

INTRODUCTION

Access to justice for all has emerged in the past thirty years as an important goal within the American justice system. The delivery of legal services to individuals with limited financial resources is challenging work. Legal service and pro bono agencies across the United States never have adequate funding and staff to respond to the needs of their local communities. This situation requires them to set restrictions on the types of cases they can accept, and necessitates adhering to strict financial resource rules. Frequently, individuals who have a problem that has not yet become a bona fide legal issue or who have incomes slightly above the limits set by the agency are left without assistance of any kind. While workshops and classes may provide generalized help, many potential clients are turned away and left feeling discounted and helpless.

To demonstrate the large number of requests for legal services from the working and non-working poor in this country, one need only look at the largest county in the United States. Maricopa County in Arizona, which includes the city of Phoenix, has 355,000 community members who meet the financial eligibility requirements of the local legal service agency. This agency receives 2,000 telephone and walk-in requests for help each week. The financial resources of the agency have made it necessary to turn away the vast majority of applicants for service.

Every jurisdiction in this country has witnessed growth in the use of what has come to be called alternative dispute resolution (ADR). Alternative dispute resolution is a term that refers to a number of processes that can be used to resolve a claim or dispute. Dispute resolution processes are alternatives to having a state or federal judge or jury decide the dispute in a trial. Dispute resolution processes can be used to resolve any type of dispute including family, neighborhood, employment, business, housing, personal injury, consumer, and environmental disputes. Common ADR processes include mediation, arbitration, early neutral evaluation, mini-trial, and many others. All forms of ADR are now routinely used to limit judicial caseloads and move lawsuits through the court system in a more efficient manner. ADR can also be effective in resolving disputes before they ever reach the courts.

Dispute resolution processes have several advantages. For instance, many dispute resolution processes are cheaper and faster than the traditional legal process. Certain processes can provide the parties involved with greater participation in reaching a solution, as well as more control over the outcome of the dispute. In addition, dispute resolution processes are less formal and have more flexible rules than the trial court.

While many judges and lawyers bemoan what they considered to be the loss of good “lawyering” skills, where lawyers are truly counselors to their clients and advocates in inter-lawyer negotiations, they recognize the benefits of a facilitated negotiation, especially, mediation. Whether provided by in-court or community-based mediators, this service is available in most jurisdictions, and is increasingly sought by both members of the public and the lawyers who represent them.

This manual will address the specifics of developing a mediation program. The following description of the mediation procedure is often used in brochures and other informative literature given to individuals considering using or referring others to mediation: People involved in a problem meet with a neutral person (the mediator), who provides guiding rules of conduct for the session, explains confidentiality, and then asks each person to describe the situation that has brought them to this point. After a full presentation of each person's views, the mediator assists with determining interests (the positive and universal needs people have that underlie the stated positions). Alternative solutions are generated that will meet these interests, and the mediator helps each party to decide whether a particular solution is acceptable to him or her. If both parties agree, the mediator documents the specifics of that agreement and the session is over.

ABA CONTRIBUTION TO THE DEVELOPMENT OF ADR SERVICES

In February 2003, the ABA Section of Dispute Resolution adopted the following resolution: *The American Bar Association Section of Dispute Resolution urges each mediator, arbitrator or other neutral to devote at least 50 hours annually to providing pro bono ADR services; attorneys who are not neutrals to devote a portion of their pro bono services to assisting needy litigants involved in ADR proceedings; and bar associations to credit such pro bono activities toward an attorney's mandatory or aspirational pro bono requirements.*

In keeping with this resolution, the Section of Dispute Resolution, with the support of the JAMS Foundation, has developed this manual to support the design and implementation programs and policies that provide dispute resolution alternatives to an underserved population.

Objectives:

- Increase the number of pro bono dispute resolution projects by creating opportunities for attorneys and clients.
- Implement innovative dispute resolution programs to expand indigent legal services.
- Improve coordination and communication among legal services and pro bono agencies implementing dispute resolution programs.
- Better educate legal services programs, pro bono programs, attorneys and clients about dispute resolution options.

THE MANUAL

This manual has been created to assist legal services and pro bono agencies in developing mediation programs. Pro bono mediation, using community volunteers, is a viable and valuable adjunct to traditional representation and advocacy. While each agency that considers adding mediation services must determine who will be served as well as what the program will encompass, this process for resolving disputes can move cases off an advocate's desk and expand the population served. Problems that have not yet risen to the level appropriate for a lawsuit can be resolved, and this can reduce future needs for lawyer advocacy and legal services. Individuals who have financial resources slightly above the requirements of the agency and cannot afford a private attorney or mediator can be served in a pro bono mediation program. Mediation can be a free or low-cost method for better serving a community with few resources and expanding needs. Mediation is an excellent way to solve problems and achieve durable agreements.

The manual is designed to give governing boards, chief executives and mediation program administrators the tools to start new programs or to strengthen existing programs within pro bono community mediation and legal services agencies. It covers the benefits of mediation, the financial resources needed and where to find them, staffing the program, the recruitment of appropriate volunteer mediator service providers, the screening and processing of cases, sample forms and training tools, and ways to handle problems as they arise. It also lists books and other external resources that may be helpful in learning more about how to design a new program.

In order to clarify or exemplify ideas in the text, Program Experience will be presented. This program experience comes from the pro bono mediation program that was established at Community Legal Services, the agency that serves five counties in Arizona. With two years of program operation completed, examples can be instructive to new program administrators.

The index at the end of the manual should make finding a particular topic easier, as all references to each topic are noted. Additional information can be obtained by contacting the ABA Section of Dispute Resolution at (202) 662-1680.

BUILDING SUPPORT FOR THE MEDIATION PROGRAM WITHIN THE AGENCY AND THE SERVICE COMMUNITY

Included in this section:

- **Arguments Against Mediation**
- **Building Support in the Agency**
- **Answering the Critics**
- **Building Support in the Community**

INTRODUCTION

The goal of the mediation program is to serve people who would not otherwise have access to legal problem/resolution services. This includes individuals who fit the financial resource requirements in the mediation program's hosting agency as well as others referred by appropriate local community agencies. Determining what the program will encompass will be discussed in detail later in this manual.

The governing board, the chief executive and staff members of a potential mediation program-hosting agency will be making decisions about developing a program as an additional service to the population the agency serves before the program is started.

What steps need to be taken by this champion to build support for the idea of having a mediation program? After the governing board, the chief executive or a staff member have been "sold" on mediation, what needs to be done to build support among all people who are connected to the agency?

Many mediators believe that the process of mediation sells itself. These mediators believe that no one could possibly argue against a process in which people with a problem are assisted in talking through the situation, listening to the other side's perspective, exploring alternative solutions, and picking one solution that both sides believe will work. Please see below for arguments commonly used *against* mediation. These arguments are addressed in the following text.

ARGUMENTS AGAINST MEDIATION

1. Mediation has none of the safeguards built into a legal/court procedure.
2. People who have not discussed their rights with an attorney may reach an agreement in mediation, only to find at a later time that they are legally entitled to more benefits than they received as a result of their mediation agreement.
3. Very few people are able to adequately express their concerns and see that their needs are met, so they may be easily persuaded to sign an agreement that does not really solve the problem or meet their needs.

4. Mediators, who may not be law trained, will not know what the law provides about the problem situation presented in mediation.
5. While mediators talk about neutrality, they are people with opinions and values, and may try to get one or both of the parties to agree to a solution chosen by the mediator.
6. Mediation does not always end with an agreement, so it just wastes time that would be better spent in preparing for an advocate to negotiate or a court to rule.
7. Most people are adversarial in nature, so they really cannot work within a collaborative process.
8. Mediation is just arbitration by another name.

ANSWERING THE CRITICS

Most of the concerns about mediation focus on rights and safeguards. When talking with individuals who express these perceived drawbacks, the training of the mediators needs to be stressed in terms of protection of the parties. Well trained mediators, whether possessing law degrees or not, know enough about the laws that apply to the problems that are presented in a mediation session to include reassuring information in their opening statements to the parties. In describing the process of mediation, the mediator indicates that:

1. Parties will not be pressured to agree to anything they do not feel adequately addresses their interests and needs.
2. In complex situations with potentially significant consequences, attorneys can review a proposed agreement before the parties sign it. (In the pro bono mediation program, the mediators will have access to attorneys within the agency.) Since many attorney-mediators volunteer in pro bono/legal services agencies, one of the mediators can be an attorney who is a specialist in the area of law covering the case.
3. The mediators will check that the parties have all the information they need to make informed decisions.
4. Unlike many court hearings, the mediation session is open-ended, and parties may take all the time they need to discuss options before considering an agreement.

The benefits of involving parties directly in the decision-making process when the dispute affects them should be stressed in talking with mediation detractors. The population that is served by pro bono/legal services agencies derives benefits beyond the solving of the individual problem in mediation. Having the mediators model good problem-solving techniques and provide guidance on managing conflict can help people in other areas of their lives.

Given a significant increase in use of mediation by courts and lawyers across the country and the number of mediation statutes that exist in many states, the legal community and

judiciary have taken a large step forward in awareness of the benefits of mediation. Unfortunately, there continues to be a large number of judges and attorneys who think that mediation is just another name for arbitration. Many mediators are familiar with the question posed by a legal professional, “After the mediator makes a decision, is it binding on the parties?” They are confusing mediation, where the parties make the decision, with arbitration. In arbitration, the case is presented to a third party neutral, who makes a decision that can be binding on the parties or may be rejected and brought to trial. . The trial judge and jury are not given information regarding the arbitrator’s award, thus making the trial a new and completely separate presentation of the case.

BUILDING SUPPORT FOR MEDIATION IN THE PRO BONO/LEGAL SERVICES AGENCY

If the mediation program is to be successful, all individuals connected with the agency must understand and support its use. Ideally, the chief executive, governing board, staff members (particularly those involved with case intake procedures) and attorney advocates would be given a mini-training in the mediation process. Many bar associations consider this type of training appropriate for general and ethics Continuing Legal Education (CLE) credit. The time spent in obtaining a thorough understanding of what mediation offers to agency clients will help increase the number of cases being referred to the program. It will also help strengthen the connection between agency and mediation program staff members, hopefully resulting in the recognition that mediation may indeed be the better service to offer to certain individuals and types of cases.

While some people are skeptical about how successful this process will be, statistics from community mediation programs can be impressive. Settlement occurs in about 75% of mediated cases, and, in the Phoenix program, 90% of the cases that have been mediated resulted in an agreement.

Once the idea of starting a mediation program has been shared in a potential hosting agency, informational meetings need to be held. The mediation program champion may suggest short presentations be given to the governing board and members of the staff. It is important to discuss the benefits as well as challenge the concerns so that a decision to initiate a program will be universally supported, if possible. When the hosting agency is fully on-board regarding mediation, referrals to the program will flow more readily as staff members recognize that particular cases will be appropriate for a self-determining process in which consensus and collaborative problem-solving are the focus.

