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ARTICLES

Mediators' Perspectives on Probate and Trust Resolution

By Edmund J. Sikorski Jr., Randolph T. Barker, and Teresa A. Killeen – January 20, 2023

This article is intended to build upon a previous article enumerating the benefits of mediating probate and trust disputes by discussing the process from a mediator's viewpoint, noting both best practices and common pitfalls on the part of the litigants.

Early Case Resolution
The longer the conflict rages, the more likely that the victor will in fact be the vanquished. The emotional, financial, and physical commitments necessary to pursue this type of litigation is enormous. It is accurate to say that the acrimony generated by the litigation process is a death sentence for any sense of family for ensuing generations.

More complex cases (such as capacity and undue influence cases) are less capable of early resolution because they are fact-intense and thus require substantive discovery. Discovery gamesmanship not only precludes early case resolution, but it also substantially interferes with the process, regardless of the stage of the litigation. Court intervention may be needed to compel the production of records and other relevant information, particularly when the information is potentially adverse to one side.

Avoidance of Trial Expense and Imposition of a Third-Party Decision
The expense of proceeding down the litigation track is enormous. When you consider the time spent preparing for, taking, and then reviewing and summarizing the testimony, a single witness deposition could cost $5,000, or more, depending on the nature of the case and the information held by the witness. In cases alleging incapacity or undue influence, for example, the fees for expert reports can easily exceed $10,000 per litigant.

A decision imposed by a third party is always unpredictable, whether it be by judge or jury. What is predicable about a third-party decision is that it will not come until long after the parties have respectively spent tens of thousands of dollars on attorney fees, experts, and discovery.

Suffice it to say that litigating a matter to its bitter end—with a judge, jury, and possibly an appellate court deciding the outcome—depletes the financial and emotional resources of the parties. This is true even when a litigant simply wants to "have their day in court."

Management of Malpractice Claims and Charges of Ethics Violations
Litigated claims can include the estate planning attorneys (if the decedent consulted an estate planning attorney). The facts of the case, developed in part by the discovery responses of the estate planning attorney(s) (who often become witnesses in the proceeding), increase the likelihood that a claim of malpractice and/or professional ethics charges will arise. *See* *Managing Risk: Estate Planning Work – Not for the Timid*, Wisconsin Lawyer, Vol.84 N.12, December 2011. The participation of estate planning counsel, and perceptions regarding their testimony and work product, are potential hindrances to the mediation process because they invite additional litigation within or separate from the proceeding the parties are trying to resolve.

Satisfied Clients
The data is overwhelming and conclusive: Clients who are involved in crafting a mediated resolution are more satisfied clients. See *Settle and Sue Again: Strategies and Snares*

See also Why Facilitative Mediation Produces better ADR Results, Res Ipas Loquitur, Vol 45 No.5, p.4, September/October 2016

Effective Mediation Produces Practical Outcomes
There are six core principles that both the mediator and counsel for the litigants must understand and convey in every estate and trust-related mediation:

> **1. Deeper understanding.** The purpose of mediation is to help people consider another perspective; develop a better understanding of the situation; and recognize what they really need from the conflict so that they can move on with their lives. The mediator's ability to identify issues and educate the litigants is critical to a successful process. The parties must learn to overcome the distractions of trivial matters in order to see the bigger picture.
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> **2. Effective common goal.** The focus must always be on finding an effective agreement—a common vision—that satisfies most of the participants' needs (not necessarily what they want) in the best manner available.
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> **3. Mutual problem solving.** The task in mediation is to help solve the other side's problem as a means of solving your own problem. Stated differently, your client(s) are their primary problem and vice versa. Mediators must help the parties identify possible solutions to common and less significant problems to establish a framework for resolving complex issues where they might have more divergent interests.
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> **4. Positions versus interests.** Positions must be differentiated from interests. Positions reflect what we assert we want as outcomes. The more we defend them, the stronger we seem to hold on to them. Interests reflect what is important to us as outcomes. Interests are the reason why the position is important to the person. Interests reveal hopes, needs, values, beliefs, and expectations. They can get lost in the fight for positions and do not necessarily reflect what the conflict is about. Do not confuse the two.
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> Consider the classic example of the "Orange Quarrel":
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> > Two children were arguing over who should be allowed to have the last orange in the kitchen. Both children wanted the orange and took the position that they should have the whole to the exclusion of the other. Through this adversarial process, both were heading toward either a win-lose situation (where only one may have the orange) or a lose-lose situation (where neither could have it).

A mediator became involved and suggested that the orange be cut in two, and even suggested that if one child cuts the orange, the other child would choose their portion. Although this seemed to be a fair, win-win solution, each party would receive only half of what they wanted.

The mediator then applied an interest-based approach to the dispute. Through this process, the mediator learned that one child wanted to use the orange zest to bake a cake, while the other child wanted to drink the orange juice and would otherwise have thrown the peel in the trash. The optimal win-win solution satisfying the interests of each child was found: Give one child the peel and give the other child the fruit.

Unfortunately, most real-life disputes are much more complex and are not always likely to achieve 100 percent satisfaction for the parties to that conflict. Applying an interest-based approach, however, allows mediators and the parties to identify the interests underlying their respective positions. Shifting the focus of mediation from positions to interests is more likely to identify more optimal, win-win solutions that do not necessarily "split the baby" and lead to a resolution that the parties will accept and adhere to.

