

**CIVIL JUSTICE REFORM ACT ADVISORY COMMITTEE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH**

Frank E. Moss United States Courthouse
350 South Main Street
Salt Lake City, Utah 84101-2180

Sidney G. Baucom
Dee V. Benson
Burton F. Cassidy
Carol Clawson
James Z. Davis
Honorable Bruce S. Jenkins
Carman E. Kipp
Ann Milne
Lee E. Teitelbaum
R. Paul Van Dam
D. Frank Wilkins

Gerald R. Williams

Markus B. Zimmer
Reporter

Ex Officio
Honorable David K. Winder
Honorable J. Thomas Greene, Jr.
Honorable David Sam
Honorable A. Sherman Christensen
Honorable Aldon J. Anderson

September 18, 1991

MINUTES OF THE SEPTEMBER 12, 1991 MEETING

Chief Judge Jenkins called the meeting to order at 3:00 p.m. Messrs. Kipp, Davis, and Wilkins had previously notified the reporter that conflicts in scheduling would preclude them from attending. Mr. Benson was represented by Mr. Paul Warner; Mr. Van Dam was represented by Ms. Janet Graham. Accompanying Professor Williams was Paul Cooper who has been hired by the Court on a temporary, full-time basis to assist the ADR Subcommittee.

Judge Jenkins began by indicating that the primary purpose of the meeting was to hear an in-depth report on the activities of the ADR Subcommittee and status reports by the Consumer and Process Subcommittees. The first order of business would be to hear from the Consumer Subcommittee.

Dean Teitelbaum briefly reviewed the purposes of the survey being conducted for his Subcommittee by the Survey Research Center of the University of Utah. Among other answers, the survey was designed to give the Subcommittee a better idea of who has control over such things as the fee structure between attorney and client, who determines whether the matter should be filed in state or federal court when a choice obtains. It will be interesting to determine, he noted, who thinks who is in control. With regard to contacts, 271 attorneys have been contacted, an excellent return. Of those, the breakdown between plaintiff and defendant attorneys is roughly equal. The data are still raw and, thus far, nothing remarkable has emerged from them. As to fee structures, the majority rely on an hourly rate; some use contingency fee arrangements. Value-added billing exists, but its incidence based upon the survey is very rare. One surprise was the extent to which depositions are not used. More than 50% of the attorneys contacted indicated that no depositions had been taken in their cases. Two thirds of all those contacted indicated that no more than one deposition had been taken.

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The survey staff experienced difficulty reaching clients; in many instances, the information provided by the attorneys about their clients' whereabouts turned out to be stale. To date, they have managed to reach only 88; the total they expect to reach is from 100 to 110. The distribution of those who have been contacted roughly follows the distribution of the total number of clients in the survey -- 33% individual clients and 66% corporate.

Dean Teitelbaum noted that he expects the data collection portion of the survey to be completed within a week and that compiling the basic distributions would take an additional week. Thereafter his Subcommittee will meet to determine how the data most profitably might be analyzed. The final Subcommittee report should be completed within four weeks of that meeting.

Chief Judge Jenkins thanked the Dean for the report, then turned to Mr. Baucom for the Process Subcommittee report. Mr. Baucom noted that the final report of his Subcommittee now was complete. He expressed appreciation to the members of the Subcommittee and indicated that the final report had been mailed to all Committee members earlier in the week. He inquired as to whether there were any comments or suggestions. There being none, he moved that the report be accepted and approved. Ms. Clawson seconded the motion. Chief Judge Jenkins thanked the Subcommittee for its work, indicated that it would be incorporated into the text of the final report, and turned to the ADR Subcommittee.

Professor Williams began by distributing a handout to all Committee members, noting that the ADR Committee had met earlier in the week with Reporter Zimmer sitting in on the meeting. The handout reflected a variety of topics that had been discussed at that meeting and provided an outline of the Subcommittee's work and the direction that it is taking. One primary issue with which the Subcommittee is wrestling is how to define the need to which ADR devices might provide a response. Tentative conclusions are that the menu of such devices it recommends to the Court should be limited; those that are recommended should be fleshed out to provide the Court with a sense of the scope of the device, how it would function, and what its objectives are.

Professor Williams invited members of the Committee to add to the discussion as he and Mr. Cooper summarized some of the material in the general statistical profile of the District of Utah that had been prepared by the Federal Judicial Center for statistical year 1990. Dean Teitelbaum indicated that he, as Professor Williams, had experienced some difficulty with the statistical data and what they could be construed to say about the status of the civil litigation process in the District of Utah. Perhaps consumption of public resources is a problem, but there has to be a more direct correlation between the data and that conclusion. Mr. Baucom, referring to a particular graph plotting the type and number

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of cases exceeding three years of age, inquired whether anyone knew how much discovery they involved and how much of that discovery could have been avoided had alternative dispute resolution measures been implemented early in the case history. Reporter Zimmer indicated that he and members of his staff, with assistance from the Federal Judicial Center, were attempting to define a way to analyze cases to provide that kind of information.

Professor Williams then referred to a list of questions posed by U.S. Magistrate Judge Wayne Brazil for courts contemplating the use of ADR devices, noting that his Subcommittee was attempting to respond to them and to adopt a methodical approach toward selecting which ADR devices it should recommend to the Court. Its preliminary expectation is that two, possibly three devices will be proposed: non-mandatory court-annexed arbitration, mediation, and maybe the summary jury trial.

Chief Judge Jenkins noted that a basic tenet of any dispute resolution program is the need to encourage the parties and the attorneys to talk, to communicate with each other. To the extent that the process can be rendered less adversarial, the probability of efficient and successful resolution is increased. Perhaps the courts should do away with all restrictions on confidential communication between parties. Professor Williams inquired whether the Court would entertain a local rule to that effect. Dean Teitelbaum noted that the results of his Subcommittee's survey may reveal something about the consumer alienation with regard to the civil litigation process and the adversarial system that drives it.

Chief Judge Jenkins inquired as to when the ADR Subcommittee might have its report ready to distribute. Professor Williams agreed to have a provisional final draft prepared and mailed to the Committee members by October 11. His Subcommittee then would make its report and elicit comments at the next meeting that is scheduled for Wednesday, October 16 at 3:00 p.m. in Room 158 of the Frank E. Moss United States Courthouse.

Chief Judge Jenkins then turned to Dean Teitelbaum with a similar inquiry. He indicated that his Subcommittee would prepare and mail its final report to the Committee members by October 28 and be prepared to report on it at a subsequent meeting tentatively scheduled for Friday, November 1, same time and location. Chief Judge Jenkins also asked Mr. Baucom to be prepared to discuss for 30 minutes or so the work and final recommendations of the Process Subcommittee. Mr. Baucom agreed to do so.