

# **PART I**

## **Understanding the Essential Elements of Mediation**

The book begins with two introductory chapters. Chapter 1 explains the basics of mediation, and Chapter 2 continues the explanation with a focus on the use of mediation in estate planning. These two chapters consider the ways mediation differs from other forms of dispute resolution, describe the different types of mediation, and examine the benefits and challenges of using mediation in connection with estate planning issues. Part I includes a lot of practical tips on topics such as how to choose a mediator, strategies that mediators employ during mediation, and the role of lawyers representing clients in mediation. Chapters 1 and 2 lay the groundwork for subsequent chapters that focus on conflict in particular areas of estate planning practice.



# Chapter 1

## An Introduction to Mediation for Estate Planners

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Mediation is a voluntary, informal, and confidential discussion in which a neutral facilitator assists two or more parties toward achieving a resolution of the conflict existing between them. As a conflict resolution tool, mediation serves a number of purposes, including providing parties the opportunity “to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.”<sup>1</sup>

Mediation is a flexible process, and so there can be as many “types” of mediations as there are parties and conflicts. For example, the definition of mediation is broad enough to include a dispute between two roommates brought to a community center, where a volunteer mediator helps them hold an informal conversation; a multi-party, billion-dollar securities class action mediated by a retired judge, in which the parties rarely meet face-to-face but instead negotiate through counsel from separate rooms; or a formal family discussion centering around a critical issue such as child custody or elder care. However, while individual mediations may differ from one another to some degree, both in content and process, certain key elements will be present in nearly all types of mediation. This chapter provides an introduction to mediation, looking at basic standards for mediation, styles of mediation, the mediation process, and the benefits and challenges of mediation. The chapter then reviews factors to consider while choosing a mediator, and describes the role of a lawyer as a client’s advocate in mediation.

### **I. STANDARDS FOR MEDIATION**

The American Bar Association’s Model Standards of Conduct for Mediators focus on several main standards, including: (1) self-determination; (2) impartiality; and (3) confidentiality. While other elements, such as the mediator’s competence and the assurance of a quality mediation process, are also necessary to the success of mediation, these three standards are widely recognized as the hallmarks of mediation theory and practice.

## A. Self-determination

In mediation, each party has the opportunity to express his view of the events leading to the conflict, in his own words. If the parties so choose, the mediator assists them in negotiating a settlement that is specifically tailored to their needs and interests. The mediator, unlike a judge, arbitrator, or early neutral evaluator, has no power to decide the facts or issues and generally does not undertake an evaluation of claims or damages; indeed, many within the field would argue that “evaluative” mediation is not mediation at all, since “[e]valuating, assessing and deciding for others is radically different from helping others evaluate, assess, and decide for themselves.”<sup>2</sup> In mediation, parties themselves control the outcome, as well as much of the process toward arriving at that outcome. Many commentators have noted that the participation of parties in the mediation process and their control over the result gives them a greater sense of satisfaction than going through litigation.<sup>3</sup>

## B. Impartiality

The credibility and integrity of the mediation process hinge upon the impartiality of the mediator. Before agreeing to mediate a dispute, the mediator must make a reasonable inquiry into the issue in order to determine whether there are any known facts that would render the mediator partial or give someone reason to believe that the mediator was partial, including a stake in the outcome of the mediation, or a relationship with either party that could affect the mediator’s ability to remain neutral. If the mediator discovers any such facts, she must disclose them to the parties as soon as possible.<sup>4</sup>

During mediation, the mediator must not only reiterate her impartiality, but demonstrate it to the parties by way of maintaining a balanced process in which everyone has equal opportunity to be heard and acknowledged. Additionally, after the mediation concludes, the mediator must take care not to enter into a relationship with any of the parties, which could raise issues of impartiality.<sup>5</sup>

## C. Confidentiality

Mediation is a confidential process in which the parties may expect to speak candidly without fear of legal repercussions. By entering into mediation, the parties agree not to divulge, or voluntarily testify, about anything said during the entire process. The parties also agree that the mediator cannot reveal anything said by the parties to a judge, or be subpoenaed to testify on anyone’s behalf. The mediator will frequently collect and destroy all notes taken during the mediation, including the mediator’s own notes.

Since most estate planning issues are heard in state courts, estate planners should know the laws of their state or the rules operating in their particular court that affect mediation confidentiality. At the state level, mediation confidentiality takes the form of an evidentiary privilege; most states have enacted statutes prohibiting statements made during mediation or settlement negotiations from being introduced into evidence.<sup>6</sup> Some courts also have specific rules governing confidentiality of their mediation programs.<sup>7</sup> Therefore, under most circumstances, parties need not prejudice their positions in court by engaging in mediation. Where parties are in doubt, they often ensure mediation confidentiality by contracting for it in their agreements to mediate.<sup>8</sup>

Parties to disputes involving estate planning matters may also wish to make agreements about mediation confidentiality for other reasons, including privacy. In such situations, mediators will

work with parties to decide what information they might wish to share with other family members, friends, etc., from the session, and what information will be limited to those who were in the room.

While public policy interests in favor of mediation confidentiality have led to strong protections in most contexts, mediation confidentiality is not absolute. One notable exception to mediation confidentiality is a situation in which the mediator hears information that leads her to believe a child is the victim of abuse. Estate planners and elder law practitioners should be aware that confidentiality may also be waived in the case of elder abuse.<sup>9</sup> Estate planners should review the relevant statutes, rules and case law for the jurisdictions in which they plan to mediate in order to familiarize themselves with the relevant confidentiality protections and exceptions.

## II. STYLES OF MEDIATION

Commentators in the alternative dispute resolution field have categorized styles of mediation in many different ways.<sup>10</sup> One of the earliest and more enduring characterizations arises from the seminal work of Leonard Riskin, who set forth a continuum examining two main mediation styles: facilitative and evaluative.<sup>11</sup> More recently, Baruch Bush and Joseph Folger articulated another mediation style, called transformative mediation. The following subsections explain each style in greater detail.

