

John Lande, *Procedures for Building Quality into Court Mediation Programs*, 23 ALTERNATIVES TO HIGH COST LITIG 17 (2005).

Copyright 2005 by CPR Institute for Dispute Resolution; John Lande [FNa1]

Editor's note: In last month's Alternatives, the author argued that good-faith requirements are unlikely to improve mediation and may cause unintended problems. See "Why a Good-Faith Requirement is a Bad Idea for Mediation," 23 Alternatives 1 (January 2005). In this conclusion, he offers suggestions for improving court ADR programs.

***17** If it is a bad idea to threaten sanctions against mediation participants who act in bad faith, what should courts do to improve the quality of mediation?

The American Bar Association's Section of Dispute Resolution recently adopted a policy stating that "[c]ourt mandated mediation programs should engage in collaborative planning efforts and establish educational programs about mediation procedures for participants." [See below.]

To implement this recommendation, courts should use "dispute system design," or DSD, techniques to improve their ADR programs, including but not limited to mediation. Rather than dealing with disputes only on a case by case basis, DSD provides organizations with a collaborative problem solving process to plan for and manage a continuing flow of cases. These techniques are used by many public and private entities, including forward thinking courts.

A comprehensive DSD process involves several steps, including:

- (1) identifying critical stakeholder groups and appropriate representatives of these groups;
- (2) assessing organizational processes and needs;
- (3) designing the system based on the assessment;
- (4) arranging for appropriate training and education;
- (5) anticipating and addressing resistance to changes; and
- (6) evaluating system performance.

Some organizations do not use all the steps. The process need not cost much money. The Federal Judicial Center and the ABA Section of Dispute Resolution offer technical assistance for courts in planning, managing, and evaluating ADR programs.

A court using DSD would appoint a facilitator to coordinate the process. The facilitator might be an internal specialist, such as a court ADR administrator, or an external consultant. The facilitator would talk with judges, court administrators, attorneys, mediators, regular litigants, and others to identify stakeholder groups to be represented in the design team overseeing the DSD process.

Many courts have ADR advisory committees, which could serve as the design *22 team or could appoint a subcommittee to do so. These DSD planners would then assess the court's goals, major stakeholders' interests, local legal culture, and merits of and problems with current litigation and ADR procedures.

Based on this assessment, the planners would consider what policies would best achieve the court's goals and address identified problems. The planners would consult with members of the stakeholder groups to solicit comments and suggestions about various policy options. The planners would develop a plan that satisfies the interests of the stakeholders and then submit the plan for approval by the necessary authorities.

A DSD approach assumes that training is needed to implement new procedures successfully and thus the planners would arrange for appropriate training for key stakeholder groups.

The plan should involve a careful implementation process, possibly including an initial pilot program to test and refine the policies before implementing them indefinitely. The plan should provide for oversight and periodic policy review. Although using a DSD process requires some resources, especially at the outset, the amount could be fairly limited.

STAKEHOLDERS' INTERESTS

Court planners can design successful court ADR programs if they identify the most important interests of key stakeholder groups and then design the programs to satisfy those interests.

In general, the key stakeholders in these programs include litigants, attorneys, courts, and mediators (as well as subgroups with distinct perspectives). We can identify general interests based on past experience and research. There often are local variations, so ADR program planners would benefit from collecting information about stakeholder groups in their jurisdiction.

Research suggests that parties are more likely to feel satisfied if their actual mediation experience meets or exceeds their expectations. Parties are more likely to feel satisfied when they feel that they have opportunities for meaningful self-expression and participation in determining the outcome.

Party satisfaction is related to beliefs that the mediation process is fair, understandable, informative, attentive to their interests, impartial, uncoerced, and private. It also is related to whether cases settle and parties' beliefs that they saved money, time, or emotional distress that they otherwise would have incurred.

Lawyers often value mediation because they believe that it can reduce litigation's time and expense. Lawyers typically use mediation when they want help in settling a case. In particular, they often want help analyzing the facts and the law, and they often value mediators' opinions about these matters. These opinions may help educate the other side as well as the lawyers' clients.

Courts promote mediation in the belief that settlement can save time and money and often produces better results than trial. Courts value mediation as a method of screening out cases that do not need much judicial attention so that they can focus their limited resources on cases that need more of their time. Indeed, courts generally see settlement as an absolute necessity to process all their cases, and judges often look to mediation as a way to relieve caseload pressures.

