A Historical Account of the Massachusetts Office of Dispute Resolution Superior Court ADR Programs: The Rise of ADR in the Massachusetts Superior Courts.

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Prologue

I am a former staff member of the Massachusetts Office of Dispute (MODR). I joined MODR in 1991 to assist in the design and implementation of the Norfolk Superior Court Mediation Program, later known as the Norfolk Superior Court ADR Program. In 2000, I took a position as MODR's Director of ADR Programs. In that official capacity my job was to oversee all ADR Programs operated by MODR. I remained in that position until November 2003. During this time, I was also a member of the Supreme Judicial Court Education and Implementation Subcommittees on Dispute Resolution.

Introduction

The genesis of the Massachusetts State Office of Dispute Resolution came from Lawrence Susskind, a well-known public policy mediator from the Massachusetts Institute of Technology. The idea was presented in a grant proposal to the National Institute of Dispute Resolution (NIDR), an agency interested in ways to promote alternative dispute resolution. With support from then Governor Michael Dukakis and Francis Keefe, Secretary of Administration and Finance and [1]the Governor's Alternative Dispute Resolution Working Group, Lawrence Susskind, wrote a grant proposal to NIDR for funding to create the Massachusetts Mediation Service, now known as the Massachusetts Office of Dispute Resolution.

In 1985, David O'Connor, an environmental mediator, became the first Executive Director of the Massachusetts Mediation Service. An advisory committee was formed to assist the new state office of dispute resolution and included people from state government, the legislature, courts and the private sector. At the same time, S. Stephen Rosenfeld, Governor Dukakis' Chief Legal Counsel, chaired the Governor's Special Committee on ADR in the Courts, which was created to look at what role alternative dispute resolution could provide to help the courts resolve disputes. The two committees worked simultaneously to explore ways of using alternative dispute resolution to resolve disputes in state government and in the courts. To eliminate any

[1] Dispute Resolution in Massachusetts, Final Report of the Governor's Alternative Dispute Resolution Group, Michael S. Dukakis, Governor, November, 1986.

confusion, from this point on I will refer to the Massachusetts Mediation Service/[2]Massachusetts Office of Dispute Resolution as the "Office."

The Mission

The mission of the Office is to aid in the resolution of disputes. The Office is charged by statute, (MGL, Chapter 7, section 51)… "to provide services to the three branches of government, as well as cities and towns to improve the resolution of disputes that arise within their respective jurisdictions."[3]

During the Office's early years, the primary focus was the mediation of complex, public policy disputes[4]. In addition to mediating public policy disputes, the Office recognized the need for the establishment and administration of dispute resolution programs to assist the courts in case management and offer to disputants an alternative to litigation. In 1987, the Office was invited by the Massachusetts Superior Court to design a mediation program for civil disputes.

The Office provides mediation, dispute resolution training, facilitation, consensus building and dispute system design to state agencies and cities and towns throughout the Commonwealth, and until 2000 to the Superior Court department of the trial court. Although the Office operated many ADR programs for state agencies and special projects for cities and towns, this Master's project will focus on key moments in the court-connected alternative dispute resolution programs the Office provided to the superior court.

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[2] The Massachusetts Mediation Service changed its name to the Massachusetts Office of Dispute Resolution in 1991.
[3] See in Appendix, Mass General Laws, Chapter 7 Section 51, establishing the Massachusetts Office of Dispute Resolution.
[4] Excerpts from the 1993, Mass Office of Dispute Resolution's Progress Report.

The Project

The purpose of this project is to raise consciousness relative to the value choices we make and to identify goals and interests when undertaking the task of designing a court-connected ADR program. Judge Wayne Brazil's essay (which I review in the next chapter), suggests it is the responsibly of the courts to define the primary purpose of its program and prioritize its values and interest. He describes the "ascendant purposes of programs from getting more cases settled, providing alternative processes, to "enhancing the parties sense of self and capacity for self-determination…" (Brazil, 1999, p.2).

This project will look at the birth and the building of the court-connected ADR programs operated by the Office. It will look at the development of the Suffolk Mediation Program Model and the expansion of ADR services to the Norfolk Superior Court. The third court-connected ADR Program in Plymouth Superior Court was in operation for one year (the pilot stage), and therefore I will only touch on this model as it relates to the expansion of court-connected ADR. The project will also look at the exclusive relationship the Office had with the superior court and the events that led to the end of that arrangement.

Foremost, this project is not a critique of the people that were involved in the rise of court-connected ADR programs at the Superior Court level; it is my hope that this paper advocates for quality, integrity and accountability in all aspects of court-connected ADR. This project is about the care and protection of court-connected dispute resolution programs, leadership and a solid commitment at all levels of the judiciary. This project is also about the Superior Court ADR Programs before the Uniform Rules on Dispute Resolution, and after.

Chapter 1
Literature Review

"*Mediation practice is shaped by a variety of underlying goals and values, including those of mediators, program administrators, users, and policy makers at the local level, as well as by more global ideological and cultural assumptions about the nature of conflict, the nature of human interaction, and what it means to resolve conflict." (Della Noce, D., Folger, J., Antes, J.,, 2002,p.14).*

The literature review for this project is concentrated primarily in reviewing scholarly articles and studies about court-connected mediation programs, how programs take shape, key decisions that shape the fundamental practices of programs, how a program defines success, the relationship between the programs and the courts. In addition to the different ideologies and visions held by each, different program models, priorities and program policies, and characteristics of programs.

I begin my literature review with Assimilative, Autonomous, or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court-Connection, (Della Noce, et al., 2002). I chose to examine Florida's Court-Connected ADR Programs for this project because Florida has some of the most sophisticated and thoroughly studied ADR programs in the country. For the purposes of this project, Florida's Court-Connected ADR Programs offered the broadest view of court-connected ADR outside of Massachusetts. The articles take a close look at the values and interests of mediation programs, and compares different program models and the delivery of court-connected ADR services.

I have also chosen to look at Judge Wayne Brazil's (1999) discussion on this topic as it relates to the quality of neutrals; he suggests that the "quality of neutrals" is the single most important variable in a high quality mediation program.

Court-Connected Mediation Programs in Florida

Florida's Court-Connected Mediation Programs are governed by both state law and court rules. In varying degrees, the court rules govern the existence, mission and structure of court-connected ADR (Della Noce, D. et al., 2002). Florida's Court-Connected Mediation Programs exist within the context of the state's court structure. Unlike Massachusetts, whose state office of dispute resolution is part of the executive branch of government, the administration of Florida's Court-Connected Mediation Programs are provided by the Florida Dispute Resolution Center (DRC), which is housed in the Office of the State Courts Administrator[5]. This is an important distinction, which impacts the way court-connected ADR is funded and supported. ADR programs within the court's infrastructure guarantees funding at least to the extent that the court, not the legislature, will determine whether ADR programs continue to operate. State programs outside the administration of the courts are directly dependant on the legislature for funding to support its ADR programs.

Structuring Court-Connected Dispute Resolution Models

By looking at different models of court-connected ADR programs, Folger, Della Noce and Antes, offer a way to understand how mediation programs operate and compromises made in order to operate within the structure of this institution. There are

[5] Massachusetts Office of Dispute Resolution operated the Superior Court ADR Programs for Suffolk, Norfolk and Plymouth Counties until July 2000.

three distinctive models of court-connected ADR programs described in the Florida study: Assimilative, Autonomous and Synergistic Models.

Assimilative Model

The assimilative model of court-connected mediation is defined as "adapting mediation to the underlying values and norms of the court system" (Id at p.6). These practices impart the courts formality and authority into its mediation program. In this study, many programs and practitioners expressed value in mediations being held in court locations. There is a certain psychology that happens when lawyers and their clients enter the confines of a courthouse that brings with it the "air of authority, credibility and formality"(Id at p.5). The mediation programs in essence became part of the judicial process and carry the weight of the court by the use of official court notices of mediation screenings and scheduling of mediation sessions. The influence of the court proved helpful in bringing reluctant attorneys and their clients to the table.

"Another marker of this practice was the mapping of legal language onto the mediation process" (Id at p.5). In the study of Florida's mediation programs, it was common to refer to mediation rooms as "hearing rooms" or a mediation schedule as a "docket." Although these practices may have helped to fully integrate the mediation process into the courts system, it did little to distinguish mediation as an alternative to litigation.

The Florida study found that improvements in case management efficiencies helped shaped the courts vision of court-connected dispute resolution. Moving cases through the system for cost and efficiency were cited among many of the Florida programs as being in conflict with the underlying values of the mediation process.

Programs were concerned that the social benefits of human interaction, capacity of participants to problem solve and shape their own outcomes, would be lost.

In this model, the marketing of mediation fell short of its social benefits and highlighted efficiency and cost as the primary reasons to use mediation. In practical terms, framing the need for dispute resolution in this way made it more saleable to attorneys, litigants and state legislators.

