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DISPUTE RESOLUTION MAGAZINE

Access to Justice

& Access to ADR for Unrepresented Litigants

Lessons Learned from Foreclosure Mediation

Redefining Access to Justice for Separating and Divorcing Families

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Features

Articles

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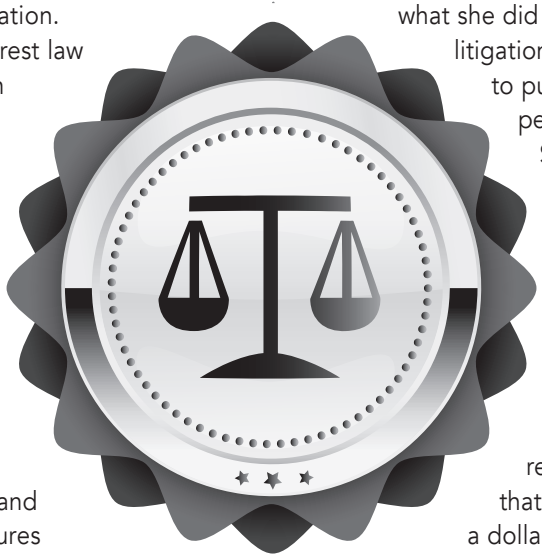
From the Southern District of New York, a Success Story

Limited-Scope *Pro Se* Program Provides Access and Justice

By Rebecca Price

Ten years ago, when I quit my full-time job in litigation for a questionable career path as a mediator, I exchanged one set of idealistic principles for another. One motivation for that shift was a growing concern about the feasibility of achieving "justice" through traditional litigation.

While working at a public-interest law firm, I represented a deaf woman who had been hospitalized for a week to receive in-patient therapy for suicidal thoughts. The hospital never provided her with an American Sign Language interpreter, despite the fact that her treatment consisted of daily talk therapy. We filed a complaint on her behalf asserting violations of federal and state disability laws and seeking monetary damages and changes in the hospital's procedures for working with deaf patients. That case, like the vast majority of cases, settled before trial, but only after 18 months of litigation.



During the time we were litigating I attended court conferences, engaged in discovery, and negotiated on my client's behalf. Although I met with my client frequently, I could tell that she found litigation to be yet one more system from which she was essentially excluded. The timing of the process was baffling to her, as was the reality that she might not be included in a conference with the judge. Very early on, my client and I realized that what she most wanted — a sense of vindication and an assurance that others in the deaf community would not have to go through what she did — would require many years of litigation at a time when she was trying to pull her family together, heal, and perhaps move to another state. She could pursue an idealistic path that would certainly take a great deal of time and involve public exposure of her illness or she could agree to a settlement that would make her daily life easier and let her and her family move on. When she chose to settle, we both felt relief — but also disappointment that her ideals had been reduced to a dollar amount.

For those seeking it, access to justice is a foundational and far-reaching theme in our society. It's also intensely personal. For some, access is as simple as hiring a trusted attorney to shepherd a case from start to finish. For others, it is infinitely complex. I see these differences daily in my work running the Southern District's Mediation Program. Something as relatively straightforward as serving papers can seem impossible, as it did for a recent litigant who was not

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legally trained, had no counsel, and communicated predominantly in Creole.

Justice, being a more ephemeral concept, has even more variability. Some see justice as Law and Order, with the wood-paneled courtroom, the jury, the judge in a robe, and the gavel. For others, justice is a call returned promptly, an explanation given clearly, or just the relief and empowerment of feeling completely understood. For unrepresented parties in civil cases in federal court (who, unlike *pro se* defendants in criminal matters, do not have a right to counsel), access to justice can be especially illusive,[1] as they are left to navigate the complexities of court systems with varying levels of support.[2]

One Answer: Limited-scope Representation

This dearth of services for *pro se* litigants is one of the reasons the US District Court for the Southern District of New York established a program to provide limited-scope representation to *pro se* parties in mediation of employment matters. The Southern District's Mediation Referral Order for *Pro Se* Employment Discrimination Cases, which is issued by judges on a case-by-case basis, informs the parties that they are being referred to mediation and that the court will locate limited-scope counsel for the plaintiff.[3] The plaintiff is then given 14 days to object to the mediation or to the appointment of counsel. Defendants can object to the referral by requesting that the judge vacate the order.

Referrals to the program have increased substantially in recent years, from 33 in 2013 to 49 in 2014 and 94 in 2015. This is the result of several factors: the increasing availability of volunteer attorneys; the role of the court's Office of *Pro Se* Litigation staff attorneys, who recently began drafting proposed mediation referral orders for judges to enter at an early stage of the litigation; and the success rate of those mediations. In 2014, the settlement rate was 69%, and although many matters are still open, at the time this article was written, the 2015 settlement rate was also 69%.

