

Statewide ADR Commission
Staff Notes of Meeting
6/19/15

Called to Order by Co-Chair Justice Chavez at 9:00am

Attendees: Hon. Edward Chavez, David Levin, David Smoak, Mary Jo Lujan, Susan Barnes Anderson, Hon. Mark Sánchez, Jeanette Rael, Laura Bassein, Philip Dabney, Sara Stevens (via phone), Sharon Ortiz, Mari Gish, Torri Jacobus, Susan Laughlin

Elizabeth Jeffreys, Coordinator

Guests: Beth Collard, 13th J.D.
Shannon Driscoll

Absent: Darcy Bushnell, Bruce Hall, Hon. Duane Castleberry, John Feldman, Kevin Spears, Ty Trujillo.

Announcements:

TOOLBOX David Levin announced developments in the creation of the Toolbox. The Quick Start Guide is complete and will link to a larger document, the Reference Manual and to a Library, which will include sample forms gathered from various courts. The Toolbox will also link to the ADR Directory

ODYSSEY David Levin states that we are “victims of our own successes”, that as we grow we face limitations. The developments in Metro & Magistrate Cts. should translate for use in the District Cts. where Odyssey is concerned. Funding is needed to move the developments forward. A recent meeting with Oscar Arevalo (AOC, Fiscal) suggests that there may be a way to move funds to support the efforts. There is no one available at JID to change the forms, and JID is underfunded. The “Plan A” SJI grant, which was denied, was intended to fund the programming activities. Now, there may be a way to use the Mag. Ct. ADR funds to get a JID contractor. There is no substitute for some elements of Plan A, but there may be a Plan B. Without funding, everything is taking longer. Writing an Odyssey Manual is not a fast track activity when utilizing staff and court managers that already have tremendous responsibilities. The task “is an Odyssey”.

MAG. CT. David Levin reports that this project is also a “victim of its own success”. He credits many who have worked to develop and maintain programs in the Mag. Cts., as it is difficult to sustain programs that are dependent on volunteers. Mari Gish kept the program alive for ten years. Her shoes are hard to fill. Sally Margolin in Taos also kept a program alive for 10 years, but her contract ended and it is time to change to a new model. Los Lunas and Belen have new programs developing, and Taos & Bernalillo have established systems.

“We can see potential, we can see where resources are constrained” and it’s time to made decisions. We are at a “make it or break it point”. He suggests a 3-5 year view: One which requires the identification of target areas for funding and also identifies funding sources (ideally, permanent funds). He continues with the Odyssey development and the enhancement of the Mag. Ct. Programs.

Statewide ADR Commission
Staff Notes of Meeting
6/19/15

Justice Chavez comments that the courts are strained financially, and that the truth is that the funding for ADR is greater than the funding for some other court needs. For example, security is entirely lacking in some courts. By comparison, he notes that we have two FTE, David Levin and Elizabeth Jeffreys, that are dedicated to statewide ADR.

JEC SCHOLARSHIPS The JEC Scholarship Recipients for the UNM-SOL summer basic mediation course were announced: Lily Atencio & Rosie Salgado.

ADR DIRECTORY The ADR Directory for the Judicial District Courts was presented with a one-page summary. Laura Bassein commented that a program in the largest court appeared to be absent, and she was concerned with the 10th Judicial District not reflecting mediation services for Dissolution of Marriage. Torri Jacobus stated that she recently sent in more materials to fill the gap for the 2nd J.D. Elizabeth Jeffreys said that she's spoken with Chief Judge in the 10th J.D. about possibly receiving assistance from the Commission, and that there were a few items that she did not have time to include in the Directory prior to the Comm. Mtg., but prior to posting on the web she will include the updates.

PRESENTATION: Laura Bassein presented an overview of the UNM School of Law's Institute of Public Law, including the **Judicial Education Center (JEC)**. [See presentation slides].

She opened with a theme of "connecting the dots" and encouraged the Commissioners to align their work to the goals of the Commission and vice-versa, as many on the Comm. already have an ADR focus in their normal routines.

She described the organizational structure of her organization, and explained the statutory focus of the JEC's work is broad, serving not just the state courts, but the county (probate) & municipal courts as well. By statute, DWI is a primary focus. ADR has historically been included, and there is continued interest in trainings on communication and conflict management.

David Levin commented that the presentation was interesting and inspiring. He noted lots of opportunities for collaboration, and encouraged the Comm. to create an action item to explore needs for ADR training.

