

STATEWIDE ADR COMMISSION

Meeting Notes

9.22.17

Attendees:

Judge McElroy, Chair	Jennifer Foote	Shannon Driscoll
Phil Dabney	Susan Barnes Anderson	Torri Jacobus
Elizabeth Jeffreys, Staff	Sara Stevens	Cynthia Olson
Judge Sánchez	Jessie Lawrence	
Laura Bassein		

Absent:

David Smoak	Mari Gish	Duane Castleberry
Justice Nakamura	Kevin Spears	Mary Jo Lujan, Vice Chair

Guests:

Lauren Feltz-Salazar & Barbara Arnold, 8 th JD	Lisa Betancourt, 3 rd JD (PH)
Peter Bochert (V)(AOC-CSD)	Kristen Freuh-Leyba (V)(SESV)

I. WELCOME & INTRODUCTIONS

II. ANNOUNCEMENTS & UPDATES

A. JEC Scholarship selections: Christopher Peck (2nd) & Judge Eichwald (13th)

B. ADR Symposium – is postponed indefinitely & may be cancelled. GSD ADR Bureau will put a notice on their webpage.

C. MCMP Funding – The Unified Budget does not include financial support for the program in FY19, so services can be continued through FY18, but then funding is uncertain.

Commission could work within the Judiciary to get support for stable funding for the program. The program coordinator’s position is unsustainable on the fee revenue, but position is critical to the continuity and quality of services. State general funds is the most stable source of funding.

Laura Bassein: Could the fee be increased to provide stable funding?

Shannon Driscoll: Case filings fluctuate, and have been going down. Programs are more stable when the employees are paid from state general funds. The AOC and Supreme Court will need to make funding a priority in order to salvage the program.

Susan Barnes Anderson: We’ve also had an increase in people applying for free process.

Metro’s program has been stable for 30-years in large part because the staff is supported by state general funds, not fee revenue.

Chair: The magistrate courts have struggled financially.

Laura Bassein: JEC is fee funded as well, and the stability of state general funds is also questionable.

Judge Sánchez: Fees cause other issues: Penalty assessments may be significantly lower than the cost of the fees that are added, and it may not look rational.

III. REVIEW OF COURT'S LOCAL ADR RULES

Chair: Joey Moya, Chief Clerk of the Supreme Court, requested that the Commission review local rules involving ADR. Process may be faster, because regular rule procedures would be by-passed. The Chair will meet with the Supreme Court on October 18, 2017, and will ask about the process requirements. We may want to form a committee to review, since there may be technical requirements. The first submission for consideration is from the 4th Judicial District. We should consider whether the ADR rules should be very specific, or general with internal procedures that can be more readily modified. We have more questions than answers, but a small committee could address, with direction from the Supreme Court.

Local Rules Review Cmte: Laura Bassein, Judge Sanchez, Phil Dabney, Judge McElroy

Judge Sánchez: The rules need to have uniform structure, and needs to not contradict existing rules.

Chair: There is a local rules committee, and we'll need clarification about the process – whether the rules will still go through the standard process. There will be more clarity after the Chair receives guidance.

IV. DISCUSSION/APPROVAL OF COMMISSION'S STRATEGIC PLAN

Chair: Lauren took the notes. Additions, corrections and changes may be offered. Jessie led the meeting and reduced the decisions to a one-page summary.

Jessie Lawrence: Not sure what the next steps would be. We could get edits and responses either now or later. The plan can then be approved as the 'backbone' of the work the Commission will focus on. Lauren's notes are very good. The purpose of the ADR Commission and the intended goals were the focus of the discussion, and then the goals were prioritized.

Chair: We can have more time to read through these.

Judge Sánchez: Maybe we would communicate with the district courts regarding a pattern rule, if that's what we want to do, and provide reasoning. That would align with our goals. With regards to the survey – has an instrument been developed?

Jessie Lawrence: No. We may need to contemplate the goals.

Judge Sánchez: No, the goals just need concrete steps (action plan), to effectuate.

