

DOCKET MANAGEMENT 101: CASE REFERRAL

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OVERVIEW

Court-connected dispute resolution (DR) programs, both state and federal, increased exponentially between the late 1970s and mid-1990s. Initially, the vast majority of these state court programs evolved out of necessity: the overwhelming increase in the number of drug related criminal cases placed significant pressure on the courts. It is evident that during the past 10 years a significant shift has occurred in the reasons for referring cases to DR. Although for some courts these programs are still required to manage case volume, in other courts the primary reason for using DR is “customer satisfaction”.¹ Just as the impetus for using DR has evolved, so have changes in the popularity of the processes used. Initially, settlement conferences and arbitration were the primary DR processes. Once mediation was introduced, it quickly became the DR process of choice.²

As the reasons for using DR evolved and as the shift in process usage changed, did the criteria for selecting cases change? Do case selection criteria change depending on the court level (small claims, trial or appellate)? Does the nature of the case (family, personal injury, intellectual property, etc.) significantly modify the selection criteria? The authors will attempt to answer these questions, and to provide basic case selection criteria.

CASE SELECTION

Most cases benefit from participating in some form of DR. Even criminal cases benefit from mediation, especially victim offender cases with a first time offender, who demonstrates remorse. Victims of horrific criminal acts derive a catharsis value from mediation, when able to confront the perpetrator and when able to tailor restitution.³ This article; however, focuses on the use of mediation for civil cases in state courts.

Numerous sources address the selection criteria that best identify those cases that are most likely to benefit from using some form of court-connected DR process. In the broadest terms the “high probability of success measured both quantitatively and

¹ Conserving judicial resources remains a significant goal for many court-connected DR programs. Conserving participant resources and improving public perception of the courts surfaced as reasons for creating some later DR programs. *State Appellate ADR: National Survey and Use Analysis with Implementation Guidelines*, 2nd Ed., Nancy Neal Yeend, The John Paul Jones Group, St. Petersburg, FL, 2002.

² As an example, in Maine during 2002, of the program’s 509 cases, 490 selected mediation, 13 selected early neutral evaluation, and only 6 selected arbitration. *Court-Connected Alternative Dispute Resolution in Maine*, Hon. Howard H. Dana, Jr., 57 ME. L. REV. 349, University of Maine School of Law, 2005.

³ See Mark S. Umbreit, Ph.D., *Crime & Reconciliation*, Abingdon Press, Nashville, TN, 1985. Harry Mika, *The Practice and Prospect of Victim-Offender Programs*, 46 S.M.U.L. Rev. 2191 (1993). For additional information about Victim-Offender Mediation, see www.voma.org.

qualitatively, and potential negative impact on the parties, the court, or other”⁴ are often the fundamental framework supporting a court’s case selection criteria. In terms of court connected mediation program policy, case selection hinges on the ability to provide mediation services that adhere to mediation’s “core values.” These include respect for the parties’ right to make their own decisions, confidentiality of the process, and neutrality of the mediator.⁵

Selection Criteria

BASICS

When reviewing a case for potential referral to mediation, developing guidelines or selection criteria is useful. What are the basic criteria that must be considered? Should any one factor control?

When looking at more specific case selection criteria, the classic examples include cases where:

- parties are in on-going relationships. (custody, employment, businesses and neighbors)
- there have been no negotiations. (partnership, family and consumer)
- one or more participants (parties or their counsel) desire mediation.
- there are significant technical issues involved. (patent and medical malpractice)
- ease of settlement is identified.
- litigation costs are a significant portion of the amount in dispute. (probate)
- litigation is unaffordable. (limited jurisdiction cases)
- multiple parties and/or complex issues exist. (construction defects and multiple insurance carriers)
- experienced counsel represent parties.
- parties are willing and able to evaluate and communicate their needs and interests.⁶
- basic discovery is completed.⁷

⁴ *National Standards for Court-Connected Mediation Programs*, Institute of Judicial Administration, Washington, DC, 1998.

⁵ *Model Standards of Conduct for Mediators*, American Arbitration Association, American Bar Association, Association for Conflict Resolution, 2004. See www.acrnet.org/pdfs/ModelStandardsOfConductforMediatorsfinal05.pdf.

