

PROBATE SETTLEMENTS: Maximizing Results for your Client

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by

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I. Introduction:

Mediation has become an integral component of the judicial process. Unlike traditional aspects of the process, however, mediation offers a unique opportunity for the parties to step back from their dispute and communicate with one another directly. With help from a third-party neutral - the mediator - providing a safe environment, the process empowers parties to examine their risks realistically, exchange information, identify common ground, reduce misunderstanding, explain their perspectives to each other directly and explore win/win solutions generally unavailable from a judge or jury. As more than 98.5% of all cases are resolved without a trial, their day at the mediation table may be a client's only "day in court." Lawyers who do not truly appreciate the opportunity offered by mediation and take full advantage of the process by preparing themselves and their clients accordingly, will not achieve optimal results. In this paper, a mediator and a litigator share their recommendations for maximizing the outcome you seek.

II. Participants should prepare for mediation by developing a set of goals and objectives in advance while remaining flexible, ready to modify their goals in the light of new information.

The Mediators Perspective:

Process Design: Mediation is a process the participants can design and shape to their liking. One size does not fit all. There are many different styles and formats available, and the litigants and their counsel have an opportunity to make choices individually tailored for their particular dispute: They can select an evaluative process where the mediator offers opinions about the quality of their claims and defenses, predicts the eventual outcome if a settlement is not reached and presses the parties to adopt terms he or she thinks will work best. Alternatively, they can select a facilitative process where the mediator remains neutral, but asks tough questions of each side to expose the risks of proceeding further. A facilitative

mediator draws out the parties empowering them to speak. He or she addresses underlying interests and needs and helps the parties brainstorm resolution options that might lead to a global settlement of all issues in contention. As probate litigation often involves multiple parties with diverse interests and complex relationships with few clear legal answers, the ability to design a process carefully tailored to resolve intractable disputes is one of mediations most attractive features.

Parties can select a process relying primarily on joint sessions where all sides remain together in one room with a mediator who fosters better communication, works on repairing relationships and simultaneously looks for “win/win” resolutions. A facilitative mediator does not press for any specific solution but empowers the parties to take responsibility for their dispute, encouraging them to identify the terms of successful resolution. Alternatively, the parties can opt for a “caucus” model of mediation, where each party spends the day in different rooms. The parties may not see each other throughout the process, while the mediator shuttles back and forth exchanging information, carrying offers and counter-offers and engaging in reality testing procedures to “soften” up entrenched positions. If putting Aunt Rose and Uncle Joe in the same room is toxic, a caucus model is probably the only way to go.

Mediator selection is another major topic. Does your dispute present complex legal issues requiring someone who understands the law inside and out? If so, a subject matter expert might suit your purposes best. Are the parties escalated, the dispute totally dysfunctional? Perhaps the best mediator is someone with keen interpersonal skills, not experience in contesting estate planning documents.

Process design also addresses which parties will speak and in what order. How will presentations and statements be divided between lawyers and clients? What would be most effective coming from sister Rose? Uncle Harold has everyone’s respect. What might he have to say? What do the lawyers add? Rather than leaving process design to the mediator, lawyers should become involved and work with the mediator to identify the best approach for their dispute.

None of the available alternatives is etched in stone. A single mediation can start in one mode and transition to the other as the process plays out. The parties might begin in joint session, speaking directly to each other, but move to caucus when the time is right – to begin exchanging offers, for example. A mediator can start the day in a facilitative mode, and as the day progresses become more evaluative and assertive. To be effective in the evaluative mode, however, a mediator must have subject matter expertise. The opinion of a personal injury mediator who knows tort law inside and out will not be especially helpful when offering an opinion on what your probate judge will do about appointment of a conservator.

Counsel and clients should consider carefully what kind of mediation process will work best for them in their particular dispute. Is relationship repair important? Is better communication? Is it mostly about money and little else? Mediators will

work with counsel to design a process to meet the needs of the participants. Effective preparation includes consideration of process design.

Goals and Objectives: Mediation is a powerful forum for the resolution of lawsuits. As more than 98.5% of cases are resolved without trial, however, mediation does not increase the likelihood of settlement. It does, however, increase party satisfaction, settlement agreements that “stick,” relationship repair and better communication within a family. If the parties agree to mediation early, it can often reduce transaction costs significantly. Such benefits are available to those who plan in advance and have thought through what they want and how they hope to achieve it. By contrast, parties who come to mediation to learn “what they can get” will be frustrated. The best results in mediation are achieved by those who carefully identify and settle on their goals and objectives in advance.

