

ANALYZING THE ALTERNATIVES

ENCOURAGING THE EFFECTIVE USE OF COURT-RELATED ADR IN ILLINOIS

A PUBLICATION OF RESOLUTION SYSTEMS INSTITUTE

☼ SUMMER/FALL 2011

FEATURE ARTICLE



FORECLOSURE MEDIATION SHOWS SUCCESS ILLINOIS PROGRAMS SETTling CASES

As the national foreclosure crisis continues, mediation has become an increasingly popular tool that courts and government agencies are using to help homeowners stay in their homes. Courts in Illinois are following this trend. Programs in Cook and Will counties marked the completion of their first year this summer, and new programs were launched in Madison County and, at the encouragement of Illinois Supreme Court Chief Justice Thomas Kilbride, Peoria County.

The foreclosure mediation programs launched last summer by the 12th Judicial Circuit (Will County) and the Cook County Circuit Court

adopted very different processes. In Cook County, where there were over 50,600 foreclosure filings in 2010, homeowners are required to meet with housing counselors and legal aid attorneys prior to mediation. Homeowners are invited to call a hotline to enter the program when they receive their foreclosure summons, are contacted by door-to-door outreach, or are brought into the program when they appear for their first court date. The program also provides representation for homeowners at mediation. All of these services are provided at no cost to homeowners.

According to a presentation made by program

CONTINUES ON PAGE 05

ADR FROM ALL ANGLES

TERRY MORITZ



RSI happily welcomed Terry Moritz to its Executive Committee in February. A lawyer with over 40 years of experience in both court and ADR settings, Mr. Moritz brings a passion for ADR and a drive to see its usage expand.

Mr. Moritz is a Principal at Goldberg Kohn, where he founded the firm's litigation practice. He has expertise in the electric utility, financial services, real estate and railroad industries. He has handled cases before the United States Supreme Court; throughout the federal court system; and in the state courts of Illinois, New York and Colorado. Over the past four decades, Mr. Moritz has represented clients in a variety of settings and has come to see the value in different resolution processes, relative to the matter at issue. Mr. Moritz believes that it is a lawyer's job to resolve clients' cases at the earliest time possible consistent with the client's goals and objectives, and therefore, any path to resolution must be explored.

Mr. Moritz will often suggest mediation as a means of effective dispute resolution. "Mediation is an important tool to be used in dispute resolution amongst individuals or entities who are confronted with a problem that needs to be resolved," he said. "Alternative dispute resolution, where possible...is an intelligent step that should be explored by counsel at various stages of any proceeding." Mr. Moritz believes ADR can save his clients time and money while giving them control over the outcomes of their cases.

Mediation in particular, he feels, can help overcome the difficulty of understanding the motivations of the opposing party, something that litigation doesn't always accomplish. Parties' positions often have an emotional component. When mediation explores these emotions, a more agreeable outcome can result.

Mr. Moritz believes that, "facilitating resolution through the use of mediation should be in every lawyer's tool kit, and in the tool kit of trial court judges." He is concerned that there appears to be an underutilization of mediation and other forms of ADR in the Chicago legal community, and he is committed to increasing its usage. Although he recognizes that ADR is not appropriate for every case at every point in the case's history, and that many lawyers and judges use ADR, he thinks there is still considerable room for improvement.

Over the course of the past decade, Mr. Moritz has become a mediator and a certified arbitrator in order to more comprehensively

CONTINUES ON PAGE 04

WORKING WITH DATA ON A BUDGET

TRACK YOUR PROGRAM WITH LIMITED FUNDS

Many court ADR programs are caught in a Catch-22 these days. On one hand, legislatures and funders are requiring more often that programs prove their success in order to obtain further funding. On the other, the amount of funding for court programs has diminished. So, courts are faced with an unfunded mandate to monitor, and often evaluate, their programs. Funding isn't the only reason programs should be concerned about monitoring their success. RSI advocates that all court ADR programs set up a monitoring system to actively track their progress. The benefits to the program far outweigh the costs.

