

## MINUTES

Alternative Dispute Resolution Advisory Committee  
1501 West Washington Avenue  
Phoenix, AZ 85007  
January 19, 2001

### MEMBERS PRESENT

Nicole Ack

Jeremy Butler

Joseph Cuffari

Judge Kenneth Fields

Lee M. Finkel

Levon Kasarjian

Melita Mulligan-Ferry

Dorothy G. Paine

Joan Tobin

Hon. Raymond W. Weaver, Jr.

Ann Woodley for Robert Dauber

### MEMBERS ABSENT

Stanley Marks

Judge Robert Moon

Calvin Morrill

### VISITORS

Gerald W. Connor, Chair, Alternative Dispute Resolution Section, State Bar of Arizona

Karen Kretschman, Staff Attorney, Family Law Unit, AOC

### AOC STAFF

Patrick Scott

## **I. CALL TO ORDER**

The meeting was called to order by Judge Weaver at 9:35 a.m. The Chair welcomed six new members to the committee and introductions were made of all present.

## **II. OLD BUSINESS**

The December 15, 2000 meeting minutes were approved unanimously as written.

## **III. DISCUSSION OF DRAFT RULE**

The Chair informed the committee a letter has been sent to the presiding judge in each county. The letter requests information about implementing Rule 16 as proposed by the committee. Two responses have been received orally by staff, from Greenlee and Maricopa Counties. Both support implementing the proposed rule.

Jeremy Butler distributed a draft of a new Rule 28 petition to amend Rule 16, Arizona Rules of Civil Procedure. The draft addresses concerns enumerated by the Arizona Judicial Council on December 13, 2000. Additionally, the draft provides a reference to Rule 72(d) ARCP that contemplates the use of alternative dispute resolution rather than compulsory arbitration.

Levon Kasarjian entered the meeting at 9:40 a.m.

Jeremy Butler outlined the Rule 28 procedure and inquired about the next Supreme Court Rules Agenda date. The next Supreme Court Rules Agenda is scheduled for April 24, 2001.

Nicole Ack entered the meeting at 9:45 a.m.

Judge Weaver requested committee members thoroughly review the draft and forward comments to Patrick Scott at the Administrative Office of the Courts. Patrick's address and email are included on the committee list.

Jeremy Butler stated he will speak with Gerry Conner, Chair of the State Bar, Alternative Dispute Resolution Section and Shirley Wahl to enlist their support for the petition. They in turn could seek the support of the State Bar Board of Governors. Levon Kasarjian asked if the original petition would need to be formally withdrawn. Jeremy believed that would be true but will verify the proper procedure with Patience Huntworth at the Supreme Court.

Joan Tobin asked if the members of the committee needed to arrange for support of the proposed rule. Judge Weaver stated that he hoped the response from the presiding judges would be useful in that area. Jeremy also suggested that the Arizona Dispute Resolution Association draft a letter in support. Joan stated that will not be a problem.

Levon Kasarjian asked if the petition addressed all the concerns expressed by AJC. Jerry responded that he believes those concerns were covered but would review the AJC minutes and verify the accuracy of the petition.

Judge Weaver asked Dorothy Paine to predict the response from the insurance industry. Dorothy stated that they will resist change, like other industries, because of the addition of another form or procedure but did not believe there would be organized opposition. Dorothy believes that those companies that try to settle are using ADR now and those that are opposed to it will go through the motions as required by the rule. The area where this will be of assistance is where one party favors ADR and the other party resists. The court could then intervene if appropriate. The change will also get the parties talking about ADR earlier in the process rather than on the eve of trial.

The committee discussed how the rule would work in conjunction with mandatory arbitration. Judge Fields believes there will be a need to educate the bench if the rule is approved. Dorothy speculated that there will be attorneys that use the rule for tactical advantage. She also believes that this will be an education issue for arbitrators. Dorothy drew parallels to when short trials were first used.

Melita Mulligan-Ferry questioned how the committee contemplated this ADR function would work within the court context. In some counties the judge will need to serve as the ADR specialist because of limited staff or because they can crack the whip. It may not be that way in Maricopa County due to the case volume. Judge Weaver wants to see the response from the presiding judges.

#### **IV STRATEGIC PLANNING**

Judge Weaver stated that the next meeting of the committee is a strategic planning session that will be facilitated by Deb King from the Human Resources Department at AOC. Judge Weaver asked if there was any preparation the committee could do prior to the session. Patrick Scott suggested that in the strategic planning sessions he has participated in they usually began by identifying the core responsibilities of the group or organization. Patrick suggested that the committee use Administrative Order 91-30 as a starting point for the session. Nicole Ack suggested that Deb King either contact the members for input or distribute a questionnaire for them to complete. Nicole also suggested that a representative of the committee or AOC staff have a conversation with the Chief Justice to determine what the role of the committee should be in the future. Nicole noted that the Administrative Order is ten years old. Patrick will distribute a questionnaire to the committee to obtain input before the next meeting.

Levon Kasarjian noted AOC has said they would like input on how to evaluate the grant applications. Levon suggested the committee include that issue as a part of the strategic planning meeting. Joan Tobin reminded the committee that even though the Administrative Order calls for the committee to advise on ADR program administration they have not reviewed the grants due to potential conflicts. Several committee members are grant applicants or their courts request funds.

#### **V. ARBITRATION TRAINING FOR ATTORNEYS**

Nicole Ack recounted a brief history of a proposal to provide arbitration training to attorneys. It was suggested that the AOC should take responsibility for training arbitrators since the courts require them to do arbitration in conjunction with the State Bar. Coconino County will be used as a pilot. Diane Sweeney from the Education Services Division of AOC distributed a draft curriculum for a half day training in late March or early April.

Melita Mulligan-Ferry informed the committee that prior to moving to Arizona she had been an arbitration administrator in Illinois and had materials from that program if members had an interest. Dorothy Paine related that there is an arbitrators' certification program in Nevada that is run by the court. There is a panel of approved people from which to chose for non-binding arbitration.

Judge Weaver asked Nicole if attorneys from other counties could attend. Nicole and Diane both agreed that the program could be a regional presentation. Judge Weaver suggested that notice be given as early as ten weeks prior to the date. Nicole also noted that this program would be free and that an evaluation would be conducted afterwards.

## **VI. GOOD OF THE ORDER**

Karen Kretschman, Family Law Unit Staff Attorney, presented a recap of legislation that has been introduced in the 45<sup>th</sup> Legislature, first regular session. Karen informed the committee that the Arizona chapter of the Association of Family and Conciliation Courts would be holding their annual conference February 9, 10, 11, 2001, in Sedona.