Are there non-monetary goals? What are they? Participants should not start considering their non-monetary objectives for the first time on the day of mediation. I recommend that disputants prepare a check list in advance to avoid leaving out any important element of their desired resolution. In the heat of mediation, or when the momentum for a settlement is building, non-monetary items can be lost or forgotten. Who gets dad’s watch? Who manages sale of the lake house? Did mom intend for Suzanne to have the watercolor in the den? After the mediation is over, it may be too late to amend an agreement or add new items. The deal, as they say, is done. It cannot be easily reopened. Sometimes new items surface during the negotiation and drafting of a final settlement agreement. Raised so late in the day, they become obstacles to completing the process. Either way, non-monetary objectives can lead to protracted and emotional negotiations, further litigation or expensive appeals.

In “money” cases, more crucial is thinking though and deciding upon a client’s economic goals well in advance. What would this case be worth if there were no problems presented? What is the likely jury potential if tried? What is the risk of success? What’s achievable? What’s reasonable?

Lawyers and their clients should meet, confer and settle on their economic goals long before they reach the mediation table. Realistically, of course, the value of a case is determined by the facts of the case, the risks assessed, the challenges and hurdles presented, the difficulty of the law, the predisposition of the judge and, where available, the nature of the jury pool available. Case evaluation is not an exact science. Sometimes, four lawyers can have five opinions about the same case. Evaluating litigation is an art dependent on many factors including the extent of the loss, the size of the estate at issue, the depth of the defendant’s pocket, and whether insurance coverage is available. With the lawyer’s experience and expertise coupled with a review of results in similar cases, clients should be walked through an economic analysis to reach a reasonable evaluation. As evaluations cannot be exact, I encourage lawyers to reach consensus with their clients on a RANGE rather than one specific dollar figure. You may not be able to say whether your claim is worth

precisely \$75,000; but you should be able to say with some confidence that it's value is somewhere between \$60,000 and \$90,000.

Once an economic objective is determined, the lawyer/client team should develop an offer/concession strategy. What number should they ask for in opening negotiations at the mediation table? As no one ever accepts an opening offer, prudent negotiators leave adequate room to maneuver and move tempered by concern that their opening is too high and discourages the offeree from engaging and making a counter-offer. An unrealistic or offensive opening demand may stall a negotiation rather than move it forward. I also encourage the offeror to prepare a thoughtful, fact based presentation to justify or rationalize the number offered. "When we add up all the claims, we believe the total loss here is \$200,000. We believe our case is strong because.... Therefore, we assess our chances of winning at 75%. We're willing to settle for \$150,000."

Negotiating with your own client to arrive at a range can be a sensitive and ticklish process. Lawyers may find themselves expending their "capital" to persuade clients to be reasonable. Advocates who have been building trust with their clients throughout the representation will now find themselves "spending it down." When clients are dealing with strong emotions, long-standing family disputes or personal slights and grievances, reining in client expectations is challenging. It is not always easy to persuade clients to make business-like, reasonable decisions. Lawyers should consider enlisting the mediator's help with reality testing, risk assessment, negotiation coaching and support. Mediators can remind the client that their attorney is well-respected, offering good advice based upon years of experience, expertise and good judgment.

Flexibility: Parties should come to the table with objectives and goals, but they must be flexible, ready to make adjustments. "Blessed are the flexible," says an old mediator's cliché, "for they shall never be bent out of shape." Coming to mediation with a range rather than a single number is the first step in the direction of flexibility. Disputants should be reminded that their range was the result of information they had at the time of evaluation, the risks assessed as they understood them then and what they estimated to be the potential for recovery. Everything can and should change during the mediation process as new information is received.

Whatever else mediation may be, it is a first class information exchange process, examining and assessing risk and coming to an understanding of the perspective of the other side. Therefore, if the mediator does his/her job properly, each party will learn a great deal at the table: 1) New and important facts may emerge about the dispute, the judge, the documents, the witnesses. 2) The information may be seen in a new light based upon a better understanding of where the other side is coming from and how they view the situation. 3) Risk assessment may be substantially altered as participants hear and reach a better understanding of one another. 4) Lawyers and clients who have "fallen in love" with their theories may discover that

outsiders are not so impressed. When the parties understand that their numbers should change as the process unfolds, they are ready to make concessions when necessary and engage in movement to reflect what they've learned. Expectation management is an important part of preparation. It's important, therefore, for counsel to educate clients about this in order to prepare them to amend their settlement range – and the “bottom line” where prudent.

The Litigators Perspective

Probate court litigation arises in different forms, including the following: (1) will and trust contests; (2) breach of trust actions against a fiduciary; (3) actions seeking the removal of a fiduciary; (4) actions seeking an accounting or other information from a fiduciary; (5) disputes between or among co-fiduciaries; (6) actions to construe, modify, or terminate a will or trust; and (7) actions concerning the need for a guardian or conservator or the proper individual to be appointed guardian or conservator. As noted above, the vast majority of these actions will be resolved before trial. Some of these actions will be resolved by dispositive motion, some by abandonment of the action, and many through a settlement reached by the parties.

