MEDIATION AS A MEANS TO ACCESS JUSTICE FOR THE MODERATE INCOME CLIENT: A SURVEY OF COLORADO, FLORIDA AND KENTUCKY MEDIATION PRACTICES AND ISSUES

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A 31 year old residential construction worker purchases a laptop for $2,800 on credit as a Christmas gift for his wife. He makes payments faithfully until he loses his job. After several moves looking for work, and five years later, he receives a summons from a debt collector demanding $8,600, due to accrued interest. Now employed again as a cabinet installer, he admits he owes the debt for the lap top and financing, but cannot afford to pay the amount demanded. He calls three attorneys asking for help. None of them will take his case or give him advice.

A 22 year old hair dresser moves out of her father's home for the first time, and signs a lease to share an apartment with a co-worker. She can afford her share of the rent on her salary and makes her rent payments on time. However, her co-worker/roommate does not pay her share of the rent payments on time and ultimately, the landlord files to evict them both from the apartment. The hair dresser calls the landlord to discuss what can be done, but the landlord won't budge. He claims she is "jointly and severally liable for the entire rent payment." She doesn't understand what the landlord is talking about and makes an appointment with a local attorney. The attorney charges $190/hour for consultation, an amount she can't afford if she is about to be homeless.

A 45 year old waitress married with 3 children is shocked when she is served with divorce papers seeking custody of her younger 2 children, ages 3 and 5. She learns through a mutual friend that her husband is claiming she is unable to care for the younger children due to her work hours. Unable to afford an attorney, she decides to represent herself, but soon realizes she does not understand the myriad of forms that need to be filed.

If these individuals had been wealthy enough to hire an attorney, they would have. If they had been poor enough to qualify for legal aid, they may have been able to get help at a legal aid clinic. Instead they were drawn unwillingly into a complex legal system, with no idea how to navigate the system, and surprised to find they had to fend for themselves. These are just a few situations I encountered in the past year, leading me to write this article and explore whether mediation as an alternative form of dispute resolution could have helped them resolve their dispute.

We are fortunate to live in a country with the rule of law, and we expect to be able to resolve our disputes through our legal system in a court of law. How many times have you heard on a TV show the line "I'll see you in court"… or "Have your attorney call my attorney!" Yet, millions of Americans are unable to access or navigate the judicial system, mostly due to financial reasons.[1] The legal community and government have been aware of this problem for years and

[1] *ABA Dispute Resolution Task Force on Access to Justice, Access to Justice through Alternative Dispute Resolution White Paper, (2015).*

have attempted to address the need through various legal aid programs across the country and access to justice commissions.[2] While legal aid can help to provide for those who are truly indigent, many with limited resources are left out of such programs. Informational programs, such as those funded by the LSC Technology Initiative Program, [3] can be helpful in directing potential litigants to the correct court and or resources, but do little to help with the costs associated with litigation, or to help actually resolve the dispute. Mediation as an alternative form of dispute resolution has been growing in popularity, and has been shown to reduce both the cost and the length of litigation.[4] Many courts are now using it as a means to address the overcrowded court system, as well as provide access for those with limited means.

This article explores how mediation can be part of a solution to this perplexing problem. Part One of this article takes a brief look at the use of mediation in three states: Colorado, Florida and Kentucky, and examines some of the mediation legislation and programs currently in place in those states. I chose these states due to my connection to them as a lawyer, mediator and client (and of course the cabinet installer, hair stylist and waitress), as well as to highlight the different approaches each state has taken towards mediation. Part Two addresses what I believe are the key issues in mediating disputes involving low and moderate income earners and is based on interviews with judges, court administrators, attorneys, clients and mediators in those states. The final section, Part Three, outlines a proposal for court-sponsored mediation programs as an alternative form of dispute resolution, meant to complement our traditional adversarial system, as a means to provide access to justice for the low and moderate income litigant.

Part One: Mediation Programs in Colorado, Florida and Kentucky

Mediation as a judicial or state-recognized form of dispute resolution is relatively new and, as such, still in its formative stages, and rife with challenges. Mediation is defined as "… intervention between conflicting parties to promote reconciliation, settlement or compromise".[5] Some states have enacted fairly comprehensive rules and regulations for mediators and the practice of mediation, particularly in court sponsored programs, while others are still formulating regulations and considering the use of the practice.[6] As a starting point, I survey three different

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[2] *ABA Dispute Resolution Task Force on Access to Justice, Access to Justice through Alternative Dispute Resolution White Paper, (2015); National Center for State Courts, Call to Action: Achieving Civil Justice for All: Recommendations to the Conference of Chief Justices by the Civil Justice Improvements Committee, (2006).*

[3] *Legal Services Corporation Website available at https://www.lsc.gov/grants-grantee-resources/our-grant-programs/tig.*

[4] *Tina Drake Zimmerman, Representation in ADR and Access to Justice for Legal Services Clients, 10 Geo. J. on Poverty L. & Pol'y 181 (2003).*

[5] *"Mediation." Merriam-Webster.com. https://www.merriam-webster.com/dictionary/mediation.*

[6] *Mediation Training Institute International: State Requirements for Mediators. Available at http://www.mediationworks.com/medcert3/staterequirements.htm. And Northern Virginia Mediation Service: State*

approaches to mediation practices currently in place in Kentucky, Colorado and Florida, reviewing the history of how mediation was incorporated into the judicial process, how the process has been regulated by the state, and how the public might access mediation in each state.

Colorado

Colorado has long been supportive of mediation as an alternative form of dispute resolution, adopting legislation earlier than most states. The Dispute Resolution Act, Colo. Rev. State Sections 13-22-301 *et sec* (the "Colorado Act") went into effect in Colorado on July 1, 1983 [7] and governs the use of mediation services throughout the state, whether private or through public sponsored programs. Case law in Colorado supports the court's authority to refer a case to mediation,[8] and recognizes that referrals to mediation are in the interest of "just, speedy, and economic resolution of disputes." [9]

The Colorado Act established the Colorado Office of Dispute Resolution ("ODR"), and grants it the authority to "establish rules, regulations, and procedures for the prompt resolution of disputes" with the Chief Justice's approval.[10] The ODR contracts with private mediators to supply mediation services based on fees prescribed by the Colorado Supreme Court.[11] Although the State of Colorado does not certify or license mediators, the ODR has established qualifications for ODR connected-neutrals, and exercises quality control through a stringent interview process, as well as requirements to adhere to ethical standards, criminal background checks, etc.[12] Recently as the practice of mediation has grown, cases have increasingly been referred to mediators not affiliated with the ODR, and therefore not subject to the quality control

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by State Guide to Court Mediator Qualifications. Available at https://nvms.us/wp-content/uploads/2014/11/us-mediation-certification-standards.

[7] *See 1983 Colo. Sess. Laws 624-26.*

[8] *Pearson v District Court, 924 P2d 512, 15-16 (Colo. 1996).*

[9] *Halaby, McCrea & Cross v Hoffman, 831 P.2d 902, 907 (Colo.1992).*

[10] *Colo. Rev. Stat. Section 13-22-305.*

[11] *The Act requires that the ODR contract with mediators or mediation organizations to implement dispute resolution programs. Colo. Rev. Stat. Section 12-22-306. The Colorado Supreme Court-prescribed fees for mediation services as of January 2, 2018, are set at: $75.00 per party for District Court Civil (including domestic relations, probate, juvenile and criminal); $100/$50 for County Court; and $60/$30 for Small Claims. See Supreme Court of Colorado Office of the Chief Justice Order dated January 2, 2018 by Nancy E. Rice. Fees can be waived by the Director of the ODR. Colo. Rev. Stat. Section 13-22-305.*

[12] S*ee Colorado Judicial Department: Office of Dispute Resolution Policies and Procedures, available at: https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Court%20Programs/ODR/PP/PP_Table_of_Contents2018.pdf.*

of ODR. [13] However, several organizations in Colorado, including the Colorado Bar Association, have endorsed the ABA Model Standards for Mediators, as a set of voluntary guidelines applicable to mediation in their mediation practice.

