TRUSTS AND ESTATES
CALIFORNIA LAWYERS ASSOCIATION

TRUSTS & ESTATES

QUARTERLY - "THE MEDIATION ISSUE"

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LETTER FROM THE CHAIR

Written by Mary K. deLeo, Esq.*

As I write this column, the temperature here in Sacramento is hovering at a balmy 103 degrees and it feels as if the summer heat will never end. It seems impossible that we will be reaching for sweaters in a mere two months. Equally impossible to believe is that in a little more than four weeks, my term as chair of TEXCOM will conclude. Has it really been only a year since our former chair, Matt McMurtrey, handed off the reins to me? It feels like mere seconds and a lifetime ago since that happened.

Being chair of TEXCOM has been one of the most rewarding experiences of my professional career. I have written about the amazing work that TEXCOM does in previous columns, but what may not be so apparent is the emotional reward that comes with working alongside some of the best legal minds in California to help chart the future course of trusts and estates law. Those who serve on TEXCOM form close bonds with each other, based upon years of shared TEXCOM experience. These bonds create a unique synergy that informs our TEXCOM work and pushes us to achieve the best results we can for our members. The downside to this fellowship is the difficulty in saying goodbye each year to those TEXCOM colleagues whose term of service is up.

But needs must, and it is that time of year when we must say goodbye to our outgoing class of TEXCOM members, a group of wonderful and talented individuals whom I am lucky to have served with and who I (and the rest of TEXCOM) will miss terribly in the future. Their hard work and wise guidance have contributed mightily to TEXCOM's success.

The first person we must regretfully say goodbye to is Mark Poochigian, an Esteemed Former Officer who is rolling off TEXCOM after 11 years of stellar service. Mark is a shareholder with the firm of Baker Manock & Jensen in Fresno, California. I am fairly certain that when he was newly elected to TEXCOM, he had no idea how tumultuous the next 11 years would be. In addition to chairing numerous TEXCOM subcommittees during his tenure and contributing to the Fourth Edition of TEXCOM's *Guide to the California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel* (the "TEXCOM Ethics Guide"), Mark served as Editor-in-Chief of the *Quarterly* for the 2014-2015 term, during which, to counteract a previous production backlog, he published ***six*** issues in one year instead of the usual four, a Herculean task indeed. He also helped TEXCOM weather the separation from the State Bar of California and the formation of a new parent organization, the California Lawyers Association. That would have been enough to test the most formidable of individuals, but things got even more complicated when Mark was elected TEXCOM Chair for the 2019-2020 term and was suddenly faced with guiding TEXCOM through an unprecedented worldwide pandemic and shutdown. With absolutely no established playbook to follow, Mark, as always, rose to the challenge and kept TEXCOM functioning at its usual high level of professionalism and excellence despite the world falling apart around us. Mark's wisdom,

tenacity, and keen legal mind will be sorely missed, as will his common sense and good humor, which made serving with him both an honor and a joy.

We also must say goodbye to John Andersen, who is rolling off after the conclusion of his six-year term. John, who is a partner at Ferguson Case Orr Paterson LLP in Westlake Village, California, distinguished himself from almost the moment he was appointed to TEXCOM. In addition to serving on numerous subcommittees, John rose to leadership early on, chairing the California Law Revision Commission subcommittee for the 2018-2019 year and chairing the Estate Planning subcommittee for the year 2019-2020. Since then, he has served in other leadership positions, including serving as Chair of the Trusts & Estates Administration subcommittee for three years straight, which just may be a record. In addition to contributing to the TEXCOM Ethics Guide, John was also an instrumental member of the TEXCOM working group that labored extensively on California's proposed electronic wills legislation a few years back. He also co-authored a *Quarterly* article on the growing trend of creating wills in the digital age. In his various leadership capacities, John has overseen and directed numerous successful efforts to analyze and comment on pieces of legislation and has contributed to many affirmative legislative proposals (ALPs) that TEXCOM has drafted and which have been enacted into law. John's diligence, hard work, and willingness to always take on new projects has made him a TEXCOM star and his absence will be greatly felt.

We also must say farewell to Howard Kipnis, who is also concluding his TEXCOM six-year tenure. Howard, a litigator with the firm of Artiano Shinoff in San Diego, California, contributed his outstanding litigation skills to TEXCOM in a myriad of ways. He was a primary author of TEXCOM's Amicus Brief in *Barefoot v. Jennings* (2020) 8 Cal.5th 822, in which TEXCOM argued successfully to the California Supreme Court for the reversal of a Court of Appeal opinion preventing former trust beneficiaries from contesting the trust instruments that disinherited them. Howard later authored an article for the *Quarterly* about the *Barefoot* case, and he was a contributor to the TEXCOM Ethics Guide. He has been a valued member of various TEXCOM subcommittees, and has held a number of leadership positions, including co-chairing the Incapacity subcommittee for the 2020-2021 term and chairing the Educating Seniors subcommittee for 2021-2022, where he and his team were responsible for programming and hosting TEXCOM's highly successful Financial Elder Abuse Symposium. Howard also served as chair of the Litigation subcommittee for 2022-2023. In addition, Howard has served as a Managing Editor of the *Quarterly*. TEXCOM will greatly miss Howard's enthusiasm, expertise, and ability to get things done.

Another individual to whom we (technically) bid goodbye is Ciaran O'Sullivan, who also completes his six-year term as a TEXCOM member. Ciaran, who is a litigator at the Law Office of Ciaran O'Sullivan in San Francisco, California, has been a prolific and valued contributor to TEXCOM throughout his tenure. In addition to serving as a member of multiple subcommittees, Ciaran was the editor for TEXCOM's case alerts from 2017 to 2021, which are one of the most important benefits for our members. He wrote articles for the *Quarterly*, contributed to the TEXCOM Ethics Guide, served as Co-Chair of the Incapacity subcommittee for 2020-2021, chaired the Litigation subcommittee for the 2021-2022 term, and was chair of the Membership, Marketing, and Social Media subcommittee for the 2022-2023 term. In the latter capacity, he has spearheaded two important TEXCOM projects. The first is the design and implementation of a series of informational videos about important trusts and estates topics, which is currently in the production stage. The second is the organization of a formal law school outreach program in which TEXCOM members and other volunteers meet with law school students to educate them on the benefits of pursuing the trusts and estates practice area as a career. While Ciaran's dedication and hard

work will be a huge loss to TEXCOM, it is tempered by the fact that he has been appointed as TEXCOM's representative to the CLA Board of Representatives, which means that, although no longer technically a TEXCOM member, we will continue to have the benefit of his knowledge and expertise for the next few years.

Although he is leaving TEXCOM before his six-year term is up, we must also say goodbye to Jeff Galvin. Jeff is leaving us for the best of reasons; he was recently appointed to the Sacramento County bench by Governor Newsom. Jeff's contributions to TEXCOM were many, particularly in terms of legislation, where he took the lead on analyzing and proposing amendments to various bills and also contributed to TEXCOM ALPs. We will also miss his outstanding work as moderator on TEXCOM's podcasts. The judiciary's gain is definitely our loss.

All of these individuals did outstanding work on TEXCOM, and the state of trusts and estates law and the strength of our Section are the better for their service. From the bottom of my heart, I thank them for all they have done.

Although the annual changing of the guard is bittersweet, it is balanced by the joy I feel at introducing you to TEXCOM's new incoming Chair, Kristen Caverly, and our recently-elected Vice-Chair, Michael Rosen-Prinz, two of the finest TEXCOM members with whom I have ever had the pleasure to serve.

Kristen is a founding partner of the law firm Henderson, Caverly & Pum LLP in San Diego. She was appointed to TEXCOM in 2017, where it became immediately evident that her outstanding legal skills and management abilities would someday qualify her for Chair. That time has come, and I cannot think of a better person to lead us in the coming year. She has been invaluable as Vice-Chair (not sure I would have made it through this year without her), has served as chair of TEXCOM's Long Range Planning subcommittee, was Editor-in-Chief of the *Quarterly* for the 2021-2022 term, and has served on a number of various TEXCOM subcommittees, including chairing Litigation. This is a person who gets things done, which is exactly what TEXCOM needs.

Michael is a partner at Loeb & Loeb LLP in Los Angeles. Michael has also been a TEXCOM star, particularly when it comes to estate planning issues. He has served as chair of the Tax subcommittee once and as chair of the Estate Planning subcommittee twice. He has also served as chair of the Uniform Laws subcommittee three times (tying John Andersen's record—see above), during which he applied his specialized skill set to tackle important and highly technical legislative projects. In his work on various subcommittees, Michael has helped draft and shepherd to completion multiple ALPs for TEXCOM. His technical expertise and his ability to drill down on the issues while devising creative solutions will serve TEXCOM well.

Kristen and Michael are a dynamic team and I have no doubt they will do great things. Our future as a Section is in the very best of hands.

And that, as they say in the movie business, is a wrap. All good things come to an end, and being chair of TEXCOM, although a very good thing indeed, comes with an expiration date. Although it saddens me to say goodbye, it is time to let others take the reins. It has been an honor to serve you and I hope that you feel that your Section has been well managed this past year. Just know I can take very little credit for that; it's all down to the group of talented, hardworking individuals that make up TEXCOM. All I needed to do was to stay out of their way.

** Weintraub Tobin Chediak Coleman & Grodin, Law Corporation, Sacramento, California*

LETTER FROM THE EDITOR

Written by Robert Barton, Esq.*

As the final issue for my term as Editor-In-Chief of the *Quarterly*, I would be remiss if I did not first acknowledge the tireless work of this year's Editorial Board—the secret sauce that made this year a success. Comprised of Erin Norcia, Nick Van Brunt, Ryka Farotte, Matt Owens, Ryan Szczepanik, Gretchen Shaffer, and Laura Zeigler, they have poured over each and every article, working to make each issue the best it can be. Thank you for all your efforts.

This issue of the Trusts and Estates *Quarterly* is the "Mediation Issue." For most attorneys, they learn about mediation on the job and there is little in the way of formal training or professional development. But arriving at mediation unprepared or with unrealistic clients impedes efforts at settlement. To help bridge that gap, several of the top trust and estate mediators in California have generously contributed their time and perspective in articles that provide practical guidance on utilizing mediation effectively.

Daniel Spector starts the issue off with his article, the *Nuts and Bolts of Trust, Estate and Financial Elder Abuse Mediation*. A primer for trust and estate attorneys, it is a must-read for new and seasoned practitioners alike.

Next, Kristin L. Yokomoto takes a deep-dive into fundamentals of mediation, providing a detailed and exhaustive analysis on all phases of the mediation process.

Judge Glen M. Reiser (Ret.) and Bruce S. Ross, Esq. then analyze the case heard around the trust and estate mediation world in *Breslin v. Breslin: Does the "Seamless Fabric" Need Tailoring?* Judge Reiser and Mr. Ross analyze the implications of the *Breslin* decision, including the effect on the right to due process and the expansion of the power of the courts to compel alternative dispute resolution over objection.

In *Probate Judges and Lawyers Don't Always Think Alike–Are Probate Judges' Brains "Abby Normal"?* Judge James Steele (Ret.) examines how a mediator's time on the bench can affect the mediation process and how practitioners can utilize that experience to their client's advantage.

Judge James P. Gray (Ret.) offers his perspective in *What to Consider When Preparing (Your Client) For Mediation* and outlines his observations on proper preparation of the client in order to achieve a successful mediation outcome.

Finally, Judge Reva G. Goetz (Ret.) examines what happens when the parties seemingly deadlock at mediation. In her article, *Reached an Impasse at Mediation? Ways to Approach It*, Judge Goetz outlines several strategies to break an impasse at mediation to achieve resolution.

We end our issue with our Litigation Alert and the resumption of our Tax Alert. We appreciate the attorneys who prepare these Alerts, which keep all of us better informed about developments impacting our clients.

I leave the *Quarterly* in the good hands of incoming Editor-in-Chief, Erin Norcia. We depend on your ideas and contributions to continue to make the *Quarterly* a success. If you have an idea for a scholarly article that might be of interest to our Section or are interested in writing for one of our alerts, please reach out to Erin at enorcia@tcklawfirm.com or 408-780-1912 with a brief outline of your idea. We would love to have you featured in a future issue of the *Quarterly*.

Finally, please consider utilizing the services of our advertisers, who help support the work of the Section.

Thank you for reading!

** McDermott Will & Emery LLP, Los Angeles*

The *California Trusts and Estates Quarterly* is looking for hard working, detail-oriented, and motivated trusts and estates lawyers to serve as Issue Editors.

Issue Editors will be on the front line of the editorial process and will work extensively with the author, as well as members of TEXCOM, in order to get an article to publication. Serving as an Issue Editor is a great way to serve your Section, get to know other practitioners, and learn more about the work of TEXCOM.

If you are interested in serving as an Issue Editor, please contact:

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THE NUTS AND BOLTS OF TRUST, ESTATE AND FINANCIAL ELDER ABUSE MEDIATION

Written by Daniel I. Spector, Esq.*

I. SYNOPSIS[01]

The purpose of this article is to provide the reader with a practical guide to mediations of disputes involving trust, estate (which is used broadly to include contested conservatorships), and civil financial elder abuse ("FEA") claims. The article is also specifically intended to provide practitioners and mediators with useful information and insights regarding the unique, deeply personal and complex nature of these mediations.

II. THE CONTEXT IN WHICH TRUST, ESTATE AND FEA MEDIATIONS OCCUR IS COMPLICATED

Families are among the most complex set of relationships we encounter. The family unit is often the most impactful cradle of our personalities and can have substantial force in forming the lenses through which we view and experience our relationships to persons, authority, and other objects. It is through each of our individual lenses that we experience the demise of a loved one and develop our own (often self-focused) conclusions about what is best for the loved one and/or what was the intention of the loved one for the control and disposition of their assets.

We add to this context certain facts about Californians: 1) that approximately one-third of California households have children,[02] 2) that the divorce rate in California is about 9% per year,[03] and 3) that more than half of previously married people over the age of 35 will remarry.[04]

Further, the author rhetorically suggests that with the exception of a few rare and ornery persons, most people seek to avoid: a) conflict; and b) disappointing people who care about them. These understandable traits result in a general avoidance by aging and/or weakened adults to directly address their family's dysfunction before they pass. This absence of communication creates a vacuum of understanding by the survivors who fill this void with their own perspectives borne from their own experiences, values, and self-centered senses of morality, which in turn leads to the development of righteous conclusions that the plan left by the decedent was not consistent with the decedent's "true wishes."

At the same time, a very old point of law in the United States is that *the individual citizen* (and not a King, aristocrat, or the State) may direct: 1) who is to manage their affairs when they are unable; and 2) who is to receive what of their assets.[05] In a related matter, California law of trust and estates is founded on the fundamental principle enshrined at Probate Code sections 1810 and 21102[06] that the court's role is to ascertain and give effect to "the intention" of the proposed conservatee or the decedent. However, since the decedent is not available to testify and these disputes are generally founded upon a foundational assertion that the decedent's testamentary intention is not accurately memorialized in a document, the survivors and ultimately the court are left arguing about the competing and differing perspectives of different loved ones to answer these questions.

Accordingly, there can be raging (and well-represented) disputes as to: a) what was the true intention of the decedent/proposed conservatee, b) whether the decedent/proposed conservatee had the legal mental capacity to express an intention incongruous with the litigant's understanding of the decedent's intention, and alternatively, c) that the decedent/proposed conservatee was subject to undue influence by the person asserting an intention contrary to the decedent's wishes.

Of course, sometimes pre- and post-mortem trust and estate disputes do not focus on the disposition of assets, but rather the administration (*i.e.*, control) of the assets by one or more persons selected by the decedent. The choice

not to select a person can cause the non-controlling person to question why someone was "favored" over them, and cause the disputant to suggest that such a choice was somehow improper or that the subsequent management of trust or estate assets reflects the dishonesty of the person in control, as viewed through the disputant's decades of experience with that individual in the context of their family.

In each of these disputes, it is highly likely that the litigants are insistent that they "know" what the decedent's true intentions were based on their own experiences with the decedent or with the party they oppose, and that they "know" (based on speculation) precisely the facts that occurred to cause the parties to arrive at their present disagreement. This is the soil from which these disputes arise.

III. TYPES OF DISPUTES GENERALLY SUBJECT TO TRUST, ESTATE AND FEA MEDIATIONS

As a general proposition, there are four types of disputes that are the subject of trust, estate and FEA mediations:

1. Fights between children of a first marriage and the surviving spouse;
2. Fights between children over administration, control, and disposition of assets;
3. Fights between children/surviving spouse and non-family member(s) over administration, control, and disposition of assets; and
4. Fights over contested conservatorships or actions of an agent under a power of attorney.

The reader should note that each of these disputes almost always occurs in the context of a family unit, which means that the disputants likely have decades of history and dynamic within which to place the immediate dispute. This means that what would otherwise be a distinct legal or financial dispute has strong, long, and complex tentacles to the perception of past actions and words. It also means that the things about which people are fighting (the family business, ranchland, or foundation in the family's name) each have meaning that does not exist in disputes between disconnected people or business entities (*i.e.*, people in a car accident, a lender and/or a debtor, etc). Thus, in order to most efficiently handle trust, estate, and financial elder abuse disputes, the mediator and the mediation process (including the pre-mediation preparation) must address and manage these complexities or the process will invariably break down or become mired in "the stuff" from which the dispute truly arises.

IV. WHEN IS THE RIGHT TIME TO MEDIATE A TRUST, ESTATE, OR FEA DISPUTE?

Until April 2021, there was essentially one answer to this oft-asked question, but now there are two. The first answer is when the parties (and their counsel) feel ready to focus on resolving their dispute (which is discussed in more detail below and is not nearly as simple as it sounds). The second and newer answer is when a court orders the parties to mediate under *Breslin v. Breslin*.[07]

As to the first answer (which remains the best answer), the ideal time to mediate is when all parties are ready to take a "time-out" from their intense litigating and instead earnestly focus for a day on the relatively collaborative process of working together to resolve their dispute. Most often this would occur after a probate petition or FEA action was filed, a response and objection lodged, written discovery exchanged, documents subpoenaed and reviewed from the decedent's treating medical professionals as well as the estate planner, and the parties' depositions taken. Through these processes the parties and their counsel achieve two things: (1) they will obtain a substantial amount of information to allow them to evaluate the strengths and weaknesses of their own and each other's positions, and (2) the parties will have invested enough time, effort and money into the litigation without feeling a great deal of satisfaction or certainty of the outcome, and thus will rationally consider an alternative resolution rather than allowing the case to drag on indefinitely with results that feel largely unsatisfactory.

Prior to this moment, most clients (as well as advocates) clutch so strongly to their own initial perspectives and stories that compelled them to hire a lawyer and file or defend a lawsuit that they are neither willing nor ready to "take a time-out" to consider the possibility of another perspective as a means to move past the dispute. However, with the arrival of this moment, the clients (and counsel) are more ready to listen and understand the other side's perspective and to entertain their needs in order to end the dispute and to resume their life free of an active family legal fight.

As to the second answer, pursuant to *Breslin v. Breslin*[08] and Probate Code section 17206, a court may now order the parties to a trust dispute to attend mediation, and if an interested person who receives notice of the mediation (including the date, location, and manner of how to participate in the mediation) opts not to participate in the mediation, the non-participating interested person may not object to the settlement reached at mediation, even if that settlement modifies the non-participating person's beneficial interest. As a result, it has become common for one or more parties to a trust dispute to ask the court for

a "*Breslin* Order," which most Probate Division courts are happy to oblige and direct the trustee's counsel to serve a "*Breslin* Notice" of the details of the mediation to all interested persons. Once the "*Breslin* Notice" is served on all interested persons, the mediation will occur.[09]

This author humbly suggests that, at the very least, the first and second answers must be combined and coordinated for the highest likelihood of a successful mediation. That is, the parties and their counsel who have appeared in the dispute should themselves be ready to take a "time-out" from the litigation and mediate before seeking a *Breslin* order.

V. THE SELECTION OF A TRUST, ESTATE, AND FEA MEDIATOR

Trust, estate, and FEA disputes stem from legal issues that are planted in the soil of a historical family dynamic. The related litigants each deeply believe the correctness of their own positions and perspectives and view them as both true and righteous, based on decades of experience within the family unit. Thus, the most efficient and effective manner of arriving at the legal issues, if at all, is to first address the perspectives of the parties relating to the historical family dynamic. Of course, time is a precious resource that the mediator must effectively manage. Nonetheless, an effective trust, estate, and FEA mediator is one who can communicate empathy while engaging in active listening in a way that makes each party feel "heard" yet helps them (momentarily) to move past their divergent personal histories and begin to collaboratively focus on the resolution of the dispute.

At the same time, the legal complexities of trust, estate, and FEA cases are substantial. Especially when litigation counsel on each side are not experts in the practice of trust, estate, or FEA cases, having a mediator with extensive substantive experience in these areas can materially help counsel and clients identify opportunities for resolution and issues to avoid that may be missed by neutrals who have plenty of general mediation experience, but limited experience handling trust, estate, and FEA cases. On the other hand, if all sides are represented by experienced trust and estate litigators, and in order to get to resolution, the clients would be comforted by the appearance of former authority held by a retired judge, then a judge who sat in a Probate Division may be a good fit as a mediator.

VI. PRE-MEDIATION TASKS FOR THE PRACTITIONER

A. Provide Client with Confidentiality Notice

Pursuant to Evidence Code section 1129, "before a client agrees to participate in the mediation" the client must be provided with a printed disclosure described at Evidence Code section 1119, which the client must sign stating that he or she has read and understands the confidentiality restrictions (of the mediation process).[10]

B. Exchange of Briefs

As litigators, we practitioners are naturally protective of the evidence and arguments we have developed to advance our clients' claims. However, the resolution of trust, estate, and FEA claims is premised on mutual understandings of each side's perspectives on the history, evidence and applicable legal points and authorities. By exchanging briefs in advance of the mediation, counsel help conserve the valuable resource of time by educating each other on the other's perspective. Put another way, counsel will necessarily be sharing their evidence and legal analysis as part of the mediation, so why delay the inevitable and use valuable mediation time to read a brief when this important activity can be completed in advance of the mediation? As a mediator, this author will often suggest that if there is a portion of a brief that either includes sensitive settlement positions or confidential information, then said portion of the brief should simply be redacted so that the larger brief may be shared. Lastly, it is worth noting and bears repeating, most often the briefs reflect the operative principle in trust, estate, and FEA cases—that two or more attorneys looking at the same evidence and law can reach opposite conclusions, each of which reflect a possible outcome of the litigation, and that for a mediation to be successful, it is imperative that each attorney at least understand the position of their counterpart.

C. Election of In-person v. Virtual Participation

This author has acted as a mediator and/or participated as a litigator in more than 30 virtual mediations since the onset of the Pandemic. In this author's view, virtual technology has virtually no impact on the likelihood of whether resolution is achieved through mediation, *except* that this author has observed in his own virtual mediations that these virtual mediations tend to take longer than in-person mediations. Thus, since many trust, estate, and FEA mediations involve parties (and counsel) whose energies, patience and focus wane after a full day of looking into a computer screen, counsel need to consider whether their clients would be best served with an in-person mediation process.

D. Practitioner's Pre-mediation Conference with Client

This is perhaps the most important factor in determining whether a mediation is successful. Through this meeting,

the practitioner should explain to their client the mediation process in general (including reminding the client of the confidential nature of mediation), the specific process to be used by the mediator, and the roles and goals of counsel and parties in the mediation. In addition, counsel should provide the client with the practitioner's *risk analysis* of both their own case and the case of the other party. The practitioner should specifically elicit from the client their "needs" in order to resolve the case in view of the risk analysis, and begin to orient the client to adjust their expectations of "their needs" in view of some rational legal basis based on the strength or weakness of their position. Of course, the practitioner should use this conference to answer whatever additional questions or concerns the client may possess. Through such a pre-mediation conference, the practitioner not only helps orient the client to the foreign process known as mediation, but the practitioner is able to forecast the future in a way that is later supported by the reality of the mediation process. This earns the practitioner faith, which becomes highly valuable once the practitioner's advice becomes more difficult to accept as the parties engage in compromise in order to resolve the dispute.

VII. CONDUCT OF THE MEDIATION

The mediation generally begins with an introduction by the mediator to the parties and counsel. This may occur in joint session or separately if the parties and/or counsel so prefer.

Next, it is not uncommon for the mediator to meet briefly with counsel (without clients present, if possible) to confirm the mediator's understanding of each party's position. If counsel have not exchanged briefs, this initial session is particularly important to educate each side efficiently about the other's legal perspectives.

