Bruce A. Kotzan, Indiana State Court Administrator, in Indianapolis, Indiana (Jan. 1992) [hereinafter Kotzan Interview]; Minutes of meeting of the ISBA ADR Committee (Apr. 13, 1989).

7. First Draft of Proposed Alternative Dispute Resolution Court Rules of the ISBA ADR Committee [hereinafter First Draft].

8. First Draft, *supra* note 7, Rule 2.1.

9. First Draft, *supra* note 7, Rules 2.2, 2.7.

10. First Draft, *supra* note 7, Rule 2.8.

than the evaluation.[11] Although not precisely stated, the language of Rule 2.8 of the First Draft could have been interpreted to require payment by a rejecting party of all attorney's fees incurred by a party after the rejection of the evaluation.[12] This provision of the First Draft would have attached significant jeopardy to a party rejecting an arbitration evaluation because such fees could obviously be substantial.

In September of 1989, the Chairman of the ISBA ADR Committee presented to the ISBA Board of Managers a proposed plan of action for educating the Bar and for presenting the proposal to the Supreme Court of Indiana. In December of 1989, that Committee and the Indiana Supreme Court Administrator presented the First Draft to the Supreme Court of Indiana for consideration.[13]

On August 30, 1990, Chief Justice Randall T. Shepard wrote to the Chairman of the ISBA ADR Committee stating, "The Supreme Court has approved in principle adoption of rules authorizing expanded use of accelerated dispute resolution in Indiana."[14] In the letter, Chief Justice Shepard also requested that the ISBA ADR Committee "review the existing proposals and prepare a final rule for the Court's consideration."[15] This letter, demonstrating the Indiana Supreme Court's receptiveness toward ADR, intensified the interest of the general Bar in the ADR proposal.

The ISBA expanded its Committee to include representatives of the Indiana Trial Lawyers Association (ITLA) and the Indiana Defense Lawyers Association (IDLA). Representatives of the ITLA and IDLA joined the Committee for a meeting held January 12, 1991. The ITLA member expressed "concern" about the First Draft and told the Committee that the ITLA was opposed to what, under the proposal, would be mandatory ADR.[16]

The real focus of the ITLA's criticisms was the First Draft provision which included sanctions of both attorney's fees and costs. In a regular column in the *Indiana Lawyer*, sponsored by the ITLA, a spokesman stated:

> The issue of sanctions is a primary concern of the [ITLA] in the event non-binding arbitration is the ADR method agreed on. . . . The ITLA's position regarding sanctions is that the losing side is already penalized by receiving less damages for

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11. *Id.*
12. *Id.*
13. Walton Interview, *supra* note 6; Kotzan Interview, *supra* note 6.
14. Letter from Randall T. Shepard, Chief Justice of the Supreme Court of Indiana, to E. Spencer Walton, Jr. (Aug. 30, 1990).
15. *Id.*
16. Chris Banguis, *ISBA Group Shares Ideas, Concerns About ADR*, IND. LAW. Jan. 30-Feb. 12, 1991, at 6.

> more work and costs incurred in presenting the case to a jury, costs which are often substantial.[17]

This position of the ITLA ignored one of the most significant rationales for the original sanction provision: to partially reimburse defendants for fees and costs incurred as a result of the unreasonable rejection by plaintiffs of arbitration evaluations.

Instead of addressing the potential loss to a defendant who ultimately prevails, the ITLA focused on the potential embarrassment to, or liability of, a plaintiff's lawyer who rejects an arbitration evaluation. In the same column, ITLA's spokesman wrote:

> In the event the plaintiff does receive a lower jury verdict than the arbitrator's award, the plaintiff's lawyer . . . will have to explain to the client that he or she would also have to pay attorney's fees and costs to the other side. Certainly a battle line would then be drawn between the plaintiff and his or her lawyer as to who pays these costs and attorney's fees, with the compelling conclusion that if the plaintiff's attorney doesn't pay it, he may be extending an open invitation to a legal malpractice suit.[18]

The attorney's fees sanction provision was also criticized because of the inherent differences between the arbitration procedure and trial. The arbitration process proposed in the First Draft would have been informal, without strict compliance to the rules of evidence. If a trial eventually ensued, however, a very different procedure, with rules of evidence and different dynamics would result. Critics of the attorney's fees provision contended that it is not fair to compare an arbitration evaluation with a trial verdict. As a result of these and other objections to mandatory arbitration with sanctions of costs and fees, the ISBA ADR Committee made an "about-face," dramatically changing the proposed ADR Rules.

Mandatory arbitration as well as the sanction of attorney's fees and costs were removed from the First Draft. Non-binding mediation became the central thrust of the final proposal of the ISBA ADR Committee. The final draft of the proposed rules (Final Draft) was submitted on February 28, 1991 to the Indiana Supreme Court Committee on Rules of Practice and Procedure (Rules Committee).[19]

On March 28, 1991, the Rules Committee, without making further changes, submitted the Final Draft to *Res Gestae* for publication and

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17. Louis Buddy Yosha, *Alleviating Congested Court Dockets Through Accelerated Dispute Resolution*, IND. LAW., Mar. 27-Apr. 9, 1991, at 5.

18. *Id.*

19. IND. R. TRIAL PROC. 80.

solicitation of comments. A public hearing was also scheduled to be held on July 15, 1991.[20] Following the public hearing, the Rules Committee made minor changes in the Final Draft and submitted it to the Supreme Court of Indiana.[21] On November 7, 1991, the Supreme Court of Indiana, with all justices concurring, adopted the ADR Court Rules to become effective January 1, 1992.[22]

Persons attempting to apply or interpret the ADR Court Rules should consider two important facts in the developmental history of the Rules. First, the basic thrust of the Rules was changed dramatically during the process. The Rules began as mandatory arbitration, including significant attorney's fee sanctions for rejection of evaluations, and emerged primarily with a focus on non-binding mediation. Second, most of the terms, conditions, and provisions of the ADR Court Rules are unique because the Rules were drafted practically "from scratch." Although there are no other states or jurisdictions with rules of similar language, the mediation aspects of the ADR Court Rules are substantively similar to those that have been in effect in Florida since 1988.

