

Supreme Court of New Mexico

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Statewide ADR Commission Summary – August 17, 2012 John E. Brown Juvenile Justice Center, Albuquerque, NM

I. Welcome

Justice Edward Chavez called the meeting to order at 9:30 a.m. He explained the primary purpose for today's meeting: to approve a rule that courts could use to implement ADR programs.

II. Budget Update

Justice Chavez reported that a budget of \$72,500 is being submitted by the AOC to fund the production of a DVD or video for litigants on ADR and to cover some transportation costs for Commissioners.

III. Proposed Rule for Court-Annexed ADR

Celia Ludi reported on behalf of the Program Standards/Rules Subcommittee. She informed the Commissioners of the process followed by the Subcommittee, a summary of the discussions, and indicated the issue of domestic abuse required more attention before the rule is presented to the Supreme Court. The Proposed Rule is attached.

Discussion of Proposed Rule Section 101

- How should the National Standards be addressed in the rule?
- It is important to include the language of the National Standards in the rule so courts won't have to hunt for it by referring to an auxiliary document. Likewise, the national standards should be expressed within the rule itself. The SC attorneys should be consulted so the process of approval could be quicker.
- Should the rule address where it deviates from the National Standards and why: include commentary to address.
- Put all the documents referred to in the rule on the website.
- Put html links in the rule to all the documents referred to within the document.
- The rule is part of the momentum started by the Summit. Commissioners will have to

interpret the rule and standards to the courts. Programs will submit their plans on what they are planning to ADR Commission so the Commission has its thumb on the pulse of ADR in NM.

- What happens following adoption of the rule: Justice Chavez explained that the Commission adopts and recommends to SC with some explanation. SC will publish for comments and it comes back to Commission for amending.
- It was noted that the 9th Judicial District domestic relations mediation program will use the adopted rule to help implement its pilot program. Ben Cross, staff attorney at the 9th Judicial District Court, will test the rule as he builds his program and provide feedback to the Commission.
- Domestic violence screening (Section 101:G): there are many protocols available to determine the presence of domestic violence and power imbalances, for example, interviews or questionnaires, on the phone, via mail. All the methods have faults as well as strengths. The National Standards suggest that individual courts develop their own protocols. The Commission could provide a model DV protocol that addresses minimum standards for courts to modify.

It was moved and seconded to adopt a rule at today's Commission meeting.

The vote to adopt was unanimous, in favor of adopting a rule, as written or with revisions.

It was moved and seconded to

- 1. Add a link (url) to the National Standards.**
- 2. Have staff attorneys at SC work on incorporating National Standards without the National Standards Commentary.**

The vote was unanimous, in favor of the proposal.

Discussion of Section 101 A: Definitions B. Domestic Abuse

- A workable definition of domestic abuse is needed before the proposed rule can go to SC. What must be included in the definition is whatever is defined in NM state law AND the pattern of coercive control exerted by the perpetrator of domestic abuse. Laura Bassein agreed to provide a definition for inclusion in the rule. The definition will be circulated and voted on via email.
- There should be links (urls) to all other documents mentioned in the rule for all the Sections.

It was moved and seconded to

- 1. Add a definition of domestic abuse to the rule.**
- 2. Add all necessary links (urls) in the rule for easy access for courts.**

The vote was unanimous, in favor of the proposal.

Discussion of Section 201: Structure of Mediation Services and Programs E. Person designated to supervise, monitor and administer programs

- The language is aspirational for program managers.
- Experienced program managers can mentor those who are inexperienced or new to the role.
- There are some national training opportunities to be researched.
- Don't hamstring the courts by insisting on standards that can't be met.

- Consider the needs and resources of the smaller courts – training opportunities could be provided via mentoring as well as OTJ training.
- Mary Jo Lujan stated that her program managers (OADPR) are not mediators. They have administrative training for managing their ADR programs.
- The Commission will address providing skill training and protocols for program managers later on.
- A language amendment was proposed: At a minimum, a program manager should understand and know court and ADR processes and shall be trained in mediation.

It was moved and seconded to adopt Section 201 with the amended language for part E. The vote was unanimous, in favor of the proposal.

Discussion of Section 301: Qualifications of Mediators

It was moved and seconded to adopt Section 301 with no changes. The vote was unanimous, in favor of the proposal.

Discussion of Section 401: Best Practices for Mediators

- Confidentiality, clause E raised the question about whether mediators or parties are at risk of having to testify, given the way the text is written now.
- Regarding clause E.4. a through g: Should the presence of parties' counsel be recorded by the mediator? By specifically naming counsel in this list, we are opening the door to inviting or requiring attorneys to attend mediation, even when it is not in best interests of parties. On the other hand, excluding counsel is out of sync with best practices on a national level; Several persons indicated that parties should not be prohibited from bringing their attorneys to mediation. Regarding the information mediators may report to the court, it was pointed out that clause E.4.d permits a mediator to report that counsel attended.

It was proposed but not seconded, to eliminate clause E.4.d referring to persons at a mediation. Several friendly amendments were offered and accepted to the motion to accept Section 401. They were

- **Renumber the clauses**
- **Include "and their attorneys" in E.4.a**
- **Add "Unless a rule otherwise provides" and change "right" to "ability" in F.2**
- **Strike "reasonable" from F.3**

It was moved and seconded to adopt Section 401, with the friendly amendments. The vote was unanimous, in favor of the proposal.

IV. PILOT PROGRAM SUBCOMMITTEE:

Judge Mark Sanchez reported that the subcommittee is working with the Domestic Relations Mediation Program in the 9th Judicial District Court. The subcommittee's written report is attached to the minutes. Discussion included:

- The pilot project began on July 26 2012. End date not set yet.

