

ESTATE PLANNING



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Mediation: An Effective Method to Resolve Estate and Trust Disputes

Alternative dispute resolution is increasingly being used to resolve a wide range of disagreements. This article examines how mediation works and why it may be the most practical approach to solving problems or resolving litigation in estate and trust cases.

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As with civil litigation generally throughout the U.S., lawsuits involving estates and trusts have increased dramatically over the years. Few would argue that participating in such litigation all the way through trial (and possible appeals) is the best way to resolve disputes concerning wills or trusts. Yet when such problems arise, an heir or beneficiary (or a person who believes she should be one) who possesses a potential claim may have little choice but to file suit in the absence of an early compromise.

The decision to seek recourse through the courts rather than trying to settle a dispute informally becomes more likely when a potential litigant faces the pressure of a rapidly approaching deadline. Depending on the jurisdiction, there may be a very short limita-

tions period within which to commence litigation or be forever barred from doing so. For example, in California, assuming certain notice requirements are met, a person has 120 days from the date a will is admitted to probate to contest that will, and the same time frame may apply to challenge the validity of a trust if a person is notified that a living trust has become irrevocable upon the settlor's death.¹

Of course, there are numerous negative aspects to any lawsuit, including the expense, the delays inherent in litigation, the uncertain result, and the commitment of substantial time and emotional energy. Accordingly, estate and trust professionals should and do counsel their clients to try their utmost to resolve disagreements without litigation. And because the overwhelming majority of lawsuits settle before trial anyway, creative ways to solve problems that arise concerning estate and trust matters should be explored as soon as possible. With growing frequency, both estate and trust advisors and courts are turning to

mediation as a relatively quick and inexpensive way to solve these problems.

What is mediation?

There are many ways that disputes can be resolved. For instance, if the parties in any lawsuit do not settle, ultimately the case will be resolved by a judge or jury after a trial or other hearing. Similarly, in arbitration the parties present their case, and a neutral arbitrator makes a decision on the dispute. In these situations, the result is imposed on the parties through the decision of the judge or arbitrator.

Mediation is a quite different way of resolving disagreements. In mediation, a completely neutral person—a mediator—tries to help the parties (often assisted by their lawyers or other professionals who may be involved) resolve a dispute. One key distinction from other methods of dispute resolution is that a mediator does not make any decision and thus cannot impose a result on anyone. Instead, the mediator attempts to

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help the parties resolve the dispute through an agreement. Because the mediator has no power to force anyone to resolve a matter, nor does she decide who "wins" the dispute, the mediator simply tries to bring about a settlement that is agreed to by all involved.

If the parties cannot reach an agreement, the mediation ends and the case proceeds towards trial. However, often the mediator and the parties will agree to meet again soon if the parties seem close to a resolution, or even some months later after discovery or other proceedings have taken place.

Mediation is generally a voluntary option that estate and trust practitioners may propose to their clients before or after a lawsuit is filed. Increasingly, courts are recognizing the value of mediation in estate and trust controversies. Although mediation is frequently used in other types of litigation, it seems uniquely appropriate for contested estate and trust matters, where the parties typically are related (or at least know each other) and where emotions may be especially strong. In mediation, everyone has the chance to have his or her say, often directly to the other parties, and in a setting in

which people may speak freely while trying to understand the other parties' views, with an eye towards an overall resolution.

To ensure that the parties and any advisors speak freely in mediation, it should be agreed at the outset that everything that is said at the mediation is completely confidential and may not be referred to in any later litigation. Many jurisdictions have laws that protect the confidentiality of the mediation process, just as similar laws protect the confidentiality of settlement discussions in lawsuits.²

In many jurisdictions, courts try to resolve cases through settlement conferences before a judicial officer.³ Although such conferences often are successful in settling cases, they may have significant drawbacks. The judicial officer usually has limited time to prepare for and handle the settlement conference, and often will meet only with the attorneys and not the parties themselves. Such time constraints, and the exclusion of parties who may feel a need to express their concerns, may impede a resolution.

These disadvantages have caused many probate courts to see the value of mediation as an alternative to more traditional settlement conferences. The parties and the mediator can allow sufficient time for the preparation and handling of the mediation. Moreover, because the parties participate directly in the mediation and are generally able to share their views with opposing parties and the mediator, the parties are an integral part of the process.

