7 COURT PROGRAMS

IMAGINE YOU ARE THE CHIEF judge of a trial court in internal turmoil. A group of your judges wants to introduce ADR options, such as mediation and early neutral evaluation, in civil cases. They believe that ADR can reduce cost and delay and give parties more creative and satisfying outcomes. A second group of judges opposes all ADR, believing that courts were created to provide justice through a public trial process and that anything else dilutes that mission and undermines core values. A final group of your colleagues favors adding ADR processes but only if they save the court significant time and money.[1]

You want your court to deliver justice and provide service to litigants at a reasonable cost. You are also mindful that your state legislature may cut the judiciary's budget in the next few years. The lowest-cost alternative would be to require all cases to go to private mediators or evaluators, which might have the additional benefit of reducing your court's heavy, and growing, caseload. Would such a plan be fair? What alternatives might be better? Will the resistant judges join the effort or at least not undermine it? How will you decide which strategy to pursue? Who else should be involved in making this decision?

Issues to consider are as follows.

- What is the proper role of courts? Should they only litigate cases, or should they more broadly assist the public in managing and resolving its disputes?
- How should courts resolve the tension between efficiency and quality?
- What are the special challenges of DSD in addressing criminal cases?
- How can courts better use and integrate online dispute resolution tools and platforms?

- How do the answers to these questions change, if at all, when applied to countries with widely varying national, local, and legal cultures?

History and Context of Alternative Dispute Resolution and Other Design Innovations in U.S. Courts

In the United States, courts have expanded from primarily providing trials to offering a wider range of formal and informal conflict resolution processes.[2] At first glance, a court seems an unlikely place for dispute system innovation, given the centrality of the trial in the United States as a rights-based option to determine facts, resolve disputes, interpret the law, and create precedent—yet courts themselves were a design innovation, a rule-based structure created to reduce violence and self-help as means of resolving disputes in society.[3]

As the legal historian Lawrence Friedman has documented, by the beginning of the twentieth century American courts faced acute problems of "complexity, waste, and injustice," exemplified by "the astonishing number of reported cases that turned not on the merits of the case, but on tiny points of procedure or pleading."[4] Efforts at procedural reform culminated in 1938 with major changes in the Federal Rules of Civil Procedure (FRCP), design innovations to allow more parties to access the courts through simplified *notice pleading*.[5] The designers of the FRCP also introduced new procedures intended to reveal the facts more expeditiously and at lower cost, including requiring parties to share key information through the discovery process.[6] Under FRCP Rule 16, judges were given new discretion to manage their cases, including encouraging settlement discussions.[7]

Beginning in the 1970s, an increasing number of judges and scholars in the United States questioned the efficiency and efficacy of the trial-based system. Though designed to decrease cost and adversariness while expediting getting to the truth, the discovery process had become another slow and costly battleground.[8] Critics of the courts' civil litigation processes pointed to the impact of cost and delay on litigants and the court, the toll of the adversarial process on business and personal relationships, and the failure of the courts' rights-based processes and limited remedial options to address the underlying issues that activated disputes.

Frank E. A. Sander, at the Pound Conference in 1976, introduced the powerful idea that courts could offer more process options to better address these interests, a concept that came to be known as the multidoor courthouse.[9] While U.S. courts were already taking steps to encourage settlement, and in many jurisdictions judges were serving as settlement facilitators, these conversations spurred experimentation in design that became a trend toward broader incorporation

of ADR in U.S. courts. Every U.S. federal district court now authorizes ADR in some form, and more than one-third authorize multiple process options.[10] The National Center for State Courts reports that "every state now has some type of court-connected ADR at some level—but rarely statewide."[11] ADR has also become a significant part of U.S. rule-of-law development assistance to other countries.[12]

New ideas were also advanced concerning how courts might work with other institutional actors to address societal problems through means other than traditional trial and incarceration. New community justice mechanisms, including community mediation, were developed starting in the 1960s (see Chapter 9). Neighborhood disputes were referred to these processes by courts or sought out directly by community members, aiming to avoid litigation and in some cases to focus on restorative rather than retributive justice.[13]

These developments were followed by experiments with problem-solving courts, also called specialized or specialty courts, which connected the judge with broader social and medical expertise and services in order to address underlying and chronic causes of conflict.[14] Following the opening of the first drug court in Miami, Florida, in 1989,[15] courts across the United States and internationally began developing problem-solving courts, which now include community courts, domestic violence courts, youth courts, veterans courts, and DUI (drunk driving) courts.[16]

Case Examples from Federal and State Courts in the United States

Civil Cases in the U.S. District Court for the Northern District of California

In 1990, Congress passed the Civil Justice Reform Act, which encouraged experimentation in ADR and case management in all federal trial courts.[17] Under the reform act, the U.S. District Court for the Northern District of California was designated one of five "demonstration districts" directed to "experiment with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution."[18] The court was well positioned for this designation because it already offered several ADR processes under Chief Judge Robert Peckham's leadership: nonbinding arbitration, early neutral evaluation (ENE),[19] and judicially hosted settlement conferences. ENE was first conceived in this court; to develop it, the court used a variant of a conflict stream assessment (see Chapter 4) by convening a multistakeholder group of attorneys from different practice areas who represented public and private clients as well as plaintiffs and defendants from various types of cases. Wayne Brazil, then a professor at Hastings College of the Law, led the process, reporting to and consulting with Chief Judge Peckham.

