ANALYZING THE ALTERNATIVES

ENCOURAGING THE EFFECTIVE USE OF COURT-RELATED ADR IN ILLINOIS

A PUBLICATION OF THE CENTER FOR ANALYSIS OF ALTERNATIVE DISPUTE RESOLUTION SYSTEMS FALL/WINTER 2006

FEATURE ARTICLE

NEW TOOL HELPS COURTS

COLLECTION OF SAMPLE RULES NOW AVAILABLE ON-LINE

One of the few things certain in life besides death and taxes is that courts with ADR programs need rules to govern them. Another is that it's a lot simpler to use other courts' rules as models than to create rules from scratch. Doing that just got easier with the creation of CAADRS' new collection of sample rules.

With the support of a JAMS Foundation grant, CAADRS has identified good examples of rules governing ADR programs in the courts and set them up as samples for courts to use as models for their own rules. For the first time, courts are able to go to one source to find rules already identified as being a cut above the others.

The Rules

The rules come from both state and federal courts for programs addressing civil, family, child dependency, probate, bankruptcy, and appellate cases. They cover just about every ADR process, including mediation, arbitration, early neutral evaluation, and summary jury trials.

Whenever possible, we selected more than one rule for a particular program and process in order to give courts options depending on how the program is structured. For example, a rule using staff mediators would be paired with one using private roster mediators.

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AN EYE TO SATISFACTION

JUDGE JANET R. HOLMGREN

CAADRS Executive Committee Member Judge Janet R. Holmgren was sitting as a judge for a medical malpractice case involving permanent disfigurement as a result of a surgical error. It was a very sensitive issue for the plaintiff, who wanted nothing more than to move past it. On the eve of trial and after other negotiations had failed, the parties asked if Judge Holmgren would be willing to facilitate a settlement, and with her help the case was resolved. Not only did the plaintiff feel that she was heard and treated with dignity, but she was happy she was able to avoid a potentially embarrassing presentation of evidence. When reflecting on this case, Judge Holmgren says she believes that the ends of justice were achieved. The plaintiff was spared the trauma of a prolonged and emotionally difficult trial and all the parties were invested in and satisfied with the end result.

This is just one example of how Judge Holmgren brings her ADR experience to the bench. Judge Holmgren's experience in the fields of law and ADR have given her different perspectives on how people view their experience with the justice system; in her approach to justice, she uses these perspectives in an effort to ensure that the people that she and the court serve walk away satisfied.

Judge Holmgren views her early experience in the fields of law and ADR as reciprocally educational. When she entered private practice in 1985, she concentrated in the areas of personal injury and insurance defense. She eventually found herself with a split caseload, with about half plaintiff's cases and half insurance defense cases. Judge Holmgren's education continued when, after the 17th Judicial Circuit piloted the first mandatory court-annexed arbitration program in 1987, she began serving as an arbitrator as well as trying arbitration cases on behalf of her clients. Later, after becoming one of the first mediators for the pilot civil mediation program in Winnebago County, she used the knowledge she gained by having a balanced caseload and arbitrating to enhance her neutrality as a mediator. Coming full circle, she says that through the mediation training she attended and mediating itself she gained a different vantage point for her own cases.

Judge Holmgren carried this new perspective with her to the bench when she was appointed Associate Judge of the 17th Judicial Circuit in 1995. Now a Circuit Judge presiding over the Family Division while also assigned to a law and chancery call in Winnebago County, she has found her mediation experience to be extremely valuable to her current work. This effect was furthered when Judge Holmgren refreshed and enhanced her mediation skills by attending a week-long civil mediation training at the National Judicial College. She says that mediating has made her a more balanced decision-maker and has educated and sensitized her to how people view their situa-

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SPEAKING OF COURT ADR . . .

CAADRS' LITTLE LIST OF DON'TS:

ANOTHER WAY OF LOOKING AT BUILDING SUCCESS IN COURT ADR PROGRAMS

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

As we at CAADRS have been working on the "how to" section of court ADR programs for the CAADRS web site renovation, it struck me that in all that formal advice - including our own - there was something missing. Then it hit me. What was missing was informal, color-outside-the-lines advice. Sometimes it comes from the contrarian in me, like the urge to tell people to stop being so collaborative and make some tough decisions. And sometimes my advice is simply an attempt to bring a little balance to the endeavor of court ADR development, like when I suggest people pay less attention to their program rules. (You'll have to read below to see why.) So this time, instead of suggesting what people should do in their court programs, I took a little different approach. I'm suggesting what they *shouldn't* do.

