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## The Effects of Alternative Dispute Resolution on Access to Justice in Utah

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# THE EFFECTS OF ALTERNATIVE DISPUTE RESOLUTION ON ACCESS TO JUSTICE IN UTAH

JAMES R. HOLBROOK\*

## I. INTRODUCTION

When I was a law student in the early 1970s, the legal profession in Utah worried about how to provide low-income and poor individuals and families with meaningful access to justice. Thirty years later we are still concerned with how to provide meaningful access to justice to people with moderate incomes.<sup>1</sup> Notwithstanding this prolonged concern, this is not a success story. In the meantime, Utah has seen rapid growth in the use of both private and court-sponsored alternative dispute resolution ("ADR"), particularly mediation. This Article discusses the effects of ADR on access to justice in Utah over the last fifteen years. Thousands of cases are resolved every year in Utah by private and court-sponsored mediation and other ADR programs, and ADR utilization trends are moving up every year.<sup>2</sup> Since 1990, over 3600 lawyers and non-lawyers have received mediator training in Utah.<sup>3</sup> This Article concludes that, although ADR has a growing, positive impact on access to justice, it does not by itself satisfy the unmet needs of moderate-income, low-income or poor individuals and families for dispute resolution services in this state.

Both national and local studies (discussed below) have shown that litigation is avoided because it is perceived to be expensive, and ADR is recommended or is perceived to be a preferred way to resolve legal disputes.

In 1986 the American Bar Association ("ABA") Commission on Professionalism issued its report, "... *In the Spirit of Public Service*": A Blueprint for the Rekindling of Lawyer Professionalism.<sup>4</sup> The report stated that

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<sup>1</sup> For a detailed discussion of the daunting challenges of providing access to traditional justice in Utah, especially for the poor, see Linda F. Smith, *Access to Justice in Utah: Time for a Comprehensive Plan*, 2006 UTAH L. REV. 1117 *passim*.

<sup>2</sup> See *infra* Table 1.

<sup>3</sup> See *infra* Table 2.

<sup>4</sup> COMM'N ON PROFESSIONALISM, ABA, "... IN THE SPIRIT OF PUBLIC SERVICE": A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986), *reprinted in* 112 F.R.D. 243, 268 (1987).

“[l]itigation is seen to consume vast quantities of time and money.”<sup>5</sup> One recommendation in the report specifically encourages increased ADR education:

Law schools should expose students to promising new methods of dealing with legal problems. Thus, for example, consideration should be given to instruction in such matters as alternative methods of dispute resolution and processes of negotiation.<sup>6</sup>

The report also recommended that all segments of the bar should “[e]ncourage innovative methods which simplify and make less expensive the rendering of legal services.”<sup>7</sup>

Less than twenty years later, a landmark national study<sup>8</sup> analyzed the steadily decreasing number of cases that go to trial in American courts. According to the report, in federal district courts the percentage of civil cases reaching trial fell from 11% in 1962 to 1.8% in 2002, and the percentage of criminal cases reaching trial fell from 15% in 1962 to less than 5% in 2002. In state courts, the trends were comparable.<sup>9</sup> The author of the report concluded, “As trials diminish we find in their place increases in settlements, in disposition by summary judgment, and in diversion into Alternative Dispute Resolution.”<sup>10</sup>

At about the same time as the ABA’s report on professionalism was published, on “December 1986, the Utah Judicial Council created an ADR task force to study and assess the desirability of establishing ADR programs for the state courts in Utah.”<sup>11</sup> The task force reviewed existing court-annexed ADR programs in Utah, workloads for state trial courts, and court costs and delay,<sup>12</sup> and “determined that, in some cases, the financial and emotional costs to litigants could be reduced and the quality of the decision making process improved with development of [a court-annexed] ADR program.”<sup>13</sup> Among other things, the task force recommended utilization of court-annexed mediation, including programs for domestic relations mediation, neighborhood dispute resolution, and juvenile court diversion.<sup>14</sup>

A recent study conducted by the Utah state courts found that seventy-three percent of those surveyed said “attorney cost” was a reason for not going to court and forty-nine percent said finding an “alternate solution” was a reason that would

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<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.* at 12.

<sup>7</sup> *Id.* at 15.

<sup>8</sup> Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2002).

<sup>9</sup> *Id.* at 1.

<sup>10</sup> *Id.*

<sup>11</sup> See James R. Holbrook & Laura M. Gray, *Court-Annexed Alternative Dispute Resolution*, 21 J. CONTEMP. L. 1 (1995).

<sup>12</sup> *Id.* at 12 & n.63.

<sup>13</sup> *Id.* at 11–12.

<sup>14</sup> *Id.* at 12.

keep them from going to court; this was especially true in middle-income groups.<sup>15</sup> The remainder of this Article explores the current landscape of ADR in Utah and its impact on middle- and low-income individuals and families.

## II. ADR IN STATE COURTS IN UTAH

### A. *Historical Background*

In 1991, the Utah Legislature enacted the Alternative Dispute Resolution Act (“1991 ADR Act”) which authorized courts to refer civil cases to ADR.<sup>16</sup>

In 1994, Michael D. Zimmerman became Chief Justice of the Utah Supreme Court and chair of the Utah Judicial Council and its ADR committee; he served in these capacities until 1998.<sup>17</sup> These were crucial years for state court-annexed ADR in Utah, and Chief Justice Zimmerman exerted significant personal leadership among state court judges, members of the Utah Legislature, and members of the Utah State Bar to promote the use of ADR in state courts.

In his 1994 *State of the Judiciary* address to the Utah Legislature, Chief Justice Zimmerman said:

[W]hile Utah has experienced few of the pressures that fueled the ADR movement elsewhere, we have been studying ADR. We have concluded that it is time for Utah’s courts to move into this area. Experience has shown that even in court systems that do not have long delays, ADR offers a realistic prospect of less expensive, faster, and better solutions to citizens['] disputes than traditional court trials. During 1993, the courts worked with interested parties on legislation that will permit the implementation of a program of court-annexed alternative dispute resolution. We will seek passage of this legislation during this session.<sup>18</sup>

The Utah Legislature later repealed the 1991 ADR Act and in 1994 enacted a new Alternative Dispute Resolution Act (“1994 ADR Act”) which authorized the Utah Judicial Council to establish rules for an experimental court-annexed ADR program in state courts.<sup>19</sup> The 1994 ADR Act authorized the appointment of a director within the Utah Administrative Office of the Courts to administer state district court-annexed ADR programs and report annually to the Utah Supreme Court about the operation of those programs.<sup>20</sup>

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<sup>15</sup> VALLEY RESEARCH, INC., LEVEL OF PUBLIC TRUST AND CONFIDENCE—UTAH STATE COURTS 96 (2006). This study was prepared for the Administrative Office of the Utah State Courts.

