# Mediating Probate Disputes: A Study of Court Sponsored Programs

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# MEDIATING PROBATE DISPUTES: A STUDY OF COURT SPONSORED PROGRAMS

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*Editors' Synopsis: This Article provides an overview of the mediation process and its role in resolving probate disputes. The Article describes six court-sponsored programs designed to encourage the use of mediation in probate disputes in five jurisdictions and contains attorney feedback on each of the six programs. The Article also examines common issues that arise in developing court-sponsored mediation programs.*



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## I. INTRODUCTION

Interest in the use of mediation to resolve probate disputes has been growing. As part of the larger trend in American courts to encourage alternative dispute resolution ("ADR"), and following the successful adoption of mediation to resolve divorce and other family disputes, there now exist a number of court-sponsored mediation programs designed to encourage the mediation of probate disputes.[1] Moreover, many jurisdictions are considering adopting their own programs designed to encourage mediation of such disputes.

Despite this trend, the use of mediation for resolving probate disputes has lagged far behind its use in other family matters. Many jurisdictions provide little or no formal opportunity for probate dispute mediation. Even where mediation is offered, judges and practitioners are often skeptical of its value in the realm of trusts and estates. Indeed, mediators themselves note that probate disputes are some of the most difficult to mediate. The following are some of the suggested impediments to the widespread adoption of mediation to resolve probate disputes:

1. Courts are not providing sufficient encouragement;
2. Probate disputes are relatively rare—particularly in comparison to divorce—and, therefore, it is not efficient to establish mediation programs specifically geared towards such disputes;

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[1] Several commentators have advocated the use of mediation to resolve probate disputes. *See generally* Ronald Chester, *Less Law, But More Justice?: Jury Trials and Mediation as Means of Resolving Will Contests,* 37 DUQ. L. REV. 173 (1999); Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397 (1997); Mary F. Radford, *An Introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust and Guardianship Matters*, 34 REAL PROP. PROB. & TR. J. 601 (2000).

3. The number of qualified mediators with a good understanding of probate law is insufficient to handle probate disputes;
4. Estate planners already act as informal mediators in probate disputes and resolve many of the resolvable cases. If litigation is threatened, it is because the dispute is unlikely to be susceptible to successful mediation;
5. The probate bar lacks familiarity with mediation and is reluctant to embrace it;
6. The parties are unwilling to bear the costs of mediation;
7. In many probate disputes, at least one party's litigation expenses may be borne by the trust or the estate thereby reducing that party's incentive to settle;
8. The emotional nature of probate disputes makes the parties unwilling to settle through mediation; and
9. Probate disputes are difficult to mediate because the person whose views are most relevant, namely the testator in a will or the settlor of a trust, is dead and not able to participate in the mediation.[2]

In some jurisdictions, courts have attempted to address these concerns directly. For example, to overcome reluctance by the parties to use mediation, some judges require that all disputes go to mediation before they can proceed in court. To reduce the costs of mediation, some court- sponsored programs use volunteer mediators or fund the cost of mediation directly. Finally, to fill the perceived need for mediators who understand the substantive law of wills and trusts, some programs provide mediation training for lawyers practicing in the wills and trusts area, and others provide probate law training to experienced mediators.

This Article examines six court-sponsored programs designed to encourage the use of mediation to resolve probate disputes in five jurisdictions: Texas, Florida, Georgia, California (Los Angeles and San Francisco), and Hawaii. Some of the programs are part of larger state-run programs designed to encourage the mediation of a variety of disputes, but all were studied in terms of their specific application to probate disputes. In discussing each of the programs, this Article focuses on the extent to which courts and practitioners either have addressed or proven false the suggested impediments to the use of mediation in resolving probate disputes.

Part II of this Article provides a general description of mediation. It discusses the role of mediation in our current dispute resolution system and describes the mediation process. Part III then describes the six court-sponsored programs designed to encourage the use of mediation in probate

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[2] For a discussion of the role of substantive law in inhibiting settlement of will contests, see Ray D. Madoff, *Lurking in the Shadow: The Unseen Hand of Doctrine in Dispute Resolution,* 76 S. CAL. L. REV. 161, 176-86 (2002).

disputes and offers attorney feedback with respect to each program. Finally, Part IV examines common issues that arise in developing court-sponsored programs designed to encourage the use of mediation in probate disputes.

## II. WHAT IS MEDIATION?

### A. General Description

Mediation is the most common ADR technique in use today. In mediation, a neutral third-party assists the parties (either with or without their attorneys) in resolving their dispute. Mediation is unlike either arbitration or the adjudication process in that the role of the third party is not to impose a decision, but rather to aid the parties in reaching a settlement. Mediation is a voluntary process and neither side is required to accept a settlement, although courts or a governing document may mandate that the parties attempt to resolve their dispute through mediation.

Mediation can offer benefits not available in traditional adjudication. The mediation process often is faster and less expensive than litigation, and if conducted early in the course of a dispute, it can save considerable resources. In addition, unlike litigation, mediation is a private proceeding. Privacy can be particularly valuable in probate disputes that may otherwise require unpleasant public disclosure of private affairs. Mediation also offers parties the opportunity to set the agenda of the discussion. This can be particularly useful in probate disputes in which the parties must resolve a variety of issues, not all of which are legal in nature. Finally, because the parties to a mediation determine what constitutes a satisfactory resolution, they often have a greater commitment to abide by a mediated agreement than a court imposed one.

Mediation can share some traits with case evaluation in that a mediator may (but does not necessarily) offer assessments of the strengths and weaknesses of each side's position. A great debate rages within mediation circles about the extent to which a mediator should evaluate, as opposed to facilitate, the resolution of disputes. In practice many mediators use both techniques to assist parties in resolving their disputes.

Although a number of advantages result from using mediation to resolve probate disputes, potential downsides exist as well. Because mediation is not essentially an inquiry about "truth" or "right," it may not provide the same sense of satisfaction to the parties that a judicial resolution would. In addition, power imbalances between the parties may cause people to agree to settle in ways that do not truly reflect their best interests. Finally, probate disputes often involve many people, and trying to resolve the dispute by taking everybody's interests into account may prove unwieldy.

### B. The Mediation Process

Mediation is an inherently flexible process. However, mediations typically have four stages: (1) mediator's introduction; (2) parties' open-

ing statements; (3) caucus; and (4) settlement.

The mediator begins the process by briefly describing the mediation process. The mediator explains that mediation is a voluntary process in which the parties reach their own resolution and that the mediator's role is not to act as decision-maker or judge, but rather to facilitate the parties in reaching their own resolution of the dispute. The mediator also explains that because mediation is a voluntary process, the parties may leave the mediation at any time.

After the mediator's introduction, the parties give opening statements in which they describe their views of the conflict. This opportunity to speak and be heard is a very important part of the mediation process. Many conflicts escalate because one or both of the parties feel that they have not had the chance to tell their side of the story. In the litigation context this is described as people wanting to have their "day in court." In some ways, however, the "day in court" may not be as satisfying as the mediation process because only certain issues will be deemed relevant in the litigation context. The opportunity to listen to the other party's version of the story can also greatly assist in encouraging settlement. People have a tendency to demonize their adversary in the litigation context, and hearing the other person's first-hand view of the conflict can help to overcome that tendency.

