

# ANALYZING THE ALTERNATIVES

ENCOURAGING THE EFFECTIVE USE OF COURT-RELATED ADR

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## FEATURE ARTICLE



## WHAT MAKES FOR QUALITY MEDIATION?

ABA TASK FORCE REPORT OFFERS SOME INSIGHT

Quality mediation requires more than good mediator skills. It also relies upon four essential practices by both mediators and lawyers. That was one of the conclusions of a recent report from the American Bar Association Section of Dispute Resolution's Task Force on Improving Mediation Quality. Another conclusion was that lawyers and mediators could benefit from greater knowledge of and training about the mediation process.

The Task Force, which included RSI Executive Director Susan M. Yates, was formed in 2006 to examine the factors that define quality mediation practice. To do so, the Task Force used focus group discussions and questionnaires to

collect information on what mediators and lawyers who represent parties in mediation believe is important for successful mediation, and what should and should not be done to make mediation effective. To gain a sense of how parties viewed quality, thirteen parties who had participated in mediation were interviewed as well. Because the field of mediation is vast, the Task Force limited its scope to commercial cases in which both sides are represented by counsel.

The findings from the focus groups and questionnaires point to four practices that are important to the quality of the mediation: preparation for mediation by lawyers, parties,

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# SERVICE AND QUALITY

## RSI STAFF



Standing, L. to R.: Jessica Glowinski, Susan Yates, Jennifer Shack. Seated: Laura Noah and Jennifer Spagnolo

By Susan M. Yates, RSI Executive Director

Regular readers of this space recognize it as the spot where RSI leaders are profiled. Having now introduced all of the RSI Executive Committee members, our core funder and founder, and, me, the Executive Director, there is one final group of essential individuals to profile: the RSI staff.

I jumped at the opportunity to write about my colleagues on the RSI staff, as I enjoy them each as individuals and I am proud of the work they do. When describing the RSI staff, there are two consistent themes that come to my mind: service and quality. The desire to serve, while it is expressed somewhat differently by each one, brought each staff person to work at RSI and is deeply ingrained in each. Along with that desire to serve, each staff person carries an abiding commitment to quality.

**Jennifer Shack** - Director of Research

Jen Shack came to RSI having served in the Peace Corps in Benin, West Africa, where she had been

introduced to informal dispute resolution. In Benin she had seen a process that, "wasn't just about who was right and who was wrong. It was about how people maintain relationships going forward." She was eager for the chance to work at RSI so she could help foster the appropriate use of such processes in the United States.

It is the combination of service and quality that has driven Jen's devotion to assisting court ADR programs. The idea of quality is bigger than just doing her job well. It's also

what draws her to RSI's mission to help courts make more effective use of ADR. As she said, "Our emphasis is not just on forming programs, but on helping programs get the information to be sure they know they are providing services the right way. Unless a program is structured in a way that it is providing services correctly, it's not going to be able to provide quality service to those it seeks to help."

As Director of Research for nearly ten years, Jen's imprint can be seen in almost every aspect of RSI. Her keen intellect and ability to see the big picture, while still toiling on the tasks necessary to implement the mission, have been key in shaping RSI's vision and high standards. In fact, she is so essential to RSI that she will begin to telecommute this fall when she shifts her home to Maine.

**Jennifer Spagnolo** - Director of Administration

Every organization needs the one person who keeps the wheels turning, and at RSI, that is Jennifer Spagnolo. From ensuring RSI meets important deadlines for proposals to administering multi-day trainings that go off without a hitch,

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## GET CONNECTED WITH E-NEWSLETTER

July 1 marked the publication of the inaugural edition of RSI's new e-newsletter, *Court ADR Connection*. RSI launched the *Connection* as a way to link those involved in court ADR with the information that will help them to assure quality programs based on the latest research and practice.

The monthly newsletter features news briefs on the latest court ADR news and events from around the country. In addition, the *Connection* highlights recently published research in the field, as well as other notable new resources available through RSI's Court ADR Resource Center, at CourtADR.org. The newsletter also provides updates on RSI projects and publications.

