

ANALYZING THE ALTERNATIVES

ENCOURAGING THE EFFECTIVE USE OF COURT-RELATED ADR IN ILLINOIS

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FEATURE ARTICLE



THE UNIFORM MEDIATION ACT: RAISING NEW ISSUES FOR COURT ADR PROGRAMS

On January 1, 2004, the Uniform Mediation Act (UMA) will take effect in Illinois. The heart of the UMA is confidentiality of mediation communications. The UMA establishes a privilege that can be invoked to protect the confidentiality of mediation communications in legal proceedings. It also lists exceptions to the privilege, including some that can only be granted by a court after an *in camera* proceeding. The new law also allows parties to continue to enter into agreements about confidentiality, and provides that courts, through rules or statutes, may continue to address the topic. In addition to confidentiality, the UMA addresses conflicts of interest and representation in mediation, as well as several other issues that do not bear directly on court-related mediation.

What does the UMA mean for court-related mediation programs in Illinois? To answer that, a determination must first be made as to whether the UMA

even applies to court-related ADR. Clearly, it does. Section 3(a)(1) of the UMA states that it applies to mediation parties who are "required" by courts to mediate, as well as those who are "referred" by courts. One court-related exception, however, is that the UMA does not apply to mediations conducted by a judge who might make a ruling in the case.

Confidentiality Provisions

Having determined that the UMA applies to court mediations, the next big question is what that means in terms of confidentiality. UMA Section 4(a) states, "Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5." Subsection (b) then defines the different degrees of privilege for parties, mediators, and

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A MAN OF VISION

JUDGE MORTON DENLOW



After that first encounter with mediation, Professor Goldberg introduced Judge Denlow to the basic concepts of alternative dispute resolution. Upon observing the mediation process and learning its goals, Judge Denlow added its color to his lawyer's palette. He received training in ADR skills and began mediating and arbitrating while practicing law.

In his present role as a federal magistrate judge for the United States District Court for the Northern District of Illinois (Eastern Division), Judge Denlow has incorporated his mediation philosophy into his conduct of settlement conferences. He believes this gives people control over the outcome of the dispute and tends to produce agreements that the parties can live up to. No matter what case he settles, whether a major class action suit or a claim involving a small sum, Judge Denlow feels the same sense of satisfaction that comes from resolving disputes with the human element at the center of the process. As Judge Denlow said, "It is not often that one comes across a wrongful death case in which both the plaintiff's mother and insurance adjuster are crying and the adjuster ends up comforting the mother."

Early in his career, Judge Denlow learned that alternative dispute resolution could serve as a means of giving greater depth to this vision. He was introduced to mediation as an attorney in a case involving a bitter family dispute that was referred to mediation. The case was successfully mediated by Stephen Goldberg, one of the founders of the ADR field and a professor at Northwestern University School of Law. In mediation, Judge Denlow saw the human element in the process of administering justice. Ultimately, what he saw was his vision of justice in motion.

When he is not occupied resolving disputes, Judge Denlow works to enhance the existing justice system. He has written several articles geared toward mediation advocacy and suggestions for judges in settlement conferences. He thinks his article entitled "Justice Should Emphasize People, Not Paper" best expresses his human-centered vision of justice. In addition to publishing articles, Judge Denlow has extensive experience teaching and lecturing. Currently, he is an instructor at the Federal Judicial Center for the course on mediation for judges. As a member of the

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SPEAKING OF COURT ADR . . .

CREATING A SUCCESSFUL LARGE CIVIL CASE MEDIATION PROGRAM

Another in a series of columns by CAADRS Executive Director Susan M. Yates

In the ten years since Illinois' first pilot mediation program for large civil litigation cases began in Winnebago County, much has been learned. Some of the essential ingredients of successful court-annexed programs have been identified through the process of establishing programs in eight circuits and a federal court. This article presents some of the key lessons from their experiences.