Autonomous Model

The autonomous approach is defined in the Florida study, as practices that: "establish a separate identify from the courts, with process flexibility, and a focus on conflict interaction" (Id at p. 6). This model is best described as the one most reflective of the fundamental principles of good mediation practice. Florida programs based on this model operate more independently than other program models, but are also considered the least integrated in the court system.

Location of the ADR program is an important aspect in establishing a separate identity. The study of Florida's Court-Connected ADR Programs found that programs operating outside the auspices of the courts were seen by lawyers and litigants as a separate institution. This model presents two problems: first, it does not become a fully integrated part of the judicial system and therefore may lack the influence and legitimacy necessary to make ADR a credible option for litigants. Secondly, visibility is important for other reasons; ADR programs need to establish an on-going presence in the courts. Ongoing education of judges and court personnel are critical components of growing an ADR program that works with, but is separate from, the adversarial process. A program

that operates outside the courts may have its work cut out for it in terms of education, access and visibility.

However, despite these concerns, this approach promises the most flexibility in the design of conflict intervention methods. Mediation is defined in the broadest sense; parties are able to enter and exit the process as the needs of the case change; parties may opt into mediation at any stage and therefore no necessity to wait until a case "ripens" often considered at the pretrial conference stage.

Another marker of this approach was the lack of emphasis on settlement as the benchmark for defining a successful mediation program (Della Noce et al., 2002). The program emphasis is on human interaction and the capacity to handle conflict. Typically, parties were debriefed about their mediation experiences, allowing for continued learning and modifying of the mediation program, and an on-going evaluation of mediators that served these programs.

The focus of this model lies in what happens during the mediation process that moves the parties toward resolution. The focus is on dialogue and human experience rather than outcome. In this model, disputes were not defined as legal cases but in human terms. The message is to emphasize that mediation is a unique, legitimate process, where parties, not courts, retain control of the outcome. The values in this model were not harmonious with the courts primary reason for using ADR, the removal of cases from its dockets. However, both these goals can exist simultaneously and achieve a common objective of making more settlement options available to litigants, while reducing the backlog of cases.

Synergistic Model

In the synergistic model, the program operated within the courts, but is not staffed by court employees. In this model, the benefits of court-connection are realized while maintaining its own identity. Court-connected ADR programs recognized the need for the legitimacy that court-connection provided. Although this model did not maintain a separate physical location, it did make every effort to "*honor the historical visions and values underlying the mediation process by preserving party voice and party choice…' (Della Noce,et al, 2002,p.17).* These practices were focused on preserving the integrity of the mediation process, while maintaining a community spirit and willingness to work within the context of the court system.

Partnership is one way of describing this approach. Confidence and trust in the administration of the ADR Program gave this approach a true community spirit. ADR Programs responded to the demands of court reform, while maintaining the spirit and vision of the ADR community. The programs worked within the community and created advisory boards to respond to the needs of the court, its mediators and the community it served. This practice gave the ADR programs a strong connection with community groups and agencies operating outside the court system, thereby "preventing an exclusive focus of serving the needs of the judicial systems" (Id at pg.7).

The Quality of a Neutral Panel

Judge Wayne Brazil's essay, "Comparing Structures for the Delivery of ADR Services by the Courts" (1999) raises an important aspect in developing court-connected ADR programs by primarily focusing on "the quality of neutrals" that serve in these programs. Judge Brazil's is a magistrate justice for the United States District Court for

the Northern District of California and he has been the judicial officer with primary responsibility for the court's ADR program since 1984. Judge Brazil provides us with a critical look at court-connected ADR programs and the values he suggests should take center stage in the design and delivery of ADR services. Brazil, describes each model as a "rich constellation of pros and cons and that we are forced to make difficult choices even among our most precious values when we try to decide which alternative is the most attractive" (Id at p.2).

Brazil's essay focuses on a fundamental question of how to define quality in court-connected ADR programs. He suggests that neutrals are the most important variable in establishing a high quality dispute resolution program. A highly qualified mediator panel will help ensure pubic trust and confidence in court-connected dispute resolution programs as an integral part of the court system.

The delivery of high quality ADR services is dependant on a number of variables, which include: "the types of cases to be mediated, the parties, representation, the neutrals, which style of mediation is practiced - facilitative or evaluative, quality control, training and monitoring of neutrals, mandatory or voluntary participation, fees, court resources and docket pressure" (Id at p.12). Judge Brazil looks at which systems for delivering ADR services are "the most likely to generate the highest levels of public confidence and to provide the most valuable services to users of ADR programs" (Id at p13). I will briefly describe each system he lays out and the values that take center stage in his assessment of each ADR structure. Before undertaking the design and structure of a court-connected ADR program, the court should identify the values and concerns that are most important in order to ensure that those values will be protected. The way a court

defines its primary purpose will effect which system for delivering ADR services will be the most appropriate.

On-Staff Mediators

"There are different considerations, interests, values and concerns that decision makers could take into account when comparing different ways of structuring court-connected ADR programs" (Id at p.4). Mediators are one variable in how a court structures an ADR program. Mediators are full-time employees; the court hires and maintains a staff of in-house mediators to provide ADR services to litigants and their attorneys. Mediation services are not provided by any other source; no volunteers or outside paid neutrals.

Brazil (1999) asserts that this system of delivering ADR services offers the most control over the performance and quality of its neutrals. Mediators can be thoroughly screened for certain attributes necessary to mediate within that context. In-house mediators would be more accountable, have a stronger interest in the delivery of services, and would be involved in the day-to-day operation and design of an ADR mechanism for the delivery of services. A major factor supporting the use of this model is that courts would be seen as using its own resources to pay the full costs of ADR services and lessen the likelihood that it will be perceived by the public as "simply trying to reduce the demands on court services and shunt its responsibility off to the private sector" (Id at p.15). The courts provision of ADR services communicates to the public that those services "represent real added value, not a poor substitute for litigation" (Id at p.16).

In this structure, a commitment to alternative dispute resolution as a form of first class justice is evident. Lawyers and their clients trust that courts stand behind the quality of its programs and are committed to providing high quality service.

Brazil identifies a tension that is confronted by system designers between quality and quantity – on one hand, in-house services may be of very high quality, but on the other hand, are limited due to the number of mediators providing the service. Unfortunately, a desire to offer services to the largest possible number of litigants is impossible in this structure. Judge Brazil argues that the ability to offer affordable ADR services to the greatest number of litigants may be worth the trade off in terms of quality. He says, "we should be prepared to live with some reduction in our level of assurance that the work performed by every ADR neutral is of the highest quality" (Id at p.4).

Although Brazil seems to support using on-staff mediators, he also acknowledges that close ties and proximity to judges and clerks could present problems of perception that may be difficult to overcome. As mentioned previously in the Florida studies, the assimilative model suffers from the same perceptions; other models were preferable because of the separation in physical location. This concern may have some merit, however in my experience as an on-sight ADR Coordinator, I seldom encountered a judge or clerk that asked for detailed information as to the nature of settlement discussions, but I will qualify that statement; although I was housed in the court, I was not a court employee. Nonetheless, attorneys may worry that on-staff mediators may feel pressure to discuss a case if asked by the presiding justice. Although I think this is unlikely, it is the perception that it could happen that matters.

A concern to be aware of before employing this model is whether mediators will feel pressure to settle cases because of the backlog of cases. In-house mediators may feel pressure to settle cases in order to keep their jobs. Concern that mediators will exert influence and leverage over parties because of their relationship to the court should be given careful consideration when opting to use in-house mediators. *" In the pursuit of settlement, mediators were exerting their influence in ways that did not demonstrate neutrality and did not honor the fundamental principle of the mediation process, the participants right to self-determination" (Della Noce, 2002 p.3).* Every effort should be made to reduce the likelihood of mediators acting out of concern for their positions within the court system.

Brazil favors the closeness and visibility of an ADR program as a "core function" of the court structure because "it sends a message to the public that the court identifies itself with the program and endorses its value and quality" (Id at p.16).

High Quality Performance

It is important to discuss the influence and benefit to on-staff mediators working as a mediator on a full time basis. A mediator that does not practice mediation on a full time basis may suffer from not enough mediation experience and training, and lack the opportunity to discuss issues and concerns that mediators encounter when practicing full time. On-staff mediators have the opportunity to co-mediate, and to hone their skills with other professional mediators. These mediators also have the benefit of program directors and other ADR professionals (consultants, academics, trainers, etc.) that are typically affiliated with most ADR programs.

Outside ADR Providers

Brazil argues quite convincingly that sending parties outside the courthouse to procure ADR services has the effect of distancing the court not just physically from the litigants, but also more importantly psychologically; it can raise the perception of "ADR as second class justice" (Id at p.11).

