

**COURT-ANNEXED ADR PROGRAM  
18<sup>th</sup> JUDICIAL CIRCUIT  
DuPAGE COUNTY, ILLINOIS**

**STEPHEN J. CULLITON**  
*CHIEF JUDGE*

**HOLLIS L. WEBSTER**  
*PRESIDING JUDGE  
LAW DIVISION*

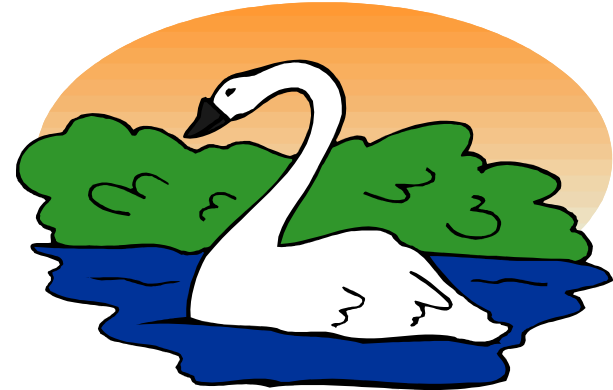
**KENNETH A. ABRAHAM**  
*SUPERVISING JUDGE ARBITRATION*

**LORETTA K. GLENNY**  
*ADR ADMINISTRATOR*

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**SUMMER 2009**

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***ADR QUARTERLY***

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**18<sup>TH</sup> JUDICIAL CIRCUIT COURT**  
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## OPENING STATEMENT

### CHANGES IN COURTROOMS & ASSIGNMENTS

Effective September 1, 2009 Judge Paul Fullerton will be assigned to Courtroom 2000 and will hear the SR call.

Judge Neal Cerne will be assigned to Courtroom 1003 and will hear the Forcible and Foreclosure call.

Judge Bruce Kelsey will be Supervising Judge of Arbitration.

### NEW JUDGE

Paul A. Marchese has been selected as our newest Associate Judge to fill the vacancy created by the retirement of Judge Kenneth Abraham.

### NEW RULES OF PROFESSIONAL CONDUCT

On July 1, 2009, the Supreme Court adopted new rules of Professional Conduct effective January 1, 2010, a copy of the new Rule 2.4 which applies to attorneys acting as neutrals is on Pages 2 and 3 of this Issue.. A full copy of the new rules is available at the ARDC website, <http://www.iardc.org>.

One of the most notable changes in the new rules is the inclusion of comments, which are intended to aid attorneys in conforming their conduct and practices to the requirements of the rules.

JUDGE KENNETH A. ABRAHAM  
*Supervising Judge  
Mandatory Arbitration*

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The editions of the *ADR QUARTERLY* and the *QUESTION AND ANSWER BOOK* are available through the County Web site, which can be accessed as follows:

<http://www.dupageco.org/circuitcourt>

Thank you to the many attorneys who have phoned, written and spoken to Judge Abraham and the ADR Center staff. We appreciate your opinions and concerns over issues important to the process. Many of your comments and concerns will be addressed and included in future editions. We encourage comments that will not only improve the process but also the result.

The Mandatory Arbitration Program, 18th Judicial Circuit Court, DuPage County, Illinois, provides the *ADR Quarterly* as a service to the arbitrators and other interested parties. Any discussion contained in this publication is offered as general information only and should not be relied upon as a legal opinion regarding any specific matter.

The *ADR Quarterly* is written and edited by Judge Hollis L. Webster, Judge Kenneth A. Abraham, Loretta K. Glenny and Carol A. Robles. Thanks to Robin Partin, Deputy Court Administrator, for running the graphics.

## **RULE 2.4: LAWYER SERVING AS THIRD-PARTY NEUTRAL**

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them and shall explain to them the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Adopted July 1, 2009, effective January 1, 2010.

### **Comment**

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. The lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration [(see Rule 1.0(m))], the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Adopted July 1, 2009, effective January 1, 2010.



