



# **Advancing Alternative Dispute Resolution in the New Mexico Judiciary**

## **Key Strategies to Save Time and Money**

**Final Report  
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Online legal research provided by LexisNexis.



# Advancing Alternative Dispute Resolution New Mexico Judiciary

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## **CHAPTER I EXECUTIVE SUMMARY**

### **What's the Purpose of this Study?**

This special study is a statewide, comprehensive assessment of court-annexed alternative dispute resolution (ADR) programs in appellate, district, metropolitan, and magistrate courts, and suggested practical strategies for improving the use and impact of ADR programs for the New Mexico Judiciary and the public it serves. Such programs hold great promise to save both time and money for courts and litigants.

Current court-sponsored alternatives do indeed make positive impacts throughout the state, but in many instances their full potential is unrealized and they fall short in maximizing system efficiencies due to a lack of consistent programming and the absence of a set of recognized, core strategic directions that judges, court staff, lawyers, and neutrals collectively embrace and pursue throughout the court system. This report offers ten ways to strengthen and improve court-annexed alternative dispute resolution that are not overly dependent on more money, more staff, or more space.

These ten recommendations are in harmony with the goals of the New Mexico Judiciary's Access to Justice Commission report and the court system's overall strategic plan for the next five years. They also build on the work done by New Mexico's Administrative Office of Courts in its 2009 Court ADR Survey, lessons learned from a review of national court-based ADR programs, and an analysis of the current ADR programs in the New Mexico courts. **These recommendations also enhance the current re-engineering efforts to increase the efficiency of the New Mexico courts.**

### **What is Court-Annexed Alternative Dispute Resolution?**

Court-annexed alternative dispute resolution for our purposes means the resolution of a legal dispute after a case has been filed in a court but prior to formal litigation. In most circumstances, it implies an in-court, early settlement through the use of mediation, facilitation, arbitration, or some form of informal negotiation that is encouraged by the court. It also may entail an out-of-court agreement that is authorized by the court after a case has been filed, but before it has been formally adjudicated.

The ultimate goal is to resolve all issues through agreement of the parties and dispose of the case short of formal litigation. Success, however, is not totally dependent on a complete resolution of all matters through ADR, but may also be concluded to occur when portions of a dispute are resolved and those early agreements shorten the length of any subsequent litigation reducing burdens (cost and time) on both the court and parties.

## **Who Paid for and Developed this Report?**

This study was funded by the State Justice Institute (SJI), an independent federal agency established in 1984 to award grants to improve the quality of justice in state courts, facilitate better coordination between state and federal courts, and foster innovative, efficient solutions to common issues faced by all courts. The National Center for State Courts (NCSC, National Center, or the Center), a public benefit corporation dedicated to improving courts nationwide and around the world, was awarded the grant and conducted the inquiry.

## **How was the Study Conducted?**

A three-person NCSC project team – Cynthia Savage, Gordon Griller, and Kent Kelly, assisted by Denver-based National Center research assistants, Erika Friess and David Sayles – spent nearly a year working in concert with a twelve member statewide ADR Steering Committee chaired by Second Judicial District Court Judge Nan Nash which helped guide and direct the work of the National Center. Although the analysis primarily focused on court-sponsored programs and embraced the objectives set out in the current New Mexico Judiciary Long-Range Strategic Plan,<sup>1</sup> it expanded to include executive branch offerings, University of New Mexico Law School mediation training, and a statewide electronic Internet survey of lawyers, neutrals, judicial officers, and ADR program staff about their attitudes and opinions regarding alternative dispute resolution in general, and court programs in particular. To complement this data gathering, one or more consultants visited the Court of Appeals, each of the 13 judicial district courts, Bernalillo County Metropolitan Court, and several magistrate courts. They interviewed scores of judges, lawyers, neutrals, and court staff about local programs and projects during two separate site visits in 2010: August 31 thru September 2, and November 1 thru 4.

## **Why is this Study Important?**

Rarely does an entire state court system study its alternative dispute resolution programs in such a wide-ranging, inclusive fashion as has been done in this study. Rarer still is a predisposed desire by court leaders to use such data to craft ADR options in stronger, more vibrant ways as part of a renewed mosaic of justice services offered to the public. NCSC consultants know of no other state in recent times that has commissioned such a pervasive analysis.

Commonplace notions about court-annexed alternative dispute resolution programs under-appreciate its positive benefits in such areas as saving time/money for litigants and the court, addressing many emotional, social and family issues better than formal litigation, and promoting more lasting settlements. Although most state justice systems offer scattered ADR choices to litigants, there are numerous forces which weaken their impact. Skilled neutrals (mediators, facilitators, arbitrators) are limited or unavailable, especially in sparsely populated

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<sup>1</sup> ADR programs throughout the Court of Appeals, District Courts, the Metropolitan Court and Magistrate Courts in New Mexico's 13 judicial districts and 33 counties were examined consistent with the goals and objectives outlined in the present Strategic Plan for the New Mexico Judiciary, 2008-2013 revised October 2009, page 6, "Improving the use of alternative dispute resolution methods and educate the public about the availability of such methods."



areas. ADR is a difficult concept to grasp. Most litigants are unfamiliar with it, and see courts as entry points to formal litigation not organizations that offer choices (i.e. multi-door courthouse concept) in lieu of an adversarial forum. Some judges take a traditionalist view, questioning the advisability of government-provided services in place of private or nonprofit driven options. Lawyers, too, may be skeptical of ADR; many reasoning formal pretrial settlement conferences are worthy substitutes, or neutrals unnecessarily siphon business from them as advocates.

We contend quite the opposite. Court-annexed alternative dispute resolution is a valuable component of any high performing court system. It saves time and money by promoting early case resolution and results in more lasting settlements, avoiding future trips to court.<sup>2</sup> New Mexico lawyers seem to agree. A recent *Survey Regarding the Civil Justice System* in the state conducted by both the New Mexico Defense Lawyers and Trial Lawyers Associations at the request of the Supreme Court showed 63 percent of the respondents agreed with “a statewide mandatory mediation rule would help resolve cases quicker,” and 76 percent concluded “early intervention by judges in a case can help narrow the issues and limit discovery.”<sup>3</sup> Consequently, it is an important component in the range of options court policymakers should consider in reengineering New Mexico’s Judiciary for a leaner tomorrow.

In deciding to examine its ADR landscape at this difficult time in American and global history - a lingering recessionary economy and advice from many experts to “re-invent,” “rightsize,” and “re-engineer” government and court business practices - New Mexico is a few steps ahead of many states in diagnosing its problems and restructuring services toward more productive methods. To that end, we conclude other state court systems likely will benefit from New Mexico’s leadership.

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<sup>2</sup> Both common sense and numerous studies support the utility, efficiency and economy of settling court cases early in their life. Alternative dispute resolution methods are directed at that very goal by employing proven settlement techniques. See Footnote 14.

<sup>3</sup> January 12, 2011 NM Bar Bulletin.

## TEN WAYS TO ADVANCE COURT-ANNEXED ADR WITHIN NEW MEXICO

### **① Appoint and permanently staff a Supreme Court ADR Commission to develop, organize, and monitor ADR programs throughout New Mexico’s courts.**

An overarching finding is that court-annexed alternative dispute resolution in New Mexico exists as a bewildering mixture of programs in need of more coherent direction, commitment and organization. This conclusion does not imply a top-down, hierarchical bureaucratic remedy is needed. Individual courts must remain at the heart of experimenting, testing and advancing workable solutions to ensure program viability and commitment at the local level. However, they need stronger support and guidance in doing so. They also need ways to more effectively and efficiently assess, employ, adapt and incorporate successful approaches, and learn lessons from failed programs. And statewide court policymakers need objective, better ways to review and allocate resources for court-annexed dispute resolution alternatives that assure results.

In order to promote the best mix of court ADR statewide and assure economical and solid results, there is a need for a single, statewide, court-centered organization for data collection, planning, advocacy, and accountability. To occasion that direction requires leadership from the top: a permanent, high-level ADR Commission appointed by the Supreme Court and staffed by a full-time coordinator.<sup>4</sup>

### **② Leverage court programs through collaboration with other New Mexico organizations**

Opportunistic and strategic cooperation with other organizations in New Mexico that support and encourage alternative dispute resolution approaches and delivery systems will help advance court-annexed programs. New Mexico has a number of groups, agencies and educational bodies presently invested in championing and nurturing ADR as a complement to or substitute for formal litigation. The State Bar ADR Committee, University of New Mexico School of Law, colleges and educational associations, the Executive Branch’s Office of Alternative Dispute Prevention and Resolution with the General Services Department, Risk Management Division, New Mexico Mediation Association, community-based resources, and private neutral associations and practitioners are examples.

The court system – centered on resolving disputes as its primary purpose - is ideally positioned to spearhead heightened organization and planning efforts among these separate groups to the mutual, symbiotic advantage of all. Here, we encourage a natural, long-term commitment by court system leaders through the Supreme Court ADR Commission to act as the hub or central force in advancing ADR statewide and in doing so simultaneously strengthen court-annexed programs.

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<sup>4</sup> The Access to Justice Commission is a model for this recommendation.

### **③ Maximize internal court system resources to enhance ADR programs**

New Mexico's Judiciary has capacity to creatively further court-annexed ADR impacts within its current resources. One way is to bolster more widespread judicial commitment through concerted in-house education, training and mentoring programs. Presently, too many judges are apathetic about court-sponsored programs. Many are not philosophically opposed to alternative dispute programs, but misunderstand or are skeptical about their potential benefits when operated in a court-annexed model. Those who do appreciate court connected programs may be at a loss regarding effective ways to mesh such approaches with their day-to-day dockets, or implement them efficiently throughout a trial court as a chief judge.

Here, the ADR Commission and ADR Coordinator can serve in a resource, advisory, planning and educational capacity to build internal judicial and staff interest, support and understanding to boost commitment and involvement in court-sponsored programs. Among tangible, creative results the Commission could promote in the use of existing resources the increase of court-to-court technical assistance,<sup>5</sup> development of a recognized, supported cadre of in-house resource experts, assessing and advancing transferrable, replicable court-annexed programs, providing statewide technical assistance to requesting courts, and collaborating on program performance improvements.

### **④ Structure new and expanded ADR initiatives in phases and pilot projects**

Implementing court-annexed ADR in a complex court caseflow process requires methodical, thoughtful planning and experimentation focused on a range of short-term, intermediate and long-term timelines.

Short-term wins are perhaps the most important. In inserting ADR processes in an existing stream of caseflow events, if you don't demonstrate you are on the right path early in the project you rarely get the chance to fully implement those initiatives later. Visible, initial, positive results are key ingredients in building support and momentum for new processes and procedures of the magnitude and lasting affect we are suggesting in this report. Quick improvements are those modifications that can be inserted within an organization or caseflow process without substantial controversy and don't present major start-up difficulties, require large expenditures of money, or engender additional detailed analysis or planning. Examples on a systemwide basis include the creation of an ADR Commission and designation of a permanent staff coordinator, identifying topics and initiatives contained within the recommendations of this report that are easier to implement within the next 12 months, and gaining formal commitments from key influence leaders inside and outside the Judiciary to support improving court-annexed ADR programs as part of re-engineering the court for a more austere future.

Intermediate efforts are those with a two to three year implementation time horizon requiring substantial interaction, agreement and collaboration among organizations both inside

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<sup>5</sup> See Chapter II, Foreclosure Mediation for examples of how technical assistance between judicial districts is currently taking place.

and outside the Judiciary. Such projects as recruitment and training regimens for court-sponsored neutrals, public marketing programs, and better ways to produce, update and disseminate standardized, uniform, statewide, easy-read forms and instructions for self-represented litigants are examples.

Long-range efforts include legislative changes, better and more consistent funding mechanisms, and building widespread community-based dispute resolution alternatives as options outside the court system to provide greater choices for potential litigants in lieu of filing a case in the court system. Often these types of changes require extensive structural modifications, including statutory or court rule mandates.<sup>6</sup>

Lastly, it is wise to introduce new and expanded programs – regardless of their time horizons - as pilot projects. Courts are multifarious organizations resistant to change. In fact, an argument can be made that they may be more wedded to the status quo than many other types of institutions since they are steeped in precedence, governed through consensus, and tend to operate in loosely-coupled, isolated work units. Among the most critical changes tackled by any court are new or revamped caseflow processes; essentially the way judicial officers do their work. This is the exact target of court-annexed ADR advocates. In this atmosphere many seasoned court leaders wisely empower small, highly-regarded, supportive guiding coalitions to test and spearhead reforms without disrupting the entire court system. In the private sector, these research and development points are sometimes called “skunk works:” protected places within an organization given a high degree of autonomy and unhampered by bureaucracy that are tasked with working on experimental projects. In this way, successful change is often more enduring and easier to expand since problems are remedied on a smaller scale and positive results can be spotlighted as early wins and are clearly and convincingly documented for any subsequent systemwide push.

## **⑤ Enhance ADR training, management and operations through technology**

Technology offers numerous ways to improve the delivery, education and management of court-annexed ADR efforts within the state’s justice system. The ADR Commission is an ideal strategic body to coordinate and advocate for the efficient application of high-tech systems for court-sponsored ADR. At present there is no accountable, dedicated group to plan and coordinate statewide technology needs and priorities for growing and improving court ADR programs.

Technical solutions offer cost-efficient ways to address many ADR needs. The new state *Odyssey*® court management system will permit court staff to better manage calendaring, neutral assignments, case tracking, party notification, and performance data. System developers, however, need to clearly understand what ADR advocates need and require of the software. Internet, video and telephone conferencing provide options in place of face-to-face mediation sessions as well as for neutral skills training, mentoring and education. Those priorities must be

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<sup>6</sup> One such structural change could be to mandate that ADR be potentially part of most non-criminal cases in the district courts by changing Rule 1-016, NMSA to require referral of a case to alternative dispute resolution at the first pretrial conference unless the court finds good cause not to do so.

promoted and placed on the agenda of decision-makers inside the court system responsible for planning, acquiring and supporting such technology.

## **⑥ Nurture different approaches in large and small court jurisdictions**

Although standard guidelines and baseline principles for effective court-annexed ADR in New Mexico should be commonly developed and followed to lessen public confusion, ensure basic program quality and promote efficiencies, court programs must be allowed to vary by jurisdiction size, type and population. In a state as diverse as New Mexico, one size does not fit all. Six out of thirteen judicial districts in the state – and roughly 15 percent of the state’s population - are essentially rural. Nearly all of the magistrate courts are small with limited resources.

Needless to say in this mix of jurisdictions, courts have different capacities and capabilities to develop and operate programs. Larger populated, urban-based courts certainly have more dedicated staff and resources to support and maintain ADR programs, self-help centers, court clinics, and structured procedures for litigants. Although larger courts have also suffered budget cuts and program reductions, courts in less populated regions seriously struggle to maintain basic services let alone provide optional ways for litigants to resolve disputes. Here, such possibilities as circuit-riding neutrals, outsourcing to private vendors,<sup>7</sup> court staff functioning as mediators, court and district partnerships in service delivery and technology (i.e. Internet, video and telephone conferences) provide promising practices.

## **⑦ Publicize and market a “multi-door courthouse” concept**

A specific finding of this study is the citizens of New Mexico have little knowledge or understanding about alternative dispute resolution services in general or court-annexed options specifically. This conclusion is neither a startling fact, nor a circumstance unique to New Mexico. ADR is a confusing subject for the general public to grasp. For that matter, many justice system professionals who have not studied it or experienced its various forms also have trouble understanding its nuances, varieties, and processes.

In such a reality, it is incumbent on those familiar with the programs and virtues of court-annexed alternative dispute resolution programs to market and educate potential users and court staff in ways they can understand. Litigants have vast possibilities to learn about alternative dispute resolution options; the more sophisticated often do so through the Internet, websites, articles, and friends or relatives. Yet, national studies and research generally substantiate that most people are unfamiliar with the fact that courts offer “softer” forms of dispute resolution in addition to adversarial adjudication.<sup>8</sup> Those who do use ADR often do not understand the process, for example, expecting the mediator to “decide” the case or otherwise have the same

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<sup>7</sup> See Chapter II for examples of how the Fourth and Ninth Judicial Districts are operating such public-private partnerships.

<sup>8</sup> McAdoo, B and A. Hinshaw (2002). The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri.” 67 Missouri Law Review 473.

authority as a judge. These litigants may ultimately be dissatisfied with their experience because it did not meet their misconceived expectations.

One way judicial branch officials in other states have presented a clearer, more recognizable public message about the array of services today's courts offer litigants is through the metaphor of a “*multi-door courthouse*.”<sup>9</sup> It is simple, memorable, and not copyrighted. New Mexico court leaders should consider adopting and promoting it widely. In doing so, however, it is important to remember that although creative marketing techniques can certainly stimulate public interest and demand (i.e. *Explore New Mexico's Multi-Door Courthouses: A Public Gateway to Choices Other than Litigation; NM Multi-Door Courthouses – Not Just Litigation Anymore*), a solid, lasting reputation requires workable, widely available, consistent court-annexed ADR programming. In other words, don't advertise what you cannot deliver.

### **⑧ Give self-represented litigants adequate access to court-annexed ADR**

A vast number of litigants filing civil matters in New Mexico's trial courts are unrepresented and could benefit greatly from a more pervasive array of court annexed alternative dispute resolution programs. Many every-day legal issues that impact citizens – divorce, parenting, mortgage foreclosures, small claims and minor civil disputes – can more easily, more harmoniously and less expensively be resolved through “softer” forms of dispute resolution – mediation, facilitation and arbitration – than formal adjudication. To that end, it is prudent for the ADR Commission and Access to Justice Commission, charged with improving court services to self-represented litigants, to develop mutually beneficial strategies and initiatives to allow greater access by lawyerless litigants to the widest possible range of court-sponsored alternative dispute resolution programs. Of particular importance for New Mexico in providing such access are services to the large and growing Hispanic population in the state; many of whom only speak and understand Spanish as their primary language. Here, the economies of scale occasioned by these two commissions working together to meet these special needs is wise public policy.<sup>10</sup>

Alaska, Minnesota and Arizona provide important efficiencies in self-help, do-it-yourself, court-annexed programs and innovations that provide some ideas on how lawyerless ADR disputants can be served better. Their approaches are based on the high-tech, high-touch world of digitized information and the Internet as a core solution to providing service consistency, 24/7 access, and ease-of-use for the public in geographically diverse and remote areas. Some of these innovations also target public libraries as non-traditional partners with the Judiciary and local courts in delivering legal forms, instructions, and educational assistance to ADR parties in new

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<sup>9</sup> The concept of the multi-door courthouse was first suggested in 1976 by Harvard Law Professor Frank E.A. Sander at the Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (commonly referred to as the Pound Conference). Frank Sander, *Varieties of Dispute Processing*, Address Before the Nation Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7-9, 1976), in 70 F.R.D. 79, 111 (1976). Sander proposed assigning certain cases to alternative dispute resolution processes, or a sequence of processes, after screening in a Dispute Resolution Center.

<sup>10</sup> Early results from the 2010 U.S. Decennial Census reported by the Associated Press in March 2011 indicate that Hispanics account for 46 percent or more of the population gains in the fastest growing population region in the country, the Mountain West which includes New Mexico. In this regard, it is important to ensure that electronic forms and instructions are available in Spanish as well as English.

and beneficial ways to augment or substitute for courthouse assistance; dovetailing nicely with a strengthened assortment of court annexed ADR programs. Detailed descriptions of these programs appear in Appendix B.

### **⑨ Grow the number and quality of ADR neutrals and court programs.**

How to provide, ensure, maintain and enhance quality in ADR programs is much discussed and debated nationally and internationally, particularly with regard to court ADR programs. ADR conferences, including the American Bar Association Section of Dispute Resolution’s annual Symposium on Dispute Resolution in the Courts, frequently include sessions on a variety of topics related to quality, including roster management, effective training, law and ethics, among others.<sup>11</sup> New Mexico’s ADR programs have fairly good reputations as to quality.<sup>12</sup> However, there is room for improvement. Any expansion of ADR will also require attention to quality. All of the data collected during the NCSC study indicates that building capacity in the form of increased numbers of available, quality neutrals should be a particular focus of New Mexico’s efforts.

Although much of the discussion of quality in ADR focuses on the neutral, whether a mediator, arbitrator, settlement facilitator, or other provider, there are a number of other interconnected topics which also need to be addressed in order to maintain and enhance quality, particularly for court-annexed programs. These themes fall under the umbrella of program design, and include selecting ADR processes, the case referral system, program policies and procedures, staff and related personnel, ethics, marketing/education, funding, and program evaluation.

### **⑩ Upgrade services through long-term, dedicated funding**

Sustainable funding for court-annexed dispute resolution alternatives is only possible through two approaches; neither are guaranteed or smooth roads to travel. Either top court leaders conclude their long-term vision for the Judiciary includes stable, General Fund core support for court-annexed dispute resolution alternatives, and/or a specific surcharge attached to filings is conditioned on exclusive support for alternative dispute resolution programming that

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<sup>11</sup> For example, this year’s Court Symposium will include a session entitled “Court ADR Roster Management: More Like a Stroll through the Park or Herding Cats through a Minefield?”, and the 2009 Symposium included a workshop entitled “Quality Focus: General Approaches and Using Technology to Advance Quality.”

<sup>12</sup> See electronic attorney survey question 12, rating appeals court and district court programs as “acceptable to good,” and Bernalillo County Metro Court as on average close to “acceptable.” Magistrate Court, however, was rated on average somewhat acceptable but closer to “poor” and the great majority of attorneys responded “don’t know” to the question. Judges have an even more positive view of program quality, rating Metro Court and Appeals Court as “good to excellent” and district and Magistrate Court as “acceptable to good” in judicial survey question 8, though most judges also responded “don’t know.” Neutrals also rated Metro Court as “good to excellent” and the other three programs as “acceptable to good” in neutral survey question 7, but even they primarily responded “don’t know.” Survey respondents all rated neutral knowledge of ADR “acceptable to good” (judicial question 11, attorney question 16, and neutral question 8). Low response rates to the electronic survey may be an indication of some level of dissatisfaction – or at least disinterest - with the ADR programs, and site visits indicated some level of concern as well.

cannot be diverted to offset reductions elsewhere in court budgets such as was done with the fee supporting magistrate court volunteer mediation efforts. One way to start is for all courts to begin collecting the civil ADR fees they are authorized to collect. Currently, some courts do not collect these monies.

It will be a tough sell to devise and secure sustainable funding for court-annexed dispute resolution alternatives. Not undoable, just hard. To do so will require concerted and deliberate action on the part of the ADR Commission in proposing solutions and persuading the Supreme Court and/or Legislature to support them. The pathway forward certainly must embrace the proposition that to do so is one of the Judiciary's best and most responsible methods to save time and money for litigants as well as the judicial system and to help to ensure that the Judiciary's constitutional obligations are satisfied. That argument can resonate with government budgeteers and elected statespersons, too, but it must first be adopted and championed as a critical solution by top Judiciary leaders.



## **CHAPTER II NEW MEXICO ADR TODAY: LIMITED RESOURCES; BIG NEEDS**

With the effects of the recession likely to linger for some years to come, New Mexico State Government continues to cut budgets and downsize government as court caseloads grow. Chief Justice Charles W. Daniels emphasized the damaging nature of this “dramatic mismatch” between reduced funding and growing filings within the court system during his State of the Judiciary Address to the Joint Session of the New Mexico Legislature on January 25, 2011, in saying...

*The financial crisis is actually increasing workloads for courts – foreclosures, debt collections, family conflicts, criminal cases and so many other cases that we have no choice but to accept and resolve... Caseloads have gone up over 7 percent at the same time budgets have been cut more than 10 percent. Not only have our appropriations been cut in dollar amounts, they have decreased each of the last few years as a percentage of the total state budget. To survive in the short term, we’ve had to make hard and sometimes painful cost-cutting decisions.*

Some of those painful decisions include a freeze on hiring, delaying replacements, mandating furloughs (payless days), and laying-off non-judicial staff. Many are reductions embraced by courts across the nation. Judicial ranks in New Mexico, and many other state court systems, have languished as well. New Mexico is 25 percent (35 judges) below adequate levels according to a recent statewide Weighted Caseload analysis, a scientific workload calculation that determines needed judgeships for effectively and expeditiously processing case filings.<sup>13</sup>

As cutbacks continue and budgets suffer, increasing numbers of court leaders are faced with the growing dilemma of deciding which adjudication functions are constitutionally mandated to perform and which are important or desirable, but not essential. Fortunately, court-annexed alternative dispute resolution is not so much a program as it is a process inserted in the flow of cases from filing to disposition. By informally crystallizing issues, diverting matters from formal litigation, and working out solutions early in the life of case, ADR achieves those government objectives budgeteers and taxpayers look to save in the long-run: time and money. This study argues that any court system concerned about efficiency and reducing costs should not neglect to strengthen its array of alternative dispute resolution methods.