Phil Dabney reflected on one slide that showed that in the late 90's and early 00's, JEC provided regular annual ADR training, and he would like to see a return to that commitment. Laura responded that it was for the Magistrate Courts, and that with the developments in Mag. Cts., the approach would likely be different.

Mary Jo Lujan said that she would like a copy of the 2002 award-winning web-based training. David Levin thought he might have a copy to share and will follow-up.

Statewide ADR Commission
Staff Notes of Meeting
6/19/15

Susan Barnes-Anderson inquired as to whether the IPL would consider partnering to provide ADR training in other forums. Laura responded affirmatively.

NOTE: Topics for Conclave are decided about a year ahead, so now is the time to submit ideas. Ideas can be e-mailed to Laura and are best submitted with an identified speaker. The JEC can also encourage the inclusion of ADR topics for CLEs (continuing legal education credits).

PROPOSED ADR RULES:

The Comm. reviewed the work of the committee, the responses to the 3 comments received, and the recommendation of the Co-Chairs. [See Responses & Letter from Co-Chairs].
Two Votes were taken.

David Levin Presented the work of the committee (Laura Bassein, Susan Barnes-Anderson & David Levin) and the responses to the 3 comments. One change was recommended to the commentary.

Discussed the “good faith” requirement as having two components: objective and subjective compliance. The objective requirement concerns in part that the participants appear with authority to settle the dispute. The subjective requirement is largely concerned with the behavior of the participants in the mediation. He notes that the ABA Resolution on the topic is informative.

The committee considered the comment that the commentary was too extensive, but the cmte. determined that the commentary was necessary to make the rules understandable.

He asked that the Comm. adopt the recommendations of the Cmte. and send the document containing the responses to Joey Moya along with the Proposed Rules.

MOTION **A motion was offered by Judge Sanchez that the Comm. adopt the recommendations and send the Responses with the Proposed Rules for consideration. Mari Gish seconded the motion. Discussion ensued.**

Phil Dabney Expressed concern for whether the comments of the 2nd Judicial were sufficiently addressed in the Responses, as all of the Judges had signed in support of Judge Malott’s comments.

David Levin Acknowledged the significance of the support behind Judge Malott’s comments. Stressed the importance of building support rather than forming oppositions. Identified the comments as a valuable opportunity to further discussions and to problem solve. Indicated that he had initial discussions with Judge Nash, and would be open to further discussions.

Judge Sanchez Spoke to the reference in the comments to the Carlsbad case, which was in his district. Stated that the antecedents were not what you’d imagine. That essentially the holding was that the authority to settle had to be present at the mediation, and that was the critical good faith requirement. There was a good, objective reason for the rule.

Statewide ADR Commission
Staff Notes of Meeting
6/19/15

David Levin Agreed. Reflected that when problems are addressed at a local level, sometimes there are unintended consequences (a “Pandora’s Box”), that could be avoided by a more global approach, recognizing the lessons of a larger community.

Judge Sanchez Expressed concern for the problems that can be caused by a lazy attorney that is poorly prepared and decides to settle for little money when the case is worth more.

David Smoak Agreed with Judge Sanchez’ concerns and reiterated that it is critical to have a decision maker on the ground for the face-to-face session.

David Levin Asks whether a good faith requirement would help to achieve that goal. Stated that good participation is always desired, but that the good faith requirement may be the wrong tool and may not fit with the “one size does not fit all” approach. Applauded the usefulness of the ABA Resolution on the topic.

Susan Barnes-Anderson Noted that it was beneficial for purposes of organizing the topic, to think of the good faith requirement in terms of objective and subjective elements. Such organization helps to avoid confusion.

Laura Bassein Pointed out that the Proposed Rule does not say that there can’t be a good faith requirement, so the 2nd or the 5th Judicial Districts could have a local rule with a good faith requirement. However, she notes, the problem with good faith requirements is that the issues are still unsettled, and subject to litigation.

Phil Dabney Acknowledged Laura’s comments and suggested that a local rule could also be challenged.

Laura Bassein Stated that the 5th JD has a good faith requirement in its local rules.

VOTE **A quorum present, and there being no further discussion, a vote was taken. The Commission voted, with a single vote in opposition, to adopt the recommendations of the Committee with a change to the commentary, and to send the Responses with the Proposed Rule to Joey Moya.**

Justice Chavez Stated that the Recommendation of the Co-Chairs is to send the Proposed Rules to the Supreme Court with a recommendation that the Rules be approved in the form of Guidelines. “Mean what you say, say what you mean”: He pointed out that the Proposed Rules had no “teeth”, that there were no sanctions for failure to comply. As a result, they served as guidelines, not rules. Other Guidelines have been adopted by the Supreme Court. He offers, as an example, the Interpreter Guidelines, which provide flexibility for each court.

