

KEEPING TRUST AND ESTATE DISPUTES OUT OF COURT: AN ESTATE PLANNER'S GUIDE TO MEDIATION

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I. Introduction

Trust and estate advisors and fiduciaries are well aware of the unprecedented growth in fiduciary litigation. There are forms of alternative dispute resolution (“ADR”) which may provide a better forum for some trust and estate disputes, in order to avoid or at least limit full-scale fiduciary litigation. Estate planners and other advisors will want to be familiar with these processes in order to help clients make informed decisions about whether or not to litigate particular contested matters. Facilitative mediation, the focus of this outline, is one type of ADR gaining popularity for resolving trust and estate disputes.

II. Mediation in the ADR Control Spectrum

A. How is Mediation Different from Litigation and Arbitration.

1. Litigation and arbitration have similarities and differences.
 - 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 is also an adversarial process, with principles similar to litigation. The parties give up control of both the process and outcome of a dispute to an impartial, third party who is the arbitrator (or panel of arbitrators). Like a judge, the arbitrator looks to the past to determine right and wrong based on legal precedent, and decides who wins and who loses.
 - c. Depending upon the arbitration agreement, the process may differ significantly. For example, the parties may have more control than in litigation, because they select the arbitrator and determine the rules of the process without being subject to all the formalities and requirements of a court proceeding.

2. Mediation is different. It is negotiated settlement discussions where a neutral third party mediator controls the process but not the outcome. The mediator facilitates the parties' communication about the disputed issues in order to help them reach a mutually beneficial resolution.
 - a. The parties select the impartial third party to act as mediator (referred to as a "neutral"¹). However, unlike a judge or arbitrator, the mediator has no authority to impose an outcome on the parties and is not the decision-maker. The parties have self-determination and retain control of the outcome of the dispute. Even where mediation has been ordered by the court, whether and how to settle is voluntary for the parties.
 - b. The mediation process itself is also different from litigation and arbitration. It focuses on communication and collaboration, and looks towards settlement without being limited solely by legal rights. The goal is to reach resolution which satisfies the parties going forward, rather than to decide who wins and who loses the dispute.

B. Different Styles of Mediation.

1. In **facilitative** mediation, the mediator facilitates negotiations among the parties to a dispute, with the goal of reaching a durable settlement which addresses their "needs and interests". The process is discussed in detail in this outline.
2. In **evaluative** mediation, an expert in a field, after hearing both sides of the dispute, evaluates the respective parties' likelihood of success in litigation, and thereby helps to set more realistic expectations which encourage settlement.²
3. 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.

C. Divorce Mediation v. Trust and Estate Mediation.

1. There are some similarities between trust and estate mediation and divorce mediation, the latter often being referred to as "family mediation". Both

¹ The term "neutral" applies to both arbitrators and mediators and some other ADR practitioners

² There are 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. Illinois has no such statute.

commonly include the emotional aspects of a dispute as well as an emphasis on financial and tax issues.

2. But there are also significant differences between the two fields. Trust and estate law focuses backwards to determine the grantor's intent and which parties are right or wrong under legal precedent. To the contrary, the law of no-fault divorce requires settlement discussions which are forward looking to resolve economic and/or custody disputes. This is consistent with the mediation process and may be a reason why divorce mediation is already so popular, even in states where T&E mediation has lagged behind.³

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

A. Consistency with the Family Settlement Doctrine.⁴

1. Historically, probate and chancery courts have favored intra-family settlement of trust and estate disputes in lieu of resolving these emotionally-charged conflicts through the courts. As a result of the family settlement doctrine, courts generally uphold such agreements in the absence of fraud, undue influence or the breach of a confidential relationship.⁵
2. Consistent with the family settlement doctrine, most states which have enacted the Uniform Trust Code ("UTC") include Section 111(b) authorizing nonjudicial settlement agreements with respect to trust matters, subject to certain requirements and definitions.^{6 7}

B. Provides a Confidential Forum.

1. Mediation, like arbitration, 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.

³ See generally Ray D. Madoff., *Lurking in The Shadow: The Unseen Hand of Doctrine in Dispute Resolution*, 75 So. Calif. Law Rev. 161 (2002).

⁴ 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), at 645.

⁵ *Id.* at 645.

⁶ 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).

⁷ The Chicago Bar Association is proposing the enactment of the Illinois Trust Code including new Section 111(b). The ITC proposal does not include the UTC provision, but reflects Illinois law on nonjudicial settlement agreements which is broader.

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 could 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. 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 including Illinois have adopted the Uniform Mediation Act (the "Act") or similar statutes to require that mediation communications remain confidential and a privilege attaches to protect the mediator from future court proceedings.⁸ Absent a statute, or in some states superseding a statute or by agreement of the parties, mediation would be subject to a private confidentiality agreement. See Section V.G. below.

C. Preservation of Relationships.

1. Estate and trust conflicts often involve related parties. Although family relations are likely to suffer 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 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. As trust and estate advisors know, these conflicts are often fueled by emotional responses in addition to violations of legal rights or objective legal standards.

