

Mediation and Law

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Alternatives to law in recent years have gained much popularity. With an overwhelming amount of cases being brought before the court not only is the court looking for alternatives but the community as well has grown tired of the constant threat of being sued. The court searches for ways to relieve the endless docket while the community seeks a way in which to create an atmosphere of togetherness instead of conflict among its citizens. The community believes that the court settled disputes are tearing the nation apart. What once were private arguments are not matters of judicial judgement.

Community mediation has been one alternative to the court that seems to have had the most success. It is a program that steps in before litigants go to court and is designed to enhance communication between the disputants so that they may resolve their conflict out of court. One of mediation's goals is to teach others how to build constructive confrontational skills to encourage disputes to be settled privately. Also, mediation seeks to maintain or develop a friendly bond the citizens must maintain with each other.

Literature Review

The importance of community mediation on the legal system has been examined by several sources including researchers, lawyers, judges and the community itself. A significant body of research exists on mediation. The research and findings contain an array of opinions on the impact of mediation, how it should be administered, who should administer it and whether or not it is beneficial to continue it. The majority of the research has displayed an overall positive attitude toward mediation and many articles

have made suggestions on how to reform mediation to make it more effective. Of the articles that negatively portray community mediation, none have suggested a suitable alternative to overloaded court dockets or how to provide legal assistance to those who cannot afford it.

Topics in the Literature

In the literature, some of the research topics on community mediation involve the anticipated, positive effect that mediation should have on the way lawyers negotiate and if mediation training for these lawyers provides any significant improvements.

Suggestions in the literature involve ways to improve mediation techniques when dealing with clients. These include an idea called constructive confrontation, which is a technique intended to be used with the traditional negotiation methods in hopes to improve the effectiveness of mediation (Burgess, 1996). Constructive confrontation is a method of negotiation in which the emphasis is based on abandoning the emphasis on resolution and instead focusing on the need to pursue empowerment and recognition (Burgess, 1996).

Other literature focuses on the methods in which mediation programs should be funded. These articles vary considerably on who should be funding the programs and what impact the sources have on the substance and objectives of the program, although all the articles agree that the programs should be somewhat decentralized. Boehm and Flaherty (1995) talk at length of the ills of federally funded programs and encourage state control while Pavlich (1996) goes further by saying state controlled programs are a way to expand state power and control, therefore mediation programs should be run by local governments. Hedeem and Coy (2000) go even further by questioning the objective of

local court funded programs, insinuating that their objectives are not in sync with the true purpose of community mediation.

Previous Research Methods

The methods used most often in community mediation research are observations, interviews including surveys and data collection. Gordon (2000) used surveys, sent to mediators and members of the North Carolina bar where he was conducting his research, to determine if mediation changed the way lawyers negotiate. He asked a list of questions based on competitive and noncompetitive strategies of negotiation, in which the respondents were to agree or disagree. The noncompetitive questions focused on a client's emotions and needs, which should show signs of a mediation approach. In turn, the competitive questions emphasized the importance of the client's demands and the true bottom line of the negotiation, which should show signs of a non-mediation approach. Gordon (2000) also used observational data in which he sat in on mediated settlement classes and observed how the participants interacted with clients.

Burgess (1996), who wanted to improve the mediation program with constructive confrontation, also conducted interviews, held seminars and analyzed cases as well as data collection. He used a less structured interview than Gordon (2000) did in which he focused on two main questions; "How can one confront a particular intractable conflict more constructively?" and "What do you mean by constructive?" Burgess (1996) also asked respondents to tell their stories of conflicts they have had and he probed them to determine how his constructive confrontation would have benefited in these situations. This puts mediation back at its original goal, to encourage the community to resolve their differences on their own. Observation techniques were used in all of the articles that

questioned the integrity of the programs based on their funding sources. Many researchers sat in on several programs and conducted interviews to determine if the objectives of the programs fit those needs of the community or the needs of the establishments that funded them. Boehm and Flaherty (1995) compared statistics on Legal Services Organization of Indiana (LSOI), which is a federally funded mediation program, with the statistics of the Indianapolis Legal Aid Society (ILAS), which is state funded program. He compared the number of cases each agency handled comparative to the funding each received and how much each case cost including the number of consultations each performed.