BUILDING SUPPORT FOR THE MEDIATION PROGRAM IN THE SERVICE COMMUNITY

After the program is running smoothly, it is time to build support in the broader community. Not only will this result in appropriate referrals of low income individuals who receive other types of service from community agencies, it will prove useful when

letters of support are needed in the fundraising endeavors of the program. Many grant making organizations ask about support in the local community in their Request for Proposals (RFPs). The time to start building support is not the week the funding proposal is due.

Many communities have an information and referral service (I & R) that provides a directory of human services in the area. Listing the pro bono mediation program is important so that people needing dispute resolution can find the program. Some I & R services sponsor meetings of community service providers. This is a place to distribute brochures about the program and talk with other program directors/staff about what is offered at the pro bono/legal services agency. I & R is often connected with the local United Way or another agency that coordinates business and individual donations to support human services.

Community Foundations operate in a similar way to United Way agencies, and frequently hold meetings to provide training on how to respond to an RFP. These meetings allow for interaction between service providers, as well as information on how to raise money to support various programs.

Another way of building support for the mediation program is to ask the volunteers to assist with presentations at agency staff meetings. Many human service agencies hold staff meetings where a sister agency offering a new service can make a short presentation and answer questions. Volunteer mediators are generally pleased to talk about the service they provide, and can serve as part of any educational efforts in which the pro bono mediation program engages. Getting the word out about service is important and appropriate referrals save the program's staff time spent on calls that do not result in cases.

In summary, building support for pro bono mediation is a two-pronged effort and has multiple benefits for the program. Whether it is within the hosting agency or out in the local community, knowledge of the benefits of mediation, the process used for resolving disputes, and how to make appropriate referrals can assist program staff in meeting important goals and sustaining the program.

INFORMATION AND ORIENTATION AGENDAS FOR THE GOVERNING BOARD, AGENCY STAFF AND PROGRAM ADMINISTRATOR

Included in this Section:

- **Information and Materials for The Governing Board**
- **One-Hour Orientation for Members of the Agency's Governing Board**
- **Information for the Agency Chief Executive And Staff**
- **Three-Hour Orientation and Training for Agency Staff Members**
- **Information for the Mediation Program Administrator**

INFORMATION AND MATERIALS FOR THE GOVERNING BOARD

The governing board of the legal services/pro bono agency should be informed and may need to approve the addition of a mediation program to the agency's services.

ONE-HOUR ORIENTATION FOR MEMBERS OF THE AGENCY'S GOVERNING BOARD

A sample agenda for an orientation session follows and materials that can be used to educate the board are found throughout the manual. For convenience, the page numbers are listed. Each agency may find that board members have additional questions, and the index to this manual will assist in finding any relevant information.

- Mediation: what it is, and how it will benefit clients of the agency as well as individuals for whom the agency cannot provide service, who will provide the service (Use material on pages 15, 33, 27, Appendices A, G, and Q) – 15 minutes.
- Case flow for disputes that will be sent to mediation (Pages 33-41) – 10 minutes.
- Mediation program evaluation: How it will be done, and how the Board will receive information (Pages 30-31, Appendices H and O) – 10 minutes.
- Funding: What the program will cost, how funds will be generated to support it, and the role of the Board, if any (Pages 11-14) – 10 minutes.
- Integrating mediation into the Agency's service plan (Pages 15-20) – 5 minutes.
- Questions from Board members – 10 minutes.

The board may want to see periodic reports on the Mediation Program. The orientation session is an opportunity to find out just what information the board would like to have. It is recommended that either an oral or written survey be conducted at this time so that the

Chief Executive and Mediation Program Administrator can determine what records should be kept on the program.

Some members of the governing board may know mediators in the community. The orientation session is a time when these members can be encouraged to contact and refer the mediators to the Program Administrator. Since the board members' first concern is service to the community and to the individuals who use agency service, it may be a conflict of interest for the board members to serve as mediators themselves.

INFORMATION FOR THE AGENCY CHIEF EXECUTIVE AND STAFF

The agency executive and staff need to understand the benefits of adding a mediation program. They also will be interfacing with the program through referral of cases and may play a role in the initial screening process when an applicant for service calls or walks into the office. Since part of the motivation for having a mediation program is the reduction of cases that need attorney advocate attention, staff members are invested in seeing the program succeed. Initial orientation is needed for everyone working at the legal services/pro bono agency, and it is important for the staff to receive an update periodically. The program executive and staff should be aware that attempts to implement new service delivery options often create conflict. These conflicts should be viewed as opportunities to practice collaborative problem-solving skills.

THREE-HOUR ORIENTATION AND TRAINING FOR AGENCY STAFF MEMBERS

A sample agenda for an orientation session follows and materials that can be used to educate the staff members are found throughout the manual. For convenience, the page numbers are listed.

- Mediation: Definition, benefits, overview of procedures to be used in the Agency's program, what are the qualifications of the mediators who will volunteer to provide service – (Use materials from pages 15, 18, 27-32, 35, and Appendices G and Q) - 30 minutes.
- Screening cases for mediation: Who will do it, where does it fit in the new client intake process, referral of individuals who don't meet Agency requirements for service, Agency staff responsibilities – (Pages 33-41 and Appendix N) - 30 minutes.
- Mediation program evaluation: How will it be done, staff involvement, if any, how staff will receive program updates – (Pages 30-31, Appendix L) - 20 minutes.
- Overview of mediation program procedures: Case flow, role of program administrator, program forms, case disposition and additional services to be

delivered when mediation is rejected or no settlement is reached – (Pages 33-41) - 30 minutes.

- Advocacy in mediation: Training of advocates in how to represent a party in mediation with practice on a simulated case (Appendix P) - 60 minutes
- Wrap-up, Q & A

The chief executive and agency staff members will want to see periodic reports on the Mediation Program. It is recommended that either an oral or written survey be conducted during the orientation session so that the Chief Executive and Mediation Program Administrator can determine what records should be kept on the program.

Some members of the agency staff may know mediators in the community. The orientation session is a time when these members can be encouraged to contact and refer the mediators to the Program Administrator. Since the staff members may at some time serve as advocates for a client who participated in mediation, it would be inappropriate for them to serve as mediators themselves.

INFORMATION FOR THE MEDIATION PROGRAM ADMINISTRATOR

The Program Administrator will naturally need to know every detail of the program to be initiated in the agency. In the ideal situation, this individual will already be a trained mediator and advocate for the use of mediation. The remainder of this manual provides the Program Administrator with guidelines for developing a program that will assist clients, reduce the number of cases needing advocate attention, fit smoothly into other agency services, and expand the service capability of the agency. The material contained in the manual should not be viewed as the only way in which to operate a program, and the creativity of the Program Administrator will have the most significant impact on the final design of a successful program in any agency.

The Program Administrator will be the person who interacts most frequently with agency staff members, the chief executive, possibly the governing board, and certainly the volunteers and clients who are referred for service. This responsibility requires the Program Administrator to be knowledgeable about the mission of the agency and all its services, community agencies that offer alternative or related services and local court procedures which may be used when a case isn't handled through mediation or doesn't settle when mediation does take place.

Prior experience in program management and working with volunteers is valuable for the person chosen to be the Program Administrator, however, these skills can be acquired in the course of helping to design and operate the mediation program. A new program administrator can receive additional help by contacting the ABA Section of Dispute Resolution at (202) 662-1680 or dispute@abanet.org and the ABA Center for Pro Bono – www.abaprobono.org or (312) 988-5759. The Center for Pro Bono has many resources about developing a pro bono project/program and managing volunteers.

FUNDING THE PRO BONO MEDIATION PROGRAM

Included in this section:

- **Funding Sources**
- **Grants**
- **Donations**
- **Allocation of Agency Budget Funds**
- **Fund Raising Events**
- **Other Community Resources**

INTRODUCTION

As with any new program, a pro bono mediation program requires funding. Office supplies, postage, a computer and a telephone line are required for the program to function. While it may be possible to find an individual to administer service delivery who will work as a volunteer, the agency will always face the uncertainty of a volunteer's commitment. It is recommended that at least a part-time paid administrator, whether given employee status or hired as an independent contractor, be used to give the agency and the program greater assurance of stability, commitment and ongoing professional service. The administrator also provides support for the volunteers involved with the program.

FUNDING SOURCES

Following development of the mediation program design and a budget for operations, a fund development plan needs to be created. The following sources of funds may be considered for solicitation:

- Local, State or National Bar Association Dispute Resolution Sections or Committees
- Private and Commercial ADR Organizations and Associations
- Law Firms, Private Mediation Service Providers, and Service Recipients
- Corporations And Foundations
- The Host Agency
- Fund-Raising Events
- Other Community Resources

GRANTS

Seeking a grant may encompass many activities ranging from a simple oral or written request to a local bar or mediation association to a formal multi-stage written proposal to a corporation or foundation. Depending on the amount sought, the agency or program

staff will usually know or can research the likelihood that a certain law or mediator association source will be responsive to a request for assistance in supporting a program. Community education about the goals and benefits of the mediation program should precede the request. Personal relationships between agency/program staff and officers of the organization being approached will certainly contribute to the possibility of a positive response to a request for funding assistance. If the budget for the mediation program is small, all costs may conceivably be covered by yearly grants from local associations.

Foundation and corporate grants generally involve larger sums of money, and require staff time to respond to formal requests for proposals (RFPs). Most public libraries have grant sections, and a librarian can be of great assistance in determining local entities that fund non-profit agencies serving members of the community with limited financial resources. Each agency seeking to fund a mediation program must consider how much time and effort will be expended in seeking funding from grant sources. While every human service organization would benefit from multi-year, easily obtained, large grants, it is likely that the mediation program and pro bono program staff will need to address program funding on at least an annual basis.

DONATIONS

Individual and corporate donations can be a source of small amounts of program funding. Most legal service and pro bono programs receive some type of support from local lawyers and law firms, frequently in the form of direct volunteer service. Many large law firms across the country are developing ADR departments, and some designate an interested mediation-trained partner or associate to handle the mediation service delivery for the firm. These law firms, as well as mediator practice groups, are not good resources for both volunteer assistance and financial support.

Solicitation of donations must include information on the mediation program itself, and this can be done in a formal presentation format or an informal conversation between a program staff member and a friend in a private law firm. A procedure for recording donations and thanking donors needs to be established when the agency determines that donations will be a part of their fund-raising plan. The Appendix includes a sample Funding Source Record form for this purpose.

Donations from service recipients may at first glance seem to be both unlikely and inappropriate. The majority of individuals receiving mediation services from the agency will not be in a position to pay their ongoing bills, much less make charitable donations. However, the landlords, employers and other second parties in the dispute often have the financial resources that allow them to make a donation. The challenge is when and how to encourage this program support.

Successful outcomes, in which all issues in the dispute are resolved to the satisfaction of the parties, represent the best environment in which to solicit donations. Follow-up letters and phone calls may be used to encourage the second (opposing) party to make a

tax-deductible donation to the agency to support the program. Quick-thinking volunteer mediators can also be of assistance.

Program Experience

An employment case involving the payment of salary prior to a dismissal was successfully mediated. Both the employer and the low-income individual were represented in the session, the qualifying individual having received a loan from a friend at the last minute that allowed her to hire counsel. Both attorneys were pleased with the outcome, and when approached by the mediator, agreed to have their law firms donate \$100 to the agency for program support.