The ODR section of the Colorado Judicial Branch website has a wealth of easily accessible information for both the public and mediators, including how to find a mediator, how to prepare for mediation, fees for mediation, and court statistics.[14] In 2016, the Colorado ODR reported handling 8,125 referred cases with 57.2% cases completely or partially resolved (including district court cases, county court cases, small claims, HOA, probate, criminal, juvenile and collections). [15]

Jefferson County in the First Judicial District of Colorado has supplemented mediation alternatives in their jurisdiction through a successful county supported program using volunteer mediators since 1994. Initially established through a joint effort between Animal Control and the District Attorney for "barking dog cases", this program has grown to encompass not only animal control cases, but neighborhood disputes, small claims, eviction, credit card debt, domestic relations, child support, workplace disputes and more.[16]
Helena Jo Goldstein, the current Program Director at Jefferson County Mediation Services says they have gone from having 10 trained volunteer mediators in 1994, to 240 trained volunteer mediators, using a co-mediation model wherever possible. Services are free of charge to participants, and referrals come from a variety of sources, including county court judges, and increasingly attorneys encouraging mediation prior to filing a lawsuit. Recently they expanded successfully into citizen-police complaints through referrals from police internal affairs.[17] Their website boasts a 65% success rate, 940 settled cases in 2016, and savings to various county agencies of $258,356 as a result of their mediation services.[18]

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[13] *Telephone Interview with Kathleen Schoen, Director of the Colorado Bar Association Access to Justice Department, 7/30/18. Also, an advisory committee to the ODR recommended the state adopt voluntary standards for domestic relations mediators, and as a result a task force was commissioned to look at the issue, but as of January 2017, the Colorado Supreme Court has chosen not to adopt the proposed volunteer standards. See Colorado Judicial Department: Office of Dispute Resolution/Chief Justice Decision on Proposed Voluntary Standards for Mediators January 6, 2017 available at: https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Court%20Programs/ODR/Draft%20Revised%20Policies/Chief%20Justice%20Rice%20Final%20Decision.pdf*

[14] *See Colorado Judicial Website available at: https://www.courts.state.co.us/Administration/Unit.cfm?Unit=odr.*

[15] *Colorado Judicial Website Statistical Reports available at https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Annual_Statistical_Reports/2016/FY%202016%20Annual%20Statistical%20Report.pdf.*

[16] *Jefferson County Government Mediation Services Website available at https://www.jeffco.us/mediation-services.*

[17] *Helena Goldstein telephone interview, 8/1/18.*

[18] *Jefferson County Colorado Mediation Services Program Report 2016 available at https://www.jeffco.us/ArchiveCenter/ViewFile/Item/52.*

Quality control of mediators is similar to the ODR procedure, with background checks and required training, as well as peer reporting as a result of their co-mediation model.[19]

Florida

The State of Florida was also early to initiate mediation procedures. As far back as the mid-70's, court connected Citizen Dispute Settlement centers were established in Florida to facilitate settlement of community and neighborhood disputes. [20] To further develop ADR in the courts, the Florida Supreme Court and the Florida State University College of Law established the Dispute Resolution Center (Florida DRC) in the mid 1980's,[21] and effective January 1, 1988, the "Mediation Alternatives to Judicial Action Act" was adopted.[22] This major legislation specifically authorized the use of mediation by civil trial judges, subject to rules specified by the Florida Supreme Court, and has been amended several times to provide specific guidelines for the ADR profession.

Florida regulates mediators participating in court sponsored programs through a certification process.[23] The Florida Supreme Court adopted the Florida Rules for Certified and Court Appointed Mediators,[24] which thoroughly describe not only the certification process, but set out standards of professionalism, ethical standards, marketing guidance, grievance procedures, training standards and continuing education requirements that apply to all court appointed mediators. The Florida Supreme Court provides further support to the mediation community through its Mediator Ethics Advisory Committee (MEAC), which posts written advisory opinions to mediators based on written questions regarding ethical obligations under the Florida Rules.[25]

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[19] *Telephone interview with Helena Goldstein, 8/1/18.*

[20] *Florida Mediation & Arbitration Programs: A Compendum, 21st Edition, Fiscal Year 2009-10, Florida Dispute and Resolution Center available at https://www.flcourts.org/core/fileparse.php/254/urlt/09-10FYDRCCompendium.pdf.*

[21] *Id.*

[22] *See Fla. Stat. Ch. 44.*

[23] *Florida certifies mediators based on the type of court case: appellate, dependency, circuit civil, family and county, requiring specialized training for each, as well as strict continuing mediation education hours for each. As of August 2017, the Florida DRC reports a total of 5,674 certified mediators: 2,083 certified county mediators, 2,211 certified family mediators, 3,216 certified circuit mediators, 226 certified dependency mediators, and 467 appellate mediators. See Florida ADR consumer mediation information available at https://www.flcourts.org/resources-and-services/alternative-dispute-resolution/information-consumers/mediation-florida.stml.*

[24] *See Florida Rules for Certified and Court Appointed Mediators available at https://www.flcourts.org/core/fileparse.php/549/urlt/RulesCertifiedCourtAppointedMediators.pdf "Florida Rules".*

[25] *Mediator Ethics Advisory Committee opinions available at http://www.flcourts.org/resources-and-services/alternative-dispute-resolution/meac-opinions.stml.*

Prior to July of 2004, funding for mediation in Florida was left to the counties.[26] On July 1, 2004, in order to provide uniform access to mediation programs across the state, Florida passed a constitutional amendment providing for state court funding of mediation programs. [27] State funding to each circuit is currently based on a formula that takes into account the actual costs of mediation from projected data, as well as modifiers for use of volunteers, number of counties in a circuit, as well as other variables. State law also sets the fees that can be charged in court sponsored county and family mediation programs based on a sliding scale. [28] Each judicial circuit determines the service method of mediation, whether it be by contract mediator, volunteer or court employee, and services may vary by county.[29] Recent statistics collected by the DRC show 62,063 ADR sessions held in court sponsored programs from June 2016 to June 2017.[30]

Mediation information is readily available for the public on the Florida Courts Alternative Dispute Resolution website,[31] as well as on judicial circuit websites which are linked to the Florida Courts main page.[32] The state court website also provides comprehensive information for both existing mediators (including MEAC opinions) as well as training information for anyone wishing to enter the mediation profession. [33]

In addition to the state-wide funding, some counties are providing additional funding for mediation programs within their jurisdiction. In Lee County, for example, parties are free to use their contract mediator program for circuit civil cases at the sliding scale rates specified by the

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[26] *Court related ADR services were available in some counties – particularly a jurisdiction comprised of a single county, but not always in every county in a multi-county jurisdiction. Florida Mediation & Arbitration Programs: A Compendum, 21st Edition, Fiscal Year 2009-10, Florida Dispute and Resolution Center available at https://www.flcourts.org/core/fileparse.php/254/urlt/09-10FYDRCCompendium.pdf.*

[27] *Id. Florida Statutes also provide, "Mediation and arbitration should be accessible to all parties regardless of financial status". Fla. Stat. Ch. 44.108.*

[28] *Current dictated fees for circuit court family mediation are: $120 per person per session (generally considered to be 2-3 hours) where the parties combined income is greater than $50,000 but less than $100,000, and $60 per session per person where combined income is less than $50,000. County court mediation fees are set at $60 per person per session, and no fees are charged in small claims court mediation, or for anyone found to be indigent. Fla. Stat. Ch. 44.108.*

[29] *In the 20th Judicial Circuit, Collier County employs staff family court mediators, whereas in Lee County, contract mediators are used. Telephone interview with Jack Hughes, Alternative Dispute Resolution Director of Lee County Circuit Court, 6/26/18.*

[30] *Florida Courts Uniform Data Reporting available at https:// www.flcourts.org/core/fileparse.php/541/urlt/Alternative-Dispute-Resolution-Program-Jul16-Jun17.pdf.*

[31] *Florida Courts Alternative Dispute Resolution Website available at http://www.flcourts.org/resources-and-services/alternative-dispute-resolution/.*

[32] *For example see http://www.jud4.org/Court-Programs/Mediation-and-Dispute-Resolution-(ADR) available at https://www.ca.cjis20.org/home/main/adr.asp.*

[33] *Florida Courts Alternative Dispute Resolution Website available at http://www.flcourts.org/resources-and-services/alternative-dispute-resolution.*

state if they choose not to select a separate private mediator. Jack Hughes, Alternative Dispute Resolution Director of Lee County Circuit Court, estimates a 50-70% success rate (partial or full settlement) of cases mediated through his Lee County program.[34] In addition, Lee County also continues with a Citizens Dispute Settlement Program, currently run by Roseann Brown, Program Coordinator. Her CDS program is free of cost to citizens, and for 28 years has been highly successful in resolving everything from neighborhood disputes, landlord/tenant disputes, consumer/merchant disputes, debt collection and more. Participants find the program through flyers, word of mouth and repeat customers – and are all pre-suit disputes with no attorney involved. Ms. Brown estimates an 85% success rate and approximately 20-25 matters each month. [35]

Kentucky

Kentucky has taken a positive, though less formal approach to mediation as a means of dispute resolution. In 1998 the Kentucky legislature endorsed mediation with the adoption of Kentucky Revised Statute Section 454.011, wherein judges were "authorized and encouraged" to refer matters to mediation.[36] In July of the same year, Kentucky commenced a 'Settlement Week" program, encouraging litigants in selected cases to meet for settlement conferences conducted by volunteer mediators. Shortly thereafter several counties in the state launched mediation programs in their courts, but since budget cuts in 2008, those programs have mostly been disbanded. [37] Regardless, Kentucky continues to encourage and facilitate the use of mediation in its courts, displaying information on the use of mediation on the Kentucky Court of Justice webpage, linking the public to mediation information. In answering the question as to what cases can be mediated, the website goes so far as to state "the easier question is what should not be mediated".[38]

The Kentucky Supreme Court Order established rules pertaining to mediation procedure in the trial courts by Order 99-1, effective as of February 2000. In 2005 the Kentucky Supreme Court went further to establish guidelines for mediators specifying minimum suggested standards for the training, experience, and ethical conduct of mediators.[39] Other than these guidelines, the court is not currently involved with mediator governance issues. Kentucky does not formally

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[34] *Telephone interview with Jack Hughes, 6/26/18.*

[35] *Telephone interview with Roseann Brown, 7/28/18.*

[36] *See 1998 Ky. Acts ch.261, sec 3.*

[37] *Telephone Interview with Chief Justice Minton, 6/27/18.*

[38] *Kentucky Court of Justice Mediation Services website available at https://courts.ky.gov/courtprograms/mediation/Pages/default.aspx.*

[39] *Supreme Court of Kentucky Order 1999-01 and Supreme Court of Kentucky Order 2005-2.*

certify, license of otherwise regulate mediators, but the state maintains a roster of court approved mediators available for court ordered mediation on a private basis. All mediators on the list are required to have mediation training. Based on interviews with practicing attorneys, clients and judges in the state, it is clear that the standard of practice is for Kentucky judges in all courts to refer most disputes to mediation prior to hearing.