## JUDICIAL TIPS

### ARBITRATORS

#### MEASURE OF DAMAGES

It is not unusual for the plaintiff in an automobile subrogation case to present as damages the cost of "totaling" the vehicle. That amount may consist of several components including the value at the date of the collision and adjustments for towing, storage, rental tax and title charges for the replacement vehicle and salvage value. In awarding damages to the plaintiff, arbitrators must consider the law as stated in IPI 30.11. That instruction states:

***30.11 Measure of Damages—Damage to Personal Property—Repairs or Difference in Value Before and After Damage***

*The damage to property, determined by the lesser of (1) the reasonable expense of necessary repairs to the property or (2) the difference between the fair market value of the property immediately before the occurrence and its fair market value immediately after the occurrence (emphasis supplied).*

The Committee comments read, in part:

When the cost of repairs is admittedly the lesser amount, use IPI 30.13, which states:

***30.13 Measure of Damages—Damage to Personal Property—Repairs***

*The damage to property, determined by the reasonable expense of necessary repairs to the property, which was damaged.*

Therefore it is important to ask the following questions:

1. Should the award include the cost of replacement even if the plaintiff presents no evidence as to the cost of repair?
2. If the cost of repair has been presented as an estimate, has a proper foundation been provided (i.e. business record)?
3. Under the law stated in IPI 30.11, is it proper to award replacement damages although the lesser amount is the cost of repair?
4. Does it make any difference that the insurance carrier has actually paid out the higher amount?

Judges are often faced with motions in *limine* seeking to bar plaintiff from presenting the cost of replacement when the cost of repair is the lesser sum. Those motions are routinely granted.

## ATTORNEYS

### SUPREME COURT RULE 105

One of the most disappointing experiences to an attorney is when a judge states that they do not have the jurisdiction to hear their motion. This usually occurs when seeking additional relief against a party in default or a Section 2-1401 motion. Although Rule 105 specifically addresses situations where a plaintiff seeks additional relief from a party in default, Rule 106 brings motions under Sections 2-1401, 2-1601 and 12-183(g) under the umbrella of Rule 105.

Proper service of notice goes to the question of jurisdiction. The first step is to view how the notice was served and the second to determine if the person served properly conveys jurisdiction to the court.

Service of notice is not proper under Rule 105 when a routine Notice of Motion is mailed either to the party, their attorney or former attorney. Rather, notice must be served:

- a. By any method allowed for service of summons; or
- b. By certified or registered mail, return receipt requested and restricted delivery. Note, unlike service by mailing in small claims court, the defendant must receive the notice. Therefore signature of someone other than the defendant does not perfect notice; or
- c. By publication upon filing of an affidavit but only in cases where the initial service by publication is allowed (e.g. *in rem* actions).

Notice must be served upon the party and not their attorney. That means service by certified mail restricted delivery upon an attorney who represented the defendant is generally improper. The only exception is called the "equitable exception". Under that narrow exception, service upon an attorney may be proper where that attorney is appearing for the movant in a matter ancillary to the judgment Welfelt v. Schultz Transit Co., 144 Ill.App.3d 767. The most common example is when an attorney is representing the plaintiff in a Citation proceeding based upon the underlying judgment, therefore, serving the attorney meets Constitutional due process requirements.

## JURISDICTION-SETTLEMENT OR VOLUNTARY DISMISSAL

If attorneys voluntarily dismiss a case and wish to have it reinstated more than 30 days after its dismissal, they may be barred from doing so unless the dismissal order gives leave to reinstate Bettenhausen v. Guenther, 388 Ill. 487. If attorneys wish to keep the door open to reinstating the case, they should ask for leave to reinstate and place that language in the order. However, if the reason for dismissal is to avoid a Rule 103(b) finding by the court, no one should be surprised if the request is denied. If reinstatement were allowed where there is no service, it may improperly extend the Statute of Limitations and blur the distinction between reinstatement and refiling. (See 735 ILCS 5/13-217)

## JURISDICTION-DISMISSAL WITH PREJUDICE

In general, a court loses jurisdiction 30 days from the date of entry of an order dismissing a case with prejudice. Although there are cases, which have held that the court has continuing jurisdiction to enforce a final order (Comet Cas. Co. v. Schneider, 97 Ill.App.3d 786), there must be language in the final order to enforce. Therefore, if the dismissal order required the performance of an act by the defendant, the court may have continuing jurisdiction. However, absent wording preserving jurisdiction to enforce a settlement, the court has no jurisdiction to reinstate and the plaintiff is left with a separate cause of action based upon breach of a settlement contract. (Brigando v. Republic Steel Corp., 180 Ill.App.3d 1016) Please note that even if that language is in the order, it must be in the decretal and not the recital portion. Very often judges see language inserted in the introductory portion of the order form but not in the order itself.