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 the District of Columbia, Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington, and introduced in Massachusetts and New York.

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

These disagreements may involve sibling rivalries, childhood disputes, perceived parental favoritism, and sentimental attachments.

2. Mediation gives the disputing parties a chance to tell their stories, both in joint conferences when they can speak directly with one another and in caucus when each party is meeting separately with the mediator. It is not unusual for parties to leave a mediation feeling that they have finally had their “day in court.”
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 also controlling the process without reacting to or allowing abusive, emotional outbursts which can otherwise interfere with communication.

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 intent upon proving that he had been bullied by a sibling may be satisfied only if a settlement includes a personal apology from the alleged “wrong-doer”.

F. Potential for Cost and Time Savings.¹¹

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

¹⁰ See generally 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.

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

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.
2. When a dispute involves an incapacitated beneficiary or where a power imbalance otherwise exists between the parties, accommodations must be made. In order to mediate, the weaker party must be adequately protected in the ADR process whether by the court, by a court-appointed special representative or guardian ad litem, through parental representation, by a virtual representation statute, or otherwise.
3. Some fact-specific disputes, such as those involving trustee fees or asset valuations, might be more efficiently resolved by either arbitration or by evaluative mediation rather than facilitative mediation.

IV. When Should Trust and Estate Disputes Be Mediated?

A. At Any Time, But The Sooner The Better!

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, particularly before the parties become invested in fixed positions. 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 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 used at any time in trust or estate administration, whether or not a conflict is already being litigated. It should be considered if the trustee and

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 business¹³ 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.¹⁴

4. Elder Mediation

The term “elder mediation” usually refers to a mediation process which addresses the health, financial and other concerns of an aging family member or friend, whether or not in the guardianship context. 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 communication going forward. This model presents additional challenges to be certain that the elder is adequately represented.¹⁵

5. When Discussions are Hampered by Professional Conflicts

- a. The Rules of Professional Conduct prohibit attorneys from representing multiple clients where there is a conflict,¹⁶ but a family meeting regarding a controversial estate or trust issue is fraught with potential conflicts. Absent waivers, all parties may choose to engage separate counsel and the meeting may result in having as many lawyers as beneficiaries in attendance. To deal

¹³ Gerald Le Van, *The Survival Guide for Business Families*, in articles are posted on the website of the firm Upchurch, Watson, White and Max: www.uww-adr.com

¹⁴ See 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).

¹⁵ See Hahn, Barbara Cashman, 39 COLO. LAW. 45 (Mar. 2010), describing particular expertise needed for elder mediation, legal and care concerns for elder family members, ethical issues, and questions of capacity of an elder participant.

¹⁶ Illinois Model Rule of Professional Conduct 1.7 provides that “without a client’s informed consent, a lawyer may not represent a client if that representation will be ‘directly adverse’ to another client or will ‘materially limit’ the lawyer’s responsibility to another client, a third person, or the lawyer’s own interests.” ILCS S Ct Rules of Prof. Conduct Rule 1.7 (West 2016).

with this in a less adversarial manner and still avoid allegations of conflicts, the attorney might consider introducing a mediator to facilitate such a meeting. As a neutral third party, the mediator is not representing any clients and not subject to the same constraints in raising necessary issues which are directly adverse to one or more parties.

- b. The mediator's privilege under the Uniform Mediation Act and the requirement for mediation confidentiality among the parties may protect conferences which would not otherwise be subject to attorney-client privilege under the Model Rules.

B. When Might a Fiduciary Use Mediation?

1. Disputes over Administrative Matters.

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.¹⁷

2. Dealing with Contentious Beneficiaries.

In a contentious matter among related parties, the fiduciary can end up in the middle between feuding beneficiaries. In such circumstances, a trustee who is properly exercising discretion under the trust terms in favor of a beneficiary may still be (a) facing frequent allegations of favoritism and breach of the fiduciary duty of loyalty by others and (b) spending a disproportionate amount of time dealing with the conflict as well as protecting against such unfounded allegations. A mediator might be engaged to facilitate resolution of these ongoing disputes among the beneficiaries, and thereby allow the trustee to focus on the important tasks necessary for administration.

V. Frequently Asked Questions about Trust and Estate Mediation.

A. How Do You Select a Mediator?¹⁸

1. Comply with any relevant court rules.

¹⁷ See generally Robert Whitman, *Procedure to Resolve Trust Beneficiaries' Complaints*, 39 Real Prop., Prob. & Tr.J. 829 (Winter 2005).

¹⁸ Harold I. Abramson, *Mediation Representation: Advocating as a Problem-Solver* (Wolters Kluwer Law & Business 3rd 2013), at 178-186.

2. Be sure there are no conflicts, such as prior representation of parties (by the mediator or an attorney at the same law firm).
3. Review the candidates' training and experience. 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. Those may provide evidence of relevant experience.
4. Consider whether the mediator needs to have subject-matter expertise. 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.
5. Studies have shown that personality traits can be indicia of mediator success.¹⁹ 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. Other attributes of a skillful mediator include tenacity, creativity and hard work in tackling impediments to settlement.
6. Identify the mediator's style, whether facilitative (or predominantly facilitative), evaluative, transformative or other. As noted, some styles may be preferable to others depending upon the nature of the dispute.
7. 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.

