

**MINUTES**  
**Alternative Dispute Resolution Advisory Committee**  
**1501 West Washington Avenue**  
**Phoenix, AZ 85007**  
**May 17, 2002**

**MEMBERS PRESENT**

Nicole Ack	Stanley Marks
Robert Dauber	Melita Mulligan-Ferry
Judge Carmen Dolny	Dorothy Q. Paine
Judge Kenneth Fields	Joan Tobin
Lee M. Finkel	Judge Raymond W. Weaver, Jr.
Levon Kasarjian	

**MEMBERS ABSENT**

Joseph Cuffari	Judge John Gemmill
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**GUESTS**

Greg Eades

**AOC STAFF**

Patrick Scott

**I. CALL TO ORDER**

The meeting was called to order at 9:00 A.M. by Judge Weaver. Greg Eades, Staff Attorney at the Administrative Office of the Courts (AOC), was introduced to the Committee. Judge Weaver informed the Committee that Judge Gemmill would not be attending the ADR Committee meeting due to a conflict with a meeting of the Arizona Commission on Judicial Conduct.

**II OLD BUSINESS**

The minutes were approved unanimously, as written.

**III ARIZONA CODE OF JUDICIAL ADMINISTRATION**

**Review of Administrative Order 96-36**

Greg Eades stated that there are approximately 410 administrative Orders that have been approved by the Supreme Court. However, unless one knows about a particular order or knows where to look for them they are not generally available to the public or the Courts.

Greg explained to the Committee that the purpose of converting Administrative Orders to Administrative Code is to make it easier for the public and the Courts to obtain that information. The code is organized by subject heading and put in a standardized format. Greg stated that any administrative order that is permanent in nature, applies to multiple courts and will not be amended frequently should be converted to Code. Greg informed the Committee that of the 120 administrative orders that have been identified for codification, half have been converted.

Committee members asked Greg if, in his opinion, administrative order 96-36 should be converted in its entirety to code. Greg responded that there is no place in the code for commentary like those in A.O. 96-36. Greg also informed the Committee that the code for Minimum Accounting Standards had similar provisions which were arranged as a procedure manual and referenced by the code. Greg added that part of the purpose of the Code was to conform and simplify the language of the sections while eliminating legalese and terms of art.

Levon inquired, if in the codification of administrative orders, the substance of those orders was being affected. Greg responded that for his part the revisions were made only to conform to the format of the code. Greg stated that if the Committee wanted to amend the standards or guidelines, it would be best to do so before they were converted to code. He also stated by converting the administrative order to code the importance of the standards would be elevated.

Dorothy expressed concern that by putting the standards and guidelines in code you might eliminate flexibility and prevent people from thinking outside the box. Dorothy also inquired of the Committee if they thought by focusing only on mediation the Committee would be restricting creativity as to other forms of ADR.

Bob Dauber reminded the Committee that the administrative order was there not only to inform the public but to act as a protection for the public. The guidelines were produced more for court administrators than the public. Levon suggested putting only the standards into code with the guidelines and commentary being put into a companion publication.

The Committee was also informed that the Code would need to be circulated to the Limited Jurisdiction Committee, the Committee on Superior Court and the Arizona Judicial Council prior to submission to the Supreme Court.

Judge Fields made a motion that the ADR Committee recommend to AJC that:

1. Administrative Order 96-36 be codified,
2. The codification be general in nature but that it incorporate the standards contained in A.O. 96-36,
3. Standards for additional ADR processes be developed in the future, and

4. The state guidelines, national standards and commentaries be referred to but not incorporated in the code.

The motion was approved unanimously. Patrick will create a draft of the standards in the format prescribed for the administrative code and circulate it to the committee members along with a copy of the national standards prior to the next meeting. Members can then determine if the standards should be revised.

#### Administrative Code 5-104

Patrick reminded the Committee that in the approved Administrative Code 5-104 there was a provision that the ADR Committee would “adopt rules for conducting Committee business.”

The members discussed the number of members needed to obtain a quorum, proxies and an attendance policy. The Committee agreed not to formulate an attendance policy. The Chair will act as necessary should a need arise. The Committee agreed that a simple majority of the appointed membership would constitute a quorum.

The Committee also agreed on a bifurcated proxy policy. A member may give a proxy to a non-member for the purpose of attending a meeting and participating in the activities of the Committee. A second proxy may be given, in writing, to a member for the purpose of casting another members vote. Two members voted against the bifurcated proxy policy.

#### **IV COCONINO COUNTY LOCAL RULE**

Nicole informed the Committee that Coconino County Local Rule 18 for alternative dispute resolution was re-submitted to the Supreme Court for approval as a permanent rule. Judge Weaver informed the Committee that Yavapai County had approached the Board of Supervisors for approval to charge a fee for ADR similar to the Coconino program. The fee was approved on May 6, 2002. Yavapai County will charge a fee of \$400.00 per case to be divided between the litigants. The court will retain \$150.00 and pay the co-mediators a fee of \$125.00. Nicole stated that Coconino County is currently charging \$200.00 per party. They also use co-mediators but only pay them \$100.00 per session.

Melitta stated that Maricopa County has not discussed fees recently but had in the past. The Court never requested a fee due to opposition from some of the judges.

