Municipal Court Mediation:
Reducing the Barking Dog Docket

by Karen Arnold-Burger

"Judge, I work nights and sleep days. So, I am home all day and that dog barks all day long! It is driving me crazy. This has been going on ever since she and her smart-mouthed son moved into the neighborhood 7 months ago. There are other people in the neighborhood that have dogs, but they don't bark like that. You know, they just rent. They don't even own that place. And another thing, when she's gone, which seems like a lot, he has kids coming in and out of that house at all hours, smoking cigarettes and throwing the butts in my yard. And, the way they speed up and down the street, it's a wonder someone hasn't been killed."

"Your honor, I am a single mother trying the best I can to raise my teenage son since my husband died. I work two jobs and the dog does stay outside during the day. We have had a lot of change and turmoil in our family in the last year. The dog is in new surroundings and is trying to protect our home. He was my husband's dog and we could never part with him. My son and his father were best friends and it has been tough, but he doesn't have anything to do with this ticket so I think Mr. Jones should keep him out of it. And judge, I know this may not be relevant, but Mr. Jones' cat is always over in my flowerbed digging up the flowers, but I haven't said anything. In fact, if my dog is barking, it is probably at his cat that has one of those doors that she can come in and out of the house at will. I just want to fit in and get along with my neighbors. But, you know judge, dogs bark and I think it is curious that the dog never barks when we are there. I've heard lots of other dogs bark in the neighborhood. In fact the neighbors on all sides of Mr. Jones and me have pets. I have an affidavit here from one of the neighbors that says she has never heard my dog bark. For some reason, I think Mr. Jones just doesn't like us. He peeks out his curtains at us all the time when we are out in the yard, I feel like I'm always being watched. Last week, when my son was mowing our yard, he stood on his front porch yelling obscenities at him because my son was not bagging the grass and the clippings were getting on his 'perfect' lawn. He stands outside late at night and waters his lawn in the summer and shovels snow in the winter. There are several times the noise has startled me in the middle of the night and I get scared when I see a man standing under my bedroom window. I am scared of him, judge."

Does this sound familiar? Often this testimony is followed by a parade of neighbors, half of whom are home twenty-four hours a day and have never heard the dog bark, and the other half who can show you clumps of hair they have lost because the dog barks incessantly and they haven't slept in seven months. At the end of the trial (which is the first one on a docket that has twelve other cases that must be heard before lunch), they are all sitting in the courtroom (on their respective sides of the aisle), expecting some words of wisdom that will solve this problem.

Half of the room is going to leave upset. Tomorrow, when Mr. Jones' cat appears in Ms. Smith's flowers, she is going to turn the hose on it (or worse). Timmy Smith is going to get a little "mouthier" and you can be sure he will lay skid marks as he leaves his driveway. Mr. Jones is going to take up his guard post on the front porch, waiting for the chance to tell that boy and his mother what kind of trailer park trash he thinks they are.

You will get to know these parties and all their relatives by first names over the next two years, because they will be back again and again for a wide range of disputes. It is cases like these that often have other judges referring to municipal courts as "judges' hell." Well, I am here to tell you that there is hope and that hope is in community mediation.[1]

Mediation has been said to have its beginnings in ancient Sumerian society. In that culture, before a dispute could be submitted to a judicial council, it had to be presented to the "*mashkim*," who would attempt to negotiate a settlement.[2] Even today, mediation is widely looked upon as the preferable method to resolve disputes in Asian, European, African, and Native American cultures. In fact, in parts of the Orient, liti-

1. For the uninitiated, mediation is a process of dispute resolution in which one or more impartial third parties assists disputants in an attempt to negotiate a consensual agreement between them. "Community mediation" has been defined as "[a] constructive process for resolving differences and conflicts between individuals, groups, and organizations. It is an alternative to avoidance, destructive confrontation, prolonged litigation or violence. It gives people in conflict an opportunity to take responsibility for the resolution of their dispute and control of the outcome. Community mediation is designed to preserve individual interests while strengthening relationships and building connections between people and groups, and create processes that make communities work for all of us." NATL. ASSOC. FOR COMMUNITY MEDIATION, COMMUNITY MEDIATOR, Summer 1998, at 12.
2. Stephen G. Bullock & Linda Rose Gallagher, *Surviving the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885, 890 (1997).

