

OPEN NINTH:

CONVERSATIONS BEYOND THE COURTROOM

KNOW YOUR COURTS

MEDIATION – A COURT’S ALTERNATIVE

FEATURING JUDGE TINA CARABALLO

EPISODE 151

HOSTED BY: LISA MUNYON

(Music)

NARRATOR: Welcome to another episode of “Open Ninth: Conversations Beyond the Courtroom” in the Ninth Judicial Circuit Court of Florida, and now here’s your host, Chief Judge Lisa Munyon.

CHIEF JUDGE MUNYON: Hello, and welcome to Open Ninth. I’m here today with Judge Tina Caraballo, our administrative judge for the Orange County Courts in the Ninth Circuit to discuss an important part of the judicial process, mediation. I’m thrilled to have you in the studio today, Judge Caraballo. Thank you for joining me.

JUDGE CARABALLO: Thank you for having me.

CHIEF JUDGE MUNYON: So tell me about mediation. How did it get started?

JUDGE CARABALLO: Well, it’s really interesting, in the state of Florida, our first community mediation centers opened in 1975 in Miami and in Jacksonville. And these local community mediation dispute resolution centers were actively supported by the judiciary. And in 1977, the Florida Supreme Court received a federal grant relating to alternative dispute resolution alternatives. And that really began the Supreme Court’s involvement in institutionalizing mediation in our court system.

CHIEF JUDGE MUNYON: And did they, after they got that grant, how did they implement mediation on a statewide basis?

JUDGE CARABALLO: So thereafter the Chief Justice created a Supreme Court committee on dispute resolution alternatives. And in 1981, the Supreme Court took the lead in sponsoring the first family mediation training and our history of the courts’ involvement really

started in that family context. And so there was – to back up a little bit, there was a lot of dispute at the time between the community organizers and the judiciary because the community organizers didn't think that the court should play a role in mediation but the Supreme Court was of the position that of course we should. That this is just another means of resolving disputes and that's what the court system is for, whether it be through the adversarial system or through this mediation process. So there was a lot of give and take and in Florida, the courts really took the view that it was their responsibility to resolve disputes and that they should take a lead in this. And in 1983, the Florida Supreme Court's matrimonial law commission recommended mandatory mediation for all custody and visitation issues in dissolution of marriage proceedings.

CHIEF JUDGE MUNYON: Wow. So that would have been a lot of mediations that were started very quickly, I would think, after 1983.

JUDGE CARABALLO: Right. Yes, there was still a lot going on in the community and now we're seeing it grow more and more in the courts.

CHIEF JUDGE MUNYON: How did that move into county court?

JUDGE CARABALLO: Well, it goes back to 1984, the legislature stepped in because they saw how effective the mediation was so in 1984, the Florida legislature created a study commission on alternative dispute resolution. They issued a report on March 1st 1985 that set the foundation for our current system. And in the February 1st 1986 report, it contained the proposed legislation that became Florida's comprehensive mediation program.

CHIEF JUDGE MUNYON: Well, tell me about that comprehensive mediation program. And particularly, how did we implement that in Orange County?

JUDGE CARABALLO: So the legislation was adopted in '87 and it required the Florida Supreme Court to establish procedural rules, grievance procedures, ethical standards and establish minimum qualifications for mediators. So it led, that legislation enabled the Supreme Court to do all the things that we know now and then key to that was in 1986, the dispute resolution center was created as a joint program between the Florida Supreme Court and the University of Florida – I'm sorry, Florida State University College of Law, it's hard to say that as a gator.

CHIEF JUDGE MUNYON: The other university.

JUDGE CARABALLO: Yeah. And so that really led the way to what we have now because now we see it's institutionalized. We have got the training. We've got these standards and we see it more and more. And then one of the key things about Florida's mediation program is that even though we have these standards, each of the circuits have freedom to implement it in the way that works best for their citizenry.

CHIEF JUDGE MUNYON: So how did we implement it here?

JUDGE CARABALLO: Here – the 9th Circuit has a mediation department and we have it in Osceola and in Orange County. And our mediators – the Court's mediation system mediate cases in family law, in county civil cases under \$15,000, the small claims cases and eviction cases.

CHIEF JUDGE MUNYON: So why would people use the Court's mediation program as opposed to just hiring a private mediator in the open market?

JUDGE CARABALLO: The Court's mediation department is extremely more affordable. So in the county civil cases, under \$15,000, over 8 under 15, it's \$60.00 per

mediation whereas if you were to get a private mediator, they're significantly more than that. And of course our small claims mediation is done at no cost to the litigants.

CHIEF JUDGE MUNYON: So private mediation, if I understand correctly, they typically charge by the hour and significantly more than \$60.00 an hour. Probably more in the range of \$350, \$400 or more an hour.

