Beyond Kumbaya:
What Every Trust and Estate Attorney Needs to Know About Mediation *

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THE VIEW FROM A TRUST AND ESTATE MEDIATOR

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THE VIEW FROM A TRUST AND ESTATE MEDIATOR

Roselyn L. Friedman, Esq.[1]

I. Introduction

This century is witnessing the largest transfer of inherited wealth in American history.[2] Although some transfers may be amicable and predictable, others may generate conflicts fueled by emotion and family dynamics. At the death of a matriarch or patriarch, it is not unusual for relationships among siblings or other family members to change and escalate to trust and estate litigation.

The unprecedented transfer of wealth appears to be accompanied by a corresponding groundswell of litigation, and it has become increasingly common for family members to bring lawsuits against one another or against fiduciaries and other professionals. In light of this trend, trust and estate attorneys and fiduciaries need to be aware of various forms of alternative dispute resolution ("ADR") that are available to avoid or at least limit full-scale litigation. In particular, facilitative mediation is a form of ADR which is currently gaining popularity for resolving trust and estate disputes.

The best strategy for an advocate in any type of mediation, in addition to properly preparing the case and the client, is to understand the process fully. It can be a challenge to do so given the variety of ADR processes, the different styles of mediators and other neutrals, and the puzzle of different state rules and laws which control. Accordingly, this article is intended to provide an overview of using facilitative mediation to settle trust and estate disputes and to answer some practical questions about the process.

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[2] Researchers had projected that over the 55-year period from 1998 to 2052, $41 trillion will be transferred between generations and estimated that figure may even double or triple. *See Millionaires and the Millennium: New Estimates of the Forthcoming Wealth Transfer and the Prospects for a Golden Age of Philanthropy*, John J. Havens and Paul G. Schervish, Boston College Social Welfare Research Institute (October 19, 1999).

II. How is Facilitative Mediation Different from Other Types of ADR?

A. Facilitative Mediation in the ADR Control Spectrum

Facilitative mediation is a negotiation of a dispute where a neutral third party mediator controls the process but not the outcome and facilitates the parties' communication about the disputed issues in order to reach a mutually beneficial result.

1. There are other key differences when comparing litigation and arbitration to mediation, including the following:

    a. In litigation, the parties give up control of both the process and the outcome to the judge who is required to look to the past, as well as to legal precedent, to decide who is right and who is wrong. So there will be a winner and a loser.

    b. Arbitration, also an adversarial process, has similarities to litigation. The arbitrator, who is a neutral third party (or a panel of neutrals), controls both the process and outcome, looks to the past to determine right and wrong based on legal precedent, and decides who wins and who loses. Nevertheless, the parties have more control than in litigation as they select the arbitrator and determine the rules of the process without being subject to all the formalities and requirements of litigation.

2. Mediation is different from litigation and arbitration.

    a. In mediation, the parties retain more control than in litigation or arbitration. The parties select a mediator, a neutral third party who will control and facilitate the negotiation, but the parties retain control of the outcome. Different from litigation, the mediator has no authority to impose an outcome on the parties and is not the decision-maker. Even with mandatory mediation, settlement is optional.

    b. The mediation process itself is also different because it focuses on communication and collaboration, and looks to the future by considering the mutual interests of the parties without being limited solely by their legal rights. The intention is to reach a solution which satisfies the needs and interests of the parties, rather than to decide who wins and who loses.

3. There are other forms of ADR, some of which are variations on arbitration. These include processes which are adversarial and binding, such as private judging; those which are advisory and non-binding, such as early neutral evaluation; or a combination, such as mediation-arbitration (med-arb) where the parties agree ahead that, if the mediation fails, they will proceed to arbitration.[3]

B. Other Styles of Mediation

1. An evaluative mediator is an expert in a field who, after hearing both sides of the dispute, evaluates the respective parties' likelihood of success in litigation. It is not uncommon for facilitative mediators to employ some evaluative techniques in "reality testing" to help the parties better assess the strength and weaknesses of their own and their opponent's case, and thereby to set more realistic expectations which encourage settlement.[4]

2. In transformative mediation, the primary goal may not necessarily be to reach an agreement. Proponents of this mediation model generally view the true goal of the process as communication. In this model, the parties may control the process as well as the outcome, with the mediator as a guide offering procedural and substantive suggestions. Transformative mediation, which looks towards total reconciliation of disputing parties in order to repair relationships, is thought to be effective in family situations where preserving relationships can be important. However, considering the potential cost and duration of transformative mediation, it may be impractical for trust and estate disputes where there are deadlines for filing tax returns or accountings,

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[3] *See generally* Harold I. Abramson, *Mediation Representation: Advocating as a Problem-Solver* (Wolters Kluwer Law & Business 3rd. 2013), Chapter 8: Breaking Impasses with Alternatives to Mediation, at 449-450 (suggesting that the parties to med-arb need to select different parties as mediator and arbitrator in order to preserve the integrity of both processes).

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

and where the parties often want to expedite resolution and move on with their lives.

C. Divorce Mediation v. Trusts and Estates Mediation

1. There are similarities between trust and estate mediation and divorce mediation, the latter often being referred to as "family mediation". For example, both often include the emotional aspects of a dispute as well as an emphasis on financial and tax issues.

2. On the other hand, there are significant differences between the two fields of mediation. One commentator notes that these differences may be the reason divorce mediation has flourished throughout the country, while trust and estate mediation has lagged behind. [5]

3. For example, it takes only two parties to sign the settlement agreement for a divorce lawsuit; with a trust or estate settlement agreement, however, there are often multiple parties who must sign (including representatives of minor and unborn beneficiaries). When the requirements can be met, virtual representation statutes may be useful in limiting that number.

4. Also, the legal doctrine of wills and trusts law differs from current divorce law. With no-fault divorce law, settlement is intended to be forward-looking in order to reach an agreement regarding how the parties are to proceed whether financially or with respect to child custody. This outlook favors negotiation or mediation for dispute resolution. To the contrary, traditional will and trust laws require that a court look backwards to determine the decedent's intent as it relates to which party should prevail in a lawsuit.