Take, for example, two programs RSI has assisted: Cook County Circuit Court's Mortgage Foreclosure Mediation Program, which includes Chicago, and Champaign County's restorative justice program. Cook County's program increased its funding in its second year by demonstrating not only that the program was successful, but showing as well what improvements were needed to benefit more homeowners. In central Illinois, Champaign County's court diversion program worried that juveniles who went through peer court weren't understanding fully the harm caused by their actions, thus limiting the impact of the program. Preliminary findings from their monitoring system surprised them, showing that this worry may be unfounded, and that their procedures appeared to be having the desired effect. They are awaiting confirmation of this as they continue to collect data.

Like Cook and Champaign counties, you can use no-cost or low-cost options to accomplish what

you need to:

- Tout your successes. You've got a great program – let the world know. This includes any funders of the program.
- Be accountable to the public. As a public institution, the court is accountable for the money it spends and the programs it creates. Monitoring and evaluating programs is the best way to address that accountability.
- Identify mediators in need of further training. Monitoring can reveal mediators who are in need of better skills. Research has shown that attorneys often can gauge the abilities of mediators. By asking them specific questions about the mediators' skills in particular areas, a pattern will emerge if a roster mediator is not performing up to the standards of the program.
- Find areas for improvement. Monitoring your program can highlight issues that need to be addressed, such as better information flow from the court or the attorneys to the mediators, or more refined referral processes.
- Identify best practices. A more in-depth evaluation of your program can help you to determine the factors that lead to greater success in procedure and outcome, and can help other courts decide how to structure their programs.

Despite these benefits, monitoring and evaluation can seem daunting these days, as courts' budgets and staff are cut. However, there are ways to get around these limitations. If you need help in developing a good monitoring system:

- Consult with RSI. RSI can work with courts to develop good monitoring criteria,

CONTINUES ON PAGE 11



JAMS SUPPORTS WEBSITE PLANNING

RSI is excited to announce the receipt of a grant from the JAMS Foundation to support the first phase of a project to upgrade CourtADR.org and AboutRSI.org. The sites, launched in February 2008, require some technical renovation to keep them sustainable into the future. While that work is being done, RSI plans to update the organization and content of the sites, as well. In order to do that most effectively, RSI will spend the first phase of the project conducting research to gather feedback from website users and target audience members. We hope to find out how the sites are meeting their needs and how we can improve the sites to serve them better.

RSI would like to thank the JAMS Foundation for its support. The Foundation has funded the development of CourtADR.org since it was launched, and we are excited to continue working with the Foundation to maintain our websites as valuable tools for the court ADR community for years to come.



TERRY MORITZ CONT. FROM PAGE 02

understand mediation and arbitration. He has great interest in continuing to learn about ADR and serving as a neutral more frequently. Mr. Moritz serves on the American Arbitration Association (AAA) commercial panel, he is a member of the International Institute for Conflict Prevention & Resolution (CPR), and he serves as a mediator and arbitrator in the electric energy industry with Midwest Independent Systems Operator.

Mr. Moritz also teaches an ADR course as an adjunct professor at Loyola University Chicago School of Law. He finds the class not only useful in educating law school students about ADR, but in helping him personally to stay abreast in ADR developments as well.

From his experience working in ADR, Mr. Moritz knew of RSI's reputation and was excited to join the organization. Dedicated to the growth of ADR, he is eager to contribute to an organization spurring that growth throughout Chicago, Illinois and the nation. "RSI promotes creating a broader and more useful knowledge base [about ADR techniques and their value]," he commented. Working with RSI enables him to participate in the expansion of both the usage and understanding of ADR among legal professionals and the broader public. RSI is grateful to have on the Executive Committee someone as experienced in the law and dedicated to ADR as Mr. Moritz.



FORECLOSURE MEDIATION CONT. FROM PAGE 01

administrators to the Cook County Board of Commissioners on July 25, tens of thousands of homeowners have been helped by the different services in the program. Between April 2010 and July 2011, 23,322 housing counseling sessions were completed, and 31,712 homeowners received pre-court legal advice. A total of 2,371 cases were referred to mediation, and 1,119 mediation sessions were held.