## ADR STATISTICS

### MANDATORY SUBROGATION PRETRIAL PILOT PROJECT

July 15, 2009 marked the end of the first year of the Mandatory Subrogation Pretrial Pilot Project. The following is a summary of the results of the first year:

TOTAL NUMBER OF CASES CONFERENCED	440
SETTLED THROUGH PRETRIAL	327
SET FOR ARBITRATION	92
SET FOR JURY TRIAL	14
NUMBER OF JURY TRIALS	2

Please remember that the program only applies to subrogation cases and only where a jury demand has been filed.

### WHAT HAPPENED TO THE REMAINING 113 CASES?

The following are the categories of disposition of the remaining 113 cases:

Transfer to Courtroom 2018 because increase to over \$10K  
Consolidated with a case pending in another courtroom  
Military calendar inactive status  
Settled between pretrial and arbitration hearing  
DWP at post arbitration status  
Settled after arbitration but before trial  
No rejection and Judgment on Award entered  
Jury Trials (2)

### COMPARISON OF SUBROGATION CASE FILINGS & JURY TRIALS

All 440 cases were assigned to one courtroom. Only two proceeded to jury trial. That represents .05% of the subrogation cases filed or about 1/10<sup>th</sup> of the national average.

## CONCLUSION

The traditional method of handling these cases in other Circuits has been to set them for trial – something that cannot be accomplished in a large county without utilizing more than one courtroom. Past experience has shown that most cases settle on the day of trial because that is the first time the plaintiff gets an offer. That results in a needless trip to the courthouse for:

Plaintiff's insured;  
The drivers of the two or more vehicles involved in the collision;  
Independent witnesses;  
Police Officers;  
An adjuster from the plaintiff's carrier; and  
Jurors

The cost of a Small Claims jury demand for a jury of six is \$12.50. It is easy to forget the human cost as well as the cost to the County to fund jurors, facilities and staff for jury-trial courtrooms. That expense far exceeds the \$12.50 received for a jury of six.

Based on the results of the program, the Circuit Judges have adopted a new local court rule.

## NEW CIRCUIT COURT RULE

### **8.01(a) SMALL CLAIMS SUBROGATION SETTLEMENT CONFERENCES** *(Added eff. 7/8/09)*

*Every Small Claims subrogation action is subject to a mandatory settlement conference.*

*Small Claims subrogation conferences shall be conducted by the assigned trial judge. All attorneys shall fully cooperate with the Court in preparation for and attendance at the conference.*

*Attorneys for all parties and insurance adjusters, with full authority to settle the case, shall personally appear at the time and date set for settlement conference.*

## CLOSING STATEMENT

It has been a great pleasure to have had the opportunity to serve as Supervising Judge of Mandatory Arbitration for over 7.5 years. During that period of time, which represents a time span of more than 1/3 of the existence of the program, I have had the pleasure of working with a great staff at the ADR Center, exchanged ideas with the best Arbitrators in the state, and fielded questions and comments from those attorneys who practice in the Mandatory Arbitration program. Those experiences will be remembered long after I retire.

Our Circuit has seen case filings increase drastically as the economy has worsened. In the last year alone, we have seen the new SR case filings for the first six months increase 43%.

However, through the hard work of those who volunteer as Arbitrators, the age of AR and small claims jury cases from filing to disposition remains at an average of under one year and the overall percentage of cases tried remains at about 2% – well under the national average. Thank you!

I hope that I have left the program in at least as good a shape as when I began serving as Supervising Judge. While I look forward to new adventures, I will not forget your kindness and wish all of you and your families the best.

*Judge Kenneth Abraham*