This group became the design team, investigating multiple process options. The court piloted and evaluated the ENE process, and given the pilot's success,[20] the judges decided to expand the ENE program court-wide.[21]

While some courts' primary goal in using ADR is to reduce caseload, the Northern District of California court had made clear that its chief goal was to provide additional, high-quality process options to better meet the needs of litigants. Brazil, who subsequently was appointed a magistrate judge, became the judicial officer who guided and supervised the court's ADR program in this period. Commenting on the high cost of litigation and the few cases that reached trial (or even had significant contact with a judge),[22] he concluded that "free or low cost ADR programs represent one of the very few means through which courts can provide any meaningful service to many litigants."[23]

The Civil Justice Reform Act mandated its own multistakeholder process, another variant on conflict stream assessment. The act required creation of an advisory group including representatives from the bar and litigants.[24] Following broad consultation with key stakeholder groups, including the judges, the clerk of the court, the court's ADR staff,[25] and the advisory group, the court decided to maintain its array of existing ADR options and add mediation. This addition provided an interest-based option with the potential to enable parties to preserve their relationship; create a broader, more creative array of settlement options than the court could order; reach more durable solutions; and reduce cost and delay.

The court then faced a set of important policy questions and design challenges in how best to determine which cases would be paired with which processes. The questions included the following:

- What role should be played by parties, their counsel, the judge, and the court ADR administrators in deciding whether to use ADR, and if it is, which process and when?
- To what degree should the court encourage or require use of an ADR option?
- Should certain cases be exempt from particular or all ADR options?
- Who should provide the ADR services, and what qualifications should they have?
- Who should pay for these new services, and what should they cost?

The court's solution, the Multi-option Pilot Program,[26] required counsel to discuss the court's ADR options with clients and confer with opposing counsel to select a process option.[27] If the parties failed to agree or opted against ADR, the new rules required counsel[28] to participate in an ADR phone conference with

the court's ADR staff. These calls provided individualized attention, educating and advising counsel on the potential benefits and costs of the ADR options. If the parties still could not agree on an option or if they agreed that no option was appropriate, the ADR administrator would either recommend an ADR process to the judge or recommend that no ADR was appropriate at that time. The goal was to educate and engage all key stakeholders to determine which ADR process, if any, was most appropriate.

Although the Multi-option Pilot Program presumed that an ADR option would be used early in the life of every case, judges could approve requests for delaying ADR or exempting the case. This approach reflected an effort to balance the court's goals of encouraging parties to use helpful processes without pressuring or requiring parties to participate in a program that could, in some cases, be a waste of time and money.[29] The court's website, information booklet, and ADR staff helped the parties and counsel compare the processes in terms of likely party satisfaction; flexibility, control, and participation; improved case management; improved understanding of the case; and potential to reduce hostility between parties.

Two major staffing models are most used in court ADR programs. Courts with a staff-neutral model employ trained court staff to serve as ADR neutrals; this model is used in some federal circuit courts of appeal and a smaller number of federal district courts. Largely because of cost considerations, however, many courts use a panel model, relying on private practitioners to serve as ADR neutrals on a court-administered or court-sponsored panel.[30] Although Congress provided limited funds for additional court staff under the Civil Justice Reform Act, the funding was not sufficient to hire enough staff to serve as neutrals in a significant number of cases. Because of these resource constraints and the court's deep commitment to the quality of the neutrals, the Northern District of California court used staff resources to screen, recruit, train, and supervise panels of private neutrals for the mediation, ENE, and arbitration programs.[31] When time permitted, the court's ADR staff attorneys also mediated cases.

Compensation was handled differently for different ADR processes. The court, pursuant to a statute that predated the reform act, provided very modest compensation for arbitrators. Judges handling settlement conferences received no compensation beyond their normal salaries. No other public funds were available to pay mediators or ENE neutrals. As a result, mediators and ENE evaluators volunteered their preparation time and first four hours of meetings. After this point, if the parties chose to continue the session, the evaluator or mediator could charge for her services.[32] These new rules reflected a compromise between the desire

to offer a free public service, in the same manner as trials and judicially hosted settlement conferences, and the acknowledgment that skilled ADR professionals provide a valuable service. It was also unreasonable and unrealistic to expect the most highly skilled attorneys[33] to fully donate the significant time necessary to provide high-quality services for the expanding caseload.[34]