Define Your Goal

To begin to define the goal and shape of the program, one judge with leadership responsibility typically invites a group of lawyers, judges, and other experts, such as local law professors and CAADRS staff members, to work on the development of program rules. The process of drafting the rules can be a useful tool to establish a program that is responsive to local legal culture and the requirements of the court.

The first step for the group is to determine why the court is considering a civil litigation mediation program. Is there a backlog of big civil cases? Are judicial resources needed in other areas that might be freed by reducing demand in the civil litigation area? Is there a desire for a wider range of outcomes than is available through litigation? Is there a push for potentially speedier or less contentious processes?

Once the goal is decided, the next question is whether a civil litigation mediation program is the best way to accomplish that goal. If a court is not experiencing a significant problem handling large civil cases, the leadership may want to consider using alternative dispute resolution (ADR) mechanisms in other areas, such as domestic

relations, juvenile, or small claims. (For descriptions of how ADR is being used around Illinois, see www.caadrs.org/adr/court-IL.htm.) It is also possible that changes other than ADR might provide efficient ways to address the court's and litigants' concerns.

Conform to Supreme Court Requirements

Perhaps the most significant change that has occurred since these large civil case mediation programs began was the implementation of Illinois Supreme Court Rule 99, "Mediation Programs." Adopted in 2001, the rule authorizes judicial circuits to establish and maintain mediation programs, provided they meet certain criteria for approval by the Supreme Court. It also provides that mediators in approved programs have immunity in the same manner and to the same extent as judges.

With the adoption of Supreme Court Rule 99, the requirements for court mediation programs in Illinois were defined. Local court rules must address (1) what will be referred to mediation; (2) appointment, qualifications, and compensation of mediators; (3) scheduling mediations; (4) how mediations will be conducted; (5) discovery; (6) absence of a party at mediation and sanctions; (7) terminating and reporting on mediations; (8) finalizing agreements; (9) confidentiality; and (10) how the court will report to the Supreme Court on the mediation program.

It is important to note that while Rule 99 lists ten items that must be covered in local rules, it does not define how those items are to be addressed. With more than a third of the circuits in the state having rules (see

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CREATING A CIVIL CASE MEDIATION PROGRAM CONTINUED FROM PAGE 3

www.caadr.org/rules/rules.htm.) for large civil case programs, there are now many approved rules to use as models when drafting local rules.

Rule 99 requirements provide a handy checklist of items to cover in creating a program. Some of these issues - such as sanctions for not appearing at mediation, or how inclusive the promise of confidentiality is - can spark heated debate. Other matters, such as reporting to the Supreme Court, may be less controversial, but do require careful thought and planning.

Know the Court's Role

Judges need to consider why they are implementing a court-related mediation program. After all, parties are free to contract with independent mediators to assist them in settling their case. In addition, today judges often view settling cases to be as central to their work as trying cases. Why, then, would a court take on this added responsibility?

For many judges the answers to this question relate to control, effectiveness, and efficiency. By having a court-annexed mediation program, judges typically have a list of approved mediators

to whom they feel they can safely refer cases. They know generally what type of process will be used and they have rules in place regarding policy issues such as confidentiality and voluntariness. By referring to mediation the cases that may settle, judges are freed to turn their attention to the cases that need adjudication.

While a court-related program is likely to provide some solutions, it will also require that judges take on a new role as gatekeepers. They must determine when cases are ripe for mediation and deal with questions from lawyers. In addition, one judge will also typically have oversight responsibility for the program as a whole.

Promote Participation

The commitment of three constituencies is essential to the success of a civil litigation mediation program. They are the bench, the bar, and the mediators.

Judges: Obviously, a court-annexed mediation program will succeed only if judges refer cases to it. (None of the Illinois programs has mandated that all large civil cases go to mediation.) Judges

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LEGISLATIVE UPDATE: ILLINOIS DRCA AMENDED

On July 22, 2003, Governor Rod Blagojevich signed into law an amendment to the Illinois Not-for-Profit Dispute Resolution Center Act (Public Act 93-0240). The original Act authorizes Illinois judicial circuits to use filing fees to fund the activities of community mediation centers in the circuit. As part of the Act, centers receiving funds were required to provide mediation services at no charge. The amendment allows these centers to charge a fee for mediation services not related to the court. For more information on the Act, go to www.legis.state.il.us.