Psychologically, separation from the court may help parties move from the adversarial approach more commonly symbolized in a court, to a more realistic assessment of their case and turn to the issues that truly matter, (Brazil, 1999). In this sense, distancing could actually enhance the party's chances for settlement. I am personally familiar with private ADR providers that would argue that the rooms provided by a court for mediations are more suggestive of second-class justice than any other factor[6].

However, the greatest risk of sending parties to outside providers is that the court has no way to assure the quality of services provided by these groups. Often, such as in the current system in the superior courts in Massachusetts, (and I will say more about this later on in this paper) a list of approved ADR programs are provided to litigants. The litigants then select and pay for an outside provider that has little or no connection to the court system. It is extremely difficult to monitor a large group of neutrals that perform their work at a distance from the courthouse. *"...The farther the parties and the neutral from the courthouse physically, the farther they may be in spirit and conduct as well" (Id at p16)*.

[6] Mediation rooms in Massachusetts can be in basements, hallways, or in some remote location that may lack basic necessities, such as adequate heat, access to phones, copy machines, faxes, etc.

Systems can be put in place to monitor the quality of services being provided, but it takes considerable resources and the political will to make sure ADR providers are following the rules and protocol set forth by the courts[7]. This is an area that has caused friction among some ADR providers that are resistant to being monitored and reluctant to provide any information to the courts.

Contracting with an Outside Non-Profit

Contracting with a non-profit organization has distinct benefits from either model previously discussed (Brazil, 1999). An outside organization guarantees the court that the neutrals are of the highest quality, by taking on the responsibility of screening, training and monitoring its neutrals for quality assurance. The neutrals are accountable to the organization for ethical conduct in a mediation session. An outside organization would have the authority to discipline or dismiss a neutral that exerts undue influence on parties and violates ethical standards of mediator behavior. An outside organization's primary responsibility is the development of a highly qualified neutral panel and the provision of ADR services. An outside organization would be able to select from a much larger pool of applicants than the in-house structure, and could offer a more diverse mediator panel because it would not be limited by resources in the same way the courts would be that hire-in house neutrals. An outside organization would be able to serve a much larger pool of cases than the in-house structure and would have a much greater degree of accountability than parties selecting from a list of private providers. When parties are choosing from a list of neutrals, they may have no other information available to them to base their selection.

[7] In Massachusetts, this was done in the form of the Supreme Judicial Court's Uniform Rules on Dispute Resolution. The rules require all approved ADR providers to provide information to the trial court department where they provide services.

When the provision of services is done by an outside non-profit organization, mediation participants may worry less about ex-parte communications between the neutral and judge. There would be less opportunity for contact between a neutral and a judge or other court employee. The outside non-profit organizational structure may provide the highest level of reassurance to users that neutrals would not be likely to engage in conversations about the dispute with the judges. The confusion over role and decision-making authority is less likely in this model, but is one that is inherent when using on-staff mediators.

With in-house mediators, parties may feel compelled to convince the mediator about the merits of their case. There may be a conscious or subconscious expectation for the mediator to take a position, and make a recommendation or decision regarding the outcome of the dispute. Distance would help ease any confusion parties might have about the authority of a mediator to make decisions. The outside non-profit organizational structure is also protected from any undue pressure from the courts to settle cases. Although settlement rates may be important to the organization in its funding efforts, there is less direct pressure to move cases off the docket in this model than the in-house model.

The organization would also benefit from its own professional staff that would be responsible for the day-to-day operation of the ADR program. Debriefing and reporting on cases would take place directly between the neutral and program administrator. Information provided to the court is limited to whether the case settled or not.

This structure adds a layer of insulation between the courts and the neutrals. If the organization does not operate on site at the courthouse it also adds an additional layer

of protection for the program administrators who might be asked about settlement discussions. It is important to note that this structure could also suffer from a perception problem if it is perceived by users of its services to have an "institutional self interest". This can be particularly tricky if the organization is dependant on a source of revenue generated by users of their ADR programs.

Disadvantages of Each Structure

As one might expect, each structure has disadvantages, but it is important to remind us that much of what is discussed in this literature review is primarily dependent on the context in which ADR services are provided. ADR programs have different fundamental purposes, which are reflected in the immense diversity in ADR programs operating throughout the court systems (Brazil, 1999).

The method in which a neutral is compensated for services and the cost to parties is an area of concern for judges, the ADR community and dispute resolution participants. If neutrals are paid less when providing services in –house or through an organization, it could suffer from the perception that the service is of lesser quality than those offered by the private market. If neutrals are paid below market rate they may rush the session along in order to make it worth their while. The neutral may feel pressure to spend a limited amount of time and energy on these mediations than ones where he would receive market rate, such as in a private ADR practice. In turn, low pay may not attract the most qualified people in the field.

ADR Programs should receive the full commitment of resources necessary to create and sustain high quality dispute resolution services. Programs that are under-funded send a message to the public that it values these programs less.

Conclusion

The centerpiece of Brazil's article is that a court affiliated mediation program must have the trust, confidence and respect of the public. "A fact of life may mean that the courts ability to commit real resources to an ADR program is limited and if forced to choose, a court should concentrate its resources in smaller high quality programs" (Id at p.4)

There are certain risks inherent in each of the models described by Brazil, Della Noce and others. As noted, location, the quality of mediators, the motivation behind courts promoting dispute resolution, values being promoted by the ADR programs, and the context in which the services are being provided are critical factors in the success of any program. In each model, the ADR services should be of the highest quality. Courts should consider carefully the values it wishes to prioritize before embarking on building an ADR program.

Chapter II
Methodology

The methods used to gather information were done in interviews and conversations with former members of the Office, superior court judges, former government officials, mediators and academics affiliated with the Office. Most, if not all, of these people I know quite well, having worked with them in the field of dispute resolution over the past 15 years.

The interviews were conducted over a period of two months. I briefed the participants about the project, sometimes orally and other times in writing depending on the amount of time each was available to discuss the Project. I also sent out preliminary questions beforehand to give the participants an idea of the kinds of questions I would be asking. My method for researching this Project was to interview people that had been involved with the Office during different phases of its court-connected ADR programs, from the genesis of the Office, the building of ADR programs and the evolution of the court-connected ADR programs, to the expansion of ADR to other courts and finally to the exclusive arrangement with the trial court. I also looked at the impact the Supreme Judicial Courts Uniform Rules on Dispute Resolution had on the evolution of court-connected ADR programs.

My questions explored the decisions to incorporate dispute resolution into the superior court by both the Office and the Massachusetts Superior Court. My questions included all aspects of building an ADR program, and the goals and objectives of both the Office and the Court. I wanted to understand the primary justification for building an ADR program and the goals and values each institution was trying to promote. "*Examples of program goals and values include increased access to justice, low cost*

dispute resolution and reduced dispute resolution demands for judicial resources." (SPIDR)[8]

Data Analysis

I used a computer software program known as the "Ethnograph, " which is a qualitative research tool. I transcribed my interviews and constructed a code system derived from the research to help me analyze the data. I developed themes that began to emerge by tracking patterns and trends from the interviews, and laid-out key concepts of designing court-connected dispute resolution models and definitions of "quality service" by neutrals in court-connected ADR programs.

Participants

Throughout the following section, Chapter III, History of the Massachusetts Office of Dispute Resolution Superior Court ADR Programs, I have used the initials of the participants in this Project at the end of sentences to indicate my source for this information. Participants in this Project are listed in the acknowledgment section.

[8] Qualifying Dispute Resolution Practitioners: Guidelines for Court Connected Programs

Chapter III

History of The Massachusetts Office of Dispute Resolution's Court ADR Programs

Building an ADR Program

Unlike other state office's of dispute resolution around the country that are housed in the judicial branch of government, the Massachusetts Office of Dispute Resolution was an agency under the executive branch of government, located within the Department of Administration and Finance. When the Office was created, the Governor felt it would be best situated outside the judiciary, creating the perception of neutrality and an office without direct influence of any one branch of government. The Office's statutory charge is to serve all three branches of government. The Office is funded by an appropriation each year for operating expenses and is statutorily required to charge fees for its services.

Suffolk Superior Court Mediation Program

In 1987, the Office was invited by the Massachusetts Trial Court to design a mediation program for the Suffolk Superior Court Civil Session. David O'Connor, Executive Director of the Office from 1986 until 1992, worked closely with the Chief Justice of Administration and Management (CJAM), Honorable Arthur M. Mason, to design a mediation program to assist the court in reducing its backlog of civil disputes.

Court-connected ADR programs represent a marriage between two institutions that are built on fundamentally different ideological visions (Della Noce and others, 2002). "This dilemma is not academic, program administrators and policy makers confront it every day" (Folger, J., Della Noce, D., Antes, J. 2002, p 4). The institutional goal is to get cases to settle faster and cheaper; from an ADR perspective, the goal is to provide litigants with a more humane experience in the legal system. As the mediation programs grew these goals began to merge closer.