Joan Tobin introduced Gerald W. Connor, Chair of the State Bar, Alternative Dispute Resolution Section and president of Arizona Dispute Resolution Association. Mr. Connor wanted to invite the members to attend a CLE at the University Club in Phoenix sponsored by the ADR section of the Bar. The program will have two tracks, one for neutrals and one for advocates.

Levon Kasarjian asked Mr. Connor if the Arizona Dispute Resolution Association would be willing to indicate their support for the rule as proposed by the committee. Mr. Connor informed the committee that Arizona Dispute Resolution Association Board would be meeting on Saturday, January 27, 2001, and he would put that topic on the agenda. Mr. Connor indicated that based on his knowledge of the Board he felt certain that they would support the rule as proposed by the committee.

## **VII. CLOSING REMARKS AND NEXT MEETING DATE**

Judge Weaver instructed members to send comments on the proposed Rule 28 petition to Patrick Scott at AOC. Levon Kasarjian asked if it would be possible to correct the approved minutes for grammatical errors. Judge Weaver stated that Levon should forward the corrections to Patrick.

The next meeting of the Committee is scheduled for February 23, 2001, from 9:30 a.m. to 1:30 p.m., in conference room 429.

MINUTES

Alternative Dispute Resolution Advisory Committee  
1501 West Washington Avenue  
Phoenix, AZ 85007  
February 23, 2001

MEMBERS PRESENT

Nicole Ack	Stanley Marks
Jeremy Butler	Melita Mulligan-Ferry
Joseph Cuffari	Dorothy Q. Paine
Robert Dauber	Joan Tobin
Judge Kenneth Fields	Hon. Raymond W. Weaver, Jr.
Levon Kasarjian	

MEMBERS ABSENT

Lee M. Finkel	Calvin Morrill
Judge Robert Moon	

VISITORS

Deb King, Human Resources Officer, AOC

AOC STAFF

Chris Claxton	Patrick Scott
Isabel Gillet	

**I. CALL TO ORDER**

The meeting was called to order by Judge Weaver at 9:35 a.m. The Chair welcomed committee members and introductions were made of all present. Nicole Ack joined the committee telephonically.

**II. OLD BUSINESS**

The December 15, 2000 meeting minutes were unanimously approved as amended. The January 19, 2001 minutes were amended on page two, substituting Alternative Dispute Resolution (ADR) for mediation, in the comments of Dorothy Paine. The amended February minutes were unanimously approved.

**III. DISCUSSION OF DRAFT RULE**

Jeremy Butler distributed a draft of a letter addressed to Dee Dee Samet seeking clarification about her concern expressed at the December 2000 AJC meeting in Yuma. Mr. Butler will

attempt to resolve the issue with Ms. Samet and will report back to the committee.

The committee discussed section b(3) of the proposed rule. Levon Kasarjian stated that parties may be confusing the section referring to a conference with a settlement conference. Various alternative new drafts were discussed by the committee. The committee voted to adopt the suggestion of Judge Fields to remove “in a conference” from line four of section b(3).

The committee continued the discussion by questioning if it were necessary to have the proposal section as a lead in to the revised rule. The rule is clear that the parties may confer by telephone or if they desire, meet in person. The court may direct the parties to confer by telephone or to meet in person. Jeremy Butler was unable to continue the discussion due to another appointment. Jeremy stated that he would be in contact with Patience Huntwork about the details of filing the rule and the withdrawal of the original petition. Jeremy distributed a new draft of the rule petition and exited the meeting.

Judge Weaver requested committee members thoroughly review the draft and forward comments to Patrick Scott at the Administrative Office of the Courts (AOC). Patrick’s address and email are included on the committee list.

#### **IV STRATEGIC PLANNING**

Judge Weaver asked Stan Marks to briefly explain the history of the committee.

Stan recollected that ten years ago superior court judges were attending settlement conference training sponsored by the Supreme Court. There was excitement among the bench and the Bar. ADR was in its’ infancy, but that people did not understand the difference between mediation and arbitration. In the mid-nineties, the committee began on the quest to mandate that people consider ADR at an earlier stage. Stan discussed early efforts in Coconino County. Stan noted the concern by the Supreme Court at that time that parties pay nothing more than the filing fees. Maricopa and Pima Counties did not wish to participate under those circumstances. It was suggested that parties be allowed to opt out of ADR. Now we want to require the parties to advise the court that at a minimum they have considered ADR.

Stan stated that we have come a long way down the road and many people now understand ADR. People have participated in ADR processes other than mandatory arbitration. There have been many questions about what the Bench and Bar expected of this committee. The goal of the committee was to develop a uniform rule that had meaning. We now have drafted a rule that could pass the approval process where litigants give notification that they have considered ADR and then do what they consider best for their particular case.

Bob Dauber noted that the committee had filed and circulated a petition to compel ADR but effectively abandoned the petition when it became obvious that it would not be adopted.

Subsequently, the committee began working on an amendment to Rule 16.

Stan distributed a copy of minutes from October 1996 that questioned whether the Committee should continue to exist and how they should redefine the mission statement. The discussion that ensued concluded that the committee should continue to exist because many unresolved statewide issues remain to be resolved.

Judge Weaver explained that he had attempted to contact the Chief Justice Zlaket to clarify his expectations of the Committee. The Judge did speak with the Chief Justice however the Chief Justice was leaving for a conference and the Judge had no additional information to convey to the committee.

Patrick Scott informed the Committee that one of the purposes of the strategic planning session was to prepare for the June AJC meeting when each Committee Chair will report issues of interest to the court. Not only the issues of primary importance to the Committee but those issues perceived to be important to the judicial department. The issues presented to AJC will be important high priority issues or issues that if not addressed would have severe negative implications for the courts.

Patrick noted that the Committee had clearly not met the mandate in Administrative Order (AO) 91-30 appointing the Committee to advise the court use of the ADR fund. The committee previously chose not to review the grant applications due a perception that to do so presented a conflict for the members. Patrick also suggested that should the rule be adopted, the committee might wish to review the standards established for ADR programs at the Justice Court level by Administrative Order 96-36. AO 96-36 was to apply equally to matters in municipal courts and the superior court. However, five years have passed and the order has not been reviewed or amended.

Patrick suggested that if the committee did not wish to actively review applications they could assist staff by prescribing the criteria used to evaluate the application. Patrick noted that the Administrative Orders of the Supreme Court were in the process of being converted to Judicial Code so the timing was perfect for redefining the role of the Committee.

