

## A Message From the Chair

Welcome to the inaugural edition of the Ninth Circuit ADR Committee Newsletter. We plan to publish the newsletter quarterly, providing judges and court staff with useful information about alternative dispute resolution.

The newsletter will highlight successful ADR programs, how they were organized and the people who run them. We hope you find the newsletter helpful and welcome your feedback.

As part of its strategic plan, the ADR Committee intends to: (1) serve as a circuit-wide resource for courts in designing ADR systems tailored to a district's needs; (2) provide ADR training to courts, attorneys and court staff; (3) volunteer our committee members to offer busy districts the committee's direct help in settling cases; and (4) assist districts in the development of reentry courts. Here are some highlights of the ADR Committee's recent activities:

### Resolution Roundup

#### Settlement Week in the District of Idaho

Last April, ADR Committee members, other judges in the circuit and private mediators traveled to Idaho for the circuit's first settlement week. Twenty-nine cases were mediated in Boise, Pocatello, and Coeur d'Alene. Of the 29 cases, four mediations were continued, and the parties have scheduled follow-up sessions. Two cases achieved partial settlements (one bankruptcy and one civil case). Of the 23 remaining cases, 16 settled, which resulted in a 70 percent settlement rate. Of those 16 cases, 10 settled before dispositive motions were decided. Of great importance is the fact that two of the cases that settled were class actions. One was a class action securities fraud case, and the second was a 30-year-old prisoner civil rights class action.

*continued on Page 2*



Magistrate Judge Valerie P. Cooke

## Prisoner ADR: Mediating Behind Bars

*by Denise M. Asper, Prisoner Litigation Project Director*

“In a world defined by deprivation, things that are trivial in the outside world are magnified to a significance far beyond their street value.” Wilbert Rideau, an inmate who spent 40 years at Louisiana's Angola State Prison.

The inmate wore his hair in a long braid and had tattoos on his neck and forearms. Sentenced to a federal prison for manufacturing methamphetamine, he had been brought to the federal courthouse for a mediation session. He had sued his court-appointed attorney in a qui tam lawsuit brought under the False Claims Act, claiming the attorney falsified CJA payment

*continued on Page 3*

## New Judges Orientation

Magistrate Judge Valerie P. Cooke and Denise M. Asper gave a presentation to the new district and magistrate judges in May 2012 on effective case management techniques for prisoner civil rights cases. This is the third year the new judge orientation has included a portion on prisoner case management. One of the suggestions provided to the new judges was the use of an early hearing conducted either at the inmate's prison facility or by telephone to determine whether the plaintiff's allegations can survive the screening standards. *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985), *abrogated on other grounds by Neitzke v. Williams*, 490 U.S. 319, 324 (1989) (similar in effect to a motion for more definite statement); *see also Julian v. Gusman*, 2011 WL 1399694 (E.D. La.). The

*continued on Page 4*

### Also in This Issue

ADR Calendar

page 2

## MESSAGE *continued from page 1*

To understand just how successful the Resolution Roundup was, this statistic says it all: from July 1, 2011 through April 6, 2012, third party neutrals mediated 35 cases, yet 29 cases were mediated in one week!

### **ADR Committee Training and Systems Design and Development**

Denise M. Asper, director of the circuit's Prison Litigation Project, and Sujean Park, who directs ADR and pro bono services for the Eastern District of California, conducted training in inmate mediation for the District of Nevada. Pro bono mediators in the Reno and Las Vegas courts, as well as the deputy attorneys general who appear in Section 1983 inmate early mediations participated in the training. Judges and pro se law clerks from the District of Arizona also visited Reno this past April to observe inmate early mediations, and meet with corrections officials and members of the attorney general's office to understand how the program works.

### **Notable ADR Events**

After Chief District Judge John M. Roll's death, the Ninth Circuit mediators traveled to the District of Arizona to mediate over 60 civil cases. Congratulations to the mediators for the generous use of their time and talents.

