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Chapter 2

Focus on Facilitative Mediation: What Estate Planners and Fiduciaries Need to Know

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The best strategy for an advocate or other participant in any mediation is to begin by understanding the process fully. It can be a challenge to do so, however, given the variety of dispute resolution processes, the different styles of mediation and mediators, and the puzzle of different state rules and laws which control. The challenges are of particular concern in the field of trusts and estates, because in many states mediation practice is still in its infancy. Mediation is one method of dispute resolution as an alternative to litigation, and facilitative mediation is a type of mediation particularly well-suited to resolving trust and estate conflicts. This chapter provides an overview of how to use facilitative mediation to settle trust, estate, and related disputes, along with answers to some commonly asked questions about the process.[1]

I. FACILITATIVE MEDIATION[2]

A. What is Facilitative Mediation?

Facilitative mediation is a negotiation of a dispute where a neutral third-party mediator facilitates the parties' communication about disputed issues in order to reach a mutually beneficial result. The intention of facilitative mediation is to assist the parties in reaching a solution that satisfies their respective needs and interests, rather than to determine who wins and who loses the dispute, and it may be based on both legal and non-legal issues. As discussed in Chapter 1, some key requirements for all types of mediation are neutrality of the mediator, confidentiality of the process, and self-determination of the parties.

B. Facilitative Mediation on the Control Spectrum for Alternative Dispute Resolution ("ADR")

1. Who Controls the *Outcome* of the Dispute?

One of the underlying principles of any type of mediation is "self-determination," meaning that the mediator has no authority to impose an outcome on the parties and does not decide the outcome of the dispute for them. The mediator focuses on communication and collaboration, and looks to the future by considering the mutual interests of the parties without being limited solely to considering legal rights. Thus, the parties retain decision-making authority over the outcome of the dispute, even in court-ordered mediation where attendance is mandated.

Litigation and arbitration differ greatly from mediation, particularly with respect to control. The parties in both litigation and arbitration cede control of the outcome of a dispute to a neutral third party, whether a judge in litigation or an arbitrator (or panel of arbitrators) generally selected by the parties in arbitration. The judge or arbitrator is required to look to the past and legal precedent to determine who was right and who was wrong, and to determine a winner and a loser.

2. Who Controls the *Process* of Dispute Resolution?

The judge takes control of litigation and determines every step in the process, including motion practice and discovery, pursuant to state laws, court rules, and custom. In deciding to litigate, a party must be willing to give up total control over both the outcome and the process of the matter to the judge and the judicial system.

Similarly in arbitration, parties must also be willing to let the arbitrator take control of the process as well as the outcome of a dispute. Nevertheless, parties in arbitration may be able to retain more control than in litigation. They may select the arbitrator as opposed to being assigned a judge, and may collaborate to establish the rules for the arbitration process which need not mirror court rules. For example, the arbitrator and parties may together decide on a shorter discovery period and/or less discovery than the judge might otherwise require.

The mediation process looks very different from both litigation and arbitration. In contrast to a judge or an arbitrator, the mediator has significant flexibility in managing the process and may work with attorneys and parties to design a mediation process that is well-suited to the dispute at issue.

C. Other Styles of Mediation

Facilitative mediation is one style of mediation with which trust and estate advisors should be familiar. Understanding the other types of mediation may prove helpful in selecting the preferable mediation process and mediator, preparing for the mediation, and understanding the role of the advocate in the process.[3] Evaluative mediation and transformative mediation are discussed in Chapter 1.

II. WHY FACILITATIVE MEDIATION IS PARTICULARLY WELL-SUITED TO RESOLVING TRUST AND ESTATE DISPUTES

A. Consistency with the Family Settlement Doctrine[4]

Historically, probate and chancery courts have favored intra-family settlement of trust and estate disputes in lieu of resolving these emotionally charged conflicts through the courts. As a result of the family settlement doctrine, courts generally uphold family settlement agreements in the absence of fraud, undue influence, or the breach of confidential relationship.[5]

Facilitative mediation is consistent with this judicial preference for internal, independent resolution of family disputes. It is similar to the approach historically used by the team of advisors, including the trust officer, attorney, and accountant, working together to help family members reach a mutually satisfying settlement, either without court intervention altogether or by involving the court only to obtain approval of the settlement agreement.

B. Provides a Confidential Forum

Mediation offers families a private and confidential forum for dispute resolution. Wealth transfer and estate planning conflicts often involve personal issues that families do not want to be a matter of public record. A family's reputation or business interests could be damaged if its competitors, or the press in high profile matters, were to gain access to confidential information which could be disclosed in the course of litigation.

The use of mediation to maintain privacy in the case of a wealth transfer dispute is consistent with the historic use of revocable trusts. One reason individuals create funded revocable trusts is to avoid probate court proceedings and maintain the family's privacy. However, if a lawsuit were filed, a trust could become a matter of public record and scrutiny, thereby defeating the grantor's intention of shielding the family's matters by using the trust form.

Although state law and court rules vary greatly, some states have adopted the Uniform Mediation Act (the "Act") or similar statutes to permit the mediation to remain confidential. The Act creates a mediator privilege to protect the process from future court proceedings.[6] Even when there is a statute or rule, mediation would also be subject to a private confidentiality agreement.

