

TRUSTS AND ESTATES MEDIATION AND THE ROLE OF THE MEDIATOR

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

- Ralph Waldo Emerson⁰¹

I. SYNOPSIS

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

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

II. DEFINITION OF MEDIATION

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

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

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

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

III. MEDIATION VERSUS LITIGATION AND ARBITRATION

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

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

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

IV. TYPES OF TRUST AND ESTATE DISPUTES

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

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

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

others, how much each child owns and is earning, and how much each child has helped with their caretaking.

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

V. PARTIES TO TRUST AND ESTATE DISPUTES

A. Family Members

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

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

B. Other Parties

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

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

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

VI. THE ROLE AND POWER OF THE MEDIATOR

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

A. Building Rapport and Managing Communications

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

B. Mediators Have Power

Mediators have power. During the recording "How to Borrow a Litigator's Power", Dwight Golann, Esq., discusses how attorneys who are aware of a mediator's powers can borrow these powers to their advantage to obtain better results for their clients.¹³ Instead of going into the mediation

with an adversarial position to fight out the best deal for their clients, attorneys can pitch their case to the mediator and request that the mediator propose their offer to the other party, knowing that the other party will likely have a better reaction to the offer if it is coming from the mediator. Attorneys can talk with the mediators in the hall and give them an evaluation of what they think their client needs to hear to be more willing to settle. If an attorney is aware that their client is having emotional difficulty, the attorney, with advance permission from the client, can share this with the mediator so that the mediator better understands the situation.

C. Mediators Can Be Magical

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

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

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

VII. STYLES OF MEDIATION

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

A. Evaluative Mediation

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

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

B. Facilitative Mediation

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

C. Transformative Mediation

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

D. Narrative Mediation

Narrative mediation incorporates storytelling into the mediation.¹⁹ The mediator encourages the parties to share their personal stories on the conflict to help reach

resolution through understanding each other's point of view. The parties reach a resolution on their own through cooperation and working together to develop a resolution. This approach is premised on the idea that language plays a role in who we are and how we engage with others. This method goes beyond interest-based mediation by finding a set of mutual interests through collaboration.

E. Riskin's Grid

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

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

through questions, develop their own options and resolution proposals.

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

F. Applying Different Methods

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

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

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

VIII. MEDIATOR SELECTION

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

A. Mediator's Traits and Skills

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

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

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

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

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

B. Mediator's Training and Experience

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

C. Mediator's Style

1. *Facilitative, Evaluative or Both*

As discussed above, a mediator's mediation style may range from evaluative mediation to facilitative mediation and broad (focused on interests) to narrow (focused on positions), which can impact the process, and possibly the outcome, of the mediation. The mediator also may be experienced with transformative or narrative mediation styles. It is important that a mediator identify and explain their style, so the parties know what to expect. If the

mediator tends to change styles based upon the parties, attorneys, and progress of the mediation, the mediator should explain what types of events could trigger a change. This way, the attorneys and parties will understand if a mediator starts off evaluative, moves to facilitative, and then goes back to evaluative. Some mediators only do facilitative mediations. If they are asked to provide an evaluative opinion, mediators who do not want to be evaluative should be clear with the parties that it is not their style to evaluate.

2. *Private Caucuses or Joint Sessions*

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

3. *Repair or Separation*

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

D. Retired Judges

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

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

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

IX. TIMING OF MEDIATION AND PREPARATION

A. When Parties Are Ready

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

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

B. *Breslin v. Breslin*

A mediation may also be ordered by the court. Under Probate Code section 17206 and pursuant to the 2021 case of *Breslin v. Breslin*,³² a court may order the parties to a trust dispute to attend mediation. If an interested person who receives a properly completed notice of the court-ordered mediation opts not to participate in the mediation,

such non-participating person may not later object to the settlement reached at mediation, even if that settlement modifies the nonparticipating person's beneficial interest.

C. Attorney Preparation

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

D. Client Preparation

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

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

X. THE STAR APPROACH TO MEDIATION

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

A. Convening

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

1. Process

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

2. Checklist

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

begin the mediation then and there once a mediation agreement and confidentiality agreements are signed.

3. Meeting with the Attorneys

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

4. Exchanging Mediation Briefs

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

B. Opening

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

1. Mediator's Style

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

2. Logistics

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

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

3. Confidentiality Reminder

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

4. Opening Statements-Joint Session

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

set the groundwork for the mediation while the mediator continues to build rapport with the parties.

5. Opening Statements-Private Caucuses

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

C. Communication

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

1. Mediator's Questions

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

2. Active Listening

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

3. Validation

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

4. Listening and Asking Questions

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

educating each party about the other party's feelings and thoughts. Once the parties have shared their stories and feel validated, the next stage is negotiation.

