

Mediation works, but will it play in Macedonia?

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I recently traveled to the Republic of Macedonia under the auspices of the U.S. Department of State. My mission was to meet with various stakeholders to learn why that country does not use mediation to its full potential and to provide ideas to increase the use of mediation. While Macedonia wrestles with whether or not to adopt compulsory mediation, other jurisdictions provide persuasive alternatives to encourage mediation.

In 1971, Macedonia created a Peaceful Resolution Council, comprised of three members with authority to appoint deputy members. The council's purpose was to settle disputes referred by the court. Unfortunately, the public did not utilize the council to its full potential and it had no power to compel attendance. The council dissolved in 1991.

There are approximately 650,000 cases filed each year in the city of Skopje, the capital of Macedonia. In a country with approximately 2.2 million people, this is an extraordinarily high volume of litigated cases. Due to the number of lawsuits, Macedonian judges conduct a trial every other day. To encourage mediation, the Ministry of Justice drafted the national Law on Mediation, effective Nov. 1, 2006. Macedonia currently has 131 mediators, trained in Slovenia. Under a mediation pilot program, 103 litigated cases went to mediation and settled. These statistics show that mediation is not being used to its full potential in Macedonia.

Under Macedonian law, mediation occurs by voluntary agreement of the parties. The Chamber of Mediators, the leading Macedonian mediator organization, recommends mandatory mediation. They refer to several countries that use court-ordered mediation, such as the United States, Montenegro, Slovenia, Norway, the Netherlands, France (labor and family law) and Serbia.

How lawyers and their clients will respond to an order to attend mediation involves the judicial cultural norms of Macedonia.

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Judges in Macedonia do not customarily order parties to perform specific tasks. Thus, lawyers and their clients are not accustomed to being ordered by the court to do something. For example, Macedonian judges do not order parties to produce documents. Instead, if a judge believes that a document is necessary to render a decision, the judge will make arrangements to directly obtain the document, whether from a public agency or otherwise.

In the Macedonian judicial system, the person who seeks to compel another person

to do something customarily pays for the activity they seek to compel. An example of this was described in the context of a paternity case in Macedonia, where the plaintiff was the mistress of a wealthy businessman. The plaintiff wanted the defendant to submit to a paternity DNA test, which the defendant refused. The judge stated that the defendant should take the DNA test, and the plaintiff should pay for the test in advance, since the plaintiff requested the test. When the defendant ultimately refused the test, the court considered that refusal in its final ruling. Under this circumstance, if the court had ordered the defendant to take a DNA test, the defendant would expect the court to pay for the test.

Thus, there is concern that court-ordered mediation would depart from established Macedonian judicial culture. A court order to mediate will be seen as a direct request from the court for the parties to engage in mediation. As such, the parties would expect the court to pay the fees for the mediator and their attorneys. Of course, a law providing for mandatory mediation could clearly state that the parties shall share mediator fees and are responsible for their own attorney fees. However, some stakeholders have concern for the potential surprise and sense of unfairness the public might experience for paying for something requested by another, in this instance, the court. An alternative to mandatory mediation is non-mandatory mediation with consequences for non-compliance.

In Macedonia, the prevailing party is entitled to recover its attorney fees and costs from the non-prevailing party, in both civil and criminal cases. The consequence of losing that right of recovery by avoiding mediation can be a powerful incentive to encourage mediation.

This approach is used every day in California real estate transactions. The California Association of Realtors provides form contracts for buying and selling real estate. These contracts state that the prevailing party is entitled to recover attorney fees and costs and that a prevailing party who avoids mediation loses the right to recover attorney fees. The California courts interpret that mediation clause to mean that mediation is a condition precedent to the recovery of attorney fees for both the plaintiff and the defendant. Refusing a request for mediation from either party results in the refusing party forfeiting its right to attorney fees.

Under the Macedonian judicial system, if a prevailing party engaged in conduct that needlessly increased the fees and costs of litigation, the court has discretion to deny the recovery of those particular fees and costs for the prevailing party. This same approach could be used to encourage mediation. If we view mediation as an important part of the litigation process, with the potential to reduce costs and attorney fees for all parties, the refusal of a party to participate in mediation necessarily results in increased fees and costs for all parties.

This policy is used in England. Major reforms in English civil procedure took place in 1999 after the publication of Lord Woolf's "*Access to Justice Report*" in 1996. The proposal did not make alternative dispute resolution (ADR) compulsory, but Lord Woolf believed that the courts should encourage ADR in appropriate cases. Under the civil procedure rules, the courts have substantial case management powers, including the power to refer parties to mediation or another form of ADR and to stay proceedings for this to occur. Failure to cooperate with a judge's suggestion regarding ADR can result in cost penalties being imposed on the party who avoids the ADR process.

Under French law where preliminary conciliation is mandatory, a party who avoids this obligation may face a sanction. For example, in divorce proceedings and disputes involving the attachment of an employee's salary, the failure to attempt preliminary conciliation renders the court procedure that follows invalid. The decision of a small claims court, if no preliminary conciliation is attempted, may be censured by the Court of Cassation, the highest court in the French judiciary. In all of these cases, if a party brings an action seeking a judgment in disregard of the requirement to participate in preliminary conciliation proceedings, the action may be deemed barred.

In Macedonia, some stakeholders support adopting a similar concept of barring a procedure or trial for failure to mediate. The result would be no trial unless mediation has occurred first.

Ultimately, the demand for mediation comes from informed consumers. We have seen this occur in the United States for more than a decade beginning with community justice centers and court-sponsored mediation programs.

In March 2001, the British government made a public statement encouraging mediation. The Lord Chancellor's pledge formally commits government departments and agencies to use mediation to settle legal disputes in all suitable cases wherever the

other party accepts it. The Macedonian government could implement a policy to encourage government agencies to use ADR proceedings. This government policy of "mediating by example" will increase public awareness of mediation.

The key judicial policy makers could prepare a written declaration to support new initiatives and recommend mediation. The Ministry of Justice may create a Council for ADR to coordinate ADR initiatives, oversee new regulations, organize meetings and conferences, provide reports, work with the press, and other functions.

Peer mediation programs are used in the Los Angeles Unified School District. The statistics show that school violence substantially diminishes after implementing these programs. A peer mediation program in Macedonia will benefit the students and educate new generations about mediation.

There are several variations in which mediation can be referred. Increased public awareness of mediation will encourage consumers to seek mediation without a court order.