

# ANALYZING THE ALTERNATIVES

ENCOURAGING THE EFFECTIVE USE OF COURT-RELATED ADR

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## FEATURE ARTICLE



PHOTO BY JOHN MUELLER

## RSI PROJECT EXPANDS MEDIATION IN ILLINOIS

### STATE CUTS THREATEN FUTURE PROGRAMS FOR LOW-INCOME DISPUTANTS

The pressures of a tumbling Illinois economy on poor and low-income Illinoisans, combined with the increasing numbers of pro se disputants looking to the Illinois courts for justice, have created growing challenges. Poor and low-income Illinoisans face greater difficulty in addressing their legal needs, while the courts have looked for new ways to attend to the needs of pro se litigants. RSI's Statewide Mediation Access Project (SMAP) has been at work for two years to deal with those challenges by developing new mediation programs and laying the foundation for other programs to address the needs of poor and low-income disputants across the state. Due

to state budget cuts, the benefits of this work are now in danger of being lost.

These past two years have been one of the most active periods of mediation program development in Illinois courts, spurred in part by SMAP. SMAP has been working with a number of circuits to determine how best to provide mediation to poor and low-income disputants. Although SMAP has worked with several courts, it has focused its efforts this year on assisting two new community mediation centers, which will be extending mediation services in areas of great need, after helping to develop the very successful 11th

CONTINUES ON PAGE 03

# ENHANCING SERVICES

## DISPUTE RESOLUTION INSTITUTE, INC.

When state budget cuts in 2007 forced Southern Illinois University to eliminate funding for the law school's alternative dispute resolution clinic, access to free mediation services in the 1st Judicial Circuit seemed seriously threatened. Fortunately, thanks to the efforts of individuals involved in the ADR clinic, a new mediation center is now ready to take over where the clinic left off.

Mary Rudasill, a former SIU law professor and director of the SIU legal clinic, and Danielle Blair, the

program specialist for mediation at the legal clinic, led the efforts to establish the Dispute Resolution Institute, Inc., (DRI) last year. The mediation center has been recognized as an official dispute resolution center by the 1st Circuit. In August, DRI took over a grant-funded pro bono family mediation program that had been housed at the SIU legal clinic, with the goal of expanding the program to more directly serve litigants in all nine of the circuit's counties. On top of that, Ms. Rudasill is working to transfer an agricultural mediation program from the legal clinic to DRI, and is collaborating with Resolution Systems Institute on establishing a new small claims mediation program in the circuit.

Ms. Rudasill retired last year and serves as the executive director of DRI. She explained

that she didn't want to see the gains achieved by SIU's ADR clinic, which had been in operation since 1993, simply abandoned.

"It seemed like a shame to let the foundation we had built slip away and not try to build on it," Ms. Rudasill said. "Mediators here need

an organization to provide training, information, a way to publicize their skills. With the loss of the ADR Clinic, nobody at the law school was prepared to do that."

In establishing DRI, Ms. Rudasill and Ms.

Blair, who will be working as a consultant to DRI, coordinated their efforts with a variety of local institutions. For example, the Mediator Association of Southern Illinois (MASI) effectively merged with DRI when the mediation center became an official non-profit last year. Members of MASI, many of whom were involved with the SIU ADR Clinic, now make up DRI's five-person Board of Directors, and will also serve as DRI volunteers. Ms. Rudasill said that MASI may eventually be reformed as a kind of advisory board for DRI, but right now the concentration is on building up the new mediation center.

Ms. Rudasill also worked with the SIU legal clinic to transfer the clinic's two remaining grant-funded mediation programs to DRI.

Working with the courts, Southern Illinois University and local mediators, DRI is in a position to greatly improve mediation services in the 1st Judicial Circuit.

CONTINUES ON PAGE 08

## NEW MEDIATION PROGRAMS CONTINUED FROM PAGE 01

Judicial Circuit Court-Annexed Small Claims Mediation Program based in McLean County, which was launched in October 2008.

Early in the year, two new community mediation centers – Prairie Land Conflict Mediation Center and the Dispute Resolution Institute, Inc. (DRI) – asked SMAP for assistance in developing their services. Prairie Land Conflict Mediation Center in Champaign was farther along in the process of establishing itself. After some initial input from SMAP, it conducted training in mid-March for volunteer mediators and has worked independently since then.