Laura Bassein: Certain aspects of the Commission's on-going work are not reflected in this plan. The identified goals are other 'additional' things, but we have on-going work such as the Scholarship work. We need to consider the on-going work that we do, and how that fits with the goals.

Jessie Lawrence: We need to define the outlying work of the Commission.

Chair: Perhaps in the November meeting we could discuss in more detail. We could approve what we have now, and then put action steps together.

Jessie Lawrence: We still need to be clear about the on-going work and include it.

Phil Dabney: We could add as a one year goal the need to define and identify on-going tasks

Elizabeth Jeffreys: A mission, vision, goals & a 1-year plan was in place before the retreat, and the new mission may be broader than what was intended by the Supreme Court in that it expands the focus to the development of ADR in the community, generally, not just in the courts.

Chair: Let's give more consideration to this and address in November. This document is a starting point more than an end point. The meeting was very helpful, especially for the new Commissioners. We can respond to the Supreme Court with the summary page, and then follow later with a more definitive plan and specific activities.

Laura Bassein: On the 3-year priorities, the second goal is perhaps troubling because demonstrating the effectiveness of ADR may not be the focus of the initial efforts.

Shannon Driscoll: We really would want to have a repository of data more than complete research.

Chair: Perhaps we could just focus on gathering data for existing programs.

Shannon Driscoll: The data may NOT demonstrate effectiveness, and that does not mean that the program needs to shut-down. That would mean that the program may need assistance to improve the system.

Phil Dabney: Are we looking for anecdotal information – surveys and the like.

Jessie Lawrence: Let's say, "data that could be used to explore the effectiveness of the programs."

Laura Bassein: In the second vision, the phrase "technical support" – what does that mean?

Jessie Lawrence: I'm not sure - maybe that could change to "strategic and technical support."

Chair: Can we get support for presenting the summary page to the Supreme Court?

Phil Dabney:

Motion: Change summary report with changes discussed this morning, and submit to the Chief Justice. **Second:** Judge Sánchez

Discussion

Laura Bassein: Maybe put a header explaining that this was derived from retreat.

Phil Dabney: **Amend motion** as offered by Laura Bassein **Second:** Judge Sánchez

Vote: All in favor.

V. DISCUSSION OF RECOMMENDATIONS FOR HB131 IMPLEMENTATION

Chair: When the NCSC report came out, we looked at what was in place in 2011, and there haven't been many changes since. The rural courts still lack programs. The draft report is presented with attachments. Request was to submit report by October 2nd to the Supreme Court. There were two workgroup meetings, with telephone and video participation from various courts. Ahead of the first meeting, there was a survey to the district courts on program operations. Information was compiled (Attachment 4). We worked on sliding fee scales, and reviewed Elizabeth's draft and others. We checked what revenue would be generated with each sliding fee scale.

Torri Jacobus: Is the goal to have a sliding fee scale to address fees for Civil ADR, DR services and SESV services?

Chair: Yes. The Sup. Ct. approved a DR scale in 2000 that was reviewed. The August meeting decided on the sliding fee scale that's in the draft report. We looked at federal programs, and the sliding fee scales used in the courts. We sent out the sliding fee scale to courts to test the revenue. It was presented to CJC and ATJ last Friday to get input. Judge Singleton submitted a comment, but no further response received. Process: Reviewed NCSC Report, picked out some guiding principles to provide an introduction. One of the questions was what the revenue would be with the sliding fee scale, so used 8th as a sample. Jessie reviewed and edited, so the draft has some sections with brackets that represent Jessie's edits for consideration. The Chair is hoping to have this approved today and finalized so that it can go to the Supreme Court.

Judge Sánchez: Attachment 4 needs to be enlarged and darkened. There is a lot of white space on the page that could be utilized.

Chair: The proposed sliding fee scale (Attachment 5), the actual scale would be the first and the third column. If you have to do math or calculations using federal poverty guidelines (FPG), then it becomes more administratively burdensome. These figures are based on the FPG, but they don't change by much each year, so the scale could be revised every 5 years.

Torri Jacobus: Could we add that these are examples, not limitations, in the last 3 columns?