The Uniform Mediation Act was also signed by the Governor. See page 1 of this newsletter for more details.

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THE UMA AND COURT ADR CONTINUED FROM THE COVER



non-party participants. In comparison, typical Illinois court mediation rule wording is: "All oral or written communications in a mediation conference, other than executed settlement agreements, shall be exempt from discovery and shall be confidential and inadmissible as evidence in the underlying cause of action unless all parties agree otherwise."

One distinction between the UMA and most Illinois court mediation rules is that the UMA tends to have more exceptions to confidentiality than the rules do. While local rules often provide an exception for admissibility of a settlement agreement in civil cases, or an exception for reporting of serious imminent harm in domestic relations cases, the UMA provides exceptions for settlement agreements, threats of bodily injury or crimes, open meetings, required reporting of professional misconduct, malpractice actions, and abuse of children or of adults in protective care (Section 6). Following *in camera* proceedings, there may be two more exceptions. It is important to remember, however, that the exceptions under the UMA do not create duties that are not already present, but provide clear guidance as to which items will not be protected by privilege if a participant is called to court, and the manner in which that differs for mediators as compared to other mediation participants (Section 6(c)).

The UMA is also distinguished from typical local rules in Illinois in terms of waivers of confidentiality. In Section 5, the UMA says that confidentiality can only be waived if all the parties waive it. It then gives specific guidance in terms of mediator and nonparty waivers. This is much greater detail than local Illinois rules give. When the rules address waivers, they often simply give the parties the power to waive confidentiality so long as the parties all agree.

One other important difference between the UMA and court mediation rules is breadth of coverage. A court rule will only apply to a case while it is in that court's jurisdiction, whereas the UMA applies throughout the state and will typically be granted full faith and credit by other states. In this respect, the UMA is much broader than a court rule. On the other hand, Illinois court mediation confidentiality

rules generally extend beyond legal proceedings to include any public or private disclosures regarding mediations. Privilege as granted by the UMA is only related to legal proceedings.

It should be noted that the UMA was intended to provide a floor, not a ceiling, when it comes to protecting the confidentiality of mediation communications. Unlike some statutes in other areas of the law that override related laws or other approaches, Section 8 of the UMA specifically states that "...mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State." It is clear, then, that a court rule or statute that extended confidentiality outside the courthouse and into the public square would not be in conflict with the UMA. Indeed, such protections were meant to harmonize with one another. On the other hand, there is still a question of what would happen when there is a conflict below that "floor" the UMA establishes - when, for example, a court rule or a statute provided for fewer limitations to privilege in a court proceeding than the UMA provides.

Other Provisions

The UMA covers a number of areas other than confidentiality. For example, it specifies the kinds of reports mediators may make to courts. Section 7(b)(1) says that a mediator may disclose "whether the mediation occurred or has terminated, whether a settlement was reached, and attendance". Any other "report, assessment, evaluation, recommendation, finding, or other communication" is forbidden.

As another example, under conflicts of interest in Section 9, mediators are required to "make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator". Clearly the "circumstances" will lead to different determinations of what is "reasonable" for a community volunteer in a small claims court as compared to a politically-connected lawyer in a multi-million dollar personal injury case. Each court program will need to assess what is reasonable in its situation.

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MEDIATION PROGRAMS GROWING

Judicial circuits throughout Illinois have demonstrated increased interest in mediation in the past year, working to develop programs for large civil cases and domestic relations disputes. The programs demonstrate the varied ways in which the circuits approach mediation, each shaping the programs to fit their specific needs and the needs of their residents.