After each side has had the opportunity to tell its story, the hard work of mediation begins in earnest. The mediator works with the parties (often meeting with each party separately in private meetings called "caucuses") to frame the issues to be resolved and to generate options. The mediators' meetings with each side are generally confidential, and one party's statements are not revealed to the other side unless specifically authorized. In this way, the mediator can sometimes help the parties overcome misunderstandings by being the repository of a more complete picture of the dispute.

Finally, the mediator encourages compromise as a way of resolving the dispute. If the parties reach a settlement, the mediator memorializes the resolution in a written statement signed by the parties.

## III. COURT-SPONSORED PROGRAMS PROMOTING MEDIATION OF PROBATE DISPUTES

This Part describes six court-sponsored programs designed to encourage the mediation of probate disputes in five jurisdictions: Texas, Florida, California (San Francisco and Los Angeles), Georgia, and Hawaii. Some of the programs are part of larger state-run programs designed to encourage the mediation of a variety of disputes, but all were studied in terms of their specific application to probate disputes. Following the description of each program is a summary of attorney feedback on the program.[3]

[3] In addition to the programs discussed in this Article, the author also gathered information on programs in Arizona, Connecticut, Michigan, New Hampshire, Utah, and

## A. Texas

### *1. Overview*

The Probate Court in Dallas, Texas, created one of the first formal programs encouraging the mediation of probate disputes in the country. The program was established in the wake of a state-wide effort to encourage mediation. In 1987 the state legislature passed the Alternative Dispute Resolution Act, which made it state policy "to encourage the peaceable resolution of disputes."[4] The Alternative Dispute Resolution Act creates a flexible framework under which a judge has discretion to refer a case to one of several ADR procedures, including a county-established ADR system, a private dispute resolution organization, or other non-judicial and informally conducted forums. ADR is widely used in Texas and courts regularly refer civil and some criminal cases to ADR.

Mediation in particular is a widespread and commonly accepted practice in Texas. Usually a judge gives the parties a chance to agree on a mediator, and, failing agreement, the judge selects a mediator for the parties. Once the mediation begins, its content remains strictly confidential, and the only information given to the court is whether the matter was settled in mediation.

Mediators receive forty hours of classroom training in general mediation techniques.[5] While the state does not certify mediators and the courts themselves do not offer mediation training, several private organizations and area academic institutions offer general mediation instruction.[6] The Alternative Dispute Resolution Act stipulates that a court may set a reasonable fee for the services of a mediator.[7] On the county level, courts have entered standing mediation orders, which allow mediators and parties to negotiate the amount of compensation. Typically mediators and parties agree on a payment schedule involving a flat per day fee, which can range from $750 to $2,500 per side.

Probate judges in Dallas and Houston regularly refer probate disputes to mediation. Although a general ADR statutory scheme exists in Texas, no laws or court programs are geared specifically toward the resolution of probate disputes. Additionally, neither the courts nor the private organiza-

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Washington. The author chose to discuss the six programs described in this Article because they illustrate well the variety of issues involved in developing court-sponsored programs to encourage the mediation of probate disputes. Because of the increased interest in ADR generally, new programs are appearing on a regular basis.

[4] TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (Vernon 1997).

[5] *See id.* § 154.052.

[6] Dispute Mediation Service, Inc. in Dallas and the Harris County Dispute Resolution Center in Houston are two private dispute resolution organizations that offer general mediation training courses. The Dispute Mediation Service, Inc. is located on the web at http://dms-adr.org, and the Harris County Dispute Resolution Center is located at http://www.co.harris.tx.us/DRC/. The University of Houston is the most prominent academic institution in Texas offering mediation instruction.

[7] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.054.

tions or universities offering mediation training offer probate-specific training. In lieu of specialized programs, probate judges in Dallas and Houston routinely refer probate disputes to a relatively small number of probate attorneys and former probate judges who have general mediation training. Although dispute resolution organizations in Dallas and Houston offer pro bono mediation services, they receive only a very limited number of mediation referrals.

The Dallas and Harris County probate courts have not established comprehensive tracking systems for probate mediations, and correspondence with ADR coordinators and the probate court administrators indicates that private attorney mediators are not reporting case volume and settlement rate information to the probate courts. Thus, the only evidence regarding the prevalence of mediation in the probate arena is anecdotal. Interviews with those involved suggest that the vast majority of probate disputes are referred to mediation, and that a high percentage of the referred cases settle during or shortly after mediation.

*2. Attorney Feedback*[8]

Dallas County and Harris County attorneys who have represented parties involved in a probate mediation generally concur that mediation is a positive option that should be explored when a contested probate matter arises, and that most types of probate disputes are amenable to mediation. The attorneys also indicated that they actively educated their clients about ADR and encouraged them to consider mediation as a viable option for resolving their legal disputes. Almost all of the attorneys interviewed believed that mediation worked best after the facts of the dispute had been substantially developed. The attorneys felt that discovery usually leveled the informational playing field and allowed both parties to stop worrying about an imbalance in knowledge and focus on the core issues of the probate dispute. Attorneys cited flexibility of outcome and savings in terms of time and cost as the strengths of mediation.

The attorneys identified the following five major situations where mediation of probate disputes was problematic: cases where parties were not familiar with how the mediation process worked, cases where years of pent-up anger clouded the parties' ability to think about the issues rationally, cases involving a mediator who did not have experience with complex probate matters, cases where parties were forced to mediate against their wishes, and cases where parties were so convinced of their positions that they refused to compromise.

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[8] The material in this subpart is based on feedback from interviews with nine attorneys from Dallas and Harris Counties in Texas. The interviews were conducted between February 23, 2001 and July 9, 2002.

B. Florida

*1. Overview*

Florida's comprehensive state-wide program, established in 1987, encourages the use of mediation in all of its courts. Probate cases are handled in the circuit courts. These are courts of general jurisdiction that hear all non-family civil cases over $15,000.[9] Although there is no program specifically geared toward encouraging mediation of probate disputes, probate cases are included in the Circuit Civil Mediation Program, and judges refer probate disputes to mediation.

Court-sponsored mediation programs in Florida are both highly centralized and highly decentralized. On the one hand, the system for court-sponsored mediation in Florida is set out in state statutes and in a series of rules promulgated by the Florida Supreme Court.[10] These rules provide uniform standards that apply to all court-sponsored mediation programs. On the other hand, each county administers its own mediation program, and each program has its own budget, directors, staff, and mediator compensation rates. As a result, mediation programs can vary significantly from county to county.

The framework for court-sponsored mediation throughout the state is established by statute.[11] This statute addresses a number of broad issues regarding mediation programs. In particular, the statute:

1. Requires that, subject to limited exceptions (not applicable to probate disputes), a court must refer a case to mediation upon the request of one of the parties, provided the requesting party is willing to pay the costs of mediation or the costs can be equitably apportioned between the parties;[12]
2. Provides that once a court order refers a matter to mediation, the time periods for responding to an offer for settlement or to an offer or demand for judgment be tolled until either the mediator declares an impasse or reports to the court that no agreement was reached;[13]
3. Establishes rules providing that all written and oral communications in a mediation proceeding (other than an executed settlement agreement) are confidential and inadmissible as evidence in any subsequent legal proceeding unless the parties agree otherwise;[14]
4. Directs the chief judge of each district to maintain a list of

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[9] Family civil cases are divorce and child related cases.

[10] *See* FLA. R. CIV. P. 1.700-1.750 (2002); FLA. R. CERTIFIED & CT. APP'TED MED. 10.100-10.900 (2002).

