

## Elements of a Successful Court Mediation Program

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There are many ways of discussing what determines whether a court mediation program will be successful. One way of looking at predictors of success is whether a program has cultivated seven essential elements.

Three aspects must be clear:

- the definitions of the program goals,
- the role of the court in providing ADR services, and
- the understanding of how the program meshes with the legal and mediation environments.

Four groups must participate enthusiastically:

- members of the bench who are knowledgeable about mediation and their role in the program,
- members of the bar who are knowledgeable about mediation and the program,
- court administrators who are knowledgeable about mediation and how to monitor and evaluate the program, and
- trained, skillful mediators who are knowledgeable about mediation.

### BE CLEAR ABOUT THE PROGRAM AND ITS ENVIRONMENT

The place to start, whether planning a new mediation program or re-thinking a program that is in operation, is to be as clear as possible about how the program should function. That involves the program's goals, why the court is

involved, how the court is involved (or not), and what support is available from the legal and mediation communities for the program.

### A Clearly Defined Goal

A fundamental element for any program is the determination of why a court is operating, or considering operating, a mediation program. Is there a backlog in cases? Is there a need for judicial resources in other areas that might be addressed by reducing the demand in the area to be served by mediation? Is there a desire for a process that will allow for a wider range of outcomes than is available through litigation? Is there a wish for a less contentious or potentially speedier process than litigation? These and other goals can be considered and then articulated among those designing, proposing and implementing the program.

If the program maintains a clear line of sight to what the goal is, the program can stay focused on accomplishing that goal. Each program design decision can be made with the goal in mind.

The initial goals may be set by legislative mandate, court rule, or by court leadership, whether group or individual, but the program will be most successful if it is shaped by a variety of voices. To achieve that, typically a judge or other leader invites a representative group of lawyers, judges, mediators, and other experts such as local law professors, leaders of local mediation organizations,

### SUMMARY

Years of assisting in the development of court mediation programs has provided RSI with insight into what elements are necessary to their long-term success. This article discusses some of the most important factors courts need to keep in mind.

and individuals from other advisory groups like Resolution Systems Institute, to work on development of the program. The process of drafting of the court program rules can be a useful exercise to design the most effective way to run a program based on program rules from higher authority, local legal and mediation culture, and the goals of the program. If the program rules are in place, this same kind of group can meet to determine how exactly the program will function.

Communicating about the goals of the program with its constituents during the development process and after the program is in place will help keep everyone who is involved with the program informed about the goals. This is particularly important if the goals change during the life of the program, as is likely as the program grows and evolves. Knowledge of the goals will assist participants in understanding how best to use the program and what to expect of it.

It is important that the goals be revisited on a regular basis to see if the program is still working to achieve the same goals,



or if the goals are still appropriate for the program. While a program might have one goal or set of goals when it is first established, those goals may change over the life of the program. For example, if a program was established to address a backlog in large civil cases and during the life of the program the caseload is brought up to date, the question arises as to whether to change the program because there are other goals that the program is now addressing (or could address) or to consider reducing the number of cases referred to the program because it has accomplished its goal.

#### *What will happen without a clearly defined goal?*

Without a clearly defined goal, a court may not set up a program that meets its or other stakeholders' needs. For example, if a major issue the court faces is dealing with unrepresented litigants and that goal is not part of the program design, the mediation program may be designed in a way that does not meet that need. Without clearly defined goals it also would be impossible to know if a court mediation program is successful or not. Indeed, it would seem to be pointless for a court to start or operate a mediation program without being clear why it is doing so.

Despite this, many programs are not entirely clear about their goals. There are various reasons for this. It may be because different stakeholders have differing goals. For example, when considering mediating child custody and parenting time cases some proponents may want to ease the way for children when their parents are divorcing by reducing the conflict of litigation while others may want to reduce the amount of time that judges spend on trying these cases, which

can be very time-consuming. These are not mutually exclusive goals, but while some strategies to accomplish them may be the same, some may vary. Courts also may not want to articulate their goals because they are not so attractive. In a highly politicized judicial environment, a leading judge may want to implement or expand a mediation program simply because it looks progressive. In other settings, courts may not articulate their goals for their mediation programs because they simply believe that everyone has the same unspoken goals so there is no reason to articulate them. Articulating program goals is essential no matter the reason to not want to do it. By doing so it will be possible to monitor and evaluate how well the program is accomplishing all its goals.