- The program in the 9th will include the precepts covered by the rule, as discussed today.
- The pilot project will allow testing of the standards discussed today to some extent to see how well they work. David Levin and Celia Ludi will keep notes on how the standards are working.
- An ending date for the pilot will be set that will allow the collection of both anecdotal and statistical information including economic data. All persons involved in the mediation will answer the satisfactions/exit surveys.
- It is anticipated that the Final Report will justify more funding for programs of this sort in this state.
- The pilot project is a model for other courts so the subcommittee will keep good notes in order to duplicate it in other parts of the state.
- Data that is important to capture includes:
 - To what degree the issues in a case were resolved, that is whether some if not all issues were settled.
 - Whether parties who go to trial after an unsuccessful mediation settle their cases more quickly and with less court time than parties who have never been to mediation.
- Legislators want to know if mediation saves time and money. What is the one measure we can give to the legislators to show how mediation saves money? Examples suggested include: How many times have judges had to reschedule because parties didn't have the material, etc.; when parties went to mediation they were more prepared for trial and only one hearing was required; etc.
- It is important to collect anecdotes as well because stories are an effective way to make an impact on how people see your program.

It was moved and seconded to accept the 9th Judicial District Domestic Relations Mediation Program as a pilot project.

The vote was unanimous, in favor of the proposal.

V. Marketing Initiatives Subcommittee Report

Marsha Lichtenstein reported for David Smoak, Marketing Subcommittee chair. The report is attached. Discussion included:

- The need to make the video or DVD accessible to litigants.
- There are existing videos that can be viewed prior to developing the RFP: Maryland courts have a good video; Children's Court Mediation Program in NM has produced a video;
- Janet Blair at Metro Court produced a video for juries that may be a good model.

VI. Calendaring for the Next Six Months

Commission meetings will be held at 9:30 am at the John E. Brown Juvenile Justice Center, 5100 Second St NW, Albuquerque NM 87107 on the following Fridays:

- September 21, 2012
- October 12, 2012
- November 16, 2012
- No Meeting in December
- January 18, 2013

- February 15, 2013

VI. Other Business

- Karen Myers, Consumer Protection Division Director, Attorney General's Office, spoke about the national settlement with the five largest servicers of mortgages. The settlement will bring money into New Mexico to assist homeowners with loan modification process; housing counseling, a hot line, and other services. A small amount of the settlement will be available for foreclosure mediation. A pilot project is anticipated for the 2nd Judicial District. Specialized training will be required to provide mediation in these cases.
- Jeanette Martinez from Outcomes, Inc. spoke about restorative justice and explained how it is being incorporated into ADR in other states. She gave a general background on restorative justice and how it includes extended family participation to support the parties. She provided us with a report.
- Laura Bassein expressed a concern regarding the proposed rule that was adopted at today's meeting. The proposed rule does not pre-empt other rules or statutes. It may not be possible to say that in a rule. Sometimes a court rule is primary on procedural matters. And sometimes it is primary on substantive matter. In Section 101, there may be conflicts with statutes and other rules. It is important to take the time to see how the rule relates to other rules and statutes to produce a really good rule. SC attorneys will be able to handle this task and the Commissioners should also have a hand in that too.
- Ben Cross, court attorney at the 9th Judicial District and manager of their Domestic Relations Mediation Program thanked the Commission on behalf of the court for selecting the 9th Judicial District for the pilot project..

VIII. Next Steps/Closing Comments

Justice Chavez indicated that will we send out the minutes to the Commissioners for approval. He will get the rule to the Supreme Court Attorneys once the revisions have been completed.

Meeting Attendees:

Commission Members Present:

Justice Edward L. Chavez, Chair
Susan Barnes Anderson
Darcy Bushnell
Judge Duane Castleberry
John Feldman
Mari Gish
Jeff Griffith
Susan Laughlin
David Levin, Co-Chair
Celia Ludi
Mary Jo Lujan
Sara Stevens
Judge Mark Sanchez
Mary Jo Lujan

Guests:

Laura Bassein
Geoff Nims
Jeanette Martinez
Rashad Mahmood
Philip Crump
Ben Cross
Laurie Knight
Diane Grover
Josh Pando
Ira Bolnick
Jocelyn M. Torres
Karen Meyers

Commission Members Absent:

Ty Trujillo
Fred Sena
Paul Briones
David Smoak
Kevin Spears
Don Schutte

Staff:

Marsha Lichtenstein

Report of the Pilot Program Subcommittee

Prepared for the meeting
of August 17, 2012,
of the Statewide ADR Commission

Subcommittee Members

Mark Sánchez, chairman

Susan Barnes-Anderson

Duane Castleberry

Mari Gish

David Levin

Marsha Lichtenstein

Celia A. Ludi

Sara Stevens

Summary

The Pilot Program Subcommittee has the task of working with a judicial district to design, oversee, institute, and evaluate a mediation program that follows the standards recommended by other subcommittees of the Statewide ADR Commission and reporting its findings to the Commission. This report includes a summary, a statement of goals, a statement on progress towards fulfillment of goals, and a summary of goals yet to be satisfied.

Statement of Goals

These are the goals of the pilot program subcommittee: (1) to identify a discrete judicial entity where a mediation program can be instituted, developed, or expanded using the standards recommended by subcommittees of the Statewide ADR Commission, (2) to assist in the design of the program, (3) to monitor the program, and (4) to evaluate the program for the purpose of determining whether mediation is cheaper, more efficient, and appropriate for the litigants, the lawyers, and the judiciary.

Progress towards Fulfillment of Goals

A pilot domestic-relations program has been instituted in the Ninth Judicial District of New Mexico. Other judicial districts were considered but the Ninth Judicial District was preferable because the program had already received funding, the program was general and to be applied in the field of domestic relations and the program did not involve needs or rights that may have made the study more costly, confusing, or burdensome.

The subcommittee contacted the chief judge of the district, the chief administrator, and a staff attorney, all of whom communicated openness to the prospect of a pilot program. A needs assessment was conducted by Marsha Lichtenstein; it is appended hereto as Exhibit A. Celia Ludi and David Levin have met in person with representatives of the Ninth Judicial District Court, and on July

26, 2012, the pilot program began operations. A report of the site-visit is appended hereto as Exhibit B.

Outlines of the design of the program are found in Exhibit B. The design incorporates precepts and recommendations from the Program Practice Standards Subcommittee of the Statewide ADR Commission.