This advice doesn't fit neatly into a step-by-step model of how to build or renew an ADR program, but I resist the urge to call this "real world" advice, because that step-by-step stuff is definitely real world, too. I do hope this is a helpful addendum to the "how to" guides. Enjoy!

1. Don't Obsess about Your Court ADR Rules

ADR is about people, not paper. Some ADR planning committees can get lost in the rules and forget they are creating a program. Sure, you shouldn't have a bad set of rules for your program, but if your planning committee keeps its nose buried in rules and you end up with the clearest, most well-formulated rules ever drafted, but you don't have enthusiastic and educated neutrals, judges, and lawyers, you can forget about your program succeeding. So, be sure that you figure out not only how you are going to select your neutrals, but how you are going to nurture them. Know who will talk judge-to-judge about the program to educate and answer questions. Designate someone to be on base to deal with any questions about the program if they need to be answered immediately, maybe with your resident ethics expert on call. Figure out who is in the best position to work with the bar to develop genuine buy-in, create a plan to obtain that buy-in, and then execute it. Going forward, there will be more tasks as you maintain interest, deal with issues as they come up, incorporate new neutrals, etc. The point is that as important as the rules are - and they are a great tool for guiding how the program will work - they are only a tool.

2. Don't Worry about Making some Enemies

There will be many pressures on you as you work to design a mediation program and sometimes you've just got to be brave. Some forces will seek simply to speed up case closure, or to make their lives easier. Others may seek to profit or want their friends to profit. Others may feel that their turf, income or status is threatened, while others may just not like change, and some may be mediation proponents who are rigid about how the process must be conducted. It is a challenge to know what to do about all these competing concerns, and compromise is not always the right answer. At some point, difficult decisions must be made. The key is educated leadership that is willing and able to make those decisions - even though they are unpopular with some groups - in order to keep the planning process moving along.

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SAMPLE RULES CONTINUED FROM COVER

Rule Summaries

For each rule, we created a cover page that provides a summary of the rule, including the case types and processes covered and any related statutes or rules. The summary is followed by bulleted lists highlighting the especially good aspects of the rule as well as interesting approaches the rule takes to particular topics.

Rule Selection

We examined almost 1000 rules for this project and selected eighteen samples. In deciding which rules to include, we assumed that courts might want to adopt them in whole and adapt them to their specific needs and situation. For the rules to be adopted in whole, they needed to pass certain criteria. First, the rules had to be well-written from top to bottom, with no parts that were poorly written or conceived. Second, the selected rules had to cover all the topics that should be covered by court rules, with the most important being eligibility, the referral process, procedures from referral to termination of ADR, neutral qualifications and compensation, and confidentiality. Third, the rules had to be written and structured in such a way that they could be adopted in other jurisdictions.

We used one other criterion as well. Since the rules are not accompanied with detailed guidance about whether or how to deal with particular topics, we decided not to include rules that address certain issues about which court ADR professionals disagree. So, for example, the sample rules do not include rules that have good faith requirements for the participants because there is disagreement about whether they are a good idea.

Once all those criteria were met, we then looked for rules that in some way rose above the others. Rules were selected if they were particularly good in dealing with a specific issue, or if they were particularly well organized and written.

The Future

The collection of sample rules is one part of a larger project that includes the collection of sample forms for an array of ADR processes and the creation of model forms for mediation. Eventually, all the collections will be housed in CAADRS' on-line Resource Center.

Support and Advice

CAADRS is very excited to provide this valuable tool to courts throughout the United States and could not have done so without the generous support of the JAMS Foundation. CAADRS also extends our sincere gratitude to the CAADRS Resource Center Advisory Committee (see box on page 5), whose advice has been extremely helpful. Any errors are ours and not those of the Foundation or the Committee.

To check out the collection of sample rules, go to www.caadrs.org/rules/sample_rules.htm.

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Lodestar Dispute Resolution Program

CAADRS Executive Director Susan M. Yates and Director of Research Jennifer Shack headed south to Carbondale in July to talk with local judges, attorneys, academics, and mediators about the use of mediation for poor and low income residents.