gation is viewed as "a shameful last resort" used only when all else has failed.[3]

In the early 1960's and 1970's, neighborhood justice centers began popping up around the country, predominantly in low-income areas, as a method of promoting reconciliation during a socially turbulent decade. By the late 1970's and early 1980's, interest in alternative dispute resolution techniques rose and several private programs, most notable of which is the San Francisco Community Boards Program, were inaugurated by foundations and civic organizations.[4] Under the direction of United States Attorney General Griffin Bell and the U.S. Department of Justice's Law Enforcement Assistance Administration ("LEAA"), federal funding was made available for several pilot programs around the country.[5] Clearly, the philosophy behind this widespread support was the belief that such programs would not only relieve exploding court dockets around the country, but that they also would make justice more accessible to the public.

> *"Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time."*
> – Abraham Lincoln

Today, the majority of states have institutionalized mediation by statutory enactment. Many courts order or encourage mediation in divorce actions involving child custody disputes, and mediation and arbitration are often looked on as favorable alternatives in complex civil actions. But mediation can be beneficial in dealing with *any* dispute in which the parties are likely to have an ongoing relationship after the conclusion of the case, such as neighbors or the relations of landlord and tenant, government and citizen, customer and client or employer and employee, to name just a few.

Several years ago, we started gathering information about how we could make mediation work in a municipal court setting. Overland Park, Kansas, is an affluent suburb of Kansas City. It has a population of about 135,000 residents and is part of a larger metropolitan area of 1.5 million people. The municipal court handles traffic and criminal misdemeanors, including animal control, property maintenance, and building code violations. It has historically had the second largest caseload of any municipal court in Kansas, second only to Wichita.

Our fact-finding group consisted of the municipal judge, a local attorney with extensive mediation training and experience, and the director of the paralegal program at the local community college, who was interested in offering some mediation courses in her program. We met with several community leaders, including a city prosecutor, a victim assistance coordinator, a city council member, a state appellate judge who had been active nationally in promoting mediation, the president of the community college, the director of continuing education for the college, and a retired mediator who had coordinated the local small claims court mediation program on a volunteer basis for several years.

We began by examining existing programs in our state and around the country. There are literally hundreds of community mediation centers nationwide. Coincidentally, we found hundreds of different approaches. Some municipalities had their own mediators on staff to help resolve community disputes. These city employees reviewed police reports daily and initiated mediation discussions in appropriate cases. Other cities had programs staffed entirely by volunteers, some with little or no formal training, but a wealth of field experience. In Wichita, Kansas, the program is operated as a private, non-profit enterprise, with a large portion of its funding and facility needs coming from the local bar association. Victim assistance personnel in various district attorneys' offices around the country often take on the role of community mediator.

Community leaders seemed to recognize the cost-effectiveness of mediation over litigation. It was believed that the community was much better served when the prosecutor's office spent its limited resources prosecuting violent and repeat offenders, not feuding neighbors. In addition, many cited the reduction in police officer time spent on repeat calls for assistance.

The informality of mediation was seen as a real plus to the process. The open exchange of thoughts and ideas, unconstrained by the rules of evidence and legal procedure, seemed to be a more effective method in these types of situations than the typical, "scorched earth" adversarial process. In addition, mediation offered lower emotional costs than those associated with more traditional forms of dispute resolution. "Where there is little room for a simple, sincere apology in litigation — other than [as] an admission to be used to tactical advantage — such empathy can be the turning point of a mediation. In this way, the promise of mediation is to transform conflict into resolution at its very core, rather than merely providing an answer to the superficial dispute."[6] Professor Frank E.A. Sander of the Harvard Law School calls mediation the "sleep-

3. *Id.*
4. Peter S. Adler, *State Offices of Mediation: Thoughts on the Evolution of a National Network*, 81 KY. L.J. 1013, 1015 (1993).
5. *Id.*
6. Richard C. Reuben, *The Lawyer Turns Peacemaker*, A.B.A. J., Aug. 1996, at 55. For a detailed examination of the situations in which apology may be a useful part of dispute resolution in mediation, *see* Deborah L. Levi, Note, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165 (1997).

