

ANNUAL REPORT
OF THE
ALTERNATIVE DISPUTE RESOLUTION COORDINATING
COMMITTEE
TO THE ILLINOIS JUDICIAL CONFERENCE

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I. STATEMENT ON COMMITTEE CONTINUATION

Since the 2008 Annual Meeting of the Illinois Judicial Conference, the Alternative Dispute Resolution Coordinating Committee ("Committee") has found that the climate for alternative dispute resolution ("ADR") continues to be favorable and the legal community has become increasingly receptive to ADR programs. This Conference year, the Committee was busy with many activities, including the consideration of a few proposed Supreme Court Rule amendments and formulating a plan to accomplish the projects and priorities set forth by the Court for Conference Year 2009.

As part of the Committee's charge, court-annexed mandatory arbitration programs, operating in sixteen counties, continued to be monitored throughout the Conference year. Madison County, in the Third Judicial Circuit, which commenced an arbitration program in July 2007, is the last county to request authorization to operate such a program under the auspices of the Supreme Court.

In the area of mediation, the Committee continued to monitor the activities of the court-annexed major civil case mediation programs operating in eleven judicial circuits. During the 2010 Conference year, it is anticipated that the Committee will continue to monitor court-annexed mandatory arbitration programs, oversee and facilitate the improvement and expansion of major civil case mediation programs, consider proposed amendments to Supreme Court Rules for mandatory arbitration and continue to study and evaluate other alternative dispute resolution options. The Committee also will continue to work on the projects and priorities delineated by the Court and stand ready to accept new projects for Conference Year 2010.

Because the Committee continues to provide service to arbitration practitioners, make recommendations on mediation and arbitration program improvements, facilitate information to Illinois judges and lawyers, and promote the expansion of court-annexed alternative dispute resolution programs in the State of Illinois, the Committee respectfully requests that it be continued.

II. SUMMARY OF COMMITTEE ACTIVITIES

Court-Annexed Mandatory Arbitration

As part of its charge, the Committee surveys and compiles information on existing court-supported dispute resolution programs. Court-annexed mandatory arbitration has been operating in Illinois in excess of twenty-two years. Since its inception in Winnebago County in 1987, under Judge Harris Agnew's leadership, the program has steadily and successfully grown

to meet the needs of sixteen counties. Most importantly, court-annexed mandatory arbitration has become an effective case management tool to reduce the number of cases tried and the length of time cases remain in the court system. Court-annexed mandatory arbitration continues to be widely accepted in the legal culture.

In January of each year, an annual report on the court-annexed mandatory arbitration program is provided to the legislature.¹ A complete statistical analysis for each circuit is contained in the annual report. The Committee emphasizes that it is best to evaluate the success of a program by the percentage of cases resolved before trial through the arbitration process, rather than focusing on the rejection rate of arbitration awards.

The following is a statement of Committee activities since the 2008 Annual Meeting of the Illinois Judicial Conference concerning court-annexed mandatory arbitration.

Projects and Priorities Prescribed by the Supreme Court

The Court prescribed several projects and priorities for the Committee to consider in Conference Year 2009, as well as meet the dictates of the Committee's general charge, and continue projects delineated in Conference Year 2008. The Committee reviewed the list of projects/priorities from 2008 and 2009, and formulated a plan to address those projects. The Committee elected to create workgroups to study each of the projects. As part of the plan, each workgroup will study a specific project and make a recommendation to the Committee to consider as a whole. Below are the projects/priorities the Committee addressed in Conference Year 2009.

Continued Conference Year 2008 Projects and Priorities

Training of Arbitrators

The Court charged the Committee with "reviewing materials to develop a training curriculum for mandatory arbitration personnel and conduct a needs analysis for training of arbitrators." The Committee gathered arbitrator reference manuals from every judicial circuit in the state of Illinois that has a mandatory arbitration program. The Committee subsequently developed a draft of a uniform manual that includes the required, fundamental practices of mandatory arbitration. It is hoped that a uniform arbitrator reference manual will assist judicial circuits with mandatory arbitration in providing materials and training to address the requisite

¹The AOIC's Court-Annexed Mandatory Arbitration Fiscal Year 2009 Annual Report will be available on the Supreme Court website (www.state.il.us/court) in January 2010.

skill set needed to be an effective arbitrator in the state of Illinois. The Committee completed the manual in Conference Year 2008 and sent it to the Administrative Director for consideration.