III. Why Is Facilitative Mediation Particularly Well-Suited to Trust and Estate Disputes?

A. Consistency with the Family Settlement Doctrine[6]

1. Historically, probate and chancery courts have favored intra-family settlement of trust and estate disputes in lieu of resolving these

[5] *See generally* Ray D. Madoff, *Lurking in The Shadow: The Unseen Hand of Doctrine in Dispute Resolution*, 75 So. Calif. Law Rev. 161 (2002)

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

emotionally-charged conflicts through the courts. As a result of the family settlement doctrine, courts generally uphold family settlement agreements in the absence of fraud, undue influence or the breach of a confidential relationship.[7]

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

B. Provides a Confidential Forum

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

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

3. Although state law and court rules vary greatly, some states have adopted the Uniform Mediation Act (the "Act") or similar statutes to require that mediation remain confidential and that the mediator privilege attaches to protect the process from future court proceedings.[8] Absent a statute, or in some states superseding a statute

[7] *Id.* at 645.

[8] Uniform Mediation Act ("UMA") (Nat'l Conference of Comm'rs on Unif. State Laws 2001, amended 2003). As of 2013, UMA has been enacted in District of Columbia, Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington, and introduced in Massachusetts and New York.

or by agreement of the parties, mediation would be subject to a private confidentiality agreement.

C. Preservation of Relationships

1. Estate and trust conflicts often involve related parties. Although family relations are likely to suffer damage when disputes escalate, they are more likely to suffer irreparable harm when the conflicts become openly adversarial as in litigation. The very act of filing a lawsuit against a family member is likely to cause lasting grudges and permanent damage to the family and necessarily "stokes the parties' emotions."[9]

2. The mediation process can resolve such conflicts while still preserving relationships because it fosters communication and collaboration, rather than controversy, among the parties. Additionally, mediation can be entered into before one or both parties are forced into fixed, adversarial positions with the filing of a legal complaint.

D. Forum for Acknowledging Emotions

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

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

3. The role of the facilitative mediator is to create an environment of communication and to encourage dialogue about issues which may have prevented the parties from reaching a settlement previously. In providing a forum for emotions to be aired, the mediator should be skilled at acknowledging and validating the parties' emotions, while

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

also controlling the process without reacting to or allowing abusive, emotional outbursts which might otherwise occur among the parties and interfere with the resolution process.

E. Developing Flexible and Creative Solutions

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

2. It is not unusual for trust and estate disputes to involve matters where no remedy in law or equity may be sufficient to satisfy the parties. Therefore, finding a creative, non-legal solution which provides both sides with a win-win result may be the key to breaking deadlock.[10] For example, a family member may be intent upon proving that other siblings were favored by their parents and that he or she had never been treated fairly; that family member may not be satisfied with any settlement, unless it includes a personal apology from the "alleged wrong-doers."

F. Potential for Costs and Time Savings[11]

1. There are substantial financial costs associated with litigating any dispute, and when the dispute concerns property of relatively small financial value, litigation costs may be disproportionate to the amount at issue.[12] Mediation has the potential to result in a faster, less expensive settlement, particularly compared to a litigated case that actually goes to trial.

2. If, through mediation, the family members can reach a comprehensive agreement that all perceive to be fair, ongoing squabbles may be eliminated.

3. In addition, mediation of family disputes can reduce the societal costs of litigation by eliminating these disputes from already crowded court dockets, in harmony with the family settlement doctrine.

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[10] *See* Roger Fisher, William L. Ury & Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In*. (2d Ed.) (Penguin 1991).
[11] *See* Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance*, 32 Wake Forest L. Rev. 397 (1997).
[12] *Id.* at 431.

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

1. There are circumstances where facilitative mediation is inappropriate and other dispute resolution techniques should be employed, which in some cases means requiring litigation. For example, as a general rule a question about the validity of a will cannot be mediated and needs to be adjudicated. But when a dispute involves an incapacitated beneficiary or where a power imbalance otherwise exists between the parties, accommodations may be possible so that the weaker party is adequately protected in the ADR process through a representative or otherwise; if adequate protections are not feasible, then a court-supervised proceeding would be necessary.[13]

2. Some fact-specific disputes (such as those involving trustee fees or asset valuations) might be more efficiently resolved by either arbitration or by evaluative instead of a facilitative mediation.

3. In family disputes over an estate plan, the tension exists between (a) a judicial process to determine the testator's intent with respect to the plan which controls the legal result and focuses on who was right and therefore the winner; and (b) a private resolution process whether by negotiation, mediation or otherwise to look for a creative, forward-looking solution.[14]

IV. When Should Mediation Be Used for Trust and Estate Disputes?

A. At any time, but the sooner the better!

Mediation can be used at any time in trust or estate administration, whether a conflict is already being litigated or arises in the course of administration.

1. Mediation During the Course of Litigation or When Litigation Looms.

It is appropriate to mediate a dispute in whole or in part when (a) it is likely a lawsuit will be filed or after a lawsuit has been filed, (b) before or after discovery, (c) before or after key motions, or (d) before trial. Although the vast majority of cases settle before trial, it can still be cost efficient to settle earlier rather than later. Early entry into the mediation process encourages parties to limit discovery to that which is necessary for settling as opposed to more extensive and expensive discovery necessary for trial. It is also possible to mediate any portion

[13] *See* Paragraph 3C of Section VD infra.
[14] *See* Madoff *supra*, at note 5.

of a case, such as disputes over the disposition of tangible personal property which can be encumbered with non-legal issues.

2. Mediation During Trust or Estate Administration.

Mediation can be incorporated at any stage of trust or estate administration, particularly when the trustee and other advisors are unable to resolve a dispute informally and administration is stalled as a result.

3. Mediation During the Estate Planning Phase.

One of the most creative uses of mediation begins in the estate planning phase to avoid an ultimate dispute over issues such as the disposition of the family business or how to be fair in a second marriage situation where stepchildren are involved. In such a case, the parties might benefit by the early use of mediation to design a solution with the assistance of an estate planning attorney who is comfortable addressing sensitive non-tax issues.[15]

4. Elder Mediation.

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

B. When Might a Fiduciary Use Mediation?

1. Disputes over Administrative Matters.

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

Mediation may be useful in reducing duplicative administrative tasks for an executor or trustee. A disgruntled beneficiary may be making repeated requests or filing numerous complaints through the fiduciary's internal compliance procedures. If mediation were used to identify and address the underlying issues when the tension first became apparent, unnecessary time and energy required of the fiduciary to respond to such beneficiaries might be reduced or eliminated.[16]

2. Requests by the Fiduciary for Court Instructions.

Within the context of construction suits, a court of equity has general authority for the supervision of trusts and, to some degree, authority to instruct the trustee as to its powers and duties when not clear. Therefore, a trustee might bring a court action for instructions regarding the use of mediation or, at least, for approval of a mediation settlement, in order to protect the fiduciary in implementing the settlement agreement and in the future administration of the trust.

