

ANALYZING THE ALTERNATIVES

ENCOURAGING THE EFFECTIVE USE OF COURT-RELATED ADR IN ILLINOIS

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FEATURE ARTICLE



ADR BLOOMS IN ILLINOIS

Illinois is abuzz with ADR activity these days. New initiatives in Illinois to expand the use of mediation in the courts have taken root throughout the state and are now bearing fruit. These efforts are under way in almost every arena, from appellate court to trial, from civil law to family cases. Many of these new programs are the product of collaborations between the bench and the bar, demonstrating an increased awareness and appreciation of the possibilities that ADR opens to both courts and litigants.

Appellate Mediation

In March, the Illinois Senate passed SB 2757 in the first step toward formalizing the use of mediation at the appellate level. The bill, which provides a mechanism for the funding of mediations

referred by the courts of review, was passed by the Illinois House in May in an amended form. As of publication, it was on the Senate's calendar for further debate. (For more information on this bill, go to www.legis.state.il.us.) If enacted, the legislation will pave the way for the Illinois Supreme Court to write rules that govern the procedures for and administration of mediation in the appellate courts.

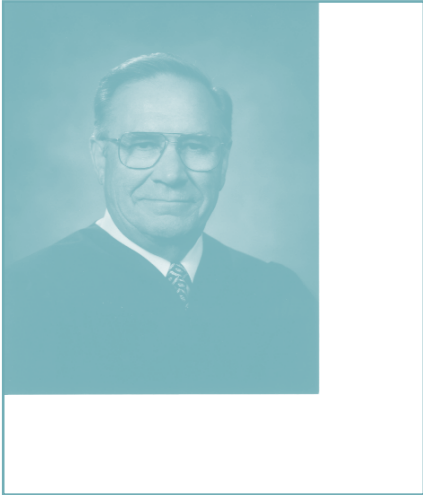
Mediation of Large Civil Cases

For the first time since 1996, more than one circuit took up mediation of large civil cases in a single year. Two major civil case mediation programs have blossomed so far in 2004. In far southern Illinois, the 1st Circuit program, guided by Judge Bruce D. Stewart, was established in January 2004. In Cook

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COMMITTED TO COMMUNITY

JUSTICE JOHN L. NICKELS



of Appeals, and as an elected trustee of the local community college. All the while he remained close to the land and his roots, farming 800 acres in Kane County, as he continued to do throughout his judicial career and as he continues to do today.

When Justice Nickels moved on to the bench, it was as a trial judge in Kane County. From there, he stepped to the appellate level before being elected to the Illinois Supreme Court in 1992. With each step, the community he served expanded until it included the entire state, and his sense of responsibility to that community never wavered.

This same sense of responsibility led Justice Nickels to appreciate the possibilities posed by ADR. Appointed liaison to the Supreme Court's Alternative Dispute Resolution Coordinating Committee, Justice Nickels began to see the benefits of mediation and arbitration. He states that through his role on the Committee he gained "a real hands-on understanding and appreciation of the ADR concept and its application to our society and the court system."

Justice Nickels believes ADR can play a significant role in assisting those with low incomes to resolve their disputes. Because ADR can shortcut costly litigation, it provides an avenue into the justice system that they otherwise might not have. This interest in expanding access to justice is hardly surprising given his work as Supreme Court liaison to the Lawyer's Trust Fund of Illinois. In this role, he worked to get authorization for overnight transfers to "sweep accounts" that pay higher interest rates, an effort that earned him the Illinois State Bar Association's first ever Access to Justice Award. This is just one

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SPEAKING OF COURT ADR . . .

MONITORING COURT-RELATED ADR: IF YOU DON'T COUNT IT, IT DOESN'T COUNT

This is the fourth in a series of occasional columns by CAADRS Executive Director Susan M. Yates addressing issues in court-related alternative dispute resolution.