"This program, a collaboration of the court's ADR Program, the Office of *Pro Se* Litigation, and attorneys and students in law school clinics willing to volunteer their services as *pro bono* counsel, is a huge help both to *pro se* litigants and to the court."

This program, a collaboration of the court's ADR Program, the Office of *Pro Se* Litigation, and attorneys and students in law school clinics willing to volunteer their services as *pro bono* counsel, is a huge help both to *pro se* litigants and to the court. Although it has been in existence for some time, the program has been especially busy since 2011, as a result of a partnership with the Seton Hall Representation in Mediation/ Settlement Conference Practicum, which has guaranteed a steady stream of well-trained counsel.

The most obvious beneficiary is the *pro se* party, who has, perhaps for the first and only time, access to counsel. During this limited-scope representation, the plaintiff can get advice and information about the litigation process, the law, available remedies, and norms of practice. The counseled defendant also benefits, particularly where a plaintiff's lack of information has been a barrier to fruitful negotiation. The mediator's job can be easier, too: with *pro bono* counsel present, the mediator can focus on the role of facilitator without having to guard so strongly against miscommunication, perceptions of bias, power imbalance, and the inevitably murky line between information and advice.

Those who serve as limited-scope counsel, whether law school students in clinics or attorneys already in practice, also see gains: they get experience interviewing and counseling clients, helping with negotiation, advocating, and appearing in federal court. In the Seton Hall program, started by Professor David M. White "to promote access-to-justice within historically vulnerable populations," experienced employment practitioners supervise student advocates as they represent *pro se* parties in mediation and settlement conferences from the initial interview until the conclusion of mediation. Over the span of one semester, law students get a rare opportunity to participate in a case from start to finish — and make a measurable difference in someone's life.

Not Always an Easy or Uncomplicated Solution

Limited-scope representation is not always a painless process. Many *pro se* parties, having crafted and filed a complaint on their own, are stung when their new advocate explains the law and mediation process, including their likelihood of success if the case goes forward and the reasonable range of damages they might negotiate for in mediation. Despite this possible initial disconnect, with time and effort, the advocate and client can learn to trust each other and form a strong partnership. Seton Hall student advocate Nina T. Trovato works with clients who "feel very wronged but do not know how to put that within the framework of the law." She says the clients are devastated by her explanations of the difference between a moral or emotional wrong and one that is cognizable as a legal claim. While it is hard for her to be the person to explain this distinction to them, she says, she "shares their sense of injustice" and through that connection is certain that her service leaves these clients in a better place.

Attorneys considering serving as limited-scope representatives should be aware that ethical and practical issues are involved. On the practical side, although a limited-scope appointment for the plaintiff typically enhances the process for everyone, a defense attorney could use the limited nature of the appointment as a bargaining advantage. In other words, the attorney could suggest that the defendant does not have to offer much to settle the case because the plaintiff will not have a lawyer for the remainder of the litigation. And a less secure *pro se* party may feel that, having had counsel for mediation, going forward without an attorney will be too difficult.

As limited-scope, or "unbundled," legal assistance has proliferated, many are exploring the ethical implications of these practices in some depth. Among the issues are the clarity of communications between

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"Attorneys considering serving as limited-scope representatives should be aware that ethical and practical issues are involved."

attorneys and clients about the limits of representation and the attorney's duties, if any, once the representation terminates. Attorneys representing *pro se* parties on a limited-scope basis should take some time to orient themselves to ethical issues specific to this type of representation.

Despite such concerns, just about everyone in the Southern District of New York — court personnel, mediators, lawyers, and especially litigants — understands that *pro se* litigants need help navigating the complicated waters of the federal court system. And they agree that limited-scope representation is an impressive solution that helps everyone involved. By demystifying the litigation process, offering opportunities for informed decision-making, and providing practical and emotional support, mediation advocates enable the full and complete participation of the *pro se* party in a court process.

As a mediator, more and more often I tell parties that justice isn't something that is necessarily achievable in mediation (which, incidentally, is the same thing I used to tell clients about litigation). I tell them that mediation offers a host of other possible benefits, including closure, insight, clarity, acceptance, and, unlike litigation, direct involvement and control for the parties themselves. Those possibilities often provide what the parties were seeking when they came to the court in the first place — and help them leave feeling that they have indeed had access to justice. ■

Endnotes

1 There are some state laws under which there are entitlements to counsel (e.g. for individuals facing commitment and retention proceedings under the Mental Hygiene Law, or for minors in certain proceedings under the Domestic Relations Law).

2 The National Coalition for a Civil Right to Counsel (civilrighttocounsel.org) works with advocates to explore and support such programs in many areas including immigration, housing, and family matters.

3 In a very small number of cases, the court is unable to find an attorney to accept the assignment.