

STATEWIDE ADR COMMISSION

Meeting Notes

5.19.17

Attendees:

Judge McElroy, Chair	Jennifer Foote	Shannon Driscoll
Mary Jo Lujan, Vice Chair	Susan Barnes Anderson	Torri Jacobus
Elizabeth Jeffreys, Staff	Sara Stevens (PH)	Kevin Spears
Judge Sánchez (PH)	Jessie Lawrence	Cynthia Olson
Laura Bassein	Duane Castleberry	

Absent:

David Smoak	Mari Gish	Phil Dabney
Justice Nakamura		

Guests: Celina Jones, AOC Deborah Dungan, Sup.Ct. Jim Noel, 2nd JD

- I. WELCOME & INTRODUCTIONS
- II. ANNOUNCEMENTS & UPDATES

A. HB131 Signed by Governor

Changed Section 34-6-45 NMSA 1978. Supports a more regular funding source for ADR, especially for more rural courts. Chair appreciates the efforts of everyone to get the bill passed. Bill was attempted two years ago with David Levin and Justice Chávez, but bottlenecked at the end of the Legislative session.

Cynthia Olson: Will there be an education effort with the courts responsive to the changes?

Chair: Yes, the Chief Judges Council (CJC) and CEOs are aware, and we'll be talking more about the plans moving forward. It's on the agenda for the next CJC Mtg. in June.

B. Request from Chief Justice for recommendations (letter)

Need to design infrastructure to make ADR court-connected services more robust, and not just use funds as a pass-through to pay vendors. Deadline of Oct. 2 to provide recommendations to Sup.Ct. Just three Comm. meetings between now & then.

Deborah Dungan: The bullet points are not directives, but things for the Comm. to consider.

Judge Castleberry: \$15 fee is set. Need for consistency across the state? Is there a concern for ordering people to mediation and then charging them?

Chair: That was one concern expressed by the Senators. It's an issue, and may need to make recommendations. When the amendments were done, we followed the DR Mediations bill, so it should work.

Laura Bassein: In DR Mediation, people are ordered to mediation and pay fees. There is a practice around this in some districts already. The person who files the case pays the fees, there is a mechanism to subtract that payment to resolve the disparity.

Chair: Some courts had the litigators pay the mediators directly, not the court. This bill allows the courts to control the funds more, and to recoup the costs of services. Today's expectation is to raise and review the issues, not resolve them. Work will be done

between meetings. Domestic relations cases are excepted from the \$15 ADR fee because those cases are subject to a \$30 DR Mediation fee. Some questions have already been raised regarding the language in the bill.

Celina Jones: The AOC is invested in the development of infrastructure, such as setting up the fiscal structure to allow the courts to collect the fees, and to properly account for the funds.

Shannon Driscoll: Each district court has an ADR fund, this is not an AOC fund.

Chair: The fund for his court has built up, but some courts have no fund set up.

Susan Barnes Anderson: Will all courts be collecting starting 6/16, even if they don't have a rule?

Chair: There's been discussion, and it appears that the courts will be collecting the fee.

Celina Jones: We're still assessing whether the courts have programs, so that's not resolved yet.

Susan Barnes Anderson: We collect the fee on all cases for Metro.

Chair: The 10th has the children's court program, so that could suffice even though they don't have a rule.

Judge Sánchez: Rule 1-016(c)(7), scheduling in civil cases. We could review existing rules and pick one as the example to follow. What's new is the sliding fee scale, and maybe we should focus on that.

Laura Bassein: I'm not clear about the "establishing a program" issue. Celina, is there a requirement that a rule establishes a program? It's more complex than putting a rule in place. Using the children's court mediation as the bookmark doesn't make sense when it is not one of the case types that would receive additional services.

Celina Jones: I spoke with people who have been around for a long time, and no one is sure about distinguishing between CV cases and other cases (JQ).

Chair: We'll need to have discussions about this with Judges and the Supreme Court. The old language required a district court rule, but new language does not. 'Any judicial district that has established an ADR program' is the requirement. The Sup.Ct. is final decider on what a statute means. We will need to understand the logistics of it.

