

ANALYZING THE ALTERNATIVES

ENCOURAGING THE EFFECTIVE USE OF COURT-RELATED ADR IN ILLINOIS

A PUBLICATION OF RESOLUTION SYSTEMS INSTITUTE

❁ WINTER/SPRING 2011

FEATURE ARTICLE

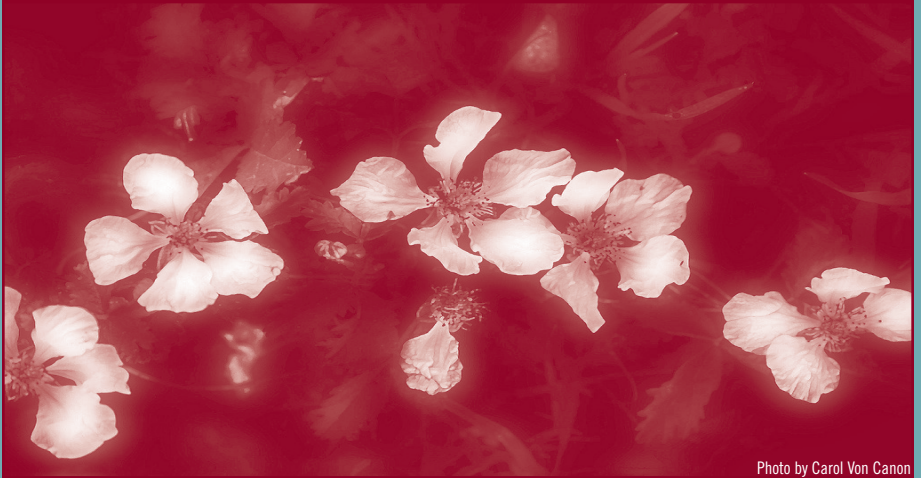


Photo by Carol Von Canon

CHILD PROTECTION MEDIATION A SUCCESS RSI STUDY FINDS POSITIVE EFFECTS FOR FAMILIES

A recently published RSI evaluation of the Mediation and Facilitation Program in the Child Protection Division of the Juvenile Court of the Circuit Court of Cook County is the basis for many improvements implemented by the program. In part as a result of the study, the court has begun referring families to mediation much earlier, and the program has enhanced its efforts to provide information on mediation to participants and referrers.

The study was the result of a joint interest of the Presiding Judge of the Child Protection Division, Honorable Patricia Martin, and the staff of the Division's mediation program in

assessing the efficacy of the program, which provides mediation for cases that have entered the child protection system.

MEDIATION

In the Cook County Child Protection Mediation and Facilitation Program, mediation is a non-adversarial process facilitated by two neutral mediators who facilitate communication between those involved in a case while also working to ensure that all have a say in the outcome. Those in attendance are generally the natural parents, the family members most involved in the child's life, the attorneys for the child, the attorney for the parents, and the

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COMMITTED TO MEDIATION

BRIAN ROCHE



RSI welcomed Brian Roche to its Executive Committee in November 2010. A partner at Reed Smith, Mr. Roche is a litigator who appreciates the time and cost savings that can be gained through mediation.

Despite his humanities background, Mr. Roche has a penchant for engineering and technology that led him to focus primarily on intellectual property and technology disputes. He began his legal career in 1982 at Sachnoff & Weaver and joined Reed Smith in 2007 when the two firms combined. He now regularly represents clients in arbitration and mediation.

Mr. Roche's first experience with mediation came when he was a litigator with Sachnoff & Weaver. He represented Honeywell in a complex case involving multiple parties that went to mediation. "The mediation was tremendously successful," he said. "After two days of mediating, we had a resolution. I'm a believer in mediating large, complex cases as a result."

Since then, Mr. Roche has been a proponent of mediation, frequently encouraging clients to try the process and working with them to identify the best mediator for their case. He said the benefits of mediation are that the parties have more control than in litigation and, since they are voluntarily participating in the process, are more motivated to make it work. Mediation can also be a faster, cheaper path to resolution than litigation, he said.

