

Alternative Methods of Dispute Resolution: A Path Way from Academic Law to Practice of Law

September 24, 2018, 12:00 – 1:00
UNM School of Law, Room 2404
One MCLE General Credit
Lunch Provided

**A Panel Discussion with
Laura Bassein, David Levin & Dathan Weems**

Materials

Printed:

1. Alternative Methods of Dispute Resolution: A Brief Introductory Overview

Available on www.nmadr.org:

2. Second Judicial District Court Local Rules LR2-601-603
3. New Mexico Statewide Guidelines For Court-Connected Mediation Services
4. New Mexico Mediation Procedures Act
5. Model Standards of Conduct for Mediators
6. National Standards for Court Connected Mediation Programs
7. Model Standards of Practice for Family and Divorce
8. Mediator Listening Skills for All Attorneys
9. Acknowledgment - A Dispute Resolution Basic Skill

Panelists

LAURA BASSEIN, UNM School of Law--Institute of Public Law Senior Attorney, works with New Mexico's Judicial Education Center and Center for Child and Family Justice. She serves as a New Mexico Supreme Court Alternative Dispute Resolution (ADR) Commissioner. Laura formerly worked for the 1) Administrative Office of the Courts on domestic violence, sexual assault and stalking issues, and as Children's Court Mediation Program statewide coordinator; and 2) Second Judicial District Court as Program Manager/Mediator of the Pro Se Mediation Program. She previously worked in Michigan's Supreme Court Office of Dispute Resolution managing several statewide mediation programs. For over twenty years, Laura has trained others in conflict resolution, basic mediation, child protection mediation, family mediation, and various advanced mediation topics. She has taught basic and family mediation courses as UNM School of Law adjunct faculty since 2008. Laura obtained her law degree in 1986 from the University of Colorado and practiced law in both the private and public sectors before turning toward work in ADR.

DAVID LEVIN graduated from Harvard College in 1971 and from UNM School of Law in 1977. David has been a trained mediator since 1987. David began his legal career as a civil litigator and general practitioner, later becoming an "AV" rated Board Recognized Specialist in Family Law and establishing an alternative dispute resolution and mediation practice. David served as Director of Court Alternatives, Second Judicial District Court, State of New Mexico, 2002-2013; Chair, Alternative Dispute Resolution Committee, State Bar of New Mexico, 2004-2014; State Project Manager, Mediation Program, Magistrate Division, Administrative Office of the Courts, 2013-2016; and Chair of the Statewide Alternative Dispute Resolution Commission, New Mexico Supreme Court, 2011-2017. David has taught basic, family, magistrate court, and advanced mediation, as well as settlement facilitation. David is currently practicing mediation and providing mediation training and education, as well as being a resource for court-connected ADR programs.

DATHAN WEEMS is a litigation and mediation attorney in private practice in Albuquerque. His experience in both litigation and mediation provides a comprehensive and balanced approach to conflict, giving his clients multiple paths to resolution. In 2015, Dathan began teaching mediation classes at the UNM Law School after many years coaching and presenting on mediation topics in the State of New Mexico. Dathan is a member of numerous mediation organizations, including the New Mexico Mediation Association, the State Bar ADR Committee, and Association for Conflict Resolution. Dathan has deep roots in the Albuquerque nonprofit community. He is the board chair for Mayor Keller's Volunteer Advisory Board, as well as for Albuquerque Involved, a nonprofit Dathan created that betters the community through service work and grants. Dathan was born and raised in Farmington, New Mexico. He attended Trinity University in San Antonio, Texas for his undergraduate and came home to get his law degree at the UNM School of Law.

Alternative Methods of Dispute Resolution

A Brief Introductory Overview

Alternative Methods of Dispute Resolution (ADR) refers to a range of methods beyond dispute resolution by a trial on the merits. The range includes settlement conference, summary jury trial, early neutral evaluation, binding/non-binding arbitration, mediation, collaborative law, and more. In New Mexico, commonly used ADR methods include binding/non-binding arbitration, mediation, settlement facilitation, and collaborative law. In the rest of the nation, the terms “mediation” and “settlement facilitation” are both covered by the single term “mediation.”

In New Mexico, there are two historical origins for mediation, each bearing a different name: “mediation” borne of community mediation programs conducted by non-attorneys, and “settlement facilitation” borne of early court-connected programs conducted by attorneys. There were originally differences in style: mediation was known as more “facilitative,” where the mediator facilitated the parties’ own creation of options for resolution, and settlement facilitation was known as more “evaluative,” where the mediator evaluated the strength and weaknesses of each position and often offered recommendations for resolution.