Except for professional fiduciaries (e.g. banks with trust powers), most participants in probate court litigation have little or no experience with litigation. Much of their perspective may be formed by cases reported in the news or depicted in television dramas. However, settlement of litigation before trial does not always make for good television drama, so clients typically have the expectation that they will almost certainly have their “day in court” (without commercial interruption, but within only days or weeks after the action is filed).

When you, as an attorney, are contacted by a potential client regarding a dispute in, or headed to, litigation in probate court, the client may not be impressed by your initial insistence that the client strongly consider settling the matter. Unlike hiring an attorney to prepare an estate plan, clients often want a “fighter” when hiring an attorney to represent them in litigation. In short, a client may not want to hire an attorney who recommends, early in the process, that the client consider settling the matter. Nonetheless, the earlier the attorney can engage the client in consideration of settlement possibilities, the more likely the client will be prepared to settle when the opportunity arises.

Preparation for settlement, through mediation or otherwise, should occur as the attorney obtains information on the matter, from the client and through discovery, and as the attorney evaluates the strength of the client's position under the law. In some cases, when the facts and law indicate the client's case may not be strong, settlement may become the principal strategic goal. Mediation becomes a vital tool to achieve this goal.

Once mediation has been scheduled, the client should be prepared in many ways. As noted above, the client should be asked to develop a set of goals and objectives in

advance of the mediation. Often, this can be distilled to a dollar figure, but the client should consider all possible ways to resolve all of the issues raised in the litigation. Is there a need or desire to preserve certain family relationships? Are there creative ways in which to satisfy the needs of the interested persons? Would an apology in some form or another position the parties to settle the matter? Before the mediation session the attorney should engage the client to the point that the client is actively considering outcomes other than complete victory. Most importantly, the client must enter the mediation with a relatively open mind.

To reach a settlement, I believe the client needs to move through stages similar to the five stages of grief first introduced by Elisabeth Kubler-Ross in her book "On Death and Dying." Kubler-Ross identified the five stages as denial, anger, bargaining, depression, and acceptance. I do not mean to imply that these are the same stages a client must go through before agreeing to settle a case, but I think there are stages of some kind that the client must go through to reach a settlement, and mediation is a process that assists the client in getting through these stages. Moreover, if you wait until the day of the mediation session to begin getting the client through the equivalent of the "anger" stage, I think you are less likely to have a successful mediation.

If I had to create my own stages of settlement of a probate court dispute, I might describe them as follows:

1. Reluctance. Reluctance to pursue a matter against another family member. Sometimes it takes an individual a long time to seek out an attorney to discuss pursuing a matter against one or more other family members.
2. Anger. Anger that the party has been denied property, control, or a voice in a matter. This anger may have existed even before the incident or matter in question.)
3. Confidence. Confidence that the matter will be resolved in the party's favor once the Court is presented with the obvious and clear facts, as the party sees them.
4. Realization. Realization that the legal fees and costs in pursuing or defending the matter are more significant or more "real" than anticipated at the beginning of the process. Realization that the risk of going to trial (losing at trial or being successful at trial and having the trial results appealed) is more significant than previously considered.
5. Acceptance. Acceptance that a settlement of the case may not achieve everything the party wants, but will achieve what the party needs (financially or emotionally).

A mediator is not a magician. If the parties are not properly prepared for the mediation, the chances of a successful mediation can be significantly diminished.

III. Mediation is a dispute resolution process, not a justice process.

The Mediators Perspective:

Mediation is the one place in the judicial system where parties can step back from zealous advocacy and work together to find a solution that works for everyone. Mediation is not a place to establish the truth of a claim or defense. Mediation is not a process where the parties should expect “justice” as they define it. The mediator is neither judge nor jury. The mediator is not a decision maker. The mediator is someone who helps bring about peace at the table. Clients who understand that mediation is a dispute resolution process and not a justice process are more likely to be helpful and productive partners with counsel. Parties seeking to change society, establish precedent or make a point do not find mediation helpful.

Mediation is entirely voluntary. Parties can be ordered to mediation, but they cannot be forced to participate. The rules of confidentiality prohibit informing the judge that one or the other participant was disengaged. Therefore, parties can walk away from the process anytime they choose after they’ve shown up on the day appointed.

Moreover, no one can be forced to accept a settlement they don’t want. Cases settle in mediation only when each side reaches the conclusion that settlement is right for them. Unless a settlement proposal meets the needs of all parties and the participants in mediation recognize that it does, the dispute is unlikely to be resolved. The ABA Model Standards for Mediators recognize that party self-determination – the right to make a reasoned judgment as to whether or not to settle – is a primary value. The needs, interests and agreement of each party must be met for the process to result in settlement.