#### **The Court's Role**

Representatives of the court need to consider, decide and communicate what the court's role is in implementing and maintaining a court-related mediation program. After all, the court does not need to take a role in ADR for parties to be able to mediate. Parties are free to contract with independent mediators to assist them in settling their case. In addition, today judges often view their job as settling cases at least as much as trying them. Why, then, would a court take on the added responsibility of operating a mediation program?

For many judges and court personnel the answers to these questions relate to control, efficiency and effectiveness. By having a court-annexed mediation program, judges have a list of approved mediators to whom they feel they can safely refer cases. They know generally what type of process will be used and they have rules in place regarding

policy issues such as confidentiality and voluntariness. Even for judges who see themselves as active settlement agents, there may be cases in which in-depth settlement discussions would take too much time from the rest of their cases or the case would benefit from a mediator with expertise in the substantive area of the case. For any judge, referring cases to mediation can free the judge to move through other cases more expeditiously, especially if the mediators in the program are able to settle the preponderance of the referred cases.

A court-annexed program does require that at least some of the judges take on a new role as gatekeepers and supervisors for the mediation program. Unless the program is comprehensive so every case goes to mediation (typically with some delineated exceptions), judges must determine when cases are ripe for mediation. They also need to manage the mediation program. This overall management of the program is typically vested in one judge who tracks the monitoring reports, works with the program committee, oversees mediator quality and ensures that the program stays focused on its goals.

Having taken on these new roles, however, the court as a whole does not give up its old responsibilities. Most specifically, the court is still responsible for taking care that the programs it administers dispense justice. When the court moves beyond the traditional forms, such as litigation and settlement conferences, and establishes mediation programs, the court must still ensure that old protections (e.g., notice, time to respond) are still in place and that the promises made in the mediation program (e.g., confidentiality, neutrality) are honored.



*What will happen if the court is unaware of its role or does not follow through on its role?*

In short, lack of clarity about the goal can undermine the program. In terms of gatekeeping, if the program is voluntary and the court does not follow through on referring cases, the program probably will grind to a halt. If the referrals are mandatory, then gatekeeping would not be as much of an issue, although judges still must consider the appropriateness of individual cases in some situations (such as when domestic violence is involved).

In terms of program management, if the court does not manage the program, the results are more difficult to predict. It is likely that a program could limp along with no management longer than with no referrals, but management issues can kill a program, too. As an example, if a very popular mediator who does almost all the work in town on a particular type of case retires, and parties begin to have negative experiences with the few other mediators on the roster, there is a problem if they have no process through which to complain about poor mediators and if no one is working to develop the mediator roster. In a short time, that program can wither and die.

Lack of quality or diminishing quality also can undo a program. While referral to mediation may or may not be voluntary, settlement certainly is voluntary, and poorly skilled mediators are less likely to be able to assist parties in reaching settlements. Even if settlement is reached, the quality of the experiences and durability of the agreements are likely to lag with poorly skilled mediators. There will be dissatisfaction among lawyers who practice in the area and their

clients will be unhappy. Together, this can slowly lead a program to wither, and understandably so.

More importantly, lack of quality can translate into a program that does not provide the administration of justice for which the court is responsible. For example, if mediators do not follow ethical standards and trample on party self-determination, then the program is not providing quality mediation services and it is not part of the administration of justice that is required as a court ADR program. Party self-determination is an underlying tenet of any mediation, but in a court mediation program it is the responsibility of the court to put systems in place to help ensure the practice of these basic principles of mediation ethics.