Partnership

The Suffolk Mediation Program was a partnership between the Suffolk Superior Court and the Office. The main principals from the court were the Chief Justice of Administration and Management, Honorable Arthur M. Mason, Superior Court Chief Justice, Honorable Robert Steadman, and Honorable John C. Cratsley, Associate Justice of the Superior Court. The main principal from the Office was Executive Director, David O'Connor, joined by David Matz and Brad Honoroff, from the University of Massachusetts-Boston and founding principals of The Mediation Group, a private ADR practice.

A staff member of the Suffolk clerk's office, held the position of ADR Coordinator for the court. Although the court did not provide direct funding to the Office to operate its ADR programs, it did provide an in-kind contribution by offering the services of a staff member and administrative support.

The Court ADR Coordinator conducted the day-to-day business of the Suffolk Mediation Program. It was the Coordinator's responsibility to identify cases that were ripe for mediation, notify attorneys, arrange and conduct group-screening sessions, and assist attorneys with mediation requests. An ADR coordinator from the Office also participated in the group screening sessions by educating attorneys on the use of ADR, scheduling mediation sessions and consulting with attorneys on the selection of a mediator. This remained a joint operation for many years. This program model most closely resembles the synergistic model described by Della Noce, et al. (2000) and the description of neutral services provided by an outside non-profit organization described by Brazil (1999).

Designing a Dispute Resolution System

It is essential in the design of a successful mediation program that the Office and its associates work closely with the court to identify allies and support from within the court system (Constantino, & Merchant, 1996). Having a known person to interface with the clerk's office and provide a mechanism to screen, collect and identify cases proved to be a critical piece in the design of the program. This function gave the Office access to cases and the court ownership of the program.

Equally important is the ongoing education of court personnel, attorneys and litigants. Judge Cratsley, a champion of ADR in the Superior Courts, was an influential and effective advocate for the use of alternative dispute resolution. David O'Connor, David Matz, and Judge Cratsley worked diligently to educate members of the court, the private bar and litigants on the use of mediation, through articles in Lawyers Weekly, MCLE training classes, and responding to questions and addressing concerns at the group screening sessions (DM).

Mediation Screening Process

During the mid – late 1980's as part of court reform, the court began to focus on the backlog of civil cases in the Suffolk Superior Court. It soon became apparent that many cases simply had not reported back to the court the status of their case (DM). The court had thousands of cases in the system and no way to determine whether the cases were still viable and in need of a trial. The court held monthly events in its civil sessions; this was later known as "group screening sessions," which called a large number of civil cases to appear before a judge and update the court on the status of their complaint (PS).

The group screening process served a dual purpose: case management and mediation potential.

It became evident during the pilot stage of the mediation program that attorneys possessed limited knowledge and understanding of the mediation process, and the group-screening event proved to be the most efficient way to educate and provide information to attorneys (DOC). Seasoned ADR practitioners were available during the screening process to discuss the mediation option with attorneys. Attorneys were presented with three options at the screening session: dismissal or default, setting a trial date, or mediation.

This method of case management was the brainchild of retired Superior Court Justice Ernest B. Murphy, who theorized that there was no real backlog of civil cases (DM). Judge Murphy surmised that the backlog of cases was a statistical problem for the court because lawyers were not required to report to the court the status of their case. This meant cases were considered active that had long since left the system because there was no reporting required of attorneys. Justice Murphy facilitated the initial review of civil cases in Suffolk Superior Court, which helped to launch the mediation program. Brad Honoroff played an important role in demonstrating to the court the success of mediation through his work resolving Superior Court remands in the district court (DM)[9].

The Implementation of Time Standards

The introduction of Time Standards addressed a problem in the Superior Courts where cases sat for a substantial period of time with little or no activity. Discovery was

[9] Community ADR Programs had been operating in many of the District Courts in Massachusetts since the early 1970's.

conducted and motions filed without court control over deadlines, a standard practice that kept cases in the system longer.

On July 1, 1988, the trial court department issued "Time Standards" to control the activity of superior court cases. All civil actions filed in the Superior Court are subject to the provisions of Standing Order 1-88, "Time standards." The Time Standards was enacted to effectively remove cases from the system within a specific time frame. The Time Standards required that [10]Fast track cases, (F) cases, proceed to trial within 14 months. At 10 months, all discovery requests are served and depositions completed, and at 12 months a pretrial conference is held, and a firm trial date is given within the next 2 months. Between the end of discovery (10 months) and the pretrial conference (12 months) a civil case on the fast track was considered ripe for settlement.

A group screening conference is scheduled and held between the 10th and 12th month period. Early on, a small group of judges actively participated in the group screening sessions, by explaining the purpose of the screening session and highlighting the benefits of mediation. Having a judge participate in the group screening process is quite significant; it provides the imprimatur of the court and sends a message to the bar that judges are supportive and committed to offering dispute resolution as a legitimate service to disputants. The ADR Coordinators from the Office and the Court conducted the group screening process by first describing the benefits of mediating and then how to use the Suffolk Mediation Program.

[10] Second Amended Standing Order 1-88. Time Standards. Track designations. All civil actions shall be designated for procedural purposes only as falling within one of three designated tracks: Fast track (F), Average track (A) or Accelerated track (X). Designation of the particular track shall be determined by the nature of the action as designated by the plaintiff on the civil action cover sheet. By directive of the Supreme Judicial Court of Massachusetts, 1988.

The purpose of the group screening conference is twofold: first, as a case management tool to find out the status of the complaint - was the case already settled, did it fall out of the system for other reasons, or if only one party appeared, a default or dismissal would be issued. The second is to explore settlement possibilities, particularly the use of mediation.

Pre-Mediation

"The process of dispute resolution begins long before the actual mediation session" (MODR Progress Report, 1993). A unique feature of the Office model was the pre-mediation work done by professional ADR staff. Office staff worked with parties to help them make an informed choice about their dispute resolution options. Staff worked in close communication with disputants to evaluate and prepare each case for mediation. A case conference would occurred prior to the first mediation session in the "premeditation stage," a hallmark in the design of the dispute resolution model offered by the Office. During this stage, staff helped prepare parties on how best to use the mediation process and explained program rules and procedures. In addition, this stage of the mediation process helped to screen out cases that were inappropriate for dispute resolution, and assist parties in choosing an appropriate ADR method and in the selection of a neutral.

Program Characteristics

During the pilot phase, only a small percentage of attorneys understood the mediation process and it wasn't unusual for them to confuse it with other methods of dispute resolution, such as arbitration or case evaluation. Helping attorneys understand the mediation process and use it effectively was a key component of the ADR program.

This was achieved by educating attorneys at the group screening sessions, and by providing attorneys with written materials describing the mediation process, the mediators and program rules and procedures.

Referral Mechanisms

Building an infrastructure for a steady stream of cases to mediation also meant understanding what type of case was appropriate for mediation and when a case is considered "ripe" for settlement. Few cases were opting into mediation early in the court process. Most cases were considered ready for mediation at the pre-trial conference stage, when discovery had been completed, and parties felt the pressure of an assigned trial date typically only weeks away, a powerful incentive to mediate.

Categories of Cases

David Matz spent considerable time identifying case type to determine which group of cases would benefit from mediation. According to the new Time Standards, all fast track (F) cases were considered ripe for settlement at the pretrial conference stage, approximately 10 –12 months from initial filing. Fast track cases fell into the following categories: five categories of contract cases, 3 categories of tort cases, and four categories of real property cases. A small number of equitable remedy cases and average (A) track cases, such as medical malpractice and lawsuits against the Commonwealth were also considered for mediation. It was primarily the cases within the F track that were targeted for mediation potential, and those cases were called to a group screening session just prior to scheduling a pretrial conference date. With few exceptions, the above-mentioned categories were found appropriate for mediation or another dispute resolution method.

Promoting Mediation

At this early stage in the history of the Superior Court Mediation Programs, there was still a lot that was unknown, predictions of success and outcome were difficult to make, and promoting the program was still primarily done by emphasizing the universal benefits of ADR – cheaper, faster, better. However, intellectual discussions among ADR providers and ADR programs focused on the value of mediation in terms of human interaction, and ADR supporters within the court system were engaged in wide range discussions on the social implications of using mediation in the broader context. Later, mediation discussions included a full range of benefits even where cases did not result in settlement.

Mediators

One of the main objectives of the Office was to develop a highly qualified mediator panel to serve the Superior Court ADR Programs. Court-connected ADR provided a steady flow of cases for mediators. One of the most important elements of court-connected ADR are highly qualified, well respected mediators (Brazil, 1999).

The courts provided "a rich environment to test mediators" (DOC). The Office and its associates were interested to learn, which characteristics make a good mediator, and the necessary training skills, background, and education a mediator should possess to be effective. The courts provided an ideal training laboratory for new mediators (DOC). Mediators would get a steady flow of cases to develop and hone their skills.

