

Mediation for Estate Planners: Managing Family Conflict

Preface

Susan N. Gary, Editor

The title of this book, *Mediation for Estate Planners*, does not fully convey the scope of situations in which mediation may be useful in an estate planning practice. The issues discussed in this book range from drafting mediation clauses for estate planning documents to using mediation to resolve probate and trust disputes; from bringing in a consultant with mediation training to addressing family business succession to assisting families dealing with guardianship and conservatorship issues; and from using mediation in hospital settings when families face difficult end of life decisions to using mediation to work through disputes between trustees and beneficiaries.

Mediation's strengths include the fostering of ongoing relationships, the opportunity for parties to express emotions, and the flexibility of potential outcomes. Family law has long been an area in which mediation has benefited parties and the judicial system, and the estate planning context holds similar appeal. The process gives parties the opportunity to create their own solutions to disputes based upon their own needs and interests, rather than turning decision-making over to a judge who is limited to making a legal determination.

Probate courts around the country are increasingly interested in encouraging— or requiring— parties to try mediation before resorting to litigation. But by the time a dispute reaches the probate court, damage to family relationships may have already occurred. If lawyers recommend mediation to clients, either at the planning stage or soon after a dispute surfaces, families may be able to resolve disagreements before family members become “parties” with entrenched positions.

Understanding mediation advocacy and how best to work with clients using the process will enable a lawyer to provide better service to clients. A lawyer who is comfortable with mediation can help clients resolve disputes in a way that accomplishes their personal as well as legal goals. For estate planning lawyers, one of the great rewards of practice is being able to assist clients on issues that have a real and personal impact on their lives. Conflict happens in families, and a lawyer who can help a client address the conflict in a constructive rather than destructive manner will have more satisfied clients and greater job satisfaction.

The book is geared toward estate planning lawyers representing clients in mediation, but will also be informative for mediators seeking a better understanding of estate planning issues and how to work most effectively in these areas.

PART I– INTRODUCTION

Chapter 1, by Alexandra Carter, provides an introduction to mediation for a reader who is not yet familiar with this form of dispute resolution. This introductory chapter reviews the basic rules and practices in mediation and describes different forms of mediation. Subsequent chapters delve into the details. A reader with a basic knowledge of how (and why) mediation works may want to begin with Chapter 2, which focuses on facilitative mediation in the estate planning context.

Chapter 2, by Roselyn L. Friedman, takes a practical look at the use of facilitative mediation in resolving estate planning disputes. This chapter provides more information about facilitative mediation and how it works, and provides practical tips for using the process, such as choosing a mediator and working with a mediator to achieve the best result for a client.

PART II– PRACTICAL PERSPECTIVES

These chapters go further into the nuts and bolts of mediation in the estate planning context.

Chapter 3, by Michael D. Simon, identifies circumstances where a lawyer must keep an eye on the ethics issues and provides guidance on how the lawyer can protect himself from a charge of an ethical violation. Legal ethics are important in any area of legal practice, and the application of ethical rules in mediation is particularly challenging.

Chapter 4, by Ellen F. Kandell, provides the perspective of a mediator, discussing the types of disputes a mediator working in this area may see and providing tips for conducting mediations of these sorts of issues. The chapter will be helpful to someone serving as a mediator, perhaps new to this area of mediation practice, and will also be of interest to lawyers representing clients in mediation. The chapter can help a lawyer understand the mediator's role and ways to work with the mediator to improve the outcome of the mediation. The chapter provides examples of disputes and possible outcomes.

Chapter 5, by Kurt A. Sommer, focuses on the lawyer's role when representing a client in mediation. Many lawyers have experience with litigation or negotiation but may have limited experience with mediation. Advising a client in mediation requires a different approach, a different mindset, and the ability to explain to the client why the process may not look like what the client expects. Chapter 5 provides guidance in how to prepare a client for mediation so that the client understands what the lawyer is doing and so that the outcome for the client will be positive and as beneficial as possible.

PART III– SPECIFIC APPLICATIONS OF MEDIATION

Chapters 6–10 look at the use of mediation in a variety of circumstances that occur in connection with estate planning and administration. Each chapter focuses on a particular application and provides examples of how mediation can be used effectively. The use of mediation is growing in each of these areas, and considering the particular issues involved in each application will be useful to a lawyer seeking an in-depth understanding of mediation in the estate planning context.

Chapter 6, by Lela P. Love and Stewart E. Sterk, considers the use of mediation at the planning stage, both pre-death mediation and the inclusion of clauses encouraging mediation in wills and trusts.

Chapter 7, by Susan N. Gary, discusses the use of mediation to resolve disputes that arise after death.

Chapter 8, by Mary F. Radford, explains the challenges and benefits of using mediation in connection with guardianship and conservation issues.

Chapter 9, by Ellen A. Waldman, looks at how mediation can help families address difficult end of life decisions for loved ones.

Chapter 10, by Robert Whitman, considers ways in which mediation processes can help trustees provide better service to beneficiaries and resolve issues before disputes develop.

PART IV– FAMILY BUSINESS SUCCESSION PLANNING

Chapters 11–13 turn to the use of mediation skills and processes to help families in succession planning for family businesses. Family businesses may face conflict when a senior generation prepares to transfer the business to the next generation, and as more family members share the ownership and management of a business, conflict can arise in a variety of circumstances. Someone trained in mediation, but acting as a consultant or facilitator, may be able to help the family address potential conflict before a full-blown dispute develops.

Chapter 11, by Scott R. Peppett, examines the role a mediator can play in helping a family transfer business interests to the next generation.

Chapter 12, by Louis A. Mezzulo and Susan N. Gary, looks at conflict that can arise among siblings and cousins, using hypothetical examines to describe common problems – and ways to address those problems.

Chapter 13, by Gerald Le Van, an early advocate of the use of mediation-trained consultants in business planning, provides three essays about business succession planning. The essays explain why the combination of family and business creates challenges.

PART V— ARBITRATION

Chapter 14, by John T. Rogers, Jr., considers the use of arbitration in the estate planning context. This form of dispute resolution differs from both litigation and mediation, and its use appears to be growing. Sometimes parties turn to arbitration when mediation fails, and sometimes the parties may decide at the outset that arbitration will be a better tool to resolve a dispute. Either way, a lawyer helping clients resolve disputes needs to understand the basics of arbitration and when it may be most appropriate to recommend arbitration.

PART VI— PRACTICE MATERIALS AND RESOURCES

Chapter 15, by Upchurch Watson White and Max, provides forms and tools. These materials include forms to help lawyers prepare for mediation as well as forms related to the mediation process.

Chapter 16, by Susan N. Gary, provides a form of mediation agreement for use in a court-connected mediation and a bibliography of articles related to the use of mediation and arbitration in all the topics related to an estate planning practice. A few general mediation resources are included.