### A. Facilitative Mediation

A *facilitative* mediator, simply put, employs “strategies and techniques that facilitate the parties’ negotiation”.<sup>12</sup> In facilitative mediation, the mediator focuses the discussion on the exploration of parties’ interests—needs that run much deeper than merely the positions articulated in litigation papers—in order to achieve both greater understanding among the parties as well as the development of options and proposals designed to be acceptable to all.

Above all, the facilitative mediator is an expert communicator—listening, re-framing destructive barbs made by the parties into their emotional or substantive content (“It sounds like you are angry.” “I can tell you’re concerned about the distribution of family photos.” “I hear you saying that you’d like an apology.”). Often, a tone of cordiality and respect introduced by the mediator and an opportunity for each party to tell his story and express his feelings, enhances the level of understanding among the parties and changes the climate so that problems and issues can be addressed constructively and successfully. When resistance or break-down is present, the facilitative mediator will focus on urging parties to re-evaluate their stances and consider their options. Litigation, with its attendant costs and risks, is not an attractive option to many people; the mediator will call for the parties to perform risk analysis and consider a realistic appraisal of that route.

## EXAMPLES

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Janice worries that her children will fight over their inheritances after she dies. She may choose to work with a mediator who could conduct a family discussion before Janice’s death, allowing Janice to explain to the children why she is leaving her property in unequal shares (rewarding Betsy for care given to Janice, providing less for Carlotta who has a successful business and no dependents). During the

family meeting, the children can express their concerns and hear directly from their mother regarding why she has prepared her estate plan the way she has.

Julio and his sister, Sophia, find it hard to agree about how to divide their mother's household tangibles after her death. A mediator may be able to help them find a solution.

Hitoshi and Midori have run a successful family business for many years. Their daughter wants to continue to manage the business, but their son thinks they should sell it. Grandchildren also have views on what should happen with the business. A mediator may be able to help the family develop a succession plan that will meet everyone's needs and wishes.

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## **B. Evaluative Mediation**

An *evaluative* mediator renders an opinion on matters that are material to the dispute being settled in mediation.<sup>13</sup> She may (in addition to or instead of the approaches of a facilitative mediator) develop a settlement proposal and urge parties to accept it—a settlement based either on legal norms or the articulated interests of the parties. She may predict the likely court outcome of the matter in an effort to persuade the parties to be flexible. The mediator will be less likely to be concerned about the understanding and rapport between participants than about reaching an agreement.

## **EXAMPLES**

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When Jacob died, he left all his property to his second wife, Sharon. His children never got along with Sharon and are convinced that she put inappropriate pressure on their father, who was in poor health, when he changed his will. An evaluative mediator may help the parties understand the risks of a will contest and assess the relevant legal issues—including, for example, whether Jacob possessed testamentary capacity, or Sharon's conduct met the elements of an "undue influence" claim—as well as make recommendations regarding a settlement that will resolve the dispute without litigation.

Carmen is approaching 75, and while her physical health remains strong, her son, Roberto, is concerned that she is showing signs of dementia. Carmen has not signed a power of attorney or health-care proxy, and Roberto, over Carmen's vehement opposition, has decided he may need to seek guardianship over his mother for her protection. Prior to the initiation of a guardianship petition, an evaluative mediator might help Roberto and Carmen understand the criteria judges use to make guardianship decisions, and depending on the specifics of their case, propose a variety of solutions short of guardianship that would address Carmen's financial and health-related needs.

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## C. Transformative Mediation

More recently, a body of work has grown up around the idea of transformative mediation, which focuses on the twin ideals of recognition and empowerment: a *transformative*<sup>14</sup> mediator will focus exclusively on helping each party become stronger (“empowerment”) and also more responsive to each other (“recognition”).<sup>15</sup> On its face, transformative mediation may seem less well-adapted to resolution of estate planning and elder law disputes than facilitative or evaluative mediation. In transformative mediation, the parties may or may not resolve the situation that brought them to mediation, but they should come away understanding themselves and one another better. For some testators interested in solving problems that might arise over estate distribution, greater understanding by the beneficiaries may not be the primary objective. Nevertheless, proponents of transformative mediation believe that it frequently resolves disputes effectively while allowing the parties to maintain maximum control of the process and achieving an outcome most suited to their needs.

## EXAMPLES

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Jane and Lauren are fighting over who should be the guardian for their mother, Betty. Betty insists that she does not need a guardian, that she can live in her own home, and that they should just stop bothering her. Jane wants Betty to move in with her, and Lauren wants Betty to move to a care facility near where she lives. The decision of whether a guardianship is appropriate for Betty is up to the probate court and cannot be resolved by agreement, even if they all agreed. Transformative mediation would seek to help Jane and Lauren hear each other’s concerns, as well as their mother’s worries, while empowering all parties, including Betty, to make the best decisions possible. Should Jane, Lauren, and Betty wish to work toward agreement about where Betty should live, the mediator would honor that desire and help them have a productive conversation in which all voices can be heard.

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## III. THE MEDIATION PROCESS

The nuts and bolts of the mediation process can vary widely depending on the mediator’s philosophy on mediation and the needs and interests of parties. This section provides a look at the basic elements of the mediation process.

### A. Setting

In nearly every case, the mediation session is held in a neutral setting selected by the parties. If the mediation involves an elder person, special care must be taken to ensure his comfort. That person’s ability to access the location for the mediation, have an advocate or support person present, hear everyone during the session, read any necessary documents, and have a comfortable place to sit or take a break, will be important in order to enable him to participate fully in the mediation process. Toward that end, the mediator and other parties should consult on what

accommodations, if any, will be needed to ensure the elder person's participation, such as amplified lighting for the mediation space, large print for documents, or an amplifier for speaking. Occasionally, a mediation will be held at a party's home in order to accommodate someone with limited mobility or purely to provide a more comfortable, familiar setting in which to talk.<sup>16</sup>

## **B. Components of a Mediation**

Typically, mediation begins with a brief opening statement by the mediator in which the mediator gives the parties an overview of the process and goals of mediation. Some mediators may set certain ground rules for parties' conduct, such as policies against name-calling or interruption, while others prefer to follow the parties' lead with regard to any rules they might wish to establish. The mediator's opening statement is usually followed by a statement from each party and facilitated discussions, during which the parties are free to address each other or the mediator; during this portion of the mediation, the mediator may ask questions toward the goal of understanding the issues at stake, the parties' interests, and potentially, the viability of proposed solutions.