[11] *See* FLA. STAT. ANN. § 44.102 (West 2003).

[12] *See id.* § 44.102(2)(a).

[13] *See id.* § 44.102(6)(a).

[14] *See id.* § 44.102(3).

> mediators who have been certified by the Florida Supreme Court and who have registered for appointment in that district;[15]
> 5. Authorizes the counties to fund mediation services by levying a five dollar service fee on any circuit or county court proceeding and a service fee of up to forty-five dollars on a petition for modification or of a final judgment of dissolution (one dollar of which is to be forwarded to the Department of Revenue for deposit in the state mediation and arbitration trust fund to be used by the Supreme Court to carry out its mediation responsibilities);[16]
> 6. Directs judges to make preferential appointments to qualified individuals who have volunteered their time to serve as mediators;[17] and
> 7. Establishes that nonvolunteer mediators be compensated according to rules established by the Florida Supreme Court and provides that if filing fees fund a mediation program, the mediator may be compensated by either the county or by the parties.[18]

The statute also provides that court-ordered mediations must be conducted according to the rules established by the Florida Supreme Court.[19] The Florida Supreme Court has established a comprehensive set of rules governing mediation in Florida courts in the Florida Rules of Civil Procedure and the Florida Rules for Certified and Court-Appointed Mediators.[20]

The Florida Rules of Civil Procedure establish the procedural rules governing mediation. These rules address the timing of mediations, and the appointment and payment of mediators. The Florida Rules for Certified and Court-Appointed Mediators establish the certification standards for mediator, the ethical standards of conduct for certified and court-appointed mediators, and disciplinary procedures.

Probate cases are handled by the Circuit Civil Mediation Program. Mediation is used in all manner of civil cases in Florida and, according to interviews with attorneys, judges regularly order mediation for probate disputes.

Once the court orders mediation, the parties have ten days from the date on the order of referral to select their own mediator. The mediator is not required to be certified provided that "in the opinion of the parties and upon review by the presiding judge [it is determined that the mediator] is otherwise qualified by training or experience to mediate all or some of the

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[15] *See id.* § 44.102(5).
[16] *See id.* § 44.108.
[17] *See id.* § 44.102(5)(a).
[18] *See id.* § 44.102(5)(b).
[19] *See id.* § 44.102(1).
[20] *See* FLA. R. CIV. P. 1.700-1.750; FLA. R. CERTIFIED & CT. APP'TED MED. 10.100-10.900.

issues in the particular case."[21] If the parties do not make a selection, the court will appoint a certified mediator using a rotation system or some other means adopted by administrative order of the chief judge.

To become a certified court mediator for the circuit civil mediation program, a person must meet the following requirements:

> (1) [C]omplete a minimum of 40 hours in a circuit court mediation training program certified by the [Florida] supreme court;
> (2) [B]e a member in good standing of The Florida Bar with at least 5 years of Florida practice [experience] and be an active member of The Florida Bar within 1 year of application for certification; or be a retired trial judge from any United States jurisdiction who was a member in good standing of the bar in the state in which the judge presided for at least 5 years immediately preceding the year certification is sought;
> (3) [O]bserve 2 circuit court mediations conducted by a certified circuit court mediator and conduct 2 circuit court mediations under the supervision and observation of a certified circuit court mediator; and
> (4) [B]e of good moral character.[22]

The fee for mediation services varies widely. If the parties choose their own mediator, they negotiate the fee privately. If the court appoints a mediator, it sets the fee. Each county has its own program regarding court appointed mediators, and the programs can vary considerably with respect to mediator certification requirements and the applicable fee. For example, Collier County and Dade County have very different programs.

The program in Collier County began in 1987. The director of the program is not a lawyer but is permitted to serve as a court-appointed mediator, despite the certification rules, because he began mediating prior to the enactment of the rules. He personally mediates all of the probate disputes in Collier County in which there is a court-appointed mediator. In Collier County the mediators are salaried and the program is funded by the five dollar court fee allowed under Florida law.[23] The parties are not charged any additional fee for use of the court-appointed mediators, but the only parties who are entitled to use court-appointed mediation are those who are indigent. If the parties are not indigent, they are required to use private mediation.

The program in Dade County began operating in 1988. The Dade County program maintains a staff of three full time mediators. In addition, private mediators can choose to provide their names to the court in which case their name is put on the "wheel," and they can be assigned to cases. Parties can choose whether they want to be assigned a staff mediator or a

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[21] FLA. R. CIV. P. 1.720(f).
[22] FLA. R. CERTIFIED & CT. APP'TED MED. 10.100(c).
[23] *See* FLA. STAT. ANN. § 44.108 (West 2003).

private mediator. The cost for mediation services for both staff and private mediators is $125 per hour.

*2. Attorney Feedback*[24]

Attorneys in Florida are familiar with mediation in general and are comfortable with the use of mediation to resolve probate disputes. The attorneys interviewed consistently reported that mediation was very valuable for resolving disputes. Several attorneys said that they believe that mediation should be attempted in every case. As one lawyer explained, "Even if the mediation does not result in a settlement, it can nonetheless open lawyers' and clients' eyes to the real issues at the center of the disagreement."

Despite this broad consensus on the value of mediation, the attorneys' responses were more mixed when it came to the court-sponsored mediation programs. Most attorneys stated a preference for choosing their own mediators rather than using those in the court-affiliated program. As one attorney said:

> There is a court affiliated program, but most sophisticated probate lawyers don't use it. There are probably 12-14 lawyers in the South Florida area who specialize in probate litigation. The litigation is usually very involved. Most of the certified mediators are not probate lawyers or do not have background in probate or tax—so the lawyers find that it is better to choose their own mediator.

That being said, one very experienced attorney stated that he thought that the court-connected mediators did an excellent job of mediating disputes, despite their lack of experience in probate law.

C. Fulton County, Georgia

*1. Overview*

The Fulton County Probate Court in Atlanta, Georgia, has required mediation for all probate disputes since 1990. This program was a result of the Georgia Supreme Court's general requirement to encourage the use of ADR. The supreme court established a Commission on Alternative Dispute Resolution to research and implement ADR programs, and then it promulgated Alternative Dispute Resolution Rules based on the Commission's recommendations.[25]

The supreme court also established the Georgia Office of Dispute

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[24] The material in this subpart is based on feedback from interviews with fifteen practicing attorneys in Florida. The interviews were conducted between January 11, 2002 and June 27, 2002.

[25] GA. CT. R. & P., ADR R. I-VII (enacted on January 17, 1993, effective October 22, 1992, as amended by the Georgia Supreme Court, May 24, 1999); Georgia Court-Connected Alternative Dispute Resolution Act, GA. CODE ANN. § 15-23-1 (2002).

Resolution to serve as a resource for ADR education and research, and to implement the Commission's policies regarding qualification of mediators. All mediators working in court-sponsored programs are required to complete at least "twenty hours of class training (including role play and other participatory exercises), plus observation of or co-mediation with a veteran mediator in at least five mediations."[26] The mediators must also apply to the Georgia Office of Dispute Resolution, which requires a letter of recommendation from a court-referred program, a private ADR service, or a judge within the county the mediator intends to serve. Applicants may be denied because of ethics violations, but they may petition for a hearing with the Ethics Committee.

