

INTRODUCING - THE VOLUNTEER MEDIATION PROGRAM IN DENVER PROBATE COURT

By
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With appreciation for the assistance of Gina Bata*

This article provides an overview of mediation in probate cases and the volunteer mediation program developed in Denver Probate Court (“the Court”) with the assistance of the Colorado Bar Association.

WHAT IS MEDIATION AND WHAT ARE THE BENEFITS?

Mediation is a recognized tool for assisting in dispute resolution both within and without the judicial system. In recent years courts have shown increased interest in mediation as a means for assisting parties to resolve conflicts by mutual agreement. Mediation programs have expanded in probate court settings primarily because these courts hear cases involving personal and family relationships - cases particularly well-suited for resolution by mutual agreement.¹

Mediation is a consensual process in which a neutral third party, with little or no decision-making authority, helps people reach a mutually acceptable solution to a dispute.² There are two primary approaches to mediation –evaluative and facilitative. The evaluative approach to mediation focuses on the parties’ legal positions and assesses liability or fault based on facts in the past. This mediation style is thought to work well for settlement of financial disputes. On the other hand, facilitative mediation, which is also known as interest-based mediation, is more process oriented and encourages parties to clarify individual needs and to reach a lasting solution that will continue to work in the future.³

In interest-based/facilitative mediation the participants meet together as a group with one or more mediators. In a probate case this approach to mediation can help parties and interested persons to:

- Clearly communicate their concerns and feel that their interests are being recognized;
- Identify issues and craft personalized solutions to meet individual needs, as opposed to “legal issue” outcomes;
- Consider less restrictive alternatives;
- Solve a problem in a more “win/win” manner, with less emotional trauma than involved in “win/lose” or “lose/lose” outcomes in litigation; and

- Develop communication skills that can enhance family and personal relations beyond the mediated agreement so that future disputes can be better managed or avoided.⁴

Mediation that resolves disputes also can benefit courts by reducing the number of contested issues proceeding to trial and improving management of pre- and post-appointment of guardian disputes.⁵

Early this year Denver Probate Court Judge C. Jean Stewart and a joint committee of Dispute Resolution, Elder Law, and Trust and Estate Sections of the Colorado Bar Association (“the Joint Committee”) collaborated to provide mediation services to parties in court-referred cases. The resulting mediation program provides volunteer mediators, using the interest-based/ facilitative approach, to assist people in developing mutually acceptable solutions to a conflict. There are several types of probate cases which are particularly amenable to resolution through mediation.

THREE CONFLICT SCENARIOS IN PROBATE CASES

Disputes in protective proceedings in probate courts primarily evolve from family and personal relationships.⁶ The following scenarios are examples of conflicts that frequent probate court dockets:

- 1) In guardianship proceedings where an adult has been determined to be “incapacitated,” family members or other interested persons may compete for appointment as guardian. Mediation may facilitate a choice of appropriate guardian.
- 2) A parent who was not able to meet parenting responsibilities and earlier consented to appointment of a guardian for her/his minor child, now wants to terminate the guardianship based on the desire to resume parenting. Mediation can assist the family and guardian in identifying and promoting the best interests of the child.
- 3) Family members or other interested persons claim that the guardian of an adult or a minor, is unreasonably restricting access to the father/mother/partner/child. Mediation can help clarify the issues and encourage constructive communications to solutions.

Solutions to family and relationship issues such as these can be complicated and contested. Mediators can help the parties consider different perspectives and alternate resolutions.

THE MEDIATION PROCESS

Interest-based/facilitative mediation is the model used by volunteer mediators in the Denver Probate Court mediation program. Judge Stewart and the Joint Committee agreed that this form of mediation was most suitable because it encourages dialogue among the participants and the mediators can facilitate development of solutions responsive to the family's situation. Opportunities to express personal concerns and needs and to participate in the decision-making process are empowering to the participants. The result is that they exercise control over the process of self-determination, an important component to a successful mediation process.⁷

This mediation program in Denver Probate Court uses two volunteer co-mediators. The mediators are lawyers and non-lawyers with experience in mediation, probate law, or both.⁸ Co-mediators "may complement each other by gender, personality, culture, professional background or other ways in a manner that can improve the quality of both the mediation process and its outcome."⁹ Considerations in selecting the professionals to co-mediate in the Denver Probate Court mediation program include subject-matter and mediation expertise, the issues being mediated, parity of gender of the mediators, preference and availability of the professionals.

In addition to potential benefits to participants in the mediation process, the Court may realize some time and cost saving efficiencies from disputes being resolved earlier in the judicial process or with less judicial resources.