During Conference Year 2009, the Committee developed a new arbitrator training outline and related training materials. The outline includes handouts, arbitration issues, arbitration case filings and scheduling for arbitration hearings, arbitration hearing procedures, and a proceedings checklist. The aforementioned training manual will be used in conjunction with the training outline for new arbitrators so as to provide uniform arbitrator training on a statewide basis. The Committee forwarded the arbitrator training outline and related training materials to the Administrative Director. The Committee also is contemplating training related curriculum for new arbitrator trainers.

Arbitrator Pro Bono Service Credit

The Court requested that the Committee "review arbitrator services in the context of *pro bono* services, as defined by the Court." The Committee considered whether to make a recommendation to the Court to allow arbitrators the opportunity to waive the \$100 compensation associated with service as an arbitrator and accept *pro bono* credit in its stead. After deliberation, the Committee was in favor of the concept and recognized that Supreme Court Rules 87 and 756 would have to be amended. As proposed, the amendments would allow arbitrators to waive the set compensation rate of \$100 per arbitration hearing in exchange for *pro bono* legal service credit. In the Committee's consideration of this matter, it was determined that Supreme Court Rule 87 (e) would have to be amended and a new subsection (f)(1)(e) would have to be created under Supreme Court Rule 756. The Committee supports this amendment as it believes that service to the legal system as an arbitrator is a community service. Further, if an arbitrator is willing to provide service *pro bono* and waive his or her fee, service as an arbitrator should be equivalent to other service to the system wherein *pro bono* credit is recognized. The Committee also realized that, for reporting purposes to the Supreme Court, a form would have to be created to prove that the attorney served as an arbitrator and opted for *pro bono* credit for the service.

During Conference Year 2009, the Committee drafted a form which would allow an arbitrator to waive the \$100 compensation for an arbitration hearing and accept *pro bono* legal service credit in its stead. Since the proposal may have a fiscal impact, the proposal to amend Supreme Court Rules 87 and 756, along with said form, was sent to the Administrative Office for consideration.

Supreme Court Rule 91

The Court requested that the Committee "reconsider proposed Supreme Court Rule 91 (Absence of a Party at Hearing)." The Committee originally submitted this proposal to the Supreme Court Rules Committee in September 2005. The original proposal would have required parties to an accident to be at the arbitration hearing in subrogation cases. It is the opinion of the Committee that the concept of good faith participation requires the major participants in cases to be present at arbitration. Their appearance and participation allows the arbitrators to properly evaluate all aspects of a dispute including witness credibility, thereby insuring the integrity of the arbitration process.

In a traditional subrogation case, the plaintiff is the insurance company, not the driver of the plaintiff's car. Thus, Supreme Court Rule 237 does not apply, nor do discovery rules allow for a fair inquiry prior to the hearing. The proposed rule change to Supreme Court Rule 91 would have put the driver of the plaintiff's car or the insured into the category of a "party," making them subject to discovery and requiring their appearance at arbitration with or without a Rule 237 notice. This rule change was intended to require of a plaintiff at arbitration, that which would be required at trial.

During Conference Year 2009, the Committee gathered mandatory arbitration rules from other states in an attempt to ascertain whether the proposed requirement exists in other jurisdictions and what impact it has on arbitration hearings. The Committee concluded its research and determined that no evidence exists to change its position originally submitted in 2005. The Committee shared the proposed amendment to Supreme Court Rule 91 with arbitration administrators and supervising judges. Upon consideration of the feedback, the Committee plans to resubmit Supreme Court Rule 91 to the Supreme Court Rules Committee for reconsideration.