Study and evaluation of the program will have two components: (1) surveys by questionnaires that seek to determine if mediation is cheaper, more efficient, and appropriate for the litigants, the lawyers, and the judiciary and (2) a study of economic data that includes time expended before resolution occurs and savings of time in the courtroom, and an estimate of monies saved by institution of the program. Samples of surveys are appended hereto as Exhibit C. Exhibit C-1 was provided by Mari Gish, and Exhibit C-2 by Celia Ludi.

Goals Yet to be Satisfied

The program has been designed and instituted; questionnaires have been drafted and are ready to be proposed to participants; and a means for obtaining economic data has been devised. The subcommittee must now decide how long the study is to last so that fair and accurate results truly representative of the experience in the Ninth Judicial District are produced. A report of the subcommittee's findings will then be prepared. The subcommittee will also seek to determine more systematically the extent to which other judicial districts have interest in programs of this kind.

Exhibit A

Summary of Ninth Judicial Needs Assessment

Present: Judge Mowrer, Louis Moore, Ben Cross, Marsha Lichtenstein
Date: July 11, 2012

(For convenience, 'tasks' are highlighted in yellow.)

Types of cases that will be mediated: Currently, Ben Cross, the staff attorney, sees primarily *pro se* clients in the domestic relations mediation program. The families are typically referred by three of the five district court judges. When families come to the *pro se* domestic relations mediation program, Ben mediates all the elements of the divorce including property, debts, child support, custody, parenting plans, time sharing, etc. The services are not limited to couples with children although they constitute the majority of clients.

Although Ben has been in his position for only a short while, he can estimate that he sees four families a week for 50 weeks, that is, he will handle 200 cases over the year. The number of families who are requesting services is greater than one staff attorney with other responsibilities can provide, which is the rationale for expanding the *pro se* domestic relations program by adding a component that will allow the use of contract mediators to take some of the *pro se* cases. **Ben will prepare an estimate of the monthly/annual caseload so we want determine costs of expanding.**

Litigants who have representation are also referred to mediation: they usually select attorneys who charge the full attorney rate for mediation. There is a list of attorneys that are available to mediate for represented parties. These attorneys may or may not have mediation training. The court wants to leave this service intact for now and address only the *pro se* client overload.

Summary: The interest in a pilot is to expand the *pro se* domestic relations program using contract mediators in order to provide services to more clients.

Program process and procedure:

- a. In-person mediation is the preferred method. Given that there is a large local military population, with significant divorce rates, there are instances when mediation must be conducted by telephone.
- b. Documents and Forms
 1. What already is in use: Notice of mediation; Referral Order that goes to Ben. Ben could use the same order to refer cases to contract mediators.
 2. **Marsha will collect from the subcommittee samples of all the other forms on the list and send them to Ben.**
 3. Ben would like a way (method, form, written instructions) to gather information ahead of time from the parties, such as having clients organize their pay stubs, debts, etc. Ben and Marsha will develop a list the information would help him if he had it ahead of time.

Statutes and Rules: There is a local rule in place for custody and visitation mediation and it allows them to collect the \$30.00.

Types of mediators: Ben is the staff mediator. The court wants to add contract mediators to help mediate the *pro se* caseload. It is not known at this time how many mediators are available in the Clovis area or what types of mediation training and experience they have. **Identifying mediators is a next step.**

Mediator Qualifications: We briefly reviewed the qualifications for the Third Judicial District's domestic relations mediators. The Judge, Louis and Ben were in favor of these qualifications. We will consider the qualifications required in other district courts' domestic relations mediation programs for comparative reasons. For example, in the Thirteenth Judicial District, a college degree is not required.

Staffing: Ben will coordinate the program, refer cases to mediators, and keep caseload statistics.

Cost Analysis: There are expenses associated with operating the program, and most of the costs are already in the budget: a fulltime staff attorney who among other duties mediates *pro se* domestic relations cases; supplies, postage, equipment, etc. The additional costs would be to contract with the additional domestic relations mediators who will be paid an hourly rate (inclusive of gross receipts and any costs of doing business such as equipment, postage, etc. Contract mediators in court-annexed programs are paid \$60.00 an hour in Children's Court and in the Third Judicial District's domestic relations mediation program. **Additional information about what mediators are paid in the Thirteenth Judicial District and other programs will be collected.**

To do a cost analysis, we need an estimate of the number of cases referred to mediation, how many actually show up for mediation, how many resolve in mediation, how many go to trial or other outcome. Average time spent in mediation will also help with the cost analysis.

Case Management: Time allocated for each mediation (maximum time allowed) including premediation has not been determined.

Funding Sources

- a. a \$30.00 fee is collected with each filing,
- b. Each party pays \$25.00 (is this per session?),
- c. Annual funding from filing fees plus party payments total between \$16,000.00 and \$20,000.00,
- d. Currently, the money from the fees has been used for parenting education classes with a local Agency. This agency is also contracted to provide mediation to *pro se* client; their maximum mediation caseload

has been approximately four a year. Thus almost all the funding goes towards parenting education: We discussed alternates to the current system of parenting education; what other districts do; and how parenting education is evaluated; and whether on-line or DVD-based parent education is effective. Marsha will check into the folks she met at AFCC.

Quality Assessment: We did not discuss assessment during this meeting. Geoff Nims will be contacted regarding the way his program keeps statistics.

Resources

- a. Money: there is a potential annual budget of between \$16,000.00 and \$20,000.00.
- b. People: Ben Cross is available to manage the referrals, schedule the mediations and file the dispositions. The availability of mediators needs to be determined. The court does not want to pay mileage but they may need to contract with mediators who live outside of Clovis, and that will involve travel costs. Another option is that there may be younger attorneys in Clovis who either have mediation training or will be willing to take it (although we are only talking about basic mediation training, not family mediation training).
- c. Space: the Clovis court house has limited space. We discussed alternative meeting spaces such as libraries. More exploration and discussion about space will need to take place.