5. It's business. Mediation is fundamentally about cutting a business deal. You may not get what you think you want, but you will be better off than if there were no deal at all.

Making a "business" decision about the conflict may be a foreign concept at first because, from the beginning, the dispute is principled, emotional, and difficult to mold into a reasoned risk assessment. But, risk assessment is at the heart of an informed business decision.

6. Experience equals realism. The mediator selected should have subject matter knowledge in this area of the law. Such experience and expertise allow a systematic analysis of the conflict and management of the unrealistic expectations of the parties.

Mediator Expectations

Here are three things a mediator expects from the parties prior to the mediation conference to ensure a successful mediation:

First: Prepare and exchange a mediation brief. Mediation briefs tell the mediator in advance the essence of the factual and legal issues in dispute, as well as the issues *not* in dispute.

Do everything within your power to objectify the claim, position, or defense. Make the content easy and simple to understand**.** Brevity is best.

Just like an opening statement, a mediation brief should tell a story that starts with a theme that is well thought out in advance. The theme should be one sentence or phrase that appeals to the moral force of the "jury" and captures the essence of the party's story. A good theme should be easy to remember, useful in decision-making, supported by the evidence, and consistent with the "juror's" concept of fairness and justice.

There are four magic word that introduce a theme: "This case is about."

The theme should be expressed in a single opening paragraph that combines an account of the facts and the law in such a way as to lead to the conclusion that you will prevail if the matter proceeds to and concludes in trial.

Second: Cut to the chase with the mediator. If the mediator understands "where you are coming from" and recognizes wiggle room in the outcome, they are in a better position to relay that to the other side (and vice versa).

Third: **Prepare.** Every primer on mediation exhorts the participants to prepare. However, this is like telling your kids to "go clean their rooms." What does this mean and how do you do it?

Preparation requires negotiators to pre-plan and prepare an intensely thoughtful, scripted plan that offers the other side a reason to accept one of a variety of alternative proposals. It might start with an ambitious proposal that does not automatically alienate the other side. The plan should be flexible and progress toward a final settlement position that weighs the client's best interests against the risks associated with a solution imposed by a third party.

From our point of view as civil mediators, failure of a party to come to the mediation session with such a scripted plan is *fatal* to the mediation process.

There are three substantive matters that the mediation participants should expect from the mediator in probate and trust mediation proceedings:

1. Knowledge of the law. Review and discuss the elements of the cause of action and the proofs necessary to establish the relief sought and the standard of review if appellate action might ensue.

The causes of action will fall into one of the following categories:

1) Tortious Interference with a Prospective Advantage
2) Tortious Interference with an Expected Inheritance
3) Intentional Infliction of Emotional Distress
4) Negligent Infliction of Emotional Distress
5) Fraud and/or Duress

6) Unjust Enrichment
7) Creation of an Express Oral Trust
8) Conversion
9) Constructive Trust, Undue Influence, and Breach of Fiduciary Duty
10) Incapacity (grantor, beneficiary, fiduciary)

The elements, proofs, and standards of review for many of these causes of action are set out in exceptional detail in: *In re Estate of Helen Bandemer et. al. v. Martin Bandemer et. al.* Unpublished COA October 12,2010 No. 293033.

> **Caveat:** As to the theory of tortious interference with an expected inheritance, there is an apparent conflict between *In Re Green* No. 173335 Mich Ct. App (1996) (unpublished) recognizing the cause of action, and *Dickshott v. Angelocci* No. 241722 Mich Ct. App (2004) (unpublished) refusing to recognize the cause of action in the absence of U.S. Supreme Court or legislative recognition. Cert. den. 474 Mach 712 (2005). *Bandemer* assumed without deciding that a cause of action existed for tortious interference with an expected inheritance or gift. Citing to *Green, Bandemer,* and *Dickshott*, a recent court of appeals decision again refused to recognize this cause of action. *Barretta-Biondo v. Shellenberger*, Unpublished COA July 28, 2022, No. 356890.

2. Knowledge of attorney's fees. When the subject of attorney fee shifting is involved in the litigation (almost always in light of statutory provisions allowing probate courts to grant them), entitlement to those fees will almost always be a subject of the mediation caucus.

When such claims are involved, we urge mediation participants to carefully digest the extensive discussion of that subject contained in *In re Clarence Temple et.al. v. Clinton Probate Court et.al.*, 278 Mich. App. 122, 278 N.W. 2d 265 (2008)

The standards for an award of attorney fees are different in estate litigation than in trust litigation.

3. Discussion of probable outcomes using decision tree analysis. A mediator having extensive knowledge and experience with contested probate proceedings is in the best position to help the litigants identify the possible consequences of their decisions. Using decision trees in caucus allows the mediator to offer each party a perspective on the uncertainties of litigation, including the economic and psychological costs. It also allows for a logical analysis and a greater sense of predictability—removing the impact of counsel's posturing that litigants might not fully understand. The result is greater confidence and credibility in the chosen solution.

Conclusion

Be prepared but be flexible. Mediation is ultimately about working to realize *common* goals.
Bring an adaptive and educated mind set to your negotiations.
You can get closer to the goal of juicing oranges and baking cakes.

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