DEMOGRAPHICS IN DENVER COUNTY AND CASE FILINGS IN DENVER PROBATE COURT

The 2000 U.S. Census estimated the population in Denver County at about 554,000.¹⁰ By 2009 Denver's population was estimated to have increased by more than 10% to over 610,000.¹¹ A population forecast for Denver projects that from an estimate of over 579,000 in 2005, the population will increase to over 626,000 in 2015 and to almost 660,000 by 2020.¹² Less conservative estimates project Denver's growth from about 577,000 in 2005 to over 674,000 in 2015 and over 700,000 in 2020.¹³ Between 2000 and 2014 the median age of Denver's population is estimated to rise slightly from 33 to 35 years old.¹⁴

DEVELOPMENT OF THE VOLUNTEER MEDIATION PROGRAM IN DENVER PROBATE COURT

Denver Probate Court refers dozens of cases to mediation each year, according to Judge Stewart.¹⁵ Some cases are referred for free evaluative mediation to Judge Kim Goldberger, a Senior Judge assigned to the Court for 15 days per year. In other cases the parties are ordered to mediate and the Court provides general guidelines on how to select a fee-based mediator but does not make a specific referral.¹⁶ The mediation program developed this year by the Court and the Joint Committee utilizes volunteer mediators and provides a third option for the Court when interest-based mediation is deemed to be of potential benefit to the parties.

For many years Judge Stewart envisioned a volunteer mediation program to serve indigent parties who appear in her court. Concurrently, members of the Joint Committee have been interested in making mediation services more accessible to persons involved in probate court proceedings. In February 2010, Judge Stewart invited mediators and attorneys to the Court to discuss development of such a program. Included in this group were members of the Joint Committee and Denver Probate Court staff involved with program implementation: Jennifer Shaler (Law Clerk), Beth Tomerlin (Protective Proceedings Facilitator) and Gina Bata, newly appointed by Judge Stewart as Coordinator for Volunteer Mediators. Bata also has served as liaison for the Court with the Joint Committee while details of the mediation program have been developed.

Following the February 2010 meeting with Judge Stewart, the Joint Committee prepared proposed forms and plans for the mediation program. Together, the Joint Committee and the Court staff developed a case management plan, an Order to Mediate, a mediation information sheet for parties, an Agreement to Mediate, and a Mediator Application form.

The Joint Committee also developed plans for educational interdisciplinary training for lawyers and mediators. In September 2010, the Joint Committee sponsored the first of a series of planned professional education credit training programs to promote understanding of issues in probate proceedings and practices that can enhance the mediation process. The first educational program addressed guardianships for adults and minors. The next program is scheduled for January 11, 2011. The Joint Committee hopes to continue working with the Court to evaluate and improve the mediation services.

OPERATION OF THE VOLUNTEER MEDIATION PROGRAM

The process for referring a case to mediation is simple. Judge Stewart and Magistrate Rubin Hernandez work with Tomerlin, the Court's Protective Proceedings Facilitator, to identify mediable issues within cases. Once an issue is identified, Tomerlin sends Bata a case description and relevant court documents. Bata forwards this information to the co-mediators who are assigned

from the volunteer pool based on the professionals' experience, preference, and availability. The mediators review the court documents but do not contact the parties before the mediation.

Most but not all of the parties are either indigent or appearing without counsel or both. All parties referred to this volunteer mediation program are involved with an issue that is deemed particularly well-suited for interest-based mediation.

Mediations take place at the Denver Probate Court and are usually scheduled for two to three hours. If an agreement is reached, the parties meet with the Judge or the Magistrate on the same day to enter their agreement into the record. The Court then can issue an order that incorporates the agreement. If no agreement is reached, this fact is reported to the Court. Bata maintains a record of cases referred to volunteer mediators and whether an agreement was reached. Cases for which a member of the Joint Committee served as a mediator are debriefed, without reference to party-specific identifying information, at a later Joint Committee meeting, as a tool for increasing the committee's understanding of issues and processes.

CASES REFERRED TO MEDIATION AND ILLUSTRATIVE ISSUES

The Denver Probate Court attempts to refer every contested matter to mediation. Judge Stewart began referring cases with indigent parties to this mediation program in April 2010. Both new filings and older cases with on-going issues are referred to mediation. Cases referred to this mediation program were originally filed from 2006 through 2010 with equal distribution amongst those years. Of the 14 cases referred to this mediation program as of December 2010, the mediation process led to resolution of the issues between the parties in 12 of the cases, for an 85+% resolution rate.