Unfortunately, many court policymakers perceive ADR as an extra expense rather than a cost savings method. Nothing could be further from the truth. Numerous studies and substantial research have established the irrefutable benefits of alternative dispute methods in expediting cases and reducing overall litigation costs, especially in trial courts.<sup>14</sup> Courts that require parties

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<sup>13</sup> New Mexico Sentencing Commission’s 2007 Workload Assessment Study for Judiciary, District Attorneys and Public Defenders.

<sup>14</sup> Some research examples include: 1) A 2004 study of five court-annexed civil mediation programs in California - three mandatory programs (Fresno, Los Angeles, and San Diego counties) and two voluntary programs (Contra Costa and Sonoma counties), evaluated the programs in five areas: trial rate, time to disposition, litigant satisfaction, litigant costs, and court workload. The study included 23,792 eligible cases of unlimited jurisdiction, of which 6,320

to submit to some form of informal dispute assessment process before proceeding to more adversarial adjudication formats are saving government funds in the long-run by shortening case life and handling more filings in less time.

### **A. Cultural and Demographic Diversity: One Size Doesn't Fit All**

The culture and demographics of New Mexico are unique based on strong Hispanic and Native American influences dating back many centuries<sup>15</sup> scattered over a sparsely populated landscape with few urban areas. It is the fifth-largest in land area of all fifty states, yet its population is only two million.

Native American populations began to inhabit what is now New Mexico hundreds and hundreds of years ago. It has been part of the Imperial Spanish Viceroyalty, New Spain, Mexico, and a U.S. territory. Among U.S. states, New Mexico is the sixth least populated, has the highest percentage of Hispanics at 46 percent (2010 estimate), including descendants of Spanish colonists and recent immigrants from Latin America.<sup>16</sup> It also has the third-highest percentage of Native Americans, after Alaska and Oklahoma, and the fifth-highest total number of Native Americans after California, Oklahoma, Arizona, and Texas. The tribes in the state consist mostly of Navajo and Pueblo peoples.

Over 40 percent of the New Mexico population lives in the Metropolitan Corridor Area, a four county region which includes Bernalillo, Sandoval, Tarrant and Valencia Counties; encompassing portions of three judicial districts. There are also substantial population centers in the northwest and southeast sections of the state with sparse populations in the northeast and southwest regions of the state. Over the recent past, outmigration has been evident in eight rural counties which have experienced continual population declines. Six of these counties – Colfax, De Baca, Guadalupe, Harding, Quay and Union - are in the east-central or northeast parts of the state. The other two counties – Cibola and Hidalgo – are in the western part of the state. Generally, population change has occurred less in the eastern and plains portions of New Mexico.<sup>17</sup> These mega trends are unlikely to change as New Mexico's overall population continues to grow modestly over the next decade, mostly in metropolitan and scattered urban areas around the state.

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were mediated, and 7,727 eligible cases of limited jurisdiction (under \$25,000, excluding small claims), of which 1,570 were mediated. Authors Heather Anderson and Ron Pi found that 58% of unlimited cases and 71% of limited cases settled as a result of mediation. The trial rate was reduced 24 to 30 percent, resulting in substantial savings to both litigants and the court. Savings were also realized by a decrease in the number of motions and/or pretrial court events for program cases. There was also a positive impact on the time from filing to disposition for mediated cases, and attorney satisfaction was higher in program cases than non-program cases<sup>2)</sup> A Department of Justice (DOJ) study of 15,000 civil cases filed in federal courts between 1995 and 1998 by Indiana University social scientists reported in the Ohio State Journal on Dispute Resolution (2009) found that 65 percent of the cases where mediation was used settled compared to 29 percent of the cases that settled when ADR was not used. The conclusion: ADR has the potential to improve dispute processing without sacrificing the quality of justice.

<sup>15</sup> The first European permanent Spanish settlement in New Mexico occurred in 1598, nine years before the first English settlement in Jamestown, Virginia.

<sup>16</sup> Source: 2010 U.S. Census. Recent statistics show that New Mexico grew by more than 240,000 people over the last 10 years (2000 to 2010) to 2 million residents and that 78 percent of that increase was among Hispanics.

<sup>17</sup> Western Rural Development Center, United States Department of Agriculture.

This mix of cultural and geographic diversity demands considerable creativity on the part of the Judiciary's ADR planners to craft services that allow access for the wide range of distinctly different communities throughout state. Understandably, judicial districts and counties with larger populations have the most structured and vibrant court-annexed services as well as larger numbers of private ADR professionals of all backgrounds. At the opposite end of the spectrum are county areas identified as *rural* on the follow table (*Table 1: 13 Judicial Districts and 33 counties*) where court-sponsored dispute resolution options are sparse and courts struggle to provide program quality and permanence.

As an example, the number of volunteer mediators in magistrate courts throughout the state has dwindled substantially since the initiative began six years ago. In 2005, the Judiciary promoted, funded, and trained a relatively large number of citizen volunteers to learn mediation skills and help limited jurisdiction courts, especially in rural regions, with their civil and small claims caseloads. Numerous 40-hour workshops were presented through community colleges, universities (i.e. New Mexico State University), and the UNM Law School. In Otero County Magistrate Court, 60 volunteers were trained; today only four active mediators are left. In Grant County Magistrate Court, 15 people were trained; only two remain. Since the original training, there has been no in-service mediator training for those previously certified and no additional Branch-sponsored basic training for new mediators.

Table 1 on the next page categorizes New Mexico's thirteen judicial districts in four groupings: metro, urban, urban/rural, and rural. In so doing, it is easier to sort the challenges and opportunities like groups of districts face in developing, sustaining and enhancing ADR programs. A bottom-line conclusion for trial courts, based on consultant site visits and data collection, is that judicial district size vis-à-vis population, county seat urbanization, and dedicated ADR court staffing matters in structuring and maintaining program vibrancy and continuity at the local level. Although such an inference isn't a startling revelation, it nevertheless helps to sort and condition long-term strategies and options toward improving services.

**Table 1**  
**13 Judicial Districts and 33 Counties**  
**2009 Population Estimates – UNM Bureau of Business and Economics**

<i>District</i>	<i>County</i>	<i>County Seat</i>	<i>County Population</i>	<i>District Population</i>	<i>District Judges<sup>18</sup> Attorneys<sup>19</sup></i>	<i>District Pop. as Percent of State Pop.</i>	<i>District Ranking 1=largest</i>
<b>New Mexico</b>	-	-	2,059,179	2,059,179		100.0	
<b>First</b>	Santa Fe	Santa Fe	144,170	214,423	8 1,051	10.2	Metro - 3
	Los Alamos	Los Alamos	17,950				
	Rio Arriba	Tierra Amarilla	40,246				
<b>Second</b>	Bernalillo	Albuquerque	66,2564	656,528	26 2,738	31.4	Metro - 1
	Dona Ana	Las Cruces	209,233	211,821	8 265	10.1	Metro - 4
<b>Fourth</b>	Mora	Mora	4,881	41,719	3	2.0	Rural - 5
	San Miguel	Las Vegas	29,393		46		
	Guadalupe	Santa Rosa	4,687				
<b>Fifth</b>	Chaves	Roswell	65,645	178,518	10	8.6	Urban - 2
	Eddy	Carlsbad	53,829		218		
	Lea	Lovington	64,727				
<b>Sixth</b>	Grant	Silver City	29,514	66,641	4	3.3	Rural - 1
	Luna	Deming	25,095		57		
	Hidalgo	Lordsburg	4,894				
<b>Seventh</b>	Torrance	Estancia	16,383	55,296	3	2.6	Rural - 3
	Socorro	Socorro	17,866		40		
	Catron	Reserve	3,725				
	Sierra	Truth or Con.	11,988				
<b>Eighth</b>	Taos	Taos	32,937	51,655	2	2.2	Rural - 4
	Colfax	Raton	13,750		97		
	Union	Clayton	4,549				
<b>Ninth</b>	Curry	Clovis	48,376	66,156	5	3.1	Rural - 2
	Roosevelt	Portales	19,846		67		
<b>Tenth</b>	Quay	Tucumcari	9,041	13,418	1	0.6	Rural - 6
	Harding	Mosquero	695		13		
	De Baca	Fort Sumner	2,022				
<b>Eleventh</b>	San Juan	Aztec	130,044	212,403	8	10.1	Urban - 1
	McKinley	Gallup	71,492		152		
<b>Twelfth</b>	Lincoln	Carrizozo	20,497	91,160	4	4.4	Urban/Rural - 1
	Otero	Alamogordo	63,797		78		
<b>Thirteenth</b>	Sandoval	Bernalillo	131,561	238,483	6	11.4	Metro - 2
	Valencia	Los Lunas	76,569		194		
	Cibola	Grants	27,213				

<sup>18</sup> Only general jurisdiction judges are depicted by county. Limited jurisdiction judicial officers not shown include 19 Bernalillo County Metropolitan Judges, and 66 magistrate judges scattered throughout 32 counties at 49 court locations. Source: New Mexico AOC.

<sup>19</sup> All active NM State Bar Members practicing in the Judicial District. Source: NM State Bar.

## **B. Isolated Courthouses and Limited Staffing**

As with most states, the district court courthouse in each county seat is the major hub for court-promoted alternative dispute resolution activities. Additionally, throughout the state there are separate locations for forty-nine limited jurisdiction magistrate courts (66 judges) in 32 of New Mexico's 33 counties; at least one in every county except Bernalillo where a specialized Metro Court (19 judges) has similar jurisdiction and is located in its own multi-story courthouse in downtown Albuquerque. For the most part, these locations are at substantial distances from each other. Each is plagued with inadequate staffing ranging from 10 to 20 percent due to recently reduced Judicial Branch funding. All essentially develop, operate, and fund their ADR programs somewhat independently under Supreme Court Rules and AOC guidelines for the Children's Court and Magistrate Court Mediation Programs.

Many courts not only face physical isolation, but organizational disconnection from each other. This creates a somewhat separatist approach to ADR development. Such a circumstance isn't necessarily harmful, but it does tend to promote disparity in program services and quality across the state.

Where face-to-face relationships are more difficult to occasion, separate work units don't understand each other well, and, more importantly, have trouble learning from each other's mistakes and successes. Consequently, successful processes and procedures are tougher to establish from district to district and organization-wide economies-of-scale are even harder to attain.

Some social scientists call this the "silo syndrome" where separate work units, part of the same system or organization, operate autonomously to the detriment of overall improvement in productivity. The results are higher costs, slower responses to changes, and, ultimately, poorer performance.

We submit that many individual courthouses, especially in rural New Mexico, tend to operate as standalone silos. This appears true in spite of the justice system's methodical move to more streamlined central services delivered through multi-county regions, statewide funding, a single electronic case management system, broad-scoped AOC assistance to trial courts, no elected clerks of court, and district-wide prosecutors and public defenders, all measures directed at regional, statewide, and branch unity and solidity.

Here, again, geographic and cultural parochialism isn't necessarily system-threatening. Many state court systems face similar dislocations among separate, decentralized court sites. The phenomenon merely needs to be recognized by policymakers and planners as a dynamic influencing court operation in New Mexico, including alternative dispute resolution services. Strategies can then be better devised to minimize this tendency in the interest of equal access and collective, simplified processes regardless of location. New Mexico, we feel, has effectively done some of this already through guidance and support from the AOC.

### **C. ADR Services are Stressed by Large Numbers of Self-Represented Litigants**

New Mexico, like many other states, has experienced a growing number of self-represented litigants seeking court services in a variety of consumer law matters. Many of these cases involve such legal issues as domestic relations, minor civil cases, small claims, landlord-tenant, parenting, real estate, and criminal actions where court-annexed alternative dispute resolution programs offer less costly, less complicated and faster dispositions than formal adjudication. As a result, ADR options are becoming increasingly popular for disputants. It is a mixed blessing for two reasons. First, serving a growing number of self-represented parties has become ever more challenging as trial budgets and staffs have dwindled in the wake of the recession. And secondly, creating consistent, streamlined processes and uniform, simplified forms and instructions among separate trial courts.

Advances toward improving services to the self-represented have been occasioned by the Judiciary's Self-Represented Working Group, part of a larger Access to Justice Commission (ATJC) created by the State Supreme Court in late 2007.<sup>20</sup> The Working Group has developed a comprehensive set of well thought-out and practical recommendations targeting expanded legal assistance, statewide self-help forms and technology, and suggestions to relax restrictive rules and statutes which limit "unbundled" legal practice by lawyers ("limited representation" or "discrete task representation" regarding an attorney's arrangement with a client limiting the scope of services more narrowly than an attorney would normally).

The Access to Justice Commission has endorsed a number of the initiatives outlined by the Working Group; most deal with forms and self-help centers to assist self-represented litigants (SRLs) at the local court level. This provides a significant assist to statewide trial court ADR efforts where standardized, statewide forms and instructions could be used more pervasively from judicial district to judicial district. Court staff training on obligations and methods to deliver procedural legal information without giving legal advice was accompanied by a new Supreme Court Rule outlining the same.

The Self-Represented Work Group also continues to work on methods to increase access, including collaborating with ongoing efforts with the New Mexico Center for Language Access (a partnership of the Supreme Court, state agencies, and higher education systems) to develop plans to achieve Title VI compliance in all judicial districts and to enhance and improve opportunities for court staff and others to achieve certification at different levels of bilingual communication or interpretership.<sup>21</sup>

The problems in efficiently serving sizeable numbers of self-represented litigants by the trial courts throughout the state, however, remain daunting. In 2007, the Work Group Report headlined these ills...

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<sup>20</sup> *New Mexico Access to Justice Commission, Self-Represented Working Group, Final Report, November 2007.* Administrative Office of the New Mexico Courts, Santa Fe, NM.

<sup>21</sup> Title VI of the Civil Rights Act (1964) protects people from discrimination on the basis of race, color, or national origin in programs or activities that receive federal financial assistance.

- ✓ Self-represented litigants (SRLs) in civil and family matters have skyrocketed (Most testimony before the Working Group outlined 50-65% of domestic relations cases were self-represented and up to 90% of the civil dockets in limited jurisdiction courts were pro se)
- ✓ SRLs struggle to file, respond and proceed with their cases delaying all cases
- ✓ Court processes are complicated and attorney driven
- ✓ Pro bono legal assistance is very limited and generally unavailable to most SRLs
- ✓ Over 70% of the self-represented could not afford an attorney. (An unscientific survey of New Mexicans representing themselves conducted in 2000 and reported by the Working Group showed 74% had annual incomes of less than \$30K)
- ✓ Low income civil legal services cannot meet the SRL need in New Mexico. Legal service providers such as NM Legal Aid turn away one income-eligible person for every client they accept (In 2011, these numbers are now two turned away for every one accepted due to budget cuts already in place)
- ✓ Inequitable, unfair results often occur to SRLs due to little understanding of legal procedures
- ✓ SRL problems are magnified for non-English speaking litigants
- ✓ Judges and court staff struggle to provide information and case processing to SRLs that does not cross the line of giving legal advice or taking the side of SRLs against another party that may be represented by an attorney

Many we interviewed in 2010 regarding problems confronting ADR programs in the state repeated these same complaints and troubles as problematic for their efforts. Domestic relations and minor civil cases were referenced as major problem areas by ADR coordinators across the state. Adding to that sense of urgency is a general consensus by the ADR Assessment's Steering Committee that better and more consistent statewide ADR services for self-represented litigants rank among its top five priorities.

Some courts continue to produce and offer simple forms and instructions, others have posted and expanded helpful website information, and some have advanced, as possible, an array of makeshift self-help literature or developed protocols that channel people to volunteer lawyers, specific ADR programs, and low-cost legal aid services. Under the guise of pro se dockets, several courts hold mini-mediations to stimulate settlements with varied success. These non-formalized approaches depend largely on individual judge champions and available behind-the-scenes staff to coordinate and inform litigants. Ethical concerns exist for both lawyer and non-lawyer mediators in filling out settlement papers while acting in their role as a third party neutral. Although better than doing nothing, the message communicated to the public is confused and mixed with no real statewide program consistency or substantial economies-of-scale.

#### **D. Current Array of Court-Annexed ADR Options**

New Mexico's present approach to court-annexed dispute resolution alternatives is largely locally operated and varies as to quality and sophistication throughout the state. Urban, higher populated jurisdictions have dedicated staff, well structured programs, website information, standard procedures, and departmental dockets organized by case type which permit efficient, uniform front-end ADR applications by staff. At the opposite end of the spectrum are

unsystematic efforts in sparsely populated regions where judicial officers have limited staff, programs are developed individually by judges, courts generally have no website presence, procedures are minimal or vary from judge-to-judge, judges often handle an eclectic assortment of matters each day hampering methodical ADR assistance, and trained neutrals available to accept case referral or as contract or volunteer staff frequently are not obtainable.

To understand both the range and gaps in court-sponsored ADR services throughout the state, it is helpful to categorize available programming in three clusters of activities: court-connected programs that operate under statewide guidelines, unique stand-alone jurisdictional programs, and independently operated and locally developed initiatives. Each has certain strengths, weaknesses and target audiences.

### **1. Common Programs Operated under Statewide Guidelines**

New Mexico's overall strategy in developing and advancing court-annexed alternative dispute resolution methods is largely to allocate to local districts and courts the responsibility to implement programs and initiatives within broad-scoped guidelines and support from the State Supreme Court and its Administrative Office of the Courts (AOC); essentially "*local autonomy within boundaries.*" Although this approach serves many state court systems well, vested in the reality that local needs and capabilities vary, it can become problematic for numerous reasons.

Where the role and responsibility of courts is not widely legitimized in accepted, understood and recognized ways, new programs can stall or collapse because of confusion or disagreement over roles and directions. Where strong local leaders committed to change are absent, momentum and results flounder. The most common reasons for failed reforms in a good number of organizations according to Harvard University management guru John Kotter are that those involved in the change really don't think it's necessary, or they don't think a strong team is needed to direct it. Both are essential.<sup>22</sup>

Alternative dispute resolution is one of those areas where the accepted, rightful functions and duties of courts, as well as the law, are in flux. It is also a subject where there are no clear cut set of solutions, only guidelines, standards and options that can be applied in numerous ways. In this reality, an overall workable organization-wide strategy – a detailed, realistic New Mexico Judiciary action plan – is necessary to create effective local programming across the state. Three current Judiciary sponsored programs which flexibly operate at local district and trial court levels provide some instructive clues in understanding the leadership and organization dynamics needed for reliable, successful ADR impacts in the future: Domestic Relations Mediation, Children's Court Mediation, and Magistrate Court Volunteer Mediation. General descriptions of these programs are reviewed in this section of the report. For the most part, the general operations and practices regarding these three standard programs are similar among the districts. Where procedures or program sophistication is notably different among court jurisdictions, it is highlighted in Appendix A: District and Magistrate Court ADR Program Summaries

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<sup>22</sup> John P. Kotter, Leading Change. Harvard Business School Press (1996). Boston, MA.



### **a. Domestic Relations Mediation (DM)**

A state Domestic Relations Mediation Act (§40-12-1 through 6, NMSA) permits courts to develop programs to assist them, and parents and other interested parties, in determining the best interests of the children involved in domestic relations cases. The Act provides a local funding mechanism – a court filing fee surcharge supplemented by payments by parents on a sliding fee scale - to support court sponsored mediation programs to work with parents to that end. Supreme Court Rule 1-125 provides for the implementation of such programs on a statewide basis. Local court rules augment the provisions of the Act and the Supreme Court Rule. Programs vary from rather sophisticated operations in the First and Second Districts to a very limited one in the Tenth District.<sup>23</sup> There is no statewide administration of funding for these programs. Examples of some of the programs are outlined below.

The First and Second Districts have staff mediators who provide services described and authorized by the Domestic Relations Mediation Act. Other districts contract with trained, local mediators to conduct a limited number of sessions shortly after the filing of a case for parties either ordered into mediation or voluntarily selecting it. Litigants may be informed of this option at the time of filing, but not always. Often, parties are referred to mediation from pro se dockets or via a mediation order from the court. They are sometimes required to complete a form questionnaire developed by the court outlining the specifics of their case prior to the start of mediation. There is no prohibition for parties to seek their own private mediators.

Court appointed mediators are commonly paid at \$60 to \$75 per hour up to 4-hours per case, although most courts permit mediation sessions to go longer if warranted. Some courts require a nominal, up-front payment by each party (i.e. \$50 per side as an example) prior to the first session if they are ordered into mediation. This initial payment may be waived in the case of financial hardship. Core funding for DM is supported through a legislatively approved civil filing surcharge fee.<sup>24</sup>

Mediators may be of many backgrounds, including but not limited to lawyers. Mediation is confidential and principally targets custody and visitation issues, the goal being to arrive at a parenting plan that meets parental needs and the best interests of their child(ren). Financial issues are not addressed by the Domestic Relations Mediation Act and are typically reserved for subsequent judicial rulings at court hearings, although the Thirteenth District does permit property issues to be mediated at the discretion of the mediator.<sup>25</sup> Approximately 50 to 75 percent of domestic relation cases reach full or partial agreement in larger urban and

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<sup>23</sup> Section 40-12-5, NMSA, permits the establishment of domestic relations mediation programs in district courts by court rule as approved by the NM Supreme Court. District courts may employ or contract with counselors to provide consultations, evaluations and mediations in domestic relations cases involving children. Where a domestic case is filed and the court offers such a program, parents may request referral to it or the court may order the parents to enter it. Parents are required to pay the cost of the mediation pursuant to a sliding fee scale based on the ability of the parties to pay. Payments are made to a “domestic relations mediation fund” established by the district court. The Supreme Court has approved local rules adopting sliding fee scales for many districts via Supreme Court Order pursuant to Rule 1-083, NMRA, (which provides the required procedure for Supreme Court approval of local rules).

<sup>24</sup> A mediation surcharge was permitted to be established by court rule in each judicial district for all domestic relations actions filed in New Mexico. See Section 40-12-6, NMSA.

<sup>25</sup> It should be noted that contract mediators in the Thirteenth District are quite skilled and any property agreements are fully reviewed by the court.

metropolitan districts where courts keep statistics, operate robust programs, and often employ in-house court staff as mediators. Statistics in rural jurisdictions were not readily available.

Although New Mexico law does not mandate joint parent education counseling where children are involved in domestic relations proceedings, individual judicial districts may require it and judges certainly can order it in specific cases. Such programs are generally provided through private or nonprofit services and directed at the affects of divorce/separation on children and techniques to minimize conflict among divorcing couples. The First District as an example requires minimal joint parent education provided by Family Court Services staff clinicians; parenting classes are also offered through a private non-profit organization called Children First.

Both the First and Second Judicial Districts offer parents and the courts professional assistance in developing Parenting Plans. The program in the First District is called Family Court Services; in the Second District the program is called Family Court Clinic. Both programs are staffed by licensed mental health professionals called Court Clinicians, mostly master's-degreed counselors or social workers. Clinicians do no counseling but focus on mediation, priority consultation (PC), advisory consultation (AC) and evaluation services as defined in §40-12-3, NMSA. Generally PCs are brief and facilitate the development of temporary orders. Advisory consultations, while still relatively brief assessments, provide a more in-depth look at parent/child(ren) issues targeting long-term solutions; they only address issues ordered by the court.

In the First District, all Petitions for Dissolution of Marriage in cases involving minor children must be accompanied by an Order for Mediation, which requires the parents to attend a general information session provided by Family Court Services, after which they are screened for scheduling for mediation to develop a Parenting Plan. Parents pay for mediation, priority consultation, and advisory consultation according to a sliding fee scale. Mediations are scheduled for 1.5 hour time slots, with additional sessions possible. Parents also have the option of engaging in private mediation to develop a Parenting Plan. In the past 2 years, Family Court Services staff has been reduced from 8 to 5 clinicians due to budget reductions.

The Second District Family Court Clinic operates somewhat differently than the First District. Mediation is offered in 4-hour sessions, and may extend to as many as 4 sessions (16 hours total), although the majority of cases are resolved in 1 ½ sessions (6 hours). Domestic violence risk is assessed ahead of time and again when meeting with the parties. The parties may or may not come together during mediation sessions. "On-call" consultation is common, meaning a clinician quickly conducts mini-consultations regarding cases judicially referred to them during the business day. The results of these "on-call" consultations are not confidential. Clinic staff also conducts priority consultations (PC), generally these are brief and facilitate the development of temporary orders. Advisory consultations (AC) in the Second District are more extensive evaluations of parent/child(ren) issues targeting long-term solutions. They only address issues ordered by the court. Clinic staff has been reduced in recent years from 14 to 10 clinicians due to budget shortfalls causing clinicians to reduce the number of PC's and AC's they can conduct. In FY 2010, the Court Clinic handled 2272 matters: mediations (760), PC's (235),

AC's (136), On-calls (972), Other (169).<sup>26</sup> In that 12-month period, 88 percent of the PC, AC and On-call cases resolved without further court involvement, and 77 percent of the referrals to mediation reached agreement. Based on NCSC consultant experience regarding other large general jurisdiction courts nationwide, these are very creditable rates.