Mari Gish Adds that there is no budget to support the requirements of the Proposed Rules, and is concerned with the absence of funding for training/education.

Sharon Ortiz Stated that the term “guidelines” is more appealing than “rules”.

Statewide ADR Commission
Staff Notes of Meeting
6/19/15

MOTION **Judge Sanchez moved to submit the Proposed Rules to the Supreme Court with a recommendation that they be approved as Guidelines. Second provided by Mari Gish. Discussion followed.**

Laura Bassein Expressed concern that if the Proposed Rules were approved as guidelines it would create an opportunity for them to be disregarded and “set on a shelf”.

Judge Sanchez Offered that any violation of Guidelines approved by the Court could be viewed as a violation of standards of practice, and that there could be enforcement of standards by court decision.

Phil Dabney Asked if the contemplated Guidelines had been in place prior to the Carlsbad decision, would that have made a difference in the outcome?

Judge Sanchez It is possible that the decision would be different under those circumstances.

David Smoak Asked if the intention of the Commission at every stage was to create Rules

David Levin Acknowledged that was the intent, but noted that there were lessons learned from the experience that led to this point. Indicated the difficulty of imposing requirements when there was no funding to support them. Stated that the Proposed Rules were always designed to give latitude to the courts, and were not really standards for compliance where no sanctions would be imposed for noncompliance. Offered that, while we would all have different things, in his opinion, “this may be the best way to move forward.” He noted that, if issued as Guidelines, anyone unhappy with a situation would look for something to show that there was a deviation from the standards. The goal is to grow mediation, not to get push-back. It’s important to speak in a language that the courts are willing to accept.

Phil Dabney Added that it is important not to create conflict between local courts and the Supreme Court.

Sharon Ortiz Offered that, as guidelines, the work would serve to help the courts, and would be a useful reference.

Susan Barnes-Anderson Stated that mediation is a creative, flexible process. If a court has questions about the process, the guidelines could provide assistance.

Laura Bassein Expressed concern that if offered as a guideline the document will be more difficult to reach. Shared that she recently had trouble locating a document from the Supreme Court, and that it was not easy even for Joey Moya to find the document. Rules are easy to find and accessible, and courts are accustomed to working in a world of rules. She did not know what would become of a guideline.

Justice Chavez Responded that the Guideline would be made available on the ADR web page, and it was true that they would not be located with Rules.

Statewide ADR Commission
Staff Notes of Meeting
6/19/15

David Smoak Expressed concern that there would not be a requirement for the certification of mediators. He stated that many states offered a certification process, or required the same.

David Levin Responded that even the Proposed Rule did not require the certification of mediators, as it would be left to the local court rules. He reflected that the development of standards would require consideration of training requirements and experience. Years ago there was a policy and practical decision not to develop such standards because New Mexico was not ready to do that. The Commission could reconsider that position, but the question at hand was whether this document would better serve as Rules or as Guidelines.

Phi Dabney Noted that in the 8th JD Family Court, the standards are so stringent that they have difficulty finding qualified mediators to serve, and so that creates another barrier and another problem.

Sharon Ortiz Cautions that some states exclude non-attorney mediators from the certification process, and this increases the costs to participants and significantly reduces the available pool of neutrals.

David Smoak Shared that he mediates in Texas, California and New Mexico, and finds that the mediations are successful for him in all cases except for those he conducts in New Mexico. He would like standards to be imposed.

Susan Barnes-Anderson Said that sometimes attorneys and retired judges make the worst mediators, but who would want to be in a position to tell them?

Sharon Ortiz Is sometimes stunned by what some, such as retired judges, call “mediation”, when it is anything but

David Levin Shared that it took years for some states to create Rules, and that a vote today on whether to issue the document as guidelines would not mean that the discussion or the work is over.

Susan Laughlin Expressed concern that if the Rule creates standards that conflicts with the current standards utilized by the Children’s Court Mediation Program, there would be difficulties adjusting those standards, since they are determined in negotiations with CYFD.

Mari Gish Wondered where the money would come from to provide training if the standards were imposed. Noted that a lack of funding provided some of the largest hurdles.

David Smoak Stressed the importance of standards and required training.