⁶ *Ibid.* Footnote 4. “While timing of a referral to mediation may vary depending upon the type of case involved and the needs of the particular case, ***referral should be made at the earliest possible time that the parties are able to make an informed choice.***” (emphasis added)

⁷ *Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, Roselle L. Wissler, *Conflict Resolution Quarterly*, V 22, n 1-2, Fall-Winter, 2004. See also, Stephen B. Goldberg, Nancy H. Rogers, Frank E.A. Sander, Sarah Rudolph Cole, *Dispute*

- without settlement a case requires continuing court involvement. (custody)

There is not one specific basic factor that precludes a case from mediation; however if there is a history of violence, substance abuse or similar issue, then closer scrutiny is required.

REVERSE SELECTION

Some courts have developed “select out” or reverse case selection criteria, which targets the type of case specifically excluded from the DR program.⁸ Trial court DR programs usually exclude class action, prisoner applications, worker compensation, juvenile, and termination of parental rights.⁹ Appellate courts regularly exclude *pro se* cases.¹⁰ Pending orders, motions of first impression and novel legal questions are not selected for DR programs.

There are a few specific circumstances where DR is inappropriate. Cases that involve the need for “public sanctioning, or where there are repetitive violations of statutes or regulations [that] need to be dealt with collectively and uniformly”¹¹ are not appropriate.

There are programs that use geographic proximity of the parties (distance to the mediation site) as one factor to screen out cases. Still other courts screen out cases if there is a history of domestic violence, substance abuse or a question of cognitive ability.¹² A number of court programs routinely screen out governmental entities, unless issues of confidentiality and ratification procedures are resolved in advance. Of course, if a legal precedent is required, mediation is not the appropriate forum.

It must be noted that at any time a court develops case selection criteria, the specific requirements must be delineated in the court’s protocol, policies and procedures. Identifying specific types of cases for inclusion or exclusion demonstrates an open court system, educates members of the bar, and facilitates detailed tracking of statistical data.

Resolution: Negotiation, Mediation and Other Processes, 4th Ed., Aspen Publishers, Frederick, MD. 2003, and *Which cases are most suitable for court-ordered mediation?*, Richard Morley Barron, October, 2004.
<http://www.mediate.com//articles/barronMR1.cfm>.

⁸ *Ibid.* Footnote 4.

⁹ In recent years; however, both juvenile delinquency and termination of parental rights cases referred to mediation have been successful. See, *e.g.*, National Council of Juvenile and Family Court Judges Publications
<http://www.ncfjcj.org/content/blogcategory/355/424>.

¹⁰ *Ibid.* Footnote 1.

¹¹ *Nebraska Judges Handbook*, 2005.

¹² *Rules of Superintendence for the Courts of Ohio, Rule 16, Mediation*, <http://www.sconet.state.oh.us/Rules/superintendence/Superintendence.pdf>; and *Georgia Supreme Court Alternative Dispute Resolution Rules Model Court Mediation Rules* <http://www.godr.org/pdfs/MODELRULESODR.pdf>; and *Guidelines for Mediation of Cases Involving Domestic Violence*, <http://www.godr.org/pdfs/Guidelines.pdf>.

Additional Factors

At least one source opined that screening cases for DR suitability was unsuccessful primarily because it implies “one size fits all”. In other words, all employment or all personal injury cases would benefit from DR, or all *pro se* should not participate in DR.¹³ There is some validity to this argument, if the following factors are not considered when developing case selection criteria: timing, parties, court level and program goals. Questions that must be answered include: how soon should a case be referred to mediation, are the parties of a temperament that they can effectively participate (especially if *pro se*), and what court is making the referral? Additionally, how do program goals influence case selection?