DRI, the new community mediation center opening this fall in Carbondale in the 1st Judicial Circuit, will work to provide significantly more custody and visitation mediation for poor and low-income disputants in this heavily rural, impoverished circuit. While this circuit has, through Southern Illinois University's legal clinic, been a mediation pioneer in the state in many ways, it has also faced significant challenges in providing mediation services to its more rural counties given how geographically dispersed it is. DRI plans to address this by training volunteer mediators from more counties, thus bringing mediators to indigent parties for whom travel would be burdensome.

SMAP has been assisting DRI with deciding how to structure the organization and how to administer programs, as well as providing liaison support with judges. Future support includes organizing mediator training and providing monitoring forms and database. SMAP is

providing the necessary expertise to launch a program that already has a dedicated staff and firm support from the court. See page 2 for a profile on DRI.

SMAP's efforts were instrumental in the development of the small claims mediation program in Bloomington. The spring issue of *Analyzing the Alternatives*, reported on the success of the program. Since then, the program has shown increases in use and satisfaction. Thirty-five cases were mediated between September 2008 and June 2009. In an interview, Richard Watts, retired minister of the Presbyterian Church USA and now a volunteer small claims mediator, stated: "We create a safe space. Even when they don't come to an agreement they walk away feeling good about the process; someone took them seriously, they were respected and they weren't blown off." In fact, statistics showed that 77% of mediations for this period reached agreement and almost everyone stated they were satisfied with mediation. According to Rev. Watts, "the cooperation with the judges has been wonderful. They have been supportive of the process." Strong judicial support, a solid resolution rate, satisfied participants, and committed mediators from the community who are volunteering their time to provide services are all indicators of a quality program.

Judge Lee Ann S. Hill, Presiding Judge of Small Claims in McLean County, began overseeing the program in December 2008, taking over from Judge Rebecca Simmons-Foley, who was instrumental in launching it. Judge Hill describes how "at first, being so new to the judiciary I did not fully appreciate how much

CONTINUES ON PAGE 05



## OPINION ON CASE MERIT NOT COERCION

It is not coercion for a federal magistrate judge to voice his opinion during a settlement conference that a case lacks merit. In *Gevas v. Ghosh*, 566 F.3d 717 (7th Cir. 2009), a prisoner (Mr. Gevas) brought a claim against Dr. Ghosh and other prison staff members alleging deliberate indifference to his medical needs. The case was sent to settlement conference, which ended with an agreement. Mr. Gevas later wrote the judge, saying he was not going to sign the agreement. Dr. Ghosh then requested the judge enforce the agreement. At a second conference, the judge ordered Mr. Gevas to sign a release and the settlement agreement within 30 days or the case would be dismissed. Mr. Gevas appealed, stating that he was coerced into settling because the judge had told him during the first conference that his case was without merit.

The Seventh Circuit affirmed the order. The court held that the judge's actions did not amount to coercion. The court reasoned that a judge is allowed to make a negative assessment of the case as a means of encouraging settlement as long as the judge does not threaten a party with penalties. In the instant case, the magistrate judge merely commented on the strength of a party's case. Consequently, the judge's actions were not improper.

## ADR RULES ADDED FOR LAWYERS

Changes in the new version of the Illinois Rules of Professional Conduct reflect the growing role of ADR in lawyers' practice. The new rules place limitations on lawyer representation and impose responsibilities on them when acting as third-party neutrals.

Rule 1.12: Former Judge Mediator, Arbitrator, or Other Third-Party Neutral was amended to expand its coverage of potential conflicts of interest. New Rules 1.12(a) and 1.12(b) now include "mediator," and "other third-party neutral" among the roles which may limit a lawyer's ability to represent a party or seek employment, and extend this to other members of the lawyer's firm. The reasoning for this addition is that "[l]ike former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter

in which the lawyer participated personally and substantially." The comments attempt to clarify the interaction of Rule 1.12 and Rule 1.6 regarding confidentiality. They state that "although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals." Furthermore, this conflict is imputed to the other members of the lawyer's firm.

The addition of Rule 2.4: Lawyer Serving as Third-Party Neutral recognizes the need for lawyers to clarify their role as third-party neutrals. This rule is consistent with Rule 2.4 of the ABA Model Rules of Professional Conduct. It defines the role of third-party neutral as "when the lawyer assists two or more per-

CONTINUES ON PAGE 10

## NEW MEDIATION PROGRAMS CONTINUED FROM PAGE 03

this program was needed and how effectively it could work." She quickly learned, however, that for pro se litigants who do not really have an understanding of the court system "this program offers them a chance to resolve their cases the same day and gives all parties a voice in what happens." Like Rev. Watts, Judge Hill believes that "much of the time the parties just wish to be heard and the mediation process gives them that opportunity."