The Second District has been an experimental hub for various mediation approaches. As an example, prior to the recent recession a rather unique program was developed by Court Alternatives, the District Court's ADR experts, in concert with the Family Court Division to better address the growing volume of non-represented litigants. Coordinated by staff mediators, the program targeted the design of specific procedures and screening techniques for low income self-represented litigants. In its infancy, the program received national recognition by the Association of Family and Conciliation Courts (AFCC) as an important innovation and promising practice. Unfortunately, budget cuts eventually scuttled its full development although remnants of it remain. (See Appendix A, Second Judicial District Court).

The Third District is quite advanced in their DM programming as well, especially regarding oversight of mediators. Quarterly meetings among the mediators and judges take place, in-house continuing education is sponsored by the Court, and mediators are on an annual contract that is re-bid each year.<sup>27</sup> Currently there are seven contracted mediators; both lawyers and non-lawyers. During FY2010, 54% of all domestic "mediation" cases were pro se and 25% entailed domestic violence.<sup>28</sup> Child custody resolutions and mutually agreeable parenting plans are achieved in 75% of the mediated cases in the Third District, up from 70% the previous year. Neither the Second nor the Third Districts permit attorneys to attend mediation sessions.

Due to their size and metropolitan character, the Thirteenth District is also advanced in their DM processes and training through dedicated court staff and a full-time ADR Program Office. Statistics for the district indicate 66% of the cases referred to mediation are either completely or partially resolved.<sup>29</sup>

Two rural judicial districts – the Fourth and the Ninth - have outsourced all or part of their domestic relations mediation services to private vendors rather than deal with contract or volunteer attorneys on an individual basis. These public-private partnerships provide an interesting option for other rural-based districts to explore as possible.

Beginning in 1999, the Fourth District began contracting with a private provider headquartered in Las Vegas for domestic mediation services; specifically SR Solutions Incorporated which provides family, divorce and child custody mediations in Colfax, Guadalupe, Mora, San Miguel and Union Counties. SR Solutions personnel conduct mediations in their offices as opposed to the courthouses. Participants are required to pay a small fee for each

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<sup>26</sup> These include psychological testing and evaluations, home studies, case management, and client orientations.

<sup>27</sup> Placing mediators on an annual contract coupled with performance reviews as to reinstatement is somewhat new in New Mexico. It was started by the Court in the Third District in 2005. A few other metropolitan districts contract with domestic relations mediators. Most districts, especially in rural regions, draw from small pools of certified mediators who serve their districts without contracts or periodic performance reviews.

<sup>28</sup> In FY2009, 50% of all domestic "mediation" cases were pro se and 29% entailed domestic violence.

<sup>29</sup> Source: ADR Office, Thirteenth District.

session based on an income-oriented sliding scale. Additionally, all domestic relation case filing surcharges are paid directly to SR Solutions. Appropriate matters are ordered into mediation early in the caseflow process prior to any formal adjudicatory hearings. When mediation is ordered, participants are initially required to attend an orientation session providing an overview of the domestic mediation process, succinct explanations of cost, time periods, and fundamentals. At one time, the court utilized the mediation services in the district court in Santa Fe, but that approach was abandoned in 1997 to ease travel burdens on litigants.

In the Ninth District, all divorcing couples with children are required to attend a custody workshop presented by Family Children & Court Services (FCCS) in Clovis, a contractor with the court which provides counselors to conduct mediations for self-represented parties and to oversee the safe exchange and supervise visitation program. FCCS also provides court appointed special volunteer advocates for children in abuse and neglect cases, as well as custody education programs for divorcing parents. The court also subcontracts with a private mediator for court ordered mediations where the parties have not obtained their own mediator or cannot afford one. Income stressed parties pay on a sliding scale, the court subsidizing the mediator through domestic relation filing surcharges (\$30 per case). Private-pay mediation is available through a list of lawyers maintained by the Court. Any party-paid fees are collected directly by the mediators or FCCS, as opposed to transmitted to the court for subsequent disbursement. The court's mediation fund is currently solvent, but may shrink in the future should case volumes increase.

#### **b. Children's Court Mediation**

The New Mexico Administrative Office of the Courts (AOC) has partnered with the Children, Youth and Families Department (CYFD) to mediate child abuse and neglect cases since 2000. Abuse and neglect mediation is available in all judicial districts and CYFD county offices. The Children's Court Mediation Program (CCMP) offers mediation services in twelve judicial districts (Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, and Thirteenth) and provides support for a locally run, in-house program in the First Judicial District.<sup>30</sup> Over 4,500 cases have been referred to the program during the past ten years. The caseload has increased by approximately 15% each year due to program expansion and growth in open adoptions (children's court cases involving the termination of parental rights). Cases are mediated at all stages of an abuse and neglect adjudication from investigation to reunification or termination of parental rights (TPR), including post adoption contact agreements until an adoption is finalized as authorized by New Mexico Statute §32A-4-29(D).

The flexible organization of the program allows for centralized coordination through the AOC with local autonomy by the district courts and local CYFD offices. The AOC contracts with part-time regional coordinators who work directly with implementation teams comprised of judges, respondent's attorneys, guardians ad litem (GAL), youth attorneys, CYFD staff and attorneys, Court Appointed Special Advocates (CASA), and other interested persons. These

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<sup>30</sup> The First Judicial District is unique within the state in that it is the only judicial district that does not participate in the statewide Children's Court Mediation Program. Instead, mediation services in abuse and neglect cases are handled within the District's Family Court Services Division. The statewide CCMP maintains contact with the Family Court Services Division with regard to mediating abuse and neglect cases and shares training and other information.

teams are a decision-making body responsible for developing protocols that meets the needs of each judicial district.

CCMP is the only ADR program administered, managed, and funded through the AOC. AOC has developed documents, forms, and best practices, all of which are located on its website (<http://joo.nmcourts.gov/joomla/ccmediation/>). A website dedicated to the program for attorneys and the public heightens its reach and commitment to useful, accurate information in what is a confusing and complex area of the law.

The AOC contracts with approximately 23 mediators who are available to mediate statewide. CYFD officials are very supportive of court sponsored neutrals in both pre-adjudication and pre-permanency planning even though mediation agreements must be subsequently adopted as court orders before becoming binding on the parties. Substantial concurrence is evident among judicial and executive branch officials that the CCMP significantly lessens acrimony, speeds case dispositions, and helps explain overlapping court and CYFD roles. The mediation process focuses on clarifying positions and identifying interests and unmet needs of the parties, often with the goal of preserving and improving the relationships as well as resolving the case. Mediators meet with the parents, their attorneys, the guardian ad litem, the CYFD attorney, the social worker, and other interested parties to assist the parties in achieving agreements regarding placement, visitation, treatment and permanency planning.

Mediator qualifications and credentials are among the most stringent within the court system. Mediators are required to have at least a BA degree, 40 hours of mediation training, 16 hours of abuse and neglect education/training, annual continuing education in mediation skills, comply with a collection of standard ethical codes, and have professional liability insurance. Mentoring and session evaluations are also part of the regimen.

Funds for the program come from federal IVB and IVE monies (\$185K) as well as State recurring funds (\$196,100). Federal money is for mediation services only; state funds are used to contract with a statewide coordinator, regional coordinators, training and evaluation efforts. Mediators are paid \$60 per hour.

### **c. Magistrate Court Volunteer Mediation**

Magistrate Courts are limited jurisdiction tribunals in New Mexico. Jurisdiction is contiguous with county boundaries and includes traffic and misdemeanor criminal cases (90% of the caseload), and civil cases up to \$10,000, including small claims. Additionally, throughout the state there are separate court locations for forty-nine (49) limited jurisdiction magistrate courts, with sixty-six (66) judges in 32 of New Mexico's 33 counties; at least one in every county except Bernalillo County where a Metropolitan Court (19 judges) has similar jurisdiction and is located in Albuquerque. For the most part, the magistrate court locations are at substantial distances from each other. The two hundred sixty-seven (267) court staff positions in the magistrate courts are funded and centrally managed through the AOC. Almost every court is plagued with inadequate staffing ranging from 10 to 20 percent due to recently reduced state general funding.

- Magistrate Court Mediation Fund

Section 35-6-8, NMSA, created the magistrate court mediation fund. The fund is administered by the AOC and is used to fund and administer voluntary mediation programs. The mediation programs are to be established by Supreme Court rule for the efficient disposition of civil complaints. Any balance remaining in the magistrate court mediation fund at the end of a fiscal year shall not revert to the general fund. Additionally, §35-6-9, NMSA, requires the magistrate judges to collect as costs a mediation fee not to exceed \$5.00 for the docketing of civil actions. Statewide, the magistrate mediation fund generates about \$100,000 annually. Due to the current budget crisis, however, almost all funds have been diverted to pay for clerk salaries. Only a small percentage of matters filed with the court (estimated to be less than 10%) are candidates for mediation, these being primarily consumer related disputes, torts and collection cases.

- Synopsis of the Pilot Programs

In 2005, the AOC piloted volunteer mediation programs in Clovis, Roswell, Silver City, Santa Fe, and Alamogordo using grant funds to train mediators. AOC offered 40 hours of mediation training in exchange for 40 hours of voluntary mediation in court assigned cases. Today, only a few magistrate courts continue with volunteer mediation programs. Courts with active mediation programs include Santa Fe and Taos; courts with moderate activity are Las Cruces, Roswell, and Farmington; and courts with small volume are Bernalillo, Silver City and Clovis.

The AOC promoted, funded, and trained a relatively large number of citizen volunteers to learn mediation skills and help limited jurisdiction courts in 2005, especially in rural regions, with their civil and small claims caseloads. Numerous 40-hour workshops were presented through community colleges, universities (i.e. New Mexico State University), and the UNM Law School. In Otero County Magistrate Court, 60 volunteers were trained; today only four active mediators are left. In Grant County Magistrate Court, 15 people were trained; only two remain. Since the original training, there has been no in-service mediator training for those previously certified and no additional Branch-sponsored basic training for new mediators.

Most mediators are non-lawyers recruited through local community civic organizations; the biggest volunteer pool being retirees. Magistrates have been supportive of the program because it has cleared cases from their dockets, but it was not well received by clerk staff in the magistrate courts since it meant more clerical work. Attempts to expand to other locations have encountered resistance.

A significant problem with the program has been the unreliability of parties or, even volunteer mediators for that matter, to show up for mediation sessions. Resultantly, the Supreme Court enacted a rule that does not make a referral to mediation in magistrate courts automatic, but gives the judge discretion to refer a case to mediation and require the parties to appear on penalty of sanctions if they do not. See Rule 2-805, NMRA.

- Administrative Office of the Courts (AOC)

The magistrate courts develop, operate, and fund their mediation programs under Supreme Court Rules and AOC guidelines. Currently, the AOC is developing standardized forms

and instructions for magistrate courts to use. Magistrate courts are forms driven in many instances.

AOC advertised for a magistrate court ADR coordinator and offered proposals to better manage the program statewide, including developing standards and forms. Unfortunately, budget problems caused by the 2007-2009 recession prompted AOC officials to abandon the initiative. The long-range desire to utilize surcharge fees for a coordinator when the economy recovers remains.

- Overview of Four Magistrate Court Programs

The *Otero County Magistrate Court* has an active volunteer mediation program targeting a variety of civil cases, including property disputes, commercial cases, and landlord-tenant. All mediations are held at the Court. As with other magistrate courts, procedures and caseflow are governed by informal policies set by each court. After filing, the judges determine which cases are appropriate for mediation. Four mediators volunteer their time to the Court, each having been trained by the AOC in a 40-hour mediation class in 2005. When parties mediate in good faith, approximately 60% of the cases are settled. No figures were available on “no shows.” Where parties fail to appear, a default judgment is entered against them. Where litigants object to mediation or are represented by a lawyer, cases are set for trial and bypass mediation.

The *Grant County (Silver City) Magistrate Court* is one of the few limited jurisdiction courts in the state that has a volunteer mediation program in operation. Originated in 2001, the program currently operates with two volunteer mediators who have received 40 hours of mediation training. Originally, a cadre of 15-20 mediators was trained by the Court, but that number has dwindled dramatically over the years. Upon filing a civil case with the Court, the civil court clerk screens them to determine which may be amenable to mediation. The types of cases targeted are collections, replevins and minor tort matters. Four cases are set for each of two mediators during a single morning every other month. A mediation session lasts 30 minutes. If there is substantial anger by the parties or an attorney represents one side, the matter is moved immediately to a judge for trial. If a party fails to appear, the appearing party can request court costs; approximately 30% of the cases experience a “no show.” Thirty percent are resolved by mediation; 40% immediately move on to trial. Of the 450 civil cases filed per year with the Court, a very small number, about 10 percent, around 50 cases, are scheduled for mediation. Using volunteer mediators as mandated by court rule helps this and all magistrate court mediation programs be cost effective. Funding for small magistrate programs continues to be difficult.

*Taos County Magistrate Court* operates a quite elaborate and distinctive civil mediation program, unusual for a rural area. It is one of the small number of magistrate courts providing such an option and largely owes its impetus to a few dedicated trendsetters who spearheaded its development eleven years ago prior to a statewide AOC mediation initiative for magistrate courts in 2005. (In 2000, Sally Margolin moved from Albuquerque to Taos. She sparked the interest of the magistrate and helped develop a pilot program patterned after the Bernalillo County Metropolitan Court in Albuquerque.) Early in the program, participation was voluntary (as it is in the Metro Court) causing many potential participants to avoid it. Taos Court officials feel mandatory mediation results in more settlements and quicker adjudication should the matter be

litigated since participants are more informed about issues and potential solutions. Today, a well established civil mediation program exists encompassing a large number of goods/services, neighbor disputes, debt/loans, and landlord/tenant cases. It is locally controlled and funded. Mediation is mandated and court ordered prior to any litigant's appearance on the docket.

Mediation orientations are conducted once month and literature is distributed explaining the mediation process, necessary documents, and possible outcomes. Mediation sessions are conducted in conference rooms at the court and typically last two hours. Interpreters are provided as needed. Attorneys may attend at the participant's option, but must be identified as such prior to the start of mediation. Performance data over the past five years show that "no show" rates are low (13%) and successful agreements are high (65%). During FY 2010, 67 cases were referred to mediation.

The *Curry County (Clovis) Magistrate Court* program focuses primarily on contract disputes. The Court has a small pool of experienced volunteer mediators. The program began in 1997; four mediators have remained with the program since that time. No new mediators have joined the program. Unlike Taos Magistrate Court, mediations are not court ordered. Rather, litigants are strongly encouraged to mediation prior to any formal hearing. If one side opposes the suggestion, mediation does not move forward. When mediations are scheduled, information is sent to the participants prior to the session. A mediator is assigned to the case and the session is conducted at the courthouse. Attorneys are not permitted to be present in the mediation. There is no fee charged to the parties. In the past, the Magistrate Court conducted landlord-tenant, neighbor dispute, and property dispute mediations but is reluctant to re-start those programs fearing the small pool of mediators would be overloaded.

No fee is charged to parties for any mediation in magistrate court. Under Rule 2-805(G), NMRA, "If a party fails to appear as ordered by the court for mediation, and the other party or parties appear, the court may, after a hearing, assess costs against a party who fails to appear as ordered for a mediation to reimburse the party or parties who did appear for attorney fees or lost wages."

## **2. Unique Stand-Alone Programs**

Three distinct, highly organized, successful court-annexed dispute mediation programs within the state are specific to three courts: the Court of Appeals: the Metropolitan Court, a specialized limited jurisdiction court serving Bernalillo County (Greater Albuquerque): and the Third Judicial District Court. It would be difficult for any other courts in the state to develop something similar, although the methods employed in developing and managing these programs may provide some insight for ADR programs in other settings. It also should be noted that the Eleventh Judicial District Court has a small special purpose mediation program targeting cases similar to those filed in the Third District, but it is very limited in its impact and therefore not reviewed in this section. More information can be found about it in Appendix A, Eleventh District.

### **a. Court of Appeals Mediation**

Among the most highly regarded mediation initiatives in the state is the long-standing Court of Appeals Program. Mediation services are available, if the parties agree to mediate, at



any time the Court of Appeals has jurisdiction. Civil cases are automatically referred to an Appellate Mediation Office upon assignment to the general calendar. The program began in 1988 as a pilot project. Previously, appellate judges held settlement conferences in each other's cases. Today, the Court's ADR Director serves as the mediator.

This facilitative approach is somewhat unusual for a state appeals court. Its value, however, has been substantiated by the fact that approximately 30% of the 150 to 200 civil cases reviewed for mediation annually are resolved by settlement. Parties may opt out of mediation if both sides agree mediation has no probability of settling the case. Fifty-two percent of the cases bypass it.

Support for the program appears to have stood the test of time for more than three decades. As attorneys learn more about the program, increasing numbers are asking to be scheduled into it sooner. Bench support for the program is quite solid. The general consensus is that it has saved the need to add an additional judgeship and is worthy enough to have occasioned a broadening of referral protocols permitting some non-mediated cases reaching the General Calendar to be reassigned back to the program.

#### **b. Metropolitan Court Mediation**

The Metropolitan Court is a unique limited jurisdiction court with 19 full-time lawyer judges serving Bernalillo County. It has combined municipal, magistrate and small claims jurisdiction and operates a robust civil mediation program using neutrals of varied backgrounds including but not limited to lawyers. Small claims filings up to and including \$10K are eligible to be mediated, including landlord/tenant, commercial disputes, collection matters, and some minor criminal cases such as neighbor-to-neighbor disputes and barking dogs. Cases generally excluded from mediation comprise restitution (eviction) cases, cases where both plaintiff and defendant are large corporations represented by attorneys, and cases where the company or attorney has previously indicated they do not want to mediate.

Mediation sessions generally involve two mediators, except for small debt collection cases which are handled by Mediation Division staff. Most cases do not involve continuing relationships between parties although some cases do involve former relationships or family members. Since most litigants are self-represented, there are very few formal rules established by the Court for mediation sessions. There is no charge for mediation.

Mediation in minor civil matters at the Metropolitan Court started in 1986 as a pilot program through a private non-profit organization called The Albuquerque Mediation Center which later became The Mediation Alliance. Metropolitan Court took responsibility for the program in 1996. Mediators are required to have a 40 hour mediation training prior to becoming program mediators. Initially, the Court offered free mediation training in exchange for an agreement to conduct a minimum number of pro bono mediations over the course of one year. Today, mediators must pay for their own 40-hour mediation training, generally through a variety of providers including the course taught at the UNM Law School and UNM Communications and Journalism Department.

Currently there are 115-125 volunteer mediators. They need not be lawyers or have a college degree. Metropolitan Court has provided periodic, supplementary training for mediators, but has recently curtailed it as a result of the budget crisis. In an effort to continue training and skills enhancement and development, regular ‘tips’ and case studies are sent to the mediators via email. Mediation Division Staff have regular, on-going conversations with mediators regarding best practices. There is no formal evaluation of mediators’ performance. Client evaluations have been conducted in the past with few meaningful results since most conclude the experience was positive. There are only one or two complaints annually regarding mediated sessions; those are reviewed and addressed by the Program Manager.

Approximately 1000-1200 cases are referred to mediation annually. Parties are generally offered mediation via letter after the respondent files an answer. Cases are scheduled for mediation within 2 weeks and litigants are asked to advise the court with a phone call if they wish to participate in mediation. If they decline or don’t call, the case is set on the regular civil calendars of the Court to be heard by one of three judges. Any time before trial, a judge may refer a case to mediation or a party may request referral to the Mediation Division.

Disputants are generally kept together at a mediation table unless there is reason to separate them. Resolution rates are quite respectable; an average of 75-80 percent which includes cases not settled at the mediation table, but ultimately settled before trial.

The Mediation Division has a staff of three persons; the Court’s General Fund supports the office in addition to a \$5.00 Mediation surcharge on every civil filing. The fee is available to all magistrate courts as well. The fee amount was statutorily set in 1986; it has never been increased. Over the last 25 years, Metropolitan Court Mediation Division has served as a model for other courts (both statewide and nationwide) as well as visiting dignitaries from numerous countries around the world.

### **c. Water Mediation**

The Third District has one very large case, the Lower Rio Grande water rights adjudication. This case has over 18,000 defendants and will take decades to complete. These factors are characteristic of water rights adjudications. The District has implemented a Water Mediation program, using contract mediators, as part of its assortment of ADR services. It also maintains a website which provides information on and documents in the case.

The State Engineer, *ex rel.* the State of New Mexico, serves as plaintiff in the case. It is responsible for making an initial inventory of all water uses in the prescribed area, describing and mapping each water use identified. It then makes an offer to each claimant based on its research and, if necessary, negotiates changes with the claimant to the initial description.

The court’s Water Mediation program becomes involved when an agreement cannot be obtained, and the Office of the State Engineer (OSE) makes a referral. The Mediation program then assigns a specially trained mediator. The cost of mediation is \$500 for a four (4) hour period. The claimant pays \$350 and the court pays \$150 of this cost. For FY 2011, there are five (5) water mediators, of which, one (1) is a non-lawyer. The requirements for a water

mediator are similar to those of a settlement facilitator with the exception that the practitioner must first complete a court approved water mediation training.

Most of the claimants in water adjudications operate without lawyers. These claimants are assisted by the Joe M. Stell Ombudsman Program of the Utton Center at the UNM School of Law. The Ombudsman Program's mission is to be a resource for and educator of claimants. It facilitates adjudications by providing toll-free help lines, videos, websites and public meetings; sending postcards to claimants as they receive offers of judgment from the OSE; and finding and calling non-responding claimants after the forty-five (45) day limit set by the court.<sup>31</sup> It also contacts objectors before the OSE begins its negotiation process when it appears that a matter may be resolved through education. Finally, it provides training for the water right mediators. The Ombudsman Program does not provide legal advice.<sup>32</sup>

In 2009, the Eleventh Judicial District Court began experimenting with mediations in water rights cases in its jurisdiction. Only a few cases have been mediated. Although inconclusive at the moment, potential exists for modest future expansion.

### **3. Independently Operated, Locally Developed Programs**

A growing number of court-annexed dispute resolution alternatives have independently surfaced over the years in district trial courts. They are locally operated. Some have required special Supreme Court authorization such as the recently launched criminal settlement facilitations in the Second District; most have developed without it.

As district court leaders test these locally produced programs, procedures are either refined or modified until their value is proven and accepted as part of the caseflow, or the experiments sputter along, languish and eventually disappear. Such an experimental, pilot project approach supports the study's contention that it is wise to legitimize and institutionalize such an approach as a valuable tool in growing court-annexed dispute resolution alternatives. It is also consistent with the way most caseflow management changes are successfully expanded nationally.

#### **a. Settlement Facilitation - Civil**

In the world of alternative dispute resolution, *settlement facilitation* is a term that often has many meanings. It is sometimes confused with different forms of mediation, specifically facilitative and evaluative mediation. A good discussion of the differences and nuances in these different types of dispute resolution techniques appeared in a *New Mexico Lawyer*, March 2010 article by Celia Ludi and David Levin. They describe *facilitative mediation* as a process where the mediator "helps the parties talk and listen to each other so they can come up with their own solutions. The mediator does not evaluate the legal positions or strategies of either party and does not offer recommendations or possible solutions..." Facilitations generally involve joint sessions with all parties. "A question asked by a facilitative mediator might be, *Tell us more about what might work for you to satisfy your needs.*" *Evaluative mediation* "...uses all the

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<sup>31</sup> See <http://uttoncenter.unm.edu/ombudsman.html>

<sup>32</sup> The Third District Water Mediation Program is the first of its kind in New Mexico as a formal mediation approach along with the assistance of the UNM School of Law Ombudsman Program. It serves as a model for other courts litigating water cases.

techniques of facilitative mediation but evaluates the strengths and weaknesses of each side, may offer opinions and recommendations, and even propose solutions. A statement made by an evaluative mediator might be: *I believe your position will not be accepted by a judge. I recommend that you consider this option....*” Evaluative mediators often meet with parties separately and shuttle information and offers back and forth. A third derivation of evaluative mediation is called *settlement facilitation* which uses an evaluative approach involving a lawyer or judge with expertise in the subject matter under dispute.

There are numerous district courts in New Mexico that are using settlement facilitation in civil cases. Some programs are quite formalized with referral to private neutrals scheduled and inserted in the caseflow process; others are very casual involving judges agreeing to do settlement conferences for each other on an ad hoc basis.