Developing a Mediator Panel

Mediators serving the Suffolk Mediation Program were very high profile, well-respected mediators. The initial panel consisted of David O'Connor, David Matz, Brad

Honoroff, Frank Sander, Eric Green, and Peter Contuzzi. Anticipating that mediations would increase, the Office would need to add mediators to its roster to serve the Superior Court. The office developed a method of screening candidates based on the "performance- based model for evaluating mediators" developed by Christopher Honeyman in Wisconsin[11]. The Office adapted Honeyman's mediator evaluation framework and mediators demonstrated their skill and competency during simulated mediation sessions. This method served to qualify neutrals to provide mediation services to the court. The Office qualified mediators and the court accepted this as the standard by which neutrals could mediate superior court cases.

This process was not without problems. Initially, the court wanted all mediators to be trial attorneys and at the time of recruitment for the panel there was an intense debate locally and nationally on the issue of whether mediators should also be attorneys. David O'Connor, with the support of the Community Mediation Programs, argued against that position and looked for ways to move the court away from credentials toward an authentic mediation skills set built on the criteria adapted from the Honeyman model.

Using this skill set helped the evaluators to assess mediator skills on many levels, not just content knowledge. Although, overtime it became clear in this context that if a mediator was weak on "content knowledge" it could not be made up by superb skills (DOC). According to David O'Connor, "the Office invested a huge amount of effort in getting a really good mediator panel. It spent countless hours interviewing, checking credentials, observing, mentoring and evaluating neutrals. It reflected the notion that

[11] Christopher Honeyman has been working in the area of performance-based evaluation of mediators for more than a decade. In 1995, a group called the Test Design Project (which consisted of recognized individuals in the ADR field and was chaired by Honeyman) issued Performance-Based Assessment: A methodology for Use in Selecting, Training and Evaluating Mediators, which was published by the National Institute of Dispute Resolution

above all else, the Office wanted a highly qualified mediator panel to serve the Suffolk Superior Court."

Challenges

Some private ADR providers, practicing in the open market for years were not accepted onto the Superior Court roster of mediators. This caused resentment and political problems both for the Office and the Court. The court stood firmly behind the Office's method of qualifying candidates for its mediator panel and fully supported its decisions. However, this resentment would grow and years later would play itself out during the implementation of the Supreme Judicial Court's Uniform Rules on Dispute Resolution.

Expansion

After many successful years of operating the Suffolk Mediation Program, the Office was asked by Chief Justice Robert Steadman of the Superior Court, to expand its services to the Norfolk Superior Court in Dedham, Massachusetts. The Chief Justice sought to replicate the success of the Suffolk program model in the civil sessions of the local superior courts. In 1991, the Office began offering mediation services to disputants on civil matters. Although, Norfolk did not have the dense caseload of the Suffolk Courthouse, there was a desire on the part of Chief Justice Steadman to offer litigants an alternative to trial in the local courthouses.

This Program was model after the Suffolk Mediation Program, but was specifically tailored to meet the needs of the community it served. The Office intended to expand the mediator panel to serve the Norfolk Superior Court and began another recruitment of mediators. The Honeyman model was used again, but this time was

expanded to include three days of intensive mediator training, along with an observation and mentoring component.

Building Support From Within

Superior Courthouses in Massachusetts are operated on a day-to-day basis by elected clerk magistrates. Support from the clerk's office was in many respects more vital to the success of a mediation program than the support of judges. To help understand this dynamic, the judges in Superior Court serve on a rotational basis at courthouses for a few months at a time. Therefore, the mediation programs could not depend on a particular justice promoting, supporting and making referrals to the program.

A clerk's primary responsibility was the scheduling of motion sessions, pretrial conferences and trial dates. The first two events were the most important referral mechanisms to the mediation program. If a case was not referred into the program at either event, it was unlikely that parties would be receiving information about the mediation option available to them.

The Office worked with the clerk's office to get their support and buy-in on the design and operation of a mediation program. The Office provided an ADR field coordinator, who would be on-site at the courthouse. Having a person on site was an important feature of this model. Unlike Suffolk, where two ADR coordinators, (one from the court and one from the office) operated the mediation program, Norfolk had the advantage of a full-time ADR professional on site to promote the program and educate court personnel, attorneys and their clients on the use of ADR. It was also important to cultivate the relationship with the clerk's office to continue to grow and sustain the mediation program.

Providing an on-site person dedicated and committed to the integrity of the program, made a strong case for the acceptance and integration of mediation as core part of the day-to-day operation of the court. Norfolk was not plagued with some of the personnel and logistical problems of merging these separate institutions. Norfolk had only two civil sessions compared to Suffolk's eight, and a much smaller and more intimate clerk's office.

Individual Screening Conferences

An important difference in screening models was the "individual screening conferences" conducted by the ADR Coordinator in conjunction with a regularly scheduled pretrial conference or conciliation. Attorneys and their clients would come directly from the pretrial conference, or conciliation, to discuss the issues and concerns of their case with the ADR Coordinator. This provided a real opportunity for counsel to use the program coordinator to inform them about the mediation process, discuss their case and provide them with information about mediators that would be suitable to mediate their case. Deflecting the suggestion of settlement onto a judge, clerk or the ADR Coordinator, provided a benefit to counsel that may be reluctant to suggest mediating for fear of appearing to have weak case.

The Norfolk Superior Court Mediation Program was successful, albeit underutilized. Unlike Suffolk that screened and mediated hundreds of cases a year, Norfolk mediated on average 100 civil cases per year, however, both programs enjoyed a high settlement and satisfaction rate[12].

[12] See Richard J. Maiman's "An Evaluation of Selected Mediation Programs in the Massachusetts Trial Court for the Standing Committee on Dispute Resolution of the Massachusetts Supreme Judicial Court/Trial Court. May 1997.

Norfolk's success stemmed from the relationship of the ADR program coordinator and the clerk's office. The clerk's office supported and advocated the use of ADR. The clerk's office, unlike the Suffolk Superior Court, also conducted the pre-trial conferences, so it was absolutely vital that a true partnership be formed for this mediation program to continue to grow. The ADR Coordinator also worked with many of the volunteer conciliators that provided services to the court. This other relationship proved extremely important both logistically and politically for the Office. The support of the conciliators, a highly respected group of attorneys that volunteered their services to the court, played an important role in the acceptance of an outside agency operating an ADR Program.

Reports and Evaluations

The Office prepared quarterly and annual case settlement reports for the court that reflected case type, referral source, participation rates and settlement rates. The Office collected case data to assist the court in its interest in case management and provide an analysis of the success of the mediation process on civil cases.

Participant evaluations were provided to attorneys shortly after each mediation session. These evaluations proved immensely helpful in fine-tuning the mediation program and helped to quickly identify mediators that might be having problems. The evaluations provided the Office with "objective criteria" to use to discuss methods of improving a mediator's performance (SMJ).

Overtime, the value of ADR began to emerge from written evaluations and conversations with attorneys and litigants. Attorney and clients reported benefits of the mediation process beyond settlement. However, there was still limited value in

promoting dispute resolution by stressing the intrinsic value of bringing parties together and preserving relationships. The tried and true method of selling mediation continued to highlight the efficiency of the process and the cost saving element to litigants.

In 1997, the Massachusetts Supreme Judicial Court engaged Professor Richard J. Maiman, Ph.D, of the University of Southern Maine, to conduct an empirical study of court-connected ADR in the Superior and District Courts[13]. A qualitative study of individual ADR programs was conducted to capture the social value of ADR. The study confirmed the effectiveness of dispute resolution in the Superior Court ADR programs and reflected high satisfaction among both attorneys and participants in the process and outcome, even when cases did not settle. Chief Justice Herbert Wilkins felt the report demonstrated "strong encouragement not only for the need to support existing programs but for seeking funding to create mediation programs systemwide."

The Value of Mediation and Funding

Statistical reports provided an important but narrow analysis of the benefits of mediation. It is impossible in these types of reports to reflect the important social implications in the way our institutions manage disputes and the potential of transforming the way we approach and resolve conflict. In addition, mediators were valued and considered highly competent if they could achieve the objective of removing cases from the docket, regardless of what actually took place in the mediation session.

Policy makers were interested in looking for ways to improve state government and in particular, helping the courts manage caseload and exploring alternatives to costly

[13] Richard J. Maiman, Ph.D., University of Southern Maine, Portland, Maine. "An Evaluation of Selected Mediation Programs in the Massachusetts Trial Court for the Standing Committee on Dispute Resolution of the Massachusetts Supreme Judicial Court/Trail Court." May 1997.

litigation. In the late 1980's, the Superior Courts of Massachusetts were looking for efficient ways to manage its caseload and reserve its limited judicial resources for only those cases where a trial was absolutely necessary. Promises of improved case management and efficiency were not only attractive to the courts, but to policy makers as well. The courts were looking for ways to cast innovation and reform in terms that policy makers would be willing to fund. Policy makers were interested in finding ways to improve the courts services to its constituents.