Sometimes disputants treat mediation as simply one more opportunity to beat on opposing counsel, deride the opposite party and score every possible point. This approach does not settle cases. To foster a better understanding and to discourage overly-aggressive, Rambo-like litigation techniques in mediation, I like to ask the litigators directly to take off your zealous advocate hat and for purposes of mediation only, put on a joint problem solver hat. Most agree. Sometimes it makes a difference.

Unless prepared otherwise, clients come to mediation with the misperception that mediation is just another hoop to jump through, the mediator just another authority figure to persuade. They work hard to convince the mediator that their cause is just, that they were right, the other side wrong and that justice will not be served unless the wrong is righted. “If I can persuade the mediator, he’ll go in the other room and tell them why they should pay/take what we’re offering/demanding.” Not so fast.

The parties will rarely persuade each other that they are right and the other wrong. Disputants rarely agree on what the facts are or the proper interpretation of those facts. To my mind, trying to establish the facts – or fault – is often a waste of time. On the other hand, parties will often agree about risks faced, obstacles presented. We may not agree that Uncle Bill’s testimony is truthful, but where the jury will

learn he took the gold watch out of dad's handkerchief drawer without authority or permission, there's no dispute that whoever calls Uncle Bill has a problem. Disputants often have similar assessments of the likelihood a court will grant one or more of the pending motions. What result if the missing witness is found? What if the document turns up? Now that we realize cousin Ruth told each side what it wanted to hear, which version can we expect she will testify to when we put her under oath in the courtroom? The more we explore risk, the more flexible everyone becomes. The more flexible parties become, the more likely it is that the mediator will be able to draw out new proposals and offers. Participants may be unwilling to admit it publicly, but the evidence that mediation techniques are working is readily apparent.

The Litigators Perspective

The first time I went through a mediation session with a client, I was surprised by how much the strength or weakness of each party's position under the law was ignored. As attorneys, we are trained to evaluate the relative strengths of each side's position under the facts as applied to the relevant law. However, a mediator's principal concern is to achieve a settlement, which often has little to do with an evaluation of the strength of each party's position under the law.

The client needs to be informed that the mediator is not a judge and will not be issuing a ruling on the case. The client needs to understand that the mediator will work toward getting the parties to agree on a resolution of the dispute without directly addressing and ruling on the legal issues raised by the case.

Even if mediation does not result in a settlement, mediation can nonetheless provide valuable benefits, including:

- (1) An advance look at the opposing party's evidence and arguments. The mediation "briefs" filed with the mediator before the mediation session often set forth the same facts and legal arguments that each party plans on presenting at trial. More importantly, the mediation process can help disclose the confidence the opposing party has in his or her positions.
- (2) Direct communication with the other party. Often, the mediator will begin the mediation session with a meeting of all of the parties, followed by separate caucus sessions with the individual parties. At the initial plenary session, you and your client have the chance to speak directly in the presence of the opposing party with your statements unfiltered by the opposing party's attorney. If an olive branch is to be extended, this is an opportunity to do it in a meaningful manner. Alternatively, a show of polite confidence in the strength of your client's position may plant the seed leading to settlement sometime after the mediation session.
- (3) Objective view of a third party. The mediator remains neutral in the sense that he or she does not decide the case or directly rule on any issues in the litigation. However, the mediator will often discuss separately with each party the costs and risks of proceeding to trial. In this discussing the risks of

proceeding to trial, the mediator will often have to point out the possibility that the fact finder will not agree with the party's views at trial. Particularly when the mediator has substantial knowledge and experience in the type of case being mediated, the mediator's comments can provide some objective insight into the weaknesses of a party's position. Also, the mediator's comments on the risks and costs of going to trial may supplement the previous attempts by the attorney in attempting to get the client to take a more realistic view of the relative strength of the client's position.

It is important to take an optimistic attitude into mediation. No one will force a client to settle. The worst possible outcome is an investment of some time and money in a process that does not lead to a settlement. Even then, much of the work involved in preparing for mediation is work that would need to be done in preparing for trial. The best possible outcome is a settlement acceptable to your client and the avoidance of the risk of an uncertain outcome at trial and the certain legal fees in preparing for trial.

IV. Parties prepared to think in terms of interest-based bargaining are more likely to reach resolution than if they adhere to positional or distributive bargaining.

The Mediators Perspective

In their now-classic work, "Getting to Yes," Fisher and Ury introduced us to "win/win" solutions, i.e., solutions that meet the needs of both parties to a dispute; and interest versus positional bargaining. Interest based bargaining moves past traditional positional negotiation, and drills down to the underlying needs and interests of the parties to understand what is truly motivating them. In an action for wrongful death of a child struck down while riding her bicycle, for example, when the parents reject cash offers their counsel considers reasonable, there may be an underlying interest or need at work. Perhaps deep down the parents are less interested in a monetary award that they see "cheapens" the meaning of their daughters life; and more interested in making sure that no other life is lost under similar circumstances.