In the First District settlement facilitation is available in civil, domestic, and probate cases, and in any other case in the discretion of the judge. The Court ADR Program maintains a roster of seasoned lawyer facilitators who have been in practice at least 5 years, have completed a minimum of 40 hours of certified mediation training, have applied for inclusion on the roster, and have agreed to obtain a minimum of 3 continuing education hours annually in mediation skills and accept a minimum of one pro bono or reduced-fee case for every five paid cases they are referred.

Once a case is filed, any party is free to submit a Request for Referral to a Settlement Conference. Judges also routinely refer cases to settlement conferences, with or without the request of the parties. Parties are free to select a facilitator from the roster by filing a Stipulated Request for Referral to a Settlement Conference using a court form. If the parties cannot agree on a facilitator, the court’s ADR coordinator assigns someone from the roster. Parties may also stipulate to appointment of a facilitator who is not on the Court’s roster, but the Court’s fee schedule does not apply to those facilitators. For good cause, the court may excuse litigants from a mandatory settlement conference.

Fees are set by the court and paid by the parties. The standard fee is \$500 for 4 hours. If no settlement is reached, and the parties wish to continue, the fee is \$150/hour for the next 4 hours. Fees beyond that point are subject to agreement in writing between the parties and facilitator prior to any further conferences. Fees are generally split between the parties. Parties who cannot afford the fees may file a motion for free or reduced costs. To determine whether to grant the motion, the court applies the same criteria as for an application for free process.

Settlement facilitation is a fact of life in the First District. Most of the civil and family court judges routinely issue Rule 16B scheduling orders requiring the parties to employ ADR, using either private or court-annexed providers, before cases will be set for trial. Judges also frequently refer cases to the court ADR program sua sponte.

In the Second District, there are four settlement facilitation programs, each with distinctive operational requirements. Two of the programs are year-around operations targeting civil and family cases. These programs address all issues in a case including for family cases, child related issues, financial and property matters. A neutral, who may be a retired or sitting

judge, an attorney, an accountant, a counselor or other qualified professional, conducts a single session, usually a half-day or full day. In family cases, neutrals are generally appointed by the court on a rotating basis; in civil cases, the parties generally select the neutrals. A cottage industry of sorts has developed, particularly in civil cases, where retired judges and seasoned litigators receive the lion's share of referrals due to parties stipulating to their use.<sup>33</sup> The facilitator focuses on the legal issues before the court, evaluates the case, and may meet with the parties jointly or separately. Some facilitations are conducted pro bono or on a reduced fee basis for low income parties. Should litigants be able to pay a fee, the facilitator may charge their normal hourly rate for as long as the facilitation takes. There is a \$500 cap in some family court cases, but not all. Settlement facilitation is confidential. Two-thirds of the cases experience progress, partial or full settlements.

Family and Civil Settlement Weeks are the two remaining facilitation programs. Settlement Week in Family Court cases takes place over one week every year in October. For civil cases, "Settlement Week" is a misnomer; it should be dubbed "Settlement Month," since it is a one-month process which takes place in lawyers' offices where hundreds of attorneys are involved. Court Alternatives sends the case to a particular lawyer. Parties can request their own neutral as part of year around settlement facilitation, but not as part of Settlement Week. Settlement Week is an old system anchored in the culture of the Court since in 1989. Pro se litigants generally misunderstand the purposes of Settlement Week; they often want the neutral to be their lawyer.

In the Third District, local rules mandate an attempt at settlement facilitation (SF) for numerous civil cases filed with the court including debt, malpractice, real estate, some statute and ordinance violations, and personal injury matters.<sup>34</sup> In FY 2010, 250 cases were facilitated. Facilitators are either selected by the parties (44%) or appointed by the Court (56%). In settlement facilitation, disputants generally do not meet together, rather the facilitator shuttles back and forth. Seven out of ten cases have attorneys on both sides, 30 percent are unrepresented on one side, and less than one percent were self-represented on both sides. Although 97% of the cases facilitated made some progress toward resolution, 24% were settled before SF and 63% were settled during SF; impressive statistics. Costs are shared by the parties; fees can vary as negotiated by the parties and the assigned neutral.

Settlement facilitators must possess a bachelor's degree, complete an approved 40-hour mediation training course, generally have practiced as a mediator for one year, comply with a collection of standard ethical codes, and obtain professional liability insurance. There are 12 settlement facilitators on the Court's approved list for FY 2011.

In the Thirteenth District civil settlement facilitation is an evaluative process, the facilitator takes an active role by personally assessing the strengths and weaknesses of potential

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<sup>33</sup> The term "cottage industry" is used to mean settlement facilitation has become so successful and popular that it has become a routine part of regular practice in the court, and beyond being limited to court-connected programs; numerous private practitioners have independently offered their services to the litigating public.

<sup>34</sup> Civil cases generally not referred to ADR are student loans, replevins, conservatorships, guardianships, adoptions, petitions regarding mental health, elections, tax, driver's license issues, writ actions and cases where there is an order for protection filed.

solutions and by giving an opinion as to the advantages and disadvantages of various outcomes. The facilitator frequently is an attorney with subject matter and legal expertise regarding the issue in controversy. Court ADR literature, local rules, and ADR staff attempt to make these distinctions clear to the parties.

The program operates similar to the one in the First District. Any party to a civil case, including domestic relations and probate, may independently request or be referred by the court to settlement facilitation through the court's Alternative Dispute Resolution Office in accordance with local court rules. The parties may choose a facilitator from a court maintained list or stipulate via a motion filed with the court to any licensed attorney or qualified neutral agreeable to the parties. If a neutral is selected from the court pool, a fee of \$500 for up to 4 hours of mediation and/or facilitation is equally assessed to each of the parties. If not, the parties are free to negotiate any fee. At the discretion of the court, should hardship exist, the court may pay the fee for a pool appointed neutral. Approximately 37% of the cases require court payment. If matters are not resolved within four hours, or a reasonable extension period pursuant to court authorization, the parties may negotiate a mutually agreeable fee with the provider for continued services. If no agreement is reached, the case is set on the civil docket for further adjudication.

In the Twelfth District, informal civil case facilitations are conducted by district judges for each other on an ad hoc basis in such matters as wrongful death, personal injury, and contract disputes. The objective is to save trial time and prompt settlement. Court officials felt some additional education in settlement skills for judicial officers would be advantageous.<sup>35</sup>

The Sixth District also has an informal program targeting complex civil cases where judges conduct settlement facilitations for each other when appropriate. Although judges could order civil cases into private mediation, they are reluctant to do so because of the extra cost burden placed on the parties. Private practitioners interviewed in the District told NCSC consultants such a service by the court is invaluable in moving complicated civil cases to resolution faster.

#### **b. Settlement Facilitation – Criminal**

A unique criminal case settlement facilitation program is currently being piloted in the Second Judicial District involving judicial officers using techniques associated with civil ADR – focusing on underlying interests not positions, generating options based on facts/evidence, outlining statutory elements of proof, scenario building, and discussing conviction criteria – to clarify plea offers and potential outcomes to facilitate settlement. The pilot has been authorized by the State Supreme Court as encouraged by the National Center in a separate criminal caseflow study in that court.<sup>36</sup>

Criminal settlement facilitation involves a pretrial judge leading discussions with a defendant, defense lawyers, and the prosecutor at a court scheduled event regarding the

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<sup>35</sup> It was also expressed that training sessions should not be onerous, but considerate of the need by trial judges to effectively attend to their calendars in their districts.

<sup>36</sup> See *Felony Caseflow Management in Bernalillo County, New Mexico*, by David Steelman, Gordon Griller, Hon. Joseph Farina, and Jane Macoubrie. Court Consulting Services, National Center for State Courts. Denver, CO (2009).

ramifications for the defendant in pleading to a reduced charge or proceeding to trial on the original charges. It is akin to evaluative mediation. The judge facilitator is normally not the judge who will try the case unless the parties stipulate to the contrary. Such discussions generally occur four to six weeks prior to the trial date and may be on the record. Discussions are not admissible in court should the case go to trial. In this setting, the judge provides information, opinions, and relevant case-related data without taking a position or cajoling the defendant to accept a negotiated plea. Early pilot project results in the Second District utilizing a retired district court judge indicate 93% of the 28 cases conferenced were resolved through pleas to reduced charges. It should be noted that various states strictly prohibit judges from any involvement in such criminal settlement conferences under the premise that it prejudices the court in its role as a strictly neutral forum in adjudicating the matter.

### **c. Court-Annexed Arbitration**

Court-annexed civil arbitration programs exist in two metropolitan districts – the Second and the Third - where only money is at issue and where no party seeks an amount in excess of \$25K exclusive of punitive damages, interest, costs and attorneys fees.<sup>37</sup> It serves as a disposition technique early in the case in both districts.

Started initially in the Second District, it is the oldest of the ADR options in that court having been established in 1989.<sup>38</sup> A unique feature of the program in the Second District is that participation of the parties and attorney-arbitrators is mandatory. Arbitrators are drawn from the pool of lawyers who reside or have an office in Bernalillo County and have been licensed to practice for a minimum of five years and are required to serve when requested by the court.<sup>39</sup> The structure of the program is similar to that seen in neighboring Arizona used in their superior courts.

A Certificate of Arbitration is required to be filed with every new civil case. If the Certificate indicates arbitration is appropriate, court administration forwards the case to Court Alternatives, the in-house ADR experts in the Second District, for the assignment of an arbitrator, and further case management. Attorney-arbitrators are paid \$100 per case by the court; there is no charge to the parties. Based on the available pool of lawyers and the increasing eligible caseloads (estimated at over 1100 cases in 2010), arbitrators may for the first time be

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<sup>37</sup> The \$25K cap was set in 1997. The equivalent amount today would be nearly \$33K. This is the same as if the 1997 amount was a little over \$18K. Any change requires an amendment in the NM Supreme Court Rules. Other general jurisdiction courts outside New Mexico have similar mandatory arbitration programs for lower level civil cases requiring bar registered lawyers to participate; Arizona is an example. In Arizona, any civil case where the amount sought is under \$50K is scheduled for arbitration.

<sup>38</sup> Local Rule 2-603 outlines the Court-Annexed Arbitration Program. All civil cases, whether jury or non-jury, are eligible except matters in the following categories: appeals, uniform arbitration act, extraordinary writs, adoption, commitment, conservatorship, guardianship, probate, children's code, domestic relations, workers' compensation, student loan, driver's license, election and tax.

<sup>39</sup> The parties may stipulate to the appointment of any licensed attorney, whether or not part of the pool and with any length of experience, by stipulated order filed within seven (7) days after the notice of choices is mailed, or within seven (7) days after a vacancy is created by order of excusal or otherwise. The stipulated order must be approved by all parties and by the proposed arbitrator. Approval of counsel and the proposed arbitrator may be telephonic; approval of parties pro se must be by signature. The court or proposed arbitrator may require the parties to pay compensation at the arbitrator's usual hourly fee.

assigned more than one case per year.<sup>40</sup> The program serves parties both represented by legal counsel and self-represented. The arbitrator issues an award after each party has had an opportunity to present their case and within 120 days from the appointment of the arbitrator. The decision is non-binding. Either party may appeal, although the appellant must pay a monetary penalty assigned if he/she loses. On appeal, the assigned district judge hears the case de novo. Over 87% of the cases are resolved without an appeal.

The biggest complaint from lawyer-arbitrators in the Second District is that they may be assigned a case in a legal area in which they are not experienced. The local rule provides that subject matter expertise is not necessary since the focus of arbitration is on processes. There are also mentors and materials available to the arbitrators from Court Alternatives. Upon agreement of the parties, the arbitrator may serve as a mediator or settlement facilitator. If the case does not settle, then a different arbitrator may be assigned the case

Arbitration referral procedures in the Third District<sup>41</sup> operate more like they do in settlement facilitation where parties can request referral to arbitration, or the court on its own motion can order it. Where the parties cannot agree on an arbitrator, the court may designate one. The pool of attorney-arbitrators must be licensed to practice for at least four years and be residents of the judicial district. They are required to serve when requested by the court. Fees are paid equally by the parties. Where there is undue hardship, a litigant may petition the court for relief and the court may pay appropriate fees to the arbitrator. An award must be made within 120 days after the arbitrator has been appointed. Awards are appealable to the district court within 21 days after the certification of the award is filed, unless the parties stipulate that it is binding before the award is served on the parties. Appeal proceedings are de novo.

#### **d. Foreclosure Mediation**

Two districts – the First and Thirteenth – have recently developed mortgage foreclosure mediation programs. The Third District is researching the establishment of such a program and has studied both of these existing programs. The initial court-annexed foreclosure mediation alternative in the state was developed in the Thirteenth District sparked by a desire on the part of its chief judge. It targets the district’s most populous county, Sandoval. Monthly mandatory status conferences for respondents (homeowners) are held to inform them of the program, introduce them to the plaintiffs’ lawyers (banks, mortgage companies) and give them opportunity to opt into the program. Respondents are usually pro se. Attorney-mediators are paid a flat fee of \$500 for 4 hours per facilitation by the court. There have been some difficulties with the program based on early data: only 4 out of 10 respondents appear at the status conference, only 1 out of 4 who appears enters the facilitation process, and a little over half (58%) of those experience a successful outcome.<sup>42</sup> The plaintiffs’ bar has not been overly enthusiastic about this new initiative.

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<sup>40</sup> The increase in appointments is principally caused by two circumstances: more cases and more excusals. The excusal rate is increasing because credit litigation firms for banks and other larger institutions are filing more cases. Many potential arbitrators have conflicts of interest with those institutions.

<sup>41</sup> Local Rules 3-705 through 3-710 outline the Third District’s arbitration program.

<sup>42</sup> Source: Thirteenth Judicial District ADR Office. It should be noted that “success” is broadly defined and could be as simple as the parties agree to keep negotiating. Over time, outcomes will be more specifically tracked and defined.



The First District's foreclosure mediation program initiated in July 2009 is an option of the Court ADR Program. At the beginning of a foreclosure action, the plaintiffs (banks, mortgage companies) are required by the court to serve an information notice with the summons and complaint to the defendant homeowner. Although either party may request referral to foreclosure mediation, to date all requests have come from defendant homeowners; judges may also make sua sponte referrals. Foreclosure mediators are settlement facilitators on the Court ADR roster with additional training or experience in foreclosures. Fee provisions are the same as in the Court ADR program. Unlike the situation in the Thirteenth District, the banking industry, as represented by the New Mexico Bankers Association and the New Mexico Independent Community Bankers Association, is quite supportive of the program.

The Third District is considering the development of a mortgage foreclosure mediation program. Court staff has visited the Thirteenth District to discuss their program. Early thinking by court leaders about program protocols will likely cause it to vary from those in the Thirteenth District. It is contemplated that information about foreclosure mediation will be sent to the respondents with the summons and complaint, as is done in the First District, and a workshop will be developed for all respondents. Final decisions were yet to be concluded at the time of NCSC's site visit in early November 2010.

**e. Post Decree "Resolution Day" (Order to Show Cause) Mediation**

Resolution Day is unique to the First District. It is a program managed by volunteer attorneys, with support from court staff. The program is neither mediation nor settlement facilitation, but it is definitely an alternative method of dispute resolution. It was developed by members of the Court's Pro Bono Committee in response to the large numbers of self-represented litigants in Family Court attempting to enforce orders with incomplete understanding of the necessary processes. It has evolved over the past three years to its current form in which family law attorneys volunteer to help litigants (with or without attorney representation) try to resolve their issues in brief sessions outside of court.

Resolution Days are held one or two days a month depending on the number of cases. All three Family Court judges set hearings on Motions for Orders to Show Cause or Motions to Enforce, and sometimes other relatively simple matters, on trailing dockets on the same day. Some Resolution Days may have as many as four docket times (at 9:00, 10:30, 1:30, and 3:00). A court-appointed contract attorney is available to represent (upon request) parties against whom a Motion for Order to Show Cause has been filed. All the parties on all the Motions gather in one courtroom and one judge checks the dockets for all three judges. The presiding judge explains the program, then calls each case and asks for a volunteer attorney. The judges' bailiffs escort the parties and volunteer attorneys to various places in the courthouse to meet in a mini-settlement conference (they are very creative and all the judges and their staffs are very cooperative in finding meeting places).

Where agreements are reached, the volunteer attorneys or the parties will reduce it to writing on a form (Stipulated Order) provided for the purpose, and will return to the courtroom to confirm the agreement to the judge and read it into the record. Where agreements are not

reached, the issues are usually narrowed and the parties, especially pro se parties, are better prepared for the hearing that takes place immediately.

The program is managed by volunteer private attorneys who recruit, orient, and schedule other volunteers. After orientation, new volunteers observe several sessions before conducting sessions on their own. All parties are required to read and sign a notice and disclaimer of representation before proceeding, and the volunteers also sign the disclaimer and indicate the disposition of the case. The bailiffs collect the disclaimers and forward them to Court Constituent Services which maintains records for the program. Resolution Day in Family Court has been so successful, and the judges and volunteer attorneys are so enthusiastic about the program, that it has been expanded to certain civil cases as well.

## **CHAPTER III**

### **NM SUPREME COURT: LEADING THROUGH GUIDANCE, SUPPORT**

Because of the wide demographic mix throughout the state and varied operational capacities among courts in New Mexico, the State Supreme Court has wisely chosen to develop ADR programming through a two-pronged approach which allows for “local court autonomy within boundaries.” Where economies of scale and essential baseline services are necessary for the sake of efficiency, consistency and equal access, uniformity through statewide rules and policies is occasioned. Where program size, operations and delivery systems require flexibility due to varied community needs, caseloads, staffing and population characteristics, individual courts are primarily responsible to develop appropriate management solutions under these broad guidelines. In this blend of responsibilities, court ADR services throughout the state can be more evenly balanced while retaining program control closest to the point of customer service.

#### **A. Statewide Initiatives Provide Needed Program Infrastructure**

The New Mexico Judiciary, not unlike other large complex public or private organizations with decentralized customer service locations, is faced with the need to maximize economies of scale and enhance efficiencies. In doing so the Supreme Court and AOC provide a series of unifying and critical underlying systems that connect and coordinate alternative dispute resolution programs delivered through the trial courts. Without such an infrastructure, consistency in services and quality would greatly suffer.

The most common training standard for court annexed mediators, notably 40 hours of instruction through the UNM School of Law or an equivalent course, is the most impactful factor in promoting a reliable level of program quality throughout the state. A significant concern, however, are long lapses of any in-service training or skills improvement for court-annexed neutrals. Some districts have required continuing education, but most do not. It would be wise for the AOC to develop mandatory in-service training, especially for publicly paid mediators and facilitators.

A unified budget, coordinated lobbying of legislative and executive branches, linkages to the other ADR advocacy groups (i.e. the organized bar, UNM School of Law, executive branch agencies) help to advance and elevate the Judiciary’s offerings. In furtherance of those directions, it is suggested the AOC designate and fund the membership costs for a top-level staff member to represent the New Mexico court system at meetings of the American Bar Association’s Section of Dispute Resolution.

Lastly, the modern governance structure of the New Mexico Judiciary allows greater policy and operational unity than in many other states. There are no separate elected clerks of court in New Mexico courts, as an example. More streamlined and efficient operations in the trial courts are resultantly possible.<sup>43</sup> Professional court administrators, district-wide chief

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<sup>43</sup> In many general jurisdiction courts, and some limited jurisdiction ones (i.e. Ohio), an independent elected clerk of court oversees court-wide recordkeeping, filing, fees, electronic data entry, courtroom clerical duties, and sometimes

judges, and trial court management by multi-county judicial districts are also pluses. Resultantly, coordination and support for ADR programs is less inhibited by antiquated organizational structures and internal branch politics than in some states. Even with these organizational reforms in place, there are additional ways the administration of ADR efforts could be strengthened. In numerous states organized around multi-county judicial districts (i.e. Iowa, Minnesota, Illinois, etc.), there is much stronger chief judge/court executive oversight, coordination, and control over county trial court operations and performance, including influencing and regulating alternative dispute resolution activities. Here, Supreme Courts have frequently promoted monitoring and control through statewide administrative orders or special court rules that specifically empower leadership judges and court executives to optimizing efficiencies (i.e. time, money, staff, and space) and effectiveness (outcomes). It is suggested New Mexico move in this direction.<sup>44</sup>

### **B. Technology Directions Support Expanded ADR in a Diverse State**

New Mexico courts are deploying a new statewide, proprietary automated case and cash management system (CMS): Tyler Justice Systems *Odyssey Suite*®. It is a web-based, integrated, configurable system which has successfully been installed in a number of state and local courts. With point-and-click as well as new touch-screen applications, it is well suited for use by judges and court staff in scheduling, calendaring, case tracking, imaging, e-filing, in-court updating, and tracking performance statistics. Tyler software meets various case type functional standards developed by the National Center. A single, electronic statewide case management system opens up numerous possibilities for automating the operations and performance of court-annexed alternative dispute resolution activities.

*Odyssey* can be customized to log, track and measure mediation/facilitation/arbitration performance. If event codes are set up for judge-ordered alternative dispute resolution sessions, it can monitor those events and rate of agreements. Technical challenges revolve around the distinction between a submitted settlement order (which has an event code), and a settlement, and submittal of a final decree or judgment order (which does not). All such cases would need to be tracked to arrive at an accurate ratio of successful alternative dispute resolutions.

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jury management, fragmenting operations at the local level. Reforms over the last 50 years have statutorily or constitutionally moved some clerks to appointed positions under the authority of the judges, court administration, or both. As clerks have become more professional, the trend has slowed somewhat. Yet, the majority of states operate with an elected clerk of court. Where clerks are independent elected officials, they have the latitude to operate at odds with the judges or court administrator. See: “Governing Loosely Coupled Courts in Times of Economic Stress,” Gordon Griller. *Trends in State Courts: 2010*. National Center for State Courts. Williamsburg VA. (2010).

<sup>44</sup> Common laments from local trial court leaders toward strengthening districtwide management in many states (not just New Mexico) are that: (a) district chief or presiding judge and the court executive neither have the time nor resources (money, staff, and space) to promote or force Judicial District solutions, (b) each county is so diverse in their needs that regional efforts are pre-disposed to fail, and (c) judges and staff serving individual counties are adverse to working together to solve regional problems and generally don’t operate or conceptualize themselves as part of a larger multi-county district. These perceptions and arguments often inhibit action by court leaders. Where state court systems have strengthened regional court management, Minnesota and Iowa being prime examples, significant efficiencies and new programs have occurred without noticeably diminishing customer service according to National Center studies. Source: Knowledge and Information Center, National Center for State Courts.

The expanded use of videoconferencing and the Internet are technologies that hold great potential to advance ADR services throughout the state, especially in rural areas. Appearances among multiple parties can more readily be accommodated. Educational sessions for self-represented litigants, neutrals and staff are proven solutions to counteract problems presented by remote locations.

States with a diverse mix of rural and urban areas such as New Mexico are experimenting with video for various hearings as a cost-savings and customer accommodation tool. As an example, Minnesota utilizes interactive video for child support hearings, standard motion matters, and other non-dispositive appearances. Local and state bar associations have been supportive.

## **CHAPTER IV E-SURVEY RESULTS**

In late 2010, an Internet survey, developed by the Alternative Dispute Resolution Steering Committee and National Center consultants, was distributed to a wide audience of attorneys, neutrals, court staff and judges within New Mexico to gather their perspectives about the performance and quality of the state's court-annexed alternative dispute resolution programs as well as thoughts and ideas for program improvements. Several thousand surveys were distributed.

Four separate surveys were developed targeting different categories of responders: attorneys, neutrals/providers, judges, and non-judicial court staff managing alternative dispute programs. Respondents who functioned in dual roles, such as attorneys also serving as neutrals, were free to complete more than one survey to report differing perspectives if they wished. Anonymity was assured to encourage candid and open feedback. Some questions were similar among the surveys to compare attitudes and opinions among the different groups. Some questions were open-ended, allowing respondents the freedom to more fully explain their viewpoints. In reporting open-ended responses, National Center staff paraphrased and grouped like responses together as possible.

By no means was this e-survey scientifically developed or dispersed. Quite to the contrary, it is a quick and broad assessment of general attitudes and opinions held by those most familiar with court-annexed alternative dispute resolution programs in New Mexico. Essentially, it gives the Committee and Center consultants a rough sense of the strengths and weaknesses seen in the current array of court promoted alternative dispute resolution offerings throughout the state.