Each pro bono/legal services agency must determine whether this type of solicitation is acceptable. Although donations from opposing parties or their lawyers will not be large sums, you can note on the solicitation that \$37 buys 100 stamps for correspondence with parties in 50 mediation cases. Timing of the solicitation is critical and should be handled in the period immediately following the successful resolution of a dispute. Solicitation should only be considered with institutions and/or law firms that clearly have the financial resources to respond positively when asked to support mediation service to future cases/parties. A sample solicitation letter may be found in the Appendix on page 68.

ALLOCATION OF PROGRAM BUDGET FUNDS

Some pro bono/legal services programs may consider their mediation program to be so beneficial in saving advocates time and serving more clients that they will create an expense line in their budgets for the program. This is unlikely to occur at the inception of the program, but may be considered after the program has been operating for a couple of years when it can be demonstrated that mediation has value.

While the program may not be in a position to fund the salary or fees for contract services of a program administrator, the small increase in funds allocated for office supplies and telephone service may be acceptable to the agency chief executive and the governing board that approves the budget. This is an issue that can be presented to the board by one of its members if that member is a champion for mediation services. The mediation program administrator also can raise the issue with the chief executive, who will undoubtedly know whether the board may find this acceptable and the timing is right.

Undoubtedly, the ideal situation is where the mediation program expenses are accepted as a normal expense of running the hosting agency. If the program administrator is a part time employee or has a contract under which she is paid and the total program costs are low, this ideal may be realized. Again, it cannot happen until the program proves its value.

FUNDRAISING EVENTS

Non-profit agencies raise money to support their programs in many ways. Some engage in silent auctions, raffles, dinners or concerts with local celebrities or politicians, and other single event fundraising efforts. This type of fundraising can be directed toward all agency services or one program that needs funding. Discussions between the mediation program coordinator and the agency's fund development staff member or chief executive can inform mediation program staff about the possibility of using this type of fundraising to support mediation services. It should also be noted that fund raising events may have the dual role of bringing in small amounts of money and contributing to good public relations with other community agencies and influential individuals. This second benefit often results in more financial support at a later date.

OTHER COMMUNITY RESOURCES

Creativity in considering the ways to support the pro bono mediation program is certainly needed. Both agency and program staff should be given the opportunity to contribute their ideas on ways to support all agency services. Perhaps a board member is a printer and will contribute brochures or business cards. A volunteer may know the contributions manager at a local business or corporation. Volunteers who practice in large law firms may be willing to be the spokesperson to solicit support from the law firm. It is important to explore all possible avenues of fund generation as this assures the mediation program of continued support over the first year or two of operation. Once a track record has been established, other sources may be available.

Resources:

1. Best Books on Fundraising for Non-Profits, Joseph P. Garecht
2. Fundraising for Dummies
3. Grant collection librarians at local libraries
4. Statewide or city-based community foundations
5. Innovative Fundraising Ideas for Legal Services (an ABA publication)
<http://www.abanet.org/legalservices/sclaid/perls.html>

MEDIATION IN THE PRO BONO/LEGAL SERVICES AGENCY

Included in this section:

- **Definition of Mediation**
- **Mediation Process**
- **Determining what the Mediation Program will Encompass**
- **Types of Cases to be Mediated**
- **Agency Staff Involvement with Mediation**
- **Benefits of Mediation for Clients**
- **Benefits for the Agency**

WHAT IS MEDIATION?

Mediation is defined as a process where an impartial third-party, who is acceptable to the disputants, intervenes to help the parties resolve the dispute. The Neutral third party does the following:

- Facilitates discussion of the issues
- Assists the parties in hearing one another's perceptions and version of the "truth"
- Helps to identify the interests and needs of both sides
- Explores alternative ways to resolve the dispute
- Guides the parties in choosing a workable and mutually acceptable resolution

Unlike other resolution procedures, there is no "expert" other than the parties themselves. The outcome is dependant on the parties' willingness to agree on what they will do to solve the problem. The mediator is the expert on the process of mediation, while the parties are experts on the information and the solution that will work for them.

The Mediation Process

The following will be familiar to every trained mediator, however there are some differences in the steps that are taught by mediator trainers. The steps below presume a single mediator serving in the role of the neutral.

- The mediator meets with all parties in a room that allows for privacy and safety.
- A brief description of the process is given; ground rules are set (see Appendix C); and confidentiality is explained. A confidentiality agreement is signed by everyone present (see Appendix B).
- Each party is asked to explain how he sees the problem situation, and what he would like to see happen to solve the problem.
- The mediators ask clarifying questions, and work with the parties to reframe their position statements into interests (needs that are universal and positive in nature: respect, adequate funds to replace or repair something that was damaged or destroyed, apologies for actions or statements that have hurt someone, etc.).

- The mediators ask the parties to consider the needs of everyone, and come up with options for meeting those needs. Willingness to be flexible and acceptance of the other's interests are encouraged.
- All options that have been generated are reviewed and evaluated in terms of how adequately they will solve the problem.
- If reached, a written agreement documents the outcome.
- If an agreement is not reached, the parties are informed of their options for getting their needs met in some other way (leaving the matter where it is, using an arbitrator, filing a case in court, seeking legal advice).
- The parties are thanked for their participation and attempts to work out an agreement, and the session ends.

DETERMINING WHAT THE MEDIATION PROGRAM WILL ENCOMPASS

Each pro bono community or legal service agency has different resources. Once a decision has been made to add mediation to the spectrum of services offered, it will be necessary to determine what that program will encompass. In some agencies, the governing board is involved in this type of decision, while in others only the chief executive and staff will decide. If a program administrator for mediation services has been selected, it is helpful to include her in the discussion.

WHAT TYPES OF CASES WILL BE MEDIATED?

Pro bono/legal services agencies handle certain types of cases that cannot be referred to mediation. Family law cases, in which one spouse cannot be located, or where there have been incidents of extreme domestic violence, are not appropriate for mediation (unless both parties can state they are willing to participate and the mediator sees them in separate sessions). Cases scheduled for court action within a short period of time may not be able to be continued until a mediation can be scheduled. Criminal cases (seldom handled in legal services agencies) rarely involve mediation.

The chief executive and legal staff will need to determine what types of cases they will refer to mediation. The financial resources available to support the mediation program may be a factor in the decision. If mediation is to be used only in one type of case, the program will certainly cost less than if all case types are open to consideration. The Program Administrator and agency management staff may recommend that the program be started with a certain type of case as a pilot project while all the steps of referral, approach to the second party, set up of a session, mediation and closing of the case are tested. On the other hand, they may want to use mediation for all the types of cases the agency handles and indicate that the first referrals, no matter what type of case they may be, will be used to check that the procedures are working well.

One service that is used frequently in mediation programs is telephone conciliation. Talking with the initiating party (IP) on the phone, and then with the opposing party (OP)

when the OP has rejected a face-to-face meeting, can bring the parties into alignment on a solution to the problem. This service requires mediation program staff or volunteer time, as there are some cases in which the conciliator needs to talk with both parties many times.

Each agency that adds mediation to its services will determine what the program will encompass, and reasons for the decision should be clear. As with courts that offer mediation for one type of case but not another, a potential client of the program has the right to know why another case can be handled with mediation but his cannot. The decision on the scope of the program must make sense.

Program Experience

The program administrator in Phoenix found that many management companies handling tenancy issues for a building owner were not willing to come to a mediation session. Having spoken with the tenant (the Initiating Party) about the issues in dispute, the administrator was able to use her mediation skills to assist the Opposing Party in looking at solutions that might bring in some of the money being assessed, but not all. When the IP admitted responsibility for some damage, the administrator was able to present this information along with the time and money to be saved by avoiding a court proceeding, and the Opposing Party agreed to reduce the charges. Presenting the flexible stance of the management company to the Initiating Party frequently worked in getting a settlement. A case that would never come to mediation was closed without need for an advocate to be involved, and saved time and money for the agency.

APPROPRIATE AND INAPPROPRIATE CASES

The first thought that comes to the minds of many mediators when asked about cases that are inappropriate for the process is domestic violence in a family case. While special screening and process considerations (such as always seeing parties separately) may need to be applied in these cases, pro bono and legal services programs frequently limit service to family cases to those where there is a history of domestic violence. Many experts believe that when marital partners are screened appropriately and offered a choice, those who agree to mediation should not be automatically eliminated from consideration because there is a history of domestic violence.

In general, mediation is appropriate in most cases where parties understand what the process is and choose to participate. They may desire an informal flexible process, wanting to maintain control over the outcome whether resolution will take a monetary or other form.

Mediation is not appropriate when it is determined that one or both are only willing to accept an outcome which exactly matches their initial position, where they want to set a

legal precedent, they want to air grievances in a public forum or they want the neutral to determine the outcome, possibly with the power of the court behind it.

Types of cases that are commonly mediated include landlord-tenant, employment, family, consumer, and community disputes.

HOW ARE AGENCY STAFF MEMBERS INVOLVED WITH THE MEDIATION PROGRAM?

The answer to this question will depend upon financial resources. Who can refer a case to mediation? Will cases come directly from intake workers, who check that a caller for service meets the agency's requirements to qualify? Do cases need to be reviewed by an attorney before they are considered for mediation? If a caller has income slightly above the limit set by the agency, can they be referred to mediation, and must someone other than the mediation program administrator evaluate appropriateness for mediation?

Some agencies may decide that one staff member (the litigation director or the chief executive) or several members (managing attorneys for each case type department) will be the connecting link between agency and mediation services. The goal is obviously to provide seamless case flow from the agency to the mediation program. The selected person or people will be the connection with the mediation program administrator for the resolution of problems. Changes in the scope of the mediation program can be initiated either by an agency staff member or the mediation program administrator, after which a decision can be made and communicated to all members of both the agency staff and staff and volunteers of the mediation program.

As the agency works toward adding mediation, both the scope of the program and the staff of the agency who will serve as the connection to other agency services should be determined. Decisions on this matter can include members of the governing board or just agency staff or only the chief executive, and it is beneficial to have input from the mediation program administrator. Having a clear picture of what the program will encompass and who will connect the mediation program to the other agency services allows everyone to move forward with confidence, knowing that if problems arise, people have been designated to solve them.

BENEFITS OF MEDIATION FOR THE RECIPIENTS OF SERVICE

Self-determination: Having full control over what outcome will be acceptable is one of the main benefits of mediation. In this process where no judge, arbitrator or "expert" determines how the dispute will be resolved, the parties do. Self-determination is a really valuable aspect of the mediation. Individuals, who come to pro bono and legal service agencies, may have few opportunities to make important decisions about how their lives will run. When subsidized housing or government benefits are sought, someone else tells them whether they qualify or not, and their own perceptions of need may neither be heard

nor taken into consideration. In mediation, the disputant has the opportunity for a full hearing as well as the ability to say that the proposed situation is unacceptable. Self-determination is a true value of mediation.

Self-reliance and skills-building for conflict management: Lack of resources contributes to a feeling of impotence and reliance on others for meeting of the most basic needs. Living at or close to the poverty level can create feelings of hopelessness and helplessness. When conflict is present, individuals may feel they have no choice but to fight or run away from a situation that requires assertiveness and good communication/negotiation skills. Many people who ask for help from a pro bono or legal service agency are in this position.