Jurisdictional Dollar Limits for Arbitration Programs

As part of its projects and priorities for Conference Year 2008, the Court asked the Committee to "examine the current jurisdictional dollar limits for arbitration programs and determine if an increase is viable." The Committee dialogued on this issue and determined that increasing the jurisdictional limit would not significantly increase the number of cases assigned to arbitration and would, consequently, funnel cases into arbitration that may be too complex in nature for the arbitration process. The Committee noted that a mechanism is currently available via Supreme Court Rule 86 to petition the Court to authorize an increase in the monetary limits. Ultimately, the Committee elected not to make a recommendation to the Court

on this issue and reemphasized the current process in place for requesting an increase to monetary limits related to arbitration programs.

Participant Satisfaction Survey

The Committee was charged with "surveying program practitioners and identifying reliable measures of participant satisfaction with ADR processes." During Conference Year 2009, the Committee collected survey instruments from arbitration jurisdictions that conducted program participant satisfaction surveys in the past. The Committee reviewed the survey instruments and related data, and began to identify which information is most useful for improving the arbitration program. The Committee developed a few surveys and plans, to narrow the scope of those surveys, to meet the objective of this project. Once complete, it is planned that the survey will be issued for statewide dissemination for a planned period of time to gather data for analysis. Upon data tabulation and compilation, the Committee will formulate a report for the Court.

Conference Year 2009 Projects and Priorities

Supreme Court Rule 87

The Court requested that the Committee "review Supreme Court Rule 87 (Appointment, Qualification and Compensation of Arbitrators) with respect to arbitrator chair qualifications and determine the appropriate criteria." Supreme Court Rule 87 directs that a panel of arbitrators "shall be chaired by a member of the bar who has engaged in trial practice for at least three years or by a retired judge." The Committee believes that Rule 87 adequately prescribes a minimum requirement for chair qualifications and, noted that, local rules may have requirements beyond the minimum. For example, in the Nineteenth Judicial Circuit, Local Rule 17.02(c) requires that "every panel of arbitrators shall be chaired by a member of the bar who has been engaged in trial practice for at least five years within the preceding ten years of the filing of the application, or a retired judge." Recognizing that retired judges serve as arbitrators and are chair-eligible, the Committee recently submitted a proposal to the Supreme Court Rules Committee to require that a retired judge who wishes to serve as an arbitrator be subject to the mandatory continuing legal education requirements. It is the Committee's opinion that Rule 87 is sufficient; therefore, the Committee elected not to suggest a change at this time.

Settlement Data Initiative

The Court requested that the Committee “review and discuss the Fourteenth Judicial Circuit’s settlement data initiative and determine whether or not the data collected has merit for consideration of statewide implementation.”¹ The initiative is a collection of settlement data captured in a format that has a utility for arbitrators and attorneys wherein arbitration awards and jury verdicts are tracked and offered as a tool to assist in settling cases. A predetermined form is provided to all attorneys and information is provided on a voluntary basis. Once an attorney submits information to the arbitration administrator, it is entered in a database. The information in the database is then distributed monthly to arbitrators and attorneys within the circuit. In theory, cases are assigned a value using settlement data and serve as a tool for settling cases. The data is used to educate unrealistic expectations by clients, educate insurance adjusters, and educate arbitrators who may not necessarily have practice expertise in personal injury cases.

The Committee is in dialogue with the Fourteenth Judicial Circuit regarding this initiative. While some data has been collected, it is hoped that the database will continue to grow. The Fourteenth Judicial Circuit is currently exploring alternate reporting options to achieve that outcome. A workgroup specifically assigned with the task of reviewing the settlement data has begun its work. The workgroup plans to continue its study and report to the Committee on the value of the information being collected and the feasibility of implementing the settlement data project on a statewide basis.

Arbitration Program Statistical Data

For Conference Year 2009, the Court asked the Committee to “review the current collection methods of arbitration statistics to determine if the data is accurately capturing the results of the program as intended when arbitration was implemented in 1987.” The workgroup assigned with this task has begun to review the court-annexed mandatory arbitration annual report and related statistics. Upon its review, the workgroup plans to make recommendations to the Committee concerning its findings.