Due to his positive experience with mediation, Mr. Roche is interested in seeing it made available to more people. He believes the best way to do this is through the courts. "Businesses can buy a private mediator, but court-annexed mediation is a huge benefit for consumers and small businesses," he said. "It's an odd access to justice, since they're not getting a decision, but through court mediation, they're going to get their case resolved. ... They get their day in court."

This belief is what attracted Mr. Roche to RSI. He said RSI's program development services put mediation in place for people who don't otherwise have access to professional help for resolving their disputes. Mr. Roche believes it is especially important for RSI to assist courts in creating and maintaining programs during difficult economic times. "In these times of tremendous budget cuts, courts don't have real support, especially for mediation programs," he said. "RSI can provide people with experience who can help courts stay motivated and keep them on track."

Mr. Roche's background in litigation, his experience with ADR, and his dedication to expanding and enhancing its use will all be of great assistance to RSI's efforts.

CHALLENGES IN FORECLOSURE MEDIATION BALANCING GOOD FAITH AND MEDIATION'S CORE VALUES

With foreclosures expected to reach an all-time high across the country in 2011, circuit courts in Illinois have joined the growing number of jurisdictions that are looking to mediation to alleviate the impact of this crisis. To date, Cook and Will counties have established foreclosure mediation programs. At least three other counties — Kane, Madison and Peoria — have set to work creating their own programs. At the time of writing, their rules were in various stages of development.

Rapid program development in the foreclosure mediation area has exposed challenges that have confounded mediation programs for years. Mediation's core values, encapsulated in the Model Standards of Conduct for Mediators (written by the American Bar Association, the Association for Conflict Resolution and the American Arbitration Association), include self-determination, mediator impartiality and neutrality, and confidentiality of the process. One significant tension in program design, then, is how to ensure that both parties participate in good faith without jeopardizing the neutral role of the mediator or the candid communications that confidentiality encourages. Frustrations with the exigencies of the foreclosure crisis may motivate stakeholders to create program accountability measures that violate these core mediation concepts. Additional issues must be considered.

First, how should courts define good faith? Of 23 current foreclosure mediation programs throughout the country that require "good faith" participation, only one actually defines what "good faith" entails. To report on behavior, then, mediators must make subjective determinations, which the mediator may be professionally pro-

hibited from doing and which certainly violates mediator neutrality. Therefore, if anyone defines sanctionable actions, it should be courts, not mediators. One county's draft rule requires its mediators to "admonish both the defendant(s) and the plaintiff of the need . . . to participate in the mediation process in good faith" at the opening of the mediation. No reporting is required. This self-policing approach may be the best, if imperfect, solution to the problem of defining good faith participation.

Second, how does the court ensure parties are held to equal standards? Some homeowner advocates call for "holding servicers' feet to the fire" and the "imposition of significant obligations" on the lenders. In Illinois or elsewhere, one stakeholder's perspective should not be the only one to determine program design. For example, one proposal would allow a homeowner to miss mediation, go back to the judge, and request more mediation. However, if the lender misses mediation or fails to participate in good faith, the court may sanction the lender. This may include dismissing the case. Another jurisdiction considered listing "continuing mediation" as one of the possible sanctions for a lender's bad faith participation in mediation. This unequal treatment of the parties foregoes basic principles of mediation: neutrality, equality and fair process. Instead, all stakeholders should be included in program design conversations, and all parties should be held to the same good faith standards.

Third, how should courts ensure good faith participation without violating the Uniform Mediation Act (UMA), which Illinois adopted in 2004? Requiring a mediator to report on the quality of parties' bargaining violates two core media-

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THANK YOU TO OUR 2010 DONORS

RSI is tremendously thankful to those who contributed to our mission of strengthening justice by enhancing court ADR systems this past year. In 2010, an anonymous donor awarded RSI \$10,000 and pledged an additional \$10,000 to match donations 1:2 in support of our Statewide Mediation Access Project. With this pledge, we launched a challenge campaign urging supporters to contribute and help us meet the entire match. In response, RSI received an unprecedented amount of contributions, raising over \$10,000 to help meet the match and provide for travel and other expenses to help develop mediation programs for poor and low-income disputants around the state. We are ever so grateful to each and every person who donated. Your contributions have really had an impact on our ability to develop programs.