Patrick introduced Deb King from the AOC Human Resources department to lead the strategic planning session. Deb stated that strategic planning is simple. It is the process of determining where we are now; where we want to be; how we know we are there; and how we get there. Deb stated that we are going to try to answer the first two questions. Deb reviewed several national issues in the courts and challenged the committee to think outside the box. Deb informed the committee that the procedure would be to go around the room asking each member to identify an issue or trend that should be part of the strategic plan. Isabel Gillet from the Family Law Unit transcribed the topics for display.

The committee listed multiple topics for discussion (attached).

After the Committee completed the list Deb asked them to vote on each topic to establish priorities. The rank was established by assigning points from one to four with one as the lowest and four being the highest priority. Deb noted that many of the items on the list were actually solutions and suggested that the committee may wish to take them and group them under an issue. The committee can then determine what issues to address and what issue to identify for AJC.

Judge Fields suggested grouping the list by: educate and communicate with the Bench and the Bar; work on legislation and/or rules; monitoring and evaluating the effect of ADR. Judge Weaver asked how quickly the data would be available. Deb stated that the information could be easily printed but that Nicole Ack's responses would need to be added. Stan Marks questioned if the committee was to share with AJC what we believe our role was and if we would receive feedback down from that committee. Stan noted that the statement on Deb's handout implied a broader charge than we had discussed. The statement asked that we identify issues that impact the court system as a whole. The members noted that if we are discussing the whole court system, then the focus is different than what the committee discussed.

Members noted that the committee has established its own agenda and AJC has never given the committee a direction in the past. Patrick mentioned that his experience in dealing with AJC was that when an item was placed on their agenda, it was identified as an information item or an action item requiring a vote. The committee could, if they wanted, ask AJC to approve a plan. Bob Dauber noted that the committee had been formed when the legislation enacting an ADR fund financed by a surcharge became effective in 1991. He stated that at that time the committee had two purposes: to advise how the funds should be distributed and to determine what types of programs should be implemented or adopted. Historically, the committee has not waited for direction from AJC.

Dorothy Paine stated that the committee needs to determine who they are. Dorothy asked if the committee felt their role was to micro-manage or if they were several levels above acting as a clearing house of ideas. Dorothy urged the committee to take a long term view, with a big amorphous goal such as 90% of the cases being resolved through ADR. Dorothy cautioned that "the shorter term for the goal, the shorter the view."

Judge Weaver suggested that the committee meet again within thirty days in order to continue the momentum created at this meeting. Patrick suggested two possible dates and the committee settled on March 29, 2001.

Levon Kasarjian asked for clarification about what it was the committee was doing in regards to AJC. Deb King stated that the committee was being asked to do two things; first to identify issues and trends in the court system independent of this committee and second identifying what this committee is about, what it is you will be doing and working on. Melita Mulligan-Ferry stated that there would be a benefit if the committee could get buy-in from

AJC before beginning new projects.

Patrick Scott noted that the committee has an opportunity to amend the directive given to them in the AO 91-30 forming the committee rather than ignoring it. Patrick suggested that the committee had formed a focus by promoting the use of ADR, the adoption of a uniform rule and education about ADR services in the community. The education component can be identified as an issue to the judicial college for inclusion into new judge orientation and future judicial conferences. Nicole Ack stated that she was surprised by the dual purpose of the planning. Nicole proposed that we formulate three broad categories for AJC but also create a more substantive detailed list after having an opportunity to discuss the items on the list. Dorothy Paine agreed but suggested that the committee have a general broader mission statement identifying the committees big picture role.

Judge Weaver discussed a letter from Christine Powell of AOC. She asked him to identify critical issues effecting the court community and who will be impacted and in what manner. The committee discussed how to identify the issues to Ms. Powell.

## **VI. GOOD OF THE ORDER**

Bob Dauber discussed a possible study that could be done to collect base line data prior to the implementation of the proposed ADR rule. Bob has had conversations with a researcher currently performing a study in Michigan or Ohio. Bob suggested that we discuss how we could support this type of study in Arizona. The committee asked if this would be a duplication of the current study. Bob did not believe so and will obtain an estimate of the cost of performing a study for Arizona. The committee was curious if the ADR fund could be used to support such a study. Bob was asked to obtain specific funding requirements. The committee discussed other possible funding sources including the State Justice Institute, law schools, graduate sociology studies, and others . Bob stated that any one of those suggested could be a source but that typically you need funding to pay for the design of the survey instrument and the analysis.

The committee asked if there had been any response to Judge Weaver's letter about the effect of implementing an ADR rule. Patrick will summarize the responses prior to the next meeting.

Patrick asked the committee to review a draft of the rule included in the handouts that he believes addresses the concerns identified by AJC. The proposed rule presented to AJC in December did not address what would happen if the parties did not believe ADR was appropriate in this case. The Committee discussed the suggestion. It was determined that Section 2(b) be amended to add "or in the alternative why ADR is not appropriate" with a corresponding change to the form. A change was also made to delete the word "most". A change to section b(1)B was made to change "process" to "proceeding" that conforms the language to section b(2)A. Patrick will make the changes and send them to Bob Dauber for

review.

The committee discussed how this rule and form will mesh with the rule on mandatory arbitration.

Joseph Cuffari distributed 5 USC §§ 571-584 (1996) concerning mediation. Dorothy Paine distributed a copy of the Nevada Supreme Court arbitration rules. Judge Weaver suggested the members review the materials prior to the next meeting.

Judge Weaver asked that members be prepared to schedule meetings for the next six months. The meeting adjourned at 1:15 p.m.

## **VII. CLOSING REMARKS AND NEXT MEETING DATE**

The next meeting of the Committee is scheduled for March 29, 2001, from 10:30 a.m. to 2:30 p.m., in conference room 230.