The phrase, "if you don't count it, it doesn't count," often attributed to economist John Kenneth Galbraith, clearly applies to monitoring court-related ADR programs. Indeed, this simple, catchy phrase is a good starting point for exploring the concept of monitoring of court ADR programs. If a court does not count, that is monitor, its ADR programs, it will not have an accurate understanding of the impact of the programs on the court or litigants, nor will it be aware of any problems that arise with the programs. Instead, the court only would be made aware of individual incidents and perceptions that may or may not reflect the actual and complete impact of the programs.

On the other hand, a court that monitors its ADR programs will likely have better information to guide its use of the program. It will have a more accurate idea of what is happening, be better able to identify problems, and have greater insight into the benefits derived from its programs.

Meet Mandates

Borrowing another catchy phrase – this one applied to topics ranging from seat belts to gravity – monitoring ADR programs is not just a good idea, it's the law. For federal and state courts in Illinois, there are evaluation or reporting requirements for ADR programs. Fulfilling these requirements necessitates some level of monitoring.

The Federal ADR Act of 1998, for example, requires that each United States district court "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." (Emphasis added.) At the state court level, Illinois Supreme Court Rule 99 requires each circuit court to have a mechanism for reporting on mediation program activity to the Supreme Court. For arbitration, Illinois law requires an annual evaluation of court-annexed programs be submitted to the General Assembly. Putting this all together adds up to a need for monitoring of all court ADR programs in Illinois.

Good Public Policy

"If it ain't broke, don't fix it" are often wise words to live by, but if a court ADR program is broken in a way that impinges on fundamental legal rights, the court has a responsibility to fix the program. Without monitoring, a court may be unaware that a program is "broken." So, along with the legal requirements, there is also a sound public policy reason for courts to monitor their ADR efforts. When a court establishes an auxiliary function to the court and either mandates or suggests that litigants avail themselves of it, it takes on a new responsibility to ensure that the change does not negatively affect the protections offered by the traditional legal system even while offering exciting, positive new possibilities to litigants. Many courts readily recognize that one way to help ensure that the justice system continues to meet the responsibilities of the administration of justice is through effective monitoring of the court ADR program.

The Unexamined Program

Socrates' statement about the unexamined life not being worth living can be reframed for court ADR programs. While it may be a stretch to say that an unexamined court ADR program is not worth implementing at all, examining (or moni-

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COURT ADR PROGRAMS CONTINUED FROM THE COVER

County, which includes Chicago and many surrounding suburbs, a mediation program for law division cases began in April 2004. Appointed by Presiding Judge William D. Maddux of the Cook County Law Division, Judge Allen S. Goldberg has been the driving force behind the establishment of the program.

In the 1st Circuit's Major Civil Case Mediation Program, mediators on the court roster are attorneys who participated in a training organized by CAADRS. Future applicants must fulfill specific experience and training requirements as outlined in the rules, and be certified by a majority of the members of the Mediation Committee (made up of five judges appointed by the Chief Judge). Although the court maintains a list of these mediators, the parties may select any mediator of their choice. If the parties cannot agree on a mediator, each party submits a list of three approved mediators, from which the judge assigns the mediator for the case. The parties negotiate the fee with the mediator.

In Cook County's new Major Case Court-Annexed Civil Mediation Program leaders from both the bench and bar were deeply involved in determining the structure and process. In the program, potential mediators apply for certification by the court. To be certified, applicants must be attorneys with the requisite experience and training, as provided by court rule. As in the 1st Circuit, parties may select any mediator, whether on the court roster or not. Mediators selected from the court roster are compensated at a fixed hourly rate unless the parties agree otherwise. The presiding judge of an eligible case may assign the case to mediation either upon agreement by the parties or by a motion of the court, although it is anticipated that most cases will be assigned by party agreement.

Further information on this program, including the rule, a list of the certified mediators, frequently asked questions, and forms, can be

found on the court's web site at www.cook-countycourt.org/divisions/index.html.

Domestic Relations Mediation

Mediation has historically been most common in the area of family law in Illinois, so it is no surprise that many of the efforts currently under way are for issues arising in divorce mediation. Expansion of services is occurring from the far southern 1st Circuit to the far northern 17th Circuit.

