MEDIATION IN TRUSTS AND ESTATES PRACTICE: WHO NEEDS IT?

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I. INTRODUCTION

EVERYONE IS IGNORANT, ONLY ON DIFFERENT SUBJECTS·

Every good storyteller knows that there is no story if there is no conflict. Conflict is often the impetus for change, be it for development or for destruction, within a person, interpersonally, and socially.

There are a variety of ways that people handle conflict: denial, avoidance, suppression, resignation, tolerance, conciliation, negotiation, litigation, violence. Different cultures and societies accept and promote different approaches and processes for intrapersonal, interpersonal, and social conflict.

In the recent past, as the personal and social costs of litigation and its limitations become evident, "alternative dispute resolution" processes have become increasingly popular. These alternative dispute resolution methods have come to be seen as possibly offering faster, cheaper, more informal, and most importantly, more satisfying results. This outline focuses on mediation among the variety of alternative dispute resolution processes.

A. Varieties of Alternative Dispute Resolution

The use of the term "alternative" bespeaks the fact that litigation is seen as the norm; that is, it suggests that the filing of a lawsuit is the default, or at least the primary, and possibly, the preferred avenue of dispute resolution. As the "alternative" processes are practiced more widely, it may be that litigation will be seen as just one of the dispute resolution methods.

If lawyers are seen as problem solvers, advocates, and advisors who use legal tools to assist their clients, alternative dispute resolution processes can be seen as additions to their toolbox. At the same time, as alternative dispute resolution processes, such as mediation, become its own separate and distinct profession with its own set of rules, standards, and ethics, the role of lawyers in mediation representing parties and as neutral mediators will change.

Different kinds of disputes call for different processes of their resolution, however, and the benefits of the "alternative" dispute resolution methods (cheaper, faster, and less formal) may make them more accessible and more

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· With thanks to Will Rogers

effective in certain areas of law and life, such as consumer law, family law, and trusts and estates law. Moreover, these "alternative" methods may prove to be quite complementary to the traditional litigation process, much akin to how "alternative" medicinal practices may be complementary to the standard 20th century medical practices.

1. Arbitration

Arbitration is a process somewhat like having a court trial, except that it is with a private judge. Arbitration differs from mediation because the disputing parties agree that one or more neutral arbitrators can make the final decision or judgment after a hearing, similar to a judge in the public court system. The arbitration process is less formal than a court trial, often dispensing with the rules of evidence. The arbitration outcome may be binding (enforceable in court), or non-binding (advisory only until accepted by the parties).

2. Neutral Evaluation

Soon after a case had been filed in court, the case is referred to an expert, often an attorney, who is requested to provide an unbiased evaluation of the dispute. After obtaining information from both sides, the neutral expert provides an assessment of the likely outcome of a trial. The evaluation may assist in settlement of the case.

3. An Ombudsman

An ombudsman is a neutral person selected by an institution, such as a university, hospital, or agency, to investigate claims or complaints and to resolve them. Ombudsmen work independently and impartially and this private process is voluntary and non-binding.

4. Settlement Conference

The settlement conference is a court imposed process that occurs a short time period before trial. The attorneys for the parties meet with the judge who strongly pushes for settlement.

5. Mediation

Mediation is a neutral third-party assisted, voluntary process in which participants with conflicting interests attempt to reach a mutually acceptable agreement. Though mediation is sometimes mandated by the court system, the process remains voluntary in that the parties are not compelled to come to an agreement. The power to come to an agreement is solely held by the parties themselves. Mediation is the most common alternative dispute resolution process currently in use. Mediation offers benefits over traditional adjudication. It is usually faster and considerably less expensive than litigation. As a private proceeding mediation

can offer significant benefits in a trust or estate dispute, because these conflicts often involve more than merely money.

B. Mediation

1. Legal Consequences

Testators often seek to enforce forfeitures on unruly beneficiaries by means of a no contest clause. This sentiment often carries over to a post death dispute, and may be an issue leading to the mediation. The general rule precludes forfeiture in a contract. See Civil Code §1675(d); *Ridgley v Topa Thrift & Loan Ass'n* (1998) 17 C4th 970, 73 CR2d 378. This rule is distinct from the enforceability of a no contest clause in a testamentary instrument. Nevertheless, parties to a settlement pursuant to mediation may not remember the contract rule when they seek to coerce compliance with the settlement by including a forfeiture provision in the settlement agreement. This coercion may be directly or by reference to the no contest clause. In *Timney v Lin* (2003) 106 CA4th 1121, 131 CR2d 387, the Court of Appeal held that a forfeiture provision in a settlement agreement was illegal and unenforceable. Court approval of a settlement does not immunize the agreement from attack on grounds of illegality. *See California State Auto. Ass'n Inter-Ins. Bureau v Superior Court* (1990) 50 C3d 658, 664, 268 CR2d 284. Arguably, therefore, a settlement agreement entered into post-death may vitiate the no contest clause in subsequent disputes.

A contract can impose mediation as a condition precedent to the prevailing party seeking an award of attorney s fees in the subsequent judgment. A party that prevails in the underlying litigation will not be awarded attorneys fees if that party did not satisfy the condition precedent of mediating. *Leamon v Krajkiewcz* (2003) 107 CA4th 424, 132 CR2d 362. Based upon the reasoning of *Leamon v Krajkiewcz*, therefore, a clause in a testamentary instrument enforcing an attorneys fees award, or perhaps even forfeiture, if a party refuses to mediate, may be enforceable.

The California legislative policy favors alternative dispute resolution, including mediation. *See* Business & Professions Code §§ 465, 465.5. The Legislature also anticipated judicially mandated mediation of civil actions. Code Civil Procedure § 1775 *et seq*. The statutory scheme limits s a mediator's testimony relating to mediation. Code Civil Procedure §§ 1119; Evidence Code § 703.5. Code Civil Proc. §§ 1119 and 1121 prohibit a court from considering report of mediator or declaration of party that is submitted in support of motion for sanctions that describes conduct or communications of party during mediation. *Foxgate Homeowners Assoc., Inc. v. Bramalea California, Inc*. (2001) 26 Cal. 4th 1, 15, 108 Cal. Rptr. 2d 642, 25 P.2d 1117.

Protection of testimony and other evidence used in mediation proceeding from discovery or use in evidence in civil action or proceeding is mandated by Code Civil Procedure §§ 1121 and Evidence Code § 703.5.

The confidentiality requirements of Evidence Code §§ 703.5, 1115 *et seq*. are absolute and include statements of parties made to each other. The Court will not imply a waiver of confidentiality. Waivers must be express. *Eisendrath v. Superior Court (Rogers)* (2003) 109 Cal. App. 4th 351, 360-361, 134 Cal. Rptr. 2d 716.

California Rules of Ct., Rule 1620 *et seq*. sets out the Rules for conduct of mediators in court-connected mediation programs for civil cases. Due to these restraints, a mediator and his or her law firm are disqualified from representing any party to a mediation in related litigation. *Cho v. Superior Court* (1995) 39 Cal. App. 4th 113, 123-125, 45 Cal. Rptr. 2d 863.

2. Definition

Informal mediation, situations where a third party helps disputants reach some resolution or management of their dispute, happens all the time in every area of life. Some cultures, such as the Chinese and the Japanese, have mediation as a long-standing social and legal tradition. Early Quakers employed both mediation and arbitration to resolve commercial and family disagreement. In more recent U.S. history, but prior to mediation's popularity in other areas, the most familiar forum for mediation was in labor-management relations.

Mediation defies easy definition, like most social practices. We can begin to define it as a *process* in which the participants, working together with one or more neutral persons, discuss their needs and wants, hone in on issues, develop options, and reach a consensual agreement. The mediator guides the process but the responsibility of the outcome is primarily in the hands of the disputing participants. What mediation is can also be understood in terms of what it is not. Mediation is not self-help, competition or adjudication.

Mediation, according to The American Heritage® Dictionary of the English Language, Fourth Edition, is "the act of mediating; intervention." A key idea in mediation is the presence of a neutral party who mediates, one who intervenes. And what necessitates that neutral party's intervention is conflict, conflict that needs to be settled or managed in some way. Thus, a functional definition of mediation might be that it is an intervention aimed at conflict resolution and/or conflict management. That is, a manifest dispute may be resolved, while deeper underlying conflict may remain.

The author's favorite definition is that ***Mediation is the process parties in conflict use to reach the best agreement of which they are capable to resolve their dispute ("BAC").*** This definition does not require the parties to reach a "fair" or "just" or "equal" agreement. Relying on any one of those judgments may prevent the parties from coming to an understanding.

3. Theories of Mediation

The practice of mediation occurs in the context of assumptions or presuppositions about human nature, values, conflict, power, and goals.

As much as mediation is a process or a social practice, there are theories that inform the practice. The development of mediation, both in its broadening application into a various forums and as a profession in itself, is seen in the articulation of a theory or theories of the practice of mediation.

Formulating a theory or shared umbrella of principles, values, and beliefs, that allows for variations in styles, techniques and implementation can improve the practice of mediation and make the teaching of mediation easier.

Jay Folberg and Alison Taylor in their book, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation*, states eight propositions, quoted or paraphrased below, as a "basis for a system of shared, unified beliefs for mediators":

> Proposition 1. People try to escape what they see as negative (pain) and go toward what they see as positive (pleasure).
>
> Proposition 2. People make better decisions when they are consciously aware of the feelings created by conflict and can integrate these feelings into their decisions.
>
> Proposition 3. In personal matters, the participants themselves can make better decisions than an outside authority.
>
> Proposition 4. Participants are more like to abide by an agreement if they develop a commitment used to reach the agreement and feel responsible for its outcome.
>
> Proposition 5. For purposes of mediation, the past history of the participants is important only for its relation to the present and as a basis or predicting future needs, intentions, abilities, reactions.
>
> Proposition 6. The more accurately a mediated agreement reflects the needs, intentions, and abilities of the participants, the more likely it is to last.
>
> Proposition 7. Since the participants' needs, intentions, and abilities will probably change, the process should include a way of modifying the agreement in the future.
>
> Proposition 8. The mediation process is substantially the same in all situations, but scheduling, techniques, and tasks to be accomplished must match the circumstances, participants, and mediator.

Folberg and Taylor propose these eight propositions as starting points. They note that there are other basic assumptions: the participants want to resolve their conflict, the participants are willing to change something about their current

position in order to resolve their conflict, and the participants are willing to undergo the process of mediation in order to resolve or manage their conflict.

Robert Baruch-Bush and Joe Folger, in *The Promise of Mediation,* propose the theory of "transformative mediation." This theory seeks not only agreement in the mediation process, but "empowerment of the participant" and mutual recognition by the participants of the validity of each of them. In a legal environment, especially a trustor estate dispute, this approach, in seeking to achieve more than "mere agreement," may seek to accomplish too much.