How could we make this happen with no money?

ing giant of ADR."[7]

We also looked at research findings from around the country. We found that the majority of existing programs reported that seventy to ninety percent of the mediated cases resulted in a lasting settlement. They routinely reported reductions in court caseloads, and a majority of program participants reported high levels of satisfaction with the process.[8]

Finally, we met with our local police department, which was just embarking on community policing and was focusing more and more on solving community problems and less and less on writing tickets. They were enthusiastic. All the feedback we received was positive. We were ready to set sail.

But then we reached our first roadblock. How could we make this happen with no money? Although lots of entities were interested, no one wanted to invest money in the project and, in all honesty, we did not have the time or resources to go searching for dollars. We were all well-meaning, but we also were all over-committed and no one had the time to develop the program and put together grant requests. And, in reality, we didn't know enough about how it would "look" or how many cases would be referred to put together a coherent grant request. Would it be a private, non-profit entity? How would we get money to hire an executive director? Would there be a charge for mediations? Would mediators be paid or would we only use volunteers? If we used volunteers, realistically was there a big enough volunteer base in the community? How would we train volunteers without a director? Where would these mediations take place? How would we pay for a facility? How many cases could we refer from the municipal court in a year? How would the cases be screened?

We decided to work from our strengths and take small steps, hoping to build on each small success. Based on our research of successful programs at the community level, three underlying criteria seemed essential for success. It had to be voluntary, free and confidential.[9] We kept quoting the famous line from the Kevin Costner movie, Field of Dreams, "If we build it, they will come."

The Kansas Supreme Court first adopted rules concerning the use of mediators in 1987.[10] The rules were expanded in 1996 to include minimum standards that must be met before a mediator could handle a case referred by a state court. In Kansas, in order to qualify as a mediator in court-referred cases, the mediator must first complete an approved training course. All mediators must complete a core mediation course, which consists of a minimum of sixteen hours and must include training in the areas of conflict resolution techniques, neutrality, agreement writing, ethics, role playing, communication skills, evaluation of cases and laws governing mediation. In addition, mediators wishing to mediate certain types of cases must have additional training.[11] As a final requirement, mediators must co-mediate three cases with an approved mediator within the first year following training. To maintain their "qualified" status, mediators must participate in six hours of continuing mediator education each year.

As already mentioned, the local community college was a strong partner in the investigative and planning effort. It had already expressed a desire to provide mediation coursework in its paralegal program. However, as a nationally certified program, any changes or additions to curriculum would take quite some time.

The curriculum review process was not as stringent for the college's continuing education program. This branch of the college offered a wide variety of coursework for professionals in various fields who needed to meet minimum requirements and also had continuing education requirements (*e.g.*, real estate appraisers, nurses, insurance agents and early childhood development professionals).

By utilizing the continuing education division, coursework could be developed and put in place quickly. This was viewed as important by the group. Mediation was a growing field. At

7. *Id.* Mediation can be contrasted with other alternative dispute resolution methods. "Mediation is unique among dispute resolution alternatives. Other approaches, such as early neutral evaluation (ENE) and nonbinding arbitration, as well as summary jury trials, minitrials, and court-settlement conferences, emphasize predicting the outcome of later adjudicatory proceedings. Mediation, however, focuses on addressing the full range of issues the parties bring to the table." Barbara A. Phillips, *Mediation: Did We Get It Wrong?*, 33 WILLAMETTE L. REV. 649, 650 (1997).
8. Bullock & Gallagher, *supra* note 2, at 919.
9. Although the issue of confidentiality of mediation agreements will not be examined in depth in this article, it is a criterion that many point to as essential to ensure an unrestricted exchange of information between the parties. In most states, statutes provide confidentiality in at least some circumstances. However, these statutes may not apply to all types of mediation, and they may not be applicable in federal court proceedings. A review of the caselaw suggests a growing trend, at least in federal courts, toward recognition of a common law "mediator privilege," much like an attorney-client privilege. *See Folb v. Motion Picture Industry Pension & Health Plans*, 16 F. Supp. 2d 1164 (C.D. Cal. 1998) (adopting mediator privilege under federal common law of privileges in civil case and reviewing existing caselaw); *In re March 1994 Special Grand Jury*, 897 F. Supp. 1170 (S.D. Ind. 1995) (adopting federal common law mediator privilege to protect mediation of state civil lawsuit from disclosure in grand jury proceeding); *United States. v. Gullo*, 672 F. Supp. 99 (W.D.N.Y. 1987)(adopting federal common law mediator privilege to protect mediation in community dispute resolution center from disclosure in grand jury proceeding).
10. Kan. S. Ct. R. 901 *et. seq.*
11. For example, domestic mediation and civil litigation mediation each require 24 additional hours of training; parent/adolescent mediation requires 14 additional hours. *See* Kan. S. Ct. R. 902.