Some follow-up issues:

Can money be diverted from the parent education program to mediation? Is parent education mandatory or just customary? What is available in on-line parent education classes and what is the effectiveness (of on-line and of classroom style). What can we brainstorm to free up the money? DVD shown to a large group; kiosk with DVD?

Parents go to library to view DVDs? The Ninth Judicial Court judges meet on the first Tuesday of the month: Louis and Judge Mowrer will talk with the judges and get approval for the pilot including the issue of diverting the parent education money to mediation.

Exhibit B

NEW MEXICO SUPREME COURT ADR COMMISSION

NINTH JUDICIAL DISTRICT — FAMILY MEDIATION PILOT PROJECT

Site Visit Report — July 26, 2012

On July 26, 2012, a meeting took place between representatives of the Ninth Judicial District and the ADR Commission. Louis Moore, CEO, and Ben Cross, Court Attorney, attended on behalf of the Ninth Judicial District. Celia Ludi, Commissioner, and David Levin, Commissioner and Commission Co-Chair, attended on behalf of the ADR Commission. The meeting in Clovis, New Mexico, was for a full day.

The purpose was to determine whether there was a fit between the Ninth Judicial District and the ADR Commission to conduct a joint Court ADR Pilot Project. The conclusion was an enthusiastic “yes.”

The Ninth Judicial District hired Ben Cross in November, 2011. One goal for him is to establish a Family Mediation Program with Ben serving as the staff mediator. The primary target population would be self-represented and low income litigants. To date, Ben has conducted approximately 20 mediations. This summer Ben completed a Basic Mediation Training at the UNM School of Law.

Ben described his mediation management techniques and initial program organization during the site visit. He has also started a clinic to provide general legal information to self-represented parties. The entire program is truly embryonic. Ben Cross, with strong support from Louis Moore, is inventing the procedures and policies as he goes. The energy, dedication, and instinct for best practices are impressive. If good programs are built around “franchise players,” then the Ninth Judicial District has a solid foundation in Louis Moore and Ben Cross.

There is a need for help. Louis Moore and Ben Cross intend to build a program for the unique needs of the Ninth Judicial District. However, both of them are relatively new to mediation, mediation programs, and the specialty of family mediation. They

would like to avoid “re-inventing the wheel.” They would welcome technical assistance.

The threshold criteria were met during the site visit. The local district needs to be open to outside help, while preserving their independence. The outside assistance needs to be open to providing support without dictating the result to be achieved. There is a delicate balance to establish. Louis Moore, Ben Cross, Celia Ludi, and David Levin all expressed a comfort in working together to create the pilot project.

A clear consensus was reached: a joint effort between the Ninth Judicial District and the ADR Commission would work. The Ninth Judicial District would benefit by strengthening and expediting their program development. The ADR Commission would benefit by learning how to effectively support a local initiative with statewide resources and expertise.

[Graphics omitted.]

What will the pilot project look like? We drew the above chart on the white board during the site visit. The diagram served as the map of the mediation work flow for our discussions. For example, pre-mediation steps include providing information for judges to use with litigants in the courtroom, logging the case into the data collection system, preparing the parties, and a court order, etc. Examples of post-mediation steps include document completion, outcome questionnaires, and entering data, etc. Policies, procedures, and forms need to be developed in accordance with Supreme Court standards at every step.

- **Mentoring.** Louis Moore and Ben Cross believe what happens in the mediation room is the cornerstone for their program – the parties should receive the best possible mediation services. Ben Cross and David Levin discussed building mentoring for Ben Cross into the Pilot.
- **Program Outline.** We agreed that outlining the steps for program building is the essential first step. Ben Cross, after the Site Visit,

created an outline of the present program steps. David Levin will prepare a generic outline of steps. Everyone will work together to identify the priority steps and the related tasks for the Ninth Judicial District.

- **Standards Committee.** Louis Moore and Ben Cross will participate in the discussion of the standards being discussed for New Mexico.
- **Family Clinic Classes.** Celia Ludi and Ben Cross discussed their respective *pro se* clinics and how to collaborate to strengthen the program in the Ninth Judicial District. We also discussed adding to the class “how to prepare for mediation.”
- **Policies, Procedures, and Forms.** Everyone agreed that developing these items were essential for a successful program. The program outline steps will provide an initial framework for this aspect of the Pilot.
- **Case Management and Data Collection.** Collection of essential data is to begin at once, even if the information is recorded on paper. Everyone agreed that gathering basic information at the beginning of the program was easier than reconstructing data from the historical record. Then, as a more structured and comprehensive case management system is developed, the data could be imported into the system. Celia will work with Ben to identify the information that needs to be collected and develop a system for maintaining it.
- **Measurable Outcomes.** Building a data collection system will help measure some outcomes. However, Louis and Ben believe helping people to resolve their cases and go forward with their lives may be more important than a particular statistic, such as “settlement rate.” They believe a quality mediation program will reduce the parties’ return visits to court. A method for capturing these results, both regarding case statistics and party satisfaction, will need to be developed.

- **Replication.** There was a consensus during the Site Visit: the goal is more than to help one judicial district; the goal is to learn how local districts and statewide resources can work together, to create a road map for subsequent collaborations between local districts and the ADR Commission. This dimension will require keeping a log of what worked and what was problematic. To achieve this goal will require being aware of the progression of steps used in the pilot and developing a general template for use elsewhere.

Next Steps

There are two immediate next steps:

1. **Flesh out the details of the pilot project.** Louis Moore, Ben Cross, Celia Ludi, and David Levin will continue to develop the plan for the Pilot;
2. **ADR Commission.** Celia Ludi and David Levin will report to the Commission's Pilot Project Committee regarding the site visit and will seek the guidance of the Committee regarding proceeding with the pilot between the Ninth Judicial District and the ADR Commission.

Conclusion

The day exceeded everyone's optimistic expectations. The conversations and work together could have lasted unabated into the evening and the next day, if not longer. All of us became excited about the possibilities and look forward to working together.