At the car rental agency, they were told, "Women here love big trucks," and were given this Ford F-150. Jennifer was happy to have Susan do all the driving.

WHAT'S NEW IN ILLINOIS:

Rule 905 Sparks Mediation Activity

In response to Illinois Supreme Court Rule 905, which calls for all custody and visitation cases to be mediated, courts throughout the state are initiating efforts to provide this service. Among these efforts are new programs in St. Clair, Madison, and Lake Counties. Each represents a different way in which courts are responding to the new mandate.

St. Clair County (in the 20th Judicial Circuit) is launching a judicial mediation program. Five judges have been trained to be family mediators. The judges mediate custody and visitation cases over which they will not preside. The program allows the parties to elect to pay a private mediator instead. The court is following the model first piloted in the 2nd Judicial Circuit, which has recently expanded its program by training five more judges.

In **Madison County** (in the 3rd Judicial Circuit), the court is relying on private mediators to conduct custody and visitation mediation. The mediators are paid by the parties, or by the court if the parties are indigent. Custody cases are sent to mediation if there is no settlement reached within 90 days of an answer being filed. The mediations are to last for four hours or until a settlement agreement is reached, whichever comes first.

Mandatory mediation inevitably leads to the need to mediate cases in which the parties cannot pay. The 19th Circuit, **Lake County**, launched a new initiative in January 2007 to answer this need. Through this initiative, mediators already on the court's list of approved providers volunteer to mediate custody and visitation cases. The mediations take place Tuesday mornings in the courthouse. The main emphasis of the program is on *pro se* cases, however, judges can refer any case they feel will benefit from the program.

Chancery Mediation Program Launched

On January 1, the **Cook County Circuit Court** officially launched the first mediation program in Illinois devoted solely to chancery cases. Local Rule 21 establishes a court-annexed mediation program designed to provide "an expeditious and expense-saving alternative to traditional litigation." Presiding Judge Dorothy Kirie Kinnaird, who has long been involved with mediation through her former position on the board of the Center for Conflict Resolution as well as more informally, has been the impetus behind the program, working to make reality a program she has complete confidence will enhance the court's services to litigants.

Although every contested matter pending before the Chancery Division is eligible for mediation, the cases will be judged appropriate for referral on an individual basis. Cases the court considers to be most appropriate for mediation are those involving ongoing relationships, those involving requests for relief, and those involving a matter of community or public concern. Not considered to be suitable are primarily those cases involving a significant question of statutory or constitutional interpretation, cases involving mortgage fraud, and cases involving rescue of property.

PROGRAMS AND TRAINING

The court has also partnered with the Center for Conflict Resolution to mediate cases uniquely suited to community mediation. Such cases include those in which the parties are *pro se* or in which they cannot afford to hire a private mediator, as well as cases in which there is a matter of community or public concern.

Arbitration Spreads to Third Circuit

Madison County will soon have a mandatory arbitration program for civil cases valued under $50,000. The Illinois Supreme Court has approved the court rules for the program. The court began collecting filing fees to fund the program on January 1, and plan to begin sending cases to arbitration in July 2007. Under the program, each case will be heard by a panel of three attorneys who will be selected from a roster on a rotating basis. The arbitrations will consist of a single hearing of about two hours for which the arbitrators will be paid by the court.

Small Claims Mediation Deemed Successful

The 17th Circuit Small Claims Mediation Project, piloted by the ADR committee of the **Winnebago County** Bar Association, has been enjoying great success since it began in January, 2006. Twenty-eight lawyers volunteer their time, conducting mediations at the courthouse every Friday. Through the third quarter of 2006, 59 mediations had taken place with an 85% settlement rate. Co-chair for the ADR committee, Judge Rosemary Collins, says the program has saved valuable court time and that several of the agreements have involved non-monetary elements that could not be awarded by the court.

Cook County Judges Are Trained

Normally, judges have to travel to Reno, Nevada to access trainers from the National Judicial College, but this summer two trainers from the college - Nancy Neal Yeend and John Paul Jones - brought their training to **Cook County**. Thirty-nine Cook County judges participated in the 40-hour training. The Center for Conflict Resolution in Chicago collaborated in the training, which was funded by the court and took place at the Chicago Bar Association. Chief Judge Timothy Evans and Circuit Judge Allen S. Goldberg worked together to bring about the training. Judge Goldberg reported that the evaluations by the judges who participated were overwhelmingly positive.

