BEYOND THE MYTHS GET THE FACTS ABOUT DISPUTE RESOLUTION

By
American Bar Association
Section of Dispute Resolution
Pro Bono Committee

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INTRODUCTION

In 2004, the JAMS Foundation funded a project of the Pro Bono Committee of the ABA's Section of Dispute Resolution to assist legal aid and pro bono programs in establishing or improving pro bono mediation projects and programs. During the course of implementing that generous grant, the Committee fielded questions from legal aid and pro bono providers about the effectiveness, desirability and worthiness of mediation for low income disputants. As a result, the committee created this brochure for legal services and pro bono programs to confront and debunk the myths about mediation and how pro bono mediation could be used to enhance the services that the low income community receives.

Through the use of a survey of legal aid and pro bono providers, we identified the most common myths and barriers to the use of mediation. Mediation is certainly not going to end the need to litigate on behalf of the low income community. Nor is mediation the answer for every problem facing the community or those that serve it. This brochure provides helpful information to legal aid and pro bono professionals to increase the number of people who can be helped to resolve their civil disputes.

Marc Kalish
Chair, ABA Section of Dispute Resolution Pro Bono Committee

MYTH # 1

MYTH: MEDIATION IS UNFAIR TO LOW INCOME INDIVIDUALS

FACT: MEDIATION PROVIDES AN OPPORTUNITY TO DEVELOP A SOLUTION EQUITABLE TO ALL PARTIES

The driving forces of mediation are empowerment and self-determination. In mediation, parties are empowered to reach a decision for themselves rather than having a judge or jury render a decision for them. As neutral third parties, mediators facilitate the discussion and exchange of information. Mediators do not make decisions about the outcome of the dispute and therefore cannot impose an agreement upon the parties. The mediator gives each party an equal platform to participate in or to leave the process.

Disparities in bargaining power are not unique to mediations involving one or more low-income parties. Litigants and their representatives in *all* cases need to carefully consider mediation in light of the alternatives. However, because the poor face power imbalances in almost all decision-making situations and have been conditioned by society to yield to the "powerful,"in deciding whether to mediate, impoverished parties must consider whether the mediator has been trained or oriented to deal with the special circumstances present when the dispute involves people of poverty. One of the resources identified at the end of this brochure is an on-line CLE program that introduces mediators to these circumstances and suggests ways to handle them.

A perceived or actual disparity in bargaining power should not prevent using mediation; instead it requires the litigants and their representatives to consider the advantages of using mediation to resolve the dispute and carefully strategize as to how to maximize their advantages in mediation. Is the mediator qualified to deal with the special circumstances presented when one or more of the parties is impoverished? Is it possible for the parties to reach an agreement in mediation that would be preferable to the decision rendered by a judge or jury? Would it be possible for the parties to reach a creative solution in mediation that would not be an available remedy in court? Do the parties, regardless of bargaining power, have incentives to settle?

MYTH # 2

MYTH: CASES CAN REACH A NEGOTIATED SOLUTION WITHOUT A MEDIATOR

FACT: MEDIATION IMPROVES THE LIKELIHOOD OF SETTLEMENT

Many people find it difficult to extract themselves from a dispute, even though they recognize that little is gained from continuing. Mediators help people in conflict recognize the benefits of a settlement by engaging them in a collaborative effort to find a solution adequate to their needs. Unlike a typical negotiation where advocates try to "sell" the other party on the *terms* of settlement, mediators "sell" the *process* of settlement by helping the parties see things from the other side's perspective.

Settlements reached through mediation are more successful and are usually honored by all parties. Mediated agreements have the buy-in and support of the parties and are generally perceived as a fair resolution of a dispute. Because the process is voluntary, participants should not feel taken advantage of or "railroaded" into a settlement Of course, there is always a chance that a party will suffer from "buyer's remorse" after settling, but that same party would probably feel much worse if they lost at trial.

MYTH # 3

MYTH: MEDIATION IS A THREAT TO THE ATTORNEY/CLIENT PRIVILEGE

FACT: MEDIATION GIVES THE PARTIES AND THEIR ATTORNEYS CONTROL OVER INFORMATION

The attorney/client privilege is in no way compromised by mediation. The parties are free to divulge or withhold any information they wish during the process. Where parties are represented in a mediation, attorneys have full access to their clients during the mediation and are not compelled to make any representations regarding their client or their case. In some mediations, the parties may caucus, giving an opportunity for the mediators to talk with one side and their representative without the other side present. Depending upon the rules and statutes applicable in the jurisdiction, the mediator generally may share the information gathered during these caucus sessions with the other side unless the parties explicitly authorize the mediator to keep the information confidential. Generally, anything said in the mediation, should be confidential by agreement or statute (See Resources Page for information about the Uniform Mediation Act). If mediation confidentiality is not protected by statute or case law, the mediator should have the parties sign a confidentiality agreement before the mediation begins. A sample confidentiality agreement is included in the ABA Manual for Legal Services and Pro Bono Mediation Programs (http://www.abanet.org/dispute/credits_toc.html)

Self determination is a critical value of the mediation process. The mediation process is voluntary; the parties cannot be compelled to reach an agreement, the parties can end the process when it is no longer productive to proceed, and the parties control whether to share information or not. The parties' attorneys are always in a position to inform their respective clients of any reasons to reject a settlement offer and to consult with their client without the mediator present.