3. When Discussions are Hampered by Professional Conflicts.

In light of the Rules of Professional Responsibility, prohibiting attorneys from representing multiple clients where there is a conflict, absent a waiver or the situation where each side is represented by separate counsel, a family meeting regarding a controversial issue may result in having as many lawyers as beneficiaries in attendance. Even absent a formal mediation, an executor or trustee might consider introducing a mediator who is trained to facilitate such a meeting and is adept at controlling the process in order to make the meeting less adversarial and more productive.

C. Examples of Situations for Facilitative Mediation

1. An estate cannot be closed or a trust funded due to family conflict, and negotiations between the parties have not resulted in settlement (whether or not the parties are already in litigation).

2. Disputes among family members interfere or are likely to interfere ultimately with the operations of the family business and/or the smooth transition of management to younger generations.

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[16] *See generally* Robert Whitman, *Procedure to Resolve Trust Beneficiaries' Complaints*, 39 Real Prop., Prob. & Tr.J. 829 (Winter 2005).

3. Trustee and beneficiaries cannot agree over trustee's distribution policy or investment decisions.

4. Adult children disagree over the care and management of an elderly parent (whether or not a petition for guardianship is already pending or powers of attorney are in place).

V. Frequently Asked Questions

A. How Do You Select a Mediator?[17]

1. Be sure there are no conflicts such as prior representation of parties (by the mediator or an attorney at the same law firm).

2. Review the candidates' training and experience.

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

   b. Consider subject-matter expertise, which is a widely-debated topic. Some contend that a skilled mediator can resolve any type of conflict. Others believe that subject-matter expertise is an integral part of problem solving, particularly in complicated and technical areas of legal practice such as trusts and estates.

3. Studies have shown that personality traits can be indicia of mediator success.[18]

   a. Perhaps the most important trait is the mediator's ability to build trust and rapport with the parties. People are likely to respond favorably to a mediator's empathy and understanding.

   b. Other attributes of a skillful mediator include tenacity, creativity and hard work in tackling impediments to settlement.

   c. The mediator should never give up trying to break impasse, whether it means staying late into the evening of a mediation

[17] *See generally* Abramson, supra note 18, at 178-186.
[18] *Id.* at 182-183.

conference and/or following up with attorneys for days (or weeks or months) if a mediation does not settle during the initial conference.

4. Identify the mediator's style, whether facilitative (or predominantly facilitative), transformative or other.

   a. As noted, some styles may be preferable to others depending upon the matter.

   b. Whatever the purported style, some mediators may be very forceful in trying to reach a settlement and this may or may not be effective when dealing with highly-charged emotional issues. This behavior must not interfere with the parties' right to self-determination which is one of the required criteria for mediation.

5. Consider co-mediators. In complicated family disputes it might be advisable to engage one mediator with subject-matter expertise and another who is trained in family dynamics.

6. Interview candidates to assess all of the above before making a decision as to a mediator.[19]

B. What are the Steps in a Mediation Process?

As with many mediation issues, there seems to be a divergence of opinion about how the process is to be conducted. However, the following suggests an overview as to common elements:

1. The mediator designs the mediation process with the attorneys in a premediation conference by phone or in person. Agreement is to be reached upon the following:

   a. Logistics

      The mediator and attorneys collaborate on the logistics of the process; how much time should be scheduled, location and date, who should attend, and the agenda for the joint mediation conference. It can be helpful to have clients input on the agenda, as they may want to include non-legal issues for discussion.

[19] *See generally* Lee Jay Berman, *12 ways to Make Your Mediator Work Harder for You*, Advocate Magazine (October 2009).

b. Discovery

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

c. Mediator Submissions

Sometimes these submissions are defined by the court's or mediator's circumscribed requirements. Regardless of the format, these submissions will include the factual content of the case, the known issues to be resolved, the current positions of the parties and, if any, the summary of prior efforts to reach settlement (including offers). Attachments and exhibits include relevant court documents if litigation is pending.

d. Confidentiality of Mediation Submissions

Submissions may be directed confidentially to the mediator, or to both the mediator and opponents with only sensitive information being treated as confidential. Attorneys seem to prefer total confidentiality for fear of divulging too much information, while mediators are likely to encourage the exchange of information among the parties to the extent feasible to expedite joint problem solving.

2. The mediator controls the process, starting with the initial joint session.

a. Opening Statements

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

b. Joint Sessions v. Shuttle Diplomacy

There is also a difference of opinion among mediators as to how much of the process is to be conducted in joint sessions and how much in separate meetings. *(caucuses)*.

Some facilitative mediators are trained to conduct the entire mediation in joint sessions among all the parties and attorneys, in order to facilitate collaborative problem solving. These mediators will use caucuses sparingly if at all, only as they deem necessary or upon the request of the parties or attorneys. Other mediators work almost entirely thorough caucuses after the opening session, by delivering proposals back and forth to parties in separate rooms (*"shuttle diplomacy")*. That approach is more typical with evaluative mediators.

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

3. The Mediator Focuses on Settlement.

   a. Notwithstanding the significant differences among mediators on many topics, there should be no doubt that any style of mediator must be able to keep the parties focused on settlement and keep the process going until settlement is reached.

   b. If the parties settle during the mediation conference, a fully-executed memorandum of agreement is usually signed, so that the attorneys will have additional time to prepare the complete documentation. The mediator remains available to assist if any new or open issues arise over finalizing the written agreement, and should be kept apprised of the matter until everything is completed.

C. What Techniques Does a Facilitative Mediator Use?

1. The mediator creates an atmosphere of collaboration and trust, starting with the first phone call. As required, the mediator's impartiality and neutrality as demonstrated by language and actions can provide a comfort zone for otherwise distraught and angry parties to the mediation.