The pilot program proved to be a beneficial first step in dispute system redesign because it allowed experimentation and refinement of the model, created allies of the pilot judges, improved the skills and confidence of the ADR neutrals, and increased the comfort level and competence of counsel representing the parties. The pilot program was evaluated, pursuant to the act's mandate, by the Federal Judicial Center, the research arm of the federal courts. The study, led by Donna Stienstra of the center, reported that over 60 percent of counsel believed that use of the court's ADR options had reduced time to disposition and the cost of their cases, with median cost savings per party estimated at $25,000. Eighty-one percent of attorneys were satisfied with case outcome and 98 percent "thought the procedures used in the ADR process were somewhat or very fair."[35] In 1999, the court refined the model and expanded the program court-wide.[36]

Family Law Cases in the Courts of San Mateo County, California

San Mateo County, California, also created a multioption ADR program. This court offered ADR programs, including mediation and arbitration options, for eight distinct types of cases, including family law cases. The San Mateo court program shared elements with that of the Northern District of California court but was distinct in several ways, such as in its family law focus, the high percentage of parties not represented by counsel, its more diverse funding base, and its multistakeholder management committees with representation from the court and the bar.

As in the Northern District of California court, the San Mateo court was dedicated to giving parties more process choices, but it explicitly acknowledged the desire to help both the court and the parties save time and money. It also recognized the very high priority that families in difficult transitions place on resolving disputes quickly and in a manner best suited to help their children.

The San Mateo court tapped stakeholder groups to help design its programs and created ongoing, multistakeholder groups to advise and monitor the programs. One committee provided oversight on all eight San Mateo court ADR programs. This committee's members included the court's presiding judge and chief executive, the executive director of the Peninsula Conflict Resolution Center (a community mediation nonprofit), and representatives from the San Mateo Bar

Association's board of directors, the plaintiffs' bar, the defense bar, and nonattorney members and representatives from the court's ADR program staff. Other stakeholder committees of attorneys, judges, and court staff monitored and advised each of the other ADR programs. Advisors to the family law program were judges, representatives from legal aid, the court's ADR staff, the family law section of the local bar association, referring agencies, and other specialists as needed.

The court's family law ADR program began in 1996 as a project of the local bar association, which provided referrals to a panel of private attorney mediators and arbitrators.[37] In 2000, the program was reorganized and moved to the court, and a coordinating attorney was subsequently hired to expand and manage it. The program offered both mediation and arbitration to litigants, including those without counsel. The court had an extensive education and outreach program, including meetings with judges and court staff, access to digital and print resources, and educational programs for attorneys. Judges could recommend that parties meet with court ADR staff to consider whether to choose ADR. Sheila Purcell, director of the program from 1996 to 2012, refers to the court's philosophy as "mandatory education, voluntary mediation."[38]

The San Mateo court assembled an innovative array of funding sources to support the program. As in the Northern District of California court, the San Mateo court began with a small pilot program. Because of that program's success in civil cases, court resources were obtained to hire a staff person to coordinate the new family law ADR program.[39] The bar continued to provide financial and human resources to support the program. Attorney mediators agreed to charge only one hundred dollars (fifty dollars per person) for the first ninety minutes of mediation (well below market rates), with the option of conducting additional sessions at the mediators' regular hourly rates.

This program offered both mediation and binding arbitration. Though the use of binding arbitration is somewhat rare in family law cases and can be challenging for cases with self-represented parties, Purcell reports that binding arbitration was chosen by the parties in approximately 10 percent of cases in 2008 and can be very effective in "pots and pans cases," in which parties are seeking a quick resolution to disputes over small property items.[40]

The U.S. economic crisis of 2008 took its toll on the California state budget and court ADR programs. Of the nearly 300 referrals to the San Mateo family law program in 2009, 149 developed into active cases, with approximately half mediated by private neutrals and the other half by the attorney mediator, who is also the program manager, on-site at the court. Budget cuts, reorganizations, and staff reductions of 60 percent in 2009 and 2010 prompted the staff mediator to

suspend on-site mediation and recruit a court-administered volunteer panel to pick up some of the caseload. Referrals to the program dropped as administrative support shrank, to 167 referrals in fiscal year 2010 with 65 cases being assigned to either the private panel or to the limited on-site program with a new group of volunteers.[41]

Some have questioned whether mediation should ever be used in cases with a history or threat of domestic violence. This is a very real concern and an area of controversy.[42] The San Mateo court's family law ADR program created the Domestic Violence Screening and Assessment Procedure to determine whether cases were appropriate for ADR. The assessment included searching the court's criminal database, telephone interviews with parties to determine the history and nature of the domestic violence or fears of abuse, and review of the family court file for allegations or protective orders.[43] Staff asked questions to determine how recent the abuse or threats were, the nature and extent of any physical violence, how the couple historically handled conflict, the presence of weapons, and whether the parties felt comfortable meeting together off-site (if applicable). On the basis of this assessment, staff might offer referrals to collateral agencies or process protections or might decline to accept referral to the ADR program.

