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Mediation in Kentucky: Where Do We Go From Here?

BY VANESSA MITCHELL*

I. INTRODUCTION

Across the United States, many states have adopted some form of statewide rule for resolving disputes through mediation. In fact, more people indicate that they would rather mediate than go to court when educated on the differences of each. Mediation is defined as a process in which a neutral third party acts to facilitate a resolution between two or more disputing parties. The neutral third party, known as the mediator, has no authority to make a binding decision and can only encourage a mutual agreement to resolve the dispute. In fact, it is this nonbinding nature that probably influences most people to mediate. They have an opportunity to settle their dispute, but they lose nothing in the process if they are unable to reach a mutually agreeable solution.

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In light of the fact that most Americans would prefer to mediate if given the choice, the Kentucky court system should adopt a statewide rule by which Kentuckians would have that opportunity. While the merits of adopting such a rule are easy to see, in that the parties would have a stake in finding their own resolution and court dockets would be decreased, exactly what such a rule would entail is a more difficult question to grasp. As one commentator put it, "[t]he legal profession welcomes change in much the same manner as the National Rifle Association anticipates each vote on the Brady Bill." In fact, Kentucky is behind in this push for change in the legal system. Other states such as Florida have been experimenting for ten years and can prove that a statewide rule works. Kentucky must decide what form its mediation rule will take. By looking at mediation models successfully implemented in other states, Kentucky can select the ideas that will work best for the Commonwealth.

This Note will begin in Part II by exploring Kentucky's past experience in the field of mediation, including an examination of the two proposed mediation rules that were before the Kentucky Supreme Court in 1994. This examination will also look at what some Kentucky circuits have adopted by local rule in response to the growing trend in dispute resolution and encouragement from the Kentucky Supreme Court. In Part III, the analysis shifts to statutes and court rules in North Carolina, Tennessee, and Delaware. These states have been chosen for the divergence in their mediation systems and/or the history leading to their current systems. Finally, in Part IV, this Note will review the choices available for Kentucky considering all of the forms examined.

II. KENTUCKY'S MEDIATION EXPERIENCE

In 1994, two different drafts of mediation court rules were before the Kentucky Supreme Court for consideration. These rules differed significantly in some important respects, including whether there should be

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5 See id.
7 See Chantilis, supra note 1, at 1047.
8 See id. at 1057; see also discussion infra Part II.
10 See discussion infra Part III.
11 See discussion infra Part IV.
certification requirements for mediators and whether the courts could force parties to mediate. The first rule was drafted by the Kentucky Bar Association ("KBA") Alternative Dispute Resolution Committee ("ADR Committee"). The Committee based its initial draft on Indiana's Alternative Dispute Resolution Rule. The other rule was drafted by the KBA Board of Governors. The Board of Governors did not draft a completely new rule but rather made changes to the ADR Committee’s rule. Both of these proposed rules concerned arbitration as well as mediation, but this Note will focus only on the mediation portions of these rules. While the Kentucky Supreme Court chose not to adopt either of these two rules, they remain important guideposts for future attempts at a statewide rule. The discussion that follows will examine the differences and similarities between these two rules.

A. The ADR Committee’s Proposed Rule

The ADR Committee’s proposed mediation rule would apply to the entire state court system. This proposal envisioned a court-annexed mediation program involving the right of the court to order parties to mediation upon its own motion or motion from any party. The rule

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12 See Chantilis, supra note 1, at 1057.
13 See Interview with Frank T. Becker, member of ADR Committee, in Lexington, Ky. (Nov. 1997).
14 See Hal Daniel Friedman, Court Ordered Mediation in Kentucky: A Boon or Bane for Kentucky Trial Lawyers?, KY. BENCH & BAR, Fall 1993, at 10. The committee also examined ADR rules from Florida, Michigan, and Wisconsin. See id. at 14 n.3.
15 See Interview with Frank T. Becker, supra note 13.
16 See id.
17 See Friedman, supra note 14, at 10. This Note in no way suggests that the arbitration rules are any less important than the mediation rules but focuses on mediation because it is currently the most frequently chosen ADR form. See Douglas A. Henderson, Mediation Success: An Empirical Analysis, 11 OHIO ST. J. ON DISP. RESOL. 105 (1996) (discussing determinants of mediation success).
18 See Interview with Frank T. Becker, supra note 13.
20 See id. Rule W. The arbitration portion of the rules would only apply if adopted by local rule. See id.
21 See id. Rule X.02. The drafters were probably not as concerned as some critics about providing for mandatory mediation because Indiana's program, which
contains factors for the court to consider in making the referral decision. These factors include the stage of litigation, the nature of the issues to be resolved, the value to the parties of confidentiality, rapid resolution or promotion of ongoing relationships, and the willingness of the parties to mediate. The referral to mediation does not stay proceedings, allowing discovery and motion practice to continue despite the mediation order. The parties are given the freedom to agree on a mediator or mediation service certified as required by Rule X.09, and to reach an agreement on the mediator's compensation with the mediator. Commentators have suggested that in agreeing on a mediator and the mediator's compensation, "attorneys should consider a mediator's skill, education, training, and experience." However, if the parties cannot agree, the court will choose a certified mediator and set a compensation rate.

The ADR Committee's rule sets a mediation procedure to be followed. This rule includes a mandate that the mediation occur within the time prescribed in the court's referral order, but if no time is prescribed, then the mediation should occur within thirty days of mediator selection. The mediator can also require the parties to submit a confidential case history. The ADR Committee's procedural rule also requires the parties to attend the mediation but makes attendance of the parties' attorneys provided for court-ordered mediation, was considered a success. See Friedman, supra note 14, at 10.

22 See ADR COMMITTEE'S RULES, supra note 19, Rule X.02. By listing these factors, the drafters acknowledged that not every case is right for mediation. The court does not have to send every case to mediation.

23 See id. Rule X.03.

24 See id. Rules X.04-.05.


26 See ADR COMMITTEE'S RULES, supra note 19, Rules X.04-.05. The judge should presumably consider the same factors that the parties would consider themselves in making the decision, but this is not written into the rule. See Paquin & Zerhusen, supra note 25, at 27.