A significant limitation regarding the survey results was the low response rate. Overall participation, including partial and full completions of all four surveys, showed 789 surveys where data was entered (564 fully completed and 225 partially completed). Considering 6,839 surveys were distributed, the "raw" response rate was 11.5 percent.<sup>45</sup> However, only 1872 surveys were opened making the "vested" response rate 53 percent.<sup>46</sup>

Low response rates do not necessarily mean lower survey accuracy; they merely indicate a risk of lower accuracy. Experts conclude that non-response rates to all types of surveys have been increasing in the past 10-15 years. Penn State academics conclude that a response rate for web surveys of 20-60% are normal; 40% is considered good; 60% is very good. They also report that e-surveys, especially where they are anonymous, tend to be more candid than mail or phone surveys. When calculating a response rate, academics suggest that both complete and partial responses should be counted by arriving at a percentage of those completing the survey as well

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<sup>45</sup> It was confirmed that after email "bounce backs" as undeliverable (309), a total of 6,839 were successfully delivered.

<sup>46</sup> This percentage assumes, of course, that each participant only completed one survey (despite any potential dual role), so therefore this number may be slightly high.

as a separate percentage for those who partially completed the survey, and then adding these two percentages together and dividing by 2 to obtain an overall rate of response. In doing so for this survey, the rate is 26.3 percent.

Three reasons largely contributed to the soft response rate. First, the survey period was the last three weeks of December 2010, when many people are preoccupied with holiday festivities or on short schedules and vacations. Second, only a limited number of pre-survey announcements were emailed to all potential respondents. Although the initial announcement was sent under the signature of Chief Justice Daniels, survey experts conclude that intensely reminding targeted audiences to access and complete an e-survey can improve response rates by as much as 25 percent. Of course, it also risks irritating and alienating a number of recipients as well. Survey salience is the third reason rates are low. Here, experts have substantiated that the relevance of the survey topic to the surveyed audience is critical to the rate of response. Where people conclude that to respond would make little difference for them personally or that changes caused by the survey would impact their work or day-to-day life very little, they are less likely to either complete the survey once they get into it, or just don't respond at all. If such is the case, lawyer response rates could be expected to be less vis-à-vis their total numbers, and the responses from neutrals to be high relative to their numbers. When it comes to judges and court staff, response rates would be assumed to vary given the variety of viewpoints regarding their feelings as to the value of ADR and any changes growing out of the study and how they may affect them in their jobs. Those general assumptions seem to be largely borne out by the survey results.

### **A. General Conclusions, Opinions and Methodology**

The e-survey data provides a valuable look, albeit not scientific assessment, into the minds, opinions, and attitudes of those invested in New Mexico's court-annexed alternative dispute resolution programs. The results from the four groups canvassed – attorneys, judges, court staff and program administrators, and neutrals – are hard to correlate in detailed ways, but some general statements together with the detailed survey results for each respondent category are outlined below.

Common viewpoints among the groups support the conventional wisdom expressed by Committee members and those interviewed by the NCSC project team during the two site visits. All groups heavily favored court-annexed neutral qualifications to require certification at the state level. Concerning ADR knowledge and attitudes, all four consistently placed client/party at the lowest rankings. On the question of how to improve ADR, all groups agreed that more and better training of neutrals must be a priority. And regarding ADR sustainability, all groups favored state-funded programs which are locally managed.

The top two responses for each question in the four populations surveyed are also recounted in the following summary information. Detailed responses to the surveys are presented in Appendix B.

Before reviewing the detailed survey responses in Appendix B, it is important to explain the average scoring methodology used in relating the data. Each survey question which included

gradient-scale response options - such as **Least Helpful**, **Somewhat Helpful**, **Helpful**, **Very Helpful**, and **Extremely Helpful**; or **Very Poor**, **Poor**, **Acceptable**, **Good** and **Excellent** - was given a weighted score to produce an average rating across all possible responses. Here's how it was done.

The weakest negative response option (for example, **Least Helpful**) was given a weight of 1, and a weight increment of +1 was cumulatively assigned to each of the other options up to and including the strongest positive option in the scale (for example, **Extremely Helpful**). As a result, the weighted response categories ranged from 1 to 5 in the following schema: **Least Helpful = 1**, **Somewhat Helpful = 2**, **Helpful = 3**, **Very Helpful = 4**, and **Extremely Helpful = 5**. Each response was given a weight and added into a single sum, which in the detailed survey tables is entitled the **Sum of All Applicable Response Scores**. The total number of questions responded to was then noted to permit an average score to be calculated.

In some questions, participants were allowed to select “**No Opinion**” or “**Don't Know.**” In these cases, those respondents were excluded from the averaging calculation, so that the average score would represent an accurate number derived only from those who actually offered a scalable and quantifiable answer. Here is an example of how that methodology is applied: **Question 4** of the **Neutrals Survey**, asks participants: *If you work in a court-annexed ADR program, what additional training as an ADR neutral would you find most helpful?* A total of 145 people answered this question by checking a series of options under the response “**Mentoring.**” One option was “**No Opinion.**” A total of 18 people selected that reply. These 18 “**No Opinion**” respondents are subtracted from the overall number of participants who responded to Question 4, giving an adjusted response total of 127 (145 minus 18).

Respondents who gave a scalable, quantifiable answer showed the following pattern: 15 selected “**Least Helpful;**” 29 selected “**Somewhat Helpful;**” 33 selected “**Helpful;**” 21 selected “**Very Helpful**” and 29 selected “**Extremely Helpful.**” The weights were then calculated...

- 15 **Least Helpful** responses (weight 1) = a sum weight of (15 multiplied by 1 equals) 15
- 29 **Somewhat Helpful** responses (weight 2) = a sum weight of (29 multiplied by 2 equals) 58
- 33 **Helpful** responses (weight 3) = a sum weight of (33 multiplied by 3 equals) 99
- 21 **Very Helpful** responses (weight 4) = a sum weight of (21 multiplied by 4 equals) 84
- 29 **Extremely Helpful** responses (weight 5) = a sum weight of (29 multiplied by 5 equals) 145

These 5 scores were then added together to calculate the “**Sum of All Applicable Response Scores:**” 15 plus 58 plus 99 plus 84 plus 145 equals 401. This sum was then divided by the “**Total Responses minus ‘No Opinion’**” (401 divided by 127) to give an average score of 3.157480314, rounded to 3.16.

Since a weight of 4.00 is “**Very Helpful**” and a weight of 3.00 is “**Helpful,**” this average score of 3.16 can be termed “**Helpful to Very Helpful,**” and slotted into the sequence of other sub-lines in question 4 (which included other factors besides **Mentoring** such as **Classroom Training**, **Statewide Conferences**, **Nationwide Conference**, etc.). Once the average score for each sub-line was calculated, all of the answer option sub-lines were arrayed from highest



average score to lowest providing an overview of the survey respondents' relative weighting for each scalable and quantifiable answer.

## **B. Attorneys**

- Total respondents (both full and partial survey completion): 538
- Respondents who fully completed the survey: 378 (70.3%)
- Respondents who partially completed the survey: 160 (29.7%)

The attorney survey represented every county and all levels of court. Of the attorneys who practice in the appellate court, metro court and magistrate court between 94% and 97% indicated that they have not participated as a court-annexed mediator/arbitrator/facilitator in the past year. For district court 53% have not used court-annexed ADR in the past year. However, of those district court attorneys who have used court-annexed ADR in the past year 39% have used the program 1 to 5 times in the past year. Results for the private ADR programs indicate there are even fewer attorneys who use these programs than the court-annexed programs.

Attorneys indicated that they became aware of court-annexed ADR program mainly through court order/court referral as well as through judge or court staff. More than half of the attorneys who use ADR use mediation and settlement facilitation. Attorneys' reasons for using ADR indicate that it saves time and money for litigants, parties settle more often, and the court requires them to use it. Conversely, attorneys who do not use ADR indicate they do not feel the case types they deal with are appropriate for ADR. Attorneys, however, did indicate that if ADR demonstrated time and money savings, higher client satisfaction rates, and higher quality neutrals they may increase their support for court-annexed ADR programs.

Attorneys who have experience with ADR rate the quality of higher courts (appellate and district) court-annexed ADR programs to be acceptable to good while the lower courts (metro court and magistrate court) to be poor to acceptable.

For both private and court-annexed ADR program neutrals attorneys feel that qualification should be determined by certification/regulation at the state level for court-annexed neutrals or by allowing the market to determine the quality for private neutrals. Attorneys view constituents to have an acceptable knowledge and a neutral to positive attitude towards ADR programs. To improve the ability for attorneys to utilize ADR there should be more/better training for neutrals, and training focused on the use of ADR in specific subject matter areas. Additionally education for attorneys is viewed as being helpful. Of the attorneys who have received training, many have received it through conferences or CLEs and the 40 hour basic mediation training.

### Top Responses of Attorneys Surveyed

Q#	Question	Top-Rated Applicable Survey Response (#1)	Second-Highest Rated Applicable Survey Response (#2)
1	“Which county or counties do you work in? (check all that apply)”	Bernalillo	Santa Fe
2	“How many times in an average year have you participated as a court-annexed mediator/arbitrator/facilitator: (check all that apply; N/A=not applicable)”	1 to 5 Times a Year	6 to 10 Times a Year
3	“How many times in an average year have you participated as a private mediator/arbitrator/facilitator in: (check all that apply; N/A=not applicable)”	1 to 5 Times a Year	6 to 10 Times a Year
4	“How many times in an average year have you represented or assisted a client in an ADR session in: (check all that apply)”	1 to 5 Times a Year	6 to 10 Times a Year
5	“Which of the following areas of law best describe your practice? (check all that apply)”	Commercial & General Civil	Civil Tort - Defense
6	“How did you become aware of court-annexed ADR programs/providers in your practice? (check all that apply)”	Court Order/Court Referral	Judge or Court Staff
7	“How often do you use ADR programs or providers in your practice?”	Never (1)	Occasionally (3)
8	“What kind(s) of ADR do you use in your practice?”	Mediation	Settlement facilitation
9	“I do not use ADR in my practice because: (check all that apply)”	Other (open-text response)	I do not feel the case types I deal with are appropriate for ADR
10	“I use ADR in my practice because: (check all that apply)”	Saves time/money for litigants	Parties settle more often
11	“Please rate the following outcomes which might cause you to increase your support for a court-annexed ADR Program”	Demonstrated time and money savings	Higher client satisfaction rates
12	“Based on what you know, how would you rate the quality of the court-annexed ADR in your area?”	Appeals Court is highest quality	District Court is second highest quality in ADR services
13	“Some state courts use a "traveling neutral" (a person who travels between jurisdictions) in providing ADR services. Would that be of interest to you?”	Need more information	Yes
14	“Regarding ADR neutral qualifications, which of the following approaches do you prefer for court-annexed neutrals?”	Certification/regulation at the STATE LEVEL	None (let the market determine quality)
15	“Regarding ADR neutral qualifications, which of the following approaches do you prefer for private neutrals?”	None (let the market determine quality)	Certification/regulation at the STATE LEVEL
16	“What KNOWLEDGE do these groups have about ADR in your jurisdiction?”	Judicial Officers have the best and highest knowledge level about ADR	Court/Program Administrators possess the second highest level of knowledge and understanding about ADR in my jurisdiction
17	“What ATTITUDES do these groups have about ADR in your jurisdiction?”	Judicial Officers have the most positive attitudes	Court/Program Administrators have positive attitudes as well.
18	“What, if any, ADR training have you received? (Check all that apply)”	Conferences/CLEs	40-hour basic mediation training
19	“What additional information/training/resources would be the most helpful to you personally in order to improve your ability to utilize ADR in your jurisdiction?”	More and/or Better Training for Neutrals	Training Focused on the Use of ADR in Specific Subject Matter Areas

### **C. Judges**

- Total respondents (both full and partial survey completion): 39
- Respondents who fully completed the survey: 30 (76.9%)
- Respondents who partially completed the survey: 9 (23.1%)

There was a cross representation in every county except McKinley County. The majority of judicial officers who participated primarily preside over civil general jurisdiction, domestic violence, criminal felony, and family cases. When they refer cases to ADR, they normally refer them in the form of mediation, settlement facilitation, or ADR programs that are court-annexed. The judicial officers who refer cases to ADR feel that ADR saves time/money for the litigants, speeds up the process for the resolution of a dispute and overall reduces the courts' calendars. It should be noted that there is a small group of judges for whom there are either no ADR program available in their area for the case types they handle or they do not know what ADR is available in their area. The majority of judicial officers said that it would be most helpful for them to improve their utilization of ADR in their jurisdiction if they had access to more/ better qualified neutrals, better public understanding of the ADR process and more staff to administer ADR.

The majority of judicial officers are more inclined to support a court-annexed program that is state funded and locally managed as a model that would work best to ensure a sustainable ADR program. Additionally, a state funded program with a neutral that travels to various courts was viewed as a possible sustainable option. Based on their impressions of the current system, the Metro Court and Appeals Court are viewed as good to excellent quality programs, while the District Court and Magistrate Court are only acceptable to good in terms of service quality.

For both court-annexed and private neutral providers, judicial officers favored qualifications by way of certification/regulation at the state level. Judicial officers across the state agreed that all judicial partners had an acceptable to good knowledge of ADR as well as a positive attitude about the programs. However, they feel that the public had a poor understanding of the programs and a neutral attitude towards them.

### Top Responses of Judges Surveyed

Q#	Question	Top-Rated Applicable Survey Response (#1)	Second-Highest Rated Applicable Survey Response (#2)
1	“Which county or counties do you work in? (check all that apply)”	Statewide	Bernalillo
2	“I currently preside over the following types of cases (check all that apply)”	Civil General Jurisdiction	Domestic Violence
3	“When I refer cases to ADR I normally refer them to the following forums: (Check all that apply)”	Mediation	Settlement facilitation
4	“I refer cases to ADR because ADR can: (check all that apply)”	Save time/money for the litigants	Speed the resolution of a dispute
5	“I do not refer cases to ADR processes because (check all that apply)”	Other (please specify) (open text entry)	There are not ADR programs in my area for the case types I handle
6	“Which of the following would work better to ensure sustainable ADR programs in your jurisdiction?”	State funded and locally managed	State funded with a neutral who travels to various courts
7	“Would you be more inclined to support court-annexed ADR programs that are (check all that apply) ...”	State funded and locally managed	State funded with a neutral who travels around the state to various courts
8	“Based on what you know, how would you rate the quality of the court-annexed ADR in your area?”	Bernalillo County Metro Court program is top flight	Appeals Court program is one of the best.
9	“Regarding the qualifications of a neutral, what do you favor most for court-annexed providers? (check only one)”	Certification/regulation at the STATE LEVEL	Certification/qualifications requirements at the program level
10	“Regarding the qualifications of a neutral, what do you favor most for private providers? (check only one)”	Certification/regulation at the STATE LEVEL	None (let the market determine quality)
11	“What KNOWLEDGE do these groups have about ADR in your jurisdiction?”	Court/Program Administrators have the greatest level of knowledge	Judicial Officers / Neutrals/Providers (tie) have significant knowledge about ADR in my jurisdiction.
12	“What ATTITUDES do these groups have about ADR in your jurisdiction?”	Neutrals/Providers are most supportive of ADR in my jurisdiction	Court/Program Administrators hold helpful and constructive attitudes about ADR in my jurisdiction.
13	“What additional information/training/resources would be the most helpful to you personally in order to improve your ability to utilize ADR in your jurisdiction?”	More and/or better-qualified neutrals	Better preparation of parties / Staff to administer ADR (tie)
14	“Some state courts use a “traveling neutral” (a person who travels between jurisdictions) in providing ADR services. Would that be of interest to you?”	Yes	No

#### **D. Court Staff and Program Administrators**

- Total respondents (both full and partial survey completion): 50
- Respondents who fully completed the survey: 32 (64%)
- Respondents who partially completed the survey: 18 (36%)

There was a cross representation in every county except Lincoln and Otero Counties. All levels of court are represented in the survey.

The administrators felt that the judicial constituents had a good to excellent knowledge of and very positive attitude towards ADR Programs. However, they felt that the public had a poor understanding, although positive attitudes about ADR Programs.

More than half of the administrators typically employ or contract their neutrals and generally feel that they are able to secure a sufficient number of qualified neutrals. What they feel is extremely important to attract a greater number of neutrals is judicial support. For both court-annexed and private providers, administrators feel that certification/regulation at both the state and program levels is most important is securing qualified neutrals. When neutrals are paid, those funds typically come from the AOC paying from legislative funds or private parties paying for the services. The majority of administrators did not express interest in using a “traveling neutral;” however, nearly a quarter of those who responded indicated that they would need more information before making a decision.

Overall, administrators want to ensure that they have high quality neutrals, fewer parties returning to court with high compliance rates and agreements reached in a manner that saves time and money for litigants. To encourage greater use of the court-annexed programs, administrators distribute information with court filings, use brochures, and provide presentations to local groups. To continually enhance the quality of ADR programs, administrators feel that is necessary to provide/require classroom trainings for neutrals, conduct participant surveys, and conduct periodic program evaluations. Administrators tend to communicate successes and problems with their ADR programs to individual judges, the Chief Judge, court staff and Neutrals via email, memos and routine communication in person or by telephone.

Regarding the quality of the actual Court-annexed ADR programs, administrators feel that the Appeals Court, Metro Court and District Court programs are good quality programs, whereas the Magistrate Court program needs improvement. Administrators feel that state funded and locally managed or centrally managed system would work best to ensure a sustainable ADR program. Additionally, regular meetings with other ADR program administrators/ managers in New Mexico are concluded to be important as well. Trainings focused on the use of ADR in specific subject matter areas and a way to evaluate ADR programs would help to improve their ability to utilize ADR in their jurisdiction.

## Top Responses of Administrators Surveyed

Q#	Question	Top-Rated Applicable Survey Response (#1)	Second-Highest Rated Applicable Survey Response (#2)
1	“Which county or counties do you work in? (check all that apply)”	Bernalillo	Santa Fe / Statewide (tie)
2	“I work in the following courts:”	District Courts	Magistrate Courts
3	“What KNOWLEDGE do these groups have about ADR in your jurisdiction?”	Court/Program Administrator possess the greatest understanding about ADR.	Neutrals/Providers have extensive knowledge about ADR in my court.
4	“What ATTITUDES do these groups have about ADR in your jurisdiction?”	Court/Program Administrators have the most affirming attitudes about ADR.	Neutrals/Providers also have optimistic and helpful attitudes about ADR in my jurisdiction.
5	“Are you able to employ or contract with a sufficient number of qualified neutrals?”	Yes	Most of the time
6	“How do you provide neutrals? (check all that apply)”	Contract	Volunteers
7	“What is important to attract a greater number of qualified neutrals?”	Other (open text entry)	Judicial support
8	“Regarding the qualifications of a neutral, what do you favor most for court-annexed providers? (check only one)”	Certification/regulation at the STATE LEVEL	Certification/qualifications requirements at the program level
9	“Regarding the qualifications of a neutral, what do you favor most for private providers? (check only one)”	Certification/regulation at the STATE LEVEL	Certification/qualifications requirements at the program level
10	“Based on what you know, how would you rate the quality of the court-annexed ADR in your area?”	Appeals Court program is the best and most high quality program.	Bernalillo County Metro Court is very well run and ranks second among program administrators and staff.
11	“How are successes or problems with your ADR programs communicated? (check all that apply)”	Routine communication in person or by telephone (tie)	Memos and e-mail (tie)
12	“Outside of your immediate supervisor, who else do you communicate with about your program? (check all that apply)”	Individual judges	Chief judge / court staff (tie)
13	“Which of the following would work better to ensure sustainable ADR programs in your jurisdiction?”	State funded and locally managed	Other (open text entry)
14	“What additional information/training/resources would be the most helpful to you personally in order to improve your ability to utilize ADR in your jurisdiction?”	Regular meetings with other ADR program administrators / managers in New Mexico	Training focused on the use of ADR in specific subject matter areas
15	“Is the space provided for ADR sessions adequate?”	Yes	No
16	“Are your neutrals volunteers?”	No	Some
17	“What percentage of your neutrals are volunteers?”	None	26-50%
18	“If neutrals are paid, where does the money come from? (check all that apply)”	AOC pays from legislative/state funds (Children’s Court Mediation Program only)	Parties pay
19	“Some state courts use a “traveling neutral” (a person who travels between jurisdictions) in providing ADR services. Would that be of interest to you?”	No	Yes / need more information (tie)
20	“How important are the following goals for your ADR program(s)?”	High quality of neutrals	Fewer parties return to court
21	“What do you currently do to educate or encourage greater use of your court-annexed ADR program by the general public and the court/legal community? (check all that apply)”	Brochures	Information distributed with court filings
22	“What do you currently do to enhance quality in your ADR program(s)? (check all that apply)”	Provide/require classroom training for neutrals	Conduct periodic program evaluations

## **E. Neutrals and Providers**

- Total respondents (both full and partial survey completion): 162
- Respondents who fully completed the survey: 124 (76.5%)
- Respondents who partially completed the survey: 38 (23.5%)

There was a cross representation in every county except Catron, De Baca, and Harding Counties. All levels of court are represented in the survey.

Neutrals were only able to respond to the court they are working in and not system wide. Across the board, neutrals reported that the quality of court-annexed ADR is acceptable to excellent. Additionally neutrals feel that knowledge of and attitudes toward ADR programs from the other constituents are very positive. The majority of neutrals indicated that they receive 40 hours of basic mediation training along with advanced or subject specific mediation training. Many respondents indicated that the training they received was through experience, education institution, or an association. The training that would be most helpful for neutrals who work in a court-annexed program is reflective practice groups with other neutrals and training focused on the use of ADR in specific subject matter areas. Regarding the qualifications of court-annexed and private neutrals, most neutrals are in favor of certification/regulation at the state level. In addition the majority of neutrals are in favor of a traveling neutral that could provide ADR services between jurisdictions.

The neutrals who responded to specific programs indicated that across programs the qualifications of the program staff and administrators, as well as the programs' ability to resolve a case quickly and with better results were the most common attributes of a program that worked well. Conversely some neutrals indicate that programs that do not work well lack properly trained staff, have poor program organization, and the lack of public understanding of the use of ADR. Training, increased staffing, and improved communication within the programs are areas that would improve the program.

Neutrals feel that the best way to educate the public about ADR is through information distributed with court filings, self help centers, and presentations to local groups or through community outreach through social networking. They believe that the best way to educate judges and attorneys is training with the local court, and one on one discussion with peers or an ADR expert. Neutrals indicated that the top three factors that could improve ADR programs in New Mexico would be information about ADR with every court filing, better access to ADR services for litigants, and better education of attorneys on ADR.

### Top Responses of Neutrals Surveyed

Q#	Question	Top-Rated Applicable Survey Response (#1)	Second-Highest Rated Applicable Survey Response (#2)
1	“Which county or counties do you work in? (Check all that apply)”	Bernalillo	Santa Fe / Statewide (tie)
2	“As an ADR neutral, which courts do you work in? (Check all that apply)”	District Courts	Bernalillo County Metro Court
3	“As an ADR neutral, what training have you received? (Check all that apply)”	40-hour basic mediation training	Advanced or subject specific mediation training
4	“If you work in a court-annexed ADR program, what additional training as an ADR neutral would you find most helpful?”	Other (open text entry)	Training focused on the use of ADR in specific subject matter areas
5	“Regarding the qualifications of a neutral, what do you most favor for court-annexed providers?”	Certification/regulation at the STATE LEVEL	Certification/qualifications requirements at the program level
6	“Regarding the qualifications of a neutral, what do you most favor for private providers?”	Certification/regulation at the STATE LEVEL	None (let the market determine quality)
7	“Based on what you know, how would you rate the quality of the court-annexed ADR in your area?”	Bernalillo County Metro Court is the best in my opinion.	Appeals Court is high quality in its operations and processes.
8	“What KNOWLEDGE do these groups have about ADR in your jurisdiction?”	Court/Program Administrator are the most informed and knowledgeable.	Neutrals/Providers are among the most educated and experienced in my jurisdiction.
9	“What ATTITUDES do these groups have about ADR in your jurisdiction?”	Neutrals/Providers have the most positive attitudes in my jurisdiction.	Court/Program Administrators are extremely upbeat and supportive of ADR.
10	(Open-ended question, statistical analysis is not possible; see trending analysis for details)	N/A	N/A
11	(Open-ended question, statistical analysis is not possible; see trending analysis for details)	N/A	N/A
12	(Open-ended question, statistical analysis is not possible; see trending analysis for details)	N/A	N/A
13	(Open-ended question, statistical analysis is not possible; see trending analysis for details)	N/A	N/A
14	“What would work best to educate the public about ADR?”	Information distributed with court filings	Self-help centers
15	“What would work best to educate judicial officers about ADR?”	Training within the local court	One-on-one discussion with another judge
16	“What would work best to educate attorneys about ADR?”	One-on-one discussion with another attorney	Training within the local court
17	“Please rate the level of importance of the following factors that could improve ADR programs in New Mexico:”	Information about ADR with every court filing	Better access to ADR services for litigants
18	“Some state courts use a “traveling neutral” (a person who travels between jurisdictions) in providing ADR services. Would that be of interest to you?”	Yes	Need more information



## CHAPTER V

### NEW MEXICO ADR TOMORROW: STRATEGIC DIRECTIONS

Ten major, strategic directions are proposed as a course of action for New Mexico judicial leaders to improve court-annexed alternative dispute resolution and position the court system to maximize its impact in saving time and money for the Judiciary and the public it serves. The foundational component underlying these directions is the creation of a high-level New Mexico Judiciary ADR Commission.