The Fulton County Alternative Dispute Resolution Rules provide that "when parties have been referred to an ADR process by the court, the court is responsible for the integrity of the process."[27] As a result, "neutrals in a court-annexed or court-referred ADR process will be chosen from neutrals registered by the Georgia Office of Dispute Resolution."[28] Disputants outside of the court system are entitled to choose their own mediators. The parties may choose any third party to assist in dispute resolution prior to filing a case with the court, but once a case is filed, the supreme court rules state that a neutral will be chosen from those registered with the Georgia Office of Dispute Resolution.[29]

According to the Georgia Supreme Court, the funding of court-annexed and court-referred ADR programs is a public responsibility.[30] As a result, the rules regarding court-connected ADR state that a sum of $7.50 or less, in addition to other legal costs, may be charged and collected in each civil action or case filed in all courts within a county for the purposes of providing ADR programs.[31]

The Georgia Supreme Court encouraged every court to consider the use of ADR processes to provide a more efficient and less costly method to resolve disputes. The supreme court strongly urged the courts to establish mediation programs. Fulton County's program began in 1990 under the direction of its then sitting probate judge, Judge Floyd Propst.[32]

The Fulton County Probate Court handles wills, estates, and guardianships of adults, and it sends all will and estate disputes to mediation.[33] Once a contested probate case is filed, it is referred to mediation before it

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[26] GA. CT. R. & P., ADR R. app. B § I(A).
[27] *Id.* at app. A § 9.1.
[28] *Id.*
[29] *See id.* at app. B § 9.2.
[30] *See* GA. CT. R. & P., ADR R. 3.
[31] The Georgia Court-Connected Alternative Dispute Resolution Act, GA. CODE ANN. § 15-23-7 (2001).
[32] Fulton County has only one probate court judge. This program has been continued by Judge Propst's successor, Judge Pinkie Toomer.
[33] Guardianships are not regularly sent to mediation because of concern for protecting the interests of the principal.

is placed on the judge's calendar. The court can only send the parties who are before the court to mediation. The parties are given an order that states the parties should attempt to mediate their dispute. Although parties theoretically have a choice, they are threatened with case dismissal if they are unwilling to attempt mediation.

All probate cases in Fulton County are referred to the Justice Center of Atlanta (the "Justice Center"), which has a special contract to perform this type of mediation with the Probate Court. The parties are informed that the mediation is free if they use the Justice Center. The parties have thirty days to contact the Justice Center to attempt to schedule mediation. When the parties call the Justice Center to schedule mediation, the mediation process and procedure are explained to them over the phone. The Director of Research and Development at the Justice Center estimated that mediation lasts about six to ten hours.[34] After a case is mediated, the Justice Center sends a written confirmation to the court in response to the order that the parties attempt to mediate their dispute. If the parties attempted to schedule mediation but could not get together for some reason, the Justice Center will inform the court of the attempt by the parties.

Parties involved in probate disputes outside of the court system are encouraged to use mediation. Disputants who have not filed a case with the Probate Court may use any mediator they wish at their own expense. But parties who file disputes with the court are given the option of using the Justice Center mediators at no or using a private mediator at their own expense.[35] If parties who file disputes with the court choose to hire a private mediator, the court encourages them to use a mediator registered with the Georgia Office of Dispute Resolution.

The Justice Center provides mediation for many types of disputes.[36] The mediators at the Justice Center undergo forty hours of general training. The Justice Center has a list of approximately ninety mediators, twenty of whom mediate probate disputes.[37] The probate mediators, in addition to the general training, must undergo special training given by the probate court administrator. This training consists of a primer on probate law and, if time permits, role-plays of likely scenarios. The probate training usually lasts about four to six hours. Once mediators have completed the program, the court administrator usually has an annual refresher course that addresses particular issues the mediators may be encountering.

The court-referred mediation program in Fulton County is funded by court filing fees.[38] The cost for the Justice Center mediators, who are paid

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[34] Telephone Interview with Edith Primm, Director of Research and Development at the Center for Justice of Atlanta (Feb. 5, 2003).

[35] Telephone Interview with Probate Judge Pinkie Toomer (Feb. 5, 2003).

[36] Telephone Interview with Edith Primm, *supra* note 34.

[37] *Id.*

[38] Every time a pleading is filed, a three dollar fee is charged and these fees fund the court-sponsored ADR programs. Telephone Interview with Judge Pinkie Toomer, *supra* note 35.

$150 per case, is funded via the contract between the Justice Center and the Probate Court.

*2. Attorney Feedback*[39]

Overall, the attorneys interviewed believed that the Fulton County mediation program worked very well. The attorneys that frequently used mediation estimated a settlement rate between sixty and seventy percent. The positive aspect most mentioned was that mediation gets the parties communicating, and this alone may settle some disputes. Will disputes often involve complex family dynamics and personal issues that are not effectively handled or resolved via the court system. The attorneys interviewed agreed a mediator may help to resolve these family issues.

Although the program works well overall and the attorneys accept and often prefer mediation, a few criticized aspects of the program.

One concern raised by a few attorneys was that mandatory referral to mediation does not work well in all probate disputes. For example, mediation may be inappropriate when one party is not of sound mind and mandatory mediation may frustrate those involved. The attorneys expressed a need for the court to analyze each probate dispute, and then refer only these cases that are appropriate to mediation.

Some attorneys also expressed concern about the ability of non-lawyer mediators to mediate complex probate disputes. In Fulton County, probate lawyers rarely act as mediators, and only a handful of the Justice Center mediators are lawyers. As a result, the attorneys who frequently used mediation to resolve disputes tended to use private mediators who had more knowledge about probate law.

On the other hand, a few attorneys believed that attorney mediators who have experience with probate disputes may be too focused on the legal merits of the case, and may not be well-equipped to handle the interpersonal and familial aspects of the case.

D. Los Angeles County, California

*1. Overview*

The California Superior Court in Los Angeles began a program to encourage the use of mediation of probate disputes in 1997.[40] This project was born out of the Trusts and Estates Section of the Los Angeles County Bar Association in 1995. The Trusts and Estates Section created a Mediation Committee that worked with the then-supervising probate judge to establish the procedures that ultimately became known as the Probate Court-Supervised Mediation Program. The program was inspired by a

[39] The material in this subpart is based on feedback from interviews with eleven judges and attorneys from Georgia. The interviews were conducted between February 23, 2001 and February 5, 2003.

[40] These rules are found at CAL. L.A. SUPER. CT.R. 10-200-10.210.

belief that "[c]ontested estate, trust, conservatorship and other matters covered by the Probate Code are uniquely appropriate for court-supervised mediation in the interests of prompt, efficient and economical dispute resolution."[41]

At the time of the creation of this program, the Los Angeles Superior Court system had its own program designed to encourage the mediation of disputes.[42] This program established the process by which mediation would operate, including the selection of mediators, their compensation, and the use of information acquired from mediation as evidence in subsequent trials.[43] However, the Probate Court-Supervised Mediation Program specifically chose to adopt its own procedures for probate disputes.

The Probate Court-Supervised Mediation Program is set out in a series of court rules. A brochure of the probate court entitled "Probate Court-Supervised Mediation Program: Guide for Attorneys and Parties" provides additional guidance. Interviews with attorneys suggest that the program operates a little differently in practice from the way it does in the rules, and these differences are noted below.