<b>ITEM</b>	<b>One</b>	<b>Two</b>	<b>Three</b>	<b>Four</b>	<b>Total</b>
T	0	0	18	16	34
O	0	4	9	20	33
BB	0	2	18	12	32
E	0	0	24	8	32
LL	0	4	21	4	29
Y	0	6	18	4	28
K	0	6	18	4	28
MM	0	8	15	4	27
Q	0	8	15	4	27
I	3	2	9	12	26
II	1	8	9	8	26
H	1	8	9	8	26
C	1	8	9	8	26
HH	0	12	6	8	26
X	3	4	9	8	24
R	2	8	6	8	24
B	2	6	12	4	24
CC	2	6	15	0	23
P	1	10	12	0	23
KK	2	10	6	4	22
N	3	4	15	0	22
V	2	8	12	0	22
AA	2	8	12	0	22
DD	1	12	9	0	22
FF	3	8	6	4	21
S	3	8	6	4	21
G	4	6	6	4	20
J	4	4	12	0	20
JJ	3	8	9	0	20
M	1	16	3	0	20
W	3	12	0	4	19
D	3	10	6	0	19
L	3	10	6	0	19
NN	4	8	6	0	18
GG	4	8	6	0	18
EE	3	12	3	0	18
F	5	8	3	0	16
U	6	6	3	0	15
Z	6	6	3	0	15
OO	5	6	3	0	14
A	8	4	0	0	12

**MINUTES**  
**Alternative Dispute Resolution Advisory Committee**  
**1501 West Washington Avenue**  
**Phoenix, AZ 85007**  
**March 29, 2001**

**MEMBERS PRESENT**

Nicole Ack	Levon Kasarjian
Jeremy Butler	Stanley Marks
Joseph Cuffari	Melita Mulligan-Ferry
Robert Dauber	Dorothy Q. Paine
Judge Kenneth Fields	Joan Tobin
Judge Robert Moon	Hon. Raymond W. Weaver, Jr.

**MEMBERS ABSENT**

Lee M. Finkel	Calvin Morrill
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**VISITORS**

Judge Dolny, Pima County Consolidated Justice Courts

**AOC STAFF**

Chris Claxton	Patrick Scott
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**I. CALL TO ORDER**

The meeting was called to order by Judge Weaver. The Judge welcomed several guests including: Judge Dolny, Associate Presiding Judge of the Pima County Consolidated Justice Courts; George Schade, Water Master for the State of Arizona; and Patience Huntwork, Chief Staff Attorney to the Arizona Supreme Court. Judge Moon joined the committee telephonically.

**II. OLD BUSINESS**

The approval of the minutes was deferred to later in the meeting.

**III. DISCUSSION OF DRAFT RULE**

Patience reviewed with the committee the rules agenda schedule for the Supreme Court. Patience informed the committee that the next meeting is Scheduled for May 1, 2001. The committee was cautioned that the proposed rule needs to be filed within two weeks if it is to be on that agenda or consideration would be delayed until the September agenda. Patience

informed the committee that Coconino County has requested Supreme Court approval of their local ADR rule on a permanent basis. She noted that this will be a decision point for the Court about how much uniformity they will require concerning ADR. The Court may decide that there be one uniform rule or they may allow certain counties to serve as experiments for the incubation of new programs.

Jeremy Butler asked Patience to inform the rest of the committee about what she had advised him about the existing rule petition. Patience stated that the committee could request that the current petition be dismissed and the file closed. The committee's new rule petition would then be issued a new number and the old petition dismissed as moot.

Patience was asked to review the suggested rule and comment for the benefit of the Committee. Staff, Patrick Scott, informed Patience and the committee that as part of the handouts they would find a Rule 16(g). The proposed language the committee had approved has been grafted onto the existing Rule 16(g) due to the abrogation of the prior Rule 16(b). The current rule 16(g) is conveniently labeled "Alternative Dispute Resolution." The committee discussed the prior changes and the language added as suggested by the Arizona Judicial Council. Bob Dauber suggested a change to the staff version that would substitute section three and become section C of the proposed Rule 16(g). The language of section 2(B)(2) was amended, deleting "a pretrial" and substituting "that the court conduct a" before the word conference.

Levon Kasarjian raised the issue whether it were now necessary for section four to remain. Bob Dauber pointed out that the 2001 Rule 16(b) requires the court schedule a pre-trial conference upon written request of a party except in medical malpractice cases.

The committee voted unanimously to remove section four from the rule.

Chief Justice Zlaket joined the Committee at 11:15 am. Judge Weaver informed the Chief Justice that the committee had completed a strategic planning session at their last meeting but wanted to verify that the direction being pursued by the Committee was compatible with the desires of the Supreme Court. Judge Weaver asked for guidance on where the Chief Justice believed the focus of the committee should be for the future.

The Chief Justice thanked the Committee for their diligence and perseverance in pursuing the revision to Rule 16. The Chief Justice noted that the committee has identified many topics worthy of attention. Additionally, the Chief Justice cautioned the Committee against waiting for direction from the Supreme Court and encouraged the Committee to establish a blueprint for promoting ADR to the judges and the Bar. The Chief especially encouraged the Committee to promote ADR to the public stating more often it is the demands of its' citizens that moves government to action.

The Chief Justice encouraged the Committee to find the best national practices in ADR and to bring them to the attention of the bench and the Bar in Arizona. The Chief Justice left the meeting at 12 noon. (A full transcript of the Chief Justices comments are attached)

The Committee resumed discussion on the rule after lunch. Patience Huntwork notified staff that all new language added to the rule should be underscored not bolded. The amended rule was approved unanimously by the committee. Staff was instructed to include a reference to the form in the rule patterned after existing form references in the Arizona Rules of Court. A new version of the rule was distributed by staff. The rule as amended is attached.

The committee discussed the forms structure and language at length. Staff was instructed to:

- S Use “Yes” and “No” in place of “True” and “False;”
- S To add a question as number 2 asking if the case is subject to mandatory arbitration, with a note that compulsory arbitration shall be waived if the parties chose a different ADR method;
- S Distinguish between agreements to attend ADR for cases subject to compulsory arbitration and cases not requiring mandatory arbitration;
- S Add “short trial” to the list of options available for ADR and remove “non-binding arbitration;”
- S Distinguish between programs provided by the court or private providers;
- S add “if known” before the name of a person providing the ADR service;
- S strike “pretrial” in the original number 5.

The form as amended is attached.

The Committee approved the minutes as amended.

Bob Dauber distributed a research proposal and asked if the Committee would like to invite the researcher to attend the next meeting. The Committee agreed to invite the researcher.

Joan Tobin distributed a handout about the ADR Resource Center and asked that it be discussed at the next meeting. The next meeting of the Committee was scheduled for May 7, 2001 from 10 a.m. to 2 p.m.