RSI would like to thank the JAMS Foundation and the James B. Boskey Memorial Foundation for their continued support of our work. The JAMS Foundation supported the development of *Court ADR Across the US*, a new section of CourtADR.org (see below). The Boskey Foundation recently awarded RSI a grant to help fund the development costs of online news archives on our two websites, AboutRSI.org and CourtADR.org. News archives will make information permanently available to create a holistic view of developments and trends in court ADR. RSI is appreciative of the JAMS Foundation's and the Boskey Foundation's continuing commitment to our mission and continued support of our new endeavors.

NEW COURT ADR RESOURCES AVAILABLE

Exciting additions have been made to CourtADR.org, RSI's Resource Center, over the past few months:

- *Court ADR Across the US*: This national guide to court ADR programs features over 2,300 resources arranged in an easy-to-navigate, state-by-state format. Each state has its own resource page featuring court rules, statutes, reports and other resources related to court ADR. The guide is also searchable. Check it out at CourtADR.org/court-adr-across-the-us/.
- **Legal Aid Professionals Special Topics Page**: This research guide provides recommended resources for legal aid professionals interested in learning more about court ADR to help their clients. It covers a variety of topics, from how to create new, or partner with existing, mediation programs to how to educate clients about mediation and other ADR processes. Access it at CourtADR.org/special-topics.php?sec=11.
- **Foreclosure Mediation Program Models**: This report summarizes the foreclosure mediation programs established in the US since 2008. Twenty-six states currently have foreclosure mediation programs, and the review provides a snapshot of the mediation process, the history of and the funding for each program. Read it at CourtADR.org/files/ForeclosureMediationProgramModels.pdf.



CHILD PROTECTION MEDIATION CONT. FROM PAGE 01

caseworker in charge of services and visitation. Each is given the opportunity to share his or her view on the case, as well as express any concerns about issues going forward. Cases can be referred to mediation at any time after the state takes the children into the child protection system due to abuse, neglect, or loss of parents, and cases are referred for issues surrounding visitation, services, permanency, reunification and post-guardianship, among others.

THE STUDY

The evaluation included dozens of interviews with judges, attorneys, case workers, family members and mediators; post-mediation participant questionnaires from 165 cases mediated over one year; and data from all cases referred to mediation. An interim report based on interviews was completed in 2006. A portion of RSI's costs for conducting this project were funded by a grant from the US Department of Health and Human Services' Court Improvement Program, obtained by the Circuit Court of Cook County.

MAJOR FINDINGS

The evaluation found that participants, particularly family members, had very positive reactions to the program. However, very few families were given the opportunity to experience it. Judges and hearing officers saw the value in the program, but didn't often make referrals to it. The majority of judges and attorneys interviewed believed mediation could occur early on, but almost always referred cases to the program two years or more after the family was brought into the system.

This was the paradox of the program. It

worked well, was well-regarded by almost everyone, and the participant families found it to be a rewarding experience, but it was underutilized.

The program was functioning well.

Very few inappropriate cases were being referred to mediation; the process of moving a case from referral to mediation was running relatively smoothly; the mediators had enough information to mediate the cases properly; and the participants were generally very positive about their experience.

The program was achieving its goals.

It was protecting the safety and best interests of the children. It was involving the parents more in the resolution. It was providing a forum for voice and communication for family members and the professionals who work with them (such as attorneys, caseworkers and therapists). It was resolving conflict among those involved in the case so they could progress toward a permanent home for the children.

The mediation program was viewed positively by judges, attorneys and participants.