Thereafter, counsel return to their respective rooms, and the mediator will begin their work in one room at a time. This author, as mediator, will generally recite back to the parties his understanding of their positions and ask them to confirm or to correct any item that they have misstated or augment in any important way anything they have missed. This not only allows the mediator to illustrate to the parties that the mediator has thoughtfully studied the materials, but it gives the parties an opportunity to share important information with the mediator in a constructive fashion.

This mediator will explain that they will be taking notes and attempting to collect information that he believes will be impactful on the other side. This mediator will explain that they will share information they deem appropriate unless counsel or the party communicates they want to keep such information confidential (which this mediator will respect).

This mediator will further explain that the purpose of this information sharing is to increase *the understanding* of each party's perspectives and needs, and *not* to convince either side of the correctness of the other's position. This mediator will underscore that there is no expectation that anyone's belief in the correctness of their position will change through the mediation process. Instead, however, what will happen is that we will understand (without agreement) each other's perspectives and needs, and then be able to work collaboratively to address each other's needs in order to end the dispute.

This mediator will shuttle between rooms sharing underlying information and explaining each side's perspectives and ultimately what each needs to end the dispute. Through this process eventually a proposal is usually reached by the parties and counsel. Occasionally, the parties are at a stalemate and the mediator will help to suggest terms of resolution, including and up to the making of a Mediator's Proposal.[11]

During mediation, the parties may be accompanied by spouses or support persons, who are generally welcome to serve in that role (so long as they refrain from advocating or inserting themselves into the dispute). In addition, for a successful mediation, the parties and counsel need to be physically comfortable, hydrated and satiated so their energy levels remain strong and they can do their best thinking under difficult, emotional circumstances.

VIII. MEMORIALIZATION OF AGREEMENT INTO A SETTLEMENT AGREEMENT OR TERM SHEET

Once the parties reach agreement about the material terms of their settlement, a written document is drafted and signed by the parties memorializing those terms. It is preferred to have a complete settlement agreement drafted, circulated, reviewed, and signed at the mediation. However, sometimes this is not feasible, in which case the parties will agree to a shorter document memorializing the material terms (known as a "term sheet") that contemplates the drafting and execution of a later settlement agreement.

Whether the parties enter into a settlement agreement or a term sheet, counsel should be mindful of the following:

1. Inclusion of provisions for enforcement under Code of Civil Procedure section 664.6 and for entry of the agreement by using electronic signatures.
2. There may be no agreement regarding confidentiality of settlement of FEA claims.

3. There may be no agreement to refuse to cooperate with an investigation of FEA claims by governmental authorities.

Counsel should further contemplate whether the agreement needs court approval with due notice to interested persons and the impact of the *Breslin* Order on interests of persons or entities who were given notice of the mediation but did not participate.

IX. CONCLUSION

Mediation of trust, estate, and FEA claims offers the parties an efficient way to end their disputes with a maximum amount of control over the ultimate outcome. When employed at the right time with the right mediator, and with proper preparation, the process is highly likely to result in outcomes that will serve the clients far better than waiting years for uncertain, expensive outcomes over which they have no control.

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02 Kidsdata, *Households with and without Children*, Population Reference Bureau <https://www.kidsdata.org/topic/40/households-with-children/table#fmt=462&loc=2,127,1657,331,1761,171,2168,345,357,324,369,362,360,2076,364,356,217,354,1663,339,2169,365,343,367,344,366,368,265,349,361,4,273,59,370,326,341,338,350,2145,359,363,340&tf=108&ch=89,90&sortColumnId=0&sortType=asc> (as of Oct. 4, 2023).

03 United States Census Bureau, *S1201 Marital Status* <https://data.census.gov/table?q=ACSST1Y2021.S1201&g=040XX00US06> (as of Oct. 4, 2023)

04 Goldberg Jones, *Fascinating Remarriage Statistics* (August 15, 2022) <https://www.goldbergjones-sandiego.com/divorce/remarriage-statistics/> (as of Oct. 4, 2023).

05 For California, see, e.g., *Herwick v. Langford* (1895) 108 Cal.608, 626 (discussing the right of disposing property by will as involving policy "which has been sanctioned by the wisdom and experience of many generations of men").

06 Prob. Code, section 1810 provides:

> If the proposed conservatee has sufficient capacity at the time to form an intelligent preference the proposed conservatee may nominate a conservator in the petition or in a writing signed either before or after the petition is filed. The court shall appoint the nominee as conservator unless the court finds that the appointment of the nominee is not in the best interests of the proposed conservatee.

Prob. Code, section 21102, subdivision (a) provides:

> The intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument.

07 *Breslin v. Breslin* (2021) 62 Cal.App.5th 801.

08 *Ibid.*

09 The author is aware that elsewhere in this edition of The Quarterly other writers have examined *Breslin v. Breslin* in great detail and thus this author will not do so here.

10 Evid. Code, section 1129.

11 A Mediator's Proposal is a proposal made by the mediator as the last act of the mediation. If each side accepts the proposal, the parties are in agreement based on the terms of the proposal; if either party rejects the proposal, the mediation is completed and there is no agreement.

MCLE SELF-STUDY ARTICLE

TRUSTS AND ESTATES MEDIATION AND THE ROLE OF THE MEDIATOR

Written by Kristin L. Yokomoto, Esq.*

"WHEN IT COMES TO DIVIDE AN ESTATE, THE POLITEST MEN QUARREL."

- Ralph Waldo Emerson[01]

I. SYNOPSIS

The mediation of trust and estate disputes are unique. Disputes over the assets of loved ones who are deceased or incapacitated involve life's most complex emotional and psychological issues related to family, wealth and death. Trust and estate litigation is on the rise, but it is also costly, public, time-consuming, and results in a decision by a judge or jury where one party wins and the other loses. Mediation is a valuable alternative dispute resolution (ADR) platform to resolve these disputes privately and expeditiously in a manner that can lead to a win-win result. The mediation platform can provide parties the opportunity to express their truths and feelings of frustration, anger, and betrayal, listen to the other parties' versions of their truths, identify interests, and solve their problems by creating a mutually acceptable resolution together.

The role of the mediator in a trust and estate mediation is a powerful one. The mediator is hired by the parties through their lawyers to resolve their conflict where emotions are running high by facilitating a negotiation between them, often in a day. Building rapport and trust with the parties early on and throughout the mediation are key for the mediator to be able to facilitate a resolution. Mediators can do this by actively and passionately listening, reframing, asking questions, validating a party's feelings, accurately relaying one party's story to the other, and identifying each party's concerns, fears, goals, dreams, and interests. Mediators who understand the psychology of conflict, cognitive biases, and how people make decisions can help parties navigate through impasses during the negotiation.

II. DEFINITION OF MEDIATION

Practitioners, mediators, and scholars have different descriptions and understandings of mediation. One definition of mediation, as provided in the Merriam-Webster dictionary, is:

> the act or process of mediating: such as [an] intervention between conflicting parties to promote reconciliation, settlement, or compromise *specifically*: a means of resolving disputes outside of the judicial system by voluntary participation in negotiations structured by agreement of the parties and usually conducted under the guidance and supervision of a trained intermediary.[02]

While some attorneys and mediators view solving the legal dispute as the only goal, others see more possibilities, such as the reconciliation referred to by Merriam-Webster's definition.

JAMS defines mediation as "a process wherein the parties meet with a mutually selected impartial and neutral person who assists them in the negotiation of their differences."[03] Both the Merriam-Webster's and JAMS' definitions suggest that mediation is a process through which the mediator facilitates the negotiation process by helping the parties overcome distrust, dislike, communication challenges, and other roadblocks.[04]

III. MEDIATION VERSUS LITIGATION AND ARBITRATION

Whereas litigation is governed by state and local rules and procedures, and arbitrations generally follow the arbitrator's procedures, there are no set procedures in mediation. Instead, the process is up to the mediator and sometimes

the parties. In litigation and arbitration, a judge or jury or arbitrator, respectively, decides on the outcome. In mediation, it is the parties who explore and decide whether they will settle and the terms of the resolution. Further, the mediator does not seek to determine the truth, analyze legal issues, or apply the law to facts. Rather, the role of the mediator is largely to facilitate discussions to identify each party's concerns, fears, goals, dreams, and interests in the hopes of creating a win-win resolution that satisfies all parties, which may mean the parties are more or less equally satisfied or equally dissatisfied.

Mediations are often scheduled for a day, with some up to several days, whereas litigation can drag on for years due to the myriad of issues that can be raised in each case, misconduct during the discovery process, various motions, continuances, appeals, and a lack of remedies to prevent a party from weaponizing litigation.[05] This does not mean that litigation is to be viewed as a threat or failure, for without it, mediation would not be as effective.[06] Litigation may also be preferred by a party who feels the facts and law support their position or is looking for vindication and has an unlimited budget to spend on attorneys' fees.

IV. TYPES OF TRUST AND ESTATE DISPUTES

Trust and estate disputes are increasing in both number and scope due to the incapacity or death of a settlor. Conflicts may arise over monetary or non-monetary issues such as a child feeling wronged by parents who chose to financially favor another child, selected another child as the fiduciary, or placed one child's inheritance in trust and distributed another child's inheritance outright.[07] While there are too many to list, below is a sampling of some types of conflict that can arise.

Disputes regarding the administration by the successor trustee of a revocable or irrevocable trust may involve a myriad of breach of fiduciary duty claims against the successor trustee, such as the failure to provide trust asset information, misuse and mismanagement of trust assets, failure to provide accountings, or the improper distribution of assets. Furthermore, a large percentage of cases in litigation result from a lack of timely communication of information and transparency by the trustee to each of the beneficiaries.

Many family disputes revolve around the concept of an equal division of parents' assets versus an unequal but fair division of such assets among the children. An equal division of assets is one many parents turn to when dividing up their assets, such as one-fourth to each of four children. Or parents may choose to distribute their assets in a manner that they feel is fair based upon, among other things, how much money they have given in gifts to one child over the others, how much each child owns and is earning, and how much each child has helped with their caretaking.

A growing area plagued with problems involves the management of the financial assets and physical care of an elderly parent or relative. Disputes related to capacity and undue influence include contested conservatorships, limited conservatorships, contested inheritance rights, guardianship matters, and related custody and visitation issues.[08] The types of disputes are endless but all are suited for mediation with the right mediator.

V. PARTIES TO TRUST AND ESTATE DISPUTES

A. Family Members

Disputes often involve the settlor's family members, such as spouses, children, parents, siblings, aunts, uncles, nieces, and nephews. Unlike the many other types of legal actions between business acquaintances or strangers, these disputes are often among family members with a long history together. The parties may have been fighting for years before the settlor's incapacity or death and the dispute could have been either expected or come as a surprise. There is a saying: "You don't know a person until you share an inheritance with them,"[09] which rings true for many. Fights may be rooted in long-standing family problems of sibling rivalry, perceived favoritism, jealousy, disapproval of a marriage, a child's abuse of drugs or alcohol, or a myriad of other complex issues.[10] These disputes can be highly emotional and cause a significant negative impact on a party's well-being.

A perfect storm for a fight is a settlor with separate property, children from a first marriage, and a spouse from a latter marriage who is the children's stepparent. This situation often leads to a dispute, particularly where a child or the surviving spouse is named as the fiduciary to administer a large trust or estate. Disputes over family money or property generally also impact the extended family and the next generation. A client's son who was part of the family's third generation once shared that he did not know his first cousins even though they lived in the same city because of a fight among those in the second generation over a multi-million-dollar plot of land they inherited from the first generation.

B. Other Parties

Other parties to a mediation may include friends, business partners, professionals, caretakers, charities, or other organizations and creditors. In addition, the Franchise Tax Board or Internal Revenue Service may be necessary parties. This is important to recognize because if the

parties fail to consider tax issues, the settlement may not be respected and one or more parties may not get the settlement they thought they had negotiated.[11] Tax advisors should be consulted for estate tax, generation skipping transfer tax, and income tax issues and those issues should be discussed in detail during the mediation.

Another party who may be involved is an attorney or other advisor against whom a malpractice claim may be threatened or pending. As the number of trust and estate disputes continues to rise, so too does the number of malpractice claims against trust and estate attorneys. California is not a strict privity state when it comes to malpractice claims brought by a third party. Rather, the courts apply a balancing test under *Lucas v. Hamm*[12] to determine if a third-party beneficiary has standing to bring a malpractice claim against the drafting attorney. If there is a potential or actual malpractice claim against an attorney, such attorney could have an interest in the mediation.

VI. THE ROLE AND POWER OF THE MEDIATOR

Mediation is a useful alternative platform for resolving trust, estate, and related disputes among family members and other parties. The role of the impartial mediator is to facilitate negotiation among the parties to create a resolution.

A. Building Rapport and Managing Communications

The mediator needs to build trust and rapport with the parties so that they will be willing to settle. The mediator's impartiality is key to creating an environment of trust and fairness. The mediator's primary role is to listen, communicate, and elicit information without judgment. Mediators also manage information from the parties and, with the express authorization of the party providing the information, may share information from one party to the other to increase all parties' understanding of what is happening beneath the surface. Mediators may also serve as valuable coaches, shaping the manner in which a party digests good or bad news and, depending upon the mediator's style, may help the parties brainstorm potential resolutions to their dispute in a way that does not favor one party over another.

B. Mediators Have Power

Mediators have power. During the recording "How to Borrow a Litigator's Power", Dwight Golann, Esq., discusses how attorneys who are aware of a mediator's powers can borrow these powers to their advantage to obtain better results for their clients.[13] Instead of going into the mediation with an adversarial position to fight out the best deal for their clients, attorneys can pitch their case to the mediator and request that the mediator propose their offer to the other party, knowing that the other party will likely have a better reaction to the offer if it is coming from the mediator. Attorneys can talk with the mediators in the hall and give them an evaluation of what they think their client needs to hear to be more willing to settle. If an attorney is aware that their client is having emotional difficulty, the attorney, with advance permission from the client, can share this with the mediator so that the mediator better understands the situation.

C. Mediators Can Be Magical

Mediators Steven W. Rottman, Esq. and Steven W. Paul, Esq., professors of Advanced Mediation at the internationally recognized Straus Institute for Dispute Resolution at the Pepperdine Caruso School of Law (Straus Institute),[14] define mediation and the role of the mediator as:

> [T]he art of mediation [is] that mystical magical transaction which occurs at the intersection of law and life. Mediators wear many hats: facilitator, coach, evaluator, therapist, resource, sounding board, confidante, problem solver, negotiation consultant, process architect and designer of opportunity. [Mediators] guide counsel and parties through conflict, exploring root causes of the dispute, managing the auction (if there is one) and crafting future opportunities.

Rottman and Paul's perspective that mediation is magical and mediators wear many hats, which will differ from mediation to mediation, highlights the endless possibilities that mediation as a conflict resolution tool can offer to parties.

VII. STYLES OF MEDIATION

There are several different styles of mediation, with the two most common being evaluative mediation and facilitative mediation. A third style is transformative mediation and a fourth style is narrative mediation. Understanding these distinctions may be helpful when interviewing a mediator and utilizing the mediator's skills during the mediation.

A. Evaluative Mediation

Formal mediation began in the United States in labor disputes during World War II, and often included an evaluative component.[15] In an evaluative mediation, the mediator is often an expert in the subject matter of the mediation and controls the process of the mediation. The mediator listens to both sides and provides an evaluation of the parties' likelihood of success in court. This type of

mediation may be useful when there is an uneven power dynamic between the parties. While attorneys often want the mediator to provide an evaluation of the legal merits, that approach may limit the parties' ability to negotiate their own resolution based upon the sharing of their interests.

B. Facilitative Mediation

In the 1960s, with funding from the federal government, several community mediation centers began conducting facilitative mediation.[16] Facilitative mediation is a negotiation of a dispute where the mediator may control the process, but not the outcome of the dispute. Rather, the mediator is there to facilitate communication and foster a greater understanding of each party's concerns and interests to help create a win-win solution that satisfies all involved. To accomplish this, the mediator listens carefully to each party, asks thought-provoking questions and encourages the parties to clearly articulate their positions and interests. Facilitative mediation is well suited to helping parties resolve a trust and estate dispute while preserving the family relationship.

C. Transformative Mediation

Transformative mediation was first described by Robert A. Baruch Bush and Joseph P. Folger in 1994 as an approach to conflict resolution that seeks to transform the relationship between the parties with a goal of creating a collaborative relationship.[17] Transformative mediation focuses on the reconciliation of the disputed parties. The mediator focuses on the parties' emotions and uncertainties to help them be more responsive to each other. This type of mediation works best when the parties are willing to work together but are having difficulty communicating and listening to each other because emotions are running high. This approach may help many families when dealing with aging parents. As parents age, many adult children experience disputes with their siblings and other relatives over the care of a parent.[18] Discussions and decisions over care can be extremely stressful if children have different opinions on whether it is physically safe for the parent to remain at home alone, if hired help is necessary, or if the parent would be better served by residing at an assisted living facility. The difficulty in making these decisions is often compounded by the parent wanting to remain at home. The use of a third-party transformative mediator may help the family work together through these and other concerns related to an aging parent.

D. Narrative Mediation

Narrative mediation incorporates storytelling into the mediation.[19] The mediator encourages the parties to share their personal stories on the conflict to help reach resolution through understanding each other's point of view. The parties reach a resolution on their own through cooperation and working together to develop a resolution. This approach is premised on the idea that language plays a role in who we are and how we engage with others. This method goes beyond interest-based mediation by finding a set of mutual interests through collaboration.

E. Riskin's Grid

The two most common forms of mediation are evaluative and facilitative mediation. In 1994, Leonard L. Riskin proposed a system for understanding a mediator's orientation, strategy, and technique, commonly referred to as Riskin's grid.[20] The grid is composed of two continuums, one which measures whether the mediator performs evaluative or facilitative mediations and the other which measures whether the mediator's approach to defining the problem is narrow (focused on the parties' positions) or broad (focused on the parties' interests). This creates the following four quadrants:

1. *Evaluative-Narrow Mediation.* The mediator assesses the strengths and weaknesses of the parties' legal positions based on a review of legal pleadings and mediation briefs, predicts the court outcome, suggests an agreement based upon the positions of the parties and urges the parties to settle along lines urged by the mediator.
2. *Facilitative-Narrow Mediation.* The mediator may review legal documents but will focus more on asking questions to help the parties understand the other parties' legal position. Rather than suggesting an agreement, the mediator helps the parties create their own agreement. The mediator does not pressure the parties to settle but helps the parties to become realistic about the strengths and weaknesses of their differing positions and understand the consequences of not settling.
3. *Evaluative-Broad Mediation.* Instead of focusing solely on the parties' positions, the mediator will also assess the parties' interests based on a review of legal pleadings and mediation briefs and responses to questions about each party's interests. The mediator will then propose and urge resolution based on the mediator's understanding of the parties' interests, often referred to as a mediator's proposal.
4. *Facilitative-Broad Mediation.* The mediator may review legal documents but will focus more on asking questions to help the parties understand each other's needs, goals, and interests. The mediator neither proposes a settlement nor urges the parties to settle, but rather helps the parties,

through questions, develop their own options and resolution proposals.

Note that Leonard Riskin has acknowledged that the facilitative-evaluative terminology has caused confusion because the essence of mediation is facilitation and if evaluation is supposed to be the opposite of facilitation, an evaluative mediation would seem to rob the mediation of its essence.[21] Nonetheless, Riskin's grid is still used widely in training, evaluating, regulating, and choosing mediators. Riskin's grid is also a useful tool to evaluate a mediator's style.

F. Applying Different Methods

While the two most common forms of mediation style are evaluative mediation and facilitative mediation, a mediator's style will depend on many factors, including the type of dispute and the mediator's training, experience, and preference. A mediator may often change their mediation style throughout the mediation to help settle the dispute. While one party's attorney may want to start with a narrow approach discussing legal positions, the mediator may try to move the parties away from such an approach towards a broader facilitative approach to change the focus to the parties' interests. A facilitative mediation that focuses on the parties' needs, goals, and interests is well suited for trust and estate disputes because it allows the parties to work together to create a resolution while potentially repairing relationships.[22] After all interests have been identified, if the matter is not heading towards a resolution, and the mediator has enough information on the facts and law involved in the dispute, the mediator may elect to adopt a more evaluative-narrow approach by more actively discussing resolution options and the consequences of not settling with each party.

In a survey by the International Academy of Mediators (IAM) consisting of 126 commercial mediators from around the world, participants were asked how frequently the following statement applied to them: "I assess and share my opinion regarding the legal strengths of arguments made by parties and/or counsel." Approximately one-third of the mediators responded that they sometimes evaluate, one-third responded that they usually evaluate, and one-third split across "never," "sometimes," and "half the time." However, in California, 50% of the mediators in the IAM practicing in California shared that they usually evaluate and 12% shared that they always evaluate. This means that two-thirds of the mediators surveyed in California responded that they share their opinions regarding the strength of the parties' positions.[23] This suggests that evaluative mediations are more common in California than elsewhere.

The potential benefit of a mediator exerting control over the mediation process, and possibly the outcome, is that the matter may settle. However, the problem of mediators exerting too much control over the conduct and resolution is that the parties lose out on creating their own resolution based upon their interests. For this reason, there is a common debate over facilitative versus evaluative mediation styles.[24]

VIII. MEDIATOR SELECTION

The terms on which a dispute will settle can greatly depend on the mediator. Mediator selection is generally made by the attorneys for all parties, or at least the main parties. Sometimes, two mediators are selected, one attorney and one non-attorney. For example, in an estate planning setting, a tax specialist and a psychologist might bring their separate expertise to the controversy.

A. Mediator's Traits and Skills

Among the most important traits of a mediator are trustworthiness, integrity, and the ability to develop rapport with the parties. The unique, deeply personal and complex character of trust and estate disputes requires a mediator to actively listen to each party, allow the parties to vent and release their hurt and anger, and communicate well with the parties to encourage a resolution.

It is important for mediators to be impartial and not favor one party's position, views, or feelings over another. This may not be as easy as it sounds, given implicit biases, which are unconscious biases shaped by the mediator's personal and professional experience and learned associations. Examples of implicit biases are age, beauty, race, or gender, and also include the halo effect of putting someone on a pedestal or the horn effect of ascribing negative attitudes to someone based upon an aspect of their appearance or character. Implicit biases can unknowingly impact one's judgment, perception, and behavior toward others, such as sitting farther away from a party or refraining from eye contact with a party. These nonverbal messages could negatively impact a party's willingness to tell their story and impede the mediator's ability to establish rapport. To prevent prejudice in the mediation, mediators should be aware of the concept of implicit biases, educate and evaluate themselves, and actively engage in bias reduction strategies.[25] Biases can present a roadblock to reaching a resolution at mediation. Controlling them can be a critical step in helping the parties to settle.[26]

The parties and attorneys will also bring their own implicit biases to the table. Unless these unconscious biases are recognized, they can impact and control the outcome of the mediation. It is the mediator's responsibility to notice and

respond to the implicit biases of the parties and attorneys and help them so these biases do not impede resolution.[27]

In a study conducted by Stephen B. Goldberg and Margaret L. Shaw on what makes a mediator successful, 216 attorneys who had participated in mediations conducted by 28 mediators provided their views. Up to 60% of the attorneys and 75% of the mediators responded that being welcoming, friendly, likeable, respectful, and conveying a sense of caring and desire to find a solution were among the top reasons for a mediator's success. Other reasons provided by the mediators and attorneys for success included a mediator's high integrity, patience, and persistence, along with the ability to respect confidences, ask good questions, listen carefully, soften bad news, provide evaluations, make suggestions, and propose creative solutions. Not surprisingly, almost half of the attorneys shared that reasons for a mediator's failure were due to lack of integrity, disclosing confidential information, and providing inconsistent valuations.[28] Mediators must be sure to correctly hear and relay information to ensure all parties remain on the same page during negotiations.

B. Mediator's Training and Experience

Depending on the nature of the dispute, the parties may consider the mediator's professional background, experience, and professional training in mediation. Mediators who not only have experience helping parties to facilitate a negotiation, but who also understand the substantive trust and estate laws are often ideal. Professional training includes a mediator obtaining a theoretical understanding and practical application of mediation principles, learning how to engage in active listening and ask questions that help the parties verbalize their thoughts and interests, knowing how to observe body language, and developing facilitative skills that encourage creative thinking and problem-solving.[29] There are many programs that offer training and certificates in mediation after completing a course for several hours, and a number of law schools offer a Masters in Law in Dispute Resolution. It is helpful if the mediator's training includes studying how different personality profiles relate to and deal with conflict.