Courts have a strong interest in assuring the integrity of court-ordered mediation. They want to ensure that mediation meets minimal quality standards and does not harm litigants. For courts to operate effectively, they need to maintain respect for ***23** their authority and ensure compliance with their orders. To achieve these goals, courts generally do not issue orders that they cannot enforce readily.

Mediators also have multiple interests in the operation of court-connected mediation programs. Mediators want to provide satisfying services for mediation participants. This goal is inherent in the mediation ethos of party self-determination.

In addition, mediators generally want a regular and increasing flow of cases to mediate. Mediators want mediation procedures to be consistent with their professional philosophies.

Many mediators are particularly wary about good-faith requirements, which they see as undermining their ethical duties. Mediators who are pressed to report bad faith or testify about it are likely to feel serious role conflicts as this would violate norms of confidentiality and impartiality. Moreover, it would cast mediators in an adversarial role against their clients and, ironically, make it more difficult to gain participants' cooperation in some cases.

ALTERNATIVE POLICY OPTIONS

Using a DSD approach, courts adopt policies tailored to fit their particular needs and the interests of their jurisdiction's stakeholders. The options described below are intended to address the interests underlying good-faith requirements and avoid the problems of those requirements. Some courts and mediation programs might find that some of these options would suit their situations, but other courts and programs might not. Local policymakers should evaluate the likely effects (including unintended consequences), incentives created, and costs imposed in their particular settings.

Collaborative Education. Courts should sponsor educational programs to help implement ADR policies. At the outset, this may involve dissemination of information by mediators and other dispute resolution experts because many judges, lawyers, and parties may be unfamiliar with mediation concepts, practices, and values.

Over time, the education should be an interactive process in which mediation program planners learn about the stakeholders' interests in addition to providing information and advice. This two-way educational process is important because program outcomes depend on how participants use the program. Thus, a good educational process should be a collaborative dialogue between mediation program planners and stakeholders.

The same spirit of collaborative education should apply during mediations themselves. In their opening statements, mediators can inform participants of an expectation that they will act appropriately, explain what that entails, and request them to mediate sincerely. This discussion may work best if it is in the form of a dialogue in which participants as well as mediators express their procedural preferences.

Educational interventions also can be an important remedy for participants' problematic behavior. If participants act uncooperatively, mediators typically consult with them in a caucus, describe the concerns, and ask participants whether their behavior is likely to advance their interests. When mediators conclude that the participants actually are acting in bad faith, the mediators typically encourage them to change their behavior. After such an educational process, if they persist in inappropriate behavior, mediators' ethical duties require them to terminate the mediation without violating the confidentiality obligation.

In most cases, termination of the mediation should be a sufficient remedy for the problem.

Pre-Mediation Submission of Documents and Consultations. Mediation is likely to be productive when participants are well prepared for mediation. Participants can prepare by exchanging position papers before mediation. These papers might include: (1) the legal and factual issues, (2) the party's position, (3) the relief sought, (4) any prior settlement efforts, (5) the individuals expected to attend the mediation, and (6) other specified information.

Courts could require each side to submit pre-mediation documents by a specified time--for example, 10 days--before the scheduled mediation date. The mediator would determine whether the documents satisfy the requirement and, if not, give prompt written notice of the deficiencies. Such a rule might establish a specified grace period to cure the deficiencies. Parties who do not do so within that time could be subject to sanctions.

Even if a court does not require an exchange of documents before mediations, it certainly can encourage these exchanges and cultivate constructive practices by developing standardized formats for voluntary exchange of documents.

It often is helpful for mediators to talk with participants before mediation. Such conversations can help identify and remedy potential procedural problems. These conversations can address issues about the attendance of appropriate representatives and experts so that participants will not be surprised when they arrive at mediation.

Mediators also can help identify information and documents for participants to bring to make the mediation most productive. Because these consultations can be so constructive, courts should authorize payment of mediators' fees for a limited and reasonable amount of pre-mediation consultation.

Requirement of Mere Attendance for a Limited and Specified Time. Courts might require participants to attend mediation for a specific time period, such as one hour. This would avoid uncertainty about what participants are required to do and remove an element of mediators' discretionary authority that could be abused.

If participants are required to stay for a limited period, mediators can encourage them to make the most of that time. Many people would take advantage of this opportunity. Requiring attendance for a specified time can provide an opportunity to mediate *24 for those interested in trying mediation while imposing only a limited cost on those not interested in doing so.