The design and launch of the *Connection* were made possible through a grant from the JAMS Foundation. RSI is extremely grateful for the Foundation's generous support.

If you would like to subscribe to the *Connection*, visit CourtADR.org and register your email address through the homepage or email [adupdates@aboutrsi.org](mailto:adupdates@aboutrsi.org), subject line "subscribe."

## MEDIATION ACCESS PROJECT TAKES OFF

The initial response to RSI's Statewide Mediation Access Project (SMAP), which is funded by the Illinois Equal Justice Foundation, has been overwhelmingly positive from courts and legal services. The goal is to create mediation programs in Illinois through collaborations between courts, legal services, community organizations, higher education, corporations, and other constituencies that will provide another path through which poor and low-income disputants may access justice.

This winter and spring, SMAP laid the groundwork to meet the needs of poor and low-income disputants through mediation in a variety of judicial circuits throughout the state. The main interest so far is in developing small claims mediation programs. A particular emphasis is being placed

on the areas of housing and eviction cases, as that is where there is the greatest need.

SMAP has moved the furthest along the path toward developing a new program in Bloomington. In June and July, RSI staff met with representatives from the court, legal services, community organizations, and a local university's school of social work to work on the implementation of a small claims mediation program. As one result of those meetings, a mediation training is being scheduled to take place in Bloomington in September. RSI will continue to provide support for development of this new program.

In addition, SMAP staff has been in discussions with community organizations regarding

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## QUALITY TASK FORCE CONTINUED FROM COVER

and mediators; customization of the mediation process based upon the needs of the case; the use of "analytical" techniques by the mediator; and persistence of the mediator. In each of these areas, the Task Force saw need for improvement that could be gained through education and training.

For Task Force Co-Chair Rachel Wohl, one of the most interesting findings of the study was "the great importance commercial users placed on the preparation phase of mediation." The lawyers and mediators were unanimous in their belief that the mediator should do some type of preparation prior to the mediation. All thought that mediators should know the case file and read the documents from the case. A large majority also believed that mediators should discuss procedural or substantive issues with the lawyers individually. Repeat users were also apt to believe that the mediator should consult with them on how the mediation should proceed.

The study found, however, that not all mediators do pre-mediation preparation, often because the court program in which they mediate either does not allow it or does not provide the time for it. It is this area that Ms. Yates believes courts will look to improve. "For court mediation programs that don't incorporate time for mediators and parties to prepare prior to the mediation," she said, "this study may provide the impetus to change the structure of the programs to allow for that preparation time."

Preparation on the part of the lawyers was also seen as necessary for quality mediation. All groups — lawyers, mediators, and parties — emphasized the need for lawyers and parties to prepare for mediation, and for lawyers to prepare their clients for mediation. This prepara-

tion includes understanding the issues and standing of the client's case, as well as those of the opponent's case, and discussion of possible creative settlement arrangements. The need for effective mediation preparation is one reason the Task Force recommended the creation of informational videos and brochures about mediation. Another recommendation was that lawyers receive CLE credit for workshops on advocacy in mediation.

In another area, "there was general consensus that the whole concept of how to mediate these cases could use case-by-case analysis of what process to use," said Task Force Co-Chair Wayne Thorpe. The lawyers said they expect the mediators to tailor the process and their techniques to each particular case. They complained that too many mediators take a "cookie cutter" approach by following the same steps and doing the same things regardless of the differences between cases. In light of this, the Task Force recommended that mediators, lawyers, and parties look at each mediation individually and take actions that best fit its specific needs.

One area stirring up some discussion is the lawyers' view of the use of "analytical" techniques by mediators. Most lawyers agreed that analytical techniques were helpful in mediation, ranging from 95% who thought it was helpful in more than half of all cases for the mediators to assess the strengths and weaknesses of the case, to 60% who believed the same about predicting the outcome in court. However, almost half of lawyers said there were times when assessing the strengths and weaknesses of the case was not appropriate, leading back to the idea that mediators need to customize their approach to each case and not repeat the same process in every mediation.