C. Mediator's Style

1. Facilitative, Evaluative or Both

As discussed above, a mediator's mediation style may range from evaluative mediation to facilitative mediation and broad (focused on interests) to narrow (focused on positions), which can impact the process, and possibly the outcome, of the mediation. The mediator also may be experienced with transformative or narrative mediation styles. It is important that a mediator identify and explain their style, so the parties know what to expect. If the mediator tends to change styles based upon the parties, attorneys, and progress of the mediation, the mediator should explain what types of events could trigger a change. This way, the attorneys and parties will understand if a mediator starts off evaluative, moves to facilitative, and then goes back to evaluative. Some mediators only do facilitative mediations. If they are asked to provide an evaluative opinion, mediators who do not want to be evaluative should be clear with the parties that it is not their style to evaluate.

2. Private Caucuses or Joint Sessions

Some mediators hold a mixture of joint sessions where all parties are in the room together or private caucuses where the mediator talks with only one party at a time. This seems to be a common approach in California and with trust and estate disputes. During private caucuses, the mediator can ask questions, a party can freely answer without the other party listening, and together they can freely brainstorm to create potential offers. However, some of the more powerful conversations may occur during joint sessions if both parties are willing to be in the same room and have guided conversations with the mediator.

3. Repair or Separation

Some mediators and scholars stress the ability of mediation to repair relationships. Others, especially those with a background in litigation, often assume the mediation is solely over the bargaining of the money and other assets.[30] Some mediators base success on whether the parties leave with a better understanding of each other's view of the situation regardless of settlement, while others only view the mediation as a success if the parties settle. It is common for a mediator to boast about how many matters they have settled. While this may be indicative of their ability to build rapport and create solutions for the parties, it also may suggest a litigator's perspective limited to an evaluative style that is less focused on artfully facilitating a negotiation. Because trust and estate disputes are often among family members with a long-standing history, a mediator who has the ability to focus less on advocacy and more on repair may offer a greater benefit to the parties.

D. Retired Judges

Retired judges are popular as mediators because their evaluations are seen as credible due to their time spent on the bench. Parties and attorneys often perceive that a retired judge will be fair and impartial to all parties because of their training and experience. Many have spent a couple of decades presiding over numerous bench trials, during which time they had to listen and wait to make a decision until they had heard all sides. Retired judges also likely have years of observing jurors and have developed a keen insight

into people's decision-making process, as well as ways of dealing with high conflict personalities.

Those who presided over trust and estate cases in probate court can offer the parties and attorneys their evaluation of the matter and provide opinions on how the matter may resolve in court if it does not settle. Retired judges are also familiar with the costs and time related to an appeal and can explain this to the parties who are having difficulty settling. As with all mediators, the mediation style of judges may vacillate from an evaluative approach and move to a facilitative approach and then back to an evaluative approach, especially if a stalemate occurs. Retired judges are often sought by attorneys who feel their clients will benefit from an evaluation of the legal merits of their case; either they confirm their position or help them realize it may not be as strong as they hoped.

IX. TIMING OF MEDIATION AND PREPARATION

A. When Parties Are Ready

Sometimes, the best time to mediate a trust dispute is when litigation is looming and before any petition is filed with the court. To this end, more trust litigators are mentioning mediation during the first few meetings with clients. Other times, it may be better to proceed to mediation after the filing of a petition, depositions of the parties and experts have occurred, and discovery is in progress or completed. By waiting, each party may have a better idea of their strengths and weaknesses, which may help to facilitate a resolution to each party's satisfaction. During an interview of Betty Epstein, Esq., mediator at ADR Services Inc., by Jeffrey S. Galvin, Esq., Epstein stated:

> The time to mediate trust and estate disputes is when the parties are prepared to make binding decisions on the day of the mediation and to sign an enforceable agreement reflecting those decisions. That timing can range from nothing yet having been filed with the court, up to just a few weeks before a trial is to begin, or even after trial and before there is an appellate decision. A key ingredient is having sufficient information on which to base the decisions being made.[31]

B. *Breslin v. Breslin*

A mediation may also be ordered by the court. Under Probate Code section 17206 and pursuant to the 2021 case of *Breslin v. Breslin*,[32] a court may order the parties to a trust dispute to attend mediation. If an interested person who receives a properly completed notice of the court-ordered mediation opts not to participate in the mediation, such non-participating person may not later object to the settlement reached at mediation, even if that settlement modifies the nonparticipating person's beneficial interest.

C. Attorney Preparation

Due to the complex nature of trust and estate disputes, parties are often represented by an attorney. It is essential that the attorney understand the legal issues involved, the disputed and undisputed facts, and all causes of action and counterclaims that each party is making. The attorney should study and evaluate the client's strengths and weaknesses and probable jury verdicts, and the likelihood of an appeal, as well as evaluate the strengths and weaknesses of the other parties' positions. It is also of critical importance that the attorney understand the client's emotions, concerns, and interests and the client's range of acceptable resolution outcomes. In addition, the attorney needs to know various negotiation tools and techniques to help the client successfully negotiate a resolution.

D. Client Preparation

Attorneys must prepare their clients for the mediation. This could make the difference between settling and not, especially for a high value, complex matter. Up until this point the attorney may have been advancing the client's position with more optimism than is supported by the facts and applicable law. If so, this is the time to discuss the strengths and weaknesses of the client's position with the client.[33] Although there are a myriad of reasons why a dispute does not resolve in mediation, lack of client preparation is a top contributor.

To set the client's expectation, attorneys should explain that the mediator is and will remain impartial and will not be making a decision. Rather, the mediator is there to facilitate negotiation through private caucuses or joint meetings by listening, asking questions, and helping to figure out each party's concerns and interests to help create a resolution. Discussions about what is most important to the client and why are key. Examples may be that the client wants to end the stress of fighting, get back to work and family, and stop incurring attorneys' fees, or the client wants an apology and the relationship restored in some manner so their children can go back to spending time with their cousins. It is important to emphasize that the purpose of the mediation is not advocacy and will not be the client's day in court. It is also important to remind the client that they will be hearing from the mediator about the other party's perspective and experience with the situation. The more open they are to listening and understanding, whether or not they agree, the more likely the parties will be able to settle the matter.

X. THE STAR APPROACH TO MEDIATION

Each mediator has their own approach to marketing, getting hired, meeting the disputants, and conducting the mediation from the mediator's opening to the closing of the mediation. One approach, the STAR approach explained by the Straus Institute, provides a useful framework. The "S" of STAR stands for the following five stages of mediation – convening, opening, communication, negotiation, and closing; "T for the tasks to be performed during each stage; "A for the actions to be taken; and "R" for the desired results of the tasks and actions.

A. Convening

The first stage of the STAR approach is convening, whereby the mediator's task is to facilitate the parties' willingness to agree to mediate with the mediator. Convening is the process by which the mediator is hired. The action is getting hired and the desired result is the willingness of the parties to hire the mediator and start building rapport.

1. Process

During this process, the mediator, directly or indirectly, starts to establish credibility and rapport with the attorneys and the parties if they are involved. The process will depend upon many factors, such as whether the parties are represented by attorneys and if their attorneys have prior experience with the mediator. If the attorneys selecting the mediator are familiar with the mediator's methods and experience, there may be little need to convene, except for a cursory discussion of the specifics of the dispute, fees, and scheduling. If only one attorney knows the mediator, then the mediator may do the convening themselves or suggest that the one attorney who knows the mediator reach out to the other party's attorney to handle the convening. Alternatively, the mediator may have an experienced staff person perform the convening or may mediate for a mediation company, such as ADR Services or JAMS, which has staff to handle the initial aspects of the convening.

2. Checklist

It is a good idea for the mediator to maintain a checklist of the necessary actions and the status of each throughout the convening stage to help ensure no details are missed. During the convening stage, parties may negotiate the terms of the mediation, such as the mediator's fee, anticipated duration of the mediation, whether the mediation will be virtual or in-person, and who will attend the mediation. At the end of the convening stage, the mediator may schedule a pre-mediation call with the attorneys, sometimes with their clients attending. Other mediators have the parties go to the mediator's office for an initial meeting and, if all goes well and briefs are not needed, begin the mediation then and there once a mediation agreement and confidentiality agreements are signed.

3. Meeting with the Attorneys

Some mediators like to meet with the attorneys before the mediation and spend time speaking confidentially to each attorney. This can allow the mediator to further understand the issues, obtain information, and be informed of client sensitivities and idiosyncrasies. Mediators who meet in advance can help the process and increase the chance of resolving the dispute, as long as both parties have the equal opportunity to meet to maintain the mediator's impartiality.

4. Exchanging Mediation Briefs

Many mediators will request that mediation briefs be submitted at least three days before the mediation, if not sooner. While most mediators prefer that the parties exchange briefs with each other, many do not demand that they do so. The purpose of the briefs is to educate and share the parties' perspectives as to the salient facts, law, and critical issues to be addressed in the mediation process.

B. Opening

The second stage of the STAR approach is the opening. The tasks of the mediator are to welcome the parties, establish rapport, and explain the mediation process. The action to be taken is an introduction of the mediator to the parties and an acknowledgment of the parties' willingness to mediate. The desired result is to create hope and establish safety for the parties to speak freely during the negotiation stage.

1. Mediator's Style

The manner in which the mediator opens the mediation has tremendous significance. Mediators' openings can vary greatly and may depend on a number of factors, such as the mediator's personality and mediation style within Riskin's grid. The mediator may arrange the parties' seating positions before the start of the meeting. Some mediators prefer to have the attorneys sit closer to them, while other mediators prefer that the parties sit closer to them. This will depend, of course, on the number of parties and if each has an attorney, as well as whether the mediator is opening a joint session or separate caucuses. Some mediators may perform some or all of their opening in private caucuses with each party separately.

2. Logistics

While some mediators will meet with the parties, or at least their attorneys, before the mediation to go over the key issues, the opening may be the first time that the mediator is meeting the parties and their attorneys in person. Each

mediator approaches the opening in their unique way and their approach may depend in part upon the parties and the type of trust and estate dispute involved. Some mediators say hello in the lobby, some tell jokes, and some are more serious. Through each such approach, the mediator is starting to build rapport with the parties. If it is the first meeting, the mediator should provide an overview of the accommodations such as parking validation, location of the restrooms, water, private caucus rooms, the temperature, lighting, whether lunch will be ordered, and any time constraints, such as an afternoon or evening airline flight reservation. Knowing these things in advance will reduce a party's stress during the mediation. The mediator may go over some ground rules such as no interruptions, civil behavior, and courteously listening to each other during any joint sessions. The mediator's style – whether facilitative or evaluative – will influence the mediation process. Accordingly, the mediator may wish to explain their style and process

3. Confidentiality Reminder

It is critical that the mediator remind the parties that everything shared during the mediation will constitute confidential information and collect any missing signed copies of the confidentiality agreement. The mediator should explain the standards of mediation, including that the mediation is confidential, the parties are the ones who will decide if they want to settle, and that the mediator's job is to be neutral and impartial. The mediator can invite the parties to bring to the mediator's attention any feelings that the mediator may be favoring one party over the other at any point. This will help the parties feel comfortable with the process, knowing they will have a voice during the mediation and can express their thoughts and feelings to the mediator if any discomfort arises. In turn, this will help the mediator establish credibility with the parties and gain their trust.

4. Opening Statements-Joint Session

Following the mediator's opening remarks, if the opening was made during a joint session, the mediator may continue with a joint session and invite each party to make their own opening statement. The parties should be reminded that they are there to try to resolve their conflict by telling their story and listening to the other party's story. The purpose is not to disparage or judge each other. The mediator may want to summarize what was said by each party and, if necessary, reframe the statement and ask clarifying questions. Listening to the opening statements and summarizing the issues allows the mediator to ensure they have correctly defined the issues. After summarizing, the mediator may ask the parties if they have correctly understood their opening statement, which also may help the parties to further identify with their own position and interests. The mediator's and parties' opening statements set the groundwork for the mediation while the mediator continues to build rapport with the parties.

5. Opening Statements-Private Caucuses

If the opening was made during a joint session, the mediator may move to private caucuses. The mediator would perform the same actions as mentioned above separately with each party and thereafter, with the party's permission, share what was heard with the other party. In a survey of 126 commercial mediators from around the world by the IAM, mediators were asked to state the frequency that the statement, "I begin the mediation with all parties in caucus," applies to them. While 21% of the mediators responded never, 35% responded sometimes and almost 43% responded half the time, usually, or always. However, only 14% of the California mediators within IAM responded never, 18% responded sometimes, and 67% responded half the time, usually or always.[34] This suggests that in California, many mediators prefer private caucuses over joint sessions. Whether the mediator performs the opening in a joint session or private caucus, once all parties feel that all issues have been shared, the next stage is communication.

C. Communication

The third stage of the STAR approach is communication. The task is commitment and the action is to participate to try to settle. The desired result is an expression and understanding achieved through a mediator's questions, active listening, validation, and caucuses.

1. Mediator's Questions

As discussed above, unlike an arbitrator, a mediator does not render a decision. Whereas an arbitrator may have questions that need to be answered in order for the arbitrator to apply the law and equitable principles to the dispute, a mediator needs to ascertain the parties' questions that need to be answered in order for the parties to create a resolution to the dispute. Especially if the mediator's style is facilitative, the mediator's role is not to ask questions seeking answers to fill the mediator's decision-making gaps, but to seek answers that will help the parties fill in their decision-making gaps. The purpose of a facilitative mediator's questions is not to figure out who is right or wrong. Rather, the purpose is for the parties to learn and share information that they need to make a decision. This means that a mediator must be in tune with the parties' thought processes and feelings and ascertain what information will help each party understand the other party's needs, goals, values, and interests.

2. Active Listening

Another way that a mediator can help the parties communicate is by active listening. When parties are in conflict, they generally listen to each other in a combative manner, and their minds are focused on responding. The mediator can serve a valuable role by helping the speakers share their stories without interruption or judgment. A mediator's active listening skills may include asking clarifying questions, paraphrasing what a party is saying, and encouraging a speaker to share more information. Responses and encouragement may also be nonverbal, such as nodding, smiling, and other facial emotions. Through active listening, the mediator can show care, comfort, support, and empathy for a party without judging or criticizing either party, thereby validating their feelings. A key to active listening is to ask a question and pause, thereby allowing a party to answer without interruption. Through this process, the mediator is continuing to build rapport with the parties, which will be essential for the negotiation phase.

3. Validation

Through active listening, the mediator provides validation to a party. This does not mean that the mediator needs to agree with or believe the party's statements, but the mediator should listen without judging or criticizing. Trust and estate disputes can be highly emotional. Mediators who are empathetic can validate a party's emotions and make them feel that the mediator will have their best interests in mind. Supporting and understanding a party is an important part of continuing to build rapport, which will help the party to relax, which, in turn, will help a party to be more open and willing to settle.

4. Listening and Asking Questions

After asking questions and listening to the parties, the mediator may meet with the parties individually. During early caucuses, the mediator may continue to ask questions to one party which can be freely answered without the other party listening. The mediator may summarize what the party is saying without evaluation and help the party ascertain their needs, goals, and interests. During subsequent caucuses, the mediator may begin to explore options to satisfy a party's interests. Mediators may ask a party for permission to share information learned with the other party. When the same IAM mediators were asked to reply to the statement, "I tell parties that I will share any information I learn during caucus, as I see appropriate, unless they instruct me to not share it," 18% of the California mediators responded never, and almost half responded always, with the remaining responding sometimes, half the time, or usually. It is through private caucuses and the sharing of select information that the mediator continues to build rapport with each party while educating each party about the other party's feelings and thoughts. Once the parties have shared their stories and feel validated, the next stage is negotiation.

D. Negotiation

The fourth stage of the STAR approach is negotiation. The tasks are organization and discussion, and the action is to identify the parties' issues. The desired result is that the parties will be innovative and create a resolution together. During this stage, the focus shifts from what the parties think happened to what the parties are willing to do together to resolve the dispute. Mediators should help the parties make a shift to negotiating and coach the attorneys and parties throughout this stage.

1. Distributive Bargaining

The traditional method of negotiation involves a distributive model that splits up a fixed pie, often based on positions, and is referred to as distributive bargaining or positional negotiation. In mediation, this method focuses on competitive bargaining, which is described on Riskin's grid as a narrow type of mediation. The typical example of positional bargaining is haggling over the price of an item, where each party starts with an extreme position and then agrees upon a price somewhere in between without considering any of the parties' interests. This is considered a win-lose solution because the distribution is on fixed resources where one party's win is the other party's loss. While many mediations are handled and settled based on a distributive model of splitting the pie, if the mediator is trained in integrative bargaining, the parties may reach more creative resolutions that satisfy more of their needs, goals, and interests.

2. Integrative Bargaining

Authors of the international bestseller "Getting to Yes," Roger Fisher and William Ury, argue that distributive bargaining is an inefficient means of reaching agreements and neglects the parties' interests.[35] They instead suggest an integrative bargaining method or interest-based negotiation that focuses on four principles: (a) separate the people from the problem; (b) focus on interests rather than positions; (c) generate a variety of options before settling on an agreement; and (d) insist that the agreement be based on objective criteria.[36]

According to Fisher and Ury, the first principle is to separate the people from the issues to avoid parties responding to the other party's position with personal attacks and damaging their relationship with each other. This separation can also help the parties get a clearer view of the dispute at hand. The second principle is to focus on interests rather than positions. On Riskin's grid, this would mean a broad mediation that

focuses on drawing out each party's needs, goals, and interests to expand the pie and create win-win solutions. The third principle is to generate creative options for solving a problem. And the fourth principle is to use objective criteria to resolve differences when the parties' interests are directly opposed to each other. Otherwise, the parties' differences will continue to cause arguments and destroy the relationship, which will not result in a good—or any—resolution. An integrative bargaining negotiation will look past each party's position and focus on each party's needs, goals, fears, dreams, and interests. As succinctly stated by Bruce Ross, mediator with the Mediation Offices of Bruce S. Ross LLC in Los Angeles, "A mediated resolution is a win-win for all involved."[37]

3. Unreasonable Offers

Parties often start the negotiation with an unreasonable and insulting offer that results in a similarly unreasonable counteroffer from the other party. A party may do this as part of early anchoring to set the outer bounds of any settlement. Such offers can be time-consuming and emotionally draining, or parties may refuse to negotiate. When this occurs, Fisher and Ury recommend first recognizing the tactic as a possible negotiating ploy, then raising the issue with the other party to find out if they want to negotiate, and then agree upon principles for the negotiation to prevent stonewalling.[38] The goal of the mediator is to help the parties move toward each other and make concessions if they want to settle.

4. Dirty Tricks

Sometimes parties will use dirty or unethical tricks to try to gain an advantage in negotiations, such as good guy/bad guy routines or threats to leak information about the dispute to the media or public. Roger Fisher and William Ury explain that parties may lie to gain advantage in the negotiations.[39] It is important for the mediator to not permit parties to personally attack each other by calling the other party a liar, pressuring a party to make a concession, or engaging in psychological warfare, in which a party takes advantage of the stressful environment and intentionally causes more anxiety for a sensitive party. The best way to respond to such tricky tactics is for a party to raise the issue with the other party and the mediator to establish procedural ground rules for the negotiation.

5. Power Dynamics

Power dynamics often exist between the parties. The mediator can help to protect the less powerful party from being bullied to enter into an unfavorable agreement. A central goal for the mediator is to handle problems caused by the application of power to the negotiation process. Mediators must recognize their own power sources: their position as mediator, their expertise, their ability to dissociate themselves from the results, and the credibility of the mediation process. If appropriate and requested, it may be a good time for a mediator who is familiar with the subject matter to provide an evaluation of the more powerful party's position if it is not as strong as what such party is advancing. This can be helpful for the powerful party's attorney who may have been experiencing difficulty getting such message through to the client. In fact, attorneys often request the mediator to help them handle such situations.

6. BATNA and WATNA

Prior to the opening of the mediation, each party should determine their best alternative to a negotiated agreement (BATNA), meaning what the party can get without settling. A party should reject agreements that would put them in a worse position than their BATNA. Power in a negotiation comes from the ability to walk away from negotiations. Thus, the party with the best BATNA is the more powerful party in the negotiation. The weaker party will have a better understanding of the negotiation context if they try to estimate the other side's BATNA. Fisher and Ury conclude that determining a party's BATNA enables such party to determine what is a minimally acceptable agreement and could probably result in a resolution above that minimum.[40]

A party may also want to be aware of their worst alternative to a negotiated agreement (WATNA), meaning the worst result that could happen to the party if the dispute does not settle. However, this may not be that helpful because the party could agree to a low offer.[41] If a party determines that its WATNA is that the court would rule against and award zero to such party, then such party may accept any offer, no matter how low it is. As such, each party is better off determining its BATNA. Mediators and attorneys who can walk the parties through determining their BATNA provide a valuable service.[42] A party who understands their BATNA will be able to determine an unsatisfactory offer and stand firm in the face of it to obtain better settlement terms.

Decision-tree analysis is helpful to assess the BATNA of going to court because it highlights aspects of a party's BATNA, helps to assess a party's risk tolerance, and provides a better understanding of possible moves and countermoves.[43] A decision tree is an objective, pre-mediation analysis of a party's positions. It may lay out each of the involved causes of actions with an assigned hypothetical dollar value, if possible, to determine the percentage of winning a summary judgment motion, percentage of getting desired discovery from the other party, and getting necessary evidence heard, up to the percentage of prevailing in court and so on. The dollar value is multiplied by each percentage until a dollar range

is determined. Such range would be the party's BATNA as determined on each cause of action.

7. Multiple Issues and Multiple Parties

If there are multiple parties to the mediation, the mediator, attorneys, and parties to the main dispute should consider discussing and negotiating all issues with the goal of proposing a package of terms. Multi-party mediations can lead to several deals being made between different parties. There may be a resolution of the overall dispute or settlement of some issues with others left unresolved.

The mediator may need to manage the process of the mediation more, due to the number of parties with an agenda, to ensure all parties have equal time to speak and be heard. The more parties that band together to form a coalition, instead of each person actingfor themselves, the easier it may be to bring all the parties together to settle because other parties may feel pressured to join. Each party should know their BATNA which may help them to stand firm when an offer falls short. Each party should also analyze and predict the other parties' BATNA. Once the negotiations start, all parties' BATNAs may begin to fluctuate. A party can prepare for the likely fluctuation by knowing each party's BATNA for different possible settlement scenarios.

The preferred negotiation style of a party or their attorney depends on their personality, culture, human nature, attitudes, emotions, implicit biases, and relationships with conflict. The more the parties can go beyond positions and try to understand each other's needs, goals, interests, and dreams, the more likely the parties will be able to resolve their conflict in a satisfactory manner.

8. Impasse and The Mediator's Proposal

If there is an impasse, the mediator has no ideas on how to restart it, and the parties have exhausted issue analysis and explored interests without success, the mediator may make a proposal if the mediator has some sense of what may be acceptable to both parties. Some experienced mediators will have presold a proposal before they make it. A party should share anything they need in a proposal before the mediator floats the proposal because no one likes to re-trade a deal. Gererally, the mediator's proposal is created from listening to the parties during the negotiation and is based upon what the mediator thinks the parties will settle for given the matter and input from both parties and their counsel.

Some mediators will ask a party in private caucus, "If I can get the other party to accept X, would you take it?" The mediator then does the same with the other party. Each party can respond yes or no and will often tack on some interest. While this may be necessary to resolve the matter, it moves away from the beginning definitions of mediation and may raise ethical issues. Parties may be holding out, especially those who begin the mediation with an outrageous offer only to obtain a mediator's proposal that is more in their favor. As such, the mediator will need to carefully ascertain if a party is influencing the mediator.[44]

Some mediators will make a proposal as a last resort to keep the parties from walking out, while other mediators will allow the mediation to end at an impasse. This may vary from medation to mediation depending upon what is at stake and the personalities involved. Even if the mediator's proposal does not produce a settlement, it may change expectations of what is achievable, convince one party that the other party really will not go there, and give the mediator valuable information.

9. Why Negotiations Fail

In general, negotiations can fail due to the lack of attorney and client preparation, emotions, not knowing a party's BATNA and overestimating one's chances at trial, or the parties simply being too far apart. The parties could be exhausted depending on when the mediation started or have another commitment. If the parties do not settle during mediaton, the mediator may want to follow up later. For example, Betty Epstein, Esq., mediator with ADR Services, Inc., will follow up with the attorneys after the next status conference or hearing and sometimes inquire if the parties want to try to mediate again.[45] Epstein has had matters eventually settle after multiple mediations because due to discovery and expert testimony, the parties have a clearer understanding of the strengths and weaknesses of their positions.

