

AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1           RESOLVED, That the American Bar Association urges federal, state, territorial, and  
2 local governments to initiate, continue and expand the use of mediation as a means to resolve  
3 criminal matters, specifically at a time prior to actual case filing, and with adequate  
4 constitutional protections, except in cases in which any of the participants are deemed to be  
5 susceptible to coercion, manipulation or re-traumatization as in a case of violent crime or  
6 domestic abuse.  
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8           FURTHER RESOLVED, That the American Bar Association encourages federal, state,  
9 territorial, and local governments to initiate, continue and expand the use of mediation, early  
10 resolution courts, pre-filing diversion, expeditors, restorative justice programs and other process  
11 innovations, where appropriate, to assist with plea negotiations and/or the expedition and  
12 resolution of both pending misdemeanor and felony cases.  
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14           FURTHER RESOLVED, That the American Bar Association encourages federal, state,  
15 territorial, and local governments to use only those individuals who have received appropriate  
16 mediation training.  
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18           FURTHER RESOLVED, That the American Bar Association encourages federal, state,  
19 territorial, and local governments to adhere to proper mediation protocols and recognize the  
20 rights, needs and sensitivities of the mediation participants, including the assurances that  
21 statements will not be used against the accused directly or derivatively and the accused will be  
22 fully apprised of the collateral consequences should the mediation fail.  
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24           FURTHER RESOLVED, That the American Bar Association encourages federal, state,  
25 territorial, and local governments to support continuing research regarding mediation as a  
26 method to assist in the processing and resolution of appropriate criminal and quasi criminal  
27 matters, and to disseminate those research results.

## REPORT

**I. Background and Primary Issue Overview**

In the mid seventies, when the ABA first began to explore its role in the use of ADR (Alternative Dispute Resolution) processes and procedures, it was with a Committee, then the Special Committee on the Resolution of Minor Disputes. Chaired by Talbot "Sandy" D'Alamberte, the committee's focus was on studying and promoting mediation use. Specifically, mediation was examined for use in community matters, and in many instances this included criminal misdemeanors at the pre-filing stage. Small claims courts were a target as well. In fact, the first staff person hired by the ABA for that committee had been the Director of the Columbus, Ohio Night Prosecutor Program, and brought that contextual experience with mediation to the ABA.

This special committee's Chair, Sandy D'Alamberte, now a former ABA President, has recognized the need for innovation and change in the criminal system. In a recent article, *A Critique of Roscoe Pound's Popular Dissatisfaction with the Administration of Justice: The Missing Discussion of Criminal Law*, found at 48 S. Tex. L. Rev. 969., D'Alamberte noted that Pound himself in his address to the ABA in 1906 noted that "revenge and its modern outgrowth, punishment, belong to the past of legal history".

Of course, it was the ABA sponsored Pound Conference in 1976 which looked at the original address, and then explored innovative processes as alternatives to what was then considered "traditional" case processing. That conference and some resulting projects served as the primary impetus for this "Modern" Mediation Movement. The Special Committee, which was a by-product of the initiation of the movement, focused primarily on increasing public awareness of the use of mediation and providing technical assistance with the creation of community mediation centers or projects. Many of these programs early on were connected in some way to prosecutor's offices. Thus while not directly noted to be projects involving mediation of criminal or quasi criminal matters, in reality that is exactly what transpired. It is indeed time to again explore the potential benefits and assistance that mediation can bring to the administration of justice in the criminal arena. Perhaps now, over one hundred years after Pound's celebrated commentary on the administration of justice, his words can again inspire the ABA to, as it did in the civil realm, lead the way in efforts to improve the criminal justice system.

As the work of this ABA committee expanded, so did ADR use. No longer just for 'minor' disputes, efforts turned to the courts, and in most, if not all instances, it was the civil courts. By the time the Section of Dispute Resolution was created in February 1993, the near exclusive focus of its work was on ADR in commercial matters and courts, primarily civil matters. Yet the need for help in the processing of criminal matters is clear, and mediation offers much potential. With the joined forces of the Criminal Justice Section and the Section of Dispute Resolution, it will be possible to make the strides in the criminal system that have been made on the civil side.

