

NEVADA'S MEDIATION LANDSCAPE

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It's a familiar scenario. Your client, Jack, comes to see you about filing a lawsuit against Jill. He is hungry for justice and wants his day in court. He doesn't care about the cost (at least not yet). You file a lawsuit, Jill files an answer and costly, time-consuming, stressful litigation begins. But what if Jack and Jill could simply sit down together and hash things out, perhaps finding some common ground and a way to move forward without years of interrogatories, depositions and hearings? It's a great idea, and luckily, there is such a process: mediation.

Although both mediation and arbitration are alternatives to court, they are significantly different practices. Mediation is a confidential, facilitated conversation guided by the mediator—a neutral third person. The mediator helps parties define the conflict, examine positions and interests, and explore settlement alternatives. Only mediation allows the opportunity to suspend advocacy for a time and focus on constructively resolving a problem. It's not about testimony and evidence; it's about communicating and getting to the heart of the matter. Mediation encourages parties to fashion their own resolution rather than have a judge or arbitrator



make a decision for them. Because of all the unique advantages the process offers, access to mediation is important to those living and doing business here.

If we were to picture Nevada's mediation scene as a landscape, it would look a lot like the view from our windows. There are areas where use of the process has flourished, places where it has barely taken root and patches where it is as barren as the Nevada desert. Overall, however, mediation is growing in the Silver State.

Courts in the United States first began using mediation in the 1960s and '70s. Nevada's first foray into mediation began in 1991, when the Legislature mandated it in certain jurisdictions for child custody cases. In that same session, the Legislature established funding for community mediation centers. Later legislation allowed both custody and community mediation to be expanded to other jurisdictions. Many jurisdictions now have established custody mediation

programs, including the First, Second, Eighth, Ninth and Tenth Judicial Districts.

As for community mediation, Clark County has the Neighborhood Justice Center, while Washoe County has the Neighborhood Mediation Center. Both centers provide valuable dispute resolution services to residents, businesses and organizations within their respective counties.

The Nevada Legislature has added other mediation programs over the years, including in the areas of construction defect (see NRS 40.680) and common interest communities (see NRS 38.310). In order to file a lawsuit involving either of these causes of action, the matter must first be submitted to mediation or other alternative dispute resolution. The Legislature created the Foreclosure Mediation Program (FMP) in 2009,

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as a result of Nevada's housing crisis. The intent behind the FMP is to allow homeowners of owner-occupied residential property to participate in foreclosure mediation after a lender or trustee files of a Notice of Default. After mediating thousands of cases, the FMP will come to an end on June 30, 2017.

The Nevada judiciary has also played a role in establishing statewide mediation programs. For those who have had a civil case go up on appeal, chances are it has gone through the Nevada Supreme Court Settlement Program. This program began in 1997, with an eye toward reducing the case-

continued on page 18

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load of the court while allowing parties an opportunity to discuss settlement after a district court victory or defeat. To date, the program has an impressive 52 percent resolution rate.

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The Nevada Supreme Court also recently introduced the Juvenile Dependency Mediation Program (JDMP). Dependency mediation offers parents and stakeholders, such as social services agencies, the opportunity to meet in a neutral setting to resolve issues surrounding child abuse, neglect and termination of parental rights. This program launched in March 2016 with the training of mediators from every judicial district in Nevada. A wonderful benefit of the JDMP is that it has brought the mediation process to rural jurisdictions. Because each judicial district now has access to at least one trained mediator, it is more feasible for mediation of all types to expand in Nevada's less-populated areas.

There are other programs worth mentioning. The federal district courts in Reno and Las Vegas have developed the Inmate Early Mediation Program. Prisoner litigation comprises 27 percent of the District of Nevada's caseload. This program was created in 2009, to assist the court in managing cases inmates file against the Nevada Department of Corrections under 42 U.S.C. § 1983. The mediators are attorneys who volunteer their time. This program has helped the court better manage its remaining caseload.

The Nevada Department of Education offers mediation in special education cases in accordance with the Individuals with Disabilities Education Act (IDEA) and Chapter 388 of the

Nevada Administrative Code. Pursuant to these provisions, mediation must be available for disputes between the parents of a child with a disability and a public agency regarding the identification, evaluation

or educational placement of the child. It is also available for other matters under the IDEA, such as the provision of a free, appropriate public education.

The state of Nevada has an internal voluntary mediation program in its Human Resource Management Department. The program is accessible to all state employees and supervisors, and encourages the resolution of issues using joint problem solving rather than through formal proceedings. The mediators are state employees who have been formally trained. This program serves as a model for organizations desiring to incorporate mediation into their regular culture.

While some of the programs mentioned above have blossomed, others have not. A good example of this is court-annexed mediation. Most attorneys are familiar with court-annexed arbitration. The same rules govern both mediation and arbitration: Part C of the Rules Governing Alternative Dispute Resolution adopted by the Nevada Supreme Court. Pursuant to these rules, any matter otherwise subject to court-annexed arbitration may be voluntarily placed into mediation. All parties must agree to the mediation via written stipulation filed with the commissioner. Just like arbitrators in the court-annexed program, mediators must meet certain

qualifications. Mediator fees are capped at \$1,000 plus \$250 for costs. If a matter is not resolved in mediation, it will go into the short trial program.

Court-annexed mediation offers an eminently affordable and accessible path to mediation, yet it has rarely been used anywhere in Nevada. This can be easily changed. A conscious effort on the part of the bar to choose mediation in appropriate cases could help grow this program into something meaningful.

While the foundation has been laid in many arenas, there remain the uncultivated areas where mediation could burgeon. In the court setting, cases involving probate, personal injury and guardianship are ripe for mediation. Restorative justice, which involves mediation between the perpetrator and the victim of a crime, is an excellent way to bring the practice to the criminal realm. The process, however, is not limited to litigated cases. One of the singular things about mediation is that it works well for just about any conflict. Many fields, including medicine, human resources and public education present ideal opportunities to expand its use.

Nevada has the potential to create a lush mediation environment, allowing the Jacks and Jills of this world an alternative to facing off in the courtroom. With the continued nurturing of what is already in place and the planting of seeds for new programs, mediation in our state can continue to grow until it is solidly rooted in the ADR landscape. **NL**



MARGARET CROWLEY

has been a member of the State Bar of Nevada since 1991. She served for more than 15 years as a civil Deputy District Attorney. In 2009, she founded Crowley Mediation, L.L.C., and has mediated over 600 cases in areas including family, employment, business and interpersonal disputes, and litigated cases. Crowley sits on multiple court mediation panels and serves as a Nevada Supreme Court Settlement Judge. She loves to share her passion for conflict resolution through speaking, writing, and teaching basic and advanced mediation training seminars.