<sup>16</sup> See Holbrook & Gray, *supra* note 11, at 12.

<sup>17</sup> Resume of Michael D. Zimmerman (on file with author).

<sup>18</sup> Michael D. Zimmerman, Chief Justice, Utah Supreme Court, *State of the Judiciary* Address 3 (Jan. 17, 1994) (on file with author).

<sup>19</sup> Holbrook & Gray, *supra* note 11, at 13.

<sup>20</sup> *Id.*

In his 1995 *State of the Judiciary* address, Chief Justice Zimmerman told the Utah Legislature that:

As of January 1, 1995, parties to civil suits in the Third and Fifth districts will be required to consider the possibility of opting for mediation or [non-binding] arbitration rather than continuing on with traditional litigation. This program was developed by the Judicial Council in conjunction with the Bar in an effort to expose the public to mechanisms for resolving private disputes that are capable of producing more enduring solutions while, at the same time, doing so more swiftly and inexpensively than traditional litigation.<sup>21</sup>

In his 1997 *State of the Judiciary* address, Chief Justice Zimmerman invited the Utah Legislature to consider a particular snapshot of Utah's judicial branch of government:

In a conference room in an office building in Tooele, you would see a mediator participating in our court-annexed alternative dispute resolution program. She would be working with the parties to settle a complex case, a case that the assigned trial judge had been told would take two weeks to try. Within an afternoon, the parties resolve the dispute. They come to an agreement that also lays the foundation for future business dealings between them.<sup>22</sup>

Chief Justice Zimmerman also told the Utah Legislature that since 1986 no new judges had been added to the Third District Court (which includes Summit, Tooele, and Salt Lake Counties, and handles fifty-seven percent of Utah's total statewide case filings).<sup>23</sup> He explained that this remarkable fact was possible in part because Utah courts had put a "court-annexed alternative dispute resolution program in place."<sup>24</sup>

In 1998, in his final *State of the Judiciary* address, Chief Justice Zimmerman described in some detail the amazing success of a juvenile-offender mediation program (which was one of six ADR programs being conducted in Utah's appellate, district, and juvenile courts that year):

The juvenile victim-offender mediation program is an . . . example of a program that we developed and later came to you for support to expand it after it showed promise. This was initiated on an experimental basis in the 3rd district juvenile court in 1996. Under that program,

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<sup>21</sup> Michael D. Zimmerman, Chief Justice, Utah Supreme Court, *State of the Judiciary Address 6* (Jan. 16, 1995) (on file with author).

<sup>22</sup> Michael D. Zimmerman, Chief Justice, Utah Supreme Court, *State of the Judiciary Address 3* (Jan. 20, 1997) (on file with author).

<sup>23</sup> *Id.* at 6.

<sup>24</sup> *Id.*

mediation is offered to the victim and the offender, generally before a judge is ever involved. The objective is to give the victim an opportunity to meet the juvenile offender and impress upon them how the crime has affected their lives. It also gives the victim a chance to play an active role in determining the restitution required and any community services to be performed.

That program proved very successful. Victims are vastly more pleased with the process than when cases are handled in the traditional manner. Surveys tell us that more than 90% of the victims participating in the program felt good about the process, a remarkable figure given that they are victims of crime. In addition, the process makes a strong, positive impact on offenders. They must sit down with their victims and understand the results of their acts in very personal terms. That has changed their subsequent behavior.

From our records, we find that when mediation is used, the offending youth is 20% less likely to reoffend than those who have not gone through mediation. And when mediation has been used to set the amount and terms of restitution to be paid, the offenders pay a higher percentage of the amount ordered, and on time.

These startlingly good results led us last year to ask for funding for one staff person to expand the program. You gave us that funding, and with that support staff person, we have been able to secure the services of volunteer mediators, allowing the program to be taken statewide. Obviously, if these results hold up over time, this program has great potential for getting youth out of the juvenile court system sooner, and keeping them out. It also has the added advantage of giving victims a much greater sense that the system cares about them, and that they are an integral part of the process.

The Alternative Dispute Resolution program I have just described is only one of six ADR programs that we are presently conducting in the appellate, district and juvenile courts, all of which show considerable promise. The bulk of these programs have been initiated without additional funding through the use of existing staff and volunteers.<sup>25</sup>

In his 1998 *State of the Judiciary* address, Chief Justice Zimmerman also warned the Utah Legislature of a growing problem that ultimately would affect access to justice in Utah courts:

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<sup>25</sup> Michael D. Zimmerman, Chief Justice, Utah Supreme Court, *State of the Judiciary* Address 4-5 (Jan. 19, 1998), available at <http://www.utcourts.gov/resources/reports/statejudiciary/state98.htm>.

Let me take a minute and reflect on another . . . emerging issue which I think will eventually be of great importance to the judiciary and the legislature, not necessarily this year or next, but certainly in the foreseeable future.

This is the challenge posed by the sharp increase in pro se litigants: this is, people representing themselves in civil matters. These cases are of various types, from divorce, abuse protective orders, custody and visitation, to contract and torts. In Utah, currently one in every five civil cases is filed pro se. . . . This trend is partly driven by economics—the cost of lawyers—and partly by a desire of people to handle their disputes themselves. Direct participation gives them more understanding and more control over the process and the outcome. This same desire to participate directly is also one of the things that is fueling the growth in our ADR programs.

Direct participation presents problems, however. Courts are structured to operate with lawyers representing the parties, which permits the court personnel and judges to act as detached participants in the litigation process. In such a scenario, lawyers who understand the intricacies of the law and the procedures can be counted on to advise the clients, advocate their positions, and get them through the process. The presence of large numbers of pro se litigants is fundamentally inconsistent with this system. Their lack of understanding of procedure and the law raises the prospect of the pro se litigant losing not on the merits of their case, but on technical grounds. Also, their lack of knowledge also means that they make many missteps and require help through the process from court employees.