The San Mateo family ADR programs were evaluated through questionnaires to lawyers, mediators and arbitrators, and parties to disputes. A court-conducted study of cases from July 2007 through July 2008 revealed that 81 percent of cases achieved some resolution through use of an ADR process; parties estimated that ADR reduced court time for all cases and reduced costs for 97 percent. Both parties and attorneys showed high levels of satisfaction with the process. Even with this high success rate, subsequent resource cuts required significant program reductions.[44]

Criminal Cases at the Red Hook Community Justice Center, Brooklyn, New York City

In 1992, the Brooklyn neighborhood of Red Hook was devastated by the death of a beloved elementary school principal caught in the crossfire of a drug gang shootout. The neighborhood was struggling with a high level of crime and the crack epidemic of that era. The tragedy motivated Brooklyn District Attorney Charles Hynes, joined by New York's chief judge, Judith Kaye, to lead a process to create a new approach to address public safety in Red Hook.[45]

Hynes and Kaye turned to the Center for Court Innovation, a nonprofit research and policy-advising entity for the New York state courts, to guide the design process.[46] This public-private partnership had been instrumental in developing

the successful Midtown Community Court in New York City in 1993 to better address "quality of life" crimes, such as prostitution, graffiti tagging, and low-level drug possession.[47] Midtown, the first community court in the United States, employed restitution, community service, drug treatment, and other techniques and succeeded in reducing some categories of crime while increasing case efficiency and generating more positive public opinion in the then very high-crime Times Square area.

In Red Hook, the broad initial DSD goals were "improving the safety of the neighborhood and enhancing the legitimacy of the justice system in the eyes of local residents."[48] The designers sought to incorporate community ideas but were also committed to situating the resulting programs within the New York City court system.[49] Greg Berman and Aubrey Fox of the Center for Court Innovation described the final DSD goals as (1) promoting accountability (all offenders receiving some sanction), (2) repairing conditions of disorder (such as fixing broken windows and painting out graffiti), (3) solving underlying problems (such as providing drug treatment), (4) engaging the community, and (5) making justice visible (by locating the court and support services in the Red Hook neighborhood).[50]

The design process took six years. Government stakeholders included prosecutors, police, judges, and court staff. Community stakeholders included community organizations, nonprofit groups, and the citizens of Red Hook. Berman and Fox describe neighborhood outreach as including "focus groups held at the local library with community leaders, social service providers, young people, and single mothers—a wide variety of informants that went beyond the 'usual suspects' of established local leaders."[51] In addition to "dozens of individual interviews," the designers sponsored bus trips to the Midtown Community Court, attended community meetings "held at precinct councils, PTAs, civic associations, tenant groups, and local churches," and "convened town-hall-style meetings that attracted hundreds of participants."[52]

The design process resulted in the opening of the Red Hook Community Justice Center, the first multijurisdictional court in the United States, in 2002. The center, housed in a former Catholic school, combined court services with enhanced community services, such as drug treatment referrals and mediation,[53] and support services, such as GED classes, youth development programs, and job training, which were also made available to the broader community.

Rather than adding processes to a traditional court model, the Red Hook experiment created a new structure, changing the role of the judge from solely an arbiter of legal status to the leader of an interdisciplinary, problem-solving team integrating court and social services. The court's emphasis was on avoiding jail

sentences, where appropriate, in favor of sanctions that benefited the defendant and the community through community service as restitution and through treatment to address underlying problems, such as drug addiction and mental illness.

Monitoring and evaluation were embedded in the program design. The center received regular input from the Community Advisory Board, comprising more than three dozen members, including "tenant leaders, clergy and civic leaders, as well as representatives from local institutions like the schools and the police."[54] External evaluators have found substantial positive impacts that include reduction in recidivism and reduction in crime,[55] a more positive view of the court by community members, and significant hours of service devoted to community improvement.[56]

Court Alternative Dispute Resolution Outside the United States

The movement to include multiple dispute resolution options in U.S. courts emerged in a specific context: U.S. courts were well developed and well funded but were criticized for cost, delay, limited remedial options, and damage to parties from the adversarial model. Likewise, distinct historical, political, legal, and social contexts in other countries affect the goals, options, and choices designers make worldwide regarding court ADR.

The goals of DSD in justice systems can go beyond the just resolution of disputes to encompass broader goals of economic development, empowerment of the poor, and good governance. International development funders, such as the World Bank and U.S. Agency for International Development, have supported expanding ADR mechanisms in some countries as a means of increasing access to justice.[57] In countries where formal court systems are expensive, difficult to access, and plagued by corruption, some commentators urge greater use of informal dispute resolution mechanisms in conjunction with efforts to bolster the formal justice system and create more inclusive and responsive governance systems.[58] However, in courts suffering from corruption, the addition of court-connected confidential settlement processes may provide more venues for injustice away from the public eye.

Specific local challenges call for tailored, creative solutions. Each setting requires careful assessment of goals and process choices.[59]

The United Kingdom, Italy, and the European Union Directive on Mediation

Mediation continues to spread through Europe, but the regulatory structures, degree of usage, and connection to courts vary enormously across countries.