In situations where one or more parties are not represented, then the mediator may suggest that the unrepresented parties fully inform themselves of their legal rights before agreeing to any settlement and provide them with information about how they might go about doing so.

MYTH # 4

MYTH: CLIENTS FEEL PRESSURE TO SETTLE BECAUSE OF FEAR THEY CAN'T AFFORD OR FIND AN ATTORNEY TO LITIGATE THE CASE

FACT: REACHING A SETTLEMENT IN MEDIATION MAY BE PREFERABLE TO THE OUTCOME AVAILABLE IN COURT

Although parties may choose to settle a case because they do not have the resources to pursue litigation, that is not a situation unique to cases with unrepresented low-income parties. Litigation is expensive, time-consuming process, and bears the risk of loss. Therefore, the existence of pressure to settle does not mean that settlement is a poor alternative to litigation. With a good mediator who has been trained and is competent in handling disputes involving impoverished people a reasonable settlement will often be a better alternative than risking everything at trial.

MYTH # 5

MYTH: MEDIATION IS A WASTE OF TIME AND DELAYS THE CASE

FACT: THE MEDIATION PROCESS IS VERY EXPEDIENT AND CAN ELIMINATE THE NEED FOR TIME SPENT IN COURT

It is often possible to schedule mediation around work schedules or on the weekend. One missed day from work for mediation is far less costly than spending several days preparing for and attending a trial if the case is not settled. Mediation is generally scheduled well in advance of any trial dates; thus there should be little or no concern about the case being delayed.

Mediators are aware of the time constraints of the parties and their attorneys and are ethically prohibited from unduly extending a mediation session. Mediation can also be used before a lawsuit is ever filed, thus saving much time, cost, and stress. Mediation is a good use of time before and during a lawsuit.

MYTH # 6

MYTH: LOW-INCOME CLIENTS CANNOT AFFORD A MEDIATOR'S SERVICES

FACT: MEDIATION IS OFTEN AVAILABLE AT LOW OR NO COST

Private mediation usually costs money, which is why the ABA Section of Dispute Resolution encourages its mediator members to do pro bono mediations and helps legal aid agencies and pro bono programs establish pro bono mediation projects. Additionally, there are a number of pro bono mediation programs around, as well as over 500 community mediation services available around the country. To find a community mediation center near you, visit the web site of the National Association for Community Mediation (See Resources page), which can provide mediators either at no cost or for a fee much less than private mediators charge.

There are additional options that programs may explore in order to expand services to the client community of financially eligible people. Where unbundled services are permitted, programs may elect to provide limited representation in mediation or establish a "free" mediation clinic where volunteer (or subsidized) mediators are available. For more information, see the Manual for Pro Bono and Legal Services Dispute Resolution Program references on the Resources page.

MYTH # 7

MYTH: AGREEMENTS REACHED IN MEDIATION MAY NOT BE ENFORCED – OR ENFORCEABLE

FACT: AGREEMENTS REACHED IN MEDIATION CAN BE LEGALLY ENFORCEABLE

A mediator will almost always have the parties sign an agreement memorializing any settlement at the conclusion of the mediation. In most situations, a written agreement established through mediation is honored by the parties. People are more likely to comply with agreements that they have created with a neutral third party; the knowledge that a person outside of the dispute knows about the agreement makes it more difficult for parties to refuse to follow the agreed upon resolution to the conflict.

Agreements reached through mediation can also be legally enforceable, just like a settlement agreement reached through any other means. The parties can execute a formal contract of settlement or have their agreement incorporated into a formal order if their case is pending in court. In either situation, the agreement can be specifically enforced by a court.

MYTH # 8

MYTH: MEDIATION IS NEVER APPROPRIATE WHEN THERE HAS BEEN DOMESTIC VIOLENCE IN A RELATIONSHIP

FACT: MEDIATION MAY BE APPROPRIATE IN SOME LIMITED CIRCUMSTANCES

There are varying opinions on whether mediation is ever appropriate in domestic violence situations. The traditional thinking has been that mediation is NEVER appropriate in these situations. Over the years, as mediation has become more prevalent and some mediators have been specially trained to handle such cases, many practitioners now believe that mediation can work when there has been domestic violence between the disputing parties. **However, all believe it is necessary to screen such cases to determine the extent of the violence so that appropriate precautions and procedures can be implemented.** The following two paragraphs summarize the varying perspectives while recognizing that domestic violence is a very serious issue and a mediator trained in domestic violence issues is absolutely necessary to ensure the safety of the parties.