4. Types of Mediation

a) Distributive vs. Arrangement

Mediation typically falls into one of two categories: *distributive* or *arrangement* cases. Distributive cases are familiar to trust and estate lawyers: it is a dispute about who gets what. The essence of the conflict is dividing acknowledged resources among the participants. An arrangement case requires the structuring of relationships on a continuing basis. Classic examples of arrangement cases are child custody; in the probate context, conservatorships often are arrangement cases.

b) Preventive vs. Remedial

Prevention may be as useful as post-symptom treatment. Given that mediation is a process for conflict resolution or management, different kinds of conflict may be better addressed at different times.

Mediation may be useful in making the potential conflict clear, or by avoiding the need for escalating it later, provided that the potential conflict is recognized early on. For example, in marriages, mediation regarding premarital or marital property agreements before divorce may avoid dissolution. In estate planning, mediation regarding different bequests among surviving relatives, depending on differing needs and the nature of the personal relationship to the testator (e.g. second spouse and children of prior marriage; business-manager child and equity-stakeholder child; well-off child vs. financially needy child), may be appropriate if postmortem litigation is likely.

In contrast, certain kinds of *structural* conflict may be inherent in a given social situation but there is nothing to be mediated until a manifest conflict develops in specific situation. Examples of these *structural conflicts* are labor-management relations and disputes between environmentalists and their opponents. Nevertheless, it may be possible to mediate prior to a manifested conflict when people are aware of the latent and inherent conflicts in social structures and

institutions, but it may be less a matter for intervention by mediation and more for change in social structures and institutions through means other than mediation.

In certain cases, mediation can only occur remedially, that is, only after something has gone wrong. This use of mediation is by far the most common. The classic examples of remedial mediation are cases arising from breach of contact, tort cases, marital dissolution and trusts and estates disputes.

II. Concepts of Mediation

A. Persons in Conflict

The theory of the American judicial system is to remove violence from the resolution of conflict. The theory of mediation is resolve conflict by consensus, rather than by coercion.

Mediation is a process, not an objective. The fundamental purpose of mediation is to move the participants from *the circle of disagreement* to *the circle of agreement*. None of the concepts discussed in this section "belongs" to the field of mediation; rather, these concepts inform the theory and practice of mediation.

A mediator can view conflict as resulting from the participants' *varied perspectives* on the existing situation; or deriving from their *differing belief systems and values*; or as resulting from their *differing objectives and interests.* Essential to any successful mediation process, therefore, is that each participant undergoes the experience of being heard on that participant's perspective, and on what they want, and why they want it.

Nevertheless, people in conflict also share common ground. Their common ground can include overlapping interests, such as resolving the conflict economically and expeditiously. Participants can also share interdependence: no one person can impose a resolution on the others without suffering a high price. Participants can also share points of agreement; even in the most hostile families these points may be recognized.

B. Conflict

To state the obvious: conflict exists in every facet of life. A common reaction to conflict is that it is undesirable because it holds the potential for loss. A mediator may assist the participants by presenting conflict as holding the potential for gain by constructing a better system or structure.

Conflict may be defined as existing when at least one participant declares dissatisfaction with the *status quo*. Therefore, it only takes one to create conflict. When one participant declares a need to change that person's *role*, all those involved with the participant must examine (or re-examine) their roles.

A participant's *declaration of conflict* is composed of *perspective* and *parts.* The participant's perspective is a product of his or her own determination of what choices best satisfy the person's self-interest. In this "self-interest" is inclusive to the human being; it is not limited to economics or achievement.

Mediation is intended to address interpersonal conflict that can be defined as competition among parties regarding (seemingly or actually) incompatible values or goals. Persons in conflict simultaneously undergo an internal process in which the conflict is acknowledged. This internal *acceptance of conflict* announces that the declarant prefers to suffer through the difficulties of creating conflict to perpetuating the *status quo*.

One definition of interpersonal conflict, offered by Kenneth Boulding, is that it is "a situation of competition in which the parties are aware of the incompatibility of potential future positions and in which each party wishes to occupy a position which is incompatible with the wishes of the other." (Boulding, p.5). His view was that there are three kinds of interpersonal conflict: simple (among individuals), group (among unorganized populations), and organizational (representatives).

Students of conflict have proposed that it has certain traits. (Folberg, p.18-19). R.J. Rummel describes the life cycle of a conflict in four stages that are a continuing spiral:

(1) The latent conflict;
(2) The initiation of conflict;
(3) The balancing of power; and
(4) The disruption of equilibrium.

Rummel theorizes that how interpersonal conflict manifests depends on whether the power structure in place is *exchange*, *authoritative*, or *coercive*.

Morton Deutsch compares "manifest conflict," which is explicit, with "underlying conflict," which is implicit or unconscious. Mediators reflect this terminology when they speak of the *presenting problem* and *hidden agenda*. Mediators need to have the ability to recognize what are the manifest conflicts or presenting problems and what are the underlying conflicts or hidden agendas, in order to be able to guide an effective mediation. Mediators need to be able to discern the real "conflicts," regardless of what the parties are professing.

The possible outcomes of conflict may be described as follows: mutual loss (lose/lose); gain for one and loss for the other (win/lose); mutual gain (win/win); stalemate; compromise. The processes used for dealing with conflict may promote certain outcomes more than others – mediation is one that promotes mutual gain outcomes.

Folberg (p. 24) summarizes conflict as a "set of divergent aims, methods, or behavior." The opposite of conflict would be *convergence*: the aims, methods, or behavior flow together. Folberg (p.25) suggests that perhaps "convergence promotion" is a better appellation than conflict resolution or conflict management.

Between the two extremes of resolving conflict through avoidance or coercion are the procedural or process methods for conflict resolution, such as mediation and litigation. Given its non-adversarial nature and procedures, mediation is a process for dealing with conflict in a way that promotes mutual understanding and gain, sharing of power, taking responsibility for outcome and implementation, and preservation of preexisting relationships – all admittedly pro-social behavior.

C. Nature of Power

Mediation, like any other social interaction, involves exercises of power by multiple participants. Each participant may have different perceptions and beliefs about power and whether he or she will have sufficient power in the process to meet the needs that he or she brings to the process. The mediator's awareness of the varying sources of power and the ability to use the mediator's tools to prevent power imbalances can play an important role in bringing about a successful outcome.

1. Sources of Power

- Participation. Each participant can participate or not participate. Where a participant may be a reluctant participant and acting generally non-engaged, the mediator can point out that withdrawing from mediation is an option, but it comes with consequences that may be undesirable. Actively participating may result in getting more of what he or she needs and wants. Determining whether participating or walking away is better requires each participant to be aware of that participant's BATNA, or best alternative to negotiated agreement. See discussion below in II.D.2.
- Knowledge of goals. Knowing what one wants and what supports one's position in obtaining it makes it more likely to be obtained.
- Ability to take risk. If a participant is able to risk, whether by giving something or disclosing something that the other participant wants, sufficient rewards for the risk-taking may come.
- Personal power. The amount of commitment, identification, or value that participant imbues a goal/desire affects how others react to it, assuming that it is understandable by the others.
- Legitimacy/Social power. Reputation or history counts, if the other party acknowledges it.
- Interpersonal power. As social beings, what the others think of us matters to us. People react strongly to what is perceived as respectful or insulting or conciliatory or uncaring.

- Retaliation (Reward/Punishment). An exercise of the "more" powerful person on the "less" powerful may have negative side-effects, such as subsequent passive-aggressive or sabotage behavior, and thus concessions acquired through force or what is perceived as force may come at a high price. Conversely, graciousness by the more powerful may garner unbargained-for rewards.

2. Negotiation Power

Negotiation power can be defined as the ability of the negotiator to influence the behavior of another. Negotiating power may be real or apparent, but it is relative between the participants, it is always limited, and it can change over time. Exercising negotiating power has benefits and costs and relates to the participant's ability to punish or benefit. Its exercise is increased by the participant's ability to endure uncertainty and commitment, and depends upon the perceived BATNA. Negotiating power is always enhanced by professional support, personal knowledge, skill, resources and hard work, but only exists to the extent that it is accepted.

D. Communication

Effective communication is crucial to successful mediation. It behooves the mediator not only to model good communication skills, but also to be aware of how to promote effective communication and of what may be preventing it and how to deal with the barriers to communication.

Since "communication" is possibly an even bigger topic than "conflict" the main point of mentioning this concept in this outline is to point out that communication is mostly non-verbal and that it has as much to do with accurate perception and conveyance of feelings as with thoughts. It's been proposed by Moore and Yamatomo that words comprise only about 10% of human communication. In the legal world where words predominate, it is easy to lose track of the importance of what is not spoken, but still needs to be understood.

1. Empathy & Understanding

Whether in commercial or family settings, it is helpful when each participant comes to understand better the other side's point of view and interests. The mediator can sometimes offer the empathy and understanding which is required to reduce the emotional tension level so that negotiations may proceed.

As the mediator reflects, summarizes, and asks for clarification from each participant, that person's viewpoint and interests, the other participants may come to recognize for themselves the speaker's viewpoint. Hearing the mediator normalizing the emotions, fears, and hopes and articulating unspoken interests and issues may nudge the participants to understand each other better.

2. Nonverbal Communication

As Barbara Madonik discusses in her book, *I hear what you say, but what you are telling me? The strategic use of nonverbal communication in mediation*, much of communication is *not* verbal and *not* conscious. She uses the phrase "other-than-conscious communication" to describe the sending of messages of which people are not consciously aware. Madonik presents in detail how a mediator can use nonverbal communication strategies in order to conduct mediation more effectively at each stage of mediation.

For example, Madonik observes that fear is an emotion that often prevents effective communication (Madonik, p. 37). Beyond the commonly known "fight or flight" reaction, fear triggers a unique physical pattern in each individual. The mediator being aware of the unique and general fear patterns may be able to moderate or break the pattern by the mediator's own behavior so that a participant's fear pattern does not have a domino effect or otherwise negatively effect the mediation. For instance, if a participant's quickens the rate of her breathing, the simple act of the mediator slowing down and deepening her own breath may temper the participant's breath all without the participant's conscious awareness.

Mediators generally have much training and awareness of their verbal communication skills, but given that most communication is not verbal, it may be that mediators need more training in nonverbal communication. For example, by learning to read and respond to participants' body movement as indicators of feelings, thoughts, and goals, the mediator may be able to identify and work with and possibly work through the impediments to dispute resolution.

