

## Mediators Win Over Skeptics in the District of Arizona

Two years ago, the United States District Court for the District of Arizona was hit hard by the tragic death of Chief District Judge John M. Roll in the Tucson shooting rampage. Not only were our judges left grief stricken by the loss of Judge Roll, they faced the daunting task of adding his sizeable caseload to their own. At the time, our court had the second largest criminal caseload in the nation (now first), most of it involving illegal immigration and drug



*Roslyn O. Silver is the Chief District Judge for the District of Arizona*

smuggling. To say our judges had their hands full was an understatement. Things had gotten so bad that Judge Roll had been preparing to declare a judicial emergency, something I promptly did upon assuming the chief judgeship after his death.

Following the tragedy, we were heartened to receive many offers of assistance, including one from the Ninth Circuit's mediation staff. With the approval of Ninth Circuit Chief Judge Alex Kozinski, the mediators reached out to our court to offer their services. Despite our predicament, many of the judges here were skeptical. Our court had always relied on

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## Funding Changes to Indispensable ADR Programs

Members of the Ninth Circuit's ADR Committee reacted strongly to the news that the Judicial Conference of the United States had approved a new staffing factor for district court ADR programs, which will cut funding for these programs. Courts with multi-option ADR programs were previously designated "robust" programs and were awarded additional clerk's office funding. The funding has been eliminated, and the programs are given only one staffing factor. Each program must be independently certified by the Administrative Office of the U.S. Courts. District courts in Idaho, and the Northern and Central districts of California will lose funding under the new formula.

Magistrate Judge Valerie Cooke, chair of the Ninth Circuit's ADR Committee, stated that "attorneys and

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## Training Highlights of ADR Committee Members

Committee members provide ADR training, consultation and outreach throughout the country and abroad. Some examples of training include:

Claudia Bernard, Chief Ninth Circuit Mediator, and Howard Herman, ADR Program Director, Northern District of California, provided mediation training for state court and federal judges in Guam. They also presented an advanced mediation workshop for state court judge and private mediators in the District of Idaho. Ms. Bernard also serves as the Chair for the Communication and Neuroscience training tracks for the ABA Dispute Resolution Conference. Mr. Herman teaches courses at U.C. Hastings College of the Law on "Effective Lawyering in Mediation." He also serves on the Executive Committee of the ABA Dispute Resolution Section.

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# Ninth Circuit ADR Awards Presented

The Honorable Susan Leeson, a retired Oregon Supreme Court justice now working as a federal court mediator, and the Willamette University College of Law were honored recently for individual and institutional achievements in the field of alternative dispute resolution.

Justice Leeson received the 2012 Robert F. Peckham Award for Excellence in ADR, while the law school received the 2012 Ninth Circuit ADR Education Award. The awards were presented on October 22, 2012, during a meeting of the Ninth Circuit ADR Committee at the federal courthouse in Portland, Oregon. Federal judges, members of the bar and Willamette law school students attended the event. Justice Leeson is credited with rejuvenating the Oregon federal court's mediation program. She led efforts to revise the court's ADR Local Rule; reorganized the court's Pro Bono Mediation Civil Panel; contributed to the development of ADR resources on the court's Internet website; set up systems to generate statistics on ADR use; and worked tirelessly to promote the program to the bar and public. Her innovations include establishing a pro bono foreclosure mediation panel.

The ADR Education Award was accepted by Richard Birke and Sukhsimranjit Singh, the director and associate director, respectively, of the Willamette University College



*Justice Susan Leeson, center, with Chief District Judge Ann Aiken of Oregon, left, and Magistrate Judge Valerie Cooke of Nevada, chair of the Ninth Circuit ADR Committee.*

of Law's Center for Dispute Resolution. Established in 1983, the center offers a broad ADR curriculum. Its faculty includes noted instructors, researchers and lecturers who have contributed significantly to advances in the ADR field nationally and internationally.

The Peckham and ADR Education awards were established in 2001 and 2005, respectively, by the Judicial Council of the Ninth Circuit, governing body of the federal courts in nine western states and two Pacific Island jurisdictions. The Peckham Award is named for the former chief district judge of the Northern District of California, who helped pioneer use of legal means other than court trials to resolve disputes.

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## TRAINING *continued from page 1*

Magistrate Judge Valerie Cooke consulted with delegations from India, Sri Lanka, Afghanistan, Iraq, Pakistan, and Kenya on case management and ADR system design at the Northern Nevada International Center. She also presented on ADR case management strategy at the Ninth Chief Judges meeting and lectured

## ADR Calendar

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**March 12, 2013**  
**ADR Committee Meeting**

**May 2013**  
**New Judge Training**

on ADR methods and system design to law students in San Sebastian and Bilbao, Spain.

Judge Cooke, Magistrate Judge Candy Dale (D.ID), Denise Asper (OCE), and Sujean Park (EDCA) presented at the 2012 ABA Court Symposium on ADR on mediating cases in prisoner litigation.

Denise Asper conducted mediation training for deputy attorneys general in Las Vegas and Carson City, Nevada, and for pro bono mediators in Nevada's prisoner mediation program. Ms. Asper provided similar training for deputy attorneys general and mediators in Idaho.

Please contact the ADR Committee of the Ninth Circuit for training and consultation assistance.

