NEW YORK CITY BAR

REPORT OF THE ALTERNATIVE DISPUTE RESOLUTION COMMITTEE

REVIEW OF THE NEW YORK COUNTY SURROGATE'S COURT PILOT MEDIATION PROGRAM

INTRODUCTION

This report documents a project commenced in 2009 by the Alternative Dispute Resolution ("ADR") Committee of the New York City Bar Association ("City Bar") to create a pilot mediation program for disputes in New York County Surrogate's Court. The initial Surrogate's Court Mediation Advisory Committee ("Advisory Committee") consisted of ADR Committee members, participants from the New York State Bar Association, and several highly experienced mediators and academics.

The program remains today in pilot status, transitioning from Hon. Kristin Booth Glen to Hon. Rita Mella, her successor as a New York County Surrogate as of January 1, 2013. Originally designed primarily as a court-annexed program for difficult cases designated by the Surrogate, the pilot program since early 2013 has been structured and operated as an "opt-in" program administered by the Advisory Committee.

BACKGROUND

In early 2009, Judge Kristin Booth Glen, one of the two Surrogates for New York County, offered the City Bar's ADR Committee the opportunity to help design and implement a mediation panel for parties litigating in the New York County Surrogate's Court. The ADR Committee, chaired by Daniel Weitz, formed a subcommittee for that purpose, made up of members of the ADR Committee as well as representatives from the Trusts, Estates and Surrogate's Court Committee.

Soon thereafter, members of the Mediation Committee of the Dispute Resolution Section of the New York State Bar Association (NYSBA) joined the project, which became known as the "Advisory Committee." By mid 2010, the Advisory Committee had prepared a formal Statement of Procedures, model forms of Order of Reference and a form of Stipulation to Mediate, and had compiled a panel of experienced mediators. Drafting the Statement of Procedures was a collaborative effort of the Advisory Committee and Judge Glen, supported by the expertise of Surrogate's Court Attorneys including, particularly, Jessica Amelar, whose skills made the various documents both internally consistent and compatible with the Surrogate's Court Procedure Act.

THE DEVELOPMENT OF THE MEDIATION PILOT PROGRAM

Although the structure of the program was modified in 2013 from the original court-annexed model to a party-driven model, it is useful to review the issues addressed and resolved at the outset and as the program evolved.

In addition to Judge Glen, the following members were instrumental in the work of the Advisory Committee:

- Richard Lutringer, Task Force Chair (City Bar ADR Committee)
- Jessica Amelar (Court Attorney, NY County Surrogate's Court)
- Leona Beane (NYSBA DR Section)
- Gail Davis (NYSBA, DR Section)
- Meena Goel De (NY County Surrogate's Court; City Bar T&E Committee)
- Elayne Greenberg (NYSBA ADR Committee; St. John's Law School)
- Irwin Kahn (City Bar ADR Committee)
- Lela Love (Cardozo Law School)
- Janet Mishkin (Court Attorney, NY County Surrogate's Court)
- Regina Ritcey (City Bar ADR Committee)
- Kathleen Roberts (JAMS)
- Amy Sheridan (City Bar ADR Committee; NY Unified Court System)
- Seth Slotkin (City Bar T&E Committee)
- Daniel Weitz (City Bar ADR Committee (Chair)/ NY Unified Court System)
- Hope Winthrop (City Bar ADR Committee)
- Peter Woodin (JAMS; City Bar ADR Committee)

Later in the process, the Advisory Committee added two additional members**,** Simeon Baum (NYSBA, DR Section) and Robert Steele (NYSBA, DR Section), both of whom were extremely valuable in the development of the program and the workshops.

From May 2009 through mid-2010, there were numerous in-person and telephonic meetings of the Advisory Committee as well as the circulation of drafts and proposals.

Members of the Advisory Committee reviewed the literature describing existing mediation programs in probate courts in the United States as well as recommendations contained in the National Standards for Court-Connected Programs (Center for Dispute Settlement and Institute of Judicial Administration, *National Standards for Court-Connected Mediation Programs*, State Justice Institute (1992)), and were guided by the New York State Unified Court System ("UCS") guidelines for court-annexed ADR programs.

Judge Glen had specific suggestions concerning the structure of the pilot project. To create a mediation program tailored for the Surrogate's Court, she contrasted the adversarial case volume (estimated at approximately 100 motions/month), in her part of the NY County Surrogate's Court with the massive dockets of commercial and family cases in local state and federal courts. The Surrogate's Court does not have a large backlog of cases needing resolution,

primarily due to the efforts of the capable Surrogate's Court Attorneys who regularly settle routine cases. There were, however, a number of cases, many of significant estate value, which remained unresolved, sometimes over a period of years, due in large part to a continual series of procedural motions driven by antipathy among family members. These kinds of cases, she felt, would particularly profit from mediation.