C. Preservation of Relationships

Estate and trust conflicts often involve related parties. Although family relations are likely to suffer damage when disputes escalate, relationships are more likely to suffer irreparable harm when the conflicts become openly adversarial as in litigation. The very act of filing a lawsuit against a family member necessarily "stokes the parties' emotions"[7] and is likely to cause lasting grudges and permanent damage to the family.

The mediation process can resolve such conflicts while still preserving relationships because it fosters communication and collaboration, rather than controversy, among the parties.

Additionally, mediation can be entered into before one or both parties are forced into fixed, adversarial positions with the filing of a legal complaint.

D. Forum for Acknowledging Emotions

Trust and estate advisors are familiar with conflicts which are frequently fueled by emotional responses in addition to violations of legal rights or objective legal standards. These disagreements may involve power struggles stemming from sibling rivalries, childhood disputes, perceived parental favoritism, and sentimental attachments.

Facilitative mediation provides the parties to a dispute with a chance to tell their stories, particularly in joint conferences when they can speak directly with one another (as well as when each party is meeting separately with the mediator in caucus). The mediator uses "active listening" to ensure that the party knows he has been heard, perhaps for the first time. It is not unusual for a party to leave a mediation feeling that he has finally had a "day in court" with the chance to tell his or story. This approach is different from litigation where a party rarely has an opportunity to tell her side of the story fully, due to procedural rules, litigation strategies, and limitations on testimony.

The role of the facilitative mediator is to create an environment of communication and to encourage dialogue about any emotional issues that may have prevented the parties from reaching a settlement during previous negotiations. In providing a forum for "venting," the mediator should be skilled at acknowledging and validating the parties' emotions, while also controlling the process without allowing abusive outbursts which might otherwise occur and interfere with conflict resolution.

E. Developing Flexible and Creative Solutions

Because mediation can address underlying issues in a conflict, the solution reached through the process may be more comprehensive and durable than otherwise possible. Certain emotional resolutions may have considerable value to the parties, yet would be completely disregarded by courts or arbitrators.

It is not unusual for trust and estate disputes to involve matters where no remedy in law or equity may be sufficient to satisfy the parties. Therefore, brainstorming about and finding creative, non-legal solutions which provide both sides with a positive result may be the key to breaking the deadlock.[8] For example, a family member may be intent upon proving that other siblings were favored by their parents and that she had never been treated fairly; that family member may not be satisfied with any settlement unless it includes a personal apology from the alleged "wrong-doers."

F. Potential for Costs and Time Savings

Often, substantial fees and costs are associated with litigating a dispute. When the dispute concerns property of relatively small financial value, litigation costs may be disproportionate to the amount at issue. In such situations, mediation has the potential to result in a faster,

less expensive settlement, particularly when compared to a litigated case that actually goes to trial.

If, through mediation, the family members can reach a comprehensive agreement that all perceive as fair, the ongoing conflict may be eliminated or at least minimized. Additionally, mediation of family disputes can reduce the societal costs of litigation by eliminating these disputes from already-crowded court dockets, in harmony with the family settlement doctrine.

G. Caution: Facilitative Mediation Is Not Appropriate in Every Situation

There are circumstances where facilitative mediation is inappropriate. For example, as a general rule a question about the validity of a will cannot be mediated and needs to be adjudicated. When a dispute involves an incapacitated beneficiary or where a power imbalance otherwise exists between parties, accommodations may be possible so that the weaker party is adequately protected in the ADR process through a representative or otherwise. If adequate protections are not feasible, a court-supervised proceeding would be necessary. Also, some fact-specific disputes (such as those involving trustee fees or asset valuations) might be more efficiently resolved either by arbitration or by evaluative, rather than facilitative, mediation.

III. WHEN SHOULD MEDIATION BE USED FOR TRUST AND ESTATE DISPUTES? AT ANY TIME, BUT THE SOONER THE BETTER!

Generally, estate planners and their clients are most likely to consider mediation as a settlement tool in the litigation context. Beyond that limited scope, however, there are practical uses of mediation in a variety of situations, some of which are highlighted in this section.

A. During the Course of Litigation or When Litigation Looms

Mediation can be incorporated at any stage of trust or estate administration, particularly when the fiduciary is unable to resolve a dispute informally and administration is stalled as a result. It is appropriate to mediate a dispute in whole or in part when (a) it is likely that a lawsuit will be filed or after a lawsuit has been filed, (b) before or after discovery, (c) before or after key motions, or (d) before trial. Although the vast majority of cases settle before trial, it is ordinarily more cost efficient to settle the case earlier rather than later.

Early entry into the mediation process allows parties to limit discovery to the extent that is necessary for settling a specific dispute, as opposed to more extensive and expensive discovery necessary for trial. It is also possible to mediate any portion of a case, such as disputes over the disposition of tangible personal property which can be subject to emotional, non-legal issues. Chapter 6 looks at the use of mediation in resolving will contests and estate administration disputes.

B. Disputes over Administrative Matters

Mediation may be useful in reducing duplicative administrative tasks for an executor or trustee. If facilitative mediation were used to identify and address the underlying issues when the tension first became apparent, unnecessary time and energy required of the fiduciary to respond to such beneficiaries might be reduced or eliminated. Chapter 12 examines the use of mediation in the trust administration context.

