AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL
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TIMING CONSIDERATIONS FOR PROBATE/TRUST MEDIATIONS

Considerations in determining the best time to mediate probate/trust disputes: pre/early litigation; after limited discovery; after substantive discovery and motion practice; or eve of trial

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TABLE OF CONTENTS

I. WHEN TO MEDIATE 1

II. WHAT KIND OF CASE IS IT? 2

III. SELECTING THE MEDIATOR 3

IV. EMOTIONS, PERSONALITIES, AND COGNITIVE BIASES 4

V. WHO NEEDS TO ATTEND 8

VI. HOW BEST TO PREPARE FOR TRUST AND ESTATE MEDIATIONS 10

VII. WHAT LEVEL OF DISCOVERY IS NEEDED BEFORE MEDIATION? 11

VIII. DECISION MAKING 13

IX. BATNA, WATNA, AND DECISION TREES 14

X. OTHER TIMING CONSIDERATIONS 15

XI. COACHING AND PREPARING LAWYERS AND CLIENTS: WHAT TO DO AND WHAT NOT TO DO 15

XII. CONCLUSION 19

I. WHEN TO MEDIATE

A. Understanding the underlying case is important for evaluating the pros and cons of early mediation versus later mediation and for identifying the appropriate mediator for the case. There is no "one size fits all." Probate and trust cases have unique considerations. Here are bullet points to consider in the timing of the mediation and in selecting a mediator.

B. Before any litigation?

Are the parties already communicating about the substantive issues? Might the parties be motivated to avoid litigation from being initiated?

C. At the beginning of litigation?

Might the reality of litigation be the motivation necessary to get someone's attention? Do you need the litigation to identify and serve all interested persons? Do you need the litigation to enable your ability to issue subpoenas?

D. After discovery – what do you need to understand and negotiate the issues?

1. Medical records

Is the medical condition of someone at issue?

2. Neuropsychological exam

Is the mental capacity of someone at issue?

3. Financial records (banks, CPA's)

Full and complete financial records from the source are necessary to analyze and evaluate various claims and to determine damage claims. You need to know the amount at issue.

4. Accountings and Inventories

What's on the plate of assets at issue? How has the administration of those assets been presented?

5. Appraisals

Do you need independent valuations of assets? Is there a disagreement over valuations?

6. Depositions

Do you need to gather information from witnesses? Do you need to evaluate how someone may present themselves on the witness stand? Are witnesses credible?

7. Experts

Will the parties need experts for any of the issues?

II. WHAT KIND OF CASE IS IT?

A. Will and Trust Contests

1. Validity issues.

a. Testamentary capacity – did the testator or trustor or signer of a beneficiary designation have capacity at the time of execution?

b. Undue influence - was the testator or trustor or signer of a beneficiary designation vulnerable at the time of execution? Were they unduly influenced into signing the questioned document?

2. Interpretation and implementation issues.

Ambiguity, conflicting terms, impossible terms – is everyone (legitimately) arguing over the interpretation of language in a will or trust? Do terms in a will and/or trust contradict other terms (or reality)? Are the provisions in a will or trust impossible to perform?

3. No Contest Clauses – is there a no contest clause? Is anyone at risk of violating the clause?

B. Estate and Trust Administration

1. Breach of fiduciary duty – so many ways to breach!

2. Financial Exploitation – are you in a State with a statute against financial exploitation of a vulnerable adult?

3. Accountings – is someone trying to get an accounting? Is someone objecting to an accounting?

4. Selection of fiduciary (PR, Trustee, G/C) – is the will or trust clear? Is there a reason to disregard the nominated fiduciary?

5. Challenges to fiduciary conduct – does the challenge have a legal basis? Or is the challenge based on “it’s the principle” or “it’s not fair” or “I’m entitled”?

6. Second family issues – is there a stepparent and stepchildren?

7. Family Business/Succession disputes

8. Calculation issues?

a. Community vs. Separate? Are you in a community property state?

b. Allocation between sub-trusts (failed allocation) Did the surviving spouse not know (or forget) to divide the Trust upon the death of the first spouse?

c. Who gets what?

9. Personal property? A topic that needs no explanation!

C. Guardianship/Conservatorship Issues

Is the proposed ward incapacitated? Can you mediate capacity?