Kentucky remains committed to access to justice issues, and in 2010 Chief Justice John D. Minton of the Kentucky Supreme Court established the Kentucky Access to Justice Commission.[40] The Commission's mission is to work with all communities and stakeholders, including the other branches of government, to ensure access to justice for Kentucky's low and moderate income citizens. The Kentucky Supreme Court reaffirmed its commitment to the Commission by an Amended Order dated June 6, 2018.[41]

Based on the overview of these three states, it is clear that there are different approaches to the governance of mediation and development of mediation programs. Florida has decided to regulate mediation through its Supreme Court, fund programs state-wide, and specify sliding scale fees for court sponsored county and family mediation programs. Long ago, Colorado established and funded an Office of Dispute Resolution which has provided mediation programs throughout the state at pre-established rates. The ODR regulates its contract mediators, yet cases are increasingly referred to other mediation programs as the practice of mediation has proliferated in the state. Kentucky maintains a roster of court approved mediators and establishes guidelines for them, but has not formally articulated governance rules and processes for mediators. As the practice of mediation continues, and as various states learn from each other's experiences with mediation and continue to embrace it, I suspect more and more low and moderate income litigants and members of the legal community will find that mediation provides a viable alternative source for access to justice. And as mediation use increases and the practice develops, more legislation and guidance is sure to follow.

Part Two: A Discussion of Issues Concerning Mediation

This section addresses some of the key issues encountered when using mediation as a means to access justice for those with limited or moderate means. In writing this section I have relied on information gathered through interviews with judges, court administrators, attorneys, mediators, and clients in Kentucky, Colorado and Florida. Their varied experiences with differing mediation practices in their states resulted in significant differences of opinion on key issues discussed in this section. I found their comments very helpful to a complete understanding of the

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[40] *Kentucky Court of Justice/Committees and Commissions: Kentucky Access to Justice available at https://courts.ky.gov/commissionscommittees/KAJC/Pages/default.aspx.*

[41] *See Amended Order 2018-09 re: Establishment of Kentucky Access to Justice Commission by Chief Justice John D. Minton.*

issues, as their views represent a diversified cross-section of opinions on mediation as it pertains to the access of justice.[42]

The Pro Se litigant

Were you ever the new kid at school unsure where to sit in the cafeteria at lunch? Can you imagine how similar it might feel to navigate a civil court without an attorney? Would you know where to sit let alone how to tell your story to the judge?

The fact is that many litigants, unable to afford an attorney, are trying to do just that: to represent themselves (often in fairly complicated cases) in a court of law. Chief Justice Minton of the Kentucky Supreme Court points out that pro se representation is an issue not just for the indigent, but the middle class as well, and estimates over 80% of the participants in Jefferson County Family court are now appearing without counsel,[43] and a study by the National Center for State Courts found 76% of litigants unrepresented in civil cases.[44] This presents problems for both the court and the litigant, often resulting in frustration for both. Moreover, it raises a fundamental concern as to whether a fair resolution can be reached in situations where one participant does not fully understand the procedural rules or the applicable substantive law. Most commentators agree that mediation can address the first of these concerns by providing a process with less formality. But it is less clear whether mediation can ameliorate the second concern – and raises the question as to whether a mediator should proactively advise a non-represented participant on matters of substantive law.[45]

Every state has detailed procedural and evidentiary rules governing civil litigation to ensure that disputes are resolved in an efficient and orderly manner, with each side having the opportunity to discover relevant evidence and present its case. Over the years these rules have become more complex. Without a working knowledge of how to discover facts or to introduce evidence to a court of law, non-represented litigants are handicapped in their ability to tell their side of the story. The mediation process can provide a workable solution to this concern. Participants in mediation do not need to be familiar with formal court rules and procedure and are able to use an informal process of the exchange of information with help and guidance from the mediator.[46]

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[42] *The biographies for each interviewee are set out on Appendix A in alphabetical order. Due to the fact that these were separate interviews, note that there was no opportunity for the participants to respond to each other.*

[43] *Telephone interview with Chief Justice Minton, 6/27/18.*

[44] *National Center for State Courts: Call to Action: Achieving Civil Justice for All. NCSC undertook a multi-jurisdictional study of civil caseloads in state courts. The Landscape of Civil Litigation in State Courts focused on non-domestic civil cases disposed between July 1, 2012, and June 30, 2013, in state courts exercising civil jurisdiction in 10 urban counties. The dataset, encompassing nearly one million cases, reflects approximately 5 percent of civil cases nationally. Available at https://iaals.du.edu/sites/default/files/documents/publications/cji-report.pdf.*

[45] *Hung, Him, "Neutrality and Impartiality in mediation," 2002. ADR Bulletin: Vol. 5: No. 3, Article 7. Available at https://epublications.bond.edu.au/adr/vol5/iss3/7.*

[46] *Jefferson County Government Mediation Services available at https://www.jeffco.us/mediation-services.*

And at the outset of a mediation, most mediators sit down with the parties separately and simply talk with them – allowing them to tell their story in their way.[47]

Although mediation may make it easier on a pro se litigant to state his or her case, lack of knowledge of the law is still a huge problem for the unrepresented. What happens if a party agrees to a settlement in direct contravention of a law meant to protect them? For example, a tenant in an eviction case agrees to pay full rent for the time period when the apartment was uninhabitable – just to get out of the lease, unaware of the defense available. Can or should a mediator advise a pro se participant on the law to prevent an unjust result? Should a judge? What is the best forum for the pro se litigant? There is significant disagreement among practitioners on these highly important questions.

As a starting point, the ABA and most mediation standards have taken the position that mediation is not the practice of law,[48] and as such, it is unlikely that a mediator can be held to the standard of being required to advise a client on the status of the law. Indeed, in most standards, mediators are instructed to advise the client that they are there as an impartial neutral;[49] and even if licensed as an attorney, not there to act as an attorney to either side.[50] Further, most mediation guidelines allow or require that a mediator advise a client of the right to obtain an attorney when it appears they need advice.[51]

However, several commentators raise the question of how a mediator can remain both fair and impartial if he or she is aware that a party is about to agree to a settlement that does not take into account defenses or protection in the law available to them. [52] Do they advise the party without

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[47] *Id.*

[48] *ABA Section of Dispute Resolution: Resolution on Mediation and the Unauthorized Practice of Law, Adopted by the Section on February 2, 2002 available at https://www.americanbar.org/content/dam/aba/migrated/dispute/resolution2002.authcheckdam.pdf. "Mediation is not the practice of law".*

[49] *Florida Rules for Certified and Court-appointed Mediators Rule 10.420 "Conduct of Mediation: (a) Orientation Session. Upon commencement of the mediation session, a mediator shall describe the mediation process and the role of the mediator, and shall inform the mediation participants that: (1) mediation is a consensual process; (2) the mediator is an impartial facilitator without authority to impose a resolution or adjudicate any aspect of the dispute". Available at https://www.flcourts.org/core/fileparse.php/422/urlt/Mediator-Rules-Tab-3.pdf.*

[50] *ABA Section of Dispute Resolution: Resolution on Mediation and the Unauthorized Practice of Law, Adopted by the Section on February 2, 2002. "Mediator's discussion of legal issues. In disputes where the parties' legal rights or obligations are at issue, the mediator's discussions with the parties may involve legal issues. Such discussions do not create an attorney-client relationship, and do not constitute legal advice, whether or not the mediator is an attorney". Available at https://www.americanbar.org/content/dam/aba/migrated/dispute/resolution2002.authcheckdam.pdf.*

[51] *Florida Rules for Certified and Court-appointed Mediators Rule 10.370 (b) "Independent Legal Advice. When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the party of the right to seek independent legal counsel." Available at https://www.flcourts.org/core/fileparse.php/422/urlt/Mediator-Rules-Tab-3.pdf.*

[52] *Hung, Him, "Neutrality and Impartiality in mediation," 2002, ADR Bulletin: Vol. 5: No. 3, Article 7. Available at: http://epublications.bond.edu.au/adr/vol5/iss3/7. See also Susan Nauss Exon, "How Can a Mediator be Both*

counsel on the law? Is that a fair result? And if they were to advise the unrepresented side on the law, are they being impartial?