EXAMPLE

A corporate trustee had been administering a marital trust for a surviving spouse for several years without significant discord among or with the adult children who were the remainder beneficiaries. However, at the death of the surviving spouse, the adult children wanted their respective shares of the trust estate immediately. They did not want to wait for the individual ancillary executor to file federal and state estate tax returns and to complete the other ancillary administration as required. It did not help that the parties detested the ancillary executor who had been a friend of the trust grantor and surviving spouse, but was not fond of the adult children with whom he now had to interact as fiduciary. The corporate trustee, who was stuck in the middle between the feuding beneficiaries and executor, also became the target of the beneficiaries' animosity and escalating threats.

At the trustee's suggestion, all the parties agreed that the trust and estate should engage a third-party, neutral mediator who could dampen the emotional turmoil while facilitating the establishment of a plan for the administration of the estate and trust. Any settlement would reflect the relevant deadlines and a practical timeframe for distributions to the remainder beneficiaries. The agreed-upon plan, as to timing and process, would be helpful for all the parties. In particular, it would allow the corporate trustee to proceed with more efficient and timely trust administration which would be less burdensome and time-consuming for all involved.

C. During the Estate Planning Phase

One of the most creative uses of mediation can begin in the estate planning phase, by addressing the complicated issues which may otherwise ripen into family strife and even litigation after the death of the senior generation. One such planning scenario concerns succession planning for the family business. This situation can be particularly volatile when there has been no effective grooming of successor management during the life of the patriarch or matriarch, and multiple parties are vying for control. Another estate planning dilemma with no easy answer can be how to achieve fairness in a second marriage where stepchildren are involved. In such complicated cases, the parties might benefit from the early use of mediation in order to design a solution with the assistance of an estate planning attorney and other advisors who are comfortable addressing sensitive non-tax issues.[9] Chapter 7 considers the use of mediation during the estate planning process.

EXAMPLE

Husband and Wife were in the process of having an estate plan prepared to conform to their pre-nuptial agreement. They had been represented by their respective divorce lawyers for the agreement, and were now being represented jointly by a new estate planning lawyer. Wife wanted to name her son from a prior marriage as the trustee of a marital trust she was creating under her estate plan as to which the same son was a remainder beneficiary. Husband did not want to have to deal with his stepson as the fiduciary and, having consulted with his separate divorce counsel, argued that such a designation of trustee contravened the spirit if not the language of the premarital agreement. No one wanted to renegotiate the premarital agreement, so the estate planning attorney suggested that they mediate to reach a solution.

In joint and separate ("caucus") sessions, the mediator worked with the couple, providing them an opportunity to vent in a safe environment and helping them listen to one another. In the end, Husband and Wife were better able to understand each other's position, and they were willing to brainstorm suggestions for an estate plan to meet their needs and interests both individually and as a married couple. Ultimately, the parties agreed to a marital trust with mandatory distributions of the greater of trust accounting income or a percentage of the total return. Accordingly, if the client's son were acting as trustee as his mother wished, he would have to distribute a required percentage of principal and income, thereby giving the surviving spouse more certainty than under the income only trust as originally drafted.

D. Elder/Guardianship Mediation

The term "elder mediation" generally refers to a mediation process that addresses the health, financial, and other concerns of a senior family member, although the term "adult family decision-making" may provide a better description. Family crises and the attending conflict are likely to occur with a change in an aging parent's circumstances, such as the loss of a spouse or a decline in mental or physical capabilities, while the parent still does not want to give up control. This type of mediation focuses on preserving the dignity, self-determination, and autonomy of the "elder," while teaching a constructive model going forward with adult family communication and problem solving. The relevant aspects of facilitative mediation otherwise discussed in this chapter are applicable; however, this model presents additional challenges such as being certain that the elder is adequately protected and represented in the planning and resolution. Chapter 8 examines the use of mediation in connection with guardianship and conservatorship decisions.

EXAMPLE

Three adult children disagreed over the care and living arrangements of their 90-year-old mother who was clearly losing physical capacity and whose mental capacity was also at issue (a petition for guardianship was already pending even

though durable powers of attorney were in place). A co-mediation was agreed to with an attorney-mediator who had experience with elder matters and another mediator who was a care manager/social worker. The neutrals were able to assist the parties in having respectful and goal-directed discussions, although difficult, about creating a plan which satisfied the mother's needs, including safety, and avoided further sibling conflict.

E. Requests by the Fiduciary for Court Instructions

Within the context of trust construction suits, a court of equity has general authority for the supervision of trusts and, to some degree, authority to instruct the trustee as to its powers and duties when not clear. Therefore, a trustee might bring a court action for instructions regarding the interpretation of a distribution standard or other trust terms in order to protect the trustee in the future administration. Prior to going to court, including the beneficiaries in a mediation to discuss an appropriate interpretation of the trust terms might lead to better results. A mediated agreement could not only protect the trustee from future allegations of breach of duty, but could also avoid family conflict as to ongoing distributions from the trust and thereby promote family harmony.

EXAMPLE

Genevieve's trust directs the trustee to make distributions to her grandchildren for their "education" with the additional direction that "education not be limited to traditional university education but may include travel for educational endeavors." The trustee has begun to get requests to pay for trips that seem to him more for amusement than education, and he thinks Genevieve's intent was to pay for study abroad. There are 12 grandchildren to consider, some of whom are attending college, some of whom are attending some form of vocational training, and some of whom want to travel around the world "researching beaches or hiking trails." The trustee needs (or wants) guidelines for distributions for education in order to avoid later challenges raised by dissatisfied beneficiaries. He could ask the court for instructions, but he thinks a facilitative mediation with a third party neutral, involving all grandchildren or their representatives, would be a preferable process. If the parties reached a mediated agreement regarding the guidelines, the court could then be asked to approve them in an uncontested setting which would be a swifter and less costly process.