While mediation is a process designed to handle the current problem, a skilled mediator will use the opportunity to demonstrate the value of approaching all problems with a collaborative approach. Using a facilitative style of mediation encourages the parties to look at their own interests and needs while listening to those of the other side. Because there is no designated expert, who will focus on positions before determining an outcome, the disputants can be helped to see how communicating with an opposing party, hearing a different perspective, and working jointly to come up with a workable solution can be translated into a skill that is useful in other areas.

One goal of a pro bono mediation program is to assist people in acquiring comfort with differing points of view and recognizing that needs of more than one person can be met simultaneously. While it is too much to expect that parties will walk away from mediation with significant skill in managing conflict, good mediators will encourage utilization of mediation to point out its benefits for handling future disputes. Participation in a mediation session can be an opportunity to practice self-reliance.

Scheduling: Legal service agencies generally experience a higher demand for assistance than can be met with limited budgets and staff. Unless the agency has a wealth of volunteer lawyer assistance, disputing parties may have to be put on waiting lists or not receive any help with the problems they face. A major benefit of the pro bono mediation program is the ability to act on a large volume of cases in a short period of time. If the number of volunteer mediators is carefully matched to the number of anticipated referrals, a mediation session can frequently be scheduled within a week. Rapid scheduling can often prevent a minor problem from escalating and adding to the frustration and hopelessness of the parties who seek help.

Opportunity for complete exploration of problems: Another benefit of mediation is that the process is designed for parties to have sufficient time to present and discuss the problem at length. While a well-trained mediator is not going to allow a party to talk endlessly about the situation, the feelings generated may require a lengthy amount of time to air. Parties often state that they were given the opportunity to address all concerns and emotions in the mediation session; this is in sharp contrast to court proceedings in which advocates do the talking and the parties feel left out and unheard. The value of self-

expression should not be underestimated, and in many cases has led to apologies and willingness to settle the case.

BENEFITS FOR THE AGENCY

Saving time of advocates for more appropriate cases: Another benefit of mediation programs in pro bono and legal services agencies is that advocates have more time to attend to complex legal situations and cases that require rapid court action. When agency staff and volunteer attorneys carry large case loads, their morale improves if they are not required to spend their time on types of cases that may:

- Not require knowledge of complex areas of law that are challenging and satisfying for advocates
- Generate strong emotions in the parties which may require time to express
- Not rise to the level where litigation can appropriately be used for resolution
- Come in large numbers with very similar types of issues

Expanding the number of clients and types of cases generally accepted for advocacy: Mediation programs can add numbers of services provided to low-income populations when cases are accepted that don't fit the agency's requirements for other types of service. Because intake procedures in most legal services and pro bono agencies need to be handled efficiently due to the high volume of calls requesting service, many potential clients may be turned away because there are insufficient numbers of staff members to handle them. Financial resource limitations may necessitate strict requirements on who will be served in what kinds of cases. Depending on how it is designed, the mediation program may be able to take some of the cases that fall outside the restrictions of income and case type priorities. When the agency reports increased numbers of services to funding sources, this may generate additional funds that can be used to hire more advocates. Legal services programs receiving funding from the federal Legal Services Corporation (LSC) must be careful to ensure that their clients meet the LSC's strict financial eligibility guidelines.

Expanding types of service to reflect changing community values: As courts and law firms develop mediation services or use community-based mediators to assist with shortening case processing time, the agency that offers mediation is more attractive and gains respect from other justice system organizations. Other non-profit agencies that serve financially limited individuals will also value a pro bono legal agency that offers a service that teaches conflict management techniques to clients.

Low costs associated with volunteer-provided services: Every non-profit agency values the ability to expand service while keeping the costs low. The mediation program at a pro bono legal service agency can contribute expanded service at low cost.

STAFFING THE MEDIATION PROGRAM

Included in this section:

- **Responsibilities of Mediation Staff**
- **Staff Recruitment**
- **The Program Administrator**
- **Additional Program Staff**

INTRODUCTION

Each agency that considers adding a mediation program will need to consider the financial resources available to support staffing and supplies for the program. Since pro bono and legal services agencies seldom have sufficient resources to handle the advocacy and educational programs already in place, the outcome of fundraising efforts will determine how staffing can be approached, to some extent. See the section on Funding for ideas about obtaining financial support.

RESPONSIBILITIES OF THE STAFF IN A NEW MEDIATION PROGRAM

Successful program administration will require that staff have the following responsibilities:

- Initial design of the mediation program (in conjunction with agency staff)
- Establishing relationships with the chief executive, department coordinators, and key staff members (finances, fund development, information technology, client screening and intake workers, etc.) of the agency
- Coordination of mediation services with other agency services
- Community outreach to locate potential volunteer mediators
- Outreach to law firms, community groups, and social service agencies to find facilities in which to hold mediation sessions
- Development of forms for use in the program
- Orientation and supervision of volunteers
- Maintenance of program records
- Case screening, tracking and coordination
- Maintenance of relationships with contributing organizations (those that provide assistance with the program's work, as well as those that provide funding)
- Ongoing oversight of the program, budget, expenditures and internal/external relationships
- Fundraising

DETERMINING WHAT STAFF TO RECRUIT FOR THE MEDIATION PROGRAM

The staffing of the mediation program will be a natural outgrowth of the program design. If an agency determines that mediation will only be offered to one type of case, and that type constitutes 20 percent of the requests for service, fewer mediation program staff members and hours will be required than if mediation will be offered for all case types. If the program design includes referrals to mediation of cases that don't fall under the income requirement, and some individuals might be able to pay a small fee for service, staffing would need to include someone who would screen for this possibility.

Can a program function with an all-volunteer staff including the administrator or program coordinator? This is certainly possible, however, research on coordination of volunteer programs in non-profit agencies demonstrates that paying at least the administrator leads to greater success of the program. The unpaid coordinator of volunteers is less likely to have the commitment, the willingness to tackle problems and the ability to provide leadership over time. It is far better to have a paid, part-time program administrator than a full-time volunteer.

Agencies considering a mediation program obviously need to determine how they will pay the program administrator. The program's budget needs to be considered before determining a staffing pattern and the salary or contracted fees that will be paid to an administrator.

PROGRAM ADMINISTRATOR

A mediation program administrator is essential to the success of the program. It is highly unlikely, given the number of tasks involved in the job, that one of the agency's existing staff members can handle the mediation program part time while continuing to work on other agency responsibilities. Therefore, unless the agency is prepared to move an appropriately trained and committed staff member into the position, the program administrator (or whatever title is given to this position) will need to be found outside the agency.

Ideal candidates

Commitment: Any new position, especially one that is connected to new community service programs, requires a person with a strong commitment to the program goals and the tasks necessary to achieve successful service delivery. In a pro bono or legal services agency, candidates for the mediation program administrator should possess a history of work in a non-profit setting and beliefs about the rights of low-income individuals to access high quality services. She should have a strong drive toward program success and believe that mediation has great value as a dispute resolution procedure. She must be willing (if not eager) to work collaboratively with other agency staff to make the services flow in a seamless manner from intake to disposition.

Training/experience

Candidates should have extensive training and experience in mediation, mediation training, program administration, volunteer management, public speaking, budget creation and oversight, grant writing, and interagency collaboration. If an individual also has experience as a mediator trainer, this is beneficial as well.

Knowledge of the community

Because the mediation program will rely on community-based volunteers and require collaboration with other community services, the candidate who has lived and worked in the area for some time is preferable. Knowledge of agencies that provide services that might benefit clients of the mediation program is also helpful, including the local court system and the existing culture of legal/judicial support for and reliance on mediation. Fortunately, many communities across the country have individuals who possess this combination of commitment, knowledge, training and experience. When an agency decides to add mediation services to the representation-advocacy-education efforts already in place, it should not be difficult to find a candidate who has most, if not all, of these traits.

After the board of directors, the chief executive and key staff members have determined that a mediation program is to be a new service offered by the agency, it is advised that the program administrator be selected. If, as suggested above, this individual has lengthy mediation and community agency experience, he can play an important role in recommending the scope of the program. He can talk with the chief executive and staff members about how they visualize the mediation program functioning and what goals should be set for service delivery. He can begin designing the outreach program that will bring volunteer mediators to the program, and can educate staff and board about the benefits to be anticipated from mediation.

ALTERNATIVES TO A PROGRAM ADMINISTRATOR

Agency Staff Alternative

Some programs may not feel they have the resources to hire or contract with a separate individual to administer the mediation program. Large metropolitan areas with a large number of mediators frequently have a number of these trained individuals who would accept a part time contract eagerly. Many would be willing to work for very limited salary or fees to have the opportunity to work in an arena about which they have strong positive feelings.

Whether in a mediator-rich community or one where there are few trained and knowledgeable, the Pro Bono/ Legal Service Agency may choose to have an existing staff member administer the mediation program. From the standpoint of encouraging referral of cases to the program, a staff member connected to agency intake procedure

could be a good choice for program administrator. Any member of the agency's personnel who expresses interest and willingness to learn about mediation and program management should be considered. The main focus should be finding an individual who recognizes the benefits of collaborative problem-solving and self-determination and will take this responsibility seriously and strive for program excellence.

Partnering Alternative

Many communities have community mediation programs, neighborhood justice centers, or court-connected pre- or post-filing mediation programs. These agencies can be excellent alternatives to an in-house administrator. Having already established screening and case processing procedures, community mediation programs are fine partners for Pro Bono/ Legal Service Agencies when mediation service is to be implemented.

Agencies considering partnering possibilities should approach community mediation programs in their local communities to explore ways in which they can work collaboratively. Many of these mediation programs already may be serving low income individuals and understand their special needs. They may have funding sources that would consider adding money for developing a new service, and be willing to generally tailor a portion of their program to meet the specific needs of the Pro Bono/ Legal Service Agency with which they may partner.

The best source of information on community mediation programs is the national Association for Community Mediation (NAFCM). NAFCM is a membership organization, providing information and assistance of programs around the country. They also may offer small grants to help start a new program. Information is available at <http://www.NAFCM.org>.

ADDITIONAL PROGRAM STAFF

Hiring additional staff will be contingent on the size of the agency, the number of cases that might be referred to mediation, whether individuals who don't fit the agency's requirements will have mediation available to them and the overall agency budget and fundraising capability. If a strong, committed program administrator has been hired, volunteers can be considered to coordinate program components, such as case screening, evaluation of services, program presentations in the community, review of documents for report generation and many other tasks of the program.

The following should be viewed as referring to staff roles, not general volunteer assistance.

Law students

In communities where there is a law school, particularly one in which there is a mediation clinic, class or pro bono program, law students may be eager to obtain program

experience through internships. The mediation program administrator can talk with faculty associated with the law school's ADR class or program to check on availability of students to participate in the agency's program. Roles for the students can be designed to meet the needs of the students, the school they attend, the mediation program, the agency and the community. If a formal internship is required by the school, the program administrator will need to determine how much time will be taken from his other duties to supervise and train the students.