## **C. Caucus**

During the session, the mediator may meet privately with each party in what is known as a caucus. Anything disclosed by a party in caucus is confidential between the mediator and that party unless that party authorizes the mediator to convey the information to the other party. If caucuses are used, each party should receive roughly the same amount of time with the mediator. Certain types of disputes, usually those involving legal claims and substantial money damages where the parties have little to no personal relationship, are sometimes mediated almost entirely in caucus, in a type of mediation known as the "shuttle model."<sup>17</sup> This model, which may work well in situations such as complex, high-stakes securities litigation, is less frequently recommended in estate law and elder disputes, because they tend to involve long-standing relationships between the parties, difficult issues such as end-of-life decisions, and inter-personal conflict less likely to be addressed by a pure monetary settlement. Even a situation involving the transfer of a great deal of wealth in a family business may benefit from a mediation process that improves communication between generations in the family. While occasional use of private sessions may be helpful in order to allow parties to vent frustrations or cope with the idea of offering a compromise,<sup>18</sup> in conflicts involving family ties and intense emotion, gathering all the parties around one table to hear one another can serve tremendous value in repairing communication and transforming the way parties relate to one another.

## **D. Length**

The length of a mediation, which can range anywhere from one hour to multiple day-long sessions, will greatly depend upon a variety of factors, including the complexity of the issues involved, the willingness of the parties to pursue a solution, and the comfort of the elder person. The mediator may terminate the session when the parties reach an agreement, or when one party no longer wishes to mediate. Because mediation is a voluntary process driven by the parties involved, if one party no longer wishes to participate, the process must conclude.

## **E. Agreement**

A frequently desired outcome of mediation is the reaching of a binding agreement. Mediation is predicated on the belief that the parties themselves know best the resources that each has to contribute to an agreement, and can draw on those resources to create solutions that go beyond money damages or performance—solutions that no judge would have the power to order.<sup>19</sup> Most court-connected mediation situations will require a written agreement, which is then considered a binding stipulation or contract, and may be judicially enforced. In the community mediation context, agreements may be oral or written, although many mediators favor written agreements because they tend to increase party buy-in and reduce the potential for post-mediation confusion or disagreement.

In the event that the parties do not reach an agreement, mediators and parties should not rush to consider the session a failure. Even in the absence of an agreement, the parties may leave the session with a sense of empowerment to make their own choices, as well as some recognition of the other party's side of the story.<sup>20</sup> This sense of empowerment and recognition may change the way each party relates to the others involved in the conflict, and in some cases, may lead to a resolution down the road. Mediation may also have the effect of clarifying for the parties what issues remain in contention, or what additional information is needed in order to continue settlement discussions, reducing future litigation costs as well as the emotional cost to the parties.

## **IV. BENEFITS AND CHALLENGES IN THE ESTATE PLANNING CONTEXT**

Mediation can be used in any conflict where the parties are willing to enter into a discussion on the issues at hand, but it can be especially helpful as a conflict resolution tool in contexts like estate planning, dealing with family businesses, managing health-care issues, and elder law. In all of these situations, the parties involved are usually family members who have close relationships that will extend beyond the immediate time of decision-making. The chapters that follow describe the benefits and disadvantages of using mediation in these family-focused areas in more detail. As a background to the discussions that follow, this section covers a few benefits of mediation as well as the potential challenges of using mediation to resolve disputes involving family members, particularly when disputes involve the elderly.

### **A. Benefits**

#### **1. Creative Solutions**

Mediation offers family members the chance to craft creative solutions that best account for their individual circumstances and meet the specific needs of all involved. If a court decides a case, legal rules dictate the result. One party wins and the other party loses, and even the winner may not get the result that party prefers. In mediation, the parties can consider factors other than those permitted in a court proceeding. The solution can involve compromises, apologies, and plans for future behavior that may go beyond the dispute at hand. In mediation the parties are not bound by strict legal rules in crafting a solution that will be most beneficial, or at least most acceptable, to all of them.

## 2. Emotional Benefits

A mediated process tends to be less intimidating to the people involved than a court process. In addition, the process may help to mend, rather than exacerbate, breaks in family relationships. As explained earlier in this chapter, a mediator can give each party a chance to be heard by the other parties and can also help the parties listen to each other. The process can lead to better understanding among the parties and may help them develop communication skills that will enable them to maintain family relationships after the dispute is resolved. Litigation, in contrast, may cause the parties to develop entrenched positions, making mending the relationships less likely. If a dispute involves a family business, litigation may make working together more difficult and may mean that continuing the business will be impossible. In a probate dispute, litigation can damage family relationships permanently. Mediation can have emotional benefits for the parties during the resolution of the dispute, and the emotional benefits may extend beyond the resolution of the dispute.

## 3. Financial Benefits

Mediation often offers a cost effective way to resolve a dispute. By planning in advance or by using mediation when disputes arrive in the context of a family business or probate dispute, the family may be able to resolve the dispute more quickly and with lower legal fees than a litigated process. The parties will pay the mediator, as well as the lawyers involved, but if the dispute can be resolved in an expeditious manner, the overall fees may well be less.