I have no doubt that the judiciary has a clear responsibility to accommodate these people seeking to assert their legal rights.

We have made efforts. In 1995, we placed five QuickCourt kiosks around the state to permit people to prepare their own pleadings in some types of matters . . . .

This year, we are asking for legislation that will permit us to make these same services more widely available over the Internet. In addition, we are making ADR available in more forums, which should help meet the needs of these litigants for understandable, sound, and accessible dispute resolution processes . . . .

The long-range implications of this increase in pro se civil litigation is that it will bog the courts down, retarding the processing of all types of cases. Already, I hear judges complaining about how they have to act as

lawyers for these pro se litigants, and how this slows down their calendars . . . .

Whatever steps are taken to accommodate this trend, it is sure to have substantial cost implications. And this is an area where there [are] no real options for the courts or the legislature. . . . [I]n the area of pro se litigation, regardless of what you do or do not do to facilitate access, the public will make its own demands on the court system.<sup>26</sup>

In the late 1990s, Utah Court of Appeals Judges Norman H. Jackson and Michael J. Wilkins became interested in offering appellate mediation to parties within their court. Specifically, they looked for guidance from the United States Court of Appeals for the Tenth Circuit, which had already established an appellate mediation program.<sup>27</sup> In 1998, with the help of the Utah Legislature<sup>28</sup> and other Utah Court of Appeals judges, the Appellate Mediation Office was created. The Appellate Mediation Office employed staff mediators who provided mediation services to the parties free of charge.<sup>29</sup>

In 2001, the Utah Legislature requested that the Utah Supreme Court study the accessibility of legal services in the state.<sup>30</sup> The Supreme Court created a Study Committee on the Delivery of Legal Services which issued a report to the Supreme Court on September 5, 2002.<sup>31</sup> One of twelve agenda topics studied by the committee was “[m]ediation and arbitration, including court annexed, private, and mandatory.”<sup>32</sup> Specifically, the report stated:

The Committee also strongly recommends that increased emphasis and public support be given to providing alternative forms of dispute resolution . . . . To these ends, the Committee concludes that incentives for greater use of alternative forms of dispute resolution (“ADR”), both inside and outside the courthouse, is good public policy. In particular, legal support for the confidentiality of mediation, consideration of

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<sup>26</sup> *Id.* at 7–9.

<sup>27</sup> *See* 10TH CIR. R. 33.

<sup>28</sup> UTAH CODE ANN. § 78-2a-6 (2004) (protecting records of the Appellate Mediation Office, creating disclosure rules, and removing liability for staff acting as mediators).

<sup>29</sup> E-mail from Michele Mattsson, Appellate Court Mediator, Utah Court of Appeals Appellate Mediation Office, to James R. Holbrook, Clinical Professor of Law, Univ. of Utah S.J. Quinney Coll. of Law (July 4, 2006) (on file with author).

<sup>30</sup> H.B. 2003, 2001 Leg., 2d Spec. Sess. (Utah 2001), *available at* <http://www.le.state.ut.us/~2001s2/bills/hbillenr/hb2003.pdf>.

<sup>31</sup> *See* SUPREME COURT STUDY COMM. ON THE DELIVERY OF LEGAL SERVS., REPORT TO THE UTAH SUPREME COURT (2002), <http://www.utcourts.gov/resources/reports/Reportfinal2a.htm>.

<sup>32</sup> *Id.*



mandated ADR, and accessibility of ADR services deserve additional consideration and support.<sup>33</sup>

Nine mediation programs in the state were included in the committee's listing of "programs and activities that may already be working to improve the conditions considered by the Committee."<sup>34</sup> The report recommended that "[t]he Legislature should be requested to consider . . . the potential benefits and costs of increased government funding of alternative forms of dispute resolution, including mediation and arbitration."<sup>35</sup> Since this report, Utah State Courts, at every level, have continued to implement and improve access to mediation.

### *B. ADR Programs in Utah State District Courts*

The Utah state district courts currently have the following ADR programs that are supervised by the Director of the State Court-Annexed ADR Program:<sup>36</sup>

*Court-Annexed ADR Program.* For civil cases filed in district courts, parties and their counsel are required to view a videotape about mediation and non-binding arbitration and file a notice with the court before the first pre-trial conference certifying that they will consider using mediation or arbitration to resolve their case.

*Domestic Mediation Program.* This program was created pursuant to section 30-3-39 of the Utah Code<sup>37</sup> and is now available in every district in the state. If, after the filing of an answer to a divorce complaint there are any remaining contested issues, the parties shall participate in good faith in at least one session of mediation. The cost of mediation is to be divided equally between the parties. If parties are unable to afford a mediator, the state court ADR Director will appoint a qualified domestic mediator to serve pro bono. Of the 3339 cases mediated in this program in 2005, eighty percent were resolved.<sup>38</sup>

*Parent-Time or Co-Parenting (Visitation) Mediation Program.* This program was created pursuant to section 30-3-38 of the Utah Code<sup>39</sup> and initially implemented in the Third District Court. All disputed parent-time

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> The descriptions of these programs are from the 2000 annual report of the director of the State Court-Annexed ADR Program. *See* STATE COURT-ANNEXED ADR PROGRAM, ANNUAL REPORT (2000) (on file with author). Information about the district courts in which ADR programs are available is from the 2005 annual report of the director. *See* STATE COURT-ANNEXED ADR PROGRAM, ANNUAL REPORT (2005) (on file with author).

<sup>37</sup> UTAH CODE ANN. § 30-3-39 (Supp. 2006) (establishing a mandatory domestic mediation program).

<sup>38</sup> *See infra* Table 1.

<sup>39</sup> UTAH CODE ANN. § 30-3-38 (establishing a pilot program for expedited parent-time enforcement).