Judge Glen provided the Advisory Committee with examples of such cases, including:

- a dispute between adult siblings as to the characterization of a pre-death multi-million dollar property transfer by the decedent to one of them as either a gift or loan;

- recurring critical business and tax decisions requiring unanimity among feuding co-trustees and effect of a pre-existing trust;

- family differences of opinion regarding the actual pre-death ownership of valuable artwork, title to which was contested by beneficiaries;

- claims by a disinherited brother that a will was improperly executed and the product of undue influence and fraud by the caregiver sibling;

- disposition by the executor/trustee of hundreds of items of personal property, the value of which was contested by three co trustee siblings;

- claims of undue influence by children of decedent against decedent's third wife and claims by a former wife that a pre-existing agreement with decedent gave her rights to assets listed in estate;

- surcharge claims against trustee for unreasonable delay in transferring publicly listed stock to beneficiaries prior to steep market decline in value

During the Advisory Committee's discussions, various issues were considered in the light of general mediation principles, the needs of the Surrogate's Court and UCS guidelines for court-annexed or sanctioned mediation programs, including:

- Whether evaluative, transformative or facilitative mediation should be mandated. [It was the consensus of the group that although a facilitative approach is generally favored, the style of mediation should be determined by the parties and the mediator in each case];

- Whether subject matter expertise should be required for panel mediators. [The opinion of Judge Glen was that Surrogate's Court experience was not as critical as training and experience with family dynamics for the type of disputes which would likely be mediated under the program. For efficiency purposes, non-T&E panel mediators would be encouraged to attend specialized training in Surrogate's Court practice];

- How the program would be administered on a day-to-day basis. [Given the lack of funding available for court programs, it was the consensus of the Advisory Committee that the pilot program would depend on the good faith efforts of the members of the pilot panel to self administer the process, once contacted by the judge or the parties to a particular dispute];

- Whether the judge can be kept informed by the panel mediator of the status of a mediation as it progresses. [Mediation standards, according to members of the Advisory Committee, dictate a clear separation between the judge and the mediation. Reasons discussed for insulating the judge from the mediation included the risks of power imbalances or where one party may provide *ex parte* too much information to the court, an unwillingness of parties to be candid with the mediator about weaknesses in their position or client concerns if the judge may become aware thereof. The position reached in the Statement of Procedures was that the judge would have no contact, but that "In order for the mediator to fully understand the dispute and the legal background, the Court Attorney assigned to the case may discuss with the mediator the relevant history of the case and may clarify any applicable law and court procedures…."];

- Whether the Procedures should provide that references to mediation under the pilot program be made by the Judge or left to the parties on their own to invoke mediation under the program? [The wording settled on in 2009 was that either the judge could refer, with the consent of the parties, or the parties could "request" a referral to the program. Thus, if one party did not want to mediate, it would not be compelled to. Since mid-2013, the procedure is that only the parties can commence the referral to the program];

- How extensive with regard to the scope of the issues in dispute would the referral be? [The initial position was that it should be left to the parties to negotiate the "particular issues to be submitted to the Program for resolution…" After at least one referred mediation was never actually convened because the attorneys were unable to agree on the scope of the mediation, the Task Force amended the Statement of Procedures to provide that unless otherwise agreed by the parties and the mediator, the entire matter was within the scope of the mediation];

- How should a mediator be selected from the panel for a mediation? [The Initial Draft provided that after the parties had filed the Stipulation, the court would provide the name and contact information of the selected mediator. Parties were also free to choose a mediator not on the panel, who would, however, only have access to a Court Attorney if they agreed to be bound to the terms of the Statement of Procedures. Under the current structure, the parties select the mediator];

- What reporting requirements should the mediator have? [It was the consensus of the Advisory Committee that the mediator should be required to send a "Report of the Mediator" to the court and the parties after completion of the mediation (within 75 days), stating the date of the initial and any subsequent sessions, and

whether or not agreement on any issue was reached];

- What should be the fee arrangements for panel members? [The original version of the Statement of Procedures provided that the parties and the mediator would agree on the fee, to be shared equally among the parties, unless otherwise agreed. In an effort to stimulate the use of the program, the procedure was amended in 2013 to provide that mediators on the panel must provide two free hours of mediation services, which includes preparatory work];

- Does referral to mediation stay the litigation proceedings? [The Statement of Procedures provided an automatic stay for the 75-day mediation period, unless otherwise decided by the judge. Since the Court is not now directly involved in the program, there is no automatic stay, but the Court has informally held the proceeding in abeyance until the conclusion of the mediation].