27 See ADR COMMITTEE'S RULES, supra note 19, Rule X.06. For a discussion of how a mediation under this rule might proceed, see Friedman, supra note 14, at 10-11.

28 See ADR COMMITTEE'S RULES, supra note 19, Rule X.06(1).

29 See id. While this can be helpful to the mediator, most experienced mediators are trained in techniques that enable them to find the facts and issues in a case at the actual mediation in order to bring the parties towards settlement. See generally MEDIATION CTR. OF KY., INC., GENERAL MEDIATION TRAINING (1996).
optional. This rule has special provisions for public entities, other organizations, and insured parties. These provisions basically require that someone with full authority to settle "without further consultation" attend the mediation, but in the case of an insured party, the insurance company's outside counsel may not be this representative. These rules can be changed either by agreement of the parties or order of the court if a good reason has been shown. If the parties cannot come to an agreement or the mediator terminates the mediation because it appears that any further attempt at that time would be fruitless, the mediator must report this to the court. If an agreement is reached, it is to be reduced to writing at the mediation by the parties. Such an agreement to settle binds the parties.

Arguably the most important part of this proposed rule is the last part of the court-annexed mediation section, which contains the confidentiality requirement. This rule mirrors Rule 408 of the Federal Rules of Evidence concerning "compromise and offers to compromise." Evidence from the negotiations is not admissible to prove liability. Mediators are also not subject to process to discover information from or about the mediation. This "mediator privilege" has been upheld in other states and compared to judicial privilege. This serves to protect the parties' confidence in the mediation process and to reinforce the fact that the mediator is and will remain neutral. If there were no confidentiality requirement, the parties

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30 See ADR COMMITTEE'S RULES, supra note 19, Rule X.06(2). Some commentators have suggested that the parties should participate in the mediation themselves because the process is therapeutic, allowing the parties to express facts as well as feelings to the other side. See Lynn, supra note 6, at 22.

31 See ADR COMMITTEE'S RULES, supra note 19, Rule X.06(2).

32 See id.

33 See id. Rule X.06. The rules give no indication of what "good cause" might entail. See generally id. Rule X.

34 See id. Rule X.06(3)-(4). When parties cannot agree, they are said to have reached an impasse. See generally Henderson, supra note 17, for a discussion of factors causing impasse.

35 See ADR COMMITTEE'S RULES, supra note 19, Rule X.06(5). It is important to get the agreement on paper before the parties leave. Otherwise, the parties could change their minds before the agreement is drafted.

36 See Note, supra note 4, at 1088.

37 See ADR COMMITTEE'S RULES, supra note 19, Rule X.07.

38 FED. R. EVID. 408(2).

39 See id.

40 See ADR COMMITTEE'S RULES, supra note 19, Rule X.07(3).

would unlikely deal with the same candor that the confidentiality requirement brings.42

Finally, the ADR Committee’s proposal establishes an Alternative Dispute Resolution Commission and certification requirements for mediators.43 This ADR Commission would be “established for the purpose of administering the certification, training, and discipline of mediators as set forth elsewhere in this Rule, the development of forms for mediation referral and reporting, monitoring the mediation system, and otherwise as directed by order of the Supreme Court of Kentucky.”44 The rule specifies that the ADR Commission should consist of three members from the KBA ADR Committee, one member from the KBA Ethics Committee, one member from the KBA Board of Governors, and two members from the Kentucky Mediation Association.45 All of these members would be appointed by the Kentucky Supreme Court for staggered two-year terms and chosen from lists of names submitted from each committee or organization.46

The ADR Commission would also handle certification requirements for mediators by establishing training requirements, certifying mediators in specialties, and even revoking certification as a disciplinary measure.47 While the proposed rule specifies that one does not have to be a member of the bar to receive mediator certification, the Commission can impose reasonable requirements to insure that those trained and certified have, by training or experience, “sufficient knowledge of Kentucky judicial procedure and law to serve as a mediator.”48 While this requirement is not designed to prohibit nonattorneys from serving, it is somewhat biased in favor of attorneys as mediators.

B. KBA Board of Governors’ Proposed Rule

The rule proposed by the Board of Governors49 is similar to and in many respects exactly the same as the ADR Committee’s rule. However, the Board

42 See Stipanowich, supra note 9, at 893.
43 See ADR COMMITTEE’S RULES, supra note 19, Rules X.08-.09.
44 Id. Rule X.08(1).
45 See id. Rule X.08(2).
46 See id. The rule also set forth special rules for the first four years in order to stagger the terms properly.
47 See id. Rule X.09.
48 Id. Rule X.09(1). Commentators suggest that the bar is worried about losing some of their traditional counseling roles, but that perhaps, in some situations, nonattorneys are more qualified for the mediator role. See Paquin & Zerhusen, supra note 25, at 26.
49 RULES FOR ALTERNATIVE DISPUTE RESOLUTION (Kentucky Bar Ass’n Bd. of Governors, Proposal 1994) [hereinafter BOARD OF GOVERNORS’ RULES] (on file with author).
of Governors’ proposed mediation rule differs in some key aspects. The similarities are understandable considering that the Board of Governors did not draft a rule but rather redrafted the ADR Committee’s rule.\textsuperscript{50} This rule proposes the same court-annexed model of mediation that the ADR Committee proposed, but the Board of Governors’ rule would only apply to courts adopting it by local rule.\textsuperscript{51} While this rule would provide a framework for statewide mediation, it would not insure a statewide system because it leaves the final decision regarding adoption of the rule to the different localities. Areas plagued by inertia or cynicism of such a system would never adopt the rule, thus continuing to deny some parties access to mediation.\textsuperscript{52} While the ADR Committee did not give the parties a chance to choose not to mediate after a court order,\textsuperscript{53} the Board of Governors’ rule allows the parties to inform the court within ten days of an order to mediate that they do not wish to mediate.\textsuperscript{54} The time for mediation does not start to run until after a mediator is selected.\textsuperscript{55}

The Board of Governors’ rule does not specify that the court can pick a mediator in the event that the parties cannot agree.\textsuperscript{56} The outcome in a situation in which the parties cannot agree on a mediator is unclear, but the drafters presumably desired that a court not have the right to pick a mediator considering that they deleted that provision from the ADR Committee’s rule when creating their own rule. In effect, this non-agreement could potentially extend the ten-day limit on notification not to mediate to an indefinite period since non-agreement would appear to have the same effect.