The following examples illustrate types of cases being referred to the volunteer mediation program. Four cases involved issues in guardianship of a child. For example, after the death of his daughter, a grandfather wrote to the Court seeking visitation with his grandchildren who currently resided with their father/stepfather. The father and grandfather met with two volunteer mediators to discuss the matter and work out a visitation plan.

Six other cases involved issues surrounding guardianship/conservatorship of an elder. For example, after an elder was diagnosed with dementia and deemed to be incapacitated by the Court, two of the elder's friends filed competing petitions to be appointed as guardian and conservator. The elder's friends met with two co-mediators and discussed their concerns and wishes regarding care of the elder. The elder's friends were able to agree on who would be appointed as the guardian, and this decision was then discussed with and presented to the court.

CONCLUSION AND SUGGESTED TOPICS FOR FURTHER DISCUSSION

Mediation increasingly is being used in probate courts to assist in resolving family and relationship issues.¹⁷ Interest-based/facilitative mediation can provide parties, interested persons and the Court with short-term and long-term benefits. Participants can acquire a better understanding of needs and concerns in the case, can craft a resolution responsive to their dispute, and have an opportunity to improve communication and problem-solving skills that may enhance their effectiveness working together on an on-going basis.

The process, results and benefits of mediation services in probate proceedings can be evaluated in a number of ways. Topics for further discussion might include:

What considerations may influence the participation of the ward/child in mediation of guardianship issues and the protected person in conservatorship cases?

Who can provide the voice of the ward/child/protected person who is unable to voice their own preferences?

What are the roles of the mediator, the parties and the lawyers in mediation?

Are there needs and benefits for mediation services to persons prior to initial filing of a probate case or prior to filing a petition in an on-going probate case?

Is the protocol of the Denver Probate Court volunteer mediation program adaptable for probate divisions in other judicial districts?

Persons interested in the volunteer mediation program in Denver Probate Court are encouraged to contact Gina Bata, Coordinator for Volunteer Mediators for the Court (ginabata@gmail.com) and to attend meetings of the Joint Committee (Dennis Whitmer, Chair), held monthly on the third Thursday at 11:00 a.m. at the offices of the Colorado Bar Association.

- Gina Bata is the Denver Probate Court's Coordinator for Volunteer Mediators.

Endnotes:

¹ Wolfe and Mullen, "Mediation in the Probate Court," New Hampshire Bar Journal (March 1, 2001), <http://www.nhbar.org/publications/archives/display-journal-issue.asp?id=213>; and Hahn,

"Elder Mediation Comes of Age in Colorado," *The Colorado Lawyer* (March 2010), Vol.39, No. 3 [Page 45].

² Hahn, *supra*; Seal and Kirtland, "Using Mediation in Guardianship Litigation," *The Colorado Lawyer* (March 2010), Vol.39, No. 3 [Page 37].

³ Seal and Kirtland, *supra*; Hahn, *supra*; and Wolfe and Mullen, *supra*.

⁴ Hartman, "Adult Guardianship Mediation," ADR Handbook for Judges, American Bar Association, pp. 141-165 (2004); Hahn, *supra*, addresses interest-based, facilitative model of mediating issues involving elders; and Wolfe and Mullen, *supra*.

⁵ Hartman, *supra* at 143.

⁶ Wolfe and Mullen, *supra*.

⁷ *Id.*

⁸ *Id.* The use of non-lawyers as mediators in court-connected mediation programs is supported by research showing mediators who were lawyers with subject matter expertise performed no better than mediators who were not lawyers.

⁹ Rendon, "Interdisciplinary Co-Mediations: The Good, the Bad and the Imago," <http://www.mediate.com/articles/rendon5.cfm>.

¹⁰ See <http://quickfacts.census.gov/gfd/states/08/08031.html>

¹¹ See <http://quickfacts.census.gov/gfd/states/08/08031.html>

¹² See <http://www.drcog.org/index.cfm?page=PeopleandHouseholds>, "Historic and Projected Population" tab.

¹³ See <http://www.metrodenver.org/demographics-communities/demographics/population.html>

¹⁴ See <https://edis.commerce.state.nc.us/docs/countyProfile/CO/08031.pdf>

¹⁵ Conversation of Gina Bata with Judge C. Jean Stewart on 11/18/2010.

¹⁶ Any fee-based mediator may add his or her name to a list made available to the parties through the Court's "matchmaker" program at the Court's website <http://www.denverprobatecourt.org/matchmaker.htm>. A form for submitting information about the mediator's services is available on the website.

¹⁷ Wolfe and Mullen, *supra*.