The majority of those interviewed and those who completed post-mediation questionnaires were positive about the program or their experience in mediation. Although not universal, the positive view of the program and of mediation cut across all groups of stakeholders – family members, judges, hearing officers, attorneys and case workers. Family members, in particular, noted that mediation was their first opportunity to voice their concerns and have a say in the decisions being made. This was equally true no matter what their relation to the child was.



RSI ANNUAL REPORT 2010:

In 2010, RSI expanded and enhanced what was already the most reliable, comprehensive information available on court ADR. RSI launched a new section of CourtADR.org, our Resource Center, that vastly improves a visitor's ability to efficiently gather information on court ADR in each state. RSI also quickened the pace of information dissemination through a new blog and posts to Facebook and LinkedIn. In addition, we worked extensively on child protection mediation, publishing a study of the program in the Circuit Court of Cook County, Illinois that led to implementation of recommended improvements.

CourtADR.org – RSI's Resource Center

RSI launched *Court ADR Across the US*, a new section of CourtADR.org, in December. The new section is a comprehensive guide to court ADR in each state. This is the only place to find all the information on court ADR in the US in one place. Initial feedback was highly positive. A Texas-based user of *Court ADR Across the US* noted that it could "...serve as a new catalyst to seek better statewide coordination" of court ADR programs in Texas. RSI is excited to hear more stories about how this new section has helped users to advance the field of court ADR across the country.

As a result of the launch, a record number of visitors came to the site in December, tripling the number of visitors to the site in November. Overall, the number of visitors to CourtADR.org grew by 68% in 2010.

Program Development

RSI expanded mediation services in Illinois in 2010 by assisting numerous programs throughout the state.

Statewide Mediation Access Project

RSI's Executive Director, Susan Yates, and Director of Research, Jennifer Shack, assisted in the development of the Circuit Court of Cook County's foreclosure mediation program by drafting evaluation forms and consulting on the overall program structure. In 2010, 51,900 foreclosures were filed in this jurisdiction.

The Statewide Mediation Access Project was given a big boost when RSI was honored as a recipient of a Skadden Foundation Fellow. The Fellow, Heather Scheiwe Kulp, was brought on in September to head the project for two years. Upon her arrival, Ms. Kulp contacted all 23 Illinois circuits to gauge their interest in mediation program development. From there, she assisted two counties with their developing foreclosure mediation programs, including advice on rule composition and mediator identification, training and evaluation.

Research

Child Protection Mediation Study

Ms. Shack completed a multi-year evaluation of the Cook County Child Protection Mediation and Facilitation Program. The study, *Child Protection Mediation: An Evaluation of Services Provided by Cook County Juvenile Court*, is available on CourtADR.org and on AboutRSI.org. A summary of this study can be

EXPANDING SERVICES & CAPACITY

found on page 1 of this newsletter.

Model Forms Project

An advisory committee comprised of leading researchers and evaluators from around the US has been working with RSI to develop model mediator reports and post-mediation questionnaires that any court can adapt for its civil mediation program. The goal of this Model Forms Project is to improve data collection – especially for courts that do not have access to expertise in this area – and to make it more uniform across the country.

Outreach and Education

Social Media

RSI launched a blog, *Just Court ADR*, in February. The blog is a combination of analysis and updates on research, legislation and other news in the court ADR field. In November, *Just Court ADR* was selected by Mediate.com to be one of its Featured Blogs, extending its reach to the 11,000 subscribers of Mediate.com's weekly newsletter. In addition, RSI maintained a page on Facebook and has a group on LinkedIn.

Publications

RSI continued to publish both its free monthly e-newsletter, *Court ADR Connection*, and its free semiannual newsletter, *Analyzing the Alternatives*, to a growing number of subscribers.

Inquiries

The number of people who contacted RSI to request information increased 10% in 2010.

Examples of inquiry responses include advising a Nevada foreclosure program on the development of mediator evaluations, providing information to a developing community mediation center in Kentucky, and disseminating general information about the use of mediation.