There is significant difference of opinion among professionals as to what impartiality requires of mediators. Shannon Bell, attorney with the law firm of Kelly Walker LLC, suggests the standard for mediators should be ensuring fairness in the process and procedure and not necessarily ensuring a fairness in the knowledge of the law.[53] Jon Asher, Director of Colorado Legal Services, takes a different view and asserts that a mediator who knows of a gross injustice in mediation shouldn't be paid. He asserts the result of a successful mediation is not any agreement by the parties, but a reasonably fair resolution of their dispute. [54] After serving 19 years on the bench, Judge Joan Byer, former family court judge in Louisville, Kentucky, points out that in her recent mediation experience, she feels more capable of dealing with a litigant's lack of knowledge of the law as a mediator, than she did as a judge, where she was required to rule solely based on the evidence in front of her.[55]

Likewise, current US law is still unclear, but evolving on how far a judge can go to assist an unrepresented litigant and yet maintain ethical standards.[56] Although the judiciary has traditionally maintained a passive role in our adversarial system, there is some support for judges taking a more active role in assisting the self-represented litigant.[57]

Impartial and Fair: Why Ethical Standards of Conduct Create Chaos For Mediators", 2006 J. Disp. Resol. 387 (2006).

[53] *Interview with Shannon Bell, 8/14/18.*

[54] *Interview with Jonathan Asher, 8/15/18.*

[55] *Telephone interview with Judge Joan Byer, 8/21/18.*

[56] *For the most part the relevant standard is still the US Supreme Court case of McKaskle v Wiggins, wherein the court ruled that pro se litigants are not entitled to "personal instruction by the trial judge, on courtroom procedure." 21 McKaskle v. Wiggins, 465 U.S. at 183, but also see Meckley v. U.S., 1992 U.S. App. LEXIS 9033 (*4) (4th Cir. 1992) (trial judge has "some responsibility to assist pro se litigants who are unable to identify the proper defendant"); Timms v. Frank, 953 F. 2d 281, 285 (7th Cir. 1992) (trial judge has duty to provide "fair notice" to SRLs of their obligations upon the filing by their adversary of a Rule 56 summary judgment motion "in ordinary English"); Cincinnati M.H.A. v. Morgan, 155 Ohio App. 3d 189, 194 (2003) (trial judge "should make clear to a [SRL] . . . that he or she has the right to cross-examine the opposing party"); Gilbert v. Nina Plaza Condo Association, 64 P. 3d 126, 129 (AK. 2003) (trial judge has duty to inform SRL of her right to file a motion to compel discovery in order to secure documents needed to comply with court's pretrial order, and to give her a reasonable opportunity to do so.*

[57] *Russell Engler, Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role, 22 Notre Dame J.L. Ethics & Pub. Pol'y 367 (2008). Available at http://scholarship.law.nd.edu/ndjlepp/vol22/iss2/5article). Also see ABA Model Code of Judicial Conduct Rule 2.2, "A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." Comment 4: "It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard". ABA Model Code of Judicial Conduct R. 2.2 cmt. 4 (2007), available at https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_2impartialityandfairness.html.*

Perhaps the answer as to when a pro se litigant should be advised on the law can be determined by the type of forum mediation is: mediation is, by its very nature, meant to be a problem solving approach to dispute resolution, rather than an adversarial process. Practitioners value the ability to use mediation to get away from the restrictions in place in the more formal court room procedure: allow a participant to "tell his side of the story",[58] facilitate getting one's client to do something the attorney cannot,[59] or to allow an emotional release.[60] Bill Ide, former President of the ABA, suggests that since the spirit of the forum of mediation is to get a resolution, not a "gotcha" or procedural game-playing adversarial procedure, it doesn't make a difference if a good mediator, after obtaining facts, helps the pro se litigant to understand the law, as long as the mediator is qualified to do so.[61] Clearly more thought needs to be put into providing guidance to both judges and mediators to help determine how best to deal with the influx of pro se litigants, and whether or not an unrepresented participant fares better in a court with a judge, or in the still developing field of mediation.

Imbalance of Power

One of the fundamental principles of mediation is that the parties must be able to exercise self-determination in coming to a mutually agreeable solution. As such, it is a fairly universal belief that mediation is not an effective dispute resolution system where one party has much stronger bargaining power or control over the other. For example, when one party has unlimited financial resources available, and the other does not, an imbalance in bargaining power ensues.

For the moderate income litigant, mediation can be an effective way to minimize the expenses of litigation.[62] All too often in disputed matters, one party may not be limited by funding, and will use that to their advantage – "over-litigating" the case in hopes the other side will give up and go away. When a case has been filed in the courts, this problem can be exacerbated by an attorney who, responding to the obligation the legal profession places on an attorney, zealously represents clients, leaving no stone unturned in adversarial litigation and churning away and increasing legal fees. Several clients I spoke to were turned down by litigation lawyers, told that the expenses of litigation would exceed the potential recovery. The result is a lack of access to justice for many, in particular someone with a moderate means of income, or with a relatively modest claim for damages or relief, who won't qualify for a legal aid lawyer.

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[58] *Telephone interview with Helena Goldstein, 8/1/18.*

[59] *Telephone interview with Sheryl Snyder, 8/21/18.*

[60] *Interview with Shannon Bell, 8/14/18.*

[61] *Telephone interview with Bill Ide, 8/24/18.*

[62] *Tina Drake Zimmerman, Representation in ADR and Access to Justice for Legal Services Clients, 10 Geo. J. on Poverty L. & Pol'y 181 (2003).*

Fortunately, mediation can be of use in these scenarios and more attorneys and clients with resources are showing a willingness to try mediation. Indeed, many attorneys no longer see an agreement to mediate as a potential sign of weakness, but rather an expected and beneficial procedure. [63] Increasingly as the expenses of litigation continue to escalate, corporate counsel are also looking to mediation as a cost-effective means to resolve disputes quicker and economically. [64] Indeed, many companies have affirmatively developed dispute resolution programs to pro-actively reach out to contact customers with grievances, offer to remedy the problem and mediate a settlement, and therefore avoid the costs of litigation for both sides.[65] And in many instances, mediation can add the benefit of avoiding further publicity on a matter.

Of course, a party cannot by definition be forced to reach agreement through mediation, and well-funded litigants may refuse to participate in good faith, believing their greater economic resources will enable them to get a better result in court. In such cases, Sheryl Snyder, attorney with Frost Brown Todd LLC, in Louisville, Kentucky, suggests that consumer watch-dog groups could assist, keeping a record on companies willing to mediate their disputes.[66] As social media becomes more prevalent and we increasingly continue to pledge our loyalty or voice our dislike of companies and products online, more information may become available to the public on a particular company's good faith willingness to provide fair dispute resolution. Bill Ide suggests corporate clients want to do the right thing, and it is in their own interest to use ADR as a way to build good will and resolve disputes in a fair system, and then move on, retaining their reputation and their brand.[67]

Limited Scope Representation

One way to address limited financial resources of litigants is through more expanded use of limited scope representation, whereby an attorney represents the client only for a specific limited purpose. For example, a limited scope arrangement would allow the attorney to represent the client only at the mediation, or only to review a settlement agreement.

Some of the attorneys I interviewed support the concept of representing a client only at the mediation, but question whether this would result in any substantial cost-savings. In order to prepare for mediation, the attorney must understand the case fully, do research on relevant law, and review relevant documentation, all of which incurs time and fees. Practitioners assert that without this preparation, the mediation will be ineffective and a waste of attorney and mediator

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[63] *Telephone interview with Sheryl Snyder 8/21/18, commenting that mediation is so commonplace now it is expected; interview with Shannon Bell, 8/14/18.*

[64] *Interview with Shannon Bell, 8/14/18.*

[65] *Interview with Chris Campbell, 8/17/18.*

[66] *Telephone interview with Sheryl Snyder, 8/21/18.*

[67] *Telephone interview with Bill Ide. 8/24/18.*

fees.[68] Of course, if successful, ending the dispute at the mediation stage could result in a substantial cost savings by eliminating all of the fees associated with trial.

