Revising the Role of the Court-Connected Mediator
To Achieve Fairness for Unrepresented Litigants

By Russell Engler

Over the past decade, the flood of unrepresented litigants in the courts has gained increased attention nationwide. The past decade has also seen a surge in the use of court-connected, Alternative Dispute Resolution (ADR) programs. Courts, including those with significant numbers of unrepresented litigants, have increasingly turned to mediation as a means of docket control.

The focus on unrepresented litigants comes amidst a backdrop of numerous reports documenting a high incidence of unmet legal needs of the poor and working poor, due to a shortage of lawyers available to represent indigent litigants in civil cases. Cases involving unrepresented litigants create problems for judges, court clerks and lawyers encountering the unrepresented litigants, and raise issues of fairness and justice for the court system as a whole.

The presence of unrepresented litigants causes problems for court-connected mediators as well. Despite the varying contexts for court-connected mediation, standard restrictions govern the mediator’s role. Mediators are prohibited from giving legal advice. Mediators must remain “impartial” and/or “neutral.” Mediators are required to be “fair.”

A straightforward application of these rules can have devastating consequences for unrepresented litigants. A mediator who realizes that an unrepresented litigant may be unknowingly waiving a legal right faces a dilemma. Even pointing out that the unrepresented party might be waiving a legal right runs the risk of giving legal advice. The mediator faces unsatisfying choices: advise the litigant to obtain counsel, terminate the mediation, or pursue settlement despite the likely waiver of rights.

The suggestion to obtain counsel is a hollow one, given the shortage of available counsel for the poor. The termination of mediations undercuts a system that was created in part to handle a high volume of cases and that measures success in part by its settlement rate. The final option, that of continuing the mediations despite the potential for the unknowing waiver of rights by unrepresented litigants, raises issues of fairness.

In the abstract, the waiver of rights might be justified as flowing naturally from the concept of mediation. Mediation is understood as a process voluntarily selected by the parties as a means of dispute resolution different from an adversarial trial. Where the unrepresented litigant “chooses” to mediate, we presume that the choice is voluntary and informed; that the litigant has had a realistic opportunity to obtain counsel and has chosen to forego counsel; that the litigant has had access to independent advice; and that the litigant appears in mediation aware of her legal rights and capable of participating in mediation. The litigant’s decision to mediate therefore implies a willingness to resolve the dispute outside of a rights-based framework. As a result, any waiver of rights might be claimed to be an acceptable and unavoidable trade-off, flowing from the decision to mediate.
These justifications collapse given the realities facing the unrepresented poor in the high volume courts. Their appearance without counsel cannot be viewed as voluntary, due to the shortage of affordable counsel for the poor. Nor is their presence in the courts often voluntary, since many unrepresented litigants are dragged in as defendants in civil cases. Many plaintiffs, such as those seeking to enforce child support orders, are compelled by financial desperation. Unable to obtain counsel, unskilled at presenting their cases, and often intimidated by the court proceedings, the unrepresented poor literally should be viewed as “without” representation.²

Even the choice to mediate cannot be presumed to be voluntary. In some settings, mediation is mandatory. More often, the mediation is labeled voluntary, but often appears mandatory to the uninformed litigant. Unrepresented litigants are steered to mediation with minimal explanation and without a full understanding of their options. Once in mediation, the pressures on mediators to obtain settlements are immense.³

In a setting with a large number of unrepresented litigants, this pressure will guarantee that the option of terminating the mediation due to the unrepresented litigant’s lack of understanding will be rarely, if ever, used. The mediation usually goes forward, with the mediator pressing for an agreement and constrained in his or her ability to protect the unrepresented litigant from waiving significant rights. The danger is present when all parties to the mediation are unrepresented, but is exacerbated when mediation involves an unrepresented litigant against a represented party, or where other power imbalances exist.

In examining the proper role of the mediator under these circumstances, we must reject the presumption that decisions by unrepresented parties are voluntary in any meaningful sense, absent evidence that their choices are informed ones. Mediation theory teaches that voluntariness is a cornerstone of successful mediation, both in terms of voluntary participation and a voluntary decision to settle on particular terms. The principle of voluntariness cannot be upheld without informed consent.

In mediation practice, the principle of informed consent is not an end in itself but is a means to achieving the fundamental goal of fairness. Fairness requires that parties know what they are doing when they decide to participate in mediation, that they understand all aspects of the decisionmaking process, including their right to withdraw consent and discontinue negotiations, and that they understand the outcome reached in mediation.⁴

The current understanding of the mediator’s role, as limited by the prohibition against giving legal advice and by a narrow view of impartiality, leaves unrepresented litigants vulnerable to the waiver of important rights in mediation. The fundamental clash between the need to achieve voluntary and informed choices by disempowered and legally unsophisticated litigants, and the prohibition against providing sufficient advice or assistance to make the choices truly informed, remains a major, unresolved dilemma in the context of court-connected ADR.