1. Conflicts about care

a. Who should be Guardian? One (or more) of the children? A private fiduciary?

b. Disputes about who controls and manages the care of another

c. Disputes about the custody of an incapacitated person

d. Disputes about proper care and management

2. Conflicts about assets

a. Who should be Conservator? One (or more) of the children? A private fiduciary?

b. Disputes about who controls assets (Trustee, Conservator, PR)

c. Disputes about management of assets (Trustee, Conservator, PR)

III. SELECTING THE MEDIATOR

Identifying the type of issues to be resolved may guide you in selecting the right mediator.

A. Does the mediator have an understanding of the particular issues? Does the mediator know the difference between a will and a trust? Has the mediator litigated the relevant issues?

B. Will the mediator be able to help the process through that understanding? Is the mediator a good listener? Is the mediator forceful enough to handle “bullies”?

C. Complicated tax issues?

D. Complicated community/separate property issues?

E. Complicated emotional issues? Will the mediator have sufficient insight and compassion for working through the emotional issues?

IV. EMOTIONS, PERSONALITIES, AND COGNITIVE BIASES

A. Mediation is a voluntary, confidential process where a mediator facilitates negotiations between disputing parties to reach a mutually acceptable settlement. As such, parties need to be able to evaluate offers and make decisions. A client's emotions, personality, and cognitive biases can have significant impact on his or her ability to evaluate offers and made decisions. If a client with a narcissistic condition is subject to an over confidence cognitive bias and feeling hurt, angry, and betrayed or their brain becomes highjacked, the probability of reaching a negotiated agreement that day may be slim. Especially in trust and estate fights involving sibling rivalry or stepparent and children resentment, these types of attributes of the parties will impact the trajectory of the disputes and mediation outcomes. It is critical that the attorneys and mediator are aware to help parties navigate before and during the mediation.

B. Before the mediation, the attorney, acting as both an advocate and counselor, can level set for the client and prepare him or her to deal with anything ranging from lies, insults, ambush, false accusations, etc. Creating decisions trees and determining the client's BATNA discussed in Part IX below can be helpful and coaching the client as discussed in Part XI below can be pivotal to helping the client stay the course. Otherwise, the client may not be emotionally and psychologically steady but rather easily triggered, which can have a negative impact on the client's ability to appropriately evaluate offers, negotiate, and make decisions.

C. If the mediation is taking place and the attorney was unable to help a party switch to a calmer, clearer, and more conducive mood for reaching an agreement, a trained mediator may be able to help. Mediators who understand these attributes can help parties navigate through impasse to resolution by noticing them, building rapport and trust with the party by actively listening, reframing, asking open-ended and clarifying questions, validating, and identifying party interests beyond positions.

D. Emotions

1. The American Psychological Association defines emotions as complex reaction patterns involving experience, behavior, and physiology. Emotions consist of subjective experiences, physiological responses such as a racing heart, and behavioral, expressive responses. Researchers generally accept fear, anger, joy, sadness, and disgust as core emotions. Some models expand this to include 27 distinct emotional states, such as rage, care, lust, grief, awe, confusion, and nostalgia.

2. Emotions are adaptive and help individuals to navigate situations, regulate behavior, and manage survival. Emotions can be stagnant, dissipate, or escalate with or without predictability. Before and during the mediation, attorneys can help clients evaluate and respond to offers and make decisions by identifying the emotions the client is experiencing and try to de-escalate them using different techniques. The mediator can also help the parties during the negotiation by being aware of each party's emotions and engaging in certain activities, which makes it all the more important to select the right mediator as discussed in Part III above.

a. Active Listening - This foundational skill involves fully concentrating on what a party is saying and validating. By validating feelings through reflective listening, such as paraphrasing or summarizing emotions, mediators can build trust and encourage open communication.

b. Creating a Safe Environment - Establishing an atmosphere of safety and trust allows parties to express their emotions without fear of judgment or retaliation. Mediators should encourage emotional expression by acknowledging feelings like anger or sadness as legitimate responses to conflict.

c. Emotion Identification - Mediators can facilitate discussions about emotions by prompting parties to identify how they feel in the moment. Questions such as “how are you feeling right now?” or “what impact has this conflict had on you emotionally?”

d. Reframing Negative Emotions - When negative emotions arise, mediators can rephrase inflammatory statements into more neutral language. This technique helps mitigate tensions and fosters a more constructive dialogue.

e. Encouraging Positive Emotions - Positive emotions should also be acknowledged and encouraged during mediation. Celebrating small victories or expressing enthusiasm about potential solutions can create a positive climate that enhances cooperation among parties.

f. Empathy and Patience - Empathy allows mediators to connect with parties on an emotional level, fostering understanding and rapport. Patience is equally important; allowing time for parties to express their feelings fully contributes to a more holistic resolution process.