Boehm and Flaherty's (1995) theory was that state funded programs had more insight into the individual needs of its communities and could better accommodate these programs than federally funded ones. He also used statistics provided by the National Association for Community Mediation that has 150 programs in 37 states, which are not federally funded.

Findings in the Literature

The findings for the research are all positive indications that mediation is making a difference and efforts should be made to promote it. It was found that mediation has a slight effect on the way lawyers negotiate but more notably the lawyers who have had some form of mediation training have a more positive attitude and commitment to noncompetitive negotiation styles than those who lack such training. It was also found that more attorneys think that a litigant's emotions and needs are an important consideration when negotiating in mediation than in routine settlement. When the negotiation is not mediated more attorneys see negotiation as a zero sum, or one in which

one side's gain is the other side's loss (Gordon, 2000). These findings may be somewhat bias because the observational data could not be random and these findings can only be representative of North Carolina.

The findings in Bugess's (1996) research conclude that the constructive confrontation method is a beneficial asset to community mediation programs. Although the idea was never officially tested through his research it suggests that this method is one that puts the mediation program back in perspective of the community, its original intent. This model provides an outline in a three-step process, involving a diagnosis, treatment and monitoring that is believed to be the best way to mediate a conflict. Its emphasis is not on resolution but instead on recognition, in an effort to bring the community closer.

The research also concluded that state funded community mediation programs were more productive than federally mandated techniques. Boehm and Flaherty (1995) found that the state funded program, ILAS provided more legal assistance including consultations and litigations with fewer resources than the federally funded LSOI. On the same note, though, mediation programs funded by the courts were found to lose credibility because of the perceived influence the court has over the program, whether the influence was actually present or not. Many of the court-funded programs were found to be under pressure to dispose of cases referred to them by the court even if it was against the wishes of the clients. Also, it was found that favor was granted toward the complainant was expressed in court funded programs, even though the program is intended to serve as a neutral negotiator. Some suggestions offered to gain back these program's credibility include less reliance on referrals from the courts and more from

police, counselors, probation officers and social workers and an array of funding sources (Hadeen Coy, 2000).

Problems with this research include statement of the researchers that the court system has lost credibility, was based entirely on assumption because no interviews were given to the public on their perceptions of the programs. The problem with the Boehm and Flaherty's research is that they statistics taken on the two programs may be measuring different types of interaction with clients and may not include these in their official numbers. Also, these programs were in different regions where the different attitudes of these programs may differ in which one may not receive as many clients.

Methods

In my internship I plan to develop a successful mediation program that will do many things including, (1) create an environment of cooperation within the community, (2) help clients settle disputes in a positive, productive environment, (3) free up the court system and (4) put the lawyer in the light of a mentor.

Goal Attainment

Encouraging negotiation between the clients before bringing a case to court sets an example for the rest of the community. A mediation program is most effective in an environment that promotes problem solving in a non-argumentative way. Also, it is crucial that the amount of civil litigation present in our courts today be cut significantly. The arguments faced by the courts today, were in the past, most often handled by friends, family member and the church. A successful mediation program can help to restore this

community-based conflict resolution. Finally a closer relationship between lawyer and client is essential to create a mediation program. This gives the client a sincere belief that his side of the argument has validity but at the same time will earn a trust of the lawyer's opinion. Once someone takes on a mentor mentality it is much easier to negotiate.

These four goals I have listed are important ones for the law community to try and achieve. It seems that so often the lawyers are the ones creating the arguments and this is a way to contribute something to the community using their skills that is very much needed.