II. ADR Court Rules

A. Preamble: General Observations

The Preamble of the ADR Court Rules was slightly revised from the Final Draft. Ironically, however, the Final Draft omitted the statement that the Rules were adopted "with the view that the interests of the parties can be preserved in settings other than the traditional judicial dispute resolution method."[23] This indicates that the Supreme Court of Indiana did not share (or at least did not articulate) the ISBA's sensitivity that the ADR Rules should not be perceived as abandoning traditional procedure. As previously indicated, ISBA President John A. Grayson addressed the Indiana Bar's concerns that the proposed ADR Rules would take dispute resolution away from the courts and lawyers. Grayson explained:

> [The] proposed ADR program never purported to remove the dispute resolution process from the advocacy system or from our existing judicial structure. The proposals that they [the committee members] have advanced in each case involve the adversarial system with legal counsel representing the parties and

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20. Ind. R. Trial Proc. 80(D).
21. *Id.*
22. *Id.*
23. Final Draft of Proposed Alternate Dispute Resolution Court Rules of the ISBA ADR Committee, Preamble [hereinafter Final Draft].

involve the judiciary in the administration of the procedures for accelerated dispute resolution.[24]

Whether the Indiana Supreme Court intended to codify the position of the ISBA on this issue is potentially important. A debate has arisen in conjunction with the emergence of ADR. The central issue is whether inserting mandatory mediation principles (which are inherently intended to be nonadversarial) into the existing adversarial trial system taints or contorts the ADR technique.[25] Some commentators are concerned that "[l]awyers may use ADR not for the accomplishment of a 'better' result, but as another weapon in the adversarial arsenal to manipulate time, methods of discovery, and rules of procedure for perceived client advantage."[26]

Rule 1.3(A) of the ADR Court Rules describes mediation as a "nonadversarial" process.[27] That phrase is not used to describe any of the other ADR methods. The conclusion could be reached, therefore, that the Supreme Court of Indiana hoped to thrust mediation into a highly aggressive and combative adversarial process without changing or altering the inherent conciliatory nature of mediation. This presumption is relevant to interpreting provisions of the ADR Court Rules.

The statement in the preamble that "[m]ediation is the primary form of alternative dispute resolution adopted under these rules"[28] seems less a legislative pronouncement than an acknowledgment of the change in emphasis from arbitration to mediation. Anecdotal information indicates that the Supreme Court of Indiana accepted the major shift in emphasis between the First Draft and the Final Draft to avoid objections voiced by certain groups and because the current Rules are seen as an initial step toward alternate dispute resolution in general.[29] If mediation works well, the court might be expected to move toward a consideration of mandatory arbitration.

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24. John A. Grayson, *'What is This ADR Thing?,'* 34 RES GESTAE 3, 5 (1990) (President's message from John A. Grayson).

25. Peter B. Edelman, *Institutionalizing Dispute Resolution Alternatives*, 9 JUST. SYS. J. 134 (1984); G. Thomas Eisele, *The Case Against Mandatory Court-Annexed ADR Programs*, 75 JUDICATURE 34 (1991); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or 'The Law of ADR,'* 19 FLA. ST. U.L. REV. 1 (1991) [hereinafter Menkel-Meadow, *Pursuing Settlement*]; Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 U.C.L.A. L. REV. 754 (1984); Neil Vidmar & Jeffery Rice, *Jury-Determined Settlements and Summary Jury Trials: Observations About Alternative Dispute Resolution in an Adversary Culture*, 19 FLA. ST. U.L. REV. 89 (1991).

26. Menkel-Meadow, *Pursuing Settlement*, *supra* note 25, at 3.

27. IND. A.D.R. RULE 1.3(A).

28. IND. A.D.R. RULE pmbl.

29. Walton Interview, *supra* note 6; Kotzan Interview, *supra* note 6.

B. General Provisions of the ADR Court Rules

Rule 1.1 lists twelve "recognized" ADR methods including several methods not mentioned in previous drafts of the Rules.[30] Rule 1.2 then specifies the five methods governed by the Rules.[31] It must be assumed that the court attached some significance to the *recognition* of seven methods of ADR not covered by the Rules. This significance could be explained by reference to Rule 1.10 which provides that the ADR Court Rules "[do] not preclude a court from utilizing any other reasonable method or technique to resolve disputes."[32] If Rule 1.10 had stated any other *recognized* method or technique, a stronger argument could be made that the ADR Court Rules grant trial courts the authority to use the seven additional ADR methods listed in Rule 1.1. Because of the general nature of those methods (such as conciliation and facilitation) and because the word "reasonable" and not "recognized" was used, the most likely intent in Rule 1.1 was merely to acknowledge judicially, if not formally endorse, ADR techniques in use throughout the country.

Rule 1.3 purports to describe, not define, the five methods of ADR covered by the Rules: mediation, arbitration, mini-hearings, summary jury trials, and private judges.[33] In describing mediation, Rule 1.3 states that the objective is to help the parties reach an agreement "on all or any part of the issues in dispute."[34] Rule 1.6 specifically provides that a judge can order a case "or selected issues" to be submitted to mediation or mini-hearing.[35]

Rule 2.1 contemplates that a mediation agreement might not resolve all issues.[36] Thus, courts are given discretion to submit particular issues to mediation, in order to "reduce points of contention,"[37] if the entire case does not appear likely to be resolved. Likewise, mediators can encourage the parties to reach agreement on one or more issues, and may, with the consent of the parties, "identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate the possibility of settlement."[38]

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30. IND. A.D.R. RULE 1.1.
31. IND. A.D.R. RULE 1.2. The scope of the ADR includes: Mediation, Arbitration, Mini-hearing, Summary Jury Trials, and Private Judges.
32. IND. A.D.R. RULE 1.10.
33. IND. A.D.R. RULE 1.3.
34. IND. A.D.R. RULE 1.3(A).
35. IND. A.D.R. RULE 1.6.
36. IND. A.D.R. RULE 2.1.
37. *Id.*
38. IND. A.D.R. RULE 2.7(E)(1).