**MINUTES**  
**Alternative Dispute Resolution Advisory Committee**  
**1501 West Washington Avenue**  
**Phoenix, AZ 85007**  
**May 7, 2001**

**MEMBERS PRESENT**

Nicole Ack	Melita Mulligan-Ferry
Jeremy Butler	Dorothy Q. Paine
Robert Dauber	Joan Tobin
Judge Robert Moon	Hon. Raymond W. Weaver, Jr.
Levon Kasarjian	
Stanley Marks	

**MEMBERS ABSENT**

Joseph Cuffari	Lee M. Finkel
Judge Kenneth Fields	Calvin Morrill

**VISITORS**

Judge Dolny, Pima County Consolidated Justice Courts  
Roselle Wissler, ASU Lodestar Mediation Center  
Kathy McCormick, Attorney General's Office

**AOC STAFF**

Chris Claxton	Patrick Scott
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**CALL TO ORDER**

The meeting was called to order by Judge Weaver. The Judge welcomed several guests including: Judge Dolny, Associate Presiding Judge of the Pima County Consolidated Justice Courts; Roselle Wissler, of the ASU Lodestar Mediation Center, and Kathy McCormick, Arizona Attorney General's Office. Judge Moon joined the committee telephonically.

**OLD BUSINESS**

The minutes were approved as written.

**DOMESTIC RELATIONS REFORM STUDY SUBCOMMITTEE**

Karen Kretschman of the Family Law Unit of the Administrative Office of the Courts reported on legislation passed or considered during the current legislative session.

## **DISCUSSION OF DRAFT RULE**

The Supreme Court has distributed for comment the rule change proposed by the Committee. The comment period runs until August 10, 2001. The Court will review comments received in September. The Committee discussed what, if any, action to take during the comment period. Melitta Mulligan-Ferry distributed a handout from Judge Burke, presiding civil judge in Maricopa County, dealing with the logistics concerning implementation of the rule. Bob Dauber raised an issue of how the rule will work with the appointment of arbiters. The Committee discussed ARCP 72. The Committee concluded that the issues raised were local issues best left to the county presiding judges and court administrators.

Jerry Butler asked if the Committee wanted to contact the Bar to gauge their reaction to the petition. The consensus of the Committee was to wait until comments are received.

## **STRATEGIC PLANNING**

The Committee discussed the comments of the Chief Justice. Levon Kasarjian referred to his notes from the prior meeting. Levon identified several of the items the Chief Justice identified including: keeping up with progress around the country on the delivery of ADR; formulating a long term plan for ADR and feeding it to the Court a little at a time; an expectation that the Committee work with the law schools to include ADR as part of their curriculum; consider ADR education programs for judges and preparation of a program for new judge orientation.

Judge Weaver recapped the priorities as voted on by the Committee. Nicole Ack noted that if the rule passes and the courts begin actively encouraging ADR, there will need to be funding to help establish programs. Stan Marks informed the Committee that in years past, judges were invited to attend retreats in order to learn and practice settlement techniques. It was suggested that this would also be a good opportunity to discuss other types of ADR, like short trials. A time when all the judges are together in one place is at the annual judicial conference.

Levon noted that Patience Huntwork suggested that this Committee will set the tone for ADR statewide. Patience also suggested the Committee become active in supporting funding of ADR programs. Joan Tobin asked for a calendar of events that the Committee could use as judicial educational opportunities like the Arizona Judicial Council meetings. Nicole suggested that after the Committee determines the priorities, the priorities be assigned to smaller work groups for implementation.

Bob Dauber suggested that the Committee not be involved with the Judicial training but rather with formulating a curriculum to be taught by experienced judges. Staff was asked to find out when the judicial College meets and membership information. Judge Weaver will check on the agenda for the presiding judges meeting to see if there is time to discuss ADR at the June meeting. Bob Dauber discussed an article by Wayne D. Brazil that highlights ADR methods that can be used by Judges.

Stan Marks will contact Judges Schneider and Kaufman about formulating a training session for Judges on ADR. Judge Weaver cautioned that any of the programs the Committee was discussing would require funding.

Bob Dauber made the point that we need to compile a knowledge base of what the current practice is statewide. Roselle Wissler is present as a guest to address the Committee about performing a survey to obtain current baseline data.

Roselle is a research fellow at the ASU Lodestar Mediation Clinic. She has worked with the Ohio Supreme Court and their Dispute Resolution Committee. Roselle distributed executive summaries of three studies she completed in Ohio. The first study was with attorneys on why they use ADR. The biggest factor was if they had been through an ADR procedure in a case. The second study was conducted to gauge the quality of mediation for a week-long mediation program using volunteer attorneys. The final study was done in conjunction with the states of Ohio and Maine. The study showed that mediated cases were likely to settle but that five percent still went to trial. Non-mediated cases were more likely to be dismissed with three percent going to trial. Neither method had an effect on the amount of time it took to resolve the case. Part of the problem was that the referral rate was so high that it created a backlog. Roselle also discussed studies completed by Minnesota and Missouri by Bobbie Macadoo. Both studies were conducted several years after their rules were changed.

Bob Dauber pointed out that we have the opportunity to conduct a good study prior to implementation of the proposed rule. Roselle stated that the return rate for the mailed survey is approximately 66%. Bob stated that there are two big problems with the study: getting a good return ratio and getting funding for the study.

Jeremy Butler made a motion to support conducting a baseline study with no financial commitment. The motion was amended to explore seeking financial support from the Supreme Court. The motion passed unanimously. The Committee discussed how it might be involved in obtaining financial support for the survey.

The Committee discussed the topics that had been ranked at a prior meeting. Members asked if the top ranked items were automatically the most important priorities. The Committee discussed formulating a mission statement. Stan Marks suggested that the mission of the Committee was to promote ADR in all its manifestations that makes the system more efficient and effective. Jeremy Butler suggested that if the rule passes, the top priority will be to have certification of mediators. Jeremy stated that the Bar is concerned that people are holding themselves out as mediators who are ill trained and are practicing law without a license. Judge Weaver asked that staff invite Deb King to attend the June meeting.

Judge Weaver suggested that the members pick out five items from the list and send those to staff before the next meeting. Nicole requested that people be prepared to vote on the priorities.

**ARIZONA DISPUTE RESOLUTION ASSOCIATION STATEWIDE RESOURCE CENTER**

Joan Tobin informed the Committee about the Arizona Dispute Resolution Association (ADRA) Resource Center. ADRA has created a website and obtained a toll free 800 number that people around the state can use to identify the resources that are available in each county. The resources are both internal to the court and private providers. Joan suggested that the Committee focus on connecting with the legal community and the courts and ADRA can focus on the general public. Joan also informed the Committee that ADRA is actively investigating a certification program in conjunction with the University of Georgia.

## **FUTURE MEETINGS**

The Committee scheduled five future meeting dates:

- June 22, 2001                      9 a.m. - 1 p.m.
- August 10, 2001                  9 a.m. - 1 p.m.
- September 7, 2001
- October 19, 2001
- December 7, 2001

## **GOOD OF THE ORDER**

Nicole Ack informed the Committee about the events at American Bar Association Dispute Resolution Conference. Judge Weaver informed the Committee that he had been contacted by Judge Jacqueline McVay of the northeast Phoenix Justice Court volunteering to serve on the Committee.