Cost savings alone should not be the reason to try mediation because concerns over an efficient resolution of the dispute may limit discussion and sabotage the benefits of mediation.<sup>21</sup> In mediation, the process itself is not a cost-free option: if participants are able to reach an agreement, they can avoid court costs associated with litigation, but in most cases, they will need to pay the mediator, and if the mediation process cannot resolve the issue quickly, the mediator's fee may be significant. Additionally, if the parties choose to have lawyers participate in the mediation, each of them must bear the cost of those fees. Finally, if the participants cannot resolve the dispute through mediation, litigation, and its attendant costs, may be the result. The cost of mediation followed by litigation does not produce a good financial outcome.

Although a lawyer should not promise a client that mediation will always result in cost savings, in most situations, a dispute can be resolved less expensively using mediation instead of litigation. Even if the mediation process does not result in settlement, parties who attend may be able to narrow the issues at stake in litigation, streamlining the process and cutting down on associated costs. Additionally, even in the event that mediation ends up costing as much as litigation, the non-monetary costs of resorting to the courts to solve family issues, including the emotional price and damage to family relationships, may still make mediation a better choice for many disputes.

## B. Challenges

### 1. Possible Elder Abuse

Mediation in the elder law and estate planning context may present difficult situations for mediators and participants. During a mediation, the mediator may hear about circumstances that give rise to an inference of elder abuse. Most mediators agree that mediation is not an appropriate

dispute resolution tool in cases involving spousal, child or elder abuse, since abuse erodes a party's ability to exercise self-determination and advocate for himself in the mediation process. Additionally, as noted above, abuse frequently counts as an exception to mediation confidentiality. When confronted with potential elder abuse, mediators must make the difficult determination as to whether to continue the mediation if the issues appear to have ceased and there is no likelihood of recurrence; or to terminate the mediation and, perhaps, report the abuse.<sup>22</sup>

## 2. Capacity Issues

The mediation process assumes that each party is able to express herself and make decisions in her own best interest. In the area of elder law and estate planning, mediators may encounter persons with varying degrees of capacity to participate in mediation and make informed decisions affecting their financial affairs and physical well-being.<sup>23</sup> Some participants will possess full mental capacity and be able to make decisions concerning their healthcare and finances, while others may need assistance in advocating for themselves. Where elders require additional support, they may participate in mediation with the assistance of a court-appointed conservator or an appointed agent who acts pursuant to a power of attorney. Elders who can advocate for themselves but require additional physical assistance or emotional support may mediate with one or more trusted support persons—such as a friend, relative, caretaker, or professional adviser—present at the table.<sup>24</sup> Whatever might be the outcome of the discussions, the goal of the mediator and the parties should be to maximize the ability of an elder person to participate fully in the mediation process, so that the person is able to exercise self-determination with regard to the discussion as well as any agreed-upon outcome.

Issues involving a family business may bring different capacity concerns because the issues may involve young family members. If the outcome of a mediation will affect the interests of children, it may be appropriate to provide representation for those interests through a guardian or appointed representative. Sometimes other family members are appropriate stand-ins for the junior family members, but other times the older family members' interests conflict with those of the younger family members. Family members, the mediator, and, where necessary, the courts may all play a role in deciding who should represent the interests of minors in the mediation process.

## 3. Need for Outside Assistance

The mediator in a dispute involving family property, a family business, health-care decisions, or care for an elder family member should understand and welcome, where appropriate, the involvement of outside professionals, such as attorneys, medical doctors, financial specialists, social workers, or home-care professionals. These outside experts can assist parties by giving them information and advice necessary to make decisions about the complex array of issues facing their families, while allowing the mediator to maintain a neutral role. Mediators in turn may assist parties in clarifying the role and involvement of each outside professional in the mediation process; some professionals may participate in some or all mediation sessions, while others may give advice or information outside the mediation room.<sup>25</sup>

Although these challenges require attention, mediation has increasingly been recognized as an excellent tool for dispute resolution in the estate planning context, allowing elders and their

families to resolve a complex web of issues with great flexibility, privacy and sensitivity to the interests of all involved.

## V. CHOOSING A MEDIATOR

Once parties, in consultation with their lawyers, agree that they would like to try resolving the dispute through mediation, selecting a mediator becomes their next important consideration. While the parties ultimately control the outcome of any mediation, given the wide range of styles falling under the “mediation” umbrella, choosing the right mediator can make an enormous difference toward achieving a mutually satisfying resolution for the parties in conflict.

### A. Why Having the Right Mediator Matters

Mediators play a critical role in the success of the mediation process. First, by working to manage key elements of the structure and operation of the mediation, the mediator helps create a process that allows each party to have a voice at the table and work toward mutual accomplishment of their goals. Second, the mediator serves as a neutral and impartial third party, meaning that he has no personal preference regarding the outcome of the dispute and does not favor the interests or positions of any particular party.<sup>26</sup> While mediators may differ widely in approach and expertise, in most cases, mediators will act to help each party explore its own interests and goals; hear and consider the interests and goals of the other party; and exercise self-determination in deciding how best to solve the dispute. Where necessary, the mediator may be “a catalyst, an educator, a translator, an expander of resources, a bearer of bad news, an agent of reality, and a scapegoat.”<sup>27</sup>

### B. Finding a Mediator

Mediators and parties find their ways to one another by a variety of means. In some situations, parties make the decision to mediate outside the litigation process. Lawyers may suggest mediation as a way to resolve a dispute before beginning litigation. For example, in an estate planning context, mediation may be used to work through property distribution issues or business succession issues. If family members disagree about health-care decisions for someone who no longer has capacity to decide, mediation may be a way to help the family come to terms with the decisions. In any of these situations, the lawyers will likely recommend a mediator or mediators, and the parties will need to agree on which mediator to select.