3. An amygdala hijack that can occur during mediation is an intense emotional response where the brain’s fear center amygdala overrides rational thought, causing fight, flight, or freeze reactions that hinder negotiations and decisions. Attorneys who are aware of a client’s tendencies can help him or her to pause and gain control. At the mediation, trained mediators can help manage this by creating safe environments, actively listening, and implementing techniques like mirroring to de-escalate, while individuals can use techniques like taking breaks, deep breathing, and identifying emotions to regain control.

4. Emotions can be weaponized in mediation to manipulate, control, or disrupt the process. Parties may use calculated anger, guilt-inducing tears, or dramatic, staged outbursts to derail negotiations. Emotional manipulation includes using fake feelings to hide true intentions, creating amygdala hijacking through rage, or engaging in emotional dialogue to control the narrative. Such behaviors shift the focus from collaborative problem-solving to win-lose and positional bargaining, which often leads to impasse.

E. Personalities

1. It is useful for attorneys to be aware of a client’s personality and perceptions that impact his or her judgments and conclusions regarding a conflict. An attorney who understands a client’s conflict resolution style may be able to help a party through roadblocks. Identifying personality conditions and preferences can help the attorney to coach the client, which will help to manage reactions and expectations, and as a result, help the clients become ready to engage and participate productively in the mediation.

2. People diagnosed with DSM-5 Cluster B personality disorders, such as antisocial personality disorder, borderline personality disorder, narcissistic personality disorder, and histrionic personality disorder are known to cause more conflict and chaos, especially in intrafamily situations. High-conflict personalities often engage in bullying, blaming others, and making up stories to defend their positions. The attorney who can spot and minimize this before entering the mediation can increase the chances of resolution. If already at the mediation, a trained mediator may be able to help defuse bullying and minimize chaos.

3. A form of narcissism seen in trust and estate disputes is entitlement. Entitlement can develop at an early age. Whereas narcissism focuses on and is about the self, entitlement is about the self with respect to others, which dove tails well with feeling and falsely believing one is entitled to a parent's wealth prior to such parent's death. It can constitute financial, emotional, and psychological abuse.

4. Tools:

a. A widely recognized personality evaluator 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. If parties differ systematically in what they perceive and in how they reach conclusions, they will differ correspondingly in their interests, reactions, values, motivations, and skills.

b. Another personality indicator is the Thomas Kilmann Conflict Mode Instrument, which identifies five conflict resolution styles. They are collaborative, competitive, accommodating, avoiding, or compromising. An attorney who understands this model may help parties to defuse the conflict in order to create a group solution that meets all parties' needs, goals, and interests.

Understanding how personality conditions (such as narcissism) and preferences (such as competitiveness or collaboration) play a role at the mediation table will help the attorney better prepare the client in advance.

F. Cognitive Biases

1. Cognitive biases are derived from diverse sources, including one's attitudes and beliefs, social influence, ability to store and recall information, mental shortcuts, age, or heuristics (operations that people can perform without thinking). They cause individuals to make erroneous assumptions, make mistakes in reasoning, evaluating, and remembering, which can impact a client's ability to negotiate and make decisions during the mediation.

a. Confirmation Bias - 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. For example, if one party believes the other is untrustworthy, that party will look for and internalize information that confirms that negative view.

b. Anchoring Bias - When individuals over rely on the first piece of information they receive. A fact or figure becomes anchored in the mind. When negotiating a monetary settlement, what is considered reasonable can be influenced by the first offer. Whoever makes that first offer often has an advantage because anchoring bias causes the parties to place excess weight on the initial offer during subsequent negotiations.

c. Judgment or Optimistic Overconfidence - People are often overconfident that they will win at trial or find a different attractive option. Attorneys might over-attribute past successes to their skill rather than the merits of a particular case. This tends to be greatest when a person has little basis for a decision and increases with investment (after betting, people become more certain 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.

d. Selective Perception and Memory - Clients only see information that validates what they think they should see and remember.

e. Fundamental Attribution Error - When someone attributes a decision to the character of the other person rather than the external circumstances that drive the decision.

f. Labeling Distortions - A cognitive distortion in which people reduce themselves or others to a single, typically negative, characteristic, like a liar or cheat. Rather than viewing the person's behavior objectively, there is a tendency to globally label the person in a derogatory manner. As a result, any information that does not support the label is filtered out.

g. Sunk Cost - Also known as escalation of commitment, involves continuing to do what an individual has been doing merely because they have invested time, resources, or energy into it. People spend more money so that they can justify prior expenditure. Instead, focus on future possibilities, probabilities, and expenditures - can be worse if they go to trial and lose.

