

OPEN NINTH

CONVERSATIONS BEYOND THE COURTROOM

ODR: ANYWHERE, ANYTIME, ONLINE

EPISODE 88

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HOSTED BY: DONALD A. MYERS, JR.

(Music)

CHIEF JUDGE MYERS: Welcome to Open Ninth. I'm Chief Judge Don Myers. The idea of mediation as an alternative method of dispute resolution is not new. In fact, it dates back more than three thousand years to a variety of different cultures. It first gained traction here in the United States in the 1970s to help us manage crowded court dockets. And over the next 50 years, it has made a huge impact on the courts. The American Bar Association estimates that only one to two percent of all cases that have been filed actually proceed to trial. That means some 98 percent of all cases are resolved before they get to trial, most often with a settlement. And that's a good thing. The courts don't have anywhere near the resources to try those 98 percent of cases filed, and if it attempted to try even half of them, we'd be many years behind in getting them resolved. Mediation has become an indispensable option for the facilitation of settlement and it's grown significantly since its nascent days of the 1970s. Online dispute resolution is its most recent incarnation and today we'll explore its impact on the courts.

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 Don Myers.

CHIEF JUDGE MYERS: I'm pleased to welcome today Christy Foley, who is a mediator with us here locally and Jamie Gillespie from Modria who is with Tyler Technologies and working in the online dispute resolution area. Welcome to both of you. Thank you for being with us.

MS. FOLEY: Thank you for having us.

MS. GILLESPIE: Yes, thank you for having us.

CHIEF JUDGE MYERS: Great. What I'd like to do, Christy, if we could just start with you, is just tell us a little bit about yourself in connection with the idea and topic of mediation.

MS. FOLEY: So I've been a mediator since 2009 and since 2016, I've actually served on Florida's Mediator Ethics Advisory Committee. So I am a bit of a rules nerd when it comes to the ethics of it all and I really enjoy having informed debates about the different ethical issues that can pop up in mediation. So for the past year and a half or so I've been serving as Chair of that MEAC Committee which has been fantastic.

CHIEF JUDGE MYERS: Great, thank you. And Jamie, from your perspective, a little bit about your background in connection to mediation.

MS. GILLESPIE: Sure, so I've been with Tyler Technologies for almost 20 years now doing multiple different implementations through our court systems and we acquired Modria about two years ago, and I took over that business and subsequently became a mediator as well just so I understood the business and all the components of it. So definitely a lot of learning over the last few years.

CHIEF JUDGE MYERS: Great. We'll we're going to head down a path that I think is going to take us toward the newest technological advances in mediation. But what I want to start with is a little bit of a conversation around traditional mediation and its use in the resolution of disputes or law suits and things like that. So Christy, tell us just from your perspective, you are a lawyer.

MS. FOLEY: Um-hum.

CHIEF JUDGE MYERS: Okay. And you were trained in traditional mediation techniques and practices. So I think historically we know that mediation came about some time in the 1970s. That's really when it became prominent in use in the court system, although used well before then for resolution of all types of disputes, I think including specifically things like labor disputes, I think was a heavy area where mediation became effective. Tell us a little bit about the traditional mediation process.

MS. FOLEY: So in the traditional mediation process, you are gathering everyone together in the same room, at least to start in most cases. And you are asking everyone to kind of present their side of the argument and then you break out into caucus sessions typically in which you know, you stay in your room until you reach a resolution and the mediator is kind of like a ping-pong ball, goes back and forth to try and help parties move closer and closer to settlement.

CHIEF JUDGE MYERS: And so unlike a traditional dispute resolution where perhaps the judge or an arbitrator would decide the issue, what's the role of the mediator?

MS. FOLEY: As a mediator, I don't get to make any decisions. Self-determination is all on the parties, not on me, so I get to ask some questions. I get to ask them to think through things in detail and think about the arguments that the other side is presenting me with, but ultimately it's up to the parties to make any kind of decision and any progress toward settlement.

CHIEF JUDGE MYERS: And I know that one of the very important principals of the mediation process is confidentiality. Talk to us about that.