The methods, procedures, or techniques used by the mediators are within their discretion. Rule 1.3(A) uses language consistent with theories of mediation utilized in standard training courses. It provides that mediators should assist the parties "in identifying issues, fostering joint problem-solving, exploring settlement alternatives, and in other ways consistent with these activities."[39]

C. Application of ADR Court Rules

Rule 1.4 provides that the ADR Court Rules apply to "all civil and domestic relations litigation" filed in all state courts, except for small claims proceedings.[40] Specific cases, such as forfeiture of seized properties and habeas corpus or other extraordinary writs, are excluded.[41] Although not specified, "other extraordinary writs" would probably include writs of mandamus, assistance, attachment, capias, and others.

Rule 1.4(G) excludes "matters in which there is very great public interest, and which must receive an immediate decision in the trial and appellate courts."[42] This provision was not in any of the drafts submitted by the ISBA ADR Committee. It could be assumed that the Supreme Court of Indiana was mindful of exceptional cases such as *In re Lawrance*,[43] which involved the right of a family to withdraw artificially provided nutrition and hydration from their incompetent daughter. In such cases, both the elements of public interest and the need for an immediate decision are required before the exception applies.

1. Only Mediation and Mini-hearings Can Be Ordered Without Agreement of Both Parties.—Rule 1.6 provides that any presiding judge can order the parties to participate in mediation or mini-hearings.[44] Conversely, arbitration and summary jury trials can only be ordered upon agreement of all parties. Likewise, although not mentioned in Rule 1.6, private judges can be ordered only by agreement of all parties, pursuant to the applicable statutes.[45]

2. Status of Case During Mediation.—Two conflicting portions of the ADR Court Rules address the issue of the status of a case submitted to ADR. Rule 1.7 provides that "[f]or good cause shown and upon hearing on this issue, the court at any time may terminate the alternative dispute resolution process *and return the litigation to the regular docket.*"[46]

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39. IND. A.D.R. RULE 1.3(A).
40. IND. A.D.R. RULE 1.4.
41. IND. A.D.R. RULE 1.4(D), (E).
42. IND. A.D.R. RULE 1.4(G).
43. 579 N.E.2d 32 (Ind. 1991).
44. IND. A.D.R. RULE 1.6.
45. IND. CODE § 33-13-15-1 (1988).
46. IND. A.D.R. RULE 1.7 (emphasis added).

Rule 2.2, however, provides that "[i]f a case is ordered for mediation, the case *shall remain on the court docket and the trial calendar.*"[47]

It must be concluded that the contradictory language in Rule 1.7 is a drafting error because Rule 3.2, regarding arbitration, and Rule 4.3, regarding mini-trials, expressly provide that cases assigned to the particular method "shall remain on the regular docket and trial calendar of the court."[48] The probable intent was to specifically provide that, except as otherwise provided in the ADR Court Rules, cases submitted to ADR would be subject to the rules and procedures governing all civil cases. Rules concerning time, pleadings, third-party practice, dispositive motions, summary judgments, pretrials, "lazy judge" rules, and all other such rules presumably remain applicable during the mediation process because of the specific language of Rules 2.2, 3.2, and 4.3.

3. Recordkeeping and Service of Papers.—Rule 1.8 provides that when a case is submitted to ADR, the referral and subsequent entries of record shall be entered in the Chronological Case Summary by the clerk of the court.[49] Rule 1.9 provides that, during the ADR process, papers and other pleadings are to be served on the other party.[50] Such papers could include the following in connection with mediation: Motion to Submit Case to Mediation (Rule 2.2), Objection to Submission (Rule 2.2), Notification of Agreement on Selection of Mediator (Rule 2.4), Report of Striking From Panel of Mediators (Rule 2.4), Request to Replace Mediator (Rule 2.4), Agreement Concerning Rate for Mediator (Rule 2.6), Notice of Filing of Confidential Statement of Case (Rule 2.7(C)), Consent to Identification of Issues (Rule 2.7(E)(1)), Agreement (Rule 2.7(E)(2)), Motion for Sanctions for Failure to Perform Under Agreement (Rule 2.7(E)(3)), Petition for Sanctions for Failure to Comply with Rules (Rule 2.11), and Objection to Obtaining of Testimony or Physical Evidence (Rule 2.12).

4. Immunity.—Mediators and others acting under the ADR Court Rules have immunity from liability to the same extent as do judges in Indiana. Judges enjoy absolute immunity from "judicial" and "adjudicatory" acts (i.e., those done in the course of deciding a controversy), but not from actions which are more functionally administrative, legislative, or executive in nature.[51] In the context of the ADR process then, mediators will be immune from liability for their actions during the process itself which are necessary to the procedure.

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47. IND. A.D.R. RULE 2.2 (emphasis added).
48. IND. A.D.R. RULE 3.2, 4.3.
49. IND. A.D.R. RULE 1.8.
50. IND. A.D.R. RULE 1.9.
51. Forrester v. White, 484 U.S. 219 (1988).

5. Submission of Case to Mediation.—Pursuant to Rule 2.2, a civil case can be submitted to mediation either by the trial judge on his own motion or on the motion of either party.[52] A case cannot be submitted to mediation by the court until fifteen days *after* the period allowed for a peremptory change of venue under Trial Rule 76(2) or 76(3) has expired.[53] Trial Rule 76 was amended December 6, 1991, effective February 1, 1992, and the automatic right to change of venue from the county no longer exists. The right to automatic change of judge remains (under Trial Rule 76) and presumably, Rule 2.2 will be amended to reflect this change. The time limit, however, will likely remain the same. Because of the routine extension of time of thirty days to respond to the complaint, most cases will not be eligible for mediation for sixty to seventy-five days after a complaint is filed.