## **ADR** Calendar

### **August 2012**

ADR Workshop at  
Ninth Circuit Judicial Conference

### **September 2012**

Award Presentations

### **October 2012**

ADR Committee Meeting

### **Collaboration with Law School Clinical Programs**

The ADR Committee believes law schools are a valuable resource to assist the district courts in court-sponsored ADR programs. McGeorge School of Law has implemented an innovative co-mediation program in the Eastern District of California in which law students work with a magistrate judge in preparing inmates for settlement conferences in Section 1983 cases. Law students from the University of Idaho's legal clinic serve as limited purpose appointment counsel in inmate Section 1983 cases. Settlement of these cases is greatly enhanced when inmates are represented by limited purpose appointment counsel in mediation. Given the steady number of inmate cases and the sharp increase in cases filed by unrepresented litigants generally, the committee is interested in working with other districts in partnerships with law schools to offer ADR assistance to effectively manage these cases.

### **Reentry Courts**

Reentry courts assist individuals on supervised release to reduce recidivism and to help people make a successful transition to the community. Reentry courts are currently in operation in the Northern and Central Districts of California, Guam, Hawaii, Idaho, Nevada, Oregon, and the Eastern and Western Districts of Washington. Elsewhere in California, the Southern District offers a pretrial diversion program, while the Eastern District is designing its future reentry court.

The ADR Committee will host a reentry court workshop at the circuit conference in Maui for judges, U.S. attorneys, federal defenders, chief probation and chief pretrial services officers. The program will include a presentation by Hawaii's reentry court team and comments from reentry court graduates. The workshop will be held on Monday, August 13, at 10:30 a.m., Regency C.

Our next newsletter will feature settlement conferences in criminal cases in the Western District of Washington and in the District of Arizona. Please call or email me if you have questions or are interested in our committee's assistance in your district: (775) 686-5855 or [valerie\\_cooke@nvd.uscourts.gov](mailto:valerie_cooke@nvd.uscourts.gov).

**For questions or comments, please contact the ADR Committee by email at [ADR\\_Committee@ce9.uscourts.gov](mailto:ADR_Committee@ce9.uscourts.gov).**

## PRISONER *continued from page 1*

vouchers for work performed on his criminal case. The complaint alleged that the attorney never visited his client, never interviewed the witnesses, and showed up for trial unprepared. Attached to the complaint was an affidavit from the commander of the jail in which the inmate had been held prior to his trial. In the affidavit, the commander said that the inmate's attorney never visited him at the jail. If the inmate prevailed in the lawsuit, he would be entitled to treble damages against the attorney.

and the county attorney where he lived had decided to pursue criminal charges against him.

After the inmate heard about the attorney's situation, he paused and then told his former lawyer that he knew what it was like to lose everything. He said that his losses closely mirrored those of the attorney. The inmate expressed forgiveness to the attorney and said that he would not pursue the case any further. The inmate asked the attorney to pay for

prisoners during the mediation sessions is: this is the first time someone has treated me like a human being.

The goal of the prisoner mediation programs is to model a conflict resolution process that can be utilized by prison and jail officials. The process is designed to listen to the legitimate concerns of prison officials, the day-to-day realities of correctional officers, and the systemic issues which, when left unaddressed, result in violence within the prison. Creating a safer workplace for the correctional officers and an accountability for all who work and live within the prison walls is feasible through increased use of mediation and conflict resolution training. Ninety percent of incarcerated individuals are released from custody, and the use of conflict resolution models can be one of the most effective reentry tools an inmate can obtain.



*Photo courtesy of the California Department of Corrections.*

*Inmates at the receiving center in San Quentin, California.*

The court ordered the parties to participate in an early mediation session, during which the attorney admitted that he failed to perform much of the work for which he submitted CJA vouchers. The attorney told the inmate that he was facing disbarment. The attorney had developed a drug addiction and stolen some client funds. He told the inmate that he was going to lose everything: his wife was leaving him, he could only see his children under supervision,

the filing fee and copying costs associated with the complaint, and the matter was settled.