It is also important to note that the Board of Governors did not include a certification requirement for mediators or envision a commission to oversee the workings of this rule.\textsuperscript{57} Presumably, anyone upon whom the parties agree can mediate despite their lack of training or qualifications. Those involved in both drafting groups had a desire to limit the bureaucracy created by an ADR rule, and the lack of a commission and certifica-

\textsuperscript{50} See discussion supra note 13 and accompanying text.
\textsuperscript{51} See BOARD OF GOVERNORS’ RULES, supra note 49, Rules W, X.
\textsuperscript{52} Private mediation groups are available but generally cost more than a court-annexed model.
\textsuperscript{53} See ADR COMMITTEE’S RULES, supra note 19, Rule X.02.
\textsuperscript{54} See BOARD OF GOVERNORS’ RULES, supra note 49, Rule X.02.
\textsuperscript{55} See id. Rule X.06(1).
\textsuperscript{56} See id. Rule X.04. This is in line with the idea that parties have the right of self-determination in mediation. See infra note 104 and accompanying text.
\textsuperscript{57} See BOARD OF GOVERNORS’ RULES, supra note 49.
tion requirements in the Board of Governors’ rule might be based on this desire.

C. The Fayette County Experience

In June 1992, the Mediation Center of Kentucky, Inc. ("Center") opened. This program is a court-connected model for Fayette County courts, and it currently receives approximately one-third of its referrals from these courts. The other two-thirds of the Center's cases come from judges in other counties and attorneys who have had good experiences with the Center and refer other cases there. The Center began using only volunteer mediators to keep overhead low, but now offers a small stipend to its mediators after they perform two nonpaid mediations each year. The Center requires its mediators to complete a forty-hour training program followed by an apprenticeship which consists of performing twenty hours of co-mediation and being graded as the lead mediator in two mediations. The Center remains nonprofit and charges $150 per party for each mediation to cover the stipend for the mediators and the overhead costs of running the Center. During the first seven months of operation, approximately forty-eight percent of mediated cases completely settled and another eleven percent reached a partial settlement. Parties, attorneys, and mediators generally rated the effectiveness of the process as moderate to high.

Rule 29 of the Rules of the Fayette Circuit Court is the local rule governing court-referred cases to the Center. The Fayette Circuit Court

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58 See Lynn, supra note 6, at 21.
59 See Interview with Carol Paisley, Director of the Mediation Center of Kentucky, Inc., in Lexington, Ky. (Oct. 1997).
60 See id.
61 See Lynn, supra note 6, at 21. The stipend allows $100 for each mediator per mediation after the initial two mediations of the year. See Interview with Carol Paisley, supra note 59.
62 See Interview with Carol Paisley, supra note 59.
63 See Stipanowich, supra note 9, at 916-17. No information was kept regarding cases resolved shortly following mediation, but there is some indication that there were a number of such cases. See Lynn, supra note 6, at 21.
64 See Stipanowich, supra note 9, at 918. These groups were asked to rank the process according to effectiveness in areas such as improving communications, clarifying viewpoints, identifying options, reaching general understanding, and reaching specific agreements. See id. at 917.
65 See FAYETTE CIR. CT. R. 29(B).
rule allows courts to mandate mediation without consent of the parties.\textsuperscript{66} The court does not have to refer a case to the Center under this rule but can refer a case to another court-approved mediator.\textsuperscript{67} The mediation must be held within thirty days from the entry of the mediation order. The parties must attend, but the attorneys do not have to attend.\textsuperscript{68} The court is given the power, upon motion, to sanction a party for failure to attend.\textsuperscript{69} This right to sanction has been upheld by courts in other jurisdictions but apparently has not been challenged in Fayette County.\textsuperscript{70} Rule 29 also has the same provisions for attendance of public entities and insured parties as both of the KBA’s proposed rules.\textsuperscript{71}

Just as the KBA proposed rules deemed confidentiality of the process important, the Fayette Circuit Rule provides for confidentiality of all mediation documents and communications.\textsuperscript{72} When the parties report to the Center, they sign an “Agreement to Mediate” that sets out the requirements of confidentiality. This agreement acts as an extra layer of protection for confidentiality in the process.\textsuperscript{73} However, there is no confidentiality requirement in two situations: the parties consent in writing to disclosure or a crime becomes known.\textsuperscript{74} This confidentiality carries over to the report of the mediator to the court. The mediator reports to the court at the end of the mediation process on whether an agreement was reached, without comment or recommendation.\textsuperscript{75} If an agreement is reached, an attorney for one of the parties will prepare and submit an order to the court reflecting settlement. If partial settlement is reached, a joint statement will be submitted to the court to enumerate the issues that have been resolved.\textsuperscript{76}

\textsuperscript{66} See id. 29(A)-(B).
\textsuperscript{67} See id. 29(B)(1).
\textsuperscript{68} See id. 29(C)(1)-(2). While the rule specifies that the parties must attend, it is unclear how enforced this is in practice, as the author has co-mediated a case with only the attorney present for one side. This case did not settle, and perhaps the lack of the party’s presence was a factor.
\textsuperscript{69} See id. 29(C)(4).
\textsuperscript{71} See FAYETTE CIR. CT. R. 29(C)(4); supra notes 31-33 and accompanying text.
\textsuperscript{72} See FAYETTE CIR. CT. R. 29(D)(1); supra notes 37-42 and accompanying text.
\textsuperscript{73} See Stipanowich, supra note 9, at 898.
\textsuperscript{74} See FAYETTE CIR. CT. R. 29(D)(3)(a)-(c).
\textsuperscript{75} See id. 29(E)(5).
\textsuperscript{76} See id. 29(E)(3)-(4).
D. The Jefferson County Experience

In 1989, a court-annexed dispute resolution task force suggested that a court-annexed mediation program be implemented in Jefferson District Court. Jefferson County currently has mediation programs in district court, circuit court, and family court. This system was no doubt influenced by Florida's three-section program consisting of differing mediation requirements in county court, family court, and general civil court. Each court in Jefferson County has its own local rules concerning mediation which are briefly highlighted below.