There are three general choices in response to this dilemma. One choice is to make no changes at all. Under the guise of impartiality the court system funnels large numbers of unrepresented
litigants through mediation, a forum that produces systematically unfavorable results to unrepresented litigants when measured in terms of outcome. The mediation process is part of a court system in which “judges, lawyers and … pro se litigants themselves … [share] a common belief that parties with competent counsel have a clear advantage.” Far from providing an impartial forum yielding fair results, the process routinely favors the more powerful party. The result is a process that is both unfair and partial.

A second choice is to maintain the current role for court-connected mediators and leave the burden on the judges to correct resulting problems, since mediated agreements are often sent to a judge for approval. If the judicial role is that of a rubber-stamp, the result is the same as if there are no changes at all. The alternative, of extensive judicial intervention in mediated cases, undercuts one justification for court-connected mediation, that of diminishing the amount of judicial resources necessary in a given case.

The third choice is to change the role of the mediator. For mediation to provide a useful component for courts dealing with large numbers of unrepresented litigants, the mediators must insure that the mediation process does not provide a forum for the represented party to gain an unfair advantage over the unrepresented party. Providing justice and fairness, rather than clearing the court’s docket, must remain the primary goal of the mediation process.

The court-connected mediator’s role must be defined to achieve that goal. The mediator must insure that agreements do not result in the unknowing waiver of rights by unrepresented parties. Where one party is represented by counsel, the mediator must also insure that the agreement does not result from any advice, threats, or promises made by the attorney to the unrepresented party. The mediator must similarly protect unrepresented litigants where other types of power imbalances exist. Courts referring cases to mediators must clarify to the unrepresented litigant whether the mediation is voluntary or mandatory, and, in either case, the mediator must avoid leaving the unrepresented party with the belief that the mediation must result in an agreement. Only in this manner can the mediator both preside over a fair and impartial process and save judicial resources.

The increased use of alternative dispute resolution will cause more problems than it solves for courts in their handling of unrepresented litigants if the role of the mediator is not revised along the lines described here. It is irresponsible to cling to a classic vision of mediation while urging its widespread use of mediation in settings involving unrepresented parties. Either the role of the mediator must be adapted to fit a given context or mediation must be deemed inappropriate for certain contexts.

Whatever problems the revised role of the mediator might cause for mediation theory in its abstract form, it is crucial to keep in mind that court-connected mediations do not occur in the abstract, but within the context of the adversarial system. The adversarial system is premised on the underlying notion of fairness and justice. Our understanding of what it means to be impartial must include the notion that the system does not favor those with counsel over those without counsel. The outcome of a case should be related to the facts of the case, however inarticulately presented, and to the governing law. Outcomes must not be controlled by whether one side has a
lawyer while the other does not, or whether one party can impose its will on another without regard to the law or facts.

The forfeiture of important rights by the unrepresented poor is predictable, and its routine occurrence is hardly surprising. Many of the unrepresented poor are unaware of their legal rights, and ill-equipped to pursue them without substantial assistance. As with Judges and Clerks who work in these courts, court-connected mediators who are not part of the solution must be viewed as part of the problem.


2 For this reason, I prefer the term “unrepresented” when referring to the poor appearing in civil cases without counsel, rather than alternatives, such as “self-represented” or *pro se*, which still implies a choice to appear by one’s self.

3 See, e.g. Andre G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 Harv. Women’s L.J. 272, 281 (1992)(discussing how mediators handling family law matters in the Massachusetts Probate and Family Courts—called “family service offices”—report pressure from judges to settle cases, and indicate that they believe their job effectiveness is evaluated based on how many cases they settle); Erica L. Fox, *Alone In the Hallway: Challenges to Effective Self-Representation in Negotiation*, 1 Harv. Neg. L.Rev. 85, 91 (1996)(“In an effort to manage the hundreds of cases docketed for a single day, the housing court instituted mediation with housing specialists”).


7 For example, there is an extensive body of literature discussing power imbalances in mediation in family law cases and housing cases. See, e.g., Penelope Eileen Bryan, *Reclaiming Professionalism: The Lawyer’s Role in Divorce Mediation*, 28 FAM.L.Q. 177 (1994); Tina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Fox *supra* note 3; Kurtzberg & Henkoff, *supra* note 5, at 60-63.
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