Scenarios similar to the one set forth above have occurred repeatedly in prisoner mediation sessions: the inmate's claims settle after the defendants meet with the inmate and provide an explanation of what went wrong. Occasionally, the inmate even receives an apology from the defendants. The remark heard most often from the

Prisoner mediation programs are currently utilized in the districts of Idaho, Nevada, California, Montana, and soon, Arizona. The settlement rates for the mediation programs range from 35 to 65 percent. Harvard Law School Professor James Greiner is conducting an effectiveness study on the Nevada early mediation model and results will be available in July 2013. For assistance with incorporating prisoner mediation into your case management plans, please contact the ADR Committee, at [ADR\\_Committee@ce9.uscourts.gov](mailto:ADR_Committee@ce9.uscourts.gov).

## NEW JUDGES *continued from page 1*

inmate plaintiff and a representative from the attorney general's office attend the conference at which a judge or staff attorney discusses the deficiencies in the plaintiff's complaint, attempts to narrow the number of defendants, creates a discovery plan, and pursues potential settlement scenarios. The hearing can be held before or contemporaneously with the filing of a response from the state.

Another case management strategy includes the use of a questionnaire to determine the adequacy of the inmate's allegations. *Watson v. Ault*, 525 F.2d 886, 892 (5th Cir.1976) (incorporating the questionnaire into the court record as a basis for either dismissing the complaint or authorizing plaintiff to proceed with specific claims). The other technique judges have found useful is requiring the correctional institution to file a report, supplying information about the prisoner's claims. The purpose of the report is to identify and clarify the issues a plaintiff raises in his or her complaint. *Martinez v. Aaron*, 570 F.2d 317 (10th Cir. 1978); *In Re Arizona*, 528 F.3d 652 (9th Cir. 2008) (recognizing the use of the report in the Ninth Circuit). Telephone evidentiary hearings before a judge may be used in place of a written report. *Gee v. Estes*, 829 F.2d 1005, 1007 (10th Cir. 1987). In certain circumstances, the court may consider the *Martinez* report to be part of the pleadings for purposes of Fed. R. Civ. P. 12(b). *Hall v. Bellmon*, 935 F.2d 1106, 1112 (10th Cir. 1991). If the plaintiff is given a notice and an opportunity to respond, the *Martinez* report can be used as a basis for summary judgment. *Id.* at 1112-13.

For questions regarding prisoner civil rights case management techniques, please contact Denise M. Asper, Prison Litigation Project Director, (415) 355-8967; [dasper@ce9.uscourts.gov](mailto:dasper@ce9.uscourts.gov).

## ADR Committee Members

Hon. Valerie P. Cooke

*Chair, Magistrate Judge, NV*

Hon. Jan M. Adler

*Magistrate Judge, CAS*

Hon. Ann L. Aiken

*Chief District Judge, OR*

Ms. Denise M. Asper

*Prisoner Litigation Project Director, OCE*

Ms. Claudia L. Bernard

*Chief Circuit Mediator*

Ms. Cathy A. Catterson

*Circuit and Court of Appeals Executive*

Ms. Rochelle E. East,

*Chief Deputy Attorney General, California*

Mr. Howard Herman

*Director of ADR Programs, CAN*

Hon. Leslie E. Kobayashi

*District Judge, HI*

Hon. Edward Leavy

*Senior Circuit Judge*

Hon. Ricardo S. Martinez

*District Judge, WAW*

Hon. Kendall J. Newman

*Magistrate Judge, CAE*

Mr. Randall J. Newman

*Retired Bankruptcy Judge, Arbitrator, JAMS*

Ms. Elizabeth "Libby" A. Smith

*District and Bankruptcy Court Clerk, ID*

Hon. N. Randy Smith

*Circuit Judge*

Hon. Christina A. Snyder

*District Judge, CAC*

Hon. Frank R. Zapata

*Senior District Judge, AZ*



Office of the Circuit Executive

Cathy A. Catterson, Circuit & Court of Appeals Executive

P.O. Box 193939, San Francisco, CA 94119-3939

Ph: (415) 355-8900, Fax: (415) 355-8901

<http://www.ca9.uscourts.gov>

### ADR Newsletter Staff:

David Madden, *Editor, Asst. Circuit Executive for Public Information*

Denise M. Asper, *Prisoner Litigation Project Director*

Katherine M. Rodriguez, *Communications Asst. for Public Information*

Alex Clausen, *Graphic Artist for Public Information*