The probate mediation rules contemplate that after the first hearing the parties in the contested matter (presumably with their attorneys) would meet to prepare a "Joint Statement re Court-Supervised Mediation" in which they would state their willingness to submit to other modes of ADR in the event that disputed issues are not resolved through the mediation.[44] Under the rules, nothing in the joint statement is admissible as evidence against the parties in any later contested proceeding solely by reason of their disclosure in the joint statement.[45] Although the rules provide the possibility of sanctions for failing to meet and confer with respect to the submission of a joint statement, interviews with attorneys in Los Angeles suggest that this requirement for joint statements rarely is enforced.

The rules also provide that at the first hearing after completion of the joint statement, the court determines whether the case should be assigned for mediation before a court-appointed member of the Probate Court Mediation Panel ("PCMP").[46] The rules provide that anyone who is

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[41] CAL. L.A. SUPER. CT. R. 10.200.

[42] In 1993 the California legislature enacted a statute designed to provide a more formal mechanism through which California courts could encourage mediation of disputes. This statute established a pilot program by which California counties could send to mediation civil matters that would be subject to mandatory arbitration procedures. CAL. CIV. PROC. CODE § 1775.2 *et seq.* (1993). The statute applied specifically to the courts of Los Angeles County, but it allowed other counties to choose and implement their own mediation procedure. *See id.* § 1775.2.

[43] *See id.* § 1775.3-12.

[44] *See id.* R. 10.201.

[45] *See id.* R. 10.204.

[46] Here the rules appear to be more flexible than practice because the rules imply that mediation will only sometimes be ordered, whereas the Guide for Attorneys and Parties, as well as interviews with attorneys, suggest that mediation is "virtually mandatory in all cases."

acceptable to all of the parties and their lawyers may serve as a mediator in the disputes. If the parties cannot agree on a choice of mediator, the court will assign one from the PCMP. The rules also suggest that rather than choosing a single mediator, the court could provide three suggested names to the parties and allow each side to strike one name.[47]

Once the court has set the matter for court-supervised mediation, the proceeding is continued for a minimum of thirty days, after which time the court will schedule a status conference for the parties to advise the court of the result of the mediation efforts.[48] If the mediation does not result in the resolution of all disputed issues, then at the status conference the court may continue the matter for further mediation efforts. If the court determines that further mediation would not be useful, the court may (1) schedule the matter for a mandatory settlement conference, (2) assign the case for one of the binding ADR methods contemplated by the parties in their joint statement, or (3) schedule the matter for trial.[49]

The PCMP consists of attorneys and retired judges. A retired judge may apply for inclusion in the PCMP by filing the requisite application and paying the filing fee. An attorney must meet the following additional requirements:

> (1) Have completed at least 10 years of practice;
> (2) Be a member in good standing of the California State Bar;
> (3) Comply with all applicable MCLE requirements;
> (4) Be familiar with [certain] provisions of [the] California Evidence Code . . ., Code of Civil Procedure . . . and California Rules of Court . . .; [and]
> (5) Either:
>
> (a) Have taken and satisfactorily completed the 30-hour Basic Mediation Training course . . .; [or]
>
> (b) Certify that he or she has substantial experience and expertise in estate, trust and conservatorship matters [and], if appointed to the Probate Court Mediation Panel, agree to submit to complete the LACBA-sponsored Basic Mediation Training course, or equivalent formal training in mediation, within one year of the date of his or her appointment to the Panel.[50]

The court rules contemplate that non-lawyers may act as mediators in disputes, although they are not eligible to be included on the PCMP.[51]

The application for attorneys to become members of the PCMP poses a number of questions regarding their expertise in the governing law. For

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[47] *See id.* R. 10.205.
[48] *See id.* R. 10.207.
[49] *See id.*
[50] *Id.* R. 10.209.
[51] *See id.* R. 10.205, 10.209.

example, one question asks what percent of the applicant's current practice consists of estate planning, estate administration, trust, guardianship, or conservatorship matters, and another question asks what percent of the applicant's total practice time since being admitted to the Bar has been spent on such matters.[52]

Although the rules do not specifically address payment of mediators, it appears that the costs of mediation are borne by the parties or the estate. Moreover, unlike the other civil ADR programs, which are funded by the state at set rates, mediators on the PCMP are permitted to charge their regular hourly fees for the mediation. The rules attempt to counteract some of the consequences of this fee structure by imposing on the PCMP attorneys (but not the retired judges) a requirement to handle one pro bono case per year. It is not clear how vigorously this requirement is observed or enforced.

*2. Attorney Feedback*[53]

The attorneys interviewed were very enthusiastic about the Los Angeles mediation program. Some expressed the view that they initially had been skeptical about the value of mediation, but they had become believers after seeing how well it worked to resolve disputes. All of the attorneys interviewed reported that mediation resolved between seventy and ninety percent of the disputes.

The attorneys largely agreed that the mediators on the PCMP were very knowledgeable. This is in part because the program was initiated by the Trusts and Estates Section of the Los Angeles County Bar Association and the PCMP consists primarily of experienced trusts and estates attorneys.

Although the program is generally viewed very favorably, two issues give rise to concern among the attorneys. One is fees and the other is the timing of the mediation process. The fee issue arises because the mediators charge their regular hourly rate for mediation. The hourly rate for mediators on the PCMP seems to range from two hundred to five hundred dollars an hour. This is significantly higher than the seventy-five dollars per hour paid in other court sponsored mediation programs in Los Angeles. Some viewed these fees as excessively high, particularly in light of the fact that mediation is virtually mandatory. To mitigate the expense, the mediators on the PCMP are required to agree to handle at least one case on a pro bono basis each year, although several of those interviewed suggested that this requirement has not been enforced widely.

This issue of market rate fees for mediators seems to be both the strength and weakness of the Los Angeles system. On the one hand, the

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[52] *See id.* R. 10.210(a)(2), exhibit C.

[53] The material in this subpart is based on feedback from interviews with eleven attorneys practicing in Los Angeles County, California. The interviews were conducted between February 26, 2001 and May 6, 2002.

ability to charge regular hourly fees encourages experienced trusts and estates attorneys to become involved in the mediation panel. This increases the expertise of the PCMP and provides a speedy mechanism for educating the trusts and estates bar on the value of mediation. On the other hand, some lawyers expressed concern that it is unfair, and perhaps even unconstitutional, to impose such high fees in an essentially mandatory system.

The other concern raised by some of those interviewed was that the timing of the mediation did not leave adequate time for discovery. Attorneys expressed concern that some mediations are not successful because the attorneys and parties have not participated in enough discovery to understand their cases.

E. San Francisco County, California

*1. Overview*

San Francisco County began its program to encourage the use of mediation to resolve probate disputes in the late 1990s. Judge Laurence Kay, who was the probate court judge for San Francisco at the time, began the program, and his successor, Judge John Dearman, has continued it.

There is little written information on the San Francisco program, and the following information was gathered through interviews with court administrators and attorneys.

San Francisco has an informal program in which attorneys volunteer their time to serve as mediators for smaller estates. The program is limited to estates that are smaller than the federal estate tax exemption amount. This amount was $600,000 when the program began, and because of changes in federal tax law, it recently was increased to one million dollars. Although the federal exemption amount is scheduled to increase over the next five years to $1.5 million, $2 million, and then $3.5 million, the court has not yet decided whether it will continue to increase the amount for the program.

The San Francisco mediation program is voluntary. Although the judge encourages virtually all eligible cases to go to mediation, the parties are not forced to go to mediation. According to the court administrator, most people choose to use the mediation program when it is offered to them. The overseer of the probate mediation program estimates that approximately fifty cases per year pass through the volunteer mediation program.