1. District Court

Jefferson District Court has the smallest mediation program of the three. Rule 7 provides for mediation of citizen complaints upon the choice of the reporting party or when a judge or county attorney deems mediation the most appropriate means of continuing resolution of the dispute. The rule also provides that if the party making the complaint fails to appear at a mediation after a date is set, the matter is closed until the complainant comes forward again to swear to the allegations. If the offending party does not appear, or in the event mediation is not successful, criminal charges can be entered after review by the county attorney and a judge. The rule also provides for confidentiality of the mediation proceeding, as do the other rules analyzed thus far.

2. Circuit Court

Rule 14 of the Jefferson Circuit Court Rules refers primarily to mediation but does not prohibit the use of any other means of alternative dispute resolution. The rule provides for the referral of cases by court

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77 See Stipanowich, supra note 9, at 877.
78 See id. at 880.
79 See JEFFERSON DIST. CT. R. 7; JEFFERSON CIR. CT. R. 14; JEFFERSON FAM. CT. R. 509.
80 See JEFFERSON DIST. CT. R. 702(A), 703(E).
81 See id. 702(D)(1).
82 See id. 702(D)(2)-(3).
83 See id. 702(E).
84 See JEFFERSON CIR. CT. R. 1401.
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mandate or on motion of any party, with the same requirement as in the KBA models that the court consider factors such as the stage of litigation, nature of issues to be resolved, value to the parties of confidentiality, rapid resolution or promotion of on-going relationships, and the willingness of the parties to mediate in making its decision. A mediation does not stay proceedings in this system. The parties are given the opportunity to select a mediator, with the court selecting one in the event the parties cannot agree. This rule also allows for the submission of a confidential case history if the mediator so desires, protects confidentiality of the mediation session, and even provides for a mediator privilege such that a mediator is not subject to process. The attendance requirements are the same as the other rules discussed in that parties must attend, attorneys may attend, and special rules are provided for public entities and insured parties.

3. Family Court

The family court mediation rule is the most comprehensive model of the three in Jefferson County. This rule not only purports to provide voluntary mediation of a dispute, but also lists certain types of disputes that will be automatically referred to mediation unless waived by the court. These include custody/visitation issues, maintenance, assignment of nonmarital property, and division of marital property. This rule also sets forth the preparation required for property mediation, including submission by counsel of updated financial information, a list of issues, and supporting documents no less than five days before mediation. The qualifications for mediators in the Jefferson County system consist of a minimum of 40 hours of training in a family mediation training program, a college degree or a license to practice law in Kentucky, and participation in no less than six mediation sessions. This rule is not biased in favor of attorneys since a license to practice law is not the exclusive way to obtain mediator certification. The rule explains in detail the duties of the mediator and

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85 See id. 1403.
86 See id. 1404-1405.
87 See id. 1407, 1412.
88 See id. 1408.
89 See JEFFERSON FAM. CT. R. 509(B)-(C).
90 See id. 509(A)-(C).
91 See id. 509(E)(2).
92 See id. 509(F).
93 See id.
provides for a review committee to oversee mediators. Confidentiality of the process is protected, the parties must attend at the risk of sanctions, and the parties’ counsel may also appear.

III. OTHER STATES

The examination of Kentucky law reveals many similarities in the different rules proposed, but also highlights some key issues such as whether a court can mandate mediation, whether certification standards should be built into the rule, and whether some sort of commission or review committee must be established. A brief examination of other states’ experiences and ideas follows, including a discussion of the North Carolina, Tennessee, and Delaware models. These models illustrate that there are many approaches that Kentucky might take, including fashioning unique solutions to concerns.

A. The North Carolina Model

North Carolina welcomed alternative dispute resolution as a means of dealing with the overcrowded court dockets that many states are facing. While child custody and visitation mediation was one of the first programs in a push for a statewide rule, an important move was the authorization by the General Assembly of a court-ordered pilot program in superior court. The statute that arose from this authorization evolved into its current form after an evaluation period by the Institute of Government. This evaluation was requested by the Administrative Office of the Courts and eventually led to the current form of the mediated settlement conference rules and statute section 7A-38.1. A cursory review of the North

94 See id. 509(G), (I).
95 See id. 509(L), (M), (P).
97 See id. at 1858.
99 See id.
100 See id. at 286. The North Carolina Supreme Court actually promulgated rules opposite to what the Institute of Government (“IOG”) suggested in that parties are required to wait longer to mediate, contrary to the expedited process suggested by
Carolina model will show that, in addition to the legislative rules in place concerning mediation, court rules have also been adopted to further these statutes. This section will review both of these sets of rules.

1. **The General Assembly's Contribution**

The North Carolina General Assembly promulgated rules for the superior court. Rule 7A-38.1 is designed to set up a statewide system for mediated settlement conferences in civil actions in superior court. All parties, their attorneys, and any other persons with authority to settle the claim must attend, as sanctions for failure to attend can be imposed. The courts of North Carolina have been willing to impose such sanctions where warranted. The idea that even attorneys must attend is different than any other model put forward or currently in use in the Kentucky models discussed.

Many commentators stress self-determination as a key to mediation. Such a model allows the parties to choose their mediator in accordance with this principle, but the judge will choose a mediator if they fail to do so within the prescribed time. The costs of mediation are to be split among the parties equally, but the statute allows for free mediation for indigent parties. This access to mediation for indigent parties has not been addressed by the rules examined previously and is certainly an important consideration for Kentucky. This statute provides for confidentiality similar to that discussed in the previously analyzed rules and also provides for mediator privilege similar to the Jefferson County, Kentucky, model.

Section 7A-38.2 of the General Statutes of North Carolina sets forth a framework that allows the supreme court to determine regulations for

the IOG. See id.

101 See N.C. GEN. STAT. § 7A-38.1(a), (d) (1996). This is a court-connected design of mediation much like both of the KBA proposed rules discussed previously. See supra notes 19-21, 51 and accompanying text.

102 See N.C. GEN. STAT. § 7A-38.1(f), (g).

103 See supra notes 30, 68, 88 and accompanying text.


105 See N.C. GEN. STAT. § 7A-38.1(h).

106 See id. § 7A-38.1(k). The statute does not define "indigent parties," but this would presumably be the same definition used for other court purposes.