F. When Discussions Are Hampered by Legal Conflicts

Legal representation of wealthy families for estate, tax, and business planning may involve multiple related individuals and entities, requiring complex conflict analysis and issues. The ABA Model Rules of Professional Conduct prohibit lawyers from representing multiple clients where there are known conflicts, unless the lawyer believes that he or she can provide competent

and diligent representation to each affected client, and the lawyer obtains written informed consent from each client. All states, except California, have enacted some version of these rules; California has enacted its own set of model rules.

Dealing with conflicts can be burdensome and time-consuming for lawyers in all practice areas, but the representation of families for estate planning and related matters presents particular problems. How can a mediator help lawyers sort out the morass of potential legal conflicts to solve estate planning, tax, and business problems, and at the same time allow lawyers and clients to continue and expand their mutually beneficial professional relationships?

The value of mediation in a heated family business dispute is illustrated in the next example. In that case as in many like it, client meetings about potentially controversial issues, such as family business succession after the death of the senior generation, could result in having as many lawyers as family members in attendance and thereby create an adversarial environment which is not optimal for joint problem solving.

Even without the threat of litigation, a lawyer might consider introducing a mediator to facilitate a family meeting. The mediator will be more adept at controlling the process, making the meeting more collaborative and productive. As described in this chapter, a mediator also has greater flexibility than the lawyer in facilitating such sessions in part because:

- Mediation communications remain confidential, even when shared among non-clients (including other advisors) in attendance. All participants will have signed and will be bound by a confidentiality agreement.
- A mediator is a neutral third party who, unlike the lawyer-advocate, is prohibited from favoring the interests of one party over those of another. As a result, the mediator can focus on creative problem-solving which is beyond the scope of an actual legal conflict.

EXAMPLE

An attorney was engaged to represent Mrs. Smith individually for estate planning, and as beneficiary and co-trustee for ongoing administration of her husband's marital and residuary trusts. In the initial contact, Mrs. Smith had been open about her need for help in dealing with her Son and Daughter. They were co-trustees who were fighting regularly over trust administration, with the expectation that Mrs. Smith would referee as she used to do while they were growing up. The lawyer had also been asked to represent Son and Daughter as beneficiaries, but was concerned that this situation might ripen into a dispute among the clients where the interests of one or more of them would be "directly adverse," or that the representation of one would "materially limit" the lawyer's representation of the others. In order to represent all three clients, the lawyer's engagement letter included complete and specific disclosure of the arrangement, including any reasonably foreseeable legal conflicts, and the lawyer obtained each client's written informed consent and acknowledgement that the representation of Son and Daughter would be only as co-trustees and not as beneficiaries of the trusts.

The trust assets included an operating business in which Daughter had worked with her father who had been grooming her as his "heir apparent." Daughter had continued to run the business during the two years following her father's death. Unfortunately, the trust agreement did not provide instructions about successor management or the disposition of the business. Son believed that Daughter was not running the business effectively and was being over compensated, among other complaints. Against the wishes of Daughter and Mrs. Smith, Son decided it was his fiduciary duty to become involved in the business on a daily basis and to oversee Daughter's every decision.

The meetings arranged by the attorney to discuss trust administration and management of the business were ineffective at best or a debacle at worst. Son and Daughter often ended up trading abusive verbal barbs, and it was not uncommon for at least one of them to walk out in the middle. Mrs. Smith threatened that she would not attend future meetings and would instead take steps for the immediate sale of the business at a bargain price.

The lawyer realized she could not effectively represent the clients as things were going and suggested that the parties engage a mediator with subject-matter expertise to facilitate the family meetings. Once the parties understood the potential benefits, they agreed to non-binding facilitative mediation and Mrs. Smith agreed to participate in at least the first mediation session.

Through joint sessions, caucuses, and frequent "time outs" (when the co-trustees started arguing), the mediator was able to get the parties to begin problem-solving about the contested issues, particularly everyone's concerns about the business. Each party had the opportunity to vent with the mediator, who could acknowledge and validate emotions while also reality testing the best alternatives for the survival of the business. Once the parties were calmer, the mediator was able to facilitate productive discussions leading to a global settlement. The lawyer was actively involved at every step, and in connection with the negotiations and the written settlement agreement Son and Daughter were each represented by separate counsel.

The agreement involved a business plan which both reduced the family discord and avoided a "fire sale" of the entity. The solution allocated day-to-day management authority for the business to Daughter but provided for Son's input through an advisory board which included the business accountant. This settlement gave Daughter an opportunity to show that she could run the business successfully in accordance with her father's wishes, while also giving Son an important oversight role in the management of this valuable trust asset.

Even though this family never experienced a "kumbaya moment" or group hug, the Smith family mediation was very successful. The effective business plan and other practical solutions resulted primarily from the intervention of a strong mediator who possessed mediation know-how, business acumen, and estate

planning experience. Also important to the successful resolution was the mediator's required neutrality, so that she did not—in fact, could not—align herself with any of the warring parties. Instead, as a skilled neutral the mediator was charged with helping the parties to identify and focus on the relevant issues, the most significant of which was structuring a business framework to fulfill the needs and interests of all parties. This included Mrs. Smith for whom ending the painful and exhausting conflict was the highest priority. Following the settlement, the lawyer was able to continue representation of the multiple clients, who appreciated how that lawyer had helped them "save the family business" and who became a good referral source for similar engagements.