In a different scenario, if judges have no one to go to for advice when issues arise with the program, unevenness in program policy can develop. For example, if there was a question about whether to allow/require a mediator to testify about something that happened in mediation, a judge may make a well-reasoned decision that has no negative impact on the future of the program. But it could go the other way. With someone giving consistent, and consistently good, advice to all judges, the program will develop a reputation as being solid and dependable.

While the outcomes of these management issues are hard to predict, the one thing that is certain is that a program with insufficient management is skating on thin ice. A court mediation program needs someone in charge of the big picture who knows the ethics and keeps an eye on the goals and the reports of whether the program is making progress toward accomplishing the goals. This is not likely

to be a time-consuming task, but it is an essential task.

### The Legal and Mediation Environments

While mediation is often seen as an extralegal activity, court mediation programs take place within the legal and mediation environments, or in the mediation environment and in the shadow of the legal environment. The legal and mediation environments have an enormous impact on whether - and how - a court mediation program will be instituted and what form it will take.

Everyone involved with the mediation program needs to understand the environment in which it functions in order to maintain the smooth functioning of the program. This does not mean that everyone needs to be trained in the law and in mediation, but that a basic understanding of environmental factors as described here makes leaders and participants more well-suited to the programs. For example, if considering starting or changing a court mediation program, one of the first places to start is by researching what ADR-related laws and court rules are in effect. They form the overall structure of the legal environment for a court mediation program.

If there are any statewide laws or rules that would apply to the program or mediators, it is important to know if they provide:

- + Directions about how court mediation programs will operate
- + Discovery rules as related to mediation
- + Confidentiality or privilege for court mediation communications
- + Other ethical guidance
- + Immunity for court mediators
- + Reporting requirements



- Financial support for court mediation programs
- Flexibility for local jurisdictions to form their own programs
- Approval processes for new or changed programs
- Other requirements

The legal environment is more than the laws and rules (and occasionally case law) that are on the books. In establishing a mediation program, the mediation program committee must understand the lifecycle of the types of court cases that will flow to the program. Understanding what the key points are in progress of the case, who is involved in the case, and what the parties' relationships are to the case during its life will enable the committee to craft a mediation program that responds to the lifecycle in the most efficient way. Mediation must be set at a time in the lifecycle that is not too early and not too late: when enough information is available to the parties to assess their case, but resources have not been squandered collecting and digesting information, and when the parties have a mindset that is most likely to be open to settlement.

Once the legal environment is understood, exploration of the mediation environment can be tackled. Are there existing court mediation programs in the jurisdiction? What types of trained mediators are at work in the jurisdiction? It is important to get a sense of how court and private mediation work together, if they do.

Then a little exploration of the legal and mediation cultures is in order. What is the attitude toward mediation in the bar? Among the bench? How long ago were the first mediation programs established? How deep and wide is the

use of mediation in the local area? Who are the leaders in the legal and mediation environments? How do the two cultures get along? Who and what are the bridges between the two?

*What will happen if the legal and mediation environments for mediation are not understood?*

A mediation program typically performs a kind of dance with the court process. A case moves from the litigation path to the mediation path and then back either for processing of the settlement or continuation down the litigation path, albeit usually in a better posture either for settlement at a later date or for a smoother trial. If the way in which these paths can best be intertwined is not explored and understood, there will be missteps in the dance and it will not proceed smoothly.

#### OBTAIN AND MAINTAIN THE COMMITMENT OF FOUR CONSTITUENCIES

The commitments of four constituencies form the four legs of support essential to the success of a mediation program. They are judges, lawyers, court administrators and mediators. Together, they are like the four legs of a stool that support the court mediation program. If they are all equally strong and supportive, the program has the best chance of being robust.

#### Judges

While not every judge must be committed to the mediation program to the same degree as every other judge, some judges must be willing to fulfill certain roles in order for a court mediation program to succeed. These may include referral to mediation, addressing issues as they arise, and overall program management.

As was mentioned above, if participation in the mediation program is voluntary, it will succeed only if judges refer cases. Timing within the life of the program, as well as within the life of the case, is important. With a new mediation program, judges should be prepared to refer cases as soon as mediators are available. This will help overcome initial program inertia and give new mediators the opportunity to put their new skills to work before they have time to cool after training if they have just been trained.

