Quality, committed neutrals are essential to a successful court ADR program. For your program to be effective, your planning committee will need to develop a system that provides neutrals who are skillful, satisfy the reasonable expectations of the participants, function ethically and possess the necessary knowledge. The individuals who administer your program will also want neutrals who are reliable, don’t cancel at the last minute and complete their record-keeping responsibilities on time and accurately!

It is difficult to design and implement a system that assesses whether neutrals possess these qualities. When considering difficult questions such as, "How do we know who is a good mediator?" your planning committee may want to throw up their hands and claim it’s impossible. The Justice Potter Stewart quote about pornography, “I know it when I see it,” may come to mind. But because these ADR programs are directly related to the justice system, it is critical that the planning committee determine standards for selecting neutrals and methods for maintaining neutral quality.

In determining the appropriate standards for neutrals in a court ADR program, your planning committee should consider the characteristics of the program. If, on the one hand, a program is essentially a function of the court, the litigants are unsophisticated, the parties do not select their mediator and the referral is mandatory, the court has a fundamental responsibility for ensuring highly skilled mediators who function at the highest level of ethics. On the other hand, if a court simply suggests ADR, the litigants are sophisticated, the parties choose any neutral they want, and participation is entirely voluntary, your planning committee may decide it has a lower level of responsibility for ensuring the neutrals the parties select can offer quality ADR services.

No court program, however, can totally divest itself of responsibility for some level of performance by neutrals, especially as relates to ethical conduct. At the very least, you should put a system in place to receive complaints from participants about neutral behavior. This system should include due process protections for neutrals.
APPLY THIS ADVICE TO PARTICULAR TYPES OF CASES

If you are developing a family mediation program that will be operated by the court, with court staff conducting mediations with parties who don’t have lawyers and who don’t have any say in selecting their mediators, you will have a high degree of responsibility for ensuring quality mediation.

If you are developing a large civil litigation mediation program where the parties decide whether to mediate, are represented by counsel, and select and pay their own mediators, you will have a lower degree of responsibility for ensuring quality mediators.

FOUR FACTORS TO SET AND MEASURE STANDARDS

To determine how your court will set standards for your program and measure whether neutrals meet the standards, your planning committee must understand these four factors.

- **Neutrals must be skillful**
  Many of the characteristics of a good neutral cross all forms of ADR. For example, all neutrals must be excellent communicators, able to control a roomful of parties in dispute, and able to think critically about and analyze a conflict situation. Some skills needed by neutrals will vary from one ADR process to another. For example, you will want mediators who are good at empathic listening, overcoming impasse and assisting parties to develop creative solutions. Your arbitrators should be skilled at deciding whether to accept evidence and at writing awards.

- **Neutrals must satisfy the reasonable expectations of the participants**
  Because court ADR is a justice experience, participants should expect to experience procedural justice. For example, they should feel that the ADR process was a fair process and that they had a chance to be heard, even if they did not prevail or get exactly what they had hoped.

  Your planning committee may also decide that you want the neutral roster to reflect the makeup of the community. For example, you may not want all the circlekeepers in a restorative justice program for young girls accused of shoplifting to be senior male lawyers. Similarly, if you create a program to mediate trademark infringement cases, the lawyers are likely to expect mediators with litigation experience, preferably in intellectual property. This is an area in which input from stakeholder groups will be helpful.

- **Neutrals must function ethically**
  “Ethics” refers to the principles that underlie the ADR process. For example, do mediators function within the bounds of confidentiality, party self-determination and mediator impartiality? Are evaluators in family custody disputes balanced in dealing with both mothers and fathers?

  Model standards, which have been developed for many ADR processes, can be adapted for court ADR programs. Your state judiciary may have adapted model standards and adopted them as court rules that will govern your ADR program. There are many other sources of model ethics standards. The [Model Standards of Conduct for Mediators](#), for example, were most recently revised and approved by the American Arbitration Association, the American
Bar Association, and the Association for Conflict Resolution in 2005. The American Arbitration Association and the American Bar Association have also developed a code of ethics for arbitrators in commercial disputes. On the Association of Family and Conciliation Courts site, you can find more than a half dozen model standards for processes ranging from divorce mediation to eldercare coordination. Your planning committee may choose to adapt one of these sets of model standards for your court ADR program.

- Neutrals must possess necessary knowledge
  The substantive knowledge that neutrals need varies considerably from one type of court ADR program to another. All neutrals need to know how the ADR program operates, e.g., how to write an agreement or award, what the recordkeeping requirements are, and timeframes for extending the ADR process to additional sessions. That may be all the substantive knowledge needed by a mediator in small claims court. On the other hand, to mediate parenting time in parentage cases, a mediator may need to be very familiar with topics such as stages of child development, intimate partner violence, and typical parameters the court will approve for parenting plans.