Laura Bassein: Can we consider that some programs charge flat fees, not hourly rates. Maybe provide more examples to demonstrate how the scale would be used under those circumstances.

Shannon Driscoll: I have several concerns. For the rule itself, might be better to not have the chart or numbers, but just include a reference so that the rule won't need to change. One person could review the FPG every year to do the updates. Each court could have a chart for

each program. People that are getting free process from the court shouldn't have to pay for mediation. The idea that people have to pay money in order to be invested in the process isn't true – people are involved in a court case and are already invested. We have high success rates in Metro and the Magistrate Court mediation programs without anyone paying. The proposed scale involves household size up to 4, so the numbers in the first column ... what is that?

Jennifer Foote: I pulled the poverty guidelines for 2017 to review, and the high-end of the scale is for a 1-person household. For a household of 4 people it's a much higher number. 100% FPG for 4 people is \$24,600. I am concerned that the scale doesn't actually reflect the FPG for household sizes greater than one.

Shannon Driscoll: The federal poverty level considers family size, and the guidelines should also.

Judge Sánchez: Poverty law may suggest that the rules could be made specific to case types.

Elizabeth Jeffreys: A lot of variables could be considered, but then it gets really complicated. Most federal programs still rely on the FPG, even though it doesn't consider household debt, regional standard of living, etc.

Chair: The analysis is Chart 1 in the draft. This is the DR scale approved by the Supreme Court in 2000. This is used for DR and SESV.

Elizabeth Jeffreys: We didn't look at SESV scales, so this scale doesn't allow for consideration of safe exchanges.

Chair: I looked at SESV scales. A family of four would get a break, but families of 1-3 would be treated the same. We based the proposed scale on this scale.

Barbara Anderson: The scale on the right is applying the 2000 FPG to analyze the DR scale. The percentages are what we determined reflect the scale on the left. (Gives examples). The FPG may not have been involved in the original scale development, but that's what was used for the analysis to develop the proposal. We tried to use the same logic in the proposal.

Elizabeth Jeffreys: I appreciate the work that went into the scale. The scale on the left shows number of children, which is not the same as the number of household members, so the scale on the right has some problems in translation.

Judge Sánchez: I understand that the scale requirement is in statute, but what about other payment strategies? Is everyone charging \$50?

Chair: No.

Judge Sánchez: I'm thinking that there may not be a fee charged for the services.

Chair: That's great if you can do that. The 4th can't manage to offer a program without collecting service fees. Most districts pass things around, so they share strategies. If one clerk does a

chart for the year, that's good, but they may not get updated. I also think we should avoid having the clerks do math. As for everyone paying, the Judges have discretion to waive the fees. I read a really good bar review article, or a professional journal, which talked about the importance of having some "skin in the game". I understand the benefits in the Metro & Mag court programs. We could make the nominal fee very, very low, but the experience in the district courts is that people are more likely to show up if they have to pay something. The free process level is 185%, which is pretty high, so you're scaling yourself out of revenue for the program. Also free process is provided to people who receive welfare. The concern for the rates of 1 to 3 household members being the same is to provide simplicity in the scale. Having access to justice is important, but that's not really what we're about. We're about having ADR programs, and having lots of programs and scales is complicated in an environment where everyone is understaffed. We did test Elizabeth's proposed scale, and the revenue was almost zero, so what was the point of having one? The 2nd JD was concerned that participants would have to pay for programs that are currently free.

Elizabeth Jeffreys: There is mandatory language in the statute that requires payment for programs that are 'established' by court rule. Programs aren't actually established by rule - either you have a program or you don't. If you do have a rule for the program then the statute says "parties shall pay according to a sliding fee scale approved by the Supreme Court". The only work around that I can think of for a program is that the Chief Judge could issue an order that waives the fees for the entire program.

Chair: Doesn't agree with Elizabeth's analysis

Elizabeth Jeffreys: The statute is attached with the draft, so everyone can have a look. It says, "shall". (Several attorney members review the language and agree that payment is mandated).