Kathleen M. Schoen, Director of Local Bar Relations and Access to Justice for the Colorado Bar Association, promotes hiring an attorney for a limited scope review of draft settlement agreements reached in mediation before being signed by the parties, to make sure the agreements are appropriate and in compliance with the law. In her view, once clients understand the importance of a court order and the fact that they have to live with it – the client recognizes it might be worth the expense and time for a limited review.[69] Moreover, some commentators also point out that clients should not assume their rights will be fully protected by a final judicial review of the settlement order, because in many cases judges oversee crowded dockets and do not have the time or resources to review the minute details of every settlement agreement for "fairness". [70]

Some practitioners expressed concern over the use of limited scope representation, as the legal profession has historically obligated attorneys to provide "full representation" under the law. They contend that a client might not fully understand the limitations of their representation, even after they agreed to limited scope representation. In these cases, attorneys understandably would want to proceed carefully and substantially limit their risk through well-drafted engagement agreements.[71] And many voice concern over whether or not limited scope representation can provide all that a client really needs.[72] Court rules and procedures, including those requiring an attorney to seek court approval before being allowed to withdraw from a case, add to the attorney's concern about using limited scope representation.

Some states have affirmatively attempted to address these concerns with rules that formally recognize and encourage the use of limited scope representation. For example, in 1999, the Colorado Supreme Court amended its rules of professional conduct and civil procedure to facilitate the use of limited scope legal assistance, easing restrictions on the preparation of pleadings and papers, and expressly allowing the limitation of the scope of representation.[73]

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[68] *Interview with Shannon Bell, 8/14/18.*

[69] *Telephone interview with Kathleen Schoen, 7/30/18.*

[70] *As Judge Byer explains, judges in her court were handling 2000 cases each per year, and had very limited time to review settlement agreements. In her court, all pro se mediation agreements were reviewed by a staff attorney. Telephone interview Judge Joan Byer, 8/21/18.*

[71] *Judge Byer would want a bold release. Telephone interview with Judge Byer, 8/21/18.*

[72] *Interview with Shannon Bell, 8/14/18.*

[73] *Colorado Rules of Professional Conduct 1.2(c). Colorado Rules of Civil Procedure Rule 11(b) and 311(b).*

And in 2003, through a Modest Means Task Force appointed by the Section of Litigation of the ABA, the ABA created a Handbook on Limited Scope Legal Representation complete with an Appendix of Practice Forms.[74]

Despite these developments, both attorneys and the public need more education on limited scope representation, and how it could apply in mediation. Jon Asher recommends that limited scope representation become a subject taught as a viable business model in law school.[75] Although attorneys are not completely on board yet with the expansion of its use, limited scope representation in the mediation process could become a more viable tool to dispute resolution for those with moderate means.

Qualifications of the Mediator

If mediation is to be successful, a qualified mediator is necessary. The current educational process accepted in many forums is a 40 hour class followed by some type of internship process, and continuing education requirements.[76] As already discussed, although some states "certify" mediators or have otherwise codified mediator requirements, most states have not become involved in ensuring the quality of the mediator.[77] There is also significant disagreement on whether or not mediators must also be attorneys. In his article, "The Expert Mediator vs the Subject Matter Expert", Jon Linen, an Accredited Professional Mediator (APM) for Civil/Commercial Mediation by the New Jersey Association of Professional Mediators, provocatively suggests that there is no reason "why an expert mediator needs to know anything about a particular case before walking in the door".[78] Indeed, some of the various guidelines, ethical rules, and standards of conduct developed to regulate mediation require a mediator to be a licensed attorney, and others do not. [79] However, there is general agreement among those I

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[74] *American Bar Association Section of Litigation Handbook on Limited Scope Legal Assistance available at https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_handbook_on_limited_scope_legal_assistance.authcheckdam.pdf.*

[75] *Interview with Jonathan Asher, 8/15/18.*

[76] *Mediation Training Institute International: State Requirements for Mediators. Available at http://www.mediationworks.com/medcert3/staterequirements.htm. And Northern Virginia Mediation Service: State by State Guide to Court Mediator Qualifications. Available at https://nvms.us/wp-content/uploads/2014/11/us-mediation-certification-standards.pdf.*

[77] *The Florida Supreme Court certifies mediators before they can participate in court sponsored programs. See Fl. Stat. 44.106; and www.flcourts.org/core/fileparse.php/549/urlt/RulesCertifiedCourtAppointedMediators.pdf; North Carolina has also established certification procedures N.C.Gen.Stat. Section 7A-38.2; Kentucky has decided not to certify mediators at this point. Interview with Chief Justice Minton, 6/27/18.*

[78] *Jon Linen, "The Expert Mediator vs. the Subject Mediator, available at https://www.mediate.com/articles/linden20.cfm?nl=66.*

[79] *Mediation Training Institute International: State Requirements for Mediators. Available at http://www.mediationworks.com/medcert3/staterequirements.htm. And Northern Virginia Mediation Service: State*

interviewed that a mediator must at a minimum be familiar with the area of law at issue in the case, and capable of spotting the issues presented.[80]

During my circuit civil mediator training class, I watched a non-lawyer struggle with several role-playing mediation scenarios due to his lack of understanding of the law involved. And I recently took a CME class geared towards educating the non-lawyer mediator on landlord tenant law and was not convinced that it provided the participant enough information necessary to understand the laws surrounding eviction. Jon Asher answers the question with another question "Do you want a third year biology student performing your colonoscopy?" [81] Whether or not a non-attorney can be trained to understand the relevant legal issues remains a highly debated question, and in the end, it depends on the subject matter involved.

However, some programs in county courts are having significant success with well-trained volunteers who are not licensed attorneys. In those courts, discovery and evidentiary rules are limited, and areas of the law less complicated such that more streamlined training of mediators can be highly effective. Family law mediation has long recognized the value of mediators trained as counselors or psychologists. And law students, under appropriate supervision and guidance, are being trained to provide mediation services in numerous scenarios, providing low-cost access to mediation programs.[82]

In thinking about this question, we should also consider the fact that there are different recognized types of mediation: facilitative and evaluative, and depending on who you talk to directive and/or transformative.[83] Facilitative is directed towards allowing the parties to come to their own decisions through discussion facilitated by the mediator. Some attorneys appreciate the ability of a facilitative mediator to allow their clients an "emotional release" such that they can then get down to the facts of the case.[84] In evaluative mediation, the mediator is free to provide his or her evaluation to the parties of the merits of the case.[85] Obviously the type of

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by State Guide to Court Mediator Qualifications. Available at https://nvms.us/wp-content/uploads/2014/11/us-mediation-certification-standards.pdf.

[80] *"The mediator needs to be able to ID the issues" -Telephone interview with Chief Justice Minton, 6/27/18; "I wouldn't want a PI lawyer mediating a patent case"- Telephone interview with Sheryl Snyder, 8/21/18; "The mediator needs to be on the same level as the attorneys" - Telephone interview with Judge Joan Byer 8/21/18.*

[81] *Telephone interview with Jonathan Asher, 6/27/18.*

[82] *ABA Dispute Resolution Task Force on Access to Justice, Access to Justice through Alternative Dispute Resolution White Paper, (2015).*

[83] *Katina Foster, "A Study in Mediation Styles: A Comparative Analysis of Evaluative and Transformative Styles" June 2003, available at https://www.mediate.com/articles/fosterK1.cfm 2003; and Doug deVries, "Mediation: Understanding Facilitative, Evaluative and Directive Approaches" available at www.dkdresolution.com/articles/Mediation.Understanding.3.1.pdf.*

[84] *Telephone interview with Sheryl Snyder 8/21/18 – he looks for a facilitative mediator when animosity is sufficient between parties such that it helps to get the client to be more reasonable.*

[85] *Interview with Shannon Bell, 8/14/18- she prefers this method rather than the mediator just running numbers back and forth, as it can help her evaluate the weaknesses in her case.*

mediation dictates the needed qualifications of the mediator. A non-attorney would not be able to evaluate a case involving a technical area of the law, and conversely, in many facilitative mediations, a former judge, used to dictating to the litigants, has trouble allowing the parties to come to their own decision.

As with any profession, there are good mediators and there are bad mediators. Some mediators are too goal oriented, rushing to reach any settlement.[86] Others are too passive and unable to foster an environment where agreement can be reached.[87] Quality control is essential in order to assure the public of the value of the service. As discussed, some states and courts have adopted rules requiring self-governance[88] and have public grievance procedures in place,[89] and others have chosen not to develop guidelines. At present, there is no consensus on the use of volunteer mediators or how they should be reviewed.[90] But particularly for the moderate income litigant, who might be mediating without an attorney, a quality mediator is a necessity and the mediation profession will need to exercise quality control to insure the efficacy of mediation and its future use.

Type of Case: What should and what shouldn't mediate and who decides?