D. Negotiation

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

1. Distributive Bargaining

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

2. Integrative Bargaining

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

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

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

3. *Unreasonable Offers*

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

4. *Dirty Tricks*

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

5. *Power Dynamics*

Power dynamics often exist between the parties. The mediator can help to protect the less powerful party from being bullied to enter into an unfavorable agreement. A central goal for the mediator is to handle problems caused by the application of power to the negotiation process. Mediators must recognize their own power sources:

their position as mediator, their expertise, their ability to dissociate themselves from the results, and the credibility of the mediation process. If appropriate and requested, it may be a good time for a mediator who is familiar with the subject matter to provide an evaluation of the more powerful party's position if it is not as strong as what such party is advancing. This can be helpful for the powerful party's attorney who may have been experiencing difficulty getting such message through to the client. In fact, attorneys often request the mediator to help them handle such situations.

6. *BATNA and WATNA*

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

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

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

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

7. Multiple Issues and Multiple Parties

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

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

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

8. Impasse and The Mediator's Proposal

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

Some mediators will ask a party in private caucus, "If I can get the other party to accept X, would you take it?" The mediator then does the same with the other party. Each party can respond yes or no and will often tack on

some interest. While this may be necessary to resolve the matter, it moves away from the beginning definitions of mediation and may raise ethical issues. Parties may be holding out, especially those who begin the mediation with an outrageous offer only to obtain a mediator's proposal that is more in their favor. As such, the mediator will need to carefully ascertain if a party is influencing the mediator.⁴⁴

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

9. Why Negotiations Fail

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

E. Closing

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

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

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

XI. THE SETTLEMENT AGREEMENT

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

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

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

With any settlement, there may be a number of actions that the trustee or another party may need to perform. If a party fails to do so, without a binding and enforceable settlement agreement, a party may have to start over and use of the documents produced and communications had during the mediation will be prohibited, due to the confidentiality provisions of Evidence Code section 1119. To avoid this, the parties to a pending litigation may file a motion to enter judgment pursuant to the terms of the settlement and request that the court retain jurisdiction over the parties to enforce the settlement until full performance.⁵² For a settlement agreement to be admissible, the agreement must be signed by all parties⁵³ and one of the following conditions must be met: (1) the agreement provides that it is admissible or subject to disclosure;⁵⁴ (2) the agreement provides that it

is enforceable or binding;⁵⁵ (3) all parties to the agreement expressly agree in writing, or orally in accordance with section 1118, to its disclosure;⁵⁶ or (4) the agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.⁵⁷ By submitting the settlement agreement to the court, the parties will be able to enforce it should one or more parties fail to comply.

XII. PSYCHOLOGICAL ASPECTS OF TRUST AND ESTATE DISPUTES

Mediators can be most effective during the mediation if they understand the psychology of the conflict⁵⁸ and the psychology of the parties, which can be learned through the attorneys or by observation. With family conflicts, emotions run deep and have been developed over years prior to the occurrence of the conflict, which may be contributing to the cause of the conflict and inability of the parties to resolve it on their own. These emotions, coupled with differing memories and perceptions of the same events, cognitive biases, and personality challenges, can negatively impact the chances of settling. Mediators and attorneys who embrace the psychology of these issues may be more effective in making parties feel understood and supported, which will lead parties to being more open and willing to settle.

A. Emotions

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

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

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

B. Memory and Perceptions

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

C. Cognitive Biases

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

A common example of cognitive bias seen during negotiations is an anchoring bias which occurs when people rely on the first piece of information they receive, such as an overly aggressive first offer. A party may take advantage of this by making an initial demand that is overly high or low, which can set the upper or lower limits of the negotiation but also serve to create frustration and cause the other party to counter with an equally outrageous demand or shut down. To diminish this, the mediator can challenge the assumptions underlying the anchor or respond by suggesting the parties consider a range of possibilities.⁶³ Another example is confirmation bias which is the automatic tendency to focus on ideas that affirm one's existing beliefs and reject or discount opposing information. As a result, people may shut down potential settlement alternatives. A mediator can try to counter confirmation bias by encouraging a party

through stories or asking the parties to consider evidence that supports the other party's ideas.⁶⁴ A third example is judgment overconfidence, which tends to be greatest when a person has little basis for a decision and increases with investment (after betting, people become more sure that their horse will win the race). Judgment overconfidence in mediation often arises from a party overvaluing the strengths in such party's position and underestimating or not understanding the weaknesses. This can be reduced by objective feedback on the situation, such as an evaluation of the party's position by the mediator. These are just three examples of many biases that impact negotiations.

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

D. Personality Type Indicators

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

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

E. High-Conflict Personalities

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

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

F. Diminished Capacity

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

G. Safety Concerns

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

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

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

XIII. APOLOGY AND FORGIVENESS

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

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

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

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

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

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

XIV. LESSONS FOR PLANNING

A. Drafting Estate Plans

With all the work and planning in which clients engage to minimize gift, estate, and generation skipping transfer taxes, there seems to be more that attorneys can do to help clients to minimize family disharmony, especially when the client shares elements of the family dysfunction. Planners can