Other Initiatives

The Court charged the Committee, generally, with “undertaking any such other projects or initiatives that are consistent with the Committee’s charge.” During Conference Year 2009, the Committee considered other initiatives such as an amendment to Supreme Court Rule 87 which would require that a retired judge be in active status with the Attorney

Registration and Disciplinary Commission (ARDC) thereby being subject to the mandatory continuing legal education requirements. The Committee also studied areas such as the \$200 rejection fee related to mandatory arbitration as a recoverable cost, judicial orders increasing arbitration monetary limits thereby exceeding judicial authority, rejection fee refund issue, and consideration on the optimal period of time for retraining an arbitrator.

Mediation

Presently, court-annexed civil mediation programs operate in the First, Third, Eleventh, Twelfth, Fourteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth Circuits and the Circuit Court of Cook County. Supreme Court Rule 99 governs the manner in which mediation programs are conducted. Actions eligible for mediation are prescribed by local circuit rule in accordance with Supreme Court Rule 99.

Court-annexed mediation programs have been successful and well received, and resulted in a quicker resolution of many cases. It is important to recognize that the benefits of major civil case mediation cannot be calculated solely by the number of cases settled. Because these cases are major civil cases by definition, early resolution of a case represents a significant savings of court time for motions and status hearings as well as trial time. Additionally, in many of these cases, resolving the complaint disposes of potential counterclaims, third-party complaints and, of course, eliminates the possibility of an appeal. Finally, court-annexed mediation programs are considered by many parties as a necessary and integral part of the court system. They are responsive to a demonstrated need to provide alternatives to trial and have been well received by the participants. The Committee continues to observe the implementation of new programs, as well as monitor existing programs.

The Committee also continues to study the area of child custody mediation in accord with the Supreme Court's Article IX Rules with respect to child custody proceedings. Specifically, the Court charged the Committee with "studying, examining and reporting on the efficacy of mediation in child custody cases in domestic relations courts as an appropriate ADR application." During Conference Year 2006, the Committee observed the Court's adoption of the Article IX Rules with respect to child custody proceedings. As part of the Article IX Rules and Supreme Court Rule 99, judicial circuits must develop a mechanism for reporting to the Court on the mediation program. During Conference Year 2007 and continuing into Conference Year 2008, the Committee dialogued with the Conference of Chief Circuit Judges regarding development of an instrument to standardize the collection of statistics for child custody and visitation mediation, which are most reliable in ascertaining the effectiveness of such mediation. Subsequently, a letter was sent to all chief judges by the Administrative Office

requesting standardized statistics related to Court-authorized mediation programs. The Administrative Office is compiling said data.

III. PROPOSED COMMITTEE ACTIVITIES FOR THE NEXT CONFERENCE YEAR

The Committee requests to continue its work toward completing the projects and priorities outlined for Conference Year 2009, as well as the projects that remained from Conference Year 2008. Those projects include consideration of arbitrator training, examining child custody mediation, reviewing the Fourteenth Judicial Circuit's settlement data initiative, developing a statewide arbitration program participant satisfaction survey, reviewing the current collection methods and reliability of arbitration statistics, and other initiatives as directed by the Court.

During the 2010 Conference year, the Committee will continue to monitor and assess court-annexed mandatory arbitration programs, suggest broad-based policy recommendations, explore and examine innovative dispute resolution techniques and continue studying the impact of rule amendments. In addition, the Committee will continue to study, draft and propose rule amendments in light of suggestions and information received from program participants, supervising judges and arbitration administrators. The Committee will continue to study the projects/priorities and other assignments delineated by the Court for the upcoming Conference year.

The Committee plans to facilitate the improvement and expansion of major civil case mediation programs. The Committee also plans to actively study and evaluate other alternative dispute resolution options.

IV. RECOMMENDATIONS

The Committee is making no recommendations to the Conference at this time.