6. Objection to Submission to Mediation.—After a case is submitted to mediation, a party has fifteen days pursuant to Rule 2.2 to file a written objection.[54] Rule 2.2 lists the following factors for the court to consider in determining whether the case should be mediated:

> [T]he willingness of the parties to mutually resolve their dispute, the ability of the parties to participate in the mediation process, the need for discovery and extent to which it has been conducted, [and] any other factors which affect the potential for fair resolution of the dispute through the mediation process.[55]

Because Rule 2.1 requires the parties and their representatives to "mediate in good faith,"[56] the first factor, i.e., the willingness of the parties, should have little practical effect. Parties who are reluctant to mediate should not be excused simply because of their recalcitrance. On the other hand, the parties' willingness to mediate could present problems in cases such as child custody disputes.[57] This factor, however, could have been intended to allow the trial court to recognize certain characteristics which might indicate that mediation would not be fruitful.

Rule 1.7 provides that the ADR process can be terminated by the trial court for good cause.[58] Rule 2.7(D) provides that a mediator can

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52. IND. A.D.R. RULE 2.2.
53. *Id.*
54. *Id.*
55. *Id.*
56. IND. A.D.R. RULE 2.1.
57. Janet E. Mitchell, Presentation of Indiana's New Mediation Rule and Procedures at the Indiana Continuing Legal Education Forum (Nov. 22-26, 1991) (ICLEF) [hereinafter Mitchell, ICLEF Materials] (available in ICLEF office).
58. IND. A.D.R. RULE 1.7.

terminate mediation "whenever the ability or willingness of any party to participate meaningfully in mediation is so lacking that a reasonable agreement is unlikely."[59] That Rule further provides that parties cannot unilaterally terminate mediation until after two mediation sessions have been completed.[60] Reading Rules 1.7, 2.7, and 2.2 together leads to the conclusion that a party's lack of willingness to resolve a dispute could be the basis to sustain an objection to the original submission of a case to mediation, to terminate mediations at any stage of the proceeding under Rule 1.7 for "good cause shown," to terminate mediation under Rule 2.7(D) by the mediator, or to serve as the party's reason to terminate mediation after two sessions under Rule 2.7(D). Thus, the ADR Court Rules attempt to strike a balance between requiring parties to approach mediation with an open mind and realizing, pragmatically, that some cases are simply not likely to benefit from mediation.

As indicated above, after a case has been submitted to mediation, a party may file a written objection if the facts and circumstances of the particular case are such that mediation would not be fruitful. For example, in long-standing disputes, where the parties have negotiated and bargained but have reached an impasse or factual disagreement, Rule 2.2 would allow a party to file a written objection to mediation. The party would set forth the history, the attempts to settle the dispute, and the conclusion that further good faith negotiations would not be fruitful.

Second, Rule 2.2 directs the court to consider the ability of the parties to participate in the mediation.[61] This implies that physical or mental abilities, such as a severe handicap or injury, could serve as the basis for denying a motion for mediation. Rule 2.1 requires the parties to mediate in good faith and Rule 2.7(B) requires that parties *and* their attorneys shall be present at mediation sessions.[62] These provisions codify the general purpose of mediation that the mediator is to *assist* the *parties* in reaching an agreement.[63] This premise is also reflected in the description of Alternative Dispute Resolution Methods which characterizes mediation as a nonadversarial process, the objective of which is to help the *parties* reach an agreement.[64] Further, decisionmaking authority rests with the *parties*.[65] Read together, these provisions indicate that the parties are the central players in mediation, not the attorneys. If one of the parties,

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59. IND. A.D.R. RULE 2.7(D).
60. *Id.*
61. IND. A.D.R. RULE 2.2.
62. IND. A.D.R. RULE 2.1, 2.7(B).
63. IND. A.D.R. RULE 2.1.
64. IND. A.D.R. RULE 1.3(A).
65. *Id.*

for some reason, is unable to participate in mediation in a meaningful way, an objection to submission to mediation could be made.

Although physical and mental disabilities of a party could be relevant in determining whether a case should be mediated, a party's financial ability to pay for mediation was probably not intended to be a factor under Rule 2.2. A party's indigency could be addressed either by the trial court during mediation[66] or by other statutes or procedures providing assistance in such cases.

Moreover, Rule 2.2 is a catch-all category, directing the court to consider "any other factors which affect the potential for fair resolution of the dispute through the mediation process."[67] Some commentators have observed that this provision could address concerns regarding the relative powers or postures of the parties.[68] In the case of spousal abuse, for example, it may not be reasonable to expect parties to be able to negotiate and mediate on an equal basis.

7. Discovery.—The third factor for the court to consider in Rule 2.2 is the need for discovery and the extent to which it has been conducted.[69] This factor, not found in the Final Draft, was added by the Supreme Court of Indiana. Rule 2.2 provisions must be read in conjunction with Rule 2.10 which provides as follows: "*Discovery*. Whenever possible, parties are encouraged to limit discovery to the development of information necessary to facilitate the mediation process. Upon agreement by the parties or as ordered by the court, discovery may be deferred during mediation."[70] Taken as a whole, it appears that the Supreme Court of Indiana intended to *restrict* discovery during mediation. Although discovery is limited, general discovery is *not automatically* stayed or tolled during mediation.[71]

Discovery is one factor the court must consider when selecting cases for mediation. This probably reflects the supreme court's recognition that some cases will be inappropriate for mediation, either because general discovery needs to be done or because substantial discovery is already underway. For example, extensive discovery may be necessary at the onset of a case because evidence could be lost or because witnesses would otherwise be unavailable. In those cases, the trial court might either decline to submit that case to mediation initially or (pursuant to Rule 2.2) grant an objection to the submission.

