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Case-Management Criminal Mediation Offers Promise But Requires Caution

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Mediating criminal cases is no longer a vague concept, limited to only juveniles, non-serious adult criminal cases, and so-called "victim-offender" programs. From major murders to average possession cases, an increasing number of judges and attorneys are turning to mediation as a method of resolving felony cases.

This is an exciting time, as we are on the cusp of a significant change in how we resolve criminal cases. Many in the legal community expressed surprise when the judge in the well-publicized Florida patricide trial of Derek and Alex King appointed a mediator to negotiate punishment for the boys after rejecting the jury verdicts of second degree murder against them both.[1] Mediating violent felony cases is happening and will continue to happen because success is contagious.

The field of criminal mediation has grown organically based on requests from either the assigned judge or the parties. During this growth, little attention has been given to the qualifications for criminal mediators. Criminal mediators have no prescribed training or certification requirements. Thus far, extensive criminal experience and expense seem to be the deciding factors in selecting a person to conduct criminal mediations.

In Idaho, judges conduct the majority of the case-management mediations. Judges offer several advantages. They are generally cost-free, as they are already under full-time public employment contracts; they have the support of their colleagues; they often have subject matter expertise from previously trying or presiding over a significant number of criminal cases; and they are interested and willing to mediate criminal cases.[2] The use of judges, however, raises concerns regarding lack of training and the use of a highly evaluative style which may result in unduly pressuring defendants into waiving their constitutionally protected rights.

Judicial mediators must recognize the potential coercive effect their presence may have on defendants or their counsel. Prosecutors already wield nearly absolute power in the criminal arena and exert that power in the plea bargaining setting. Some have argued that in the plea context, coerciveness is so pervasive that it sometimes results in innocent people pleading guilty.[3] Judicial mediators need to be cautious not to unduly add the power of the robe into the equation.[4] Participants in the mediation process want the judicial mediator to perform multiple tasks, which at times may conflict. The judicial mediator is expected to assist the participants with a risk analysis, to bring a voice of objective reason to the table, to protect the defendant from coercive tactics, to persuade the participants to settle, and to preserve the integrity of the mediation process and ultimately the criminal justice system. They want the judicial mediator to determine when one side or the other is not acting in good faith and to either get them to change their bargaining position or to call the mediation.[5]

Although judicial mediators may not perceive their actions as coercive, they cannot under-estimate their influence on the settlement process and the weight their "judicious recommendation" carries and maintain that they are simply accommodating the parties' desires.[6] Parties and attorneys generally perceive a judge as "a person of integrity, as an impartial and fair mediator with a background of experience in their type of case, and as an administrator of justice from whom they can expect a judicious recommendation for settlement."[7] And that is usually what they get. As one judge noted, "[b]ecause of their experience as adjudicators, judicial mediators tend to be more evaluative than facilitative, that is, they are generally more willing to share their evaluation of the merits or value of a claim."[8]

As Professor Riskin so aptly noted when he wrote about evaluative mediators, "[T]he parties should understand that once they involve a third party, and allow that 'neutral' to give an opinion on the merits, that determination will almost always have a powerful impact on all further negotiations."[9] This is especially problematic in the criminal arena. While in civil cases, some judges view their role as listening, probing, and exploring each parties' views and then fashioning and presenting to the disputants his or her "reasonable settlement,"[10] some argue that judges in the criminal context should refrain from being strongly evaluative out of concern that the judge's opinion will unduly sway and intimidate the defendant into pleading guilty and waiving his constitutional rights.[11] Thus, while judges think, "lawyers may value the judge's opinion on the merits of their cases and appreciate a thoughtful, analytical, and impartial assessment of the case for settlement purposes,"[12] the power of the robe can be coercive even though the mediator is not the assigned judge.[13]

While criminal mediations are ostensibly voluntary, defendants and their counsel may fear reprisal from the court for failure to participate and ultimately settle.[14] Although the "fear" may not result in actual complaints to the court, the apprehension is real, and courts must be proactive to minimize or allay the concerns. One federal judge who periodically serves as a settlement conferencing judge, generally starts each session telling the parties that the process is voluntary, that the session will not be an "arm twisting" session, and that he has "concerns about the notion of criminal settlement conferences, the potential for intimidation, and the defendants need to be free from even the feeling of coercion."[15] Is that enough of a disclaimer? The answer is not clear. What is clear is that such statements alert counsel and the defendant to the issue of coercion.