2. Heuristics are types of cognitive biases that arise from using mental shortcuts to simplify complex problems. While they allow for fast, efficient, and sometimes accurate decisions, they can sometimes lead to predictable, suboptimal, or irrational conclusions.

a. Common Sense Heuristic - Taking an umbrella because it is raining.

b. Scarcity or Popularity Heuristic - Choosing a restaurant based on an extensive line.

c. Representative Heuristic - Assuming someone quiet is an accountant or someone who looks like an accountant is not the thief.

d. Authority Heuristic - Trusting an expert.

e. Effort Heuristic - Deciding something is high quality because it took effort to make.

f. Affect Heuristic - Instead of using objective information, one relies upon one's emotions to evaluate a situation. The affect heuristic causes us to consult our emotions and feelings when we need to form a judgment but lack the information or time to reflect more deeply.

3. The attorney who spots cognitive biases can help a client to avoid the negative effects of cognitive biases and distortions by identifying the specific bias or distortion, asking open-ended questions without attacking, slowing down, listening to people who need to be heard.

a. Ask the client about what they need and what they think the other side needs can be disarming.

b. Focus on solutions, not fault or blame to avoid competitive arousal, and instead create collaboration. This will diminish reactive devaluation and fundamental attribution error.

c. If already at the mediation, the mediator can challenge the assumptions underlying the anchor or respond by suggesting the parties consider a range of possibilities.

G. Before the mediation, the attorney can help the client to prepare for the mediation by being aware of the client's emotions, personality, and cognitive biases and providing appropriate counseling. This way, the client will be more stable during the mediation and better able to hear and respond to information and offers and make decisions as discussed in Part VIII.

V. WHO NEEDS TO ATTEND

Trust and estate litigation often involves multiple interested parties, some of whom may have independent counsel. Proper attendance is critical.

A. Interested Parties

1. Heirs

2. Beneficiaries (current and remainder)

3. Surviving spouse

4. Legatees

5. Individuals listed in a prior will (depending on jurisdiction and type of claim)

B. Fiduciaries

1. Personal representatives / executors

2. Trustees

3. Temporary or special fiduciaries appointed by the court

4. Conservators or guardians when applicable

C. Attorneys of Record

1. Counsel for fiduciaries

2. Counsel for individual beneficiaries/heirs

3. Guardian ad litem counsel (for minors, unborn, or incapacitated beneficiaries)

D. Participants Sometimes Necessary for Effective Resolution [Alternative: be available by phone/video throughout the day]

1. Accountants / Tax Professionals - To address estate tax exposure

a. Generation-skipping transfer (GST) considerations

b. Allocation of capital gains vs. ordinary income

c. Trust tax implications

2. Valuation Experts

a. Real estate appraisers

b. Business valuation experts (closely held/family business assets)

c. Personal property or art/collectible appraisers

3. Professional Trustees or Corporate Fiduciary Representatives

a. With actual settlement authority

b. Able to adjust distributions or trust interpretations as part of the global resolution

4. Family Facilitators or Counselors [Never invited -- anyone else?]

a. Particularly valuable in intrafamily conflict?

b. Helps manage emotional dynamics that can derail settlement?

E. Attendance Considerations

1. Some beneficiaries may live out of state or abroad or be physically incapacitated in some way; video participation may be necessary.

2. In many jurisdictions, all parties with an objection on file or a petition pending must be included/attend.

3. If a court must approve the settlement (e.g., for minors or special-needs beneficiaries), a guardian ad litem may need to participate or provide a report.

VI. HOW BEST TO PREPARE FOR TRUST AND ESTATE MEDIATIONS

A. Case Preparation: Clarifying the Legal Theories

Trust and estate litigation commonly includes:

1. Will contests (capacity, undue influence, fraud, lack of formalities)

2. Breach of fiduciary duty claims

3. Accounting disputes

4. Surcharge petitions

5. Trust interpretation or construction claims

6. Creditor claims

7. Disputes over spousal or elective shares

B. Prepare with:

1. A clear articulation of each claim/defense

2. Statutory authority or case law supporting your position

3. A realistic assessment of the likelihood of court approval

C. Client Preparation

Beneficiaries and family members often have emotional and historical grievances that impact settlement.