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clients now assume that ADR is an integral part of the legal process in the federal judiciary. They have come to expect that our courts will provide options for dispute resolution that certainly include jury trials, but also offer mediation, court-sponsored settlement conferences, and a wide array of court-annexed programs.” Circuit Judge N. Randy Smith, a member of the ADR Committee, commented that he has extensively mediated both state and federal court cases during his tenure on the state and federal benches. He said that “ADR is an integral part of case management in the trial court, and I felt obligated to offer this public service as part of my judicial duties.”

The ADR Committee was also informed that the Federal Judicial Center is conducting an effectiveness study of court-annexed ADR programs over the next year. Donna Stienstra at the FJC will lead the study, and the results will significantly influence future funding decisions for district court ADR programs. The ADR Committee has formed a working group to focus on data collection which will prove the effectiveness of district court ADR programs. The information from the working group will be provided to the FJC.

At the ADR Committee’s October 2012 meeting, its members discussed the congressional mandate to provide ADR options in federal courts. In October 1998, Congress passed the Alternative Dispute Resolution Act (ADR Act). The ADR Act states

§ 651. Authorization of alternative dispute resolution

(a) Definition. - For purposes of this chapter, an alternative dispute resolution process includes any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial, and arbitration as provided in sections 654 through 658.

(b) Authority. - Each United States district court shall authorize, by local rule adopted under section 2071(a), the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy, in accordance with this chapter, except that

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## MEDIATORS *continued from page 1*

its magistrate judges for settlement work. We were pleased with their work and had a hard time imagining that non-judicial officers could be as effective. But the magistrate judges were overwhelmed and welcomed the promise of a respite. So, skeptically, we agreed to experiment with mediation conducted by the Ninth Circuit mediators. To our great surprise and good fortune, the project was a resounding success.

Over the course of the summer and fall of 2011, eight different Ninth Circuit mediators took turns setting up shop in our courthouses in Phoenix and Tucson. The court initially sent them 149 civil cases. Of these, 29 were later removed from the mediation track, mostly for reasons of timing. Of the remaining 120 cases, the mediators settled 88 or 73 percent. The cases ranged from consumer class actions to civil rights cases, to wrongful death actions, and to intellectual property matters; essentially the whole spectrum of district court litigation.

**The experiment opened our eyes to the value of court-sponsored mediation conducted by skilled mediators.**

The mediators were models of professionalism. The lawyers who worked with them universally expressed respect for their abilities and diligence, describing them as talented, professional and excellent at what they do. Clients expressed relief at the outcomes obtained and gratitude for having been listened to with respect and understanding. Here is a sampling of their comments:

“Our mediator had the rare ability to obtain the trust of both parties, and then use that trust to explain persuasively to both sides the benefits of resolution. This was a case I never thought would settle. He did an excellent job.” - Ali Farhang of Farhang & Medcoff in Tucson

“Our mediator was personable, effective and accommodating. She helped us resolve three difficult medical device cases; working with her was a very positive experience.” - Lori A. Zirkle of Bowman and Brooke in Phoenix

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the use of arbitration may be authorized only as provided in section 654. Each United States district court shall devise and implement its own alternative dispute resolution program, by local rule adopted under section 2071(a), to encourage and promote the use of alternative dispute resolution in its district.

(c) Existing Alternative Dispute Resolution Programs. - In those courts where an alternative dispute resolution program is in place on the date of the enactment of the Alternative Dispute Resolution Act of 1998, the court shall examine the effectiveness of that program and adopt such improvements to the program as are consistent with the provisions and purposes of this chapter [28 U.S.C.A. 651 et seq.].

(d) Administration of Alternative Dispute Resolution Programs. - Each United States district court shall designate an employee, or a judicial officer, who is knowledgeable in alternative dispute resolution practices and processes to implement, administer, oversee, and evaluate the court's alternative dispute resolution program. Such person may also be responsible for recruiting, screening, and training attorneys to serve as neutrals and arbitrators in the court's alternative dispute resolution program.

(e) Title 9 Not Affected. - This chapter [28 U.S.C.A. § 651 et seq.] shall not affect title 9, United States Code.

(f) Program Support. - The Federal Judicial Center and the Administrative Office of the United States Courts are authorized to assist the district courts in the establishment and improvement of alternative dispute resolution programs by identifying particular practices employed in successful programs and providing additional assistance as needed and appropriate.

Congress based this legislation on its finding that ADR "has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlement." 28 U.S.C. § 651. The requirement to integrate ADR options into district court case management is in jeopardy of becoming an unfunded mandate.

The ADR Committee welcomes feedback from Ninth Circuit district courts on the effect the ADR funding cuts.

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Magistrate Judge Charles R. Pyle, who served as liaison to the mediators working in the court's Tucson division, was similarly impressed.

"The Ninth Circuit mediators provided an invaluable service to our Court during a time of critical need," Judge Pyle told me. "They came to Arizona with a great reputation and left with a better one. We are grateful for their efforts and willingness to help."

I could not agree more. The experiment opened our eyes to the value of court-sponsored mediation conducted by skilled mediators. Our initial skepticism was replaced by unqualified respect and appreciation. We are extremely grateful to have received their help.

## 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*

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Mr. Howard Herman, *Director of ADR Programs, CAN*

Hon. Leslie E. Kobayashi, *District Judge, HI*

Hon. Ricardo S. Martinez, *District Judge, WAW*

Hon. Richard Neiter, *Bankruptcy Judge, CAC*

Hon. Kendall J. Newman, *Magistrate Judge, CAE*

Ms. Elizabeth "Libby" A. Smith,  
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