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## SMAP UPDATE CONTINUED FROM PAGE 03

the mortgage foreclosure crisis. As organizations turn to mediation as a possible innovative way to address the crisis, staff is identifying other ADR models addressing foreclosures around the country and examining how they function. RSI is looking into how SMAP might provide assistance in the design of particular models to mediate these cases and how to develop programs specifically for mortgage foreclosure cases in Illinois.

With the Illinois Equal Justice Foundation grant year ending in August, RSI is also searching for renewed and additional funding. With a strong foundation laid, several local programs in the pipeline, and the Bloomington program ready to launch in the fall, RSI is looking for support to continue the work of relationship-building, program development support, and evaluation throughout the state so that poor and low-income disputants have access to mediation for resolving some of their most pressing issues.

## QUALITY TASK FORCE CONTINUED FROM PREVIOUS PAGE

This is the message Mr. Thorpe took from the report. He said that, "the report has made me think more about how I use analytical approaches." He noted he has become more nuanced in his use of these approaches and has found that he can start with less obtrusive techniques and move to more obtrusive ones over the course of the mediation, "but I don't get very far on the scale before the parties settle."

The emphasis lawyers place on analytical techniques points to increased use of mediators who use these techniques. The possibility of using them incorrectly is real, however, and the Task Force recommends that mediators get specific training on the correct and ethical use of these techniques.

Persistence is another behavior that participants believe affects quality. Almost all participants thought that mediators should follow up with each side if mediation doesn't end in agreement. Many thought that mediators should apply more pressure and keep the parties at the table longer to reach agreement.

Lawyers complained of mediators who were too passive and threw in the towel when negotiations became difficult. To overcome this, the Task Force recommended greater training in dealing with impasses skillfully and ethically.

Since the report came out, Task Force members have created a toolkit for local bar associations or other organizations to use for their own focus groups on mediation quality. It has also created a brochure for mediators and is working on one for mediation users as well. Going forward, Mr. Thorpe would like to see the Section of Dispute Resolution promoting further discussion on the best use of analytic techniques in mediation. The Task Force's report and further actions are important steps in an ongoing process of maintaining an information flow among mediators, lawyers, and parties in an effort to improve the quality of mediation.

*The report is posted on the ABA Section of Dispute Resolution's web site at [www.abanet.org/dispute](http://www.abanet.org/dispute).*



# RSI 2007 ANNUAL REPORT:

The year 2007 was one of planning and preparation for some exciting changes that would take off early in 2008. While continuing to work on program development, monitoring, and evaluation, as well as outreach efforts, RSI spent much of its efforts throughout the year on developing a plan for providing mediation services to poor and low-income residents of Illinois and on preparing the way for the launch of its two new web sites.

## Program Development

RSI completed its study, *Accessing Justice through Mediation: Pathways for Poor and Low-Income Disputants*, which was funded by the Illinois Equal Justice Foundation, in early 2007. The project explored how mediation might help meet the legal needs of poor and low-income residents of Illinois. RSI found that "mediation provides many viable paths to justice for poor and low-income residents in Illinois," and the written study provides a blueprint for developing a statewide program. The culmination of the project set the stage for two other endeavors.

With the help of a planning grant from the Illinois Equal Justice Foundation, RSI Executive Director, Susan M. Yates, worked with Center for Conflict Resolution Executive Director, Marilyn Smith, to design a statewide initiative for the development of mediation programs that serve the needs of poor and low-income residents. Ms. Yates and Ms. Smith based their recommendations on how the proposals in *Accessing Justice* could be implemented.

Taking into account the findings of *Accessing Justice* and the determination to pursue the statewide initiative, the Illinois Equal Justice

Foundation provided RSI a grant of \$70,000 for the creation and administration of the Statewide Mediation Access Project. Work for this project began in November and continues through 2008. It entails assisting courts outside of Cook County, Illinois (where mediation is available), to develop mediation programs that are targeted to the needs of poor and low-income disputants.