D. Prepare clients to understand:

1. The mediator is neutral.

2. Evidence may not support every emotional concern.

3. Litigation could result in:

a. Long delays

b. Erosion of estate assets

c. [Further] Destruction of family relationships

E. Settlement may involve:

1. Modifying trust terms

2. Adjusting distributions

3. Removing or replacing fiduciaries

4. Agreeing to future accountings or enhanced reporting

F. Preparing the Mediator

Provide essential materials in advance:

1. The will(s), trust(s), and amendments

2. Petitions or objections filed

3. Expert reports/accountings

4. Prior annual reports/accountings

5. Relevant ambiguities or disputed provisions

6. Summary of family dynamics

7. Financial summary of trust/estate assets

VII. WHAT LEVEL OF DISCOVERY IS NEEDED BEFORE MEDIATION?

Discovery in trust and estate litigation is often targeted, not as expansive as regular civil litigation. The goal is to uncover key facts efficiently so parties can evaluate risk.

A. When Minimal Discovery Works

1. Disputes limited to interpretation of a trust clause

2. Beneficiary disagreements over modest assets

3. Non-contested accountings where parties simply need clarity

B. When Extensive Discovery Is Needed

1. Significant lifetime transfers to a single beneficiary

2. Complex fiduciary breach claims (self-dealing, conflicts of interest)

3. Estates with disputed business valuations

4. Cases involving alleged incapacity or fraud

5. Often the more money at stake, the more discovery

C. Additional “Necessities”: Inventories, Appraisals & Tax Analysis

1. Inventories - For mediation, inventories should identify:

a. All probate and non-probate assets

b. Titling and beneficiary designations

c. Valuation basis and documentation

d. Debts, liabilities, tax obligations

Inventories help parties understand what is *actually available* for settlement.

2. Appraisals - Appraisals are critical where value drives the dispute:

a. Real Property

b. Family Businesses or Professional Practices

c. Collectibles, art, jewelry

d. Farm or ranch operations

e. Restricted stock, partnership interests, LLC interests

f. Consider whether to:

i. Use a joint appraiser for efficiency, or

ii. Submit competing appraisals if viewpoints diverge significantly

3. Tax Analysis - Tax implications often determine whether a settlement structure works.

Key considerations:

a. Estate tax exposure (including portability)

b. Income tax basis step-up issues

c. Allocation of gain/loss on sale of estate assets

d. Trust tax consequences under Subchapter J

i. IRC §§ 641–692 provides the framework for how income earned by a trust or estate is taxed, how distributions are treated, and how taxable income flows between the entity and its beneficiaries

ii. Subchapter J defines a concept called DNI - Distributable Net Income, which determines who pays tax: (x) if income is distributed, the beneficiary pays the tax and (y) if income is retained, the trust/estate pays the tax.

iii. This structure prevents double taxation and ensures that income is taxed once, but in the hands of the party who benefits from it. Subchapter J matters in Mediation because tax consequences often drive or limit settlement strategies.

e. GST tax consequences for multi-generational trusts

f. Whether settlement will require a nonjudicial settlement agreement and how tax reporting will occur

g. Consider having a tax professional available or provide written estimates beforehand.

VIII. DECISION MAKING

A. Attorneys attending mediation and the mediators are expected to help clients through the decision-making process to reach a settlement. However, research has proven that people are not hardwired for decision making because people have a very narrow view of what is going on and do not see far in the future. In making decisions during negotiation, clients and attorneys must constantly balance the benefit of gathering more information with the hope of making a better choice against the cost of vacillation and balance what is already known with added information as negotiations proceed, which takes thought and effort.

B. The good news is that decision-making is a distinct skill that can be learned and honed through understanding principles of psychology, neuroscience, behavioral economics, game theory, and probability. There are well-known barriers to disinterested analysis, factors correlated with inferior quality decisions, and adverse outcomes, the incidence and magnitude of settlement decisions errors, and methods they can employ to improve decision-making and critical thinking skills for themselves and also for the parties and attorneys who appear before them in mediation. Attorneys create value for their clients by effectively representing them in negotiations and aiding them in settlement decisions, which is why understanding decision making skills can be extremely helpful.