ONE VIEWPOINT: The most important values associated with mediation are self determination and voluntariness. Mediators must therefore screen all cases and be very careful when there is an indication of domestic violence. If the domestic violence is recent and high conflict, mediation in a traditional sense is inappropriate. The potential for coercion is great, no matter how skilled the mediator. For remote incidents and low level conflicts, the mediator must still interview the parties separately to insure that they are both willing and capable of negotiating on their own behalf. The use of caucusing or separate sessions along with legal and personal support can help provide balance for some situations. One technique is for the mediator to move back and forth between the rooms using shuttle diplomacy. The parties remain in separate rooms and never see each other during the mediation.

A SECOND VIEWPOINT: Mediation can be a safe and empowering process for a victim of domestic violence. The situation and parties must, however,

MYTH # 8
Continued

be appropriate for this type of dispute resolution. The key is a properly trained family law mediator. The mediator will be able to balance the room to remove issues of power and control that may have dominated the relationship as well as determine the appropriateness of the disputants for mediation. The mediator will also know when to call for separate sessions or even when it is not appropriate to continue the mediation. A person mediating where there has been domestic violence should be trained in the dynamics of domestic violence, the law pertaining to protective orders and, most importantly, the use of universal precautions to ensure the safety of everyone to the mediation process.

A CAVEAT: In most cases, mediation is probably not a viable alternative for victims of domestic violence who are not represented by lawyers, especially when the abuser is. For these victims who find themselves with access to a pro bono mediation program with properly trained mediators, but who cannot get direct representation from a legal services or pro bono agency, the mediation program should, if unbundled services are permitted in the jurisdiction, strive to establish a pool of qualified lawyers who would agree to provide limited representation to domestic violence victims in a mediation. If that is not possible, the domestic violence victim may very well be better off in court, even with self-representation.

MYTH # 9

MYTH: CLIENTS CANNOT ACCESS MEDIATION WITHOUT FIRST FILING LITIGATION

FACT: MEDIATION IS ACCESSIBLE PRIOR TO LITIGATION FOR MANY CASES

Many mediations occur before litigation is filed. In some cases, there may be a contractual requirement for mediation as a prerequisite to filing a lawsuit. In other cases, the parties may simply agree after a dispute arises to mediate in an effort to avoid litigation.

In jurisdictions where the courts provide mediation services, it might be necessary to have a pending case before getting access to those services. Usually, however, court-based mediation services are not the only mediation services available. If they are, local legal aid and pro bono agencies should contact the ABA Section of Dispute Resolution to learn how to set up a pro bono mediation program not connected to a court. In addition, those agencies should approach the court to see if the services can be made available to those seeking to avoid filing suit.

CREDENTIALS OF AUTHORS

Neal Dudovitz received his JD from Northeastern University School of Law in 1973 and has spent his entire 33 year career as a legal services lawyer. Neal has served as the Executive Director of Neighborhood Legal Services of Los Angeles County, one of California's largest legal services programs, since 1993.

Debra House is an Associate Director at Legal Aid of East Tennessee. She is a Tennessee Supreme Court Rule 31 listed family law mediator and teaches a negotiation course at the University of Tennessee College of Law. Deb received her BS degree from Western Michigan University and her law degree from the University of Tennessee.

Marc Kalish is a full-time mediator and arbitrator in private practice in Phoenix, Arizona. He has been the Chair of the Pro Bono Committee of the ABA's Section on Dispute Resolution since the committee was formed in 2002. He is also on the board of directors of Community Legal Services in Phoenix and served as board president from May 2005 to May 2006. For more information, visit his website at www.arizonamediator.com.

Mark Kleiman is the Executive Director of Community Mediation Services, Inc., New York City, where he designs training and implements programs that divert people from the Family, Criminal and Civil courts and empower people from the community to better resolve their problems. He is a Practitioner Member of ACR and a Board Member of the National Association for Community Mediation.

RESOURCES

Manual for Legal Services and Pro Bono Mediation Programs
http://www.abanet.org/dispute/credits_toc.html

Expanding Your Horizons through Pro Bono Mediation, an online complimentary ABA CLE program
http://www.abanet.org/cle/clenow/probonomediationreg.html

2005 Equal Justice Conference Materials: "Innovative Ways to Increase the Number of Clients Served Without Increasing Your Budget or Staff"
http://www.abanet.org/legalservices/ejc/workshop_preview_2005.html

Model Standards of Conduct for Mediators
http://www.abanet.org/dispute/documents/model_standards_conduct_april2006.pdf

Model Standards of Practice for Family and Divorce Mediation
http://www.afccnet.org/resources/resources_model_mediation.asp

Uniform Mediation Act
http://www.nccusl.org

Domestic Violence and Child Abuse/Neglect Screening for Domestic Relations Mediation, Model Screening Protocol
http://courts.michigan.gov/scao/resources/standards/odr/dvprotocol.pdf

American Bar Association Section of Dispute Resolution
http://www.abanet.org/dispute

RESOURCES

American Bar Association Standing Committee on Pro Bono and Public Service and the Center on Pro Bono
http://www.abanet.org/legalservices/probono/

American Bar Association Division for Legal Services
http://www.abanet.org/legalservices/

National Association for Community Mediation
http://www.nafcm.org

Association for Conflict Resolution
http://www.acrnet.org/

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