Many law schools with mediation classes and clinics look for opportunities in which the students will be able to mediate with real clients as opposed to the simulations they have experienced in the classroom. If the pro bono mediation program uses a co-mediator model for service delivery, and if the model has mentoring capability, this can be the proverbial win-win situation. If the mediation program has not found sufficient numbers of volunteers in the community, the law school mediation program can fill this gap.

The main drawback to using law students is the possibility that they might only participate for one semester. This situation can result in the need to do regular orientation of new students as well as writing internship contracts and evaluation of skills reports on a frequent basis. If a paid or volunteer student coordinator has been recruited to serve the program, this may not be a problem. The program could also consider having law students return after a semester course and work as volunteers without getting academic credit.

Paralegal training programs

Individuals attending paralegal training programs may also be interested in serving as program staff members in a pro bono mediation program, especially those enrolled in programs with a mediation or ADR course. The same considerations must be given to paralegal students as to law students. An additional factor requiring attention is the level of sophistication, knowledge and education of students, who may have entered the paralegal training program/school directly from high school. While law students may have the benefit of a college degree and additional years of life and study, paralegal students need to be carefully screened if they are to be considered for "staff" roles. The program administrator may not have the time to train and supervise students who cannot work with some degree of autonomy. Certain general volunteer tasks in the mediation service delivery system can be handled well by paralegal students, however, it is best to give careful consideration to assigning paralegal students to program and volunteer supervisory roles. The manual writer acknowledges the generalizations made in this section, and recognizes that bright, capable individuals also choose paralegal work as a career path.

Practicing lawyers, paralegals, corporate executives, business managers

Experienced practitioners, particularly ones who are retired, approaching retirement, cutting back or already working part time, can be excellent part-time staff for the pro

bono mediation program. Retired corporate executives or business managers, already serving as volunteer mediators in the pro bono or other community mediation programs, can be excellent candidates for staff roles. Their income needs may be handled in other ways, and they will find the role of an unpaid staff member attractive and challenging. These individuals can frequently be found through local volunteer bureaus, mediation associations and state bar sections.

To summarize, the agency developing a mediation program needs to consider a staffing plan that takes into account the program's scope and design as well as financial resources available. Emphasis should be placed on recruiting the appropriate program administrator, and finding sufficient funds to either pay a salary or contract fees. Excellent programs may rely on volunteers in other staffing roles; however, it is strongly recommended that the administrator receive compensation to assure commitment and continuity for the agency.

VOLUNTEERS: THE HEART OF PRO BONO MEDIATION SERVICES

Included in this section:

- **Recruitment**
- **Orientation**
- **Supervision/Evaluation**

INTRODUCTION

Legal services agencies and pro bono programs would not be able to function without volunteers. Most mediators, coming from disciplines such as law, behavioral health, psychology, teaching or many other specialty areas, received their training in a court, community or college setting, and obtained their first mediation experiences outside the classroom in a volunteer capacity. While most trained mediators begin or continue to practice law or another profession such as psychology in order to support themselves, whether or not they charge fees for mediation, they also frequently give pro bono service to their local communities. Across the country, courts and state bar associations encourage such service. It is standard practice in every profession to give back to the community by delivering services to those who cannot pay for them, and mediators typically volunteer in community justice centers and court mediation programs. The organized bar has a tradition of providing pro bono services. Please see ABA Model Rule 6.1.

RECRUITMENT

Like other professionals, mediators in all states and many cities form associations. The statewide or local association provides mediators with an opportunity for networking, continuing education, community education and service, group marketing of services, and the opportunity to affect court rules and legislation related to mediation and the resolution of disputes. State and local bar associations also generally have dispute resolution sections or committees. All the following groups provide pro bono programs with a good place to recruit volunteers:

- Your STATE BAR ASSOCIATION
- Your COUNTY BAR ASSOCIATION
- Your Statewide MEDIATOR ASSOCIATION
- Your Local Or County MEDIATOR ASSOCIATION

Many state Supreme Courts credential or license mediators through statute or rule, and may assist you in locating mediators. Also, check with universities that have law schools with mediation clinics or courses. The clinic director or instructor on alternative dispute resolution may be helpful in finding local mediator associations.

In rural communities, where there may be fewer mediators, those individuals who have received training and want to deliver service may belong to national associations. Your agency can contact the following groups for information about mediators in your state and local area:

- AMERICAN BAR ASSOCIATION (ABA) SECTION OF DISPUTE RESOLUTION
- ASSOCIATION FOR CONFLICT RESOLUTION (ACR)
- NATIONAL ASSOCIATION FOR COMMUNITY MEDIATION (NAFCM)

Presentations: Mediator organizations and sections of bar associations are always looking for speakers. Contact the organization where the pro bono program hopes to find volunteers. Contacting the educational program chair generally results in an invitation to present information about your needs at an upcoming regular meeting of the group. Since recently trained mediators are always looking for ways to improve their skills and obtain “real client” experience, face-to-face presentations generally result in successful recruitment of volunteers.

While this seldom occurs, if a group is not interested in a presentation, sending program information, program brochures (if available) and a batch of applications can also generate interest. A call to the chair of the group, asking for distribution of the materials to the members, is likely to result in calls from mediators with questions and completed applications arriving at the agency.

Applications: An application form that provides the mediation program with important information is appropriate to use as a handout when recruitment presentations are made to mediator groups. See the sample application in the appendix at page 65. If the agency has the capacity to generate a form that will electronically translate into an Access or Excel format, lists of volunteers can be generated that program staff will use when mediators are called to work on a particular case. It can also serve as the mechanism for generating group E-mails or letters for communicating with the volunteers once the program is operational.

The application generally includes the following information:

1. Name, address and all phone/fax/e-mail information for the individual who wants to volunteer
2. Gender, age, cultural background, languages spoken (Note that this information should be provided voluntarily, and that it can be helpful in assigning mediators to specific clients.)
3. Training received in mediation skills, credentialing information, continuing education
4. Mediation experience: years, number of cases, types of cases
5. Specialty areas in which the mediator feels qualified (family, consumer, housing)

6. Interest in mentoring (This allows experienced individuals to indicate they are qualified to mentor, and new mediators can be paired with them. Using a co-mediator system is beneficial for feedback to program staff about skills and problems.)
7. Availability (days, times), frequency of willingness to be called (once a month, etc.), and the duration of service (6 months or 1 year) to which the mediator is willing to commit.
8. Locations to mediate (If there are multiple sites where sessions will be held, some mediators may not wish to travel to a distant town or area of a large city.)
9. Why the individual wishes to serve as a volunteer in the program (Helpful information when assigning mentors or determining whether the individual will continue [or the program staff want him to continue] to volunteer over time.)

For a sample application form, see appendix K.

As you recruit volunteers, be careful to ensure that the program has the capacity to provide the volunteers with sufficient cases. A lack of good referrals may result in a lack of volunteer momentum and enthusiasm as well as a perception that the legal needs of the poor are being met sufficiently.

ORIENTATION

Volunteers need orientation for several reasons. They need to know what is expected when they sign up to assist with service delivery. They also need to know the value of the program to the community so they can serve as ambassadors for the agency and its mediation program. It is important to inform the volunteers about the steps in case processing and where they fit in it.

While mediators are trained to recognize the importance of confidentiality to the process they use, it is always appropriate to remind them about this. Exceptions to the confidentiality requirement should also be addressed.

Since many of the mediators may be lawyers who are accustomed to an aggressive, settlement conference format in mediation, the orientation session is a good opportunity to talk about a more facilitative approach for unrepresented parties. Inform volunteers that the pro bono mediation program serves clients of the agency and people referred by other community services where limited financial resources are a concern. Referred parties in mediation will seldom have counsel, although the opposing party may have an attorney coming to the session. Discussion of the program's view on the preferred style of mediation is appropriate during orientation.

Orientation also needs to include some education about the population to be served, as many lawyers and mediators have not worked previously with people who have extremely limited means, education, language skills, and general ability to function in the situations life presents. They may be homeless and/or may have developmental, mental

or emotional disabilities. Patience and the willingness to explain seemingly clear information may be needed from the volunteers when working with agency clients.

The orientation session for prospective mediators, who think they want to volunteer, may result in a few individuals choosing not to offer their service. It is easier to lose a prospective volunteer up front rather than counsel them out of service after it has been shown that he is not relating well to clients. Not everyone is cut out for working with every group in the community, and individuals attending the orientation session should not be asked to give reasons if they choose not to volunteer.

Each agency and pro bono mediation program has unique features and resources, so it is important to tailor the agenda to your needs.

SUPERVISION/EVALUATION

Direct supervision of the volunteers is challenging unless the agency has space for service delivery at a site where the mediation program staff members work. A variety of methods for getting feedback on an individual volunteer is generally helpful in assuring high quality of service and volunteer satisfaction. The co-mediator model works well as one way of obtaining information about the volunteers. When concern has been expressed about a mediator by the other volunteer who serves with him on a case, a member of the program staff can step in as the co-mediator the next time that individual is asked to handle a case.

Co-mediation, where two mediators work as a team, is used by a large number of community and court programs. Many mediators are familiar with the shared responsibility of handling a case as they have been trained in a program that uses two mediators in their simulated exercises. For ongoing supervision and evaluation purposes, the co-mediator model has great advantages over the use of a single mediator.

Evaluation forms: Using a co-mediation format for service delivery provides the volunteers with the opportunity to debrief and evaluate one another immediately after a mediation session. The Program Administrator should establish that one mediator is considered the Mentor and the other the Mentee, so that the evaluation form can focus on the teacher/student roles. This allows for evaluation and a consistent emphasis on learning better mediator skills. Volunteers, at the time they are scheduled for the session, are informed that they will be asked to complete a confidential form that gives program staff valuable information for promoting skill enhancement and quality control in the pro bono program. While encouraging the two volunteers to give verbal feedback to one another, the written form can give the volunteers the opportunity to address concerns about which they may feel uncomfortable speaking directly.

Program Experience

A young, law trained, new mediator was paired with an experienced older lawyer/mediator. The session was scheduled in one of the many conference rooms available at the law firm in which the older mediator had practiced for over 20 years. During the course of the mediation session, the lawyer's paralegal interrupted several times to ask that the lawyer sign papers, and once to take a short telephone call. The lawyer left the room for the call, but only asked that the session stop for a moment while the papers were signed. The Mentee mediator experienced great discomfort at these interruptions, observing the angry looks of the parties, however, she felt she could not address this verbally following the completion of the session. Using the confidential evaluation form, she was able to bring her concerns to the attention of a program staff member. The staff member felt no discomfort about raising the issue with the experienced mediator.

The evaluation form works best if it is designed in a way that allows for most questions to be answered by checking a box. As is true with any written form, most people are more likely to check boxes than they would be to write detailed narrative answers. Statements about which they can agree or disagree generally work quite well. If program orientation has included discussion of use of the forms, mediators will provide the information needed in response to one statement, such as, "Please provide detailed information to the Program Administrator regarding any concerns you may have about mediating with this co-mediator again." It is important to provide stamped, program-addressed envelopes for each mediator so that forms may be mailed independently following the session. For an example of Mentor and Mentee Evaluation Forms, see Appendix O.