TIMING

With respect to timing of DR processes, especially mediation, it is well documented that the earlier the referral the higher the settlement rate. Studies of small claims, county and justice courts, found that pre-hearing mediation sessions, as opposed to “same-day as trial mediation,” experienced higher settlement rates. Pre-hearing programs that provided mediation in advance of the court date experienced settlement rates of between 75 and 92 percent; however, mediation programs that provided services on the day of the hearing only averaged 50 percent settlement rates.¹⁴

In a study of custody and visitation cases, it was found that when mediation preceded a preliminary court hearing, parties were four times as likely to opt for mediation then if asked to participate in mediation after the hearing. In addition, the cases mediated earlier averaged higher settlement rates and required fewer court hearings per case.¹⁵

These statistics are mirrored in other court programs. The earlier the mediation is scheduled, the higher the settlement rate. Even at the appellate level this phenomenon is observed. The national settlement rate average for appellate cases is generally in the range of 36 to 42 percent.¹⁶ When a case reaches the appellate level, there is a significant amount of history associated with the case, and yet when these cases are immediately referred to mediation, settlement rates are significantly above the national average. California’s First District Court of Appeals enjoys nearly a 60 percent settlement rate¹⁷ and the Nevada Supreme Court program averaged approximately 55 percent over a nine year period.¹⁸

The age of the case, the length of time it has been pending, and the proximity of a firm trial date are additional timing related factors that cases share across jurisdictions as well. Conventional wisdom postulates that the point at which some, presumably enough, but

¹³ Edward A. Dauer, *Manual of Dispute Resolution*, Shepard’s/McGraw-Hill, Inc., Colorado Springs, CO, 1994.

¹⁴ *Small Claims Mediation Programs*, Jessica Notini, mediate.com, 2001.

¹⁵ *Timing Is Everything*, Virginia State Judicial Institute, 2001.

¹⁶ *Ibid.* Footnote 1.

¹⁷ *Annual Report*, First Appellate District of the California Court of Appeal, 2006.

¹⁸ *Annual Report*, Nevada Supreme Court, 2007. (Nevada does not have an intermediate court of appeal, so their settlement rate is exceptional.)

not all discovery is completed is the “right time” for mediation. Discovery scheduling “should be made with an eye toward when and how dispute resolution might be used.”¹⁹ On the other hand, when key players know the important facts and engage in early mediation, they can make decisions and agreements with less formal discovery. Small claims, eviction, rent escrow, consumer loans, other business cases and property damage auto accident claims are other examples of cases that benefit from early mediation.²⁰

PARTICIPANTS

Selection criteria cannot be developed in a vacuum. In addition to considering the types of cases and timing, the litigants need to be considered as well. Individuals who have had a history of cooperation and who have had the ability to communicate directly with one another in the past typically make better candidates for mediation.

The ability of the parties to actively participate in face-to-face discussions is an important factor influencing mediation settlement rates. Jurisdictions that cover large geographic areas and that do not require the plaintiff and/or defendant to attend, have lower settlement rates than jurisdictions that require party attendance. Lower settlement rates were noted when mediation sessions were conducted via telephone.²¹ Selecting cases where everyone is required to attend is beneficial to any DR program, as the probability for resolution is generally greater when face-to-face mediation occurs.

COURT

A primary selection criterion that is influenced most by the level of the court is *pro se* parties. Small Claims, Magistrate, Justice and County courts, or courts with lower dollar case value limits, typically permit *pro se* parties to actively participate in DR programs. Most trial courts permit *pro se* parties to participate in mediation, or at least consider *pro se* participation. Foreclosure cases and contract cases involving *pro se* defendants are new types of cases being resolved in mediation.²² It is rare for an appellate court to permit *pro se* participation.^{23 and 24}

¹⁹ John S. Murray, Alan Scott Rau, and Edward F. Sherman, *Process of Dispute Resolution*, 2nd Ed., Foundation Press, Westbury, NY, 1996.

²⁰ See *2007 Mediation Programs Report to the Judges of the Franklin County Municipal Court*, on file with the authors.

²¹ *Ibid.* Footnote 1.

²² *Ibid.* Footnote 20, and *Foreclosure Mediation Program Model Now Available to Ohio Courts*,

http://www.sconet.state.oh.us/Communications_Office/Press_Releases/2008/foreclosure_020708.asp.

²³ *Ibid.* Footnote 1. West Virginia has no intermediate appellate court, so it created a specific program for worker compensation cases. Oregon and Tennessee have similar programs.