Interest bargain is especially useful in family disputes like those that may arise in probate court. At an ICLE program several years ago, Ken Cloke, an outstanding mediator, explained the distinction this way: Consider a dispute between a 16-year old boy and his mother over what time to be home on a school night. The boy argues: "There's a dance tonight, mom! I'm staying out until midnight." "No you're not," says his mother. "You'll be home by 10 o'clock! You have school tomorrow." If you were to find yourself in the middle of that age-old conflict, would you simply direct them to split the difference and settle on 11 pm? No, suggests Cloke. A compromise in the middle meets no one's needs. Cloke counsels examining their underlying interests. What's going on with mom? Isn't she concerned with safety and security? And Junior? Isn't he concerned with independence and autonomy?

“Now that,” observes mediator Cloke, “is a discussion worth having.” And, if you dig even deeper, perhaps mom is worried that in 2 years Junior is off to college, and she’ll be facing an empty nest; while Junior may be thinking about the joys of living alone on campus. That discussion, suggests Cloke, may be the most satisfying of all.

I encourage counsel to prepare their clients to articulate their own interests and needs and identify the potential needs and interests of the other side. Counsel should consider providing clients a copy of “Getting to Yes” to help educate them. If the parties focus on needs and interests rather than positions, they may be better able to craft offers to meet them. What is driving the other side? Is this really about mom loving you best? If so, giving the other side the opportunity to make the first selection of personal items from the estate might be very attractive. Is the other side driven by debts, pushing them to hold out for more money? Settlement means money now; continued litigation could be protracted and tied up in appeals for years. Is a party worried about payment of mounting legal bills? Perhaps the mediator can “paint the courtroom picture”, listing the costs and fees likely to be spent on preparing the case for trial. At the end of “Bleak House”, no one remembered what *Jarndyce v. Jarndyce* was about, but no dollars were left in the estate to distribute to the winner! Is the plaintiff’s brother a public figure or politician – would confidentiality and non-disparagement in a settlement be valued over public exposure and possible derision or humiliation resulting from a trial in open court? Engaging the parties in identifying underlying needs and interests can often be productive.

Perhaps a party is seeking something in the dispute that could never be recovered in litigation. In my employment practice, for example, it is virtually unheard of for a court to order plaintiff reinstated, no matter how egregious the discrimination or unfair the discharge. If the plaintiff’s goal is to get her job back, continuing to trial is not the most likely way to reach the goal. On the other hand, reinstatement could well be part of a resolution where the relationship is returned to a positive basis during the mediation process. I’ve seen it happen often enough. Short of reinstatement, the employer might be willing to assist by paying for head-hunting services, preparing a letter of introduction, cleaning up a personnel file filled with negative papers, or providing a neutral reference. In a family dispute, perhaps intractable bargaining positions are driven by memory of a personal slight or insult that’s been breeding for a decade. A sincere, heart-felt apology might offset that grievance and break a negotiation logjam. I have a friend in the general counsel’s office of a large automobile manufacturer. She has attended hundreds of product liability mediations. Where deserved, she has apologized to the plaintiff and offered a hug. A HUG! My friend reports that sometimes need for acknowledgement that a wrong occurred was driving the dispute: “I’ve been waiting three years for someone from your company to say that. I’m ready to dismiss my case!”

Settlement proposals designed to meet the other side’s needs often stimulate matching counter-proposals. Offers and counter-offers that take interests into account are more likely to be perceived as positive. Positive attitudes change the

climate and increase the likelihood of a successful conclusion. Unlike tort litigation, the relationship of the parties is likely to continue once the dispute is over. As Wayne County Probate Judge Milton Mack has said, "After a probate mediation, the parties are still related!"

The Litigators Perspective

Aside from the subject matter of the litigation, what most distinguishes probate court litigation from general civil litigation is that the parties to probate court litigation are often members of a nuclear family or extended family. What this means is that you may be dealing with issues far deeper and more complex than simply who mom intended to benefit under her will or trust. When dealing with conflict between siblings in probate matters, I often describe it as dealing with an issue or issues that first arose in the sandbox decades ago.

When the litigation is between family members, I try to get as much insight as possible into the underlying family dynamics in order to understand what is motivating the parties. (In doing so, I keep in mind that my information is coming primarily or exclusively from my client.) I want to get as far as possible into the question "why"? The simple answer to this question may often be that each party prefers to have more wealth than less wealth. However, longstanding issues of resentment and control in a family are often at work in creating a climate conducive to conflict in the probate court. One of the more common issues I see in probate court litigation involves the resentment toward a sibling who remained financially or emotionally dependent upon the parents well into adulthood to the detriment of the parents' best interests. Recognizing this issue is important in exploring how a matter might be resolved in mediation.

