

MINUTES
Alternative Dispute Resolution Advisory Committee
1501 West Washington Avenue
Phoenix, AZ 85007
February 22, 2002

MEMBERS PRESENT

Nicole Ack
Ann Woodley for Robert Dauber
Judge Carmen Dolny
Judge Kenneth Fields
Lee M. Finkel
Judge John Gemmill

Levon Kasarjian
Melita Mulligan-Ferry
Dorothy Q. Paine
Joan Tobin
Judge Raymond W. Weaver, Jr.

MEMBERS ABSENT

Joseph Cuffari

Stanley Marks

GUESTS

Kate Otting, Attorney General's Office
Elizabeth Winter, ADRA

Roselle Wissler, ASU

AOC STAFF

Chris Claxton

Patrick Scott

I. CALL TO ORDER

The meeting was called to order at 9:05 A.M. Patrick Scott informed the members that Judge Weaver was meeting with the Chief Justice. The two new members in attendance, Judge John Gemmill from the Court of Appeals Division One and Judge Carmen Dolny from Pima County Consolidated Justice Courts, were greeted by the Committee. Nicole Ack is attending by phone. The position for an Attorney General appointment has not been made at this time. However, Kate Otting from the Attorney General's Office attended the meeting.

II OLD BUSINESS

Approval of the minutes was deferred until later in the meeting.

III CREDENTIALING

Melitta Mulligan-Ferry explained that as a member of both the ADR and the Arizona Dispute Resolution Association subcommittees on credentialing, she is in an awkward position. In order to accurately have the ADRA position represented, Melitta invited Elizabeth Winter, President of the Arizona Dispute Resolution Association, to discuss credentialing. Elizabeth thanked Melitta and the Committee for allowing her to address the Committee on the issue of credentialing. Elizabeth informed the Committee that she is a private attorney from Scottsdale with practice that includes mediation.

Elizabeth recounted the historical process both locally and nationally surrounding the credentialing issue. She stated that ADRA supports the concept of credentialing and, in fact, had developed a performance-based credentialing process. ADRA had been concerned with three things, the protection of the public, setting professional standards and improving the competence of mediators. The process was halted due to administrative costs and because there might have been unintended cultural biases. Also, the process was halted due to the fact that the national organizations in the field had obtained grants to develop national standards. However, the national organizations became preoccupied with a movement to merge the various organizations into one. Credentialing was once again moved to the back burner.

As a result, ADRA formed a new committee, co-chaired by Jan Bender and Melitta Mulligan-Ferry. Their approach has been a definitive approach utilizing protocols of research to develop governing policies. This approach was reinforced at a recent meeting by Bob Barrett, the Executive Director of the California Dispute Resolution Institute. Mr. Barrett stated that you improve the process by infusing better information into the process and as a result you improve the outcome. The components of the protocols identified by ADRA include:

- Policy research examining; the ABA survey of court annexed programs, the national association seven key questions in credentialing, a San Diego Law Review article on credentialing and a California survey of court annexed programs.
- Field research; investigation of programs available in the counties and broad-based input.
- Analysis of the research; identification of the components and protocols of research.

ADRA has established standards of conduct and an enforcement procedure including a grievance process. Development of a credentialing process is the next step.

ADRA has concerns with the proposal presented by the ADR subcommittee including; the party's evaluation, tracking compliance, confidentiality concerns, a lack of focus on education and no discussion concerning cultural issues. Additionally, Elizabeth expressed her own concern that the AOC subcommittee sets no boundaries and that the proposal is over reaching, dictating a process to ADRA, including fees. Also the subcommittee process was not consensus based and could act to circumvent the efforts of the ADRA research process.

Elizabeth stated that she believes we share the same goals but have adopted different processes on how to get there. ADRA is focused on empowering groups and regions through,

inclusivity therefore lowering the possibility that ADRA could be accused of being motivated by their own self interest. She stated that she values a process that leads to results rather than being results driven. Elizabeth suggested that perhaps the AOC subcommittee could step back and allow ADRA to go through their process. ADRA could keep the ADR Committee informed of their progress from time to time.

Elizabeth questioned whether the court would want to be the entity that took on the responsibility for credentialing. Could the Committee collaborate with a nonprofit organization such as ADRA? Should the program be statewide or vary according to the county? Elizabeth noted that California had gone through an elaborate evaluation process that ultimately left the decisions to the counties. Elizabeth stated that due to the cultural diversity of Arizona it might be difficult to have a single statewide model and that perhaps a program could be initiated as a pilot.

In conclusion Elizabeth stated that she did not view this as a crisis or as an emergency needing immediate resolution. Nor did she believe that this opportunity would slip through our fingers. Elizabeth encouraged ADRA and the ADR Committee to use an approach that is humility based and serves the public of Arizona.

Patrick noted that Elizabeth had referenced the AOC in referring to the ADR Committee and subcommittee on several occasions. Patrick clarified that the Committee is a Supreme Court Committee and that he was an AOC employee staffing the Committee. The AOC is not advocating any particular position for the Committee to adopt.

Joan Tobin noted that the certification work group of the ADR Committee had met and given the Committee a draft of a certification guideline. The guideline has never been discussed by the full Committee. Melitta noted that the Committee had not made a determination when or if they would take on the issue of credentialing and that needs to be settled before reviewing any proposal. The goals of this Committee may be different from ADRA or the Supreme Court.

Judge Fields questioned what type of model the Committee proposed to follow citing the State Bar, Bomex and a private accounting association as three different models to consider.

Nicole stated that her expectation was that each court would be accountable for the program they provided including the qualifications of the mediators. She did not see a need for a statewide one size fits all approach. Judge Fields expressed concern that eventually these agreements come to the court for validation either in the form of proposed judgments or as enforcement actions. The court needs to have a comfort level with the qualifications of those persons serving as neutrals. Judge Dolny asked if these are separate issues; court connected programs vs. private programs.