In civil law countries, growth in the use of mediation in legal cases has been, overall, slower and more uneven than in common law countries.[60] Nadja Alexander explains that Anglo-American common law courts generally have more authority and flexibility to write their own court rules, which more easily allows court-by-court experimentation.[61] She notes, however, that cost and delay are less of a problem in many civil law countries and that the established presence of judicial settlement and case management in civil law courts may have slowed acceptance of mediation.[62] Alexander also observes that, unlike those in the United States, lawyers in most civil law countries initially resisted mediation, allowing psychologists and other professionals outside the legal field to begin "to carve a niche for themselves as mediators of disputes (particularly in family, community and victim-offender matters) well before the legal profession became involved."[63]

In 2008, the European Parliament issued a Directive on Mediation requiring EU member states (with the exception of Denmark) to develop legal frameworks to offer mediation for cross-border commercial and some civil matters, including certain family and labor law cases.[64] The directive's goals included increasing access to justice by encouraging mediation and "ensuring a balanced relationship between mediation and judicial proceedings."[65] The directive applies to cases of party-initiated voluntary private mediation and to "cases where a court refers parties to mediation or in which national law prescribes mediation."[66]

A 2014 study on the directive, commissioned by the European Parliament, reported on the wide variation in mediation uptake across the European Union. The study estimated that only the United Kingdom, Netherlands, Italy, and Germany were holding over ten thousand mediations per year, and thirteen of the twenty-eight countries covered by the directive were holding fewer than five hundred per year.[67]

In the United Kingdom, mediation and conciliation in family, neighborhood, and consumer cases was well established for several decades before the EU directive.[68] Leadership on ADR expansion into commercial cases in the United Kingdom had come from a coalition of powerful stakeholders: lawyers involved in commercial litigation, the courts (including the Commercial Court), the Lord Chancellor's Department (which oversees the courts), the Department of Trade and Industry, and some academics.[69] Interest in ADR expanded significantly as a result of Lord Woolf's 1995 and 1996 *Access to Justice* reports and subsequent civil procedure legislation.[70] Surveys of the public in that period revealed high levels of dissatisfaction with the civil justice system, which was seen as too slow, too complicated, unwelcoming, and dated.[71] A slate of reforms that simplified procedures (to achieve reductions in cost and delay), made judicial case management

more active, and implemented ADR followed Woolf's reports, and a new civil procedure act passed in 1997.[72]

There is no national law in the United Kingdom that controls and regulates mediation practice, so the practice varies by type of court and jurisdiction. Mediation is voluntary, though the courts can encourage its use and impose sanctions for a party's "unreasonable" refusal to participate.[73] Mediation is administered primarily by private providers, such as the Centre for Effective Dispute Resolution for commercial cases and the ADR Group for family law and commercial cases.[74] In contrast to the United States, private providers in the United Kingdom lead in design of the procedural rules, screening and training of neutrals, and quality control.[75] A Centre for Effective Dispute Resolution study identified eight thousand mediations of commercial and civil matters in 2012.[76] Because this public-private model of ADR was already so advanced in the United Kingdom, the directive did not bring about major changes.

In contrast, mediation was not used in Italy as a form of ADR by the general public before 2008.[77] Italy had a strong culture of supporting litigation among members of the legal profession and the public, despite substantial delays,[78] and Italian lawyers, who are powerful stakeholders, viewed mediation as a significant threat to their livelihoods.[79] Following issuance of the directive, Italy passed legislation that led to a requirement that certain categories of civil cases try mediation before court action. In protest, attorneys went on strike, and a leading association of lawyers successfully challenged the constitutionality of the new requirements, thereby halting virtually all mediations in the country, including private, consensual mediations.[80] A modified law, passed in 2013, created a four-year experiment in which certain commercial and civil cases (approximately 8 percent of all civil cases) required an initial, low-cost mediation session.[81] Under the law, judges have the power to order parties into mediation at any point in the life of the case.[82] The law also provides financial incentives to parties who resolve a case in mediation and financial penalties for lawyers who fail to educate their parties regarding mediation.[83]

A 2016 research report commissioned by the European Parliament concluded that "in the majority of the Member States mediation is on average still used in less than 1% of the cases in court."[84] A 2016 progress report from the European Commission concluded that the directive had helped increase the use of mediation in domestic cases in some countries, but a lack of awareness and information presented barriers to greater use in at least ten countries. The report made recommendations, such as education of litigants, creation of financial incentives for mediation, and development of a better database on the use of mediation. To

address resource needs, the European Commission committed to continue to cofinance certain mediation-related efforts and raised the possibility of financially supporting a "stakeholder-driven development of European-wide quality standards for the provision of mediation services."[85] To encourage the use of mediation in courts in the European Union, a 2018 report recommended adoption of a model of "required mediation with easy opt-out," which has substantially increased mediation usage and settlement in the categories of court cases in Italy in which it is used.[86]

Bhutan

Unlike most European nations, many countries have long-established, informal, community-based processes that remain the norm for conflict resolution. In these countries, rights-based courts are the alternative, and less frequently used, form of dispute resolution. Such is the case in the small Himalayan country of Bhutan, which is experiencing a huge political shift as it evolves from an absolute monarchy to a constitutional monarchy with an elected parliament.