C. Decisions will be impacted by a client’s tolerance for risk and ability to deal with uncertainty. Attorneys can help prepare clients to efficiently evaluate information and offers during the mediation and make settlement decisions by counseling the client to discern what does the client want most and what are the client’s differing interests, values, concerns, and fears most relevant to achieving their goals. By helping a client to identify preferred outcomes

and imagine alternatives, while evaluating risks and consequences, the client can assess offers and make settlement decisions.

D. Attorneys and mediators can help client to identify underlying interests. By uncovering the true concerns behind stated positions, attorneys and mediators can help clients to move beyond their initial demands to explore mutually beneficial solutions. By doing so, the attorney can help to expand the pie, not just split the pie, which is often too limiting. Identifying interest involves addressing emotional needs alongside practical concerns. For multi-party mediations, there will be multiple agendas and personalities, and identifying interests can be more complicated, but necessary to get beyond an impasse.

E. Resources:

1. The fifth edition of Thinking and Deciding by Jonathan Baron covers the field of judgments and decisions and discusses standards used to evaluate conclusions, such as logic, probability, and various forms of utility theory. It describes accounts of departures from standards, focusing on principles of cognitive psychology and emphasizing the distinction between search processes and inferences. Chapters cover decisions under risk, decision analysis, moral decisions and social dilemmas, and decisions about the future and is suited for attorneys.

2. In the 2010 revised and expanded edition of Predictably Irrational: The Hidden Forces that Shape Our Decisions, the author, Dan Ariely, argues that humans are not rational decision-makers but instead make predictable errors influenced by emotions and other forces. Both books provide insight into how clients may evaluate offers and make decisions.

IX. BATNA, WATNA, AND DECISION TREES

A. Prior to attending mediation, with the assistance of the attorney, each party should determine their best alternative to a negotiated agreement (BATNA), meaning what the party can achieve without settling at the mediation. Power in a negotiation comes from the ability to walk away from negotiations. The party with the best BATNA is the more powerful party in the mediation. The weaker party will have a better understanding of the negotiation context if they try to estimate the other side's BATNA.

B. Once the negotiations start, one or more parties' BATNAs may begin to fluctuate. A party can prepare for fluctuation by knowing each party's BATNA for different settlement scenarios. Accurately identifying a client's BATNA before the mediation is critical because the client should always reject an agreement that would put them in a worse position than their BATNA and likewise, always accept one that would put them in a better position.

C. 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 is not settled. If a party determines that its WATNA is that the court would rule against and award little to nothing 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.

D. Decision making 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 moves and countermoves. 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.

X. OTHER TIMING CONSIDERATIONS

A. What mutual interests may impact mediation timing?

B. Keeping family matters from being aired publicly?

C. Costs of litigation?

D. Limiting the "parties" to the dispute?

E. Are the parties willing (or unwilling) to identify, disclose and produce documents and other evidence in an informal pre-litigation and/or expedited fashion?

F. Can the documents be obtained informally (even if everyone cooperates)? Do you need cooperation from third parties?

G. What are the economics of litigation vis a vis the value of the Estate or Trust and/or vis a vis the financial ability of the parties.

H. Are the costs of litigation going to wipe out the Estate or Trust? Is there a disparity in "litigation power" among the parties?

I. Is the pending dispute holding up distribution of the Estate or Trust? Are there individuals who really need their bequest? Might that "need" constitute leverage to reach a settlement?

J. Is resolution of the dispute interfering with family interactions?

XI. COACHING AND PREPARING LAWYERS AND CLIENTS: WHAT TO DO AND WHAT NOT TO DO

Trust and estate litigation is unique because it combines legal complexity with deep emotional history. Preparing both attorneys and clients for mediation significantly increases the likelihood of settlement. This section provides practical guidance on pre-mediation coaching, as well as best practices and pitfalls during the mediation itself.

