



Probate Attorney's Toolkit for Mediation

State Bar Trust and Estate Section Webinar

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Agenda

- Why Probate Cases Are Especially Suited for Mediation
- The Attorney's Role in a Successful Mediation
- Dealing with High Conflict People in Mediation
- Unique Considerations in Probate Mediation
- Use of Mediation in Non-Litigation Contexts

Why Probate Cases Are Especially Suited for Mediation

- The parties often have an ongoing personal relationship
- The parties have difficulty communicating with one another
- Emotional issues make settlement difficult
- Parties act out old family conflicts that create barriers to settlement
- Litigation will be financially and emotionally draining
- The parties wish to retain control over the ultimate outcome of the case, for instance, when operation or control of a family business is involved
- Privacy issues are important

The Attorney's Role in a Successful Mediation

- Plan the mediation with the mediator and opposing counsel
- Prepare your client for the mediation
- Make sure the other side understands your position
- Manage your emotions
- Express yourself in ways that calm rather than arouse passions
- Be patient
- Remain open and flexible
- Be prepared for substantive, procedural, and tax issues
- Encourage clients to speak directly to the mediator
- Be culturally sensitive
- Recognize that mediation is not an adversarial proceeding

Who Are High Conflict People?

High conflict people are persuasive and often charming people driven by one or more of the following fears:

- *The fear of being abandoned*
- *The fear of being belittled*
- *The fear of being dominated*
- *The fear of being ignored*
- *The fear of being betrayed*

Distorted Thinking Causes Distress

- **All or nothing thinking** – events are viewed in terms of absolutes.
- **Personalizing events** – random events are taken as intentionally harmful.
- **Jumping to conclusions** – the worst is assumed from very little information.
- **Mind reading** – beliefs about the thoughts and intentions of others are taken as though they were confirmed facts.
- **Exaggerating events** – broad conclusions are drawn from minor or unusual events.
- **Projection** – internal problems are projected onto the environment.

HCP Behavior Pattern

- Unable to accept or heal from a loss.
- Negative emotions dominate thinking.
- Emotional feelings are transformed into perceived fact.
- Unable to reflect on their own behavior.
- Avoid any responsibility for causing the problem or creating a solution.
- Prone to self-sabotaging behavior.
- Constantly seeking allies and advocates.

HCPs and the Court Process*

Characteristics of HCPs	Characteristics of Court Process
Preoccupation with blaming others	Purpose: decide who is to blame
Avoids taking responsibility	Court will hold the target liable
All-or-nothing thinking	Win or lose - the only outcomes
Always seeks attention/sympathy	One can be the center of attention
Constantly seeks allies/advocates	Can bring advocates to court
Speaks in dramatic extremes	Can testify in court dramatically
Focuses on target's past acts	Focus is on past acts of parties
Punishes those who hurt them	Court can dish out punishment
Wants others to solve problems	Court can solve their problems
Okay to lie if you feel desperate	Perjury is rarely punished

Preparing the HCP Client for Mediation

- Genuinely listen to client's story with active listening. Be calm and soothing.
- Focus on the emotional message rather than the literal content of the complaint.
- Listen for how the feelings distort the facts.
- Validate the person, not the complaint.
- Maintain a healthy skepticism, while remaining supportive, respectful and empathetic.
- Listen to fear and anger without getting hooked by the persuasiveness.
- Don't question the truth, rather focus on needs.

- After allowing expression of emotion, re-direct the HCP to a discussion of interests and problem-solving.
- Give the client a clear sense you are on their side.
- Re-direct the conversation back to the subject you set out to discuss.
- Focus on strengths to provide acknowledgment.
- Assign specific tasks that can be accomplished.
- Avoid threats, personal attacks and direct confrontation.
- Focus on external sources to induce the HCP to think more realistically. E.g., “I understand, but a judge would likely misconstrue your actions.”