Sometimes, a disputant will begin a lawsuit, either to meet a filing deadline or because the person, or his lawyer, assumes that litigation is necessary to resolve the dispute. If litigation is underway when the parties decide to try mediation, the court may assist in finding a mediator, or permit the parties to select their own. Some courts have rosters of mediators from which parties may choose, or parties may bypass those rosters and select a private mediator of their own choosing (potentially at a greater cost).<sup>28</sup> Where the parties have retained lawyers, those lawyers often take a lead role in selecting the mediator.<sup>29</sup>

Sometimes, the judge hearing the case will offer to “mediate” the case by way of holding a judicial settlement conference at which parties will be asked to present information directly

relevant to any legal claims and may be pressed to make concessions. In the words of several commentators, “[c]lients usually do not participate in settlement conferences, legal and monetary issues are the focus of discussion, and the judge is the ultimate and forceful decision maker.”<sup>30</sup> The upside to such settlement conferences is that the judge or magistrate is well-educated on the case, and it is likely that she already understands the facts and legal issues at stake. The downside is that parties are much more likely to act strategically, and much less likely to freely share information, when they are in the presence of someone with authority to decide the case. Additionally, the types of agreements reached in settlement conferences usually parallel the type of relief offered in court, with little room for more expansive, creative solutions.<sup>31</sup>

### C. Selection Criteria

In going about the task of selecting a mediator, parties and lawyers alike may wonder: what types of mediators are more likely to help parties achieve their aims? A recent, well-publicized study by two successful mediators, who surveyed mediation parties and their attorneys, found that the most important quality of a successful mediator is the ability to gain the confidence of the parties.<sup>32</sup> When parties trust their mediator, they are more likely to share information, make concessions, and brainstorm ways of resolving the conflict that will be satisfactory to all. Therefore, while some disputants might be tempted to look for a mediator who they believe would be sympathetic to their side of the issue, parties and their attorneys ultimately will be better served by finding a mediator on whom all parties agree, or at a minimum, suggesting someone who can gain the “buy-in” of all involved.<sup>33</sup> In fact, mediator selection is almost never made by one party alone; rather, the process of selecting a mediator may itself require a period of serious negotiation with the other parties involved.<sup>34</sup>

In addition to trustworthiness, the study found that other important qualities of successful mediators include: integrity, patience and persistence, the ability to provide useful reality testing or legal evaluation, and the skill of asking good questions and listening carefully to responses.<sup>35</sup> With these qualities in mind, where can parties and their advocates turn to find the right mediator for their case? Trustworthiness, integrity and other personal qualities can be discovered by checking references. Indeed, given the rapidly increasing number of people advertising their availability for mediation services, more and more parties now undertake significant “due diligence” on mediators—including contacting colleagues and asking detailed questions about prior mediation experiences—before making a selection or even picking up the phone to interview candidates.<sup>36</sup>

Beyond the realm of personal attributes, however, parties can prepare to select the best possible mediator for their situation by asking themselves two questions: (1) what is the problem we are trying to solve?; and (2) what are the barriers to solving this problem?

Defining the problem to be solved greatly helps parties select the appropriate mediator and prepare for mediation. For example, if the main issue is restoring communication between estranged family members about decisions made by an elder’s guardian or health-care proxy, a facilitative mediator with a warm, empathic manner and some experience as a “process expert” in elder law disputes may be the best fit to help parties bargain beyond the reaches of the law and develop their own mutually agreeable solutions to an issue—solutions that go beyond the

typical forms of relief offered by the courts.<sup>37</sup> On the other hand, if parties are disputing language in a long-term care insurance contract, or seeking clarification on laws relating to wills, they may wish to select a mediator with a significant legal background in elder law or trusts and estates, in order to establish credibility with all parties involved.

Identifying existing barriers to settlement also helps parties determine what kind of mediator will best suit their needs. For example, if the parties know that the reason the dispute has not resolved itself is because they lack clarity on what a judge might decide, an evaluative mediator, who would be likely to study relevant case documents such as briefs, deposition testimony, or mediation statements, assess each side's strengths and weaknesses, and potentially propose an agreement to the parties, could be the appropriate choice.<sup>38</sup> In such a context, the parties might even consider a retired judge with specific expertise deciding similar cases. By contrast, if the barriers to settlement relate to topics outside the confines of a legal case—for example, strained communication or a long history of disputes between family members—a facilitative mediator who will allow parties to explore issues that matter to them, without limiting discussion to the legal pleadings, might be the best person to run the mediation process.

If the case involves issues relating to an elder, parties may benefit by selecting a mediator with some familiarity regarding elder law, not only because such a mediator will be better able to establish credibility with all parties but also because some subject matter expertise may allow the mediator to design a process that permits the elder to participate to the fullest extent possible, as well as help the parties brainstorm potential options for settlement of the dispute.<sup>39</sup> Parties may consult with the elder law or alternative dispute resolution sections of their local bar association for mediators with elder law expertise.<sup>40</sup> Alternatively, local elder law mediation groups have sprung up all over the country and may offer parties a place to start evaluating potential mediator candidates for their disputes.<sup>41</sup>

Finally, some parties prefer to hire a team of two mediators, one lawyer and one non-lawyer, under the theory that one will be able to discuss legal concerns and one will help the parties connect on emotional issues.<sup>42</sup> This type of team mediation has become especially popular in the area of family law, where close relationships and some gender concerns lead parties to select a co-mediation team. Parties hope that a balance of mediators from different identity groups or areas of expertise will increase the odds that each party finds a mediator with whom that party can connect.<sup>43</sup> For example, in an estate planning setting, a tax specialist and a psychologist, both trained in facilitation, might bring their separate expertise to different aspects of a controversy.

In choosing a mediator, parties may want to consider the styles of mediation discussed earlier in this chapter. Does the mediator follow a facilitative, evaluative, or transformative style? Does the mediator operate in *joint session*, with parties together, or *caucus*, where the mediator talks with fewer than all parties at a given time? Is the mediator comfortable focusing the session on *party participation*—even where the parties may be distraught and angry? Or, is the mediator likely to focus the process on *attorney-centric* presentations and negotiation? Finally, is the mediator likely to keep the procedure aimed towards *narrow* legal questions and causes of action or to *broaden* the discussion to all the concerns likely to be pressing on family members? No one perfect answer exists; rather, the choice of the right mediator will depend on the specifics of the situation: the issues to be addressed, inter-personal dynamics, and the preferences of the parties.