107 See id. § 7A-38.1(l); supra notes 37-42, 87 and accompanying text.
mediators. This section also sets up a "Dispute Resolution Commission" to administer the court's rules for certification and provides for a $200 charge to applicants for certification or renewal of certification. These fees are to be used for the maintenance of the Commission. A framework such as this helps alleviate a funding crisis at a time when most state budgets are tight.

The North Carolina General Assembly has also provided for mediation in other areas. Prelitigation mediation of farm nuisance disputes is a mechanism by which disputes over farming activity can be brought to mediation before they are even filed. A custody and mediation program was enacted in 1989, and beginning on July 1, 1989, the Administrative Office of the Courts was to establish programs in the local districts. Strict standards for mediators were actually built into this statute, including a minimum requirement of a master's degree in psychology, social work, family counseling, or a comparable human relations discipline; at least forty hours of training in mediation; and professional training and experience in child development, family dynamics, or a comparable area. An advisory committee was to be formed to oversee this program. The General Assembly legislated to encourage mediation in labor disputes.

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108 See N.C. GEN. STAT. § 7A-38.2.
109 See id. § 7A-38.2(b), (d).
110 See id. § 7A-38.2(d).
111 See Sharon Press, Building and Maintaining a Statewide Mediation Program: A View from the Field, 81 KY. L.J. 1029, 1034-35 (1993). Press also indicates that there are problems with this sort of funding because many courts use filing fees to increase revenues. See id. at 1035.
112 See N.C. GEN. STAT. § 7A-38.3. Under this statute, if the plaintiff does not initiate mediation before filing suit, the suit can be dismissed by motion of any party unless (1) the claim involves a class action; (2) the nonmoving party has satisfied the section already and a mediator has filed a certificate stating such; (3) the mediator improperly failed to issue a certificate stating that the nonmoving party met the requirements; or (4) the court finds good cause for failure to attempt to mediate. See id. § 7A-38.3(c).
113 See id. § 7A-494(b). As of the end of 1993, this program existed in only four counties, illustrating the fact that systems do not always work the way they are envisioned by drafters. See Mebane, supra note 96, at 1858-59 n.13.
114 See N.C. GEN. STAT. § 7A-494(c). This is one of the few areas where the standards for mediators were built directly into the statute. The standards were usually a matter for the supreme court to handle.
115 See id. § 7A-495(b).
116 See id. § 95-32.
and disputes between the Hazardous Waste Management Commission and local government. The General Assembly also provided for mediated settlement conferences in administrative hearings.

2. Supreme Court Rules

The Supreme Court of North Carolina has promulgated some interesting mediation rules for the superior courts that deserve the consideration of Kentucky's drafters. Parties can move within ten days of the mediation order not to mediate, and the judge can grant the motion for good cause shown. Another rule provides that if the parties pick a mediator that is not certified pursuant to the court's rules, the plaintiff's attorney must file a nomination stating the training or other qualifications of the person and the rate of compensation to be paid. The judge shall rule whether this person can serve. In the event the parties do not agree on a mediator, they can still elect whether they want a certified attorney mediator or a certified nonattorney mediator. This election provides the parties with some degree of self-determination. An especially interesting rule states that only certified mediators that have agreed to mediate indigent cases for free will be appointed by the court. Kentucky should take note of this rule as it allows indigent parties access to the process, yet may still make a filing fee of sorts plausible for non-indigent parties.

Rule 3 of the superior court rules provides strategic guidelines regarding the mediated settlement conference. This rule, for instance, provides that the mediated settlement conference should not be held until after discovery. The rule also states that the mediated settlement

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117 See id. § 130B-21.
118 See id. § 150B-23.1. These provisions are very similar to those found in the statute governing superior courts.
119 See N.C. R. SUPER. CT. MEDIATED SETTLEMENT CONFERENCE R. 1(A). Perhaps this is what the Board of Governors envisioned by adopting a 10-day period to decide not to mediate. See supra note 54 and accompanying text.
120 See N.C. R. SUPER. CT. MEDIATED SETTLEMENT CONFERENCE R. 2(B). This rule helps to insure that a qualified mediator will preside over the mediation, thus giving the mediation the best chance for successful resolution of the dispute.
121 See id. 2(C).
122 See Kovach & Love, supra note 104, at 31.
123 See N.C. R. SUPER. CT. MEDIATED SETTLEMENT CONFERENCE R. 2(C).
124 See id. 3(B). The rule provides that the date of completion for the mediation shall not be less than 120 days or more than 180 days after the order to mediate is signed.
conference should be held in the courthouse. This presumably helps to eliminate power imbalances that may occur by forcing one party to negotiate at a place more favorable to another party, such as a party's office. The rules do not specify a good faith requirement in mediation, but do state that parties shall attend until an agreement is reached or an impasse is declared. Any agreement should be reduced to writing and signed by the parties and their counsel.

Other points of interest in the superior court rules include a strict certification process. A candidate must complete forty hours in a certified training program. The requirements then bifurcate depending on whether the party is an attorney or a nonattorney. If the candidate is an attorney, the candidate must be a member in good standing of the state bar and have at least five years of experience as a judge, practicing attorney, law professor, or the like. If the candidate is a nonattorney, the candidate must have an additional twenty hours of training; five years of experience as a mediator, having mediated at least twelve cases a year for at least twenty hours per year; six hours of training in North Carolina legal terminology, civil court procedure, and mediator ethics and confidentiality; three letters of reference with at least one letter from someone knowledgeable about the candidate's mediation experience; and a four-year degree from an accredited school. Obviously, this system is highly biased in favor of attorney-mediators.

After clearing all of these hurdles, the certification process is still not complete. The applicant must still observe two court-ordered mediations, demonstrate familiarity with the statutes, rules, and practice of the mediated settlement conferences, be of good moral character, submit proof of these qualifications, pay all administrative fees, and agree to mediate indigent cases without pay. In addition, the certification can be revoked at any time if it is shown that the person no longer meets all of these qualifications.

The Supreme Court of North Carolina has also promulgated rules to govern the other mediation situations designed by the General Assembly.