Civil Case Mediation

Programs for large civil cases are in the works in Cook County and in the First Judicial Circuit. Cook County, which includes Chicago and many surrounding suburbs, is in the process of finalizing rules for their voluntary mediation program, which will be submitted to the Illinois Supreme Court before the end of the year. The program will utilize private mediators who will be paid by the parties and whose applications have been accepted by the Court. CAADRS has been consulting with the Court on every aspect of the development of the program: the rules, the training of judges and mediators, administration of the program, and its evaluation.

The Cook County Circuit Court has also begun referring Chancery Division cases to mediation by volunteers at the Center for Conflict Resolution. Participation is voluntary and the service is provided free of charge.

At the other end of the state, in far southern Illinois, the First Judicial Circuit program will be very similar to that in Cook County. The main difference will be that the mediators will be invited by the Chief Judge to be on the roster. Those mediators will then be required to participate in a three-day training organized by CAADRS. The

rules for the program have been approved by the Supreme Court, leaving training as the last step to getting the program up and running. Training is scheduled for the end of January 2004.

Domestic Relations Mediation

Three circuits in Illinois have pushed forward with domestic relations mediation programs in the past year. The 19th Circuit, in northeastern Illinois, has expanded its divorce mediation program from one to both of its counties with the adoption of a program for Lake County. The program calls for the mandatory mediation of custody and visitation disputes and voluntary mediation of financial disputes arising from divorce. The Court maintains a roster of qualified mediators, who are paid by the parties. Those parties considered by the Court to be low-income pay a reduced fee.

The Second Judicial Circuit in southern Illinois has taken a different approach to the resolution of custody and visitation disputes. In an example of the creativity that judicial circuits display when confronting their particular strengths and constraints, it has submitted rules to the Supreme Court that authorize a sitting judge to mediate these cases free of charge to the parties. Under the rules, parties may opt to pay a private mediator if they so choose. CAADRS is assisting the Court with development of the program, including the content of its rules, the administration of the program, and the method for evaluating its effectiveness.

The judicial mediation rules indicate that in order to mediate, the judge must first attend 40 hours of training in family mediation. In addition, the

IN ILLINOIS JUDICIAL CIRCUITS

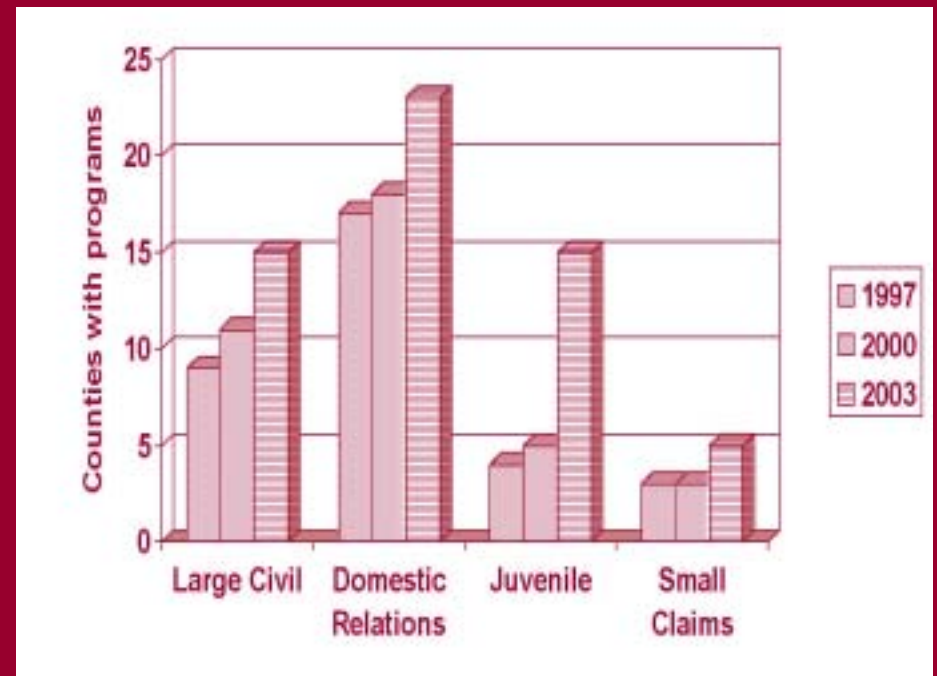
mediating judge may not be the trial judge for that case. Cases can be referred to mediation by the parties or by the judge. Mediation is conducted after discovery is completed (or in pro se cases after filing of financial affidavits).