E. Negotiation

Negotiation is each party communicating for the purpose of reaching an agreement reflecting the best expression of the participant's self-interest. Mediation is negotiating with a neutral third party involved.

One could categorize two basic approaches to negotiation: positional (competitive) and interest-based (integrative). There may be a relationship between negotiation approaches and personality style, but it is idle to assume a correlation. For example, a negotiator with a charming demeanor may utilize competitive tactics, to the point that the pleasantries are part of competitive manipulation. It may be self-evident, but still bears repeating: the best negotiators usually possess both sets of skills. Two well-known books in the area of negotiations are *Getting to Yes: Negotiating Agreement Without Giving In* by Roger Fisher and William Ury and *Getting Past No: Negotiating Your Way From Confrontation To Cooperation* by William Ury.

1. Positional Bargaining

A competitive negotiator will consider a "good" agreement for his or side as one that is *better than fair.* Competitive negotiation assumes a "distributive" view on agreements: negotiation is the *division* of limited resources; one side's gain is the other side's loss; and a bargain reached today will not affect tomorrow's choices. Characteristics of a competitive negotiator are to open with a high demand, to stretch the facts, to stick to a position, to be tight-lipped, and to seek a clear victory. Competitive negotiators risk becoming trapped in their positions, which results in conclusory statements about what one will or will not do. Positional bargaining can easily become a contest of wills or social power, about who can win and make the other lose.

2. Interest-based Negotiation

Getting to Yes offers the idea that *principled negotiations* will lead to more productive outcomes than simply proceeding without structure and guidelines. Fisher and Ury argue that effective bargaining addresses one's own *interests,* rather than one's *positions*. To participate in principled negotiations, and thereby achieve the best of agreement of which the parties are capable, four main principles should guide negotiations:

- **Separate the people from the problem**. Substantive and relational issues always exist in negotiation. (These issues are especially acute in trust and estate disputes.) Make emotions explicit and legitimate. (This approach can prove treacherous in trust and estate mediation, and must be addressed carefully.)
- **Focus on interests, not positions**. Positions are symbolic representations that are the equivalent of one dimensional points in a space of infinite possible solutions. Explore what interests are underlying the positions; for example, ask "If you achieved all that you seek, what interests would that satisfy?"
- **Develop options**. With careful listening and communication, explore and develop a variety of possibilities which can provide for mutual gains.
- **Use objective criteria**. Rather than each side insisting on one outcome or another, try to develop objective criteria – such as the satisfaction of enumerated interests of both sides.

3. NA-NA-NA: Knowing one's Own

A frequent psychological mistake in negotiation occurs when a participant views "all the alternatives in the aggregate" rather than appreciating that if there is no agreement, a participant must choose just one other alternative and accept its risks. A participant needs to know that participant's three alternatives to reaching agreement in the mediation process. Ideally, the parties will share their own perspectives on their three "NA's" (negotiated agreements) with the mediator, part so that the mediator can be an agent of reality. This analysis will give a clearer picture of what is hoped to be obtained by negotiating.

a) BATNA

A participant's *best alternative to negotiated agreement*. The participant needs to ask him or herself: what can-or will- I obtain if I do not negotiate? What is my *best* upside? If I walk out today without an agreement, what is the most I can hope to achieve?

b) MLATNA

A participant's *most likely alternative to negotiated agreement*. The participant needs to ask him or herself: what is most likely to occur if I do not negotiate? What is my *most likely* result? If I walk out today without an agreement, what is the result I am most likely to see? Examples in litigation will be

- More legal costs;
- More expenditure of time;
- More stress;
- Continued lack of certainty.

Additionally, the factors specific to that dispute will also need to be calculated.

c) WATNA

A participant's *worst alternative to negotiated agreement*. The participant needs to ask: what could-or will-I lose if I do not negotiate? What is my worst downside? If I walk out today without an agreement, what is the least that I could receive?

4. Overcoming Barriers to Agreement

William Ury's *Getting Past No* is a sequel of sorts to *Getting to Yes*. In it he categorizes barriers to agreement under five general headings and provides a strategy for overcoming these barriers. The basic idea is to take an "indirect route," and *not* to do what comes as the initial reaction. The goal is to keep focused on playing a joint problem-solving game rather than slipping into adversarial confrontation. A summary of Ury's presentation of the five barriers and how to overcome each is contained in Appendix F.

F. Definition of Success

The purported goal of mediation is conflict resolution, or at least, conflict management. How can we evaluate the success of mediation as a dispute resolution method overall and in each specific instance?

The success of mediation as a process can be said to be confirmed by the studies that show a high rate of satisfaction, both on its own merits, and in comparison to litigation. The burgeoning of the practice itself is perhaps the best indicator of its success.

But more important perhaps is the question of how is the success of each specific instance of mediation to be evaluated? The success of mediation in each

specific instance can be evaluated both subjectively and objectively. On the subjective level, one may inquire as to whether the participants themselves are satisfied with the outcome. On the objective level, we can examine whether the mediation did what it supposed to do.

And what is mediation supposed to do? Fisher and Ury propose in *Getting to Yes* that "the most any method of negotiation can do is to meet two objectives: *first*, to protect you against making an agreement you should reject and *second*, to help you make the most of the assets you do have so that any agreement you reach will satisfy your interests as well as possible."

This comment serves to remind us that simply reaching an agreement in itself may not be the best indicator of success. The agreement can be the product of pressure or weakness, rather than a mutually beneficial outcome. A more objective indicator of success may be to ask if each part obtained via the agreement something better than their BATNA, or best alternative to negotiated agreement. The mediator needs to be aware of what each side's BATNA is, assuming that it is a realistic alternative.

Professor Robert A. Baruch-Bush proposes an alternative standard of success: the problem-solving approach to mediation defines success as improving the conflict situation, but a transformative approach would define success as the transformation of the parties. In the transformative approach, achieving the objectives of "recognition" and "empowerment" could also be a dimension of making mediation successful.

"Empowerment is achieved when disputing parties experience a strengthened awareness of their own self-worth and of their own ability to deal with whatever difficulties they are faced with, regardless of the external constraints upon them. Recognition is achieved when, given some degree of empowerment, disputing parties experience an expanded willingness to acknowledge and be responsive to other parties' situations and common human qualities," writes Professor Bush.

Under this approach, the empowerment (deeper self-understanding, clarity of one's interests, autonomy) and recognition itself (empathy for others, reassessment of others,) is an independent marker of success, dependent of any agreement reached and the level of satisfaction with that outcome.

G. Professional Standards & Ethics

A day may come when each state has its own rules of professional conduct for mediators, akin to the rules for attorneys. At present, some state and federal courts have established mediator ethics rules and some states have statewide ethics rules adopted by state bar associations. California Judicial Council has promulgated Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases, effective January 1, 2003. See Appendix D for a copy of these rules.

In the early 1990's a joint committee of interested organizations drafted the Model Standards of Conduct for Mediators with the stated purpose of serving as a guide for mediators, informing the mediating parties, and promoting public confidence in mediation as a process for resolving disputes. Although various organizations informally or formally adopted its own rules of conduct prior to the drafting of the Model Standards, these standards became widely recognized.

Among other principles such as neutrality of the mediator and self-determination by the parties, confidentiality is an important principle for mediating parties – both in terms of protection of privacy and as an evidentiary privilege. At present, most states, including California, have evidentiary laws that address the confidentiality issues in mediation. The Uniform Mediation Act, finalized in 2001, demonstrates the primary importance of confidentiality issues.

1. Model Standards of Conduct for Mediators

In the period 1992-1994, a joint committee comprised of six delegates, two from each of the American Arbitration Association, American Bar Association, and Society of Professionals in Dispute Resolution, prepared a "Model Standards of Conduct for Mediators." The Model Standards have been approved by the American Arbitration Association, the Litigation Section and the Dispute Resolution Section of the American Bar Association, and the Society of Professionals in Dispute Resolution. The introductory note to the Model Standards provides that "the purpose of the initiative was to develop a set of standards to serve as a general framework for the practice of mediation."

The Model Standards have been used as the model by many other jurisdictions. Currently, Professor Joseph B. Stulberg of Ohio State University, Moritz College of Law, is serving as the reporter for the work-in-progress Revised Model Standards of Conduct for Mediators.

The Model Standards discusses the following topics:

- Self-determination: A Mediator Shall Recognize that Mediation is Based on the Principle of Self-Determination by the Parties.

- Impartiality: A Mediator Shall Conduct the Mediation in an Impartial Manner.

- Conflicts of Interest: A Mediator Shall Disclose All Actual and Potential Conflicts of Interest Reasonably Known to the Mediator. After Disclosure, the Mediator Shall Decline to Mediate Unless All Parties Choose to Retain the Mediator. The need to Protect Against Conflicts of Interest Also Govern Conduct that Occurs During and After the Mediation.

- Competence: A Mediator Shall Mediate Only When the Mediator Has the Necessary Qualifications to Satisfy the Reasonable Expectations of the Parties.

- Confidentiality: A Mediator Shall Maintain the Reasonable Expectation of the Parties with Regard to Confidentiality.

- Quality of the Process: A Mediator Shall Conduct the Mediation Fairly, Diligently, and in a Manner Consistent with the Principle of Self-Determination by the Parties.

- Fees: A Mediator Shall Fully Disclose and Explain the Basis of Compensation, Fees, and Charges to the Parties.

- Obligations to the Mediation Process. Mediators have a duty to improve the practice of mediation.

See Appendix C for a copy of the Model Standards of Conduct for Mediators.

2. Uniform Mediation Act

In 2001, the National Conference of Commissioners on Uniform State Laws finalized the Uniform Mediation Act. The Act contains provisions regarding confidentiality, waiver, prohibition of mediator reports, and requirement of disclosures regarding conflicts of interest by the mediator.

The Preface Note states that the Act "may be viewed as a core Act which can be amended with type specific provisions not in conflict with the Uniform Mediation Act." It further states: "the law has the unique capacity to assure that the reasonable expectations of participants regarding the confidentiality of the mediation process are met, rather than frustrated. For this reason, a central thrust of the Act is to provide a privilege that assures confidentiality in legal proceedings (see Sections 4-6). Because the privilege makes it more difficult to offer evidence to challenge the settlement agreement, the Drafters viewed the issue of confidentiality as tied to provisions that will help increase the likelihood that the mediation process will be fair. Fairness is enhanced if it will be conducted with integrity and the parties' knowing consent will be preserved... The Act protects integrity and knowing consent through provisions that provide exceptions to the privilege (Section 6), limit disclosures by the mediator to judges and others who may rule on the case (Section 7), require mediators to disclose conflicts of interest (Section 9), and assure that parties may bring a lawyer or other support person to the mediation session (Section 10). In some limited ways, the law can also encourage the use of mediation as part of the policy to promote the private resolution of disputes through informed self-determination…a uniform act that promotes predictability and simplicity may encourage greater use of mediation…"

Six states, including New York and New Jersey, and the District of Columbia have introduced some version of the Uniform Mediation Act in the 2003-2004 legislative session. The website for the National Conference of Commissioners on Uniform State Laws provides bill tracking information.

