From February 21, 2011 through February 25, 2011, Judge Robert Levy of the U.S. District Court for the Eastern District of New York, and Ms. Donna Stienstra, Senior Researcher at the Federal Judicial Center, participated in a series of meetings in Sofia, Bulgaria. The purpose of their visit was to examine the Alternative Dispute Resolution (“ADR”) programs of the Regional Court of Sofia and the District Court and to make recommendations to enhance the use of ADR in the courts. The consultation was supported by the America for Bulgaria Foundation.

The consultation was coordinated by Judges Evgeni Georgiev and Tsveta Jeliazkova, along with Mediators Albena Komitova and Sevdalina Alexandrova, who also direct the Settlement Center in Sofia, which works closely with the courts. The consultants met with judges, mediators, lawyers, and representatives of businesses and parties who litigate frequently in the courts, such as insurance companies, banks, credit card companies, victims of automobile accidents, and Sofia’s heating utility, Toplofikatsiya.

During the meetings, the consultants heard a number of concerns about the ADR programs in the Regional and District Courts. This report describes those concerns and presents recommendations to address them. While directed specifically at these courts, the recommendations below may also apply to other courts in other locations. The recommendations cover many different aspects of a court-connected mediation program. Those who implement these recommendations will, of course, have to decide which ones should have highest priority and when conditions are conducive to implementation.

1 Judge Levy has been a United States Magistrate Judge since 1995. In addition to his judicial duties, he is the Alternative Dispute Resolution Oversight Judge for the United States District Court for the Eastern District of New York and is responsible for the operations of the Court’s ADR Programs. He is a Consultant in Mediation for the Federal Judicial Center and a member of the Alternative Dispute Resolution Staffing Formula Working Group of the Administrative Office of the United States Courts. Judge Levy has assisted other courts in the design and development of mediation programs and has provided mediation training for judges and lawyers in the United States and overseas. He is a founding member of the board of the International Conference of Mediation for Justice (CIMJ) and recently co-taught a mediation training program for judges and lawyers in Moscow (2009) and at Pepperdine Law School (2010). Judge Levy is a graduate of Harvard College and New York University School of Law.

2 Donna Stienstra is a Senior Researcher at the Federal Judicial Center in Washington, D.C. She has conducted extensive research and published numerous papers and reports on the evaluation and design of court ADR programs and is recognized internationally as an expert in the field. Ms. Stienstra directs the Federal Judicial Center’s Consultations in Mediation program and has evaluated court ADR programs and drafted recommendations for courts in the United States and throughout the world.
Issue 1. Too Few Cases are Referred to Mediation.

The primary concern among judges and mediators was that cases are rarely referred to mediation. Many judges believe they have too many cases and too little time to discuss a referral with the parties, to educate them about the benefits of mediation, or to distribute information about the program. Most litigants and lawyers are unfamiliar with mediation; because mediation has not been part of the traditional court process, many attorneys are hesitant to recommend it to their clients and question whether it can add any value to the litigation process. Similarly, because mediation has not been a part of the general legal or social culture in Bulgaria, litigants are often unaware of its potential benefits. There was a suggestion that some attorneys may be reluctant to mediate because it could shorten the lawsuit and reduce their fees.

Recommendations

The recommendations below seek to increase the use of mediation by making it more visible, by actively encouraging use by individual and institutional litigants, and by using education to increase awareness and reduce apprehension.

1. Create an expectation that cases will go to mediation; publicize the availability of mediation.

   a. Place signs, posters, brochures, and other written material about mediation in locations throughout each participating court, especially at the windows where cases are filed. Circulate newsletters describing the successes of the mediation program.

   b. Ask the Chief Judge of each participating court to draft a letter urging parties and their attorneys to use mediation as a cost-efficient, swift, and effective means of resolving their case. Distribute this letter to every lawyer and party at the time a case is filed and use it as part of the court’s outreach to the bar, businesses, law schools, and the public at large. Such a letter is essential to demonstrate to judges, lawyers, and litigants that the court stands behind mediation as an integral part of the court process and that mediation is the norm rather than the exception. The leadership of judges, such as Chief Judge Krasimir Vlahov of the Regional Court of Sofia, who is a strong and resourceful advocate for mediation, will be essential to the success of the program.