With approximately 750,000 citizens, many living in remote villages, Bhutan held its first national elections in 2008 under a new constitution and subsequent general elections in 2013 and 2018. Bhutan has representatives from all branches of government working together to design a dispute resolution system with the goals of building trust in the judiciary and advancing the rule of law. The system is intended to enhance the quality of traditional community-based processes and link them to the courts.[87] The courts have also described their goals as encompassing national and Buddhist religious values of compassion and peaceful coexistence and promotion of the government's policy of gross national happiness.[88]

Historically, mediation in Bhutan has been conducted by community leaders, elders, and monks. Many mediations have been conducted by *gups*, well-respected, locally elected county heads; their deputies, known as *mangmis*; and village representatives known as *tshogpas*. Because *gups* are being required to take on more administrative duties, their availability for mediation is constrained.[89] There is also a perceived need to provide court processes or other options when a *gup*, *mangmi*, or *tshogpa* has a conflict of interest in a particular case.

Bhutan has approximately two hundred lawyers, very few of whom are in private practice. Almost all are employed by the government in a range of judicial, administrative, policy, and legal capacities. To bridge the traditional, interest-based community processes with the formal, rights-based courts, judges are educating the public about the new laws via radio and personal appearances. Judges have also begun conducting mediation training programs throughout the country

to increase *mangmis*' mediation skills, regularize mediation models, and educate these officials about the developing substantive law.[90] Program design in Bhutan will need to continue to evolve as its government systems and economy develop.

Key Framework Issues in Court Alternative Dispute Resolution Programs

Goals

In ADR design, a court may prioritize service to litigants, including reducing cost and delay and providing more individualized, less adversarial, and more creative procedures and outcomes than a trial can offer. The court may also seek to help litigants preserve or repair relationships, especially in cases involving child custody, business partnerships, and other contexts in which parties may need to work together after the lawsuit ends. Many courts choose to add ADR options wholly or in part to reduce the cases on their dockets. These widely varying goals raise fundamental questions about the purpose of courts and judges in a society.[91]

An important question for a court dispute system designer is which, if any, cases to exclude from an ADR program. The U.S. District Court for the Northern District of California excluded self-represented parties[92] from automatic inclusion in the multioption program to decrease the risk of coercion to settle and ensure that all parties had the advice of counsel on the legal merits of their cases during private ADR processes.[93] However, increasing recognition of how the traditional trial-based court system fails to meet the needs of self-represented parties has led to an increase in ADR programs for this growing clientele. As of 2011, at least twenty-one federal district courts allowed some self-represented parties to participate in court-connected mediation.[94]

Discussion Questions

With problem-solving courts, a designer faces a very broad list of goals. Possible goals are reducing caseload, promoting peaceful community relations, addressing community health challenges such as drug addiction and mental illness, engaging youth, and combating unemployment. How many goals can and should a court tackle and with what priorities? When engaging multiple stakeholders with differing interests and levels of power, which actors are and which should be most influential in determining the court's goals?[95]

Processes and Structure

Courts that add one or more ADR options must determine how to best integrate these options with each other and with traditional court activities. Judicially hosted settlement conferences, whether conducted in a facilitative, evaluative, or hybrid model, are also ADR options but may not be considered as such because they are traditionally conducted by judges and often predate the development of other ADR options.

The Red Hook Community Justice Center is one example of a specialty or problem-solving court integrating many new structures, processes, and procedures. These new court structures are not categorized as ADR programs but often include ADR processes, such as mediation and other assisted negotiation models, and incorporate some of the philosophies that gave rise to ADR and community justice programs, such as restorative justice and therapeutic jurisprudence.[96]

Developments in online dispute resolution (ODR) offer new tools and opportunities to improve the quality and efficiency of court processes, both traditional and ADR, including increasing the use of online filing, enabling counsel and the public to get more information through online sources, and providing phone and video conferencing. Almost all U.S. circuit courts of appeal have conducted

Examples of Specializations for Problem-Solving Courts

- Community courts (for quality-of-life crimes)
- Dependency (child welfare)
- Domestic violence
- Drug treatment (adult and juvenile)
- DUI/DWI (driving under the influence or while intoxicated)
- Family treatment or unified family (domestic violence, substance abuse)
- The homeless
- Juveniles
- Mental health
- Opioid intervention
- Prostitution/human trafficking intervention
- Reentry (of the formerly incarcerated back into the community)
- Teens/youths
- Tribal healing-to-wellness programs
- Veterans[97]

Discussion Question

In courts covering large geographic areas, the cost and time to travel is prohibitive for some parties. Some courts rely largely or exclusively on telephone conferences to conduct mediation sessions. What are the benefits and disadvantages of this form of ODR in court-connected mediation?

mediations by phone, with the Fourth Circuit U.S. Court of Appeals conducting over 95 percent of mediations by telephone in 2013.[98]