Perhaps most importantly, the difference with mediation is, as Rev. Watts explains, that "[the parties] get to deal with the presenting issue and also the relationship. This is significant because even if the people in the case never see each other again, their debriefing of what has gone on is really significant to them." Rev. Watts, who was a long-time pastor, understands the significance of repairing relationships. He believes – and evaluations from participants support this – people feel respected and listened to in mediation, and as a result they have a positive experience with the process even if they didn't get what they wanted when entering mediation.

According to both Rev. Watts and Judge Hill, a number of the cases are landlord/tenant disputes. Judge Hill believes "[small claims mediation] benefits both sides of these cases greatly. Because our dockets are so crowded the landlord can get a quicker resolution than they would if they had to wait for a bench trial in the matter and in addition have the tenant get more time to move out after a judgment is entered. The defendant benefits by not having to pay the bench trial fee and often gets their late fees waived and more time to move out."

It was this type of positive feedback coming out of the 11th Judicial Circuit that first got the attention of Judge John L. Hauptman from Morrison County in the 14th Judicial Circuit based in Rock Island. Judge Hauptman explained, "I first became aware of this program through an article [Bench & Bar, Illinois State Bar Association, April 2009]. The article was very informative and I felt that this was a program that would be a good fit for the 14th Circuit in light of the availability of our Arbitration Center located in Rock Island."

As he learned more, Judge Hauptman's impression was that "[small claims mediation] had wonderful potential for providing for a swift and just resolution of small claims issues and could help considerably to soften what can sometimes be a very frustrating experience for citizens not familiar with the judicial process." While the potential of a small claims mediation program developing in the 14th Circuit is still pending, this connection demonstrates the importance of building relationships with individuals and organizations committed to increasing access to justice for poor and low-income disputants through mediation.

Unfortunately, the future of SMAP is currently at risk. SMAP receives funding from the Illinois Equal Justice Foundation (IEJF), which receives funding from the State of Illinois. IEJF expects a 50% cut in funding from the state down to \$1.7 million for their next fiscal year (September 2009 – August 2010). This means significant cuts to various legal service programs, including the mediation services area, which includes SMAP.

CONTINUES ON PAGE 11



# RSI ANNUAL REPORT 2008:

The past year set a high standard of accomplishments for RSI to meet in the future, with change and growth the defining factors for Resolution Systems Institute in 2008. It was the year in which new state-wide and national projects were launched, research was published, staff was expanded and the organization was renamed – from the Center for Analysis of Alternative Dispute Resolution Systems.

## New Projects

### *Statewide Mediation Access Project (SMAP)*

With the hiring of a part-time consultant to conduct SMAP, the project got off the ground in early 2008. The consultant contacted all judicial circuits in Illinois to let them know of the new service to assist them in developing mediation programs targeted to poor and low-income residents. A number of circuits responded with interest.

The 11th Judicial Circuit of Illinois, centered in Bloomington, was the one most prepared to move forward. Through funding provided by the Illinois Equal Justice Foundation, SMAP helped the court design a small claims mediation program for pro se litigants, provided training for mediators, and provided a program monitoring system, including forms and a database. The program went from concept to launch within nine months – an incredibly quick timeframe for the development of a program.

During 2008, SMAP also initiated work with a developing community mediation center in southern Illinois and a newly established community mediation center in central Illinois.

## *Web Sites*

Three years of hard work to create two new web sites bore fruit with AboutRSI.org and CourtADR.org – which replaced the original www.caadrs.org site. The web sites were launched in February 2008. CourtADR.org houses RSI's Court ADR Resource Center, which contains thousands of resources, as well as advice on program development and evaluation. AboutRSI.org is RSI's organizational site. With the launch of the web sites, RSI hired a Resource Center Coordinator to lead the effort to maintain and enhance the Resource Center and any ancillary projects.

There were 3,528 total visitors to the organizational web site and 4,005 visitors to CourtADR.org during 2008. CourtADR.org was received very positively in the ADR community, mainly due to its enhanced access to resources and the expansion of the site to include instruction for courts on program development and evaluation.

## *Publications*

RSI launched a monthly e-newsletter, *Court ADR Connection*, in July. The newsletter focuses on news and updates on court ADR throughout the United States, new research and tips for using the Court ADR Resource

# CHANGE, GROWTH, SERVICE

Center. As of December, there were about 325 subscribers, with 60% readership, a high percent for an e-newsletter.