125 See id. 3(A).
126 See id. 4(A)(2).
127 See id. 4(C)(2).
128 See id. 8(A).
129 See id. 8(B)(1).
130 See id. 8(B)(2).
131 See id. 8(C)-(H).
132 See id. 8.
Most of these rules follow or incorporate by reference the superior court rules. The only major difference important to the discussion here is the fact that the Dispute Resolution Commission can set a curriculum for training in prelitigation farm nuisance disputes as well as qualifications for trainers.\(^{133}\) It appears that the Commission has not acted on this authority as of yet.

### B. The Delaware Model

Delaware has a very unique mediation statute known as the “Delaware Voluntary Alternative Dispute Resolution Act” (“Act”).\(^{134}\) This statute mandates mediation in cases where a party has brought himself or herself under the statute before litigation is filed for disputes of $100,000 or more.\(^{135}\) Any person can bring himself or herself under the statute by filing a certificate with the secretary of state and paying $1000.\(^{136}\) The certificate must contain the name and address of the person filing it, the address of the party, and an agreement to abide by the rules of the Act.\(^{137}\) This Act does not limit the types of disputes it covers, except that there must be at least $100,000 in dispute.\(^{138}\) The Act also provides for revocation of the certificate by filing a revocation and paying another $1000.\(^{139}\)

The Delaware Act also has some interesting rules for certification of a mediator and for the mediation procedure itself. The certification standards are lenient in comparison to the other models discussed as they only require a person to have five years of experience as an attorney or to have completed a twenty-five hour training course in resolving civil disputes.\(^{140}\) The mediator is selected by the parties in a fashion reminiscent

\(^{133}\) See N.C. R. PRELITIG. FARM NUISANCE MEDIATION PROGRAM R. 10.  
\(^{134}\) See DEL. CODE ANN. tit. 6, § 7701 (1995). Delaware also has offender/victim mediation provisions as well as visitation and custody mediation provisions. These will not be discussed but are codified at DEL. CODE ANN. tit. 11, § 9501 (1996), and DEL. FAM. CT. C.P.R. 16(b), respectively.  
\(^{135}\) See Chantilis, supra note 1, at 1045.  
\(^{136}\) See DEL. CODE ANN. tit. 6, §§ 7703, 7706 (1995).  
\(^{137}\) See id. § 7704.  
\(^{139}\) See DEL. CODE ANN. tit. 6, § 7707. This would not be a light decision for a small capital party, but it would not make a difference to the larger capital companies that this statute mainly catches.  
\(^{140}\) See id. § 7708. Most models seem to require at least 40 hours of training. See, e.g., supra notes 92, 114, 128 and accompanying text.
of the "I cut, you pick" solution to keeping one person from having too much power. The party who initiates the proceedings picks three certified mediators, and the other party gets to choose one of these three.\textsuperscript{141} Other parties to the dispute that have not filed a certificate, and thus are not subject to alternative dispute resolution, may be given the opportunity to participate.\textsuperscript{142} Confidentiality, mediator privilege, and attendance of the parties are required in a fashion similar to the provisions already discussed.\textsuperscript{143}

The parties in a Delaware mediation must come prepared. Unless the parties have agreed otherwise, the proceeding does not resemble the typical mediation because there are witnesses, cross-examination, and demonstrative exhibits.\textsuperscript{144} It is not clear that such a design would be beneficial in Kentucky, and trying to include such a provision would probably only lead to the common complaint of cost of preparation.\textsuperscript{145} People need to see the cost-effectiveness of the procedure itself before they will accept adding more layers of preparation and participation.

Delaware also has a mediation program concerning custody and other mediation proceedings that will not be discussed here.

\textbf{C. The Tennessee Model}

Tennessee is relatively new to the realm of alternative dispute resolution. The Supreme Court of Tennessee passed Rule 31 providing for court-annexed mediation in December of 1995.\textsuperscript{146} The rule was amended on December 17, 1996.\textsuperscript{147} Tennessee's history is important because it suggests a way for Kentucky to ease itself into the process and to avoid having to insure that the rule has everything everyone wants in it from the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{141} See Del. Code Ann. tit. 6, § 7709. In the event there are more than two parties, the party initiating mediation picks a panel of three certified mediators and the other two parties vote on one. In the event of a tie, the party initiating the proceeding picks among the tied candidates. See id.
\item \textsuperscript{142} See id. § 7711. This rule does not indicate any cause for concern by leaving out certain parties because they only "may" be invited to participate.
\item \textsuperscript{143} See id. § 7716-18. See supra notes 37-42, 87 and accompanying text for discussion of confidentiality and immunity provisions.
\item \textsuperscript{144} See McNally & MacDonald, supra note 138, at 100. This is more like a mini-trial proceeding except that an actual jury is not convened; rather, the other side in a way serves as the jury.
\item \textsuperscript{145} See id. at 93.
\item \textsuperscript{146} See Chantilis, supra note 1, at 1075.
\item \textsuperscript{147} See Tenn. Order 96-21.
\end{itemize}
\end{footnotesize}
start. As one member of the KBA ADR Committee phrased it, "[l]et’s just get something on the books and work with it from there."\textsuperscript{148}

The Tennessee court rule, as initially adopted, mainly addressed the basics. The rule allowed for court-ordered mediation, with the same confidentiality and mediator privilege provisions that have been examined thus far.\textsuperscript{149} It provided that the parties bear the costs but stated that "[p]arties proceeding \textit{in forma pauperis} may request the court to waive or reduce the costs."\textsuperscript{150} The rule does not necessarily require the presence of the parties and leaves the form of party participation to the judge’s discretion.\textsuperscript{151} The rule also set up an Alternative Dispute Commission to oversee certification of mediators, monitor the process, and determine standards of professional conduct for mediators.\textsuperscript{152} While there have been national standards established,\textsuperscript{153} none of the other rules discussed in this Note have attempted to adopt any such standards for mediators.\textsuperscript{154}

The current rule, adopted in December of 1996, made a few changes and additions to the initial rule. A significant change was the addition of certification requirements. These requirements differ according to the kind of case being mediated. Mediators in general civil cases must be of good moral character, have a postgraduate degree and four years of practical work experience or a bachelor’s degree and six years of practical work experience, complete forty hours of mediation training, and observe one complete mediation.\textsuperscript{155} Mediators in family cases must be of good moral character; be a certified public accountant or have a postgraduate degree; have four years of practical work experience in psychiatry, psychology,

\textsuperscript{148} Interview with Carol Paisley, \textit{supra} note 59.

