How Do You Mediate a Criminal Case?

By Jean Whyte

Mediation and other forms of dispute resolution are becoming more commonplace in the criminal sector. The criminal mediation program in Anne Arundel County, Maryland is an internal program of the State Attorney’s Office (SAO) consisting of one mediator and one case manager. Since 1983, the program has been assisting the SAO and the citizens it serves to resolve criminal cases prior to trial. The program continues to thrive with an average of 250-400 cases being resolved through mediation each year. Mediation assists the parties, the prosecutor’s office, the courts, and the public to save time, money, and frustration. By discussing their interests, concerns, and developing agreements in a confidential setting with the assistance of an impartial mediator regarding their conflict, parties often experience more satisfaction and achieve long-term resolution that avoids escalation and resolves problems.

Selecting criminal cases for mediation

Clearly, not all criminal matters are appropriate for mediation. Although mediated in some victim-offender programs, felony cases or serious misdemeanors rarely lend themselves to mediation. Conversely, minor misdemeanors, particularly involving individuals who have some form of a relationship, often benefit from mediation. Assault, trespassing, malicious destruction of property, harassment, telephone misuse, arson threats, and theft are examples of criminal disputes frequently referred to mediation. Family members, business associates, and neighbors are examples of groups that typically gain more by participating in mediation to address their grievances.

Cases referred to the mediation program originate from several different sources. The majority of cases referred to mediation are carefully investigated by a specific screening unit within the SAO to initially determine whether mediation is a plausible option. If domestic issues are present, the victims’ assistance program plays a role in deciding whether mediation is a plausible option. If domestic issues are present, the victims’ assistance program plays a role in deciding whether a case should proceed to mediation. Prosecutors may refer cases on their docket to mediation. Criminal defense attorneys familiar with the program may recommend cases for mediation. Judges may refer parties to mediation when they appear for trial. On occasion, members of the public seek to refer their own dispute to mediation. The mediation program performs the final screening function to assess whether a case is mediation-appropriate. Cases approved by all applicable screeners are then scheduled for mediation. Should the case fail to meet any screener’s criteria, the matter is discussed internally and any case ultimately rejected for mediation proceeds to prosecution. Incidents of domestic violence, physical injuries, and the parties’ criminal history are examples of factors that influence a decision about whether to mediate a case.

Who participates in a criminal mediation?

The parties named in a criminal complaint and the defense attorney are the primary participants in the criminal mediation session. The defense attorney’s participation in the criminal mediation session is an attorney-client decision. If attorneys do accompany their clients to mediation, they usually assume a more passive role in the mediation process itself as compared to their clients. Prosecutors do not participate in the mediation session. The mediation process is voluntary for the victim and the defendant. Either party may elect to bypass mediation and proceed to prosecution.

When and where does criminal mediation occur?

Criminal mediation always takes place prior to trial. The SAO sends to the parties and their attorneys, if applicable, a letter and brochure about mediation. The letter requests that recipients contact the mediation program to discuss the option to mediate. When parties contact the program, the case manager or mediator describe the mediation process, field questions, and if the party is agreeable, schedules the mediation session.

Mediation sessions occur at various times throughout the day on all business days. The program identifies a mutually convenient time, date, and location for mediation to occur. Written confirmation notices are sent out to all anticipated attendees. Mediation sessions are held at the Maryland Judiciary’s Mediation and Conflict Resolution Office (MACRO) offers grants to MD State’s Attorneys’ Offices to start or expand criminal mediation programs. MACRO was created by and is chaired by the Honorable Robert M. Bell, Chief Judge of Maryland’s highest appellate court. According to Chief Judge Bell, “Criminal mediation can often get to the root causes of ongoing conflicts that otherwise reappear before the courts over and over again. In mediation, the participants may find permanent solutions by agreeing to certain forms of relief that the courts are prescribed from providing.”

Jean Whyte directs the criminal mediation program for the Anne Arundel County State’s Attorney’s Office (Frank R. Weathersbee, State’s Attorney). She can be reached at SAWHYT33@aacounty.org.
SAO office in a private conference room. When there is delay in scheduling a mediation session, prosecutors and defense attorneys typically jointly consent to a postponement of the trial date to permit more time for mediation to occur. Judges are often willing to grant such a request.

**How does the criminal mediation process work?**

When a criminal matter is referred to the mediation program, the case manager performs the initial screening function. The mediation program has access to any information compiled by the SAO, including attorney case files, charging documents, screening unit data, prior criminal history records, police reports, and any other pertinent information on file. Related cases and the prior legal history between the parties is examined. The mediation program screens both the victim and defendant within the criminal and civil legal system. The mediator then performs the last internal screening to finally determine if a case is appropriate for mediation. Cases that are rejected for mediation travel the traditional channels to trial.

During the mediation, the mediator welcomes the parties, introduces the mediation process, and addresses any other important items or questions. After the introduction, the mediator presents the parties with a consent form to review and sign expressing their willingness to participate in mediation. In a confidential setting, each party is then given an opportunity to offer their perspective, share any concerns, and identify their interests or needs with regard to the matter. Important issues are discussed more thoroughly and an option-building phase follows. Parties discuss various options or ideas for how the situation could be resolved. The ideas generated are then evaluated more critically to determine if they are acceptable and realistic solutions. Once the parties have developed and finalized their resolutions, the mediator commits their agreement to writing which both parties sign. If all parties consent, a mediation agreement may include a requirement that counseling or treatment programs be completed by a certain date. The parties receive a copy of their mediation agreement, and the mediator retains the original agreement document. With the exception of the written mediation agreement, all communications associated with the mediation screening, scheduling, and the mediation session are confidential.

**What happens after criminal mediation occurs?**

Following the mediation session, but prior to the scheduled trial date, the mediator meets with the prosecutor assigned to the case to share the content of the parties’ written agreement and provide a recommendation for case disposition. Cases that resolve through mediation may be subject to one of two possible legal case dispositions. A case may receive a nolle prosequi disposition or be placed on an inactive docket. The final decision with regard to case disposition rests with the prosecutor. The prosecutor may file a disposition immediately with the court or close out the matter in person on the trial date. In the latter case, the mediator provides the prosecutor with a folder containing copies of the written mediation agreement for the prosecutor and the court. Under either scenario, parties are usually excused from appearing for court on their trial date.

**Why are criminal cases mediated?**

Like civil cases, the stakeholders to a criminal matter may all benefit from exposure to mediation. The parties receive a confidential forum to air their grievances, discuss the matter thoroughly, and have a unique opportunity to design their own resolutions. Many parties fear the trial experience and the harsh consequences that may flow from it. Others may feel frustrated or overwhelmed by the complexities of the criminal justice system. Mediation allows parties to steer their own course with respect to their dispute and create win-win outcomes. As with civil cases, criminal mediation frequently saves parties time, money, and aggravation. Mediation may prove advantageous not only to the parties, but also to the prosecutors. Insufficient evidence, unpredictable witnesses, lack of information, risk of disappointing outcomes for victims or any other factor that may render a case difficult to prove at trial may make mediation a more attractive option. In some cases, victims may gain something (perhaps more valuable) through engaging in the mediation process rather than an adversarial judicial proceeding that risks an uncertain result. The judicial system, yet another important stakeholder, is positively affected by criminal mediation. On the trial date, the prosecutor provides the court with a written copy of the parties’ mediation agreement. The court places the agreement on the record to conclude the court’s review of the matter.

Criminal mediation can save the judicial system considerable time, resources, and expense. Research has shown that individuals who participate in criminal mediation are less likely to re-encounter the criminal justice system.