MS. FOLEY: Absolutely. I think one of the reasons that mediation is so effective is that people feel like they can speak openly to their mediator and they feel like this is a safe space for them. So anything that could be inhibiting their desire to reach a settlement or holding them

back in any way, that's something that they're able to talk about with the mediator and the mediator can figure out the best way to potentially use that information to help the parties reach a settlement.

CHIEF JUDGE MYERS: And I know a concept that's going to become important to us as we talk about the online dispute resolution process is synchronicity, the idea of synchronous and asynchronous communication. Tell us a little bit about that in the traditional mediation context.

MS. FOLEY: In traditional mediation, you're sitting right next to someone having a conversation with them. Everything is happening in live time. There's no delay whatsoever. And even if you do an online format, mediation, where you're doing virtual conferencing, you still have that advantage we well.

CHIEF JUDGE MYERS: Jamie, you said that you went and obtained your certification as a mediator, is that right?

MS. GILLESPIE: That's correct, yes, sir.

CHIEF JUDGE MYERS: Tell us a little bit about that process and was that in mediation, in the traditional context?

MS. GILLESPIE: It was, yes, it was in the traditional, you know, 40 weeks setting of going through all the different components of mediation and the different types of ADR components in general. There wasn't really at the time a focus on ODR. That's really just starting to kind of get more and more prominent in the states, really just more about the caucusing, how to negotiate with the parties and all the different aspects of that.

CHIEF JUDGE MYERS: (Music) There are a number of barriers inherent to traditional mediation processes. The advancement of technology brings us a significant opportunity to overcome some of those barriers while still accomplishing the goal of facilitating settlements. In traditional mediation, the personal presence of all of the parties is required. People might have to travel hours to appear in person for a mediation session. Then there's cost, and not just the costs of the mediation itself, but there's lost wages, lost productivity, and lost time. So throughout the rest of the podcast, we're going to dive into some of these barriers a bit. We're going to pull apart why the traditional method may be worth it despite these barriers. Take a look at how e-mediation and online dispute resolution aimed to eliminate these traditional obstacles, and begin to uncover the barriers that are inherent to the virtual and online formats.

Christy, you have described in your background for me a little bit about moving from the traditional mediation process into a place where you're able to take advantage of some of the technology that we have – that has really become an important part of the mediation process. Talk to us about that and I guess you call it, e-mediation?

MS. FOLEY: I do. So about a year and a half ago, I started conducting e-mediations, more so out of necessity than anything else. We had parties who were located in different parts of the state and were unable to travel. And they wanted to conduct a mediation. Their hearts were in the right place. They wanted to try and settle a claim. And so we came up with this idea of virtual conferencing, where we're all able to see each other, even though we're in different locations. And we're able to break out into virtual caucus rooms. We're able to share documents, share power points, and communicate via chat as well. And it is probably the closest thing to a traditional mediation that I think you can get while utilizing technology and having everyone separated by distance.

CHIEF JUDGE MYERS: And so some the advantages then is it cuts down on travel costs, obviously.

MS. FOLEY: Absolutely. It's also a lot more convenient for people, particularly I think if you're dealing with someone who's elderly or someone who has an injury, or a disability, you know, travel for them is incredibly challenging. So letting them stay home, letting them stay in a place of comfort is also helping them to feel calmer and more secure when they're going through what can be a challenging or uncomfortable mediation process if they've never been through it before and don't know what to expect.

CHIEF JUDGE MYERS: In the role of mediator, how important is this concept of trust?

MS. FOLEY: Incredibly important. As a mediator, right from the moment I am introducing myself to the parties, I am trying to build trust with them because ultimately they are putting one of the most challenging experiences of their lives into my hands to try and help them resolve it and be able to move forward. And so I have to be someone that they can trust and talk to openly so that I can try and help them with that.

CHIEF JUDGE MYERS: And in the context of video or e-mediation, do you find that that helps you in being able to establish trust even though you're remote from each other in the process?

