Does the Pro Se Litigant fare better in Mediation or in a Traditional Court Procedure?

By: Heather Gilchrist, Esq.

Mediation is rapidly becoming the "first try" for dispute resolution. Not only are judges ordering mediation at some stage, but attorneys are also recommending mediation as a low-cost alternative to litigation. As the practice of mediation has grown, so too have the number of pro se litigants, trying to find their path to justice in a sometimes very complex judicial system. Many studies on the problems faced by the pro se litigant look to mediation as a viable method of providing access to justice for the pro se party. (*Julie R. S. Fogarty and Daniel H. Jeng, Reaching for Justice with Pro Se Litigants: Featuring Original Interviews with Judges, May 10, 2013*). This article examines the question of whether a pro e litigant is better served through the process of mediation or through the traditional adversarial court process.

Although mediation is gaining in reputation as a less expensive and successful form of dispute resolution, I submit that it is not necessarily a "better" forum for the pro se litigant. The pro se litigant's most devastating handicap is a lack of knowledge of the law. Neither a judge nor a mediator can remedy this, because neither is in a position to advise the pro se litigant on the law. To do so would run contrary to the requirement of remaining impartial and providing a fair process. Despite this, mediation can be a highly effective form of alternative dispute resolution for the pro se litigant, depending on the type of dispute involved and the circumstances involved.

The question of whether or not to refer a matter to mediation depends on the case and the parties involved and should be determined by the judge. I would advocate for a cautious approach when selecting mediation for the pro se litigant. Consideration should be given to maintaining impartiality and fairness, the capacity of the parties, the benefit of creative solutions, cost, and the need for judicial involvement in deciding which cases with pro se litigants are referred to mediation.

Impartiality and Fairness in the Process.

How does the judicial system address a pro se party's lack of familiarity with legal standards? In response to the growing pro se litigant population, a body of law and regulatory guidance is beginning to develop to address this question. First and foremost, a judge must remain impartial and fair. Current interpretation of the judicial code of conduct allows a judge to provide "reasonable accommodation" to a pro se litigant *(See Comment 4 to the 2007 ABA Model Code of Judicial Conduct, ABA Model Code of Judicial Conduct R. 2.2 cmt. 4 (2007), found at https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_2impartialityandfairness.html.)* Yet a judge is also clearly restricted from giving the self-represented an unfair advantage in the form of substantive legal advice.

All too often, the pro se litigant is substantially handicapped by a lack of knowledge of the rules of evidence, and therefor unable to effectively present their case to the court. (*Julie R. S. Fogarty and Daniel H. Jeng, Reaching for Justice with Pro Se Litigants: Featuring Original Interviews with Judges, May 10, 2013*). The rules of evidence in a judicial proceeding were developed to ensure a fair trial by safeguarding the types and nature of evidence which can be submitted, and over time have become quite complicated. The definition of "reasonable accommodation" may vary in practice and a common yet unsolved question is how much assistance a judge can provide the pro se litigant in the submission of evidence and still remain impartial (*Cynthia Gray, Pro Se Litigants in the code of judicial conduct, Judicial Conduct Reporter, Volume 36 No 3, Fall 2014).* Although jurisdictions differ on the exact definition of "reasonable accommodation", interpretation of the concept has included: providing procedural information, explaining the basis for a ruling, liberally construing pleadings, etc (Id.).

Although a mediator has a similar obligation to remain impartial and provide a fair process to the parties *(See the 2005 Model Standards of Conduct for Mediators adopted by the ABA on August 9, 2005 found at https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf)* the flexibility of the process and lack of formal rules can make it easier for a pro se party to make their case known in mediation. Participants in mediation do not need to be familiar with evidentiary rules, and can present whatever documents they wish in a mediation proceeding. Of course, the opponent may choose to find the document lacking in some manner, and disregard it, but at least the pro se party is able submit evidence, without navigating a complex labyrinth of rules. In such circumstances, mediation has a possible edge in providing justice to the pro se litigant.

However, the lack of formality in the mediation process can pose a risk to the pro se litigant and a possible unfair result if a pro se party agrees to a settlement which would not be required by law. For example, a pro se litigant debtor could agree in mediation to pay the creditor a usurious interest rate, without knowing the interest rate is illegal. A tenant could agree to allow the landlord to withhold a security deposit that the tenant was entitled to by statute. In order to ensure a fair process and the parties' ability to exercise self- determination, a mediator can and should advise a participant of their right to seek counsel if it appears they are unaware of their rights, or about to agree to something that appears unfair or illegal to the mediator (*See Standard IA Model Standards of Conduct for Mediators).* Yet many mediators are not lawyers, may be unaware of applicable law, and are not in a position to provide advice of counsel in the non-adversarial dispute resolution practice of mediation. Without complete knowledge of the intricacies of the case, it is impossible to say that a miscarriage of justice has necessarily occurred in such cases. Ideally, all settlement agreements resulting from mediation would be reviewed carefully by the ordering judge, limiting the possibility of gross injustice to the pro se litigant in mediation. Given crowded dockets, however, it is unlikely that most judges are in a position to carefully review all mediation settlements, but priority should be given to settlements involving pro se clients.

In short, as currently constructed, neither system – the judge nor mediator- can fully resolve the pro se party's inherent disadvantage.

Capacity of the parties.