(visitation) matters are automatically referred to mediation. Private professionals provide mediation services at cost to the parties. The court provides mediation services at no cost to impecunious parties. This program is a pilot program in the Third District Court. Of the 305 cases mediated in this program in 2005, seventy-two percent were resolved.<sup>40</sup>

*Juvenile Court Victim-Offender Mediation Program.* This program gives victims of juvenile crime an opportunity to meet their offenders and express the impact that the crimes have had on their lives. It also gives victims a more active role in the justice process in determining restitution and ways for offenders to help restore the community. Trained volunteer mediators from the community provide mediation services at no cost. This program is available in the First, Second, Third, Fourth, and Fifth District Courts. Of the 1625 cases mediated in this program in 2005, eighty percent were resolved.<sup>41</sup>

*Child Welfare Mediation Program.* This program provides cooperation among families, attorneys, state agencies, and the juvenile court in serving the best interests of children, while negotiating parental treatment plans and placement of children. Mediation services are provided by full-time staff mediators and a caseload coordinator. This program is available statewide in all district courts. Of the 870 cases mediated in this program in 2005, sixty-seven percent were fully resolved and eleven percent were partially resolved.<sup>42</sup>

*Landlord-Tenant Mediation Program.* This program provides mediation services to landlords and tenants involved in eviction proceedings. The program utilizes trained volunteer mediators. This program is available in the Third District Court. Of the 321 cases mediated in this program in 2005, seventy-six percent were resolved.<sup>43</sup>

*Truancy Mediation Program.* This program began as a collaboration between courts and the Jordan School District in Salt Lake County to provide mediation services in truancy cases to attempt to divert those cases from the juvenile court system. The program utilizes trained volunteer mediators. This program is now available in the First, Second, Third, Fifth, and Sixth District Courts. Of the 250 cases mediated in this program in 2005, seventy-five percent were resolved and diverted from juvenile court.<sup>44</sup>

*Small Claims Mediation Program.* This program is a collaboration with Utah Dispute Resolution. Disputants in small claims cases are given the opportunity to mediate their case prior to trial. The program utilizes trained volunteer mediators. This program is available in the Second, Third, and

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<sup>40</sup> See *infra* Table 1.

<sup>41</sup> See *infra* Table 1.

<sup>42</sup> See *infra* Table 1.

<sup>43</sup> See *infra* Table 1.

<sup>44</sup> See *infra* Table 1.

Fourth District Courts. Of the 660 cases mediated in this program in 2005, sixty-four percent were resolved.<sup>45</sup>

*Probate Mediation Program.* All probate disputes assigned to judges in the Matheson Courthouse in the Third District Court not resolved by the law and motion judge are referred to mediation before trial. No statistical data were available for this program.<sup>46</sup>

### C. Appellate Mediation in the Utah Court of Appeals

Utah Rule of Appellate Procedure 28A<sup>47</sup> governs appellate mediations. Cases at the Utah Court of Appeals are randomly selected for mediation early in the process, though some cases are referred after briefing is underway. Parties and counsel receive an order from the presiding judge of the court requiring them to participate in a mediation on a given day. Participation is mandatory but, as in all mediations, settlement is only by agreement of the parties.<sup>48</sup> Agreements must be reduced to a writing to be enforceable. Over fifty percent of the cases mediated in the appellate mediation program settle, which is remarkable considering that a decision already has been rendered by the trial court in favor of one party. Cases in the Utah Supreme Court may be mediated by the Appellate Mediation Office with the Utah Supreme Court's permission.<sup>49</sup>

### III. COURT-ANNEXED ADR IN FEDERAL DISTRICT COURT IN UTAH

In Utah, the United States District Court's ADR program began in 1989 when the court was selected as one of ten courts authorized to use non-binding arbitration in a pilot program as an alternative to litigation.<sup>50</sup> The next year, Congress enacted the Civil Justice Reform Act of 1990, which required all federal district courts to develop and implement a plan ("ADR Plan") to "improve litigation management and ensure just, speedy, and inexpensive resolutions of civil disputes."<sup>51</sup> In 1991, the chief judge of the U.S. District Court for the District of Utah appointed an ADR subcommittee to make recommendations to the court regarding use of court-annexed ADR.<sup>52</sup> After studying the ADR programs used in other courts, the ADR subcommittee recommended that the court draft local court rules to implement an ADR program using voluntary mediation and non-binding arbitration.<sup>53</sup>

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<sup>45</sup> See *infra* Table 1.

<sup>46</sup> See *infra* Table 1.

<sup>47</sup> UTAH R. APP. P. 28A, available at <http://www.utcourts.gov/resources/rules/urap/28a.htm> (last visited Sept. 21, 2006).

<sup>48</sup> *Id.* at R. 28A(d).

<sup>49</sup> Mattsson, *supra* note 29.

<sup>50</sup> Holbrook & Gray, *supra* note 11, at 5.

<sup>51</sup> 28 U.S.C. § 471 (2000).

<sup>52</sup> Holbrook & Gray, *supra* note 11, at 6.

<sup>53</sup> *Id.*

Under what is now local rule DUCivR 16-2<sup>54</sup> and the court's ADR Plan,<sup>55</sup> the United States District Court for the District of Utah offers most civil litigants the option to elect either voluntary mediation or non-binding arbitration at a small fee to the parties. This means that the parties in a civil case choose whether they want to use mediation or arbitration instead of litigation and that all parties to the action must agree to use ADR in order to utilize the program.<sup>56</sup> Parties select their mediator or arbitrator from a list of experienced attorneys that the court has appointed to serve as neutral intermediaries.<sup>57</sup> If mediation is unsuccessful or a party to a completed arbitration is dissatisfied with the award and files for a trial de novo, the case is returned to the litigation track and the assigned judge knows nothing about the mediation or arbitration proceedings except that they were unsuccessful.<sup>58</sup>

About fifty cases per year are referred to mediation in the federal court. About sixty-five percent of these cases settle during mediation, and another fifteen to twenty percent settle between mediation and trial. The court also recently has begun using judicial settlement conferences conducted by magistrate judges as part of the court's ADR program.<sup>59</sup>

#### IV. ADR IN UTAH STATE GOVERNMENT AGENCIES

##### *A. Historical Background*

In 2001, the Utah Legislature passed the Government Dispute Resolution Act<sup>60</sup> that gave Utah governmental agencies broad authorization to develop and adopt ADR procedures and use ADR to resolve "any dispute, issue, or controversy involving any of the agency's operations, programs, or functions."<sup>61</sup>

In July 2001, Governor Michael O. Leavitt's chief of staff, Rich McKeown, submitted a \$75,000 grant request to The William and Flora Hewlett Foundation ("Hewlett Foundation") for the establishment of a statewide mediation effort for all of Utah's state agencies to assess, evaluate, and implement the use of mediation and ADR mechanisms in state government, both internally within state agencies

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<sup>54</sup> D. UTAH R. PRAC. 16-2, *available at* <http://www.utd.uscourts.gov/documents/05rules.html>.