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66. IND. A.D.R. RULE 2.6. The court may allocate costs between the parties based on an hourly mediation rate.

67. IND. A.D.R. RULE 2.2.

68. Mitchell, ICLEF Materials, *supra* note 57, at 5.

69. IND. A.D.R. RULE 2.2.

70. IND. A.D.R. RULE 2.10.

71. Pursuant to Rule 2.10, discovery can be deferred during mediation by agreement of the parties or by order of the court.

8. Selection of Mediators.—The ADR Court Rules provide that all persons who wish to serve as mediators *must* file an application with the trial court.[72] Applicants must list their qualifications and indicate the type of cases which they wish to mediate.[73] Trial judges, or someone delegated by them, must examine applications, determine which applicants meet the requirements of Rule 2.5, and maintain listings of approved mediators.[74]

Mediators may be selected in one of three manners, pursuant to Rule 2.4.[75] First, the parties may select a mediator from the court's approved listing. Second, a mediator can be selected from an approved listing from another court within the state. Third, the parties can select a nonlisted mediator. However, mediators who are not listed by a court within the state must meet the requirements of Rule 2.5 and must be approved by the trial court prior to selection.

If the parties do not agree upon a mediator within fifteen days of referral to mediation, the trial court shall designate three mediators from its approved list and the parties shall alternately strike names.[76] The mediator so selected may decline to serve for any reason.[77] Presumably, the court would then designate a second panel of three mediators and the parties would strike a second time. Because there are no time limits for the parties to strike, the selection process could be unreasonably drawn out.

Assume, for example, that the parties report to the court on the fifteenth day after submission that they cannot agree on the selection of a mediator. The court then takes five days to name a panel and the parties take ten days to strike. If a mediator does not accept the selection, the process starts again. Thirty to forty-five days could elapse before the mediator is even selected.

The potential for delay can be alleviated if trial courts institute strict and effective controls on the selection process. The Rules do not prohibit, for example, reasonable time limits for the striking procedure. Moreover, the courts are not prohibited from naming a panel immediately upon submission and ordering that the parties consider that panel *and* attempt to agree on a mediator within the same fifteen day period following submission.

9. Qualifications of Mediators.—To serve as a mediator, a person must complete forty hours (thirty hours in 1992) of mediator training

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72. IND. A.D.R. RULE 2.3.
73. *Id.*
74. *Id.*
75. IND. A.D.R. RULE 2.4.
76. *Id.*
77. *Id.*

in courses certified by the Indiana Commission For Continuing Legal Education.[78] Rule 2.5(A)(2) further provides that persons must also "have received a minimum of five hours (5) of mediation training during the two year period prior to re-application."[79] The reference to re-application relates to Rule 2.3 which provides that all mediators must reapply every five years in order to maintain listing with the trial court.[80] To reapply, mediators must complete five additional hours of mediation training within the last two years of each five year period.[81]

The Supreme Court of Indiana substantially changed Rule 2.5. The Final Draft provided for thirty hours of training, and the trial court was charged with approving the training.[82] The proposed rule also provided that mediators could meet the requirements by having ten hours of training in 1991, 1992, and 1993.[83]

In addition to the training requirements, a mediator must not be interested in the outcome of the litigation, must not be employed by or related to the parties or attorneys, and may not be a full-time judge.[84] In civil cases, unless the court approves and the parties agree otherwise, a mediator must be an attorney in good standing.[85] In domestic relations matters, unless the parties agree otherwise and the court approves, a mediator must be either an attorney admitted to practice in Indiana or a person holding a "bachelor's degree from an accredited institution of higher learning."[86] Any mediator selected must have, to the extent practicable, knowledge of domestic relations policies, practices, and procedures, as well as a working knowledge of Indiana's judicial system.[87]

If Indiana's experience is similar to that of other states, standards or codes of ethics for mediators probably will be developed in the near future. For example, Florida has had court-annexed mediators since 1988 and has pending proposed standards of professional conduct for mediators and separate proposed rules of discipline for mediators.[88] Several

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78. IND. A.D.R. RULE 2.5(A)(2).

79. *Id.*

80. IND. A.D.R. RULE 2.3.

81. IND. A.D.R. RULE 2.5(A)(2).

82. Final Draft, *supra* note 23, Rule 2.5(A)(1).

83. *Id.*

84. IND. A.D.R. RULE 2.5(A)(1).

85. IND. A.D.R. RULE 2.5(B)(1). "Good standing" is determined by the Supreme Court of Indiana.

86. IND. A.D.R. RULE 2.5(C)(1). The court may also approve a mediator selected by the parties who is a non-attorney, a person who does not hold a bachelor's degree, or a person who has not met the training requirements of Rule 2.5.

87. IND. A.D.R. RULE 2.5(C)(2).

88. Florida Mediator/Arbitration Programs: A Compendium, Proposed Florida Standards of Professional Conduct for Certified and Court-Appointed Mediators app. D

professional organizations, such as the Society of Professionals in Dispute Resolution, have developed standards for member mediators. Also, the Family Law Section of the American Bar Association has adopted ethical standards for mediators. National and uniform standards for mediators may soon be available. Talbot D'Alemberte, President of the ABA, has directed the ABA Standing Committee on Dispute Resolution, in co-operation with the American Arbitration Association, to begin the process necessary to promulgate standards of conduct for civil mediators.[89]

10. Mediation Costs.—Mediators are to be paid by the parties.[90] If the parties select a mediator who is not on the court's approved list, they may agree on the hourly rate the mediator is to receive.[91] If a mediator on the court's approved list is selected, the ADR Court Rules are not clear whether the mediator can charge (and the parties agree to pay) an hourly rate higher than the court would set absent an agreement. Presumably, any time a mediator is selected by agreement before the striking process, the parties and the mediator can agree upon a higher hourly rate. Forms prepared by the ISBA ADR Committee, although not adopted by the Supreme Court of Indiana, are evidence that the Committee considers such agreements to be appropriate. Paragraph six of the "Agreement For Mediation" form states that the "mediator selected (has) (has not yet) agreed to serve and the parties (have) (have not yet) agreed to the mediator's fee."[92]

The proposed forms contemplate that each mediator will have his own fee schedule and that the court's duty will be to determine how the fee is to be paid. The difference in mediation fees between mediators chosen by agreement of the parties and mediators selected after the striking process is also an issue in Florida.