As stated above, mediation requires that the parties be able to exercise self-determination, or be able to understand and make a decision on their own behalf (*See Standard IA Model Standards of Conduct for Mediators)*. Some litigants may unable to do so without counsel. In particular, a pro se litigant might be unable to be reasonable without an understanding of the applicable law. A party to a divorce might demand alimony, not realizing the lack of a statutory right to it in their case. Trusted counsel would most likely have been able to explain the law and set realistic expectations. In some cases a party might be angry to the point of being irrational and unwilling to consider any alternative point of view, entrenched in their position without the ability to compromise. Many times counsel, willingly or not, are put in the position of providing a "reasonableness standard" for their clients, and in such cases would provide valuable assistance in the mediation process. Similarly, a mentally incapacitated litigant might be incapable of making a reasonable decision, and therefore unable to meaningfully participate in mediation. Many county mediation programs are aware of "repeat customers" who file cases pro se several times a year without a real controversy involved. In such cases, judicial determination is necessary, as even the best mediator would not be able to get the parties to reach a settlement, and the pro se litigant should be in front of the judge in the traditional judicial process. A judge is in a much better position to level the playing field between the litigant parties, particularly those involving pro se litigants, and can rule on the conflict and issue an order regardless of the parties' reasonableness.

Benefit of Creative Solutions.

One of the handicaps of the judicial process can often be the requirement that a judge rule in accordance with specific remedies allowed by law, leaving little room for creativity or human judgement. In most landlord tenant cases, the law is fairly well established, often requiring the landlord to serve certain notices within a given time frame in the required manner in order to be able to obtain an eviction order. If no notice was sent as required, the judge cannot rule otherwise, even if competing facts are presented.

One of the biggest advantages of mediation is that it allows for creative solutions often originating from the parties themselves. Particularly in situations where the parties have an ongoing relationship, this can be a huge advantage and often results in a greater likelihood that the agreement will be honored over time. In a controversy involving parenting time with a statutory amount of parenting time required for each parent, through the mediation process, the parents might be able to reach a different agreement that they feel is better for their child at that given time. Or in a landlord tenant case, the parties might agree to a settlement that each is happier with because it avoids moving costs for the tenant, or advertising costs for the landlord,

despite the absence of statutorily required notice. In typical litigation, the judge is not able to rule outside of the specified statutory requirements. In such cases, the flexibility of mediation can be an advantage to both represented and pro se parties.

Many times, the more creative solutions occur when those familiar with the law and its usual dictates and solutions are not present. Rather than simply solve a construction dispute with the payment of money, a pro se litigant might be willing to agree to allow a contractor to complete another job for them. Or an employee dispute might result in second chances with a different job description. Such solutions would rarely be proposed by a judge, and mediators are able to explore such options with the parties. With counsel involved, ready to advise their clients on the every possible risk and legal implication, such alternative arrangements might never be considered. In such circumstances, pro se litigants willing to consider creative solutions might fare better in the mediation process.

Cost.

Typically the pro se party appears alone due to their inability to afford legal counsel. In a case where mediation services are provided by the court at either no or minimal cost to the parties, judges can order mediation services without negative impact to a pro se client, and should do so for appropriate cases. However, in many circumstances, where no aid is given, as private mediation costs are on the rise, the pro se litigant might be better served by keeping the matter served solely by the traditional system with the judge deciding the result of the case. Many advocates of mediation cite the avoidance of trial costs as a benefit to mediation (*Tina Drake Zimmerman, Representation in ADR and Access to Justice for Legal Services Clients, 10 Geo. J. on Poverty L. & Pol'y 181 (2003*), but for someone unable to afford counsel, fronting money for mediation services might not be a realistic possibility.

Judicial Involvement.

Mediation is still developing and many parties are reticent to try it. Although we would like to believe we can solve our own conflicts, the U.S. public is used to being able to go to court to redress their perceived wrongs. Most litigants expect to have their conflict resolved by a judge, and indeed, want to "tell their story to the judge". Particularly those without counsel will be looking for judicial involvement. The only way those parties will find mediation is if they are ordered to try mediation by a judge. This could be especially helpful to the pro se client who is unaware of the practice of mediation and does not have access to counsel or information on alternate forms of dispute resolution.

However, it is critical to note that not all cases are appropriate for mediation. A case brought to establish legal precedent needs to remain in the traditional judicial process. A domestic violence case or a case where one party is being threatened by the other typically does not belong in mediation. Particularly in cases involving pro se litigants, a judge is in the best position to

screen cases and refer only appropriate cases to mediation, and can do so without impact to his or her impartiality or a fair process.

Conclusion:

As the trend of pro se litigation continues, so should our efforts to provide ways to assist the pro se client within our current judiciary structure. Although mediation services are still fairly new, there is no doubt that it provides a meaningful service and has a good track record in dispute resolution. In most cases, mediation should be ordered before proceeding with costly litigation. But in cases involving a pro se client, we need to proceed with caution and be careful to use the mediation process only where appropriate. A judge is in the best position to monitor the use of mediation for unrepresented litigants, and consider the individual circumstances, the parties, and the law involved. Due to flexibility, cost, and the possibility of creative solutions, in many circumstances, a pro se litigant may be served best by a mediator as opposed to a judge. However, given the inability of both mediator and judge to advise a pro se litigant on the law, neither is in a better position to absolutely protect the rights of the pro se litigant. Judges need to remain involved and vigilant towards regulation of the mediation process to ensure that mediation is ordered only in appropriate circumstances.

About Heather Gilchrist, Esq.

Heather has been licensed as an attorney since 1983 and as a 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 at MacGil Lane Mediation, LLC.