   c. Appoint one or more Mediation Coordinators for each courthouse. At the Regional Court of Sofia, for example, this could be accomplished by expanding the duties of the current ADR staff. When a case is filed, tell parties and counsel that a Mediation Coordinator is available to explain the mediation program and answer questions.

   d. At the time of filing, give parties a letter from the clerk that explains the procedure for including a case in the mediation program. The letter should provide the address and telephone number of the Settlement Center and contact information for Mediation Coordinators in the courthouse.

   e. Place volunteers, such as law students and mediators, in strategic places inside the entrance to each courthouse to distribute information about mediation and explain its benefits and availability.

   f. Provide information about mediation on the web site of each court, including fact sheets on Frequently Asked Questions and How to Have a Case Referred to Mediation.
2. **Encourage the use of mediation by institutional litigants.**

The Regional and District Courts should reach out to institutional litigants who make up a significant percentage of their docket, such as insurance companies, banks, and victims of automobile accidents, to encourage the use of and support for mediation. Although many of these companies are probably aware of mediation, emissaries from the court may be able to address misunderstandings or apprehensions about the process and can also underscore the court’s commitment to mediation. As with Chief Judge Vlahov’s recent meetings with the utility Toplofikatsiya, this kind of outreach can also create good will and mutual desire to resolve cases through mediation. Such outreach can help the management of these companies create a mediation policy and ensure its implementation by attorneys who litigate on their behalf.

3. **Undertake an expanded training and education program.**

The goal of training is to change the legal and social culture in Bulgaria to make mediation an accepted part of resolving any dispute. A goal this large requires effort on many fronts and will also take time. Some of the targets for education and training are identified below.

a. Law schools should make courses in mediation and negotiation available to all law students in Bulgaria, as is increasingly done in law schools throughout the world. Through such training, future lawyers will better understand the value of mediation in resolving disputes and be more likely to view ADR as an essential part of their practice.

b. The National Institute of Training should offer courses for judges—both experienced and new judges—on mediation, its utility, and ways to encourage parties to use it. Many judges believe that referrals to mediation are either too time-consuming or not part of their judicial role. Training should help judges find an efficient and appropriate way to integrate mediation referrals into their case management. Judges who have had success with mediation should be invited to share their experiences. Checklists should be developed with questions for judges to use in making referrals. Materials for judges should include reasons why mediation would be cost-effective and efficient for judges and lawyers generally and in specific types of cases. Training could also discuss the characteristics of cases that are particularly well suited to mediation: for example, partition cases, cases where parties have ongoing relationships, and cases where a mediated settlement might provide a resolution that is more tailored to the parties’ ultimate interests than a court decision might be. The National Institute of Justice could create a research body to identify best mediation practices in Bulgaria and abroad and to inform judges about them.

c. Training for lawyers should be expanded considerably. Basic information about the mediation process and its benefits should be provided through Continuing Legal Education programs and low-cost stand-alone seminars on mediation. Training should include instruction on how to effectively represent clients in mediation and should also provide opportunities for lawyers to observe mediations and question mediators.

d. Mediation programs should be established in schools, government agencies, and the private sector to increase the public’s familiarity with mediation and help make mediation a part of the dispute
resolution culture. These programs would provide a forum for resolving workplace and school disputes before they escalate or, in extreme cases, become lawsuits.

**Issue 2. Referrals to Mediation Are Not Made Early Enough at Each Level of the Case.**

Judges, lawyers, and mediators alike noted that referrals should be made at the earliest practical point in the process, before unnecessary time and money have been expended on litigation in courts of first and second instance. Because of heavy caseloads, some judges have said they do not have sufficient time to make early referrals.