A. Preparing Attorneys for Mediation

1. Clarifying Advocacy vs. Facilitation

Lawyers in probate disputes sometimes approach mediation like trial. Instead:

2. Shift from adversarial to problem-solving mode.

3. Focus on client goals, not “winning.”

4. Prepare to propose creative solutions (trust modifications, reporting requirements, structured distributions).

B. Develop a Negotiation Strategy

C. Counsel should identify:

1. Primary goals (financial or non-financial)

2. Acceptable distribution ranges

3. Non-negotiables vs. flexible points

4. Creative alternatives (e.g., delayed distributions, creation of subtrusts, appointment of a neutral trustee)

D. Prepare the Attorney for Caucus-Based Communication

Mediation in trust and estate cases is typically caucus-heavy because:

1. Emotions run high

2. Family members don’t want to be in the same room

3. Confidentiality helps the mediator reality-test each side

E. Prepare counsel to:

1. Use caucus to test ideas

2. Share settlement rationales they prefer not to disclose directly to other parties

3. Allow the mediator to act as a “buffer” on emotionally charged issues

F. Preparing Clients for Mediation

1. Explain the Mediation Process. Clients in probate disputes often misunderstand mediation. They need to know:

a. The mediator is neutral, not a judge

b. Mediation is confidential

c. They won’t get a formal “ruling” that day

d. It’s normal for negotiations to feel slow

G. Address Emotional Dynamics Before the Mediation. Clients may feel:

1. Betrayal

2. Grief

3. Anger over perceived favoritism by the decedent

4. Suspicion of fiduciary misconduct

5. Resentment about unequal lifetime gifts

H. Coaching should include:

1. Identifying emotional triggers

2. Framing goals in practical - not punitive - terms

3. Understanding that mediation is not therapy, but emotions still matter

4. Set Realistic Expectations

I. Clients should understand:

1. Settlement rarely gives anyone “everything” they want

2. A “fair resolution” may not equal a perfect one

3. Litigation could drain the estate/trust

4. Court outcomes are uncertain, especially with capacity or undue influence claims

J. What to Do During Mediation

1. Use the Mediator as a Resource

2. The mediator can:

a. Assist with reframing difficult messages

b. Propose formulas for division or distribution

c. Reality-test expectations

d. Suggest creative non-monetary solutions

K. Stay Open and Flexible - Particularly in trust and estate litigation, solutions can be nuanced:

1. Adjusting percentages

2. Creating new subtrusts

3. Altering fiduciary roles

4. Scheduling future accountings

5. Dividing disputed personal property through agreed methods

L. Maintain Professionalism and Composure - Even when clients are emotional:

1. Counsel should model calm behavior

2. Avoid inflammatory language

3. Re-focus conversation on options and outcomes

M. What NOT to Do During Mediation.

1. Do Not Treat Mediation Like Mini-Trial. Avoid:

a. Long speeches about how “you’ll win in court”

b. Overly aggressive posturing

c. Personal attacks on opposing family members

d. Insistence that the other side admit wrongdoing

This shuts down productive negotiation.

2. Do Not Reveal Bottom Lines Too Early - Clients often think this speeds things up, but in reality:

a. It removes negotiating power

b. It can lead to impasse if the other side anchors higher

3. Do Not Ignore Non-Monetary Opportunities - Overlooking these can kill deals:

a. Changes to trustee

b. Enhanced reporting

c. Clarifications to ambiguous trust terms

d. Family agreements about personal items

4. Do Not Underestimate the Role of Emotions.

a. Comments like “this isn’t personal” or “let’s stick to the numbers” often backfire.

b. In many trust and estate disputes, emotional conflict is driving the litigation, not the assets themselves.

N. Post-Mediation Follow-Through - Even after agreement is reached:

1. Draft clear, comprehensive settlement documents

2. Consider court approval when minors/incapacitated beneficiaries are involved

3. Ensure tax professionals review the settlement structure

4. Clarify timelines (distributions, accountings, trustee turnovers)

5. A well-structured, forward-thinking agreement prevents future disputes

XII. CONCLUSION

The obvious best time to mediate trust and estate disputes is when the parties are prepared to negotiate, make decisions, and sign an enforceable agreement. That timing can range from pre-litigation, to before or after light or extensive written discovery and depositions, to the eve of trial, and to after trial and before an appellate decision. Negotiations can reach an impasse due to a variety of reasons including emotions, personalities, cognitive biases, limited discovery, lack of sufficient information about asset and liability values, absent necessary parties, or restricted exchange of information between the attorneys. Unfortunately, too often than not, if an impasse occurs and the mediation ends without settlement, one or more parties will end up with a less attractive deal after significant additional costs and expenses. Fortunately, the chances of reaching resolution can be increased if each party enters the mediation in a calm and open-minded mindset, armed knowing his or her trigger points, BATNA, and interests over positions and with the training to patiently share and listen, evaluate offers, and make decisions.