I'll imitate the Kentucky Court of Justice's mediation information page and start this discussion with the easier question of "What should not be mediated?" Obviously cases with violent parties, and cases requiring constitutional interpretation or cases raising technical questions of law should not be mediated. Legal aid lawyers are sometimes reluctant to mediate cases, due to their desire to establish important legal precedent which would apply to a broad spectrum of

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[86] *Interview with Shannon Bell, 8/14/8.*

[87] *Interview with Chris Campbell, 8/17/18.*

[88] *Florida requirement for competence and an obligation to withdraw if the mediation is outside of the mediator's skill level. Florida Rules for Certified and Court-appointed Mediators: Rule 10.630 "Professional Competence: A mediator shall acquire and maintain professional competence in mediation. A mediator shall regularly participate in educational activities promoting professional growth." Rule 10.640 "Skill and Experience: A mediator shall decline an appointment, withdraw, or request appropriate assistance when the facts and circumstances of the case are beyond the mediator's skill or experience."*

[89] *Florida Mediator Ethics Advisory Committee. Available at www.flcourts.org/resources-and-services/alternative-dispute-resolution/information-trainers-legal-professionals/meac-opinions.stml.*

[90] *Helena Goldstein praises the dedication of her trained volunteers in Jefferson County Colorado yet admits that there is a variety of capabilities amongst the mediators. The program maintains quality control through co-mediation methods and peer review. Telephone interview with Helena Goldstein, 8/1/18. See also a discussion of the benefits and drawbacks on the use of volunteer mediators in a report by the Supreme Court of Florida Commission on Trail Court Performance and Accountability. Supreme Court of Florida Commission on Trail Court Performance and Accountability, "Recommendations for Alternative Dispute Resolution Services in Florida Trail Courts", page 44 (August 2008).*

disputes.[91] And companies might not be willing to mediate where they need a resolution on liability or systemic issues need to be resolved[92] or wish to establish a pattern of behavior.[93]

Mediation has been an accepted form of dispute resolution in domestic relations cases for quite some time,[94] and it has been suggested that mediation works best where the parties have an ongoing relationship or need to work together, such as family probate disputes, business partner disputes, and landlord/tenant issues other than eviction procedures. But whether a specific dispute should be mediated really depends on the specific case and its participants.[95] Some courts now routinely make it a practice to refer all matters to mediation – however, where litigants are unwilling or unable to listen, let alone compromise in good faith, this can be a waste of time.

It would be wonderful if parties would seek out private mediation services on their own, prior to filing a lawsuit, but once a case has been filed with a court, the judge is in the best position to ascertain whether mediation is a viable option. Chief Justice Minton is "not a fan of mandatory mediation", recognizing the need to consider all alternatives and issues presented.[96] Plus, statistics show a higher success rate with voluntary ADR vs mandated.[97] But as Jon Asher notes, in many cases, "unless mandated, the parties won't get there on their own".[98] Court procedures recognize that there may be issues of which a judge might not be aware, and afford parties the opportunity to argue to the court that mediation is not appropriate to the controversy, and the judge can then consider and rule on those objections.[99] Hopefully, as experience with

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[91] *Tina Drake Zimmerman, Representation in ADR and Access to Justice for Legal Services Clients, 10 Geo. J. on Poverty L. & Pol'y 181 (2003). Jon Asher notes in these cases it is a disservice not to have a judgment of record. Telephone interview 6/27/18.*

[92] *Telephone interview with Sheryl Snyder, 8/21/18.*

[93] *Interview with Shannon Bell, 8/14//18.*

[94] *ABA Dispute Resolution Task Force on Access to Justice, Access to Justice through Alternative Dispute Resolution White Paper, (2015).*

[95] *Kathleen Schoen points out that both participants need to be willing. In divorce cases, logistics of the mediation, including if it is to go forward, are determined on a case by case basis. To be effective, mediation needs to be a voluntary decision of the parties. Telephone interview with Kathleen Shoen 7/30/18. Shannon Bell agrees stating each case is "fact and client specific". Interview with Shannon Bell, 8/14/18.*

[96] *Telephone interview with Chief Justice Minton, 6/27/18.*

[97] *US Dept of Justice: Alternative Dispute Resolution at the Department of Justice: Statistical Summary: Use and Benefits of ADR by the Dept of Justice – 2013 -Voluntary ADR 75% Resolved, Court Ordered 49% Resolved. Available at: http://www.justice.gov/olp/ard/doj-statistics.htm.*

[98] *Interview with Jon Asher, 8/15/18.*

[99] *Both Florida and Colorado have mandated that in domestic relations where one party feels physically threatened by the other, mediation is not appropriate. Col. Rev. Stat. Section 13-22-311 and Fla. Stat. Ch. 44:102 (2)(c). And Florida has a required screening form available for domestic relations cases.*

mediation grows, we can rely on the judiciary to appropriately refer cases to mediation after taking all factors and issues into consideration, and continue to make mediation accessible to and workable for moderate income earners and the public.

Success, Data and Satisfaction with the Process:

One of the benefits cited for the use of mediation is the level of satisfaction with the process. If one is involved with the solution to the dispute, one is more likely to approve of the process and adhere to the terms of settlement.[100] A recent study of an EEOC Mediation program cited a 96% approval of responding parties and 91% approval of charging parties involved.[101] Indeed, of the clients I spoke with, all spoke very highly of their involvement in the mediation process.

But what is a successful mediation? Does settlement equal justice? As discussed above, without oversight from someone knowledgeable with the law, a settlement agreement might actually conflict with the laws meant to protect us, or provide an unjust result if not corrected by a judge reviewing the final agreement. Jon Asher suggests we need an objective review of a mediator's work to determine if a just settlement was reached.[102] Yet most court records are limited to whether or not a case settled – giving us no knowledge of whether, in some objective sense, a settlement is just.[103] Clearly, we need to do a better job gathering information on whether or not a mediation session resulted in a settlement. But if the parties have reached an agreement through self-determination, should we be inserting our own notions of "fairness" into someone else's dispute to determine mediation's efficacy? And if so, how?

Technology and Online Dispute Resolution:

The increase of technology in everyday life has been and will continue to be a great asset to providing access to the court system. LSC's Technology Initiative Grant Program has awarded

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[100] *Donna Shestowsky, The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante, 99 Iowa L. Rev 637 (2014) Available at https://ilr.law.uiowa.edu/print/volume-99-issue-2/the-psychology-of-procedural-preference-how-litigants-evaluate-legal-procedures-ex-ante.*

[101] *https://www.eeoc.gov/eeoc/mediation/studies.cfm*

[102] *Interview with Jonathan Asher, 8/15/18.*

[103] *The Colorado Judicial Department Statistics record whether or not a case was resolved, partially resolved, served and left with a proposal, was inappropriate for mediation, is ongoing, or was referred but no mediation session was held. See Colorado Judicial Website Statistical Reports available at https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Annual_Statistical_Reports/2016/FY%202016%20Annual%20Statistical%20Report.pdf. Florida courts record cases referred to mediation and sessions held, but no data is currently kept for circuit civil cases given the difficulty in keeping accurate records where predominately private mediators are used. See www.flcourts.org/core/fileparse.php/541/urlt/Alternative-Dispute-Resolution-Program-Jul16-Jun17.pdf. See also Florida Mediation & Arbitration Programs: A Compendum, 21st Edition, Fiscal Year 2009-10, Florida Dispute and Resolution Center available at https://www.flcourts.org/core/fileparse.php/254/urlt/09-10FYDRCCompendium.pdf.*

substantial funding to projects in several states seeking to help meet the needs of low income people.[104] Through such grants, states continue to improve access to justice though informational websites containing readily understandable information for litigants. Many private sources have gained popularity such as Legal Zoom and Rocket Lawyer, providing basic legal information to the public.[105] All of these methods can be extremely helpful to the moderate income litigant in particular, with access to a computer and enough education to navigate a website. Yet many times, available information is not enough to effectively access the system.[106]

With this wave of legal information from technology also comes a plethora of information on mediation sources --for example, quite simply "mediate.com" , and most court websites contain information on sponsored mediation facilities. Mediators have also taken to providing mediation services online rather than in person.[107] Although the reaction of many mediators and attorneys is that mediation is best handled in person, or at a minimum with visual contact,[108] in reality some successful mediation already takes place without visual contact in every day practice.[109]

Several online dispute resolution programs are giving the human centered traditional form of mediation a run for its money. EBay maintains a program where buyers and sellers can settle disputes online.[110] Many businesses are looking at similar online programs, and according to Susan Marvin, the Florida DRC is reviewing the MODRIA software (Modular Online Dispute Resolution Implementation Assistance), an online dispute resolution program. MODRIA starts

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[104] *LSC Website – Technology Information Grants. Available at: https://www.lsc.gov/grants-grantee-resources/our-grant-programs/tig.*

[105] *I was disheartened to see that it costs $24.95 on USlegalforms.com to buy KY Probate form KY AOC-830 – Petition to Dispense with Administration, and the form is available for free on the Kentucky Court website.*

[106] *As Judge Byer cites, "forms alone do not provide access" and legal advice is often still necessary. Telephone interview with Judge Joan Byer, 8/21/18. Jon Asher believes we shouldn't be satisfied with simply providing forms. Telephone interview with Jonathan Asher, 6/27/18.*