In looking at the history of the modern mediation movement within the United States, it is clear that early efforts were made and work done with criminal and quasi – criminal matters. Specifically, in the early days of experimentation with mediation, the criminal courthouse served as the site for, or foundation of, the creation of several early community mediation centers or

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programs. In fact, many early programs used referrals from prosecutor's offices to initiate mediations. This was, in effect, a case diversion, which, over time, has taken some different paths. It is hoped that a number of potential innovations are considered to re-incorporate mediation and mediation-like processes within the criminal justice system. These initiatives can be housed both within the system itself as well as through outside private ventures. Options are numerous and range from early diversion to mediation use in reaching pleas and consequences. Today with the many difficulties facing the administration of justice in the criminal realm, it is indeed possible that once again mediation can be used to provide a diversion for many types of cases, lessening the case load, and allowing innovation in case procedures and approaches. Also considered in this report are necessary research and educational efforts which must accompany innovation.

In essence, the potential of ADR use in criminal matters has a variety of different options along the time line of criminal case processing. Because this policy initiative recognizes the existence of prior resolutions and work with victim offender mediation, this new focus is placed on pre-filing, that is, matters or disputes before they evolve or become actual cases, and pre-trial negotiation in pending cases. It is indeed possible to keep many cases out of the system, if, at the outset, screening and referral provide mechanisms for resolution. And, when cases are filed, during their pendency, the time to final disposition can be decreased with mediation serving as a method for early initiation of settlement discussions and negotiation.

It is also appropriate to expand the use of alternative case processing procedures as alternatives to imprisonment is part of a new focus on sentencing advocacy, practice and reform. For example, a speech by Judge William Sessions, who serves as the Vice Chair of the United States Sentencing Commission, emphasized the need for flexibility with sentencing and specifically, the need to fit the sentence to the individual offender. The opportunity to participate in various services and programs which address underlying issues that lead individuals to criminal behavior can be critical in reducing recidivism and in the long run the criminal docket. This trend towards recognizing and addressing the needs of the offender and the community is now at the forefront of the criminal justice field, as demonstrated by the virtual explosion of specialty courts, such as drug, mental health, problem solving, community courts and family treatment courts. Mediation and other processes provide more opportunity for the offender, the victim and even family members to address both past and future conduct as well as relationships.

## **II. Mediation and Other Procedural Innovations as Early Diversion and Assistance in Resolving Criminal Cases Prior to Trial**

Criminal caseloads continue to rise resulting in courts that are overcrowded and overworked. Just the processing of criminal matters consumes much in terms of court administration. Even though cases may eventually be settled or resolved, much time and effort is spent in the administrative processing. If the case is never filed, then no administrative work is needed.

As noted, early mediation programs in essence served as a diversion for individuals who wished to file criminal charges against one another, but for a variety of reasons were unable to do so. In some cases, the district attorney's office did not have sufficient evidence to file a formal complaint, and rather than encourage, explicitly or implicitly, the parties to engage in self help, the mediation alternative was suggested, and usually provided at no cost. In a few jurisdictions, police were involved in the referral process. Part of the rationale was that as neighbors, the parties would continue to relate to one another; through mediation they may learn skills that

would assist them in resolving further conflict. Calls to the prosecutor's offices were referred to mediation centers. Thus, in a variety of ways, cases were diverted through a referral to mediation.

By continuing and expanding these types of efforts, diversion before a formal criminal case manifests, (when appropriate) it may be possible to prevent filings. More over, and perhaps even more importantly, by participating in the mediation process, parties were able to truly resolve the underlying matter or dispute. Instead of addressing one incident or event, mediators are often able to get at the overarching dispute and resolve all issues.

A variety of approaches to early case diversion exist, ranging from increased training for police officers and support personnel to the use of current community dispute resolution centers to the establishment of new service providers. In addition, existing programs have experimented with both centralized programs housed at the courthouse, as well as decentralized or neighborhood centers as the mediation provider.

Some concern may arise, however when cases are diverted from the system. In the past, most of these cases were misdemeanors and involved individuals who knew each other, and in some instances, had some sort of an ongoing relationship. While these case characteristics can provide initial selection criteria, other cases may be appropriate as well. It is advisable for each jurisdiction to establish mechanisms for determining the types of cases or matters which will be targeted for diversion.

In addition to the mediation process, a number of other procedural innovations also hold promise. For example, courts which focus on early resolution can provide the mechanism to decrease case loads, while allowing for the processing of cases. Other dispute resolution procedures may be appropriate as well. Many of the barriers to negotiated settlement identified in civil matters are also present in criminal cases. In some instances, a more evaluative or case analysis type of intervention is necessary to overcome these obstacles in reaching a negotiated outcome. Differences and preferences for a particular approach to dispute resolution can be influenced by jurisdictional practice, and innovators should be cognizant of such and work in ways that can incorporate current practice.