\textsuperscript{149} See TN. R. S. Ct. R. 31, §§ 1, 4-6 (as adopted Dec. 1995); \textit{supra} notes 37-42, 87 and accompanying text.


\textsuperscript{151} See id. 31, § 11(b). The court could order, for instance, that the party be available by telephone.

\textsuperscript{152} See id. 31, § 12(a). The original rule did not set any ethical standards for mediators but left this to the commission to decide. See \textit{id}.

\textsuperscript{153} See \textsc{National Standards for Court-Connected Mediation Programs} (Center for Disp. Settlement, Institute of Jud. Admin. Standards for Court-Connected Mediation Programs).

\textsuperscript{154} The Mediation Center of Kentucky trains its mediators in ethics and supplies them with standards of practice. These standards include the duty to be competent, the duty of impartiality, the duty of confidentiality, the duty to define the process, the duty to facilitate the negotiation process, and the duty to refer ethical concerns to the director of the program. See \textsc{Mediation Ctr. of Ky., Inc., supra} note 29.

\textsuperscript{155} See TN. R. S. Ct. R. 31, § 13(a).
counseling, social work, education, law, or accounting; complete forty
hours of training; complete six additional hours of training in Tennessee
family law and court procedure; and observe one complete family
mediation. Both types of mediators also pay an application fee set by the
commission, pay an annual renewal fee with their annual report asserting
their continued qualification to mediate, and are subject to continuing
education requirements. The rule establishes a grievance committee to
hear grievances against nonattorney mediators. Grievances against attorney
mediators are heard by the Board of Professional Responsibility. It is
interesting to note that no other model studied here provided such a
grievance procedure. It is unclear what would happen in those models, but
presumably a court action would be filed.

Finally, there are two additional provisions worth noting. The revised
rule requires mediators to be available to conduct three pro bono
mediations per year. The court also adopted standards for professional
conduct. Standards for professional conduct are something that every
system should have in place at some point in time. However, as Tennessee
has exhibited, such standards might not be the top priority when first
drafting a rule.

IV. WHERE DO WE GO FROM HERE?

It is certain that Kentucky needs a statewide rule for mediation to make
this process available for all of its residents and to come in line with the
general trend seen across the United States. Some might argue that a
statewide rule is not necessary when several areas have already addressed
the need for an alternate dispute resolution mechanism by adopting local
rules. The problem with that argument, however, is twofold. First, there is
no guarantee that all areas will adopt local rules. If they do not, Kentucky
will still have areas that do not offer access to mediation when research has

156 See id. 31, § 13(b). It is obvious that only highly qualified people can be
family mediators in Tennessee, but one has to wonder what these mediators charge.
The court is, after all, ordering the parties to mediation, yet these mediators must
be paid for their time because it is hard to imagine a large enough group of
volunteers with enough time to make the process work.

157 See id. 31, §§ 13(d), 14(b).
158 See id. 31, § 15.
159 See id. 31, § 16.
160 See id. app. at A. These standards are quite detailed and include the sorts of
issues covered by the Mediation Center of Kentucky's General Mediation Training
handbook. See MEDIATION CTR. OF KY., INC., supra note 29.
shown that people would probably prefer the availability of mediation.\textsuperscript{161} Many parties would miss out on an opportunity for a faster, cheaper settlement of their dispute. Second, the failure to adopt such a rule, or to delay adopting a rule, would also cause Kentucky to miss an excellent opportunity to lessen its court loads. By adopting a statewide rule, Kentucky would insure statewide participation and uniformity that would make the process familiar and comfortable to all, attorneys and parties alike. The safeguards that would be put into place, such as mediator certification and review, as well as ethical standards, would help to insure fair and efficient proceedings.

There are several feasible models for Kentucky to consider. It is clear from the previous discussions that certain aspects of a statewide rule are prevalent in most models. Confidentiality of the proceedings is one such aspect. All models agree that everything from these proceedings should be kept confidential.\textsuperscript{162} This aspect is, in fact, very important for mediation success so that the parties do not feel constrained and can negotiate with great candor. Most models seem to agree that the parties themselves must attend the mediation. Mandatory attendance allows the previously discussed therapeutic benefit of mediation to have effect and insures that the parties with settlement power are present at the mediation.\textsuperscript{163} If the parties with settlement authority are not present, chances for a mediated resolution are greatly diminished.

Another factor that is not mentioned by every model, but is still prevalent, is that of mediator privilege. Most models seem to agree that the mediator should be afforded the same type of immunity that is granted to judges. This also helps increase the candor of the parties in negotiating because they know that the mediator cannot be called to testify against them. The Mediation Center of Kentucky requires the parties to sign an agreement when they arrive for mediation to protect the confidentiality of the process and to insure the immunity of the mediator.\textsuperscript{164} Kentucky should consider making this practice one of its rules of procedure adopted in a statewide rule.

The difficult part of this analysis begins where the models disagree. Especially important are the ways in which the two KBA models differ. One such difference concerns the power of a court to mandate mediation. The Board of Governors’ rule and the North Carolina model allow a party

\textsuperscript{161} See \textit{National Survey Findings}, \textit{supra} note 2.  
\textsuperscript{162} See \textit{supra} notes 37-42, 72-75, 87, 107, 143, 149 and accompanying text.  
\textsuperscript{163} See \textit{supra} note 30 and accompanying text.  
\textsuperscript{164} See \textit{supra} note 73 and accompanying text.
to "opt out" of mediation within ten days of the order. The other models do not. Some critics of mandated mediation argue that it interferes with a party's right to trial. This is simply not true. Mandated mediation is really no different than a judicial settlement conference under Rule 16 of the Federal Civil Rules of Procedure. The parties are forced to negotiate, not to settle. Other critics argue that mandated mediation will just add another level of pretrial procedure to the system. If past settlement rates of other programs are any indication, the benefits of the system will surely outweigh the burdens here. In fact, it will be a final step in the litigation process for many, if not most. Supporters of mandated mediation point to the benefits of mediation, such as the preservation of relationships, the likelihood that parties will follow an agreement they created, and the possibility for a wide range of outcomes outside those a court could offer to indicate that mediation is beneficial even when mandated.

