

Court Mediation Program Development: Other Secrets to Success

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The first secret to establishing and maintaining a court mediation program is that it is not a clean, linear process. While that may not be much of a secret, some of the dualities and contradictions inherent in program design and operation are somewhat complex and the solutions can sometimes seem veiled in secrecy. Sorting through these issues can be intriguing. The answers often lie in discerning the right balance for each jurisdiction or situation.

Program Selection

- ✦ Mediation is not a panacea.
- ✦ Not all programs are created equal.

Be sure a mediation program is really the right way to address the issue the court or community is facing.

Start by being clear about why the court or community is planning on a mediation program. Unless it is clear what need mediation is supposed to address, it will not be possible to measure whether that need has been met. Stop and ask whether mediation is the way to go, or if there is a better way to meet that need. In answering that question, the shape of the mediation program will begin to emerge.

Don't fall for the first good looking program that comes along.

All too often when people tell the history of their court mediation programs, it starts with a variation on "I was at a conference and So-and-So did a presentation on their program. It sounded good so we did our program

like theirs." It may be that it was a good program, but that does not mean that it was the best program for the situation. With an ever-expanding level of sophistication in the provision of court ADR services, it is always a good idea to look around and see what the options are. With so many programs in operation across the country, there are many models to explore. Define the needs of the court. Then see which mediation programs might meet those needs. Talk with program directors of programs in other jurisdictions. Visit programs. Then decide what is best based on specific, local needs.

The program selection secret: It is easy to get so invested in the idea of a mediation program that the reality of the available options gets lost. To avoid falling into this trap, find the program - whether it is mediation or something else - that meshes with the jurisdiction's needs and resources.

Planning

- ✦ Determine the model for the court mediation program and don't try to be all things to all stakeholders.
- ✦ Throw out the cookie cutter and don't be rigid about the court ADR program.
- ✦ Just say "no" to bad mediation, because bad mediation is worse than no mediation at all.
- ✦ Just mediate.

Pick a model and stick to it.

The planning committee must establish and stick to clear definitions and goals

SUMMARY

The "Other Secrets to Success" in court mediation are the ones that people who have been working in the court ADR field for a long time might share over a cup of coffee. The secrets point out the push and pull of finding the balance in creating and nurturing programs.

for the court mediation program. Otherwise, it will be ill-defined, its ethics will be murky, mediator quality sketchy and program use unpredictable. The point of planning a program and designing it is to have a reliable structure that is dependable for all participants.

But remember you can't have it all.

It is not possible to write rules for every eventuality or to write rules to pin down participants to behave in a particular manner at each step. It should be understood that the program design will necessarily be open about some topics.

Be fearless about holding off on a launch date or even pulling the plug on a program that has jumped the tracks.

Bad mediation is much worse than no mediation. If during the planning process the program somehow is not turning out to be what had been expected or it is not going to address the community's needs or is going to be costly or time-consuming, hit the brakes. Don't finish the rules. Don't mediate the first case. If people are forced into a mediation program that is just another hurdle in the litigation process, has poorly-skilled



mediators that exacerbate conflicts and never settle any cases, or has nothing positive to contribute, it will not serve their needs. Plus, it will kill the idea of mediation in the community for a generation. The best way to establish a mediation program is for people to have a good experience in mediation. If it is going to be bad, it is better to wait until the environment is ripe for a healthy program.

On the other hand, waiting until everything is in a perfect position, may mean the program is never started. At some point a decision must be made to begin to mediate.

Remember that no program is perfect from the beginning, or even as it matures. The idea is to keep communicating, learning and teaching; keep stakeholders involved; keep taking the pulse through ongoing monitoring and regular evaluations; and keep adjusting the program to take account of shifts in the environment.

The planning secret: The need for structure and guidance must be balanced with the need for flexibility and room to change. Whether stopping, delaying or giving the green light to a court mediation program, it is important to stay focused on the reason for the program, not just the idea of establishing a program.

Court ADR Rules

- + Get the court rules right the first time.
- + Don't worry that everything is set in stone.

Rules are made to be . . . written

Not only are the court rules for a mediation program critical to the functioning of the program, but the

process of drafting them educates the planning committee about the program and involves them in deciding how it will actually function. Unless the jurisdiction has rules set by a higher authority, it may take a bit of time and effort to write the rules for a court mediation program. Taking the time to engage in this process will bear results in a program that is well thought out for the community and a group of leaders who are committed to the program.

It is also important to take the time to do the rules thoroughly the first time so that they do not need to be amended soon. Eventually, the program's monitoring group may make suggested changes to the rules, but those changes should be based on experience with the program, not because work was left undone.

. . . and sometimes re-written

On the other hand, everything is not set in stone when the program begins. Many court mediation programs are started or expanded as pilot programs. Pilot programs often involved new approaches or new types of cases, especially if evaluation and sunset provision are included. If something does not work, it can gracefully be ended. If it works, it can smoothly be extended.