Exhibit C

**Exit Survey For
Magistrate Court Mediation Participants
(Exhibit C-1)**

As part of the evaluation of the Mediation Programs in the Thirteenth Judicial District, we would like your feedback about today's mediation. Please take a moment and respond to the items below. Your responses will be kept completely confidential. When you are finished, please return the form to either the **Mediator** or to **Civil Clerk window**. **Thank you.**

Date of Mediation ___/___/___

Mediator(s) _____

Your Role:

- | | | |
|----------------------------|--------------------------|-----------------------------------|
| 1. Plaintiff/Petitioner | <input type="checkbox"/> | Attorney for Plaintiff/Respondent |
| 2. Defendant/Respondent | <input type="checkbox"/> | Attorney for Defendant/Respondent |
| 3. Other _____ | <input type="checkbox"/> | Other _____ |

Did your case?

- Settle Fully
 Settle In Part
 Fail to Settle

Did you receive sufficient information about mediation?

- Yes
 No, the information provided lacked

For each of the statements below, please circle the response that best tells us what you think:

- | | | | |
|----|--|--|--|
| 1. | I was satisfied with the mediation process. | | |
| | Do Not Agree Somewhat Agree Mostly Agree Completely Agree | | |
| 2. | I was able to present my side of the dispute. | | |
| | Do Not Agree Somewhat Agree Mostly Agree Completely Agree | | |
| 3. | The mediation process was fair. | | |
| | Do Not Agree Somewhat Agree Mostly Agree Completely Agree | | |

4. I felt heard and understood during the mediation.
- Do Not Agree Somewhat Agree Mostly Agree Completely Agree
5. The mediator treated me fairly and with respect.
- Do Not Agree Somewhat Agree Mostly Agree Completely Agree
6. The mediator(s) explained clearly the mediation process and procedures.
- Do Not Agree Somewhat Agree Mostly Agree Completely Agree
7. We were encouraged to come up with our own solutions.
- Do Not Agree Somewhat Agree Mostly Agree Completely Agree
8. I would be willing to attend mediation in the future.
- Do Not Agree Somewhat Agree Mostly Agree Completely Agree

If an agreement was reached, please respond to the following:

- A. The agreement reached includes the issues important to me.
- Do Not Agree Somewhat Agree Mostly Agree Completely Agree
- B. I am satisfied with the final outcome of the agreement.
- Do Not Agree Somewhat Agree Mostly Agree Completely Agree
- C. I believe the agreement was fair.
- Do Not Agree Somewhat Agree Mostly Agree Completely Agree
- D. I believe the agreement was written clearly and accurately.
- Do Not Agree Somewhat Agree Mostly Agree Completely Agree

Please write any comments you think would be helpful to the mediation program. Thank you.

(Draft of July 3, 2012)

PARTICIPANT FEEDBACK

(Exhibit C-2)

We would like your feedback about your mediation process. Please take a moment and respond to the items below. Your name is not needed on this form, and your responses will be kept confidential. Thank you.

Please indicate your role in this case: ___Litigant ___Attorney ___ Other

For each of the statements below, circle the response that best tells us what you think.

- | | | | | | | | |
|-----|---|------------|--------|----------|----------|------------|----------------|
| 1. | I received a good introduction to the mediation process. | Definitely | Mostly | Somewhat | A Little | Not at all | Does not apply |
| 2. | The mediator treated everyone fairly. | Definitely | Mostly | Somewhat | A Little | Not at all | Does not apply |
| 3. | I felt heard and understood. | Definitely | Mostly | Somewhat | A Little | Not at all | Does not apply |
| 4. | We talked about all the issues that were important to me. | Definitely | Mostly | Somewhat | A Little | Not at all | Does not apply |
| 5. | The mediators did not take sides. | Definitely | Mostly | Somewhat | A Little | Not at all | Does not apply |
| 6. | I had an opportunity to present my views in the mediation session. | Definitely | Mostly | Somewhat | A Little | Not at all | Does not apply |
| 7. | Other people listened to me during the mediation session. | Definitely | Mostly | Somewhat | A Little | Not at all | Does not apply |
| 8. | The mediation helped me understand other people's points of view. | Definitely | Mostly | Somewhat | A Little | Not at all | Does not apply |
| 9. | I agreed with the decisions that were made today. | Definitely | Mostly | Somewhat | A Little | Not at all | Does not apply |
| 10. | I understand what I have to do next. | Definitely | Mostly | Somewhat | A Little | Not at all | Does not apply |
| 11. | The mediation helped me improve my relationship with one or more people in the room. | Definitely | Mostly | Somewhat | A Little | Not at all | Does not apply |
| 12. | I would participate in mediation again. | Definitely | Mostly | Somewhat | A Little | Not at all | Does not apply |
| 13. | Tell us the most important thing that happened in the mediation today. Use the back of the form if needed. | | | | | | |

PROPOSED RULE FOR COURT-CONNECTED MEDIATION SERVICES

_____-101. **Court-connected Mediation Services.** This rule provides minimum standards to guide and inform courts interested in initiating, modifying, or improving court-connected mediation or settlement facilitation services and programs. For convenience, all such services will be referred to hereafter as “mediation services”. Nothing in this rule is intended to preempt any statutory provisions or Supreme Court rules addressing mediation or settlement facilitation.

A. The Supreme Court retains superintending control to ensure that courts adopt appropriate rules, policies, and procedures for the implementation of this rule, and may as appropriate delegate this role to the ADR Commission.

B¹. Mediation services should be available on the same basis as other services of the court and should be provided as broadly as possible.

C². Mediation is used in many different types of cases, from minor criminal cases, small claims cases, and domestic relations cases to complex civil matters. These standards are intended to apply to court-connected mediation services that handle all such cases. These standards are not intended to apply to settlement conferences held by the judge assigned to the case.

D. The goal of these standards is to inspire court-connected mediation services of high quality. They are intended to be used by courts as guidelines to achieving that end. They recognize that court-connected mediation services need to be designed and implemented in ways that take account of local needs and circumstances. They should not discourage courts from providing mediation services because current shortages of resources preclude immediate adherence to all of the provisions of the standards. Courts are also encouraged to exceed the minimum standards whenever possible.