**Recommendations**

In addition to publicizing the benefits and availability of mediation in courts of first and second instance, as described above, courts should have the authority to develop and implement their own mediation programs in the way that works best for each court, taking into consideration the nature of the cases the court hears and the local legal culture in the area where the court is situated. With that principle in mind:

1. **The Regional and District Courts should be able to enact, and should consider enacting, rules encouraging early referral to mediation.** Court rules should (1) encourage parties and counsel to consider mediation at the time a lawsuit is filed and (2) authorize and encourage judges to refer cases to mediation at an early stage. For example, a judge could request, or even require, counsel to discuss mediation with their clients and their adversaries and to advise the court at an early date whether they consent to mediation.

2. **The Courts could create forms or letters encouraging the parties to consent to mediation.** “Consent to Mediate” forms, for example, could be distributed to lawyers and parties at the earliest appropriate stage of the litigation at the Regional and District Courts. The use of forms would reduce the time judges would have to devote to referring cases to mediation. However, the consultants believe that the best practice would also be to have a Mediation Coordinator or judge discuss mediation with lawyers and parties in individual cases, at least at this stage of the development of mediation in Bulgaria.

3. **The Courts should consider creating pilot programs to divert cases to mediation before or at the time of filing.** Each court should be permitted to create programs to divert cases to early mediation.

   a. For example, the consultants were advised that the Regional Court of Sofia has approximately 50,000 cases in which the utility company Toplofikatsiya is seeking over 200 million leva in outstanding bills. In meetings with the company, Chief Judge Krasimir Vlahov has encouraged the utility to consider mediating as many of these cases as possible. Because of the number and similarity of these cases, it would be useful to design a special program for including these cases in mediation. The court might consider whether a group of mediators should be specially trained or assigned to handle these cases. At the outset, the court and the utility might wish to identify, if possible, the kinds of cases that are most suitable for mediation and designate them for the first referrals to mediation.
b. Similarly, the District Court could consider requiring some or all of the appeals filed in the court to undergo a brief mediation before the court decides the appeal. Mediation has enabled appellate courts in some other countries to significantly reduce the number of appeals that require a decision. In these jurisdictions, mediation is provided in several ways, including through mediators who are employees of the court or through private-sector mediators who receive referrals from the court.

**Issue 3. In a Substantial Portion of Referred Cases, One or More Parties Fails to Appear for Mediation.**

Mediators reported that with some frequency, the parties in cases referred to mediation simply do not appear at the appointed time. Because judges do not have authority to order parties to participate in mediation and because there is no effective sanctioning mechanism, parties face no consequences when they fail to appear. The recommendations below assume neither of these conditions will change soon and therefore focus on three other steps that might be taken to encourage appearance of the parties.

**Recommendations**

1. **Hold premediation conferences.** The court programs should ask the mediators (or, in lieu of the mediator, a member of the Settlement Center) to hold a premediation conference with the parties in each case. The mediator (or member of the Settlement Center) should contact the parties shortly before the mediation to confirm who is attending and to ensure, to the extent possible, that each party has properly prepared for mediation. Such conferences would most likely be by telephone. If it is not possible to speak to all counsel at the same time, the mediator should avoid any substantive discussion of the case and limit the call to logistical issues, such as the date and time of the mediation and who will be attending. A premediation conference will reinforce the expectation that the parties will appear and make them more likely to commit to the process.

2. **Hold mediations at the courthouse.** The Regional and District Courts should try to provide mediation at the courthouses so parties who are willing to mediate immediately will have a way to do so. For some portion of the cases judges refer to mediation, the parties may be willing to mediate promptly. Rather than losing their interest and commitment by delaying mediation to another time and place, the courts can capitalize on the parties’ interest by providing mediation at the courthouses.

3. **Enact rules governing the mediation process.** As discussed above, courts need the authority to publish their own rules to manage their mediation programs. The rules should establish clear procedures governing the mediation and require the attendance of counsel and parties at the mediation. Where courts do not have rulemaking authority, it may be useful to develop a Consent to Mediate form or a Mediation Contract, in which each party who agrees to mediation also agrees to follow a limited number of simple rules, such as attending the mediation and maintaining confidentiality. A contract could also contain provisions for sanctions for failure to attend, such as monetary penalties paid to the party who does attend.