David Levin Noted that any training requirement would vary by the topic, that in addition to the 40-hours of basic training there may be a need for training in civil/money cases, family law, domestic violence, etc.

Statewide ADR Commission
Staff Notes of Meeting
6/19/15

Mari Gish Shared that the certification offered by her organization initially required 300 hours of training and 300 hours of expertise, but few people qualified so the standards were lowered to 100 hours each.

David Smoak Stated that at least the option for certification needed to be available.

VOTE **A quorum present, and there being no further discussion, a vote was taken. All voted in favor of submitting the Proposed Rules to the NM Supreme Court with the recommendation that the Court approve the document and issue the same in the form of Guidelines.**

MEDIATION WEEK: The Comm. will not meet again until October, so now is the time to plan for the Oct. Mediation Week.

Justice Chavez Encouraged the generation of ideas for Mediation Week that would serve to get the message out. Suggested that there are several ways to accomplish this, including use of the DVD, going out to local communities to talk with leadership groups, visiting AM community radio programs to talk about related topics, and making the ADR DVD available to jury pools when they have down time. He noted that most jury member speak favorable about the system of justice and may be receptive to learning more about ADR.

Elizabeth Jeffreys suggested a media “blitz” with photos and articles about ADR presented in conjunction with the OADPR.

Justice Chavez offered that Barry Massey (AOC) “news guy”, could be a great resource to access the local papers.

Judge Sanchez expressed concern for use of juries involved with criminal trials because of the sensitivity of the attorneys involved to what information the jury is exposed to during a trial. Thought that the Commission could decide on objectives and goals and then divide up the state for follow-up by Commissioners.

David Smoak suggested that there be a competitive mediation event held to generate enthusiasm and improve the skills of participants.

David Levin responded that there are such competitions nationwide, but that they are not designed to inform the spectators and are generally held at the end of a larger training for the participants. He noted that UNM SOL does not participate in these nationwide competitions. He has judged these competitions and is skeptical of the use of a competition in the context of a Mediation Week because the focus is on competition and not on the accessibility of acquiring ADR skills. He suggested that a better demonstration would be to show the application of various types of ADR to a similar set of circumstances, and design the process to educate the observers.

Statewide ADR Commission
Staff Notes of Meeting
6/19/15

Mary Jo Lujan said that the interest in holding competitions reflects the energy and enthusiasm for ADR, but a competition may be difficult to manage. She said that Risk Management's OADPR holds an annual **Symposium** in October, and this event is sometimes held at UNM-SOL.

Susan Barnes-Anderson thought it would be a great time to celebrate the volunteers providing ADR services to the courts. Also offered that the ABQ Journal could maybe be enticed to present an article about the work of the Commission.

Mary Jo Lujan said that perhaps an Op Ed piece could be blasted to all the local papers, perhaps authored by the Co-Chairs.

David Levin suggested an annual award by the Commission to recognize achievements.

Mari Gish offered that something could be done with the schools. There was a peer mediation program in the state, but then funding was lost. Once ABQ had an all-day picnic for those involved. Perhaps a contact could be made with the Department of Education to encourage schools to recognize Mediation Week. There is a mental health wellness division of PED that may be interested.

Mary Jo Lujan added that PED has district coordinator(s) that can help to disseminate information.

Mari Gish Stated that the NM Mediation Assoc. provides an award at the annual meeting in October.

David Smoak Suggested that the Commission issue and determine standards for receipt of any awards or recognition.

Justice Chavez said that each court could recommend someone to the Commission for recognition and provide its own standards as the basis for any award. He asked if David Smoak, as head of the Marketing and Education Cmte, pursue the topic further and make decisions on behalf of the Comm.

Mari Gish, Torri Jacobus, and Phil Dabney all volunteered to assist in this effort.

Laura Bassein said that there used to be an insert in the Bar Bulletin, and that it may be too late for this year, but we could explore the option for future use.

David Levin said that there could be an ADR Issue planned for next year, and the Editorial Board should be approached.

FY16 STRATEGIC PLAN

Elizabeth Jeffreys Presented the results of two surveys completed by the Commissioners. The first received 16 responses and led to the development of the "bones" of the Plan. The second received 9 responses, and led to the development of the "meat" of the Plan. All the responses of the second survey were presented and incorporated into the Plan. She is concerned that some of the responses are unclear, need further development or are too ambitious. Sufficient feedback was received to take some actions, but discussions on the plan will continue at the next meeting in October. [See FY16 Plan]

Meeting Adjourned at 1:30pm