The 17th Circuit, which includes Rockford, has had a program for the mediation of custody and visitation disputes for ten years. Current caseload has prompted the Court to consider expanding

that program to include the mediation of financial disputes as well. CAADRS is assisting the Court in refining the details of this experimental effort and will be organizing a program-specific training for the mediators.

For more information on ADR programs in Illinois courts, see CAADRS' web site at www.caadrs.org/adr/court-IL.htm.

MEDIATION PROGRAMS IN ILLINOIS STATE COURTS



OUT AND ABOUT WITH CAADRS

Executive Committee member Judge Morton Denlow has been busy writing. So far in 2003, he has written: "The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard," published in *The Review of Litigation*; and "Federal Jurisdiction in the Enforcement of Settlement Agreements: *Kokkonen* Revisited," published in the *Federal Courts Law Review*.

Executive Director Susan Yates has accepted the American Bar Association Dispute Resolution Section's invitation to co-edit a book for judges on court-annexed ADR. The book will serve as a guide for judges who are interested in implementing a mediation program or improving a program that is already functioning. Ms. Yates and co-editor Donna Stienstra, of the Federal Judicial Center, will write an introduction, which will outline the significant questions that arise when designing, implementing, and maintaining an ADR program. ADR experts from various practice areas will write the subsequent chapters. The book will also include a collection of resources to which judges and court staff might turn. Publication is anticipated in spring of 2004.

Executive Committee Chair Judge Harris Agnew has been working with the Winnebago County Bar Association and the 17th Judicial Circuit to establish a small claims mediation program. Planning for the program has just begun.

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need orientation, training, and ongoing support. Some of these activities can be conducted in conjunction with mediator gatherings so that there can be some cross-pollination among participants. As new judges take over these cases, they must be brought up to speed as well.

Lawyers: Even with judges referring cases, if lawyers do not accept the program, it will fail. Obtaining buy-in from leading plaintiff and defense counsel is an early step. Presentations to bar association gatherings and educational programs for lawyers - covering topics such as when cases might benefit from mediation, how much discovery is appropriate for a mediation (as compared to trial), and how to advocate effectively in this new setting - can be very helpful in developing program acceptance.

Mediators: While mediators will be among the strongest proponents of these programs, they too will need orientation sessions and ongoing supervision and support.

Ensure Ongoing Administration and Management

Most of the early mediation programs were built on successful court-mandated arbitration programs, which provided a convenient administrative infrastructure for the new mediation programs. An amendment to the "Illinois Mandatory Arbitration System" statute (www.caadrs.org/rules/Statutes.htm) provides direction regarding the relationship of arbitration programs to other ADR efforts and the use of arbitration resources in these efforts.

Even if an arbitration program is in place, courts have to determine how to track and manage individual mediation cases and the program as a whole. Although mediation programs are not generally time-intensive, they do require management. It is essential to have an administrative person who is responsible for the program, who will work with the judge who has oversight

responsibility. Including the administrative person in the early steps of the planning process tends to improve the workability of the eventual rules as well.

Having started the program development process by setting a goal, programs need an effective monitoring system to measure progress toward that goal. Usually a court wants information on mediation timeframes (time from referral to mediation and from mediation to case closure, hours in mediation, etc.), whether the parties are satisfied with mediation, and the characteristics of cases that resolve as compared to those that do not (e.g., case type, mediator, referring judge). Additionally, Supreme Court Rule 99 mandates regular reporting.