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

B. Mediation Provisions

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

C. No-Contest Clauses

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

D. Holistic Planning

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

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

XV. CALIFORNIA MEDIATION CONFIDENTIALITY

A. Confidential Communications

In general, pursuant to Evidence Code section 1119, all communications that take place during a mediation are confidential, including anything said in the course of a mediation, all writings⁹¹ prepared during the course of a mediation or mediation consultation, and all communication, negotiations and settlement discussions.⁹² The reason for that confidentiality is to encourage parties to mediate by eliminating concerns that something said or written will later be used against a party. To ensure that the parties understand these confidentiality restrictions, as of January 1, 2019, California attorneys must provide to their client in all mediations, except for class or representative actions, specific disclosures about the mediation confidentiality before the client agrees to mediate and must obtain a signed acknowledgment by the client that they have read and understand the confidentiality restrictions and prohibition on the use of confidential information.⁹³ Pursuant to Evidence Code section 1129, the disclosures must be printed in the preferred language of the clients, be in at least 12-point font, be printed on a single page, not be attached to any other document, include the names of the attorney and client, be signed and dated by the attorney, and be signed and dated by the client.⁹⁴ If an attorney is retained after their client agrees to mediation, that attorney must comply as soon as possible.⁹⁵ Failure to comply will not invalidate a settlement but could lead to disciplinary action against an attorney.⁹⁶ Due to the broad application of the mediation confidentiality, it is important that the parties understand the disclosure and its implications.⁹⁷

B. Mediator Testimony

Evidence Code section 703.5 disqualifies mediators from testifying in court regarding mediations, except where a statement or conduct could "(a) give rise to civil

or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings."⁹⁸ This section is also inapplicable to mediators in child custody mediations.⁹⁹

C. Prohibiting Evidence of Attorney Malpractice

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

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

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

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

D. Pending Legislation

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

XVI. STANDARDS OF CONDUCT FOR MEDIATORS

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

A. Self-Determination

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

B. Impartiality

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

C. Confidentiality

The mediator must maintain the confidentiality of information and not disclose such information unless the parties expressly agree that the mediator may do so or the mediator is required to do so by law. If the mediator meets with a party in private caucus, the mediator shall not communicate any shared information to another party without express consent. While the parties can make their own rules, the mediator should address the parties' expectations regarding confidentiality. Mediator

confidentiality is critical to allow the parties to share information with the mediator, especially during private sessions. There may be times when the mediator thinks sharing information obtained during a private session may be helpful for the other party to hear. In such an instance, the mediator can ask the sharing party if it would be permissible to share information with the other party, but the mediator must abide by the parties' wishes under all circumstances.

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

XVII. ETHICAL AND OTHER RULES

A. Rules of Professional Conduct

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

B. Other Rules

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

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

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

C. Claims Against Mediators

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

XVIII. VIRTUAL MEDIATIONS

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

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

and parties may want to consider a dry run before the mediation day.

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

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

XIX. ARTIFICIAL INTELLIGENCE IN MEDIATION

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

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

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

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

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

XX. CONCLUSION¹²⁹

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

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- 129 The author acknowledges and thanks Honorable James P. Gray (Ret.), Mediator at ADR Services Inc., Honorable Glen M. Reiser (Ret.), Mediator at JAMS, Bruce S. Ross, Esq., Mediator at ADR Services, Inc., Honorable Jamoa A. Moberly (Ret.), Mediator at ADR Services, Inc., Betty Epstein, Esq., Mediator at ADR Services, Inc., Thomas J. Stipanowich, Esq., Mediator at JAMS and Professor at the Straus Institute, Dwight Golann, Esq., Mediator and Professor of Law at Suffolk University and the Straus Institute, Peter Rufo Robinson, Esq., Mediator and Professor Emeritus at the Straus Institute, Steven Rottman, Esq., Mediator at Rottman Mediation and Professor at the Straus Institute, Joseph L. Chairez, Esq. of Baker & Hostetler LLP, Robert K. Sall, Esq. of Sall Spencer Callas & Krueger and John P. Glowacki, Esq. of Carico Glowacki Macdonald Kil Benz LLP, for their review and contributions to this article.

TRUSTS AND ESTATES

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JOIN US FOR THE TOP FIVE CRITICAL LESSONS FROM MEDIATORS OF TRUST AND ESTATE DISPUTES

December 13, 2023 Webinar
12:00pm to 1:15pm

Panelist
Hon. James Gray (Ret.)
ADR Services

Panelist
Hon. Jamoa Moberly (Ret.)
ADR Services

Panelist
Hon. Glen Reiser (Ret.)
JAMS

Panelist
Bette Epstein, Esq.
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Panelist
Bruce Ross, Esq.
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Moderator
Kristin Yokomoto, Esq.
Baker & Hostetler LLP

For more information, please see page 67.

Top Five Critical Lessons from Mediators of Trust and Estate Disputes

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



Panelist
Hon. James Gray (Ret.)
ADR Services



Panelist
Hon. Jamoa Moberly (Ret.)
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Panelist
Hon. Glen Reiser (Ret.)
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Moderator
Kristin Yokomoto, Esq.
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Join a panel of esteemed mediators of trust and estate disputes as we explore the intricacies of successful mediations. Trust and estate litigation is on the rise and so are the number of disputes being successfully resolved through mediation. These experienced mediators will discuss the top five critical lessons on dealing with challenges of mediating trust and estate disputes. They will also share touching stories about apology and the opportunities to help families build bridges to be able to potentially reconnect with each other.

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