Program Development

To begin a mediation program it is important to first decide which cases would be most appropriate to use and which would be most beneficial. A review of the client's first consultation should reveal whether or not the case is acceptable for mediation. I believe that the majority of civil cases should be first handled in a mediation program before going on to court. These cases are most appropriate because the majority of them are quarrels between acquaintances or family and these are the bonds we want most to stay intact as well as the ones that people are most often willing to sacrifice for.

Although mediation is possible in criminal cases it is much more difficult to negotiate with the state to drop the charges than it is with a single person. Once a familiarity is achieved determining what cases work best in the program it may be appropriate to drop some or include others. This first step by itself should help to free up the court system but it also requires an effective mediation process.

The subject playing the part of the mediator needs to be a skilled negotiator, requiring the practice to hire a trained instructor. There are several courses that teach

effective techniques and the best ones are found to be non-confrontational approaches. This brings me to another goal: helping clients to resolve disputes in a positive, productive environment. When the mediator is using a non-confrontational manner in which to resolve conflict, it is evident to the clients and in most cases they are more than likely to conform to the surrounding atmosphere. Once clients begin to use a non-confrontational approach, they let down their guard and it becomes more likely for a successful agreement outside of court. This could include a face-to-face discussion between the disputants or one in which they never see each other. It is best to negotiate between parties, and later when this process becomes more comfortable to them, to try and bring them together to meet in person.

Another goal to achieve for a successful mediation program is to create a mentor out of the lawyer. This involves the lawyer making somewhat of a sacrifice and spending more personal time with the client. I believe this can be accomplished because there will be less time spent in court. The lawyer must learn to emphasize with the client, and although not necessarily agree with the client, produce a sound reason as to why the client has merit. When you have made the client believe that he/she is not the bad guy, either for being the defendant or for bringing up the charges, the client is now relaxed and more willing to accept your opinion. When you begin to turn the tables and have your client empathize with the other side, it is easier for them to accept that their argument may not be as justifiable as they first believed. They will be able to look at the argument from more than one angle. In turn, this will have an impact on the community.

Challenges

With a small firm attempting to take on such a large project it is expected that one will encounter problems. It has been discovered that it is often beneficial to have help that is trained as a mediator but not necessarily a student of law. Many times this can be a secretary that will be able to look at the client's file and make the initial decision as to whom would benefit most from the program. When members of the staff of a firm are trained in mediation it creates an atmosphere that makes it easier for the clients to adapt to and accept. A secretary may sometimes seem less formal to clients and therefore be a more comfortable person for the client to relate to.

A mediation program will also require the firm to "sell" the program to its clients. The mediation program may run into problems because many clients do not see the advantages of settling a dispute without any formal contract holding either side to the arranged agreement. The duty of the firm would be to show the positive effects of mediation-based settlements as opposed to court-settled disputes. It must be stressed that settling out of court would help to avoid any unwanted exposure to one's personal life. Also, it avoids the possibility of one party getting nothing while the other gets everything. In mediation the goal is to make everyone a winner. And, it is also important to stress the need to have a community that supports each other although we may all not agree totally with others beliefs. A team that can effectively stress this to their clients will have a high success rate in participation.

Evaluation

I believe that an accurate evaluation would of course have to consist of the number of clients who agreed on a settlement out of court. Each client who participated

in the program would be labeled as either “successful” or “not successful.” It would also be beneficial to make note of those who could not resolve their conflict even after a settlement was agreed upon and request to take their dispute to court. Unfortunately, this information would be somewhat difficult to obtain because the client may not go back to the same firm. I would encourage a short survey given to all clients who have completed the mediation program inquiring their satisfaction with the program. The clients that can be verified as not to have had a court settlement would be considered as success. However, if a client did return to the firm requesting additional mediation-type guidance than I would consider this to be a sign of a positive experience. The fact that the client wishes to continue using the program would be a sign of success.

In the area of settling disputes, there will never be a shortage. But when people have positive experiences with a typically unpleasant situation they tell people about it and this will eventually lead the public to expect this same service from others.

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