See Appendix E for a copy of the Uniform Mediation Law.

3. California Confidentiality Law

Confidentiality is an important aspect of mediation. There are three aspects of confidentiality. First, there is the confidentiality of the contents of mediation as to any non-participant, as to the world-at-large, as agreed to by all the participants, usually in a mediation contract. Second, there is also the confidentiality between the mediator and each participant, by which anything that a participant discloses to the mediator remains private unless that participant gives the mediator the permission to disclose. Third, there are evidentiary rules that prohibit the disclosure of what went on in the mediation in court.

In California, Evidence Code §§ 1115-1128 governs mediation-related evidence and confidentiality issues. The general idea is that nothing that the parties say and reveal during mediation will be used against them in subsequent litigation and that the mediator cannot submit any report to the court.

Subject to a waiver and exceptions, "all communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential. Evidence. Code § 1119(c). Also, "[n]o writing, as defined in Section 250, at is prepared for the purpose of, in the course of, or pursuant to, a mediation…is admissible or subject to discovery." Evidence Code § 1119(b). In a recent case, the Supreme Court construed Evidence Code § 1119 broadly, holding that the Court of Appeals erred in holding that photographs, videotapes, witness statements, and "raw test data" from physical samples that were prepared for mediation were not protected under Evidence Code § 1119. In *Rojas v. Superior Court* (2004) 33 Cal. 4th 407, the Court of Appeal's interpretation of Evidence Code § 1119 (b), relying on an analogy to the discovery of work product, was that the statute's protection applies to so-called derivative material--such as charts, diagrams, information compilations, and expert opinions and reports—but that such material is nevertheless discoverable upon a showing of good cause. The Supreme Court held that there is no "good cause" exception to a protection or privilege, as there is for work product, and thus overruled the Court of Appeal's decision.

III. Models and Myths of Mediation

A. Overview

To speak of distinct models of mediation is illusory; rather, how mediation is conducted varies depending on the participants, what is at stake, resources

available for the resolution of this conflict, experience and background of participants and mediator, extent of procedural rules, impact on non-participants, and use of public resources. Nonetheless, the mediations that lawyers are likely to be involved in and are familiar with perhaps can be still portrayed in terms of "models."

B. Competitive

Too many attorneys view the mediation process as an adjudicatory substitute for a court trial. They adopt a competitive negotiation strategy. This strategy is a manipulative approach designed to intimidate the other party into losing confidence in their own case so that the party will accept the competitor's demands.

Mediation statements are prepared in echo of trial briefs. These statements are often drafted in the tone of advocacy, as if persuading the mediator will resolve the dispute. This lack of understanding pf the process is aggravated when attorneys refuse to allow their mediation statements to be shared with the other disputants.

Arbitrary time constraints are imposed: "we have only one day to complete this mediation." The advocate's assumption is that the coercion of a deadline will compel a participant's agreement. "Wearing down the other side' is viewed as a reason to conduct a mediation until the "wee hours."

The mediator is viewed as the equivalent of a judge. Many lawyers want to know whether the mediator "will knock some heads together" to conclude an agreement. This perspective reveals a fundamental misapprehension about the prerequisite of any mediation: ***that it is the parties who agree, and not a third party who decides***.

The disadvantages of the competitive strategy are several:

- Confrontation leads to rigidity;
- Limited analysis of the relevant criteria to resolve the dispute;
- Limited development of alternative solutions; and
- Lack of awareness of gains available to both sides.

C. Collaborative

A collaborative approach, also known as an *integrative* approach, to mediation relies upon the parties' recognition of "enlightened" self-interest, rather than "egocentric" self-interest. Contemporary lawyers have been hesitant to adopt this approach in mediation, especially when the mediation arises from a litigation context. The lawyer's duty of zealous representation and undivided loyalty is used as a rationale by these advocates as insuperable barriers to the collaborative approach. This theory is nonsense, and is relied upon by advocates averse to acquiring new skills.

The collaborative approach relies upon the following assumptions:

- Some common interests exist between participants;
- Negotiation between participants benefits by a full discussion of each participant's perspective and interests; and
- Applying the best intelligence and creativity of all the participants will create the likeliest opportunity for achieving an agreement.

An attorney can clearly satisfy professional responsibilities within the framework of an integrative mediation. Disclosing the perspective and interest of one's client should not require the abandonment of vigorously representing that client.

The risks to the collaborative approach derive from the obvious fact that all participants must be willing to act together in reaching a mutually satisfactory result. If a participant is unwilling to utilize this approach, the other participant may be compelled to adopt a competitive posture in defense, or the participant may view himself or herself as a "failure" if no agreement is reached.

The author contends that participants who adopt a collaborative approach, especially in trusts and estates disputes, increase the opportunity for reaching the best agreement of which the parties are capable.

D. Commercial

1. Labor

In the world of commerce, as opposed to family life or politics, mediation in labor-management conflict is probably the most widely practiced and well-known model of mediation. Labor mediation has a long history and has produced successful results and a body of scholarship as well. Hallmarks of labor mediation include a professional mediator, experienced participants who often act in a representative capacity, separate caucusing, procedural customs, and regulation by laws. The labor mediation model is has been adapted for settling disputes in other areas of everyday life such as family law, housing, health service, and education.

2. Contract/Tort

If labor mediation is seen as occurring among parties with ongoing relationships, at the other end of the spectrum may be disputes regarding a contract or tort between parties without such a continuing relationship. The lack of such ongoing commitment may mean that there is less structural or underlying conflict and that the manifest conflict is the primary conflict that needs to be resolved. The direct effect on non-participants may be not as significant a factor.

3. Environmental

Three frequent participants in environmental disputes are business interests, environmental groups, and government agencies. In these disputes, significant reliance may be made on scientific information and projections and experts, as well as the relevant laws and regulations.

E. Interpersonal

1. Family/Divorce

Given the long-standing relationships and personal nature of these relationships, it is not surprising that family law issues were the first of court-connected mediation cases. The benefits of mediating rather than litigating family law issues are self-evident: self-determination, more private, less expensive, and faster.

Divorce mediation probably comes close to having a recognizable "model." That is because this kind of mediation is conducive to having a detailed structure, given that many family law matters will have similar issues: custody, support, and property division. Having detailed procedures -- such as who may attend sessions, goals of each session, and consequences of not meeting the goals, set times when attorneys may be present or consulted permissible conduct within and outside the meetings -- may be well-suited to family matters because it provides security and predictability for the participants.

Divorce mediation is the archetype of a mediation paradox: compelling parties to mediate often results in agreement. The paradox arises because mediation by definition relies upon consensus in preference to coercion. Parties to a divorce are usually quite resistant to reaching agreement with the other participant. Yet, such mediations are often quite successful.

2. Family/Trusts & Estates

Besides divorce, other family matters are also conducive to mediation: estate planning, elder or dependent care, division of personal property, trustee-beneficiary relationships, postmortem disputes. The paradox present in divorce mediations is equally present in trust and estate disputes. Yet here too, parties who often are resistant to negotiation reach agreement.

IV. The Process of Mediation

A. *Introduction*

Central to mediation is the concept of informed consent. A participant must understand the nature of the mediation process and provide informed consent to participate in order for the process to have a realistic possibility of success. This section discusses briefly the actual nuts and bolts of how a mediation session is conducted. Different practitioners divide the process into different number of stages and not all mediations call for each stage. Each stage has specific tasks and purposes that the mediator is monitoring for, to make sure that they are accomplished.

B. Structuring

1. Pre-Mediation Meetings

The author's preference is to discuss logistics with the participants' representatives in advance of any meeting by the principals. These discussions usually occur by telephone conference. They are used to agree upon dates for the mediation, discuss the identity of attendees, and payment of the mediator's fee. Other ground-rules as may be required may also be agreed upon. For example, an agreement may need to be reached that no service of process will be effected on either party within a stated distance of the mediation, or for a stated time on either end of a mediation

2. Mediation Agreement

Essential to commencing the process of achieving consensus is the execution by all parties of an agreement to mediate. Too often this document is viewed as a mere "slip of paper." Lawyers treat the agreement as p*ro forma*, because they have seen similar agreements before, and quickly instruct the participant/client simply to sign it. Too many mediators allow this superficial treatment to occur. In fact, the mediation agreement is the first bright opportunity for the mediator to observe to the participants that they are capable of reaching agreement. This fact is not insignificant, especially in family disputes such as occur in trusts and estates. A mediator should make the most of any agreement the parties reach on any matter. Actually signing a document together is therefore a watershed. In consequence, lawyers readying for mediation should expect that the mediator will circulate the proposed mediation agreement *in advance* of the first day of mediation. A sample Mediation Agreement is attached as Appendix B.

C. Mediation Days

Before the participants have arrived, the mediator has set up the room(s) in a way that will assist the mediation. Upon everyone's arrival, the initial step is to orient the participants by making introductions, explaining the process, and establishing rapport.

1. Opening Statement

The mediator usually provides an opening statement for the purpose of obtaining informed consent. A skilled mediator will usually emphasize the qualities particular to mediation:

- It is voluntary, a participant may leave at any time;
- It is collaborative, an agreement is possible only if all the parties wish it;
- It is controlled, each participant has complete decision-making power;
- It is confidential, all communications that occur within the mediation process cannot be disclosed, unless all of the participants so agree;
- It is impartial, the mediator has the responsibility to assist each mediating party and cannot favor the interests of one participant over another; and

- It is safe; the mediator's role is to make certain that participants reach agreement in a voluntary and informed manner, free of coercion or intimidation.

This statement may also include a discussion of many of the following elements: acknowledgement of prior acquaintance, disclaimer of bias, time frame, procedure of joint sessions and private meetings, guidelines of behavior during mediation, case information, and encouragement. The substance of this statement and understanding are also contained within the mediation agreement.

2. Initial Discussion

The mediator conducts a discussion asking for each participant's expectations and goals regarding the mediation. During this discussion the mediator often suggest ground rules for the balance of the process. Agreeing upon ground-rules, such as "no interrupting," and "appeals and attempts to persuade should be made to each other and not to the mediator." From this discussion, the mediator can assess each participant's initial motivation, attitude, and communication style. The mediator can also achieve an early agreement among the participants.