MS. FOLEY: I find that the virtual conferencing, the e-mediation is definitely more effective at building trust than let's say a telephonic mediation where you're not able to read any body language, people can't see you smiling, people can't see that genuine look in your eyes. I do however also find that as a mediator I have to work extra hard in an e-mediation to really

build that trust with the parties. Particularly if I'm mediating for people who have never mediated with me before.

CHIEF JUDGE MYERS: How about the confidentiality aspect? How do you address that in the e-mediation?

MS. FOLEY: I actually put everyone on the same playing field for that so I not only mention that we can't have any kind of recordings, video or audio, but that we also can't have anyone eavesdropping at the door and I ask everyone to just take their web-cam and you know slowly just show a whole perspective, 360 degree of the room. And I do the same thing myself. And this way we can all feel comfortable that we are the only people in the room and we know truly who all the participants are.

CHIEF JUDGE MYERS: How about cost? You know, in the judicial system, we sometimes lose a little bit of sensitivity to the idea that the things that we insist of folks to participate in are expensive. How does mediation and e-mediation compare/contrast in that way?

MS. FOLEY: I think that one of the many advantages of e-mediation is that people don't have to come downtown necessarily, come to a set location to do their mediation so they may be saving on gas money, bus fare, that kind of thing. Also, they may not need childcare, depending on the age of the child. If they're able to be home but not supervising the child, that can save them money as well. And also not paying for parking. So I think there's some little costs that can add up for people, particularly in small claims court that you're able to avoid having them incur by conducting e-mediation.

CHIEF JUDGE MYERS: Great. Jamie, let's talk a little bit about ODR, online dispute resolution. Tell us, sort of give us the 30 thousand foot view. What is it?

MS. GILLESPIE: So online dispute resolution is really an online website, or kind of playing field that allows the parties to come in and start those negotiations and start those discussions. And really it starts out with a diagnosis where we're just trying to understand what the problem is and what would be a satisfactory resolution for the parties. And then as we get that information, then we're helping the parties negotiate with each other just between the parties at this time. If they're able to successfully come to a resolution then that's great, but if they're not, then we pull in a live mediator who can then join in that process as well and help them to kind of help guide them to a resolution. And when it's done online, all of the, you know, benefits that Christy was talking about is really the same when you see it, you know, in online dispute resolution and also it can complete all of those documents and file those back through the court so it really kind of helps – helps the parties get everything that they need to complete the case.

CHIEF JUDGE MYERS: And so as we – let's drill down a little bit into the process. First of all, how long has it been available or utilized in the United States?

MS. GILLESPIE: So it's actually been available since probably the early 90's, that it really was more focused in the e-commerce world and so it's really kind of started to shift into the judicial phase over the last few years, probably about the last two-and-a-half to three years it's really become a lot more prominent.

CHIEF JUDGE MYERS: I understand that this type of system is used to resolve disputes on some of those major e-commerce websites, things like eBay and other types of sites like that with tremendous success.

MS. GILLESPIE: Yes, that's correct. The success rate that they have is extremely high allowing the parties to negotiate.

CHIEF JUDGE MYERS: And a huge number of successes as well. I've heard numbers for eBay in the tens of millions of disputes that are resolved every year.

MS. GILLESPIE: That is correct. Before online dispute resolution, they were actually using people to do that kind of intermediary between the buyers and the sellers, so they were having to really hire up and get a lot of staff in order to cover the amount of disputes that were coming in.

CHIEF JUDGE MYERS: That's incredible. In your experiences, have you – well, let me ask this first question, have you ever participated in a mediation like that?

MS. GILLESPIE: I have. I had a – I had an in-person mediation. I have not participated in an online mediation. When I went through a mediation, it was a little bit before this time of online dispute resolution.

CHIEF JUDGE MYERS: Let's talk about your personal mediation experience without any of the details because obviously everything that was accomplished there was confidential but was it successful?

MS. GILLESPIE: It was successful, and honestly I went into the situation a little bit skeptical, not because I didn't believe in mediation but I just wasn't sure that the opposing party was willing to, you know, was going to be able to settle in this scenario but it was successful.