E. Party self-determination, in which the decision-making authority rests with the parties themselves, is the core value of court-connected mediation services or

¹ Shaw, M., Singer, L. R. and Povich, E. A. (1993), NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS. Family Court Review, Vol. 31, Issue 2, p. 156. [“Nat’l Stds”], 1.1

² Nat’l Stds, Introduction

PROPOSED RULE FOR COURT-CONNECTED MEDIATION SERVICES

programs. Courts may mandate referral to mediation, but should institute appropriate provisions to permit parties to opt out of mediation and to ensure that there is no inappropriate pressure to settle.

F. Courts' responsibility for mediation and mediation services and programs³. The degree of a court's responsibility for mediators or mediation programs depends on whether a mediator or program is employed or operated by the court, receives referrals from the court, or is chosen by the parties themselves.

- 1) The court is fully responsible for mediators it employs and services and programs it operates.
- 2) The court has the same responsibility for monitoring the quality of mediators and/or mediation services and programs outside the court to which it refers cases as it has for its own services and programs.
- 3) The court has no responsibility for the quality or operation of outside services or programs chosen by the parties without guidance from the court.

G. A court shall establish procedures to ensure that each case to be referred to mediation services, regardless of the type of case, is screened for domestic abuse and other issues related to the capacity and competency to mediate before, during and after mediation.

- (1) A court that decides that some cases may be mediated regardless of actual or alleged domestic abuse shall identify and require appropriate training for mediators to mediate such cases.
- (2) A court that decides that some cases may be mediated regardless of actual or alleged domestic abuse shall ensure that only mediators with appropriate training mediate such cases.

H. Confidentiality. Except as otherwise provided in the Mediation Procedures Act⁴ or by applicable judicial court rules, all mediation communications are confidential, and not subject to disclosure and shall not be used as evidence in any proceeding.

³ Nat'l Stds, 2.0, 2.1

⁴ NMSA 1978, 44-7B-1 et seq..

PROPOSED RULE FOR COURT-CONNECTED MEDIATION SERVICES

I. Where not inconsistent with this rule, the National Standards for Court-Connected Mediation Programs developed in April 1993 by the Center for Dispute Settlement in Washington, D.C., and the Institute of Judicial Administration in New York City, through a grant from the State Justice Institute, are adopted and incorporated by reference.

J. It is expected that general acceptance and widespread implementation of these standards will enhance confidence in and satisfaction with our public justice system.

-101A. **Definitions.**

A. “Court-connected⁵” means any program or service, including a service or program provided by an individual, to which a court refers cases on a voluntary or mandatory basis, including any program or service operated by the court or any judicial agency, such as the Administrative Office of the Courts.

B. “Domestic abuse” means ...

C. “Mediation⁶” means a process in which a mediator or mediators:

- (1) facilitates communication and negotiation between mediation parties to assist them in reaching an agreement regarding their dispute; or
- (2) promotes reconciliation, settlement or understanding between and among parties.

D. “Mediation communication⁷” means a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing or reconvening a mediation or retaining a mediator.

E. “Mediation party⁸” means a person who participates in a mediation and whose agreement is necessary to resolve the dispute.

⁵ Nat’l Stds, Definitions

⁶ Mediation Procedures Act [“MPA”], Definitions, NMSA 1978, 44-7B-2

⁷ Id.

⁸ Id.

PROPOSED RULE FOR
COURT-CONNECTED MEDIATION SERVICES

F. "Mediation program"⁹ means a program that provides mediation services and is created or administered by a court or court agency.

G. "Mediator"¹⁰ means an individual who:

- (1) holds the individual's self out as a mediator and who conducts a mediation;
- (2) the mediation parties agree to use as a mediator and who conducts a mediation;
- (3) is designated by a mediation program as a mediator and who conducts a mediation; or
- (4) is an observer who is permitted by the mediation parties to watch and listen to the mediation for educational or other administrative purposes.

H. "Nonparty participant"¹¹ means a person, other than a mediation party or mediator, who participates in, is present during the mediation or is a mediation program administrator, including a person consulted by a mediation party to assist the mediation party with evaluating, considering or generating offers of settlement.

I. "Person"¹² means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government or governmental subdivision, agency or instrumentality, public corporation or any other legal or commercial entity;

J. "Record"¹³ means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

K. "Sign"¹⁴ means:

- (1) to execute or adopt a tangible symbol with the present intent to authenticate a record or to ratify the agreement set forth in the record; or

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ Id.

PROPOSED RULE FOR
COURT-CONNECTED MEDIATION SERVICES

- (2) to attach or logically associate an electronic symbol, sound or process to or with a record with the present intent to authenticate a record or to ratify the agreement set forth in the record.

DRAFT

PROPOSED RULE FOR COURT-CONNECTED MEDIATION SERVICES

-201. **Structure of mediation services and programs.**

A¹⁵. Each court shall specify its goals in establishing mediation services or programs or in referring cases to mediation programs or services outside the court.

B¹⁶. Courts shall set performance expectations for mediators and establish a means of evaluating whether the services provided meet the specified goals.

C¹⁷. Each court shall develop clearly stated written policies, procedures and criteria establishing program structure, procedures, and the qualifications of those who serve as mediators, including at the minimum:

- (1)¹⁸ referring cases to mediation;
- (2) determining qualifications of mediators;
- (3) assigning a mediator to a case, including whether and how parties may select a mediator;
- (4) replacing an assigned mediator;
- (5) payment of fees if any by the parties, including provisions to make mediation available to parties regardless of the parties' ability to pay, and provisions to make mediation available on a sliding fee scale based on ability to pay;
- (6)¹⁹ evaluation of mediators by participants;
- (7)²⁰ removing from the roster of mediators those mediators who do not meet performance expectations;
- (8)²¹ collecting data reflecting whether the program is meeting its goals;
- (9)²² a complaint mechanism to address any grievances about the mediation service or program, or mediators;
- (10) screening for domestic abuse and other issues related to the capacity and competency to mediate before and during mediation²³;

¹⁵ Nat'l Stds, 2.2

¹⁶ Id.

