

“What’s Mediation Got to Do with Access to Justice?” (includes increasing access to justice with dispute resolution and selecting the right mediation process and mediator)

[Judge Jennifer Ching, Judge Ronald Ibarra, Judge Michael Tanigawa, Tracey Wiltgen (moderator)]

To lay the foundation for the discussion, the role of Hawaii’s five community mediation centers, jointly referred to as Mediation Centers of Hawaii (MCH), was described. It was noted that MCH provides services for a broad variety of areas that involve the low income population including: divorce, unmarried couples with children, landlord/tenant, civil rights, foreclosure, special education, family, elder and more. It was additionally noted that the role of community mediation centers in increasing access to justice is steadily growing as evidenced by the fact that a total of a 3,537 cases were served in fiscal year 2013-2014 and nearly the same amount of case were already served (3,480) in the first three quarters of fiscal year 2014-2015. To serve this large number of cases approximately 274 mediators (both lawyers and non lawyers) provided services pro bono, or in some instances, low bono.

Following the introduction, the three panel members provided an overview of different mediation and dispute resolution programs that are currently being used in their respective circuits. These programs include:

- An on-site paternity mediation program, a Guardianship Mediation Program, Child Welfare Mediation Program and the Volunteer Settlement Masters Program in the Family Court of the First Circuit.
- A foreclosure mediation program in the Third Circuit.
- A small claims, summary possession and TRO (injunctions against harassment) mediation programs in the District Court of the First Circuit.

In describing these different programs, it was noted that there were key similarities as well as differences that made the respective programs successful. The similarities between the processes were:

- The participants were provided with the opportunity to discuss their issues in an informal setting with the assistance of impartial neutrals
- No party was required to settle in any of the processes and could return to court
- Irrespective of whether or not the parties settled, most felt the process was valuable
- The parties involved in cases that were not resolved through the processed, were generally clearer on what they wanted to achieve when they returned to court

The differences between the programs included:

- The extent of the Court involvement
 - The foreclosure mediation program requires the participants to appear in court for a status conference; the court determines whether or not a case is appropriate for mediation; the court monitors the progress of the case
- The participants in the process
 - Foreclosure mediations have multiple participants including the lender representative who may be required to travel from the mainland, the borrower, attorney for the lender and in some instances, attorney for the borrower, whereas Paternity mediations mediated on-site at court generally include two pro se people

- Where the process is conducted and the length of time before the return court date
 - Foreclosure mediations are conducted at the offices of the community mediation centers and are provided an extensive period of time to exchange documents, meet and negotiate, before returning to court.
 - Small claims and summary possession mediations take place at District Court for approximately 30 minutes. If no agreement is reached, the parties promptly return to the courtroom to have their case decided by a Judge.
- The background and training of the neutrals conducting the process
 - All neutrals have effective listening and people skills.
 - The foreclosure mediators come from a broad variety of backgrounds and complete a Basic mediation training and specialized training in Foreclosure mediation.
 - The on-sit Paternity mediators are all experienced mediators with specialized training and most are attorneys with background in Family law.

In general it was emphasized that the challenge for the legal system in providing access to justice for all is that the system strives to provide a single process for all disputes and limited remedies for all problems. Mediation and other dispute resolution processes provide a more flexible approach for addressing the needs of the litigants rather than serving the application and enforcement of the law. The resolution of a mediation is not be limited to the remedies allowed by law. Additionally, mediation does not require the time and location constraints placed on judicial proceedings because of support personnel required such as court clerks, bailiffs, and sheriffs. Mediation is adaptable to taking place online, by video conference, or by phone to accommodate parties in different locations or to preserve the safety and security of the parties.

Questions that were addressed by the panel included:

- Do mediators need to have subject matter expertise to be effective?
 - It was felt that subject matter expertise is needed in certain cases i.e. products liability, medical malpractice etc. But all mediators should have people skills that bring parties together.
 - Mediators should have some background and understanding of the laws governing the areas they mediate in
- How does Rule 12.2 impact mediation?
 - Circuit Rule 12.2 allows the court to refer the parties to mediation.
- When is mediation appropriate or not appropriate?
 - Mediation is appropriate in most cases where violence is not an issue
- When should mediation be ordered?
 - Because parties don't think about using mediation first, mediation is ordered in most of the court programs. The parties are required to participate, but they are not required to reach an agreement.

A concern was raised about the statutory mandate under 514(b) for owners and condominium association boards to participate in mediation. Owners are required to pay for their own time and attorney, as well as a pro rata share of the cost of the board and the AOA attorney's participation.