If the judge orders mediation, the parties are given a "Minute Order Referring Case to Pro Bono Mediation" that states that the parties are ordered to contact the overseer of the probate mediation program. The order contains a date by which time the mediation must be completed, a date for a status conference, and a trial date. The parties are also given a list of approximately twenty-five mediators who serve as a volunteer

mediation panel to provide pro bono probate mediation services.[54] After choosing a mediator from the list, the parties are supposed to contact the overseer of the program so he can keep a log of the cases. As people have become more familiar with the process, they sometimes omit that step.

The attorneys on the volunteer mediator panel have experience in probate and trust matters as well as mediation. There is no formal application process for the panel, and there are no specific minimum standards for membership on the panel, other than the requirement that all mediators must be attorneys. The San Francisco probate court judge determines whether someone has sufficient experience to be on the panel. The determination is based on a judgment that the person has litigation experience in probate and trust matters as well as experience with mediation. Although not required, formal mediation training is one of the factors considered in determining whether someone is eligible to be on the panel.

All attorneys on the panel serve on a pro bono basis. Although it varies from attorney to attorney, members of the panel generally serve as volunteer mediators for three to six mediations per year. Each mediation takes approximately one day.

The parties and the volunteer mediator set the schedule for the mediation. If the parties believe they need discovery before they are ready to engage in mediation, discovery can be arranged with the mediator. The only outside limit is the date for the status conference set in the mediation order.

*2. Attorney Feedback*[55]

The attorneys interviewed overwhelmingly stated that mediation was highly successful in resolving disputes. Records kept by the overseer of the program reflect this success by estimating that approximately eighty percent of the cases settle during the mediation.

The volunteer nature of the program has also been spoken of in favorable terms because it provides an opportunity for Trusts and Estates lawyers to provide valuable pro bono service to the community. Also, because the program is both voluntary and free, it is not subject to the same criticisms that a mandatory program may encounter.

The mediators in the San Francisco program enjoy wide respect for their knowledge of the law governing probate disputes as well as their ability to "get the job done." But some attorneys noted that the mediators sometimes lack training in mediation dynamics.

The informal nature of the program raises issues for some. First, San Francisco attorneys appear to lack a clear understanding of the program.

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[54] The probate court maintains a separate list for guardianship and conservatorship disputes.

[55] The material in this subpart is based on feedback from interviews with ten attorneys practicing in San Francisco, California. The interviews were conducted between January 1, 2002 and July 30, 2002.

Several of the attorneys interviewed did not know that the program was limited to smaller estates. In addition, attorney-mediators who were not already on the panel did not know how to get on the panel. Some thought that one needed to be a "member of the club" to get on the panel.

Another issue raised by attorneys who used the program was the difficulty in finding a listed mediator who was willing to handle the dispute on a volunteer basis. This was particularly true for the mediators who were more well-known. Some perceived this problem to be a result of the relatively small number of mediators on the panel. One attorney said that she had to call nine mediators before she found someone who was willing to take her case. Another lawyer said that he was not able to find any mediator for one of his cases so it had to go to trial. Although this lawyer suggested that a larger panel might have avoided this problem, he also acknowledged that he would not want to see the quality of the mediators on the panel suffer.

Finally, a surprising number of attorneys questioned the wisdom of making the program entirely pro bono. One concern was that the pro bono nature of the program kept mediators from agreeing to do more than a couple of mediations per year.[56] Another concern was that the opportunity for free mediation kept the parties from resolving their dispute in a timely manner because "the clock wasn't ticking." Finally, lawyers questioned the appropriateness of asking attorneys to donate their time. The lawyers on the panel help judges keep their case loads reasonable by helping reduce the judges' case load. These same lawyers also appear before these same judge on a regular basis. The concern is that these judges might be more inclined to think favorably about lawyers who volunteer their services on the panel, and thus be more willing to assist them when they appear before the judge in other matters.

F. Hawaii

*1. Overview*

The program for mediating probate disputes in Hawaii is part of a larger program designed to encourage ADR in Hawaii. In 1989 the Hawaii Legislature enacted legislation establishing the Center for Alternative Dispute Resolution.[57] This was the beginning of the formal use of ADR as a tool to solve disputes in the Hawaii Court System. [58] In 1996 rule 2.1 of the Hawaii Probate Rules came into force.[59] It authorizes judges to refer any probate case to mediation at their discretion. The use of mediation to solve probate disputes is governed by the Mediation Rules

[56] Although it is always possible to pay for one of these mediators, attorneys noted that the clients often were not willing to pay for something that the court told them they could get for free.

[57] HAW. REV. STAT. §§ 613-1 to 613-4 (1989) (§ 613-2 amended 2000).

[58] Informal, often non binding, forms of ADR have existed in Hawaii for generations.

[59] HAW. PROB. R. 2.1 (1996).

for Probate, Trust, and Guardianship of the Property ("Hawaii Mediation Rules"), which are part of the Hawaii Court Rules.

Hawaii has no formal court-sponsored mediation program for probate disputes. There are no requirements for certification of mediators and there are no rules about fees for mediation services. The Hawaii Mediation Rules do, however, set forth regulations about assigning cases to mediators, the authority of mediators, attendance at mediations, confidentiality, sanctions, and immunity.[60]

The Hawaii Probate Rules provide that the probate court may direct parties to participate in mediation in accordance with rules set forth in the section entitled, "Mediation Rules for Probate, Trust, and Guardianship of the Property."[61] The Hawaii Mediation Rules provide that the probate court may refer any case to mediation "upon the motion of a party, by written stipulation of all parties, or upon the court's own motion."[62] In all cases the court refers to mediation, participation in mediation is mandatory.[63] "All contested probate, trust, and guardianship matters are eligible for referral to mediation" and all mediations must be conducted in accordance with the Hawaii Mediation Rules.[64]

Parties may select their own private mediator or the court will assign one to their case.[65] Unless the court determines otherwise, mediators must be compensated.[66] Compensation must be borne by the parties, not by the estate, unless otherwise ordered by the court.[67]

Mediators must work with the parties to arrive at a mutually acceptable resolution.[68] The mediator has the authority to terminate the mediation if she feels that the process is unproductive or a party is not mediating in good faith.[69] Mediators may recommend to the court that sanctions be imposed on a party who violates the Hawaii Mediation Rules.[70] The mediator is not allowed to issue a decision or make procedural or substantive recommendations about the case to the court.[71]

If a party is represented by counsel, counsel must participate in the mediation.[72] The mediator has the authority to compel third parties to attend the mediation if she feels that it is critical to the resolution of the case.[73] None of the parties to the mediation, including the mediator, the

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[60] HAW. PROB. R. 2.1 exhibit A, MEDIATION R. 4, 7, 8, 9 (1996).
[61] HAW. PROB. R. 2.1.
[62] MEDIATION R. 1.
[63] *See id.*
[64] MEDIATION R. 3.
[65] MEDIATION R. 4(A).
[66] MEDIATION R. 4(B).
[67] *Id.*
[68] *See* MEDIATION R. 5.
[69] *See id.*
[70] *See id.*
[71] *See id.*
[72] *See* MEDIATION R. 6.
[73] *See id.*

parties, and the attorneys, may communicate any matters discussed at the mediation to the court.[74] But if a party violates any part of the Hawaii Mediation Rules, the violation may be reported to the court and sanctions may be levied.