JUDGE CARABALLO: Yes, depending on the mediator and the mediator's expense, experience they can charge you know a lot and that fee is usually split by the parties when you attend private mediation.

CHIEF JUDGE MUNYON: So the Orange County mediation – Orange and Osceola County mediation programs allow people that otherwise couldn't afford to go to mediation to do mediation in these cases and avoid going to court.

JUDGE CARABALLO: Absolutely. And mediation is really a preferred means of resolving disputes. The parties are in charge at mediation and while the Court's require the parties to participate in mediation, we can't force them to enter into an agreement. Only a resolution that all sides agree to can be had at mediation. And it really puts the parties in charge. At the mediation conference the parties can talk about things that the Court really can't address. When it goes to trial, the judge is limited in making the decision based solely on the evidence, whereas at the mediation conference, the parties can talk about all kinds of things even if it's not admissible evidence.

CHIEF JUDGE MUNYON: So how do cases get assigned or sent to mediation?

JUDGE CARABALLO: For the county court, we refer the case to mediation and then the mediation department schedules it. Our small claims is a little bit different. The way that we

– they’re still referred to mediation but during the small claims pretrial conference, which we hold now virtually on the Zoom platform, we have a representative of the mediation department in a breakout room so when the parties need to or are referred to mediation, they go to the breakout room. They get the date and time of their mediation. We’re hopeful that once the mediation department gets up to speed and get all their volunteers back into the office that we’ll be able to conduct the mediations on the spot for the small claims. So we can have multiple breakout rooms and that way we can get it done in one day.

CHIEF JUDGE MUNYON: Well, you’ve indicated to me that the role of the judge is to send cases to mediation. Does the judge have any other role in mediation?

JUDGE CARABALLO: The judge does have – the judge needs to send the case to mediation, refer it to mediation, but also the judge needs to entertain any motions related to it. So if a party fails to attend, then the judge needs to determine if that was a willful failure to attend and take appropriate action, and then also, there can be you know emotions are running high. And if litigants do something inappropriate at the mediation conference, the judge may have to get involved then. But generally everything, with very limited exception, everything that happens in the mediation conference is confidential and this is designed so that the parties can freely discuss their case without fear it will be used against them in court.

CHIEF JUDGE MUNYON: I’m sure a lot of people that go – that have small claims cases, or county civil cases, have never been to a mediation before. So describe what they can expect during the course of the mediation.

JUDGE CARABALLO: So during the mediation conference, the parties can expect first an introduction by the mediator to go over the confidentiality rules and to talk generally about

the conduct of the mediation. If the parties need to be in separate rooms, and the mediator needs to shuttle offers back and forth and that when you're in a separate caucus, if you tell the mediator something that you don't want disclosed to the other party, they'll keep it confidential. And you know just set some ground rules. And then after that, it's you know, the one side gets to give their presentation, then the other side and then there's an attempt to resolve it.

CHIEF JUDGE MUNYON: So what are the possible outcomes to a mediation that parties are involved in?

JUDGE CARABALLO: Well, the outcome that we most prefer is a full settlement. And if the parties do reach a resolution at mediation, it does need to be reduced to writing and signed. And that is a critical step. We find that if the parties are really close to settlement or they've settled, and they say, well, we're going to go back to our office and draft it, then it – the agreement usually falls apart once you get out of the mediation room and people start thinking about it and talk to their family and friends, oh, why did you do that. So it's really critical that any agreement that is reached, that it be reduced to writing and signed. So that's full agreement. Then we can have an impasse where the parties were unable to agree and that goes back to the judge. Or the parties can agree to continue the mediation conference. Perhaps there's some additional information that's needed that the parties need to gather and they can always come back for another mediation.

CHIEF JUDGE MUNYON: And if the parties reach an agreement, does that always mean that someone's going to have a money judgment against them?

JUDGE CARABALLO: Not always. That's the key component of mediation that the Courts can't do. Many times in mediation what a party really wants is an apology. You know,

especially we see this a lot in the county court cases, that – we’re really the people’s court, and we get a lot of disputes between neighbors, oh, they’re playing their stereo so loud I can’t enjoy my back porch. Well, there might not be monetary damages for that but it sure would be nice to sit across from the person and say, look, I’m so sorry, I didn’t realize my music was that loud. I’m going to keep it down from now on and that goes a long way. And that’s just not something that a judge could order.

CHIEF JUDGE MUNYON: So other than an agreement, even when the parties agree to a monetary settlement, are there times when the party that’s paying is given time to make those payments before a judgment is entered?

JUDGE CARABALLO: Frequently. Frequently payment plans are agreed to, especially in the small claims cases, a lot of that is credit card debt. And more often than not, it’s a payment plan as opposed to lump sum payment so that happens frequently.