E. Closing

The fifth stage of the STAR approach is the closing. If the dispute has settled, the primary task is to produce a settlement agreement or write a memorandum of understanding memorializing the agreement. The desired result of this stage is that each party has made an informed decision. At the closing, it is appropriate for the mediator to compliment and congratulate the parties and their attorneys if the matter settles, and even if it does not, acknowledge them for their time and efforts.

Pursuant to Evidence Code section 1125, a mediation ends when: (1) the parties sign a written settlement agreement that fully or partially resolves the dispute; (2) the mediator signs and sends a statement to the parties that the mediation is terminated without resolution; (3) a party provides written notice to the mediator and to the other party that the mediation is terminated without resolution; or (4) there is no communication between the mediator and any of the parties related to the mediation for 10 calendar days,

although this time period may be shortened or extended by agreement.[46] If a mediation is on hold but not over, attorneys and parties should be aware of the 10-day rule and agree to extend it to avoid an inadvertent end to the mediation.

XI. THE SETTLEMENT AGREEMENT

If the terms of an oral agreement are recorded by a court reporter, tape recorder, or other reliable means of sound recording by all parties and counsel in the presence of the mediator, Evidence Code section 1118 requires that the parties expressly state that the agreement is enforceable or binding and that the agreement is reduced to writing and signed by all parties within 72 hours.[47] Some parties may wish to include a non-disparagement provision in the settlement agreement wherein the parties agree not to disparage each other. However, any agreement to refrain from providing information to law enforcement as part of an investigation of any elder abuse claim is prohibited by law.[48]

In January 2012, the legislature added Code of Civil Procedure section 664.6, subdivision (b) to clarify that a writing is signed by a party if it is signed by the party or an attorney who represents the party, which means that attorneys can now sign settlement agreements on behalf of a client with the client's authorization.[49] Attorneys who sign without their clients' authorization could be subject to professional discipline.[50]

The settlement agreement needs to specifically recite that if one party participated in the mediation without the aid of an attorney, such party was given the opportunity to obtain their own attorney and elected not to do so. A settlement agreement signed through DocuSign should include a provision that each party had agreed to conduct transactions electronically pursuant to the California Uniform Electronic Transactions Act, which can be found at Civil Code section 1633.1 et. seq.,[51] to ensure the agreement's validity.

With any settlement, there may be a number of actions that the trustee or another party may need to perform. If a party fails to do so, without a binding and enforceable settlement agreement, a party may have to start over and use of the documents produced and communications had during the mediation will be prohibited, due to the confidentiality provisions of Evidence Code section 1119. To avoid this, the parties to a pending litigation may file a motion to enter judgment pursuant to the terms of the settlement and request that the court retain jurisdiction over the parties to enforce the settlement until full performance.[52] For a settlement agreement to be admissible, the agreement must be signed by all parties[53] and one of the following conditions must be met: (1) the agreement provides that it is admissible or subject to disclosure;[54] (2) the agreement provides that it is enforceable or binding;[55] (3) all parties to the agreement expressly agree in writing, or orally in accordance with section 1118, to its disclosure;[56] or (4) the agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.[57] By submitting the settlement agreement to the court, the parties will be able to enforce it should one or more parties fail to comply.

XII. PSYCHOLOGICAL ASPECTS OF TRUST AND ESTATE DISPUTES

Mediators can be most effective during the mediation if they understand the psychology of the conflict[58] and the psychology of the parties, which can be learned through the attorneys or by observation. With family conflicts, emotions run deep and have been developed over years prior to the occurrence of the conflict, which may be contributing to the cause of the conflict and inability of the parties to resolve it on their own. These emotions, coupled with differing memories and perceptions of the same events, cognitive biases, and personality challenges, can negatively impact the chances of settling. Mediators and attorneys who embrace the psychology of these issues may be more effective in making parties feel understood and supported, which will lead parties to being more open and willing to settle.

A. Emotions

Emotions are psychological, not logical, and play a significant role in the creation and continuation of a conflict that is a factor in every negotiation. The confidentiality element of mediation provides parties with the opportunity to feel safe sharing their story and the emotions they are experiencing due to the dispute. It is important for mediators and attorneys to understand how emotions shape a person's ability to problem-solve and make decisions, as well as the predictably irrational nature of the way people make decisions.[59] Mediators who can spot the predictably irrational way a party is making decisions during the negotiation can help such party to see things a different way.

Recognizing that emotions, like breathing, do not stop and cannot be ignored during a negotiation, Roger Fisher and Daniel Shapiro, a psychologist, theorize in *Beyond Reason, Using Emotions as You Negotiate* that these five desires are present for parties in negotiation: (1) appreciation in being heard, understood, and valued, (2) affiliation of an emotional connection with people and groups, (3) autonomy and freedom to make decisions without influence from others, (4) status of being acknowledged by others, and (5) roles which have meaning to a person.[60] These desires can be used as two lenses, one to diagnose the situation and the other to improve the situation. Fisher and Shapiro advance that focusing on these desires by expressing appreciation, respecting autonomy, building affiliation, acknowledging

status, and shaping fulfilling roles can serve to create a more effective negotiation between the parties.[61]

B. Memory and Perceptions

With all conflicts, the role of memory and perceptions play a significant role. People selectively remember things and perceive facts, abilities, interests, history, fairness, priorities, applicable law, and likely outcomes, which can be a factor in how a person determines the worth and reasonableness of a settlement offer.[62] A person's memory and perceptions can differ greatly from another person. Often times at the beginning of a mediation, the parties are focused on different elements of the dispute because they are prioritizing the weight of the issues differently due to their different perceptions. It is common for the mediator to discover through active listening that the parties remember and see the facts differently in material ways that will impede resolution. Understanding the parties' different memories and perceptions of the dispute, and the roots thereof, and helping the parties to see things differently can be pivotal to getting past a negotiation impasse.

C. Cognitive Biases

Cognitive bias is the mistake in reasoning, evaluating, remembering, or other cognitive processes that occurs as a result of a person holding onto one's preferences and beliefs. Mediators and attorneys need to be aware of a party's cognitive biases because they can negatively impact one's ability to make decisions, think critically, accurately recall a situation, and be receptive to hearing information that contradicts their belief of a story, as well as create anxiety during a negotiation. Cognitive biases are derived from many diverse sources, including one's attitudes and beliefs, social influence, ability to store and recall information, mental shortcuts, heuristics (operations that people can perform without thinking), and age.

A common example of cognitive bias seen during negotiations is an anchoring bias which occurs when people rely on the first piece of information they receive, such as an overly aggressive first offer. A party may take advantage of this by making an initial demand that is overly high or low, which can set the upper or lower limits of the negotiation but also serve to create frustration and cause the other party to counter with an equally outrageous demand or shut down. To diminish this, the mediator can challenge the assumptions underlying the anchor or respond by suggesting the parties consider a range of possibilities.[63] Another example is confirmation bias which is the automatic tendency to focus on ideas that affirm one's existing beliefs and reject or discount opposing information. As a result, people may shut down potential settlement alternatives. A mediator can try to counter confirmation bias by encouraging a party through stories or asking the parties to consider evidence that supports the other party's ideas.[64] A third example is judgment overconfidence, which tends to be greatest when a person has little basis for a decision and increases with investment (after betting, people become more sure that their horse will win the race). Judgment overconfidence in mediation often arises from a party overvaluing the strengths in such party's position and underestimating or not understanding the weaknesses. This can be reduced by objective feedback on the situation, such as an evaluation of the party's position by the mediator. These are just three examples of many biases that impact negotiations.

In addition to cognitive biases, people evaluate decisions from a reference point, which means that the way something is framed can affect a person's thoughts and decisions about it. As such, reframing, which is the art and science of altering a party's perception of the situation with the intention of changing their view of the situation, is a necessary skill for mediators to help the parties reach a resolution.[65] For example, people tend to choose gain over loss or risk. Thus, reframing an offer as a gain rather than a loss will enhance the likelihood that a person will accept it. Reframing is an extremely important tool for a mediator, which can help parties to shift their mindset.

D. Personality Type Indicators

It is useful for attorneys and the mediator to be aware of how a person's personality and perceptions of the situation can impact such person's judgments and conclusions regarding the conflict. A widely recognized personality indicator is the Myers-Briggs Personality Type Indicator, which is designed to identify a person's likes, dislikes, strengths, weaknesses, preferences for taking in information, and compatibility with others.[66] If people differ systematically in what they perceive and in how they reach conclusions, then it is only reasonable for them to differ correspondingly in their interests, reactions, values, motivations, and skills. A mediator or attorney who understands the parties' conflict resolution styles may be able to identify a party's roadblocks.

Another useful personality tool to understand how people prefer to resolve conflict is the Thomas Kilmann Conflict Mode Instrument, which identifies four conflict resolution styles, namely collaborative, competitive, accommodation, and avoidance. This tool may help parties defuse conflict in order to create a group solution that meets all the parties' needs, goals, and interests.[67] A mediator who is aware of these personality tools may be able to identify a party's preferences and figure out how to help each party perceive the dispute from the other party's perspective. This can be key to moving a party from digging their heels into the sand to feeling more understood and, in turn, being more open and willing to settle.

E. High-Conflict Personalities

Individuals with certain high-conflict personalities can cause havoc during the mediation by getting emotional and putting blame on the other party without taking any responsibility for the conflict or refusing to listen to the other party's perspective. As psychologists gain a better understanding of the law, and attorneys gain a better understanding of psychology, there is more information on dealing with parties diagnosed with DSM-5 Cluster B personality disorders, such as antisocial personality disorder, borderline personality disorder, narcissistic personality disorder, and histrionic personality disorder, which are known to cause chaos in the court.[68] Additional challenges of mediation with persons with high-conflict personalities often include blaming others and making up stories to defend their positions. Author Bill Eddy believes that these matters can still be settled and offers many suggestions for mediators to use when dealing with a party with these personality disorders.[69] The trained mediator who is at least aware of these disorders can try to help defuse the emotions and allow the parties to focus on interest-based bargaining.

A form of narcissism seen in trust and estate disputes is entitlement. The concept of entitlement can start at a young age and blends in with high conflict personalities such as narcissism, but with a twist. Whereas narcissism focuses on and is about the self, entitlement is about the self with respect to others, which dovetails well with a feeling and false belief of entitlement to a parent's wealth prior to such parent's death. It is financial, emotional, and psychological abuse. One study shows that financial entitlement was negatively associated with sympathy, which in turn was positively associated with gratitude.[70] This same study looked at the impact on an adolescent with a sense of financial entitlement and found that those with a greater sense of financial entitlement had lower levels of sympathy and higher levels of aggression. Entitlement can show up as or with narcissism and other high conflict disorders.

F. Diminished Capacity

In the same way that attorneys make judgments regarding a prospective or current client's capacity when engaging in estate planning, mediators may need to make judgments about a party's capacity. The ADA Mediation Guidelines provide that if a party lacks capacity to participate in the mediation, the mediation should not proceed.[71] It could be challenging for the mediator to facilitate a mediation if a party has an impaired short term memory. Additionally, the parties need to have the legal capacity to mediate and contract.[72] Two helpful handbooks on assessing capacity, issued by the American Psychological Association and the American Bar Association (ABA), recognize the interaction between law and the psychology of those with diminished capacity.[73]

G. Safety Concerns

As mentioned during a webinar presented by The American College of Trust and Estate Counsel (ACTEC) and Mediate.com, *Mediation Primer: Growing Your Probate & Elder Mediation Practice*,[74] there can be safety concerns during mediations involving high-conflict and unstable disputants. While none have been noted in the trust and estate mediations, attorneys and parties have been injured during mediations.

1. On January 31, 2013, an attorney and his client were shot after a morning mediation session in Phoenix, Arizona, over a $20,000 office furniture dispute. The attorney and client died, and the shooter, described as having anger issues, committed suicide.[75]
2. In Tennessee, after a mediation session that "apparently didn't go well," according to a Manchester police investigator, a wife fired seven shots at her husband, with four of them striking him.[76] The husband survived and, in 2018, a judge ordered that the wife should serve 19 years in prison for the attempted murder and 6 years for using a firearm in the commission of a crime.[77]
3. On December 19, 2022, in Goldsboro, North Carolina, following a settlement reached in a mediation session related to a divorce dispute, the husband shot and killed the wife's attorney and then committed suicide.[78]

Even if these unfortunate incidents are rare, such shootings show that mediations that involve high emotions can pose a danger to the parties, attorneys, mediator and others present at the location of the mediation.

XIII. APOLOGY AND FORGIVENESS

As mentioned, these disputes are filled with high emotions among family members who may at one time have been close. Not only can mediation resolve the dispute at hand, but it also has the power to repair relationships for interested parties, in which an insightful and trained mediator can play a key role. Sometimes these disputes are the manifestation of long-standing family problems, such as jealousy, sibling rivalry, or perceived favoritism. Sometimes a party seeks no more than an apology or an opportunity to vent anger over a situation they perceive as unfair.[79] In such matters, skilled mediators can act as a conduit to creating a high-quality apology which can have a transformative effect on the dispute.[80]

There are different types of apologies with different impacts and culpability, which range from: (1) an externally motivated apology which is made by the apologizer to feel better with low culpability and little to no impact on the receiver, (2)

to an empathetic social harmony apology, (3) to a regret apology, and finally (4) to a remorse apology which is more sincere and genuine, and which indicates high culpability with the most chance of having a positive impact on the receiver.[81] It is important to understand the motive of the apologizer and be able to assess the sincerity of the apology. Often, a party may want an apology but is not able to put into words what they want the apology to be.[82] Trained mediators may help create conditions conducive to an apology by cultivating interpersonal interaction in bargaining situations, helping to craft an apology while not jeopardizing a party to liability.[83]

As shared by the Honorable Jamoa A. Moberly (Retired), a mediator at ADR Services Inc.: "Everyone experiences family in different ways, which is why we need to listen carefully during the mediation process to each family member's story and try to understand all the relationships. While we cannot change history, if we treat the disputants with respect and honor, we may be able to help them build bridges that one or more of them can choose to cross at any time in the future to come together. Building bridges, instead of furthering walls, can be particularly helpful for families involved in multigenerational disputes. Upon the resolution of one of my mediations where some family members had not been speaking to each other, a family photograph was taken of the matriarch, her children, and her grandchildren, which meant so much to her. Many people can settle a property dispute, but it is in these ways that mediators meaningfully impact the lives of others."[84]

Another story that exemplifies mediation as a platform for reconciliation is shared by the Honorable James Gray (Retired) of ADR Services Inc.:

> As a judge and mediator, I have seen inheritance disputes demolish family relationships. I have also seen the resolution of such disputes allow the family members to come back together. During the mediation between two estranged brothers who were fighting over an inheritance and no longer had any relationship because of it, the brothers shared their feelings, settled, shared their apologies and then hugged for the first time in years. This is how healing mediation can be.[85]

XIV. LESSONS FOR PLANNING

A. Drafting Estate Plans

With all the work and planning in which clients engage to minimize gift, estate, and generation skipping transfer taxes, there seems to be more that attorneys can do to help clients to minimize family disharmony, especially when the client shares elements of the family dysfunction. Planners can help mitigate fights by, among other things, applying lessons learned through the administration, litigation, and mediation of messy situations. For example, if a client shares that the children do not get along, it probably would not make sense to give a business to both or name both as co-trustees. If a client is on a second or third marriage, the client and drafting attorney should consider a potential fight over whether the spouse or child is named as trustee. In such instances and depending upon other factors, a bank, trust company, or private fiduciary may be better. If a client's capacity is at issue and that client wants a major change in distributions such as the disinheritance of a child, the attorney may consider declining, obtaining a certificate of independent review by another attorney, or recommending a petition for substituted judgment. With more awareness of messy situations and thoughtful planning, the estate plan can be tailored to best mitigate the chances of a fight.

B. Mediation Provisions

Attorneys may also consider adding mediation provisions in trusts that express the grantor's wish that the beneficiaries and heirs try to resolve any disputes through mediation before going to court. When a will or trust mandates mediation, it provides a dispute resolution mechanism aimed at preserving family harmony, conserving estate assets, and keeping the family fights out of the public, all of which are objectives common to many settlors."[86] While a provision in a trust to mediate may not be enforceable in California as to the beneficiaries and heirs because they were not parties to such contractual provision, such provision could relay the settlor's wish which, in turn, may encourage the beneficiaries and heirs to mediate.

C. No-Contest Clauses

Trusts and wills often will include a no-contest clause drafted pursuant to Probate Code section 21311, which provides that no-contest clauses are enforceable against direct contests filed without probable cause. This means that if a beneficiary's contest of the trust alleges the invalidity of a trust based upon mental incapacity, undue influence, or other specified grounds without probable cause,[87] then such beneficiary risks their share of inheritance from the trust or will. Settlors may be able to encourage mediation with language similar to a no-contest clause, such as providing that if a beneficiary does not agree to mediation such beneficiary is treated as having predeceased the settlor. Again, while such a provision would likely not be enforceable, it may help encourage beneficiaries to mediate before filing in court.

D. Holistic Planning

A relatively recent alternative to traditional estate planning is referred to as holistic estate planning. It uses mediation

techniques and considers family dynamics when creating the estate plan. Under this planning method, the entire family may be involved in the hope of transferring wealth and assets along with family values and traditions.[88] Conversations about money in healthy ways may be possible to prevent feelings of entitlement.[89] Holistic estate planning may explore personal family issues, with family members' differences analyzed and discussed in order to prevent future conflicts.[90] Family harmony and the love of family may be a more significant gift than assets that parents can give to their children. While such planning could be beneficial to the family, there could be risks if the parents subsequently decide to change the plan or children may not be pleased with the plan, which could cause a rift.

XV. CALIFORNIA MEDIATION CONFIDENTIALITY

A. Confidential Communications

In general, pursuant to Evidence Code section 1119, all communications that take place during a mediation are confidential, including anything said in the course of a mediation, all writings[91] prepared during the course of a mediation or mediation consultation, and all communication, negotiations and settlement discussions.[92] The reason for that confidentiality is to encourage parties to mediate by eliminating concerns that something said or written will later be used against a party. To ensure that the parties understand these confidentiality restrictions, as of January 1, 2019, California attorneys must provide to their client in all mediations, except for class or representative actions, specific disclosures about the mediation confidentiality before the client agrees to mediate and must obtain a signed acknowledgment by the client that they have read and understand the confidentiality restrictions and prohibition on the use of confidential information.[93] Pursuant to Evidence Code section 1129, the disclosures must be printed in the preferred language of the clients, be in at least 12-point font, be printed on a single page, not be attached to any other document, include the names of the attorney and client, be signed and dated by the attorney, and be signed and dated by the client.[94] If an attorney is retained after their client agrees to mediation, that attorney must comply as soon as possible.[95] Failure to comply will not invalidate a settlement but could lead to disciplinary action against an attorney.[96] Due to the broad application of the mediation confidentiality, it is important that the parties understand the disclosure and its implications.[97]

B. Mediator Testimony

Evidence Code section 703.5 disqualifies mediators from testifying in court regarding mediations, except where a statement or conduct could "(a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings."[98] This section is also inapplicable to mediators in child custody mediations.[99]

C. Prohibiting Evidence of Attorney Malpractice

Evidence Code section 1129 was enacted after *Cassel v. Superior Court*,[100] where the plaintiff alleged his attorney, among other things, threatened to abandon him at trial if he did not accept the proposed settlement and made misrepresentations and false statements. The California Supreme Court ruled that mediation confidentiality prohibited the *Cassel* plaintiff from introducing communications that took place during mediation as evidence of malpractice against his former attorneys.[101] The *Cassel* decision was highly criticized from both a legal ethics and a legal malpractice standpoint for giving attorneys a free pass for malpractice if it occurs in the context of mediation.[102]

After *Cassel*, to ensure that clients understand the extent of the mediation confidentiality, Evidence Code section 1129 requires the following disclosure:

> This means that all communications between you and your attorney made in preparation for a mediation, or during a mediation, are confidential and cannot be disclosed or used (except in extremely limited circumstances), even if you later decide to sue your attorney for malpractice because of something that happens during the mediation.

This suggests that legislature values confidentiality to encourage the parties to freely express themselves during mediation over investigating alleged improper attorney behavior.[103]

D. Pending Legislation

There is pending legislation, Assembly Bill No. 924 (2023-2024 Reg. Sess.), introduced on February 14, 2023, and amended on April 19, 2023, that, if passed, would require a dispute resolution neutral, which includes a mediator, or alternative dispute resolution provider who receives a complaint against a dispute resolution neutral alleging that they violated a rule of conduct during an alternative dispute resolution proceeding to submit a report of the alleged violation to the State Bar of California.[104] Controversy and concerns exist that this proposed Assembly Bill would be interpreted as superseding current statutory protections for mediation communications.[105]

XVI. STANDARDS OF CONDUCT FOR MEDIATORS

The ABA's Model Standards of Conduct for Mediators focuses on the following standards: Standard I, self-determination; Standard II, impartiality; Standard III, conflicts of interest; Standard IV, competence; Standard V, confidentiality; Standard VI, quality of the process; Standard VII, advertising and solicitation; Standard VIII, fees and other charges; and Standard IX, the advancement of mediation.[106] While all standards guide the conduct of mediators, this section will focus on the three standards that are recognized as the hallmarks of mediation and theory, namely self-determination, impartiality, and confidentiality.[107]

A. Self-Determination

The mediation should be conducted based on the self-determination of the parties. This means that all parties come to their own voluntary, uncoerced, and informed decisions. Parties may exercise self-determination throughout the process, including by participating in the selection of the mediator, giving input or making decisions on the process of the mediation, and participating in the negotiation and outcome of the dispute. It is of critical importance that mediators recognize that principle and put it into action because the parties are the decision-makers, not the mediators or the parties' counsel.

B. Impartiality

A mediator shall be impartial and avoid any conduct that gives the appearance of partiality. A mediator needs to be aware of their biases and shall not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, performance at a mediation, or any other reason. If the mediator feels that they are not able to remain impartial, the mediator needs to explain this to the parties and withdraw. As mentioned above, biases include implicit and explicit biases. While known biases are easier to correct, unconscious biases can be challenging to identify. As such, it is critical that a mediator is trained in bias reduction strategies.

C. Confidentiality

The mediator must maintain the confidentiality of information and not disclose such information unless the parties expressly agree that the mediator may do so or the mediator is required to do so by law. If the mediator meets with a party in private caucus, the mediator shall not communicate any shared information to another party without express consent. While the parties can make their own rules, the mediator should address the parties' expectations regarding confidentiality. Mediator confidentiality is critical to allow the parties to share information with the mediator, especially during private sessions. There may be times when the mediator thinks sharing information obtained during a private session may be helpful for the other party to hear. In such an instance, the mediator can ask the sharing party if it would be permissible to share information with the other party, but the mediator must abide by the parties' wishes under all circumstances.

The inherent nature of these standards represents the core of mediation. The purpose of mediation is for the parties to be self-determined to create their resolution together. To help facilitate the best outcome for all parties, the mediator must act impartially, and all communications must be confidential. Without these standards, the process can fail. For example, if the matters were not confidential, one or more parties may not feel comfortable sharing their feelings for fear of retaliation in court if the matter were to proceed to trial.

XVII. ETHICAL AND OTHER RULES

A. Rules of Professional Conduct

The Rules of Professional Conduct apply to mediators and attorneys during mediations. Pursuant to rule 4.1, mediators and attorneys shall not make false statements of material fact or law to a third person.[108] A misrepresentation can occur if an attorney or mediator affirms a statement of another that the mediator or attorney knows is false or makes statements that are partially true but misleading. Whether a statement is one of material fact depends on the circumstances. Attorneys must promptly communicate the terms of a settlement offer to the party.[109] Attorneys also need to keep information confidential,[110] be competent,[111] avoid conflicts of interest,[112] communicate with their clients,[113] exercise independent professional judgment, and render candid advice.[114]

B. Other Rules

The 2001 Uniform Mediation Act, amended in 2003,[115] is intended to promote uniformity, candor of parties, resolution with principles of integrity, active party involvement and informed self-determination by the parties, and to advance the policy that decisionmaking authority in the mediation process rests with the parties. The 2001 Uniform Mediation Act has been adopted by 12 states as listed on the website of the Uniform Law Commission. They are Georgia, Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington, plus the District of Columbia.[116]

Local rules for mediators in court-connected mediation programs are found in the California Rules of Court, with

similar standards of conduct.[117] Specifically, rule 3.857(b) requires that mediators conduct mediation proceedings in a "procedurally fair manner" which gives each party the opportunity to participate and make uncoerced decisions. Rule 3.857(b) also requires that a mediator inform the parties about the process, procedures to be used, and roles of the parties.