D. Substantive Negotiations

This stage allows each participant to begin to come to understand the other's perspectives, interests, and needs.

1. Expression of Emotions

Seeking redress of emotional injury is often a powerful force in trust and estate disputes. Mediators refer to the expression of these emotions as "getting current." Participants in family based controversies often have a profound need to discharge these feelings. The dynamics of such mediations may require voicing the emotions. The mediator's challenge will be to move the participants beyond these emotions after their expression. The mediator has several tools available to keep the process moving:

- Ignore the participant's nonproductive and potentially destructive behavior;
- Confront the behavior by inquiring "how does this behavior take you closer to your objective?"
- Normalize the emotions-"other people feel the way you do;" or
- Referral, if the mediator cannot manage the emotional cauldron, suggest that the participants seek professional counseling.

Giving each participant time to express strong feelings and beliefs along with the opportunity to ask and respond to each other assists the participants to begin to acknowledge each other's perspectives, interests, and needs.

2. Fact- Finding

Fact-finding in mediation is not the equivalent of fact-finding for trial. Mediation requires that the participants agree upon the facts necessary for them to reach the best agreement of which they are capable. The mediator seeks to identify those facts existing among and between the participants that each needs to be acknowledged in order to reach agreement. In this context, it is closely related to defining the issues between the parties.

3. Definition of Issues

The parties together determine the contested issues and their goals for the mediation. An issue well stated is a problem half-solved. The mediator can contribute substantially to the resolution of the conflict if he or she can obtain agreement among the participant's to the statement of issues.

This stage is over when the mediator and the participants know what the manifest and the underlying conflict issues are and what each participant wants and will not accept. The agenda for the remainder of the mediation is set, although, of course, it is subject to revision.

It is possible, although rare, that an impasse would be declared at this time. The identification of issues may have made it obvious that a participant is not interested in resolving the dispute by mediation. A conscientious mediator will undertake "heroic" efforts to avoid such impasse.

E. Crafting the Agreement

1. Creation of Options

The mediator reviews the issues to be resolved and lists possible solutions thus far. The mediator may also provide and develop with the participants a list of criteria for developing and evaluating options. The mediator can also suggest new options overlooked by the participants. This process provides an "objective" success criteria, rather than relying on a like-dislike subjective criteria.

Criteria for development and evaluation of options may include:

- the needs and interests of the participants, current and potential
- its effect on non-participants
- legal restraints and requirements of its implementation
- practical restraints and requirements of its implementation
- past experience with the option or something similar
- how the option may fare in changing circumstances

2. Mediation Strategy

a) Interest based option generation approach

This approach is most dependent upon the participants, and therefore provides them with the most power over the process. The mediator earns permission to guide the parties through the discussions by responding to what is happening to the parties. The mediator must meet the participants wherever they are, in order to facilitate the participants reaching the agreement of which they are the most capable.

b) Hypothesis generation and testing approach

This approach depends upon the participants and the mediator continually seeking the solution by reductionist questioning. The mediator may begin with open-ended questions that lead to questions that are increasingly focused in order to test the respective participant's hypothesis.

c) The doubt and dissonance approach

The reality of most trust and estate disputes-and mediation- is that the participants need encouragement to leave the positions they adopt, prior to or during, the mediation. To create a catalyst for this movement, the mediator creates a measure of doubt or dissonance in the rationale underlying the thinking of the participant. This technique weighs on all parties to the conflict, thereby inducing flexibility contemporaneously. Interestingly, this technique may be most effective in a joint session.

3. General Session

A general session occurs when all participants are present in the same room at the same time. The author's experience has led him to conclude that the general session is misunderstood and misapplied by most professionals involved in trust and estate mediation. Typically, the general session serves only as an introduction of the mediator, and an opportunity for the lawyers to reiterate legal arguments that have already been well-briefed in court filed pleadings. The participants often are not encouraged to speak, and usually choose not to speak because of their nervousness with an unfamiliar proceeding. This misunderstanding of the purpose of the general session detracts from the ability of the participants to reach agreement, as well as delaying the time it takes to conclude the dispute. ***The more direct communication between participants, the more possible it becomes for the parties to reach the best agreement of which they are capable***.

4. Private Caucus

Nevertheless, times will arise that having separate meetings with the different participants may be necessary. For example, if there is an apparent impasse, the mediator may want to meet with each side to determine whether the impasse can

be worked through. Similarly, if payments are being proposed, parties may need to discuss these amounts in caucus.

The participants must remember, however, that the more negotiation that occurs in caucus, the more the mediator becomes the decision-maker. The more likely it becomes that a third party (the mediator) becomes an adjudicator, the *less likely* it becomes that the parties can attain the best agreement of which they are capable-and therefore that they will reach any agreement at all.

It is important for the mediator to understand what remains confidential between that participant and the mediator and what is permissible and even desirable to let the other participants know.

5. Negotiation & Decision-Making

In rare cases, it may become clear to everyone which option best suits each participant's needs and interests overall and there is not much decision-making to do. In most cases, it may not be clear to the participants which option is the best or better among the array developed through brainstorming and discussion.

The participants should be talking directly to each other. The mediator can then observe the content and the process of negotiations. The mediator can guide the participants toward collaborative negotiations ("how can we meet all the parties' needs?") when it appears that the participants are becoming unnecessarily adversarial or competitive ("if you win something, I must be losing"). The mediator can watch for intimidation and other kind of power-plays that become more possible in direct participant to participant interaction. If strong negative emotions or other unproductive patterns surface, the mediator can use different techniques (redirecting, reframing, normalizing, empathy) to return the discussion to a productive direction. Emotional and cognitive readiness for decision-making depends upon the individual. It would be helpful if the mediator is able to perceive a participant's readiness or lack of readiness, as the case may be, and be able to deal with the obstacles to decision-making.

F. Writing the Agreement

The purpose of this stage is to draft an agreement that accurately reflects the agreement crafted in the previous stage. When attorneys are involved, the mediator should play no part in drafting the agreement. Due to the possibility that some terms will need to be revised or added, a provision regarding the procedure for revision or modification should be included as well.

Any subsequent drafting that is required to complete the settlement document should be explicitly stated in the document. It is important to be clear about whether the document produced at the mediation is intended to be a binding contract or is just a draft or memorandum subject to finalization at a later time.

A recent case, *Fair v. Bakhtiari*, 2004 Cal. App. LEXIS 1432, illustrates the risk of not being clear about this point. The settlement document was entitled

"Settlement Terms;" it was drafted by the mediator on the day of mediation and signed by the parties. The draft contained an arbitration clause that read: "9. Any and all disputes subject to JAMS arbitration rules." This document was intended to be supplanted by a more formal settlement agreement, but due to disagreements that arose, the "formal" agreement was not signed by the parties.
A party brought a motion to enforce the arbitration clause. The trial court ruled that the settlement document was inadmissible under Evidence Code § 1119 and then held that without that document, there was insufficient grounds to compel arbitration.
Reversing the trial court, the appellate court held that (1) the settlement agreement satisfied a statutory exception to the inadmissibility of written or oral communications made during mediation under Evidence Code § 1123, and (2) the settlement agreement, including its arbitration term, constituted a valid contract between the parties. Interestingly, the appellate court stated that the inclusion of the arbitration provision "demonstrates that the parties necessarily intended the settlement terms document to be 'enforceable or binding." The court reasoned that "because inclusion of the arbitration provision is consistent solely with an intention on the part of the parties for the settlement terms document to be enforceable or binding, we find that that provision constitutes 'words to that effect' under subdivision (b) of section 1123. Section 1123 plainly reflects a legislative intent not to make inadmissible settlement agreements that the parties intend to be enforceable. To find section 1123 inapplicable in the present case would frustrate that intent."

The mediator should inform the parties that if a settlement is reached during the mediation, a legally effective settlement agreement will be signed prior to the end of the mediation, rather than relying on a nonbonding oral agreement to sign a written settlement agreement later.

G. Legal Review

When attorneys have not been present or involved during the mediation, the mediated agreement may need to be subject to legal review and/or legal processing, such as court confirmation, acceptance by a governmental entity, or ratification by a board of directors. In such cases, provisions in the settlement agreement should state clearly what the status of the settlement agreement is between the parties before such review and the consequences of the outcomes of such review.

H. Implementation

This stage refers to the participants living up to the terms of the settlement agreement, without much involvement of the mediator, and so could be considered not a stage of the mediation itself. In arrangement cases, however, such a family custody cases, conservatorships, or ongoing trust administrations, there may be reason for the mediator to continue an on-going relationship with the participants. In cases where there are predictable problems, the mediator may facilitate the successful carrying-out of the settlement agreement by

providing information on how certain problems may be prevented or dealt with. If during implementation, issues arise that necessitate further mediation, familiarity with the mediation process and the mediator may make the conflict resolution easier than the first time around.

V. The Role of the Mediator

The multi-faceted role of the mediator is subject to an ongoing development and debate. A common misperception is that it is the mediator's responsibility to resolve the conflict. Despite the principle of mediation that it is the parties themselves who must make the decisions, the practice of mediation and its focus on settlement has *de facto* resulted in some unfortunate consequences of the mediator either consciously or unconsciously becoming more involved then is consistent with the principle of self-determination by the participants. The temptation to enter a more influential role, rather than remain a neutral, disinterested, facilitating party, is definitely present, especially when the participants themselves lean on the mediator to make evaluative determinations. Mediators can keep from making the mistake of interfering with the self-determination by the participants by remembering the mediator's appropriate roles.

A. Many Hats of the Mediator

1. Proponent of the Process

The mediator is neutral as to the participants and as to the outcome, but not the process. The mediator must control the process so that it is safe, fair, inclusive, and productive.

2. Facilitator of Communication

The mediator as an outsider perspective and can observe the verbal, nonverbal, physical, and emotional patterns of communication. The mediator can more easily spot the obstacles to understanding and barriers to agreement.

3. Model for Listening &Understanding

The mediator can demonstrate what it is to understand a participant's point of view. The mediator makes open-ended, non-directive, non-judgmental comments to provide each participant an opportunity to be deeply heard. The mediator does not evaluate, advise, agree – the mediator simply strives to fully understand the participants perspective, position, interests, and needs.

4. Negotiation Consultant

In private caucuses, the mediator can offer insight into possible strategies and consequences of differing negotiating tactics. The mediator's neutral perspective may enable the mediator to see options as having different consequences than the one the participant sees.

5. Balancer of Negotiating Power

One theory of mediation argues that the mediator has a responsibility to balance unequal negotiating power. Another theory argues that the mediator's obligation to ensure that each participant has sufficient capacity to represent the participant's interests effectively in the mediation. The difficulty with the first theory is that it compels the mediator to make value judgments:

- At what specific point in time during the mediation?
- At what level?
- How good does the balance need to be?

