"How to Initiate or Improve a Court Mediation Program"

"Building Your Mediation Practice: September 2008"
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Question: We don't have a mediation program in our courts, and I keep hearing from people in other states what a great boost it is for mediation as a whole. How can we work with our local courts to interest them in starting (and paying for) a court-annexed civil mediation program?

Answer: Taking your challenge even broader, and including those jurisdictions that already have court-annexed mediation programs in place that may not be functioning to the level everyone would like, let's talk about courts and mediation.

Much can be learned from the courts that have programs in place, which can inform courts that are contemplating a mediation program. When I was working with the Santa Barbara Court, starting our Court Annexed Dispute Resolution (CADRe) Program (www.sbcadre.org), our mediation program was having such great success in terms of both resolution rate (72%) and user satisfaction (as defined by post-mediation surveys of both attorney advocates and clients) relative to other courts in southern California (some with resolution rates as low as 28-33% and great client dissatisfaction), and I wanted to understand why. Granting that defining success in mediation is an entire discussion unto itself, my focus was on these two variables because they were the two that mattered most to the court. If the users liked the program, and if cases were settling, the court was happy.

The other thing that should be noted about this program is that by selecting me to be the inaugural ADR Director, they specifically selected an experienced mediator (who at that time had mediated between 300-350 cases for the Los Angeles Superior Court's existing program), rather than an experienced court employee, and they followed that by asking me to shape this program so that it would be most successful from the mediator's perspective. This was a unique charge, as most court programs design "from the inside out," meaning they start with what the court knows and tell the public how the program is going to work. Santa Barbara, and it's insightful and progressive Presiding Judge, Frank J. Ochoa, brought in the outside professionals with experience in mediating litigated cases (consultant Robert Oakes and me) to shape the program "from the outside - in."

While I did not arrive at my conclusions through pure scientific methods (control groups, controlling variables, etc.), the summary of what I learned can be contained in one sentence:

The more choice the users have, and the more committed the advocates and neutrals are, the higher the success rate.

Following are my perceptions of the reasons for this program's success, which can serve as a guide to a community that is contemplating adding (or improving) a mediation program.

Consider an interim step in mandating mediation.

Counsel appearing at their case management conference could be (and often were) ordered, not into mediation, but into a 10-minute conference with the court's ADR Director. In that conference, they were briefly introduced to the multi-door courthouse that included binding arbitration, mediation, early neutral evaluation, settlement masters (retired judges and senior litigators who held settlement conferences), and special masters (essentially discovery referees). At that conference, they could opt in to any of these programs. If their case had under $50,000 in controversy (by stipulation of all counsel), they were eligible for judicial arbitration or limited mediation (a program that did not cost them anything to utilize, which will be discussed in greater detail below). While the court had the authority to order parties into one of these programs if their case was under $50,000, this only happened two times during my term (the program's first year), as he judges understood that people get more out of something when they request it, rather than when it is thrust upon them.

A free market can exist, even in a bureaucracy.

Here is what I mean. Santa Barbara's CADRe program is a market-rate mediation program for cases with over $50,000 in dispute. The program is designed on the basis of a true, free-market economy, and I believe that is why it worked.

The CADRe mediation program operates as follows:

* Parties choose to participate in the program (only order may be to an informational conference)
* Parties choose their neutral, with full resume information available at the court and on the court's public website (cutting edge back in 1999), allowing for (aka "trusting") the informed consent of the parties, most of whom were represented by able counsel, to select the right mediator for their case.
* Parties pay market-rate mediator fees in a competitive setting (fees ranged from $100/hour to $5,000/day)
* Parties have a court-furnished completion date, movable by stipulation to the court, but within that period, parties decide when the time is right to mediate.