The 1st Circuit has expanded its family mediation program to all counties in its jurisdiction and expanded eligible cases from contested child custody and visitation issues to all those arising from family law. The expanded program includes dissolution, post-dissolution, paternity, family, and order of protection proceedings.

In the 17th Circuit, in Rockford, family law judges are facing increasing workloads. To alleviate this, the judges are considering expanding the issues for which the court had been referring cases to mediation from custody and visitation to include financial matters. To see if such an expansion is warranted, an experiment has been designed in which a family division judge may refer cases to mediation for property and financial issues upon agreement of the parties. For the 15-case experiment, the mediator roster consists of five 17th Circuit attorney-mediators who have been selected for their expertise in matrimonial law. They participated in a special one-day course that emphasized skills for mediating financial disputes and working with lawyers in mediation. The parties may select any of the mediators, with whom they negotiate the fee individually.

At least one new program also is in the works. In southern Illinois, the 2nd Circuit's judicial mediation program for domestic relations cases is in the final stages of planning, with Judge Stephen G. Sawyer heading this effort. In this program, cases will initially be mediated by Judge Sawyer,

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COMMITMENT TO ADR RECOGNIZED

Two of CAADRS' own have been honored recently for their work to improve the courts in Illinois. Former 17th Circuit Chief Judge Harris Agnew, CAADRS' Director of Mediation Services and Executive Committee Chair, was inducted as Laureate of the Academy of Illinois Lawyers on March 3. The Academy was established by the Illinois State Bar Association to "celebrate excellence in the legal profession and to recognize

lawyers throughout the state who maintain the highest of professional standards." Judge Agnew was inducted in recognition of his profound influence on court ADR in the state. One supporter said it best: "He is simply relentless, tenacious, and motivated by his sense of right. He never gives up, nor does he give in. He very softly but surely stays the course and moves mountains."

Kent Lawrence, CAADRS Advisory Board member and President of the M.R. Bauer Foundation, was recog-



From left, Hon. Harris Agnew and his wife Pegee are welcomed to the induction ceremony by Chancellor Jill B. Berkeley of Chicago and Thomas S. Johnson of Rockford, who was chancellor in 1999 when the Academy was established.

nized by the Illinois Supreme Court for his "exceptional commitment to alternative dispute resolution in the State of Illinois through the M.R. Bauer Foundation, the Center for Analysis of Alternative Dispute Resolution Systems, and his work as an advisor to the Committee on Alternative Dispute Resolution."

CAADRS is truly privileged to have two individuals of such dedication and commitment as Judge Agnew and Mr. Lawrence working with us to enhance the use of ADR in Illinois.

COURT ADR PROGRAMS CONTINUED FROM PAGE 4

who participated in a 40-hour divorce and custody mediation training in order to meet the qualification standards set for judicial mediators by local court rule. Other judges who may be called on to mediate in the future will be required to meet those standards as well. Cases that have completed discovery may be referred to mediation either upon the request of a party or by motion of the court. To ensure that there will be no conflict between Judge Sawyer's responsibilities as a judge and his service as a mediator, only cases *outside* the county in which he sits will be sent to

mediation. The issues eligible for judicial mediation are child custody, child visitation, and removal of children from the state of Illinois. With Judge Sawyer as their mediator, disputing parties participate free of charge. Those parties that would prefer to pay a private mediator instead are provided that option through the court rule.

CAADRS Assistance

CAADRS assisted these circuits in the development of rules, the training of mediators, and the set up of program administration procedures.

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ANNUAL REPORT 2003: CAADRS

In 2003, courts turned to CAADRS more frequently, and for greater assistance, than in any previous year. Whether it was a consultation for development of a new court mediation program, or an evaluation of an existing program, CAADRS was in demand more than ever before by courts interested in making better use of ADR. Beyond this, CAADRS staff continued to reach out through other activities with the aim of enhancing ADR programs and increasing information flow to those who work with the courts.