2. The mediator models problem–solving behavior in controlling the process. Siblings sharing in an estate or trust may never have had an

adult conversation while their parents were still alive, and may revert to old behaviors from their childhood. The mediator is trained to control and limit angry outbursts from the parties, in order to attend to the difficult work of joint problem solving.

3. The facilitative mediator intends to alter the dynamics of a negotiation with a focus on settlement by some of the following means:

- "Encourage exchanges of information,
- Provide new information,
- Help the parties to understand each other's views,
- Let them know that their concerns are understood,
- Promote a productive level of emotional expression,
- Deal with differences in perceptions and interests between negotiators and constituents (including lawyer and client),
- Help negotiators realistically assess alternatives to settlement,
- Encourage flexibility,
- Shift the focus from the past to the future,
- Stimulate the parties to suggest creative settlements,
- Learn (often in separate sessions with each party) about those interest the parties are reluctant to disclose to each other, and
- Invent solutions that meet the fundamental interests of all parties."[20]

4. The facilitative mediator's toolbox includes the following techniques:

a. Providing the disputant an opportunity to vent emotions in a controlled environment and to have these acknowledged and validated, perhaps for the first time;

b. "Active listening" to solicit information and identify the parties' needs and interest to be addressed in settlement, as effective facilitative mediation usually involves interest-based rather than positional bargaining;

c. "Reality testing" to help parties understand the weaknesses as well as strengths of their own case, and the strengths of their opponents' case; this may be one of the key factors in successful mediations, and attorneys should not hesitate to ask

[20] Steven B. Goldberg, Frank E. A. Sanders and Nancy H. Rogers, *Dispute Resolution* (2d Ed.) (Aspen Law & Business), at 103.

for the neutral's assistance in reality testing to manage the client's expectations; and

d. Brainstorming to invent options for mutual gain, beyond the legal determination of who is right and who is wrong; creative and joint problem solving among the mediator, attorneys and clients provides opportunities for settlement and is one of the most important differences between mediation and litigation or other types of ADR.

D. Who Should Attend the Mediation?

1. All of the parties at the mediation should have an interest in a negotiated settlement and enough information to make an informed decision. The attendance of parties with settlement authority is mandatory.

2. When mediation occurs in the litigation context, the parties to the dispute will be represented by legal counsel who should attend the mediation. All parties, including the fiduciary and fiduciary's counsel as well as the beneficiaries' counsel, are to participate in collaborative and creative problem solving in order to resolve the dispute at issue.

3. When mediating an estate, trust, elder or family business dispute, it may be practical to include all "interested parties", meaning not only the parties who have a legal interest in and settlement authority for the matter, but also those who may be impacted in other ways.

   a. For example, assume the purpose of a mediation is to resolve a conflict over family business succession. In that mediation, it might be advisable to include all family members, whether or not working in the business, who are beneficiaries of the senior generation's estate plan, wish to participate in the mediation, and could be directly affected by the result.

   b. If it were not advisable for such other "interested parties" to participate in a joint mediation conference, then consider whether they might be able to participate in separate caucuses with the mediator.

   c. The interests of all the necessary parties for settlement must be protected in mediation. All states have some statutes to protect minors and incapacitated parties, whether (a) by the court, (b)

by a court-appointed special representative or guardian at litem, (c) through parental representation, or (d) by a virtual representation statute. Unless all the parties can represent themselves or be adequately represented otherwise, mediation is not appropriate.

E. What is the Role of the Attorney Representing Clients in Mediation?

1. The attorney is central to the process as counselor and problem solver, a role which is more collaborative and less adversarial than in litigation even when making the client's best case to the opposing side. The goal is for all the attorneys and parties to help in building consensus and to participate in joint, creative problem solving. This can be difficult for seasoned litigators who are used to positional bargaining and more comfortable with adversarial negotiations.

2. Effective mediation advocacy requires great diligence in preparation. Just as with litigation, the attorney needs (a) to know the facts, the file and the law regarding the case, (b) to design a plan, strategies and tactics of the case, and (c) to prepare the advocacy submission, if requested by the mediator, in the form requested. The submission should also advise the mediator as to the results of previous negotiations and any previous offers. In most cases, the submission will not be as extensive as a brief in litigation. However, it is intended to accomplish the same purpose of setting forth sufficient information to persuade the mediator and opposing parties of the strength of the case. If the case is already in litigation, it will include some, if not all, of the court filings.[21]
See Appendix A and Appendix C for Mediation Preparation Checklists.

3. For successful mediation advocacy, the attorney must prepare the client thoroughly for what to expect. Otherwise, the client may be surprised by the more collaborative style of the attorney in the mediation, and may think that aggressive tactics should be used as in trial. Once the client understands the problem–solving focus of the proceeding, the attorney's role as well as the mediator's role should be clarified. Hopefully the client will then become a willing party to the creative problem–solving forum.
See Appendix C for Client Preparation Checklist.

[21] *See generally* Karen K. Klein, *Representing Clients in Mediation: A Twenty-Question Preparation Guide for Lawyers*, 84 N.D. L. Rev. 877 (2008); Abramson, supra note 18, at 364.

a. Assuming the client can do so effectively, it can be advantageous to have the client participate in the process by telling his or her own story in opening statements. Because trust and estate disputes can be fueled by emotional issues, the client may be best-suited to explain such issues to the mediator and opposing party, as well as to express the repercussions to the client from the perceived wrong. In addition, the mediation process may be valuable to client just by having an opportunity to be heard.

b. During this process, the mediator will be reality testing to make the client aware of the weaknesses in his or her own case as well as the opponent's strongest arguments. The attorney may have tried to accomplish this in the past to no avail; however, in this context, the mediator's efforts may help the client to face the risks of litigation as well as the potential financial, time and emotional costs for the first time in making settlement decisions.

4. The attorney and clients should all participate in inventing options for mutual gain with the mediator as a guide. The mediation process does not require a legal finding of right and wrong, but instead looks forward using creative ideas for dispute resolution. This allows for flexibility and consideration of non-legal options for settlement where appropriate. For example, if a dispute has arisen between a fiduciary and the sole income beneficiary regarding distributions of trust accounting income, subject to the provisions of state law and the document all the parties and beneficiaries might consider converting the vehicle to a total return trust in order to avoid an ongoing controversy.