Another area on which the different models diverge concerns certification standards for mediators. The Board of Governors’ rule is the only model that does not provide for any certification standards while Delaware provides for very lenient standards by comparison to some other models. The ADR Committee's rule and the Tennessee model both initially set up a provision for certification requirements, but left the actual requirements to another day. The North Carolina model and the amended Tennessee model both provide for very strict standards for certification as a mediator. These standards are so strict that Kentucky could experience problems in finding enough qualified, interested mediators in the beginning if requirements such as these are initially enacted. Perhaps the Mediation Center of Kentucky's training program followed by an apprentice period is a happy medium. If it appears that stricter certification standards would be beneficial, they could be adopted after the program becomes established. Delaware's requirements are also similar. These moderate standards would allow for a smaller oversight function and thus smaller overhead. The fee to enroll in training could support the process.

Next, the decision whether a commission or committee must be established seems to be a major point of disagreement. The ADR Commit-

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165 See Stipanowich, supra note 9, at 883. No constitutional problem exists where there is no undue expense or delay. See id.
166 FED. R. CIV. P. 16.
167 See Note, supra note 4, at 1094.
168 See supra note 2 and accompanying text.
169 See Note, supra note 4, at 1091-92.
170 See supra notes 57, 140 and accompanying text.
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Committee, Jefferson County, Tennessee, and North Carolina models all provide for such a body. The Board of Governors’ rule and the Delaware Act do not. This question will ultimately be answered, however, by the answers to the other questions. If a detailed system with certification and continuing education requirements is put into effect, then a commission or committee will be necessary to oversee that process. A grievance committee may also be necessary. However, if no certification requirements, or lenient requirements, are put into place, perhaps a commission would not be necessary. A small committee might still be desired to assess the effectiveness of the program and suggest changes every few years.

Besides the conflicts within the models that need to be addressed by drafters of a statewide rule, some of the state models contain good ideas not mentioned in any of the discussions concerning what has happened in Kentucky. North Carolina and Tennessee both require mediators to mediate a set number of pro bono cases per year. The Mediation Center of Kentucky requires its certified mediators to mediate two cases without charge per year. Such a pro bono requirement provides access to all parties. Only then is the process fair. Indigent parties are exactly the sort of parties that benefit from cutting costs since the court system may not otherwise be available to them. Kentucky perhaps should even consider demanding that its mediators agree to mediate all indigent cases for free as the North Carolina model dictates. This would also allow the mediators to be compensated by the parties at an agreed upon level. This compensation would help alleviate some funding problems. It is especially helpful in the whole funding plan, if combined with mediator certification fees and renewal fees as provided for in North Carolina, for the maintenance of the system or commission, if one is used.

Some state models put forth interesting ideas concerning the process for selecting mediators. Perhaps Delaware’s “I cut, you pick” idea would be the fairest way to select a mediator and avoid the issue of what to do when the parties do not agree. The court would never have to step in, and thus it is still truly the parties’ process. North Carolina adopted a provision for parties to choose their mediator, even if that mediator was not certified. A provision allowing the court to review the selection and to decide on its own discretion still gives the parties a chance for someone qualified, but not certified, to serve as their mediator. Again, this promotes self-determination.

Finally, Kentucky might consider providing different rules to fit the specific type of dispute as in the Jefferson County and North Carolina models. This decision could turn on the Tennessee example. Many of the models seem to have some sort of custody/visitation mediation program in
place, and in some instances, it is the very first program put into place. Kentucky may need to get something on the books and then fine-tune it after seeing what works and what does not. Other new ideas will inevitably spring up that Kentucky may want to consider since this is a dynamic field.

V. CONCLUSION

From this Note's analysis it is clear that a statewide rule is needed for mediation in Kentucky. There are plenty of models from which to choose, and pieces and parts of each can fit together to form Kentucky's own brand of system for mediation. While there are arguments on both sides, the ADR Committee's rule seems to fit most easily in the middle of the models discussed. However, it is clear that other states have some interesting and beneficial ideas that may deserve incorporation. In any event, the time for action is now. Kentucky is already behind in this movement, and parties to disputes are the ones being harmed by this inertia. The parties are not educated in alternative dispute resolution choices to attempt to mediate before filing litigation. Therefore, it is the court's responsibility to steer them in that direction. The courts will benefit from decreased caseloads, and disputants will save time and money in court and legal fees. Statewide mediation is truly a win-win situation.

ADDENDUM

Since the writing of this Note, Kentucky has once again become proactive in its attempt to adopt a statewide rule for mediation. The drafting of this rule began through the concerted efforts of many groups, including the ADR Committee, the Rules Committee, the Board of Governors, judges, and attorneys. This rule was approved by the Board of Governors on January 8, 1999, to be sent to the Kentucky Supreme Court for review. If all goes well for the rule at the supreme court, it could be set for public hearing at the July 1999 KBA Convention. It could be adopted by the Kentucky Supreme Court as early as August 1999. This assumes that the rule passes every stage of the process.


172 See MODEL MEDIATION RULE (Kentucky Bar Ass'n Bd. of Governors, Proposal 1999) (on file with author).
The proposed rule differs in many respects from the last rules proposed and reviewed by the Kentucky Supreme Court in 1994. It is based primarily on the Jefferson County model and is envisioned to apply only to those jurisdictions adopting it by local rule. The rule, as sent to the supreme court, contains no certification requirements and no provision for a commission to oversee the process. It does allow for mandated or voluntary mediation.

The proposed rule is a very good start to “getting something on the books,” but there are still many good ideas out there which could be incorporated. It is this author’s hope that the formation of a statewide rule does not end should this rule be adopted, but that Kentucky continues to make positive progression towards a true statewide rule. This goal may have to be accomplished through the adoption of the rule as a permanent, mandatory provision and not merely as a voluntary provision to be adopted by the localities. Much inertia still exists in this state and many parties are thus being denied the opportunity to mediate.

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173 See Letter from David L. Gittleman, supra note 171.
174 See MODEL MEDIATION RULE, supra note 172.
175 See supra note 148 and accompanying text.