2019 Hawai‘i Access to Justice Conference
“Expanding Access to Civil Justice”
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Workshop Summary[1]

“**Mediation for the Income Gap Group in Divorce Actions”**

Panel Presenters:

Thomas Crowley, partner, Rezents & Crowley, LLP; **Stephanie Rezents**, partner, Rezents & Crowley, LLP; **Judge Dyan Medeiros**, Family Court Judge in the First Circuit

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Stephanie Rezents canvassed the audience to see how many attendees were attorneys, practice family law, work with domestic violence victims, etc. She cited reports to explain the session’s “gap group” definition. For example, she cited the recent HUD report which says a single person on O‘ahu earning below $67,500 annually is considered to be a low-income individual. Another report referenced a Hawai‘i living wage (i.e., just above the poverty line) as approximately $64,000 a year for two adults with one child.

Ms. Rezents also provided data regarding average Hawai‘i divorce costs, per litigant, at $220 an hour for an attorney. For example:

- $17,500 for a family with one child ($14,700 if the case settles; $20,500 if it goes to trial)
- $16,200 for a case with alimony issues
- $16,400 for a case with property division ($11,700 if the case settles; $20,500 if it goes to trial)

The “gap group” was defined as those in Hawai‘i earning $50,000 to $100,000 per year. This range was once considered as the middle class, but now is deemed to be low income and those entering middle income. Parties may start with an attorney, but often end up at trial with no representation, or the individuals cannot afford representation post-divorce. The parties may have to borrow, use credit cards, take loans, or use charging liens with an attorney to obtain or continue representation. “Divorce is not a life event people plan for.”

Judge Medeiros, as a family court judge, noted that family law cases need to be handled differently from others such as medical malpractice. A family may still need to move forward for 10 to 20 years after a divorce.

Those helping the parties need a long-term perspective. In addition to assistance with standard court preparation, the parties need to ensure when addressing kids, property division, and the like that they can survive long-

term.

Litigation costs are steep. These costs may be $5,000 up front but may increase toward approximately $20,000 on average. Private mediation also costs money, but it can be money well spent. Mediation usually costs between $5,000 to $7,000 in total, and those costs are split by the parties.

Mediation allows the parties to control the outcome. A "good outcome" from mediation is "one you can build with going forward." Mediation allows people to feel heard, relative to the trial process. Even if everything is not resolved in mediation, it can lessen the number of issues that need to be addressed at trial. For example, all custody issues may be resolved in advance of trial. The main con of mediation is that if it is unsuccessful the parties still need to pay the attorneys after paying their costs of mediation. Nonetheless, mediation success rates are extremely high. Ms. Rezents also noted that an attorney needs to know if mediation is floundering. If so, the attorneys may cease it, lessen that expense, and just go to trial.

Judge Medeiros noted that parties do not have the opportunity to say everything they want in trial, because of the Rules of Evidence, or the judge may not agree with what they say. There also can be issues of adequate trial time.

She also noted 90% of the time a judge won't meet with a child involved.

Tom Crowley asked about the court's ability to order mediation. Judge Medeiros noted Rule 53.1 of the Hawai'i Family Court Rules ("HFCR") allows the court to order mediation without anyone requesting it. Also, Rule 94 (re Motions to Set) requires a statement that mediation has been attempted or is inappropriate. Movants most commonly try to say mediation is inappropriate simply "because the case won't settle."

Mediation usually is not ordered in domestic violence cases. But this can vary by the type of domestic violence involved and the facilities available. It may be fine if there are separate, different times for the parties, and if the mediator understands power/control dynamics. Also, some domestic violence victims want mediation, and some do not; the court needs to listen to them.

On the question when should mediation commence, Ms. Rezents brings it up at her first client meeting. There commonly are misconceptions. People think a case never will settle, but she explains that mediation may be cheaper and faster. Some people fear being in the same room with their spouse, but mediation can be done in separate sessions.

Some clients are very verbal, some are not. An attorney needs

information, such as finances. They then can explain how a court likely will order property division if a case goes to trial, and they can prepare their client for mediation. Better preparation = a better result. Just resolving even some issues in mediation can cut divorce costs.

A Rule 16 conference can be held over limited issues, short of a whole trial. Mediation can help with interim orders and agreements, too. Mediation can cut discovery costs. Most of what is obtained in formal discovery is irrelevant. One can use a mediator to get documents without formal discovery. A mediator can move a case forward even if they don't have all the information.

Judge Medeiros discussed the need for client control, especially with family court. A client needs to trust one's attorney enough to listen to the attorney and not fight with the attorney. Clients are being seen at the worst part of their life. Attorneys need to build trust with the clients, but not just tell them what they want to hear. Client control is not bossing a client around. A client needs to trust the attorney's judgment and listen to the attorney's advice.

Mediation should start as early as possible, but homework is needed for mediation to work. The parties need to be educated in advance about the law and need to enter mediation with the right mindset.

Usually one party wants divorce, the other needs to adjust. An attorney does not need to be their client's therapist, but they can refer them to a therapist.