## VI. THE ROLE OF LAWYERS IN MEDIATION

Representing a client in mediation presents opportunities and challenges for lawyers. Mediation, as described above, can provide a forum for one's clients to achieve more satisfying, durable, expansive, expeditious, and cost-effective resolutions to a host of estate planning issues. However, the prospect of advocating for a client in mediation, which differs from the adversarial process of litigation in many ways, raises questions for many lawyers about their role. Specifically, lawyers may wonder: What can I do to prepare? How should I advocate for my client in the session itself? How can I best work with the mediator? Adding to lawyers' uncertainty is the fact that while a great deal has been written about mediation itself, fewer resources exist to guide lawyers on how to represent clients in the process. Despite possible misgivings, lawyers need not fear the mediation process; with appropriate preparation, they can empower themselves and their clients to shape the process in ways that will promote settlement of the dispute.

### A. Adopting a Problem-Solving Mindset

Lawyers participating in mediation first face a challenging switch in mindset: from "zealous adversaries" to "zealous problem solvers."<sup>44</sup> Up until the point at which parties consider mediation, the dispute in question may have proceeded in an adversarial fashion in which each side sought to prevail in a zero-sum game of law or equity. The parties and advocates sitting around the table in mediation, by contrast, can serve as the lawyer's partners in finding solutions to shared problems. Under a problem-solving mediation framework, the lawyer's goal is not to "win" the entire pot at the expense of the other side, but to identify and further the underlying interests of the client.<sup>45</sup>

Working with underlying interests can be challenging for lawyers. Lawyers, armed with a "standard philosophical map" that privileges rights and monetary relief over non-material values, may find the idea of thinking beyond litigation positions to explore underlying interests such as respect, communication, autonomy, or affiliation to be foreign, or even pointless.<sup>46</sup> Parties' interests, however, often serve as the key to unlocking the legal dispute at hand. For example, in a guardianship case, as discussed in Chapter 5, family members might find themselves vying for positions of power over an incapacitated adult. In an adversarial setting, those positions—"I should be Mom's guardian"—are easy to identify and would seem to be in absolute conflict. In reality, however, lawyers may find that different family members have complementary, or even common, interests that might facilitate resolution of the dispute. For example, one family member's initial quest for guardianship might have been motivated by nothing more than a desire for greater communication with siblings about medical developments with a loved one.

The mediator can help to flesh out those underlying interests during the mediation process—indeed, most good mediators will—but lawyers should not wait until all parties have seated themselves around the table to start thinking about the relevant issues from a problem-solving mindset. Rather, from their very first meeting after the attorney-client relationship has been established, lawyers serve their clients best by asking open-ended questions about what matters to them most, beyond what the legal posture of the case would seem to dictate, and helping them brainstorm about creative ways to satisfy their interests while also achieving a positive resolution of the dispute.

## B. Using the Process

Mediation represents far more than a mere “method of facilitating traditional bargaining over money.”<sup>47</sup> Lawyers can use the mediation process to transform the outcome of the conflict affecting their clients. “Using the process” means far more than making the most of the session itself: from the very first time someone mentions mediation—the lawyer, her client, the court, or another party—lawyers can and should work to make sure that they and their clients can take full advantage of the opportunity it presents.

First, put simply, the lawyer should prepare with his client for the mediation process. This preparation goes both ways: as noted above, the lawyer first prepares for mediation by engaging in expansive conversation with the client to identify his or her interests and explore different possibilities for advancing those interests. The lawyer then prepares his client for the mediation process by giving the client an idea of what to expect and coaching him or her on how to participate most effectively.

One important point for lawyers and clients to consider is who should be present at the mediation itself, since mediation participants do not always begin and end with those named in a legal proceeding. In an estate planning situation, additional participants beyond those directly involved in litigation may well be necessary to the success of the mediation process. For example, lawyers would be wise to ask whether there are family members or others who: (1) have a stake in the ultimate outcome of the mediation; (2) possess information that would be helpful or necessary in understanding the issues or crafting a resolution; (3) could provide support to any of the parties in the mediation; or (4) otherwise wield influence over whether the agreement will succeed. These additional persons might include anyone from a party’s spouse to a social worker with expertise in end-of-life decisions. While good mediators will have experience in helping to assemble the right people at the table, they rely heavily on input from lawyers and clients—those who best know the people involved and the issues at stake.

Another important consideration, and one which preoccupies most lawyers representing clients in mediation, involves the allocation of speaking roles during the session itself. In the adversarial process of litigation, a lawyer serves as the client’s “mouthpiece,” playing a dominant role in advocating for the clients’ interests by communicating with other parties and court personnel in highly strategic ways that are structured around rules of evidence and civil procedure. The client himself need not have *any* direct interaction with other parties in the case, from the time the complaint is filed through the end of trial. By contrast, the mediation process often produces superior results when the parties themselves directly engage each other, since parties themselves usually know best how to resolve their own conflict and what kinds of agreements will last. Party participation matters even more greatly in areas such as estate planning, where interpersonal issues often strike at the heart of the conflict, and the parties may have long-standing, close relationships that will endure long after the legal issues are resolved.

For these reasons, most mediators will encourage as much party participation as possible during the mediation process. In preparing for mediation, lawyers should work with their clients to divide speaking roles for the joint session in a way that allows the party to participate in ways that are most meaningful to him. For example, the party may wish to address the other parties directly on factual matters, emotional issues and proposals for the future, and leave any legal

issues to be touched on by the lawyer. While many lawyers may be tempted to try and control the mediation process by “scripting” what their clients say word-for-word, such a strategy is less than ideal for mediation, for at least a couple of reasons. First, the client who merely reads a canned statement may come off as less persuasive, credible, or invested in a resolution. Second, most clients, when confronted with opposing views across the table, will end up reacting and going “off script,” rendering the effort useless.