The one area where mediation has probably been least utilized in the criminal justice context is that of assisting in the negotiation of plea agreements. A plea is essentially a negotiation, and mediators facilitate negotiation. Thus it would seem likely that when, during the course of plea bargaining, agreements are not easily reached, mediators could provide assistance. In fact, as sitting judges have begun to intervene to settle cases in a quasi-mediator role, the ability and possibilities for the use of mediation in these matters seems even more clear and compelling.

Both negotiators, the prosecutor and defense counsel, could utilize a mediator to not only expedite a decision, but also to help all participants look at possible variations in final outcome. During the pre-trial phase of a criminal matter, some attempt at negotiating a plea is generally made. In many instances a resolution is reached, while in some cases an impasse prevents settlement and the case proceeds to trial. While not every case, civil or criminal, should be settled, each case should have the opportunity to explore that potential. Yet, over the last three decades, despite the expansion of mediation use, it appears that little interest has been expressed in this regard. While prosecutors and defense counsel have immense experience in negotiating pleas, and certainly the parameters of the negotiation are limited, avenues for expansion of options in both pleas and consequences exist. For example, in Idaho, mediators, and in particular judges serving a mediator-like function, assist in resolving criminal matters. While admittedly

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the process is not as flexible as in the civil context, information exchange and explorations of options are, nonetheless, facilitated through mediation use.

In some instances, the process appears to be more like judicial settlement conferences rather than pure mediation. In all cases, however, agreements are expedited and the parties are better able to understand and accept the consequences. In other cases, a more facilitative, interest-based mediation approach is used. This approach is generally more similar to how victim-offender mediations are conducted. Courts have become more creative in both their approach to case disposition as well as final outcomes. Mediators, who are often facilitators of brainstorming during the process, can provide more opportunity in this regard. Mediators who intervene in the negotiation of a pending criminal matter may take a variety of approaches to resolution. On one hand, if the court or jurisdiction is focused primarily or solely on expediting dockets, then a more evaluative, end result focused method could be used, which likely would result in a final resolution similar to more "traditional" plea outcomes. Alternatively, if the objective of the program includes the consideration of alternative sentencing or consequences, then mediators can employ a more facilitative approach, enabling the parties and their lawyers to explore a variety of options and alternatives.

As process experts, mediators also assist parties in overcoming impasses in negotiations. As ADR use has expanded, so has knowledge and understanding about negotiation. Although most of this research has been conducted in the civil context, its applicability in criminal negotiations is apparent. Over the last ten or so years, additional research has provided important insight into the barriers and obstacles to resolution in negotiation generally. These include impediments that arise at the structural, informational and psychological levels of the process. Mediators are trained to first recognize and identify what those barriers are, and then make attempts to help the parties and their lawyers in overcoming them in order to reach a resolution.

More recently this knowledge, or canon of negotiation, has been examined in light of negotiations in the criminal justice context. It is clear that each of these barriers exist in criminal cases as well. With greater knowledge, understanding and use of mediation, barriers can be overcome and resolutions achieved. Mediation use can also serve as a foundation for continued research of negotiation in criminal matters.

Additionally, research has also demonstrated that parties' views of the justice system is colored by their impressions of what is termed "procedural justice." One of the critical important components of procedural justice is the ability to be heard by a neutral person. In other words, the ability to have "voice" in processing the matter is vital to a positive experience and subsequent satisfaction with the procedure. In the case of criminal matters, often neither the offender nor the victim has a voice, as much of the negotiation discussions occur between prosecutors (the State) and defense counsel. By participating in mediation, victims and defendants alike will have the opportunity to be heard and take an active role in the process. It has been demonstrated that by doing so, their perception of the outcome is enhanced.

Within stated parameters of plea restrictions, mediation can be used to not only expedite the process, but also help reach agreements which provide more than a standard penalty. And with their participation in the process, the parties have the ability to not only be heard but also have a part in decision making.

Finally, it is important that all new processes and procedures as implemented comply with the existing ABA Standards and Policies. For example, in those instances where mediation or other means of assisted negotiation takes place during the time a case is pending, and results in a plea made to the court, it is also imperative that the courts follow the precepts set forth in

Standard 14-3.3 of the ABA Standards for Criminal Justice: Pleas of Guilty. Furthermore, it is noted that such Standards caution against the judge acting as a facilitator or assisting with the negotiation.