[107] *JAMS online -https://www.jamsadr.com/endispute/.*

[108] *Shannon Bell's " knee jerk reaction" is that mediation needs to be in person, but acknowledges the world is changing and other possibilities need to be considered. Interview with Shannon Bell, 8/14/18; Helena Goldstein believes that mediating in person allows the mediator to glean valuable information from the body language and other non-verbal clues provided by the participants. However, she also states that JCMS has conducted dozens of successful phone mediations, and notes that elderly people, people with disabilities and illnesses, as well as those living in remote areas (where mediators may be unavailable) have greater access to mediation via tools such as Skype and Gotomeeting.com, and as a result believes that tools such as Skype will be used more and more in the future. Telephone interview with Helena Goldstein, 8/1/18.*

[109] *Shannon Bell notes that on occasion insurance representatives participate in mediation telephonically- Interview 8/14/18; Helena Goldstein mentioned that where one party has moved out of state, mediation regarding child support is often handled through telephone calls –Telephone interview, 8/1/18; and Roseanne Brown already often mediates by phone call- Telephone interview, 7/28/18.*

[110] *https://resolutioncenter.ebay.com.*

with negotiation assistance and leads into the mediation process if warranted.[111] Online dispute resolution systems are praised for their ability to provide more flexible, less biased and efficient dispute resolution, limiting the need to travel, and so far enjoy great customer satisfaction.[112] Such mechanisms can be a huge supplement to access to justice for moderate income participants; however, as pointed out by several interviewees, in many disputes, there is no substitute for a human touch.

Part Three: Proposal

The courts have been the center of our dispute resolution system since our Constitution was adopted. We expect, as a fundamental right, the ability to go to court to address our disputes and seek justice. As our society developed, more regulation and rules in our justice system followed. Although well intentioned as a means to address some problem, issue, or even access to justice, our adversarial litigation system is complex and increasingly difficult to access. Lawyers spend three years in law school studying the law, rules of procedure, and how to advocate for their client zealously. They also spend an increasing amount on law school tuition and admission to the bar, then start their practice already burdened with substantial debt. Increasingly, moderate income clients are unwilling and unable to pay their fees. It is true that many cases need to be dealt with in a court of law, and without our rules of civil procedure and evidence we would have a system where "whoever yells the loudest gets heard".[113] The rules, albeit complicated, are there for our protection. But not every dispute needs to be resolved in a formal adversarial manner.

As mediation develops, surviving its infancy as a profession, its efficacy is becoming apparent, as more and more participants express satisfaction, and mediators gain respect from attorneys, the judiciary and their clients. In no way do I wish to denigrate private mediation, and in fact, I am a proponent of people taking responsibility for their own issues, and seeking out alternative forms of dispute resolution prior to seeking justice in the court system. However, given our longstanding history of seeking dispute resolution through the courts, I believe the judiciary (through appropriate funding) should take the responsibility for promoting mediation through court-sponsored programs. We are already tied to court offices for tasks such as obtaining marriage licenses, name changes, and settling estates of loved ones. It is natural to continue regulation of disputes over those issues through the courthouse. Many citizens have an appreciation for the "authority of the court" and look to the judiciary to enforce the rule of law. Mediation programs can promote justice for all, and as such represent an essential government function best administered by the courts.

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[111] *https://www.tylertech.com/solutions-products/modria; and Telephone interview with Susan Marvin, Chief of ADR for the Florida Dispute Resolution Center, 7/16/18.*

[112] *Joint Technology Committee: ORD for Courts, Version 2.0, November 2017.*

[113] *Telephone interview with Kathleen Schoen, 7/30/18.*

If mediation is going to remain a viable dispute resolution forum, discussion needs to continue on appropriate mediator qualifications, and each state or court needs to develop appropriate standards and guidelines for their mediators, whether they be court employees, volunteers or contract mediators. It should be expected that qualifications and education will vary based on the type of case and mediation. To be effective, quality control is key, and evaluation standards need to be in place for each court. Given the influx of unrepresented litigants the legal community needs to take a stance on whether or not a mediator, may or must advise a pro se litigant on substantive or procedural law in order to provide a fair result. In the spirit of keeping mediation as a problem solving approach to dispute resolution and not adversarial, I propose a mediator should be able to advise a non-represented litigant on relevant law to the extent of the mediator's qualifications in any given scenario. However, in all scenarios, an attorney mediator must not act as counsel to either party and must be sure to advise all clients that he or she is not acting as counsel to either party. Of course every mediator should promote fairness in the process by stopping the mediation if the mediator feels an injustice might occur as a result of lack of legal knowledge and advise the participant of their right to seek legal counsel, or refer the matter back to the court for resolution.

The legal community should continue the promotion of limited scope representation, and put safeguards in place for attorneys willing to do so. Limited scope representation can be in the form of representing a client only at the mediation, or limited even further to post mediation review of the settlement agreement. Local courts can maintain a list of attorneys willing to provide such limited representation. And efforts should be made to continue practice guidance and require attorneys to discuss ADR with their clients such as the Colorado rule already in place.[114]

Judges can assist the moderate income litigant by referring appropriate cases on their docket to mediation in an effort to save trial expenses and allow access for those with a limited budget. By mandating mediation, even the well- funded and perhaps recalcitrant party will have exposure to mediation and an opportunity to experience the benefits of mediation. In time, as the practice develops, more parties might seek mediation prior to filing with the court, saving even more expense and allowing more access to justice.

Educational efforts need to apply to everyone: from CLE and articles written for practicing attorneys, changes to the law school curriculum to add alternative dispute resolution practice and more emphasis on ethics and the responsibility of the legal profession, to continuing discussion of effective mediation programs (including online dispute resolution for judges and court administrators). The continued use of online websites providing information regarding mediation to the public is imperative. Every local court website, and every bar association website should have links to information on mediation, where to obtain it and who to contact. As familiarity with online processes continues, every jurisdiction should look into online dispute resolution programs. And with added technology resources, courts will also be able to maintain

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[114] *Colorado Rules of Professional Conduct direct attorneys to advise their client of alternative forms of dispute resolution in a matter involving litigation. Colo. RPC. 2.1.*

an accurate record of cases referred to mediation to help us continue to study the mediation process and determine where it is best used.

In Reboot Justice, Benjamin Barton and Stephanos Bibas propose a solution of limiting a lawyer's education, and relying more on technology to settle disputes.[115] Although I appreciate and advocate for the necessary role of technology in our legal system, and appreciate the cost effectiveness of less human intervention, less education never solved anything, and in the emotional world of dispute resolution, human intervention is a necessity. The ever advancing use of computers and technology in all aspects of our lives is reality and the quicker we learn how and where to use it to our advantage, the better, but we cannot forget the need for human interaction and discussion.

Conclusion:

So what happened to the cabinet installer, hair dresser and waitress? With a few words of encouragement, the cabinet installer was able to negotiate his own settlement with the collection agency. Had there been an available online dispute resolution forum, he would have made use of it. The hair dresser unfortunately moved back into her father's home and continued to make rent payments to her landlord for 5 months. I suspect the landlord was able to rent the apartment to someone else and had a windfall in rent payments, but I do not know that for a fact. She was a victim of a power imbalance, and had she been given some advice on the law, through either limited scope representation or through a mediator in a mediation program (if legally permitted), her result might have been much different. The waitress was fortunately able to successfully mediate both a divorce settlement and custody issues through a court sponsored family mediation program.

If the judiciary is going to remain at the center of dispute resolution, changes are imperative. Chief Justice Minton recognizes the need stating, "I am a fan of trying to find ways to provide access to the courts. Unless we are open to new ideas, we will find ourselves out of the dispute resolution business."[116] Public perception and habit is still to look to the court to seek justice, and that is where we should continue to place our focus for dispute resolution. True, our rules and regulations have become more complicated, perhaps an over response to a problem we sought to solve, making the adversarial litigation process perhaps too cumbersome. Yet, the courts have the public responsibility to provide dispute resolution.

Through the addition of court sponsored mediation programs wherever possible, we can work to provide a problem-solving approach to dispute resolution, and still use our more formal adversarial approach where necessary. Education and funding are key components to facilitating this necessary change. As the public and the legislature become more aware of the availability

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[115] *Benjamin H. Barton and Stephanos Bibas, "Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law", (2017).*

[116] *Telephone interview with Chief Justice Minton, 6/27/18.*

of mediation programs and how they can work, and as better data are collected on the efficacy of mediation, continued funding will hopefully follow. Education efforts regarding the practice of mediation and its benefits are already in the works through many articles like this one which hopefully contributes to further the discussion. We need to put a little faith in our judicial system, as an entity capable of being both impartial and amenable to change, adding a mediation based dispute resolution system that can be less focused on legal procedure and law and more on creative problem solving. As with any social issue, with time, we can change.