A superior method of preparation for the client’s speaking role in mediation would be to work with the client on determining (1) the most important points the client wishes to convey to the other parties; and (2) ways in which the client could frame those points so that the other side will be more likely to hear them. In addition, the lawyer should ask the client how he or she believes the other parties in mediation view the issues in question, and work with him or her on how to respond to those concerns in a productive way. While clients themselves usually know best what is at stake and how to resolve the issues they face, lawyers can provide a tremendous service in helping their clients make the mental switch toward a problem-solving mindset in the way they express their views.

While it is important to determine who will participate and to allocate speaking roles, a lawyer’s job in preparing for mediation does not end there. Additional considerations the lawyer and the client may wish to address together include: deciding what documentary evidence to bring, if any; developing a negotiation strategy; identifying and planning for possible challenges; brainstorming potential solutions that satisfy the client’s interests; and deciding what (and by what means) information will be shared with the mediator.

### **C. Using the Mediator**

The mediator can be critically useful to a client representative in several ways, including shaping the structure of the mediation process, helping to manage the content and flow of information, and brainstorming potential solutions.<sup>48</sup>

Because mediation is a flexible process, mediators and lawyers can work together on ways to tailor the mediation process to the parties and issues involved. For example, if the lawyer indicates that “turf” may be an issue in determining where to hold the mediation, the mediator may be able to suggest locations away from the parties’ homes or their counsel’s offices, in order to start things off on a more neutral, less formal footing. Additionally, mediators often work with lawyers on the mediation process itself, in order to achieve the best possible results. For example, in a case in which a lawyer has advised the mediator that his client has some anxiety about the mediation process, the mediator might choose to hold individual, face-to-face meetings between the mediator and each party before the first joint session, in order to establish trust and confidence. Other mediators might ask lawyers in advance to give their opinions regarding which topics would be best discussed first, and which should be reserved for later, once there has been some positive momentum. Each party’s advocate can use the mediator to serve as a partner in designing the process that best fits his or her client’s individual concerns and goals.

Mediators serve many important functions related to the management of information. Because the mediator is a safe, neutral person to whom both parties feel comfortable speaking, the mediator often becomes the keeper of certain pieces of information until the parties feel

ready to share that information with each other. Many mediators use private sessions to give parties and their advocates the space to air out feelings, concerns and proposals without the risk of a negative reaction from other stakeholders in the dispute. Additionally, the mediator can serve as a valuable “coach,” helping lawyers brainstorm about the best ways to frame settlement offers or convey difficult pieces of information, in order to maximize the chances of reaching settlement.

Finally, mediators can play an integral role in helping parties to brainstorm potential solutions to their dispute. Some mediators work by creating an atmosphere in which the parties themselves feel safe to volunteer ideas for settlement without the risk of judgment or censorship. Other mediators may, with the consent of the parties, share ideas that have worked for other parties facing the same situation.

## VII. CONCLUSION

When lawyers take an active, open approach to mediation, using it to further their clients’ best interests and generate workable solutions, they become a powerful force in the mediation room, helping the parties move toward problem solving and away from strife and division. Knowing when to recommend mediation can provide significant benefits to clients. The chapters that follow will look at the use of mediation in a variety of contexts. In some situations, mediation can be used at the planning stage to avoid conflict. In situations where a dispute already exists, mediation may provide an alternative to litigation. Mediation will not be the right process for every situation, but understanding how and when to use mediation will enable estate planning and elder law lawyers to better serve their clients.

## NOTES

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1. AMERICAN BAR ASSOCIATION, SECTION OF DISPUTE RESOLUTION, MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), Preamble, available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/dispute\\_resolution/model\\_standards\\_conduct\\_april2007.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf) (last visited April 19, 2016).
2. Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FL. ST. U. L. REV. 937 (2004). For an opposing viewpoint, see Kenneth M. Roberts, *Mediating the Evaluative-Facilitative Debate: Why Both Parties are Wrong and a Proposal for Settlement*, 39 LOY. U. CHI. L. J. 187 (2007).
3. See, e.g., BUSH & FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994); Chris Guthrie & James Levin, A “Party Satisfaction” Perspective on a Comprehensive Mediation Statute, 13 OHIO ST. J. ON DISP. RESOL. 885 (1998).
4. UNIF. MEDIATION ACT § 9 U.L.A. (2003).
5. Model Standards of Conduct for Mediations, *supra* note 1, at Standard II.
6. For example, in New York, N.Y. C.P.L.R. 4547 provides that with limited exception “[e]vidence of any conduct or statement made during compromise negotiations shall also be inadmissible.” Examples of such rules in other states include Pa.R.E. 408 (Pennsylvania) and OEC 408 (Oregon). See also *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1179 (C.D. Cal. 1998) (listing many states’ mediation privileges).
7. See, e.g., Cal. R. Ct. 3.854; WV. R. Tr. Ct. 25.12; Rules of the Alternative Dispute Resolution Program, Commercial Division, New York State Supreme Court (2010), Note 4, available at [http://www.nycourts.gov/courts/comdiv/nassau\\_ADR\\_Rules.shtml](http://www.nycourts.gov/courts/comdiv/nassau_ADR_Rules.shtml)
8. DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES* 220 (2009). Part VI of this book contains examples of mediation agreements and confidentiality agreements.