<sup>55</sup> United States District Court for the District of Utah, Alternative Dispute Resolution Plan (Jan. 28, 2005), <http://www.utd.uscourts.gov/documents/05rules.html#Alternative>.

<sup>56</sup> Holbrook & Gray, *supra* note 11, at 8.

<sup>57</sup> United States District Court for the District of Utah, ADR Program, <http://www.utd.uscourts.gov/documents/adrrpage.html> (last visited Sept. 21, 2006).

<sup>58</sup> Holbrook & Gray, *supra* note 11, at 9.

<sup>59</sup> E-mail from Michelle Roybal, Dir. of Fed. Court ADR Program, to James R. Holbrook, Clinical Professor of Law, Univ. of Utah S.J. Quinney Coll. of Law (June 27, 2006) (on file with author).

<sup>60</sup> UTAH CODE ANN. §§ 63-46c-101 to -104 (2004).

<sup>61</sup> *Id.* § 63-46c-103(1).

and externally between state agencies or between citizens and state agencies.<sup>62</sup> The grant proposal included convening a mediation council having one representative from each state agency, assessing the need and availability of ADR services in each agency, and developing a plan to provide mediation services in each agency.<sup>63</sup> In December 2001 the Hewlett Foundation authorized the grant of \$75,000 to Utah for a statewide mediation program for all state agencies.<sup>64</sup>

In 2002 Governor Leavitt created the ADR Council in the executive branch of state government and appointed Palmer DePaulis to serve as chair.<sup>65</sup> The council was comprised of a representative from each agency of government and charged with changing the culture of interaction between government and citizens by reducing conflicts through the use of ADR, especially mediation.<sup>66</sup>

In early 2003 the ADR Council selected two pilot programs (one for the Office of Licensing in the Utah Department of Human Services and the other for the Career Service Review Board in the Utah Department of Human Resource Management (the "DHRM Mediation Program")) and created a legislative advisory group and a community advisory group.<sup>67</sup>

On May 7, 2003, Governor Leavitt issued an Executive Order—*Integrating Alternative Dispute Resolution (ADR) into State Government*.<sup>68</sup> The purpose of the order "is to facilitate and enhance the use of ADR in state government with a view to improving services to the public and avoiding unnecessary and costly litigation."<sup>69</sup> The order officially created the ADR Council with a mission to evaluate, implement, and improve ADR systems in each state agency.<sup>70</sup> By

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<sup>62</sup> Letter from Michael O. Leavitt, Governor, State of Utah, to Terry Amsler, Program Officer, The William and Flora Hewlett Found. (July 19, 2001), <http://www.tax.utah.gov/adr/handouts/govgrantletter.html>.

<sup>63</sup> *Id.*

<sup>64</sup> Letter from Paul Brest, The William and Flora Hewlett Found., to Rich McKeown, Chief of Staff to Governor Michael O. Leavitt (Dec. 31, 2001) (on file with author).

<sup>65</sup> SUSAN BRADSHAW, ALTERNATIVE DISPUTE RESOLUTION 2 (2005) (on file with author).

<sup>66</sup> Letter from Palmer DePaulis, Chair of the Utah ADR Council, to Terry Amsler, Program Dir., The William and Flora Hewlett Found. (Mar. 31, 2003) (on file with author).

<sup>67</sup> *Id.*

<sup>68</sup> Exec. Order, *Integrating Alternative Dispute Resolution (ADR) into State Government*, UTAH ST. BULL., June 1, 2003, at 1, available at [http://www.rules.utah.gov/publicat/bull\\_pdf/2003/b20030601.pdf](http://www.rules.utah.gov/publicat/bull_pdf/2003/b20030601.pdf).

<sup>69</sup> *Id.* at 2.

<sup>70</sup> *Id.* at 1–2.

December 2003 two mediator training programs were conducted<sup>71</sup> by a consultant who trained over forty state employees as mediators.<sup>72</sup>

On December 22, 2004, Governor Olene S. Walker issued her own Executive Order—*Integrating Dispute Resolution into State Government*.<sup>73</sup> This order included new language emphasizing that ADR was the preferred conflict-resolution option in state government: “The purpose of this order is intended to facilitate the use of ADR in state government as the preferred option to reduce unnecessary and costly litigation.”<sup>74</sup> Shortly thereafter, in the 2005 General Session, the Utah Legislature adopted Senate Joint Resolution 3 urging state and local government entities to use ADR “as a preferred option of preventing and resolving conflicts, reducing litigation costs, and resolving disputes.”<sup>75</sup>

In 2005, the DHRM Mediation Program and the Department of Workforce Services Mediation Program successfully mediated ten disputes, “saving the state \$18,500 in formal hearing fees.”<sup>76</sup>

#### B. ADR in the Utah State Tax Commission

The Utah State Tax Commission has responsibility to hear administrative appeals for all tax matters including locally- and centrally-assessed property. The Commission traditionally has used a two-step administrative appeals process to decide tax appeals. First, a tax appeal is scheduled for an informal, off-the-record proceeding called an “initial hearing” conducted by a tax commissioner or a Tax Commission administrative law judge (“ALJ”). If the administrative decision issued after the initial hearing fails to resolve the dispute, either party may request a “formal hearing” which is an adjudicative (i.e., adversarial and evidentiary) proceeding to decide the tax appeal.<sup>77</sup>

Although Utah tax law does not expressly contemplate the Commission using ADR procedures to handle tax appeals, state law authorizes the Tax Commission to use the initial hearing to “take any action it deems appropriate to settle,

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<sup>71</sup> Descriptions of the mediator training for ADR pilot programs are available on the Utah ADR Council website. ADR Council, State of Utah Mediator Training for ADR Pilot Programs (Sept. 11, 2003), [http://www.tax.utah.gov/adr/handouts/09\\_11\\_2003\\_05.pdf](http://www.tax.utah.gov/adr/handouts/09_11_2003_05.pdf); ADR Council, State of Utah Mediator Training for ADR Pilot Programs (Oct. 9, 2003), [http://www.tax.utah.gov/adr/handouts/10\\_09\\_2003\\_03.pdf](http://www.tax.utah.gov/adr/handouts/10_09_2003_03.pdf).