Random phone calls/e-mails: Another evaluation and quality assurance tool is an occasional random call or e-mail to one or both of the mediators. Asking for some feedback on how the session went may elicit information about high quality performance or concerns regarding the other mediator. If no information is provided, the staff member can determine whether or not to ask a direct question about the other mediator. Getting to know program volunteers is key to obtaining useful information.

Case review meetings: While busy people may have no interest in attending meetings of the volunteer group, the program has a periodic need to see the volunteers and provide information to them. These meetings, which may include an opportunity to discuss recent cases and the challenges they presented, are good opportunities to talk with volunteers both in the group and individually. A volunteer may be asked to come early or stay late so that concerns can be addressed or questions asked on a confidential basis. All forms of interaction between program staff members and the volunteers offer a chance for thoughtful and sensitive individual mediator evaluation.

Terminating volunteers: Pro bono mediation program administrators must be ready and willing to terminate service from an individual volunteer at any time. Good volunteer management should not be seen as a totally different situation from managing staff within

a corporation or government agency. While there are issues, such as prolonged periods of absence from volunteering, which would not be tolerated in a salaried staff /business environment, it is important for pro bono program administrators to have management skills and know methods for supervising volunteers in ways that best assure quality service delivery and satisfaction for the mediators.

Recognizing volunteers: Many court, community and non-profit agencies recognize their volunteers annually. They may provide certificates or pins to recognize merit, host a gathering with refreshments and presentations of a small gifts such as dinner for two in a local restaurant, having the Agency Board President speak to the group about the value of the volunteers' service or using some other method of thanking them. While some mediators love this public acknowledgement of their service, others feel good about the recognition they receive in calls and letters following a mediation session and would prefer to skip group meetings. Knowing your volunteers, talking with them about what they would value, and looking at financial resources for recognition will guide each program administrator in making the decision about what to do for volunteers who spend their time and give their skills to the pro bono mediation program.

Other Program Support for Volunteers: The program should consider providing additional support for its volunteers such as mentoring, training, administrative support, malpractice insurance, etc, and more.

Resources: The ABA Center for Pro Bono is a national resource center for pro bono advocates. The Center offers a pro bono clearinghouse library, which contains information on recruiting, retaining and recognizing volunteers, program operation and management issues, and much more. Contact www.abaprobono.org or (312) 988-5759.

The following books may be helpful to program administrators, particularly those individuals who have no experience working with a corps of volunteers:

1. The Volunteer Management Handbook, Tracy Daniel Connors, Ed.
2. Leadership and Management of Volunteer Programs, James C. Fisher and Kathleen M. Cole
3. Volunteer Management: Mobilizing All the Resources in the Community, Steve McCurley and Rick Lynch

CASE SCREENING, REFERRAL AND SERVICE DELIVERY PROCESS

Included in this section:

- **Case Screening**
- **Contacting the Opposing party**
- **When the Opposing party Says No**
- **When the Opposing party Says Yes**
- **Setting Up the Session**
- **Final Stage of Case Processing**

CASE SCREENING

Pro bono and legal services agencies have a screening process by which they determine what clients will be accepted for legal guidance, advocacy or participation in educational programs. In most agencies, the screening of potential clients, whether over the phone or in-person, assesses whether the individual meets the financial resource and case type and priority requirements. When people do not meet the agency's requirements, they are given information on outside resources that might be of help. If the person seeking assistance fits all the agency's criteria for service, one of the following two next steps is taken: 1) a meeting with one of the agency's lawyers, or 2) the information gathered during the screening call is provided to the appropriate agency department and further screening may take place. If mediation is available, the outcome of the staff meeting may be a referral to the mediation program administrator.

Agencies setting up mediation programs need to decide whether the client intake process will be expanded to include mediation screening or that screening will be handled in another way. Generally, this screening procedure is expected to be brief due to the high volume of potential clients seeking help. Alternatives to litigation are seldom presented, and the screening staff member has no time to explain mediation or assist the individual in determining whether the problem situation is appropriate for mediation.

An agency considering adding mediation to its spectrum of services needs to determine how the mediation screening will be handled. Should telephone and walk-in screening staff receive training to be able to screen the case for mediation during the first contact? Should departmental staff review the information provided by screening personnel and determine when to make the referral to mediation? Should there be a separate mediation screening conducted by mediation program staff? Should the mediation program administrator attend staff meetings to assist the lawyers in looking at the benefits of mediation for any particular case under review? Should outside volunteer resources be used to augment the screening of cases for mediation?

Program Experience

Mediation screening takes place at several steps in the standard intake procedure. Intake workers have been asked to provide the phone number of the mediation program administrator when the caller doesn't meet agency criteria for legal representation. The caller can then contact the mediation program administrator directly or choose to handle the problem in another manner. If the caller contacts the program directly, then the Program Administrator (or another program staff member) screens the case.

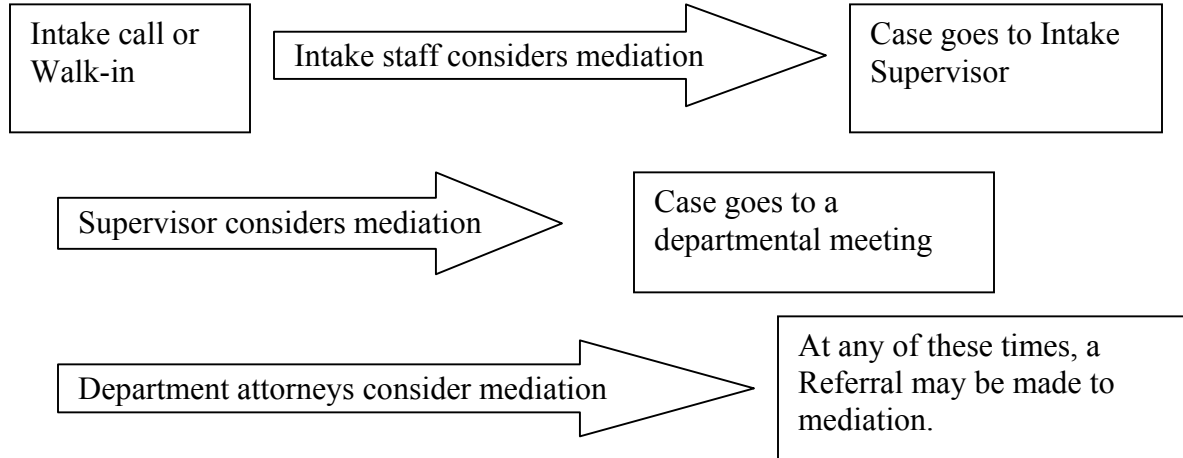
Some agency department coordinators consider a referral to mediation rather than scheduling the client for a face-to-face meeting with a lawyer. In this situation, a staff member may call the mediation Program Administrator to discuss whether the case should be referred. If the answer is yes, the Program Administrator calls the client to do the mediation screening.

Mediation is sometimes discussed when a case is reviewed at the program staff meeting. If judged appropriate, the case is referred to mediation. The program administrator then handles the mediation screening process.

Two additional methods of getting the case screened for mediation have been used in Phoenix. 1) The intake supervisor reviews all cases handled by her staff each day, and selects those considered appropriate to give to the program administrator for mediation screening. 2) Volunteers from the College of Law at Arizona State University have come to the agency and been given cases by the intake supervisor, and a second call to screen for mediation is made by one of the volunteers.

To summarize the various methods used in Phoenix, cases are referred for mediation by the hosting agency's intake staff, the intake supervisor, a departmental supervisor or the staff in the departmental meeting. None of these individuals screens the case for mediation with the initial party. The Program Administrator or a student makes a separate mediation screening call shortly after the initial request for service has been received at the agency.

Diagram of possible screening procedure:



Screening procedure:

In a telephone mediation screening procedure, the specifics of the problem situation are solicited from the potential client. Questions are asked to clarify the information provided. Emphasis is placed on the relationship between the client and the other person or people involved. For example, if the case involves a tenant/landlord dispute, the mediation screener may ask:

1. How long has the tenant lived in the apartment or house?
2. Was the property rented by the owner, an on-site manager, or a management company?
3. Who are the key people with whom the tenant has had telephone or face-to-face contact?
4. What is the nature of the relationship between the tenant and the key people?
5. Have there been occasions when the key people handled something in a responsive manner (an on-site manager who fixed a toilet, etc.)?
6. What were the occasions like when key people handled something poorly (a management company that never returned calls in a timely manner, etc.)?
7. What is the tenant's belief about the key person's potential willingness to work collaboratively to solve the problem?

At this point, mediation is explained. The mediation screener focuses on the benefits associated with a direct, face-to-face meeting between the tenant and the landlord facilitated by the mediator(s), the confidentiality of the process, and what staying out of court saves. The screener uses examples from the tenant's explanation of the problem situation to show how a mediator's involvement can assist the tenant, as well as the landlord, in getting more of what they want or need.

As the screener is listening to the tenant, an unspoken assessment is being made about the participation of this particular individual in a mediation session. The questions that the screener is asking herself could be:

- 1) How much emotion is connected to the problem situation?
- 2) Does the tenant show flexibility or a need to “be right” or to get revenge?
- 3) Is the tenant articulate and able to express the underlying interests of his position?
- 4) Does the tenant sound like he would be able to talk about his own contribution to the problem situation?

Finally, either the screener tells the tenant that the case does not seem appropriate for mediation or that this particular case type is frequently resolved in mediation. If the latter is true, the screener asks if the tenant finds mediation to be an acceptable step in resolving the issues that caused the initial call for legal assistance to the agency. The answer of yes from the tenant initiates the process leading to mediation. This tenant has now become the initiating party (initial party) of a case in the mediation program. For a diagram of the service flow, see Appendix J.

CONTACTING THE OPPOSING PARTY

Following the screening, the initial party is asked to provide all contact information for himself and the opposing party:

- INITIATING PARTY’s full name, address and phone numbers
- OPPOSING PARTY’s full name, address and phone numbers
- Days and times that would work for the INITIATING PARTY to attend a mediation session

The screener explains that a letter describing mediation and asking for participation will be sent to the opposing party and a copy of that letter will go to the initial party. See Appendix D for a sample letter. The initial party is told that he will get a call from the mediation program administrator as soon as contact is made with the opposing party. If the opposing party is willing to mediate, the case will be set up for a mediation session. If the opposing party has declined mediation, the initial party will be given information on alternative ways to handle the problem.

The program administrator sends the opposing party a request to contact the program by phone by a specific date (generally five business days from the date when the letter is sent). If no call comes in, the program administrator attempts to reach the opposing party by phone. Occasionally, when the opposing party calls is reached by phone and will agree to mediation immediately. Most of the time, it will be the program administrator’s responsibility to show how beneficial mediation will be for the opposing party, as well as the initial party. Highlighting the neutrality of the mediators helps in getting the opposing party to say yes to mediation.