Shannon Driscoll: We need an idea of how this is interpreted. If it takes more to establish a program than to just pass a local rule, then we need to know that. What is needed for the courts to collect the fee? Saying that they have a program may be a way for them to start the development, by providing the fees.

Chair: We have money that has accumulated that will allow us to create a program. If a court doesn't have a fund, it won't be able to spend any money this year. There's a requirement to collect the money before it can be spent in the next fiscal year.

Laura Bassein: When we say "local rule" is that different than the district court rules?

Celina Jones: This could be a recommendation to the court.

Chair: Looking at the chart, there could be .75 million dollars from the \$15 fee. Based on existing revenue collected was about half of this amount. The handout shows \$650k potential because indigent waivers were subtracted. We need to determine what

“reopened” cases are – those reopened after 90-days pursuant to the Sup.Ct. definition? Or any reopened case?

Judge Sánchez: Is confused about the role of the Comm.

Chair: The role is defined by the letter [from Justice Nakamura].

Judge Sánchez: Suggests a response that we’re ready to serve if we get some direction.

Chair: In one directive, there’s a line for indigent waivers that allows a judge to waive only some fees (filing fees not service fees, for example).

Laura Bassein: Should the approach be to identify the big-picture, policy directives, such as identifying the mechanism that will generate the most fees?

Chair: Or recommend the earliest possible date for collection of fees?

Laura Bassein: Do we want to weigh-in on the details, such as whether a case is “reopened” for purposes of the fee, or just stick to the big-picture? Certain cases may not be appropriate to have the fee charged. I think our role is to figure out the big-picture issues. What do we hope to happen? Do we want to emphasize more fees or be concerned for people’s pocket books?

Jennifer Foote: Was not aware that judges had discretion to waive some fees and still impose others. Is the same person being charged twice when the fee is charged against a reopened case? What are we contemplating as the possible fee(s) for an indigent person who will receive services? There are questions of access that come into play.

Jim Noel: Is there a suggestion that the \$15 is the standard fee, and then they’ll be other fees?

Chair: Judge Nash told him that HB131 would not likely have an impact on the 2nd JD. She may not want to charge any additional fees because services are already in place. The 8th JD is paying contractors out of the fund, and the sliding fee scale will help to support administrative costs and provide financial stability. We’ll need to consider whether the fees should be uniform. In the 9th JD there’s a staff person who provides the services, so each district is different.

Judge Sánchez: The sliding fee scale practice is already established by courts in DR Mediation cases, which is covered by local rule.

Kevin Spears: I don’t think the intention is to maximize the fee. We’re [the 9th JD] conservative on the 90-day rule, and we only do CV cases. The fee shouldn’t be over-utilized. It does generate additional revenue, but our role is likely to provide guidelines. Agrees that money must be collected in order to have it available to use in the next fiscal year.

Torri Jacobus: Sounds like each district does things different. Would be helpful to see how each district operates so we can see the options.

Jim Noel: In 2nd JD there’s a lot of waivers of fees. We’re not generating enough revenue to cover half of our program. The 2nd would like to generate enough funds to cover the ADR services.

Chair: Calculated for the 8th JD, the fee would generate \$13k max, and there’s not a lot to get with that kind of money.

Shannon Driscoll: We'll want to see the revenues from the various sliding scale fees currently in place. It will inform decisions regarding whether there's a need for uniform practices, and how to design a sliding fee scale.

Chair: Governor asked what the sliding fee scale would generate for ADR? It's not known. He tried to generate some stats for his court and determined \$38k could be generated by a sliding fee scale. He further calculated that he'd have a budget of \$55k, and he has a reserve pool in the fund. It's really hard for districts to calculate the potential revenue from a sliding fee scale. Maybe the 2ndJD, Jim [Noel], could try to calculate the anticipated revenue.

Kevin Spears: The \$15 is not covering anyone's ADR program. The sliding fee scale should be proposed differently for each court.

Chair: Do we have a motion for how to interpret the \$15 fee?

Judge Castleberry: What's intended in the request for a motion?

Chair: There are disagreements, but maybe we can endorse an interpretation of statutes to allow for the collection of the \$15 ADR fee.

Kevin Spears: Do you know how many courts are not currently charging the fee?