C. Claims Against Mediators

While mediation is a nonlegal process without rigid rules and procedures, case law regarding the mediation process is developing as a result of a growing number of claims against mediators,[118] which is partly due to the increasing number of court cases being sent to mediation.[119] It would behoove mediators to be familiar with the ABA Model Standards of Conduct for Mediators, and mediation confidentiality, ethics and other state rules, can help protect the integrity of the mediation platform, and the mediators and their practices.[120] Claims against mediators can include, among other things, a failure to disclose a conflict of interest, breach of confidentiality, unauthorized practice of law, and inflicting emotional distress on a party. While a mediator who makes bad decisions during a mediation could create grounds for a party to sue, in reality, very few mediator behaviors create liability exposure.[121]

XVIII. VIRTUAL MEDIATIONS

While virtual mediations were taking place prior to COVID-19, the pandemic forced mediators and parties to mediate online through platforms such as Zoom, Microsoft Teams, Skype, WebEx and Google Meet. Mediation that has traditionally been face-to-face is now on multiple screens. There are many benefits to virtual mediation, the greatest being not having to travel to the mediation site. Virtual mediations also allow for more attorneys, parties and mediators to attend with no additional travel expenses and provide the parties with a broader geographical choice of mediators. Virtual mediations are ideal for some disputes with parties living in other countries.

Attorneys have an ethical duty of technological competence.[122] Online mediation requires that the parties be technologically prepared by, among other things, having the proper software downloaded and access to the correct meeting link and password, if any, and being familiar with certain settings, such as the volume to hear others and a microphone so others can hear the speaker. Some people use a background, which can be tricky depending upon lighting and choice of scenery because the edges of a person's head and body may cut out. However, backgrounds can be conversation pieces, and a mediator can use their background to connect with the parties. The mediator and parties may want to consider a dry run before the mediation day.

As building rapport and communication is critical for mediation to be successful, the mediator needs to be able to build rapport with the parties and engage in active listening by being present and aware of the parties' level of engagement. Knowing how to use the mute and chat features can be helpful, but those features can also create problems. There are countless times when someone who is speaking does not realize they are on mute, and there are the unfortunate times when someone who intended to type a chat to only one party mistakenly sends the chat out to all parties. Similarly, there are times when others can see that a person is talking to them but cannot hear them because such person is on mute.

A mediator who conducts private caucuses needs to be extremely careful which room they are in before speaking so as to avoid making an unintended harmful statement to the wrong party. It is also important for the mediator and parties to keep background noises and distractions to a minimum so that each party feels heard. While there are more in-person meetings occurring now than during the pandemic, virtual mediation is anticipated to continue as a preference of not only mediators but the parties too.[123] In general, online mediations have their pros and cons. While more convenient, it could be more challenging for the mediator to create rapport, as well as more exhausting for the mediator.

XIX. ARTIFICIAL INTELLIGENCE IN MEDIATION

The concept of artificial intelligence (AI) has been around since the mid-1950s.[124] About five years ago, the topic of AI found its way to estate planning conferences that led to many controversial debates among practitioners. It should not be surprising given the continuous global growth of AI that AI and mediation are becoming intertwined. AI is not replacing mediators today. Due to the limitations of AI, the accuracy of AI depends upon the accuracy of the data it is fed and AI cannot interpret nonverbal cues which can be important in mediation to build trust.[125] However, JAMS arbitrator, Ryan Abbott, M.D., Esq., advances that the evolving regulatory and governance environment and new regulations for AI will significantly impact ADR because ADR is already using AI and will continue to do so in the future.[126]

When asked if AI could replace a human mediator, ChatGPT responded:

> As an AI language model, I can provide information and suggestions based on data and algorithms, but I cannot replace the role of a human mediator … A mediator often relies on a combination of

> communication skills, active listening, empathy, and the ability to recognize and address power imbalances to help people in dispute find common ground….Mediation often involves emotional intelligence, which is an area where AI models like myself still have limitations.[127]

While mediators are not subject to replacement by AI any time soon, some mediators may choose to take advantage of AI tools to assist in the mediation process by providing the parties with objective analysis and recommendations for potential settlement options.[128]

XX. CONCLUSION[129]

Mediation is a powerful platform to resolve trust and estate disputes, and mediators have power. For a small percentage of parties, mediation will not resolve their dispute and they will proceed to trial or arbitration. For a larger percentage of parties, mediation will fully resolve their dispute either during the initial mediation or a subsequent one. Mediation might not only resolve their dispute but also create bridges to reconnect. By selecting the right mediator for the situation and dynamics, preparing the client in advance of the mediation, informing the mediator of any personality traits that may hold up resolving the dispute, and borrowing the powers of the mediator, attorneys can help to increase the chances of the parties creating a win-win resolution. Mediators who see their power, build trust and rapport with the parties, navigate through personality challenges, and facilitate a negotiation by identifying each party's interests can help to create resolutions acceptable to all. Mediators who also focus on the possibility of repair can impact the lives of the parties desiring to reconnect and their family for generations.

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BRESLIN V. BRESLIN: DOES THE "SEAMLESS FABRIC" NEED TAILORING?

Written by Judge Glen M. Reiser (Ret.)* and Bruce S. Ross, Esq.*

I. SYNOPSIS

Declaring the contested trust proceeding under review "made from the seamless fabric of probate and mediation law," the Second District of the California Court of Appeal in *Breslin v. Breslin* recently ruled that prospective beneficiaries under a trust, the validity of which is in dispute, who are given notice of a court-ordered mediation and elect not to participate, are bound by the results of the mediation.[01]

This article will discuss the implications of the *Breslin* decision and the decision in *Smith v. Szeyller*,[02] on which the *Breslin* court relies, and ask whether the potentially drastic impact of these cases upon the potential claims of non-participants offends a non-participant's right to due process of law, and whether *Breslin* unnecessarily expands the power of the courts to compel alternative dispute resolution over attorney objection as California courts struggle to effectively manage ever-increasing caseloads.

Prior to *Breslin*, there had been a casual perception of mediation in California as simply a litigation assistance tool to measure and weigh case value in the context of assisted negotiation. The rule in California civil cases has traditionally been that mediation is a voluntary process with no consequence to those who fail or even refuse to participate, leaving the courts to toothless efforts to "try to cajole" interested parties into active participation.[03] As previously observed by one commentator:

> Mediation is a voluntary, informal, and confidential discussion in which a neutral facilitator assists two or more parties toward achieving a resolution of the conflict existing between them. As a conflict resolution tool, mediation serves a number of purposes, including providing parties the opportunity 'to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solution, and reach mutually satisfactory agreements, when desired.'[04]

After *Breslin* was published, and prior to its finality, a significant number of bar groups and the California Attorney General protested deviation from the "civil court" rule rejecting court-compelled mediation, asking the California Supreme Court either to review the decision or—at the very least—order the opinion depublished. The California Supreme Court refused to do either, suggesting at a minimum that shrinking judicial resources combined with increasing caseloads has propelled alternative dispute resolution into the new frontier of mandatory court-compelled participation.

In light of what is now an apparent divide between mandatory mediation in trust matters (*Breslin v. Breslin*)[05] and voluntary mediation in civil cases (*Jeld-Wen, Inc. v. Super. Ct.*)[06], the authors here raise the question as to whether or not court-compelled mediation and possible forfeiture of non-participants' rights under *Breslin* adversely and prejudicially violates the due process rights of trust beneficiaries and the concomitant ability of lawyers to manage their cases and clients without the courts forcing unwanted participation.

II. *BRESLIN V. BRESLIN*

A. The Facts

Don Kirchner ("Kirchner" or "Uncle Don") died in 2018, leaving an estate valued between $3 and $4 million. Uncle Don left no surviving wife or children, but was survived by nieces and nephews. Kirchner's restated and amended trust of July 27, 2017, and named his nephew David as trustee (the "Trustee" or "David"). The restated trust made three specific gifts of $10,000 each (including one to David) and directed that the residue of the trust be distributed to the persons and charitable organizations listed on an "exhibit

A" to the trust in the percentages set forth. Unfortunately, there was no "exhibit A" attached to the trust as located. However, in a pocket of the estate planning binder containing the restated trust, the Trustee found a document or worksheet titled "Estates Charities (6/30/2017)", which listed 24 charities with handwritten notations appearing to be percentages. (Although not further described in the court's opinion, the worksheet included the names of 24 charities with numerous cross-outs and interlineations, but the numbers next to each charity, when totaled, added up to 100 (%).)

B. Proceedings in the Probate Court

Faced with the foregoing facts, the Trustee, citing his duty of impartiality, filed a petition pursuant to Probate Code section 17200 asking the probate court to confirm his appointment as successor trustee and to instruct him as to whether there were any trust beneficiaries at all, given the absence of a formal "exhibit A." The probate court ordered mediation among the interested parties, including the intestate heirs and all of the listed charities. One of the listed charities sent notices of the mediation to *each* of the interested parties.

The notice of mediation was quite detailed and included language stating:

> Mediation may result in a settlement of the matter that is the subject of the above-reference cases and of any and all interested persons' and parties' interests therein. Settlement of the matter may result in an agreement for the distribution of assets of the above-referenced Trust.

Twice citing the Second District Court of Appeal's decision in *Smith v. Szeyller*,[07] the *Breslin* notice also stated that attorneys' fees could be awarded to one or more parties and that "[i]nterested persons or parties who do not have counsel may attend the mediation and participate."

The *Breslin* notice of mediation expressly warned:

> Non-participating persons or parties who receive notice of the date, time and place of the mediation may be bound by the terms of any agreement reached at mediation without further action by the Court or further hearing.[08]

Although each of the intestate heirs and each of the 24 listed charities received notice, only five of the listed charities, together with the intestate heirs, participated in the mediation. Nineteen of the listed charities did not participate (although apparently only ten challenged the resulting settlement in the probate court).

At the mediation itself, the five charities and the intestate heirs who appeared at the mediation resolved their differences, with the settlement agreement awarding "specific amounts to various parties, including the appearing charities, and attorney fees with the residue to the intestate heirs." The "no-show" charities were excluded from any award under the settlement.

After the *Breslin* mediation, one of the five charities that participated filed a petition to approve the settlement. Ten of the non-participating charities (represented by one of the non-participants, the Pacific Legal Foundation, and therefore denominated the "Pacific parties") pursued objections to the petition to approve.

Before hearing on the petition for approval of the settlement in the trial court, the Trustee filed a supplemental declaration stating that he had discovered an original trust document with the previously referred to "exhibit A" attached, listing the same charities as found on the document first discovered by the Trustee. The probate court approved the mediated settlement over the objections of the Pacific parties. The Pacific parties appealed.

C. The Decision of the Court of Appeal

After publishing a unanimous decision affirming the trial court, and then rehearing its original decision after objection from numerous bar groups, the Court of Appeal affirmed the lower court in a 2-1 decision, citing Probate Code section 17206:[09]

> [T]he probate court has the power to establish the procedure. ([section]17206.). It made participation in mediation a prerequisite to an evidentiary hearing. By failing to participate in the mediation, the [19 charitable no-shows] waived their right to an evidentiary hearing. It follows that the [19 no-shows] were not entitled to a determination of factual issues, such as Kirchner's intent, and cannot raise such issues for the first time on appeal.[10]

The Court of Appeal majority distinguished *Estate of Bennett*,[11] which had held that estate beneficiaries who petitioned to set aside a settlement agreement were entitled to an evidentiary hearing. The *Breslin* court dryly (albeit correctly) observed, "But *Bennett* did not involve a party's failure to respond to a mediation order."[12] The *Breslin* court held:

> The [19 charitable no-shows] may not ignore the probate court's order to participate in the proceedings and then challenge the result. The probate court's mediation order would be useless if a party could skip mediation and challenge the resulting settlement agreement.

D. The Dissent

In a dissenting opinion, one jurist was troubled by the fact that additional discovery emanating from the Trustee *after* the mediation strengthened the case of those who might otherwise object. That judge took the majority to task for, focusing upon the challengers' procedural shortcomings and not upon Uncle Don's substantive intent "above all else."[13]

The dissent also contended that the decision imposed a "forfeiture" of the interests of the non-participating parties and argued that the majority had elevated the probate court's authority to order mediation over concepts of fairness and due process.

Justice Tangeman observed:

> [This ruling] forces potential beneficiaries to participate in costly mediation (legal entities cannot appear except through counsel), something 'antithetical to the entire concept' [of mediation].[14]

The majority chastised the dissent for expressing concern for the due process rights of parties who ignored multiple notices to appear at the mediation, while showing "apparently no concern for the parties who responded to the notices and spent time and effort complying with the probate court's order for mediation."

After rehearing, the Pacific parties sought review of the decision before the California Supreme Court and depublication of the appellate decision. Both review and the request for depublication were denied.[15]

Before the authors discuss further the far-reaching implications of the *Breslin* decision, this analysis will consider the ruling of the Second District Court of Appeal in *Smith v. Szeyller*,[16] upon which reasoning the *Breslin* court places much of its weight.

III. *SMITH V. SZEYLLER*

A. The Facts

Don Smith Sr. ("Don Sr.") and Gladys Smith ("Gladys") created a family trust naming their five children, Dave, Donna, Dee, JoAnn, and Don Jr. as the beneficiaries following the death of the surviving spouse. Upon the death of the first spouse, the trust provided in relevant part for the creation of three subtrusts (a "bypass trust," a "QTIP trust" and a "survivor's trust," the latter being amendable by the surviving spouse). The five children were equal beneficiaries of the three subtrusts.

Don Sr. was the first spouse to pass away, and upon his death Gladys became the sole trustee. The couple's assets (worth approximately $14 million) were divided into the three subtrusts as contemplated by the trust instrument. JoAnn moved in with Gladys, who over time became estranged from the other children. Gladys amended her survivor's trust to disinherit Donna and to give Dee's share of that subtrust to JoAnn. JoAnn and her husband served as successor trustees and allegedly spent over $2 million in trust funds on personal items, gambling, and gifts.

After Gladys' death and the delivery of a verified account by the co-trustees to the beneficiaries, Don Jr. filed a petition in the probate court questioning the expenditures by the co-trustees, requesting the court to surcharge and remove the co-trustees (his sister and her husband), and for an award of attorneys' fees as an ancillary remedy to JoAnn's proposed removal. The co-trustees responded to Don Jr.'s petition, disputing substantially all of Don Jr.'s allegations. The other beneficiaries, Dave, Donna, and Dee did not appear in the proceedings. (Donna was under a conservatorship due to mental illness and died before trial of the case. She was represented by her conservator and, ultimately, her executor). The co-trustees, responding to Don Jr.'s complaints, filed an amended account to which Don Jr. further objected and filed a civil elder abuse action.

B. Trial and Settlement

The consolidated cases went to trial in the probate court. On the fifth day of trial, Don Jr. reached a settlement with his sister, JoAnn, and her co-trustee husband. Pursuant to the settlement, Don Jr. (only) received a "confidential" sum from JoAnn's subtrust shares (of course, JoAnn's shares under the amended trust included Dee's entire share of the survivor's trust and a portion of Donna's share). The settlement further contemplated the appointment by the probate court of a referee pursuant to Code of Civil Procedure section 638, and the preparation of a final accounting and of a revised federal estate tax return. The settlement provided that Don Jr. would receive over $700,000 in attorneys' and expert witness fees, of which almost 50% was to come from the QTIP trust and almost 11% from the bypass trust (neither of which were amendable by Gladys as the surviving spouse). The settlement further provided that all *future* fees incurred by both Don Jr. and JoAnn and her husband, as co-trustees, to complete the accountings and close and distribute the subtrusts were to be paid from each of the subtrusts proportionately.

Instead of requiring the filing of a petition to approve the settlement arrived at by the warring parties and the giving of notice to all the interested beneficiaries, the probate court entered an "Order after Trial" encompassing and approving all settlement terms and "findings." The trial court expressly found in approving Don Jr. and JoAnn's

settlement that Don Jr.'s petition and ensuing litigation "benefitted all of the beneficiaries of the [family] trust… by acting as a catalyst to the improved preparation of the accountings."[17]

C. Post-Trial Proceedings

Following the trial court's order, Donna's estate, through her personal representative, made its first appearance, moving for a new trial and to vacate the judgment. Donna's counsel argued:

1. Don Jr.'s attorney fee award was not supported either by the pleadings or by the evidence;
2. The fee award was disproportionate to any benefit to the beneficiaries; and
3. The fee award violated Donna's right to due process of law.

The trial court rejected Donna's arguments, finding that new trial motions are *not permitted* under the Probate Code in decedents' estate proceedings and that Donna forfeited her objections to the settlement mid-trial because she did not earlier object to any of the litigation activities undertaken by Don Jr. Donna (through her executor) appealed.

D. The Appellate Opinion

The Court of Appeal in *Smith* affirmed the trial court's decision. After observing that the Probate Code does not permit motions for new trial in probate proceedings,[18] the appellate court ruled that "Donna forfeited her objections to the fee award when she did not object to Don Jr.'s petitions and objections."[19]

The *Smith* court continued:

> Donna chose not to participate in the trial and cannot now second-guess the resolution of Don [Jr.]'s objections. *The litigating parties resolved disputed facts* [by way of settlement], *and the court was bound by that resolution.*[20]

It is fundamental that a factual stipulation between parties only establishes facts as between the stipulating parties. Absent notice of prospective impact and subsequent finding of default with respect to notice of such a stipulation, would not imposition of those findings upon non-stipulating parties be in contravention of the non-participants' due process rights? The appellate court in *Smith* nevertheless found to the contrary, treating Donna's lack of previous participation as essentially a waiver of her right to intervene in the settlement allocation:

> Due process did not require the parties to use other procedures, such as a motion to enforce a settlement or a petition for approval of a settlement or a new accounting… [S]uch procedures were unnecessary because the dispute was before the court on properly noticed petitions and objections.[21]

With respect to her conservator's decision to not participate in the first instance, Donna pointed out that there had been no notice to the remaining siblings that the bypass trust and the Q-Tip trust were at risk for purposes of paying hundreds of thousands of dollars of Don Jr.'s attorneys' fees so that Don Jr. could personally receive a "confidential" payment from JoAnn. The appellate court noted that Don Jr.'s initial pleading had requested payment of attorney fees from JoAnn as a potential remedy for her proposed removal as a fiduciary. Though JoAnn was never actually removed, through stipulation or otherwise, the appellate court in *Smith* held that the "substantial benefit" doctrine justified allocation of attorneys' fees across all subtrusts and beneficiaries.

The Court of Appeal in *Smith* determined that the litigation "substantially benefited" the non-participating litigants because the litigation had purportedly "maintained the health of the sub-trusts; raised the standards of fiduciary relations, accountings and tax filings; and prevented abuse." Specifically, and as it later relates to *Breslin*, the appellate court in *Smith* found that it was "'not significant that the benefits found were achieved by settlement of plaintiffs' action rather than by final judgment.'"[22]

The ruling in *Smith v. Szeyller*, if limited to its specific holding that the beneficiary who did not participate in the trial and settlement of the underlying litigation waived her right to contest an attorneys' fee award affecting that beneficiary's equitable share, may seem innocuous. However, it is on this inauspicious foundation that the appellate court in *Breslin* constructed its ruling that someone who does not participate (for whatever reason) in a duly noticed mediation ordered by the probate court possibly forfeits the right to object to a settlement arrived at in the mediation, even if the settlement confers benefits only as to participating beneficiaries who are otherwise identically situated to the forfeiting non-participating beneficiaries under the trust in litigation.

IV. *BRESLIN:* THE FALLOUT

Post-*Breslin* consequences, most of which are observational and anecdotal to the authors, appear mixed.[23] The reality is that the majority of trust litigation cases, because of their expense, complexity and uncertainty of outcome, resolve in mediation. That reality is inescapably alluring

to the California probate courts, which are overworked, underfunded, and under-resourced. If not resolved in mediation, trust litigation resolutions are almost exclusively judge-centric, requiring often lengthy court trials and comprehensive statements of decision, crafted by judges on nights and weekends when not attending to their daily calendars.

A large number of California judges, particularly those in urban and suburban areas, have leveraged the *Breslin* holding in order to help clear their COVID-delayed trial calendars of voluminous trust litigation inventories. *Breslin* orders are being utilized by courts not only through private mediation, typically at the trust's expense, but to weave in any non-participants by also issuing *Breslin* orders to achieve full case resolution at mandatory settlement conferences.

While *Breslin* itself authorized the participating litigants to completely ignore and thereby forfeit the prospective interests of the non-participating parties, more often *Breslin* settlements simply adjust the proportionate distributive shares of the non-participants to account for attorneys' fees and litigation risks as to which the non-participants did not share. While some California judges strictly apply the forfeiture rules authorized by *Breslin*, other probate courts, recognizing both their discretion and their equitable authority, prefer to consider settlement opposition through the critical lens of fairness voiced by the *Breslin* dissent.

Notably, there is no requirement in *Breslin* for a non-participating beneficiary or heir to retain counsel, and in fact most *Breslin* non-participants appearing at mediation today do so through self-representation. Likewise, there is no requirement for a non-participant who appears at mediation to agree to anything, as long as the non-participant appears in good faith. Lastly, there appears to be no requirement in practice for a non-participant to appear at mediation in person. In the experience of the authors, remote appearances on a designated software platform or by telephone have been deemed sufficient mediation participation. All of these allowances, to a large degree, undermine any contention that *Breslin* mediation participation requires money and lawyers to access.

While civil litigation and special proceedings in probate have their genesis in different courts and practice traditions, it appears to the authors that the *Breslin* decision to some degree attempts to fuse the harshness of a default judgment in a civil case with the latitude provided to probate judges in order to conform procedure to the needs of a particular case. In the situation of a civil default, the "go to" form of relief is typically Code of Civil Code Procedure section 473, in which the excusable neglect of the defaulting party or their counsel is presented to the court as grounds to relieve a party from adverse judgment "upon any terms that may be just." And while the non-participating beneficiaries in *Breslin* failed to claim excusable neglect, one can assume in many cases of non-participants such neglect will exist. The downside to such recourse is that "terms that may be just" to set aside a fully mediated settlement could include the many thousands of dollars collectively incurred by the settling parties and their counsel to mediate to settlement a case that should return to square one because of non-participant neglect.

Because probate courts are now fully leveraging the case management benefits of *Breslin* in contested trust matters, an obvious question becomes the prospective extension of Probate Code section 17206 court-compelled mediation to contested litigation in analogous probate and conservatorship estate litigation in the same court.

Probate Code section 1000, subdivision (a) authorizes a probate court to rely upon the California Code of Civil Procedure for applicable procedural rules where the Probate Code is silent. Examining inherent judicial powers provided to courts under Code of Civil Code Procedure section 128 and section 187, when viewed in tandem, such powers appear to a large degree to replicate the generic enabling language applicable to courts hearing trust cases under Probate Code section 17206. Once so extended, however, the rule of *Breslin* authorizing court-compelled ADR would arguably be applicable to all litigation, probate or civil, the only difference in a civil action being the lack of a probate estate or conservatorship estate from which to advance mediation expenses.

V. CONCLUSION

Breslin and its application raise a series of difficult questions that a trial court ought to consider when facing opposition from a mediation non-participant to settlement enforcement:

- Is the settlement "fair and honest" and "in the best interests of the estate"?[24]
- How can interested parties "rewrite" a will or trust without court oversight? The decision in *Breslin* effectively modifies the trust in question without ever definitively determining whether or not the trust was valid. Since Probate Code section 17200 proceedings involve only the "internal affairs" of a trust, how can unnamed heirs at law receive benefits from the trust assets when some of the named beneficiaries of the trust receive nothing?
- Should a party who does not participate in a mediation because they cannot afford to or do not know what their possible rights are, be precluded

from asking the court in equity to oversee the fairness of a voluntarily mediated settlement that purports to determine the rights of all parties, even those parties who have not participated in the mediation process?

Each of these thorny questions needs to be balanced against the very real need for litigating parties to resolve trust disputes timely and economically. In mediated settlements, trust agreements are very often rewritten to accommodate the compromises that are absolutely necessary to move trust administration and distribution timely forward. One can be certain that trust settlors do not labor for a lifetime to allow their trust assets to be withheld from distribution for years because courts lack the resources to try every case to judgment and appeal, all the while the family assets are whittled down in order to properly compensate litigation lawyers, accounting and medical experts.

