

## A New Chair Takes the Helm

I am the new chair of the Ninth Circuit Alternative Dispute Resolution Committee. I look forward to serving the committee and the entire Ninth Circuit family.



*Andrew P. Gordon is a district judge in Las Vegas*

Prior to taking the bench in 2013, I was a private civil attorney. Much of my practice focused on ADR, and I served as an arbitrator and mediator in many commercial matters. I also had the pleasure of being one of the first mediators in Magistrate Judge Valerie P. Cooke's inmate mediation program in the District of Nevada.

I have seen both the value of properly employed ADR tools and the damage that can arise when those tools are improperly used. I have also experienced the creative problem solving that goes into each mediation session. I know that many times the mediated outcome provides remedies not found in a courtroom.

The ADR Committee has been an active advocate and consultant for programs and systems to facilitate the effective and efficient resolution of disputes. Over the past few years, the committee has also promoted the use of reentry and pretrial diversion programs for offenders in the federal system. Under the direction of our outgoing chair, Chief District Judge Ricardo Martinez of the Western District of Washington, the committee members have provided mediation training for those in the correctional law field, offered training workshops at the Ninth Circuit conferences, and published articles about current trends in the ADR field.

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## Applying Restorative Justice Principles to Criminal, Civil Cases

San Quentin State Prison sits on the edge of San Francisco Bay and is one of those incongruous places in the corrections world that incorporates both the old and new. Some of the prison walls date back to the 1850s, but in the center sits a new state-of-the-art hospital building. And next to the hospital building is an old, windowless chapel where a steady stream of volunteers for inmate programs gather during the week.



*Denise M. Asper is the Ninth Circuit Prison Litigation Project Director*



*A watchtower at San Quentin Prison*

I go to the San Quentin chapel to volunteer in a restorative justice program for inmates and victims of crime. The program provides another contrast between the old and the new: a restorative justice approach to victims and criminals in our legal culture.

Others involved in the criminal justice system can also participate in the program. It is fascinating to observe the perpetrators of crime seeking out

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opportunities to learn from crime victims, sometimes engaging in a dialogue with the very person they harmed. The program always begins with an overview of the restorative justice principles: (1) crime violates people and personal relationships; (2) the criminal owes obligations to the people he or she violated; and (3) the criminal's obligation is to somehow correct the wrongdoing. Crime is viewed as a violation of personal relationships within a community, and the crime's damage ripples through the entire community, weakening it. Howard Zehr, *Restorative Justice*, Skyhorse Publishing, Inc., 28-9 (2015). Zehr defines restorative justice as "a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs and obligations in order to heal and put things as right as possible." Zehr, *Changing Lenses: A New Focus for Crime and Justice*, 130 (1990).



The inmates who participate in the restorative justice program invite victims of a wide array of crimes to speak to them. They listen to powerful witnesses of the damage inflicted through crime and then give their reactions to the crime victims' words and emotions. One crime victim's story stands out in my mind because she was a single mother of twin boys. She put herself through college and a master's degree of social work, all the while raising these twin boys in a rough neighborhood in East Oakland, California. The boys were successful in school and received scholarships to college. The young men came home to visit for Christmas break, and one of them was killed while waiting for the other to come and help him with the stalled family car. This mother of the young man full of promise agreed to come and share her story. At the beginning, she spoke to the inmates in a beautiful sing-song voice. Then her words became more halting, until she started to cry and then wail for the son she had lost. She described the devastation to the victim's twin brother

as a limb being severed from the young man's body. She then methodically evoked the life events her dead son would never experience. The mother's wailing echoed through the San Quentin Chapel, and everyone in the room that day was forever marked with the intensity of this devastating loss.

After the inmates listen to the crime victim's stories, they are given an opportunity to respond to the victim's words, and most often, the inmates who speak have great difficulty talking through their tears and cracking voices.

The perpetrators of the crime discuss their remorse and the personal retribution they have undergone in prison. The most powerful programs include crime victims and the actual perpetrator, who speak about the relationships they have formed through victim and offender dialogues. One woman stood side by side with the young man who killed her daughter – an innocent victim of a drive by shooting. They discussed the evolution of their relationship from one of revulsion and hatred to one of friendship and compassion.

After the crime victims and offenders speak, the restorative justice participants break into small circles for further facilitated discussion. The circles follow a specific pattern of passing an object from person to person, designating the only person in the circle allowed to speak. The circle process reveals stories of crime, suffering, reconciliation and forgiveness. Sometimes the circles have crime victims who have not reconciled the damage inflicted on them and struggle to find a way through their pain.