PITFALLS TO AVOID WHEN SETTING STANDARDS

*Be sure to look at a variety of qualifications when picking neutrals*
Your planning committee may be tempted to require that neutrals have more knowledge of the law than is necessary. This urge is understandable because most people involved in developing a court ADR program usually come at it from a legal perspective. To develop the best roster of neutrals, you would do better to look at the sum of the four factors. Do the potential neutrals with stellar legal credentials also have the skills to ensure the participants experience procedural justice? Are they familiar with the ethics for the particular ADR process, not just legal ethics? Developing a roster with a balanced set of characteristics will serve your participants better than focusing only on legal knowledge.

APPROACHES TO SELECTING NEUTRALS

Most of the criteria used by courts to establish standards for neutrals are proxies for skills. When selecting neutrals, courts focus on skills, and sometimes on knowledge and ethics, but rarely on satisfying the expectations of participants. For example, mediators are often required to have a particular type of education, experience or training, rather than meet performance-based measures of ability. However, education and non-ADR experience, for the most part, have not been proven to relate to neutral ability.

There have been some attempts to develop performance-based testing methods that would be more directly related to actual ADR practice than the proxy standards are. Two of these approaches are written tests and observation of an ADR session — either real or simulated. Community mediation programs and law school clinics sometimes develop systems that use performance-based assessment of mediators, and provide some mix of training, observation, debriefing, co-mediation, and mentoring to assess and improve their mediators’ skills.
Some programs require that neutrals adhere to particular ethical standards, but there is no measurement of the neutral’s ability to apply the standards. Attention is often only paid to ethical matters when there is an allegation that standards were breached. Whether a neutral has the necessary knowledge is typically assessed by whether they have work experience or education that could be expected to provide the necessary knowledge. For example, some foreclosure programs have sought neutrals with experience in banking, foreclosure or bankruptcy.

**NEUTRAL SELECTION**

Your planning committee will need to tackle both sides of the neutral selection coin: putting neutrals on a roster from which they can be assigned and assigning a neutral to a particular case. This chapter discusses selecting neutrals for a roster. See Chapter 8: Design the Mechanics of Your Program for the mechanics of identifying a particular neutral for a particular case.

To develop a system to assess potential neutrals, your planning committee needs to consider the four factors – skills, party expectations, ethics and knowledge.

**SKILL**

**Training**

One of the first criteria your planning committee will want to determine is what training is required to serve on a roster. While it may not ensure skill, training is still an essential criterion. For mediators, 40 hours is the typical training base for most programs. However, you will need to determine if your roster will require more. It is not unusual to require additional time for specialized training. For example, more hours are needed for training family mediators to recognize and address substance abuse and intimate partner violence. On the other hand, some community mediation programs that rely heavily on mentoring and co-mediation to develop skills require a lower number of initial hours of training. Arbitrators and early neutral evaluators also will need less training time, assuming they are familiar with the law they are expected to apply.

Simply requiring a number of training hours is not sufficient, especially for mediation. You will want to ensure that the training is high quality, and includes the following: the trainers require that the neutrals participate in the entire training and either the training addresses the type of cases involved in the program (e.g., no family training for a civil program) or it is a general training when that is sufficient for the area being addressed, e.g. general training to do small claims cases. Additionally, for mediators, you will want a significant portion of the training to be devoted to role-plays. Deciding which trainings to approve can be based on a review of the training agenda, manual, and exercises, plus criteria for the lead trainer. While approving training programs can help weed out incompetent trainers – which is certainly a good thing – it does not ensure skilled mediators.

In addition to the training characteristics described above, you may want to add one or two other criteria. The optimal criterion would be a requirement that the assessment of trainees’ performance be based on observation by their trainer, who would then report to the court whether the trainee is competent to mediate. This observation can be done during or after training. Few courts require this because it is costly to have an experienced mediator observe multiple mediations. Plus, it requires agreement about what is and is not acceptable mediator behavior. For example, what if a mediator didn’t do anything ethically wrong, but didn’t have the skill to help the parties overcome impasse? Determining where to draw that line is more difficult than it may seem.
**Education**
You may find that deciding what kind of education to require is more controversial than setting a training standard. This requirement varies among ADR processes. Some courts require particular education, such as a law degree, to mediate even small claims cases, while others do not have any education requirement for any type of case. When deciding on education requirements, you should determine whether there is any correlation between that education and the skill or ethical behavior of the mediator. The American Bar Association Section of Dispute Resolution is on record as opposing any requirement that mediators for court programs be required to be lawyers, as there is no evidence that lawyers are better mediators.