In this program, agreements can be reached at any point, including during the housing counseling and legal aid processes. In total, 736 cases completed the program, with 402 (55%) reaching agreements. Of the agreements reached, 354 involved terms that allowed homeowners to stay in their homes. Mediation participants surveyed during this time also reported a 95% satisfaction rate with the program.

During its first year, the program was funded by a \$3 million grant by the Cook County Board of Commissioners. The Board extended this funding for another year in July. The new contract approved by the Board included funds for two additional mediation case managers, as well as contract mediators.

In Will County, the program requires all residential foreclosure filings to be scheduled for a pre-mediation conference. Homeowners are given contact information for local housing counseling agencies, but are responsible for seeking out their services on their own. At the pre-mediation conference, homeowners review their financial information with a mediator, who determines whether a work-out with the lender would be possible. In general, Trial Court Administrator Kurt Sangmeister said, homeowners are eligible for mediation if their income

is greater than their expenses. If so, the case is scheduled for mediation.

According to Mr. Sangmeister, between August 2010, when the program began taking cases, and mid-August 2011, there were 6,543 residential foreclosure filings scheduled for pre-mediation conferences. In 3,577 cases, the borrower did not attend the conference or the lender and the court were not able to contact the borrower. Of the 2,966 conferences that were held, 1,607 borrowers went on to mediation. Of those, 914 (57%) reached agreement, with the remaining cases either pending or reaching no agreement.

Mr. Sangmeister said the program had encountered some challenges during the first year, including working with the lenders to make sure they were prepared for mediations. He said most mediations require 3-5 sessions, mostly because the necessary documents from lenders are not available for the initial sessions.

"We still consider [the program] a work in progress," Mr. Sangmeister said, "but helping out nearly 1,000 families is decent progress."

The programs in Madison and Peoria counties, which were both launched in June, are modeled on the Will County program. In both, residential foreclosure filings are automatically scheduled for pre-mediation conferences, where homeowners meet with the program coordinator to determine if they are eligible for mediation.

In Madison County, the mediation coordinator is Linda Jun, an Americorps VISTA member working with the court. Ms. Jun said the program was motivated by an increase in foreclosure

BUILDING THE FUTURE OF COURT

RSI envisions a world in which every court system provides high quality, accessible ADR programs for people looking for less expensive, more satisfying ways to resolve their conflicts. We are working hard to make that vision a reality. RSI increasingly is being tapped to assist with mediation programs around the country, while more programs in Illinois also are turning to us for expertise. The past months also saw RSI partnering with two other organizations to convene a conference of experts to discuss challenges facing court ADR. The following are some of the steps forward we have taken in the past six months.

Opening Access to Small Claims Mediation
Pro se small claims litigants in Coles County (in rural East Central Illinois) will soon have the option to mediate their disputes. RSI Staff Attorney Heather Scheiwe Kulp has been working with a group of stakeholders from the county, including local mediators, the local small claims judge and a law school professor, to develop a new mediation program. Aimed at better serving the court's high percentage of pro se litigants by helping them come to more meaningful resolutions, the program will serve three court sessions per week. Ms. Kulp helped the group identify potential program partners and draft a court rule, which the Circuit is considering. Four potential program mediators attended a small claims call and conducted mediation simulations in September, with the hopes the program will launch by January 2012. RSI Director of Research Jennifer Shack also will be working with the court to develop a system to monitor the progress of the program.

Providing Insight to Restorative Justice Program
A restorative justice program for juvenile offenders in Champaign County is learning more about how participants respond to its process thanks to help from Ms. Shack. She recently worked with the Champaign County Regional Planning Commission's Court Diversion Services to develop monitoring forms and a data entry system for their restorative justice program. The program, located in central Illinois, includes peer court and mediation options for juvenile offenders who accept responsibility for their actions. The program's staff was very interested in gathering data for the express purpose of evaluating their own process of intake and orientation, as well as the juveniles' reactions to their experiences with peer court or mediation. They wanted the juveniles to understand why they were asked to participate in a restorative justice process and to understand that the impact of their actions went beyond harm to the victim. If the juveniles' responses indicated they didn't have a good understanding of these two issues, the staff believed they would need to change how they were approaching the juveniles at the outset.