Texas has been among the leaders in developing creative ways to resolve lawsuits, having established the Texas Alternative Dispute Resolution Procedures Act in

1987.⁴ The Texas statutory framework permits judges in all types of disputes to order the parties to participate in mediation, among other forms of alternative dispute resolution.⁵ The Probate Court in Dallas County, Texas, has been favoring mediation for years as a way to resolve contested estate and trust matters.

As another example, at least two judicial districts in California have turned to different types of mediation programs for lawsuits involving estates and trusts. The San Francisco County Superior Court has a voluntary mediation program that is being used for most estate and trust disputes.⁶ There, the court decides on a case-by-case basis whether mediation is appropriate, and in practice strongly encourages the parties in most cases to try mediation. In contrast, the Los Angeles County Superior Court now has a *mandatory* mediation program for all contested estate and trust matters before it.⁷

The Los Angeles program is particularly instructive not only because it is mandatory but also because the court's local rules provide a court-supervised mediation framework that begins right after the first appearance by all parties in a contested matter.⁸ If necessary, this process continues with further mediation efforts just before trial.⁹ The Los Angeles program has proved to be quite successful, and the San Diego County Superior Court is considering a program modeled on it.

How is a mediator chosen?

Anyone who is acceptable to all the parties may serve as a mediator. There are many professional mediators throughout the country who handle a broad range of matters, including civil, family and probate

¹ Cal. Prob. Code § 8270 and 16061.8.

² See, e.g., Cal. Evid. Code § 1115 *et seq.*, 1152, and 1152.5; Tex. Civ. Prac. & Rem. Code § 154.073; N.C. Gen. Stat. § 7A-38.1; Fla. Stat. § 44.102(3).

³ Most settlement conferences appear generally to be left to judicial discretion through local court rules rather than being mandated by state laws. See generally Orange County [California] Superior Court Local Rule 448; Los Angeles County Superior Court Local Rule 7.9(b)(5).

⁴ Tex. Civ. Prac. & Rem. Code § 154.001 *et seq.*

⁵ Tex. Civ. Prac. & Rem. Code § 154.023.

⁶ San Francisco County Uniform Local Rule 14.16.

⁷ Los Angeles County Superior Court Local Rules 10.200 *et seq.*

⁸ *Id.*

⁹ Los Angeles County Superior Court Local Rules 10.200 *et seq.*

disputes. Similarly, many attorneys, accountants and other professionals undergo mediation training and supplement their professional practices by acting as mediators in areas within their expertise. In jurisdictions where local courts have mediation programs, there usually are panels from which mediators may be selected by the parties or appointed by the court.

As with other types of professionals, it is often helpful to obtain referrals from those who have used the services of particular mediators. The nature of a specific estate or trust dispute may determine whether a certain mediator is the right choice.

For example, in complex matters involving accounting issues or breach of fiduciary duty claims, it may be helpful to have a mediator with a legal or accounting background in estate and trust matters—especially when tax issues arise—that may be crucial in reaching a settlement. In other matters, the stature of a retired judge serving as a mediator may be useful. Moreover, a mediator with specific expertise may be able to educate the parties and their advisors about the strengths and weaknesses of particular claims or defenses, in an effort to focus the parties on reasons to settle the matter.

How does mediation work?

Once selected, the mediator will normally communicate with the parties (or their advisors) about the manner in which she conducts mediations. Mediators may have very different procedures to follow before the actual mediation session. Some mediators require the parties to sign a mediation agreement and to provide a fee deposit, while other mediators serve as volunteers. Also, some mediators

will request a short written statement from each party about the dispute, often together with key documents. Depending on the complexity of the matter, detailed legal briefs may be required, as well as calculations of damages or other data.

Most mediations take place at the mediator's office, and are usually scheduled for one-half or a full day, although mediations may be scheduled for several days or continued if progress is being made. Typically, the mediator starts by meeting together with all the parties and their advisors to explain the mediation process and to discuss the dispute in general terms. In addition to educating the parties about the mediation process, this meeting provides a forum for the parties to express their thoughts to each other and to acknowledge that they at least hear what the other parties are saying, even though they disagree. Some mediators may also ask attorneys who are present to give short opening statements about the case.

