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

October 18, 1991

MINUTES OF THE OCTOBER 16, 1991 MEETING

The meeting began at 3:00 p.m. in Room 158. All members of the committee attended except Mr. Baucom and Dean Tietelbaum, who were excused, and Mr. Van Dam who was represented by Ms. Janet Graham. Reporter Zimmer started the meeting, indicating that Chief Judge Jenkins would be delayed because of a jury matter, by asking Professor Williams to proceed with the report of his ADR Subcommittee.

Professor Williams prefaced his report by noting that the project with which his subcommittee has been tasked is a substantial one, and that one of the issues he and his colleagues have discussed is how to best draw on the experience and expertise not only of members of the full committee but, in addition, the bar at large in developing and implementing appropriate ADR mechanisms for the District of Utah. To that extent, he invited all members to participate and contribute to the discussion.

In reviewing program choices, he noted, there are several variables that should be defined. First is client involvement in the process. Studies have shown that the relative level of client involvement in the dispute resolution process has a direct correlation with the outcome. The greater the level of their involvement, the more likely the clients are to define the outcome as satisfactory. Second is client control over the outcome. Generally, the more control the client is able to exert over the outcome, the more likely the client is to find that outcome satisfactory. Third is the degree of flexibility that both the process and its outcomes embrace. The greater the flexibility, the greater the possible options, hence the greater the client satisfaction is likely to be. The formal process of trial adjudication generally has a restrictive effect on all three variables, and to that extent the index of client satisfaction is not particularly high.

There are, he continued, a variety of dispute resolution devices; some are more effective than others. Taken in ascending order of the relative levels of process and ritual that attach to them, they are as follows. *Avoidance* probably is the most frequently used device, but it also is the least satisfying one. Next is *negotiation*, a broadly defined process of trying to reach mutually acceptable goals. Next is *mediation* in which the element of a third party is introduced. However, that third party has no authority to determine the outcome. Next is *arbitration* which not only includes a third party but attaches to that third party the authority to determine the outcome, a major step beyond mediation and negotiation. Finally, there is the formal process of adjudication by *trial*.

Carrying the theme further, Professor Williams distributed a table comparing these five basic methods for dispute resolution and proceeded to explain it to the committee members. At one point, Chief Judge Jenkins expressed disagreement with the chart's attribution to the litigation process of no instructive value regarding communication or dispute resolution skills. He noted that it has been his experience that judges frequently take time to assist the parties to articulate and to understand their specific needs and concerns, to focus in on what is at the core of the dispute, and to refine the terms of the dispute. Professor Williams agreed with him that there is some instructive value in litigation, although not as much as when the parties or clients are directly participating in the process. Ms. Graham noted that the litigation process is less cathartic for parties because counsel substantially assume the formal role of communicating matters to the court.

Mr. Kipp added that attorneys frequently improve the nature of communication in the dispute resolution process for reasons that have to do with their professional training and experience, with their ability to objectively present the facts of the dispute; moreover, clients frequently are timid, fearful, or otherwise unable or unwilling to perform well in an adversarial environment. In such instances, lawyers provide an important service. Mr. Wilkins noted that it has been his experience that lawyers also can be helpful in the mediation process.

When Professor Williams concluded his discussion of the table, he turned to his subcommittee's draft report, copies of which were distributed. As it currently stands, he explained, the subcommittee foresees two, possibly three phases to a period of extended experimentation with ADR in the District of Utah. The first phase would consist of an experiment with voluntary, non-binding, court-annexed arbitration. Undertaking such an effort would involve a substantial amount of up-front work such as developing appropriate local rules, defining the program, publicizing the effort, and educating clients, lawyers, and prospective arbitrators as to the process. To accomplish that work, he proposed the creation of a new ad hoc ADR Development Subcommittee that would be tasked with much of this work and that would report to his ADR Subcommittee.

The second phase would consist of an experiment with mediation that would involve the same amount of up-front effort. The subcommittee also may propose a third phase of experimentation with the summary jury trial. The subcommittee was not locked into this sequence, he noted, and the full committee may wish to reverse or revise the order. Mr. Wilkins noted that the subcommittee's proposal was based in good part on what is currently in effect in the Eastern District of Pennsylvania (EDPA), a large court that has in place successful court-annexed arbitration and mediation programs.