> The Rules [Florida's] now permit the parties to choose their own mediator (even one who does not meet the certification requirements of the rules) if they do so within ten days of the order of referral. This provides a mediator with an opportunity

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(July 1991) [hereinafter Florida Standards of Professrional Conduct for Mediators]; Proposed Rules of Discipline for Certified and Court-Appointed Mediators (July 1991) [hereinafter Florida Rules of Discipline for Mediators] (available from the Florida Dispute Resolution Center).

89. Letter from Talbot D'Alemberte, President of the American Bar Association, to Robert Coulson, President of the American Arbitration Association (Sept. 10, 1991) (on file with the author).

90. IND. A.D.R. RULE 2.6.

91. *Id.*

92. Proposed Amendments to Local Rules: Domestic Relations Mediations submitted by ISBA ADR Committee with Final Draft, Form: Agreement for Mediation (not adopted by the Indiana Supreme Court).

> to negotiate a rate of pay higher than the rate usually set by the court, or, conversely, it gives the parties an opportunity to find a mediator who will accept a lower rate.[93]

The Florida Dispute Resolution Center has found that attorneys are now seeking to have the court appoint popular mediators so that the lower court-set hourly rates apply.[94]

Local courts will need to address this issue so that abuses do not occur. Individual mediators must also be cognizant of the appearance of impropriety which could present itself by accepting the court-set hourly rate for some cases, but charging a higher hourly rate when the employment is the result of an agreement between parties. A difference in fees may present a problem unless there are corresponding differences in other factors of the cases. The above-mentioned proposed Florida Standards of Professional Conduct require that the mediator occupy a position of trust, endeavoring to keep the total charges reasonable and consistent with the nature of the case.[95]

The comments to Rule 2.2 of the Model Rules of Professional Conduct indicate that the Rule does not apply to lawyers acting as mediators.[96] Whether other Model Rules of Professional Conduct apply to lawyers acting as mediators is not as clear. Therefore, lawyer-mediators should be aware of the Rules of Professional Conduct which indicate that fees shall be "reasonable" and that lawyers should consider eight factors in setting the fee.[97]

ADR Court Rule 2.6 also provides that the court shall "determine the division of such costs by the parties."[98] This should allow the court to divide the costs between the parties on a percentage basis, but there are no criteria in the Rules to guide the court.

11. Mediation Procedure, Disclosure Requirements.—Rule 2.7 mandates that mediators provide certain information and make certain disclosures to parties.[99] Some of the information required by Rule 2.7, by its nature, must be imparted in advance of any mediation session. The Rules provide, for example, that the mediator shall inform the parties ten days in advance of the time, date, and place of any mediation session and "advise the parties of all persons whose presence at mediation

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93. James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA ST. U.L. REV. 47, 58 (1991) (footnote omitted).

94. *Id.*

95. Florida Standards of Professional Conduct for Mediators, *supra* note 88, at VII.A.

96. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1989).

97. MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.5(a)(1)-(8) (1989).

98. IND. A.D.R. RULE 2.6.

99. IND. A.D.R. RULE 2.7.

might facilitate settlement."[100] On the other hand, some disclosures are made *after* the mediation session or sessions. Rule 2.7(A)(6) requires that the mediator disclose any documentation released during the mediation if, at the end of the mediation process, the disclosure is agreed to by both parties.[101] The remainder of the eleven requirements, such as the duty to inform the parties as to the anticipated cost of mediation, would seem to be appropriately disclosed *either* before the mediation session or at the beginning of the session.

The confusion over *when* the disclosure required by Rule 2.7 must be made increases upon an examination of the First Draft. Rule 3.6 of those rules was worded differently than the current Rule 2.7. The draft provided the following: "*Duties of Mediator.* In a prompt fashion, the mediator will meet with the parties in the litigation and attempt to reach settlement of issues."[102] The context of the original ten requirements in the First Draft suggests that the ISBA ADR Committee intended that the disclosures be made at the outset of the mediation session. The inclusion of the requirement concerning the disclosure of documentation during the session, however, creates an inherent inconsistency. A general conclusion can be reached concerning Rule 2.7 that all the information and disclosures must be imparted, but not necessarily at the same time. Some can be imparted before the session, some during, and some after.

Rule 2.7(B)(1) provides, "The parties and their attorneys shall be present at any mediation session unless otherwise agreed. At the discretion of the mediator, non-parties to the dispute may also be present."[103] This subparagraph is inconsistent with subparagraph (2) which provides, "All parties, attorneys with settlement authority, representatives with settlement authority, and other necessary individuals shall be present at each mediation conference to facilitate settlement of a dispute unless excused by the court."[104] The confusion between these two subparagraphs results from changes made by the Supreme Court of Indiana in Rule 2.7(B) of the Final Draft. The provisions of Rule 2.7(B)(1) and (2) of the Final Draft provided:

> *Mediation Conferences.*
> (1) The mediator and the parties shall determine those persons whose presence at a particular mediation session will be beneficial to the resolution of a dispute. At the discretion of the mediator, non-parties to the dispute or attorneys may be present during

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100. IND. A.D.R. RULE 2.7(A)(9), (10).
101. IND. A.D.R. RULE 2.7(A)(6).
102. First Draft, *supra* note 7, Rule 3.6.
103. IND. A.D.R. RULE 2.7(B)(1).
104. IND. A.D.R. RULE 2.7(B)(2).