CHIEF JUDGE MUNYON: So people that come to mediation hoping to resolve their case don’t have to have a big chunk of money to go to mediation?

JUDGE CARABALLO: Right. Obviously, depending on the case.

CHIEF JUDGE MUNYON: Yeah. Right.

JUDGE CARABALLO: But certainly in a lot of cases in county court that we see, that that’s the case.

CHIEF JUDGE MUNYON: Are there benefits in saving time and money to a case going to mediation?

JUDGE CARABALLO: Absolutely. If the parties are able to resolve the case at mediation, then you save the cost of litigation. Litigation can be timely, take a lot of time and have a lot of uncertainty. And so attorneys' fees are going accrue and that's why also the plaintiff has an incentive in resolving the case too. If there's no attorneys' fees provision, if there's no ability for a prevailing party to get attorneys' fees, then mediation is the much preferred method of resolving it. That way you don't have to go to trial, you don't have to get your witnesses ready, call your witness, get your evidence in.

CHIEF JUDGE MUNYON: Are there any other benefits to mediation that we haven't talked about?

JUDGE CARABALLO: So we talked about the cost. We've talked about the creativity. It saves time and I think it can mend fences. You know, it can really help people overcome a difficult situation, particularly in the family law context. I think that's why it was so successful initially just for people to be able to talk about something and come to a resolution together. I think that builds infrastructure for going forward, you know, especially when you're dealing with children. So I do think that those are some of the main –

CHIEF JUDGE MUNYON: Yeah, I would certainly think that it's better for families to have harmony and agreement than to duke it out in court.

JUDGE CARABALLO: Right, and business people like it too because they appreciate the savings that is realized in mediation. I know when I practiced law I did construction – commercial construction litigation. And I would say probably 98 percent of my cases resolved in mediation. We treated the mediation as trial. We were prepared for it. We had all of our facts and evidence ready. And we would put on these big presentations, but that was great for

business people because they can knock it out in one afternoon instead of continuing to pay the lawyers and all that discovery and all that paper and going to trial. So it was really beneficial.

CHIEF JUDGE MUNYON: I know that I have ordered thousands of cases to go to mediation during my time on the bench and when I'm talking to parties, I like to let them know that when they're in mediation, they can be more creative in resolving the case than I can be as a judge. I mean, take a foreclosure case for example, they may agree at a mediation to either reduce the payments or reduce the interest rate on the loan, do something that I can't do. I can't do either of those things as a judge. I have to follow the law. I decide whether they owe the money or not and how much it is. And it's that flexibility I think that really helps the parties because they can do things that I can't order and I'm sure you find that in county court too.

JUDGE CARABALLO: Absolutely. Yeah, that's another reason why mediation is such a preferred means of resolving disputes. If the parties – you know, they can be as creative as they can write it out, you know, so they do have a lot more flexibility whereas we're just limited in deciding the law and based on the evidence that's ultimately admitted.

CHIEF JUDGE MUNYON: So we have a beautiful new mediation space too for people to use. Could you describe where it is and what it's like?

JUDGE CARABALLO: Yes, it is a beautiful space. I just toured it yesterday. I went there when it was under construction and I finally toured it after it was completed. And it's located at –

CHIEF JUDGE MUNYON: 105 East Robinson?

JUDGE CARABALLO: Yes. And it's just about a block away from the courthouse. It's on the fourth floor. It's really a beautiful center that we have. I think there's 15 mediation

rooms. There's a couple of other conference rooms that we're going to use for depositions. There's several waiting rooms. There's plenty of room for the mediation staff. They have really nice work stations. There's a large copy room and so they have all the infrastructure that they need. And we're slowly but surely seeing more and more people coming back to in person mediation. We're still doing a lot of virtual mediations because it is convenient for the parties, but there's just really something gained from sitting across the table from someone and mediating a case. So we hope that rooms will be full before we know it.

CHIEF JUDGE MUNYON: And it really is a court space so there is security there, so people don't have to be worried about sitting across the table from someone that they're in a lawsuit with it, right?

JUDGE CARABALLO: Right. There's security there, just like when you come into the courthouse, you have to go through a scanner and so it is a secured facility.

CHIEF JUDGE MUNYON: Well, thank you for joining me today. That was a very interesting education on mediation.

JUDGE CARABALLO: Thank you for having me.

NARRATOR: Thank you for listening to "Open Ninth: Conversations Beyond the Courtroom" brought to you by Chief Judge Lisa Munyon and the Ninth Judicial Circuit Court of Florida. Follow us on Facebook, Twitter or Instagram @ninthcircuitfl for updates on new episodes and subscribe to Open Ninth on your favorite podcast service.

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