## Resource Center and Web Site

The Court ADR Resource Center is a core program of Resolution Systems Institute. In 2007, RSI undertook an enormous effort to create a new web site ([www.CourtADR.org](http://www.CourtADR.org)) to house the Resource Center, which would be launched in early 2008. At the same time, RSI was working on creating a new organizational web site ([www.AboutRSI.org](http://www.AboutRSI.org)), to be launched in tandem with the Court ADR Resource Center. Staff put in hour upon hour to prepare these web sites for launch, including researching and developing new content and adding new resources.

RSI also received a grant from the James B. Boskey Memorial Foundation in support of a new position, the Resource Center Coordinator, who would be responsible for maintaining, developing, and marketing the Court ADR Resource Center. The position was filled January of this year.

## Resources

In 2007, RSI completed its project to select and annotate samples of good court rules from around the country in an effort to expand and enhance the resources available to help courts around the country develop and improve their ADR programs. With the support of a grant from

# LAYING THE GROUNDWORK

the JAMS Foundation, RSI examined almost 1000 rules before selecting 18 as exemplary.

RSI Director of Research Jennifer Shack completed the 2nd edition of *Bibliographic Summary of Cost, Pace, and Satisfaction Studies of Court-Related Mediation Programs*. This bibliography of evaluations of court-related mediation programs provides extensive annotation on the methods and findings of more than 70 studies of civil, family, small claims, workers' compensation, appellate, victim-offender, and bankruptcy mediation programs. A link to the bibliography can be found in "Quick Clicks" at [CourtADR.org](http://CourtADR.org). It is one of the most popular downloads on the site.

RSI handled 87 inquiries to the Resource Center in 2007. In past years, RSI has received a larger quantity of inquiries; however, the inquiries in 2007 were more complex, requiring more time to research and respond to them.

## Monitoring and Evaluation

With the support of a grant from the Illinois Equal Justice Foundation, RSI worked with the Center for Conflict Resolution to revamp their post-mediation participant and mediator questionnaires, and to create a system for organizing and using the data. The project entailed a collaborative process to create the questionnaires, a pilot phase to test questionnaires, consultation with a programmer to create a database, and follow up to ensure the process of collecting and entering the data was working.

## Outreach

Outreach was conducted on a number of levels in 2007. RSI staff was deeply involved in pre-

paring a public relations campaign for the new web sites. As always, staff had a high profile at a number of conferences. Ms. Yates served on a panel titled, "The Future of Appellate Mediation: What Have We Learned" at the Wisconsin Bar Association Annual Convention in Milwaukee, WI, and moderated a panel on practical advice for appellate mediation as well.

Ms. Shack presented on the basics of program evaluation as part of a panel for the Association of Family and Conciliation Courts in Washington, D.C. Also in the nation's capital, Ms. Yates was very involved in the American Bar Association Section of Dispute Resolution annual conference. She participated in a summit on court ADR at the Section Council meeting, attended the National Court ADR Conference, and participated on panels on research and ethics for the main conference.

Ms. Yates was appointed to the American Bar Association Section of Dispute Resolution's Task Force on Improving Mediation Quality, which conducted a number of focus groups of lawyers and mediators around the United States. In this capacity she was invited to report on the task force's work at the International Institute for Conflict Prevention and Resolution's annual meeting in October.

## Conclusion

RSI was at its busiest ever in 2007, as it laid the groundwork for the immense changes that would come about in 2008. In 2008, these changes promise to greatly enhance RSI's ability to help courts make better use of alternative dispute resolution systems.



# OUT AND ABOUT WITH RSI

Congratulations to RSI Executive Committee member Justice Robert E. Byrne on his retirement in July! Justice Byrne had been Appellate Justice in the Second District since 2001. His career on the bench began in 1986 as an Associate Judge in the 18th Judicial Circuit. RSI is very glad he will be continuing to serve on the Executive Committee.

RSI Executive Committee member James Alfini has announced that he will be stepping down as President and Dean of South Texas College of Law, effective next year (July, 2009) after six years. His decision was largely based on his desire to join the faculty and return to his twin passions, teaching and scholarship.