Allowing our probate courts the power to better accomplish the purposes of a trust as envisioned by the settlor through compulsory ADR should certainly be encouraged. Whether *Breslin* is the appropriate means toward that end in light of fairness and due process concerns remains to be seen.

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01 *Breslin v. Breslin* (2022) 62 Cal.App.5th 801.

02 *Smith v. Szeyller* (2019) 31 Cal.App.5th 450.

03 *Jeld-Wen, Inc. v. Super. C.* (2007) 146 Cal.App.4th 536, 540-543.

04 Carter, *An Introduction to Mediation for Estate Planners* (ABA Section of Real Property, Trust & Estate Law, 2016) (citing ABA Section of Dispute Resolution, Model Standards of Conduct for Mediators (2005), *Mediation for Estate Planners: Managing Family Conflict*, p. 3, (Gary, S., ed.)).

05 *Breslin v. Breslin*, *supra*, 62 Cal.App.5th 801.

06 *Jeld-Wen, Inc. v. Super. C.*, *supra*, 146 Cal.App.4th 536.

07 *Smith v. Szeyller*, *supra*, 31 Cal.App.5th 450.

08 *Smith v. Szeyller*, *supra*, 31 Cal.App.5th 450. Rights of trust beneficiaries or prospective beneficiaries may be lost by the failure to participate in mediation.

09 Probate Code section 17206 is the same statutory authorization relied upon by the appellate court in *Schwartz v. Labow* (2008) 164 Cal.App.4th 417, establishing the inherent right of a trial court in a trust proceeding to *sua sponte* suspend or remove a trustee (without regard to the requirements of the removal statute) "[t]o preserve the trust and to respond to perceived breaches of trust;" and by the appellate court in *Christie v. Kimball* (2012) 202 Cal.App.4th 1407, authorizing one of this article's authors to *sua sponte* compel a full statutory accounting in the absence of any corresponding petition.

10 *Breslin v. Breslin*, *supra*, 62 Cal.App.5th at pp. 806-807, citing *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 865, fn. 4.

11 *Estate of Bennett* (2008) 164 Cal.App.4th 1303, 1310.

12 *Breslin v. Breslin*, *supra*, 163 Cal.App.4th at p. 807.

13 *Breslin v. Breslin*, *supra*, 163 Cal.App.4th at p. 810.

14 *Breslin v. Breslin*, *supra*, 163 Cal.App.4th at p. 810 (*dissenting opinion*), citing *Jeld-Wen, Inc. v. Superior Court*, *supra*, 146 Cal. App.4th at p. 543.

15 *Breslin v. Breslin* (Cal. Ct.App. No. B301382, 2021) 2021 Cal. App. Lexis 4956.

16 *Smith v. Szeyller*, supra, 31 Cal.App.5th 450.

17 *Smith v. Szeyller*, supra, 31 Cal.App.5th at p. 456, quoting the trial court.

18 Prob. Code, section 7220.

19 *Smith v. Szeyller*, *supra*, 31 Cal.App.5th at p. 457.

20 *Smith v. Szeyller*, *supra*, 31 Cal.App.5th at p. 591 (emphasis added), citing *Capital Nat. Bank v. Smith* (1944) 62 Cal.App.2d 328, 343 ("A stipulation of counsel at the trial of a case, agreeing that specified material facts upon essential issues may be considered as evidence, and that a judgment shall be rendered accordingly, is binding upon the respective parties thereto and upon the court.").

21 *Smith v. Szeyller*, *supra*, 31 Cal.App.5th at pp. 591-592.

22 *Smith v. Szeyller*, *supra*, 31 Cal.App.5th at p. 594, quoting *Fletcher v. A.J. Industries, Inc.* (1968) 266 Cal.App.2d 313, 324 (shareholder derivative action).

23 The authors have found no published appellate opinion to date (August 2023) directly applying the rationale of the *Breslin* holding.

24 *Treharne v. Loftin* (1984) 153 Cal.App.3d 878, 886; see Prob. Code, sections 9831, 9832, 9833, 9834, 9835.

PROBATE JUDGES AND LAWYERS DON'T ALWAYS THINK ALIKE–ARE PROBATE JUDGES' BRAINS "ABBY NORMAL"?

Written by Hon. James Steele (Ret.)*

One of my all-time favorite movies is Young Frankenstein, a comedic film parody based on Mary Shelley's "Frankenstein; or the Modern Prometheus" in which Dr. Victor Frankenstein creates a living creature from non-living tissue. At one point in the movie, Gene Wilder (Dr. Frederick Frankenstein, a decedent of Dr. Victor Frankenstein) is almost killed by the monster he created who he had anticipated would have been perfectly normal. Wilder then inquires of his assistant, Marty Feldman (Igor), whether Igor had, as instructed, obtained for implantation the brain of "the late Hans Delbruck–scholar and saint". Feldman then admits that he had inadvertently dropped the brain while attempting to steal it but was fortunate to find an even better one ("no wrinkles!"). Wilder calmly inquires as to whose brain he implanted into the "7 foot tall 4 foot wide" monster he created to which Feldman replies "Abby". "Abby who?" Wilder asks to which Feldman responds: "Abby… somebody". Upon further questioning, Feldman admits the jar containing the brain was marked "Abby Normal". I have often wondered if lawyers similarly think that the transformation from practicing lawyer to judge somehow also involves the implantation of an "Abby Normal" brain. This article, which is intended to help explain the reasons why judges and lawyers don't necessarily think alike, will hopefully dispel the notion that judges' brains are just "Abby Normal".

I have often been told during the mediation process how much parties and counsel appreciate a "judge's perspective" on their cases. Having successfully assisted lawyers and their clients in resolving thousands of cases during the past eight years as a neutral, it has become clear that sharing the unique perspective of a former probate judge was instrumental in bringing about a number of those settlements. While there are a great many excellent, highly effective, and accomplished attorney mediators who are extraordinarily well suited to assist parties in arriving at what I like to refer to as the "point of mutual unhappiness," this article is intended to assist counsel in determining why and when utilizing a retired judge, especially a retired probate judge, might be particularly advantageous to the settlement process in probate matters. Part of that analysis involves consideration of the reasons why judges and lawyers don't necessarily think alike in assessing cases or in formulating settlement strategies.

I regularly employed the services of mediators during my nearly three decades in the law prior to my appointment to the bench. Depending on the circumstances, I utilized retired judicial officer mediators in some cases, while in other cases, I sought the assistance of experienced attorney practitioners. Paramount among the factors I considered when selecting a mediator was client preference. For example, some clients expressed a decided preference for an attorney mediator with significant specialized education, credentials, and work experience, especially in cases involving technical areas, such as civil or structural engineering. The clients believed those industry-specific mediators would be better equipped to understand certain aspects of the case and would, in many instances, speak the language of the clients and their retained technical experts. In other instances, for example in representing corporations, oftentimes through in-house counsel, or in cases involving highly sophisticated clients with extensive

litigation experience, there would more often be a decided preference in hearing a judge mediator's assessment of the case for settlement purposes.

Nevertheless, selecting one type of mediator over another has likely always been, and will likely always be, an exercise in balancing the right combination of expertise, experience, and personality. Some mediators, regardless of their backgrounds, are simply better suited than others to help clients and their lawyers make the difficult decisions associated with settling a case on a satisfactory basis. Regardless of who is selected to assist in the process, however, gaining some insight and appreciation into how current and former bench officers think, and especially how that may differ from the lawyers litigating the case or from lawyers acting as mediators, can be of tremendous value. This is true irrespective of whether or not the case settles in mediation.

At some point during my transition from practicing attorney to judge, I experienced an epiphany: the way I viewed cases, and in fact, how I viewed the entire litigation process, had changed rather dramatically. I attribute the change in perspective to a number of factors, some of which are discussed below.

I. JUDGES HAVE NO CLIENTS

I recall a conversation I had many years ago with another lawyer from the same firm I worked for. We frequently discussed our feelings about our cases, as well as the practice of law in general. While I have enjoyed all of the various legal positions I have held, he seemed rather unsatisfied with the practice of law. While he certainly appreciated the financial rewards, he was left unfulfilled by his role in the legal process. When asked what it was he did not care for about his vocation, he said something like "Well, if it weren't for judges and opposing counsel, I would probably enjoy the practice as much as you do." He then added, "and clients … they go to the top of that list."

Judges have no clients, and in fact, most judges have not had any clients for many years. The effect this has on a judge's perspective when it comes to mediation cannot be overstated. The absence of a client to account to profoundly affects the way in which judges look upon litigation and the entire litigation process, especially for those judicial officers coming from the private sector. A lawyer is ethically obligated to pursue a client's cause or endeavor with commitment and dedication and must advocate on the client's behalf with zeal.[01] An attorney also owes a duty of loyalty to the client's interests.[02] Judges have no such obligation to individual clients, nor should they. Unlike counsel, a judge is obligated to view every litigant and every case which comes before the court fairly and objectively.

While good lawyers strive to look upon their own cases fairly and objectively, that goal is far easier said than achieved. It is not uncommon for lawyers on opposite sides of a case to cite to an identical portion of a statute or excerpt from a case in support of their diametrically opposed, even mutually exclusive, viewpoints. It is only natural that when a lawyer looks at a statute or case, or hears a witness testify, he or she seizes upon that portion of the statute, case, or testimony which would potentially benefit that lawyer's client. Aside from the professional obligations incumbent upon an advocate to further the client's case, lawyers often also establish a professional, as well as a personal, bond with the client, and wish to see a client's case succeed for the sake of the client.

> **Practice Tip: Be as realistic and objective as possible about your case—as well as the other side's case. As an exercise, be prepared to honestly explain to the mediator and your client the other side's evaluation of your case with specific references to what your case's weaknesses are. Be similarly prepared to explain how you expect those weaknesses may be overcome (or at least mitigated) at trial, as well as the obstacles which may be encountered in doing so.**

On the other hand, a judge who takes the role of judicial officer seriously has the luxury of undivided loyalty only to a considered determination of the facts to be applied to what the judge determines to be a correct interpretation of the law. This application of the facts to the law pays no heed to the judge's personal feelings about the litigants or even the judge's feelings about the law to be applied. As a judge, I oftentimes had to reconcile finding in favor of parties who were, on a personal level, not particularly worthy or sympathetic, or worse. In many instances, the facts and the law led to finding against sympathetic and worthy parties who were represented by lawyers I greatly respected and held in high esteem.

II. JUDGES TYPICALLY DECIDE MANY MORE CASES THAN LAWYERS EVER SEE

It is almost impossible for a practitioner, regardless of how busy he or she may be, to participate in as many cases as judges do. In my first year as a judge, I presided over more than three dozen bench and jury trials. In my first year as a probate judge, I presided over approximately 40 probate bench trials. With very few exceptions, many lawyers simply don't see as many trials during their entire legal career as a judge might not just see, but preside over, in a year or two of being on the bench. With respect to bench trials, it should be remembered that judges are not merely making evidentiary rulings but are actually deciding the final outcome. Advocating for a party in a case and deciding the

outcome of a case are drastically different undertakings requiring vastly different skill sets.

We know that probate cases typically fall into only five or six recurring categories, usually involving iterations of some of the same issues such as undue influence or lack of capacity. I found myself observing similar factual scenarios play out repeatedly in the probate cases before me. While some might say that most judges probably are not any better than anyone else in figuring out who is or is not telling the truth, I can assure you that during my time on the bench I have seen some truly impressive liars. I therefore believe that, as a rule, judges are probably at least a bit better at assessing credibility than those who have not been so exposed. However, even assuming that judges are not necessarily any better than average in divining who is being truthful and who is not, I oftentimes find it especially helpful in the settlement process to share with one side or the other my observations as to whether or not a party presents well as a potential witness. Interestingly, especially if the case involves family members, some parties cannot fathom the possibility that the testimony of an opposing sibling or other relative on the other side of the case might actually be *believed* if the case were to go to trial. I have had more than one mediation suddenly settle on that basis alone.

> **Practice Tip: Be prepared to give the mediator a summary of your experience and successes in similar matters, if any, and, if known, the opposing counsel's relevant experience including prior trial results. If you have worked with opposing counsel on previous occasions in this or any other cases, let the mediator know of your experiences in that regard.**

Another aspect of the trial process that parties, and even lawyers, oftentimes fail to fully appreciate is that the judge, although charged with deciding the case, is likely the person in the process who knows the least about the case. Factually, the clients likely know the most, followed closely by the lawyers. By contrast, the knowledge of the judge who presides over a case is limited to what the judge may read within admissible documentary evidence, and what the judge might see or hear during the trial. It is the lawyer's job to sort through the mountain of available facts to determine what is or is not worthy of inclusion during trial. Being able to successfully balance how much detail and which facts to provide to the court in order for the court to focus on the issues and make a considered decision is the mark of an accomplished litigator. A former judge serving as mediator may, during the course of the mediation, explore lines of inquiry which a sitting judge might also be expected to focus upon at trial. A judge mediator, having likely presided over scores of similar cases previously, may focus on aspects of the case, the importance of which might not be fully appreciated by someone who had not previously decided such cases. Hearing what facts or circumstances a former judge might find particularly helpful in analyzing a case provides an opportunity for counsel to gain some insight into how a trial judge may ultimately view certain elements of the case—and may potentially encourage settlement.

> **Practice Tip: Your mediation brief should be as concise as possible and should focus upon the relevant facts. An overly lengthy brief which includes marginally relevant information may interfere with the mediator's ability to obtain a necessary overall understanding of the case.**

Parties (and even lawyers) sometimes wrongly assume they will be able to present all of the potentially relevant facts and information and the court will somehow sort through it all in order to arrive at a decision. Being able to articulate a coherent and consistent message at trial is far more essential to achieving the right result than many practitioners appreciate. In broad terms, a case should have elements of both ethos (credibility) and pathos (emotion), as a properly presented case should be about far more than just how much money moves from one side to the other. It is the role of the judge mediator to view the case in these broad terms within the context of his or her judicial experience, and to focus on the minutiae only as may be absolutely necessary to provide worthwhile commentary to the mediation participants.

> **Practice Tip: Draft a simple, concise statement of your client's case which is both accurate and persuasive. Your case must have a theme which can be easily and quickly communicated. Avoid "legalese". Conveying the "pathos" of the case is essential. If possible, the statement should present your case as being bigger than just the facts or simply moving money from one party to another; it should be as much about principle as anything else. You should be able to recite this from memory should the court, a mediator, or anyone else ever ask you what your client's case is about.**

As for the testimony of third parties, those unfamiliar with the process sometimes place far too much emphasis on the value of potential third-party testimony. For example, I oftentimes hear that the estate planner will be the most important and persuasive witness for one side or the other (or both!) on the issue of the settlor's intent. As a judge, I assume in most instances the planner will be expected to testify that the settlor was alone in the room with the planner without any beneficiaries present or within earshot; that each and every provision in the instrument was read, reviewed and explained in detail to the settlor;

that the settlor acknowledged in each instance the he or she understood and fully agreed with each such provision as being fully consistent with the settlor's intent; and only then, after having this intent and understanding carefully confirmed, was the instrument finally signed and attested to by the settlor.

Practice Tip: Keep a list of your essential witnesses and the essence of what their testimony will establish. The list should also include anticipated potential problems with their testimony (e.g., bias, reliability, problems with their backgrounds such as prior criminal convictions, adverse administrative actions, etc.). If the need for brevity in briefing for the mediation precludes including that information in the mediation brief, let the mediator know such information is available and be prepared to summarize it when discussing the case specifics during the early stages of mediation.

While it is true that most planners will so testify, it is equally true that testifying otherwise could have potentially disastrous consequences to the planner. Having assumed the foregoing, the judicial officer looks for anomalies, or what might be viewed as the unexpected. Although I have heard many estate planners give testimony consistent with the above, I have also personally observed scenarios including the following, in some instances when the planner had already given, or was expected to give, testimony consistent with the above:

Present during the process was not only the planner, but also the primary beneficiary and her spouse who stood in the doorway making disparaging remarks regarding other family members and potential beneficiaries, all of which was overheard by a testifying caretaker;

Just prior to the process, the settlor had been administered a potent cocktail of painkillers and psychotropic medications, and was, according to the medical records, almost entirely incoherent at the time of the signing;

The planner, a personal injury attorney, best friend of and former lawyer for the primary beneficiary, had never before prepared an estate plan of any kind since he was doing so only as a favor to the primary beneficiary. The planner also had no file or contemporaneous notes of any kind;

The planner was in fact unlicensed to practice law since his license had been revoked for stealing large amounts from his client trust fund account;

The settlor was on his death bed facing the ceiling, without his eyeglasses or hearing aids, and completely unable to sit up or even to tilt his head; and

Possibly my favorite of all time, was the settlor who, as testified to by the attending physician and confirmed by the medical records, was actually in a coma at the time the instrument was supposedly executed in her hospital room.

Having "seen it all" at one time or another, a former judge's ability to speak to the parties from personal experience as to what can happen during trial, may prove invaluable in assisting those parties in recognizing potential risks should the matter fail to settle.

Practice Tip: There are far fewer "Perry Mason moments" at trial than lawyers expect. Through proper discovery and investigation, parties are, or at least should be, generally well prepared for what one side may believe will be a devastating blow to the adverse party's case. Prepare your client for the possible sharing of these items with the mediator and, if necessary, authorize the mediator to utilize those items in discussions with the other side as may be necessary to reach a settlement.

In addition, having been involved in so many cases, judges tend to develop an innate sense of likely outcomes. In fact, anyone who has been a repeated spectator in a courtroom would be hard-pressed not to gain some insight into how a particular case might turn out. It should be of no surprise that some courtroom staff are rather adept at predicting, for example, jury trial outcomes. The staff in my own department assured me, somewhat unconvincingly, that they never did so in my bench trials. It should be remembered that judges are experienced not just as courtroom spectators, but as active participants in the decision-making process. A judge mediator should, after being provided sufficient information, be expected to be even more adept at evaluating likely outcomes. In the probate realm, having discussed many cases both informally with other probate judges and more formally view in the classroom setting, I observed that judges tend to certain kinds of cases in a very similar way.

Another aspect in the analysis of determining whether you should select a retired judge as your mediator is a judge's greater familiarity with the Evidence Code. This is an important area often completely overlooked by attorneys during the mediation process, or, even worse, during trial. Given the number of trials they have presided over, former judicial officers are typically far more familiar with the rules of evidence, as well as how judges are likely to view certain kinds of evidence. While it is sometimes said that "a trial is the search for the truth," the fact is that oftentimes, the truth is inadmissible.

In probate cases, it is not uncommon for one or more of the parties to tell me that if the case goes to trial, they will certainly prevail based on a series of compelling but entirely self-serving statements purportedly made to them by the decedent. Or, a party will offer something like a post-it note with numbers scrawled all over it, which allegedly "proves" one thing or another (usually that their sibling already received the entirety of his or her intended inheritance so nothing further should be received). In these contexts, sometimes having a discussion during mediation regarding what may, or may never, see the light of day inside the courtroom, or what may or may not be accorded much weight even if admitted, can prove invaluable to parties and their counsel in assessing the value of a case. Similarly, the appreciation a former judge would have regarding the profound importance of burdens of proof, and what may or may not be sufficient to meet such burdens, is of considerable value in evaluating potential settlements.

> **Practice Tip: Make a list of critical items of evidence in the case. Anticipate potential evidentiary challenges as to your own evidence and be prepared to explain why the evidence will be admissible. As for evidence adverse to your side, explain why the evidence will be subject to objection and if admitted, why the evidence will not be persuasive on the relevant issues. As with essential witnesses, if the need for brevity in briefing precludes including this information in the mediation brief, be prepared to summarize it when discussing the case specifics during the early stages of mediation.**

All of the above, combined with the vast number of Mandatory Settlement Conferences judicial officers preside over, and the process of approving a great many petitions to approve probate case settlements, adds to the judicial officer's storehouse of relevant knowledge. Years of assisting parties in resolving cases also gives retired judges a feel for what may or may not be possible in structuring a workable settlement in a particular case.

> **Practice Tip: Your mediation brief should include what you calculate to be your client's best and worst outcomes at trial as well as your assessment as to each. Include what you believe should be your initial starting point and an explanation of its genesis.**

III. JUDGES HAVE A GREATER APPRECIATION FOR DISCOVERY THAN MIGHT BE EXPECTED

How little law schools emphasize the importance of effective discovery is confounding given its actual importance to the litigation process. Perhaps as a result, many lawyers see discovery as a billing exercise, oftentimes relegated to the least experienced associate in the firm. I was oftentimes surprised when, after I was called upon to intervene in the parties' discovery disputes, there was never any mention at trial of any of the discovery over which so much figurative blood was spilled. Discovery should be well planned and targeted to lead to learning of the existence of relevant and essential documents, facts, and witnesses. Limited, well-focused discovery, along with independent investigation, can be far more effective than broad fishing expeditions which almost always seem to lead to unwieldy and unavailing discovery disputes.

> **Practice Tip: If there is particularly helpful or hurtful discovery including deposition testimony, be prepared to recite and explain the significance of that discovery to the mediator.**

IV. JUDGES HAVE MORE EXPERIENCE DEALING WITH DIFFICULT ATTORNEYS AND DIFFICULT CLIENTS

A substantial part in running an efficient courtroom is maintaining control over the proceedings. This necessarily includes learning how to resist attempts by others who might interfere with or unduly delay the process. Dealing with difficult counsel, whether in the courtroom or in mediation, can be a challenge. But it is a challenge every competent judicial officer should have mastered. The considerable experience former bench officers gained in effectively dealing with challenging personalities, whether counsel or parties, is an invaluable asset in moving a case towards settlement during mediation. Even the most difficult lawyers and clients tend to give deference to retired judicial officers, which allows the parties to better focus on the merits of the case as opposed to pointless and unproductive personality disputes.

> **Practice Tip: Avoid being drawn into personality clashes with opposing counsel. Stay above the fray and exhibit professionalism during the course of your case no matter what. Opposing counsel may be extraordinarily difficult to work with at times, but remember that they may be the only person ultimately standing in the way of your client achieving a satisfactory settlement. "Settling well is the best revenge."**

Sometimes it is the client who is the impediment to achieving a reasonable settlement. Having an experienced probate judge who likely decided many such cases during his or her career discuss the case and the process of rendering a decision after trial has dampened the expectations of many an overly enthusiastic client. As

a general rule, clients place greater value in a retired judge's opinion of the case than they may place in that very same opinion should it come from someone who has never presided over a courtroom. This may also apply in instances when the client may have received substantially the very same advice from his or her own attorney. On more than one occasion, I have sensed that the lawyer, even while vigorously advocating the client's position during the mediation, is desperately hoping I will convince an unyielding client to settle the case in a reasonable fashion.

V. JUDGES OFTEN THINK ALIKE IN ANALYZING CASES

The takeaway from all of the above should be that judges and lawyers do not view cases the same way, including during mediations. In crafting motion rulings or even during routine status conferences, judges sometimes, whether intentionally or not, reveal their general sentiments regarding certain aspects of the case, including their views on how a particular statute might be applied. Since judge mediators have considerable experience in ruling on motions and in other courtroom proceedings, judge mediators may be able to "read between the lines" when reviewing motion rulings or transcripts of court proceedings.

Practice Tip: Bring to the mediation any significant motion rulings in the case. Sharing those items with the judge mediator may allow the mediator to gain insight into how the trial judge may view certain aspects of the case. A judge mediator's insight and commentary in this regard may prove invaluable in resolving the case.

VI. CONCLUSION

Judges and lawyers, and certainly clients, don't view cases from the same perspective. Judges, by virtue of their role in the legal process, have their own way of viewing the world. The perspective of a former judge may therefore not only provide valuable insight into a case for possible settlement purposes, but appreciating how judges think if the matter ultimately goes to trial may be equally, if not even more, valuable.

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01 See, e.g., ABA Model Rules Prof. Conduct, rule 1.3 cmt.

02 See, e.g., Cal. Rules Prof. Conduct, rule 1.7.

WHAT TO CONSIDER WHEN PREPARING (YOUR CLIENT) FOR MEDIATION

Written by Hon. James P. Gray (Ret.)*

Over the last nearly 40 years, I have been involved in hundreds of mediations and settlement conferences, covering a wide variety of cases—including all kinds of civil and probate disputes. During my 25 years on the bench as a trial court judge, I held settlement conferences on nearly all of my own cases. For the past 14 years, I have served as a mediator on many cases concerning a variety of legal issues. Although every case involves its own unique set of facts, disputes and parties, the mediation *process* generally applies equally across the board.