Facilitating communication among the parties is a key aspect of mediation, and causes mediation to be especially well-suited for estate and trust disputes. Because most of estate and trust disagreements involve parties who are related by blood or marriage, there generally has been a breakdown of communication that culminated in the dispute. Even absent a relationship among the parties, such as disputes involving a corporate fiduciary, the heart of the problem often revolves around communication issues.

Often, parties have been unaware of the terms of their relative's estate plan until after their relative's death because it is quite common for people not to discuss

Practice Notes

If mediation is being considered, explain the mediation process fully to your client, and provide advice about a reasonable range of settlement options. It also may be appropriate to instruct the client not to discuss certain matters, and to provide guidance on ways for the client to make his or her points appropriately.

their estate plans with others, even close family members. Or there may have been tensions simmering because a parent had remarried, and the relationship between the new step-parent and the spouse's children has been uneasy. Moreover, usually the key person who could have answered all the questions or addressed all the issues is dead. In mediation, a chief goal for the mediator is to facilitate an open discussion so the parties can address concerns that may not even relate specifically to the underlying dispute about a disposition of assets.

Although there are many different approaches, in most mediations the parties will sometimes all be together with the mediator, while at other times each party will meet privately with the mediator. These private sessions, often referred to as "caucus" sessions, are completely confidential; the mediator will not tell the others what one party has said privately unless she has been given permission to do so. Frequently, the mediator will shuttle back and forth between different rooms, trying to bring the parties closer to settlement. Most mediators insist that all parties be present at the mediation, although in special sit-

uations (such as an out-of-state resident) a mediator may agree to have a party participate by telephone.

In discussing the dispute with the parties and their advisors, the mediator tries to find common ground on which the parties agree. As the parties agree on more and more points, the mediator tries to help them to reach a complete resolution of all disputes between them.

If a resolution is reached, the terms are usually put in writing and signed by the parties (and their lawyers, if present). If possible, the terms of the resolution will be written down and signed at the mediation, although sometimes it is necessary to finish the documentation later. Both for psychological and legal reasons, it is generally preferable to have some type of written documentation of the agreement signed by the parties at the mediation; otherwise, parties who orally agree to a settlement may have second thoughts following the mediation and what had appeared to be a resolution may fall apart.

How should you advise clients in mediation?

The issue of how lawyers and other professionals can best advise their clients in preparing for and handling a mediation could easily be the topic of a lengthy article by itself. However, for the sake of brevity there is a simple rule that professionals should follow in advising clients in an estate or trust mediation with a competent mediator—stay out of the way! Seriously, because mediation is so geared to the participation of the parties themselves, advisors need to make sure that they do not impede the settlement process

either by relegating their clients to a silent role or by denigrating a particular settlement option the client appears willing to consider.

This does not mean that advisors should be passive in working with their clients before and during the mediation. It is important that practitioners explain the mediation process fully to their clients, and provide advice about a reasonable range of settlement options. It also may be appropriate to instruct the client not to discuss certain matters, and to provide guidance on ways for the client to make her points appropriately.

However, as noted above, because one of the most significant benefits to mediation is the fact that the parties participate directly in crafting a settlement, it is a mistake in mediation for advisors to inject themselves into the process too much. The best way for a mediation to be successful is for the parties to speak their minds, especially to each other, in addition to having a frank dialogue with the mediator without the other parties present.

Could following this course lead to a settlement that you, the professional, believe is not acceptable from an economic standpoint? Perhaps, and it is your duty to advise your client accordingly. But there is nothing wrong with assuring your client that you understand there are emotional or other non-economic reasons why the settlement may be in the client's best interests, even though you, as a professional who must focus on the economic issues, cannot recommend it. In this way you will fulfill your professional obligations to your client, even if the client

nevertheless chooses to resolve the dispute.

Conclusion

Because mediation has proved to be an effective means of resolving disputes, estate and trust professionals must be prepared to advise their clients about this method of alternative dispute resolution. In addition, mediation may be mandatory for certain types of disputes. Thus, practitioners must be mindful of the benefits of mediation and be ready not only to participate in or even propose it, but to be enthusiastic (and knowledgeable) about it. ■



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