Negotiation Process with HCP's

- Anticipate a slow negotiation process.
- Encourage patience from the other side.
- Prepare for breach of agreements and the need to cover the same ground multiple times.
- Anticipate crises and hold firm to your boundaries.
- If attacked, do not become defensive or respond in kind.
- Don't give up or feel like a failure if they won't always listen to your good counsel.

Tips for Working with Your Mediator

- Alert the mediator to the personality dynamics
- Collaborate on the structure of the mediation:
 - Individual caucuses predominate over joint sessions.
 - Length of time that will be needed with the HCP.
 - Anticipate the need for multiple sessions.
- Support the mediator’s methodical approach to moving your client forward:
 - Allow the mediator to focus on your client instead of you.
 - Don’t become a “negative advocate.”
 - Collaborate with the mediator on an approach to your client.
- Involve mediator in post-mediation implementation of the settlement.

For Further Study

- Read:
 - *High Conflict People High Conflict People* (Janis Publications 2006) by Bill Eddy
 - *“It’s All Your Fault!” 12 Tips for Managing People Who Blame Others for Everything High Conflict People* (Janis Publications 2008) by Bill Eddy

Unique Considerations in Mediation of Probate Cases

- **Before mediation:** determine if a Guardian ad Litem is needed. (See article on *The Doctrine of Virtual Representation* by Josef D. Houska in *Trusts and Estates Quarterly*, Winter 2004)
- **Before mediation:** Tell the mediator and opposing counsel who will attend.
- **During mediation:** Get emotional hot-button issues on the table before the big issues are decided.

Interpretation vs. Modification or Termination of Trust

- **Section 15043**
 - Occurs after the death of settlors
 - Consent of all beneficiaries needed
 - Is continuance of the trust as created necessary to carry out a material purpose of the trust? If so, good cause needed to modify or terminate trust.
 - Spendthrift clause: if present, the court has no discretion to modify or terminate trust
- **Can the proposed action be characterized as “interpretation” of the trust instead?**

Other Modification or Termination Statutes

- **Section 15404** – Modification with settlor and beneficiary consent
 - If all beneficiaries consent, then modification shall be granted
 - If some beneficiaries do not consent, then modification only allowed if it does not impair interests of non-consenting beneficiaries
- **Section 15408** – Uneconomically low principal
- **Section 15409** – Changed circumstances
- **Section 15411** – Combination of similar trusts
- **Section 15412** – Division of trusts
- **Procedure: Section 17200**

Other Considerations

- **Tax Consequences**

- Be prepared to consider the estate, gift, GST, income, and property tax consequences of settlement.
- Consider risks of tax strategy – *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967)

- **Drafting of Settlement Agreement**

- See chapter by Shirley Kovar on the drafting of settlement agreements in *California Trust and Probate Litigation* (CEB). Sample clauses include:
 - Representations by parties concerning full disclosure of the decedent's assets
 - An acknowledgment that no guarantees have been made concerning the tax consequences of the settlement agreement
 - An agreement that no party has violated the no contest clause
 - A contingency for court approval

Use of Mediation in Non-Litigation Contexts

- **Estate Planning**
 - Very large estates
 - Potential conflicts of interest in estate-planning process
 - Family circumstances are complex
 - Family business succession planning is needed
- **Include Dispute Resolution Clause in the Trust and Will**
 - “In keeping with my desire that our family remain strong and harmonious, any disputes arising under this Trust shall be resolved by mediation if at all possible. The trust estate shall pay the cost of the mediation.”

- **Elder Care Decisions**

- Housing and caregiving
- Driving and transportation
- Financial decisions, powers of attorney and conservatorship
- Control or sale of businesses and property
- Sibling rivalries
- Geriatric assessment and health care
- End of life

- **Mediation between Trustee and Beneficiaries**

- Help trustee to understand needs and interests of beneficiaries
- Help beneficiaries to understand the constraints of trust law
- Help all to chart a course for the future
- Especially helpful with HCP beneficiaries



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