CRIMINAL MEDIATION

WHY?

WHAT?

WHO?

WHEN?

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WHY DO CRIMINAL MEDIATION?

The reason to participate in criminal mediation depends on one's perspective. The Oxford Dictionary defines perspective as the "understanding of the relative importance of things." The relative importance of a criminal case will be viewed differently by the defendant, the defendant's attorney, the prosecutor, the victim, and the family of the victim.

For the criminal defendant, mediation offers the opportunity to speak directly to a judge. The defendant wants the judge to hear and understand his position on the case. Frequently, the defendant wants the judge to see him as a person and not just another criminal with a pending charge. He wants to tell the judge all the things his attorney told him would not matter to the outcome of the case or the sentence imposed. By taking the time to listen to the defendant, the judge can assess the defendant's personal set of circumstances and provide him a reliable second opinion. Sometimes defendants feel their attorneys are not listening to them, but in reality the attorney is only telling the defendant what they are saying does not matter in a court of law. By allowing the defendant to speak freely to the judge, the defendant can be certain the judge heard and understood his concerns.

For the defense attorney, mediation can be a useful tool for many reasons.

First, if the attorney has a difficult client, the attorney may need assistance in helping the defendant appreciate his dire position. Second, the attorney may be seeking a second opinion on the advice he gave to his client. Third, the attorney may need help convincing the prosecutor to be reasonable. Anyone who has ever represented a criminal client will recognize these factors quickly and appreciate the defense attorney's situation.

The prosecutor will very often have the exact same problems as the defense attorney but with a slight twist. Instead of having a difficult client, the prosecutor may have a difficult victim or family member or a victim who needs help understanding the problems with his case or the pitfalls of a jury trial. The prosecutor may need a second opinion on his case not only for himself but also for his supervisor. In handling a case he knows inside and out, very often the prosecutor will know that a weakness in the case could prove difficult to overcome. Unfortunately, the supervising attorney may not understand this difficulty and thus prevent the prosecutor from offering a reasonable plea deal. This is an occasion where the prosecutor needs support from his boss so he can make an offer on the case. Armed with the judge's thoughts, the prosecutor can inform his supervisor the judge heard everything, knows what the case is about, and believes a plea offer is needed.

The victim or the family member(s) of the victim often feel they are lost in an impermeable legal process. It is a process victims do not understand and it is occurring at a time when victims are experiencing a variety of emotions. Victims are frequently scared, frustrated, hurt emotionally or physically, tired of repeating their story, and cannot understand why everything takes so long. This encounter can be a relief to them because they finally have a judge hearing what they want everyone to know about them, their family, and how the defendant has impacted their life. Sometimes there is more to the story, and victims will want the judge to know the missing details. They will also want to hear the thoughts of the judge on the matter. Often victims will want to know about the defendant. They will want to know what he is like as a person, why he did what he did, and if he is truly sorry for his conduct.

The courts should encourage criminal mediation because it takes the mystery out of the process for the participants, it gives everyone the chance to speak freely in a much more relaxed setting, and the people whose lives have been impacted have the chance to directly participate in the process and influence the outcome of the matter. When mediation is successful, it frees up court time for the prosecution of matters that cannot be resolved and really need to be tried.

WHAT IS CRIMINAL MEDIATION?

Criminal mediation is like any other type of mediation and many of the same issues will arise, but it is always complicated because emotions are extremely high. It is not at all uncommon for a defendant to be mentally ill, undereducated, angry, or aggressive. Sometimes the defendant is all that and more. Every state has laws that govern mediation, and although criminal mediation is not specifically addressed in most states, these same laws will apply.

One of the key components to any mediation is confidentiality. In Kansas, the specific statute on confidentiality can be found at K.S.A. § 23-605. In criminal mediation, the parties still make the ultimate decision on any plea agreement. However, the judge can suggest solutions to both parties to help move them toward a resolution. Generally speaking, when we use the term "criminal mediation," it is not what a purist would consider to be mediation, but it is the only term that can be used to ensure confidentiality is maintained. Without confidentiality there can be no mediation.

WHO PARTICIPATES IN CRIMINAL MEDIATION?

As stated earlier, mediation should not be limited to only the prosecutor and defense attorney. It is imperative that the defendant be allowed to participate in the process. It should be noted that very often the defendant will need the input of a friend or family member in making a decision during the mediation. If the defendant wants that person present at the mediation, the judge needs to ensure that person is present. It is easy to understand why a defendant would want to be assured by a friend or family member he is making the correct decision. A difficult defendant may listen to the judge or his attorney, but he might also take guidance from a friend or family member. In any event, there must be a decision-maker present to reach an agreement. If the defendant is a decision-maker, he may not need or want anyone else present. If he is indecisive or needs to be assured he is making the right decision, a friend or family member should be present.

Everyone must remember, however, that even though this process is mediation and confidentiality will be maintained, an attending third party may not be protected. As a result, be certain this issue is addressed in some fashion.

Most often, the defendant has already told his significant other his version of

the facts. Sometimes it is learned that the facts as known by the prosecutor are different from the facts known by the defendant. In order for the person helping with the decision-making to be of any assistance, it may be necessary if that person has only heard one side of the story to allow him to see a copy of the police reports to make certain he can accurately assess the significance of any dissimilarities in the stories. Some defendants might say they do not want the person assisting them to see the police reports. At this point, the judge might ask the defendant to consider the fact that if the case goes to trial, these facts will be known to everyone. Remember this, police reports are not confidential communications. They are simply the reporting of another person(s)' comments, observations, and opinions.