9. See, e.g., UNIF. MEDIATION ACT, *supra* note 4, at Section 6(a)(7) (2003) (exception to mediation privileges for evidence of elder or child abuse); Mary J. Hoeller, *Facilitative Mediation: A Model for Resolution of Eldercare and Family Disputes*, 50-APR. RES GESTAE 34 (2007), at 34 n. 7; Florida State Courts Mediator Ethics Advisory Committee Advisory Opinion MEAC-2000-002 (June 27, 2000).
10. See Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEG. L. REV. 7 (1996) (dividing the mediation universe into a grid with four quadrants, each defined by the mediator's orientation with respect to two continuums: evaluative-facilitative role and narrow-broad problem definition). More recently, partially in response to criticism of the "evaluative-facilitative" labels, Professor Riskin has revised his grid to focus on "directive" and "elicitive" mediator behaviors, Leonard L. Riskin, *Decision-Making in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003). See Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y. Q. 7 (1986) (describing bargaining or therapeutic styles); James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?* 19 FLA ST. U. L. REV. 47 (1991) (describing three distinct mediator styles labeled "trashing", "bashing" and "hashing it out"); Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703 (1997) (dividing mediation into three separate models described as "norm-generating", "norm-educating" and "norm-advocating"); Kenneth Kressel et al., *The Settlement-Oriented vs. The Problem-Solving Style in Custody Mediation*, 50 J. SOC. ISSUES 67 (1994) (contrasting a settlement orientation and a problem-solving style).
11. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996).
12. *Id.* at 17.
13. *Id.*
14. The theory of transformative mediation is best articulated in the seminal work *The Promise of Mediation*, by Robert A. Baruch Bush and Joseph P. Folger.
15. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 22 (Rev. ed. 2005).
16. See, e.g., *Eldercare and Adult Guardianship Mediation*, 36 VT. BAR J. 53 (Fall 2010).
17. Mary J. Hoeller, *Facilitative Mediation: A Model for Resolution of Eldercare and Family Disputes*, 50-APR. RES GESTAE 34 (2007).
18. Caroline C. Vincent, *The Challenges of Mediating Disputes Involving Elders*, 30 OCT. L.A. LAW. 12 (Oct. 2007).
19. See PAUL J. SARKOSI, CHECKLIST FOR MEDIATOR'S OPENING STATEMENT: CASES WITH LAWYERS AND CLIENTS (1998).
20. Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, MEDIATION Q., VOL. 13, No. 4 (Summer 1996).
21. Mary F. Radford, *Advantages and Disadvantages of Mediation in Probate, Trust and Guardianship Matters*, 1 PEPP. DISP. RESOL. L. J. 241 at 249-50 (2001) (citing Joseph S. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. DISP. RES. 909, 910 (1998)).
22. Rikk Larsen & Crystal Thorpe, *Elder Mediation: Optimizing Major Family Transitions*, 7 MARQ. ELDER'S ADVISOR 293, 306-07 (2006).
23. Vincent, *supra* note 18.
24. See UNIF. MEDIATION ACT (2003), *supra* note 4, at N.Y. C.P.L.R. 10.
25. Larsen & Thorpe, *supra* note 22, at 300-01.
26. FRENKEL & STARK, *THE PRACTICE OF MEDIATION* 83-84 (2008).
27. GOLDBERG, STEPHEN B., ET AL., DISPUTE RESOLUTION 92 (1985), summarizing Joseph Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85 (1981).
28. Murphy, Jane C., *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891, 911 at n. 97, 914 (2010).
29. Blankenship, John T., *The Vitality of the Opening Statement in Mediation: A Jumping-Off Point to Consider the Process of Mediation*, 9 APPALACHIAN J. L. 165, 172 (Spring 2010).
30. Chris Stern Hyman, et al., *Interest-Based Mediation of Medical Malpractice Lawsuits: A Route to Improved Patient Safety?*, 35 J. HEALTH POL. POL'Y 797, 819 (Oct. 2010)
31. See, e.g., Riskin and Welsh, *Is That All There Is? "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863 at 922 (June 2008).

32. Margaret L. Shaw & Steven B. Goldberg, *Further Investigation Into the Secrets of Successful and Unsuccessful Mediators*, 26 ALTERNATIVES TO HIGH COST LITIG. 149 (September 2008). Other important qualities included integrity, patience and persistence, providing useful reality testing or legal evaluation, and asking good questions and listening carefully to responses. *Id.*
33. Jeffrey Kichaven, *You're Letting 'Em Choose the Mediator? Your Case Isn't That Good! Getting to Settlement Demands Mutual Participation in Selection*, 25 ALTERNATIVES TO HIGH COST LITIG. 115 (July/August 2007).
34. Arthur Chaykin, *Selecting the Right Mediator*, 49 DISP. RESOL. J. 58, 59 (September 1994).
35. *Id.*
36. See, e.g., Edward D. Shapiro, *Mediation: Maximizing the Chances for a Successful Outcome*, 834 PLI/LIT 587, 590-92 (October 6, 2010) (including a list of questions to ask about potential mediators); Chaykin, *supra* note 34, at 64 (setting forth two important questions to ask others about potential mediator candidates: "(1) Does the mediator have a reputation for honesty, integrity, persistence and determination? Will the mediator try hard before giving up on a resolution? (2) What is the mediator's approach to resolving disputes?")
37. See, e.g., Larsen & Thorpe, *supra* note 22, at 294.
38. Riskin, Leonard L., *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO HIGH COST LITIG., 111, 111-112 (1994)
39. Larsen & Thorpe, *supra* note 22, at 297, 309.
40. The New York, New Jersey, Washington and Oregon state bar associations, for example, have active Elder Law and Dispute Resolution sections.
41. See, e.g., Elder Mediation Center of New Jersey, available at [www.elderdecisions.com](http://www.elderdecisions.com).
42. Elizabeth L. Allen, et al., *How to Choose the Right Mediator*, 26 OCT. VT. B. J. 27 (September/October 2000).
43. See, e.g., Beth M. Erickson, *Therapeutic Mediation: A Saner Way of Disputing*, 14 J. AM. ACAD. MATRIM. LAW. 233 (1997).
44. See, e.g., Harold Abramson, *Problem-Solving Advocacy in Mediations: A Model of Client Representation*, 10 HARV. NEG. L. REV. 103, 113 (2005).
45. *Id.* at 118.
46. Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L. J. 29, 43 (1982)
47. DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES* 227 (2009).
48. See, e.g., Dwight Golann, *Representing Clients in Mediation: Advice for Lawyers*, 1789 PLI/CORP. 685, 689 (Feb.-Apr. 2010).