Make family court mediation accessible to everyone

Mediation works — if you can afford a lawyer. Most Californians can't.

An article last month, "10 ways lawyers can maximize family law mediation outcomes," Daily Journal, Sept. 10, rightfully praises mediation as a fast and effective solution to family law disputes. But that assumption only holds when both sides have capable attorneys who are reasonably paid.

In reality, nearly 70% of those who find themselves in a family court matter do not have lawyers; they represent themselves. While mediators correctly point to the relative ease and simplicity of their service as an obvious alternative to legal war, the majority of litigants in family court can't afford the service, let alone consider long-term benefits.

California's one universal exposure to mediation comes through custody cases. Parents must attend mediation before their dispute moves forward in family court. Interestingly, custody mediation in family court is usually provided by a court-employed mental health professional, not a lawyer. In most instances, this process is successful, leading to a partial or full resolution of custody issues. For many parents, it is their first introduction to the benefits of mediation. Yet once the custody issue is addressed, availability of mediation services drops dramatically. Many more issues, such as property division, child or spousal support, or enforcement of prior orders, could be successfully mediated, especially by attorney mediators with knowledge of California law. But the mediation door typically remains closed unless the parties can afford to pry it open themselves.

That is a missed opportunity. Mediation could relieve pressure on the courts, save families from prolonged conflict, and empower litigants to reach creative solutions that judges, bound by procedure, cannot easily craft. But those outcomes are largely reserved for the small fraction of families with attorneys who can guide them to the right mediator. The majority is left with little direction and few affordable options.

Courts do not provide lists of available mediators, much less those willing to work at reduced rates for self-represented parties. Large mediation services, staffed with highly credentialed neutrals, are typically priced out of reach. And while there are family law attorneys who want to develop mediation practices, their main referral source is other attorneys. That creates a closed loop: mediators seeking business from lawyers, and lawyers referring to mediators, while the vast population of unrepresented litigants remains invisible to the system.

There are practical ways to bridge this divide.

First, courts could provide litigants with neutral, non-endorsing lists of mediators who are willing to take cases at a range of fee levels. Courts may be concerned about potential liability as the provider of the list,, but this could be easily remedied. Mediators who would like to be included in the list must provide proof of liability insurance and agree to indemnify the courts in lawsuits. Legislators could make this even simpler with a rule indemnifying courts that provide lists.

This would function much like bail bond listings provided at local jails, not a requirement, but an indirectly recommended resource. Such a step would immediately give self-represented litigants a starting point rather than leaving them to Google their way through an unfamiliar landscape.

Second, mediation services could broaden their reach by recruiting and training family law attorneys who want to build practices in this area. Many lawyers have both the skill set and the desire but lack a path into the profession. With proper training and mentoring, these attorneys could become a pipeline of affordable mediators who better reflect the needs of ordinary families. Further, the mediation companies could enlarge their bottom line by increased work. As new attorneys gain experience, their fees will likewise rise, increasing profits for all who are willing to make the initial investment.

The most sophisticated litigants, with experienced attorneys, are still going to turn to distinguished former judges and experienced attorney mediators to resolve their matters, but the average respondent will now have mediation access.

Third, the field should make greater use of limited scope representation rules to offer "unbundled" mediation services. Instead of requiring parties to commit to full-scope mediation of every issue in their case, neutrals could offer targeted assistance for specific issues – child support, division of assets or even single enforcement questions. This would allow parties to pay only for what they need, making the process less intimidating and much more affordable.

Even if none of the above becomes reality, it's far past time that we adapt legal education to reflect this overwhelming need. Many law schools already offer general mediation courses, but family law mediation, particularly in sensitive areas like custody disputes involving domestic violence, requires specialized training. Law school–connected clinics could give supervised students practical experience by offering family court mediation services. Mediation providers could also contribute by sponsoring competitions at the law school, college and even high school levels. These programs would not only draw more students to the subject of mediation but also build long-term familiarity and interest in the field, ultimately expanding both participation and public awareness of mediation as a viable, accessible option.

Finally, judges and court staff should not underestimate the influence of their own encouragement. Every appearance is an opportunity to remind litigants that mediation exists, works and often produces outcomes more satisfying than those imposed in the courtroom. For unrepresented parties, a judge's suggestion may carry more weight than any brochure or website.

The common thread here is access. Mediation shouldn't be reserved for those who can afford lawyers. It should be the norm for everyone. If we want to reduce conflict, unclog our courts and deliver more just outcomes, we must expand access. That means training more mediators, lowering costs, creating referral systems and ensuring self-represented litigants have a way in. Until then, mediation will remain what it is now: a powerful tool sitting just out of reach for the majority who would benefit most.

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