Don't always assume that the preservation of family relationships is important to a party. As often as not, when I tell a client that I am concerned about taking any action that would make it difficult for the client to reconcile with his or her family member after the litigation has concluded, the client tells me that he or she has no concern about having any continuing relationship with the other family member after the litigation is over. I know that this may be a feeling expressed in the "heat" of litigation, but I also recognize that it may reflect the fact that the "family" relationship between the parties ended years ago.

One of the most frustrating things to fight over in probate court is the distribution of tangible personal property, particularly when the tangible personal property has limited intrinsic value. Efforts to convince the parties that the legal fees incurred in continuing the conflict over the tangible personal property are often unsuccessful. There are a number of mechanisms to distribute tangible personal property among the children of a decedent (lottery, bidding, etc.). The mediator may be successful in suggesting one.

V. Identifying the right time to mediate is essential.

The Mediators Perspective

Mediators often distinguish between early stage and late stage mediation. The choice is whether to mediate early in the case before a great deal of time, money and ego is invested; or late in the case when all the facts are known, the experts hired, the documents reviewed, the witnesses deposed – but much of the money spent! Each has virtues and drawbacks. In my experience, for mediation to be effective the parties must have sufficient information to make a reasoned and thoughtful analysis of the facts to assess their risk and identify their own best interests. Parties rarely need to know every fact. Choosing between early and late stage mediation is another topic for counsel to have when preparing clients. The more clients understand the options, the greater the likelihood they will select the right moment.

Early Stage Mediation: Sometimes the parties don't need discovery. They know the case, have the same documents and understand what is at stake. If additional clarity is warranted, written mediation summaries can be exchanged to provide information. On the other hand, if the parties do NOT have adequate information, the mediator may serve as a discovery master or coach, assisting the parties in identifying additional limited discovery needed and how to get it. Perhaps a short deposition of a key witness covering a limited number of issues. Perhaps a few documents to be exchanged. Whatever it is, the mediator can oversee the exchange and make sure everyone remains on track.

The factors especially important in early stage mediation are:

- ***Saving transaction costs.*** What is the cost today of litigating a garden-variety probate dispute? The average cost to the employer of litigating a run-of-the-mill employment discrimination suit from start to finish is somewhere around \$125,000. If a lawsuit can be resolved early, much of that money is saved or could be used to resolve the case and eliminate the risk. The earlier the mediation, the greater the potential savings. At the beginning of the case, clients are often at their most inflexible. Motivated by anger or outrage, however, they may be unwilling to listen to the benefits of a dispute resolution process. It is nonetheless worth the effort. Well-trained mediators are skilled in helping parties see the savings that can result from early resolution.
- ***Wear and tear.*** Litigation can be an emotional roller coaster ride. Parties to a dispute can make each other miserable and unhappy. They dig into the most intimate details of each other's lives and business. They ask the most personal and embarrassing questions. They make harsh judgments and bring damaging accusations. There can be adverse publicity and exposure to the public of sensitive or proprietary information. Early resolution prevents all that. Once the parties have been through the discovery process, they may be so angry, they have no interest in resolution. At that point, they may be seeking vindication and revenge. Better to resolve early and avoid that.

- **Disruption of the business.** Parties who have not been through litigation previously may not realize what is in store for them. If a business is involved, nothing happens in the case without a ripple effect in the work place. All the employees start talking about it. People take sides. Work is put aside. They share information about the suit. Rumors fly. They share misinformation. Work isn't completed. Parts aren't shipped. People become less productive. Good employees – lacking a taste for controversy – may start looking for new opportunities elsewhere so as to put distance between themselves and the fighting.
- **Style of mediation.** Early stage mediations are more likely to be facilitative rather than evaluative; they are likely to feature more time in joint session; and parties are more likely to participate directly by making opening statements, answering questions, engaging in direct communication.

Late Stage Mediation: Late stage mediations generally occur after the close of discovery when the parties know everything they're ever going to know about the case. It may follow MCR 2.403 Case Evaluation, meaning that the parties have also been through at least one evaluative ADR process already. Motions for Summary Judgment may already have been heard and decided. If the motion was granted, of course, the parties are probably on their way to the court of appeals. On the other hand, if the motion was denied, plaintiff may be more entrenched and confident than ever. In late stage mediation, the parties are often escalated, aggravated and distrustful of one another. The late stage mediator will have his hands full in building trust, gaining party confidence and encouraging the participants to focus on their dispute rather than their litigation grievances.