5. The attorney also needs to use confidential private meetings *(*caucuses) with the mediator effectively. Be open about asking the mediator for suggestions and ideas for effective negotiating, such as the following:

a. Develop and test settlement proposals with the mediator.[22] It can be useful for the attorney to brainstorm with the mediator in caucus; this provides an opportunity to develop new settlement options and determine how best to present them to the other side. The mediator brings a fresh prospective based

[22] *See* Abramson , supra note 18, at 239.

on experience in other mediations as well as previous joint sessions and caucuses with the opposing parties, and may be able to help package the proposal in a manner which the other side finds more positive whether or not yet acceptable. Also consider asking the mediator to test the other side with hypothetical settlements, in order to anticipate better their possible response to future actual proposals.

b. Seek the mediator's assistance in breaking impasse.[23] The mediator is trained to identify the cause of impasse and formulate ways to overcome impediments to settlement. For example, a facilitative mediator may try further reality testing the parties so that they have a better understanding of the downsides of litigation and the reason for continuing settlement discussions rather than walking away.

F. How Do State Laws and Court Rules Affect Mediation?

1. The laws affecting mediation vary greatly among the states. The only apparent consistency is that each state has some type of provision for divorce/family mediation, at least with respect to child custody matters.[24]

b. Some states, such as Texas, California and Florida, have comprehensive statutes governing the practice, while a majority of states do not.[25]

c. Some court systems have court-annexed mediation or other types of court programs, but these rules and procedures may differ greatly even within the same state.[26] Court-ordered mediation will have its own set of rules imposed upon the process.

d. In most states which have enacted the Uniform Trust Code ("UTC"), Section 111(b) authorizes nonjudicial dispute

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[23] *Id.* at 240.
[24] *See* http://CourtADR.org for the ADR Resource Center established by Resolution Systems Institute ("RSI").
[25] *Id.*
[26] *Id.*

resolution with respect to trust matters, subject to certain requirements and definitions**.** [27]

2. Confidentiality is a critical aspect of mediation, but is not necessarily treated the same from state to state.

   a. In states that have enacted the Uniform Mediation Act ("UMA"), [28] a mediator privilege is created to protect against disclosure for mediation communications so that, except for certain limited exceptions, a mediator may refuse to testify in court proceedings or otherwise disclose the content of the mediation. The privilege protects all parties, making all mediation communications privileged and not subject to discovery or admissible in evidence in a proceeding unless waived, precluded by misuse, agreed to otherwise in writing, available in the public record, or restricted or exempted under certain other limited circumstances.[29]

   b. States which have not enacted the UMA may have adopted similar protection for confidentiality and mediator privilege. For example, Florida has enacted the Mediation Confidentiality and Privilege Act[30] as part of its comprehensive mediation legislation.

   c. Absent the protection of a statute, it is very important that the mediation be subject to a private confidentiality agreement.

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

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[27] Unif. Trust Code §111(b) (2000), C.U.L.A. 2006; *See also* Gil E. Mautner & Heidi L.G. Orr, *A Brave New World*: *Nonjudicial Dispute Resolution Procedures Under the Uniform Trust Code and Washington's and Idaho's Trust and Estate Dispute Resolution Acts,* 35 ACTEC J. 159 (Fall 2009).
[28] Uniform Mediation Act ("UMA"), note 10 supra.
[29] *Id.* at §§4-6.
[30] FLA Statutes 2012, Title V, Chapter 44, Sections 401-406).

4. The regulation of mediators varies even more dramatically. Some states have formal certification procedures and/or training requirements, but others do not.[31]

5. In addition, Model Standards of Conduct for Mediators were originally developed in 1994, and revised in 2005, and adopted in both forms by the American Bar Association Section of Dispute Resolution, the Association of Conflict Resolution, and the American Association of Arbitration in 1994 and revised in 2005. These are the ethical guidelines applicable to all mediators, including attorney-mediators, but do not include and enforcement procedures and are not binding.

    a. The Model Standards of Conduct address essential mediation concepts, inducing self-determination of the parties, impartiality and competence of the mediator, and the quality of the process.

    b. The Model Standards are intended to be a guide for mediator conduct; to inform the mediating parties about the process; and to promote public confidence in mediation as a process for resolving disputes.

G. What are the Relevant Tax Considerations of Trust and Estate Mediation?

1. The critical tax considerations of trust and estate mediation are similar to those for any negotiated settlement, and are fully considered in many resources from ACTEC and others.[32]

2. It is important to note that advocates in mediation need not only be knowledgeable about the relevant tax rules, but also be mindful of their impact on the negotiations. It is a delicate balance knowing when to focus on

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

[32] *See generally* M. Patricia Culler, Laird A. Lile and Donald R. Tescher, *Uncle Sam: The Silent Party at Estate and Trust Settlement,* ACTEC Annual Meeting (2005); Mary F. Radford, *Tax Considerations and Other Issues Unique to Mediation of Trust and Estate Cases,* University of Miami School of Law, 19th Annual Heckerling Institute on Estate Planning (2005).

tax issues early enough in the process to address them fully as the parties are working towards a realistic proposal, but not so early that it can distract the parties from addressing other high-priority issues. The mediator is trained to provide guidance with this "negotiation dance".

VI. Conclusion

Facilitative mediation offers an additional tool for resolving disputes that arise in many aspects of a trusts and estates practice. The process is particularly well-suited to these types of disputes for a variety of reasons, including that (a) it permits the parties to retain control over the outcome, (b) it can provide a private forum for communication about sensitive family issues and an opportunity for acknowledging the emotions involved, and (c) it allows an opportunity for creative problem solving without the limitations imposed by litigation or arbitration. As trust and estate litigation continues to increase, facilitative mediation is likely to become a favored technique for resolving disputes earlier and more efficiently. For this reason it is important that attorneys, fiduciaries and other advisors involved with trusts and estates have a thorough understanding of the facilitative mediation process, as well as when and how it can be utilized effectively.

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Appendix A

EXCERPT FROM AND REPRODUCED WITH THE PERMISSION OF: Karen K. Klein, Representing Clients in Mediation: **A Twenty- Question Preparation Guide for Lawyers**, 84 N.D. L. Rev. 877 (2008).