An approach that is more nuanced than all-lawyers or no-lawyers will serve you well. For example, you may want to require legal education (and experience) to serve as an arbitrator. But even in arbitration, you may find that a variety of educational backgrounds is useful. You can imagine that if you were developing an arbitration program for attorney-client fee disputes, you may want to use three-person panels of two lawyers and a community representative so that the clients do not feel they are being unfairly treated because the panel is all lawyers.

**ADR EXPERIENCE**
Your planning committee should consider whether to require prior ADR experience. This demonstrates a track record and reduces the need for neutrals to learn on the job while handling your program’s cases. For example, if your planning committee is developing a parenting coordination program for high-conflict, low-income parents in which the court will pay the parenting coordinators, you may set a requirement that the parenting coordinators have experience handling at least five or ten cases.

**PARTY EXPECTATIONS**
You will want to assess party satisfaction by collecting party surveys once the neutral is working for the court ADR program. No entry criteria related solely to the ability to meet reasonable party expectations have been articulated or studied.

**ETHICS**
The court rules your planning committee develops for your ADR program should either incorporate ethical rules for the program or refer to ethical rules as presented in another document, such as statewide or model ethical standards. Such standards provide broad guidance for neutrals and give parties some assurance of adherence to ethical norms.

At the very least, you need to describe situations under which a neutral could be removed from the court’s roster. You should describe a complaint procedure that could trigger removal. That process should also offer due process to the neutrals.

**KNOWLEDGE**
Your planning committee will need to decide what work experience will be required of neutrals. Such experience can often provide neutrals with knowledge of a particular type of case or area of the law. This is most readily seen with lawyers who practice in a particular area of the law. Some court ADR programs that hire neutrals look for individuals who have had experience that prepares them to be neutrals in a substantive area, such as intellectual property or construction.

It is important that your planning committee understand that work experience is not confined to legal experience. For example, someone who had worked in a foster care agency might have a good
background, when combined with mediator training, to become a mediator in a child protection ADR program. Similarly, someone who worked in personal banking might be well-prepared to conduct ADR for foreclosure matters.

**APPLY THIS ADVICE TO REQUIRING SUBSTANTIVE KNOWLEDGE**

In one of the first major civil litigation mediation programs RSI helped develop, the court invited the most respected litigators in the local legal community to complete mediation training and become the first pilot group of mediators. By developing a roster of respected lawyers, the court hoped the new mediation program would be more readily accepted. The program seemed to work. The early mediations tended to settle, and the parties and their lawyers were satisfied with the program.

Then, after several months, we noticed the resolution rate was falling. Looking more closely at the monitoring reports, we saw that the types of cases had become more varied, including real estate and commercial cases along with the core of personal injury (PI) cases. While the PI cases were settling, the other types were not faring as well. We realized that the first group of mediators invited by the court were mostly PI lawyers. The program needed a roster with more varied legal knowledge and experience. With the next training group, the roster was diversified and the settlement rate came back up.

**WHO PAYS THE NEUTRALS**

Your planning committee will have to decide several questions about neutral pay. Are the neutrals paid? By whom? How much? For what amount of work (e.g., by the case, session or hour)?

You may want to link the question of who pays the neutrals with who will manage them. On one end of the continuum of management and payment, the court pays staff members who provide ADR services. Moving along the continuum, the court may maintain a roster of neutrals – independent contractors – who are paid by the court and selected by the court for each case. The court could also maintain a roster of independent contractor neutrals who are paid by the parties or who volunteer. At the far end of the continuum, the court can contract with another entity to maintain a roster of mediators, and those mediators might be paid through a contract with the court, paid by the parties or be volunteers.

You might want to establish a program that uses a combination of approaches. For example, in some programs, mediators volunteer for an initial block of time for each case (e.g., three hours), and then work out a payment plan with the parties for any service following that initial time. If you are considering this approach, you should know that the way these programs usually work in reality is that the mediations only last three hours, and either the case is settled or not in that time. In another approach, as a condition of being on the court roster to receive paid referrals, neutrals must agree to mediate a certain number of pro bono cases per year. For example, a court may require three pro bono mediations from each family mediator on the court’s roster every year as a way to provide services to families who could not otherwise afford them.

This question of who pays the neutrals may be a deciding factor when you are considering mandatory vs. voluntary participation in an ADR process. If the court is going to mandate participation, many argue that the court should also provide no-cost or sliding-fee access to ADR.
services. Mandatory participation can be one of the most expensive options, especially if the court is paying the neutrals.