Whether a program is voluntary or more comprehensive in its referral process, issues will arise. For example, there may be a question about whether a party is being represented at mediation by someone with sufficient authority or about whether a handshake agreement is enforceable when it was reached at midnight after long and stressful hours of mediation. Judges will need to know how to respond to these issues in a mediation framework. Some judges are likely to become more involved in the program and be more adept at answering these questions, but every judge will need to have a basic familiarity with them.

It is often best to have a judge or judges do the outreach and training for other judges who will need to have this knowledge of the program. The more knowledgeable and comfortable judges are with the mediation program, the easier it will be for them to make referrals to it. With more knowledge, they can also make more appropriate referrals as well.

One effective way to develop judges' knowledge, understanding of the program, and interest in mediation, is to invite them to attend and/or participate in all or part of mediator training. Training will



include simulated mediations, so judges will have the opportunity to witness what mediation will be like for the parties they refer to mediation. Judges may have the opportunity to participate as parties, lawyers or mediators in training. This will deepen their understanding of the process. Because all referring judges may not be available to attend training, an additional orientation session for judges is generally advisable.

During program operation, it is useful for judges to meet with one another about referring cases and about the program more generally. This can be arranged in conjunction with a mediator gathering so that all participants can share their perspectives.

At least one judge will need to be responsible for managing the program. He or she will need to review regular reports on the numbers and types of cases that are being mediated, how many and which types of cases are settling, how many cases each mediator is mediating, and other statistics of interest to the court. That judge, or someone else, also will need to either be an authority for the kinds of questions posed above, or have access to an authority on those issues. This judge will be in charge of the processes or committee(s) that determine how mediators will be accepted for the program, how to track whether mediators have complied with ongoing expectations for education, how to receive and process complaints about mediators, and so on. Bottom line: that judge will be the face of the program.

### Lawyers

Even if participation in the program is mandatory or judges refer cases well, in most programs lawyer acceptance

and participation is key to the success of the mediation program. Obtaining participation from lawyers who practice on both sides of whatever type of case is involved in the program is essential. Inviting bar leadership to help in the planning stages of the program helps to ensure the bar's commitment to it during implementation.

Educational programs for lawyers should start before the program launches and continue throughout its life. These programs should cover such topics as when cases might benefit from mediation, when lawyers have done enough discovery to be prepared for a mediation (as compared to trial), and how to negotiate in mediation as compared to other settings. One of the best ways to get lawyers interested in mediation is to get them to have a positive experience in a mediation. These programs can help develop initial program acceptance and then later develop skill in using the program.

Depending on the type of case, many lawyers also get trained to act as mediators in the court mediation programs. Participating in both the mediator and the counsel roles also can strengthen an individual's abilities in each of those roles. Additionally, in voluntary referral programs, if every lawyer-mediator on a court roster recommends mediation for a few of his or her own cases in the opening months of a mediation program, it can go a long way toward developing program momentum.

### Court Administration

Although mediation programs are designed to reduce the overall use of court resources, they do not entirely run themselves. Someone needs to feel

and act responsible for the success of the mediation program. While the mediation program may not be that person's sole task, someone needs to wake up every morning with the goal of seeing the mediation program succeed. Mediation programs need both administrative support and management oversight. Courts have to determine how to track and manage individual cases and the program as a whole. The programs need not be labor-intensive, depending on how they are structured, but they do need someone to pay attention to them. Including the person or people who will have these responsibilities in the planning process should help to improve the functioning of the program as it matures.

The degree to which court staff is responsible for management of individual cases varies. In programs where the mediations are conducted in court facilities, there is likely to be more daily administration and more ability to oversee the program. No matter where the mediations are conducted, programs need an effective monitoring system to allow for ongoing improvement. At a minimum, a court is going to want information on mediation timeframes (how long it is taking to get cases through the mediation process), whether the parties are satisfied with mediation, and the characteristics of cases that resolve as compared to those that do not (e.g., case type, mediator, referring judge, timing of mediation).