REPRESENTING CLIENTS IN MEDIATION: A LAWYER'S PREPARATION GUIDE

1. Are you ready and willing to serve as a problem solver and not as an adversary when you advocate for your client during mediation?

2. What discussions have you had with your client about settlement? Have you asked about your client's motivations for litigating, your client's impressions of the legal system, and your client's expectations? Have you explained the mediation process to your client?

3. What is your client's emotional state? Have you regularly monitored your client's emotions over time? Have you tried to promote a healthy client attitude toward settlement?

4. What facts or legal issues will most affect settlement value? Have you developed these facts and researched these issues? What information may be important to settlement but not relevant to the legal dispute? How will you gather this information?

5. Have you evaluated the strengths of your client's case? Have you realistically assessed the weaknesses? What are the strengths and weaknesses of the other party's case? Have you adequately considered the strengths and weaknesses in your settlement evaluation? Does this assessment include litigation cost as well as risk of outcome?

6. Have you discussed with your client his/her needs and interests which might affect the client's desire for settlement or for trial? Have you anticipated the other party's needs and interests? To what extent are your client's needs and interests and those of the other party compatible, or at least not incompatible?

7. What remedies are available through litigation? What remedies would address the needs and interests of the parties, but are not available through litigation?

8. A. If your client is a business entity or has insurance coverage, who makes the final settlement decisions for your client? Have you talked to that person about settlement? Who will attend the mediation on behalf of the client? Does that person have sufficient authority to make the final decision at mediation? If not, have you informed the mediator?

8. B. If your client is a governmental entity, has the entire board met with you in an executive session to discuss settlement evaluation and negotiation strategy? Will the

representative(s) who attend the mediation have reasonable authority parameters? If the case can be settled only beyond those parameters, will the attending representative(s) have sufficient credibility with the other board members to make a strong recommendation for settlement? Do you know when the full board can meet to approve any settlement?

9. Is there insurance coverage in this case? What are the limits? Is there a dispute over coverage? If so, should the coverage dispute be negotiated before, during, or after negotiation of the underlying dispute? If global negotiations are best, will coverage counsel attend the mediation? Have you informed the mediator of the coverage dispute and the identity of coverage counsel?

10. Are there subrogation interests or outstanding liens? Have you verified the amounts? Have you informed counsel for the other party of these liens and the amounts? Are the liens negotiable? If so, can you resolve them in advance of mediation, contingent upon settlement of the case? If not, will/should a representative of the lien holder attend the mediation in person or by telephone? Have you informed the mediator of these interests and names of lien holder representatives?

11. Is there a person who may have a strong influence on your client's settlement decision? Will that person help or hinder settlement of the case? Should that person attend mediation with your client? Have you informed the mediator of this person's influence?

12. Does the defendant have the financial ability to pay a judgment or settlement in the likely range? If not, what financial information will substantiate the defendant's claim of inability to pay? Can you bring that information to mediation? Will you need to bring an accountant or other financial person to explain it? What payment terms might the defendant need? Have you mentioned the financial concerns to the other attorney(s) and the mediator?

13. Do you have concerns about your client's unreasonable expectations and your ability to manage them? Have you contributed to the client's frame of mind? Have you tried to conduct a reality check on the client? Have you or will you request the mediator's assistance in persuading your client to become more reasonable?

14. How well do you know your mediator? Does the mediator use mostly joint sessions or private caucus meetings? Is the mediator's style facilitative or evaluative, or does it change depending on the circumstances? Which mediation style would work better in this case? Will the mediator primarily address counsel or the clients? Are you and your client ready for this?

15. How much time has the mediator set aside for the session? How can you best use the time? If you or your client's travel arrangements may conflict with the schedule, have you informed the mediator and the other attorney(s)?

16. Is an award of attorney's fees an issue in the case? If so, have you and your client discussed the potential for a conflict of interest between you? Do you know the current amount of the fees and costs? Are you prepared to show verification of the amount without infringing on work product or privilege?

17. Is there a rationale for the settlement proposal you will make at mediation? Are you prepared to share that rationale with the mediator and the other party? Are there calculations or documents you can bring to show the rationale? Do you have evidence adverse to and unknown by the other party that significantly affects settlement value in your client's favor? Have you weighed the risks and benefits of revealing the evidence to the other party? Have you disclosed the evidence to the mediator?

18. Are you expected to prepare a written mediation statement? When is it due? Does your statement address all of the mediator's requirements? Is it balanced and candid, or is it argumentative? Will the statement assist the mediator in guiding the parties toward a settlement?

19. Have there been prior negotiations in the case? What was the last settlement proposal of each party? Have you sent any "non-offer" signals to the other party's lawyer? Have you revealed the full negotiation history to the mediator, including any "non-offer" signals made to the other party's lawyer?

20. Are there special terms your client will want in the final settlement documents? Is confidentiality of settlement terms an issue? Are payment terms an issue? Will you insist upon certain language in the release(s)? What other special issues does your client have? Have you revealed these special issues to the mediator?

Appendix B

Checklist: Preparing Mediation Representation Plan

21. Checklist: Preparing Mediation Representation Plan

Consistent with the primary Mediation Representation Triangle, this checklist consists of three parts. Parts 1 and 2 cover preparing for the negotiation and the mediation—the homework that you should do before you prepare your representation plan. Part 3 covers what to include in your representation plan for the key six junctures in the mediation process.

Part 1: Prepare for Negotiation

☐ 1. Identify interests to meet
  ☐ a. Your client's

- ☐ 2. Identify impediments to overcome
  - ☐ a. Relationship
  - ☐ b. Data
  - ☐ c. Value
  - ☐ d. Interests
  - ☐ e. Structural
- ☐ 3. Research legal case (public BATNA).
  - ☐ a. Research law
  - ☐ b. What information do you need?
  - ☐ c. Should you file any cleanup motions?
- ☐ 4. Develop with your client her personal alternatives to settlement (personal BATNA).