IV. THE MEDIATION PROCESS

A. Tips for Selecting a Mediator[10]

Consider the following while interviewing candidates and before selecting a mediator:

1. Conflicts

Be sure there are no conflicts, such as prior representation of parties (by the mediator or a lawyer at the same law firm if the mediator practices in one).

2. Training and Experience

As a start, look for certifications required by court rules or statutes as well as to panels of approved neutrals. Also, carefully review the quality and quantity of programs in which the candidate has trained, and the number of mediations he or she has conducted. Both may provide evidence of relevant experience.

Consider whether the mediator should have subject-matter expertise, a topic about which there is a difference of opinion. It is not unusual to find opposing counsel taking conflicting positions on this issue when selecting a mediator. Some contend that an experienced and well-qualified mediator can resolve any type of dispute, and that mediation skills are most important. Others in specialized fields of the law prefer neutrals with both mediation and subject-matter expertise, particularly when technical legal issues will be an integral part of problem solving. For example, estate planners may want a mediator with subject-matter experience for a complicated dispute about how taxes should be allocated if the governing document and/or state law are not clear.

Caution: To be effective in estate and trust mediation, lawyers need to be both knowledgeable about the relevant rules and also mindful of their impact on the mediation. For example, there is a delicate balance in knowing when to focus on tax or other technical issues early enough in the mediation process to address them fully as the parties are working toward a realistic proposal, but not so early that it can distract the parties from addressing any other high-priority issues. A mediator with subject-matter expertise can provide guidance as to the "negotiation dance" in this type of situation.

3. Personality Traits

Studies have shown that personality traits can be indicia of mediator success.[11] Perhaps the most important trait is the mediator's ability to build trust and rapport with the parties. People are likely to respond favorably to a mediator's empathy and understanding.

Other attributes of a skillful mediator include tenacity, creativity, and willingness to work hard in tackling impediments to settlement. The mediator should never give up trying to break impasse, whether it means staying late into the evening of a mediation conference and/or following up with the lawyers for days (or weeks or months) if a dispute does not settle during the initial conference.

4. Mediation Style

Know whether the mediator's style is facilitative (or predominantly facilitative), evaluative, transformative, or something else. As noted, some styles may be preferable for certain matters.

Whatever the purported style, some mediators may be very forceful in trying to reach a settlement, and this may not be as effective when dealing with highly charged emotional issues. In any case, the mediator's behavior must not interfere with the parties' right to self-determination or the mediator's impartiality, both of which are required for the process.

5. Consider Co-mediators

Where a family dispute is based on longstanding discord, it might be advisable to engage one neutral with subject-matter expertise and another who is trained in family dynamics to co-mediate.

B. Designing the Process

Using best practices, the mediator would begin by designing the process with the attorneys in a pre-mediation conference by phone or in person. Generally, the following are to be addressed:

1. Logistics

The mediator and lawyers might collaborate on the logistics of the process, such as how much time should be scheduled, location and date, who should attend, and the agenda for the mediation conference. It can be helpful to have the clients' input on the agenda, as they might want to include non-legal issues for discussion. For example, it is not unusual for a client to give priority to an issue such as the disposition of grandma's blue teapot over substantive legal matters.

2. Discovery

Matters related to the court case, if any, should be considered, including deadlines for discovery and exchange of information, or whether discovery should be delayed until after the mediation if the case does not settle.

3. Mediator Submissions

Sometimes, submissions to the mediator are defined by the circumscribed requirements of the court or mediator. Regardless of the format, these submissions will include the factual content of the matter, the known issues to be resolved, the current positions of the parties and, if any, the

summary of prior efforts to reach settlement (including offers). Attachments and exhibits may include relevant court documents if litigation is pending.

Submissions may be directed confidentially to the mediator, or to both the mediator and opponents with only sensitive information being treated as confidential. Sometimes lawyers prefer to keep the submissions confidential for fear of divulging too much information, while mediators are more likely to encourage the exchange of information among the parties to the extent feasible in order to expedite joint problem solving.

C. Steps in the Mediation Process

The mediator controls the process, starting with the initial joint session. As with many mediation issues, there seems to be a divergence of opinion about how the process should be conducted. This overview discusses some of the frequently used steps.

1. Opening Statements

The conventional wisdom is that the mediator's statement (in part explaining the process, guidelines, and rules) starts the joint session. This is followed by opening statements presented by all sides of the dispute which, although less argumentative than in court, are to provide a disputant's view of the case to the opposition. However, some mediators and lawyers believe this part of the process fuels the flames of anger and discontent among the parties, and prefer to limit or even omit the parties' opening statements.

2. Joint Sessions versus Caucuses

There are no defined rules as to how much of a mediation process is to be conducted in joint sessions and how much in separate meetings. The mediator's preference as to this issue should be explored when interviewing candidates to mediate.

Some facilitative mediators are trained to conduct the entire mediation in joint sessions among all the parties and lawyers, in order to facilitate collaborative problem solving. These mediators will use separate meetings ("caucuses") sparingly if at all, only as they deem necessary or upon the request of the parties or their lawyers. Some attorneys may be leery of joint sessions for reasons such as whether it will be "free discovery" or whether there will be an emotional debacle. A skilled and experienced mediator will be able to handle whatever occurs, and may be able to build some additional protections into the process to respond to such concerns.