#### A. Create and Permanently Staff a Supreme Court ADR Commission

**Recommendation 1: The Supreme Court should establish and permanently staff a Court-Annexed Alternative Dispute Resolution Commission charged with creating, organizing, monitoring, and nurturing court sponsored alternative dispute resolution (ADR) programs throughout New Mexico's courts.**

An overarching theme throughout this report is that court-annexed alternative dispute resolution in New Mexico is a mosaic. Litigant needs differ, court capabilities vacillate, programs vary, staffing is mixed, funding is sporadic, results fluctuate, and support is scattered. With this perplexing range of issues, problems and possibilities, the collective attitude among Judicial Branch leaders is one of indifference; not unlike many other states... lukewarm about their programs, but curious about their hidden potentials.

In the midst of this malaise, some ADR programs are struggling to gain acceptance or can produce only marginal impacts in saving time and money due to budget cutbacks. Where court-annexed programs have had a more lengthy presence, principally in urban trial courts and at the Appeals Court (i.e. Court Alternatives, Family Court Services/Court Clinic, Settlement Week, and Appellate Mediation), they have been able to demonstrate results, cultivate champions, secure a budget presence, and more or less anchor themselves in their court cultures.

There is little doubt, as this report concludes, that well developed and effectively managed court-annexed ADR programs can show positive, cost-efficient results as well as generate better, more lasting outcomes for litigants than formal adjudication methods. The real question for New Mexican policymakers this study poses is whether strengthened court-annexed alternative dispute resolution options will be part of the solutions embraced by the courts in facing a new, austere normal most futurists predict awaits us on the horizon. We submit, an aggressive program to do so is, indeed, a wise course.

To that end, the Commission should be empowered to collaborate with public, private and nonprofit organizations; garner and accept grant funds; lobby the New Mexico Legislature on behalf of the Supreme Court in support of court-annexed alternatives; create and institute public education programs to promote the use of ADR; develop and recommend court-annexed neutral and provider standards, competencies and ethics; recommend and institute pilot programs

and initiatives; objectively assess, examine, and recommend improvements in existing court-annexed programs; and otherwise promote the effective and productive operations of court-annexed alternative dispute resolution programs in New Mexico courts. Commission members should include, but not be limited to, representatives of the court, government, bar, public and private sectors. Three groups that should be represented on the Commission are alternative dispute resolution professionals of all backgrounds, alternative dispute resolution advocates at the UNM School of Law, and representatives of the Executive Branch's Office of Alternative Dispute Prevention and Resolution. Court members on the Commission should represent all levels of courts as well as rural, urban, and metropolitan areas as defined in this report.

A permanent, dedicated staff coordinator should be hired to develop programs, organize and manage the work of the Commission, and perform other necessary functions to enable the Commission to carry out its responsibilities in a successful and constructive manner. The coordinator should be a paid, full-time employee on the staff of the Administrative Office of the Courts, and at a sufficiently high level to be imbued with the respect and authority required in such a position of trust and importance. The coordinator should report to a high-level official in the AOC as designated by the State Court Administrator.

## **B. Leverage Court Programs through Collaboration with Other NM Organizations**

**Recommendation 2: The ADR Commission should explore and develop mutually beneficial programs that could stimulate and advance court-annexed alternative dispute resolution training, programs, and performance throughout the courts of the State, and where feasible develop grants, funding proposals and other resource initiatives to promote and sustain such collaborative, beneficial efforts.**

A great strength in support of court-annexed dispute resolution alternatives in New Mexico are the numerous community and government programs that offer adjunct, out-of-court dispute resolution programs (i.e. Executive Branch's Office of Alternative Dispute Prevention and Resolution) and educational and programmatic assistance (i.e. ADR Committee, New Mexico State Bar; ADR trainers including academic institutions like the UNM Law School). They are key allies in promoting enhanced efforts led by an ADR Commission. Among the options to explore should be programs to more effectively educate and train judicial officers in alternative dispute resolution methods; collateral efforts to instruct and teach court staff skills and techniques to implement and sustain court-annexed ADR operations through creative partnerships, and multi-faceted efforts to pilot and expand as possible community-based mediation services.

Created three years ago by state statute, the state Executive Branch's Office of Alternative Dispute Prevention and Resolution (OADPR) operates as a Bureau within the state's Risk Management Division of the General Services Department. It is staffed by three full-time employees, and serves all branches of state government at both local and state levels to protect public assets and promote loss prevention. Services are provided at no cost to state agencies and employees, and the use of mediation through the state program is totally voluntary on the part of

the disputants. A nine-member advisory council provides guidance and recommendations to the Office.

The establishment statute requires that agencies “shall provide interested parties with access to alternative dispute resolution procedures to prevent or resolve any dispute, issue or controversy involving any of the agency's operations, policies, programs or functions...” Where there is potential loss that may affect state employees, programs or interests, and there is an opportunity to mediate it, the Office can be engaged. Typical requests for assistance include supervisory/employee or employee/employee disputes, ADA issues, and organizational or team issues. As a result, the potential breadth of involvement by the OADPR is immense; 153 state and local agencies (including a number of public universities and colleges) are part of the risk pool covered by the Risk Management Division. Most state executive branch ADR programs are much narrower, often located in a governor’s office or human resources department and limited to state level executive branch agencies. During FY 2010, the Office coordinated mediation for 56 disputes involving potential claims against the state, and assisted in another 88 mediations within state government agencies, many to successful and cost-effective solutions.

The program is vested with a cadre of professionally trained state employee peer mediators (mostly non-lawyers who are professionals in other fields) who co-mediate issues on “company time” as assigned by the OADPR. Training, essentially the 40-hour industry-standard mediation curriculum taught at law schools, colleges and in community programs, is the required minimum qualification for mediators. At one time, training expenses were paid from the State’s self-funded insurance program, and resulted in over 300 employees trained as mediators. Currently about 100 mediators remain on the active roster, which is supplemented with mediators from other area government programs and the state’s universities. During the last three years, program funding for training new mediators has been unavailable.

The University of New Mexico’s Law School mediation training programs, New Mexico Mediation Association, and the NM State Bar’s ADR Committee are additional supportive institutions that have had a solid and continuing effort in promoting alternatives to formal litigation in the State. They are at the center of the present community of interests regarding alternative dispute resolution in New Mexico. The Law School, as an example, offers basic and family mediation courses to both students and non-students. The course cost is \$895 per participant; it is offered each semester and during the summer. The NM Bar is another continuing source of support, especially the ADR Committee and the CLE office. In addition to offering stand-alone CLEs, the NM Bar CLE office has designated an “ADR track” at the State Bar Annual Meeting and allowed the ADR Committee to plan and provide the seminars. The Bar CLE office also co-sponsors, with the the First and Second Districts, an annual ADR Institute that brings a nationally-known mediation trainer to New Mexico. In providing continuing ADR updates and educational programs to its members and the community at large, the State Bar has kept dispute resolution alternatives in the news and on the minds of lawyers and judges. They are planning on highlighting the results of this ADR Assessment at their summer 2011 Annual Meeting.

Legal and governmental entities are not the only potential resources. According to interviews and conjecture, one of the reasons offered for the current lackluster public support for

ADR in New Mexico has been the erosion of community mediation centers as a viable part of the alternative dispute resolution landscape in New Mexico. Formerly sponsored widely by local governments, schools, civic groups and neighborhood organizations interested in solving conflicts early to enhance the quality of life, they provided a basic education and introduction for the public about the value and impact of non-litigation means to ameliorate conflicts. The nearby state of Texas is held up as an example where community mediation is heavily integrated in the day-to-day life of its residents. There, it is posited, people are conditioned to think about mediation as an early and responsible option to settle discord rather than formally litigate disagreements.

Lastly, there are numerous national resources that can be tapped for research and instructional materials on how to energize court reform concerning expanded court-annexed ADR programs and approaches to solving ever-present complacency and inertia on the part of court leaders in stimulating better and more impactful programming. Appendix B provides a number of contact points for additional information. An impetus lately holding greater promise among the national community of courts is the more intense interest in using alternative dispute resolution methods to reengineer caseload toward reducing costs, saving time, and enhancing public access; all high on the list of objectives in streamlining courts.

### **C. Maximize Internal Court System Resources to Enhance ADR Programs**

**Recommendation 3: The ADR Commission should creatively solicit and utilize existing court resources to improve the capacity of the entire Judiciary to provide better and more efficient court-annexed dispute resolution alternatives. In doing so, the Commission should function as a clearinghouse and coordinating body to identify, organize and facilitate the sharing of knowledge, skills and abilities among court personnel in different jurisdictions.**

New Mexico's Judiciary has capacity to creatively further court-annexed alternative dispute resolution impacts within its current resources. One way is to promote more widespread judicial commitment through concerted in-house education, training and mentoring programs.<sup>47</sup> Presently, too many judges are apathetic about court-sponsored programs. Many are not philosophically opposed to alternative dispute programs, but misunderstand or are skeptical about their potential benefits when operated in a court-annexed model. Those who do appreciate court connected programs may be at a loss regarding effective ways to mesh such approaches with their day-to-day dockets, or if in an administrative leadership position to implement them efficiently court-wide.

The ADR Study Steering Committee has been extremely helpful in providing data, insights, and ideas about improving court-annexed dispute alternatives. In essence, the members of the committee represent a brain trust of knowledge and expertise in ADR that is extremely valuable in building and sustaining momentum about the issues and suggestions outlined in this report. Committee support in keeping court-annexed dispute resolution on the "front burner"

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<sup>47</sup> Recently (early 2011), the Judicial Education Commission agreed to fund a few judges every year to take the 40 hour mediation training at the UNM School of Law. Source: John Feldman, UNM Law.

between the time this report is published and the time any action is taken by court system leaders is critical.

Eventually, the ADR Commission will serve in a resource, advisory, planning and educational capacity to build internal judicial and staff interest, support and understanding to boost commitment and involvement in court-sponsored programs. Among tangible, creative results the Commission could promote in the use of existing resources is the increase of court-to-court technical assistance,<sup>48</sup> training and utilizing court staff as mediators, periodic retreats of court leaders to develop action plans for statewide and local court-annexed directions and priorities, assessing and advancing transferrable, replicable court-annexed programs, providing statewide technical assistance to requesting courts, and collaborating on program performance improvements. Also, a cadre of court system in-house resource experts should be determined, recruited and utilized to work with programs and courts outside their jurisdictions as consultants under the authority of the Commission in court-to-court technical assistance efforts through teaming and partnership programs.

New Mexico courts have strong and passionate resources within them to lead and organize a much improved series of court-sponsored dispute resolution alternatives. Realizing it and tapping those proponents and their skills early in the process is wise.

#### **D. Structure New and Expanded ADR Initiatives in Phases and Pilot Projects**

**Recommendation 4: It is essential the ADR Commission act as the chief statewide authority in guiding program implementation, developing objective performance data about programs, and identifying the best use and deployment of the limited court system resources for court-sponsored alternatives.**

Continual experimentation, assessment, and data-driven decisions are key features of judicial systems that provide high performing court-annexed dispute programs. In many ways New Mexico courts exhibit this trait. The ADR Commission must assist and champion this direction by advocating and encouraging new and expanded initiatives in phases and pilot projects.

Implementing a court-annexed dispute resolution alternative in a complex court caseload process is not for the short-winded or organizationally challenged. Major change takes time, sometimes lots of time. And it requires methodical, thoughtful planning and experimentation focused on a range of short-term, intermediate and long-term timelines.

Short-term wins are perhaps the most important. In inserting ADR processes in an existing stream of caseload events, if you don't demonstrate you are on the right path early in the project you rarely get the chance to fully implement those initiatives later. Visible, initial, positive results are key ingredients in building support and momentum for new processes and

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<sup>48</sup> See Chapter II, Foreclosure Mediation for examples of how technical assistance between judicial districts is currently taking place.

procedures of the magnitude and lasting affect we are suggesting in this report. Quick improvements are those modifications that can be inserted within an organization or caseload process without substantial controversy and don't present major start-up difficulties, require large expenditures of money, or engender additional detailed analysis or planning. Examples on a systemwide basis include the creation of an ADR Commission and designation of a permanent staff coordinator, researching this report for topics and initiatives that are easier to implement within the next 12 months, and gaining formal commitments from key influence leaders inside and outside the Judiciary to support improving court-annexed alternative resolution programs as part of re-engineering the court for a more austere future.

Intermediate efforts are those with a two to three year implementation time horizon requiring substantial interaction, agreement and collaboration among organizations both inside and outside the Judiciary. Such projects as recruitment and training regimens for court-sponsored neutrals, public marketing programs, and better ways to provide access to ADR services for self-represented litigants are examples.

Long-range efforts include legislative changes, better and more consistent funding mechanisms, and building widespread community-based dispute resolution alternatives as options outside the court system to provide greater choices for potential litigants in lieu of filing a case in the court system.

Lastly, it is wise to introduce new and expanded programs – regardless of their time horizons - as pilot projects. Courts are multifarious organizations resistant to change. In fact, an argument can be made that they may be more wedded to the status quo than many other types of institutions since they are steeped in precedence, governed through consensus, and tend to operate in loosely coupled, isolated work units. Among the most critical changes tackled by any court are new or revamped caseload processes; essentially the way judicial officers do their work. This is the exact target of court-annexed dispute resolution advocates. In this atmosphere many seasoned court leaders wisely empower small, highly regarded guiding coalitions to test and spearhead reforms without disrupting the entire court system. In the private sector, these research and development points are sometimes called “skunk works,” denoting protected places within an organization given a high degree of autonomy and unhampered by bureaucracy that are tasked with working on experimental projects. In this way, successful change is often more enduring and easier to expand since problems are remedied on a smaller scale and positive results can be spotlighted as early wins; clearly and convincingly documented for any subsequent systemwide push.

## **E. Enhance ADR Training, Management and Operations Through Technology**

**Recommendation 5: All efforts directed at enhancing court-annexed alternative dispute resolution development, operations, information, training, and management should maximize the use of technology.**

Technology offers numerous ways to improve the delivery, education and management of court-annexed alternative dispute resolution efforts within the state's justice system. The ADR Commission is an ideal strategic body to coordinate, advocate and capitalize on the efficient application of high-tech systems for court-sponsored dispute resolution alternatives. At present there is no accountable, dedicated group to plan and coordinate statewide technology needs and priorities for growing and improving court ADR programs.

Technical solutions offer cost-efficient ways to address many ADR needs. The new state *Odyssey*® court management system will permit court staff to manage calendaring, neutral assignments, case tracking, party notification, and performance data better. System developers, however, need to clearly understand what ADR advocates need and require of the software.

Especially given the vast geographic distances in New Mexico, internet, video and telephone conferencing provide options in place of face-to-face mediation sessions as well as for neutral skills training, mentoring and education. Yet, those priorities must be promoted and placed on the agenda of decision-makers inside the court system responsible for planning, acquiring and supporting such technology.

## **F. Nurture Different Approaches in Large and Small Court Jurisdictions**

**Recommendation 6: The ADR Commission must ensure the basic array of court-annexed alternative dispute resolution programs available in the state are offered effectively in both large and small jurisdictions. Of particular concern to the Commission should be remote, isolated court locations that are understaffed and struggle to maintain basic services.**

Although standard guidelines and baseline principles for effective court-annexed ADR in New Mexico should be commonly developed and followed to lessen public confusion, ensure basic program quality, and promote efficiencies, court programs must be allowed to vary by jurisdiction size, type and population. In a state as diverse as New Mexico, one size does not fit all. Six out of thirteen judicial districts in the state – and roughly 15 percent of the state's population - are essentially rural. Nearly all of the magistrate courts are small with limited resources. Conversely, the population concentrations in the Rio Grande corridor, the northwest, and the southeast, bring very different issues.

Needless to say in this mix of jurisdictions, courts have different capacities and capabilities to develop and operate programs. Larger populated, urban-based courts certainly may have more dedicated staff and resources to support and maintain dispute resolution alternatives, self-help centers, court clinics, and structured procedures for litigants to avail themselves of those resources. Although larger courts have also suffered budget cuts and

program reductions, courts in less populated regions are seriously struggling to maintain basic services let alone provide optional ways for litigants to resolve disputes. For courts in less-populated regions, such possibilities as circuit-riding neutrals, outsourcing to private vendors,<sup>49</sup> court staff functioning as mediators, and technology (i.e. Internet, video and telephone conferences) provide promising practices.

A particular challenge for the ADR Commission will be how to ensure that smaller courts which do not currently have adequate resources in place for everyday operations can support more effective ADR programming. In less populated jurisdictions, caseloads are frequently not high enough to generate sustainable surcharge funding. In some areas, there appears to be an absence of trained neutrals willing to take court-annexed ADR referrals at minimal court fee levels.<sup>50</sup> Consequently, a mix of in-house (court staff), volunteer, and contract mediators as well as circuit-riding neutrals may be more viable. Experimentation with private vendor outsourcing, collaborations among courts to share services, partnering with public libraries, and enhanced technology use, especially pertaining to the Internet should be explored.

In any event, smaller, rural jurisdictions will undoubtedly need special attention and tailored solutions that may require funding and assistance from the larger court system itself in order to provide effective programming. It is not uncommon for statewide court systems to subsidize smaller, rural courts that struggle to generate funding or offer services on par with other courts in the state. Equal access to justice for all citizens of a state regardless of where they live or the economic capacity of their local courts is a widely recognized and responsible standard of state court systems nationwide.

### **G. Publicize and Market a “Multi-door Courthouse” Concept**

**Recommendation 7: The ADR Commission should spearhead a Judiciary-wide initiative to create effective, informative, and consistent (uniform, reliable and English/Spanish bilingual) written and complementary electronic information (including digitized voice, video and data) for statewide distribution through multiple outlets (courthouses, mass media, Internet, civic/business/government/bar sites, meetings, and educational forums) about court-annexed dispute resolution programs and services directed at the public.**

A specific finding of this study is that the citizens of New Mexico have little knowledge or understanding about alternative dispute resolution services in general or court-annexed ADR options specifically. This conclusion is neither a startling fact, nor a circumstance unique to New Mexico. ADR is a confusing subject for the general public to grasp. For that matter, many justice system professionals who have not studied it or experienced its various forms also have trouble understanding its nuances, varieties, and processes.

<sup>49</sup> See Chapter II, Private Vendor Outsourced Mediation for examples of how the Fourth and Ninth Judicial Districts are operating such public-private partnerships.

<sup>50</sup> Some New Mexico ADR experts believe there are an adequate number of trained neutrals in all judicial districts except the Tenth, but court set fees for mediation services are not sufficient to prompt their involvement with court-sponsored programs.



In such a reality, it is incumbent on those familiar with the programs and virtues of court-annexed alternative dispute resolution programs to market and educate potential users and court staff. Litigants have various possibilities to learn about alternative dispute resolution options; the more sophisticated often do so through the Internet, websites, articles, and friends or relatives. Yet, national studies and research generally substantiate that most people are unfamiliar with the fact that courts offer “softer” forms of dispute resolution in addition to adversarial adjudication.<sup>51</sup> Those who do use ADR often do not understand the process, for example, expecting the mediator to “decide” the case or otherwise have the same authority as a judge. These litigants may ultimately be dissatisfied with their experience because it did not meet their misconceived expectations.

One way judicial branch officials in other states have presented a clearer, more recognizable public message about the array of services today’s courts offer litigants is through the metaphor of a “multi-door courthouse.” It is simple, memorable, and is not copyrighted. New Mexico court leaders should consider adopting it. In this regard, the Commission should consider collaborating with marketing and advertising experts at the University of New Mexico or other academic institutions and private entities to develop and cultivate such an identifiable “brand reputation” around the metaphor of a *multi-door courthouse*.

The concept grew out of a speech given by Frank E.A. Sander, a Harvard Law School professor and early advocate for alternative dispute resolution over 30 years ago. In 1976, Chief Justice Warren Burger persuaded Sander to discuss dispute resolution at the Pound Conference in St. Paul where in 1906 Roscoe Pound, a young law professor at the University of Nebraska gave a lecture on “The Causes of Popular Dissatisfaction with the Administration of Justice,” beginning the modern era of court reform. Sander, in the same room where Pound stood 70 years earlier, presented his thoughts about the “Varieties of Dispute Processing.” In his remarks, he explained his concept of a multi-door courthouse – a courthouse that routes incoming court cases to the most appropriate form of dispute resolution. The idea of offering alternatives to traditional litigation has gained popularity ever since. Now, Sander is considered to be the pioneer of ADR and his paper is seen to have revolutionized the legal system. Few law schools had offered courses in negotiation or mediation; now every law school in the country has at least one (most have more) course on alternative dispute resolution. Recently, when asked why the multi-door courthouse concept took off after the Pound Conference, Sander responded, “To borrow from a title of a recent book by Malcolm Gladwell, you reach a ‘tipping point’ when things in favor of a movement fall into place.” Although a catchy phrase, metaphor, or slogan cannot energize court-annexed ADR where leadership and willpower is absent, it certainly, however, can add momentum, energy and excitement where it exists. How a court system conceptualizes its purpose, vision and mission, also has a lot to do with whether court-annexed ADR is seen as a vital part of its services.

Such a metaphor can be used in numerous ways, but certainly should be prominently featured at the court’s earliest and most practical “customer touch-point,” case filing. Survey data from justice system insiders in New Mexico - lawyers, neutrals, judges and staff – indicate

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<sup>51</sup> McAdoo, B and A. Hinshaw (2002). The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri.” 67 Missouri Law Review 473.

their experience is that court customers typically first encounter information about court-annexed alternative dispute resolution programs at filing or early in their case from judges and court staff. This is especially true for self-represented litigants. The multi-door courthouse image provides a simple instructive platform upon which more detailed information can be conveyed. Brief and easy-read written materials (i.e. brochures, fact sheets, and litigant testimonials) given to all parties upon filing and attached to summonses to respondents explaining the idea and array of options or mandated front-end dispute resolution alternatives in a court has proven helpful in other court systems across the nation. Where web and video technology can succinctly support and amplify the metaphor, public understanding is further enhanced and reinforced. A common, statewide Judiciary website or mandated use by individual court websites of approved courtwide messages, procedures, and information contributes immensely to the clarity and impact of the message as well.

The existing Judiciary website provides very limited information to litigants about court-annexed alternative dispute resolution other than the Children's Court Mediation program and links to some trial courts that have websites with more comprehensive information on their ADR offerings and specific processes. Some child support and dissolution forms are available at the Judiciary site for downloading, but general information for self-represented litigants is quite minimal. It would be helpful if this general purpose website could be significantly improved with more useful and instructive materials including more user-friendly electronic pathways for litigants in search of data about court-annexed programs.

To effectively market a service to customers, whether a private business or a government entity, requires those promoting it to hold a heartfelt belief that the value and importance in using that service or product will indisputably improve the lives of those who use it. At the center of that belief must be a clear, understandable vision about the worth and merit of ADR in the overall mission of the court to resolve disputes fairly and expeditiously and its ability to effectively deliver results consistent with that vision. This is not to diminish the significance of money, staffing, facilities, and technology in doing the job right. However, by far the most vital ingredient for success is also the most intangible... passion and commitment. The ever-present undercurrent of disbelief by some judges and court officials in the significance and impact of court-annexed dispute resolution alternatives is, perhaps, the most challenging hurdle in promoting greater litigant participation in it and creating a successful marketing program.

For this reason, it is suggested one of the best ways to build and sustain that internal court system commitment and spirit is to establish and empower a high-level Commission directly tied to the Supreme Court to consistently and fervently spotlight the issue. Complacency about court annexed alternative dispute resolution is the enemy in building momentum for change. A needed, indispensable first step is raising the level of urgency about the importance and usefulness of court-annexed ADR as a solution to today's costly and time consuming litigation maze, not just among a few dedicated judges and court staff, but increasingly reaching a number of those who are currently "fence-sitters," un-energized about alternative dispute resolution methods and their potential.