¹⁷ Adapted from Nat'l Stds, 1.2, 1.3, comment to 2.1.

¹⁸ Adapted from Nat'l Stds, 3.2b

¹⁹ Adapted from Nat'l Stds, 6.5

²⁰ Nat'l Stds, 6.6

²¹ Adapted from Nat'l Stds, 2.2

²² Nat'l Stds, 2.6

PROPOSED RULE FOR COURT-CONNECTED MEDIATION SERVICES

(11) determining whether a case should be removed from mediation²⁴.

D²⁵. A court shall, in each case to be referred to mediation, regardless of the type of case, determine whether a party asserts domestic abuse is present and whether it appears that domestic abuse is present.

(1) If the court determines that domestic abuse is present, the court shall halt or suspend mediation unless the court specifically finds that the following three conditions are satisfied:

(a) the mediator has substantial training concerning the effects of domestic abuse on victims;

(b) a party who is or alleges to be the victim of domestic abuse is capable of negotiating with the other party in mediation, either alone or with assistance, without suffering from an imbalance of power as a result of the alleged domestic abuse; and

(c) the mediation process contains appropriate provisions and conditions to protect against an imbalance of power between the parties resulting from the alleged domestic abuse; or

(2) the party who is or alleges to be the victim requests mediation and the mediator is informed of the alleged domestic abuse.

E²⁶. The court should designate a particular person to be responsible for supervision, monitoring and administration of its mediation services or programs, or to act as liaison with private, court-referred programs or mediators. At a minimum, this person should be trained in mediation and understand and know court processes and ADR program management.

F. Information for judges, court personnel, and users.²⁷

(1) In a manner which complies with its Language Access Plan, courts should provide information, education, and orientation to the public, the

²³ See, NMSA 1978, 40-4B(1); Model Standards of Conduct for Mediators [“Model Stds.”], Standard VI B; Model Standards of Practice Standards for Family and Divorce Mediation [“Model Pract. Stds.”], Standards IX, X

²⁴ See, Nat’l Pract Stds, Standard XI; Model Stds, Standard VI A(10), C.

²⁵ NMSA 1978, 40-4-8B(1)

²⁶ Nat’l Stds, 2.5

²⁷ Nat’l Stds, 3.0, 1.5, 1.6

PROPOSED RULE FOR
COURT-CONNECTED MEDIATION SERVICES

bar, judges, and court personnel regarding the availability of court-connected mediation services, court-connected mediation service procedures, and the mediation process.

- (2) Courts should adopt procedures describing the information regarding the case or the parties to be provided to the mediator upon a referral for mediation.
- (3) Courts should provide procedural information before, during, and after mediation to parties, including self-represented parties.

PROPOSED RULE FOR
COURT-CONNECTED MEDIATION SERVICES

____-301. **Qualifications of mediators**²⁸. Courts have a continuing responsibility to ensure the quality of the mediators to whom they refer cases.

A. Courts should establish minimum qualifications for mediators to be included on the court's roster. Qualifications of mediators to whom the courts refer cases should be based on their skills. Different categories of cases may require different types and levels of skills. Skills can be acquired through training and experience.

B²⁹. Courts should establish procedures to regularly monitor the performance of mediators to whom they refer cases and ensure that their performance is of consistently high quality.

C³⁰. Courts should adopt procedures for removing from their roster of mediators those mediators who do not meet their performance expectations and/or ensuring that they do not receive further court referrals.

D³¹. Courts are responsible for determining that the mediators to whom they refer cases are qualified. The level of screening needed to determine qualifications will vary depending upon the type of case involved.

E³². Courts should require mediators to attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.

²⁸ Nat'l Stds, 6.0. See also, Model Standards of Conduct for Mediators ["Model Stds"], Std. IV, Competence; and Model Pract. Stds., Std. II.

²⁹ See, Nat'l Stds, 6.5

³⁰ Nat'l Stds, 6.6

³¹ Nat'l Stds, 6.3. See also, Model Stds, Std. IV A

³² Adapted from Model Stds, Std. IV A2

PROPOSED RULE FOR
COURT-CONNECTED MEDIATION SERVICES

____-401. Best practices for mediators³³.

A. Impartiality. Impartiality is at the heart of mediators' ethical responsibilities. The mediator should maintain impartiality toward all parties. Impartiality means freedom from favoritism or bias either by appearance, word or by action, and a commitment to serve all parties as opposed to a single party.

- (1) Mediators may not accept or give a gift, request, favor, loan or any other item of value to or from a party, attorney, or any other person involved in any pending or scheduled mediation process. This prohibition does not apply to payment of mediators' fees for services provided.
- (2) Mediators shall not use information disclosed during the mediation process for private gain or advantage nor shall a mediator seek publicity from a mediation effort to enhance his or her position.
- (3) If a mediator finds that s/he cannot maintain the requisite impartiality in a mediation, the mediator should withdraw from the case.

B. Conflict of interest. A mediator must disclose any known, significant current or past personal or professional relationship with any party or attorney involved in the mediation. If a mediator has represented, treated, or advised either party or their attorneys in any capacity, the mediator must disclose that professional relationship. Disclosure must also be made of any pertinent pecuniary interest.

- (1) After the mediator discloses the prior personal or professional relationship or pertinent pecuniary interest, the parties may choose to continue with the mediator.
- (2) The duty to disclose is a continuing obligation throughout the process.

³³ Nat'l Stds, 8.0, Ethical Standards for Mediators, list 6 areas of concern: Impartiality, Conflict of Interest, Advertising by Mediators, Disclosure of Fees, Confidentiality, and Role of Mediators in Settlement. The Model Stds include 9 standards which address those areas except Role of Mediator on Settlement, plus Self-Determination, Competence, Quality of the Process, and Advancement of Practice. The Model Pract. Stds address self-determination, qualifications of mediators, impartiality, fees, confidentiality, advertising, competence, as well as several having to do with quality of process and families in particular. These topics draw from provisions in all of them.