> the course of the interview or may be present during the course of the session.
>
> (2) A court may order all parties, attorneys with settlement authority, representatives with settlement authority, and other necessary individuals to meet at a mediation conference to facilitate settlement of a dispute.[105]

Based upon these differences, it appears that the Indiana Supreme Court wanted to change the Final Draft and to make the presence of parties and attorneys mandatory. Reading the two versions of Rule 2.7 together, one can conclude that the supreme court intended to mandate the presence of both attorneys and clients in all sessions. It is not as clear, however, that the supreme court *intended* to mandate persons with settlement authority (insurance company representatives, for example) to be *physically present* at all sessions.[106] Until this apparent confusion is addressed, Rule 2.7 must be interpreted as requiring attendance of all parties, counsel, and those with settlement authority at all sessions.[107] On a final, more definitive note, Rule 2.7(B)(4) provides that mediation sessions are not open to the public.[108]

12. Confidential Statement of Case.—In civil cases, attorneys *may* submit a confidential statement of the case *prior* to the mediation conference pursuant to Rule 2.7(C).[109] The Rule neither mandates a written statement nor states how far in advance of the hearing a statement must be filed. Presumably, it could be filed on the day of the conference, but the advantage of educating the mediator prior to the conference would obviously be lost. If, however, the statement is supplemented by damage brochures, videos, and other exhibits, such evidence must be made available to opposing counsel at least five days prior to the mediation session.[110] Although Rule 1.9 provides that papers and pleadings used during mediation must be served pursuant to Indiana Trial Rule 5, the written case statements are excepted from this service requirement.

Second, Rule 2.7 contains an important statement of general philosophy concerning the role of mediators. The Rule provides that the written statement *shall* include the legal and factual contentions of the parties, the factors considered in arriving at the current settlement posture,

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105. Final Draft, *supra* note 23, Rule 2.5(B)(1), (2).

106. It may be possible for the representatives with settlement authority to be present by telephone.

107. One commentator, a member of the ISBA ADR Committee, wrote that Rule 2.7(B)(2) was intended to apply solely to civil cases, rather than to domestic relations cases. Mitchell, ICLEF Materials, *supra* note 57.

108. IND. A.D.R. RULE 2.7(B)(4).

109. IND. A.D.R. RULE 2.7(C)(3).

110. *Id.*

and the status of the settlement.[111] Rule 2.7(C) contains the following provision:

> In the mediation process, the mediator may meet jointly or separately with the parties and may express an evaluation of the case to one or more of the parties or their representatives. This evaluation may be expressed in the form of settlement ranges rather than exact amounts. The mediator may share revealed settlement authority with other parties or their representatives.[112]

This provision suggests that mediators refrain from expressing direct personal opinions on the value of a case.[113]

Third, Rule 2.7 (C) requires that the Statement of Case be returned to the submitting parties or attorneys if the mediation process does not result in settlement.[114]

13. Completion/Termination of Mediation.—The First Draft provided that mediators were required to report to the court within forty-five days from appointment that the case had been completed or terminated.[115] This forty-five day requirement was apparently to function as a time limit on the duration of mediation. The limit, however, was eliminated in the Final Draft and the ADR Court Rules. Rule 2.7(D) provides, "As soon thereafter as practicable, the mediator shall report to the court that the mediation process has been completed, terminated, or extended."[116] The word "extended" was added when the forty-five day extension was deleted. It is not clear to what the term "thereafter" refers, but it probably means as soon as practicable after the mediation conference.

A mediator has the discretion to terminate the mediation process if he believes that the process is harming or prejudicing one of the parties or any children involved.[117] A mediator can also terminate mediation if one or more of the parties is so unwilling to participate meaningfully in mediation that a reasonable agreement is unlikely.[118] This provision raises the question of whether the mediator can, or should, participate

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111. IND. A.D.R. RULE 2.7(C)(1)-(3).

112. IND. A.D.R. RULE 2.7(C)(3).

113. Florida has found that some mediators are aggressive and direct in their attempts to force agreements and will use the weight of their position or experience to "bash" the parties, stating their personal opinion as to the value of the case. Alfini, *supra* note 93, at 68-71.

114. IND. A.D.R. RULE 2.7(C)(3).

115. First Draft, *supra* note 7.

116. IND. A.D.R. RULE 2.7(D).

117. *Id.*

118. *Id.*

(or testify in) any sanction proceeding brought pursuant to Rule 2.11. The Rules answer this question in the negative.

The mediator is not to be involved in any sanction proceeding. Rule 2.7(D) provides that even if the mediator terminates the process because a party is unwilling to mediate in good faith, the mediator may not state the reason in the report to the court.[119] A mediator may state that mediation was terminated "due to conflict of interest or bias on the part of the mediator."[120]

Further, Rule 2.12 provides, "Mediators shall not be subject to process requiring the disclosure on *any* matter discussed during the mediation, but rather, such matters shall be considered confidential and privileged in nature."[121] Confidentiality *cannot* be waived by the parties and *can* be raised via an objection to obtaining evidence from mediation, either by the mediator or by any party.[122] Rule 2.7(D) also provides that the parties must attend at least two sessions before terminating mediation.[123]

14. Report of Agreement.—Pursuant to Rule 2.7(E)(1), if no agreement is reached, the mediator must report that fact to the court without comment.[124] If an agreement *is* reached, the agreement *must* be reduced to writing and *filed* with the court.[125] If the agreement disposes of all issues, it shall be accompanied by a "joint stipulation of disposition."[126] Disposition is not defined and is not necessarily equivalent to a joint stipulation of dismissal. The agreement reached might contemplate that the lawsuit remain active while some action is taken or some other issues resolved. The uncertainty created by this process and the potential confusion between "disposition" versus "dismissal" and "joint stipulation" versus "judgment," can be avoided in most cases by the parties submitting the agreement in the form of an agreed judgment.