After three weeks of testing the forms, which demonstrated that the questions were well-formulated, Court Diversion Services is getting the information it needs to decide whether any changes need to be made. The juveniles' responses also will provide feedback the program can use when seeking county and foundation funding in the future.

ADR IN ILLINOIS AND THE NATION

Helping Utah with Foreclosure Mediation
RSI's reputation as a leader in providing research, resources and program development services in the new area of foreclosure mediation is garnering attention beyond Illinois. In May, the Institute for Advanced Mediation and Problem Solving (IAM) invited RSI to present at the Utah Council on Conflict Resolution's annual symposium. RSI Executive Director Susan M. Yates and Ms. Kulp, who are experienced foreclosure mediators, demonstrated skills particular to foreclosure mediations in two mini-workshops. They also gave a continuing education presentation on foreclosure mediation models.

As part of their efforts to assist Utah in the process of developing a foreclosure mediation program, Ms. Yates and Ms. Kulp facilitated a meeting with the Attorney General's office, a Utah city mayor, the head of the Utah Banking Association, representatives from IAM, the Executive Director of TEEMS (housing advocates), a real estate agent, HUD counselors, and foreclosure defense attorneys. The stakeholders discussed how other states had created foreclosure mediation programs and how Utah may adopt a model for its needs.

In follow-up conversations, the Utah stakeholders have reported that they are continuing to work out a proposed bill. When needed, RSI will go back to Utah to continue to facilitate dialogue among the many stakeholders and provide a national perspective on best practices in foreclosure mediation.

Training Hawaii Neutrals in Foreclosure
Ms. Yates and Ms. Kulp extended their expertise to Hawaii in October, where they were asked to conduct two two-day trainings of neutrals in issues surrounding foreclosure. The training helped the neutrals to understand the basic legal concepts involved in foreclosure, the financial calculations needed in resolving these cases, and the dispute resolution process as it pertains to foreclosure.

Exploring the Future of Court ADR
Beyond direct program development, RSI is also working with other ADR experts to identify solutions to the challenges facing court ADR. RSI partnered with the Association for Family and Conciliation Courts and Marquette University Law School to conduct a small, national symposium at Marquette in September. The conference brought together experts from around the country with backgrounds in family and civil ADR to discuss potential collaboration between these traditionally disconnected groups and to develop recommendations. Attendees participated in panel discussions on the core values of dispute resolution, what program stakeholders need and contemporary practices that are meeting those needs. They later gathered into think tanks to discuss the issues facing court ADR nationally and in Milwaukee's family court, focusing on what can be done to move court ADR forward.

A webcast of the panel discussions was streamed live. Recordings are available for free on the conference website: law.marquette.edu/courtadr.



OUT AND ABOUT WITH RSI

RSI Executive Committee member Honorable Karen Shields traveled to Cuba with the Chicago Bar Association to learn about the Cuban legal system from lawyers, judges and law professors. The President of the People's Supreme Court of Cuba discussed the judges' heavy workloads and their need for settlement processes, given Cuba's change in economic structure to allow private ownership of business and investment from other countries. Judge Shields found they were interested in mediation and they welcomed ideas to increase their understanding of successful processes.

This past spring, RSI Executive Committee member Honorable Allen Goldberg was a judge for a mediation competition in London. Law schools from around the world sent teams of students to mediate various problems; teams were from as far away as India. A team from Australia won.

In April, RSI Executive Committee member Honorable Morton Denlow traveled to Rostov-on-Don, Russia, to present at the International Conference on Improvement of Procedural Remedies in Commercial Litigation. He spoke to 200 Russian judges about successful techniques they can use to help litigants settle their cases.

CONTINUED FROM PAGE 05 FORECLOSURE MEDIATION

filings in the county. It was developed through a joint effort involving the court, local mediators, plaintiff attorneys, homeowner advocates and the Land of Lincoln Legal Assistance Foundation.