The difficulty with the second theory is also that it compels value judgments:

- When should sufficient capacity be determined?
- How often during the mediation should the mediator review the determination?
- How does the mediator determine sufficient capacity?

6. Agent of Reality/ Devil's Advocate

Not being the "opposing party" allows the mediator to question the participant's viewpoint without the psychological possibility that such comments would be disregarded simply because it came from the "opposing party."

7. Synthesizer of Options

Participants may tend to get fixated on one option or they may simply be unaware of other options. Due to the mediator's experience, ingenuity, and understanding of all the participant's needs, the mediator may able to craft different options.

B. Many Skills of the Mediator

There are innumerable skills that a skilled mediator possesses. And certain skills like empathy and humor, that may appear as if they are innate, can be developed with practice.

- Creating trust and building rapport
- Listening
- Assessment of interests and needs
- Identification of Issues
- Pattern recognition
- Handling emotions & anger
- Empathy
- Empowerment
- Reframing
- Humor
- Negotiation
- Reality-testing

- Strategic planning & goal setting
- Building momentum
- Breaking impasses
- Maintaining neutrality
- Caucusing techniques
- Balancing power
- Agreement writing
- Assessment for referrals

VI. Mediation in Trusts & Estates

What doesn't get heard just gets louder. This epigram applies to toddlers, illness, and…family conflict. Denial, avoidance, and suppression as strategies can work, but only for a while. At some point in time, the pain must be dealt with. In fact, it would be wiser to act preventatively rather than after a problem is full-blown.

Mediation has so far been used more for handling after family conflict has become full blown, in the form of a contested conservatorship, a trust contest, or will contest, for example. Mediation, however, also offers a process by which families can act to care for family members, family relationships, and family wealth and prevent destructive conflict.

A. As Part of Planning

One way to look at the family is as a system or structure. System theory proposes that the essential properties of the whole system are properties of the whole; these properties belong not to the part but to the whole; change any of its parts and the whole system is altered. Structural family theory treats families as organizations that must deal with problems presented both from within and without and are thus constantly transforming in light of internal and external forces and circumstances. One definition of a healthy family could be that it provides economic and emotional support to its members, care for the children, protect its members from outside forces, and assists the development of its members. W. R. Beavers describes a healthy family as one that possesses "clear boundaries, contextual clarity, relatively equal power, and the process of intimacy, the encouragement of autonomy, joy and comfort in relating, skilled negotiation, and significant transcendent values." At the other end, severely dysfunctional families are characterized by "poor communication patterns and negotiation skills, an unclear power and decision-making system, and a pervasive tone of depression and cynicism." (Folberg, p. 153).

However healthy or dysfunctional a family is, mediation is a tool that can be very useful in handling family matters where the issues and solutions need some clarifying because it is goal-oriented and takes only a limited amount of time. Just as mediation can be of significant assistance in both hostile and amicable

divorces, families planning for a major family structural-system transition, such as disability and/or de ath of a parent, can similarly benefit greatly.

Planning with the use of mediation, during which each member had an opportunity to express one's thoughts and feelings and participate in the crafting of the plan, is likely to not only prevent destructive conflict after the parent's death, such experiences are likely to empower each member to be able to resolve conflicts in a productively manner even if conflicts do arise. Mediation can also improve family relationships just because it creates a forum for discussing matters of importance to the family.

If the attorney picks up on cues that there may be actual or potential conflicts that may be brewing, the attorney could suggest mediation as a means to resolve them. Conflict need not mean hostility: it could well be that there is no hostility at all, but simply that more of each family members' needs could be met if all the needs, wants, and resources were open for discussion. Given attorney's familiarity with postmortem disputes and his or her outsider's point of view, the attorney may be better able to advice the clients when mediation seems advisable.

Some family situations that may warrant the involvement of a mediator include the following:

- Substantial estate

The idea of substantial is not necessarily an objective term referring to some dollar figure. It's more contextual in that it's the perception of the estate to the parties involved. The crucial question is can the way it's managed or divided cause conflict? The cost of a mediator, as significant as it may seem, can be compared with the cost of litigation. It is probably less expensive to have the difficult conversations earlier than later.

- Significant separate property

The owner of the separate property and the other spouse may view the "equitable" ownership of the separate property differently. There may have been commingling which makes it unclear what is separate property and what is community. Candid feelings and views about property is more likely to occur with a neutral third party who can forever hold this information confidentially than with an attorney who cannot provide confidentiality.

- Elder care

Planning for care of the aging parent before the need arises is advisable. In some instances, it may be clear that the child who lives closes to the parent, or the child who is the most mobile due to a portable job, is going to be the one who

will take care of the parents if and when necessary. Even when it seems very obvious, discussing the issues relating to the care that the parents may need as they grow older, including who is the most appropriate person to hold the power of attorney for financial matters and to hold the power of attorney for health care, will enable a family to have a plan in place, rather than relying on assumptions that may not be commonly held. Having had a discussion on who has what responsibility and providing for contingencies will prevent the burgeoning of suspicion, distrust, and misunderstandings that often happen in stressful situations.

- Mentally or physically challenged child or other issue

Someone is going to have to care for dependents who may never become autonomous or self-supporting. Like with elder care, how this responsibility is to be shared can be planned for, instead of waiting until the discussion is unavoidable or there is a crisis. Important matters should in general be dealt with before it they become urgent.

- Different contribution to care of parents

In this highly mobile age, many children do not live physically close to their parents. If one of the children does do much of the physical care-taking, that child may not want to be "compensated" per se during life but does hope for and perhaps even expect a greater share of the parents' property, despite the fact that the child does not need the assets while other children or grandchildren may. Through open communication such as mediation offers, it may be possible for the family to find other ways to recognize the efforts of the care-taking child.

- Closely-held businesses

Generally, when there is with a closely-held business in the parent family, there is or needs to be succession planning that involves one or more members in the children generation. Most likely there are unspoken expectations and maybe hopes of not just who will own the business, but how it will be managed. Family members may have different views on fundamental points, such as whether the business should continue or be sold after the death of the parent. These views may not be explored and resolved without a third party neutral, such as a mediator. And the consequence of not exploring these views is that when they do surface, say, after the death of the parent, it may inadvertently or directly sabotage the goals of the parent and create family schisms.

- Different economic resources and earning power of beneficiaries

Parents may want to treat children equally, but equal does not necessarily mean the same. If one of the children is doing substantially better than others, the parents may wish to "equalize" the economic well-being of all their children to the

extent they can do so via bequests. The well-off child may or may not be amenable to this plan, but if that child is not consulted or informed, there may be misunderstanding as to the intent of the parents. It is also possible that the well-off child later loses his or her wealth and/or earning capacity for unforeseen circumstances.

- Children of prior marriages

Each parent is different about what and how they would like to provide for their children. A complete discussion of this issue that would prevent later changes, such as after the death of the first spouse, would be desirable. For example, if one spouse has been the primary earner, and this spouse has fewer children than the other spouse, the spouses may differ on their views of how they want to gift to each the children. Given the power of money in current social culture, it may be difficult to have a truly open conversation about this topic without a neutral third party who can facilitate the discussion.

- Promises of gifts at death

Some testators may promise different gifts of personal or real property or cash to various people with the full intention of fulfilling these promises. And yet, intentions and feelings may change over time and assets may be disposed of but the promised beneficiary may not be aware of these changes. Also, without intending to, the testators may have promised too much. For example, they may have promised the same family heirloom to two grandchildren, or they may have overestimated their wealth and promised a lump sum that would impact their primary beneficiaries. Bringing everyone to the table through mediation would give everyone a chance to disclose to a neutral party, what they have been promised and what they are hoping for, and also finding out when the promises are unable to be kept.

- Different views on charitable gifts

People vary greatly on their views on charitable giving. Some are open to the idea of combining charitable gift and estate planning, others are not.
For some, regardless of their estate size, they plan to leave a certain percentage to their church or school, as a way of contributing back into their community. For others, they want everything to go to their children, to the point that they want to control the gifts that their “overgenerous” children make.

Family Scenario

Ron, the husband, is an architect, about to retire. Rachel, the wife, has never worked since they got married in 1960. They have substantial real estate rental properties in their neighborhood and other investments that Ron actively manages. They have three adult daughters. Mary lives close by with her

contractor husband and three sons. Myrah lives on the East Coast with her wealthy husband and a disabled daughter. Melanie is a political activist, living in North Carolina with a longtime partner, and does not plan to have children.

Ron's plans are to divide the property in equal values between the three daughters and provide for college funds for his grandsons. Ron is not very happy with Melanie's political activism, as he thinks she is somewhat misdirected. Ron hopes that she will "mature" and become more practical. Ron is not particularly philanthropically inclined, but he is very interested in literacy because of the difficulty he had had in his earliest school years. He felt that the specialist, who taught him to read effectively in middle-school, changed his life and enabled him to become as successful as he is.

Rachel believes that Melanie should be given more because it is unlikely that Melanie will make any money and that Myrah's share should be managed by someone else, like Mary, because Myrah does not manage money well. Rachel does not like to disagree with Ron, especially in public. Rachel also feels that he has provided so well for her and the family overall that she is fine with going along with whatever he proposes, since he is the one who "made all the money" anyway. Rachel is concerned about her disabled granddaughter and hopes that she will always be provided for.

Mary believes that since her husband helps her dad with repairs and construction for no compensation, she or her children will receive more than the other two. Also, she expects that she will be the one that provides the primary contribution to arranging for the care of the parents, as that becomes necessary. Since Mary believes that she will be the primary one responsible, she feels entitled to ask for "more" from her parents, in form of vacations and gifts for her children.

Myrah finds Mary a bit overbearing and bossy and she sometimes feels somewhat jealous that Mary has always been Ron's favorite. His generous gifts to Mary's sons contribute to this sentiment. Myrah has considered moving back to California, if she can persuade her husband, but does not want Mary to meddle in her life and how she care for her disabled daughter. Still, Myrah really wants to be there for Rachel when she gets older, since Ron is likely to die first.

Melanie lives strongly by her principles and plans to contribute most of her inheritance to political causes. At the same time, she really wants to be there for her parents if they need her as they grow older. She assumes that her parents, Mary and Myrah know that she will be there if she is needed for family.

Ron and Rachel visit an estate planning attorney, recommended by a business associate of Ron. Given the size of their estate, the estate planning attorney sees that they may want to utilize certain tools such as family business formation, succession planning, lifetime gifting, and charitable gifts.

Scenario's potential problems and how mediation could help

Despite that this scenario's family is a "successful, happy family" – significant wealth, three daughters who get along fine and who want to be there for their parents as they get older – how the estate management and distribution is handled can create tension and conflict.