Today, both mediation and settlement facilitation include both styles, and attorneys and non-attorneys conduct both mediation and settlement facilitation. The distinction is only a historical anomaly. Styles of mediations are seen as a continuum. While programs and mediators may have a preferred style, actual mediation practice may often be a thoughtful blend of mediation styles.

Third-Party Determination/Self-Determination is a more differentiating scale for ADR methods. On one hand, a third party may determine the outcome. For example, arbitration is like a trial on the merits: attorneys act on behalf of the parties, and the arbitrator makes the decision. On the other hand, in mediation, the mediator facilitates the process, the attorneys support the actions of the parties, and the parties exercise self-determination. The Third-Party Determination/Self-Determination continuum deeply impacts how the ADR method is conducted and the roles of the people in the room.

Private Service/Court-Connected Program continuum will shape the ADR service to be rendered. On one hand, the parties may contract with an ADR service provider. The agreement between the parties and the ADR service provider will define the ADR method to be used. The agreement may invoke a legally recognized format and set of rules, such as the Uniform Arbitration Act. The background of the ADR service provider and the nature of the ADR method may also invoke professional, ethical, and practice standards, such as regulations governing the practice of law and standards for mediators.

On the other hand, an ADR service may be provided by a court-connected program, such as a district court settlement facilitation program or a magistrate court mediation program. These programs are authorized and governed by additional frameworks beyond professional, ethical, and practice standards, such as supreme court approved local rules, statutes, and supreme court rules and guidelines. Further, a program itself may have its own unique standards of practice.

Parties, attorneys, and ADR service providers should be aware of applicable requirements of the ADR method to be rendered. In New Mexico this requirement is particularly salient, because ADR methods are typically more governed by a wide variety of local practices than governed by ascertainable statewide practice. However, throughout New Mexico, professional and legal standards may also apply. These

standards may be found in statutes, regulations, court rules, case law, program and organization requirements, national standards, model acts, and more.

The “vanishing trial” makes ADR competency mandatory for attorneys. The societal context for the practice of law is substantively changing. There are far fewer trials. “Bargaining in the shadow of the law” is more problematic when there are fewer precedents for what a judge or jury might do. Disputants are also changing. Fewer disputants desire or can afford full litigation services. The role for attorneys is being radically redefined.

There are ADR methods, such as arbitration, where traditional lawyer skills based upon trial advocacy skills carry the day. However, traditional legal training is less applicable for other popular ADR methods, such as mediation, particularly as party self-determination emerges as a core value.

ADR has become a necessary, if not required, part of legal dispute resolution. ADR is a different forum from the courtroom. Different approaches, skill sets, dynamics, and roles for attorneys are required. Competency as a trial attorney will not necessarily mean competency as either an ADR service provider or as a legal representative in an ADR process.

ADR is not the traditional practice of law. Lawyers are trained to assemble the relevant and material facts, to determine the applicable law, to develop a theory to support the position of the client, to negate the theory propounded by the other side, and to persuade the trier of fact to decide in their client’s favor. Yes, these talents are important for ADR. And, there is more.

ADR is a unique set of roles, relationships, and behaviors. Fundamentals are different. The attorney is no longer the sole actor; the client is a player. The other side is no longer an opponent to defeat; a voluntary resolution requires mutuality. Position based attempts to win are displaced by interest based collective decisions. A striving to solely control the outcome is subordinated to working together. These elements are often counter-intuitive to the classically trained attorney and to the historical role for the client.

There are communication skills and behaviors to be learned. Meaningful participation in ADR means both protecting the client and a different form of interacting with the other side, as well as one’s own client. For example, active listening, nonjudgmental acknowledgment, and an open creative, and flexible state of mind are essential. As will trial practice skills, these ADR skills can be taught and need to be a subject for life-long learning.

Why is ADR fluency important? The standard of care for attorneys has grown to include ADR competency. Clients are demanding alternatives to dispute resolution by traditional litigation methods. The economics of full litigation are no longer always feasible for attorney, clients, or even courts. Trial and/or ADR needs to be a choice. Practitioners should not default to one due to unfamiliarity with the other. Today, success, true satisfaction, and a healthier career call for a broader spectrum of skills and services. In the context of law school, educators and students alike need to approach legal training with a multi-dimensional framework.