Chair: Establishing sliding fee scales is complicated, and then they need to be approved by the Supreme Court, and then years later the scale is in use and no one remembers if the scale was approved. Fees will need to be approved by the Supreme Court.

Laura Bassein: No, they don't need to approve fees.

Chair: reads statute – ok, fees maybe not, but the scale does.

Jennifer Foote: The ATJ Commission included Senior Justice Maes, who expressed concerns about the fees varying for similar services. Should there be some continuity in the rates across the state, or should there be caps in place?

Chair: Many of the rates may be the same, but they may also be a flat rate or hourly rate. Justice Nakamura wanted to allow more in-house staff doing the work. The Governor didn't want this to be an employment program.

Elizabeth Jeffreys: The concern was for the money not to be used as a pass-through: that you wouldn't take the money from the participant and give it all to the service provider. What she

wanted was infrastructure, the meaning of which is not clear but, to me it means that you are offering a program and not just services. In a program, you have an administrator who can offer policies and consistent quality, and measures for data to analyze.

Chair: Took the chart for income in each county, and determined the median income (\$36,000). The median income household would pay about 50% of the maximum fee.

Shannon Driscoll: Does not think the scale is fair for low-income parties.

Jennifer Foote: Agrees. The scale is a false equivalency because it's not really using the FPG as a guide, even though it says that it is. It's not fair to say that the FPG are used when they're not used. I think we need to use the FPG. It's great that each Judge can waive fees, but the scale could incorporate the concern for low-income parties, and alleviate the need for each Judge to make those determinations.

Shannon Driscoll: I think that we could use the FPG - It's not that difficult.

Chair: We are using the FPG.

Torri Jacobus: A family of 4 would fall into the first group according to FPG, but on the proposed scale they fall into the 3rd group. The way that the income is calculated, it doesn't take into consideration the family size.

Barbara Arnold: FPG is calculated every two years based on census and household size, and then FPG are developed that account for the number of children. This is basically creating a different guideline. Using a similar logic used by DR scales, there was a need for simplification that is based on the FPG.

Laura Bassein: A family of four making \$14,000/year should not have to pay one cent for mediation. I want them to have the service so that they can resolve their issues.

Kristen Freuh-Leyba: SESV concerns are different. More staff are needed for larger families, because more observers are needed. In SESV there's typically a weekly fee. According to the proposed scale, it would cost \$300/wk to maintain contact with the kids.

Chair: The scale doesn't dictate the rate, so you could set the rate as needed.

Kristen Freuh-Leyba: For SESV exchanges, it is an "event", so it would need an event rate.

Laura Bassein: An example could be provided for 'events', such as exchanges.

Shannon Driscoll: Should the scale apply to SESV and DR? We should take a look at the DR scale, and maybe make some suggestions about the scale, but it may not work.

Judge Sánchez: The Judges will sometime ask the parties to find a family member to use instead of SESV, because that program has its own costs.

Kristen Freuh-Leyba: I disagree with making a scale that puts these critical SESV services out of reach for families who need them to maintain safety.

Torri Jacobus: SESV doesn't fit under the ADR umbrella, so it shouldn't be considered. There are many concerns of the 2nd JD related to the inclusion of SESV, and possibly to DR. Is the sliding fee scale applying to private contractors that the court refers parties to, but doesn't collect funds?

Chair: It is confusing.

Elizabeth Jeffreys: The conversation in putting HB131 forward, was to consider that the court had control over employees and contractors, but not over outside providers that contract directly with the parties. However, David Levin initially contemplated having the scale apply to outside contractors, and in the Mediation Guidelines we talk about "court-connected" mediation as including outside contractors when parties are referred by the court to the provider.

Torri Jacobus: I am confused, and unclear about what we're doing. What is the scope of the sliding fee scale? Where do contractors fit in? It would be helpful to agree on definitions.

Chair: We could be dealing just with civil mediation, but the question presented by the Supreme Court is whether a scale could be developed for SESV and DR? The courts want to develop programs, and want to set their own fees, but having a single sliding fee scale makes it easier.