Given that an attorney in his joint representation of spouses cannot hold confidential discussions with each of them; it is likely that the attorney may never even hear of Rachel's wishes. The mediation process allows greater confidentiality to each person. The mediator, as a neutral party, has the opportunity to meet with each family member separately, in a structure that legitimizes such meetings and disclosures.

Even if the attorney does somehow discern that Rachel may have different views, any suggestion of obtaining separate counsel is unlikely to be followed. The option may not make any sense for Rachel and may silence her even more.

If the attorney does hear Rachel's wishes, Myrah's share may ends up in trust for her, with Mary serving as the trustee. This arrangement is unlikely to help their relationship. It may cause Myrah to misinterpret the arrangement as somehow putting her second to Mary and therefore initiated by Ron, when it was Rachel's idea.

The attorney may not address the need for the family to plan for elder care, other than for providing for the agents for the powers of attorneys, since he believes it to be a family matter. He may not be aware of how Mary's sense of entitlement is based on her belief that she will be the primary emotional and logistical support for them during their later years and on her husband's help to her parents. Without a family discussion about estate planning and elder care, no one may know that each of the three daughters wants to participate wholeheartedly in the care of the parents.

The estate planning attorney should keep his or her eyes out for family situations in which mediation may be helpful. Mediation can be helpful because it creates a forum for discussion of these topics that are only cursorily dealt with or avoided all together. Involving the children in the process of planning for aging and for death can often have the advantage of bringing the family closer and in greater harmony.

B. As Remedy in Postmortem Disputes

1. Emotional Release

Self-pity, envy, greed, resentment, revenge, fear, distrust, perceived slights and wrongs, misunderstandings, poor communication – they all have contributed to the proliferation of postmortem disputes, as much as more laudable goals of following the testator's intent, fairness, and correction of mistakes and wrongs. Having a process that is geared toward self-determination by the participants, empowerment for each individual, and recognition of other's viewpoints, may prevent conflict from escalating to the point that it destroys relationships. It also builds skills for resolving subsequent disputes.

Mediation can be especially helpful when the division of tangible personal property becomes the focus of dispute. Judges are fond of saying that they "don't do property divisions." Yet these items often form the core of the antipathy. Family members will often fight over something when the real fight is over something else. This transference often happens with the fight over tangible personal property. They might be fighting over the family piano, but it really is about who was mommy's favorite, for being musical like her.

When there are tangible items of significant monetary and emotional value that have symbolic value that stir up strong emotions, the presence of a neutral mediator who can have confidential conversations with each interested family member and who can disinterestedly help them develop the criteria by which to divide the property can be helpful. Participating in a forum where fairness and self-determination principles reign can help the participants live with the outcome even if they didn't get everything they wanted.

2. Fiduciary- beneficiary relationship

The beneficiary may perceive as the trustee as coming between the beneficiary and beneficiary's property. The trustee may perceive himself as simply upholding the trustee's duties to adhere to the trust instrument, being impartial among the beneficiaries, and making sure there is enough for the entire trust term.

The beneficiary may perceive the trustee as being insensitive to the present and real needs of the beneficiary. The trustee may be concerned about the long-term support issues for a perceived spendthrift beneficiary.

The beneficiary may feel upset about how the investments are being made, how little information the trustee is providing, how the trustee is ignoring the beneficiary by not returning calls or responding to letters. The beneficiary may feel disrespected and insulted. The trustee may perceive himself to be providing legally adequate responses.

Beneficiary's sense of frustration and powerlessness may lead to a relationship which is unpleasant for both sides. It could also lead the beneficiary to bring a lawsuit to replace and possibly surcharge the trustee. The likely result is that

there will be a reduction in the trust estate to pay the legal fees for the trustee, which is presumably the last thing the beneficiary wanted.

Mediation can be helpful in putting this kind of relationship back on even keel by its future-oriented, short-term structure. Mediation is not therapy and does not attempt to counsel anyone, but it provides a forum for each participant to hear each other out and feel heard so that effective communication can be established.

3. Court Proceedings

Kay E. Henden, an attorney, in her article "Mediation in Trust and Probate Practice" surveys the use of mediation in trust and probate practice in California and concludes that mediation has delivered on its promise of quicker, cheaper, and more satisfying outcomes. Henden's article discusses the alternative dispute resolution programs in place in the California courts, federal courts, and IRS.

In the California trial court system, four general approaches are used. In a few counties, alternative dispute resolution is offered, but is limited primarily to settlement conferences utilizing either the assigned judge, or volunteer judges from other divisions in the same county. The drawback to this approach derives from its structure: judges are used to adjudicating, and not facilitating. Too often the settlement conference model reaches conclusion because of the judge's coercive power, not because of a willingness by the participants to reach consensus.

In the majority of California's 58 counties, comprehensive general civil programs encompassing arbitration and mediation are available in addition to the settlement conference option. Court staff administers the ADR program for both civil and probate divisions, and probate and family law courts sometimes develop methods of mutual support based on similarity of issues in their cases. The success of these mediations turns heavily on the identity of the mediator. When a judge serves as the neutral, a high risk exists that the process will develop along the settlement conference model. If a skilled mediator is involved, however, the opportunities for reaching the best agreement of which the parties are capable become greater.
In the state's most populous counties, ADR programs have become more sophisticated, and it is common to see a professionally staffed general civil ADR program. Formal mediation training is provided to mediation panel members at no cost or on a reduced fee basis. A separate program for probate staffed primarily by volunteers often arises, though still utilizing some of the infrastructure established for the general civil program. Counties such as Los Angeles, San Francisco, Contra Costa and San Diego have developed separate mediation panels with specific trust and probate expertise. The panel lists are

generally kept at the court, although in some counties (such as Alameda) the county bar association maintains the court panel roster.
The most complex mediation models available at the state trial court level are located in Los Angeles and San Francisco. These programs further subdivide between probate and trust litigation, on the one hand, and conservatorship and guardianship matters on the other. Moreover, one or more separate mediation programs are maintained by the bar association in addition to the court-annexed program.

The six appellate districts (encompassing eight divisions, including the three separate divisions of the Fourth Appellate District) have different levels of staffing and complexity in their ADR programs. In the Fourth Appellate District (Division Two, Riverside), one of the oldest organized ADR programs has been highly successful in reducing court backlog and improving efficiency. This program evolved from a more traditional settlement conference type model using an all-volunteer panel of mediators to its current mediation program conducted in a dedicated ADR conference facility. In the Second Appellate District, the program was developed from earlier test programs and has been in its present form for about six years. It originally used the settlement conference model as well, but in the last year has begun training its volunteer attorney settlement officers in mediation, and both techniques are used as appropriate. All referrals to the program are voluntary but occur immediately upon intake. In the First Appellate District, one of the newest programs has emphasized mediation from inception; it also refers early in the process, but pre-screens referrals to the program. Extensive materials are available, and comprehensive statistics are being maintained. Most of the remainder of the appellate level courts has differing if less intensive programs.

Although insufficient statistics are maintained by the programs, Henden was still able to make some noteworthy observations regarding the use of mediation:

- Mediated cases settle much earlier in the proceedings than non-mediated cases.

- Compared to civil cases generally, trust and probate matters settle more often.

- Surveyed participants claim significant monetary savings, ranging from few thousand to $100,000, mostly between $20,000 -40,000.

- Surveyed participants claim time savings, ranging from months to years, mostly around six months.

- Satisfaction rates of attorneys and clients -- in terms of perceived fairness, efficiency of process, and sense of closure – were very high, even when the process did not result in settlement.

Some of the negative feedback by mediation participants included the following:

- Opposing counsel can use the process as a discovery tool.
- Untrained or ineffective mediators who are not familiar with probate or trust law can be a source of dissatisfaction.
- Cost of mediation, if there is no settlement, is another cost.
- Private resolution means there is no public declaration of guilt or innocence, which may be important where a party is interested in vindication.

C. As Condition for Inheritance

Any tool can be used in a variety of ways and so it is with mediation. In planning their estate, the parents have an opportunity to bring the children to the table about something that a lot to them, not only financially but also psychologically.

Mediation as a condition for inheritance can be a means for healing past pain and overcoming misunderstandings as well as establishing a model for family communication and cooperation after the older generation has passed away. Just as personal counseling can be an effective tool, not only for mental illness, but as a means of personal growth and maintaining psychological health; mediation can be a tool for maintaining and improving interpersonal communication, especially when there exist complex family relationships, sharing of responsibilities, and significant wealth. Examples of drafting suggestions for inclusion in a testamentary document are attached as Appendix A.

APPENDIX A

OPTION A

I recognize that my beneficiaries may not always agree among themselves in regards to matters concerning the administration of my estate. If my beneficiaries are unable to resolve their disputes directly, I request that they promptly participate in good faith in a collaborative process facilitated by a neutral third party (*mediation*). If any of my beneficiaries refuses to participate in good faith in such mediation [*ALTERNATIVE 1*: any gift remaining to be distributed to such beneficiary pursuant to this document or any other document of mine comprising part of my integrated estate plan shall be forfeited by such beneficiary.]OR [*ALTERNATIVE 2:* If any of my beneficiaries refuses to participate in good faith in such mediation then such beneficiary shall bear the entire cost of such mediation, including the attorneys fees of all parties.]The determination of a beneficiary's good faith participation shall be made by the neutral third party at the conclusion of the mediation proceedings. I suggest that _____, [my good friend] [my sibling] he requested to serve as such facilitator. If such person or persons are unable or unwilling to serve as neutral, I direct that my beneficiaries select a professional neutral to facilitate this process. If all parties are found to have participated in good faith in the mediation, the payment of the cost of such process shall be paid by the trustee from the trust estate as an expense of administration. I remind my beneficiaries that disagreements over material matters should not serve as a basis for permanent estrangement among them.

The disputing party shall give the other parties written notice of the dispute. Within twenty-one (21) days after notice is given, the trustee and the beneficiaries shall select an

agreeable neutral (if not otherwise selected by this instrument). Within fifteen (15) days thereafter the trustee and beneficiaries shall agree upon mediation dates acceptable to the mediator. Thereafter the parties may exchange relevant information precedent to conducting the mediation. Any party may pursue any available judicial remedy, upon the first to occur of any of the following:

1. If the dispute giving rise to the request for mediation has not been resolved within one hundred eighty (180) days after a party has given notice of the intent to initiate mediation, *or*
2. Upon notice that a party will not participate in the requested mediation, *or*
3. If the mediator concludes that the parties are at impasse.