So, what are mediations and what good do they do? In a nutshell, mediations assist parties in resolving their disputes voluntarily, usually with a neutral mediator as the agent to help them through the process. Why is this helpful? Because, as you may have noticed, litigation is expensive, both financially and emotionally, and perhaps even more importantly, it utilizes a lot of time that could otherwise be used more productively. Over the past four decades, I have learned that mediation is one of the most important and powerful tools that we as legal professionals can use.

My extensive experience has also taught me first-hand that one important consideration many attorneys often overlook is preparation of their clients for mediations. Of course, I recognize that attorneys are busy. I also acknowledge that preparing for the mediation itself takes time, as meticulous effort and thought are put into analyzing the case, thinking through possible outcomes, and drafting an always-stronger brief. While preparing the client may seem like the least pressing matter when gearing up for mediation, it is often the most important but overlooked aspect. Client preparation almost always makes a substantial difference in the success or failure of a mediation. Why? Because a more informed and prepared client is often more receptive to a reasonable proposal and agreement to settle a dispute.

So how do attorneys "properly" prepare their clients for mediations? The answer is, of course, it depends! But there are some universal considerations. Below are some tips and examples generated from my experience with mediation efforts that may be helpful to consider when preparing your next client for mediation.

I. EXPLAINING THE DIFFERENCE BETWEEN MEDIATIONS AND TRIALS

Attorneys spend most of their days engulfed in the legal process. As such, legal terms and procedures become second nature to them. So, it is easy to forget that most clients (fortunately) have never been involved in litigation. Consequently, what may seem like basic terms and processes to an attorney can be completely foreign to clients which, in turn, can cause a lot of stress and anxiety. For example, some clients have never even heard the term "mediation" before they became involved in litigation, or they may use the term mediation and trial interchangeably. That is why it is critical to take the time to explain to your client what a mediation is and the difference between a mediation and a trial, including the benefits and risks of both, before engaging in the mediation process.

Often you may find that although, in theory, an explanation may be simple, the actual wording may be difficult to generate as you want to keep your explanations easy to follow. Over time, you may develop your own style. For example, in my practice I like to use a baseball analogy. Thus, right in my introduction I explain, in baseball lingo, that during a mediation you will give up your ability to "hit a home run" because the opposing "team" will not voluntarily agree to that result. So, if you want to hit a home run, you will have to go to trial to have that chance. But you also give up your right to "strike out" because, similarly, you will not agree to that result. In sum, mediations virtually always end up with a compromised result, like "hitting a ground-rule double."

While a baseball analogy may not work for everyone, it does help the baseball-loving client conceptualize what a mediation will look like. But you may want to consider developing your own analogy that leaves a meaningful impression upon your client.

II. SETTING EXPECTATIONS

The hardest cases to settle are those in which clients come into them with unreasonable expectations. Of course, the root of those expectations can vary. It could be pure matters "of integrity." Or it could stem from an attempt by the prospective attorney to get the client to sign up with them in the first place by unrealistically increasing the client's expectations. But take caution because when that is the case, no one will come out ahead. Why? Because even if the attorney later gets a good resolution at mediation, or a good judgment at trial, their clients will still not be satisfied because they were misled into thinking that they would win the world. So, ultimately, that means no repeat business or referrals to other potential clients.

Attorneys will do both their clients and themselves a favor by setting their client's expectations to be reasonable prior to engaging in mediation. This involves seriously discussing the risks of pursuing litigation, as well as the potential benefits. It also includes discussing the benefits of engaging in mediation to end their dispute once and for all. Or, how about voluntarily exchanging some pertinent information or documents and then setting up a mediation right away, instead of going through the more laborious process of filing suit and litigating for a while before addressing an ultimate resolution? Of course, there are outside considerations, like how litigious the opposing party or counsel is, and there are other approaches as well, but you get the idea.

III. SOLUTION VS. RESOLUTION

As an attorney you have probably figured out that, unlike with mathematics, the practice of law rarely involves a *solution*, but rather seeks a series of *resolutions.* Of course, many clients come into the litigation process firmly believing that they are in the right and entitled to be made completely whole, whatever that may look like. But that is also why it is important to impress upon your clients, prior to engaging in mediation, that most human disputes have no *solution* and a mediation, at best, can achieve a resolution that will help them move forward in their lives.

For example, if someone runs a red light, hits your car, and breaks your leg, to be made whole would involve not having had your leg broken in the first place, and a return of all of the pain and loss of opportunities that accompanied it. Clearly, no one can make that happen. Instead, a resolution may involve the payment of some amount of money to help with the costs of the injury. Prepare your client for the idea that if they are successful, they will likely receive, and should only expect, artificial results, not perfection—on any of their complaints. That is a reality of life. Similarly, this would be the case at trial, albeit it will cost more time and money (and emotional burden) to get there.

IV. IF YOU CAN'T PROVE IT, PUT IT OUT OF YOUR MIND

Generally, there are three sides to every story: your client's version, the opposing party's version, and what actually happened. A client may be so convinced of their version of events that they lose sight of what can actually be proven at trial. So, prior to a mediation, you should sit down with your clients and impress upon them that what actually happened in their case (or what they think happened) is irrelevant. The only thing that matters is what can be *proved* to have happened—and that is not always the same thing.

For example, a party may have had an oral discussion with the opposing party that, if believed by a judge or jury, would probably make a huge difference in the outcome of the case. But, everyone can be sure, the opposing party will certainly have a different recollection of what was said and done. So that is where independent corroboration comes into play. Was anyone else present during the conversation? Was the discussion later memorialized in writing? Impress upon your client, before committing to mediation, that unless something can be proven through corroborating evidence, it will likely not carry the day. Thus, "if you can't prove it, put it out of your mind" is a good mindset to take into mediation. It may not always be fair, but it is the only way the legal system can do business.

V. THE PRESENCE OF THE DECISION-MAKER

Many mediations fail because the actual decision-maker or makers are not present or even available. What is a decision-maker? Well, if your client is a human being, that is the person who decides whether the case can be resolved or not. More commonly, if your clients are groups of individuals (e.g., multiple siblings contesting a trust), it will take each of those individuals agreeing to settle the case before actual settlement can occur. But what about a corporation, insurance company, homeowner's association, or partnership? Those groups almost always have officers or other agents who are vested with the power to make decisions, and those are the individuals who should either be present in person at the mediation or, at least, fully available by Zoom or by telephone until the mediation is concluded. Why? Because if they are not included, no final decisions can or will be made successfully.

Consider the situation where one side's decision-maker has limited authority based upon a prior meeting with other decision-makers about "what this case is worth." In that situation, it will be difficult to convince both that person as well as the others "back in the office" to change their proposed resolutions, either upward or downward. Every reasonable effort should be made to avoid this trap! Plus, you do not want to taint mediation efforts by wasting everyone's time. Therefore, it is important that both you and your opposing counsel make every effort to ensure the actual decision-maker(s) *for all of the parties* are personally present at the mediation or, as a fallback position, that they are at least available by Zoom or telephone.

VI. WHEN THE DECISION-MAKER'S MISTAKE LED TO THE LITIGATION

If you have a situation in which it was your client's decision-maker's action that led to the litigation being filed in the first place, that case will probably not be settled for more than "nuisance value," *unless* you are able to convince that person that you believe that "probably any reasonable person *who had only the information that was available to you at that time* would have made the same decision." Otherwise, you will likely get stuck hearing things like: "We will be vindicated at trial!" Or, if we lose, we can always blame "that stupid jury," or "that stupid judge," or even "our own stupid attorney"—but never me! If you have a situation like that, advise your mediator in advance and collaboratively try to come up with a plan to address such a scenario. Otherwise, unless you can get a different decision-maker to attend, mediation will probably be a waste of time and money.

VII. THE COST

Everyone understands that litigation is expensive, and no one understands that better than your client who writes those big checks. So, the topic of money, more often than not, will make clients listen up and listen good. I often emphasize that fact at mediations by saying something like: "Hey, I have an idea, let's give all of the money at stake to the attorneys! And that is the direction you are traveling at this point." In addition, if there is a provision for attorney's fees to be awarded to the prevailing party, I also tell them: "And if you think that paying your attorney's fees is fun, imagine how much fun it would be to pay the attorney's fees of your opposing party!" Or, again depending upon the circumstances, I often tell the parties that no prevailing party is entitled to attorney's fees, they are only entitled to *reasonable* attorney's fees. So, for example, even if it costs you $100,000 in attorney's fees to prevail at trial, if the total judgment is only $90,000, your chances of being awarded more than $50,000 in reasonable attorney's fees are slim. Similarly, plaintiffs settling at mediation for a smaller amount or defendants paying a somewhat larger amount would often still be a good business decision because it would avoid the emotion and loss of productive time and effort of going to trial—the costs of which are hard to assess.

VIII. FAITH IN YOUR MEDIATOR

If you do not have faith in your mediator, you chose the wrong one. Often attorneys are familiar with the mediator they are mediating with through prior personal involvements, through word of mouth, or otherwise. But clients often will know nothing about the mediator with whom they will be working. Therefore, it is important to brief your client about who their mediator is, what prior experiences and results you and other attorneys have had with that person, or any other information that may instill faith in your client that the mediator is there to help them resolve their dispute. This can be an incredibly effective tool because when the clients have faith in their mediators, the clients will be more likely to listen to and be influenced by their opinions and suggestions.

IX. THE DISSATISFACTION DISTRIBUTION BUSINESS

When I do my introductions to the parties, I usually tell them that I see my mandate as being to help them resolve their cases globally and today. As part of carrying out my mandate, it is my job to help them make a good business decision. And, as their attorney, you also have the same job. Of course, I also tell them that, as the decision-maker, they are free to adopt the position of "Not a Penny for Tribute!" or "I Deserve Total Vindication!" or "I want to have headlines in the *Los Angeles Times* that 'Jonathan Jones Prevails!'" That is the client's prerogative. Although, I also usually explain that I really do not think that the *LA Times* will care one way or the other.

As attorneys and mediators, it is incumbent upon us to point out to the clients that insisting upon certain outcomes is usually not a good business decision. Therefore, the scenario usually goes: "When I am with you, I will focus upon your vulnerabilities and weaknesses, because that will help you see your case more realistically. But cheer up, when I am with your opponents I will focus upon their vulnerabilities! So, if the opposing parties were to hear me talk with you, it would certainly put smiles on their faces. Of course, this will not happen because these discussions are confidential. But, on the flip side, when I am with the opposing parties, I will focus upon their vulnerabilities. So, if you were to hear me speak with them, it would certainly put a smile on your face, which will also not happen, because that is also confidential. As a result, as a mediator I see myself as being in the 'Dissatisfaction Distribution Business' because I will make everyone unhappy with me. But you will like me better tomorrow when you wake up and understand

that your dispute has been forever resolved and put behind you."

Thus, take some time to impress upon your client that you are on their team and, in a sense, so is the mediator. We all want them to make a good business decision, even if it stems from some dissatisfaction distribution.

X. MEDIATOR'S PROPOSALS

If the case does not settle through the back-and-forth negotiation process, before the parties walk out of the mediation most mediators offer what is called a "Mediator's Proposal." Different mediators approach their proposals differently. My general procedure is to tell the parties that this is not where I am attempting to "do justice," or "be fair," or to "try the case," but rather it is simply my opinion as to the highest number I could get the defendants to pay and the lowest number that I could get the plaintiffs to accept, plus other compromise terms depending upon the circumstances.

Usually, a mediator's proposal signifies that the negotiation process is now over. All each side needs to do is provide a "yes, we will," or a "no, we won't" answer. And if one side says yes and the other says no, mediators will usually not tell the party that said no that the other party said yes. And, since the proposal is still covered by the mediation privilege, the clients will not hurt themselves in any future negotiations. This process is successful with me about seventy percent of the time.

It is important to check with your mediators in advance to confirm that they make a mediator's proposal if the parties' negotiations are not successful. Explain the mediator's proposal process to your client in advance of the mediation so they are not caught off guard and know what to expect if that process is invoked.

XI. CONCLUSION

As with anything else in the practice of law, advance preparation helps and, with each experience, a new lesson is learned. I hope that some of these suggestions about what you and your clients should do to prepare for mediations will be helpful. And if they are, you might want to visit my website at www.JudgeJimGray.com for more of my writings on mediations and other litigation practices. More "justice" goes to those who are well prepared!

** James P. Gray is a retired Judge of the Orange County Superior Court, the author of* Wearing the Robe: The Art and Responsibilities of Judging in Today's Courts *(Square One Publishers), and presently serves as a mediator, arbitrator and discovery referee with ADR Services, Inc. in California.*

REACHED AN IMPASSE AT A MEDIATION? WAYS TO APPROACH IT

Written by Hon. Reva G. Goetz (Ret.)*

Walking between mediation conference rooms, I muse that I cannot see how this case is going to settle. The parties have reached an impasse that needs to be resolved before settlement is possible.

Apart from dealing with the legal issues stemming from the facts presented, trust and estate cases are often complicated by the history between the parties and the emotions driving each party's approach to their case—emotions which may be deep-seated and unresolved. For one or more of the parties, the litigation may provide an opportunity to eke out revenge for a long-simmering grievance. And it may be the last time the party will have that opportunity unless the case does not settle; in which case the expense and revenge continue.[01]

With emotions running high, it is not uncommon in trust and estate cases to find the parties entrenched in their positions, intent on getting the result they want. When negotiations begin, neither party is willing to budge. We are at an impasse.

The word "impasse" is defined as a situation from which there is no escape; a deadlock.[02] It appears as a permanent, not a temporary, situation. An impasse may occur in myriad ways and at different times during the course of mediation. It may occur at the beginning of negotiations with one party not willing to put the first demand on the table. It may occur during negotiations with a party declaring that they have reached their limit regarding the amount or result for which they are willing to settle. It may occur at the end of negotiations when finalizing the details necessary to document the settlement agreement.

This article will address various types of impasses and suggest ways to overcome them. While there are many tools that a mediator has to broker a successful settlement, including bracketing, mediator's proposals, and the like, this article focuses on the impasses that occur at the outset of discussions, before getting to those settlement steps.

I. IMPASSE NO. 1: NEITHER PARTY WILLING TO "BLINK" FIRST

Trust and estate litigation is often akin to a staring contest, with neither party wanting to blink first. Sometimes even suggesting that the parties attend mediation can be perceived as an admission of weakness or an indication that one side or the other is not confident in the strength of their case. That may be considered the "first blink." Assuming the parties agree to participate in mediation, however, the next opportunity to blink first may be at the mediation itself.

To get negotiations started, the mediator will typically indicate that it is time to try to resolve the case and suggests that one party make their first "demand." This is often met with resistance because each of the parties fears starting too low or too high, or feels they may gain the upper hand by making the other party make the first demand. Sometimes the resistance stems from a party's concern that they may project a lack of confidence in their case by making the first move. While overcoming these concerns may prove daunting, that should not discourage the mediator or the parties' attorneys from soldiering on, and it is imperative that neither party leave the mediation.[03]

When neither party is willing to make the first move, my practice is to suggest that we make the initial demand either the relief requested in the petitioning party's pleadings or, if settlement discussions have already been had, where the parties left off with their last offer. With this approach, the petitioning party is not giving up any ground. I, as the mediator, already know that the other side is going to scoff at the demand since their client already rejected it, did not counter it, and probably views it with disdain. Nevertheless, it at least gets the conversation started.

II. IMPASSE NO. 2: FEAR OF SETTLING BASED ON INCOMPLETE INFORMATION

Let's assume that the preliminaries of mediation have occurred. Caucuses and the facilitative and evaluative phases of the process are concluded. We are now ready to begin the settlement phase.

We are usually faced with one of two situations. Either there have been settlement discussions and offers/counteroffers have been exchanged, or there have been no settlement discussions and the mediation is the first effort undertaken to settle the case. Trust and estate mediations typically occur early in the case, maybe before any petition or complaint has been filed or, after filing, but before the parties want to incur the expense of discovery and discovery motions. In cases where mediation is the first meaningful attempt at settlement, the lack of discovery and one side or the other "not knowing what they don't know," can be an impediment to resolution of the case, because the party lacking information may be afraid of giving up unknown claims.

In those situations, I find it helpful to provide a realistic estimate of the costs—in terms of both time and money—that will be incurred in order to conduct the discovery necessary to satisfy the unknowing party's concerns, while, at the same time, emphasizing the benefits of the certainty of result and finality realized by settling the case.

III. IMPASSE NO. 3: REJECTING OFFERS JUST BECAUSE THEY COME FROM THE OTHER SIDE

Why is a demand unacceptable? One reason could be the mere fact that the demand or counteroffer came from the other side. For that reason alone, it is suspect. The formal term for this is "reactive devaluation." The family dynamics, animosity, perceptions, or perspectives may be such that the other side's position is instinctively viewed as having no merit and, therefore, no value. Any settlement proposal, no matter how reasonable, is met with suspicion.

I recently mediated a case involving four siblings, one acting as the current successor trustee and another who was the removed trustee. The removed trustee, while she had cost the trust a lot of money related to her removal, failure to cooperate with the sale of trust property, and delay in administration, viewed the successor trustee, her sister, negatively. As such, she was solely focused on trying to figure out how she was being taking advantage of by her sister. While the financial settlement was easy to resolve, the division of personal property became the barrier to settlement.

The removed trustee laid claim to all personal property that came from their mother's house that had been in storage for over two years. The other siblings wanted to divide the property among the siblings equally, but the removed trustee insisted that all of the property belonged to her—not her mother. After a week of intense negotiations, an agreement was finally reached when the removed trustee agreed that she would limit her claim to that property for which she had proof of purchase.

This was a classic example where the siblings devalued the claims made by the others solely because they came from the other side. It is hard to believe that the case almost did not settle because of pots and pans that had been in storage for so long, but that was the case.

One technique that helps to overcome the impulse to devalue offers made by the other side is to tell the offeree party that the offer was my idea and did not come from the other side. And, in many cases, that representation is mostly true.

IV. IMPASSE NO. 4: PARTIES RELYING ON ALTERNATIVE FACTS

Another barrier to settlement may occur when the parties are not working from the same information pool. In that situation, the objectives of the parties may differ based on their respective understandings of the facts and the corresponding assumptions that follow therefrom. A discrepancy of information may lead one side to seek a financial result that is unrealistic, or to have unreasonable expectations, or to push for an outcome that is action-based and not financially driven, thereby causing them to misunderstand or mistrust the other party's objectives or preferences.

The difficulty in settling such a case is when one of the parties refuses to elicit or consider information they do not have or even to entertain the idea that they may be lacking information. A common example of this involves property valuations, where one party insists on using an old appraisal and refuses to consider more current information. This becomes a barrier to settlement, because the parties are not working from a common starting place. It can have a profound impact on reaching possible settlement since one side is undervaluing what is necessary for the other party to accept. The failure to settle in this situation becomes a self-fulfilling prophesy.

There is a way to overcome such a disparity of information. It is incumbent on the mediator to recognize the situation and to move the parties to navigate the information gap, either by agreeing on a common set of facts or devising a plan to derive the necessary information that will enable

the parties to start from the same information. The latter solution may require the parties to return for another mediation session once the information discrepancy has been resolved.

V. IMPASSE NO. 5: WHEN THE ATTORNEY IS THE BARRIER TO SETTLEMENT

Attorneys, themselves, can present a barrier to settlement in myriad ways.

A. The Myopic Attorney

There are attorneys who see themselves as the savior or "knight in shining armor" for the aggrieved party. Counsel has a specific outcome in mind and they will not advise their client to settle for any less. As a mediator, when faced with that situation, it is clear that the professional's judgment is biased in such a way that they do not properly assess the strengths and weaknesses of their case.

When an attorney comes in adamant that their client has been aggrieved, and that the wrong must be remedied, they are already closed to information that might modify their perceptions about their client. They do not contemplate the possibility that their client may have played a significant role in the circumstances leading up to the litigation and may not be as innocent as the attorney thought. This lack of awareness on the part of counsel can pose a huge impasse to settlement of the case. In the meantime, the "victimized" client is happy to have someone fighting for their cause.

This could be viewed as another example of an information gap, but it really is not because, here, it is counsel's myopia regarding their client and case, rather than a true discrepancy of information, that is causing the impasse. A common example involves a client who is elderly and portrays themselves as an innocent victim. The client's appearance alone may lead counsel to assume that the client must be the aggrieved party, thereby closing the attorney's imagination to other possibilities.

As a mediator, I have often found that, after listening to the "victim's" side of the story and sympathizing with them, credible information is presented by the other side establishing that the "victim's" actions may be far from innocent and may even go so far as to constitute elder abuse and/or undue influence.

In this situation, it is necessary to speak with counsel outside the presence of their client to ensure counsel's relationship with their client remains intact. Given that counsel participated in the selection of, and agreed to, the mediator, it may be presumed that counsel values the mediator's opinion. Relying on that relationship with counsel, and the mediator's position as an unbiased neutral, I have found that, when presenting counsel with competent evidence that rebuts what their client has told them, counsel's eyes may be opened to the fact that their client has distorted the information on which they are relying. Often, once the attorney is educated to the "true" facts, the attorney will become the greatest advocate for settlement. Rather than continuing the attack, representation of their client now becomes a matter of damage control, where counsel's job is to minimize the exposure of their client, while finding a way to resolve the situation in a manner that will be accepted by the opposing side.

B. Conflicting Incentives

I have seen valuable estates eviscerated solely by legal disputes that arise during the course of administration and continue through years of litigation.

Another example of the attorney acting as a barrier to settlement occurs when the attorney has no incentive or desire to settle. The attorney has a client paying their fees on a regular basis and to the extent the case remains ongoing there is no financial incentive to resolve the case. In such cases, the attorney does not come to participate in the mediation in good faith, but simply to give the appearance that they were amenable to settlement. Or, perhaps, the attorney may have been required to attend mediation by the court, so the attorney showed up, but not with the intent to meaningfully participate in any settlement efforts.

I recently mediated a case where one party was represented by two unaffiliated attorneys. One attorney represented the party in his capacity as the suspended trustee of a trust. The other attorney represented the party in his capacity as a beneficiary of the trust, together with the other trust beneficiaries. At one point during the mediation, it became clear that counsel for the beneficiaries was not participating in good faith. The attorney was not properly considering offers or even methodologies to settle the case; counsel for the beneficiaries merely said "No" to everything. Meanwhile, counsel for the suspended trustee expressed frustration regarding the reticence of beneficiaries' counsel to discuss ways to settle the case.

In an attempt to resolve this impasse, it became necessary to try to divide and conquer the competing interests. This presents a delicate situation for the mediator, however, because the last thing a mediator wants to do is interfere with the attorney-client relationship, even when the mediator believes counsel is not acting in their client's best interests. Ultimately, counsel for the beneficiaries seemed to carry more influence with this party, and given that counsel's recalcitrance, it was not possible to bridge the differences. While it is costly for the client, unfortunately,

going to trial may be the only way to resolve a legal dispute when counsel refuses to engage in settlement efforts.

VI. IMPASSE NO. 6: STRUCTURAL BARRIERS TO SETTLEMENT

A. Sunk Costs

At times there are barriers impacting resolution based on some external issue or pressure having nothing to do with the actual case. These are known as "structural barriers." Sometimes, a case goes on for so long that the resources no longer have the value they did when the case began, or the attorney fees have grown to such an extent that any settlement amount pales in comparison to what was spent to get to that point. Neither of these circumstances has anything to do with the merits of a case, but they may greatly influence a party's willingness to address that reality and settle the case.

I recently mediated a matter where one of the parties had already spent thousands of dollars in attorney fees only to find that she was not likely to prevail in litigation and the cost of going forward was going to be significant. In economic terms, the attorney fees already incurred represented a "sunk" cost. The money was spent and was unlikely to ever be recovered, either by prevailing in litigation or through a favorable settlement.

That is a hard concept for someone to accept. In such cases, it can be helpful to emphasize the risks and costs, in terms of money, time, and emotional toll, of continuing to litigate. At the end of the day, the party in this case understood the risks involved in not settling the case and agreed to settle for no money and a full Civil Code section 1542 release and waivers from the other parties. At least she put an end to incurring further attorney fees and guaranteed that the opposing side would not sue her for malicious prosecution or any other cause of action.

B. Cultural Factors

While they may have nothing to do with the specific legal issues or questions of fact involved in trust and estate litigation, cultural factors resulting from a party's place of origin must be considered as they may be subliminal influencers affecting whether and how a case is settled. Cultural norms may present unique sensitivities that should not be ignored or dismissed when trying to resolve the case. For example, understanding how an eldest son is regarded in certain cultures may play a role in how a party views the case. A mediator will be better able to help the parties settle their case, if the mediator is sensitive to these cultural differences and has an understanding of how the norms and customs of a particular culture may be influencing one or more of the parties.