The agreement, however, is, if not a formal settlement agreement, a binding agreement to settle. Rule 2.7(E)(3) clearly indicates that upon filing with the court, the agreement becomes a court *order*, but not a final judgment.[127] The order means that the parties will perform as agreed. If there is a failure to perform or a breach of the agreement, the court can impose sanctions, including the "entry of judgment on

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119. *Id.*
120. *Id.*
121. IND. A.D.R. RULE 2.12 (emphasis added).
122. IND. A.D.R. RULE 2.12.
123. IND. A.D.R. RULE 2.7(D).
124. IND. A.D.R. RULE 2.7(E)(1).
125. *Id.*
126. *Id.*
127. IND. A.D.R. RULE 2.7(E)(3).

the agreement."[128] Rule 2.7(E)(2) and (3) also allows the court to impose appropriate remedies if a party fails to perform the settlement agreement.[129] Such remedies could presumably include orders of specific performance, injunctive relief, or other such equitable relief.

15. Subsequent Involvement of Mediators.—The role of the mediator in subsequent associations with the mediating parties is unclear. Because the Supreme Court of Indiana changed Rule 2.8 from its proposed format, an inconsistency between the first two sentences of Rule 2.8 developed. The current rule provides:

> A person who has served as a mediator in a proceeding may act as a mediator in subsequent disputes between the parties, and the parties may provide for a review of the agreement with this mediator on a periodic basis. However, the mediator shall decline to act in any capacity unless the subsequent association is clearly distinct from the mediation issues.[130]

The first sentence states that a mediator may participate as *mediator* in a *subsequent* dispute between the parties on issues related to the first mediation. The second sentence, however, restricts subsequent participation (even as a mediator) to disputes which are clearly *distinct* from the original re-evaluation issues. This conflict was apparently created by a change made by the Indiana Supreme Court. The Final Draft of Rule 2.8 had the same first sentence as the final Rule but the second sentence in the Final Draft provided that "the mediator shall decline to act as *attorney, counselor or psychotherapist* for either party during or after the mediation process unless the subsequent representation, counseling, or treatment is clearly distinct from the mediation issues."[131] By deleting the words "attorney, counselor, or psychotherapist" and inserting instead "any capacity" (which obviously includes the capacity as mediator), the Supreme Court of Indiana created confusion. Presumably the confusion will be addressed.

16. Evidence.—Rule 2.9 provides that, except for privileged communications, the rules of evidence do not apply in the mediation session.[132] It is recommended that damages should be supported by documentary evidence, such as medical bills, checks, and related documents.[133]

17. Sanctions.—Sanctions for failure to comply with the mediation rules are limited to "the assessment of mediation costs and/or attorney

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128. IND. A.D.R. RULE 2.7(E)(3).
129. IND. A.D.R. RULE 2.7(E)(2), (3).
130. IND. A.D.R. RULE 2.8.
131. Final Draft, *supra* note 23, Rule 2.8 (emphasis added).
132. IND. A.D.R. RULE 2.9.
133. *Id.*

fees relevant to the [mediation] process."[134] This limitation language resulted, as previously indicated in Part I, from the reluctance of certain special interest groups to accept the attorney's fees penalties provided in the First Draft. This limitation, however, must be read in conjunction with Rule 2.7(E)(3) which provides much broader sanctions for failure to comply with settlement agreements.[135]

18. Confidentiality.—Mediation is to be regarded as settlement negotiations for evidentiary purposes. Rule 2.12 states that offering to pay or accept any settlement sum is inadmissible evidence for the purpose of proving liability for or invalidity of a claim or its amount.[136] Evidence of *conduct* or *statements* made during mediation is likewise inadmissible.[137] The Rule, however, does not seem literally to prohibit evidence of what the parties *said* in mediation concerning what the agreement was, or what the intent of the parties was, in the event of a dispute as to the performance or nonperformance of a settlement agreement.

Further, Rule 2.12 states that evidence "otherwise discoverable" may still be offered at trial even if it was presented in the course of the mediation process.[138] If, for example, the plaintiff admits in mediation that he told the police officer that he ran a red light, the defendant is not prohibited (by Rule 2.12) from calling the police officer to testify as to that statement. A closer question is presented if, in a deposition subsequent to the mediation, the plaintiff is asked whether he told the police officer the light was red. Does the plaintiff have to answer the question? Can the plaintiff refuse to answer on the grounds that the comment was privileged? Probably, the answer is that the plaintiff has to answer, but if he answers differently than at mediation, no mention nor any use of the previous statements made in mediation can be made. Again, if there is evidence independent from the statements in mediation, that independent evidence can be used.

Evidence of what was done or said in a mediation session could be admissible if the evidence is offered "for another purpose, *such as* proving bias or prejudice of a witness, [or] negativing a contention of undue delay."[139] For example, a statement of a plaintiff in mediation promising one-half of any potential recovery to a sister could be used at trial, if the sister testifies, to show the bias or prejudice of the sister. The Rule is not clear whether this would apply to issues of bias and prejudice by the plaintiff.

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134. IND. A.D.R. RULE 2.11.
135. IND. A.D.R. RULE 2.7(E)(3).
136. IND. A.D.R. RULE 2.12.
137. *Id.*
138. *Id.*
139. IND. A.D.R. RULE 2.12 (emphasis added).

Conduct of a party during mediation sessions is admissible in connection with issues of "undue delay."[140] Although this provision is unclear, it probably refers to claims for sanctions (under Rule 2.7(E)(3) or 2.11) for parties who unduly delay the mediation or general litigation process.

III. Conclusion

The language of Indiana's court-annexed mediation is unique. The substance of the ADR Court Rules is similar to rules which have been placed in effect in some states or proposed in others. The interpretation and application of the ADR Court Rules by the Bench and Bar in Indiana should ultimately be guided by the general underlying theme of the Rules: the intervention of a neutral party in the trial process can result in earlier and less costly settlements.

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140. *Id.*