Uniform Rules on Dispute Resolution

In 1993, the Massachusetts Supreme Judicial Court (SJC) issued a policy statement on dispute resolution alternatives in the Massachusetts Trial Court[14]. The policy statement said, "The judicial branch should make available appropriate dispute resolution alternatives to the traditional process of adjudication. These alternatives include, but are not limited to mediation, arbitration, mini or summary trials, case evaluation and complex case management services. A standing committee was appointed that consisted of judges, attorneys, members of the public, academics and dispute resolution professionals to provide assistance with the development of the standards and implementation of dispute resolution alternatives throughout the trial court… The role of the standing committee was to advise the SJC and the Chief Justice of Administration and Management with respect to standards for court-connected dispute resolution services and the implementation and oversight of court-connected dispute resolution services throughout the trial court."

[14] Excerpts from Commonwealth of Massachusetts Supreme Judicial Court/Trial Court Standing Committee on Dispute Resolution. Supreme Judicial Court Uniform Rules on Dispute Resolution.

The purposes of the Uniform Rules on Dispute Resolution is to ensure the quality of court-connected alternative dispute resolution services and provide consistent standards governing these services[15]. The Rules were adopted in June 1998, setting the stage for a political showdown between private ADR providers and court-connected ADR programs. The two most controversial aspects of the Uniform Rules on Dispute Resolution were the provisions in Rule 4, Implementation of Court-Connected Dispute Resolution, which called for each trial court department to approve programs qualified to receive referrals through a competitive process, and Rule 8, qualification standards for neutrals.

The Application of the Uniform Rules

The implementation of Rule 4, drew criticism from some private ADR providers at the Superior Court level, because the Chief Justice of the Superior Court elected to continue to use exclusive providers of ADR services. In Suffolk, Norfolk and [16]Plymouth counties, Chief Justice Mulligan decided to continue with the ADR programs that the Office had been operating since 1987. The Office expanded its range of ADR services to include: case evaluation, arbitration, summary jury trials and mini-trials.

The decision to use exclusive providers under Rule 4, and the provisions under Rule 8, qualification standards, created a broad opposition against the need for the Uniform Rules, prompting a swelling of resentment and anger among some private ADR providers that felt the court was taking away its business by opting to contract with exclusive ADR providers (JC).

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[15] Excerpt from Uniform Rules on Dispute Resolution section on Frequently Asked Questions.

[16] The expansion of ADR services to Plymouth Superior Court began shortly before the Uniform Rules on Dispute Resolution came into effect. The Plymouth ADR Program was modeled after the Norfolk ADR Program and was still in its pilot stage when the exclusive arrangement with the Office ended in July 1999.

Some private ADR organizations did not want the court involved in the business of ADR and did not feel the need for training, which was required by Rule 8. Some lawyer/mediators felt that being a lawyer was a sufficient credential for becoming a mediator (TL). However, the SJC Standing Committee generally and many in the ADR community, did not agree with this premise.

For years before the Uniform Rules came into effect, the Office ran successful mediation programs for the superior courts using different models to fit the needs of a particular court. As mentioned earlier, documented in the independent evaluation conducted by Professor Richard J. Maiman for the SJC, the ADR programs operated by the Office had both a high satisfaction rate among attorneys and litigants, and a high settlement rate. Therefore, the Chief Justice saw no reason to change a practice that had worked so well for so many years. Unfortunately, the dissatisfaction of some private ADR providers and the broad opposition to the Uniform Rules played out in the legislature by lobbying against funding for court-connected ADR and targeted the Office's annual appropriation. Each year a tremendous amount of energy by the courts and the Office was expended to fend off these attacks (JC). However, in 1999 the tenure of Chief Justice Mulligan ended and a new Chief Justice, Susan Delvecchio called for the end of the exclusive arrangement with the Office.

Ending the Exclusive Arrangements

The private ADR providers found a sympathetic ear in the new Chief Justice of the Superior Court. To address the concerns and neutralize the opposition of some private ADR providers and their efforts to legislate their concern against mandatory training for mediators, and prohibit the court from making exclusive arrangements with

any ADR provider, the courts recognized the need to have a dialogue with the providers and asked a representative to join them on the SJC Standing Committee on Dispute Resolution (JC).

The Uniform Rules on Dispute Resolution give the chief justices of the trial court departments' broad discretion when applying the Rules in their respective courts. Chief Justice Delvecchio felt that having one provider did not serve the interests of the superior court and opted for multiple providers that would best serve the needs of the parties (TL). In addition, the Chief Justice was not in support of Rule 8, qualification standards. Her position was premised on the survival of the private ADR providers in the marketplace as an indicator of their qualifications (TL). The SJC Standing Committee struggled with this perception and the influence of the private providers, but eventually became convinced that the battles over funding would continue unless some compromises were made around these issues (JC).

The outside providers became unified around the issue of court-connected ADR interfering with their financial interests (TL). They viewed the exclusive arrangements with the Office as interfering with their ability to conduct their business in the courts. The catalysts for these concerns were both the enactment of the Uniform Rules on Dispute Resolution and the Plymouth ADR Program, where many of these private ADR providers were doing business. The Superior Courts represented a large section of the ADR marketplace that private ADR firms wanted access to.

The court eventually persuaded the private ADR providers to ease off legislative attempts to cut the courts funding for court-connected ADR and its effort to enact legislation around the issue of mandatory training. The court compromised on the

qualification standards allowing for a one-time grandparenting clause under Rule 8, section 8(k)(iii) that must be exercised by May 15, 2004. The grandparenting clause allows for experience mediators that have been providing ADR services in the private market for 5 years to qualify under Rule 8[17]. In July 2000, the superior court agreed to end the exclusive arrangement with the Office.

The end of the exclusive programs was a great loss to the Office and to many supporters a loss to the courts. Susan M. Jeghelian, Executive Director of the Office, reflecting on the court programs said, "We offered some really great models. If we had continued, we may have been able to replicate these models in other trial court departments." The Office, in the true spirit of collaboration, worked within the system to created unique screening models to meet the needs of the courts, attorneys and litigants. The Office also played a significant role in the education of judges, clerks and attorneys by providing ADR workshops, mediation simulations, and ADR orientations.

Under the new arrangement about 20 programs currently provide ADR services to the superior courts. Group screening sessions have been reduced both in number and in substance in the Suffolk Superior Court and individual screening conferences conducted in Norfolk and Plymouth Superior Courts are non-existent. The function of group screening sessions in the Suffolk Superior Court are currently limited to a status report, scheduling of a pre-trial conference or trial date and an offer to mediate. However, there is little in depth exploration of a dispute's mediation potential. If attorneys are interested in mediation they are directed to a list of approved providers.

[17] See Appendix, Uniform Rules on Dispute Resolution, Qualification Standards for Neutrals.

Using ADR

No information or data is being collected to determine the extent of court-connected ADR in the Superior Courts at this time. It is unknown whether parties are using the services of any approved ADR provider. Approved programs are required to report to the court on a quarterly basis and those Programs reporting are reflecting "no court referrals." The thought among some court personnel is that parties are finding their own way to mediation (TL). If that proves over time to be true, it is a tribute to the wonderful work educating the private bar about the benefits of ADR, which was the objective of the Office, many dedicated ADR providers and supporters within the courts.

Chapter IV
Discussion

The Movement Toward ADR

The Pound Conference in 1976 marked an important historical time in the history of court-connected mediation programs. The task of the Pound Conference was to explore possible remedies for the dissatisfaction with the judicial system. Mediation was offered as one possible remedy to the cost, delay and inaccessibility to adjudication due to a rapidly increasing judicial caseload, (Burger, 2000, Sander, 1976). Professor Sander (1976) argued that appropriate cases could benefit from the mediation process and the social values mediation promised to advance citing … "*its capacity to reorient the parties toward each other…giving parties control and self-determination in decision making.* " In the earliest years of integrating conflict resolution methods into the court system, the primary objective was to "improved case management efficiency" (Sander,1976).

Improving efficiency in the way courts process and remove cases from the docket was a motivating factor in the court's decision to embrace mediation as a legitimate alternative to trial. Mediation program administrators emphasized the value of mediation as an alternative to the often overwhelming and dissatisfying experience of the litigation process. Unlike the adversarial process, litigants would fully participate in mediation; they would have a choice of process and a voice in shaping the outcome.

