

Exporting the Wisdom of Mediation

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LOS ANGELES - Los Angeles neutral Lee Jay Berman recently returned from India with a bronze statue of Buddha, a symbol of knowledge.

The gift came from judges in the country's capital, Delhi, in gratitude for Berman and two others neutrals in a delegation sent to share their wisdom on the art of mediation.

The recent trip was sponsored by the Institute for the Study and Development of Legal Systems, which is helping to establish what is believed to be the first-ever judicial mediation program in this South Asian nation of 1 billion.

"It was wonderful to watch mediation beginning somewhere," Berman said.

Started in August, the program so far has trained 18 judges, all from a lower court in Northern Delhi.

Until a few weeks ago, the judges mediated cases in their chambers because construction of separate rooms was not complete.

If the program is successful, the Institute for the Study and Development of Legal Systems hopes similar centers can be developed throughout the country.

"That was our mission, to create a model judicial mediation program," said fellow delegate Robert Rack, the chief staff mediator for the 6th U.S. Circuit Court of Appeals in Cincinnati.

The program may be the first of its kind, but other efforts by Americans to encourage alternative dispute resolution in India have gone on for years.

In the late 1990s, the Straus Institute for Dispute Resolution at Pepperdine University School of Law helped set up a center for mediation and arbitration in Delhi. The focus was on training business leaders, although a handful of judges and the country's minister of law and justice also participated, Peter Robinson, the Straus Institute's acting director, said.

But having a program in which a group of judges is dedicated to mediation is unique, Robinson said.

"That's certainly different than what we did," Robinson said. "By doing this in a courthouse, they've gone to the next level in institutionalizing this."

The nonprofit Institute for the Study and Development of Legal Systems, based in San Francisco, focuses on reforming legal systems throughout the world, including Bolivia, Jordan and Indonesia.

The task in India is daunting. A civil case can take 18-to-35 years to reach resolution after trial and appeals are exhausted, Berman and Robinson said.

Rack said there is resistance from leaders of the Delhi Bar Association because lawyers are concerned they will lose business. Attorneys in the United States once had the same fear. But as more joined the ranks of mediators, their enthusiasm grew, he said. Rack hopes India's lawyers will come around as well. "Time will tell," he said. He said officials at the Delhi courthouse have embraced the program.

The gains so far are modest. The judges started mediating in September. They've handled 257 cases with a 57 percent settlement rate. Rack said that's fine "considering three months ago, they didn't know what mediation was." "I think there's every reason to think the settlement rate will go up," Rack said. The judges are still learning the craft. "Mediators get better at this as they get experience," he said.

Rack helped create a computer data system to track the settlement rate of every mediator. Eventually, the better ones will spend more time doing it, he said. Also, the program is monitoring the type of cases that show the greatest success in mediation in order to fine-tune what claims to undertake in order to maximize effectiveness.

Berman said he felt appreciated. "The judges that I met there were so warm and giving," he said. A judge overseeing the program referred to the team as "his experts from America," Berman said. He said the judge accepted their guidance even when he had reservations. "He said, 'I would have thought it different, but OK. What other changes do we need to make?'" Berman recalled. "He really deferred at every turn to our recommendations."

Berman, who spent 11 days in India in September, trained some of the judges and observed others who had finished the training. He watched to ensure that they didn't fall back into their judicial role of deciding a dispute rather than facilitating communication between the parties so they can reach their own resolution. Berman would sit near the judge's desk in his chambers.

Cases ranged from business disputes to personal injury to family law and beyond. "They also have an epidemic there of people writing bad checks," he said.

The judges would speak in English to the clients' attorneys. "But, generally speaking, none of the parties spoke English," he said. "They all spoke Hindi."

They told Berman he spoke too fast and that he had a "funny" accent. "So there was a language barrier from English to English," he said.

India's caste system prevented the judges from adopting some American norms. They didn't feel comfortable initiating the introductions and greetings with the parties and their counsel. "It was just not acceptable to them," Berman said. "They had to sit behind a desk or a table and let the parties come to them."

Also, in America, mediators prefer to shuttle in and out of rooms for separate, private sessions with individual parties. The judges in India declined to adopt that approach. "So that they weren't traveling; they were being traveled to," he said. "Culturally, it was very interesting," he said.

The country's tremendous backlog has several causes. Not only does the country have an enormous population, but courts in India do not consolidate cases, he said. So a marriage dissolution will encompass separate suits for the right to divorce, child and spousal support, child custody and return of dowry gifts. Another reason for delay is that every decision a judge makes in a case can be appealed to the highest court, he said.

At the same time, legal costs are not as prohibitively high as they are here, he said. With mediation, a case that could take years to wind through the court system may be wrapped up in a few short sessions, he said.

Berman recalled a property dispute between siblings in a contested will case stretching back to 1984. "It was settled after three mediation sessions," he said.

Berman estimates that the legal community in India lags 10 years behind California in embracing mediation. "Sometimes it's helpful to remember just how far we've come," he said.