

Urban Law Annual ; Journal of Urban and Contemporary Law

Volume 17 Symposium: *Alternative Dispute Resolution Mechanisms to Landlord-Tenant Problems*

January 1979

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Recommended Citation

David M. Ebel, *Landlord-Tenant Mediation Project in Colorado*, 17 URB. L. ANN. 279 (1979)

Available at: https://openscholarship.wustl.edu/law_urbanlaw/vol17/iss1/25

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LANDLORD-TENANT MEDIATION PROJECT IN COLORADO

DAVID M. EBEL *

I. BACKGROUND

Almost every urban area in our country faces a rapidly increasing number of landlord-tenant disputes. Traditional judicial procedures appear incapable of efficiently resolving these disputes. Although there have been many efforts to make the judicial process more responsive to the growing flood of landlord-tenant disputes, there is an increasing feeling that perhaps a part of the solution lies entirely outside of the traditional court structure. The Colorado Bar Association and the Commission on Community Relations for the City and County of Denver have jointly undertaken a new nine-month experimental project in Denver, Colorado, which seeks to resolve landlord-tenant disputes through mediation.¹

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1. Particular credit for the conception and implementation of this pilot project should be given to Mr. Minoru Yasui, the Executive Director of the Commission on Community Relations, Ms. Lynn Smith, the project coordinator, Ms. Annette Finesilver and Ms. Wendie Downie, all with the Denver Commission on Community Relations; to Mr. Carlos Lucero, the past President of the Colorado Bar Association, and Professor Jonathon Chase, for their work on behalf of the Colorado Bar Association; and to Ms. Karen Olson, state program officer of ACTION, for her guidance and counseling throughout.

This project is funded by a \$34,000 grant from ACTION; it is reasonably expected that a further grant will extend the project for an additional year.

Landlords and tenants encounter various problems in seeking to resolve their disputes through the courts. Foremost, there is the problem of delays. A case filed in the Denver District Court² usually takes several years to be resolved. A case in the county court will take several months. A case filed in the small claims court will take at least one month.³ These delays can be intolerable to the landlord and tenant when the issue is where the tenant is going to live; who is going to fix the furnace that does not work in the middle of the winter; what rent is due and when; or whether the apartment can be vacated and relet. These problems need almost immediate attention: in these circumstances justice delayed *often* will be justice denied.

The second problem encountered is that access to the courts is frequently inconvenient. The courts meet during business hours, and they are typically located in the downtown area.⁴ It is often difficult and expensive for a tenant or landlord to take time off from work to appear in court for a setting and trial. This inconvenience is compounded when the parties have to wait several hours until their case is called. The cost in terms of lost wages and inconvenience can easily exceed the amount in controversy.

The third problem is the expense of litigation. All courts require that the parties pay a filing fee ranging from \$9 in the small claims court to \$41 in the district court. Additionally, where the parties are represented by attorneys, the cost of litigation increases considerably.⁵ When these out-of-pocket costs are added to the cost of lost wages and inconveni-

2. The Denver District Court is the trial court of general jurisdiction.

3. In addition, both the County Court and the Small Claims Court have severe jurisdictional limitations. The county court cannot try cases where more than \$1,000 is in controversy. COLO. REV. STAT. § 13-6-104(1) (Supp. 1978). The small claims courts are limited to claims of \$500 or less. *Id.* § 13-6-403(1) (1973).

Neither court can issue injunctions. *Id.* § 13-6-105(f) (County Courts); *Id.* § 13-6-403(2)(h) (small claims courts).

The County Court can not try title to real property. *Id.* § 13-6-105(e). The Small Claims Courts cannot try actions involving forcible detainer, forcible entry, or unlawful detainer. *Id.* § 13-6-403(2)(c) (1978 Supp.). The Small Claims Courts may also not try actions for replevin, *id.* at § 13-6-403(2)(d) (1973) or for specific performance, *id.* at § 13-6-403(2)(e).

4. The Denver Small Claims Court, however, does meet during the evenings, one night each month.

5. Parties may be represented by counsel in both the county court and the district court; in the small claims court, however, representation by counsel is disallowed. COLO. REV. STAT. § 13-6-407(2) (“[I]t being the intent of this section that no attorney. . . shall appear or take any part in the filing or prosecution or defense of any matter in the Small Claims Court.”).

ence, there is no doubt that a number of landlords and tenants make the practical economic decision to abandon their claims rather than to pay such disproportionate cost to obtain a judicial resolution.

The fourth problem involves psychological barriers that deter many persons from seeking judicial relief. In particular, many tenants perceive courts as omnipotent and dangerous places that should be avoided at all costs. To people who are unaccustomed to the judicial system, the courts have strange customs, procedures and language, which are confusing and intimidating.