VII. IMPASSE NO. 7: HEIGHTENED PSYCHOLOGICAL OR EMOTIONAL SENSITIVITY OF ONE OR BOTH OF THE PARTIES

Interpersonal or psychological issues can also be an impediment to settlement. These may arise, for example, if one party has poor communication skills, is suffering from a personality disorder, has a fear of being taken advantage of or of being left out. That party experiences a heightened sensitivity that interferes with their participation in mediation.

In working with people experiencing such a heightened sensitivity, it is necessary to reassure them that their concerns are being considered and taken seriously. That is not to say, however, that they should be appeased. Where a party is not realistic regarding their case and possible settlement parameters, it is necessary to educate them on the law and why what they want is not going to happen.

This presents a good opportunity for the mediator and counsel to address what the party's life will look like if the case does not settle. They should explain how long it will be until the case goes to trial (frequently years), as well as the additional fees and costs that will be incurred, and the likelihood that any proceeds the party receives in the future will be significantly diminished. Lastly, it should be explained that, even after all of that time and expense, there is no guarantee, and little probability, that the party will get the result they want.

This also presents an opportunity to emphasize the rewards of settlement, such as the certainty of the result, and more importantly, the ability to regain some form of control over the circumstances in which the party finds themselves.

If these efforts are successful in getting a party with heightened sensitivity to accept that they are not being taken advantage of and that the probability of success is low or, at best, uncertain, often they will begrudgingly be more amenable to entering into a settlement agreement.

VIII. IMPASSE NO. 8: "MOM LOVED YOU MORE!" (DYSFUNCTIONAL FAMILY DYNAMICS)

There are cases where one party hates the other for no apparent reason, and that emotion is driving the litigation and inhibiting settlement. The hated party may not even

realize that it is these feelings, as opposed to the merits of the case, that are impeding the settlement process.

In psychology, there is something known as attribution theory, which is divided into two categories: situational attribution and dispositional attribution.[04] Situational attribution arises when external factors are the cause of anger or discomfort. It can be related to something over which one has no control, like the weather. If one is traveling and misses their connecting flight due to bad weather, they will be upset and unhappy, but there is no one to blame. The person's anger arises from a situation created by external factors or influences.

Dispositional attribution arises from internal factors that are case specific. The affected party assigns responsibility for their grievance to the other party or parties based on perceived motives, beliefs, or personality. There may be no apparent rationale for the feelings the aggrieved party is experiencing, but the aggrieved party only wants to inflict pain. Often, this results in the other party giving up more than they want or reasonably should just to reach a settlement and stop the pain of continued litigation.

When apparent, this dynamic presents an opportunity for the mediator and counsel to explain the need to compartmentalize emotions to the party experiencing strong feelings. The mediator and counsel should emphasize that this is a business transaction and needs to be addressed in that way. Hopefully, this will help the aggrieved party step away from their feelings and approach settlement more objectively.

Often, the aggrieved party is preoccupied with what the other side will get through settlement. In such situations, the mediator and counsel may attempt to re-focus the aggrieved party's attention on the evaluation of the applicable law as applied to the instant set of facts and circumstances. It may also be helpful to emphasize to the aggrieved party the benefits of settlement.

One case involving dispositional attribution comes to mind that required extreme steps to reach a resolution. A few years ago, I mediated a case involving the distribution of 13 trust real properties between two sisters. Under the terms of the trust, the distribution of assets between the two sisters was to be equal. Since the values of the properties had been agreed upon, it seemed at first that it would not be difficult to reach an agreement on a non-pro rata division of the properties between the sisters, but that turned out not to be the case.

Sister A was a successful professional, happily married with adult children. Sister B, while able to support herself, had a less prestigious career, was not married and did not have children. Although each sister's situation was not based on anything to do with the other sister, Sister B bitterly resented Sister A. Sister B's anger was palpable and not rational. There was no way to reason with her or explain how the numbers worked. If Sister A wanted any particular property, Sister B was bound and determined to prevent it and claim it for herself.

Sister A wanted to move on with her life and put the trust matter behind her. Sister B gained strength from continuing to engage Sister A and cause her pain by not agreeing to resolve the property distribution.

Sister B had two attorneys representing her at the mediation. It was clear over the course of the day that they were having difficulty getting her to agree to anything. As time went by, they loosened their ties and unbuttoned their collars, their hair became mussed as they ran their fingers through it in frustration, their jackets came off, and by the end of the day, their shirttails were hanging out of their pants. They were exhausted.

On the other hand, Sister A was at the mediation in good faith and wanted a fair resolution. As the mediation progressed, however, it became clear that a fair resolution could not be reached by agreement. Sister A, her attorney, and I had a frank discussion about the irrationality of Sister B's behavior and that it was unlikely an equitable result could be reached through mediation. While Sister A understood and agreed that Sister B was being unreasonable, she did not understand the source of Sister B's anger, and at the end of the day, Sister A simply wanted to move on with her life.

As the hours passed and the distribution of each property was discussed one by one, it was painful to watch as Sister A repeatedly caved to Sister B's demands. By the end of the day, many hours later, it was agreed that Sister A would receive the one property that the parties had agreed prior to the mediation would go to her and Sister B would take the remaining 12 properties. This grossly inequitable result was truly the only way Sister A could get out of litigation and move on with her life without going to trial.

IX. CONCLUSION

When faced with an impasse, it is incumbent on the mediator to try to identify what "pressures" are getting in the way of reaching a settlement. Once that determination is made, it is the job of the mediator to work with counsel and the parties to acknowledge the impasse, address the pressures creating it, and attempt to work through it. One cannot just throw up their hands. In many cases, it only requires a very small shift in perception or attitude by one or both of the parties to break the impasse, after which it

is possible to reach a settlement. It can take many hours of arduous effort to get to that point, however, but that is an essential task for the mediator, the reward for which is the gratifying result of settling the case.

** JAMS Mediation, Arbitration and ADR Services, Los Angeles, California*

01 See Goetz, *Weaponizing the Litigation Process – When Litigation Results in the Taking of Hostages* (Cal.Law.Assn. 2021) Vol. 27, No. 2, Trusts & Estates Q. 44.

02 Dictionary.com <https://www.dictionary.com/browse/impasse> (as of Sept. 12, 2022).

03 I've been known to stand in front of the conference room door so no one can leave. With Zoom, that presents some difficulty.

04 See McLeod, *Attribution Theory in Psychology: Definition & Examples* (June 11, 2023) Simply Psychology < https://www.simplypsychology.org/attribution-theory.html> (as of Oct. 3, 2023).

LITIGATION ALERT

Written by Michael S. Brophy, Esq., Courtney A. Sorensen, Esq., Craig S. Weinstein, Esq., Sara Z. May, Esq., and Joubin Hanassab, Esq.

I. THE FACT THAT A TRUST, NOT A TRUSTEE, WAS THE NAMED PLAINTIFF AND LITIGATED A MATTER FOR SEVERAL YEARS DOES NOT RENDER THE ENTIRE PROCEEDING VOID *AB INITIO*, AS THE TRIAL COURT SHOULD HAVE ALLOWED A CURATIVE AMENDMENT TO NAME THE TRUSTEE AS THE PLAINTIFF.

Jo Redland Trust, U.A.D. 4-6-05 v. CIT Bank, N.A. (2023) 92 Cal.App.5th 142

The First District Court of Appeal held that when a complaint mistakenly brings a lawsuit in the name of a trust, which is an unrecognized person under the law, rather than in the name of the trustee, and the oversight goes unnoticed for several years, the trial court should allow a curative amendment naming the correct legal entity rather than render the entire proceeding void *ab initio*.

Following the death of the settlor and trustee of a trust, the successor trustee filed a quiet title complaint relating to a trust-owned parcel of land, naming the trust itself as the plaintiff. Three years into the litigation, an interested party intervened in the lawsuit and sought dismissal of the matter because the trust, which is not a legal entity with the ability to participate in litigation, was the named plaintiff. The trial court granted dismissal. Subsequently, the successor trustee sought leave to amend the complaint, seeking to name himself a plaintiff in his capacity as successor trustee of the trust. The trial court denied leave to amend on the ground that the complaint was a nullity from inception. Thus, the trial court reasoned, the successor trustee could not rely on the "relation back" doctrine to avoid a statute of limitations bar, rendering the proposed amendment legally futile and unjustifiably late. The successor trustee appealed.

The Court of Appeal reversed. The Court of Appeal recognized that while the trust lacked capacity to sue because it has no independent legal existence, the trial court should have permitted the amendment because the entire proceeding was not void *ab initio* since its inception. Every court has jurisdiction to determine its own jurisdiction, which includes the discretionary power to allow a curative amendment. Here, the trial court failed to discharge its duty to assume jurisdiction. The Court of Appeal held that the trial court abused its discretion in denying leave to amend when the successor trustee presented facts demonstrating that he had capacity to sue and was mistakenly omitted from the original complaint, especially considering that the initial defendant litigated the matter for three years before intervener raised the jurisdictional issue. Although the successor trustee was an indispensable party, his absence during the first three years of the litigation did not deprive the court of fundamental jurisdiction. The filing date for the amended complaint, therefore, would relate back to the date the original complaint was filed, and would not be barred by the statute of limitations.

II. TRIAL COURT MISINTERPRETED MEANING OF "SPECIAL NEEDS" WHEN DISALLOWING EXPENSES AND OFFSETS FOR THE SURCHARGES AGAINST TRUSTEE

McGee v. State Department of Healthcare Services (2023) 91 Cal.App.5th 1161

The Third District Court of Appeal held the trial court abused its discretion when it narrowly defined what constitutes a "special need" as provided in a special needs trust and surcharged the trustee for certain disbursements.

The trial court established a special needs trust for the benefit of a beneficiary as part of a settlement in a medical malpractice action. The court found the beneficiary to be disabled because she suffered from a syndrome that impaired her ability to provide for her own care. The trust instrument stated that the special needs trust's purpose was to provide a discretionary, spendthrift trust to supplement

public resources and benefits when such resources and benefits are unavailable or insufficient. The trust authorized the trustee to distribute funds in the trustee's discretion as the trustee deemed appropriate and reasonably necessary for the beneficiary's special needs. The trust defined special needs as follows: "'Special Needs' means the requisites for maintaining the Beneficiary's good health, safety, and welfare when, in the discretion of the Trustee, such requisites are not being provided by any public agency, office, or department of the State of California, or of any other state, or of the United States of America." The trial court determined that the trustee abused his discretion and breached the terms of the trust instrument by making distributions for items and services that did not constitute "special needs" as defined by the instrument. Some of the disallowed distributions included food for the beneficiary and her caregivers, care for the beneficiary's animals, clothing, gifts, and other miscellaneous items.

The Court of Appeal reversed and remanded. The trust instrument defined "special needs" broadly as including more than just items or services reasonably related to the beneficiary's disability. The trust's definition of "special needs" is consistent with the interpretation of the term under Federal law and the Social Security Administration's treatment of special needs trusts. As a result, the trial court abused its discretion by applying the wrong legal standard when it defined "special needs" more narrowly than allowed under the trust instrument and special needs trust law in general. The Court of Appeal also noted that, on remand, the trial court should consider how the trustee operated consistently with the purpose of the special needs trust, which was to preserve the beneficiary's eligibility for public assistance while allowing the trust to supplement those benefits when they are unavailable or insufficient to meet the beneficiary's special needs.

III. A PROBATE COURT MAY CONSIDER EXTRINSIC EVIDENCE SURROUNDING A LETTER SOUGHT TO BE ADMITTED TO PROBATE AS A WILL EVEN IF THE TERMS OF THE LETTER ARE UNAMBIGUOUS

Estate of Berger (2023) 91 Cal.App.5th 1293

The Second District Court of Appeal held that a probate court may consider extrinsic evidence of the circumstances surrounding the execution of a document, even if the intent expressed by the document's terms is unambiguous. The facts of this case established that the drafter intended for a letter to make a revocable disposition of property upon her death.

In 2002, the drafter printed out a letter on stationary from her then-employer, listing her full name, address, and social security number, beginning with "To whom it may concern." The letter named the drafter's then-fiancée as "my sole beneficiary in the event of my death" and stated that the fiancée would take ownership of all of the drafter's possessions and property upon the drafter's death. The letter included the drafter's signature and the date, but there were no witnesses. The couple ended their romantic relationship six months later. The drafter passed away 18 years later. The former fiancée filed a petition seeking to have the letter probated as the drafter's will. The drafter's sister opposed the petition. After an evidentiary hearing, the court denied the petition, holding that the fiancée had not proven by clear and convincing evidence that the drafter intended the letter to be her will, noting doubts about the context of the letter and the credibility of the fiancée. A month later, the court reopened the matter and heard additional evidence of email correspondence between the drafter and fiancée around the time the letter was drafted, but still denied the petition. The fiancée appealed.

The Court of Appeal reversed. The fiancée's position boiled down to two arguments: (1) a probate court's analysis of whether a drafter acted with testamentary intent is limited to the four corners of the document if the language in that document unambiguously evinces such an intent; and (2) the probate court's finding that the drafter did not intend the letter to constitute her will was unsupported by substantial evidence. On the first point, the Court of Appeal noted that extrinsic evidence is admissible under the Probate Code to determine whether a document constitutes a will, or to determine the meaning of a will or a portion of a will if the meaning is unclear. The ability to use extrinsic evidence to determine whether a document constitutes a will does not require that the language of the will itself be ambiguous. In addition, looking at the drafter's intent regarding whether something constitutes a will entails looking at the surrounding circumstances, which requires extrinsic evidence outside the four corners of the document.

On the second point, the Court of Appeal found that substantial evidence at the trial court level compelled a finding by clear and convincing evidence that the drafter intended for the document to be testamentary. The words and circumstances of the letter demonstrated that the drafter intended the letter to have testamentary effect, because it named a beneficiary, listed the drafter's most significant assets, and had a level of formality consistent with a document meant to have an enduring effect.

TAX ALERT

Written by Lawrence M. Lebowsky*

This article summarizes selected developments in federal and state taxation law since the last Quarterly that may be of interest to trust and estate attorneys. "Code" refers to the Internal Revenue Code of 1986, as amended. "Tres. Reg." refers to any Treasury Regulation. "IRS" refers to the Internal Revenue Service.

I. FEDERAL ADMINISTRATIVE & LEGISLATIVE ACTIVITIES

A. Qualified Appraisal Required for Charitable Contribution of Digital Assets or Cryptocurrency In Excess of $5,000

Chief Counsel Advice Memo 202302012 (January 13, 2023)

A qualified appraisal was required under IRC, section 170(f)(11)(C) for a gift of cryptocurrency for which a charitable contribution deduction in excess of $5,000 was claimed. The use of the value reported by the cryptocurrency exchange did not satisfy the qualified appraisal requirement, or the reasonable cause exception for failure to obtain the qualified appraisal. The value published by the exchange is not a readily ascertainable value under section 170(f)(11)(A)(ii)(I). Cryptocurrency is not a type of property listed in that section.

II. FEDERAL CASES AND RULINGS: ESTATE TAX, GIFT TAX & GENERATION-SKIPPING TRANSFER TAX

A. No Basis Step-Up for Assets of Irrevocable Trust Not Included in Grantor's Estate

Rev. Rul. 2023-2, 2023-16 IRB 658 (March 29, 2023)

The basis of assets of an irrevocable grantor trust which was funded by a completed gift for gift tax purposes is not adjusted to fair market value on the date of the grantor's death under IRC, section 1014, where the assets are not included in the grantor's gross estate, because the assets were not acquired or passed from a decedent as defined in IRC, section 1014(b). The grantor retained a power over the Trust that caused him to be treated as the owner of the Trust for income tax purposes. However, the grantor did not hold a power that would result in the inclusion of the Trust assets in his estate, and was not any of the types of property listed under section 1014(b). The asset was not bequeathed, devised or inherited within the meaning of section 1014(b)(1). The decedent's death did not transfer the assets into the Trust.

B. Trust Distributions Pursuant to Court-Approved Settlement Will Not Cause GST Tax, Gift, Income, or Taxable Disposition of Property to Beneficiaries

PLR 202313006 (March 31, 2023)

Trust distributions made in accordance with a Court Order approving Settlement Agreement will not result in a GST tax, will not treat any beneficiary as having made a taxable gift to another beneficiary, will not be treated as a taxable sale, exchange, or disposition of property between beneficiaries, nor will it result in receipt of gross income to a beneficiary to the extent that terminating distributions exceed Trust distributable net income.

The Settlement Agreement addressed a bona fide issue based on ambiguity created by the Trust language as to how Trust assets are to be distributed upon termination of the Trust. The highest court of the State had not ruled directly on point in any case that would address this ambiguity with any certainty. Therefore, each Beneficiary had a legitimate claim, their distribution was uncertain if the question were litigated, and they engaged in arm's length negotiations to avoid the possibility of protracted litigation to resolve the interpretation of ambiguous Trust provisions.

The Settlement Agreement "reflects the result that would apply under State law" based on the Trust language and State statutes, "after considering the uncertainty of the results if the question were litigated." The Settlement Agreement was "a compromise between the positions of the beneficiaries and reflects their assessments of

the relative strengths of their positions." The Settlement Agreement did not extend beyond resolving the ambiguity. Thus, the Settlement Agreement was "within the range of reasonable outcomes" under the Trust language and applicable State law addressing the issue.

C. Post-Death Trust Amendment of CRAT Without Court Approval Is Not A Qualified Reformation

***Estate of Block v. Comm'r* (Mar. 13, 2023) TCM 2023-30**

The IRS determined that a post-death amendment of a Trust which provided for the creation of a charitable remainder annuity trust was not a qualified reformation of the Trust under IRC, section 2055(e)(3)(A), because the amendment was not a reformable interest under the default rules, the amendment was executed more than one year after the 90-day period following the due date for the estate tax return, and the amendment was instituted by the co-trustees alone and not by a court. The court found that Congress made clear that the qualified reformation rules are to be construed strictly, and so did not find substantial compliance. The court also found that the nonjudicial reformation provisions in Rev. Proc. 2003-57 do not involve corrections for "major, obvious defects," "such as where the 'income' interest is not expressed as an annuity interest." A judicial proceeding would have had to commence before an IRS audit might begin.

The decedent's trust instrument provided that she intended a trust gift to a charitable foundation to be "a charitable remainder annuity trust, within the meaning of Rev. Proc. 2003-57 and [section] 664(d)(1) of the Code, and the terms of this Section shall be construed to give maximum effect to such intent." The instrument set forth an annuity amount equal to the greater of all net income or $50,000. The Trust instrument also gave the Trustee the power to amend the Trust to ensure that it qualifies and continues to qualify as a CRAT, but not to change the annuity period, amount or recipient. After the IRS examined the Estate's Form 706, the co-Trustees executed a Trust amendment with an effective date of the decedent's death to revise the annuity amount to $50,000.00 at least annually. The annuity amount was not limited to a specific stated dollar amount and violated the "sum certain" provision of IRC, section 664 and the Trust did not qualify as a CRAT as of the decedent's date of death.

D. Payments for Care and Companionship Services Deemed Taxable Gifts; Payments Under Prenuptial Agreement Were Not Contracted For; Probate Litigation Not Reasonable Cause to Abate Penalty for Late Filing of Estate Tax Return

***Estate of Spizzirri v. Comm'r* (Feb. 28, 2023) TCM 2023-25**

The decedent's estate failed to meet its burden of proof that significant payments to family members and other friends were not taxable gifts to express appreciation to friends. The checks contained no indication that these were meant as compensation. No Forms 1099 or W-2 were filed, and the payments were not reported on the decedent's personal income tax returns. The IRS denied deductions for claims brought by the surviving wife and her children for distributions provided in an antenuptial agreement as not stemming from the performance under the agreement, and because these claims were not contracted for with adequate or full consideration. Rather the payments provided for in the agreement were testamentary gifts and the recipients did not include these in income. The IRS determined that pending probate litigation was not reasonable cause for filing a late estate tax return, that a timely return was required based on the best information available, and an amended return could be filed if necessary.

The decedent and his wife executed an antenuptial agreement and modified it several times during the marriage. The provisions included the right of the wife as surviving spouse to live in the decedent's property free for a period of years, and bequests to the surviving spouse's children from a prior marriage. During the last few years of his life decedent paid his daughter, stepdaughter, and women with who he had various types of relationships, amounts in excess of the annual gift tax exclusion amount. The surviving spouse and her children filed claims against the decedent's estate, which were paid in part under a court-approved settlement. The estate tax return was filed after the extended due date, reflecting deductions for the claims which were reported on Forms 1099-MISC, and for the value of the surviving spouse's right to live free in the decedent's property. The IRS informed the Estate that its request for a second extension of time to file the return due to ongoing probate litigation could not be granted as a matter of law. The IRS treated the payments to the daughters and women as taxable gifts, disallowed the deductions for the claims and assessed a late filing penalty for the estate tax return. The Estate argued that the payments to individuals were for care and companionship services.

E. Beneficiary Lacks Standing to File Refund Suit on Behalf of Estate

Huberty v. IRS **(E.D.Cal. Jan. 4, 2023) 131 AFTR2d 2023-308**

IRS dismissed refund suit brought in pro se by both return preparer accountant and by personal representative, both of whom were also two of several beneficiaries of the Estate, for lack of standing. The IRS granted the personal representative leave to amend to bring suit upon retention of counsel to represent him to bring the suit. The beneficiary is not the one who made the overpayment, rather it was the estate that did so. A refund suit on behalf of an estate can be filed only by an appointed personal representative. If there are beneficiaries other than the administrator, or creditors, then the administrator must be represented by an attorney.

F. No Estate Tax Deduction for Claims Against Estate That Were Donative Intrafamily Transfers and Not Bona Fide Debts

Estate of MacElhenny, Jr. v. Comm'r **(Mar. 15, 2023) TCM 2023-33**

The IRS disallowed a deduction under IRC, section 2053(a)(3) for claims against an estate based on judgments against the decedent arising out of his failure to repay loans. The judgments were not bona fide debts of the estate because, before the decedent's death, his children as his agents under a power of attorney settled the judgments by payment from their own funds of a discounted amount, and the judgments were assigned to themselves to use to offset their later purchase of estate real property. The judgments were no longer the decedent's personal obligations at his death. The court found that the assignments were donative, not made in the ordinary course of business, and not arm's length transactions because the children were "on both sides of the claims." The children purchased an estate asset by a combination of assuming a mortgage on the property, a credit for the amount they paid to settle a judgment against the decedent, and a credit on account of reducing the balance of the judgment assigned to them which they purportedly held against the estate. The court concluded that the judgments were not a bona fide liability and therefore the reduction in the amount of one of the judgments was not consideration in money or money's worth. Thus, the IRS treated the disregarded consideration in the children's discounted purchase of the estate property as a taxable gift to them.

G. Neither Faxing a Copy of a Partnership Income Tax Return to an IRS Revenue Agent Nor Mailing a Copy to an IRS Attorney Qualifies as Filing the Return

Seaview Trading, LLC v. Comm'r **(9th Cir. 2023) 62 F.4th 1131**

The Ninth Circuit on rehearing en banc affirmed the tax court over a dissent and held that a partnership did not meticulously comply with the place-of-filing requirement for its income tax return in IRC, section 6230(i) and Treas. Regs. section 1.6031(a)-1(e), which requires that a partnership income tax return must be filed with the prescribed Service Center, even though it sent copies of the return to an IRS revenue agent and an IRS attorney at their request. The court concluded that the return was never filed and the three-year limitations period on assessment never began to run. The court also held that compliance with the place-of-filing requirement was not conditioned with the time-for-filing requirement. The court quoted the Supreme Court for the proposition that limitation statutes barring collection of tax are strictly construed in favor of the government, so there must be "'meticulous compliance by the taxpayer with all named conditions in order to secure the benefit of the limitation.'" Filing the partnership return as required by the regulations is one of the conditions.

An IRS revenue agent informed Seaview, a partnership, that the Service had no record of receiving Seaview's partnership income tax return for a particular tax year and asked Seaview to send him retained copies of the return and proof of mailing. Seaview's accountant faxed a copy of the return and a certified mail receipt but could not prove that the return was part of that mailing. After the IRS commenced an audit of Seaview, its counsel mailed the same copy of the return to an IRS attorney. Neither the revenue agent nor the attorney forwarded a copy of the return to the relevant Service Center for processing, nor did Seaview.

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TRUSTS AND ESTATES

CALIFORNIA LAWYERS ASSOCIATION

Top Five Critical Lessons from Mediators of Trust and Estate Disputes

December 13, 2023 Webinar – 12 to 1:15 p.m.

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