**MINUTES**

**ALTERNATIVE DISPUTE RESOLUTION COMMITTEE**

**1501 West Washington Street  
Phoenix, AZ 85007**

**June 22, 2001**

**MEMBERS PRESENT**

Nicole Ack  
Jeremy Butler  
Robert Dauber  
Joan Tobin  
Lee Finkel

Stanley Marks  
Melita Mulligan-Ferry  
Dorothy Q. Paine  
Hon. Raymond W. Weaver, Jr.

**MEMBERS ABSENT**

Joseph Cuffari  
Hon. Kenneth Fields  
Hon. Robert Moon

Levon Kasarjian  
Calvin Morrill

**GUESTS**

Hon. Carmen Dolny, Pima County Consolidated Justice Courts  
Kathy McCormick, Attorney General's Office

**STAFF**

Karen Kretschman  
Chris Claxton

## **CALL TO ORDER**

The meeting was called to order by Judge Weaver at 9:10 a.m. A quorum was present.

## **OLD BUSINESS**

The May 7, 2001 minutes were approved as written.

## **RULE DISCUSSION**

Jeremy Butler reported opposition to the form (“too much paper”) from the Board of Governors. Discussion followed regarding getting someone from the Committee to their meeting. Jeremy Butler was appointed to attend their meetings.

## **STRATEGIC PLANNING**

Judge Weaver asked the members present to revisit the buff colored list of strategic planning items developed at previous meetings. Discussion followed on the number of members who sent in their votes as to priority items since the last meeting and what their priorities were. Robert Dauber suggested further discussion of the items prior to getting to voting. Nicole Ack suggested an individual county approach as well as evaluating a statewide perspective. Her top priority was funding. Jeremy Butler commented on the necessity of communicating options to lawyers. Judge Dolny said her priorities were: (1) Funding (2) Certification issues (3) Provide information to people and educating about the benefits of ADR (4) Publishing materials (5) Educating judges. Robert Dauber’s votes were for (1) Educating judges and the Bar and (2) Training Programs. Kathy McCormick stressed (1) Funding (2) Education (3) Certification. Stan Marks’ priorities were: (1) Educating Bench and Bar and (2) Certification. Jeremy stressed certification and educating bench and bar. Lee Finkel stressed education of the public and certification issues. Mandatory arbitration issues were also discussed.

After additional discussion, the following issues were identified as the ones taking priority for the Committee:

- Educating the Public**
- Educating and training of judges**
- Educating and training of the Bar**
- Resources/Funding issues**
- Certification and standards issues**
- Mandatory arbitration**

The Committee then discussed various options for focusing on the identified issues. Workgroup/Subcommittee formation was chosen as the initial approach, with 4 to 5 members on

each Workgroup. The goals and action plans for each topic are to be developed by the corresponding Workgroup; each workgroup is to report to the larger Committee before going forward. The Workgroups may address more than one related topic at a time.

The following Workgroups/Subcommittees were established by appointment and by volunteering of various members:

**Education of the Public**

Joan Tobin  
Lee Finkel, Chair  
Dorothy Paine  
Joseph Cuffari

**Education of the Bar**

Jeremy Butler  
Stan Marks, Chair  
Bob Dauber  
Carmen Dolny  
Judge Ken Fields

**Education of the Bench**

Bob Dauber  
Judge Ray Weaver, Chair  
Stan Marks  
Judge Ken Fields

**Funding/Resources**

Nicole Ack, Chair  
Melitta Mulligan-Ferry  
Judge Carmen Dolny

**Arbitrary Arbitration**

Bob Dauber  
Joseph Cuffari  
Stan Marks  
Dorothy Paine, Chair  
Lee Finkel

**Certification**

Jeremy Butler  
Joan Tobin, Chair  
Kathy McCormick  
Lavon Kasarjian

Stan Marks asked how each workgroup is to function—how do the members implement the workgroups; what are they investigating; what are the targets, goals?

Discussion followed, with the following ideas developed:

**Education of the Public:**

Look at ADR as a whole first. Also look at what is being done in courts to educate the public. Determine ways to complement the work of ADRA. Determine what is already out there; develop additional ways to let people know what ADR is about. Develop a list of definitions. Possibly develop a list of “success stories.”

**Educating and Training the Bar:**

Determine what is already out there, as seminars are available. Stan Marks pointed out that seminars are not necessarily the answer, as attendance at seminars is likely more due to required CLE than true interest in the topic. Discussion followed regarding possible development of a State Bar website link. Very important is educating the bar in what lawyers will have to do to comply with the new Rule. Education on how the new Rule works will be imperative. Determine what resources are available through the courts, i.e. Mohave’s program.

### **Educating and Training of the Bench:**

Judge Weaver suggested getting the Judicial College involved. Finding ways to educate judges on the benefits of short trials, summary jury trials, etc. He suggested getting Agnes Felton's Division involved in training on ADR – perhaps in the new judge orientation classes. Some thought should be given to training the new judges in ADR first, then go to the seasoned judges. Showing what different processes are available and focusing on appropriate case selection might be appropriate.

### **Resources/Funding:**

Nicole Ack announced that she, Melitta and Carmen had already talked during the noon hour and have scheduled a meeting with David Sands to learn more about the chances of obtaining legislatively authorized funding by fee increases. Further exploration of positions which have limited funding was also discussed.

### **Mandatory Arbitration:**

Finding out how the rules work and are fitting in with other procedures will be important; also looking at other models such as in Pima County. The lack of payment to the arbitrator was discussed and a nationwide survey on arbitration payments will be studied.

### **Certification:**

The biggest question is to find out if everyone is for having certification standards. Study all current efforts and find out what other states are doing. Connect with Peggy Herman regarding national efforts. Discussion also included the idea of certified neutrals for short trials. Advisory juries were also mentioned.

## **DOMESTIC RELATIONS REFORM STUDY SUBCOMMITTEE**

Karen Kretschman gave a report on the strategic planning results of the Domestic Relations Reform Study Subcommittee and the topics the Subcommittee will be studying in the fall.

## **NEW BUSINESS**

Judge Weaver asked staff to contact Professor Morrill at the University of Arizona to inquire whether he is interested in continuing on as a member of the Committee. Judge Weaver will contact Ken Fields and Robert Moon regarding their continued participation on the Committee.