Other mediators sometimes work almost entirely through caucuses after the opening session, by delivering proposals back and forth to parties in separate rooms ("shuttle diplomacy").

Many mediators employ some type of compromise by using both joint sessions and caucuses, depending on how the mediation is developing and whether the issues need to be discussed collaboratively or separately.

3. Agreement Writing and Final Steps

If the parties settle during the mediation conference, a memorandum of agreement is to be fully executed. Unless restricted by applicable court rules, the lawyers can take additional time to

prepare the complete documentation. Whether the mediator or the lawyers will draft the memorandum of agreement can differ among mediators and may be subject to state law. The mediator remains available to assist if any new or open issues arise over finalizing the written agreement, and should be kept apprised of the matter until everything is completed.

D. The Facilitative Mediator's Techniques

1. Focus on Settlement

Notwithstanding the significant differences among mediators, any type of mediator must be able to keep the parties focused on settlement and keep the process going until settlement is reached.

2. Create an Atmosphere of Collaboration

Starting with the first phone call, the mediator's impartiality and neutrality, as demonstrated by language and actions, can provide a comfort zone for otherwise distraught and angry parties to the dispute.

3. Model Problem Solving Behavior in Controlling the Process

Siblings who are sharing in an estate or trust may have never had an adult conversation while their parents were still alive, and may revert to old behaviors from their childhood during joint mediation sessions. The mediator is trained to control and limit angry outbursts from parties in order to focus productively on reaching a settlement. The mediator can also encourage this by demonstrating problem solving behavior with participants.

4. Additional Skills in the Facilitative Mediator's Toolbox

- Providing the parties with an opportunity to vent emotions in a controlled environment and to have these acknowledged and validated, perhaps for the first time;
- Using "active listening" to solicit information and identify the parties' needs and interests to be addressed in settlement, as effective facilitative mediation usually involves interest-based rather than positional bargaining;
- "Reality testing" to help parties understand the strengths and weaknesses of their own case and the strengths of their opponents' case, as this understanding may be one of the key factors in reaching a successful and durable settlement; and
- Brainstorming to invent options for mutual gain, instead of pursuing the legal determination of who is right and who is wrong.

E. Who Should Attend the Mediation?

1. Parties with Legal Interests and Settlement Authority

All parties at the mediation should have an interest in a negotiated settlement and enough information to make an informed decision. The attendance of parties with settlement authority is mandatory. When mediation occurs in the litigation context, parties to the litigation and counsel to represented parties should attend the mediation (although lawyers do not necessarily participate in every phase of the process, such as when issues about medical care arise in an elder mediation).

2. Representatives of Incapacitated Parties

The interests of all the necessary parties for settlement must be protected in mediation, and all such representatives will be participants. All states have statutes to protect minors and incapacitated parties, whether (a) by the court, (b) by a court-appointed special representative or guardian at litem, (c) through parental representation or by a virtual representation statute, or (d) by an agent under a durable power of attorney executed when the principal had capacity. Unless all the parties can represent themselves, or be adequately represented otherwise, mediation is not appropriate.

3. Other "Interested Parties"

When mediating an estate, trust, elder, or family business dispute, it may be practical to include all "interested parties." This means not only the parties who have a legal interest in and settlement authority for the matter, but also those who may be affected in other ways. Of course, anyone who participates must sign and be bound by the confidentiality agreement.

For example, assume that the purpose of a mediation is to resolve a conflict over family business succession. In that mediation, it might be advisable to include all family members, whether working in the business or not, who are beneficiaries of the senior generation's estate plan, wish to participate in the mediation, and could be directly affected by the result. Or, if it were not advisable for such other "interested parties" to participate in a joint mediation conference, consider whether they might be able to participate in separate caucuses with the mediator or could be available by phone. In a mediation involving the division of estate property among three siblings, it might be important to include their spouses or partners in the discussions. Understanding and addressing the influence spouses have over the persons with legal interests may be a critical component in achieving a successful resolution of the dispute.

F. The Role of the Lawyer Representing Clients in Mediation

1. Mediation Advocacy; Lawyer as Counselor and Problem Solver

In facilitative mediation, the lawyer is called upon to act as counselor and problem solver, a role that is more collaborative and less adversarial than in litigation even when making the client's best case to the opposing side. The goal is for all the lawyers and parties to help in building consensus and to participate in joint, creative problem solving. This can be a challenge for seasoned litigators who are used to positional bargaining and more comfortable with adversarial negotiations.

2. How the Lawyer Prepares for Mediation[12]

Effective mediation advocacy requires great diligence in preparation, both for the lawyer and the client. Just as with litigation, the lawyer needs (a) to know the facts, the file, and the law regarding the case, (b) to design a plan, strategies, and tactics of the case, and (c) to prepare the advocacy submission, if requested by the mediator, in the required form. The submission should also advise the mediator as to the results of previous negotiations and any previous offers. In most cases, the submission should not be as extensive as a brief in litigation. However, it is intended to accomplish the same purpose of setting forth sufficient information to persuade the mediator and opposing parties of the strengths of the case. If the case is already in litigation, it may include court filings.