Assistance to Courts

True to its mission, the majority of CAADRS' activities in 2003 involved assisting courts in Illinois to develop, monitor, and evaluate their mediation programs. Throughout the year, CAADRS was involved in developing or evaluating seven programs in six jurisdictions, as well as providing information to other jurisdictions looking into the possibility of starting up programs. CAADRS' activities in this area included:

- ✦ Working on the committees set up to create the Cook County Law Division mediation program for large civil cases, including the rules and training committees. CAADRS also designed post-mediation questionnaires for use by the program, and consulted on the creation of the monitoring and evaluation system.
- ✦ Assisting the 1st Circuit (in far southern Illinois) to start up their major civil case mediation program, including help with rules, creation of a monitoring and evaluation system, and organization of mediator training.
- ✦ Assisting the 2nd Circuit (also in southern Illinois) to create their judicial mediation program for contested child custody and visitation disputes, including help with rules and administra-

tive logistics, and the creation of a monitoring and evaluation system.

- ✦ Working with the 17th Circuit (based in Rockford) to extend their divorce mediation program to include the mediation of financial matters. Assistance included help with rules, training, and monitoring and evaluation of the program.
- ✦ Beginning the process of a comprehensive evaluation of the Cook County Child Protection Mediation Program.
- ✦ Creating and installing monitoring and evaluation software for the mediation program in the U.S. District Court for the Northern District of Illinois - Western Division (based in Rockford).
- ✦ Installing monitoring and evaluation software in the 14th Circuit (based in Rock Island) for their major civil case mediation program.

Outreach

In addition to directly assisting courts in Illinois, CAADRS was involved in a number of other projects that have a more national impact. Executive Director Susan Yates was asked by the American Bar Association to co-edit a book designed to assist judges to develop and manage court ADR programs. Publication is anticipated in late summer 2004. Additionally, Ms. Yates was invited to join the Editorial Board of Conflict Resolution Quarterly. She also continued to act as one of two representatives from the American Bar Association on the Joint Committee on Model Standards of Conduct for Mediators, whose mandate is to revise the mediator standards. The Association for Conflict Resolution (ACR) and the American Arbitration Association are also collaborating in this effort. This past

STEPS UP ASSISTANCE TO COURTS

year she also was invited to join the ACR Court Section's Advisory Council.

As part of her long-standing survey of evaluations of court mediation programs, Director of Research Jennifer Shack published "Mediation Can Bring Gains, But Under What Conditions?" in the Winter 2003 issue of *Dispute Resolution Magazine*, a publication of the American Bar Association's Dispute Resolution Section. The article provided preliminary findings of the survey and discussed changes to improve the research into the impact of mediation on litigants and the courts.

CAADRS staff was also busy presenting on different aspects of ADR. Presentations were made in 2003 to about 300 attendees at several events, including:

- ✦ The American Bar Association Dispute Resolution Section's annual conference
- ✦ The Association for Conflict Resolution's annual conference
- ✦ The Policy Consensus Initiative/ACR Court Section Pre-Conference Seminar
- ✦ Bar association meetings
- ✦ Local law school mediation classes

Resource Center

In addition to those individuals CAADRS educated through outreach, thousands of others came to CAADRS for information in 2003, far surpassing the number who did so in 2002. Last year, 88,259 visitors came to CAADRS' site. This is a 51% increase from the 58,300 visitors to our site in 2002. Inquiries to the Resource

Center increased as well, rising 30% from 91 to 118.

Web Site Update

To better serve the increasing numbers of people using CAADRS' resources, CAADRS began the long process of completely overhauling our web site in 2003. The improved site will be more easily navigated and will be expanded to provide more information to courts interested in developing or improving their mediation programs. Included as well will be sections specific to the interests of judges, lawyers, neutrals, and the public. This project is scheduled to be completed in 2005.

2004 and into the Future

If the first months of 2004 are any indication, this increased call for CAADRS' services in 2003 will continue well into 2004. CAADRS: Busier than ever, and well-prepared to assist courts in making more effective use of alternative dispute resolution.



OUT AND ABOUT WITH CAADRS

CAADRS warmly congratulates Executive Committee member Magistrate Judge Morton Denlow on being appointed Presiding Magistrate Judge of the U.S. District Court for the Northern District of Illinois (Eastern Division). His service in this role commenced on January 26, 2004.