Ethan Katsh and Orna Rabinovich-Einy note that courts and administrative tribunals are experimenting with new models from private sector ODR applications such as those at eBay and PayPal.[99] In Canada, the British Columbia Civil Resolution Tribunal has established a multistage ODR process for small claims and certain condominium cases.[100] The first level of interactive, online engagement provides problem diagnosis and interpretation of the facts of the dispute in a legal context. If this does not resolve the case, the parties move through stages of a possible negotiation option, followed by facilitation, and finally adjudication, all conducted online, by phone, or through videoconference.[101] Other court ODR innovations, addressing case types like family law, small claims, traffic violations, and cases with self-represented parties, have been tested or are being implemented in the United Kingdom, the Netherlands, and U.S. states, including Ohio and Michigan.[102]

Interaction with the Legal System

In designing any dispute resolution system, the designer must be cognizant of how that system will interact with the formal legal system and whether the courts will permit such a program if it is challenged. These questions take an interesting twist when a court itself is creating the dispute resolution options. An obvious threshold question is whether the ADR processes themselves are permissible under the law. Binding arbitration, for instance, could not be imposed by a court in the United States, because it would deny parties their constitutional right to trial.

What about the legality of a court encouraging or requiring parties to use other, nonbinding ADR procedures? Appellate cases in different U.S. jurisdictions have held that a judge cannot mandate participation in a summary jury trial against the wishes of the parties[103] but can require parties to try mediation.[104] The Alternative Dispute Resolution Act of 1998 requires every federal district court to offer at least

Discussion Questions

Some commentators express concern about the decline in the percentage of cases filed in U.S. courts going to trial. What is the ideal percentage of cases or types of cases that should go to trial? What factors would you consider in trying to answer this question?

one ADR option and authorizes judges to mandate participation in mediation and ENE.[105] Other court opinions have addressed the enforceability of good-faith participation requirements.[106]

Another potential conflict exists between the mediation norm of protecting confidentiality and the courts' need to determine facts. Judges may override mediation confidentiality protection when a conflicting public policy objective is deemed overriding.[107] The Uniform Mediation Act, adopted by twelve jurisdictions,[108] has confidentiality exceptions for criminal activity or mediator misconduct.[109] Many codes, model standards, and court ADR rules explicitly provide confidentiality exceptions to prevent violence[110] or to investigate impropriety by the mediator.[111]

Problem-solving courts have reported many positive outcomes, but both ends of the political spectrum have raised concerns regarding a potential abandonment of accountability on the one hand and disproportionately intrusive interventions on the other.[112] Defense attorneys have questioned whether these new courts create inappropriate pressure on defendants to plead guilty in order to obtain services and whether they deny defendants the benefit of the full legal defense they would receive at trial.[113] An additional critique connects some of the early community courts to the broken-windows strategy, as implemented under New York City Police Chief William Bratton and Mayor Rudolph Giuliani in the 1990s.[114] This attempt to reduce crime by substantially increasing arrests for low-level offenses is now criticized by some as ineffective and a contributor to overpolicing and harassment of communities of color.[115]

Resources

Elements in the DSD Analytic Framework interact and can be interdependent, perhaps none more so than resources. For example, a decrease in court resources may increase pressure on a court to narrow its broader public service goals to focus on court efficiency. Such a choice could lead to pressure to settle cases, which may

Discussion Question

In court cases, one party often has more financial resources than the other. If your court has the funds to pay for ADR neutrals for only a few cases, how should you design your ADR program to minimize this power imbalance?

undercut party self-determination, party satisfaction, and the delivery of justice. These pressures may also create ethical dilemmas for court administrators and ADR neutrals.

Public court funding is limited, and allocating those resources to processes other than traditional trial-related activities can be controversial. However, shifting the costs of court-sponsored ADR programs to litigants can present questions of fairness, because of the financial burden on the parties and the risk of bias if only one party pays the provider. Self-represented parties are particularly vulnerable. Insufficient resources challenge a court's ability to provide high-quality services, including training, monitoring, and evaluation of ADR process providers.

Significant reductions to court budgets in the United States since 2007 have had a dramatic impact on court ADR programs.[116] Drastic budget cuts to the state courts in California in 2009 resulted in staffing cuts in San Mateo County that affected the level of referrals and the work of the ADR program's important multistakeholder committees. The system adapted to diminished staff resources by using the stakeholder groups as an on-call support base for consultations on policy, procedures, and program monitoring.[117] In the Northern District of California court program, federal budget cuts eliminated in 2018 most of the previously required early phone conferences between counsel in a case and a member of the ADR legal staff.[118]

The Red Hook court has been supported by a mix of public funding (from several levels of government), nonprofit foundation funding, and AmeriCorps staff.[119] As with any design innovation, these specially funded programs must demonstrate their worth, often within a short time, to compete successfully for public resources.

Evaluation

Court ADR programs are notoriously difficult to evaluate. Different court programs are motivated by different goals, which may not be fully specified at the outset of new programming. Measuring efficiency in cost or time (for parties and the court) and tracking user satisfaction (of parties or counsel) requires surveys.