The design, promotion, and first year of writing and delivery were supported in part by a grant from the JAMS Foundation. The James A. Boskey Foundation has provided partial support for the second year of *Court ADR Connection*.

## Research

RSI completed a study of the use of mediation in the 17th Judicial Circuit of Illinois, based in Rockford. This ground-breaking study, done at the request of the court, used information provided by judges, lawyers and mediators to determine how much mediation was occurring for large civil cases in the circuit, whether they were part of the court's mediation program or not. The circuit's mediation program was reporting drastically fewer mediations from year to year. The court believed that this was due to the fact that more lawyers were opting to mediate without a court order rather than a decline in the use of mediation in the circuit. The study found that this indeed was the case, with as many as five times more cases going to mediation than were reported to the court.

## Outreach and Education

### *Inquiries*

Inquiries became much more closely related to RSI's mission and required more effort to respond to than in previous years. Much of

this was due to the switch over to the new web site. With the new web site, inappropriate calls for legal advice ended. Almost all the inquiries focused on in-depth questions regarding court ADR in Illinois or the rest of the US, or on evaluation issues. The net effect of this was that inquiries to RSI in 2008 were down from 2007, dropping from 87 to 21.

## *Presentations*

The number of presentations and number of people attending presentations in 2008 were the same as in 2007. RSI staff made five presentations, including two at the Cook County Law Division Brown Bag Lunches and one at the ACR Chicago event honoring Hon. Jack Cooley. Another presentation was in Carbondale, Illinois, at a workshop organized by the Southern Illinois University Legal Clinic. The total number of attendees at these presentations was 195.

## Conclusion

The year 2008 marked an exciting transition for the organization. Developing programs boosted staff from three full-time-equivalent to four and a half full-time-equivalent permanent employees. The new Statewide Mediation Access Project raised RSI's reach throughout Illinois, and the new web sites and e-newsletter served expanding markets while enhancing RSI's reputation as the premier source of information on court ADR in the United States.



# OUT AND ABOUT WITH RSI

Executive Committee member Hon. Morton Denlow was reappointed to the Chicago Bar Foundation on July 1. On September 1, he was reappointed by U.S. Supreme Court Chief Justice John Roberts to a three-year term on the Committee on the Administration of the Magistrate Judges System of the Judicial Conference. Judge Denlow was also elected a Vice President of the Jewish Judges Association of Illinois.

Judge Denlow wrote an article titled, "Making Full Use of the Court: Come to Settle First, Litigate Second," published in the Fall 2008 issue of *Litigation*, the Journal of the Section of Litigation of the American Bar Association.

On August 1, Executive Committee member James J. Alfini stepped down from his position as President and Dean of South Texas College of Law. He will continue as Dean Emeritus and Professor of Law. After a semester sabbatical, Professor Alfini will teach Civil Procedure, Constitutional Law, First Amendment, Mediation and Professional Responsibility. This past summer, he taught a course in cross-cultural negotiation and mediation in South Texas College of Law's study abroad program in Malta.

## CONTINUED FROM PAGE 02 DISPUTE RESOLUTION INSTITUTE

The transfer of the agricultural mediation program is still underway, due to the difficulties of coordinating the process with the many state and federal agencies that fund the program. DRI has received certification from the state, but is awaiting word from the United States Department of Agriculture. Ms. Rudasill said the program may not be transferred to DRI until the start of the next grant year.

The transfer of the family mediation program was completed in August. Ms. Rudasill and Missy Greathouse, the coordinator of the family mediation program for DRI, are now working on increasing its geographical reach. Most mediations currently take place in the population centers in the three northern counties in the circuit, but Ms. Rudasill said she wants the program to serve the entire circuit. In order to make that possible, Ms. Rudasill and Ms. Greathouse have contacted judges in the nine-county circuit to create a schedule for holding mediations in each county on certain days of the month. They expect the mediation schedule to make it easier for volunteer mediators to plan times they would be available to mediate in more rural counties.

"We have volunteer mediators who say they'd be happy to travel, as long as people will be there, ready to mediate," Ms. Rudasill said.

Beyond creating the mediation schedule, Ms. Rudasill said she is looking forward to working as a partner with the 1st Circuit, which will be implementing a new \$1 filing fee for civil cases in order to help fund DRI.