WHEN THE OPPOSING PARTY SAYS “NO”

Volunteer mediators and staff of mediation programs have witnessed a successful outcome in sessions when the defendant (in court cases) has been reluctant or hostile to mediation. The process gives all parties the opportunity to learn about varying perspectives on the problem. Many people who have used mediation indicate they feel much better after telling their stories, even when no agreement has been reached. Unlike in court programs, the opposing party cannot be ordered to mediation, so once the benefits have been explained thoroughly, if the program administrator (or other staff or volunteers) gets a firm “NO” from the opposing party, no mediation session can be scheduled.

Mediation program personnel must now inform the initial party that mediation is no longer an option, and give the initial party information about next steps. If the agency has advocates who will step in at this point, the case can be referred back immediately for this service. The volume of cases coming into the agency that need immediate attention from an attorney makes this highly unlikely.

Program Experience

Written materials on filing a small claims case in limited jurisdiction courts are available to initial parties when the opposing party rejects mediation. One role that can be filled by volunteer students from local colleges or law schools is to assist an initial party in completing the paperwork needed to file a case. The volunteer may also accompany the initial party to court hearings to provide support and assistance, so long as the volunteers are trained to avoid the unauthorized practice of law. While the written materials are sent to an initial party in the Phoenix program, the volunteer support portion of this plan has yet to be implemented.

WHEN THE OPPOSING PARTY SAYS “YES”

After an opposing party has indicated willingness to participate in a mediation session, the days and times of availability are checked, and the mediation program staff member indicates that contact will be made again when the mediation is scheduled. Since the program already has information on the availability of the initial party, days and times can be matched, and a proposed date can be given to the opposing party, subject to mediator availability.

SETTING UP THE MEDIATION SESSION

Finding a venue in which to hold the session

Many large law firms have conference rooms that are not in use every hour of the workweek. Before initiating the mediation program in the pro bono or legal services agency, it is best to contact law firms, libraries and corporations, social services and community agencies with community rooms to ask if they would be willing to assist the program by providing space for mediation. A letter, signed by the pro bono mediation program administrator or the chief executive of the agency, should give a brief overview of the program and request this assistance. Law firms are generally very responsive to such requests, and corporate and library community rooms are frequently available to non-profit agencies at no cost. In order to serve mediation clients, who may not have cars and use public transportation, it is best to have several locations where sessions can be scheduled.

The letter requesting assistance should make it clear that the program is not asking that a room be held open for mediation at all times, but that a program staff member will call when there is need. It is important to stress that a response of “no room available” on any particular day will not result in a discontinuation of requests in the future, and that the agency is grateful for the willingness of the law firm, library or corporation to support the program by providing this resource to the community.

Finding the mediators to handle the case

Obviously, no services can be initiated until the program has recruited and oriented volunteer mediators. Depending on the estimates of the agency about the number of cases that might be referred to mediation, program staff will determine how many mediators might be needed.

Program Experience

In Phoenix and the surrounding smaller cities, the agency receives close to 2,000 requests for service each week. Pro bono mediation program staff decided that an initial estimate of 3-5 cases being referred to mediation each week should make a group of 40 volunteer mediators appropriate. As the program has been in operation for two years, it is clear that 20 mediators would have been sufficient. This is based on actual referral of cases to mediation as well as the number of cases where the opposing party rejected mediation. It also became apparent very quickly that more Spanish-speaking mediators were needed for the cases in which the initial party only spoke Spanish.

Scheduling the mediation session

Once the two parties have agreed to mediation, mediators on the volunteer roster are contacted to check their availability for a session on the date and time that the parties are both available. E-mail makes it easy to contact a group of mediators, and the first two to respond and indicate they are willing to handle the case are selected. If a mentoring program has been made a part of the program, one Mentor (experienced) and one Mentee (recently trained) are chosen.

Setting the location

The last step in the process is to contact one of the organizations that has indicated a willingness to make a conference room available. The contact person at the organization is given the name of one of the mediators, and asked to see that the parties are seated in a waiting area should they arrive before the mediators.

Finalizing the session set-up

A confirmation letter (see Appendix F for an example) is sent to the parties and the two mediators. The letter sent to the lead mediator (Mentor) is accompanied by the forms that need to be used during the mediation session. These include: ground rules for the session, a confidentiality agreement, a mediation agreement form, evaluation forms for the parties to complete and mail back to the program administrator in stamped, self-addressed envelopes, a mediation outcome report, and Mentor/Mentee evaluation forms for the mediators to complete following the session. Examples of these forms are included in Appendices B,C, E, H, L, and O.

If the mediation session has been scheduled for more than one week from the final telephone conversations with the parties, it is best to call to remind them about the session 48 hours before it is to occur. This allows parties to ask any final questions or indicate they will not be coming for the session due to some problem. When the latter occurs and a fair amount of work has gone into the final stages of getting the case to the mediators, it is to be expected that program staff will feel annoyed that they must go through the steps of setting a new date and contacting everyone again. This is the time to remember that the people we serve often have unpredictable lives that make it difficult for them to plan ahead and keep scheduled appointments.

Program Experience

An extremely poor single mother, with whom the program administrator had been working for several months to get a mediation session scheduled, did not appear at the time the case was to be mediated. After repeated calls to her home resulted in no response, the mediators and the other party left the session. It later was found that the client had been waiting on a corner for a bus, which failed to arrive, leaving her stranded with no way to contact the mediator. The case was rescheduled, and was settled several days later.

The mediation session

The mediators and the parties have received the confirmation letters. The mediators have the necessary forms to complete. The location is scheduled. Calls have been made to the parties to check that they will attend and know how to find the location for the session. Program staff members have completed all the work so that the mediation session can be held. Now, everything is in the hands of your program volunteers.

Following the session, the mediators hand the evaluation forms to the parties and encourage them to complete and mail them to the program administrator. If agreement has been reached, the parties are congratulated on their hard work and flexibility. If no agreement was made, the mediators indicate that the program administrator will contact the initial party to explain the next steps. The parties are thanked for their willingness to participate in mediation and for their attempts to find resolution.

After the parties depart, the mediators complete the Mediator's Report to Program form as well as the evaluations of one another. Hopefully, the two mediators have discussed the flow of the session and provided oral feedback before independently writing their assessment of the co-mediator's skills and performance.

FINAL STAGE OF CASE PROCESSING

It is important to stress with volunteer mediators the need to contact the program administrator immediately after the session so that the final stage of case processing can be accomplished in a timely manner. Particularly when no agreement has been reached, the initial party needs to be contacted and given guidance about the available resources for resolving the issues in dispute. It is good to talk with the initial party before closing the case no matter the outcome, however, if there is likelihood that a case will need to be filed in court, the program administrator needs to check on agency resources for advocacy. When the agency cannot provide an appointment with a lawyer, whether staff or outside volunteers, information about filing a small claims case needs to be sent to the initial party.

If the initiating party took the first steps in initiating action on a problem, he may choose to drop the matter, but this is seldom the case. No resolution in mediation frequently enhances the initial party's desire to move to an adversarial process to resolve the issues in dispute. The program administrator can assist with resources, and guide the initial party in handling the matter in a responsible manner.

There is also value in a telephone contact with the opposing party, as this individual may have second thoughts about willingness to settle once the mediation session is over.

Program Experience

In some cases, the opposing party, when contacted by the Program Administrator after the mediation session, made an offer of settlement. The Program Administrator conveyed the offer to the initiating party, and assisted with consideration of the offer. A number of cases have been settled in this manner. There have also been cases in which one party contacted the other party directly. A call to one of the parties alerted the Program Administrator that although the mediation session had not directly resulted in resolution, the opportunity to discuss the situation in a neutral forum had led to second thoughts and subsequent settlement.

After all the work with the parties has been completed, the Program Administrator completes the case record and conveys the outcome to the agency referral source. This allows that agency to complete its own case closure process.

Program Experience

While program experience has shown a high percentage of cases in which the opposing party is unwilling to mediate, neutral empathic and supportive contacts with opposing parties have proven to be quite beneficial. In fact, they have resulted in a new category of resolution being added to the spectrum of possible outcomes, namely, settled by telephone conciliation. Disputes between landlords and tenants appear to be particularly responsive to this technique.

Case screening and the entire process of moving a case through mediation requires time as well as thoughtful responsiveness to the unique personalities and issues involved with any case. It is natural to feel frustrated when it becomes clear that either an opposing party cannot be contacted or, once contacted, is unwilling to participate. These feelings, once a mediation program has been operating for a few months, are over-shadowed by the great satisfaction mediators and program staff members experience when a difficult situation is brought to resolution. Over time it will become clear that certain procedures aren't working and may need reconsideration and change because each agency has different conditions, resources and values. Operating a successful pro bono mediation program requires constant attention to relationships between the program administrator and the advocates who provide representation. Therefore, it is important to look at the choice of a mediation program administrator and what qualifications the agency should consider in selecting the right individual for the job.

DEVELOPMENT AND MAINTENANCE OF RECORDS

Included in this section:

- **Benefits of Records**
- **Who Wants What Information for What Purpose**
- **Confidentiality of Records**
- **Types of Records Needed for Program Operation**

BENEFITS OF RECORDS

Non-profit agencies, particularly those funded by departments of the federal or local government, are burdened by the task of developing and updating seemingly meaningless records that serve no apparent purpose and frequently are not read by anyone. The individuals charged with keeping these records feel it is a waste of precious time that could be devoted to service delivery.

The pro bono or legal service agency developing a mediation program should give careful consideration to the records that will benefit the agency and the program in various ways. Appropriate records can influence a potential or in-place funding source to donate money, help to reduce stress of advocates with high caseloads, document problems so that they can be addressed, determine the specific ways to improve service delivery and designate those volunteers and organizations that should receive recognition. Repetitive reports of meaningless numbers and uninformative narratives about service simply annoy the staff members and volunteers who are required to generate them, and frustrate readers who seek useful information.

WHO WANTS WHAT INFORMATION FOR WHAT PURPOSE?

The agency and mediation program will need to decide what kind of information and reports are important to maintain funding, show program accomplishments and maintain high standards of service delivery. The 'who and what' question above should be answered so that the appropriate information can be gathered for specific report generation. Does the board of directors or the chief executive want an annual report on the program, and if so, what information is considered to be relevant for their needs? Will a funding source require a specific type of report to consider additional years of support? What information does the mediation program administrator need to evaluate program components and volunteers? What information will be useful if a problem arises in the program or with a volunteer?

Unfortunately, many programs begin operation without determining what records are needed to meet the needs of various categories of people associated with the agency. If a problem arises and the relevant information that could lead to a solution has not been kept, it can be frustrating to everyone involved. Therefore, time spent in discussion of what reports and information may be needed is time well spent. The program

administrator, the agency's chief executive, and perhaps a member of the board of directors are well advised to think through what they will want to know in the future, and set up information collection and report generating mechanisms in advance of the need.

CONFIDENTIALITY OF RECORDS

Privacy and confidentiality of communication during the mediation session is one of the major reasons parties choose to use this procedure for resolving disputes. Following referral of a case to mediation, there are many points in case processing where information is provided to program staff members. This information may be recorded and could become a part of a permanent case record.

The same attention given to confidentiality during the session needs to be applied to case records. The mediation program must see that records are protected, maintained in locked storage (if in printed documents), and kept in computer document files that require a password or other protective measures so that they are accessible only to designated staff members.