In order to determine if homeowners are eligible for mediation, Ms. Jun uses a formula laid out in the program rules. The homeowner must be able to afford a mortgage payment equal to 31% of her income in order to go to mediation. Ms. Jun said that the rule was inspired by the federal government's HAMP program, although the program is not directly connected to HAMP.

"We tried to find some way to gauge if homeowners could feasibly make a mortgage payment," she explained.

As of August, Ms. Jun had held a handful of pre-mediation conferences, and no mediations had been held. Mediations will be conducted by volunteer mediators who complete court-provided foreclosure training and mediation training (for those who have not mediated before). Ms. Jun said that a foreclosure training had been held in June and mediation training was held in September. Twelve mediators are now ready to mediate for the program.

The Peoria County program is at a similar point in its implementation. The mediation coordinator, Michelle Miller, schedules eight pre-mediation conferences each week. As of early October, attendance was low, with an average of three homeowners attending each week. Ms. Miller said the low attendance rate was partially due to lenders and the court not being able to contact homeowners to serve them notice of foreclosure. Ms. Miller works with those who do attend the pre-mediation

conference to determine if mediation would be a helpful option for them. She reviews the homeowners' financial documents with them and explains their options for settlement.

"I ask, what's your income? How many payments behind are you? Is it possible that you could ever catch up?" Ms. Miller said.

When a case is referred to mediation, the court assigns a mediator, and the homeowners and lender are directed to contact the mediator to schedule mediation. Mediators report back to the court at the conclusion of mediation. Ms. Miller said that, on average, she refers one case to mediation each week. The program completed its first mediation in early October.

Mediators are compensated \$150 per mediation, which is paid for by a new \$25 foreclosure filing fee. As of August, Ms. Miller said the program had three mediators on its roster, including one retired judge and two attorneys.

Like the other programs, Ms. Miller said the motivation to create Peoria County's program came from an increasing number of foreclosure filings in the county. It was also spurred along by Justice Kilbride's interest in seeing a foreclosure mediation program created in the county. Justice Kilbride sits on the Supreme Court for the 3rd Judicial District, which includes Peoria County. Justice Kilbride's interest prompted former Chief Judge Stuart Borden to observe a foreclosure call, which revealed the need to start a program.

"He heard from people who couldn't get in touch with their lenders, who wanted to find a way to stay in their homes," Ms. Miller said. "This is a mechanism where we can help them do that."

RSI thanks our summer intern, Nora Kahn, for all of her hard work. Over the summer, she conducted a survey to learn how Illinois judicial circuits are implementing the Supreme Court's 900-series rules requiring mediation of child custody and visitation issues. She also diligently added resources to CourtADR.org. Ms. Kahn is pursuing both a Juris Doctor and a Masters of Divinity at the University of Chicago, and we wish her the best.

Judge Denlow had his article, "Breaking Impasses in Judicial Settlement Conferences: Seven (More) Techniques for Resolution," published in *Court Review*, the quarterly journal of the American Judges Association, Vol. 46, Iss. 4.

In September, RSI Executive Director Susan M. Yates presented at the South Eastern European Mediation Forum's International Conference on Alternative Dispute Resolution in Ljubljana, Slovenia. Ms. Yates gave a presentation on defining, developing and measuring mediator quality.

RSI Staff Attorney Heather Scheiwe Kulp and Executive Committee member Terry Moritz will regularly write a column to appear in *In the Alternative*, the newsletter of the Illinois State Bar Association's Section on Alternative Dispute Resolution. The column will address significant events involving mediation in Illinois and throughout the US. Their first article, "Of the Moment: Current Developments in Mediation," appeared in Vol. 17, No. 6.

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

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

RSI is affiliated with the Center for Conflict Resolution, a non-profit corporation.