Put the court mediation rules in their proper perspective. ADR is about people, not paper. Obsessing about the program rules to the detriment of other aspects of program development will not resolve more disputes. The goal is not to have a bad set of rules for a program, but if a planning committee keeps its nose buried in rules and ends up with the clearest, most well-formulated rules ever drafted, while neglecting outreach

and education of mediators, judges, and lawyers, the program is not likely to succeed. Be sure to figure out not only how to select the neutrals, which will be in the rules, but how to nurture them, which may not be. Know who will talk judge-to-judge about the program to educate and answer questions. Designate someone to be on base to deal with any questions about the program if they need to be answered immediately, maybe with a resident ethics expert on call. Figure out who is in the best position to work with the bar to develop genuine buy-in, create a plan to obtain that buy-in and then execute it. Going forward, there will be more tasks to maintain interest, deal with issues as they come up, incorporate new neutrals, etc. The point is that as important as the rules are - and they are a great tool for guiding how the program will work - they are only a tool.

The court rules secret: While the court rules for the mediation program are a great road map, like any good trip, some of the best parts might happen when the unexpected occurs.

People Issues

- + Politics and court mediation programs don't mix.
- + Getting everyone involved is important, including the powerful.

Don't let mediation get sullied in the mud of politics.

One of the great strengths of court mediation is that it can appeal across the board to diverse groups of people. Allowing court mediation programs to become politicized can dilute that strength. Trying to keep mediation programs above the political fray is a worthy exercise.



On the other hand, much of “politics” within large organizations like courts is about negotiating to get resources for programs, and using many of the skills that mediators assist parties to use in mediation can help gain support for mediation programs. Concepts from interest-based negotiations, such as identifying what the parties are really interested in, separating the people from the problem, and expanding the pie of resources are all useful in developing a mediation program within a court setting.

Work hard to get everyone involved.

Another part of “politics” is getting the support needed for program acceptance. There are generally local power structures within the courts and legal communities and in order to establish a working court mediation program, some of the people from those structures are needed as supporters of the program. The judges or lawyers who generally must be involved with any court-based effort in order for it to succeed should be invited to the planning committee. Having a powerful friend of theirs invite them is usually the best approach. If they cannot attend meetings, having their name on the committee may be enough, although they should also be offered an occasional update on the progress of the planning through the friend who extended the invitation.

As part of the planning process, it is important to invite some respected naysayers to the formative committee so that their input is received. After all, conflict is useful. Their presence can spice up the meetings and their input is likely to help uncover the holes in the rules. They may end up buying into the

ADR program. If not, at least they will know their input has been respected and their concerns will be known.

The first “people” secret: The creation of a successful program requires that all the different constituencies are brought into the process. Include the powerful, the knowledgeable and those who will do the work. Give them all a voice.

More People Issues

- + You never know who can help your program.
- + You never know who can hurt your program.

The unexpected allies

While the politically powerful judges and lawyers in a legal community are usually well-known, there are often others who can have a surprising impact on the success of a mediation program. These judges, lawyers, mediators, administrators, and occasionally clerks and bailiffs sometimes emerge during the planning, but they may not become apparent until the program is under way. There may be an expert mediator who has a leading judge’s ear for program development issues or a clerk who is excellent at identifying small claims cases for mediation and nudging the judge to refer them.

Mediation can be conflictual

On the other hand, there will be many pressures from people during the design of a mediation program that may not be so positive. Some forces will seek simply to speed up case closure no matter the cost, or to make their own lives easier. Others may seek to profit or want their friends to profit. Others may feel that their turf, income or status is threatened, while others may just not

like change, and some may be mediation proponents who are rigid about how the process must be conducted. None of these have the best interest of the disputing parties or the administration of justice at heart. It is a challenge to know what to do about these competing concerns, and compromise is not always the right answer. At some point, difficult decisions must be made. The key is educated, open-minded leadership that is willing and able to make decisions - even if some may be unpopular.

The second “people” secret: It is important to stay focused on the goal of a solid court mediation program designed to serve the parties and the administration of justice, and respect input from everyone who is helping to attain that goal.

Collaboration

- + Thoroughly incorporate all the stakeholders into the process.
- + Stop being so collaborative and make the tough decisions.

Collaboration is useful, but it is not the only skill that is needed.

In devising and managing court mediation programs, proponents should use the collaborative skills they bring to the mediation table. It is important to hear from all potential stakeholders - representatives of plaintiffs and defendants, the bar overall, judges, court administrators, mediators and program evaluators. On the other hand, there comes a time to wrap up the collaboration and reach conclusions about how the program will function.

The collaboration secret: Selecting the right leader for the planning process is critical. Among other qualities, this



requires someone who can take in all the input, but also respectfully bring disparate voices to closure.

Conclusion

Perhaps the final secret is to remember that just as many of life's most enduring lessons are learned not through success, but also through travail, faltering and even failure, this may be true of a court mediation program. While a court mediation program is likely to be a great success, it is important to learn from the process and to learn from any falterings. Share those with others in the field and use what is learned to improve the program and to build new programs.

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