Judge Weaver also asked staff to take care of the process to get Kathy McCormick and Judge Carmen Dolny appointed officially to the Committee. He also asked that Robert Dauber be placed on the August agenda to report on the survey report.

## **NEXT MEETING**

August 10, 2001 is the next meeting date from 9:00 a.m. to 1:00 p.m. Lunch will be served.

## **ADJOURNMENT**

The meeting adjourned at 1:10 p.m.

**MINUTES**  
**Alternative Dispute Resolution Advisory Committee**  
**1501 West Washington Avenue**  
**Phoenix, AZ 85007**  
**August 10, 2001**

**MEMBERS PRESENT**

Nicole Ack

Joseph Cuffari

Robert Dauber

Judge Kenneth Fields

Lee M. Finkel

Stanley Marks

Melita Mulligan-Ferry

Dorothy Q. Paine

Joan Tobin

Hon. Raymond W. Weaver, Jr.

**MEMBERS ABSENT**

Jeremy Butler

Levon Kasarjian

Judge Robert Moon

**VISITORS**

Judge Dolny, Pima County Consolidated Justice Courts

Craig Fuji, Office of the Attorney General

**AOC STAFF**

Chris Claxton

Karen Kretschman

Patrick Scott

**I. CALL TO ORDER**

The meeting was called to order by Judge Weaver at 9:05 A.M. The Judge welcomed several guests including: Judge Dolny, Associate Presiding Judge of the Pima County Consolidated Justice Courts and Kathy McCormick and Craig Fuji of the Conflict Resolution Program at the Attorney Generals Office.

The judge announced that Kathy McCormick has accepted the position of Alternative Dispute Resolution (ADR) Coordinator in Yavapai County.

**II OLD BUSINESS**

The minutes were approved as amended. A correction was made on page three changing "arbitrary" to "mandatory."

### III ARIZONA CODE OF JUDICIAL ADMINISTRATION

Patrick Scott outlined for the Committee the conversion of Administrative Order (AO) 91-30 to Administrative Code 5-104. The code deals with the Alternative Dispute Resolution fund and its administration. It was noted that the committee has been removed from the administration of the fund in keeping with actual historical practice. The second point noted for the committee was that the directive to appoint the ADR committee was removed from this section and placed in the revision of AO 91-31.

The committee next reviewed the conversion of portions of Administrative Orders 91-30, 91-31 and 2000-5 to code. The code details the appointment of the Committee by the Supreme Court, terms of appointment, and provides for specific membership. Additionally, the code details a charge to the committee and requires the Committee to formulate rules for the transaction of committee business.

The committee discussed the both codes. The committee voted to approve Administrative Code 5-104 (the Fund) as written. The committee amended the code membership section to specify additional attorney positions and a position for a statewide ADR organization. The reference to the ADR Committee was discussed and the reference will be the "Committee." The Committee code as amended was approved unanimously by the Committee.

The committee discussed AO 96-36 which outlined ADR program guidelines and standards for the courts. The committee discussed the history of AO 96-36. The committee discussed the issue of whether it is necessary to mandate standards or to pare down the requirements. The committee agreed that counties will need flexibility to formulate programs that address local issues but that address common minimum requirements. The committee decided to form a separate work group to review AO 96-36. The work group will bring a recommendation to the full committee.

#### **WORK GROUP REPORTS**

- ! **Education of the Public:** Lee Finkel reported that the work group had not met but they will schedule a meeting prior to the Committee's next meeting.
- ! **Education of the Bar:** Stan Marks questioned what the committee does until the rule is approved. Stan hypothesized that the work group could plan a seminar to present the uniform rule and educate the local Bar Associations members on ADR. Judge Fields suggested contacting Bill Haggerty of the State Bar ADR section about running mini-seminars so that it would not be necessary to gain the approval of the CLE committee. Dorothy Paine suggested contacting additional bar sections, such as commercial or corporate sections, that might not be traditionally thought of when discussing ADR.

- ! **Education of the Bench:** Judge Weaver stated that the work group had not met but they will schedule a telephonic meeting prior to the Committee's next meeting. Staff noted that the Judicial College Committee will be meeting on September 18, 2001 and suggested that a representative of the ADR Committee address them about future collaborations. The Chair asked that staff provide him a copy of the membership of the Judicial College Committee.
  
- ! **Funding and Resources:** Nicole Ack informed the Committee that the work group met with David Sands, the AOC Legislative Liaison, and Mike DeMarco, the AOC Budget Officer. The group was informed that they could go to the legislature for an appropriation or a fee increase for ADR programs. The group was told that to approach the legislature without a mandate would be difficult at best in tough economic times. It was recommended that the Committee make a legislative proposal in the next cycle for seed money and also to propose an increase to the ADR fees. The work group noted that if the rule 16.g. passes, we would have a quasi mandate.
  
- ! **Mandatory Arbitration:** The work group was scheduled to meet but emergency matters intruded on the members calendars. Dorothy Paine has been accumulating information about current statewide practices. The work group plans to invite additional attorneys to participate in their discussions. A plan to address fees for arbitrators was scrapped after a decision by the Ninth Circuit.
  
- ! **Certification:** The work group met and came up with a draft mediation certification procedure. The work group was expanded to include three Arizona Dispute Resolution Association members, two attorney mediator and the Director of the Lodestar Mediation Clinic at ASU. The work group has one issue left to resolve and will then present a draft of their recommendations to the Committee.

#### **IV ADR SURVEY**

Professor Bob Dauber presented a draft of the results of the ADR survey sent to members of the Civil Litigation Section of the State Bar and all attorneys in Coconino County. Bob noted that the initial analysis was done pro bono by Roselle Wissler and if further analysis is to be done, a funding source will need to be obtained. Bob reviewed the survey with the Committee and reminded them that this would be the baseline data for a future study if rule 16.g. is approved by the Supreme Court.

#### **V NEXT MEETING**

The next meeting is scheduled for September 7, 2001 9 A.M. to 1 P.M.

The chair adjourned the meeting at 11:30. The members utilized the remaining time to meet as work groups.

**MINUTES**  
**Alternative Dispute Resolution Advisory Committee**  
**1501 West Washington Avenue**  
**Phoenix, AZ 85007**  
**December 7, 2001**

**MEMBERS PRESENT**

Jeremy Butler

Judge Kenneth Fields

Lee M. Finkel

Levon Kasarjian

Stanley Marks

Melita Mulligan-Ferry

Dorothy Q. Paine

Joan Tobin

Hon. Raymond W. Weaver, Jr.