the time, the only training being offered in mediation around the state was at the state bar association's continuing legal education programs. However, it was not required that one be a licensed attorney to be a mediator. It was felt by the group that it would be unrealistic to think that a neighborhood mediation program would be able to afford to have attorneys mediate the disputes. Studies we read indicated that the success of mediation was largely dependent on the skill, training and experience of the mediators.[12] A bank of non-law-trained mediators needed to be developed and no other college was offering any training targeted to this group. So, the first step was to develop a training program and get it up and running as soon as possible. The group, led by community college personnel, spent the next few months developing the curriculum, devising a marketing plan and selling the training component. In September 1997, the first twenty-hour training session was offered.

This still didn't solve the problem of having a method to refer and mediate municipal court disputes. In talking to mediators, the group realized that mediators were having a difficult time meeting the second prong of the Supreme Court's mediator qualification criteria. It was difficult to find an "approved" mediator with whom to co-mediate three cases. Many people were actually trying to make a living at mediation and they were not likely to give their services away to help their new competition. Modeling the program after legal aid clinics that operate out of law schools around the country, it was decided that the college would offer, in conjunction with the training course, a practicum. The practicum would consist of co-mediating three cases with an approved mediator. This practicum would only be available to those students who took the training course through the community college.

As it has been set up here, the students pay $150 for the practicum. The college then uses the money to pay approved mediators to co-mediate cases with the students. The practicum is completely self-funded. And where would they get the cases to co-mediate? From municipal court referrals. The circle was complete. Students would get the training and experience necessary to apply to the Kansas Supreme Court for the designation as an "approved mediator," the college would get income from providing the training course, the citizens of Overland Park would get free mediation services, and, finally, the municipal court would experience a proportional decrease in its caseload.

The first practicum included twenty students. So we had an immediate need for sixty cases to mediate. We also had a list of "approved" mediators who were willing to offer their services. We had conducted training classes for the police department and the neighborhood services and building code enforcement divisions three months earlier. We started targeting cases for mediation on July 1, with hopes of having them mediated in September. Our goal was to have all sixty cases mediated within ninety days, when the class and practicum would be offered for a second time.

[T]he first step was to develop a training program....

When the first practicum class took place, we had had only three cases referred for mediation, obviously a major hurdle for success of the program. We asked ourselves where we went wrong. Was there simply not a demand in our community for mediation? We tried not to panic. We contacted the local legal services office, which was providing mediation for small claims court cases. They were providing this service with volunteer mediators, all of whom were already approved by the Supreme Court. We arranged with them to allow our students to co-mediate small claims court cases. We also rolled out the program to several neighboring cities. They began to refer cases from their municipal courts.

Although we were not able to reach our ninety-day goal, we were able to get all practicum students their promised mediations. Clearly, important questions remained about the long-term viability of the program. Why weren't we getting the referrals from the police department and the neighborhood services division we had hoped to get? We had been confident that at least thirty cases a month could be referred from the court. What happened?

As is true with most community mediation programs, we were committed to making the program voluntary. In other words, both parties had to agree to mediation before one would be scheduled. We discovered that we were getting a significant number of referrals (although still not as many as we had hoped for reasons that will be addressed later), but we could not get both parties to agree to come to the table. These mediations are generally referred to as "victim/offender" mediations. The offenders were always willing to cooperate and looked forward to the opportunity to discuss the matter short of trial. However, the victims were extremely reluctant. "I am the victim here and a taxpayer and I expect the City to prosecute the offender," was an all-too-common refrain.

In the small claims court setting, a civil proceeding, the judge was more comfortable ordering that mediation take place on the day of trial. Only if mediation failed, which it rarely did, would a trial take place. The criminal proceeding was not as clear-cut. The police were generally not called out and in a position to make a referral unless there was at least an apparent violation of the law. Once a violation was noted, the city attorney had a statutory duty to prosecute and many victims were not satisfied until a prosecution took place and a clear penalty had been imposed.