The agency should determine whether it will retain case notes regarding information provided during the time the case was active. Some agencies may decide that once the case is closed only party contact information, dates of significant case processing events, and final disposition will be maintained. In the Phoenix program, records contain the following:

- Case number
- Date of referral to mediation
- Parties contact information
- Type of case: housing, family, etc.
- Date of mediation (if a session was held)
- Names of mediators
- Disposition- mediation, settled; 2nd party unwilling to mediate, etc.
- Case closing date

While the case is open, notes or phone calls and other significant events are recorded, however, these are destroyed once the case is closed.

Whatever decision is made about the specific records to maintain, they must be protected. Attention paid to this issue will add to the confidence of clients and others connected to the program.

Programs receiving funding from external sources should also be aware of the funder's record-keeping requirements. For instance, legal services programs receiving funds from the federal Legal Services Corporation must comply with the specific record-keeping requirements of the LSC if they count these cases towards the program's private attorney involvement.

TYPES OF RECORDS NEEDED FOR PROGRAM OPERATION

Programs should consider using a database or case management software to manage the program operation information.

Individual client records

The pro bono mediation program cannot function without obtaining the following information:

- Contact information {Name, address and phone numbers for the initiating party (IP), the opposing party (OP) and others who will play a role in the case (attorneys, family members, employers, housing management staff, etc.)}
- Specific dispute or problem information
- Referral source information (can include outside agency referrals, internal agency staff referrals, case type department referrals)
- Case type

Service delivery information

To determine program efficiency and track case status as parties move through the program, the following information is needed:

- Referral of IP date
- Case screening date (may precede referral)
- Date when initial letter is sent to OP
- Date when contact is made with OP
- Dates of any significant information collection or provision
- Date on which the mediation session is scheduled
- Date when the case is closed
- Notes about information that is relevant to the case as it proceeds through the various stages of the process

After the case has been closed, case specific information is less important, and aggregate data for the program as a whole is used for program and service delivery evaluation and reports. For example, if the agency delivers 30 percent of its services to clients who have housing problems, it would be useful to understand why only 10 percent of the mediation referrals are housing cases. When 50 percent of the agency services go to family law cases, why are only 5 percent of the mediation referrals family cases? Records of this kind can assist the program administrator as well as the agency as a whole in spotting problems and making appropriate changes to the program.

Individual volunteer records

To facilitate volunteer contacts and assure high quality mediation service, the following information needs to be recorded:

- Contact information for all volunteers (name, address, phone numbers, e-mail addresses, fax numbers)
- Training and experience
- Availability
- Mentor or Mentee status
- Attendance at orientation and training sessions
- Documentation of any unusually positive contributions, as well as problems noted by co-mediators, staff members, clients or others
- Periodic Evaluation of skills and service to the program

Facilities in which sessions may be scheduled

- Name, address and phone number for organizations that will provide space for a session
- Contact person's name
- Number of times used (for thank you letters)

Program funding sources

- Name, address and phone numbers for all organizations that have contributed funds to the agency for the program
- Contact person's name
- Amount of funds contributed
- Type of contribution (one time contribution, potentially long term contributions, grants (which require proposals), etc.
- Date when funds were solicited and received
- Any other pertinent facts that will assist with future requests for specific information, thank you letters and annual or periodic reports, etc.

Community agencies or programs that contribute to program operation and success

- Organizations that refer potential clients
- Organizations that provide associated services
- Volunteer source organizations
- Courts and judges where cases may be heard when mediation does not settle the dispute

TROUBLE SHOOTING

Included in this section:

- **Steps in the Trouble Shooting Process**
- **Examples of problems for practice in trouble shooting**

INTRODUCTION

All the good planning in the world will not assure an agency that there will never be a problem in the mediation program. When there is evidence of trouble, it is good to have a starting place for analyzing the situation and finding an appropriate solution.

STEPS IN THE TROUBLE SHOOTING PROCESS

1. Determine whether the problem is a one-time event or has wider program ramifications.
2. If the problem is a one-time event, talk with those involved and brainstorm possible solutions.
3. If the problem has wider program implications, define the exact problem for which a solution is sought.
4. Determine how this problem is affecting various people or program components.
5. If the problem is in the service delivery component, check to see if it relates to an administrative function or to some area of the service delivery that is handled by volunteers.
6. If the problem relates to service delivery by volunteers, convene a small group of well-known and trusted volunteers to review the problem and help with determining a solution.
7. If the problem relates to an administrative function, bring other staff members of the program and/or the chief executive or other agency staff together to determine the best approach to solving the problem.
8. In all problem situations needing involvement of other individuals besides the program administrator, set the stage for good problem-solving by reiterating collaborative techniques and encouraging consensus decision-making.
9. Once trouble has arisen, a problem has been defined, people are called together to work on a solution, a solution has been determined – check to see that everyone who needs to know is informed if changes are being made that will effect them.
10. Implement the solution with a time set for evaluating whether the solution has indeed solved the problem.

Of these steps, number three and four are extremely important. Problem definition and determining the people affected are critical since the people who experience the problem need to be included in the problem solving process. If the program administrator has

identified trouble, she must talk with the people who have some knowledge of the situation, and then bring them together, unless there are good reasons not to do this. Administrators, who develop their own definition of a problem without others' involvement, will find it difficult when they attempt to impose solutions essentially developed in a vacuum. Poorly defined problems can waste a lot of time, cause a program administrator to bring in the wrong problem solvers, and often start a new problem where none previously existed. As noted in step 8, it is wise to remind people that collaboration and consensus-based decision-making will create buy-in for the chosen solution.

The program administrator who sets the right tone with program staff and volunteers will gain their respect and willingness to work together. Problems are to be expected, and there are good problem-solving techniques to be used when they arise. There are no perfect programs or administrators, and the problem-solving process can build staff and volunteer morale as well as hone good mediator skills.

EXAMPLES OF PROBLEMS

Some examples of problems, gained through experience in the Phoenix program are presented here. They can be used in interviews of prospective program administrators to give an interview committee or the agency chief executive more information on a candidate's skills.

PROBLEM #1 – Referral of certain types of cases dwindles to zero. No one from the agency department responsible for these referrals is talking about any problems. What steps need to be taken to define the problem accurately and find a solution?

PROBLEM #2 – Attorneys in the agency ask that one specific volunteer be used to mediate the cases they refer; yet no information has been provided about problems with other volunteers. What could be the problem or does one really exist?

PROBLEM #3 – Volunteers take a lengthy period of time to send in the mediation outcome reports, making it difficult for program staff to complete and close cases. What may need to be done in this situation?

PROBLEM #4 – A large number of volunteers indicated willingness to mediate in the program and attended an orientation session. Only a very small number of cases are being referred to mediation and volunteers have complained. How should the problem be defined, and what are possible solutions?

Program Experience

At one point in the history of the pro bono mediation program's operation, a number of calls for service were received related to individuals complaining about dogs barking in their neighbors' yards. While there are laws about noise in residential neighborhoods, legal service agencies do not provide representation or advocacy since these situations are typically heard, when a lawsuit has been filed, in a limited jurisdiction court. These courts have short timelines and a swift determination of whether there are grounds for damages to be awarded.

The program administrator in the legal service agency mediation program in Phoenix had been the trainer for mediators who provided service in the Phoenix Community Mediation Program (CMP). That program had a contract with the city and county animal care and control service to offer mediation in dog barking situations. In fact, close to 60 percent of the CMP's services were devoted to animal issues between neighbors. A call to the director of the CMP found that the city had recently experienced serious budget problems, and that the CMP had been shut down. No organization had stepped into the gap to pick up these services. Subsequent discussion with volunteers showed that the corps of mediators serving the pro bono mediation program was neither prepared nor willing to handle dog-barking cases. The program administrator was left with the unpleasant duty of informing all callers with this problem that the pro bono mediation program did not handle this case type. She urged the callers to follow-up with the City of Phoenix and complain about the closing of the CMP.

This example shows the value of having a plan for trouble shooting in advance of problems arising in the program. It also illustrates the value of having a program administrator with wide knowledge of the mediation and other service agency community.

ETHICAL CONSIDERATIONS

The ethical considerations associated with the mediation program (and the host agency as well) are too numerous to completely cover in this manual. Most mediator training programs spend several hours looking at the issues that arise in a mediation session and the ethical dilemmas they present to the mediator. When the mediation program recruits volunteers, the Program Administrator may want to review the training agenda for each volunteer applicant to determine each has had appropriate training. Additionally, it is important to have continuing education regarding ethics, and this can be done at a volunteer meeting. Lawyer mediators, as well as professionals from other disciplines, can often use these sessions for continuing education credit.

Some of the ethical issues that should be included in training for volunteers are:

1. Confidentiality – The general guidelines and reporting issue in cases of abuse and other types of cases that may raise confidentiality issues.
2. Terminating a mediation session – What issues would prompt this action and how to do it.
3. Neutrality – How to handle when the mediator or a party feels it has not been maintained.
4. Self-determination – Issues regarding pressure to settle
5. Co-Mediator Feedback – Providing information to the Program Administrator about breach of ethical responsibilities.
6. Different considerations when working with represented and unrepresented parties.
7. Handling party complaints about mediator behavior.
8. Handling complaints about attorney behavior in mediation.
9. Conflicts of interest from the mediator's perspective.

There are numerous resources available for those wishing guidance on ethical issues. Please see below for a partial list of available resources.

Dispute Resolution Ethics: A Comprehensive Guide, available from the ABA Section of Dispute Resolution (512 pages). For ordering information, see <http://www.abanet.org/dispute/pub/publist.pdf>.

The ABA/AAA/SPIDR Model Standards of Conduct for Mediators. See <http://www.abanet.org/dispute/modelstandardsofconduct.doc>.

The CPR-Georgetown Principles for Provider Organizations. Available at (<http://www.cpradr.org>).

The Model Standards of Practice for Family and Divorce Mediation. See (http://www.afccnet.org/docs/resources_model_mediation.htm).

ABA Model Rules of Professional Responsibility (Rules 1.2, 1.4, 1.6, 2.1, 3.3, 4.1, 4.2, 4.4, 8.3, and 8.4).

A Bibliography of Further Readings on Ethics in Dispute Resolution (Appendix R).

NOTES

APPENDICES

Appendix A:	Benefits of Mediation	53
Appendix B:	Confidentiality Agreement	54
Appendix C:	Ground Rules	55
Appendix D:	Initial Letter to Second Party	56
Appendix E:	Mediation Agreement	57
Appendix F:	Mediation Confirmation Letter	58
Appendix G:	Mediation Process	59
Appendix H:	Mediation Process Evaluation	60
Appendix I:	Mediation Referral Form	63
Appendix J:	Mediation Service Flow	64
Appendix K:	Mediation Application to Volunteer	65
Appendix L:	Report to Program Form	67
Appendix M:	Solicitation Letter	68
Appendix N:	Timing Options for Mediation Screening	69
Appendix O:	Volunteer Evaluation Forms	70
Appendix P:	Advocacy in Mediation role-play	72
Appendix Q:	The Guide to Dispute Resolution Processes	76