OUT AND ABOUT WITH CAADRS

CAADRS Director of Administration Jennifer Spagnolo married Brian Anstiss on October 7. We wish them all the best and a lifetime of happiness.

CAADRS Executive Committee member Judge Allen S. Goldberg was honored by the Illinois State Bar Association along with Law Division Presiding Judge William D. Maddux for their work in bringing to realization Cook County's Law Division Mediation Program.

CAADRS Executive Committee member Judge Morton Denlow was an instructor at the Mediation Skills Workshop for Federal Judges put on by the Federal Judicial Center this September.

As part of a project supported by a grant from the Illinois Equal Justice Foundation, CAADRS Executive Director Susan M. Yates and Director of Research Jennifer Shack met with judges, legal services lawyers, private lawyers, mediators, and legal educators in Carbondale and Rockford to discuss how mediation might be used to improve access to justice for poor and low income residents in Illinois.

Ms. Yates spoke at the Cook County Judges Mediation Training on Illinois ADR rules and statutes on August 2.

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CAADRS' LIST OF DON'TS

As part of the planning process, it is important to invite some respected naysayers to the formative committee so that their input is received. After all, conflict is useful! Their presence can spice up the meetings and their input is likely to help find the holes in the rules. They may end up buying in to the ADR program. If not, at least they will know their input has been respected and you will know what their concerns are.

3. Don't Shy Away from Politics

Having said that you need to do what is right for the program, not what necessarily makes friends all the time, you also have to be cognizant of your local power structure and how to flow within it. If there are a couple judges or some lawyers in your community who must be involved with something in order for it to fly, be sure to invite them to the planning committee. Better yet, have a powerful friend of theirs invite them. If they can't attend meetings, see if they'd like an occasional briefing on the progress of the planning. And if there are certain people who will make your mediator roster more legitimate in the eyes of the lawyers who will be selecting neutrals, then you might want to write rules that allow them on the roster. If you are offended by the idea of "playing politics" with your court ADR program, get someone from the committee to do it for you.

4. Don't Believe You'll Fix Your Rules Anytime Soon

It's going to take quite a bit of time and effort to get your rules written and approved in the first place. Once the program is operational, some leaders will move on to the next project. It may be a new jail or space for visitation exchange, but it will not be amending the rules of the new ADR program. If something needs to be worked out in the rules, do it up front. Don't leave it to the side, thinking you will come back to it in six months. Be sure to include a plan for roll out, implementation, continuing education, mediator support, party grievance procedure, gathering statistics for monitoring, evaluation, and a standing committee with representatives from all involved parties, e.g., judges, mediators, courts personnel and lawyers, to oversee the project. If you put that all in place during your planning phase, you won't be playing catch-up later. This doesn't mean you may not want to re-open your rules at a later date based on the information you gather from your monitoring and evaluation efforts during the life of your program, but it won't be because you dodged a tough bit of work in the beginning.

5. Don't Think Everything Is Set in Stone

What are the two most magical words in court ADR? "Pilot program." With those words, especially if you include an evaluation and a sunset provision, you can try all kinds of new things. If something doesn't work, you can gracefully end the program. If it works, you can smoothly extend it.

6. Don't Fall for the First Good Looking Program that Comes Along

All too often when people tell me the history of their programs, it starts with a variation on "I was at a conference and So-and-So did a presentation on their program. It sounded good so we modeled our program after theirs." It may be that this is a good program, but that doesn't mean that it is the best program for your situation. With an ever-expanding level of sophistication in the provision of court ADR services, it is always a good idea to look around and see what your options are. With so many programs in operation across the country and so many program descriptions on the Internet, there is no excuse for implementing the first program you learn about. Do your research. Define the needs in your court. Talk with program directors of programs in other jurisdictions. Visit programs. Then decide what is best for your specific needs.

7. Don't Start a Mediation Program Just to Start One

Bad mediation is much worse than no mediation. If the program you had envisioned

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The second edition of CAADRS Executive Committee member Dean James Alfini's textbook, *Mediation Theory and Practice* by Alfini, Press, Sternlight & Stulberg, was published by LexisNexis in 2006. The textbook includes the article, "Mediation Can Bring Gains, But Under What Conditions?" written by CAADRS Director of Research Jennifer Shack and originally published in the Winter 2003 issue of *Dispute Resolution Magazine*.