Section 613 of the Hawaii Revised Statutes establishes the Center for Alternative Dispute Resolution (the "Hawaii ADR Center")[75] within the judiciary to "help reduce public and private costs of litigation and increase satisfaction with the justice system."[76] The Hawaii ADR Center's charges include "[p]roviding . . . consultative resources and technical assistance" concerning "cases that affect the public interest or the work of state and county agencies," "[p]romoting . . . the appropriate use of ADR," and "disseminating to government agencies and to the community at large up-to-date information . . . [about] ADR."[77]

The Chief Justice of the State of Hawaii appoints the director of the Hawaii ADR Center. The state does not have any requirements for the certification of mediators and does not endorse the use of any particular mediator. But the Hawaii ADR Center does train mediators and has conducted training specifically in the area of probate law. All of the mediators trained by the Hawaii ADR Center are attorneys or judges, although nothing formally requires that they be. The mediators set the fees for mediation, and the parties pay the mediators.

A large part of the Hawaii ADR Center's work is to educate the public and lawyers concerning the use of ADR through public forums, an "ADR Month," and outreach to the Hawaii State Bar Association.

The Hawaii ADR Center conducts a probate mediator training course and publishes a pamphlet[78] that provides general information about the use of mediation in probate disputes. It promotes the use of and discusses several specifics about the mediation process. It also states that the Neighborhood Justice Center, a private center related to the Hawaii ADR Center, will mediate cases using its trained volunteer mediators for a fee of twenty-five dollars.[79]

*2. Attorney Feedback*[80]

Attorneys widely regard probate mediation in Hawaii as successful. Much of its success is attributed to the fact that there is no formal pro-

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[74] *See* MEDIATION R. 7.
[75] *See* HAW. REV. STAT. ANN. § 613.
[76] *Id.* § 613-2(a).
[77] *Id.* § 613-2.
[78] GOING TO PROBATE COURT? WHAT DO YOU KNOW ABOUT MEDIATION? WHAT SHOULD YOU KNOW BEFORE YOU TAKE YOUR PROBATE CASE TO TRIAL (Center for Alternative Dispute Resolution) (on file with author).
[79] *See id.*
[80] The material in this subpart is based on feedback from interviews with nine attorneys practicing in Hawaii. The interviews were conducted between February 23, 2001 and January 10, 2002.

gram. Attorneys are free to choose their own mediators and, therefore, they have the freedom to choose mediators based upon what they believe are important characteristics. Most attorneys view requiring mediation as a good thing because mediation is an effective way of solving will and trust disputes. The combination of required mediation, the strong Hawaii ADR Center that advocates the use of mediation and provides education regarding mediation's usefulness, and informal mediation rules all work together to encourage the widespread acceptance of mediation in Hawaii.

All of the attorneys interviewed had long careers in dealing with probate litigation, and the majority of their cases had been litigated in the Hawaii courts before the advent of mediation. None of the attorneys who were familiar with the Hawaii Mediation Rules and the Hawaii ADR Center had any complaints about either. The number of trusts and estates lawyers in Honolulu is limited, and they all seem to be familiar with each other.

Only one attorney expressed reservations about the value of mediation for solving probate disputes. He stated that he saw the mediation as a way for the judge to "pass the buck." He would prefer a system in which the court would appoint a master to handle probate disputes. In his experience, this has worked well because the master is usually a lawyer who is familiar with probate law. He believes that most probate disputes are based upon family hatred or fights over money. He said that "nothing resolves family hatred." He believes that if the parties are reasonable, the case will be settled through negotiation, and mediation is therefore not necessary.

## IV. COMMON ISSUES IN DEVELOPING COURT-SPONSORED MEDIATION PROGRAMS

Any jurisdiction considering adoption of a program to encourage mediation of probate disputes needs to consider a number of issues, including:

- Encouraging acceptance of mediation of probate disputes by the bar and by disputants;
- Establishing standards for mediators;
- Determining fees for mediators and funding for programs; and
- Setting the timing of mediation.

This Part examines each of these issues, taking into account the variety of ways in which the programs described in this Article address the issues and some of the ramifications of the different choices.

### A. Encouraging Acceptance of Mediation

The greatest challenge for jurisdictions seeking to develop or encourage participation in programs for the mediation of probate disputes is encouraging their acceptance by the bar and by disputants. Interviews with lawyers in states where such programs do not exist indicate a signifi-

cant degree of skepticism over the value of mediation to resolve probate disputes. For example, some attorneys express the belief that if a dispute can be resolved, good lawyers can negotiate a resolution without the addition of a mediator. Other lawyers express the view that probate disputes are not susceptible to mediation because the disputes are too emotional. Finally, some lawyers express concern over the added expense of mediation. However, one message that comes through loud and clear from the interviews with attorneys and judges practicing in jurisdictions where such programs are in effect is that familiarity with mediation breeds not just acceptance, but enthusiasm. Where mediation has taken root, it has flourished. Even in those jurisdictions where the probate bar does not regularly avail itself of a court-sponsored mediation program, mediation is widely accepted and people often hire private mediators from outside the program to assist in the resolution of disputes.

Attorneys and judges operating within jurisdictions in which mediation of probate disputes regularly occurs are quite enthusiastic about it. The reasons for this enthusiasm are obvious. Judges are enthusiastic because mediation encourages settlement of disputes that can be settled. This helps clear their dockets and provides them the time to focus on issues that truly need court involvement. Attorneys are enthusiastic because mediation helps their clients resolve disputes. Even where no settlement is reached, attorneys appreciate that the mediation process can often help refine their cases. In addition, many attorneys have themselves become mediators and find it very satisfying, and sometimes lucrative, to assist people in resolving their disputes through mediation. Many of the lawyers interviewed stated that while they were initially skeptical about the value of mediation, they had become "true believers."

Jurisdictions have taken a variety of approaches to encouraging acceptance of mediation, including:

1. Encouraging mediation on a state-wide level;
2. Mandating mediation;
3. Educating parties about mediation; and
4. Educating attorneys about mediation.

*1. State-Wide Encouragement*

In Texas, Georgia, California, Florida and Hawaii the state sponsored programs—usually originating in the respective state supreme courts—were designed to encourage mediation of all disputes. These state sponsored programs provide attorneys a basic level of familiarity with mediation. That said, the importance of these state sponsored programs should not be overstated because many of the most successful programs that encourage mediation of probate disputes operate independently of the state program. For example, although California has a general program to encourage mediation of disputes, both the Los Angeles and San Francisco programs have their own standards and procedures and operate independently of the state sponsored program. Similarly, Texas encourages media-

tion on the state level, but only some probate courts specifically encourage the use of mediation to resolve probate disputes.

*2. Mandating Mediation*

One way of encouraging familiarity with mediation is by requiring mediation for all probate disputes. While none of the programs discussed in this Article makes this requirement explicit, several of the programs—such as those in California, Texas, and Georgia—have a de facto mandatory program because judges essentially order all cases to mediation. Although mandatory mediation programs produce the fastest conversion, they are also susceptible to the greatest criticism, particularly where the programs obligate the parties to pay attorney mediators their regular market rate.

