TEN WAYS

TO IMPROVE MEDIATION SETTLEMENT RATES

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After settlement conferences, mediation is the most effective court-connected dispute resolution process.

Participants like mediation, because they retain control over the outcome, discussions are confidential and it conserves resources—time, money and stress. Courts are satisfied with the process because it conserves judicial resources: settlement and compliance rates are high. With the current rate of success, why are courts reevaluating? As custodians of the process, courts must be mindful of procedural and ethical considerations.

A successful court-connected mediation program demands solid administration. Comprehensive policies, procedures and rules enhance any program. Periodic program review may increase settlement and satisfaction rates. The 10 essential points of evaluation are: process, timing, confidentiality, mediators, case analysis, client participation, opening remarks, caucus practices, settlement agreements, and evaluations.

1 PROCESS

There are nearly a dozen different court-connected ADR processes, and not all attorneys or their clients are familiar with the distinctions of each. The court must define all of its ADR processes; clarify the role of the neutral; identify types of cases that might be best suited to a given process; develop intake forms; standardize the confidentiality agreement; and provide practice tips for attorneys. Check state and local rules, or for a quick overview of different processes go to: *www.cand.uscourts.gov/adr.*

2 TIMING

Court-connected mediation can also be an effective case management tool as long as cases are not referred too soon. Mandatory programs often send cases prematurely, resulting in lowered settlement rates. Developing a questionnaire or conferencing with the program administrator will help avoid premature referral. For research on the topic of timing see: Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research,* 17 Ohio St. J. Disp. Resol. 641 (2001-2002).

3 CONFIDENTIALITY

When discussions are confidential, participants may make disclosures that enable settlements to occur. Admissions and unprompted, heart-felt, apologies get cases settled, but should all discussions be confidential? A recent California Supreme Court decision, *Cassell v Superior Court of Los Angeles County*, suggests that confidentiality is absolute. In this case, broad interpretation prevented a client from suing his attorney for malpractice. A judge may wish to review confidentiality rules, with an eye to determining if exceptions are necessary, raising the question, "Should confidentiality be so privileged that attorney or mediator malpractice is shielded?" About 20 percent of the states have adopted the Uniform Mediation Act, which contains confidentiality exceptions: *www.united-adr.com/rules/UMA2003.pdf.*

4 MEDIATORS

With apologies to the reader, courts must resist the shortcut of basing qualifications solely on degrees or titles. Florida, a state that has enjoyed mandatory mediation for 25 years, prohibits mediators from using "prior adjudicative experience, including, but not limited to, service as a judge" to imply that an individual is a "better or more qualified mediator." For Florida's Rule 10.610, Marketing Practices, and other standards see *www.flcourts.org/gen_public/adr/brochure.shtml.* A court has a duty to place only qualified individuals on its roster. National trends are 40 hours of instruction for civil mediators and from 40 to 60 hours for family mediators. Requiring prior "hands-on" mediation experience will help improve settlement and satisfaction ratings.

5 CASE ANALYSIS

When attorneys do not take mediation seriously, they neglect to prepare and consequently fail to properly assess their cases. Settlement rates are higher when attorneys conduct a 360-degree analysis of their cases: honestly determining the strengths and weaknesses, and identifying all topics for discussion and negotiation. The "good faith" rule is subject to abuse. What does "good faith" mean, and who will make that determination? What about confidentiality and determining "good faith"? Creating policies and procedures for attorneys to follow, when representing clients in court-connect mediation, is often the better way to accomplish the goal of getting attorneys to prepare.

6 CLIENT PREPARATION

Failure to prepare the client is a missed opportunity to take full advantage of the court's bias toward facilitative mediation, which requires active participation by the client. Unlike the common settlement conference format, clients must be prepared to participate: they do not just sit in the hallway like potted plants. Surveys show that involved clients tend to be more satisfied with the process, even if there is no settlement. Having the opportunity to talk about their case, or where relevant, the impact it has had on their lives, provides significant cathartic value. The client who will be a great witness can be showcased, helping to move settlement discussions to resolution. The private caucus may be better for volatile clients, where they can vent for the eyes and ears of the mediator, while allowing for damage control by counsel. If courts provide tips and suggestions to attorneys on how to prepare themselves and their clients, settlement percentages could rise, and clients may be more satisfied with the experience.

7 OPENING REMARKS

The old adage "you get more with honey than vinegar" is appropriate for opening remarks. Assailing the other side, using disparaging language and blame are not tactics that persuade people to settle. Opening statements can be effective when jointly given by the attorney and client. Less is more: keeping the opening to ten minutes or less; outlining the key topics, issues or points to be addressed during the mediation; and acknowledging a willingness to jointly work out a resolution, is a great beginning. From these statements a roadmap for the mediation will emerge. Even if one party's tactic

is to burn rather than build, taking the high road can be beneficial. This and other advice from the court, through its program policies and procedures, will have significant value for the attorneys representing clients in mediation, and may even increase settlement rates and improve process satisfaction evaluations.

8 CAUCUS PRACTICES

A caucus is a private discussion between two or more mediation participants, usually including the mediator, a party and its counsel. The experienced mediator knows the value of keeping parties focused, even when he or she is meeting with the other side. Assignments to the parties between caucuses move the settlement discussions along. To avoid errors during caucus, mediators must protect that which is confidential, establish an environment of open-mindedness and then, get out of the way and encourage participants to present their own offers. Skilled negotiators understand that only seven percent of a communication occurs through words; 93 percent through body language, facial expressions and voice intonation. Unless counsel fears the consequences of allowing the client's true feelings to be "read" by the other party and its counsel, facilitative mediators may want to encourage participants to present, discuss and evaluate directly. On the other hand, evaluative mediators give opinions regarding case value, or predict how a particular judge might rule. The concern—will this style result in a sense of investment in the outcome? When establishing its preferences a court might ask, "Is the evaluative model mediation or a settlement conference?" By clearly defining the process, setting standards for neutrals by promulgating specific rules, policies and procedures, courts can heighten satisfaction with the process while conserving court resources.

9 SETTLEMENT AGREEMENTS

Settlement potential is greatly increased when attorneys work in advance of the mediation to develop a proposed settlement agreement, including boilerplate language, and leaving open points to be resolved during the mediation. Coming with at least a settlement outline may help avoid problems of selective memory. All parties should seek to avoid new litigation or a court disadvantageous interpretation of a surviving bullet point memo. Courts might wish to consider making available a "fill in the blank" settlement document for pro se and low amount in controversy matters. Such forms should include an exception to any confidentiality prohibition of admissibility of the document to provide for enforceability.

10 EVALUATIONS

As soon as parties complete the mediation, evaluations should be distributed to the participants or be referred to the forms on-line. The shorter the deadline for returning evaluations, the higher the response rate. All attendees, including the mediator, need to provide feedback to the program administrator. The court is encouraged to evaluate other court-connected ADR programs, paying particular attention to those that have compliance numbers for observing rules and guidelines, and success in settlement of cases assigned. For examples of forms and other court-connected mediation program information, go to: *www.aboutrsi.org/programs.php*.

If a court-connected mediation program has been running for more than five years, and/or has an average settlement rate of less than 65 percent, then a closer look at the administration of the program; qualifications of the neutrals; rules, policies and procedures needs to be undertaken. When court-connected programs have satisfaction ratings less than 80 percent, then a complete review may benefit the program.