According to the study of Florida's Court-Connected ADR Programs by Della Noce et al., (2002), the significance of mediation as a case management tool began to shape mediation practice and policies in significant ways. Standards for court-connected mediation programs were frequently built on the assumption that the goal of mediation

was to produce an agreement (Della Noce, D., et al., 2002). " Settlement rates were used as a yardstick of a successful mediation program" (Id at p.2). The author's understanding suggests this assumption is incompatible with the values of mediation that stress the significant value of process over outcome. "…Mediation and the judicial system are built on incompatible assumptions about human nature, human capacity, and the goals of conflict intervention…"(Id at p.2)

Settlement agreements are of course a worthy objective of courts and mediation programs. There is a significant social benefit to assisting parties in resolving their complaints faster and less expensive than the alternative. Parties no longer have to wait months, if not years to resolve their cases, and it may be of considerable cost savings to them. In promoting the practice of mediation as a less expensive alternative to litigation, it is important not to lose sight of the less discussed benefits and intrinsic value of the mediation process when cases do not result in settlement agreements. In many cases, participants report that they have narrowed the issues for trial, have a better understanding of the other's position, and have simplified trial preparation and shortened the length of trial. In cases that do not result in settlement agreements, this is the added value of the mediation process that is not reflected in quantitative reports.

The court system was not designed to help parties resolve the underlying issues driving a dispute and given the magnitude of a courts day-to-day responsibilities and limited resources, it would not be productive for courts to attempt to do so. Court leaders have long since recognized that litigation can be an inefficient means of resolving certain disputes. Legal language and procedural rules control the discourse and framing of disputes making it difficult, if not impossible, for litigants to give voice to their concerns.

Once a conflict begins to expand and escalate often the real interests of the parties are lost (Deutsch, M., 1973).

The Appropriateness of Mediation

Pressure to settle and act cooperatively, even when it is not in ones best interests, can have serious implications. Inappropriate case referrals are areas that the court and the mediation programs must be vigilant about because these occurrences can cause harm to the parties, the mediation process and the ADR field. "Some critics have argued that ADR actually hurts those who are less powerful in our society…by leaving them unprotected by formal rules…"(Menkel-Meadow, C., 1991, p.4).

In Superior Court, referrals to mediation of un-represented parties has often been frustrating for both parties and mediators, and settlement of these cases are rare. As a former ADR Coordinator in the Superior Courts, I have often thought that part of the frustration may stem from parties not having the benefit of legal advice. Although, pro se referrals were rare, questionable referrals were made where parties felt pressure from the court to participate when they did not feel it was in their best interest. Further along this point, but in a different context, Trina Grillo (1991) highlights problems associated with mandatory mediation for divorcing couples. Mandatory mediation requires parties to take part in a process that does not protect them. She cites inappropriate case referrals on matters such as temporary restraining orders and mandatory mediation, such as those held prior to hearing in some courts, and unsuitable mediators. There is some direct evidence of this in Massachusetts Family Court, due to the mandatory mediation event presided over by a family service officer who is not a trained mediator, and inappropriate

case referrals where there may be issues of domestic violence, or legitimate concerns over power imbalances, and un-represented parties where rights could be compromised.

In many situations, mediation opens the door to communication, gives the parties the best opportunity to achieve their goals, allows for relationship continuity and relationship building, and provides the greatest flexibility and creativity in crafting solutions (Ury,, Brett, & Goldberg, 1993). Appropriate ADR has the potential of teaching parties a constructive approach to problem solving and thereby reducing the likelihood of further litigation. An ADR professional should serve as the gatekeeper to ensure that attorneys and their clients are willing participants and that mediation is the appropriate remedy.

In Lawrence Susskind's "Breaking the Impass" he says, *"ideally, the disputing parties should retain as much control as possible over the outcome of the dispute resolution process. If they do, they are much more likely to produce an agreement they will support.*[18]

An Essential Case Management Tool

A common theme that resonates throughout the literature on court-connected ADR, is that mediation holds the potential to clear dockets so that matters more deserving of trial are able to reach adjudication expeditiously and relieve overburdened judges. Although this is an important feature of mediation, its social values are much more complex than simply caseload reduction, even when it provides for more complex legal matters to come to trial in a speedier fashion.

[18] Excerpt from the Massachusetts Office of Dispute Resolutions Progress Report, 1993. Breaking the Impass: Consensual Approaches to Resolving Public Disputes, Lawrence Susskind & Jeffrey Cruikshank.

Carrie Menkel-Meadow, (1991), cautioned that the changes that ADR is suppose to produce have been co-opted by the courts to decrease caseload, forcing ADR to adapt itself to legal institutions. The danger is that mediations potential, beyond efficiency at processing cases through the legal system, may become lost. Many ADR scholars (Barak-Bush,. & Folger, 1994) believe that mediation has the potential to transform the way parties deal with conflict.

Certain authors (Brazil,1999, Folger, Della Noce, Antes, J., 2000) caution that if it is perceived that courts are promoting the use of ADR only to reduce backlog, it sends a message to the public that the courts are less interested in fairness or justice. If mediation is to be treated in this fashion, then the primary social value becomes case management efficiency and "human interaction becomes an incidental benefit of this process" (Della Noce, 2002, p.1).

Whether this is a correct assumption or not, it is too simplistic to view the courts motives for integrating dispute resolution into the judicial system as simply a case management tool. Framing alternative dispute resolution as a case management tool is supported by judges and clerks, and enables courts to appeal to the legislature for funding. The values expressed by mediation programs and practitioners that mediation offers a better more satisfying outcome for parties provides a less convincing argument to lawmakers primarily concerned with the "bottom line." Della Noce found in her study the need for "tangible measurable markers" to demonstrate efficiencies by the court were being achieved (2002). There is great interest in demonstrating to the legislature that alternative dispute resolution moves cases out of the system saving the court valuable time and expense, judicial resources, and most importantly serving the public needs.

There is however another side of this argument that is worth some considerable scrutiny. Can the claims of mediation being less expensive and more efficient be born out in every context? Participant evaluations of the mediation process in the Superior Courts on some civil matters, such as motor vehicle torts and other two party disputes, have consistently reported a cost savings benefit to the parties. However, environmental matters and multi-party, multi-issue, complex mediations can last for many sessions and are often very expensive. Therefore, if mediation is only valued for its claims of being more efficient and more affordable than trial, then the value will not be sustainable in all contexts. Mediations can be drawn out and expensive, but the long-term benefits, such as maintaining relationships, eliminating risks of future lawsuits, confidentiality, privacy and full participation in the decision-making process by all affected parties, maximize the benefits of using mediation in these cases.

As illustrated in the Florida programs, each courthouse is unique and the needs of litigants differ, depending on the context (Menkel-Meadow, 1991) in which dispute resolution services are provided. How mediation comes into the courts, how it is supported, how it evolves are important to the success of a mediation program. If mediation is reduced to a function of case management, than the social value for litigants and the courts will never be fully realized. The hope is that the mediation experience encourages the interaction of disputing parties and the possibility of transforming the conflict experience from a negative experience, to one of change and opportunity (Baruch-Bush, Folger,. 1994).

Culture and Conflict

Courts, like other great institutions, have their own culture, traditions and norms. "Each institution is built on a particular vision of how human beings can, and should engage in, and resolve problems" (Della Noce, D., 2002, pg.3). The traditional legal process is not constructed in a way that encourages collaboration or cooperation (Deutsch, M., 1973), rather competition and winning.

Disputing (Felstiner, Abel, & Sarat, 1980-81), is a complicated process, involving ambiguous behavior, faulty recall, uncertain norms, conflicting objectives, inconsistent values and complex institutions. Institutions are not well equipped to deal with these variables. The courts seek to provide a fair, efficient and affordable process for parties, but the institution is not design to offer real life alternatives to many of the complex, emotional issues driving litigants into the courts. Legal remedies are one-dimensional in that the formulas used to determine outcome are often not useful, or just, in real world situations.

Litigation is a poor remedy for many of our social problems. It is a poor venue to address the underlying conflict and interests of the parties. The courts make decisions based on case law and statutes. The outcome is win/lose and "premised on a discussion of who is right and who is wrong"(Moore, C., 1986, p.8). In traditional legal processes, lawyers define the dispute and remedies are limited by general categories (Moore, C.,1986).

Disputing (Moore, C., 1986) can become transformed over time, by delays, by widening the disputes to include other parties, by politics, by an unwilling party, or an egotistic counsel. Because of the very nature of litigation, disputes (Deutsch, 1990) can

often become protracted, more contentious and exacerbate the conflict, losing sight of the important issues driving the dispute.

Disputing Institutions

Procedural norms tend to narrow issues and normalize circumstances using formulaic remedies, which often cannot meet individual needs (Felstiner, Abel, & Sarat, 1980-81).

> A highly personal and idiosyncratic situation from the point of view of the parties is classified as an instance of general categories… Once the issues are narrowed in this way there is no need to inquire into the general situation…Most of the time…[what is preferred] is not to know why anything happened, but rather what occurred, or even more narrowly, what can be shown…to have occurred (Moore, C. 1977: 182-183).