If the subject of the mediation is a crime against a person, the victim and/or the family of the victim should be present for the mediation. The victim needs to make sure his voice is heard and respected. He may be scared, confused, angry, or distrustful of the system. The judge must remember that, as part of the system, he or she may be in the line of fire for any emotional responses. The judge needs to provide an overview of how the criminal process works, how the sentencing guidelines influence penalties, lesser included offenses, and an honest opinion concerning what can be expected if the matter proceeds to trial.

Everyone the judge comes into contact with during a criminal mediation will have his own perspective, personality, and purpose. Although a judge may frequently see the same type of defendant, the same type of crime, or the same type of victim, each case is unique and requires the judge to be prepared for the mediation. Certainly, patience and skill is important for any mediator, but for criminal mediation, the ability to assess people and their situations is a must. The approach taken by the judge will depend, in large part, on his assessment of the participants' needs.

It probably has been noted the mediator has been referred to throughout as a judge. Certainly, criminal mediation could also utilize a private mediator, but the obvious problem with this is that neither the state nor the criminal will likely have the ability to pay for a mediator's time. Therefore, judges will almost always be the mediators in criminal cases. However, not every judge will make a good mediator. By way of example, if an attorney has a complex class action matter, he may want or hope the case will be assigned to a judge who has previously handled class action matters, who will take the time to read the mountains of paperwork that will accompany such a case. The judge who does criminal mediation should be someone who likes people, communicates effectively, understands the criminal system, appreciates the sensitive environment, and wants to help find a solution to

a complex problem.

Most judges are law trained, and consequently, it is common for many judges to think like lawyers. This is wonderful except for the fact most law schools teach lawyers the answers are in law books. In criminal mediation only a portion of the answer to a problem can be found in a law book. Often the judge will have to find a solution to the problem by using common sense and thinking "outside the box." It is only after the solution is found that law books come into play and a legal review is required. This is a backward approach not customarily taken by lawyers and judges. Frankly, this methodology should be preserved for mediation and is not the approach that should be taken in any other matter before the judge .

WHEN SHOULD CRIMINAL MEDIATION TAKE PLACE?

Criminal mediation can take place any time the parties are ready to mediate. Depending on the case, this could be before or after the preliminary hearing. In fact, some mediation have taken place before the defendant has been formally charged with a crime. The only requirement is the parties have to request a mediation or be ordered to participate in one.

Things To Remember

1. Never underestimate the power of forgiveness.

2. Consider whether the victim or the defendant has a story that needs to be heard by the other side.

3. Humanize the individuals to each side.

4. Would it be helpful for the defendant to allow the prosecutor to visit directly with him, with counsel present?

5. Would it be helpful for the victim and defendant to allow the victim to hear directly from the defendant?

6. Have phone cards or long distance access available to allow defendant to call for advice from long distance family members.

7. If there are other pending cases or detainers outstanding, determine if they can be worked into the mediation.

8. What will the defendant's likely custody classification be after going to prison?

9. Convert the length of time the defendant is projected to serve not only in months, but in time frames he understands.

10. Have a general understanding of the facilities and programs available for a defendant serving prison time.

SUGGESTIONS WHEN WORKING WITH THE DEFENDANT

1. Never have the defendant and the victim in the same area. If possible, avoid having them see each other. This may require visits with each side to be at different times. Let everyone know that the things they say cannot be used against them and that a mediator cannot be called to testify at trial about what took place during the mediation.
2. Never wear a robe.
3. It is helpful to at least read the affidavit for the complaint. This is a good place to start. If it is a difficult or complex matter like a sexual assault or a matter involving a death, a mediator should read enough to familiarize themselves with the facts of the case.
4. It is very useful to first visit with the attorneys privately to learn what thoughts and concerns they have about the case. At this same time, the judge should get a sense of the people involved and what they are like as individuals.
5. When visiting with the defendant make sure he understands what he is charged with and his exposure if convicted as charged. Having an extra copy of the sentencing guidelines is helpful so he can visualize what is being discussed.
6. Explain how the guidelines impact him with each scenario presented. When considering all the variables, sometimes it is necessary to have a calculator so that the defendant can be provided with realistic numbers. Note that good behavior time credits have changed and there are other ways to get additional time credits while in custody.
7. It can be helpful for the judge to have a general understanding of the services that are available to a defendant, whether in custody or on probation.
8. A copy of the pattern instructions is frequently needed so the judge can read the exact elements of the crime to the defendant. Inform the defendant these will be the instructions

given to the jury and ask him how he thinks they will answer each element.

9. There are many ways to start a conversation with the defendant. One way is to ask him what he thinks the state will say happened and then ask him what he thinks his evidence will be if he goes to trial.
10. Depending on the defendant, simple questions like these can be used to start a dialog:
    i. "You have been in custody for a while and have spoken to other folks about our juries and your case. What have you learned since being in custody?"
    ii. "What would you like to have happen with this case?"
    iii. "What are some of your concerns?"
    iv. "What does your family think about this matter?"
    v. "What questions can I help you with?"
11. Some defendants are more direct and aggressive. Do not assume the defendant is an "asshole" until you have more first hand evidence. It may be that the defendant is scared and/or frustrated and this is his way of responding to stress.
12. Always be clear, direct, and honest. Statements do not have to be sacrificed at the cost of respect for the individual.
13. Speak their language.
14. When listening to the defendant, try to determine what is important to him and how he thinks and feels. Do not listen to him as an attorney preparing for cross-examination.
15. Reality therapy may be necessary with some defendants.