**MEMBERS ABSENT**

Nicole Ack

Joseph Cuffari

Robert Dauber

Judge Robert Moon

**AOC STAFF**

Chris Claxton

Karen Kretschman

Patrick Scott

**I. CALL TO ORDER**

The meeting was called to order by Judge Weaver at 9:05 A.M. Patrick Scott informed the members that Judge Moon had resigned. Committee re-appointments have been forwarded to the Chief Justice. Two positions were not filled, a justice court administrator or clerk and a position for an attorney general appointment.

**II OLD BUSINESS**

The minutes were approved as amended.

**III ARIZONA CODE OF JUDICIAL ADMINISTRATION**

**Administrative Code 5-104**

Karen Kretschman outlined for the Committee the conversion of Administrative Order (AO) 91-30 to Administrative Code 5-104. The code deals with the Alternative Dispute Resolution fund, its administration and the Committee. It was noted that the code no longer separates the Committee from the fund as had been presented in an earlier draft at a prior meeting. Karen also explained that the position for a representative of a statewide alternative dispute resolution association had been deleted but that person could be

appointed as a "Such other members with knowledge and experience in the field of ADR..." The code will be presented to the Arizona Judicial Council at their next meeting on December 13, 2001

### **Rewrite of A.O. 96-36**

Judge Fields informed the Committee that the draft administrative code incorporating A.O. 96-36 is generic in nature to allow flexibility. The standards and guidelines would not be enumerated in the code but would be attached as an exhibit. Both Patrick and Karen suggested to the committee that the standards and guidelines need to be examined in the context of the Supreme Court's approval of rule 16 (g) and the sunseting of the Coconino County local rule.

Melitta stated that when questions arise about mediation in the Justice Courts that she often uses the standards and guidelines as a reference.

The Committee discussed whether the rule applied to justice court and if it applied to all cases. The consensus was the rule applied wherever the Rules of Civil Procedure apply. Judge Fields noted that there is a parallel rule in the criminal rules, Rule 16.4 for a mandatory prehearing conference, that is routinely ignored. The Committee discussed the advantages of allowing flexibility and creativity versus the need for uniformity. Judge Fields suggested the issue be tabled until the next meeting when Bob Dauber would be available to add historical perspective to the genesis of the administrative order.

Melitta volunteered to examine the current practice used in Maricopa County to determine if they complied with the Administrative Order. Judge Weaver asked that she contact other programs around the state to find out if they use the standards and guidelines.

### **WORK GROUP REPORTS**

- ! **Education of the Public:** Lee Finkel reported that the work group had not met but is planning to meet with the ADRA education committee.
  
- ! **Education of the Bar:** Stan Marks informed the Committee that he had been in contact with the State Bar about conducting a seminar on the new rule. A CLE session chaired by Bruce Myerson has been planned for January 30, 2002 at the new Federal courthouse. The session will be videotaped for future training opportunities. Stan suggested that planning for additional trainings through the local Bar associations be suspended until after this first seminar has been held.
  
- ! **Education of the Bench:** Patrick distributed a copy of the membership for the Board of the Judicial College. Their next meeting is scheduled for February 1, 2002. Patrick spoke with Agnes Felton and Diane Sweeney of AOC Education Services about having representatives of the ADR Committee on the agenda. The Committee suggested Judge Fields, Bob Dauber and Levon Kasarjian as presenters. The Committee discussed having training sessions on compliance with the rule, including new judge orientation, or a separate seminar on ADR including a mock

settlement conference.

- ! **Mandatory Arbitration:** Dorothy Paine has been accumulating information on mandatory arbitration in Coconino, Maricopa, Pima and Yavapai Counties. Dorothy stated that despite protests to the contrary, the system appears to be working. Dorothy also noted that there appears to be an inconsistency in the rules concerning witnesses and exhibits. Recent modifications to the rules concerning disclosure do not require a list of witnesses and exhibits but Rule 76(g) does when an appeal is taken from an arbitration award.
  
- ! **Certification:** Joan Tobin distributed a handout of a sample requirements document for certification of mediators. The initial focus is on minimum training requirements, evaluations by participants, continuing education and a grievance procedure. A future modification might include passing a competence test.

The committee discussed how the requirement would be implemented and if legislation would be required. The Committee agreed it would be best if it were done through the Supreme Court. ADRA does not now certify mediators but does certify training. The Committee agreed that at this time there is no consensus that certification is needed. The concern does exist that if some type of oversight plan does not exist, the legislature could mandate a licensing requirement. The workgroup should continue their discussion and present the Committee the pros and cons of certification.

### **State Bar of Arizona - Rule 31 Draft**

The Committee discussed a proposed rule being circulated by the Bar that would define the term mediator. Melitta suggested that a better definition is contained in the standards section of Administrative Order 96-36. Jeremy Butler informed the Committee that he is a member of the Bar Committee working on the new Rule 31 and would be happy to express the concern of the ADR Committee to the Bar Committee. Jeremy suggested that members contact him with their suggestions.

### **Risk Management Program**

The Committee discussed the history of the Public Funds Risk Management ADR Project. The project was instituted by Administrative Order 92-19 and administered by Judge Fleischman in conjunction with AOC staff. The Arizona Judicial Council recommended that the project be extended while a continuation plan was developed. Chief Justice Feldman signed Administrative Order 96-14 continuing the project until further order of the court. The project has declined in popularity since Judge Fleischman left the bench.

The Committee suggested that prior to any contact with outside governmental agencies or the Defense Bar, Judge Weaver should discuss the project with the Presiding Judges.

## **Judicial College Collaboration**

Staff will contact the Judicial College Board and request time to address the need for educational programs promoting ADR to Judges. The Committee suggested that Levon Kasarjian, Bob Dauber and Judge Fields be asked to speak for the Committee. The next meeting of the Board is scheduled for February 1, 2002. (See above)

## **Future Meeting Dates**

The Committee tentatively scheduled five meetings for the coming year:

February 22, 2002  
April 19, 2002  
June 21, 2002  
September 20, 2002  
November 15, 2002

Judge Weaver suggested that if it is necessary to meet more frequently, the Committee could meet telephonically.

The next meeting is scheduled for February 22, 2002 from 9 A.M. to 1 P.M.

The chair adjourned the meeting at 12:30.

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

**MEMBERS PRESENT**

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

**MEMBERS ABSENT**

Joseph Cuffari	Stanley Marks
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**GUESTS**

Kate Otting, Attorney General's Office	Roselle Wissler, ASU
Elizabeth Winter, ADRA	

**AOC STAFF**

Chris Claxton	Patrick Scott
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**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 petition 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.

**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.