Finally, courts frequently lack the time, inclination, and authority to develop creative and responsive solutions to landlord-tenant problems. Courts generally deal in terms of right and wrong, winning and losing, and strict legal precedent. When confronted with the massive volume of cases typically found in the landlord-tenant area, courts are often required to act upon the basis of incomplete and filtered evidence. It is no wonder, then, that courts are seldom able to do more than simply enter a monetary judgment for the plaintiff or defendant. They do not have the resources to fashion creative relief or to probe potential compromise solutions that might be more acceptable to both parties than the usual winner-take-all approach.

For these and other reasons, a growing number⁶ of landlords and tenants are turning to sources other than the civil courts for help in resolving their disputes. The challenge is to develop a new approach to problem solving that can minimize or eliminate the problems associated with the courts, and, at the same time, effectively handle a large number of cases.

II. THE STRUCTURE OF THE COLORADO LANDLORD-TENANT MEDIATION PROJECT

The Colorado Landlord-Tenant Mediation Project is governed by a five-person governing board with representatives from the Commission on Community Relations, the Colorado Bar Association, the judiciary, a landlords' association, and a tenants' association. To assist the governing board and to provide broad community support, there is a much larger advisory board, consisting of representatives of other organizations interested in landlord and tenant concerns. In addition, a paid, full-time project coordinator, accountable to the governing board, supervises all intake and screening, assignment of mediators, and the general opera-

6. For example, the Colorado Landlord-Tenant Mediation Project described in this Article is receiving approximately ninety to one hundred inquiries a week from landlords and tenants.

tion of the program.

The actual mediators are all volunteers. To date, twenty volunteers have been recruited. Each person has agreed to mediate at least one dispute a month. Twenty additional volunteers will be recruited within the next four to six months. The mediators come from many different walks of life, although they tend to be professional people with skills particularly applicable to landlord-tenant controversies. All prospective mediators are carefully screened in order to exclude those with preconceived biases. In addition, there are plans to enlist retired people to serve as mediators: it is believed that they could bring a special perspective, dedication, and availability to the project. This proposal would also tap one of society's greatest underutilized resources—its senior citizens.

Once the mediators are selected, they undergo several intensive training sessions. These sessions include instruction from representatives of the Colorado Bar Association on landlord-tenant law in Colorado, as well as instruction from psychologists and experienced mediators on the art and skill of mediating disputes. The training sessions also include several mock mediation demonstrations. Additionally, the Colorado Bar Association is preparing a manual for reference by the mediators. The Colorado Bar Association also supplies back-up lawyers who can be consulted at any time.

A. *Intake*

The mediation services are available without charge to any landlord or tenant in Denver with a dispute relating to the rental of residential property. There are several possible intake routes. First, an individual landlord or tenant may directly contact the project coordinator; the coordinator can then obtain the required information to commence resolution of the dispute. Second, a cooperative procedure is now being established with the Denver Small Claims Court. Under this procedure, when a landlord-tenant dispute is filed in the Small Claims Court, the parties will be advised of the mediation services offered by the panel and encouraged to use these services. Pending mediation, the case will be kept active on the small claims court docket: if the mediation is unsuccessful, the parties will be able to proceed to trial in the small claims court without any loss of time.

Efforts are also underway to establish a working relationship with various landlord and tenant organizations whereby they will refer complaints by their members directly to the mediation panel.⁷ Ultimately, it

7. Referrals will also be encouraged from the Legal Aid Society, the Metropolitan

is hoped that landlords in the area can be persuaded to insert a provision in their leases stating that both parties agree to submit any disputes that arise under the contract to the voluntary mediation panel before proceeding to court.

B. *The Mediation Process*

The coordinator tries to assign a mediator within two days after a party has requested mediation. Although mediators generally are assigned at random, some consideration is given to special skills that may be useful in particular kinds of disputes (such as assigning an engineer to handle a case involving claims of structural deficiencies or uninhabitability). An effort is also made to select a mediator whose location is convenient to the parties. Within two days the mediator is to contact the opposing party to determine if he will attend a voluntary mediation session.⁸

If both parties agree to try mediation, the mediator sets up a meeting as soon as possible—hopefully within the next several days. Neutral sites such as a church or community center near the location of the property are sought. The mediator should be flexible enough to hold the session during the evening hours or on weekends, if desired by the parties, to avoid interfering with the parties' employment situations and to obtain a prompt scheduling of the mediation session.

The mediation process itself is informal. There is no record and no formal taking of testimony. Either side may advance whatever arguments and evidence desired; in addition, the mediator may actually visit the premises to make an on-site inspection. Depending upon the circumstances, a mediator may determine that the process will work better if he meets separately with each side, rather than having both parties together at a single meeting. However, the typical procedure involves a single meeting with all participants present.

The mediator's role in the dispute resolution process will depend upon the circumstances of each individual case. There may be times when the mediator should simply facilitate a meeting of the disputants. Other times, the mediator may serve most effectively as an intermediary or mutual confidant. Still other times the mediator may serve as an adviser or non-binding arbitrator making specific suggestions and recommendations to the parties.

Denver District Attorney's Consumer Office, and other agencies who come in contact with landlord-tenant problems.