Some argue that the presence of competent counsel serves as a security blanket or buffer, which protects defendants from coercive intimidation; however, the strength of this assertion is dependent on the caliber of defense counsel.[16] The belief that the defendant can walk out of this "voluntary process" underestimates the control and power judicial mediators exert. Whether mediation is truly mandatory versus voluntary depends on one's perspective. Thus, while judges may deny that mediation in a particular situation is mandatory, defense counsel understand a request from the bench. As one of the defense attorneys in the King brothers' mediation noted, "The judge asked us—he basi-

cally ordered mediation between the parties."[17] It is critical that the growth of criminal mediation involves a truly voluntary process and not an implicit requirement leaving defense counsel in conflict between abiding by the wishes of the client and complying with the not-so-subtle messages from the court.

In many ways, criminal case-management mediation is the logical extension of a failed plea-bargaining process. If a neutral third party can help break an impasse without exerting extensive control over the outcome, criminal mediation presents a positive addition to the dispute resolution processes. If the process simply allows a judicial mediator to clear a calendar by strong-arming a defendant into accepting a plea, then the process must stop.

Judicial mediators thus need to be trained in mediation and mindful of the power they exert over the participants in the criminal process. The judge-mediator sits on a powder keg of rights and liberties that must not be cavalierly or even inadvertently ignited. The defendant's life and liberty are at stake in the criminal context. Judicial mediators need to proceed cautiously and not wait for complaints to arise. A proactive response to this burgeoning field is prudent.

As this process of assisted plea-bargaining takes root and becomes an emerging reality in our criminal justice system, it requires reflective consideration from prosecutors, defense counsel, the bench, and the ADR community.

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Endnotes

1 *See, e.g.*, Stephanie Francis Cahill, *Punishment By Mutual Agreement: Lawyer for Boy Accused in Dad's Murder Doubts Mediation Will Work,* 1 No. 41 A.B.A. J. E-REPORT 1 (October 25, 2002); Brett Norman, *Mediation to Chart Unfamiliar Course,* Pensacola News Journal, Oct. 18, 2002 at 2A.

2 When talking with one judge who recommends criminal mediation in many of his felony cases, he said that he used judges as mediators for two reasons. First it is, in large part, a matter of economics. Second, the judges are interested in it. He further noted that it promotes a team concept amongst the judges as they help each other out. Notes of conversation on file with author.

3 The 1992 Yale Law Journal's symposium articles discussed the risk that innocent people would plead guilty. *See* Frank H. Easterbrook, *Plea Bargaining as Compromise,* 101 YALE L.J. 1969 (1992); Stephen J. Schulhofer, *Plea Bargaining as Disaster,* 101 YALE L.J. 1979 (1992); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract,* 101 YALE L.J. 1909 (1992); Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants,* 101 YALE L.J. 2011 (1992).

4 *See* Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?,* 46 SMU L. REV. 2079, 2085-86 (1993) (maintaining that judicial mediators can "coerce" settlements).

5 This reflects the opinions of some of the participants in the seminar, "Mediating the Criminal Case."

6 *See* Robert C. Zampano, *Settlement Strategies for Trial Judges, in* JUDGING: A BOOK FOR STUDENT CLERKS 125, 126–27 (Matthew Bender & Co. 2002) ("The settlement judge must have the patience, open-mindedness, and skill to fashion a settlement that is fair and reasonable under all circumstances.").

7 Id. at 127.

8 Hiram E. Chodosh, *Judicial Mediation and Legal Culture,* 4 E-JOURNAL OF THE U.S. DEPARTMENT OF STATE ISSUES OF DEMOCRACY, ¶ 10 (1999) at 6 at http://usembassyaustralia.state.gov/hyper/wf991201/epf312.htm. (last visited Mar. 29, 2004).

9 Leonard L. Riskin, *Understanding Mediator Orientations, Strategies and Techniques: A Grid for the Perplexed,* 1 HARV. NEGOT. L. REV. 7, 44 (1996)

11 Alan Scott Rau, Processes of Dispute Resolution: The Role of Lawyers 549 (3rd ed., 2002).

12 Notes from conversation on file with author.

13 Zampano, *supra* note 12, at 128.

14 *See* James J. Alfini, *Risk of Coercion too Great: Judges Should Not Mediate Cases Assigned to Them for Trial,* 6 DISP. RESOL. MAGAZINE 11, 12-13 (Fall 1999) (judges should not serve as settlement conferencing judges or mediators in cases assigned to them for trial.).

15 Notes from the seminar on Mediating the Criminal Case. The participants expressed concern that courts may begin routinely ordering mediation regardless of the appropriateness of mediation in a particular case.

16 Email from Magistrate Judge Kelly Arnold, Federal Magistrate Judge for the Western District of Washington, to author (August 29, 2003)(on file with author).

17 *Id.*

18 *See* CNN, *Rosie Hires Attorneys in King Brother's Case* (Oct. 19, 2002) at Http://www.cnn.com/2002/LAW/10/19/rosie.king.trial/.