Understanding settlement rates can be difficult, because many courts fail to track key data on how cases resolve and whether ADR options were employed. Harder still to assess are more qualitative program goals such as rebuilding the parties' relationship and enabling them to reach creative outcomes a court could not order.

As discussed in Chapter 5, meaningful evaluation of court programs is also challenging because of the wide range of variables. For courts with ADR programs, these variables include the number of ADR processes offered, types of cases eligible for each process, the definition of mediation and other ADR processes, the number of processes a given case may encounter, and the wide range of actual practice within each process offered. For specialty courts, the increased number and complexity of goals increases the assessment challenge.

Differences in local legal cultures and program design elements—such as referral structures, training of neutrals, and education of counsel, parties, and judges—make efforts to compare programs more challenging. Individual court cases have their own many variables of the subject matter and complexity of the case, the contentiousness of counsel, the relationships between or among the parties, and more. Effective evaluations of such programs are sophisticated and expensive, with few courts having sufficient resources to conduct thorough long-term analyses. The northern district and San Mateo programs demonstrated high satisfaction rates and savings of cost and time for parties. However, given the wide array of contexts, designs, process definitions, and data-collection methods, it is not surprising that surveys of court programs around the United States have shown widely varying outcomes.[120] These challenges have resulted in broad variability in study quality and a general call for more and better data collection and evaluation.[121]

Because of courts' interest in reducing the number of cases on their dockets, settlement rates are often used as a key measure of success for court ADR programs. The risk of this approach is that it can create an incentive for the court and its mediators to coerce parties into settlement, regardless of procedural or substantive fairness. Even if settlement is the goal, it is often difficult to know which one or more of the activities in the life of a case—or which characteristics of the ADR program—contributed to its settlement.[122]

A critique of many of the earlier court ADR studies is that they paid scant if any attention to the wide range of activity being labeled mediation. Under the Civil Justice Reform Act, Congress tasked the RAND Corporation with evaluating a cross section of courts paired with so-called comparison courts.[123] In contrast to the Federal Judicial Center studies, RAND's results showed no savings of time or money[124] and generated substantial controversy. Although the pairs of courts were

deemed similar by the study's designers, they were viewed by some commentators as "quite different, geographically, culturally and in terms of their caseloads."[125] The results were also questioned because the court programs being studied were "moving targets," changing their programs to respond to the legislation over the course of the study.[126]

New research is focusing on what actually takes place within the many processes labeled mediation and on participants' satisfaction with the process and outcome. ADR programs in the Maryland state courts have been evaluated in a series of studies led by Lorig Charkoudian. In a study of day-of-trial mediations in civil cases in the district courts, the researchers observed the mediations and recorded and coded mediator and participant behaviors. The evaluators categorized the styles used by the mediators in this program as (1) *reflecting* (articulating what the participants' expressed, focusing on their interests and emotions), (2) *eliciting* (asking participants for their ideas on solutions and following up on those ideas), and (3) *offering opinions and solutions* (mediators' own opinions and proposed solutions).[127] Of the three strategies, only the elicitive strategy had a positive effect on reaching an agreement.[128] The evaluation also found that while caucusing had no statistical impact on reaching a settlement, the greater the amount of time spent in caucus, the more likely the case would return to court within a year for enforcement action.[129] Another promising research development is Donna Shestowsky's direct study of litigants' perceptions of different dispute resolution options over the life of a case, which will provide knowledge to enhance the quality of future court DSD.[130]

Evaluation of new court structures, such as Red Hook's problem-solving court, reflects the challenge of measuring conflict prevention. This objective seeks better outcomes for the community as well as for individual perpetrators and victims. Program designers seek to achieve not only retributive justice but also procedural and sometimes therapeutic or restorative justice. A comprehensive evaluation of Red Hook noted the program's success in enhancing procedural justice and cited this increase as the likely contributor to the positive findings of reduced recidivism in adult criminal cases[131] and increased community approval of the courts.[132]

All courts should commit the necessary resources to collect data that will allow effective internal and external evaluation. Best practices include coding case data in the internal court system, such as the type and time of ADR referral, the processes to which the case was referred, the outcome of these processes, the type of case, and whether parties were represented. Following the ADR process, the parties, counsel, and neutral should be surveyed.[133]

Conclusion

Court program innovations are institutionalized in federal and state courts in the United States and are expanding internationally. New process options have led to new designs and reconsideration of the court's role in democratic governance, including the strengthening of connections between courts and the communities they serve. In response to societal changes and the unanticipated effects of court rules and changing legal culture, courts continue to innovate, creating and amending procedural rules and process options to try to improve the delivery of justice.

Effective application of the DSD Analytic Framework elements can help create systems that provide maximum benefit to users in these sensitive contexts, but this application will require clarity of goals, deep cultural and historic knowledge of local dispute resolution systems, and the willingness and ability to evaluate and adapt as societies and technologies continue to evolve.