3. How to Prepare the Client for Mediation

For successful mediation advocacy, the lawyer must prepare the client thoroughly for what to expect. Unless fully prepared, the client may be surprised and concerned by the more collaborative style of the lawyer in the mediation, and may think that aggressive tactics should be used as in trial. Once the client understands the focus of the proceeding as creative problem-solving, the lawyer's role as well as the mediator's role should be clarified. Hopefully, the client will then be a willing party in brainstorming toward conflict resolution. Chapter 5 provides more information about how to prepare a client for mediation.

4. Advantages of Client Participation in Mediation

If a client can be effective, it can be advantageous to have the client participate in the process by telling his or her own story during a joint session. Because trust and estate disputes can be fueled by personal issues, the client may be best-suited to explain such issues to the mediator and opposing party, as well as to express the repercussions to the client from the perceived wrong. Additionally, the mediation process may be valuable to the client just by having an opportunity to be heard.

5. Collaboration in Inventing Options for Mutual Gain

The lawyer is a guide to, and participant with, the parties in creative problem-solving in their mutual interests. As discussed, the lawyer needs to keep in mind that the mediation process, unlike litigation, does not require a legal finding of right and wrong, and allows for flexibility and consideration of non-legal options where appropriate for settlement.

G. How a Lawyer Can Use a Mediator Effectively

In developing a plan of mediation representation, a lawyer might identify specific ways for the mediator's techniques to move the case forward, and then work together with the mediator to take advantage of those opportunities. This section includes some examples of how to use the mediator proactively for best results.

1. Managing Client Expectations

The mediator will be reality testing to make the client aware of the weaknesses in his or her own case as well as the opponent's strongest arguments. It can be difficult for an advocate to manage the expectations of a client who is absolutely confident of a victorious finding by the judge. The lawyer may have tried to accomplish this in the past to no avail; however, in this context, the mediator's efforts may help the client face the risks of litigation as well as the potential financial, time, and emotional costs for the first time. Understanding these issues is essential for making wise settlement decisions and can prove to be a key to breaking impasse.

2. Effective Use of Caucuses

The lawyer should use confidential private meetings with the mediator effectively. It can be beneficial to ask the mediator for suggestions and ideas regarding negotiations and settlement throughout the process. The caucus can provide an opportunity to develop new settlement

options and determine how best to present them to the other side. The mediator brings a fresh prospective based on experience in other mediations, as well as previous joint sessions and caucuses with the opposing parties, and may be able to help package a proposal in a manner which the other side does not see as negative even if not yet acceptable.

3. Assistance in Breaking Impasse

The mediator is trained to identify the causes of impasse and formulate ways to overcome impediments to settlement. For example, if one side were about to give up and leave the session, a facilitative mediator might try further reality testing with them. With a better understanding of the downsides of litigation and the reasons for continuing settlement discussions, those parties might reconsider and decide not to walk away.

V. STATE LAWS, RULES, AND STANDARDS

A. Variance among States

The laws and rules affecting mediation vary greatly among states. The only apparent consistency is that each state has some provision for divorce/family mediation, at least with respect to child custody matters.[13]

Some states, such as Texas, California, and Florida, have comprehensive statutes and rules governing the practice of mediation, while a majority of states do not.[14] Some court systems have court-annexed mediation or other court programs, but these rules and procedures may differ greatly even within different counties in the same state.[15] Court-ordered mediation will have its own set of rules imposed upon the process.

In most states that have enacted the Uniform Trust Code ("UTC"), Section 111(b) authorizes non-judicial dispute resolution with respect to trust matters, subject to certain requirements and definitions.[16]

The regulation of mediators varies even more dramatically. Some states have formal certification procedures and/or training requirements while others do not.[17]

B. Confidentiality Requirement

Confidentiality is one of the underlying requirements for mediation but the application can differ. In states that have enacted the Uniform Mediation Act ("UMA"),[18] a broad mediator privilege is created to protect against disclosure for mediation communications so that, subject to certain limited exceptions, a mediator may refuse to testify in court proceedings or otherwise disclose the content of the mediation. The privilege also protects parties by making all mediation communications privileged and not subject to discovery or admissible in evidence in a proceeding, unless waived, precluded by misuse, agreed to otherwise in writing, available in the public record, or restricted or exempted under certain other limited circumstances.[19]

States that have not enacted the UMA may have adopted similar protection for confidentiality and mediator privilege. For example, Florida has enacted the Mediation Confidentiality and Privilege Act[20] as part of its comprehensive mediation legislation.

Mediation will also be subject to a private confidentiality agreement. This agreement serves an additional important principle as proof that each participant agreed to maintain the confidentiality of the process.

C. Application to Mediation of American Bar Association ("ABA") Model Rules of Professional Conduct for Lawyers

Provisions for ADR, including mediation, were first added to the ABA Model Rules of Professional Conduct for Lawyers with the changes adopted in 2002. Among the important provisions are the recognition of neutral roles for lawyers (Rule 2.4), and the duty of lawyers to advise clients of ADR options in resolving disputes (Rule 2.1, Comment 5). The latter has been controversial and different positions have been taken among the states.

D. Model Standards of Conduct for Mediators

Model Standards of Conduct for Mediators, originally developed in 1994 and revised in 2005, were adopted by the American Bar Association Section of Dispute Resolution, the Association for Conflict Resolution, and the American Arbitration Association. These address essential mediation concepts and requirements, including self-determination of the parties, impartiality and competence of the mediator, and the quality of the process. The Model Standards are intended to be a guide for mediator conduct; to inform the mediating parties about the process; and to promote public confidence in mediation as a process for resolving disputes. These ethical guidelines are applicable to all mediators, including lawyer-mediators, but they do not include enforcement procedures and are not binding.