Presentations

Ms. Yates was busy meeting with judges, neutrals and lawyers from around the world in 2010. She met with individuals from China, Italy, Thailand, Ukraine and the US. She also made presentations at the American Bar Association Section of Dispute Resolution's annual conference, at a symposium at DePaul University College of Law, and to Cook County lawyers and mediators.

Service to the Community Award

Honorable Patricia Martin, Presiding Judge of the Circuit Court of Cook County's Child Protection Division, was the recipient of RSI's Service to the Community Award in 2010. RSI honored her for her leadership in developing and improving a mediation program for issues involving children and families in the child protection system.

Strategic Growth

As part of the implementation of RSI's strategic plan, three new members joined the RSI Executive Committee. They bring expertise and insight from the perspectives of corporations, law firms, neutrals and the bench. They will help guide the future development of our services and capacity.



OUT AND ABOUT WITH RSI

RSI Executive Committee member James J. Alfini received the 2010 Law Student Wellness Award, sponsored by the American Bar Association's Commission on Lawyer Assistance Programs (CoLAP). The award recognizes outstanding commitment to improving the mental and physical well-being of law students.

On March 20, RSI Executive Director Susan Yates and Stuart Widman, lawyer at Miller Shakman & Beem, presented on "Current Issues in Mediation Ethics" at the Cook County Law Division Brown Bag series on ADR.

RSI Executive Committee Member Frances Kao, partner at Skadden, Arps, Slate, Meagher & Flom, transferred from Chicago to the firm's Hong Kong office in January. There she is leveraging her knowledge of international dispute resolution to deal with an increase in cross-border disputes and regulatory probes.

In October 2010, RSI Executive Committee member Honorable Karen Shields acted as faculty for the Illinois Institute for Continuing Legal Education (IICLE) on the subject of mediation. She participated in a course titled, "The Good Karma Divorce: Civility in the Trenches of Adversity."

CONTINUED FROM PAGE 05 CHILD PROTECTION MEDIATION

Two-thirds of referrals to mediation occurred between the disposition hearing and the hearing as to whether to terminate parental rights.

The disposition hearing (the hearing to decide with whom the child will reside while in the child protection system) occurs long after the family is brought into the child protection system, generally upwards of two years after intake. This means that families were referred well after they were brought into the system.

Referrals were made mainly by judges and were concentrated in a few courtrooms.

More than half of all referrals were by judges. Attorneys and caseworkers were much less likely to request mediation. Only one mediation was requested by a family member. More than half of the referrals came from four of the 15 referring courtrooms. This clustering of referrals could have detrimental effects on the program. In response to preliminary feedback regarding this, Judge Martin took steps to broaden the referral base.

The program's impact on time to permanency is not known.

Although the program was not established with the goal of reducing the time it takes for a child to be placed in a permanent home (whether with his or her natural parents or someone else), this is a desired outcome. The impact of mediation on time to permanency could not be determined because too few cases closed within the study time frame. This lack of closed cases is an indication of the overall need to reduce the time to permanency for child protection cases.

Program users and referrers lacked information.

Although the program made an effort to dis-

seminate information about mediation and the program, it was clear from interviews that more was needed:

- Family members and caseworkers lacked information about the availability of mediation and what the process is.
- Judges, hearing officers and attorneys asked to have more information about what cases to refer and when referral could benefit the family and the case.
- Mediators lacked information on which agreements break down after mediation. This information can be helpful for adjusting mediation to address issues that lead to breakdown of agreements.

The program has been addressing these issues, with orientations for attorneys and caseworkers. The challenge is to provide a sufficiently frequent program of orientations in an environment in which there is rapid turnover.

CONCLUSION AND IMPACT

The underutilization of the program and its late use in the life of the cases in the system meant that the court and the family members were not getting the full benefits of the program. Many of those interviewed said that mediation had a positive impact on their cases, but that it was not often used. Based on an early report on the results of the study, Judge Martin moved to address some of the potential for improvement indicated by the study. Most importantly, in 2010 she instituted mandatory mediation for all cases soon after families are brought into the child protection system. The study and subsequent program changes indicate the importance of this kind of in-depth analysis to promote the best practices of mediation.