<sup>72</sup> Letter from Palmer DePaulis, Chair of the Utah ADR Council, to Terry Amsler, Program Dir., The William and Flora Hewlett Found. (Dec. 31, 2003) (on file with author).

<sup>73</sup> Exec. Order, No. 2004-0013, UTAH ST. BULL., Jan. 1, 2005, at 1, *available at* [http://www.rules.utah.gov/publicat/bull\\_pdf/2005/b20050101.pdf](http://www.rules.utah.gov/publicat/bull_pdf/2005/b20050101.pdf).

<sup>74</sup> *Id.* at 3.

<sup>75</sup> S.J. Res. 3, 2005 Leg., Gen. Sess. (Utah 2005), *available at* <http://www.le.state.ut.us/~2005/bills/sbillenr/sjr003.pdf>.

<sup>76</sup> BRADSHAW, *supra* note 65, at 10.

<sup>77</sup> JAMES HOLBROOK & DREW BRINEY, REPORT ON THE UTAH STATE TAX COMMISSION’S MEDIATION CONFERENCE PROGRAM EVALUATION 5 (1999) (on file with author).

compromise, or reduce the deficiency, or adjust the assessed valuation of any property.”<sup>78</sup> With this authority, the Tax Commission in 1997 began to study using mediation in lieu of an initial hearing. As part of this study, Tax Commissioners and Commission ALJs in December 1997 received eight hours of basic mediator skills training to become familiar with mediation.<sup>79</sup>

In early 1998 the Commission decided to make mediation available to parties who voluntarily elect to participate in a mediation conference. After filing a tax appeal, parties receive a notice of mediation conference along with an explanation of the program. Either party may opt out of mediation by filing a hearing request. If either party opts out, the appeal proceeds to the adjudicative process of a formal hearing.<sup>80</sup>

Tax Commission ALJs serve as mediators—without charge to the parties—for the vast majority of mediation conferences, although parties have the right to hire outside mediators at their own expense if they choose to do so.

About 3500 tax appeals are filed with the commission each year. In fiscal year 2005, the Tax Commission had about 600 cases enter mediation and about eighty-nine percent of those cases settled.<sup>81</sup> If the parties are successful in resolving a tax appeal in the mediation conference, they and the Commission avoid the need for formal hearing. This saves valuable time and conserves both private and public resources, because a formal hearing generally takes from thirty to sixty minutes to complete. Moreover, in the formal hearing, taxpayers also bear the burden of proving that their property has been assessed incorrectly. Taxpayers rarely have the necessary experience or information to meet this burden without professional representation.<sup>82</sup> A study conducted in 2005 revealed a cost savings of \$58,848 because the Tax Commission effectively used ADR.<sup>83</sup>

### C. ADR in the Utah Department of Labor

The Utah Department of Labor utilizes ADR to resolve disputes in two different programs, the Workers Compensation Claims Resolution Program and the Anti-Discrimination and Labor Division Program (“UALD”). The UALD mediates claims involving discrimination in employment, housing, and wages. In 2004 the Workers Compensation Claims Resolution Program settled 870 cases through mediation, with a cost savings of \$136,000.<sup>84</sup> In 2004 the UALD

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<sup>78</sup> UTAH CODE ANN. § 59-1-502.5 (2004).

<sup>79</sup> HOLBROOK & BRINEY, *supra* note 77, at 5.

<sup>80</sup> *Id.*

<sup>81</sup> E-mail from Palmer DePaulis, former Comm’r, Utah State Tax Comm’n, to James R. Holbrook, Clinical Professor of Law, Univ. of Utah S.J. Quinney Coll. of Law (Aug. 21, 2006) (on file with author).

<sup>82</sup> HOLBROOK & BRINEY, *supra* note 77, at 5–6.

<sup>83</sup> BRADSHAW, *supra* note 65, at 7.

<sup>84</sup> *Id.* at 8.

conducted 270 mediations and resolved seventy-six percent of these cases, with a cost savings of \$41,995.<sup>85</sup>

*D. Private Property Ombudsman in the Utah Department of Natural Resources*

In 1997 the Utah Legislature created the position of private property ombudsman in the Utah Department of Natural Resources.<sup>86</sup> The Private Property Ombudsman was “an attorney hired by the state to assist property owners, state agencies, and local governments with issues related to constitutional property rights.”<sup>87</sup> The ombudsman could provide information, facilitate conciliation, assist in negotiation, serve as a mediator, express an opinion, and arrange arbitration.<sup>88</sup> In 2003 (the last year for which statistics are publicly available<sup>89</sup>), the ombudsman’s office received about 600 requests for advice or assistance with a property rights matter.<sup>90</sup> Of those who inquired, 462 were private property owners. The ombudsman discussed the concerns of about 250 of these owners with the government entities involved. One hundred forty of these matters were resolved by relaying information between the parties; in most of these, there was a valid justification for the government action and no question of constitutional property rights existed, or the government agency or municipality moved quickly to correct a legitimate problem and resolve the concern.<sup>91</sup> Another ninety cases included valid questions of property rights and just compensation, many of which were resolved by mediation, and thirteen resulted in formal arbitration.<sup>92</sup> A study conducted in 2005 revealed a cost savings of \$150,000 because the Department of Natural Resources effectively used ADR.<sup>93</sup>

In 2006 the Utah Legislature moved the Private Property Ombudsman to the Department of Commerce by creating the office of the property rights ombudsman in that department.<sup>94</sup> The purpose of the office is to assist state agencies, local governments, and real property owners with regard to constitutional takings

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<sup>85</sup> *Id.*

<sup>86</sup> H.B. 64, 1997 Leg., Gen. Sess. (Utah 1997) (codified at UTAH CODE ANN. § 63-43-13 (repealed 2006)). The role of the Property Rights Ombudsman is now described in sections 13-43-101 to -206 of the Utah Code. *See also* CRAIG M. CALL, PRIVATE PROPERTY OMBUDSMAN’S REPORT ON PRIVATE PROPERTY 1 (2003), *available at* [http://www.utahpropertyrights.com/annual\\_report.htm](http://www.utahpropertyrights.com/annual_report.htm).