VI. CONCLUSION

Facilitative mediation is an important tool for resolving disputes that arise in many aspects of a trusts and estates practice. The mediation process is particularly well-suited to such disputes for a variety of reasons, including that it (a) permits the parties to retain control over the outcome, (b) provides a private forum for communication about sensitive family issues and an opportunity for acknowledging the emotions involved, and (c) presents the opportunity for creative problem solving without the limitations imposed by legal decisions as in litigation or arbitration. As fiduciary litigation continues to increase, mediation should prove to be a useful technique for resolving disputes earlier and more efficiently, and for reducing complex conflicts and malpractice risks otherwise inherent for lawyers in many cases. Accordingly, it is important that lawyers, fiduciaries, and other advisors involved with trusts and estates have a thorough understanding of the facilitative mediation process, as well as when and how it can be used most effectively.

NOTES

1. "Mediation has become a widely used method for settling divorce disputes, and based on this success, there has been interest in encouraging the use of mediation to resolve will disputes. ... Yet ... mediation to resolve will disputes has lagged far behind its use in divorce." Ray D. Madoff, *Lurking in The Shadow: The Unseen Hand of*

Doctrine in Dispute Resolution, 75 So. Calif. Law Rev. 161, 163-64 (2002). Prof. Madoff's comment from 2002, about how divorce mediation has flourished while probate mediation has not, remains applicable in many areas of the United States.

2. Chapter 1 describes other forms of mediation. In addition, there are processes which are adversarial and binding, such as private judging; those which are advisory and non-binding, such as early neutral evaluation; or a combination, such as mediation-arbitration (med-arb) where the parties agree in advance that, if the mediation fails, they will proceed to arbitration. *See generally* Harold I. Abramson, Mediation Representation: Advocating as a Problem-Solver 435-60 (Wolters Kluwer Law & Business 3rd. 2013).

3. Several states, in some cases, after debating whether an evaluative assessment by a mediator constitutes giving legal advice and is the unauthorized practice of law, have enacted legislation restricting or even prohibiting evaluative mediation. *See e.g.*, Section D of Virginia's Standards of Ethics and Responsibilities for Certified Mediators, adopted by the Judicial Council of Virginia (Virginia Code Section 8.01-576 et. al., effective July 1, 2011). This provision requires written informed consent by the parties to the entire mediation process before it takes place, including (without limitation) understanding of and consent to: the role of the mediator; the style and approach of the mediator (e.g., facilitative, evaluation, etc.); that the mediator is not practicing law, but that the mediation process may affect the legal rights of the parties and/or have procedural effects on the underlying case pending in court; and that the parties or mediators may terminate the process.

4. *See generally* Mary F. Radford, *An Introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust, and Guardianship Matters*, 34 Real Prop. Prob. & Tr. J. 601 (2000).

5. *Id*. at 645.

6. Uniform Mediation Act ("UMA") Uniform Law Commission (2001, amended 2003). To date, UMA has been enacted in District of Columbia, Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington, and introduced in Massachusetts and New York.

7. Steve Schwartz, *Family Business Litigation: The Remedy Can Be Worse Than the Malady*, 61 Bench & Bar Minn. 40 (April 2004).

8. *See* Roger Fisher, William L. Ury & Bruce Patton, Getting to Yes: Negotiating Agreement Without Giving In (Penguin Rev. Ed. 2011).

9. *See generally* David Gage, John Gromala and Edward Kopf, *Holistic Estate Planning and Integrating Mediation into the Estate Planning Process*, 39 Real Prop. Prob. & Tr. J. 507 (2004).

10. *See generally* Abramson, *supra* note 2, at 178-86; Lee Jay Berman, *12 Ways to Make Your Mediator Work Harder for You*, Advocate Magazine (Oct. 2009).

11. *See* Abramson, *supra* note 2, at 182-83.

12. For checklists outlining steps for attorney preparation, see Karen K. Klein, *Representing Clients in Mediation: A Twenty-Question Preparation Guide for Lawyers*, 84 N.D. L. Rev. 877 (2008); Abramson, *supra* note 2, at 364-70.

13. *See* http://CourtADR.org for the ADR Resource Center established by Resolution Systems Institute ("RSI").

14. *Id.*

15. *Id.*

16. Unif. Trust Code §111(b) (2000), C.U.L.A. 2006; *See also* Gil E. Mautner & Heidi L.G. Orr, *A Brave New World*: *Nonjudicial Dispute Resolution Procedures Under the Uniform Trust Code and Washington's and Idaho's Trust and Estate Dispute Resolution Acts*, 35 ACTEC J. 159 (Fall 2009).

17. *ABA Section of Dispute Resolution Task Force Report on Mediator Credentialing and Quality Assurance* (2010) (2012) (failing to reach consensus on or to support a national model of credentialing, but supporting local initiatives and innovations in the field of credentialing which follow the Section guidelines); *Association of Conflict Resolution (ACR) Task Force on Mediation Certification Report and Recommendations to the Board of Directors* (2011) (setting forth final recommendation for national Model Standards for Mediation Certification which were adopted by ACR).

18. Uniform Mediation Act ("UMA"), *supra* note 6.

19. *Id*. at §§ 4-6.

20. Fla. Stat. §§ 44.401-44.406 (2012).