Judge Sánchez: On Page 4 of Appendix 5, the conclusion is "mixed". This is just a study.

Chair: The Supreme Court will make the final decision.

Judge Sánchez: Shannon suggested using household size, and that doesn't sound like it would be difficult. Maybe Shannon could work on the proposed sliding fee scale. I think the argument for including household size is meritorious. Let's call the question ...

Motion (Judge Sánchez): That the report be proposed to the Supreme Court, including the sliding fee scale, **Second**: Phil Dabney. Discussion.

Discussion:

Susan Barnes Anderson: If this is approved, then can we change it?

Judge Sánchez: No.

Chair: Asks that some editorial changes be made if approved.

Torri Jacobus: I appreciate the work, and think it's valuable, but I have concerns and will vote "no".

Phil Dabney: If the motion is defeated then we'll need to have a discussion about what to do next.

Vote: 4 in favor, and 8 opposed.

Judge Sánchez: We need a cmte to work on a scale.

Elizabeth Jeffreys: We may want to answer some preliminary questions to assist the cmte.

Chair: Maybe look at the questions posed by the Sup.Ct.

Laura Bassein: Taking some of the questions one at a time and getting clarity and agreement is a critical step. If we make the underlying assumptions and the definitions clear, then we'll have more confidence in designing the scale and answering the concerns.

Judge Sánchez: The Supreme Court asks if there should be one sliding fee scale or several sliding fee scale. I see that tremendous work went into this.

Chair: The deadline is October 2nd.

Elizabeth Jeffreys: The DR Rules Cmte meets October 6th.

Laura Bassein: Should we include the SESV and the DR Rules Cmte?

Chair: We've been trying for 3 months to get involvement, and we weren't able to get that.

Laura Bassein: Was unable to participate at the last workgroup meeting, but is very interested and willing on working towards a solution.

Barbara Arnold: The Chief Justice asks for sliding fee scale recommendations and says that SESV and DR Rules should be consulted, but it sounds like we're not going to recommend a single sliding scale for all of the programs.

Chair: I will appoint a committee. The Supreme Court should be informed about where we are with this.

Judge Sánchez: Would like the concerns regarding the proposal to be identified for the court.

Chair: We can say that we're still struggling with the answers, and want time to involve more people. If a committee is appointed, then we can do that work and involve others.

HB131 Implementation Cmte: Elizabeth, Shannon, Torri, Jennifer, Laura, Sara, Kristen,

Elizabeth Jeffreys: Stephen Vigil is the staff for the DR Rules Cmte. I can contact him if you want. I'm willing to lead the cmte. I can see what Stephen Vigil recommends in terms of working with the DR Rules cmte.

Cynthia Olson: What is the outcome expected for the 11/16 meeting?

Chair: We would like to have everything ready for the recommendations at the end of that meeting.

Cynthia Olson: I am not sure what SESV means, but if the program can't live with the proposal then it's not a favorable proposal. I like that there are options available for Judges to waive fees, and knowing that is helpful. I would like to have clarity in the presentation so that we avoid the confusion we experienced today. I would be willing to help, but I don't know that we could come up with a document with such a big group.

Chair: Could we get a recommendation from the committee by Nov. 1?

Elizabeth Jeffreys: Yes.

Susan Barnes Anderson: Having one for civil, one for DR, and one for SESV would be helpful.

Lauren Feltz-Salazar: If we're revising this, and it's already been presented to the ATJ Comm., should we present it again to them? Their next meeting is Nov. 3rd.

Elizabeth Jeffreys: Jennifer is our liaison to ATJ. We can, as a cmte, draft up the plan and circulate it within our Commission. Then, if it's more agreeable, we can circulate it through the other Commissions.

Chair: Let's have the proposal by the end of October.

Elizabeth Jeffreys: The October Mediation Week is not receiving any focus, and the cmte has not met to discuss.

Torri Jacobus: I think the Commission needs to discuss the mediation week activities and re-examine the purpose/intent.

Chair: Yes, I don't think we have time to put anything together.

Adjourn: 12:35pm