Ms. Rezents noted clients never get 100% of what they want. Successful mediation is as close to a fair and reasonable outcome as possible, given the costs. An agreement in mediation can resolve ongoing stress impacting someone's life. There is a huge relief factor with an agreement. Getting a divorce finalized results in the couples back on track with their lives. Children also are impacted by the stress of an ongoing divorce.

Judge Medeiros mentioned parenting plans and reviewing them prior to a mediation. Thinking about these parenting plans help the couples to focus on these issues prior to the mediation. Children of different ages may need different plans due to different developmental stages.

Clients need reasonable expectations about how things will change post-divorce. Clients need to be flexible. Some parents will fight over one visitation day. However, the children themselves notice the quality of time they have with a parent more than they notice one day, or stuff such as mom has four more hours on Saturday.

Ms. Rezents stated that clients usually do not prepare the income and

expense statements correctly on their own. An attorney needs to review multiple financial statements and ask about bonuses that might have been omitted. The more accurate a statement is, the more it helps save attorney time and fees. Clients commonly exaggerate or underreport expenses.

Clients can prepare documents such as the financial statements for their attorney on their own time. An attorney then can guide a client to make the court document accurate. Credit card statements can be reviewed for regular expenses like gas. One usually would look at the last 2-3 months and ask if what's there is normal. Some things like food won't ever be exact.

It can take hours to do these statements correctly. Commonly it takes perhaps three to four redrafts with clients in this gap group. It can take experience to gauge if it's being done correctly.

Judge Medeiros similarly said it can take two to three drafts. She would give a blank statement to a client to do on their own in advance of a meeting. Also, people should know at least if they have savings or are in the red at the end of every month. One can use that knowledge to assess if the rest of the math is working out correctly.

Mr. Crowley posed a question about form preparation for mediation, such as the Child Support Guidelines Worksheet. Judge Medeiros said it should be relatively easy to complete once you have the gross incomes. An audience member noted that there can be slightly different forms on the different islands. Another attendee noted the judiciary is working on a chart of all the different forms out there. Judge Medeiros believes the information on the form needs to be consistent, but it does not have to be the same form everywhere.

Another question about the asset/debt statements and the property division chart was posed. Ms. Rezents reiterated there are different forms available. For example, people often do not know what retirement plans they have, and you do not need to have a Qualified Domestic Relations Order to divide an IRA. Different retirement plans are treated differently. An attorney needs the actual statements from the plans to confirm what people have.

In a property division chart, one can include items such as known accounts of the other party, even if the value is unknown. This helps track what occurs in mediation and ensure such assets are not omitted.

Mr. Crowley raised a question about the different types of available and how to do mediation that the income gap group can afford. Tracy Wiltgen, executive director of the Mediation Center for the Pacific, noted there are facilitative, evaluative, and informative types of mediation. Community mediators use facilitative mediation, including reality testing tools. Those

with subject matter experience can use an evaluative approach. All mediators use the same techniques, but evaluative mediation can evaluate the strengths and weaknesses of the parties' positions. This evaluation is done privately to help them move forward when stuck. Community centers do not have the expertise to do evaluative mediation.

Mr. Crowley described his experience as a mediator. He uses what he calls "directive" mediation. He wants attorneys there. He sets process expectations at the start. He will do one day of mediation and abide by deadlines. The parties must come prepared. It is about having "data data data" with the completed forms there.

His mediation takes place in three acts:

(1) Talk story about what's happened;
(2) Exchange offers;
(3) Breaking the impasse – the last is why there's mediation in the first place.

He never has the parties in the same room. He will ask the attorneys questions in advance. Do you have client control? Will the client follow your recommendation? If not, there will be problems. How can I help you settle the case? What do you need the other side to do (to settle)? What are you willing to do (for the other side)? What are your client's emotional trigger points?

First stage: Talk story.

He listens. "Everyone needs a good listening to." "All disputes are personal."

"Emotions are the first facts in any dispute."

Listening is the key to establishing rapport. Down the road if there's an impasse, he needs to make a non-binding recommendation for settlement.

"Each side has their own truth."

"Disputes take on lives of their own." This is determined by the ritual of resolution used. (He used a specific example of dueling being used historically.)

He listens and echoes back what the parties say. "People don't care what you care about until you show you care about them." He needs to "listen like a sincere friend."

Second stage: Exchange offers.

The initial response is almost always "that's a slap in the face" / "that's offensive."

Third stage: Breaking impasse.

If there is ultimately no agreement, he makes a non-binding recommendation for settlement based on everything he's absorbed and what he knows as a divorce practitioner. One, he won't disclose the responses unless

all parties accept the recommendation; and two, the recommendation comes with no further changes or amendments allowed. It's a take it or leave it recommendation. He figures out the "excruciating extreme" he thinks each side can stand. He types this out a day or two after the mediation and ensures it is clear to minimize confusion. He emails it to the attorneys and sets a deadline for responses. At the deadline, he announces to each side if there is an agreement. Even with an agreement, the attorneys still need to tie up loose ends.

[1] An initial draft was prepared by Jay L. Mason, staff attorney at Legal Aid Society of Hawai'i and reviewed by the presenters.