CHIEF JUDGE MYERS: Good. And your feelings walking out of that experience?

MS. GILLESPIE: Very satisfied and you know, really felt like I was – I got most of what I wanted out of the situation, and that I could move forward from where we were.

CHIEF JUDGE MYERS: And so Christy mentioned the idea of self-determination and how important that is. Is that an experience that you had?

MS. GILLESPIE: That's definitely an experience that I had, and you know, I really think that that's one of the things that you have to explain to the parties that are participating in this. But that's one of the huge benefits of any kind of dispute resolution in general, that this is really they're only opportunity to kind of make that decision on their own or participate in what the final outcome is. You know, once it goes into the hands of the judge, they're limited to what the rules and the law is, but through mediation you can actually come up with a resolution that you're satisfied with.

CHIEF JUDGE MYERS: Great. Christy, I didn't ask you that question. Have you ever been a participant in a mediation other than as a mediator?

MS. FOLEY: I have not, no.

CHIEF JUDGE MYERS: Interesting. Let's talk a little bit more, Jamie, about the online dispute resolution process and let's kind of bring it down to a practical example. We've got two parties who are engaged in a dispute over a relatively modest sum, let's say \$1,000 or \$2,000 and maybe it relates to a home repair. And in this context I think the case gets filed here in our small claims court.

MS. GILLESPIE: Correct.

CHIEF JUDGE MYERS: And once that dispute is filed and the case is referred to an online dispute resolution process, what does that look like for the participants?

MS. GILLESPIE: All right. So once it's filed, and I'll take a little step further on explaining, let's just say in this scenario, that maybe the contractor wasn't paid for their services. So the contractor would file the case. They would then serve the defendant just like in the normal way that we do that processing through the court. Then we would invite the plaintiff to log into the website. Also, we would send an email to them with instructions, and we also go through a lot of this stuff that we were talking about with Christy that, you know, the confidentiality, and kind of explaining what mediation is and what the benefits are. They would get online at their convenience. The website is available 24/7 so there's no reason that they have to schedule a time or, you know, do it – take time away from work or anything. So they would get online and they would start answering the questions, so it's kind of a guided walk-through. And then again, what we're doing at this stage is we're trying to understand what the problem is and what they would be satisfied with as a resolution. You know, the whole court system and the cases that we have are very emotional for people, and a lot of times people don't – they haven't been – haven't experienced this so we're trying to pull as much of the emotion out of it and just really try and get to the facts and allow them to answer the questions without all of the back story that sometimes gets them more and more upset as they go through that. So once the plaintiff completes all of their information to get it started, it then goes to the defendant through an email, so they will get an email to invite them to participate. They'll see the same terms and conditions so they'll understand what the process is. Once they click that link it will take them to that secure website. And it will ask them a set of questions as well and allow them to kind of propose an offer, whether that offer is that they don't owe anything or, you know, maybe some

range that's less than the one or two thousand dollars that the plaintiff is suing for. If they're able to come to a resolution right there, then the case is complete and they sign it. If not, the system allows them to go back and forth between each other so maybe the defendant would propose a number that's a little bit less than what the plaintiff wants. The plaintiff would then get invited back in. The benefit of this and you talked about this earlier was the asynchrony communication. So each party can do this at their own time so if one party is, you know, works nights and needs to do it at 8 a.m., they can do that while the other party maybe wants to do it at home in the evening before they go to bed. There's no scheduling for them to get together to have to participate. There's time limits on all of that so, you know, we don't want them to negotiate for four months, you know, so we do put time limits on it based on the court calendar and the processes that the court has. Once they either expire that time limit or if they say, hey, we're not going to be able to come to a resolution on our own, we then pull in a mediator. And that mediator does the same thing that they would do in the in-person space so they have a place that they can talk to the parties in group. They also have private caucus areas where they can individually caucus with each party and really understand what the perspective is, and then they go through that same process until a resolution is had or until the final time limit has been reached.

CHIEF JUDGE MYERS: So one of the – I was a trial lawyer, and when we had cases to be resolved, and wanted to go to mediation, there might frequently be motions asking for a party to be excused from mediation or to be able to appear telephonically. And the traditional response, Christy?