CAADRS is the recipient of a mini-grant from CRInfo, an organization dedicated to the dissemination of information on conflict resolution, to improve and expand the court ADR section of CRInfo's web site. This project entails identifying the best court ADR resources in each of several topics related to court ADR, merging CAADRS' on-line database with CRInfo's, identifying other possible resources for both databases, recoding CRInfo's resources to better reflect their content, and searching for future funding sources to continue this work. When completed, CRInfo.org will have more thorough and better-organized court-related ADR resources available to the public.

Executive Committee Chair Hon. Harris H. Agnew explained the differences between mediation, litigation, and arbitration in a presentation at the Illinois State Bar Association Law Education Seminar on mediation that took place in February.

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MONITORING COURT-RELATED ADR

toring) court ADR programs makes them much more worthwhile – and informs a court of any major issues that might arise.

Monitoring systems should be designed and implemented during court ADR program design, although they can be added later to an existing program. The focus of monitoring efforts is determined by the goals of the program. If, for example, the goal of the program is to improve litigant satisfaction, the focus of monitoring will be on litigant sense of fairness, being treated justly in the process, etc. Specifics of monitoring also will vary based on the particular area of the law. A good monitoring program, however, will cover at least the following five basic areas:

1. How much ADR is happening? How many cases are going through ADR?
2. How effectively is the ADR program removing cases from the docket? For example, what is the resolution rate for mediation? What is the rejection rate for non-binding arbitration programs?
3. What is the time to closure for cases that are going through the ADR program?
4. What impact does the ADR program have on cost measures? For example, what are the court's expenses for operating the program? What are the parties' perceptions of the program's effect on their litigation costs?
5. How satisfied are the participants with their experience in the ADR program?

Know What Is Going Right, Wrong, or Changing

The grandmother's adage about child rearing – "sometimes you need to catch a kid doing something right" – also applies to monitoring court ADR programs. The goal is not just to find the flaws in a court ADR program, but also to know the positive aspects of the program, to get a complete picture of what is happening, and to track how the program is changing over time.

Over the years in Illinois there have been many examples of various phenomena in court ADR programs. For example, in one of the large civil case mediation programs, the regular monitoring

reports made the court aware of a significant drop in settlements. Further investigation of the data showed that one large insurance carrier in the area had instructed its adjusters to stop settling. Discussions were held between the supervising judge and a high level manager in the insurance company. After the discussions, the insurance carrier decided to start participating in the program again, and the resolution rate moved back to its previous level. Without monitoring reports, the court could have become aware of the situation only through anecdotal evidence and the supervising judge would most likely not have initiated a discussion with the insurance carrier based on such evidence. With clear monitoring data, the court could have a frank discussion with the carrier about the program, and rational, informed decisions could be made.

Another time, a presiding judge noticed a jump in miscellaneous cases being reported through the mediation program's monitoring system. Investigation into this revealed that a judge who had transferred into a new division had assumed he could continue to refer cases to mediation, although in fact those cases were not formally included in the mediation program. This led to the successful expansion of the program into that division. Other circuits then included those cases as well when developing new mediation programs.

As these examples make clear, monitoring information on its own does not change or improve anything. However, it does provide opportunities for judicial leaders to investigate and take steps to address problems or take advantage of opportunities.

Conclusion

Whether responding to a legal mandate, the draw of solid public policy, or good management instinct, monitoring a court's ADR program makes sense. For help monitoring a court ADR program in Illinois, contact CAADRS at 312-922-6464, ext. 924, or at caadrs@caadrs.org. For assistance outside Illinois, go to www.caadrs.org.

Magistrate Judge Morton Denlow and CAADRS Director of Research Jennifer E. Shack co-authored "Judicial Settlement Databases: Development and Uses," which was published in the Winter 2004 edition of *The Judges Journal*, a publication of the Judicial Division of the American Bar Association. The article outlines the benefits that can be derived from a database of settlement conference outcomes. Such a database was designed by CAADRS for the U.S. District Court for the Northern District of Illinois and is used to create summary reports of settlements that the judges can turn to for assistance in resolving cases in settlement conferences.