8. In some cases, the matter can be resolved very quickly over the telephone. Of course, a meeting will not be required in those cases.

The mediator tries to bring as much flexibility and creativity to the process as possible. For example, if there is a dispute over the tenant's right to remain in possession, the mediator could determine that the tenant's main objection to vacating the premises is his concern about finding suitable alternative housing. The mediator may then be able to assist the tenant in locating alternative housing in exchange for the tenant's willingness to accept some definite future date to vacate the premises. The landlord may be persuaded to give the tenant enough additional time to locate such alternative housing on the basis that it will be cheaper and faster than instituting an eviction action. In the area of damage deposits, a mediator might be able to identify precisely what damage was done to the apartment. In addition, the mediator might be able to obtain an agreement between the parties for repair without resort to a damages judgment. In a case where the tenant is withholding rent until certain repairs are made, the mediator may assist the parties by identifying the work to be done and by arranging for suitable escrow of the withheld rent so that both parties are protected.

If the mediation is successful, the mediator will assist the parties in drafting a brief and simple agreement. If the mediation is unsuccessful, the mediator will advise both parties of the availability of remaining courses of action. If one or both parties desire to carry the matter to the Small Claims Court, the mediator may help both parties narrow and frame the issues and prepare a stipulation of undisputed facts so that the case can be expeditiously presented. In return for this assistance it is hoped that the court will give the parties priority on the docket so that the parties will not have lost any time by initially trying mediation.

If the matter does proceed to trial, the mediator will not be available to testify on behalf of either party. This will preserve the mediator's neutrality and will encourage both parties to participate in a frank exchange during the mediation process.

C. Evaluation

In order to determine the effectiveness of the project and to supervise the work of the mediators, there will be monitors who periodically observe the mediation sessions. Furthermore, the participants will be asked to evaluate the process after it has been completed.

The ultimate objective of this program is to develop credible statistical data on the cost effectiveness of mediation. A further objective of the program is to define the parameters and techniques that are important in achieving successful mediation.

D. *Other Benefits*

In addition to the immediate benefit of resolving specific landlord-tenant disputes, it is hoped that this pilot program will generate additional long-term benefits for the community. For example, there is an educational benefit. There will be a fairly extensive program of public education on the rights and obligations of tenants and landlords and the procedures to be followed in enforcing these rights. Brochures are being prepared for distribution and presentations before local high schools.

III. SUMMARY

Lawyers are traditionally taught that disputes can only be resolved successfully if there is a third party, such as a court, with power to impose a settlement. However, the price paid for vesting such authority in a third party is that the disputants themselves are subjected to a great deal of delay, expense, and formality that has been developed to protect the parties against abuse of this decision-making power. Although voluntary mediation does not have the finality of a judicial decree, at the same time it does not carry all the burdens that have evolved in judicial proceedings and which now threaten to choke them. For those who say the mediation process will not work, it should be pointed out that mediation has rarely been given the chance to work. Further, in those limited situations where mediation has been tried in a landlord-tenant context, it has worked very well.⁹

It is the hope of this project to remedy, or at least to minimize, the problems attending use of the courts to resolve landlord-tenant disputes. First, the mediation process, if successful, should be much faster than any conventional court proceeding. If the process is unsuccessful, efforts should be made to enable the parties to return to court without any loss of time on the docket resulting from their mediation efforts. In this way, mediation will be integrated into the court structure.

In addition, the mediation process should be much less expensive than a court suit: no fee is charged and attorneys will generally be discouraged from participating in mediation.¹⁰

9. See, e.g., the Weld County Information Referral Service program in Greeley, Colorado, which applies a very informal mediation approach to these and other kinds of problems.

10. If the project proves to be cost effective in terms of saved judicial time or in terms of saved legal costs and other trial expenses for the disputants, it is hoped that the project can eventually be funded in a more permanent way through one or more of the following sources: (1) nominal filing fees required of the participants themselves; (2) contributions

The process should also be more convenient to the parties, particularly since the mediation session generally will be located near the parties, rather than in the traditional downtown judicial complexes. The scheduling of the mediation session will be more flexible: it should not be necessary for the parties to take time off from work in order to participate.

Further, mediation should be less intimidating for both parties. It is strictly voluntary in nature, and the proceedings are informally conducted in neutral, comfortable surroundings. People who traditionally have been unwilling to submit their dispute to a court should be more willing to try the mediation process.

Finally, and perhaps most importantly, it is hoped that the flexibility of the mediator both in marshaling the resources of the community and in suggesting creative solutions to these intensely human problems will manifest more acceptable solutions for both parties. It is, of course, always the risk of a demonstration program that it may demonstrate the unworkability of the idea. However, it is still hoped that the information obtained will be of use to others around the country who are similarly coping with the difficult problems of finding an economical, efficient, and fair way to resolve landlord-tenant disputes.

from the major landlord and tenant organizations in the Denver area; (3) support from the state and local governmental entities that would otherwise have to resolve these same disputes through the more expensive judicial process.