### Mediators

Quality, committed mediators are essential to a successful court mediation program. Quality can be viewed in at least two ways: "Are the mediators skillful and therefore satisfying to the parties?" and "Do the mediators



function ethically?” (Here “skills” refers to mediator behaviors, such as listening, identifying issues, overcoming impasse and working through the steps in the mediation process. “Ethics” refers to the principles that underlie the mediation process, such as confidentiality, party self-determination and mediator impartiality.) While it is important for mediators to be skillful and ethical, setting the standard, identifying methods to measure the standard, and then applying the standard when mediators are selected and retained can be very difficult. In addition, mediators need to receive continuing education to maintain their skill and ethical performance.

#### *Context for Determining Mediator Standards*

In determining the appropriate standards for mediators in a court mediation program, it is reasonable to consider the characteristics of the program. If, on the one hand, a program is essentially a function of the court, the litigants are unsophisticated, the parties do not select their mediator and the referral is mandatory, the court has a fundamental responsibility for ensuring highly skilled mediators who function at the highest level of ethics. At the other end of the scale, if a court simply suggests that mediation might be a good idea, the litigants are sophisticated, the parties chose any mediator they want, and participation is entirely voluntary, the court may decide it has a lower level of responsibility for ensuring the mediators the parties select have high skill levels. No court program, however, can totally divest itself of responsibility for some level of ethical performance by mediators. At the very least, a system should be in place to receive complaints from parties about mediator behavior, with due process

protections for the mediator within that process.

Once the underlying context for the standard is set, the critical question remains: how do courts set standards and measure whether mediators meet the standards?

#### *The Approaches*

Most of the criteria used by courts to establish standards for mediators are proxies for competence, rather than performance-based measures of mediator ability. For example, mediators are often required to have particular education, experience or training. These are factors that for the most part have not been proven to relate to mediation ability.

There have been some attempts to develop performance-based testing methods that would be more directly related to actual mediation than the proxy standards are. Two of these approaches are written tests and observation of mediation. There is enormous time and expense involved in developing valid tests of either type, especially a test that is capable of withstanding a court challenge. The pioneers in this area are still working to pave the way for the field.

Some programs require that mediators adhere to particular ethical standards. Some are the standards of state mediator bodies or of the court itself, while others are national standards for the area covered by the program or the Model Standards of Conduct for Mediators that apply to all practice areas.

#### *Which Standards to Apply*

Starting from the premise that mediator standards depend on the characteristics of the mediation program, the first

step is to study those characteristics and determine what level of standard is appropriate. Then a court can determine which approaches are likely to ensure that level.

Without standards that relate directly to mediator ability available, court mediation programs use the following to select, monitor and maintain sufficient quality mediators:

#### *Mediator Selection*

Courts often establish selection procedures based on training hours and education completed. A court mediation program should consider the following:

Training: A mediator training requirement is definitely needed. While 40 hours is the base for most mediation, it is not unusual to require additional time for specialized training. For example, more hours are needed for family mediators for training in recognizing and dealing with substance abuse and domestic violence.

Additionally, court programs need to ensure that the training is high quality, the trainers require that the mediators participate in the entire program, and the training addresses the type of cases to be mediated in the program (e.g., no family mediation training for a civil mediation program) or it is a general training when that is sufficient for the area being mediated, e.g. general training to do small claims cases. Ideally, the trainer should assess the trainee and indicate to the court whether the trainee is competent to mediate, but few trainers provide this service.

Education: As compared to training, education is a much more controversial



question. Some courts require particular education, such as a law degree to mediate even small claims cases, while others do not have any education requirement for any type of case. The American Bar Association Section of Dispute Resolution is on record as opposing any requirement that mediators for court programs be required to be lawyers.