<sup>87</sup> CALL, *supra* note 86, at 2.

<sup>88</sup> *Id.*

<sup>89</sup> E-mail from Craig M. Call, Utah Prop. Rights Ombudsman, to James R. Holbrook, Clinical Professor of Law, Univ. of Utah S.J. Quinney Coll. of Law (Aug. 30, 2006) (on file with author).

<sup>90</sup> CALL, *supra* note 86, at 4.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 5.

<sup>93</sup> BRADSHAW, *supra* note 65 at 9.

<sup>94</sup> S.B. 268, 2006 Leg., Gen. Sess. (Utah 2006) (to be codified at UTAH CODE ANN. § 13-43-201).



issues.<sup>95</sup> If requested by a private property owner, the office of the property rights ombudsman shall mediate, or conduct or arrange arbitration for, disputes between private property owners and government entities that involve takings or eminent domain issues and other related matters.<sup>96</sup>

#### *E. ADR in the Utah Department of Transportation*

In 2000 the Motor Carrier Division of the Utah Department of Transportation (“UDOT”) implemented reconciliation conferences as a step before formal hearings. Since that time, no disputes have proceeded past the reconciliation conferences to formal hearings. A study conducted in 2005 revealed a cost savings of \$20,000 because UDOT effectively used ADR.<sup>97</sup>

### V. UTAH DISPUTE RESOLUTION

Utah Dispute Resolution (“UDR”) was established in 1991 to provide residents of Utah with quality mediation services, information, and training in dispute resolution, and the means to successfully, informally, and cooperatively resolve disputes. UDR has operated as a 501(c)(3) non-profit corporation since 1997. The organization serves low-income residents throughout Utah from its office in the Utah State Bar’s Law and Justice Center in Salt Lake City.<sup>98</sup>

UDR relies on volunteers to carry out its mission. Trained volunteer mediators contribute their time without compensation to assist disputing parties address a wide range of issues from family, relationship, and youth peer-to-peer disagreements to consumer complaints, employment grievances, and community conflict. Volunteers also assist a small staff of professionals with case management, training, and special projects.<sup>99</sup> UDR provides several mediation programs, including:

*Family Mediation Program.* This program provides mediation services to low-income clients who need assistance with divorce, separation, parenting, and family issues. Bilingual staff and volunteers provide services in Spanish when necessary.

*Small Claims Mediation Program.* This program provides mediation to litigants in Salt Lake City, West Jordan, West Valley City, Bountiful, and Taylorsville prior to their small claims hearings.

*Community Mediation Program.* This program provides mediation services for low-income clients who need assistance with a variety of disputes, including landlord/tenant, consumer/merchant, debt/loan,

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<sup>95</sup> UTAH CODE ANN. § 13-43-203 (Supp. 2006).

<sup>96</sup> *Id.* § 13-43-204(1)(a).

<sup>97</sup> BRADSHAW, *supra* note 65, at 3.

<sup>98</sup> E-mail from Nancy McGahey, Executive Dir., Utah Dispute Resolution, to James R. Holbrook, Clinical Professor of Law, Univ. of Utah S.J. Quinney Coll. of Law (Aug. 30, 2006) (on file with author).

<sup>99</sup> *Id.*

medical/dental, insurance, contract, employment, property, neighbor, and parent/teen issues.

*Youth Mediation Program.* UDR develops and delivers training on mediation and conflict management skills for students at the Horizonte Technical and Training Center as part of a life skills curriculum. Student mediators from this program mediate disputes between students at Salt Lake City Peer Court.<sup>100</sup> In these programs from May 1998 through June 2006, UDR mediated 5588 disputes of which 3691 were either fully or partially resolved.<sup>101</sup>

UDR also develops and delivers forty-hour basic and thirty-two to forty-hour advanced domestic training for mediators. UDR's mediator training programs are approved by the Administrative Office of the Courts.<sup>102</sup> From 1998 through June 2006, UDR has trained 806 mediators.<sup>103</sup>

#### VI. UTAH RULE OF PROFESSIONAL CONDUCT 2.4(C)

Effective November 1, 2006, the Utah Supreme Court adopted Utah Rule of Professional Conduct 2.4(c), which provides that:

- (c) A lawyer serving as a mediator in a mediation in which the parties have fully resolved all issues:
  - (1) may prepare formal documents that memorialize and implement the agreement reached in mediation;
  - (2) shall recommend that each party seek independent legal advice before executing the documents; and
  - (3) with the informed consent of all parties confirmed in writing, may record or file the documents in court, informing the court of the mediator's limited representation of the parties for the sole purpose of obtaining such legal approval as may be necessary.<sup>104</sup>

This rule change permits a lawyer-mediator to draft legally binding documents and file them with a court, jointly representing the parties in their common goal of obtaining judicial approval of their resolved issues.<sup>105</sup> For example, divorcing parties who retain a lawyer-mediator and who fully resolve in mediation all issues about their divorce can have the lawyer-mediator file in court the legal pleadings necessary for them to obtain a decree of divorce and obtain other agreed-to relief.

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *See infra* Table 2.

<sup>104</sup> UTAH RULES OF PROF'L CONDUCT R. 2.4(c) (2006), *available at* <http://www.utcourts.gov/resources/rules/approved/2006/11/RPC02.04.pdf>.

<sup>105</sup> *See id.* R. 2.4(c) cmt. 5a.

## VII. CONCLUSION

Thousands of cases are resolved every year in Utah by private and court-sponsored mediation and other ADR programs, and ADR utilization trends are moving up every year.<sup>106</sup> Since 1990, over 3600 lawyers and non-lawyers have received mediator training in Utah.<sup>107</sup> Clearly, ADR has a growing positive impact on access to justice in this state. However, it is just as clear that ADR by itself does not satisfy the huge and growing unmet needs of moderate-income, low-income, and poor people for dispute resolution services in this state.<sup>108</sup>

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<sup>106</sup> See *infra* Table 1.