²⁴ Some states are silent on the issue of *pro se* participation. New York’s 3rd Judicial Department permits *pro se* cases, while California’s 1st District Court of Appeals only permits *pro se* when the party has a law degree. Federal appellate court programs cover the spectrum from permitting *pro se* litigants, to permitting only *pro se* with law degrees, to silence on the issue, to outright prohibition of *pro se* litigants. Mediation and

Appellate courts are more likely to limit the types of cases that may participate in a DR program. This is especially true in mandatory appellate programs. In alphabetical order only, criminal, habeas, juvenile, parental rights, prisoner, *pro se*, restraining orders, tax appeals, and worker compensation²⁵ are more likely to be excluded from appellate DR programs. Historically, many appellate courts prohibited custody and other family matters from participating in DR programs; however, that trend reversed in the past several years.²⁶

GOALS

Finally, case selection criteria may depend on the goals and original purpose for establishing the court DR program. If the goal of the court is case management, then cases may be selected arbitrarily: odd/even case number, every third case, etc. Other factors may not even be considered due to expediency. With arbitrary selection a certain percentage of cases will settle, and if not resolved completely, at least the parties may narrow the issues and focus on future discovery, negotiations or trial.

In several studies conducted between 1995 and 2002, the type of case was not an accurate predictor of settlement. Similarly, the amount in dispute was also not a factor influencing settlement rates.²⁷ Courts that selected by case type, verses those that selected cases on a random basis, experienced similar settlement rates. Parallel studies involving small claims and appellate programs yielded similar conclusions.

For example, personal injury and business cases referred to mediation in a court with a jurisdictional limit of \$15,000 resolved at similar rates and were not dependent upon existing or ongoing relationships among the parties.²⁸ There are a very few studies that identified slightly higher settlement rates for cases involving family and probate issues over personal injury and employment.²⁹

In DR programs that have goals relating to conserving litigant resources, preventing future disputes and/or improving the public's perception of the court, the case selection criteria may be viewed differently. A court might select cases that are typically time consuming and costly to litigate, referring them to mediation with the hope that the case will settle, thus conserving participant resources. Cases typically selected with this goal include probate, custody and child protection cases. The goal of preventing future disputes often leads to selection of cases where there is a likelihood of an on-going relationship, such as neighbor-to-neighbor and employment. If the goal is to improve public perception of the court, then business-to-business cases and programs that reach out to underserved sectors of the community are good choices.

Conference Programs in Federal Courts of Appeal, 2nd Ed., Robert J. Niemic, Federal Judicial Center, Washington, DC, 2006.

²⁵ *Ibid.* Footnote 1.

²⁶ *Ibid.* Footnote 1.

²⁷ *Ibid.* Footnote 4.

²⁸ See *2006 Mediation Programs Report to the Judges of the Franklin County Municipal Court*, on file with the authors.

²⁹ *Ibid.* Footnote 17.

SUMMARY

Just as mediation is more art than science, selection of cases is not an exact science. Sometimes disputes that no one thinks will be resolved in mediation are; and sometimes those that look as if they should settle easily do not. Even so, considering basic case selection criteria and additional factors can guide dispute resolution program design and case selection. The exercise of reviewing case selection criteria and additional factors in light of dispute resolution program goals offers an opportunity to fine tune the program to fit the needs of participants and the court. Clarity about those needs should inform timing decisions as well.

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CHECKLIST

GENERAL SELECTION CRITERIA

- Did one or more of the parties and/or counsel request mediation?
- Did one or more of the parties and/or counsel acknowledge previous negotiations?
- Are there continuing relationships among the parties that should be preserved?
- Are there complex factual or technical issues?
- Do parties have reasons to pursue a quick resolution to the case?
- Is finality important to the litigants?
- Are there experienced counsel?
- Are the parties sophisticated or have previous experience with litigation?
- Are parties and/or counsel effective communicators?
- Are there unrealistic assessments of potential outcomes by one or more parties and/or counsel?
- Can parties afford extensive discovery and can discovery be limited?
- Are litigation costs a significant percentage of the amount in dispute?
- Will the mediation process be cost and time effective?
- Are there internal pressures to settle—time constraints?
- Is litigation unaffordable?
- Is a lengthy trial likely?
- Does the case involve routine property damage claims?
- Is the case straightforward and easy to settle?

FURTHER REVIEW REQUIRED

- Is there a history or threat of violence?
- Is there a history of substance abuse?
- Are the cognitive abilities of one or more of the parties in question?
- Are one or more of the parties *pro se*?
- Have the parties previously participated in another dispute resolution process?

Is there a need for public sanctions?

Is outcome uniformity statutorily required?