Part 2: Prepare for Mediation

- ☐ 1. Decide who should attend the mediation session.
  - ☐ a. Should you attend?
  - ☐ b. Should your client attend?
  - ☐ c. How do you involve an institutional client?
    - ☐ i. Who should participate on behalf of an institutional client?
    - ☐ ii. Does the person have sufficient and flexible settlement authority?
    - ☐ iii. How can you convince the client representative to participate?
    - ☐ iv. What should be the role of an in-house counsel?
  - ☐ d. Should any other people participate (advisors)?
    - ☐ i. Expert witnesses?
    - ☐ ii. Fact witnesses?
    - ☐ iii. Personal advisors or supporters (family members or friends)?
    - ☐ iv. Other?
- ☐ 2. Identify who your audience is in the session.
- ☐ 3. Prepare presentation of the legal case.
  - ☐ a. How can you productively present the legal case?
  - ☐ b. When do you want to present it—in opening statements or later?
- ☐ 4. Prepare presentation of complete case.
  - ☐ a. Story
  - ☐ b. BATNAs
  - ☐ c. What does your client want?
  - ☐ d. What would you like the mediator to do?
- ☐ 5. Prepare for initial information exchange
  - ☐ a. Prepare questions.
  - ☐ b. Resolve what information to share and when and where.
- ☐ 6. Consider level of confidentiality that you need.
  - ☐ a. Is confidentiality necessary?

- ☐ b. What are the sources? Look at mediation contract, any binding private mediation rules, and local laws.
- ☐ c. What do the sources cover?
- ☐ d. What are the exceptions?
- ☐ e. Is the applicable level of confidentiality sufficient?
- ☐ f. If not sufficient, how does it affect your willingness to share information?
- ☐ g. Do you want to withhold any information even with confidentiality protections?

☐ 7. Consider how to abide by conduct rules and mediation law.

- ☐ a. Check local professional conduct rules relevant to mediation representation, including truth telling obligations.
- ☐ b. Check whether a local obligation to participate in good faith applies and how it is interpreted.
- ☐ c. Check for any other relevant mediation law that may establish parameters for your representation.

☐ 8. Identify the mediator's possible contributions to resolving the dispute.

- ☐ a. *Approaches to dispute.* You want the mediator to use the following approaches:
  - ☐ i. Manage the process by primarily facilitating, primarily evaluating, or following another approach.
  - ☐ ii. View the problem broadly or narrowly.
  - ☐ iii. Involve clients actively or restrictively.
  - ☐ iv. Use caucuses extensively, selectively, or not at all.
- ☐ b. *Useful techniques.* You want the mediator to use her techniques to:
  - ☐ i. Facilitate the negotiation of a problem-solving process.
  - ☐ ii. Promote communications through questioning and listening techniques.
  - ☐ iii. Deal with the emotional dimensions of the dispute.
  - ☐ iv. Clarify statements and issues through framing and reframing.
  - ☐ v. Deal with power inequalities.
  - ☐ vi. Overcome the impediments to settlement.
  - ☐ vii. Overcome the chronic impediment of clashing views of the court outcome (public BATNA).
  - ☐ viii. Create options for settlement (e.g., brainstorming).
  - ☐ ix. Fashion creative solutions.
  - ☐ x. Facilitate claiming of options.
  - ☐ xi. Close any final gaps (consider your preferred methods for closing gaps).
  - ☐ xii. Deal with _____.
- ☐ c. *Control over mediation stages.* You want the mediator to use his or her control over the mediation process in the following ways:
  - ☐ i. Use the mediator's opening statement to set up a problem-solving process.

- ☐ ii. Use the information gathering stage for venting and securing information for the specific purposes of understanding issues, interests, and impediments. (Opening statements of participants, first joint session, and first caucus)
- ☐ iii. Use the stage of identifying issues, interests, and impediments to ensure that key information is clearly identified.
- ☐ iv. Use the agenda formulation stage to ensure that key issues and impediments will be addressed.
- ☐ v. Use the overcoming impediments stage to overcome known impediments.
- ☐ vi. Use the generating options stage to ensure that creative ideas are developed. (Inventing stage)
- ☐ vii. Use the assessing and selecting options stage to ensure that your client's interests are met. (Claiming stage)
- ☐ viii. Use the concluding stage to ensure that any written settlement meets your client's interests, or if there is no settlement, that a suitable exit plan is formulated

☐ 9. Contact mediator before session.

- ☐ a. Inquire whether the mediator plans to hold a premediation conference.
- ☐ b. If not planning one, request one if you determine that it would be useful.
- ☐ c. Inquire whether the mediator wants a premediation submission. If so:
  - ☐ i. Determine what the mediator wants included.
  - ☐ ii. Determine whether the mediator will share any information in the submission with the other side.
  - ☐ iii. If the mediator plans to share any information, determine whether he wants you to send the entire submission or a portion to the other side.
- ☐ d. If the mediator does not want a premediation submission, request one if you determine that it would be useful.

☐ 10. Consider what to bring to the mediation session.

- ☐ a. What will you bring to the session?
- ☐ b. How will you visually present key information?

Part 3: Prepare Representation Plan for Six Junctures

Develop a representation plan based on your preparation in Parts 1 and 2 for the negotiation and mediation. You should form a plan to advance your client's interests, overcome any impediments, and share relevant information at each of the key junctures in the mediation process. Your plan, which includes enlisting assistance from the mediator, should be consistently developed throughout the junctures.

Plan for Each Key Juncture (Use the Information You Collected and the Choices You Made When Preparing Parts 1 and 2)

- ☐ **1. Select mediator (with rationale for each choice).**
  - ☐ a. Select person who is facilitative, evaluative, or other.
  - ☐ b. Select person who views problem broadly or narrowly.
  - ☐ c. Select person who involves clients actively or restrictively.
  - ☐ d. Select person who uses caucuses extensively, selectively, or not at all.
  - ☐ e. Select person with relevant credentials.
    - ☐ i. What training and experience would be suitable?
    - ☐ ii. What subject matter knowledge would be helpful, if any?
    - ☐ iii. Which key personal traits would be suitable?

