Mediation can offer swift dose of justice

State pilot program tries experiment

By Jason Riley • jriley@courier-journal.com • May 26, 2008

Charged with burglarizing two family members' homes in Clay County earlier this year, Michael Gilliam was facing as many as 20 years in prison -- and angry relatives pushing for stiff punishment.

But before his felony case got to trial, a judge suggested the prosecution and defense try something different -- an informal mediation process that, in less than an hour, resulted in a plea agreement where Gilliam avoided prison but agreed to pay restitution, get drug treatment and be on probation for five years.

The March 18 mediation also gave Gilliam and his victims a chance to speak, to each other and a neutral judge, with Gilliam eventually apologizing for his crimes.

"Both sides felt like they got something out of it and got to have their say," said Kristen Bailey, Gilliam's attorney.

She would not allow him to discuss the process because he's not yet been formally sentenced. But she noted, "The victims felt like they were being listened to, and my client felt like he was being listened to."

Gilliam's was one of 18 felony cases mediated and settled for Clay, Jackson and Leslie counties that day -- as part of a state pilot program that aims to reduce congestion in courts, and in prisons.

While mediation is common in civil cases, felony mediation is rare in Kentucky and across the country, in part because of prosecutor opposition and judges' concerns about political fallout from the public.

Saves time and money

Supporters in Kentucky say mediation saves time and money and gives victims and defendants more input. In Kentucky's pilot effort, the mediators are retired judges taking part in the state's senior status judge program and have no affiliation to the county or case.

During a mediation session, the senior judge meets first with the defendant and his attorney, as well as the prosecutor, and possibly police and victims, before separating both sides and then shuttling back and forth trying to work out a plea agreement, which both sides must agree to.

Citing the cases resolved March 18, Circuit Judge Oscar Gayle House, who presides over the circuit that includes Clay, Jackson and Leslie counties, noted that completing that many in a traditional court setting would have taken about six to eight weeks -- and likely ended with both victims and defendants dissatisfied.

"A lot of times … victims and defendants will leave the system without feeling they have had their say," said House. "…We very seldom leave court with people who are happy, but we did."

Judges in Boone, Gallatin and Boyd counties, which are also trying the program, are reporting similar results. "It gives people a chance to resolve their cases in an informal setting," said senior status Judge Steve Mershon, who has participated in several mediations.

"If you let people just vent, get things off their chests and explain the possible options to them, there is a good possibility" of settling the case, he said.

Court officials say felony mediation has benefits for all parties, as defendants can make a confidential apology to victims' families and hear from a seasoned judge about their chances at trial.

It also gives prosecutors the opportunity to achieve justice in a case without burdening the victims and their families with a lengthy trial. And it can be good for victims, who might speak to the defendant, forgive him and move on with their lives, said court officials.

But the program has met with some resistance -- from defense attorneys leery of having their clients open up about a case in front of others and from prosecutors who say it is unnecessary and takes away their authority.

Mershon said he pitched the idea of mediation a few years ago when he was the chief circuit court judge in Jefferson County, but the commonwealth's attorney's office objected.

"We do mediation every day; it's called plea bargaining," said Harry Rothgerber, first assistant Jefferson commonwealth's attorney. "If the defendant doesn't like the offer we make, they don't have to accept it."

Rothgerber said mediation adds an unnecessary layer to the criminal process and an "inappropriate interjection" of a judge who won't know as much about the specifics of a case as the lawyers involved.

"I trust our prosecutor's ability more to evaluate the case rather than senior status judges," said Rothgerber.

Officials who have taken part in the mediation program, however, say that working out a plea agreement is often no easy task because it is difficult to get everyone together at once -- police, victims, attorneys -- and on the same page.

For mediation, all the parties are required to come together, making it easier to work out a deal. "We get all the players together, which is extremely unusual," said Senior Status Judge Steve Hayden.

Confidentiality

Another concern among prosecutors and defense attorneys alike has been the confidentiality of the mediation meetings.

For example, what if the defendant confesses or makes an incriminating statement during mediation, with prosecutors and victims present? If mediation fails, could that be used against the defendant?

"If a defendant says something incriminating during mediation and it falls through, I expect to be able to use it at trial," said Rothgerber.

But Carol Paisley, manager of the mediation division at Kentucky's Administrative Office of the Courts, said none of the parties in mediation are allowed to discuss what was said.

"Everyone knows they can't use (incriminating statements made in mediation), and the judge isn't going to allow it to be used," said Boone County Chief Circuit Court Judge Anthony Frohlich, whose court was the first in Kentucky to use mediation, in 2005. "Nobody would agree to this if (what they say) could be used against them."

Paisley said reactions from all sides have thus far been positive -- and it is inexpensive, with the mileage paid for senior status judges being one of the only costs.

"Actually, I think it's saving money," said Paisley, noting that the quicker cases are settled, the sooner some defendants are out of jail.

Paisley said state officials want to track the recidivism of defendants who take part in the mediation. And she said officials would like to have every county in the state try mediation within the next year or so.

"It's hard to explain the value of mediation until you experience it," she said.

HOW IT WORKS
A judge, prosecutor or defense attorney suggests mediation.

Defendant, his attorney and the prosecutor, often with police and victims, meet in a room with a senior status judge who asks each side to lay out their case -- and discuss the potential penalty.

Anyone can speak and the discussions are confidential, though the prosecutor and defense attorney lay out specifics of the case.

Each side is put in separate rooms with the senior judge shuttling back and forth, discussing possible plea agreements and assessing the strengths of each side's case and possibly giving advice.

If a deal is reached, both sides draft a plea agreement and present it to the judge presiding over the case. While the presiding judge can reject the plea, officials don't think that has happened thus far.

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