The Commission approach legitimizes a way to promote a compelling message for stronger and more pervasive court-annexed dispute resolution alternatives to address burgeoning

caseloads at the same time that internal court resources are constantly being reduced. It also provides a forum to educate the currently unmotivated by targeting ADR as an unappreciated, untapped, underutilized solution to re-making and reengineering the Judiciary for a leaner tomorrow. In essence, it is an urgent idea worthy of action today. Creating a strong sense of urgency often demands bold or even risky actions that are part of good leadership.<sup>52</sup>

There are essentially two audiences in marketing improved and more pervasive court-annexed alternative dispute resolution programs for New Mexico. One is an internal court audience, many of whom are complacent about the topic now and need to be energized and invested in the value of ADR as a vital direction for the courts; a smarter way to address a different and more threatening future where internal court resources will remain severely limited. The other is a public audience of potential users who need meaningful, clear education about the relevance and value of court-annexed alternative dispute resolution offerings to save them time, money and aggravation in going to court.

In addressing both these audiences, the Commission and its subgroups will need to think seriously about complementary and persuasive messages. What are the perceptions and apprehensions each group holds against ADR now? How can these concerns be addressed with factual, understandable data? What's the ultimate vision of court-annexed ADR for the New Mexico Judiciary? How does that vision address the current problems and disturbing trends? How will court leaders know ADR initiatives are achieving the goals set for them? How do judge and court staff education and training fit with an ADR growth strategy? How can the value of court-annexed ADR as a solution for both court and litigant problems be sustained? These questions and others will need to be raised and addressed by the Commission. Outside assistance and ideas from experts will be helpful.

## **H. Give Self-Represented Litigants Adequate Access to Court-Annexed ADR**

**Recommendation 8: The ADR Commission and the Access to Justice (ATJ) Commission should collaborate to address issues related to self-represented litigant access to ADR.**

Though the challenges presented by non-represented litigants in court systems throughout America are substantial, numerous collaborations, partnerships, and alliances among court officials, court reform organizations, and lawyers offer hope for a better future. These efforts, also, can prove helpful to New Mexico courts. Both the Law School and State Bar ADR Committee sit at the center of the circle of interest in the State regarding alternative dispute resolution programs in general and court-annexed options in particular.

Based on interviews, observations, and literature reviews, NCSC consultants conclude New Mexico has largely left the development of ADR programs for lawyerless litigants to the individual trial courts themselves. ADR programs specifically designed for self-represented litigants are virtually nonexistent. Many self-represented litigants avail themselves of other

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<sup>52</sup> Leadership, many organization experts note, is frequently dangerous and risky since it's about changing the status quo where most people are comfortable and contented. Source: Ronald Heifetz and Marty Linsky, John F. Kennedy School of Government, Harvard University.

ADR programs, but find them difficult to navigate and often too expensive. Local and state-level court initiatives for SRLs generally do not focus on ADR. The Access to Justice Commission has done a great deal of work toward developing statewide forms and instructions, for example, but their work also has not focused on ADR specifically.

The Second District has been an experimental hub for various mediation approaches. As an example, prior to the recent recession a rather unique mediation program was developed by Court Alternatives, the District Court's ADR experts, in concert with the Family Court Division to better address the growing volume of non-represented litigants. Coordinated by staff mediators, the program targeted the design of specific ADR procedures and screening techniques for low income self-represented litigants. In its infancy, the program received national recognition by the Association of Family and Conciliation Courts (AFCC) as an important innovation and promising practice. Unfortunately, budget cuts eventually scuttled its full development although remnants of it remain.

Difficulty in providing services of all kinds to SRLs is not unusual among state courts nationally. Generally, central statewide solutions have been difficult to establish because of the myriad of caseload processes and procedures in local trial courts that often confound uniform applications. Commonly, trial courts have been left to borrow and invent their own solutions. Fortunately, there has been considerable sharing among courts and states.

Many states with large land masses, scattered populations, isolated courthouses, and limited resources such as New Mexico are addressing self-represented litigant services more efficiently through leveraging internal Judicial resources to benefit all trial courts, and affiliating with non-traditional partners to help deliver do-it-yourself information, forms and instructions. Alaska, Minnesota and Arizona self-help approaches are examples that can provide useful ideas and approaches for New Mexico both regarding common forms and instructions as well as providing court-sponsored ADR options. More information about those states' self-help approaches can be found in Appendix B.

Considering these examples of innovative self-help court-annexed programs in concert with alternative dispute resolution programs raises an interesting philosophical and organizational question court leaders should consciously explore... Should self-help and ADR programs be closely aligned and coordinated to a greater extent? This report suggests they should, arguing the nexus between the two so tightly overlaps that it is a more efficient course to follow. We believe strong collaboration between the two areas through both the Supreme Court Access to Justice Commission and a new Supreme Court ADR Commission would stimulate programs and solutions in both arenas.

The ATJ Commission should certainly continue its work on uniform statewide forms, instructions and procedures for self-represented litigants. The ADR Commission should work to assure access for self-represented litigants to appropriately designed ADR processes. It would be beneficial for the Commission to incorporate, as feasible, (a) technology solutions consistent with the implementation of the new statewide electronic case management system, (b) experimental partnerships between courts and other entities such as public libraries for dispensing information to self-represented litigants about ADR and other matters, and (c) tap

national resources for insights into efficient and cost-effective ways to provide consumer information and services through the Internet.

## I. Grow the Number and Quality of ADR Neutrals and Court Programs

**Recommendation 9: The ADR Commission should be empowered to recommend to the Supreme Court for adoption by rule, administrative order, or other such official actions as desired by the Court, a comprehensive strategy and attendant mechanics to improve and maintain the highest achievable quality in the competence, skills and abilities of court-annexed alternative dispute neutrals and providers.**

How to provide, ensure, maintain and enhance quality in ADR programs is much discussed and debated nationally and internationally, particularly with regard to court ADR programs. ADR conferences, including the American Bar Association Section of Dispute Resolution's annual Symposium on Dispute Resolution in the Courts, frequently include sessions on a variety of topics related to quality, including roster management, effective training, law and ethics, among others.<sup>53</sup> In a broad-scoped view, New Mexico's ADR programs have fairly good reputations as to quality in comparison to other states.<sup>54</sup> There is always room for improvement, however, and any expansion of ADR will also require attention to quality. All of the data collected during the NCSC study indicates that building capacity in the form of increased numbers of available, quality neutrals should be a particular focus of New Mexico's efforts.

To that end, the Commission should endeavor to promote six broad objectives. Each is essential in improving the quality and skill of neutrals as well as the effectiveness of court-annexed programs themselves. They are discussed at length in this section of the report.

- expressly articulate court-annexed ADR program goals;
- define quality for neutrals and for each element in the design of ADR programs,
- identify specific methods to be implemented in maintaining and enhancing quality for each element of program design;

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<sup>53</sup> For example, this year's Court Symposium will include a session entitled "Court ADR Roster Management: More Like a Stroll Through the Park or Herding Cats Through a Minefield?", and the 2009 Symposium included a workshop entitled "Quality Focus: General Approaches and Using Technology to Advance Quality."

<sup>54</sup> See electronic attorney survey question 12, rating appeals court and district court programs as "acceptable to good," and Bernalillo County Metro Court as on average close to "acceptable." Magistrate Court, however, was rated on average somewhat acceptable but closer to "poor," and the great majority of attorneys responded "don't know" to the question. Judges have an even more positive view of program quality, rating Metro Court and Appeals Court as "good to excellent" and district and Magistrate Court as "acceptable to good" in judicial survey question 8, though most judges also responded "don't know." Neutrals also rated Metro Court as "good to excellent," and the other three programs as "acceptable to good" in neutral survey question 7, but even they primarily responded "don't know." Survey respondents all rated neutral knowledge of ADR "acceptable to good" (judicial question 11, attorney question 16, neutral question 8). Low response rates to the electronic survey may be an indication of some level of dissatisfaction – or at least disinterest - with the ADR programs, and site visits indicated some level of concern as well.

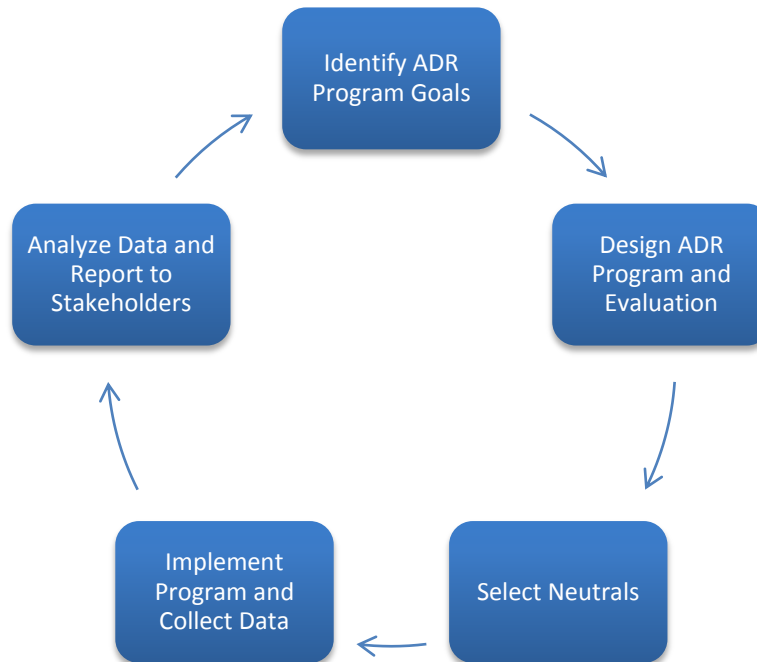
- establish training requirements, including identifying specific quality enhancement tools and outlining procedures for oversight of all neutrals;
- investigate and recommend effective Judiciary (state-level) regulations and certifications for mediators and other neutrals permitted to work in court-annexed capacities;
- design and implement an ongoing evaluation process for each court-annexed ADR program and for New Mexico ADR as a whole; and
- develop regular and ongoing processes to evaluate court-annexed neutrals, court programs and offerings; specific and general ADR goals embraced by the court system; and the mechanics and effectiveness of the evaluation process itself.

Any discussion of quality in ADR must begin with defining the term. To do so requires identification of program goals. The term “ADR” encompasses very different types of processes that can accomplish very different results. Identifying program goals enables stakeholders to select an appropriate form or forms of ADR best suited to accomplishing those goals, define quality, and monitor and evaluate the subsequent implementation of the program. Quality considerations may be different depending on the type of dispute resolution process and on the goals of the program. For existing programs, it is common that goals and quality definitions have not been expressly articulated. Going back to fill this gap will assist in clarifying what needs to be done to maintain and/or improve quality.

Although much of the discussion of quality in ADR focuses on the neutral, whether a mediator, arbitrator, settlement facilitator, or other provider, there are a number of other interconnected topics which also need to be addressed in order to maintain and enhance quality, particularly for court-annexed programs. These other topics fall under the umbrella of program design, and include selecting the ADR process(es), the case referral system, program policies and procedures, staff and related personnel, ethics, marketing/education, funding, and program evaluation.

A flow chart for establishing, maintaining, and enhancing quality in ADR programs could be represented as follows:

**Figure 1: Representative Flow Chart**



### **1. Identifying and Articulating Program Goals**

Courts typically use ADR primarily as a case management tool, seeking more efficient and less costly ways of resolving disputes. However, courts may also have additional goals as well, such as improving communication between the parties; particularly where there is a continuing relationship such as may exist in family or business-related disputes. Courts may also be seeking to reduce post judgment caseloads, including appeals, post-decree parenting cases, collection actions, and other filings related to the initial dispute, as well as to reduce the impact of continuing or future litigation on parties (including reduced business productivity) or third parties such as children. Some ADR processes are better suited than others to meet specific goals, and program design and implementation can also make it more or less likely that specific goals will be met. A quality program thus requires selection of appropriate processes as well as thoughtful program design and implementation, in accordance with legal and ethical constraints. And, in order to ascertain whether quality considerations are being met, an appropriate evaluation and monitoring system needs to be in place.

The electronic survey data collected during this project from the New Mexico courts indicates that the overwhelming majority of judges refer cases to ADR in order to save time/money for the litigants (96%) and to speed resolution of disputes (92%) (electronic judicial survey, question 4). A very large majority of judges also want to reduce the court's calendars (84%), and nearly one in 4 judges want help with overwhelming dockets (24%). Similarly, more than three out of four attorneys indicated that they use ADR to save time/money for litigants (79%), and more than half said they use ADR because parties settle more often (58%). Attorneys also rated “demonstrated time and money savings” highest in a list of outcomes which

might cause them to increase their support for a court-annexed ADR program. The site interviews revealed similar primary goals for using ADR.

A substantial majority of judges also believe ADR can lead to better resolutions (72%), improve communication between parties (68%), and improve parties' understanding of the dispute (60%). Substantial minorities refer to ADR in order to promote agreements that have higher compliance rates than third party decisions (48%), maintain or improve the parties' relationships (40%), result in fewer future disputes, and address issues that cannot be addressed in the courtroom (40%). Similarly, almost 46% of lawyers use ADR because issues can be addressed better than in the courtroom, and nearly 35% use ADR because parties are more satisfied.<sup>55</sup> Finally, one in 5 judges and nearly 15% of attorneys believe ADR can help teach litigants problem-solving skills.

The variety of goals identified in the survey may be the result of a number of factors, including differences in case types, differences in judicial and attorney philosophies, and differences in understanding of what ADR can and cannot accomplish as well as what each judge or lawyer thinks is feasible given available resources. In particular, urban and more rural areas of New Mexico face very different situations regarding ADR resources. Three alternative options could make it possible to meet the goals of all or most stakeholders. First, further discussion could be had in order to build a consensus as to the most important goals. Second, processes could be selected which have the most chance of meeting the widest variety of goals. Third, different courts, judges, or groups of judges who hear similar types of cases could design separate programs to meet needs that might differ by case type. Programs could be designed for specific courts, or, to conserve resources in developing programs, for similar case types statewide. One example of the latter approach is the Children's Court program, which was specifically designed to meet the needs of abuse and neglect cases. Given responses to Judicial Survey question 6, identifying state funded and locally managed programs as most likely to work, either building consensus at the local level or differentiating programs per alternative three would seem to be the best fit. Site interviews also supported local management, or at least local flexibility in implementing more centralized programs.

## **2. Program Design and Evaluation**

Each element of program design impacts quality; thus, quality will need to be defined for each component of the ADR program. Sources to consult in defining quality include stakeholders; program mission, vision, values,<sup>56</sup> and goals; legal and ethical requirements; state and national standards; and, if mediation is one of the processes offered, standards developed for different mediation approaches and styles. Evaluation, though often thought of as the last step in designing a program, instead needs to be kept in mind throughout and incorporated into the design process: how will quality be measured for each of the program components?

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<sup>55</sup> In question 11, "Please rate the following outcomes which might cause you to increase your support for a court-annexed ADR Program, attorneys also rated client satisfaction as "important to very important," slightly higher than "higher settlement rates."

<sup>56</sup> For example, some values frequently associated with the mediation process include: voluntary, self-determination, collaborative, transparent, fairness, neutrality, and efficiency, although these values may not always be carried out in practice. E.g., Kolb, D. *When talk works: Profiles of mediators*. ( Jossey-Bass 2001).



- **Choice of ADR Process(es)**

There are two basic types of ADR processes: negotiation-based processes, including mediation and settlement facilitation, in which the parties retain decision-making authority, and adjudication based processes, including arbitration, in which the neutral makes the decision.<sup>57</sup> Both types of processes are currently in use in the New Mexico court ADR programs.

Negotiation-based processes can generally fulfill a larger variety of goals than adjudication processes. Negotiation-based processes are more likely to address parties' underlying interests, resulting in better resolutions, fewer future disputes, and address issues that cannot be addressed in the courtroom, as well as improving communication and understanding about the dispute, simply because in order to reach agreement, parties must feel on some level their needs are being met and must communicate in order to reach that point.<sup>58</sup> Efficiency goals can be met through either negotiation or adjudication types of processes. Short-term efficiency goals sometimes are better met by adjudication processes which always result in a decision (although as arbitration has become increasingly "legalized," with increased participation of attorneys and more formalized processes, it has also become more expensive and time-consuming). Longer term efficiency goals (reducing post-judgment actions and other future filings) are often better accomplished through negotiation types of processes, which can achieve more complete conflict resolution as compared with settlement.<sup>59</sup>

Because New Mexico courts use both types of processes, it would be helpful for the courts to review whether these uses and outcomes are compatible with the court's goals for the types of cases and parties referred to each process.

- **Different Approaches to Mediation**

Enhancing quality in mediation programs is challenging in part because mediation is not one homogenous dispute resolution form. There are many different approaches to mediation. Several experts have attempted to capture these differences through different terminology; examples include dealmakers and orchestrators,<sup>60</sup> problem-solving and transformative,<sup>61</sup> evaluative and facilitative,<sup>62</sup> directive and non-directive,<sup>63</sup> or through a more elaborate series of grids.<sup>64</sup> There is Narrative Mediation,<sup>65</sup> Mediation through Understanding,<sup>66</sup> and Restorative

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<sup>57</sup> See, e.g., C.W. Moore, *The Mediation Process* Jossey-Bass 2003 (3<sup>rd</sup> 3dition), and Gulliver, P.H. (1979). *Disputes and Negotiations*. New York: Academic Press. Ch. 1, "The Process of Negotiation."

<sup>58</sup> Gulliver, *supra*.

<sup>59</sup> Pruitt, D. G., and Kim, S. H.. *Social conflict: Escalation, stalemate, and settlement*. (3<sup>rd</sup> ed.). Ch. 11, Problem-Solving and Reconciliation, p. 190 – 191 ("[P]roblem solving can produce *settlement*, a substantive agreement dealing with enough of the issues that the parties are willing to give up their escalated struggle. The difficulty with settlement is that other issues remain that can cause the conflict to heat up again in the future...*conflict resolution* [is] an agreement in which most or all of the issues are cleared up. Agreements in which the parties get most of what they are seeking are more likely to last than superficial agreements of the kind usually reached in settlements.") New York: McGraw-Hill 2004).

<sup>60</sup> Kolb, D.M., and Kressel, K. (1994). The Realities of Making Talk Work. In Kolb, D.M., *When Talk Works*. Jossey-Bass. Pp. 459-493.

<sup>61</sup> Bush & Folger, *The Promise of Mediation*, Intro., Chs. 1 & 2 (pp.1-84)(Jossey-Bass 2005).

<sup>62</sup> Riskin, Leonard L., *Decision-Making in Mediation: The New Old Grid and the New New Grid System* (June 30, 2003). *Notre Dame Law Review*, Vol. 79, No. 1, 2003.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

Mediation.<sup>67</sup> There is disagreement as to whether or not one mediator can implement more than one approach, or whether one mediation session can incorporate different approaches.<sup>68</sup> There is some agreement, however, that although some basic skills may be similar, different skills are also needed to implement different approaches.<sup>69</sup> Thus, a program's choice of approaches to mediation will influence everything from training of neutrals to policies and procedures and even to ethical constraints. This choice of approach should flow from program goals.<sup>70</sup>

### **3. Case Referral System**

Cases can be referred to ADR in a number of ways: by uniform state statute; through a standing order (also known as “blanket orders”) for specific case types in a judicial district, case type division, or individual judge; through orders in a particular case by an individual judge; or by the parties themselves (in consultation with their lawyers, if any) in response to a court order to engage in ADR, or voluntarily in an effort to resolve the case short of litigation. The ADR process can be selected by the referring court, the ADR program, or the parties themselves. A quality approach to case referral should include four elements: (1) case screening; (2) an opportunity to opt out in some circumstances; (3) education of parties and attorneys as to the purpose and logistics of the process; and (4) an efficient process which does not delay progress of the case.

- **Case Screening**

The purpose of case screening is to improve quality on the front end by maximizing the chance that the case will proceed successfully through the ADR process, and to screen out cases which may be inappropriate for reasons such as party incapacity, domestic violence or other physical or psychological abuse between the parties, and/or previous similar, unsuccessful efforts to resolve the case through ADR. Case screening can be done on the macro level, by selecting certain case types and excluding others; on a more individual level by the judge or staff reviewing case files; or, on the micro level, by the judge or staff meeting with the parties to discuss appropriate options. Whoever is screening cases needs to have training as to what factors make ADR, or particular forms of ADR, a good choice, and what factors make a case inappropriate for ADR.<sup>71</sup> Case screening should also continue to be addressed by the neutral.

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<sup>65</sup> Winslade, J., and Monk, G. (2001). *Narrative Mediation: A New Approach to Conflict Resolution*. San Francisco: Jossey-Bass.

<sup>66</sup> Friedman, G. and Himmelstein, J. (2008). *Challenging Conflict: Mediation Through Understanding*. ABA.

<sup>67</sup> Under discussion for possible legislation, Colorado SB 11-013.

<sup>68</sup> Bush and Folger, *supra*, say no, but others recognize more flexibility; see, e.g., Moore, C.W., *The Mediation Process* Jossey-Bass 2003 (3<sup>rd</sup> Edition); (Menkel-Meadow, C. (1995). *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*. *Negotiation Journal* 11, pp. 217-242.

<sup>69</sup> See, e.g., Della Noce, D.J., Antes, J.R., and Saul, J.A., “Identifying Practice Competence in Transformative Mediators: An Interactive Rating Scale Assessment Model,” *Ohio State Journal on Dispute Resolution* 2004, 19(3), 1005-1058.

<sup>70</sup> The U.S. Postal Service Redress Program, for example, chose transformative mediation because one goal was to transform the culture of the workplace. See the U.S. Postal Service REDRESS Program website at [http://www.usps.com/redress/a\\_howit.htm](http://www.usps.com/redress/a_howit.htm). See also Bingham, L.B. *Mediation at Work: Transforming Workplace Conflict at the United States Postal Service*. Washington, D.C.: IBM Center for the Business of Government, 2003.

<sup>71</sup> Judges responding to the electronic survey question 13, “What additional information/training/resources would be the most helpful to you personally in order to improve your ability to utilize ADR in your jurisdiction?” rated training on case screening and staff to screen cases as “somewhat helpful to helpful.”

Even after referral, the neutral should continue to assess the case for appropriateness for a specific ADR process.

- **Opportunity to Opt Out in Some Circumstances**

Although case screening can anticipate reasons why ADR would not be appropriate in particular cases, it will not always be possible to identify inappropriate cases. Therefore, parties should be entitled to object to the referral based on articulated criteria, at the judicial level or at the program level. The formal opportunity to object becomes more important at a macro-level in case screening. For example, a standing order for all dissolution of marriage cases to engage in mediation may not identify particular cases in which the existence of domestic violence should excuse the parties.<sup>72</sup>

- **Education of Parties and Attorneys**

Parties and attorneys need to be clearly directed as to the process, program, time limits, and any reporting requirements back to the court (if this reporting is not handled by the neutrals or the ADR program). In order to enhance quality, they also need to be educated about the purpose of the referral, the basics of the ADR process and their role in the process, the hoped-for

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<sup>72</sup> Jessica Pearson, *Mediating when domestic violence is a factor: Policies and practices in court-based divorce mediation programs*, 14 CONFLICT RESOL. Q. 319 (2007) (noting that domestic violence is estimated to be a factor in at least 50% of the cases served at court-based divorce mediation programs). Domestic violence generally indicates serious power imbalances in the parties' relationship, with resulting high possibilities in mediation for coercion and for a failure to follow through on agreements. See, e.g., Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57, 72 (1984); Laurie Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues*, CLEARINGHOUSE REV. 19 (Summer 1985). There is also a potential for continuing or increasing levels of violence in the absence of an authoritative procedure. See, e.g., Andree G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272, 278 (1992); Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW, POLICY, PRACTICE* 216 (1989). For these reasons, all domestic cases should be screened by the attorneys and the mediator for the possibility of violence. See, e.g., Jane C. Murphy & Robert Rubinson, *Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens*, 39 FAM. L.Q. 53 (2005-2006); Rene L. Rimelspach, *Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program*, 17 OHIO ST. J. ON DISP. RESOL. 95 (2001-2002); Linda Girdner, *Mediation Triage: Screening for Spouse Abuse in Divorce Mediation*, 7 MEDIATION Q. 365 (Summer 1990); D. Ellis, *Marital Conflict Mediation and Post-Separation Wife Abuse*, 8 LAW & INEQ. J. 317, 328 (1992). Experts disagree as to whether mediation is ever appropriate when violence is or has been present. It is also important to distinguish between cases where the domestic violence charge itself is being mediated versus where violence is or has been present but is not the subject of the mediation. Woods et al., *DISPUTE RESOLUTION* 328-29 (1992); see also Nancy H. Rogers & Craig A. McEwen, *supra* note 40, at 216-17 (1989); Lerman, *supra* note 40, at 84-85; but see Ellis, *supra* note 40, at 333-35. Those who believe mediation may be appropriate use additional screening, such as how recently the violence occurred, how frequently it occurred, how dangerous it was, and whether the parties are or have been in therapy. See, e.g., Lerman, *supra* note 40, at 100-102; Girdner, *supra* note 40, at 366-71. If domestic violence is present and a client wishes nonetheless to mediate, it is particularly important to find a mediator who is knowledgeable about and experienced with domestic violence issues; because screening may not always bring to light the presence of domestic violence in a case, all mediators (including all clinic students mediating these types of cases) should be educated about domestic violence and its potential impacts on mediation. It is also important to structure the mediation carefully. For example, it may be preferable to conduct all or much of the mediation in caucus; and it may be desirable to require mutual temporary restraining orders as a precondition for beginning the process. A substantial body of specialized literature has developed regarding the mediation of cases in which domestic violence exists. See, e.g., *Special Issue: Mediation and Spouse Abuse*, 7 MEDIATION Q. 291 (1990); *Special Issue: Domestic Violence*, 46 Family Court Review No.3 (2008). Screening protocols used by Michigan, Maryland and Oregon may be useful as well as Desmond Ellis writings on the DOVE Screening Tool and Nancy Ver Steegh's "Yes, No, Maybe...." article.

outcome, and their rights and responsibilities. If the parties understand their responsibilities and are prepared to participate effectively in the process, the chances of meeting outcome goals are enhanced. In addition, if parties are knowledgeable about their rights with respect to the process, they can act as a check on the neutral's ethics and competence.