RSI Executive Director Susan Yates was one of six speakers who honored mediator and former US Magistrate John Cooley for his contributions to the field of ADR at the ACR Chicago meeting May 13. Susan focused on Judge Cooley's national work with the ABA and ACR, while others remarked on his work as a federal magistrate, jazz musician, writer, mediator, arbitrator, teacher, and creative problem solver. The emcee for the night was current US Magistrate Geraldine Soat Brown.

## CONTINUED FROM PAGE 02 SERVICE & QUALITY

Jennifer keeps RSI on the right track. She also writes for RSI – newsletter articles, meeting minutes, resource abstracts – and ensures that all RSI's documents, from short letters to the newsletter to huge studies, leave the office flawless.

Jennifer is another long-serving staffer, having come to RSI in 2001. But she is more than just the competent person who makes sure all RSI's "t"s are crossed and "i"s are dotted. She brings her heart to the idea of serving, of making the world a better place. As Jennifer said, "Think about what conflict is like for people and how it just rips them apart. For me, RSI is about the people and providing a program so that going to court is less intimidating and people can help themselves. We work with the court system side of things, but I really value knowing how things will be different in the lives of individual people." In an organization that values service and quality, it is critical to remember the actual people who will receive these court ADR services. Jennifer brings heart to RSI – and makes sure we deliver a high-quality product while we do it.

**Jessica Glowinski - Resource Center Coordinator**  
Having started as an intern helping transfer information from the old web site to the new during development of RSI's national Court ADR Resource Center, CourtADR.org, Jessica Glowinski showed that she not only had the smarts to handle the Resource Center, but also the curiosity and drive to develop it and publicize it. Naturally she got the job when the new full-time position of Resource Center Coordinator was created this year to keep up with the rising demands of maintaining, developing, and promoting CourtADR.org. Jessica's background in journalism serves her well in her ability to dig up the information needed for the Resource Center, as well as providing a foundation for her latest project as editor of RSI's new e-newsletter, *Court ADR Connection*.

Jessica boils down her philosophy of service to: "Do it in your own backyard," meaning that it is important to work toward the principles of civil society on every level, as well as globally. Jessica says that working on the Resource Center, her "mind is engaged in important ideas of justice and conflict resolution, and they are key systems of all countries and all civilizations." The themes of quality and service are readily apparent in Jessica, too. She says she "loves making the Internet work for people. Working with CourtADR.org is like creating the Google of court ADR, which is really exciting."

**Laura Noah - Program Development Coordinator**  
The most recent addition to the RSI staff, Laura Noah, is putting her many talents to work running RSI's Statewide Mediation Access Project where she helps judicial circuits throughout Illinois develop mediation programs specifically for poor and low-income disputants. This reflects Laura's values, "I've been a long-time believer that mediation should be accessible to everyone, and this program is trying to make that happen throughout the state." So far this is a part-time position due to funding, but Laura brings 100% drive and commitment to her work.

Laura has extensive experience in the ADR field, having mediated family disputes for the courts and managed peer mediation programs in the schools. Additionally, with her Master of Arts in Dispute Resolution, Laura brings a thorough study and understanding of the theory of conflict and conflict resolution processes to her work.

Laura sees her work at RSI as a public service dimension to her life, which harmonizes with her own private mediation, teaching and training business. As she said, "When people are in conflict, they are often at their most vulnerable. Navigating the court system can be challenging for anyone, but particularly so for those who can't afford an attorney. The work we do at RSI

RSI is pleased to welcome our new intern, Keith Krider. Keith just completed his first year of law school at the University of Chicago. He is working on updating the CourtADR Resource Center ([www.CourtADR.org](http://www.CourtADR.org)) with new court ADR rules and other resources and has already proved to be a tremendous asset to the RSI team.

RSI Director of Research Jennifer Shack will soon be following her dream of moving to the beautiful landscape of the state of Maine, but RSI will not lose her. Thanks to the ability to telecommunicate, she will be continuing in her role as Director of Research at RSI from afar. Whew!