To read the full study, go to AboutRSI.org/pfimages/RSI_CPDstudy.pdf.

Ms. Yates wrote a commentary for the newly released book, *Mediation Ethics: Cases and Commentary*, which was edited by Ellen Waldman and published by Jossey-Bass. Her commentary appears in the chapter, "Ethics for ADR Provider Organizations."

RSI Executive Committee member Terry Moritz will have his article, "The Future of Consumer Arbitration In Light of Stolt-Nielsen," published in the Spring edition of the *Loyola Consumer Law Review*, Volume 23, Issue 3.

For the first time, RSI will participate as an exhibitor at the ABA Section of Dispute Resolution Annual Conference in Denver on April 13-16. There, RSI will also take part in the presentation, "Accessing Justice through Mediation: Innovative Responses to Unmet Legal Needs and Juvenile Crime."

RSI Staff Attorney Heather Scheiwe Kulp gave a presentation on February 24 to students at the University of Illinois, College of Law. She was a guest speaker in the Conflict Resolution Clinic, where students learn about real cases and hone their professional skills.

RSI attended the Midwest Public Interest Law Career Conference on February 5. The event was held at Northwestern University, and RSI met with dozens of students from universities throughout the Midwest.

**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.

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**FORECLOSURE MEDIATION CONTINUED FROM PAGE 03**

tion values – confidentiality and voluntariness – codified in the UMA. An Illinois mediator cannot report any communications, including anything that may indicate bad/good faith participation, made during the mediation. Other UMA states, such as Florida and Tennessee, have reprimanded or de-certified mediators for such reports. Likewise, Illinois foreclosure mediation programs cannot require a report from the mediator on party participation, except attendance, without conflicting with state law.

To prevent this conflict, Will County's rule emphasizes, "[T]he goal of the program is to have parties engage in a confidential mediation process." Therefore, any pre-mediation or mediation reports remain in a separate, confidential, undiscoverable judge's file. Cook County cites the UMA directly in its rule about confidentiality, specifically barring mediators (or parties, without consent from all involved) from dis-

closing mediation communications, even in a subsequent lawsuit about the mediation (see Local Rule 21). By ensuring confidentiality, these rules conform to the UMA.

Mediation program developers perform a balancing act. They must determine the program's values, weigh stakeholders' interests, and comply with various statutory, administrative and professional standards. As the foreclosure mediation context demonstrates, these factors often conflict. In Illinois, measures meant to hold parties accountable for participating in good faith can be at odds with mediation confidentiality, neutrality and voluntariness. In the midst of these seemingly incompatible characteristics, however, courts can – and do – develop foreclosure mediation programs that incentivize homeowners, lenders, mediators and the justice system to work out solutions by balancing these needs.

WELCOME NEW EXECUTIVE COMMITTEE MEMBERS

RSI welcomed three new Executive Committee members over the past six months. Brian Roche is a Partner in Reed Smith's litigation department and a proponent of court ADR. Mr. Roche regularly represents clients in mediation and arbitration, believing ADR to often be a better and more efficient process than litigation for both large and small disputes. RSI is pleased to add Mr. Roche's diverse knowledge to that of our Executive Committee.

Terry Moritz is Principal at Goldberg Kohn, where he handles commercial disputes both in court and in ADR settings. Mr. Moritz is an arbitrator and mediator, and he teaches a course on alternative

dispute resolution at Loyola University Chicago School of Law. RSI is proud to have such a seasoned expert on ADR on the Executive Committee.

Judith Rice is Senior Vice President for Community Affairs & Economic Development at Harris Bankcorp, where she manages the company's external affairs with the community and with the government. Ms. Rice is exceptionally active in the Chicagoland community, serving on the boards of the March of Dimes, the United Negro College Fund and the Chicago Public Library, to name a few. RSI appreciates the commitment to the community that Ms. Rice brings to the Executive Committee.