Under the leadership of CAADRS Executive Committee member Judge Goldberg, the Cook County Circuit Court Law Division is presenting a series of brown bag lunches for Court-Annexed Mediation Continuing Education. All seminars take place in Courtroom 2005 of the Richard J. Daley Center from 12:00 - 1:45 p.m. If you are interested in attending please contact Mrs. Ferenzi at (312) 603 6078 or Ms. Patty Formusa at (312) 793 0134.

Ms. Yates attended an ABA Dispute Resolution Section Council Meeting in Toronto in October. She also attended another ABA Dispute Resolution Section Council Meeting and a Quality in Mediation Task Force meeting in Miami in February.

CAADRS has been fortunate to have a long-term research intern this past year. Lindsey Green, a third year law student at DePaul University College of Law, joined CAADRS in June. She has been a tremendous asset to the organization.

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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somehow jumps the tracks during the planning process and is headed somewhere horrible, hit the brakes. Don't finish the rules. Don't mediate the first case. If you force people into a mediation program that is just another hurdle in the litigation process, has poorly-skilled mediators that exacerbate conflicts and never settle any cases, or has nothing positive to contribute, it will kill mediation for a generation. The best way to establish a mediation program is for people to have a good experience in mediation. If it's heading in the wrong direction, it's better to wait until the environment is ripe for a healthy program.

As the saying goes, none of this advice is rocket science, but sometimes it helps to look at something from another point of view. And relax; it doesn't hurt to have a little fun as you build or renovate your program.

JUDGE HOLMGREN CONTINUED FROM PAGE 02

tion and their contact with the court. She believes people come to court wanting to air their grievances, be listened to, and be treated with dignity and respect. Mediation provides a venue for this while also being a neutral and confidential environment. As a result, it can be very effective in ending a dispute in the early stages of litigation, thus saving the parties from a lot of additional expense, delay, and frustration.

For Judge Holmgren, when parties to a dispute come to the table and effectively arrive at their own resolution, their satisfaction with their entire experience with the court system is higher. This is because ADR addresses all aspects of a case, including the emotions behind the dispute, which are important to the parties but not a part of the case that a jury hears. In Judge Holmgren's experience, jurors are thoughtful when rendering a verdict, but because there are aspects of the case that the jury can't consider, the parties are not always satisfied with the jury's ultimate decision.

Judge Holmgren's experience has not only given her different perspectives to draw upon in her approach to justice, but has led her to support efforts toward increasing people's satisfaction with their contact with the justice system by developing the court into an entity that offers multiple avenues for attaining justice. She hopes that ADR becomes even more accessible, more creatively utilized in a variety of cases, and more of a public service - that individuals without means have access to an alternative method for resolving their dispute.

Judge Holmgren's integrated approach to justice, in which she draws on her legal and ADR skills as needed, epitomizes the coming together of ADR and the justice system as a way to enhance the litigants' experience with the court. CAADRS is honored to have Judge Holmgren on its Executive Committee and shares Judge Holmgren's vision of a court and its adjuncts that function effectively and efficiently, leaving litigants feeling they have been well and fairly served.

1ST APPELLATE WEIGHS IN ON GRACE PERIOD

In Nix v. Whitehead (1-05-1412) the Appellate Court for the 1st Appellate District of Illinois found that arriving at an arbitration hearing a few minutes after the 15 minute grace period does not bar a party from rejecting the arbitration award. The Appellate Court reversed the Trial Court's decision, stating that by arriving 2 minutes after the grace period the plaintiff neither failed to be present at the hearing, nor failed to participate in good faith, the two grounds that bar a party from rejecting an arbitration award under Supreme Court Rule 91. The Court referenced Zietara v. DaimlerChrysler Corp., 361 Ill. App. 3d 819 (2005), a similar case where the Court emphasized that the 15 minute grace period is not mandatory.

The Court remanded the case for a new arbitration hearing and noted this was a limited holding, stating, "We do not condone tardiness" and explaining that being "significantly late" could "result in debarment of the party from rejecting the arbitration award."

To read the full text of the opinion, go to http://www.state.il.us/COURT/Opinions/AppellateCourt/2006/1stDistrict/September/Html/1051412.htm.

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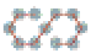

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