Ms. Clawson inquired as to Senior Judge Christensen's recent work which, she understood, was in large part settlement oriented. Chief Judge Jenkins noted that Judge Christensen had been conducting basic settlement conferences for the court for some time. These conferences regard cases assigned to the other judges who refer the attorneys to Judge Christensen to explore settlement possibilities. He varies his settlement approach based on the type of case, types of clients, etc.

The subcommittee's handout included a page of statistics from EDPA which generated some questions. Paul Cooper, who is assisting Professor Williams, responded to most of them, noting that he recently spent several days in Philadelphia reviewing the programs and observing the arbitration and mediation processes in action. The handout also listed some issues that need to be addressed as the experimental programs are fleshed out.

Focusing on the issues of compensation, Mr. Kipp questioned whether the modest fees proposed for service as an arbitrator and the voluntary nature of the service provided by mediators would discourage prospective applicants from applying. To the extent that the court is interested in a program that gains the respect and confidence of the bar and the public, it needs to attract quality advocates and should not base its reimbursement schedules on false economies. Professor Williams responded that the subcommittee was interested in keeping the costs of participating in the program relatively low and, for that reason, wanted to limit payment. Mr. Cooper noted that the figures represent payment schedules currently in effect in EDPA where the bar's response to court announcements soliciting applications for arbitrator and mediator appointments drew record responses. Moreover, he noted, the typical EDPA arbitrator/mediator handles an average of two or three matters a year, each of which may take from two to four hours. To that extent, service does not entail a financial hardship.

Ms. Clawson wondered whether the court might not simplify the process of experimenting with these devices and creating a structure for them by contracting with the American Arbitration Association (AAA) as an alternative to setting up its own program. Reporter Zimmer noted that the legislation mandates that the arbitration effort be court annexed. Furthermore, he indicated, one of his Hinkley Institute interns had interviewed Ms. Kim Curtis of the AAA about what setting up a voluntary court-annexed arbitration

program under the auspices of the court would entail. Ms. Curtis was not particularly optimistic about the success of such a program and did not express interest in a joint undertaking.

Mr. Wilkins noted that there is a great deal of movement in the direction of ADR, both nationally and within the state. Indeed, sometimes it occurs quietly and informally, outside the constraints of an organizational structure. On occasion, for example, he has been called by attorneys and asked to sit down with them and their clients to evaluate the relative merits of a dispute.

Mr. Cassity expressed some concern about the compensation factor, referring to Mr. Kipp's earlier comments about getting a program off the ground in a way that fostered respect and interest. He also noted that if participation in an arbitration program were made mandatory rather than voluntary, it also might be more successful. The committee discussed the issue but concluded that because the District of Utah is one of ten non-mandatory pilot courts, it should proceed with a voluntary program.

Professor Williams completed his explanation of the proposed program, then asked whether the subcommittee was on track and should proceed with the effort as outlined in the report. Generally, the committee expressed agreement with the goals and the general outline of the proposed experiment. Chief Judge Jenkins noted the subcommittee should proceed to experiment with arbitration over the course of approximately one year on a voluntary basis. He echoed Mr. Kipp's concerns over compensation, noting that the legislation naming Utah as a pilot court also appropriated funding with which to conduct such experimentation and that funds would be available to compensate arbitrators and mediators.

As to creation of an Ad Hoc ADR Development Subcommittee, the committee agreed that it should include the members proposed in the report as well as individuals from the local bar associations and, in particular, the Utah State Bar ADR Committee. Mr. Davis indicated he would assist Professor Williams in coordinating the latter.

Chief Judge Jenkins expressed appreciation to Professor Williams and his subcommittee for their work. The next meeting of the committee is scheduled for Friday, November 1 at 3:00 p.m. in Room 158 of the Frank E. Moss Courthouse. At that meeting, the consumer subcommittee will present the results of the telephone survey and its recommendations for inclusion in the committee's report.