The old system for resolving conflict in the courts was taking most disputes that were not resolved outside the court to the highest level possible, trial. The design of a dispute resolution system sought to address conflict at the lowest level possible and create multiple entry points (Bunker, 2000). A civil dispute in the Superior Court could enter the process during any stage, i.e., after filing, before or after discovery, during the pre-trial conference stage and even in the midst of trial. At times, repeat users of ADR referred themselves to the programs before the actual filing of the dispute in superior court.

The Right Process

The right forum for your dispute (Ury, Brett & Goldberg, 1993, Sander & Goldberg, 1994), involves assessing the needs and interests of the parties. All dispute

resolution methods are not equally good for all types of disputes, and having informed professional ADR staff to help parties choose which option is best, was a strength of the Office's mediation programs. Assisting participants in choosing an appropriate dispute resolution method, selecting a neutral and the lack of case information, is a casualty of the new system.

Change

"*We can't solve problems with the same kind of thinking we used when we created them" (Albert Einstein).* It is difficult to institute change in any institution, organization or culture. Initially, there is resistance to change agents and the ideas that follow (Schein, 1992). Producing change requires the involvement and participation of key people and a deliberate effort to educate and train others that work within the institution and will be instrumental in implementing the changes. Change produces uncertainty and insecurity among staff people if the reasons for the change are not well-understood. "ADR is not an alternative for an ailing judicial system; it is a remedy that will ultimately strengthen the delivery of justice to the public."[19] The goal of the change agent is not to prevent forms of resistance, but to manage them productively and engage them in the process of change (Marcus, 2000).

Although Schein (1993) defines conflict systems from the perspective of organizational culture, institutions also have distinct cultures and a shared belief system, which reflect their priority issues. Ideological principles shape they way courts do business and determine which values they espouse. Institutional thinking about conflict and methods of resolving disputes provides a shared cognitive framework, which guides the language, behavior and perceptions used throughout the institution (Schein, 1993). Culture is a concept that helps us understand the "why" in certain types of behaviors and attitudes that are part of the fabric of the institution. The Courts have customs, traditions and a language that is unique to the institution, and explicit rules and procedures designed to control the discourse of conflict situations.

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[19] Quote from "Dispute Resolution in Massachusetts." Final Report of the Governor's Alternative Dispute Resolution Working Group. Michael S. Dukakis, Governor. November, 1986.

Dispute System Design

The fundamental elements of a good dispute system design are; trust building, confidence and ownership in the process. In order for a dispute system to be successful, leadership must be convinced of the need for change (Schein, 1992, Marcus,.2000, Kanter, Stein, & Jick, 1992), and the need for those impacted by the change to be involved in the design process. The persons within the court system bring the history and culture of the institution to bear on the design of the dispute resolution model. The collective needs of the institution, along with individual needs of litigants, will help shape the design. The Norfolk model is a good example of a system design created to work within an existing structure and designed to meet the needs of the Norfolk community. Cooperation happens when groups have a shared understanding of the problem, (Deutsch, 1973).

Judge Brazil recommends that courts give considerable time and attention to which values and practices will prevail when designing a dispute resolution program. But what happens when those values are in conflict with the values mediation programs seek to promote? Who will be the gatekeeper? Who will make sure cases are not funneled into mediations that are inappropriate for this process? What compromises will ultimately be made in order to keep dispute resolution as an option for litigants? The Office and the Superior Court addressed some of these issues by conducting regular Program Management Team meetings to discuss issues and concerns. The meetings provided a continuous dialogue between program staff and court personnel, which helped to forge the type of interdependence (Deutsch, 1983) that leads to cooperation and collaboration.

Are The Rules Being Carried Out?

Is the lack of ADR data in the Superior Court a comment on the Rules, or the current system of ADR? The Rules appear to provide all the important elements of integrating dispute resolution into the judicial system. The rules provide a mechanism for courts to monitor programs by requiring those programs to report to the court referrals to ADR. A good example of this is in the Massachusetts District Courts, where community mediation programs are providing the trial court with information on matters being handled in their programs. However, at the Superior Court level that requirement is either not being enforced, or there is a design flaw in the system currently being used because not all programs are reporting and those that do, report no court referrals.

Some of those interviewed for this project felt that ADR was being used more than ever. The proliferation of ADR in many of the trial court departments can be documented. However, in the Superior Courts there is no information available and the connection of ADR to the courts appears to be weakening. It is my opinion that this is where the Superior Courts have lost ground in the institutionalization of ADR. As sited previously in Brazil's essay, the courts are the least connected to outside ADR providers.

The loss to the Superior Courts is one of accountability of the approved programs and quality control measures that were once a hallmark of the Office's work in the court and among many of its contributions to the ADR field. Many of those that I interviewed felt that the quality of the mediator panel, along with a firm commitment by the leadership of the Superior Court, and a committed funding source, are essential to operate sustainable, successful ADR programs. Fredie Kay, former executive director of the

Office said, "Programs are successful or unsuccessful based on the level of support at all levels of the institution. Support from the top is critical – support throughout the system is also required."

My overall orientation to this process was honed in the civil sessions of the Norfolk Superior Court. Disputing systems will need to change overtime as the needs of the parties and courts change. Due to budget constraints and increasing political pressure from some private ADR providers, the commitment of ADR funding and support is uncertain at best. As a result of changes in the political climate and a private ADR marketplace affecting the way ADR services are procured in the future, the landscape of dispute resolution in the Superior Courts has been dramatically altered.

Market Forces

What's driving dispute resolution in the courts? There is a growing market for dispute resolution and the Superior Courts are a large market for professional mediators. Many ADR providers built their reputations and careers providing dispute resolution services to the Superior Court by serving on the Office's ADR panel of neutrals. One of the primary goals of the Office was to keep ADR affordable and accessible to all litigants, including providing for fee reductions and waivers. Overtime, the low fees associated with court-connected ADR programs caused tension with the private ADR providers whose fees were considerably higher. This progression should have been expected, however it was one that the Office had not anticipated or planned for. ADR practitioners felt that providing ADR services under the auspices of the Office was undermining their own practices. Although, there is no evidence of whether the businesses of some providers has increased as a result of the Office no longer providing

ADR services to the court, as we know in this business, it is the perception that matters most.

To their credit, the Superior Courts have implemented a mediation program for pro se litigants and prisoner cases. However, there still remains a gap between those that can afford ADR and those that cannot. The Office served this function well by being responsive to the needs of represented parties that do not have the resources of big insurance companies or wealthier litigants, by providing affordable dispute resolution.

Summation

The Massachusetts Office of Dispute Resolution, the "Office" operated on-site, integrated ADR programs and was instrumental in furthering the understanding and use of alternative dispute resolution within the judicial system. The Office provided leadership in the design of dispute resolution models and set the bar for high quality dispute resolution programs and practitioners. Since the inception of the court-connected ADR programs, the Office has resolved hundreds of lawsuits, removed thousands of cases from the court's docket through its unique screening process, and has achieved widespread recognition for being a leader in the ADR field.

It is a natural progression and desirable that the Office's role of providing dispute resolution in the courts would change over time. However, the essential elements of a good dispute resolution system should be maintained regardless of whom operates the program. There are concerns over quality assurance and accountability that are lacking in the current system.

What is loss is the nexus between the courts and the ADR providers (SMJ). Currently, there is no nexus between a superior court case and a referral made to an

approved program, which means there is currently no way to account for the quality of court referred mediations. This is a system flaw that should be corrected if Superior Courts are to continue to work with outside providers, and have a way to gather data that is both reliable and useful; otherwise, the pressure from some private providers to do away with court-connected ADR will be successful because there will be no authentic connection, the term "court-connected" becomes meaningless in this context.

As Schein (1992) says, "Leadership and culture are two sides of the same coin" (p.1). Leadership is most influential in shaping the psychological orientation of the system. Over the years, courts have championed the use of ADR and that embrace has trickled down throughout the system. Support is not something we can take for granted. There are still some that do not consider ADR a "core function" of the justice system. For many years, ADR worked in the shadow of the courts, not as a fully integrated part of the judicial process. There is no guarantee that ADR will thrive and continue to be supported and funded by the courts. Downsizing, budget cuts and reallocation of resources affects the way courts do business and limits options available to litigants. When funding is cut, ADR is one of the first services affected. Sadly, this situation is reflected in some state offices of dispute resolution across the country.

ADR is not a panacea for all conflicts. Court personnel, ADR coordinators and mediators have an increasing responsibility to make sure mediation is not used to circumvent the public process and rights of individuals not able to protect themselves (Delgado, Dunn, Brown, Hubbert, 1985). I prefer an ADR model that works within the institution to change its approach to conflict and the experience of litigants. Having ADR professionals committed to protecting the integrity of the mediation process and

providing litigants with an experience that is markedly different from litigation, will help ensure that the values mediation seeks to promote are not compromised in an effort to achieve a more efficient justice system. Quality should never be compromised for quantity.

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APPENDICES