**Issue 4. The Quality of the Mediators Needs to be Reinforced.**

The success of court-sponsored mediation depends in large part on the quality of the mediators provided to the parties. If the courts urge parties to use mediation, they are in effect vouching for the competence and ethical conduct of the mediators to whom they direct the litigants. Any lapses in judgment or skills will reflect poorly on
the courts and discourage parties from using mediation. The consultation revealed no alarming problems with the mediators, but no ringing endorsements either. One or two questions were raised about whether non-attorney mediators are qualified to handle court-referred cases. The situation seemed ambiguous and to call for greater clarity about the quality of the mediators.

Recommendations

To win the judge and attorney trust that is essential for further development of mediation, the Regional and District Court ADR programs, along with the directors of the Settlement Center and other essential stakeholders, should implement a high-quality certification and quality assurance system. The goals of this system should be to enhance the skills of the mediators, to regularly monitor mediator performance, and to ensure that only qualified mediators serve on court-referred cases.

1. **Train to the highest standards.** Those who train Mediators to handle cases referred by the courts should train to the highest standards of mediator demeanor, skills, and judgment.

2. **Certify and appoint only the most highly-qualified mediators for court-referred cases.** Only mediators who meet the highest training standards should be certified to receive referrals from the courts. Mediators whose skills or temperament are questionable or not suitable should not be selected to participate in court-referred mediations.

3. ** Adopt a mediator code of conduct.** Each court separately, or the court system generally, should adopt a code of conduct for mediators who conduct court-referred mediations. The code should set high ethical standards and address such issues as confidentiality, conflicts of interest, and communications with the court and parties, among others, and should be widely broadcast.

4. **Establish a process for monitoring mediator quality.** Each court should ensure that a system is in place for monitoring the performance of mediators who conduct court-referred mediations. Means of evaluating the quality of mediators could include, for example, direct observations of mediators or interviews or surveys of all counsel, parties, and mediators who have participated in mediation.

Issue 5. Design and Management of the Court Mediation Programs Should be Enhanced.

The development of a good court mediation program requires different skills from those that judges, clerks, and court administrators use in their normal daily work. An understanding of the broad principles that go into making a successful and efficient program, and how these principles may apply to a particular court, would be very useful at this stage of development of court mediation programs in Bulgaria. The development of a good court mediation program also requires close attention to the legal culture it will serve. Thus, the courts should have some latitude to design mediation programs that are appropriate to their circumstances and that will be respected and used by their legal community.

Recommendations

1. **Each court should provide training in mediation program design for court leaders.** Each court should send a judge, clerk, or administrator to a course focusing on the design and management of a court mediation program. Such a program exists, for example, at the University of California Hastings
College of Law in San Francisco. Chief Judge Vlahov of the Sofia Regional Court might be an excellent choice for such a program because of his leadership in bringing mediation to his court.

2. Each court should establish rules regarding its mediation program. If authority to do so is unclear, such authority should be sought. Each court should establish its own mediation program and adopt its own rules to implement and manage it. If necessary, Parliament should amend existing legislation, or the Supreme Judicial Council should promulgate regulations, authorizing courts to establish mediation programs and develop implementing regulations.

Issue 6. There are Problems With Enforcement of Mediated Agreements.

Judges, mediators, lawyers, and administrators all voiced concerns over difficulties in enforcing compliance with settlements reached through mediation. To win the support of bench and bar, these problems must be resolved.

Recommendation

Enact legislation or rules to simplify enforcement of settlements reached through mediation. The consultants were not asked to evaluate the current state of the law concerning the enforcement of mediated settlements. However, such an analysis should be conducted, perhaps by a law school professor or bar association, and proposals should be made to enact legislation to ensure the swift and inexpensive enforcement of mediated settlement agreements.