The factors especially important in late stage mediation are:

- **Saving transaction costs.** While the parties have invested heavily in pretrial litigation practice, late stage mediation generally occurs before the parties incur the costs of preparing for trial. Trial costs these days can run into the tens of thousands. Final trial preparation is typically when litigants start spending significant monies on experts, visual aides and computer animations or jury consultants. The cost in attorney time of completing a federal court Joint Final Pretrial Order can be a major investment by itself.
- **Lost opportunities.** If the parties are heading to trial, they will incur time lost from work for the plaintiff, down time by any business while the principles and managers are preoccupied with trial issues, and time away from the office. Avoiding lost opportunity costs can often be a substantial savings in late stage mediation.
- **Closure.** By the time a trial date is approaching, the parties may be ready to discuss the benefits of closure and putting the litigation behind them. Saving on attorney fees, an end to worry, or the fear of humiliation can all bring a party to the point where closure looks better and better. What life might be like once the litigation is ended is an important conversation for counsel to have with his client.

- ***Style of mediation.*** Late stage mediators tend to be more evaluative; and rely more heavily on caucus and shuttle diplomacy. The parties are often sick of one another, and spending time in the same room may be counter-productive escalating hard feelings further. In late stage mediation, the parties have heard it all; seen it all. They don't need to "better understand" where the other side is coming from. Indeed, they resent suggestions to "consider the other side's perspective" or hear them with alarm!

The Litigators Perspective

Increasingly, probate courts in Michigan are directing the parties to mediate disputes in the probate court soon after the action is initially filed, but after the parties have some opportunity to engage in some discovery. The principal advantage of this "early stage" mediation is to permit the parties to resolve the conflict with less legal fees incurred.

Court-ordered mediation also has the advantage of getting the parties to discuss settlement without having either party feel that such discussion implies the party is not confident in his or her legal position. Too often, the party who makes the initial settlement offer or overture is viewed as doing so out of weakness. However, just as often, the party making the initial settlement offer may be doing so out of a position of strength. The party with the stronger position may have more to lose in terms of legal fees if the matter goes to trial and may recognize that a portion of these future legal fees can more productively be applied toward a settlement offer.

It is possible to wait too long to mediate or settle a probate court dispute. If the parties wait too long, settlement can become nearly impossible because each party is no longer in a position to recoup his or her "investment" in the case in the form of legal fees and other costs. Most parties want to get back to "even," at the very least, in settling a case.

In some matters, settlement is not a realistic option until a key piece of discovery is completed. If one party is seeking a key document in discovery (e.g. the prior will or trust instrument, the signature page on a beneficiary designation for forensic examination) or seeking to take the deposition of a key party (e.g. the deposition of the person who allegedly exerted undue influence), then the party is unlikely to consider settlement until having the opportunity to see the document in question. However, each party should be able to recognize when he or she has generally had the opportunity to develop the facts necessary to evaluate the strength of his or her position. Recognizing this point in time, and exploring all settlement opportunities as soon as possible thereafter, will optimize the chance of achieving a settlement of the case.

Perhaps the most important incentive toward settling a matter is the invoice each party's attorney sends out each month. Without these invoices, the client is not properly and appropriately reminded of the "cost" of not settling the matter.

Further, if an initial estimate of the cost of the litigation is given to the client at the beginning of the matter, the cost of the litigation should be reviewed periodically and particularly before a mediation session. Heading into the mediation session, the client should be aware of the cost of the litigation to that point, and the projected cost through trial.

Finally, the parties need to be reminded by their attorneys that the matter will not necessarily end at the conclusion of the trial. The Court of Appeals exists for any party not satisfied with the result of the trial. Settlement can eliminate this possibility.

VI. Including clients in the mediation process at the table.

The Mediators Perspective

There are two unique advantages to mediation that counsel should consider carefully and put to use in the appropriate case. Mediation is the one and only stage in the judicial process where the parties are permitted to speak directly to one another without interruption. They can speak their minds and from the heart. They can use their own words without being limited to specific questions on direct or cross examination, and without strict adherence to technical rules of evidence.

Sometimes parties have the need to vent – to get something off their chests bottled up for years. Mediation can be a safe environment created by the mediator to allow venting productively. I've frequently worked with one side to shape a statement to be most productive. As carefully as I work with the side needing to vent, I will work with the other side to hear it appropriately. If the venting party sees that the other side is sincerely listening with an open mind, the effect may be very beneficial. More and more, lawyers are coming to understand and appreciate the value of venting – and letting the other side vent without argument. Proper management of the venting process without escalating the conflict more takes a great deal of preparation on the part of counsel and client.

The party needing to vent should be well prepared. Clients should know the goal, which is to show the depth of feeling, the sincerity, the pain that's been caused. Most of us learned the lesson from our grandmothers: you "catch more flies with honey than with vinegar." Venting to browbeat or intimidate the other side will likely backfire. Threats and harsh accusations are unlikely to be well received. Clients should not be encouraged to look their brother in the eye across the table and call him a "liar", "cheater" or "crook." I highly recommend that counsel work with clients to prepare their opening remarks, and practice delivery until the client can deliver the remarks in precisely the right way.

