Lessons for Wisconsin: Romania as a Mediation Laboratory

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In 2000-01, I served as liaison to Romania for the American Bar Association's Central and Eastern European Law Initiative (ABA-CEELI). While there, I advised the Romanian government, chambers of commerce, the U.S. embassy, the U.S. Agency for International Development and other institutions on their efforts to reform the country's justice system. The most prominent of CEELI's programs for Romania during this period were aimed at introducing mediation to the country.

Welcome to the lab

Romania is a microcosm of the wider region. As citizens there reacquire long-denied rights, they anxiously seek justice in a legal system characterized by crushing caseloads, subpar funding, inadequate staffing, antiquated record-keeping, endless delays and worse.

Leaders in the region have come to appreciate that one of the best ways of achieving justice reform is to relieve pressure on the system by introducing a culture supportive of mediation. So mediation programs there are receiving increasing attention at all levels of government and in the "civil society."

And, because countries like Romania start with a base of little or no experience with modern mediation theory and practice, they serve as a kind of laboratory for the development of effective mediation programs.

My experience in this laboratory has taught me three great lessons that may be of value here in the U.S. These lessons touch on the need for involvement by lawyers in developing and operating mediation programs, effective training of mediators, and, finally, the continuing debate over the relative merits of "facilitative" and "evaluative" mediation methods.

Lesson one: The importance of lawyers

To illustrate, before I arrived in Bucharest, a pilot mediation program was started in one of the local trial courts. The national bar association quickly organized a lobbying campaign that killed it at birth. The bar's objections:

- First, they hadn't been consulted.
- Second, because they hadn't been consulted, the professional needs of practitioners hadn't been taken into account in the program's design.
- Third, virtually anyone could qualify as a mediator under the plan.
- And, finally, the bar had no role in the administration of the program. In short, a key player had been left out of the planning process.

Just as in Bucharest, many a mediation program here in the States has gone awry because well-intentioned program designers have failed to appreciate the central importance of lawyers to the success of their plans. It's fundamental, for example, that, in any mediation program that hopes to deal with

"economic cases" (i.e. cases with substantial economic value), lawyers will likely be involved as advisers and advocates on both sides of a given case, and those lawyers will serve as the gatekeepers to the program.

In other words, if the lawyers say, "Let's mediate," it will happen, and not otherwise.

Mediation programs aimed at resolving economic cases should, therefore, be designed with lawyers and law practice considerations in mind, and practicing lawyers should be deeply involved in the design and operation of any such programs.

My experience in Romania also taught me that it's best to have lawyers involved, not merely as advocates and gatekeepers for mediation programs, but also as mediators. This is because economic cases almost always involve complex legal issues that a mediator untrained in law may not adequately appreciate. And neither lawyers nor their clients want to use valuable mediation session time educating their mediator.

Lesson two: The training of mediators

Speaking of mediator training, as part of the failed pilot mediation project in Bucharest, an effort was made to prepare a cadre of local mediators. A call went out to the community inviting anyone interested in becoming a mediator to attend a free training program. Nearly 100 people responded. The training was therefore judged a success.

Regrettably, however, more than a year later, not one of those who had been trained had found a live case to mediate. This is because one of the risks of introducing new mediation programs is a tendency to train the wrong people as mediators. A sense of urgency often moves program developers to act quickly to prepare a corps of neutrals for early service. This process often involves broadcasting a general call to attract those interested in becoming mediators, perhaps coupled with an announcement that the training will be provided free of charge. The result is, too frequently, that the training room quickly fills with eager recent graduates and the like.

There are two problems with this approach. First, both lawyers and their clients tend to want mediators with gray at the temples.

This is partly a reflection of a natural reverence for scholarship, professional achievement and position authority. As importantly, though, it's also a reflection of the fact that increasingly complex legal disputes require resolution with the aid of seasoned problem-solvers as neutrals.

Still more fundamentally, the mediation program that searches out its new mediator corps by asking the public at large who among them would like to become a mediator asks the wrong question and asks it of the wrong audience. The right audience is the membership of the program's target market (and their lawyers), and the right question is, "Whom do you want to be your mediator?" Thus, the best approach for mediation program developers is, first, to define carefully the target market of the program, then to survey that market with the pertinent question, and, finally, to train as mediators only those who've been thus identified as viable candidates.

This market-oriented approach requires close cooperation among attorneys and mediation program planners. It also takes more time and effort than the quick-fix method. But it's essential if a mediation program is to be successful.

Lesson three: Facilitative v. evaluative mediation

One of my first discoveries on arriving in Bucharest was that virtually all of the most viable candidate mediators in the country were identified on a very short list maintained by the national chamber of commerce. They were its veteran arbitrators, and, almost to a man (they were all men), they were emeritus law professors, senior partners of well-known law firms or retired government officials. Not one of them had had even two minutes of formal training as mediators. Still, it quickly became clear that each was far more likely to see service as a mediator than were any of those that had been trained.

The reason, I soon learned, was in the perception of the core function of their mediator among attorneys and their clients.

Although I, like others, came to Romania prepared to preach the gospel of facilitative mediation, I was instructed that both lawyers and their clients expected more from their mediator than facilitation. In fact they were unwilling to pay for mere facilitation, and instead expected both facilitation and evaluation from their mediator.

For years the "third rail" of the mediation profession in the U.S. has been a debate over the relative merits of the two dominant styles of mediation practice, one "facilitative," the other "evaluative." Champions of the facilitative approach, which emphasizes the benefits of the unadorned mediation "process," say theirs is the purer form because it leaves the parties free to divine the best outcome for their dispute, unencumbered by the opinions of the assigned neutral.

Some proponents of the facilitative style even say there may be an ethical barrier to use of the evaluative method, which gives the parties the opportunity to have input from the mediator, if desired, on particular issues in the case. Still others say the evaluative approach opens the mediator to charges of practicing law without a license (if s/he is not a lawyer), or to risking a malpractice claim (if s/he is a lawyer) in the event one of the parties finds the proffered advice disagreeable.

Proponents of the evaluative approach, on the other hand, say that offering constructive, issues-oriented opinions or advice, when requested, merely enhances the utility and efficiency of the mediation process and gives the mediator another useful tool with which to serve the parties.

What experience with the development of mediation programs in Romania has taught me is that mediation customers there, like many of their stateside counterparts, not only want a measure of evaluative input from their mediator, they insist upon it. This suggests that the long-running debate over the two dominant styles of mediation overlooks the marketing dimension of mediation practice.

The lesson here is simple: Those who ignore the wants and needs of their customers do so at their peril. An effective mediation program planner should, therefore, not waste energy debating which is the better style of mediation. Rather, a planner should take a marketing approach, and ask the customers of the program, "What style do you want?" If the answer is that they want facilitation, that's what they should have. If, instead, they want evaluation, they should get it. And if they want a mix of the two, they should have that.

The ultimate lesson

I was called to Romania to teach mediation theory and practice methods to my colleagues there. What I discovered from them was that, to be a good teacher, I must first become an attentive student. My Romanian friends, with their admirable blend of ancient learning and openness to new ideas, taught me to see my profession in a new light. I believe they taught me well.

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