The program in a neighboring county, the one with the 28% resolution rate, operated as follows:

* Court ordered parties into mediation
* Court assigned the mediator
* Court furnished mediation at no cost to the parties, and mediators were paid $100 per case, regardless of length
* Court not only set a completion date, but set the actual date and time of the mediation

Our two programs in Santa Barbara showed us something about party investment into the process. Our market rate mediation panel for cases over $50,000 had a resolution rate that

was 10% higher than the limited mediation panel, where the parties did not have to pay and the mediator was assigned to them. This caused us to hypothesize that when parties are paying for a process, they tend to prepare better (both lawyers and clients) and perhaps select their mediator more carefully, and are possibly more invested in settlement at that point. Of course, we were never able to prove this, given all of the other variables, but it is worth considering when designing a court-annexed program.

Mediator quality makes a big difference.

There were other variables involved that should be noted. While this neighboring county did diligent work in screening their mediators, they only required completion of a 25-hour training course at a program they approved, so the bar for entry onto their panel was relatively low. The CADRe mediators had to complete one basic mediation skills course of at least 25 hours, plus they had to have mediated (not co-mediated or observed) seven (7) cases prior to applying, and they had to supply two letters of recommendation from counsel for whom they had mediated. These somewhat more onerous requirements contributed to the quality of neutral on the CADRe panel. The next thing we did was reach out to colleagues, neutrals form all over the state, and recruit them to apply for our panel. Here we did have one distinct advantage: who wouldn't want to travel to Santa Barbara and mediate a case on a Friday or a Monday and stay for the weekend?! So, from Orange County (south of Los Angeles) to the San Francisco Bay Area, our first class of neutrals were among the finest in the state. We were fortunate to have some very talented local mediators to help the program launch, but it is much easier to get good results, and to "seed" a program at its outset, when you have experienced neutrals, even from outside the jurisdiction, to give counsel and their clients a great first experience with court-annexed mediation. In subsequent years, more and more local lawyers and professionals finished their mediation training and obtained the requisite experience, continuing to grow the talent of the panel.

Invest in Neutrals with Orientations and Continued Training.

Given that the court and its panelists shared the same goal - a successful mediation program - the court worked with the neutrals to take them through orientations, were they learned all about the court program, what it offered, what the court's goals, objectives and expectations were. The court also offered additional training programs, bringing in both local and out-of-town trainers, to offer the neutrals advanced skills, to offer them skills in areas in which they did not practice (mediators got arbitration skills, arbitrators got discovery referee skills, etc.), and offering training to the local bar's advocates that featured the mediator panel members as the experts in mediation.

The court essentially partnered with the neutrals in order to build a successful program. The programs that have more temperate success are those who declare that the neutrals are lucky to be listed on the court's panel. While there are arguments that say that it adds credibility to a neutral to be a member of a court panel, the truth is that it all depends on the quality of the court's panel. A court mediation panel where anyone can sign up, and panelists are required to volunteer, has little to offer a mediator in the way of prestige.

Every Successful Program Needs a Champion.

When starting or reviving a court-annexed program, the most important piece might be the judge who is carrying the sword during the charge. Santa Barbara's then-Presiding Judge was Frank J. Ochoa, who was trained in mediation skills, understood the difference between mediation and a settlement conference, and was a strong proponent of the multi-door courthouse. He assembled a bench-bar committee that was very strong - good judges and good lawyers. This is a key to success in building a program. The committee shapes the program, proposes the rules that will govern it, and essentially give it the personality and the energy it will have. In our case, they had great minds, debated at times, but generally trusted the input they received from me and from our consultant (who transitioned out once I was in place), and they were bold enough to stand up to the judges who resisted change and who were threatened by the new program. They helped to educate the local bar and mollify their concerns about the new program, and they showed up to support and participate in the events and presentations.

Size Matters.

Santa Barbara had another distinct advantage that other courts may or may not share - our size. We were large enough that a mediation program could make a measurable difference in the administration of justice, and access to justice, in our county, and yet we were small enough that we could be fairly nimble and embrace change effectively and efficiently. Within a few months from our launch, most of the lawyers in the bar understood the basics of the program, how it worked, and what the goals were.