**MONITORING NEUTRALS**

Your planning committee can’t stop at deciding how neutrals get onto the court’s roster. You also have a responsibility to determine whether neutrals should stay on the roster. Some courts simply require that neutrals renew their standing with a letter during every given period, such as a year or three years. That may keep the roster up-to-date in terms of availability, but it will not ensure quality or adherence to ethical standards.

In general, courts’ monitoring of neutrals ranges from simple to complex. Your planning committee will probably start with the most basic requirements: neutrals must sign up to handle a certain number of cases per year and annually report that their malpractice insurance is in effect. Programs often offer continuing education, which may sometimes be mandatory, especially if it addresses a critical aspect of the ADR program, such as screening for intimate partner violence in divorce cases. While programs should provide a complaint process, that is often one of the later elements that is added.

There are three other approaches that are more complex. They involve observation, surveys and a complaint process.

**OBSERVATION AND REVIEW**

One way you can know if a neutral is doing a good job is to watch the neutral conduct an ADR process. While this may seem straightforward, doing it in a way that is fair and feels fair to the neutral can be daunting. (See RSI’s [Model Tools for Peer Review](#) for guidance on how to develop and operate an observation and review process.) One challenge is how to allow for differences in style while still requiring that the neutral conduct the ADR process within the parameters of the ADR program. Another issue can be the sometimes quirky nature of ADR cases not providing an opportunity to see how the neutral would usually handle a case. This, as well as scheduling difficulties, could require several attempts to get a good observation.

You would need to follow the observation with a discussion with the neutral. If the observation is intended to determine if the neutral is meeting criteria, the observer may need to consult with staff or other neutrals before issuing a decision as to the neutral’s competence. (If the observation is intended only to help develop the neutral’s ability, no additional consultation would be needed.) You should try to conduct observations of all neutrals on a regular basis to improve the skills of everyone on the roster, but observations can be scheduled when triggered by a complaint or by a staff person’s concern about the neutral’s competence.

**PITFALLS TO AVOID WHEN CONDUCTING OBSERVATIONS**

*Make sure your observers are respected*

When conducting observations, it is important that the neutral who is being observed respect the opinion of the observer. Typically, the observation is done by someone the program and the neutral recognize as highly skilled, such as an experienced neutral. A less-experienced neutral may not have the status to provide feedback that will be accepted.
EVALUATION FORMS

Another good way you can assess how the neutrals are doing is to ask the participants. Again, this is more complicated than it may seem. Deciding what you want to know, formulating reliable questions, collecting information and tabulating results can be tricky. Fortunately, there is a tool your planning committee can put in place for your mediation program to simplify evaluation. RSI, in cooperation with the American Bar Association Section of Dispute Resolution and a national committee of court ADR experts, developed a suite of mediation surveys to address the need for professional guidance when monitoring mediators. Click here to learn more about the surveys.

Collecting feedback from parties and their lawyers should be a regular part of your program’s monitoring system. Feedback should be provided to each neutral on an annual basis (sooner if there is a problem) to let the neutral know how the parties perceive his or her performance.

COMPLAINT PROCESS

One significant step your planning committee should take is to develop a complaint process. It will help your program meet reasonable expectations of participants. Your state court office of ADR may already have such a process in place. For example, Florida, which has arguably one of the most well-developed state court ADR programs in the country, has promulgated an ethics policy, publishes ethics opinions, and operates a complaint process. Other states have taken similar steps in their own contexts and some state court ADR programs have statewide systems of selection, development, monitoring and continuing education for neutrals.

NEUTRAL DEVELOPMENT

Your approach to neutral competency should by no means stop at setting minimum standards for programs depending on their program characteristics – in essence, a “half-empty” approach. It is also worthwhile to look at standards from a “half-full” approach. That is, how might neutrals’ skills and ethical abilities be developed further? Efforts such as continuing education, mentoring and neutral peer groups can assist in this development. To keep the cost of promoting ongoing development of neutrals to a minimum, you may want to collaborate on continuing education events with other entities, e.g., professional groups of neutrals, lawyers, and other professions, such as social workers or engineers.

CONCLUSION

For your program to be effective, your planning committee will need to develop a system that provides neutrals who are skillful, satisfy the reasonable expectations of the participants, function ethically and possess the necessary knowledge to competently resolve cases. To establish and maintain this roster, you should set standards that are appropriately high for neutrals in your program, establish suitable monitoring and disciplinary systems, and encourage on-going professional development of neutrals.

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