Northern Illinois University College of Law presented RSI Executive Committee member Hon. Janet R. Holmgren with its Distinguished Service Award for her "outstanding career achievements and devotion to the public good."

RSI Executive Committee member Hon. Allen S. Goldberg presented at a Chicago Bar Association meeting on the Cook County Law Division Court-Annexed Civil Mediation Program.

Ms. Yates participated in ABA Dispute Resolution Section long-range planning meetings in Houston on March 15 and again in Washington, DC, on June 20. In between, on April 2-5, she attended the ABA Dispute Resolution Section annual conference in Seattle.

**RSI****RESOLUTION SYSTEMS INSTITUTE****RSI MISSION STATEMENT**

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

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

**RSI EXECUTIVE COMMITTEE**

HONORABLE HARRIS H. AGNEW, *Chair*  
Chief Judge, 17th Judicial Circuit, *retired*

DEAN JAMES J. ALFINI  
President and Dean, South Texas College of Law

HONORABLE ROBERT E. BYRNE  
Justice, 2nd Appellate District of Illinois, *retired*

HONORABLE MORTON DENLOW  
Magistrate Judge, US District Court  
for the Northern District of Illinois

HONORABLE ALLEN S. GOLDBERG  
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HONORABLE JANET R. HOLMGREN  
Chief Judge, 17th Judicial Circuit

HONORABLE JOHN L. NICKELS  
Justice, Illinois Supreme Court, *retired*

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**SERVICE & QUALITY CONTINUED FROM PAGE 09**

with court-related ADR is essential whether you look at it on the level of a judicial circuit or right down to the perspective of a private individual."

**Service and Quality**

Perhaps the key to service and quality lies in what the RSI staff members said about one another. Everyone used terms like "ease of working as a team," "constant collaboration," and "camaraderie" to describe working at RSI. Those terms, together with these last two comments from two staffers, sum up the commitment of the staff to the mission and their energy to work for it: "Everyone is focused and hardworking, but they also have a great sense of humor," and last but not least, "Working together we are making a difference in how disputes are approached and resolved in Illinois and further afield."

**3<sup>RD</sup> CIRCUIT ADDS CIVIL MEDIATION**

The Illinois Supreme Court voted in February to approve Madison County's Civil Mediation Program, making it the fourth alternative dispute resolution program created in the Third Judicial Circuit Court in the past three years.

The new program joins the county's mediation program for custody and visitation issues, established in 2006, as well as the circuit's medical malpractice mediation and mandatory arbitration programs, both started in 2007. This surge in ADR programs comes amidst a series of reforms in Madison County's courts. Named the number one "judicial hellhole" in the country by the American Tort Reform Association from 2002 to 2004, the county was dropped from the list entirely just last year.

Because the court already has a list of certified mediators through its medical malpractice mediation program, civil mediations were able to start up immediately after the Supreme Court gave its approval. Similar to other civil mediation programs in the state, the county's new program is designed for civil cases involving monetary claims of more than \$50,000. Judges may refer cases to mediation, or parties may also request a mediation referral.

"We hope this will be useful for cases where, if people just sat down and talked, they could work it out themselves," said Circuit Court Judge Barbara Crowder, Co-chair of the Circuit's ADR Committee. Judge Crowder and Circuit Court Judge Daniel Stein, the other ADR Committee Co-chair, wrote Madison County's civil mediation rules, as well as the circuit's arbitration and medical malpractice rules.

The benefits the court hopes to get from the new program are two-fold, Judge Crowder said. For judges, the program will be a new tool to use in managing their dockets. In the Third Circuit, judges handle each case on their dockets from "birth to death," and, Judge Crowder said, their schedules become crowded quickly.

"There is a limit to what each judge has time for," she said. "We wanted to give the court another option for the judges to manage their own dockets."

Just as importantly, Judge Crowder also expects litigants to benefit from the new program. She said that, for some cases, mediation is less expensive and less time-consuming than litigation, but it isn't considered by litigants or their counsel.

"Part of these programs is to try to help people get cases done with the least amount of expense," she said, "and help them get to resolution as quickly as possible."



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