Conclusion

In each county or circuit, there will be particular political and economic considerations involved in implementing a successful large civil case mediation program. Supreme Court Rule 99 provides broad guidance while still enabling local courts to adapt programs to fit their specific needs. No matter what the local issues are, each program requires thoughtful investigation, program planning, and commitment to the effort.

For hands-on expertise, any court considering a large civil case mediation program would gain a wealth of knowledge from the judges, court personnel, lawyers, and mediators who have developed these programs and work with them every day. Information on existing programs is available at www.caadrs.org/adr/mediation.htm.

As always, CAADRS stands ready to assist in the development of mediation programs. Any court in Illinois is welcome to turn to CAADRS for technical assistance, training, development of monitoring and evaluation systems, and enthusiastic support. Contact CAADRS at caadrs@caadrs.org or (312) 922-6475 x 924.

The Cook County Child Protection Mediation Program has approached CAADRS to assist it in creating a monitoring system and to conduct an evaluation of the efficiency and effectiveness of the program. The program, which was established in 2000, is interested in determining whether it is meeting its goals of achieving permanency for children in the child welfare system more quickly and reducing the number of cases being re-opened.

Ms. Yates has been invited to join the editorial board of *Conflict Resolution Quarterly*, a leading journal in the ADR field. The Quarterly sets forth the latest developments in theory and practice in the dispute resolution field and is sponsored by the Association for Conflict Resolution.

On October 15-18, 2003, Ms. Yates attended the Association for Conflict Resolution's (ACR) Third Annual Conference, which took place in Orlando, Florida. While there, she presented at sessions on evaluating court ADR programs and on standards of conduct for mediators. She has recently taken on a number of new assignments at the national level, including becoming a member of the Association for Conflict Resolution Court Section's Advisory Council and a member of the planning committee for the court mini-conference at the ABA's 2004 ADR conference.

CAADRS was fortunate to spend a day this fall working with organizational consultant Angie Karesh. She assisted a group of staff and Executive Committee members in revisiting CAADRS' mission, vision, and program priorities in order to further shape and define CAADRS' future.



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.

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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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Section 10 of the UMA, Participation in Mediation, may throw a few curves for some court programs. It states that an "attorney or other individual designated by a party may accompany the party to and participate in a mediation." In many court mediation programs in the state, especially domestic relations programs, the parties do not bring counsel. These programs will need to decide how to reconcile the new law and their long-standing practices, but it should be emphasized that parties may bring someone; they are not required to do so.

To read the UMA in its entirety, see Public Act 93-0399, on the Internet at www.legis.state.il.us/legislation/publicacts/default.asp.

Conclusion

What does the UMA mean for court-related mediation in Illinois? That remains to be seen. The new law raises some interesting issues. As a first step, people with responsibilities for court mediation programs will probably want to compare the UMA to their existing local rules and practices. From there, the central goal would be to make the UMA and local rules work together to establish the most positive environment for court-related mediation in Illinois.

A MAN OF VISION CONTINUED FROM PAGE 2

ADR Committee for the U.S. District Court for the Northern District of Illinois, he is working to make ADR an important part of the court system.

Perhaps his greatest practical contribution to the provision of justice, however, is the creation of a database of resolutions achieved through settlement conferences by federal magistrate judges in Chicago. Through a summary report, this database provides judges in the Northern District of Illinois with information on the characteristics and settlements of hundreds of cases. The judges use this information to assist them in resolving similar cases. This database is the first organized

attempt to collect and use outcome data of cases resolved by means other than trial.

Judge Denlow's commitment to improving the provision of justice by focusing on the human element has led him to ADR and, happily, to CAADRS. CAADRS is fortunate to benefit from the advice and guidance of someone who not only has keen insight into the federal court approach to ADR, but also a deep understanding of the role of ADR in the justice system. The great wisdom and experience that have brought definition and life to Judge Denlow's vision of justice have also given CAADRS an invaluable member of its Executive Committee.

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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