OPTION B

I recognize that my children [beneficiaries] may not always agree among themselves in regards to matters concerning the administration of my [trust] estate. I prefer that my children [beneficiaries] seek to resolve any disagreements between themselves by themselves. Nevertheless, if my children are unable to resolve their disputes directly, I request that they participate in a collaborative process facilitated by a neutral third party (*mediation*). I suggest that _____, [my good friend] [my sibling] he requested to serve as such facilitator. If such person or persons are unable or unwilling to serve as neutral, I direct that my beneficiaries select a professional neutral to facilitate this process. In any event, I direct that the payment of the cost of such process shall be paid by the trustee from the trust estate as an expense of administration. I urge my children [beneficiaries] to participate in this process with the utmost good faith. I remind my children [beneficiaries] that it is one of my lasting wishes that family harmony be preserved, and that disagreements over material matters do not serve as a basis for permanent family estrangement.

The disputing party shall give the other parties written notice of the dispute. Within twenty-one (21) days after notice is given, the trustee and the beneficiaries shall select an agreeable neutral (if not otherwise selected by this instrument). Within fifteen (15) days thereafter the trustee and beneficiaries shall agree upon mediation dates acceptable to the mediator. Thereafter the parties may exchange relevant information precedent to conducting the mediation. Any party may pursue any available judicial remedy, upon the first to occur of any of the following:

1. If the dispute giving rise to the request for mediation has not been resolved within one hundred eighty (180) days after a party has given notice of the intent to initiate mediation, *or*
2. Upon notice that a party will not participate in the requested mediation, *or*
3. If the mediator concludes that the parties are at impasse.

APPENDIX B

ACKNOWLEDGMENT REGARDING CALIFORNIA EVIDENCE CODE MEDIATION CONFIDENTIALITY PROVISIONS AND AGREEMENT TO MEDIATE

In the Matter of Mediation of: **THE ESTATE OF _____**

_____ SUPERIOR COURT PROCEEDING _____

_____

This ACKNOWLEDGMENT AND AGREEMENT TO MEDIATE is entered into by the undersigned parties and the respective counsel as of _____ in order to promote communication among the parties and the mediator and to facilitate resolution of the dispute between the parties. The undersigned participants to this mediation agree as follows:

1. Nature of Mediation

The parties hereby appoint and retain John A. Hartog, attorney at law, ("Mediator") as mediator. The parties understand that mediation is an agreement-reaching process in which the Mediator assists parties to reach agreement in a collaborative and informed manner. The parties understand that the Mediator has no power to decide issues for the parties. The parties understand that mediation is not a substitute for independent legal advice. The parties will obtain independent legal review of any formal mediated agreement before signing that agreement. The parties understand that Mediator has an obligation to work on behalf of all parties and that Mediator cannot render individual legal advice to any party.

2. Scope of Mediation

The parties understand that it is for the parties, with Mediator's concurrence, to determine the scope of the mediation; this scope will be accomplished early in the mediation process. Nevertheless, the parties intend to mediate all issues concerning the _____ Estate.

3. Mediation is Voluntary

All parties here state their good faith intention to complete their mediation by an Agreement. Each party understands however, that any party may withdraw from or suspend the mediation process at any time, for any reason.

The parties also understand that the Mediator may suspend or terminate the mediation if he feels that the mediation will lead to an unjust or

unreasonable result; if the Mediator feels that an impasse has been reached; or if the Mediator determines that he can no long effectively perform his facilitative role.

4. Applicable Statutory Provisions

This mediation process is being conducted pursuant to the provisions of California Evidence Code Sections 1115 through 1128 and 703.5.

5. Mediation Inadmissible in Any Proceeding

No evidence of anything said or any admission during the course of the mediation is admissible or subject to discovery. Disclosure of the evidence may not be compelled in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

6. Confidentiality of Process

All communications, negotiations, or discussions by and between participants in the course of this mediation shall remain confidential. Any draft resolutions and any unsigned mediated agreements shall not be admissible in any court or other contested proceeding. Furthermore, anything told to the Mediator in private caucus meetings shall remain confidential with the Mediator unless permission is given to the mediator to disclose that information to another person.

7. Privileged Nature of Mediation

The privileged character of any information or documents is not altered by disclosure to the Mediator. The Mediator's subsequent oral and written communications with the mediation participants in a continuing effort to resolve the dispute are also protected by this Agreement. In the event that the mediation does not fully resolve the dispute in the initial session, the participants agree that the confidentiality provisions of Evidence Code Sections 1115 through 1128 and of this Agreement continue in full force and effect past the ten calendar day period set forth in Evidence Code Section 1125(a) (5), unless the mediation is terminated through any of the mechanisms set forth in Sections 1125(a) (3) and (4) or (b) (1) and (2).

8. Mediator Not a Witness

The Mediator will not be called as a witness by any of the parties to testify in court (pretrial, trial or post-trial) or any other proceeding whether or not the mediation results in an agreement.

9. Full Disclosure

Each party agrees fully and honestly to disclose all relevant information and writings as requested by the Mediator and all information requested by any other party, if the Mediator determines that the disclosure is relevant to the mediation discussions.

10. Mediator Impartiality

The parties understand that the Mediator must remain impartial throughout and after mediation process. The Mediator shall not champion the interests of any party over another in the mediation nor in any court or other proceeding.

11. Coordination with Legal Counsel

The parties agree that the Mediator may discuss the parties' mediation process with any attorney any party may retain as individual counsel. Such discussions will not include any negotiations unless the parties instruct the Mediator that their attorney(s) have negotiating authority. The Mediator will provide copies of correspondence, draft agreements and written documentation to independent legal counsel at a party's request.

12. Mediation Fees

The parties and the Mediator agree that the fee for the Mediator shall be $450 per hour for time spent with the parties and for time required to study documents, research issues, correspond, telephone call, prepare draft and final Agreements, and do such other things as may be reasonably necessary to facilitate the parties reaching full Agreement. The Mediator shall also be reimbursed for all expenses incurred as part of the mediation process. Nevertheless, the mediator shall give 30 minutes of scheduling and preparation and 2 hours of mediation conference time pro bono.
A payment of $_____ toward the Mediator's fees and expenses shall be paid to the Mediator on or before_____ [along with the signing of this agreement]. Any unused amount of this retainer fee will be refunded to the parties. The parties shall be jointly and severally liable for the Mediator's fees and expenses. As between the parties only, responsibility for mediation fees and expenses shall be: _____.
The parties will provided with a monthly accounting of fees and expenses by the Mediator. Payment of such fees and expenses is due to the Mediator no later than 15 days following the date of such billing, unless

otherwise agreed in writing. There shall be a 1.0% monthly service charge on accounts not paid by the last day of the month.
Should payment not be timely made, the Mediator may, in his sole discretion, stop all work on behalf of the parties, including the drafting and/or distribution of the parties' Agreement, and withdraw from the mediation. If collection or court action is taken by the Mediator to collect fees and/or expenses under this Agreement, the prevailing party in any such action and upon any appeal therefrom shall be entitled to attorney fees and costs therein incurred.

13. Governing Law

This Agreement and any written settlement agreement resulting from the mediation are admissible to prove the existence of and/or to enforce the settlement agreement under California Code of Civil Procedure Section 664.6, if applicable, or under any procedure permitted by law. In all respects the terms of this agreement are governed by California Law.

14. Breach a Cause of Irreparable Injury

Because the participants are disclosing information in reliance upon this Agreement, any breach of this Agreement would cause irreparable injury for which monetary damages would be inadequate. Consequently, any party to this Agreement may obtain an injunction to prevent disclosure of any such privileged information in violation of this Agreement.

IN WITNESS WHEREOF, THE PARTICIPANTS HAVE SIGNED THEIR NAMES BELOW.

(Name and Title)	(Signature)
(Name and Title)	(Signature)
(Name and Title)	(Signature)
(Name and Title)	(Signature)

APPENDIX F

Barrier	Strategy
• Stand on the balcony	The image to inspire this focus and to act in a non-reactive way is to imagine your self going to the balcony and looking down at the negotiations.
• Step to their side.	Although they are attacking you, you can disarm them through listening to them, acknowledging their views, agreeing, and showing respect. Since the point is joint problem-solving and they are not, you step to their side.
• Reframe	As they dig in, you want to reject their position. Don't. Accept what they say and then reframe it as their attempt to deal with the problem. Ask for more information on why that's their answer to the problem.
• Build Them a Golden Bridge	You have to demonstrate how an agreement has benefits for them, can satisfy their interests. Build a bridge from their side to yours, so they can save face. Make your idea also their idea.
• Use Power to Educate	Show that there are costs of not agreeing. Ask reality-testing questions, discuss

your BATNA. Provide reassurance that you want mutual satisfaction, that it's their choice.

- Your reaction.

Each of us feels like striking back when struck. If the other side attacks, the natural reaction is to do so too.

- Their emotion.

The other side is angry and hostile or possibly distrustful and afraid. They are not listening.

- Their position.

Rather than cooperative problem-solving, they stick to their position and pressure you to give in.

- Their dissatisfaction.

The other side is not aiming mutual satisfaction because they don't see why they care about your satisfaction at all. They don't want to lose face by backing down.

- Their power.

They think they can get what they want without your cooperation.

- Go to the balcony.

To not get derailed by the other side's reaction, you need to remain focused.

Resources

Books

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Henden, Kay E., "Mediation in Trust and Probate Practice" in *California Trusts and Estates Quarterly*, State Bar of California, Winter 2002 (Vol. 8, Issue 4).

McDonald, Brian, Isabella Horton Grant and Richard Collier, "Family Feud: Attorneys Can Use Mediation to Prevent Estate Disputes" in *San Francisco Daily Journal*, September 27, 2005.

The following articles can be found on the website, www.mediate.com:

Bachle, Laura, "Estate Planning and Family Business Mediation"

Gage, David and John A. Gromala, "Mediation in Estate Planning: A Strategy for Everyone's Benefit"

----------, Trustee-Beneficiary Mediation

Grey, Robert, "Mediation of Guardianship and Elder Law Cases"

Gromala, John A., "The Use of Mediation in Estate Planning: A Preemptive Strike Against Potential Litigation"

Larsen, Rikk, "Tipping Points – Reasons Why Mediation Works in Complex Family Disputes"

----------, "Mediating a Key Estate Settlement Issue – Diving Personal Property"

----------, "Mediation in Today's Estate Settlement World"

Mitchell, Janet, "Elder Care Mediation: A New Way to make Decisions Regarding Aging Parents"

Other

ABA Section of Dispute Resolution	www.abanet.org/dispute
Association for Conflict Resolution	www.acrnet.org
Mediation Information and Resource	www.mediate.com
The Oregon Mediation Center	www.smartmediator.com

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