CAADRS Executive Committee member James J. Alfini and CAADRS Executive Director Susan M. Yates attended the American Bar Association Section of Dispute Resolution's annual conference April 15-17, 2004, in New York City. Dean Alfini and Ms. Yates both gave multiple presentations. Dean Alfini spoke on judges as mediators and justice in mediation. Ms. Yates addressed evaluating the effectiveness of court mediation programs and on the Model Standards of Conduct for Mediators. CAADRS was once again a collaborating organization for the court ADR mini-conference, which was held just prior to the full conference.

CAADRS has added to its staff for the summer. Brian Parsons, a Northwestern University Law School student, has been hired as Research Intern.

CAADRS MISSION STATEMENT

The CAADRS mission is to encourage effective and efficient use of court-related alternative dispute resolution in Illinois. To accomplish this mission, CAADRS provides a range of information-gathering, clearinghouse, evaluation, analysis, and training services.

CAADRS is affiliated with the Center for Conflict Resolution, a not-for-profit corporation.

CAADRS EXECUTIVE COMMITTEE

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CAADRS STAFF

SUSAN M. YATES
Executive Director

JENNIFER E. SHACK
Director of Research, Newsletter Editor

JENNIFER A. SPAGNOLO
Director of Administration

CENTER FOR ANALYSIS OF ALTERNATIVE DISPUTE RESOLUTION SYSTEMS

11 EAST ADAMS STREET, SUITE 500
CHICAGO, ILLINOIS 60603

312 922 6475 x924
CAADRS@CAADRS.ORG
WWW.CAADRS.ORG

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Additionally, as the circuits are interested in monitoring their programs' progress, CAADRS has been working with them to create monitoring systems that fit their needs. These systems include mediator report forms; post-mediation questionnaires for tracking party, mediator, and attorney satisfaction; and, for some programs, resolution rate and timeframe information. To assist the circuits in monitoring their programs, CAADRS is designing software to capture the data and print reports.

The programs listed here are only some of the many recent and current efforts to introduce or expand ADR in the courts in Illinois. It is apparent that ADR is becoming more widely accepted as another tool for courts and litigants to use in resolving disputes.

For more information on these programs and many others, go to www.caadrs.org/adr/court-IL.htm, email caadrs@caadrs.org, or call CAADRS' Resource Center at 312-922-6475, ext. 924.

TRUE TO HIS ROOTS CONTINUED FROM PAGE 2

example of the combination of compassion and principled action that exemplifies Justice Nickels' commitment to community in its truest sense.

It is Justice Nickels' appreciation of ADR's meaningful role in society and the courts that has led him to CAADRS. He has kept this in mind with every judicious word of counsel he has given as an Executive Committee member. In his farewell address to the Supreme Court, Justice Nickels recognized that he "can never really leave the law. I

shall always continue to reap the benefit of having acquired and developed a legal mind." The citizens and courts of Illinois have been the true beneficiaries of the development of Justice Nickels' legal mind. Because of the way he has lived his life – rooted to his community and committed to its well-being – he has worked with integrity and compassion in all his roles, including as member of CAADRS' Executive Committee. CAADRS is truly privileged to count among its ranks a man of such wisdom, honesty, and compassion.

DONATE TO CAADRS?



Have you ever thought of making a financial contribution to CAADRS? It may never have occurred to many of CAADRS' friends, but we're inviting you to consider it now. With demand for our services expanding by leaps and bounds, and our base of support no longer growing, **your contribution would be a great help!** Research, program development, training – your tax-deductible gift will help CAADRS as we assist courts in Illinois in making more effective use of ADR.

Please make your check payable to the *Center for Conflict Resolution*, indicate that the contribution is for CAADRS, and send it to CAADRS c/o Jennifer Spagnolo, Director of Administration, 11 E. Adams St., Suite 500, Chicago, IL 60603.

Thank you!

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