- **Efficiency and Timing of Referrals**

Efficiency is also a measure of quality, as neither litigants nor the courts benefit from case referral processes that delay movement of a case through the courts. Certain cases in particular, such as those involving children, need to be handled efficiently. This is as true for ADR as it is for litigation. Many times it is the reason ADR is being used. Court orders can be extremely helpful by setting deadlines for ADR case scheduling, when the ADR process needs to be completed, and identifying who is responsible for reporting results to the court. Research supports referral of cases to ADR early in the life of the case. When cases are settled or otherwise resolved early, savings in time and resources are maximized and parties often become less polarized than if the case takes a lengthy time to resolve.<sup>73</sup> The timing of the referral must take into account whether the parties have sufficient information to engage in settlement discussions as well.

#### **4. Program Policies and Procedures**

Policies and procedures enhance quality by articulating expectations and preventing situations that may compromise program strength. Policies and procedures can and should also detail procedures in the event of complaints about the program. Recording these policies and procedures in writing provides standards for program staff, parties, attorneys, and neutrals; making enforcement easier. Topics addressed should include case procedures,<sup>74</sup> process expectations,<sup>75</sup> preparation expected of participants<sup>76</sup> and specific circumstances such as how cases involving domestic violence claims are handled.<sup>77</sup> Ethical codes and standards of practice to which neutrals must adhere, fee schedules including fee waiver procedures if any, and the complaint process for unsatisfied participants are important as well. Forms can be provided such as agreements to mediate or arbitrate, fee agreements, case tracking forms for mediators, participant surveys, or others.

#### **5. Staff and Related Personnel**

Referring judges, ADR program staff, volunteers, and related personnel have a big influence on program quality. They can prevent – or cause – miscommunication and misunderstanding of the purpose and procedures of the ADR referral, and they can prevent -or cause – legal and ethical violations. For example, if staff does not understand the difference

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<sup>73</sup> See, e.g., N. Thoennes, *Mediating Disputes Over Parenting Time & Responsibilities in Colorado's 10th Judicial District Assessing the Benefits to Courts* (Center for Policy Research August 2002).

<sup>74</sup> Including, for example, scheduling logistics, and who can attend the ADR event.

<sup>75</sup> Such as whether there may be individual and joint sessions, who is the decision-maker, and goals and steps of the process.

<sup>76</sup> In civil mediation cases, for example, it is common to require parties to submit confidential settlement statements to the mediator in advance of the scheduled session. Similarly, arbitration procedures might address briefing requirements, if any.

<sup>77</sup> For example, programs which provide mediation in cases in which domestic violence is alleged might provide for separate meeting rooms for the parties with no joint sessions, and might even schedule parties on different days.

between mediation and arbitration and as a result parties are not adequately prepared to participate in the process, quality is adversely affected. Staff and related personnel need to receive adequate training so that they can effectively communicate with parties, including answering questions and/or directing parties to someone who can answer their inquiries. In the neutral survey,<sup>78</sup> untrained and undertrained staff was mentioned again and again as something that needs improvement. It can also be helpful for staff and related personnel to observe a mediation, arbitration, or other ADR procedure so that they better understand the service being provided and what the parties will encounter.

## **6. Neutrals**

An element regarding neutrals which falls within program design is how neutrals are associated with the program. There are four approaches: staff, a roster system, contracting, and/or referral to other organizations that provide neutrals. All other things being equal, staff neutrals afford the highest opportunity for maintaining and enhancing quality, because there is much more opportunity for oversight and supervision. In practice, however, all other things are rarely equal; quality staff neutrals also requires sufficient resources and caseload to attract and keep high quality personnel, sufficient resources for continuing education, training, and evaluation, and sufficient resources for adequate supervision and oversight are also necessary. Contracting with neutrals provides some of the benefits of staff neutrals but allows for more flexibility in the face of uncertain or unpredictable caseloads. In particular, contracting with one or more neutrals to provide services in several jurisdictions can be a way to increase quality in areas of the state with low caseloads and insufficient availability of locally qualified neutrals.<sup>79</sup> Rosters typically establish minimum qualifications for neutrals and sometimes have ongoing requirements as well; roster administrators often struggle with how to maintain and enhance quality in the absence of more direct supervision and oversight, but rosters are very common throughout the country to assure quality in the absence of the resources required for competent staff neutrals, and particularly where neutrals are paid by the parties or volunteer with the program.<sup>80</sup> Some courts refer to other organizations to provide neutral services, such as community mediation programs, and rely on those programs to provide quality neutrals.<sup>81</sup>

## **7. Law and Ethics**

The primary ethical and legal concerns that tend to arise in connection with ADR programs pertain to neutral competency and/or concerns about coercion, conflict of interest, unauthorized practice of law by non-lawyer neutrals, and bias. Some of these concerns, in the context of mediation, can be addressed in part by adopting and educating neutrals about the ABA/AAA/ACR Model Standards of Conduct for Mediators (2005).<sup>82</sup> The ABA Section on

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<sup>78</sup> Questions 10 – 13; Neutral and Providers Survey.

<sup>79</sup> Colorado has had some success with this approach of a traveling or “circuit-rider” mediator, in the southwest corner of the state. The electronic survey indicated some interest in, as well as a need for more information about, this concept, see attorney responses to question 13 and judicial responses to question 14. Slightly over half of the neutrals said they would be interested in the concept (neutral question 18), suggesting that neutrals would be available to implement the concept in interested regions of New Mexico.

<sup>80</sup> Roster management is often a topic at ADR conferences, see *supra* n.1.

<sup>81</sup> There are a number of community mediation programs in Colorado, for example, and all of them provide some level of services for court-referred cases. For example, Jefferson County Mediation Services, Boulder Community Mediation Service, and the University of Denver Mediation Clinic program. Nebraska, New York, and Hawaii have historically provided a significant amount of their court-ADR services through community mediation programs.

<sup>82</sup> See Appendix B: Resource List on Law and Ethics for Neutrals.

Dispute Resolution also provides a clearinghouse on mediation ethical opinions, in addition to accepting inquiries and providing responses. Training and oversight is critical to reducing the potential for coercion in negotiation-based processes. Sometimes the zeal for innovation and the quest for efficiency need to be tempered to a greater degree with protection for party rights and self-determination. Too much pressure to settle runs the risk of backfiring by resultant poor outcomes, litigant dissatisfaction with the process and the sponsoring courts, and increased post-judgment litigation. Without adequate training in other methods, mediators and settlement facilitators will rely too much on arm-twisting as a fall back technique. Such abuses may be familiar to lawyers, who are typically more skilled at protecting the interests of their clients. Self-represented litigants, on the other hand, are particularly susceptible to pressure and often do not have sufficient legal or factual information to evaluate the suggestions or statements of a neutral or the skills to resist even if they do not agree. Concerns about coercion can also be addressed by the tools for maintaining and enhancing neutral quality identified below, by not allowing the judge who will decide the case to act as an ADR neutral, and by not making settlement the sole criteria for success and evaluation in mediation and facilitated settlement processes. Conflict of interest can be largely prevented through clear policies regarding dual roles, by requiring neutrals to disclose potential conflicts, and by prohibiting sitting judges from referring cases to themselves for provision of ADR services.

### **8. Marketing/Education**

Education can help participants understand and participate effectively in the process, as well as serving to promote or market ADR programs. Marketing and education contribute to program quality by ensuring that claims made about program successes are congruent with program results and not overpromising results that cannot be delivered, or that can't be delivered in every case. Educating referral sources, including judges, can also improve program quality by enabling them to explain the purpose of the ADR referral to parties and to create effective orders to engage in ADR.

### **9. Funding**

It is perhaps obvious to say that it is difficult to establish and maintain quality in a program that does not have sufficient resources. Sources of funding can also impact quality in less obvious ways. For example, where funding is based solely on settlement rates, a neutral can unwittingly encourage coercion, or where the funding structure creates bias or the appearance of bias such as when one side pays for the process (particularly where the paying side is a repeat player who participates in many ADR cases) it can dilute quality.

### **10. Evaluation**

Program evaluation is necessary to determine whether ADR is meeting its goals, as well as providing input from consumers and others as to whether quality is perceived. Identification of data to be collected and processes for collection should be part of the program design, rather than an afterthought once the program is established. And a schedule for data review – monthly, quarterly, yearly - should be established up front. Periodic reporting to stakeholders also helps to maintain high performance. Automated electronic case tracking systems make data collection more efficient, less duplicative, and easier. And with safeguards in place to keep certain ADR case information confidential, ADR tracking can be built into the courts general case management software. Case tracking and other data can include, for example: staff and/or

mediator information (quantitative), number of cases/parties served, time to disposition, length/number of mediation session(s), settlement rates (full, partial), participant surveys (qualitative),<sup>83</sup> stakeholder surveys, client interviews, and focus groups.

### **11. Maintaining and Enhancing Quality of Neutrals**

Although the impact of program design on quality cannot be understated, the competence of the neutral is most often cited as having the greatest impact on the effectiveness of programs. In the electronic survey, judges noted “more and/or better qualified neutrals” as the most important requirement in improving their use of ADR. Attorneys in responding to a similar question rated “higher quality of neutrals with better training” as important to very important.<sup>84</sup>

There is a continuum of approaches to maintaining and enhancing quality, from regulation on one end to market-place forces on the other, with hybrid approaches such as voluntary compliance to standards through incentives in the middle. There is also a timeline along which quality is addressed; some programs depend on front-end selection criteria, whereas others include some degree of ongoing methods for maintaining and enhancing proficiency.

- **Regulation**

Regulation encompasses all forms of licensing, certification, and/or practice requirements at the state or program level. Most of the discussion and controversy in the field of ADR relating to regulation is focused on mediation. In the case of mediation, even in states which regulate it at the state level, such as Florida, there are no prohibitions on the unauthorized practice of mediation such as exist for the legal, medical, and some other professions. Rather, regulation focuses on who can be appointed as a mediator by the court, and/or who can work for or be associated with a particular program. The regulation approach typically establishes minimum qualifications for neutrals, including one or more elements such as ADR process training and education, substantive knowledge, legal knowledge, and/or experience. A regulation approach could also include continuing education or other ongoing requirements.

- **Market-place**

Marketplace is the other end of the continuum. Neutrals are chosen by parties (and/or lawyers) in the absence of any regulation; essentially, the “marketplace decides.” Although some states may in theory opt for a purely market-driven approach, more typically there are hybrid approaches in which private ADR professionals are unregulated but neutrals in court programs are available to parties through a roster. The neutrals qualify to be on the roster according to some criteria.

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<sup>83</sup> Many courts currently use participant surveys, including, for example, Colorado and Maryland, and the JAMS Foundation is currently funding an effort by the ABA Section on Dispute Resolution and Resolution Systems, Inc., to develop model forms for use by court programs in civil mediation cases. Participant surveys can be handed out by neutrals at the end of the session, mailed or emailed to participants with or without incentives after the session, or can even be required in order to deem the process complete (as does the postal service REDRESS program, for example). Ideas for automating participant surveys include use of Scantron technology (being investigated by Maryland MACRO) and use of computers or iPads on site.

<sup>84</sup> Judicial survey question 13, and attorney survey question 11, outcomes which might cause you to increase your support for a court-annexed ADR program.

- **Hybrids**

Hybrids encompass those approaches that include some elements of regulation along with some marketplace elements. Examples include voluntary guidelines, such as Colorado's Recommendations for Education/Training and Experience of Professional Mediators and Voluntary Model Standards of Conduct for Mediators<sup>85</sup> and Maryland's Mediation Excellence approach, which creates a voluntary program with specific elements and incentives.<sup>86</sup> Conditions which lead to hybrids include a failure of consensus on whether or how to regulate.<sup>87</sup>

The NM ADR electronic survey indicates a strong, though not exclusive, interest in a regulation approach at the state level, particularly for court-annexed providers. However, a majority of attorneys and neutrals, and a significant minority of judges, selected other options in response to the question regarding court-appointed neutrals (#14 – 55%, #5 – 65%, and #9 - 42% respectively), and even more judges and attorneys selected other options for private providers (52% and 66% respectively).<sup>88</sup> The ADR Commission should form a subcommittee to further investigate this approach, to see if it will be possible to come up with a consensus on implementing such an approach. In the meantime, individual programs will need to adopt a hybrid approach, either individually or with the support of voluntary guidelines and/or incentives developed on the state level.

- **Selecting Neutrals**

There are typically several different methods used for selecting qualified ADR neutrals. Quality programs typically establish minimum requirements that require some level of ADR process training and education,<sup>89</sup> either acquired prior to selection or provided by the program after selection; some also require some amount of substantive knowledge, legal knowledge, and/or experience.<sup>90</sup> Determination of these minimum qualifications may be ascertained and/or

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<sup>85</sup> <http://www.dola.colorado.gov/osg/docs/adrmmodelstandards.pdf>

<sup>86</sup> The major goal of the Maryland Program for Mediator Excellence (MPME) is to assist Maryland mediators in providing high quality mediation services to their clients. This is accomplished by providing participating mediators with choices for continued learning, and improvement, along with appropriate recognition for their achievements (cite to MACRO website). Colorado also has taken some steps toward creation of a Dispute Resolution Excellence Program in which Colorado re-formulated Maryland's tree metaphor into a mountains metaphor.

<sup>87</sup> See Charles Pou, Jr., "Mediator Quality Assurance: A Report to the Maryland Mediator Quality Assurance Oversight Committee (February 2002), an excellent review of the history and issues involved in defining and assuring mediator competence, along with advice and resources in addressing mediator quality. The Maryland Mediation and Conflict Resolution Office subsequently adopted a "quality assistance" approach; see the well-developed Maryland Program for Mediator Excellence, <http://www.courts.state.md.us/macro/mpme.html>.

<sup>88</sup> Certification/regulation at the state level was selected more often than the other options by judges (58%), attorneys (45%), and neutrals (35%). Those numbers were reduced by judges and attorneys when they were asked the same question about private providers (49% and 34% respectively), though neutrals answered at a slightly higher number (36%) for private as compared with court-annexed providers.

<sup>89</sup> A 40 hour training for mediators has become the standard for most programs, although some programs – particularly some community mediation volunteer programs – require less time. Arbitration trainings are also typically shorter than 40 hours. Degree requirements are hotly debated. Although research has not established a need for competent mediators to have a degree, and some believe degree requirements unnecessarily limit access to the field and inhibit diversity, others believe mediators for certain cases should be lawyers (see Florida's mediation certification requirements), mental health professionals (see California's statute), or college graduates.

<sup>90</sup> Where mediators are regulated at the state level, as in Florida, these minimum qualifications may be established by statute; where there is no state statutory regulation, mediator qualifications may be established by the courts on a statewide or local basis. For example, Colorado has statewide minimum qualifications for its judicial branch



supplemented by a variety of methods, including paper requirements such as certification of trainings attended and resumes; interviews;<sup>91</sup> performance-based testing (such as conducting mediation role-plays or submitting video recordings or real or simulated mediations);<sup>92</sup> and paper and pencil tests.<sup>93</sup> Any selection process should also include background and reference checks for all neutrals.

Mediator experience has been consistently correlated with quality,<sup>94</sup> and the expense of recruiting, selecting, and training neutrals leads many programs to maintain the same mediators for long periods of time. On the other hand, building capacity, maintaining a diverse pool of mediators, and maintaining quality over time all indicate some benefit in establishing timeframes for mediator service, at least through periodic evaluation/review to ensure mediator competencies remain current, if not through a reoccurring new mediator selection process.

- **Tools for Ongoing Maintenance and Enhancement of Quality Neutrals**

There are a variety of tools available that can maintain and enhance quality in program neutrals. These tools can be implemented through formal requirements or more informal offerings. Some New Mexico programs are already making use of such tools.<sup>95</sup> More opportunities for communication and networking between program administrators can help them learn from each other about how to more effectively use these tools. Tools can include the following, which are listed in the order in which neutrals rated them in Neutral Survey question 4, with the first three in each *category* underlined as “helpful to very helpful” and the remaining initiatives which are not underlined ranked “somewhat helpful to helpful.” *Continuing neutral development: reflective practice groups with other neutrals, training focused on the use of ADR in specific subject matter areas, training focused on ADR processes, statewide conferences, mentoring, classroom training, supervised training in actual cases, and nationwide conferences.*

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mediators, but individual programs also look to other information in selecting mediators. Arbitrators seem to be less regulated than mediators, which is curious considering that arbitrators are decision-makers, whereas mediators are not. Perhaps this is because arbitration is less complex and requires more familiar skills (particularly for lawyers and judges), and thus can be taught in less time than mediation processes and skills. In New Mexico, some concerns have been raised about the lack of consideration for relevant substantive knowledge of arbitrators; these concerns should be taken seriously, as they can negatively impact the reputation and experience of the court-annexed program, for both litigants and neutrals.

<sup>91</sup> E.g., in Colorado resumes were screened and a limited number of applicants were selected for interviewing and performance-based testing. Interviews consisted of questions designed to elicit the applicant’s knowledge of mediation theory and application to practice through hypotheticals.

<sup>92</sup> Performance-based testing has been hotly debated, particularly as a basis for national or statewide regulation; it is endorsed by some as absolutely necessary to determine mediator competency, and rejected by others as too subjective and too expensive. On the program level, it is our belief that it is an extremely helpful supplement to other selection criteria. Paper qualifications are just that; interviews provide additional information as to applicant’s theoretical knowledge; performance-based testing can provide information about how the applicant actually applies theory to practice. Some people can talk or write about mediation but can’t actually mediate effectively; others can mediate effectively but can’t describe what, why, or how they mediate. The best neutrals can do both. Examples of performance-based testing can be found in Colorado, Maryland, and Family Mediation Canada.

<sup>93</sup> Paper and pencil tests can also be expensive to administer, and like interviews run the risk of skewing selection toward applicants who are good with theory but not necessarily with practice. The worker’s compensation program in Colorado once used paper and pencil tests to select mediators. Subsequent changes in the program eliminated the test.

<sup>94</sup> SPIDR’s test design project, among others.

<sup>95</sup> See, e.g., neutral answers to question 11, “what works well in the program.”

*Additional tools suggested by neutrals in the “other” category or not mentioned in the survey: individual reflective practice, training focused on effectively working with a co-mediator, domestic violence training,<sup>96</sup> networking ideas to share ideas and strategies, session observations by other mediators, security and physical plant safety for neutrals, and demonstrated mediations by experienced mediators. Program oversight, results of which can be used for evaluation and/or neutral development: observations of neutrals by program staff, participant surveys, co-mediator assessments of each other, establishment of continuing education requirements, and periodic review of complaints and sanctions*

Needless to say, there are additional tools to maintain and enhance the competence of alternative dispute resolution neutrals commonplace to any effective court-annexed programs, including stressing and promoting open communication, applying recognized and evidence base research findings, employing a consumer friendly website, and developing programs and improvements through sound and inclusive strategic planning. All of these tools should be employed in a methodical and iterative fashion by first defining expectations, establishing a vision and strategies to accomplish it, selecting neutrals based on those expectations, visions and strategies, using the tools mentioned to maintain and enhance the competence of the cadre of court-annexed neutrals, collecting data on performance and program value, analyzing that data routinely and objectively, and using it to begin the cycle again.

In enhancing the skills and know-how of court-annexed neutrals, there are a variety of issues that judicial policymakers will have to tackle, not least of which is... an absence of consensus in the alternative dispute resolution field on how to assess competence; certification questions reflecting this absence of consensus; lack of sufficient knowledge about ADR on the part of judges, attorneys, program administrators, government policymakers and litigants; a wide spectrum of mediation styles and approaches; the confidentiality inherent in ADR processes that allows them to operate in private, away from public scrutiny making it difficult to assess, measure, and control the fitness and proficiency of neutrals; a lack of sufficient funding and resources; a lack of sufficient racial, gender and ethnic diversity on the part of neutrals; and the existence of state statutes, regulations, and court rules which sometimes inhibit quality.<sup>97</sup>

## **J. Upgrade Services Through Long-term, Dedicated Funding**

**Recommendation 10: The ADR Commission should study and propose to the Supreme Court from time to time appropriate surcharge fees and a responsible Judiciary General Fund budget for the practical, viable development and improvement of court-annexed alternative dispute resolution programs in the New Mexico Judiciary.**

Sustainable funding for court-annexed dispute resolution alternatives is only possible through a limited number of approaches, none of which are guaranteed or smooth roads to travel. One approach is for top court leaders to conclude that their long-term vision for the Judiciary includes stable, General Fund core support for court-annexed dispute resolution alternatives. Another approach is a specific surcharge attached to filings which is dedicated to specific

<sup>96</sup> Every neutral that provides services for family cases should have this training.

<sup>97</sup> For example, court rules which limit the length of mediation sessions or, conversely, require continued participation when the mediator and all parties agree that no further progress is possible.

support for alternative dispute resolution programming that cannot be diverted to offset reductions elsewhere in court budgets such as was done with the fee supporting magistrate court volunteer mediation efforts. A third approach involves in-house staff serving as mediators, with payments made by parties for their services augmenting funding for court-annexed programs.

A model for using these various approaches in combination is the First District where the General Fund, surcharges, and litigant payments collectively support Family Court Services. Here, the Domestic Relations Mediation Fund is composed of both filing fee surcharges and direct payments by parties for services rendered. Some employees are paid entirely out of the General Fund, others are paid partly out of the General Fund and partly out of the Mediation Fund, and three employees are paid entirely out of the Mediation Fund.<sup>98</sup>

Any Commission proposals should consider phased-in funding, the ability to reallocate current Judiciary resources to economically stressed areas, matching grant monies, responsible user fees, pro bono services, and other options directed at easing and sustaining funding for long-term programming, including but not limited to public and private contributions (i.e. voluntary juror fee allocations, fundraising programs and the like). As possible, such financing plans should also outline and highlight cost and time savings for the court and public as well as enhanced access to justice for litigants.

It is helpful to place the current economic crisis in perspective. There is little dispute that the eighteen month Great Recession lasting from late 2007 to mid-2009 met not only the classic definition of economic contraction as *a measurable, long-term drop in the Gross Domestic Product (GDP) across diverse industries and markets for two or more successive quarters*, but it resulted in a very different recovery than was experienced in the three most recent recessionary cycles: July 1981 to November 1982 (14 months), July 1990 to March 1991 (eight months), and March 2001 to November 2001 (eight months). This most recent recession lasting 18 months didn't lead to what economists conclude is a conventional recovery. Although banks and other financial institutions, the stock market, large corporations, and the wealthy have bounced back to pre-recession levels, the middle class, young, poor and governments have not. Further, high government debt loads and a continued structural imbalance in public budgets – tax revenues that cannot sustain even the current reduced level of government expenditures – mean it is unlikely that states or local governments will return to budget stability anytime soon. And when they do, it will be at much lower funding levels for a substantially long time.

With that as a backdrop, it will be a tough sell to devise and secure sustainable funding for court-annexed dispute resolution alternatives. Not undoable, just hard. To do so will require concerted and deliberate action on the part of the Commission in proposing solutions and persuading the Supreme Court and/or Legislature to support them. The pathway forward certainly must embrace the proposition that to do so is one of the Judiciary's best and most responsible methods to save time and money for litigants as well as the judicial system. That argument can resonate with government budgeteers and elected statespersons, too, but it must first be adopted and championed as a critical solution by top Judiciary leaders.

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<sup>98</sup> Source: First Judicial District, Court Constituent Services.