Celina Jones: Six, I believe

Cynthia Olson: Motion: That the statute be interpreted in a manner that would allow the earliest collection of the fee in fiscal year '18.

Chair: the recommendation is either to the CJC or Sup.Ct. Since it can be collected in June 16, 2017, then it's earlier than FY18.

Cynthia Olson: Amends the motion: That the statute be interpreted in a manner that would allow the earliest collection of the fee. [no second provided]

No discussion

All voted in favor.

Elizabeth Jeffreys: Presented and explained the proposal for a single sliding fee scale and flat rates. Explained the FPG and the free process rule of the Sup.Ct. Sliding fee scales for DR Mediation are available for review and can be provided. SESV sliding fee scales are difficult to obtain.

Laura Bassein: Concern for complexity of civil cases, with corporate litigants. Using an hourly rate seems complex. Staffing may be more complex than using a flat rate for services.

Elizabeth Jeffreys: The proposal is an example. It is not set in stone and things can be changed.

Shannon Driscoll: Recommends that the Comm. consider separately the concept of the rates from the concept of the sliding fee scale. We would still need to consider the relationship between them.

Elizabeth Jeffreys: Could add an administrative charge, a percentage (10/15/20%) to each district's determined rates, to come up with a program rate.

Judge Castleberry: Likes the idea that courts could be in charge of setting the rates, because it likely varies across the state.

Shannon Driscoll: Commission could provide guidance on setting of rates for districts if they're not going to be flat rates across the state.

Laura Bassein: DR Mediation and civil [ADR] are distinct. There are many considerations in civil cases in trying to figure out what the fees will be. There may be 10 litigants, there may be higher complexity ...

Chair: There are rules in place that help to determine some of these issues.

Vice Chair: Is trying to understand the handout for ADR fund expenditures ...

Kevin Spears: May have provided the incorrect data for the handout, the court attorney in the 9th JD spends 50% of his time on mediation, primarily for DR mediation.

Chair: Our fund expenditures vary by year, so the expenditures are representations.

Chair: The Comm. should consider vendors vs. In-House service providers. The idea is to build infrastructure, such as developing expertise within each district as an example.

Kevin Spears: Agrees that's a possible direction.

Torri Jacobus: The 2nd JD doesn't refer to service providers as 'vendors' because the parties go straight to the service providers and contract with them.

Chair: Read the NCSC Report (2011) recently, and there's a reference to J.Daniels' presentation to the Legislature. It could have been the same presentation this year. Things really haven't changed. Talks about the 'central corridor', the center of the state, where services are concentrated. But the districts in the rural areas are isolated and they call it the 'Silo effect'. As a commission, perhaps we can draw bands around the silos and pull them together and make recommendations to the Sup.Ct..

Vice Chair: When creating the GSD ADR Bureau there was no infrastructure at all. We had a few people that were trained and ready to mediate, but needed to go to customer agencies to get buy-in. First year was spent learning what each location needed, and how each was unique. Started to create system for a self-sustained program. We're 10 years in now, and it's by no means done. The courts are a critical partner in identifying needs and sharing resources.

Chair: Similar position for the district courts. Cannot impose on the courts, as some are in position to develop a program, but others may be struggling with other issues. We need to keep in mind the needs of the district courts and the needs of the Sup.Ct.

III. **Discussion/Formalization of Cmte Structure and Activities for 2017**

Chair: redesigned plan by himself, thought that HB131 would change the year's activities.

Handout: Activities/Plans for 2017. The Chair called many Commissioners recently to identify interests. If there are several committees working and reporting during the Commission meetings, and we bring in people from outside, then it's a more productive and organized approach. [The handout] is a draft open for discussion.

Torri Jacobus: Supports the direction.

Laura Bassein: Wants to include other courts: probate, municipal ...

Judge Sánchez: Supports working through committees.

Chair: next steps? Should people volunteer?

Shannon Driscoll: There's probably not any Mag/Metro court need for a cmte right now.

Chair: Was thinking in terms of the expansion - thought the Commission could be involved.

Shannon Driscoll: The need for the Commission would be to support funding efforts. There's not an unmet need for the expansion, other than funding at this point.