For the party preparing to hear these remarks, what will be their reaction? Certainly it would not be helpful to interrupt to say the Monopoly game was actually destroyed in 2003, not 2006. Nor is likely to be productive if the listener make faces

to show she does not agree. After a compelling, emotional presentation, the listener should be ready to say something, too. What should it be? How should it be said? What word choices would make this most productive? Counsel for the party receiving a statement from the other side should also practice their response. If the listener intends to reply with an apology, counsel should preview that apology and make certain it's a good one. There are excellent resources on apology in the ICLE Partnership. A bad apology can make matters worse, not better. I've heard some terrible apologies in my time. "I'm sorry, but you were an idiot" is unlikely to defuse an emotional logjam! Not only should the apology be practiced and prepared with care, it might be good to warn the mediator and practice it with the mediator, as well!

The Litigators Perspective

Mediation is a time for the parties to speak, not a time for the attorneys to argue. Mediators generally impress this upon the parties at the beginning of the mediation session. Each party should feel comfortable that his or her attorney is present to guide and advise the party, but the principal actors in mediation should be the parties.

Each party should expect to be called on in the initial meeting among all parties at the beginning of the mediation to identify, from his or her perspective, the issues that need to be resolved at the mediation. The statement by each party may have a significant impact on the tone of the mediation session. Therefore, the substance of the party's "opening statement" should be discussed with his or her attorney before the mediation. This will give the attorney the opportunity to guide the client on the possible consequences of the opening statement.

Overall, each party is best advised to take the "high road" at the mediation session by being polite, considerate, optimistic, and listening to all viewpoints presented. Each party can always get "tough" later. Moreover, being respectful and considerate of the other party's views is the best way to produce the cooperation necessary to settle the case.

Mediation sessions often start at about 9:00 a.m. and continue until approximately 5:00 p.m. or later. Fatigue is often a factor in mediation sessions in the sense that a party may become more likely to settle as he or she physically and mentally tires over the course of a fairly intense day of discussions. The client should be warned of the physical and mental demands of a long mediation session. The client should be directed to come to the mediation session well rested and armed with any snacks or drinks necessary to get him or her through the day (before and after an expected lunch break).

I generally do not want to leave my client's side during mediation. When strong feelings of animosity exist between family members in a probate dispute, I do not

want to be lulled into a false sense of security in supervising my client through the mediation session.

Ultimately, the parties, and not the attorneys, decide whether to settle a case and the terms of the settlement. The attorneys are not there to get in the way of a settlement. However, the attorneys are there to explain the terms and consequences of a settlement. If a settlement is reached, the parties and the attorneys will be asked to sign a writing setting forth the terms of the settlement. On occasion, a party may wake up the next morning with the desire to avoid the settlement entered into the previous day. The best way to avoid this, or to be prepared to deal with it, is to get all issues resolved in the written settlement agreement signed by all parties and to explain the finality of the settlement agreement to the parties before they sign the settlement agreement.

You do not have to wait until 4:45 p.m. on the day of the mediation to begin drafting the settlement agreement. Either party may put together a “template” of the settlement agreement in advance so that only the substantive terms of the settlement need be inserted once the parties agree on the terms of a settlement. This permits various non-substantive terms, which may be important, to be considered without the time pressure present as everyone wants to get the settlement completed at the end of a long day. These non-substantive terms of the settlement include the procedural aspects of the settlement (e.g., stipulated order submitted to the court?), the confidentiality of the settlement, and the scope of any releases of liability and claims. If you bring a copy of the “template” of the settlement agreement to the mediation session on a flash drive, you will be in a good position to have your template used for the settlement agreement. Moreover, you are therefore more likely to get the settlement agreement drafted and signed by the parties before they can change their minds.

VII. Conclusion: Mediation is a powerful and effective process for the resolution of conflict. In mediation, your clients are empowered to take responsibility for the outcome. The mediation process can help repair relationships and improve channels of communication, two unique outcomes especially valuable in resolving family disputes. Mediation can result in win/win settlements tailored specifically to party interests and needs. Mediation provides creative outcomes unavailable from a judge or jury. Even where mediation fails to result in resolution, the parties better understand each other. Best of all, mediation comes with a very small price tag. If mediation does not achieve your goals, the dispute returns to the judicial process, nothing lost. The scheduling order remains unchanged. The motion cut off and trial dates are the same. Confidentiality rules prohibit use of information gained at the table from being used in trial. What could be better than that?

To take full advantage of these factors, however, requires thought, time and preparation. Litigators who do not appreciate the virtues of the mediation process and fail to prepare clients to take full advantage of its unique strengths and

advantages, miss a golden opportunity to add value, achieve client goals and satisfy client expectations.