Although attendance at mediation by representatives with authority to settle the case generally helps make mediation more productive, a requirement of attendance with full settlement authority is problematic because it invites resistance and easy evasion. In revising Rule 16 of the Federal Rules of Civil Procedure, the Advisory Committee wisely recommended against a requirement of "full settlement authority" and instead opted for a more flexible approach about attendance at judicial settlement conferences:

[The revised rule] refers to participation by a party or its representative. Whether this would be the individual party, an officer of a corporate party, a representative from an insurance carrier, or someone else would depend on the circumstances. Particularly in litigation in which governmental agencies or large amounts of money are involved, there may be no one with on-the-spot settlement authority, and the most that should be expected is access to a person who would have a major role in submitting a recommendation to the body or board with ultimate decision-making, responsibility. The selection of the appropriate representative should ordinarily be left to the party and its counsel.

Courts should use a similar approach in adopting, attendance requirements for mediation.

Policy Governing Cancellation of Mediation. Mediation program planners face a dilemma in adopting a cancellation policy. If courts signal that they will cancel mediations easily, they risk that many appropriate cases will be cancelled.

On the other hand, if they rarely permit cancellation or make it burdensome to cancel mediation, many mediations are likely to be unproductive and produce complaints of bad faith. Thus no cancellation policy would ensure that appropriate cases are mediated and that inappropriate cases are excused from mediation requirements.

The best solution is to design mediation programs that satisfy participants' interests generally. This often is a function of whether mediations are scheduled at times that participants feel ready to negotiate seriously. When procedures are well designed, most participants are not likely to want to cancel mediation.

Protections Against Misrepresentation. Parties can protect themselves by including warranty or representation provisions in mediated agreements when they rely on promises or representations of material facts. If participants are uncertain about particular representations, mediators or attorneys can suggest consideration of such provisions. If particular courts repeatedly have problems with misrepresentations in mediation, they can recommend that participants consider such provisions in each case.

Because mediated agreements are readily admissible in evidence, these provisions could avoid most disputes about possible misrepresentations.

Another possible protection against misrepresentation would be a brief period before mediated agreements become binding, to permit investigations about any material facts on which the parties relied. Although some tentative agreements may not become binding, in some situations, this may be a good result in preventing problems due to hastily-signed agreements. Although courts may not want to require such revocation periods in all mediations, courts can encourage participants to consider them if appropriate.

* * *

Using a DSD planning process and adopting policies like those described above are likely to address most problems of bad-faith participation without additional litigation or exceptions to confidentiality rules.

These procedures would be consistent with attorneys' and mediators' responsibilities to help clients reach agreements satisfying their interests. These policies also would maintain the integrity of mediation programs with relatively little need for judicial intervention. If faithfully implemented, these policies will enhance the integrity of mediation programs and satisfy the interests of the stakeholder groups without the problems caused by good-faith requirements.

*The author is an associate professor and director of the LL.M. Program in Dispute Resolution at the University of Missouri Columbia School of Law. He served on the American Bar Association task force that addressed good-faith requirements in mediation that is discussed in this article and the sidebar. This article is based on "Using Dispute System Design Methods to Promote Good-Faith Participation in Court Connected Mediation Programs;" 50 UCLA Law Review 69 (2002) (available at www.law.missouri.edu/lande/publications.htm). That article received honorable mention in the professional articles category of CPR's Awards for Excellence in ADR in 2002.

ABA SECTION OF DISPUTE RESOLUTION'S RESOLUTION SUGGESTIONS

Here is an excerpt from ABA Section of Dispute Resolution's Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated Mediation Programs, adopted last Aug. 7, which can be found at www.abanet.org/dispute/webpolicy.html#9:

Court-mandated mediation programs should engage in collaborative planning efforts and establish educational programs about mediation procedures for participants.

Collaborative Planning of Court-Mandated Mediation Programs. Court-mandated mediation programs can prevent or minimize problems of bad faith by designing the programs to satisfy the interests of key stakeholder groups. These groups include judges and court administrators, lawyers, mediators, and especially the parties in mediation. By convening committees with representatives of all the stakeholders, courts can adopt procedures to minimize foreseeable abuses of mediation. For example, rules prohibiting referrals to mediation from delaying trial dates can avoid unproductive mediations requested solely to postpone a trial date. Similarly, procedures for scheduling, canceling, or postponing mediations can increase the likelihood that participants would act productively in mediations because participants would be more likely to be ready to mediate.

Education About Mediation Procedures. For people to participate productively in mediation, it is important that they understand the purposes and procedures in the mediation program. Court-mandated mediation programs can identify their goals and the concerns of the stakeholder groups to provide information addressing these concerns and thus reduce the incidence of problematic behavior. Programs can also encourage individual mediators to talk with lawyers and/or parties before mediation so that everyone has similar expectations about the process.