Susan Barnes Anderson: agrees with Shannon Driscoll

Cynthia Olson: We could include the cmte, so that we recognize a place and don't forget about the need.

Chair: Marketing Cmte could be rethought. Works on October mediation week and awards. It might be good to get on the agenda of other entities and educate the ADR cmte at the Bar and get their feedback on that. The need for training is across the board, including maybe going to the Conclave or Bar meetings to do programs.

Deborah Dungan: J.Nakamura is talking about changes to CJC meetings to provide a forum for training, if folks are eager to work on that.

Judge Sánchez: Would like to work on district court development, and will leave it to the discretion of the Chair.

Kevin Spears: Agrees, and would also like to work on it.

Jessie Lawrence: A lot of people would like to be engaged in activities, but maybe not the lead. Maybe Commissioners could each submit to the Chair what their level of interest is for the cmtes.

Chair: Send an email to the Chair if interested in any cmtes. The July 14 meeting will be from 10am to 3pm, with a working lunch, would like to find a space with white boards.

Susan Barnes Anderson: There are classrooms in parking garage area, but may not be a call-in or video.

Chair: There should be in-person participation.

Susan Barnes Anderson: The chairs are not comfortable in the classrooms.

Chair: Maybe we could meet at JID in Santa Fe?

Judge Sánchez: It's 20 miles shorter to Santa Fe than to Albuquerque.

Chair: Wondered if Cynthia could be the facilitator.

Cynthia Olson: Is unlikely to be here, but could help with the planning.

Vice Chair: Suggests the Chuck Garra Corrections building (1st & Lomas) nearby with a large conference room, it may be available. There's a kitchen.

Chair: The HB131 Working Group could set a working session of 2-3 hours to gather information and organize and set activities, or could do a longer session.

Jennifer Foote: ATJ has done smaller work sessions, and it's more effective than longer sessions where details get lost.

Cynthia Olson: Is wanting to understand the purpose of the Comm. Who are we? What are we supposed to be doing? What is the relationship to the staff? etc.

Chair: recommends that everyone review the NCSC Report (2011) as a statement of purpose. It's online. It is important to attend the July 14 retreat in-person.

Jessie Lawrence: Jessie could do facilitation and work with Cynthia Olson to prepare.

Chair: The HB131 Cmte will form a working cmte meeting, maybe at JID Conf. Room (video & telephone access, whiteboards) on a Friday from 9-12? Chair will reserve JID room, make contacts, email everyone interested, and then maybe we can make assignments & divide districts up to gather information on sliding fee scales for DR Mediation.

Deborah Dungan: Requests that maybe data cmte work on creating an ADR performance measure to assist the ADR performance measures cmte.

Shannon Driscoll: Happy to work on that, and data cmte has representatives of ADR folks.

Jennifer Foote: Would like input from ATJ on sliding fee proposal or from civil legal service providers that are on the ATJ commission. There's a variety of ways to engage the ATJ.

Judge Nash is co-chair with Liz McGrath, and Justice Maes also involved with the comm..

Chair: Was thinking to meet in June, so could bring ATJ in to the June meeting & maybe also bring someone from the DR Mediation cmte.

Deborah Dungan: Neil Bell staffs the DR Mediation Rules Cmte, so he could help.

Cynthia Olson: Has concerns about the profession as a whole, and standards and quality, and is reading that the we 'report on, develop, organize and monitor' courts in New Mexico.

Susan Barnes Anderson: We spent years drafting the Rules which later became Guidelines on mediation. As a commission early on we spent years on those rules. They were submitted to Sup.Ct. 7 mo. ago. It's not a fast moving process.

Chair: we might want to present the Guidelines to the District Courts

Susan Barnes Anderson: The courts will have to take on the piece of oversight, but we can give guidance. There's such a differing opinion about what constitutes good practices, so it's a complex task. It's like herding cats.

Vice Chair: At some point the Commission may want to do a billboard, such as for HB131, and broadcast wider than just the website. The Round the Roundhouse publication accepts submissions of articles of general interest.

Cynthia Olson: The request for infrastructure needs focus.

Mtg. adjourned. Send emails on cmte interest to Chair, and prepare for July 14 meeting.