When deciding on education requirements, a court should determine whether there is any correlation between that education and the skill or ethical behavior of the mediator. Unless there is a correlation, there are other requirements that are more likely to ensure quality mediation. One exception could be family mediators with appropriate work in their advanced course of study such as social work or psychology, which would be useful in their work as mediators. Interestingly, many programs rely on volunteers from a variety of backgrounds to mediate family disputes.

Other experience: Some court mediation programs that hire mediators look for individuals who have had employment experience that prepares individuals to be mediators in the substantive area. So, for example, someone who had worked in a foster care agency might have a good background, when combined with mediator training, to become a mediator in a child dependency mediation program.

**Knowledge of and adherence to ethical standards:** Although they should, court rules do not always require that mediators adhere to a set of ethical standards. They do, however, typically address several factors that would be covered in an ethics policy. These would include

confidentiality, neutrality and party self-determination. Some also describe situations under which a mediator could be removed from the court's mediator roster. They do not outline formal complaint policies, but they do state that mediators can be removed for failure to comply with local rules or for other "unprofessional conduct." This is significant because it sets a "floor," or minimum performance level, for mediators, which gives parties some assurance of at least a basic level of competence and adherence to some ethical norms.

#### *Monitoring Mediators*

Once mediators are on a court's roster, the court has a responsibility to determine whether they stay on that roster. Some courts simply require that mediators renew their standing with a letter once during every given period, such as a year or three years. That will at least keep the roster fresh in terms of availability, but it will not ensure quality or adherence to ethical standards. Some methods for doing that include:

#### Creating systems to provide for review by peers, staff, judges or more advanced mediators as indicated by the program.

This is typically an observation followed by a discussion with the mediator. It is better when done on a regular basis, such as annually, but can be done when triggered by a complaint.

#### Collecting and collating information from evaluation forms from parties and their representatives.

This should be a regular part of the monitoring and evaluation systems. Feedback should be provided to the mediator on an annual basis (sooner if there is a problem) to let the mediator know how the parties perceive his or her

performance.

#### Creating a complaint process, making it available to all participants and ensuring its fairness to all mediators.

One significant step that court mediation programs and state offices of dispute resolution can take to meet reasonable, contextual expectations and to bring programs more in line with expectations, is development of a complaint process. Florida, which has arguably the most well-developed state court ADR program in the country, has promulgated an ethics policy, publishes ethics opinions, and operates a complaint process. Other states have taken similar steps in their own contexts and some court mediation programs have their own systems of selection, development, monitoring and continuing education.

#### *Mediator Maintenance and Development*

The approach to mediator competency should by no means be focused solely on setting minimum standards for programs depending on their program characteristics - in essence, a "half-empty" approach. It is also worthwhile to look at standards from a "half-full" approach. That is, how might mediators' skills and ethical abilities be developed further? Efforts such as continuing education, mentoring and mediator peer groups can assist in this development. The cost to the court of promoting ongoing development of mediators should be minimal if approached in a collaborative way with other entities such as bar associations, mediator groups and social worker gatherings, and the benefit to mediators and the parties they serve can be enduring.

Courts, and the stakeholders who work with them, should ask themselves



how they can set standards that are appropriately high for mediators in their programs, establish suitable monitoring and disciplinary systems, and encourage on-going professional development for mediators. All these need to be designed with the context of the program and the legal and mediation environments in mind.

*What will happen if the legs of the stool are uneven?*

A little unevenness among the legs of a court mediation program is to be expected. Indeed, from one time to another in the life of a program, it is to be expected that different constituencies will be stronger than at other times. But if one leg is significantly shorter than the others, the program is going to suffer. Consider what would happen to a program if the judges were not supportive of it or if the mediators were not high quality. What would happen if the lawyers chose to boycott the project or the court staff did not collect any information about whether the program was functioning, not to mention functioning well? All four groups - judges, lawyers, mediators and administrators - bring essential skills and activities to a court mediation program.

## CONCLUSION

In truth, maybe this should have been called "The Seven Heavenly Elements of Successful Court Mediation Programs," because heaven may be the only place where all of these elements really are going to function at the same high rate all the time. Still, working toward getting all seven elements to work optimally is the goal.

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