"I don't think it's going to mean a lot of money," Ms. Rudasill said of the filing fee, "but what it does do is establish a partnership ... between us and the courts."

In addition to the family mediation program, DRI also is working with the courts to establish a small claims mediation program. RSI's Program Development Consultant Laura Noah has assisted DRI in starting that process, working with Ms. Rudasill on creating rules for the program and organizing a training program for new volunteer mediators.

Ms. Rudasill said DRI also will begin collecting civil mediation statistics for the court. Looking toward the future, she said she hopes DRI will offer continuing legal education programs, as well as parenting education programs. She said she is also looking forward to working with the courts to expand and improve their mediation programs.

"This is all dreaming right now," she said, "but these are needs down here."



In July, Professor Alfini received a Lifetime Achievement Award from the American College of Civil Trial Mediators at their annual meeting.

Executive Committee member Hon. Allen S. Goldberg once again organized a 40-hour mediation training for sitting judges in Cook and other Illinois counties. The training was conducted by National Judicial College trainers John Paul Jones and Nancy Yeend the week of August 24-28. Approximately 300 judges have already received training through this program.

Executive Committee member Hon. Robert Byrne will be teaching ADR at Kent College of Law again this fall. He also continues to mediate and arbitrate cases as they arise.

RSI'S summer research intern, Ryan Helgeson, raised the bar for future interns, proving to be a great asset. Ryan completed his second year at DePaul University College of Law and plans to go into family law. He spent the summer updating and adding rules and resources to CourtADR.org, RSI's Court ADR Resource Center.

In May, Executive Director Susan M. Yates spoke at the DuPage County Bar Association continuing legal education seminar on mediation ethics. She focused on the Model Standards of Conduct for Mediators and what effect they have on practicing lawyers and neutrals.

CONTINUED ON PAGE 11

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

The RSI mission is to strengthen justice by enhancing court ADR systems through resources, study, and expertise in program development.

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

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**ILLINOIS RULES CONTINUED FROM PAGE 04**

sons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them," and instructs the lawyer to clarify the lawyer's role for the parties. It provides that a "lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them and shall explain to them the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client."

The new rules, which take effect on January 1, 2010, can be found on the Illinois Supreme Court's web site: [www.state.il.us/court](http://www.state.il.us/court).

**OUT AND ABOUT CONTINUED FROM PAGE 09**

Ms. Yates also participated in the American Bar Association Section of Dispute Resolution Annual Conference in New York City, April 15-18. It was immediately preceded by a special conference for those interested in court ADR, where she had an opportunity to gather input on RSI's joint project with the ABA Dispute Resolution Section to develop model forms for court ADR programs.

Program Development Consultant Laura L. Noah will be offering a workshop in collaboration with The Center on Halsted, titled *LGBTQ Couple Disputes: Potential Relationship Dynamics Affecting Mediation that All Practitioners Should Know* in October.

Director of Research Jennifer Shack has been appointed to Kennebunk, Maine's Conservation Commission by the town's Board of Selectmen.

**NEW MEDIATION PROGRAMS CONTINUED FROM PAGE 05**

When asked about possible cuts in state funding that could result in funding cuts to SMAP, Rev. Watts said that "this is the kind of program that needs to be expanded, not only not cut, but not kept at the level it is. It needs to be an expansive movement. It brings a degree of civility to the court process that everybody benefits from: the court, judges, the system and participants. It should happen in more circuits, not less."

Judge Hill believes that the current economy will result in a greater number of small claims and housing cases and that "the mediation program can be a great benefit in keeping the court system from being even more burdened than it is already." Also, better agreements and more satisfied parties often mean less enforcement is needed. As Judge Hill explains: "I am finding that fewer cases are coming back to me on Rules to Show Cause because the parties have not lived up to their agree-

ments (or the Court's judgment) than I would from cases that have not participated or are not eligible [for mediation]. My personal opinion is that this occurs because all parties were able to actively participate in the process."

The current state budget crisis puts the future of the Statewide Mediation Access Project in serious jeopardy, yet mediation programs that SMAP can help develop, such as small claims mediation, are needed more now than ever as the number of pro se filings continues to rise. While the future of SMAP is rather murky, the positive impact it has had on communities and courts in short two years is crystal clear.

*To help SMAP continue to develop mediation for poor and low-income disputants around Illinois and other RSI efforts, please go to [www.AboutRSI.org](http://www.AboutRSI.org) and click on the SUPPORT RSI button.*



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