### **III. Need to Assure Adequate Training of Mediators**

One of the more recent efforts of the Section of Dispute Resolution has been the examination of the quality of mediation. While no overall credentialing or certification exists and currently no organization has the ability to regulate mediators, the need for quality assurance or control in the mediation field has been recognized. In most jurisdictions, in both communities as well as court contexts, there is a requirement of a basic training in mediation before an individual can conduct mediations. In some, perhaps several jurisdictions, additional, specialized training is also necessary for mediating a particular type of matter, for example, family cases. It is critical, therefore, at a minimum, that individuals who are selected to mediate in the criminal arena have some basic training in the process and skills of mediation. In the case of those who mediate pending cases, it is also recommended that they have specialized training which would provide the adequate understanding of criminal case processing as well as any local jurisdictional variations. In addition, as in all types of legal arenas along with mediation practice, ethical considerations are paramount. Mediators must also therefore, be educated in an understanding of ethical principles, surrounding the process. And this may be even more critical when dealing with criminal matters. As issues arise in criminal cases which may differ somewhat from civil matters, it may also be appropriate to eventually examine the need for specialized ethical rules for application in the mediation of criminal matters.

In some jurisdictions, statutes or court rules have also set forth requirements for continuing mediation education. Mediator organizations have done likewise. It may be important to also consider compulsory ongoing education or training, particularly as court procedures, laws, and programs change over time. In addition, the mediation, process itself may also undergo variations which must then be incorporated into further training.

As noted below, as experience with the mediation process took place, so did developments and evolution with regard to the process itself. Those skills and abilities in terms of mediator effectiveness continue to evolve, and have done so at a level that the field is now looking at what can be considered the next generation in terms of knowledge and skill. It is likely that such changes would also occur in the mediation of criminal cases. Therefore, while some specialized training and education is necessary at the outset for those who will mediate these matters, it is also imperative that continuing education is provided as the field matures and new techniques are developed.

### **IV. Mediation Protocols**

In addition to the training of mediators, it is also important that all of the mediators working in this arena are aware of, and sensitive to, the rights and needs of all of the mediation participants. The constitutional rights of the alleged offenders must be preserved throughout the process. While not required, it is often part of dispute resolution program policy that all parties in the process have the opportunity to have counsel present or the opportunity to discuss settlement options with counsel.

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It is advisable that each jurisdiction develop a system for contacting parties, explaining the mediation process, and ensuring participation is voluntary.

## **V. Importance of Research, Dissemination of Information and Additional Education**

In the civil system, over the now nearly thirty years of experimentation and use, much more has been learned about the mediation process itself, as well as the theory, law and skills which accompany mediation. Research has informed our learning.

Necessary components of continued and further integration of ADR in criminal justice must include research as well as expanding education about mediation use, specifically tailored to criminal matters. As experience is gained, data gathered, and lessons learned, methods to disseminate the information must be implemented. As current awareness and understanding of these approaches is lacking, it is likely that a great deal of effort in education is necessary.

As those working in the criminal justice arena, including courts, prosecutors, defense counsel, police, and probation officers' make efforts to experiment with the implementation of new programs, research regarding effectiveness is also necessary. Research provides not only the data to determine programmatic or project goals, it also allows those involved to take a step back and reflect upon any need for changes or adjustments in the program. It is important to include both objective and subjective components in any research design.

Research must be both empirical with a specific focus on gathering data, as well have a more subjective bent, consisting of interviews and conversations with participants. This research, however, must also be tailored specific to the goals and objectives of each program or jurisdiction, as it is likely that all will not be identical. In other words, the anecdotal reports of those who participate in the mediations, including for example, discussions with victim, offender and all counsel. Feedback from mediators can also be instructive. The research will serve not only to inform continued program development, but also as a foundation for increasing the breadth of educational efforts.

## **IV. Conclusion**

In conclusion, many strides and, much work was done initially with regard to the use of alternative procedures and processes in criminal cases or matters. For a variety of reasons, the focus moved to civil matters, and over the last two decades, much progress has been made integrating mediation and other alternatives within the civil justice system, as well as providing numerous avenues for dispute resolution outside of the court house. It is now time to move some of these efforts to the criminal justice system as well. Numerous opportunities exist for mediation to provide a beneficial and valuable option to court proceedings. The ABA has urged the use of mediation in victim offender matters in the past, and now those efforts should be expanded to earlier in the case processing timeline. Mediation can be used as a method of case diversion, as well as an aid in negotiation and plea bargaining during the pendency of cases. Those individuals who serve as mediators must be trained appropriately. Specialized and continued training should be integrated in programs which are created or expanded. And finally, it is essential that research is conducted which will provide feedback to the programs. The data can also be used as a basis for continued and expanded educational efforts.

Respectfully submitted,

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