PROPOSED RULE FOR COURT-CONNECTED MEDIATION SERVICES

C. Representations by mediator. A mediator shall only make accurate statements about the mediation process, its costs and benefits, and the mediator's qualifications.

- (1) A mediator should make no claims of specific results or promises which imply favor of one party over the other.
- (2) A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.
- (3) Mediators should refrain from promises and guarantees of results. A mediator should not advertise statistical settlement data or settlement rates.
- (4) Mediators should accurately represent their qualifications. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it specifically grants such status to the mediator.

D. Disclosure of Fees. Where costs and fees are paid by the parties directly to the mediator, the mediator should provide written information to the parties that includes costs, fees, and time and manner of payment. The parties and the mediator should enter into a written agreement that describes costs, fees, and time and manner of payment before beginning the mediation. This requirement applies even where the mediator's fees are set by court order.

- (1) No commissions, rebates, or other similar forms of remuneration should be given or received by a mediator for the referral of clients.
- (2) Fees shall not be based on the outcome of the mediation. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or the amount of the settlement.

E. Confidentiality³⁴. In the absence of a statute to the contrary, the mediator should treat information revealed in a mediation as confidential, except for the following:

- (1) Information that is statutorily mandated to be reported.

³⁴ Nat'l Stds, 8.1e; see also, MPA: NMSA 1978, 44-7B-4; NMSA 1978, 44-7B-2 B.

PROPOSED RULE FOR COURT-CONNECTED MEDIATION SERVICES

- (2) Information that, in the judgment of the mediator, reveals a danger of serious physical harm either to a party or to a third person.
- (3) Information that the mediator informs the parties will not be protected. The mediator should inform the parties at the initial meeting of any limitations on confidentiality.

A mediator may only inform the court of the following information regarding the mediation, subject to the requirements of a mediation program:

- (a) whether the mediation parties appeared for mediation;
- (b) whether a mediation occurred or has terminated;
- (c) the date, time and place of a mediation;
- (d) the persons in attendance at a mediation;
- (e) whether a mediator received payment for the mediation;
- (f) whether or not a written agreement was signed by the parties;
- (g) the outcome of the mediation for program and mediator evaluation purposes, such as fully settled, partially settled, no settlement, etc., which do not reveal the content of the mediation and any agreements made during mediation;
- (6) other administrative facts which do not reveal the content of the mediation and any agreements made during mediation;
- (7) except that a program may require any written agreements to be presented to court.

F. Role of mediator in settlement³⁵. The mediator has the responsibility to see that the parties consider the terms of the settlement and be sensitive to inappropriate pressures to settle. In adhering to this standard, the mediator may find it advisable to educate the parties or to refer one or more parties for specialized advice.

- (1) The mediators shall not make decisions for the parties, nor shall the mediator give legal or professional advice.
- (2) A mediator shall inform the participants of their right to withdraw from mediation at any time and for any reason.

³⁵ Nat'l Stds, 8.1f

PROPOSED RULE FOR COURT-CONNECTED MEDIATION SERVICES

(3) Mediators have a continuing responsibility to ensure that the parties retain the capacity to mediate. If at any time a mediator believes the participants are unable to participate meaningfully in the process or that a reasonable agreement is unlikely, a mediator shall suspend or terminate mediation and encourage the parties to seek other forms of assistance for the resolution of their dispute.

(4) If the participants reach a final impasse, a mediator should not prolong unproductive discussions that would result in emotional and or monetary costs to the participants.

(5) At no time and in no way shall a mediator coerce any party into agreements or make substantive decisions for any party. Depending on the program and model being utilized, mediators may make suggestions for the parties' consideration, but all decisions are to be made voluntarily by the parties themselves.

G³⁶. Quality of the process. The role of the mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, mediators should distinguish between the roles.

(1) A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards and only if the mediation model being utilized does not prohibit the mediator from providing such information.

(2) A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.

(3) If the parties so desire, the mediator should allow attorneys, counsel or advocates for the parties to be present at the mediation session.

H³⁷. Written agreement. With the agreement of the participants, the mediator may document the parties' resolution of their dispute. These agreements may be on forms approved by the court. The mediator should inform the participants that any agreement

³⁶ Adapted from Model Stds, Std. VI

³⁷ Adapted from Model Pract. Stds, Std. VI E, and discussion.

PROPOSED RULE FOR COURT-CONNECTED MEDIATION SERVICES

should be reviewed by an independent attorney before it is signed. The confidentiality and enforceability of these agreements are governed by the Mediation Procedures Act and other applicable law.

I. Domestic abuse. A mediator shall recognize a situation involving domestic abuse and take appropriate steps to shape the mediation process accordingly³⁸.

(1) A mediator has a continuing obligation to screen for domestic abuse and other issues related to the capacity and competency to mediate before and during mediation.

(2) A mediator shall, in each case, regardless of the type of case, determine whether a party asserts domestic abuse is present and whether it appears that domestic abuse is present.

(3) If the mediator determines that domestic abuse is present, the mediator shall halt or suspend mediation unless the mediator specifically finds that the following three conditions are satisfied:

(a) the mediator has substantial training concerning the effects of domestic abuse on victims;

(b) a party who is or alleges to be the victim of domestic abuse is capable of negotiating with the other party in mediation, either alone or with assistance, without suffering from an imbalance of power as a result of the alleged domestic abuse; and

(c) the mediation process contains appropriate provisions and conditions to protect against an imbalance of power between the parties resulting from the alleged domestic abuse; or

(2) the party who is or alleges to be the victim requests mediation.

I. Where not inconsistent with this rule, the Model Standards of Conduct for Mediators, developed in September 2005 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution, and the Model Standards of Practice for Family and Divorce

³⁸ Model Pract Stds., Std. X

PROPOSED RULE FOR
COURT-CONNECTED MEDIATION SERVICES

Mediation developed in August 2000 by The Symposium of Standards of Practice, are adopted and incorporated by reference.

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