MS. FOLEY: Traditionally, people are not too open to that. You will see it on occasion though, especially the telephonic appearance can get approval, and it's a little more acceptable.

CHIEF JUDGE MYERS: And the motivation for that is really the idea that, well, let's get everybody together into the same space, into the same room, and see if the dynamic of everybody's presence with a motivation to resolve a case might assist the parties in coming together. Is that fair?

MS. FOLEY: Absolutely. I think having everyone together shows a level of commitment to resolving the case. That is really important and just knowing that everyone is devoting time and attention to it also helps people feel like people are here in good faith and want to settle.

CHIEF JUDGE MYERS: So, Jamie, in the context of online dispute resolution, how do we capture that dynamic?

MS. GILLESPIE: You know, that's definitely – that's a good question and really allowing the parties to kind of communicate back and forth and explain a little bit to the mediator really helps them feel like they're getting their day in court and their side is being understood. So it kind of helps them to get to that point.

CHIEF JUDGE MYERS: And we've talked a little bit about the idea of trust, Christy, how important that is for you as a mediator in being able to effectively move the parties. In the online dispute resolution, certainly when a mediator gets involved, there's that opportunity, and, of course, there's the imprimatur of credibility of the court since it is a court driven process. Jamie, do those things help from your perspective on the trust issues?

MS. GILLESPIE: I think absolutely they do. And you know one of the – some of the feedback that we've gotten from mediators that have participated in this said that they end up using a lot more pleasantries of good morning and how are you doing today, those type

conversational pleasantries that they may not necessarily always use in person because they are able to do a lot of the body language of the smiling and shaking hands, and that kind of stuff.

CHIEF JUDGE MYERS: And do you think that in this era where we have become so comfortable with technology, emailing and instant messaging, and participating in chatroom type of conversations, do you think that's of some benefit in this online dispute resolution process?

MS. GILLESPIE: Absolutely. And really you're seeing a generation that is expecting that this is kind of the way that conversations work. They rarely pick up the phone. Everything is either through a text or, you know, some kind of online chat, so that is just kind of the expectation of how things work.

CHIEF JUDGE MYERS: One of the issues that you had talked about, Christy, was this idea of benefit of e-mediation, is the ability of the mediator to see facial expressions and body language. Tell us again how important that is for you in the e-mediation context.

MS. FOLEY: Well, as a mediator, my job is to read people and to use what I read in them to help move them towards settlement. So any clue I can potentially get toward reading them more effectively is helpful. Things like their facial expressions, their intonation when they're speaking, their -- even body position overall. If they seem engaged in the mediation or if they seem too nonchalant, in like their heart's not in the settlement. Things like that really help me know what direction to move parties in and where to steer the conversation.

CHIEF JUDGE MYERS: And Jamie, thoughts on that? How do we take advantage of communication style and the -- the things that we observe visually in communication in the online dispute resolution?

MS. GILLESPIE: You know, you really are – you’re kind of shifting the visual cues that you have that Christy was just talking about and looking more into what they’re saying and the way that they’re responding to the questions that you’re asking through the messaging, and you’re going to have to start picking up more and more of those messages there.

CHIEF JUDGE MYERS: One of the topics that’s critical to the court is access to justice, and I know we have that conversation in a lot of different venues about a lot of different techniques and methodologies. Talk to us a little bit about that, Jamie, for the online dispute resolution process.

MS. GILLESPIE: Yeah, for the online dispute resolution, you know, really when you have – we have areas within the country that are not served by mediators. There’s just not an influx of mediator professionals that are available and so we don’t want to deprive them from the same opportunities that some of our larger urban areas have. So that’s one of the main, you know, of the benefits. And then we also have – some of the stuff that Christy talked about earlier, people that maybe are having an issue getting to court or they don’t have, you know, child care. We also have, you know, situations where we have people that are scared of going into the court. They don’t – they’ve never participated in a process like this and just going into a courthouse is very intimidating for them and they’re stressed and anxiety goes up so much. By offering this, you’re really allowing them to participate in the process without those fears. And, you know, the cost of doing something like this is reduced greatly. They’re not having the travel costs that’s associated with this, potentially the parking, and you know, the time is shortened as well, so you have that.