APPENDIX A

Jonathan Asher
Jon Asher is the Executive Director of Colorado Legal Services. He was the Executive Director of the Legal Aid Society of Metropolitan Denver from December 1, 1980 until October 1, 1999 when the three federally funded programs in Colorado became a single statewide program, Colorado Legal Services. He began his legal services career with Colorado Rural Legal Services in Greeley, Colorado in l971. Jon is a member of the Colorado Access to Justice Commission and a member of the Colorado Bar Association's Board of Governors. He is a member of the NLADA Civil Policy Group Committee on Regulations (2000-present). Jon earned his degrees from Harvard College and Harvard Law School.

Shannon Bell
Shannon is a partner with Kelly Walker LLC in Denver and has years of trial experience in state and federal courts litigating a wide variety of complex business disputes, construction disputes, fiduciary claims, employment issues, and has represented individuals and companies in dealing with claims arising out of officer shareholder liability, piercing the corporate veil, and derivative actions. Shannon routinely lectures on business dispute issues, construction issues and discovery issues. Shannon obtained her juris doctor from University of Denver – Order of St. Ives, and is admitted to Bar in both Colorado and Wyoming.

Roseann L. Brown
Roseann L. Brown is a Supreme Court of Florida County Mediator and Program Coordinator of the Citizen Dispute Settlement /Small Claims Court Programs at the Twentieth Judicial Circuit of Florida for 29 years. Roseann graduated from the University of South Florida and is a native Floridian.

Judge Joan L Byer
After serving 19 years as Circuit Court Judge, family division, in Louisville, Kentucky, Judge Byer is now a mediator at the firm of Bowles and Byer, specializing in family law mediation. Judge Byer received numerous awards during her jurist career, including Louisville Bar Association Judge of the Year in 2002 and the Kentucky Law Related Education Award presented by the Chief Justice of the Kentucky Supreme Court. Among her published articles is A Model Response to Truancy Prevention: The Louisville Truancy Court Diversion Project, Juvenile and Family Court Journal, Winter, 2003. Judge Byer received her juris doctorate from Loyola Law School, Los Angeles, California and was admitted to the California Bar in 1982, followed by admission to the Kentucky Bar in 1983.

Christian L. Campbell
Christian L Campbell served as General Counsel of YUM Brands, Inc. (KFC, Pizza Hut, and Taco Bell) from 1997-2016, as is currently a director of Yum China, Inc., a stand-alone US publicly traded company licensed to offer these brands in mainland China. Prior to these roles, he was General Counsel of Owens-Corning, Nalco Chemical Company, and a partner with Sidley and Austin. He received his B.A. and M.A. degrees in economics from Northwestern University, summa cum laude, and his law degree with honors from Harvard Law School.

Helena Jo Goldstein
Helena Jo Goldstein is Director of Programs for OvalOptions, LLC, a company specializing in conflict resolution. Under the auspices of OvalOptions, Ms. Goldstein serves as the Program Director at Jefferson County Mediation Services (JCMS). She has a B.A. in History from the University of Michigan, and earned her Juris Doctor at Northeastern University School of Law. She was an attorney in private practice in Boston, specializing in domestic law and tax issues, before her appointment as General Counsel for the Cambridge (MA) Housing Authority.

Under the auspices of the Council of Large Public Housing Agencies (CLPHA), Ms. Goldstein traveled nationwide as a trainer on EEO issues for housing authorities. She also served on the committee that rewrote the Massachusetts state regulations for housing authorities.

After relocating to Colorado in 1993, Ms. Goldstein pursued a career in mediation. She has advanced training in

Workplace Mediation, Team Decision Making Facilitation, and Parenting Coordination and Decision Making. She has co-taught courses for mediators on Intimate Partner Violence. More recently she was an ethics panel participant at the Colorado Statewide ADR Conference, in November 2017. At the same conference she presented a session on Mediating with Multiple Generations. She is a professional member of the Mediation Association of Colorado, and serves as a mentor to many of the JCMS volunteers.

Jack W. Hughes
Jack served for 19 years as a circuit court judge in Alabama. Upon his retirement from the bench in 2007, he moved to Fort Myers and in 2008 became certified as a Florida Family and Circuit Court Mediator. Jack mediated cases until 2013, when he was appointed to his current position supervising the ADR program and the Civil Case Management Program for Lee County Circuit Court in the 20th Judicial Circuit of Florida. Jack obtained his law degree from Birmingham School of Law.

R. William "Bill" Ide
Bill Ide is a partner with the law firm of Dentons, in Atlanta, Georgia, and currently focuses his practice on M&A transactions, corporate governance issues, special investigations, crisis management, ethics and strategic projects. Bill has been an active advisor to fortune 100 companies, boards of private companies, and boards of government agencies and not-for-profits.
Bill formerly served as senior vice president and General Counsel of Monsanto Company. He was Counsel to the United States Olympic Committee and President of the American Bar Association. He also was an investment banker for E.F Hutton and Cranston Securities.
Bill received his B.A. degree, *cum laude*, from Washington and Lee University, J.D. degree from the University of Virginia, (Law Review, Order of the Coif) and M.B.A. degree from Georgia State University. He was admitted to the Bar in both Georgia and the District of Columbia.

Susan Marvin
Susan Marvin, Esq. is the Chief of ADR of the Florida Dispute Resolution Center, Office of the State Courts Administrator. She served as the staff attorney for the DRC from 2012 through May of 2016, and is a Florida Supreme Court certified county and family mediator. Susan served as a staff mediator for the Second Judicial Circuit Court's ADR program for six years during one of which she was also the small claims and county mediator services coordinator, supervising about sixty volunteers. For eight years Susan was the director of The Family Visitation Program in Tallahassee, and she has previously been a case coordinator and attorney for the Second Circuit's Guardian ad Litem Program.

The Honorable Chief Justice John D. Minton
Chief Justice John D. Minton was elected to the Supreme Court of Kentucky in 2006 and re-elected to another eight-year term in 2014. His fellow justices elected him for a four-year term as chief justice in 2008, 2012 and 2016. In July 2017, Chief Justice Minton completed a one-year term as President of the Conference of Chief Justices and chair of the National Center for State Courts Board of Directors. Chief Justice Minton was the first chief justice from Kentucky to hold this post in nearly 25 years. He is also the chair of the board of directors for the State Justice Institute, a federal nonprofit corporation that awards grants to improve the quality of justice in state courts. President Obama nominated Chief Justice Minton to the SJI board and the U.S. Senate confirmed the nomination in December 2016.
Chief Justice Minton was in private practice for 15 years before serving as a circuit judge from 1992 to 2003 and a Kentucky Court of Appeals judge from 2003 to 2006. He holds degrees from Western Kentucky University and the University of Kentucky College of Law.

In 2003, the Kentucky Bar Association honored him with its Outstanding Judge Award. He was named Distinguished Jurist in 2012 by the University of Kentucky College of Law Alumni Association. He was inducted into the Western Kentucky University Hall of Distinguished Alumni in 2013.

Kathleen M. Schoen
Kathleen M. Schoen, Esq. is currently the director of the Colorado Bar Association's Local Bar Relations and Access to Justice Department, where she focuses on issues of access to justice, especially access to the civil courts.

She graduated from University of Oregon Law School in 1980. She is a member of both the Colorado and Oregon bars. She provides support to the Access to Justice Commission and local bar associations. Kathleen has been a mediator since 1997. Kathleen has written, spoken, and taught nationally and internationally on many topics, including women and violence, mediation and family violence, and women and law. She volunteers as a domestic relations and protection order mediator in Jefferson and Denver counties. Kathleen is the 2010 recipient of the American Bar Association Commission on Domestic Violence Sharon L. Corbitt Award for exemplary legal services to victims of domestic violence, sexual assault, and stalking. She is the 2003 recipient of the Carolyn Hamil-Henderson Memorial Award from SafeHouse Denver for her inspiration and leadership to end domestic violence.

Sheryl Snyder
Sheryl Snyder is a lawyer with the firm Frost Brown Todd LLC, in Louisville, Kentucky, specializing in businesses and complex litigation as well as appellate practice. He has been heralded as "the state's premier appellate lawyer" according to *Chambers USA*®. Prior to joining Frost Brown Todd LLC in 1994, he was Executive Vice President and General Counsel of ICH Corporation, an insurance holding company. Sheryl is a Past President of both the Kentucky and Louisville Bar Associations. He served as Editor-in-Chief of the Kentucky Law Journal (1970-71) and law clerk to Honorable M. C. Matthes, Chief Judge, United States Court of Appeals for the Eighth Circuit (1971-73).

About the author:
Heather Gilchrist, Esq.
Heather has been licensed as an attorney since 1983 and as a circuit civil mediator in Florida since 2014. After graduating from Valparaiso University where she was Executive Editor of the Law Review, she started her legal practice with Sidley Austin in Chicago, and later practiced in her own law firm based in Naples, specializing in real estate, estate planning, probate and business issues. She has been admitted to the bar in Indiana, Illinois, Ohio, Florida and Kentucky. Her experience in the legal profession over the years has encompassed both corporate and individual clients, as well as teaching law, and now mediating real estate, construction, trust and estate contests, and other contract based disputes.