- ☐ **2. Premediation conference**
  - ☐ a. Verify mediator's mix of approaches to the mediation.
  - ☐ b. Verify other side's approaches to the mediation.
  - ☐ c. Verify attendance by the other side's best client representatives with sufficient and flexible settlement authority.
  - ☐ d. Verify date, time, place, and length of session.
  - ☐ e. Resolve what information you need from the other side before or by the start of the session.
  - ☐ f. Determine whether the mediator plans to have any ex parte conversations with each side before the session.
  - ☐ g. Consider signaling the likely interests of your client.
  - ☐ h. Consider broaching a discussion of possible impediments.
  - ☐ i. Ask about the premediation submission, if questions are still unresolved.
    - ☐ i. Determine whether the mediator wants you to submit any premediation materials.
    - ☐ ii. Determine what the mediator wants included in the premediation submission.
    - ☐ iii. Determine whether the mediator will share any information in the submission with the other side.
    - ☐ iv. Determine, if the mediator plans to share any information, whether he wants you to send the entire submission or a portion to the other side.
  - ☐ j. Identify any other issues that need to be resolved in the premediation conference.

- ☐ **3. Premediation submission (assuming you're planning one)**
  - ☐ a. What are the overall goals that you want to accomplish?

- ☐ b. Consider whether and how you want to cover the following points in the submission:

  Description of dispute and legal case
  - ☐ a. "Factual summary," including a chronology of events, description of key undisputed facts, and description of key disputed facts
  - ☐ b. "Critical legal issues" in dispute, including your client's view on each issue and key cites
  - ☐ c. "Relief" sought, including a particularized itemization of all damages claimed
  - ☐ d. "Motions" filed and their status
  - ☐ e. "Discovery status," including what still needs to be done to be ready for trial

  Settlement analysis
  - ☐ a. "Interests of your client" that you want met in mediation
  - ☐ b. "Settlement discussions," including any offers or counter-offers previously made
  - ☐ c. "Why not settled," covering your views on the obstacles to settling this dispute and ways to overcome them
  - ☐ d. "What you want out of the mediation," especially what you want the mediator to do and what inventive settlement concepts you would like the other side to consider

  Other information
  - ☐ a. "Who will attend" the mediation session and the title of any client representatives
  - ☐ b. Attach critical documentary evidence

☐ **4. Opening statements**
- ☐ a. What are the overall goals that you want to accomplish?
- ☐ b. Prepare statements.
  - ☐ i. Tone
  - ☐ ii. Content
    - ☐ (a) Tell story.
    - ☐ (b) Cover public BATNA (legal case).
    - ☐ (c) Cover Personal BATNAs.
    - ☐ (d) Suggest what your client wants out of the mediation (no specific proposals yet).
    - ☐ (e) Suggest how the mediator might help the parties resolve the dispute.
- ☐ c. Should your client present an opening statement?
- ☐ d. How should you divide the opening statements between you and your client?
  - ☐ i. Story
  - ☐ ii. Public BATNA (legal case)

- ☐ iii. Other BATNAs—personal and other
- ☐ iv. What you want out of the mediation
- ☐ v. How you want the mediator to help resolve the dispute.

☐ e. Should you or your client speak first?

☐ **5. Joint sessions**

☐ a. Determine how to generate movement to advance and meet interests at each mediation stage.

- ☐ i. When venting and gathering information
- ☐ ii. When identifying issues, interests, and impediments
- ☐ iii. When formulating agenda
- ☐ iv. When overcoming impediments
- ☐ v. When generating options
- ☐ vi. When assessing and claiming options for settlement

☐ b. Determine ways to enlist assistance of the mediator at each stage.

☐ c. Determine how and when to present your legal case.

☐ d. Decide how to split responsibilities between you and your client as mediation unfolds.

☐ **6. Caucus**

☐ a. Select purposes that you want to accomplish and ways to generate movement in any caucuses (purposes that cannot be accomplished as effectively in a joint session).

☐ b. Determine what information you want to share initially or only with the mediator.

Appendix C

Checklist: Preparing Client

10. Checklist: Preparing Client

- ☐ 1. Explain mediation process to your client.
  - ☐ a. Remind your client that mediation is a continuation of the negotiation process.
  - ☐ b. Explain that it is a problem-solving process.
  - ☐ c. Review stages of the mediation.
  - ☐ d. Review techniques of mediators.
  - ☐ e. Show a videotape of an actual mediation.
  - ☐ f. Review the level of confidentiality.
  - ☐ g. Determine whether any information should be withheld from the joint sessions or mediator.
  - ☐ h. Advise your client to be patient and open-minded.
- ☐ 2. Explain your different role in the mediation session.
- ☐ 3. Reinterview your client.
  - ☐ a. Clarify interests.
  - ☐ b. Clarify impediments.
  - ☐ c. Prod for creative solutions.
- ☐ 4. Review what essential information your client needs before the mediation session and the risks of incomplete discovery.
- ☐ 5. Review strengths and weaknesses of the legal case (public BATNA).
- ☐ 6. Probe for your client's personal benefits and costs of litigating (personal BATNA).
- ☐ 7. Finish developing your mediation representation plan.

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- ☐ 8. Prepare your client to answer likely questions.
- ☐ 9. Finalize the opening statements.
  - ☐ a. Will your client present a statement?
  - ☐ b. How will you divide the presentation of the story and determine public and personal BATNAs, what your client wants, and what you want the mediator to do?
  - ☐ c. Will your client speak first?

Here are some of the comments Roselyn has received about her mediation skills from attorneys and their clients:

"I'm happy to recommend Roselyn Friedman as a mediator. Before working with her, I couldn't believe that a family of siblings whom I had represented for years and who had been feuding since they were kids would ever agree to a settlement about their mother's estate. But she somehow made it happen!"

"Roselyn brings the perfect skill set to a mediation: a superb base of substantive knowledge coupled with the kind of personal skills that lead to positive results."

"Our office handles a significant amount of contested probate and trust litigation. Our clients have retained Ms. Friedman on three occasions and have been impressed with her preparation for the mediation, her attention to detail, her determination and hard work during the mediation process, and her ability to mesh with and work with all parties. We recommend Ms. Friedman as a mediator in any contested estate or trust matter."

"Roselyn's depth of understanding in the trust and estate area gives her a strong advantage over other mediators in settling these types of disputes."

"I have used Roselyn Friedman as a mediator in several of my cases, and have been totally satisfied with the results. At the mediation sessions, her manner is sympathetic and understanding, while at the same time she looks realistically at the facts and works diligently to help the parties reach agreement. Roselyn is determined to settle every case and, based upon my experience with her, I believe that she does."

"It was a pleasure working with Roselyn-- she has terrific instincts, and her observations and suggestions were valuable in reaching resolution."