CHIEF JUDGE MYERS: We know frequently when people come to visit the court that they’re having to take off of work, and so it’s sort of the double whammy where you might end

up in a mediation context having to pay money and in addition to that, now you've lost your ability to work. Is that something that you see as a dynamic in the mediation?

MS. FOLEY: I see it all the time because I volunteer here as a mediator in small claims and county claims, and so I see that quite frequently. And that is a big concern to people and that's also something that makes them worry about whether they have to come back to trial as well, because if their case doesn't settle in mediation and they have to come back for a trial, then they're looking at taking another day off work and losing even more money. So that's something that we talk about often in mediation, whether that's something that is practicable for them.

CHIEF JUDGE MYERS: That's great. Jamie –

MS. GILLESPIE: Can I add to that?

CHIEF JUDGE MYERS: Please.

MS. GILLESPIE: You know, if you think about a case of even beyond your small claims, like kind of an eviction case, a lot of the time the parties are unable to make the payment there that's in front of them for their housing and then they're in a situation where we're asking them to take off work, and they may not get paid for that time off of work, that's just getting them further and further behind on some of those bills that they have outstanding. So I think like what Christy said, it's just showing them that there is an opportunity that's outside of that that can get them a resolution that they're satisfied with.

CHIEF JUDGE MYERS: Excellent. Christy, any thoughts to wrap up?

MS. FOLEY: You know, I'm just really excited to see where online dispute resolution takes the nation and specifically the Ninth Circuit. I think that it does have some access to justice benefits and I think as a mediator, it's going to require a big shift in my perspective on traditional mediation and how that can be applied in the online dispute resolution world, but I'm excited to shift that perspective. I'm excited to figure out how it all works.

CHIEF JUDGE MYERS: Wonderful. Thank you. And Jamie?

MS. GILLESPIE: You know, I really think that online dispute resolution is the way of the future. It's really going to help us transform the judicial system, so we've seen it all over the United States and even outside the United States. I think it's not a matter of if it's coming, I think it's just a matter of when.

CHIEF JUDGE MYERS: Well, in the Ninth, it's certainly our desire to take full advantage of those technologies that can improve access to justice, that make it more convenient, that make it easier, candidly, for litigants to be able to resolve disputes in a way that they do have self-determination and self-control because we know how important that is in the concept of procedural due process. Yes, I got my day and yes, I was able to resolve the dispute.

Christy and Jamie, I want to thank you both for joining us today. We're excited about what the future holds and maybe we'll be here in a follow-up conversation in a few years to talk about just how beneficial it's been. Thank you.

MS. FOLEY: Thank you.

MS. GILLESPIE: Thank you very much for having me.

(Music)

CHIEF JUDGE MYERS: Acknowledging the tremendous success of online dispute resolution in e-commerce disputes, the Florida Supreme Court developed a pilot program to test its benefits here in our state courts. The Ninth is one of six circuits piloting the project. We will be running online dispute resolution in small claims cases in Orange County. Those are cases where the disputes, where the value is less than \$5,000. The move to online dispute resolution has the potential to greatly increase access to justice. The online mediation process is web-based and the parties can negotiate directly with one another whenever is convenient. Once they reach an agreement, documents will be automatically filed with the court and if they fail to reach an agreement, they can request a certified mediator to continue on with the process in hopes of resolving the dispute. It's an important step in the evolution of how Florida handles dispute resolution and the accessibility of our courts. And it's a step that the Ninth is glad to take as a part of this pilot project.

NARRATOR: You've been listening to "Open Ninth: Conversations Beyond the Courtroom" brought to you by Chief Judge Don Myers and the Ninth Judicial Circuit Court of Florida. For more information about the Ninth Judicial Circuit Court, follow us on Twitter, Facebook, Instagram and LinkedIn.

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