RSI EXECUTIVE COMMITTEE**JAMES J. ALFINI**

Professor, South Texas College of Law

HONORABLE MORTON DENLOW, *Acting Chair*Magistrate Judge, US District Court
for the Northern District of Illinois**HONORABLE ALLEN S. GOLDBERG**

Judge, Cook County Circuit Court

HONORABLE JANET R. HOLMGREN

Chief Judge, 17th Judicial Circuit

FRANCES KAO

Partner, Skadden, Arps, Slate, Meagher & Flom

TERRY MORITZ

Principal, Goldberg Kohn

HONORABLE JOHN L. NICKELSJustice, Illinois Supreme Court, *retired***JUDITH RICE**Senior Vice President, Community Affairs &
Economic Development, BMO Harris Bank**BRIAN ROCHE**

Partner, Reed Smith

HONORABLE KAREN G. SHIELDS, *retired*

Mediator and Arbitrator, JAMS

RSI STAFF**LINDSEY FILA**

Director of Administration

JESSICA GLOWINSKI

Resource Center Coordinator

HEATHER SCHEIWE KULP

Staff Attorney

JENNIFER E. SHACK

Director of Research, Newsletter Editor

SUSAN M. YATES

Executive Director

RESOLUTION SYSTEMS INSTITUTE11 EAST ADAMS STREET, SUITE 500
CHICAGO, ILLINOIS 60603

312 922 6475

INFO@ABOUTRSI.ORG WWW.ABOUTRSI.ORG

"GREEN" YOUR SUBSCRIPTION

Help the environment and unclutter your desk by signing up for the e-version of this newsletter. Go to www.AboutRSI.org/analyzing-the-alternatives.php or scan the adjacent QR code and follow the prompts on the page to switch your subscription. You will receive the e-version of *Analyzing the Alternatives*, with the same great content as the print version, twice yearly.

**DATA ON A BUDGET CONT. FROM PAGE 03**

the forms to capture the data and a format in which to collect it. This service is free of charge to courts in Illinois. Fees for courts outside Illinois are decided on a case-by-case basis, with no fee charged for many types of assistance.

- Use free resources. Start with RSI's Instruction Manual on CourtADR.org. It is full of information on how best to monitor and evaluate your program, as well as good forms to capture some of the data. The Instruction Manual also links to other sites with a wealth of information on evaluation.

If you're going to evaluate your program, you have two choices:

- Apply for an evaluation grant. Like everything else, this has gotten trickier these days. Funders are often interested in questions that have far-reaching impact, not evaluation that will only answer whether your program is achieving its goals. But there are ways to get funding. RSI can partner with you to seek funding and conduct the evaluation.
- Contact a local university to see if a graduate student would like to conduct the

evaluation as part of a thesis or dissertation.

If you're awash in data but don't know what to do with it, or you're wondering how you can manage the data once it's collected, there are resources to tap into:

- Interns can be a good source of labor. If you have never thought of having an intern, now is a really good time to offer internships. You need the labor and the interns get experience they might not otherwise be able to obtain in the current labor market.
- Trade data entry for data access. That is, a researcher may be willing to take on data entry in exchange for use of the data to answer her own research question. In this case, and with an intern, care must be taken in order to maintain confidentiality.
- Consult with RSI about how to analyze the data. If you have data entered, but you don't know what it's telling you, RSI can help.

A little ingenuity with resources can overcome the obstacles to discovering just how well your program is doing and what improvements can make it better. Contact RSI at info@aboutrsi.org for further information or assistance.

JUDGE AGNEW STEPS DOWN AS CHAIR

RSI's longest serving Executive Committee Chair, Hon. Harris H. Agnew, has resigned from his leadership role effective October 1. We will miss his constant presence and support, but we will continue to draw on his expertise and wisdom as we move forward. Judge Agnew was one of the founders of RSI, and one of the most instrumental people in the development of court ADR in Illinois. As Chief Judge of the 17th Judicial Circuit, he presided over the implementation of the first mandatory arbitration program and then the first major civil case mediation program in the state. Since leaving the bench, he has worked tirelessly with RSI to advance the use of mediation throughout Illinois. The cause of court ADR could not have wished for a more dedicated proponent.



RESOURCES / STUDY / INNOVATION FOR COURT ADR



RSI

RESOLUTION SYSTEMS INSTITUTE

11 EAST ADAMS STREET

SUITE 500

CHICAGO

ILLINOIS

60603

Return Service Requested