#### **V RULE 16(g)**

Nicole Ack informed the Committee that at the last meeting of the of the Conciliation

Roundtable there was considerable discussion about the impact of Rule (16g) on Family Law cases. The consensus of that group was that the rule should not apply to Family Law cases. Nicole stated in the earlier drafts of the rule Family Court cases were excluded and was not sure when that changed.

Melitta informed the group that Maricopa County is attempting to comply with the rule in all areas, including Family Law. However, they have adapted the required form to be more specific to the area of practice such as probate, family law and justice court. Additionally, the Family Law department is scheduling about 80 settlement conferences per month with a 70% agreement rate. Judge Fields added that he supported the use of the rule in Family Law. He also mentioned that the Family Law divisions would be adding an attorney to act as a case manager and they will be monitoring the use of the rule.

Nicole questioned if the Committee would support changing the rule to make the form an option. She explained that in Coconino County every case goes to a settlement conference and the court is informed by the conference officer of the outcome. The Committee discussed the issue and reached a consensus that it would be counter productive to change the rule before it was given a chance to operate. Bob Dauber asked what the court will do if the form is not filed. Bob stated that he had heard some people suggest that the court sanction the parties or that opposing parties should have to motion for sanctions.

Bob Dauber also addressed the Committee about the opportunity to evaluate the impact of Rule 16(g). Bob was concerned that the courts do not appear to have any plan for utilizing the information provided by the form. Bob would like to believe that the information that is in the form will get to the assigned judge either through an ADR coordinator or court administrator. He wanted to know if the Committee was willing to try to inform the courts about how best to utilize this information. He also expressed concern that in three years when we try to analyze the effect of the rule it will be impossible.

Nicole pointed out that many counties have case flow managers and that they would have an interest in this as a tool She also stated that every county has a court administrator and that their association meets on a regular basis. She suggested that we obtain a meeting schedule of all the major groups (clerks, court administrators and PJ's) and that we should send someone from our education group to meet with them about the rule.

The Committee discussed the type of data that is currently available. One of the problems is that the courts don't always know how a case is resolved particularly if the case settles. The parties may simply stipulate to the court that the case can be dismissed. A suggestion was made that the Committee survey the parties to a case to obtain settlement and information on the cost of their cases.

Stan Marks questioned what it was that the Committee was really trying to determine. He asked if the Committee wanted to know:

- If cases were resolved more expeditiously;

- If cases were resolved less expensively;
- Was there more satisfaction with the process;
- Was the time from filing to resolution faster;
- Were settlement conferences held earlier;
- Has ADR increased;
- If attorneys are more knowledgeable about ADR;
- If judicial involvement with ADR increased;
- How soon ADR conferences held, and does it matter?

The Committee discussed what needed to be evaluated and how to obtain the resources and data that will be needed. Bob Dauber has been contacting counties to determine what is currently available. Melitta Mulligan-Ferry stated that they are asking to have codes added to their computer systems to capture some of this information. The Committee determined it would be prudent to approach the Presiding Judges about how to capture the baseline information.

Judge Weaver instructed Patrick to add the topic to the Presiding Judges meeting in June. He also requested that Bob Dauber contact Roselle Wissler and invite her to the meeting to give a presentation.

The Committee continued to discuss what criteria would be needed to determine if the rule was a success. It was suggested that if it were not possible to do a statewide evaluation, that the Committee approach only those counties that can supply good data and use them as a statistical sampling. It was also suggested that the Committee could do a comparison between divisions that aggressively use the rule versus those that do not.

It was determined that the first step should be to approach the PJ's and to gain their buy-in. Judge Weaver thanked Bob Dauber for all the independent work he has done in contemplating how to make the evaluation meaningful.

## **VI WORK GROUP REPORTS**

### Credentialing

Joan Tobin reported that the work group had been meeting regularly and distributed a draft of minimum qualifications. The mediators either working in a court connected program or being given referrals by the court would be required to meet the qualifications. The work group will ask that the ADR Committee recommend to the Supreme Court that they adopt the minimum qualifications for all courts.

### Arbitration

Dorothy Paine noted that ARCP 76(g) contains an outmoded reference to a "list of witnesses and exhibits." Dorothy noted that all appeals are *De Novo* and as such must complete

disclosure according to ARCP 26.1. Dorothy suggested that this reference could be removed from the rule.

### Fees

Nicole stated that there has been no further discussion about fees since the work groups' discussion with David Sands and Mike Di Marco. Nicole noted that with the state budget being so strained, it appeared that the climate for a fee proposal did not look good.

### Education

Judge Weaver noted that there had been no change in the status of the Judicial Conference, canceled. Bob Dauber suggested that the work group should still look into the possibility of presenting at New Judge Orientation.

## **VII PUBLIC RISK MANAGEMENT PROGRAM**

Judge Weaver reported that he discussed the Public Risk Management program at Presiding Judges meeting. The Presiding Judges questioned if there was a need for the program and were not aware of any requests for the program. It was also disclosed that the Attorney General's Office was contracting with Larry Fleischman, the former Pima County Judge that ran the program, for mediation services. Mike Baumstark was going to do additional research.

## **VIII CLOSING REMARKS**

The next meeting is scheduled for June 21, 2002 from 9:00 A.M. to 1:00 P.M. in room 230. The Chief Justice is scheduled to attend. Patrick requested that Committee members forward any questions or topics for discussion for the Chief Justice to him as soon as possible.

## **IX CALL TO THE PUBLIC**

After no answer to the Call to the Public, the chair adjourned the meeting at 12:40 P.M.