The draft Statement included a discussion of the basic concept of mediation, since neither the parties nor their T&E lawyers were expected to be familiar with the hallmark principles of mediation such as confidentiality, party participation and party self-determination.

PRESENTATIONS INVOLVING THE PILOT PROGRAM

1. October 19, 2009 Workshop on Mediation for Court Attorneys of the Surrogate's Court

Members of the Advisory Committee presented to in-house Surrogate's Court Attorneys an introduction to mediation in general, and the pilot program, in particular. Using a fishbowl role play scenario, the presenters demonstrated how mediation techniques can address adult sibling family issues which can often derail a settlement negotiation concerning a parent's estate.

2. December 2009 Training of Roster Mediators in Surrogate's Court Practice

Court Attorneys Jessica Amelar and Janet Mishkin led a workshop for members of the Pilot Program mediation roster in the intricacies of litigation in Surrogate's Court under the Surrogate's Court Procedure Act (SCPA). For members of the roster practicing mediation primarily in commercial or family contexts, it provided an excellent introduction to the practice of estate litigation.

3. October 28, 2010 presentation to the NYSBA Senior Lawyers and Dispute Resolution Sections on "Mediation of Estate Issues and Development of the Use of Mediation in Surrogate's Court"

At this presentation, Judge Glen and Richard Lutringer described the genesis of the Pilot Program, followed by a mock mediation role play performed by Gail Davis and Barbara Levitan with Leona Beane as mediator.

4. February 25, 2014 CLE Presentation at the Surrogate's Court, "Estate Litigation in New York County Surrogate's Court: Resolving Family Disputes through Mediation"

Judge Mella invited over 65 primarily trusts and estates lawyers to a presentation by Simeon Baum, Leona Beane, Gail Davis, Gary Freidman, Lela Love, Richard Lutringer, Eric Penzer, Robert Steele, Hope Winthrop and Pauline Yeung-Ha, followed by a reception.

The event was sponsored by the ADR and Trusts, Estates and Surrogate's Court Committees of the City Bar and co-sponsored by the Dispute Resolution Section and Trust and Estates Law Section of the NYSBA, the New York Women's Bar Association, and the NYCLA Dispute Resolution Committee and Estates Trusts Section.

THE CURRENT STATUS OF THE MEDIATION PILOT PROGRAM

Judge Mella has been supportive of the use of mediation in her court and encourages parties of suitable cases to take advantage of the pilot program. She invites mediators on the panel to attend the motion calendars so that one member of the panel is always available to discuss the possibility and advantages of mediation with lawyers and/or parties while they are in the courthouse. In appropriate cases, Judge Mella personally introduces the member of the panel to counsel, asks them to meet with the panel member in the courthouse and encourages them to consider mediation in their case.

A brochure is available at the Court which contains a general description of mediation as well as the names, brief bios and contact information of the current panel of 11 mediators. The brochure also notes that each panel mediator will provide two free hours of mediation services after appointment. Since the original Statement of Procedures is no longer applicable to provide confidentiality and other boilerplate provisions, each panel mediator selected enters into a separate mediation agreement with the parties covering those points.

Gail Davis, a member of the panel, administers the scheduling for this project by sending out availability requests to the panel for motion calendar days. The role of the "panel mediator on duty" at the court is to explain and encourage the use of the mediation program, and not to be the mediator designated for that case. The parties are encouraged to contact any of the panel members, and one designated panel member follows up, provided the counsel present have indicated they would be receptive to further discussions about the possibility of mediation in such case.

CONCLUSION

The pilot mediation pilot program for the New York Surrogate's Court is still a work in progress. At the present time, the Advisory Committee has no official connection with the court, although panel members are regularly invited by Judge Mella to explain to counsel the concept of using mediation as an alternative in appropriate cases, without compelling the parties to utilize the process.

Fewer cases have been mediated under the pilot program than had been hoped -- it is estimated that panel members have mediated approximately 10-12 complex cases through 2015. (This number does not include additional cases that may have been mediated by other independent mediators after the parties were introduced to the idea by a mediation panel member or through the brochure.) In any event, the public discussion of the concept at bar seminars and the well-attended February 2014 workshop at the court directed at T&E attorneys have raised consciousness among the trusts and estates bar of the mediation alternative.

Nancy Kramer
Chair, ADR Committee

Richard Lutringer
Former Chair, Subcommittee on Surrogate's Court Mediation

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