*3. Educating Parties*

Some jurisdictions encourage familiarity with mediation by providing educational—and in some cases even promotional—material on mediation directly to the parties. This material explains what mediation is and lists advantages of mediation. For example, when parties file suit in probate court in Hawaii, they are given a brochure.[81] This brochure provides a general description of the mediation process and lists the advantages to mediation and the disadvantages of litigation, including statements to the effect that mediations can be scheduled at more convenient times than court hearings, mediation offers parties more time to tell their story than they may otherwise get at a court hearing, mediation can result in resolution of disputes in far shorter time than is typical for litigation, mediation can result in a resolution that is more satisfying than having a judge imposed decision, and mediations are confidential. Although it is difficult to judge the effectiveness of these materials without directly interviewing parties, it would seem that the materials encourage parties to mediate their disputes.

*4. Educating Attorneys*

Educating attorneys is essential to the widespread acceptance of mediation. However, it may be difficult for many attorneys to find the time needed to learn about mediation, given the limited amount of time they have to spend on non-billable matters. Some of the most successful mediation programs have accomplished this education process by encouraging members of the probate bar to be trained as mediators. For example, programs in San Francisco, California, Los Angeles, California, Harris County, Texas, and Dallas County, Texas, and Dade County, Florida all depend on experienced probate attorneys and retired judges to act as mediators.[82] When attorneys act as mediators, they have an incentive to

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[81] *See* discussion *supra* Part III.F.1.
[82] *See* discussion *supra* Part III.

educate themselves about the mediation process quickly.

B. Establishing Standards for Mediators

The success of a court-sponsored mediation program depends on having well-trained mediators. Establishing appropriate qualification standards for mediators helps to ensure well-trained mediators will be available. To the extent there were complaints about programs, the most common was that the mediators were not qualified. When attorneys and parties expressed this concern, they also tended to say that the mediation was a waste of time and money.

Although at least one program (Hawaii's) has virtually no set requirements and allows anyone to be a mediator in its program, most jurisdictions impose minimum requirements to ensure that the mediators are trained in mediation. In addition, many jurisdictions require that the mediator have some experience with substantive probate law.

*1. Experience with Mediation*

The mediation programs in Florida, Georgia, Texas, and Los Angeles all require mediators to go through a mediation training course.[83] The amount of training required in each jurisdiction varies from ten to forty hours. In addition, several of the jurisdictions require that the mediator-in-training observe mediations conducted by experienced mediators or have their first mediations observed by an experienced mediator. Florida imposes some of the strictest requirements for mediation training. It requires mediators to have forty hours of classroom training, to observe two mediations conducted by more experienced mediators, and to conduct two mediations under the observation of an experienced mediator. Georgia also has strict training requirements for mediators, requiring new mediators to attend twenty hours of classroom training and observe or co-mediate at least five mediations.

*2. Experience with Probate Law*

The requirement for training or experience with substantive probate law varies considerably from jurisdiction to jurisdiction. Some programs, such as those in Florida, Georgia, and Hawaii, provide no system for ensuring that mediators of probate disputes understand probate law. Thus, for example, the mediator for all probate disputes in the court-sponsored program in Collier County, Florida is an experienced mediator but is not an attorney and has no particular training in probate law. Other jurisdictions, such as Harris and Dallas Counties in Texas and in San Francisco, California, have no stated requirements for ensuring that the mediator understands the law governing probate disputes. Nonetheless, knowledge of the law is effectively achieved because the judges responsible for

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[83] *See* discussion *supra* Part III.

implementing the program essentially limit their referrals to attorneys with significant experience in the law governing probate disputes and retired probate judges.

The PCMP in Los Angeles consists of mediators with significant probate mediation experience because the application specifically asks what percentage of the applicant's experience and current practice is focused on estate planning, estate administration, guardianship, or conservatorship matters.[84]

Finally, the program in Fulton County, Georgia, provides probate law training to the mediators who are to handle probate disputes. Although this program is well-intentioned, it is unable to produce the same result as having an attorney with significant probate experience. A number of attorneys in Georgia expressed reluctance to use court-appointed mediators to mediate complicated probate disputes because of their lack of experience in probate law.

C. Determining Fees for Mediators and Funding for Programs

One critical aspect of a court-sponsored mediation program is the mechanism provided for paying mediators and, where necessary, funding the mediation program. Three basic systems are in use for paying mediators and funding the cost of mediation: free or reduced mediator fees supported by court filing fees, volunteer mediators, and mediators' fees paid by the parties.

A number of states, such as Georgia and Florida, fund their mediation programs through court filing fees. These fees are used to provide the infrastructure for the mediation programs and, in some cases, to pay or supplement the mediator fees. For example, in Collier County, Florida, a staff mediator provides free mediation services to all eligible participants. In Georgia, the Justice Center provides free mediation for probate disputes. The fee-based structure tracks the court system itself in that mediation is essentially publicly financed and available to all. Many of the fee-based systems have mediators who are trained in mediation, but lack specific knowledge of probate law. This results in many probate lawyers and disputants opting out of the court-sponsored program and hiring private mediators.

San Francisco has an informal program that relies on volunteer mediators to perform mediation for estates smaller than one million dollars. The volunteer mediators are San Francisco probate attorneys. By limiting the informal program to experienced probate attorneys, the volunteer system in San Francisco does not seem to raise the issues that the fee-based programs do. But it is not without its critics. The most common criticism of the San Francisco program is the difficulty of finding a mediator.

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[84] The expertise of the mediators in the Los Angeles program also results from the fact that the program was initiated by the Trusts and Estates Section of the Los Angeles County Bar Association.

Several of the attorneys interviewed stated that the best mediators were in high demand and that there was sometimes difficulty in finding anyone who was willing to handle their case on a volunteer basis. In addition, the use of volunteer mediators does raise questions regarding the appearance of impropriety because the volunteer attorneys help the judge reduce his docket. The concern is that the judge may act more favorably toward those attorneys in other matters.

Texas, Hawaii, and Los Angeles have systems in which the court refers cases to private mediators, and the parties bear the cost of the mediation.[85] If the parties do not have the resources to pay a private mediator, many programs have connections with dispute resolution services that will provide mediators for free or at a nominal rate. This system can work well when the parties interested in mediating have sufficient assets to fund the mediation. But in jurisdictions such as Los Angeles, where mediation is mandatory, some attorneys expressed concern about the appropriateness of having courts require parties to pay outside attorneys their hourly rate to mediate disputes.

### D. Setting the Timing of Mediation

One issue about which attorneys expressed concern involved the timing of the mediation. Programs with mandatory mediation, such as those in Georgia and Los Angeles, often provide standing orders for mediation before the judge hears the case. The advantage of early mediation is that it encourages the parties to reach resolution by allowing them to begin resolving their disputes before their positions become hardened. In addition, when successful, early mediation results in the maximum savings for the parties in terms of reducing the expense of litigation.

But there are disadvantages to early mediation. Many attorneys suggested that it is more productive to have mediation after some discovery has taken place because the parties and their lawyers then have a better understanding of the case.

## V. CONCLUSION

It is often said that our system of federalism allows states to serve as laboratories in which experimentation can occur. This is true even more so in our judicial system in which innovative programs often are enacted on a county or even courthouse level. Of course, one of the challenges raised by this decentralized system is that we have no formal mechanism to share the results of these experiments. This Article has sought to fill this void by compiling information from judges, attorneys, and court administrators in courts and counties across the country that have established programs to encourage mediation of probate disputes.

This Article has analyzed common issues faced in these programs.

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[85] Hawaii provides an interesting twist; if the dispute involves an estate, the cost of the mediator is not charged to the estate.

Given the enthusiasm for mediation, the number of programs undoubtedly will grow over the next decade, and it will be important for future planners to understand these common issues when developing their own innovations.