<sup>107</sup> See *infra* Table 2.

<sup>108</sup> See Smith, *supra* note 1, at 1182–83.

TABLE 1

Utah State Court-Annexed ADR Cases and Resolutions Reported for 2000 through 2005 <sup>109</sup>						
Program	2000	2001	2002	2003	2004	2005
Court-Annexed ADR	2159 cases 79% resolved	2526 cases 79% resolved	2465 cases 74% resolved	No data separately reported	No data separately reported	No data separately reported
Domestic Mediation	No data separately reported	No data separately reported	No data separately reported	1707 cases 84% resolved	2026 cases 82% resolved	3339 cases 86% fully or partially resolved
Parent-Time (Visitation) Mediation	238 cases 52% resolved 24% partially resolved	298 cases 56% resolved 21% partially resolved	309 cases 54% resolved 23% partially resolved	251 cases 50% resolved 31% partially resolved	403 cases 75% resolved	305 cases 72% fully or partially resolved
Juvenile Victim-Offender Mediation	425 cases 93% resolved	205 cases 98% resolved	297 cases 98% resolved	171 cases 80% resolved	123 cases Over 80% resolved	162 cases Over 80% resolved
Child Welfare Mediation	489 cases 65% resolved 17% partially resolved	524 cases 66% resolved 24% partially resolved	615 cases 69% resolved 19% partially resolved	696 cases 72% resolved 10% partially resolved	659 cases 72% resolved 11% partially resolved	870 cases 67% resolved 11% partially resolved
Landlord-Tenant Mediation	90 cases 91% resolved	110 cases 95% resolved	117 cases 93% resolved	159 cases 80% resolved	346 cases 76% resolved	321 cases 76% resolved
Truancy Mediation	156 cases 79% resolved 124 diverted	189 cases 87% resolved 164 diverted	154 cases 87% resolved	176 cases 75% resolved and diverted	306 cases 75% resolved and diverted	250 cases 75% resolved and diverted

<sup>109</sup> The data included in this table come from the annual reports prepared by the Director of the Utah State Court-Annexed ADR Program. See sources cited *supra* note 36. Comparable data for the years prior to 2000 are either unavailable or were reported in a different format that is inconsistent with that used from 2000 through 2005. The data reported by the director do not include cases and resolution percentages by private mediators who do not belong to the state court mediator roster and, therefore, do not report their mediations to the director.

Small Claims Mediation	503 cases 73% resolved	No data reported	537 cases 62% resolved	923 cases 68% resolved	979 cases 63% resolved	660 cases 64% resolved
Probate Mediation	No data reported	No data reported	No data reported	No data reported	No data reported	No data reported

TABLE 2

Mediator Training Program	Trainees
Univ. of Utah Dept. of Communication—Conflict Resolution Certificate Program courses (1990–2006)	378 <sup>110</sup>
Univ. of Utah Dept. of Family and Consumer Studies Mediator training courses (1994–2006)	728 <sup>111</sup>
Univ. of Utah S.J. Quinney College of Law Mediation courses (1993–2006)	450 <sup>112</sup>
Univ. of Utah Division of Continuing Education—Mediator training courses (1994)	60 <sup>113</sup>
Utah Dispute Resolution—Mediator training courses (1998–June 2006)	806 <sup>114</sup>
BYU J. Reuben Clark Law School—Mediation courses (1997–2006)	480 <sup>115</sup>
Comm. Dispute Resolution Services—Mediator training courses (1998–2006)	297 <sup>116</sup>
U.S. Arbitration & Mediation of Utah—Mediator training courses (1988 & 1993)	30 <sup>117</sup>
Utah Anti-Discrimination and Labor Division Alternative Dispute Resolution Pro Bono Panel Training (1994)	25 <sup>118</sup>
U.S. District Court for the District of Utah—Mediator training course (1993)	20 <sup>119</sup>
U.S. Bankruptcy Court for the District of Utah—Mediator training course (1996)	20 <sup>120</sup>
Utah Association of Realtors—Mediator training course (1995)	20 <sup>121</sup>

<sup>110</sup> The information was prepared by Michelle Hawes and is on file with the author.

<sup>111</sup> The information was prepared by the University of Utah Department of Family and Consumer Studies and is on file with the author.

<sup>112</sup> The author has taught or co-taught fourteen semester-long ADR and mediator training courses and estimates there have been 450 total trainees.

<sup>113</sup> The author co-taught three four-day courses and estimates there were sixty total trainees.

<sup>114</sup> The information was prepared by Nancy McGahey and is on file with the author.

<sup>115</sup> The information was prepared by Susan Bradshaw and is on file with the author.

<sup>116</sup> The information was prepared by Tamara Fackrell and is on file with the author.

<sup>117</sup> The author co-taught two two-day courses and estimates there were thirty total trainees.

<sup>118</sup> The author co-taught one two-day course and estimates there were twenty-five trainees.

<sup>119</sup> The author co-taught one two-day course and estimates there were twenty trainees.

<sup>120</sup> The author co-taught one one-day course and estimates there were twenty trainees.

<sup>121</sup> The author co-taught one two-day course and estimates there were twenty trainees.

Transition Management, Inc.—The Effective Mediator Courses (1995–1998)	100 <sup>122</sup>
Utah State Administrative Office of the Courts Basic Mediation Training for Justice Court Judges course (1995)	20 <sup>123</sup>
Utah State Tax Commission—ADR & basic mediator training courses (1997–1998)	40 <sup>124</sup>
Utah State Government Alternative Dispute Resolution Pilot Project Mediator Training courses (2003)	70 <sup>125</sup>
Salt Lake County Government—Mediator training courses (2006)	40 <sup>126</sup>

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<sup>122</sup> The author co-taught seven four-day courses and estimates there were one hundred total trainees.

<sup>123</sup> The author co-taught one two-day course and estimates there were twenty trainees.

<sup>124</sup> The author co-taught two courses and estimates there were forty total trainees.

<sup>125</sup> The author co-taught three four-day courses and estimates there were seventy total trainees.

<sup>126</sup> The author co-taught two four-day courses and estimates there were forty total trainees.