There were only 23 judicial officers in the county when we launched the program. I say only because we were just an hour's drive away from what has become the largest court in the world, the Los Angeles Superior Court. When it unified a couple of years later, they counted over 400 judicial officers and over 2,000 mediators on its panel. Santa Barbara mediated about 350 cases in its first year. That same year, the Los Angeles court program mediated somewhere in the range of 15,000-20,000 cases. Los Angeles had been legislated to start a mandatory mediation program in cases under $50,000 as a pilot study for the state, but that pilot tag was later removed and the program became permanent, with little ability for those folks to make changes to it. It was an imperfect program about which there has been a lot of controversy, but they never had the advantage of the smaller, surrounding counties who could shape their own program, and who were small enough to build consensus and provide one-on-one informational conferences with almost every litigant referred to the program. The rigidity of their program, as it was legislated, resulted in a 36% resolution rate at the time we began the Santa Barbara program. That means that almost two out of every three mediations ended without a resolution, potentially leaving a bad taste in the mouths of many users, as I often heard them say, "being ordered to a program that didn't work more than it did."

When thinking about building or refining a mediation program, be cautious to consider the size of the court and its constituency, and take on only what can truly be accomplished given a court's size and budget.

Enlist and Educate the Judges.

It is critical to the success of any court mediation program for the judges to understand the difference between mediation and the settlement conferences that they do routinely. They must also understand their role in helping parties access the mediation program. They must speak from the bench in a way that is informed, while being proponents of the program, hopefully without being over-powering in their use of the judicial order, and they must listen to counsel with regard to ripeness of a case and readiness to mediate. If they can do all of this, then the program can achieve maximum success.

There Are Many Different Models.

While we have detailed some of the different models above, it is worth noting that another adjacent county achieved a resolution rate that was even higher than Santa Barbara's. In San Luis Obispo county, to the north, the court determined that it was in the business of dispute resolution, and that if mediation was what people wanted, then it was the court's duty to give that to them. In this county, it meant that the judges on the bench in that court, led by Hon. Jeffrey Burke (a Pepperdine trained mediator, who has since instructed there) mediated the majority of the cases that came through their informal mediation program. Counsel were offered a private mediator from the court's list, or a free mediation conducted by one of the judges. While that program saw a far smaller percentage of cases opt into the program, their resolution rate was 82%. Imagine the satisfaction when more than four out of five cases that opt for mediation are settled. While the local private mediators did not like it at first, eventually several built thriving practices. So, when developing a program, in addition to everything discussed above, consider whether there is another option, depending on the court's budget and backlog, that might make sense as a part of the design of a program.

And a backlogged judiciary should not dissuade from this kind of a program. When I was in Delhi, India, helping the Delhi High Court shape their program, their backlog was astounding. It was not unusual for a case to take 30 years to go to trial! Their courts were open on Saturdays because of the tremendous backlog. But they decided to take 16 judges from their incredibly backlogged courts and have them sit as mediators for one day a week to see if they could dispose of cases. What they soon found was that after a week-long training program, and individual coaching (by professionals and peers), they were disposing of more cases through mediating, than they could by using the same time on the bench. They quickly built them a mediation suite in the courthouse, moved them to two days a week each, and started expanding the program as fast as they could.

It's Not All Roses.

Contrary to common myth, having a court mediation program will not, in itself, unburden a court's docket, launch a private mediation industry, or convert the hard-core litigators into wanting an interest-based process. And more specifically, there are decisions that are made during the design phase that can cause a program to come under fire and/or have fatal flaws. Those designing, implementing or revising a court's mediation program

would be wise to seek professional consultation, as it may help to avert some of these pitfalls and save the court time, money and potential embarrassment.

It Is Worth It.

In the end, while there are gripes about some court-annexed programs from private mediators, and there are gripes from some advocates who don't want to be forced to jump another hurdle before having their day in court, having a court-annexed mediation program is a win-win for everyone, if it is designed right. With the right construction, parties can have greater satisfaction with the courts than they do through traditional litigation, counsel can have more satisfied clients and more efficient settlement discussions than they might directly, and mediators have an opportunity to practice, gain exposure, and build a reputation.

If your local court hasn't revisited its design in some time, maybe this is a good time to start asking questions. After all, that is what mediators do best!

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