The discussion continued with Levon noting that the Committee focused on the issue of credentialing because there are no standards. The possibility therefore exists that the legislature would fill that void with uncertain consequences. Levon reminded the Committee

that Justice Zlaket had encouraged the Committee to be proactive in examining issues to bring to the Court. It was determined that Joan would reconvene the subcommittee consisting of Levon, Melitta, Judge Fields, Kate Otting and Patrick.

Lee Finkel noted that it is ironic that we are having the discussion focusing on mediators when the same issues apply to arbitration. Standards have never been established solely because arbitrators are members of the Bar.

Patrick distributed a copy of the Chief Justice's strategic plan for the next three years. He directed the Committee's attention to page six. The plan is to:

Develop innovative ways in which to use alternative dispute resolution methods to achieve more mutually satisfying results and to expedite case dispositions

Members suggested that the Committee invite Chief Justice Jones to the next meeting. New members, Judges Dolny and Gemmill, volunteered to serve on the education subcommittees for the Bench and the Bar.

STATE BAR OF ARIZONA - ADR PROGRAM

The Committee discussed the seminar on Rule 16(g) sponsored by the State Bar. The consensus was that the program was an effective presentation and well received by the participants. Levon queried the Committee members about the definition of the word "party." It was his recollection that "party" was inclusive of those persons who were clients. He was concerned because at the seminar, the participants were informed that it was not necessary for clients to confer if represented by counsel. Dorothy Paine stated that in her practice this was not possible because the clients have contractually given up the right to control the litigation. Other members believe responsibility to confer with the client is covered by the rules of professional responsibility and Rule 11.

Judge Fields stated that after the seminar he was approached by a group of municipal lawyers and the county bar to speak about Rule 16(g).

Ann Woodley, Director of the Lodestar Mediation Clinic at the ASU College of Law, and Roselle Wissler, a research fellow at the clinic, spoke to the Committee about how the rule was being implemented and the implications for future research. Roselle was concerned that if implementation is not reasonably uniform it will be impossible to measure the effect of the rule with a survey in the future. The Committee members discussed what was happening in their own counties. It was agreed that courts are generally just beginning to address the issue and had not thought about tracking results. Roselle suggested speaking to the court administrators prompting them to consider the benefits of accumulating at least some kind of minimal statistics.

Melitta informed the Committee that Maricopa County was looking to adapt the form to better serve the family court. Judge Weaver stated that in Yavapai County a separate handout had been developed for Justice Courts.

Nicole took the opportunity to inform the Committee that there had been some misinformation delivered to the seminar participants about the Coconino County ADR program. The program is scheduled to continue as in the past and they plan to repetition the Supreme Court for a new local rule. Nicole reminded the Committee that there is currently a provision for courts to charge a fee for ADR services in state statute under A.R.S. 25-134 with the approval of the County Board of Supervisors. Coconino has had that approval for several years.

Nicole also informed the Committee that after consulting with the superior court judges, Coconino County was not requiring the filing of the required form but was continuing with their practice of case management conferences. Discussion ensued about the mandatory nature of the rules and consequences for noncompliance. Judge Weaver instructed staff to have this put on the agenda for the next presiding judges meeting.

Roselle was asked what the court should count. She was not prepared at this time to give specifics but hoped to work with the courts again in the future perhaps with a few counties as a pilot project. Roselle is meeting with Maricopa County the following week.

JUDICIAL COLLEGE COLLABORATION

Patrick informed the Committee that he and Professor Bob Dauber had attended a meeting of the Judicial College Board. They presented a copy of the new rule and form to the Board. A request was made to the Board to include education on the rule and ADR at the annual Judicial Conference, New Judge Orientation and to sponsor a separate seminar on ADR. The Board was very supportive of the request and promised to contact the ADR Committee with an answer as soon as the judicial conference program had been set. They encouraged the Committee to plan for a two or three-hour breakout session.

Patrick informed the Committee that he had an additional discussion with Board member Judge Druke. The judge had been scheduled to join the ADR Committee by phone but later informed Patrick that the Judicial conference might be canceled due to the budget crisis. However, the judge still encouraged the Committee to plan for an ADR education program.

The Committee discussed how to structure a training session for judges. The Committee discussed using the rule and the form as an introduction to the various forms of ADR. Dorothy suggested that Judge Schwartz would be an excellent choice to demonstrate settlement conferences. It was also suggested that the participants be drawn from the audience. Patrick will inform the Committee if the Judicial Conference is canceled. Judge Fields suggested that it would be even more important to present a session on the rule if the

conference were canceled.

WORK GROUP REPORTS

There were no reports at this time.

ARIZONA CODE OF JUDICIAL ADMINISTRATION

Melitta informed the Committee that she had begun a review of Administrative Order 96-36 to ascertain if it matched current practice in Maricopa County and if it could be revised. Melitta found that beginning on page six the order had multiple direct quotations from the national standards without proper attribution. She highlighted the direct quotations in a document that was subsequently distributed to the Committee by Patrick. Joan informed the Committee that the national standard had been the starting point for the AO but that it had been changed to conform to practices within Arizona. The topic was tabled until the next meeting when Bob Dauber would be present. Patrick was also instructed to extend an invitation to AOC Staff Attorney Greg Eades to explain the conversion process to Administrative Code.

GOOD OF THE ORDER

The minutes were approved unanimously.

. The next meeting is scheduled for April 19, 2002 from 9:00 A.M. to 1:00 P.M. in room 230.

CALL TO THE PUBLIC

After no answer to the Call to the Public, the chair adjourned the meeting at 12:30 p.m.