In addition, the police department was also being schooled in community policing techniques and was getting pretty good at "shuttle diplomacy" between disputing parties, avoiding a criminal complaint being filed altogether. Finally, the mere

12. William D. Underwood, *Divergence in the Age of Cost and Delay Reduction: The Texas Experience with Federal Civil Justice Reform*, 25 TEX. TECH. L. REV. 261, 317 (1994).

process of calling the parties and requesting that they participate in mediation sometimes had the same "shuttle diplomacy" effect of working the matter out without further intervention.

But the fact remained that, as judges, we found it somewhat distasteful in a criminal case that was already on file to order the "victim" to participate in mediation. Only the situations in which there were cross-complaints tended to lend themselves to such a referral.

Faced with a limitation of the use of mediation in victim/offender cases due to a reluctance of both judges and victims, we did more research. We found that when victims finally did come to the table, they received many benefits from this face-to-face confrontation. In a report on a restorative justice program in Polk County, Iowa, victims routinely reported that their victim-offender meeting allowed them to have previously unanswered questions about the crime answered.[13] They also reported that the meeting allowed them to obtain closure in a way not provided by the traditional prosecution approach. Polk County officials found this even worked in what are sometimes called "victimless crimes," such as prostitution, drug offenses, drunk driving and weapons charges. In such cases, representatives of neighborhood associations where the crime occurred served as the "victim" for purposes of the mediation session.[14]

We decided we were not targeting some disputes early enough. In some cases, once criminal charges had been filed, it might be too late for mediation. The parties became too quickly entrenched in their adversarial roles once the term "victim" and "defendant" had been applied to them. We again met with the police department and neighborhood services division and asked them to consider referring cases on their first contact with the parties. So, for example, anytime a neighbor called and complained of a barking dog or an abandoned car, the case would be referred for mediation – before a ticket was issued. This immediately increased referrals. Although the use of this approach means that we cannot measure our success solely on the basis of the number of court-referrals that result in successful mediations, we hope to be able to measure an appreciable decrease in the initial filing of certain types of cases.

We also increased our public relations campaign. All the local newspapers, and many local television news programs, ran stories on the program. We knew that when we were able to get the parties to the table, mediation was almost invariably successful. We measured this by whether or not the police were called back to the residence. We started to trumpet our success stories. The word started to spread and our referrals have increased each month since inception.

The program has now been in operation for one year. All five core-training classes have been full. There often has been a waiting list. The college has expanded its course offerings to include courses in the more specialized areas of domestic mediation, parent/adolescent mediation, and civil litigation mediation. It also offers several courses for continuing mediation credit. We have been able to successfully arrange mediation opportunities for the practicum students in a timely manner. The word is getting out in the community.

We are now moving into the next phase of our development. We are refining the forms we use, developing evaluation instruments for both the mediators and the participants and analyzing each stage of the process. For example, we learned that many mediations end in a written settlement agreement. Participants seem to appreciate the ability to memorialize their discussions. We were concerned about how we would handle failures to comply with this confidential agreement. The mediators now encourage the parties to agree to return to mediation if there is a perceived or actual failure to comply with the agreement. This avoids further police involvement and lets the parties take responsibility for bringing the matter back to the table.

After just one short year, it has become essential that we hire an executive director. We desperately need someone who can market the program to homes associations, community groups, and other courts. Our hope is to ask the four participating municipalities to make a one-time contribution to hire a part-time director; it would then be the director's responsibility to find money to continue the position and to expand it into a full-time job. Our vision is to one day have a freestanding Community Mediation Center, located at the community college, that will be a resource for court-referred and community-referred mediations of all types. The appearance to the public of neutrality is important, and locating the program at the college fulfills that requirement. We are excited about the opportunity this holds for our community. We still believe that "if we build it, they will come."

And the best news? I haven't heard a barking dog case in months.

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13. Fred Gay & Thomas J. Quinn, *Restorative Justice and Prosecution in the Twenty-First Century*, PROSECUTOR, Sept./Oct. 1996, at 16, 18. *See also* Melissa Baria, *Victim-Offender Mediation*, COURT REVIEW, Spring 1996, at 14.
14. *See* Gay & Quinn, *supra* note 13, at 18.