The ultimate goal of restorative justice programs is to provide crime victims an opportunity to define their suffering and their needs. The crime victim defines her or his needs, rather than having the criminal justice system define them. The perpetrator's accountability for the crime flows from the victim's story of the specific harm she experienced. Family members of the victim and perpetrator can be included in the circle process in order to heal the damage caused to them and to

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provide a path for the criminal's accountability and restitution. Community members can also be included in the restorative justice process, helping to prevent future crimes and discern its root causes. The process also allows the victim to participate in a dialogue about preventing future harm to themselves and others in the community. Zehr, *Restorative Justice*, 39-40.

Our current criminal justice system tends to deepen the damage from crimes and separates the stakeholders into separate conflict camps. What are the implications for using a restorative justice continuum in federal criminal cases? Is there a way to incorporate the principles into pretrial diversion and reentry court programs? Would it allay fears of community members if they knew that an offender had participated in restorative justice programs with the victim of their crimes?

There are similarities between mediation in civil cases and the restorative justice process for criminal cases. Mediation is a gathering of those who have a stake in a specific dispute to collectively identify and address harms, needs and obligations. The mediation is designed to creatively put things as right as possible, given the harm caused by the dispute. For example, a circle process can be used in an opening session of a mediation or settlement conference. Both sides to the dispute are given an opportunity to express their



*The restorative justice program at San Quentin Prison brings together perpetrators of crime and the victims of crime.*

view of the dispute and the damage arising out of it. In an employment law case, the mediator's first instinct may be to separate the parties, discussing the parties' perspectives in individual caucus sessions. But a restorative justice approach would place the stakeholders in the same room for a facilitated circle discussion. Approaching the mediation as an identification of harms, needs, and obligations shifts the parties away from the retribution goals of a lawsuit to a set of restorative goals.

A talented mediator I used in my employment law practice always began our mediation sessions with a circle process. She took careful notes of each stakeholder's comments and read them back to reflect her understanding of the conflict. She was adept at identifying the harms in the dispute, and then encouraged the parties to describe what they

needed to resolve the harms. She directed the parties in the dispute to establish restorative goals, separate and apart from financial remedies, as a way to establish a forward path in the mediation. Only after the harms, needs, and common interests were explored, did she shift the parties' focus to the obligations or remedies for resolving the dispute.

As we close out a year and begin a new one, we can set our own goals, using the restorative principles of respect, responsibility and relationships. When we live in relationships, our behavior impacts others, and we have responsibilities for the harm we inflict. Those of us privileged to work in the court system have an opportunity to model the restorative principles outlined above. There is an urgent need for such models in the world today. ●

## FROM THE CHAIR *continued from page 1*

Committee members have traveled to Azerbaijan and Indonesia to train judges and conducted mindfulness workshops for clerk's office employees in various districts. An in house settlement project for inmate cases has been developed in California, and committee members consult with deputy attorneys general in other states' correctional law divisions on their settlement programs.

The committee conducted a survey of bankruptcy court ADR programs and found that several bankruptcy courts in the Ninth Circuit operate robust dispute resolution programs. Bankruptcy courts are using innovative online portals to bring parties together in mediation sessions.

The ADR Committee has also recognized excellence in Ninth Circuit ADR programs through the Peckham Award and innovative law school programs through the ADR Education Award.

It has been gratifying to watch the growth and refinement of alternative dispute resolution programs in our circuit. Our committee members generously spend time consulting with district court programs both in the Ninth Circuit and in courts across the country. ADR Committee members are also instrumental in implementing shared ADR resource programs across district courts as a way to address the lack of judicial appointments.

Our committee sends a huge "thank you" to outgoing chair Chief Judge Martinez for his leadership over the past three years. I hope to continue the high quality of work that he fostered in the committee. And I plan to explore new ways that the ADR Committee can assist courts and law schools in expanding and fine-tuning their ADR programs.

Please let us know if there is anything we can do to help your district and bankruptcy courts. ●

## ADR Committee Members

**Hon. Andrew P. Gordon**  
*Chair, District Judge, NV*

**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*

**Hon. Jacqueline Scott Corley**  
*Magistrate Judge, CAN*

**Hon. Roger L. Efremsky**  
*Chief Bankruptcy Judge, CAN*

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*Chief Bankruptcy Judge, WAW*

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

**Hon. Troy L. Nunley**  
*District Judge, CAE*

**Ms. Elizabeth "Libby" A. Smith**  
*District and Bankruptcy Court Clerk, ID*

**Hon. N. Randy Smith**  
*Circuit Judge, Pocatello, ID*

**Jonathan L. Wolff, Esq**  
*Senior Assistant Attorney General, CA*

## Committee Website and Newsletter Archive

[www.ce9.uscourts.gov/committees/adr/](http://www.ce9.uscourts.gov/committees/adr/)



### 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, *Managing Editor, Asst. Circuit Executive, Public Information*  
Denise M. Asper, *Prisoner Litigation Project Director*  
Katherine M. Rodriguez, *Communications Asst., Public Information*  
Alex Clausen, *Audio and Visual Specialist, Public Information*