B. What Techniques Does a Facilitative Mediator Use?

1. The mediator creates an atmosphere of collaboration and trust starting with the first phone call. As demonstrated by both language and actions, the mediator's impartiality and neutrality can provide a comfort zone for otherwise distraught and angry participants in the process.
2. An effective facilitative mediator models problem-solving behavior in controlling the process and is trained to deal with and limit angry outbursts from the parties. Siblings sharing in an estate or trust may never have had an adult conversation while their parents were still alive, and they may revert to old behaviors from childhood.

¹⁹ *Id.* at 182-183.

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 the parties 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 interests which 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 interests to be addressed in settlement; 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 help the attorney in managing client expectations. A client who is able to assess realistically the risks as well as the potential financial, time and emotional costs of litigation is likely to make better settlement decisions.

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

- 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 increases opportunities for settlement.

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 governing document, the parties might consider converting the vehicle to a total return trust in order to avoid, or at least minimize, ongoing controversy.

C. 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 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 “interested nonparties” who may be impacted in other ways.

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, and could be directly affected by the result. If the other parties object to such other “interested nonparties” participating in a joint mediation conference, consider whether they might be able to participate in separate caucuses with the mediator or available by phone.

D. What are the Steps in a Mediation Process?²¹

As with many issues, there is a divergence of opinions among mediators about how the process is to be conducted. The following is an overview as to common elements:

1. Pre-mediation

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

²¹ See Abramson, supra at note 18, Chapter 7.

a. Logistics

The mediator and attorneys collaborate on the logistics of the process, including: 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.

b. Discovery

Matters related to the court case are considered, such as an agreed upon schedule for discovery and exchange of information, the scope of discovery, or whether discovery should be delayed until after the mediation if the case does not settle.

c. Mediator Submissions

Written submissions prepared by each side and provided to the mediator in advance of the conference should 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). Submissions are subject to the mediator's guidelines, but generally need not be as extensive as briefs. If the case is already in litigation, it will include some, if not all, of the court filings.

d. Confidentiality of Mediation Submissions

Submissions may be directed confidentially to the mediator who is not to share with the opposition, or to both the mediator and opponents with only sensitive information being treated as confidential. Attorneys often prefer total confidentiality for fear of divulging too much information and providing "free discovery" by mistake, while mediators are likely to encourage the exchange of information among the parties to the extent feasible to expedite joint problem solving.

2. Mediation Conferences

The mediator controls the process, starting with the initial joint session:

a. Opening Statements

The conventional wisdom has been that the mediator's statement (in part explaining the process, guidelines, and rules) starts the initial 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 opening statements fuel the flames of anger and discontent among the parties, and prefer to limit or even omit them.²²

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”), although it is not unusual for a mediator to use a combination.

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 through caucuses after the opening session, by delivering proposals back and forth to parties in separate rooms (“shuttle diplomacy”). That approach is typical with evaluative mediators.

3. The Mediator Focuses on Settlement.

- a. The mediator must be able to keep the parties focused on settlement and keep the process going until settlement is reached if at all possible.
- b. If the parties settle during the mediation conference, a 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 regarding the matter until everything is completed.

E. What is the Role of the Attorney Representing Clients in Mediation?²³

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. This role can be difficult for seasoned litigators who are used to positional bargaining and more comfortable with adversarial negotiations.
2. Effective mediation advocacy requires diligence in preparation. Similar to litigation, the attorney needs: to know the facts, the file and the law regarding the

²² Folberg, Jay, The Shrinking Joint Session: Survey Results, Dispute Resolution Magazine, winter 2016, vol 22, number 2, at pages 12-20.

²³ See Abramson, supra note 18, Chapter 5.

case; to design a plan, strategies and tactics of the case; and to prepare the written advocacy submission, in the form requested by the mediator, to advise the mediator and others of the strengths of the client's case. The submission should also advise the mediator of the results of previous negotiations and any previous offers. See Appendix A for a Mediation Preparation Checklist.²⁴

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 process, the attorney's role as well as the mediator's role should be clarified. Hopefully, the client will then be a more willing participant.²⁵
4. 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:²⁶
 - a. Develop and test settlement proposals with the mediator.

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 perspective, and may be able to help package the proposal in a manner which the other side finds more positive even if 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 actual future proposals.

- b. Seek the mediator's assistance in breaking impasse.

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.

²⁴ See Karen K. Klein, *Representing Clients in Mediation: A Twenty-Question Preparation Guide for Lawyers*, 84 N.D. L. Rev. 877 (2008).

²⁵ Abramson, *supra* at note 18, Chapter 6.

²⁶ See generally Lee Jay Berman, "12 Ways to Make Your Mediator Work Harder for You," *Advocate Magazine* (October 2009).

F. What are the Relevant Tax Considerations?

1. The tax considerations for mediated settlements are the same as those for other negotiated settlements of trust and estate disputes, and are fully considered in many resources.²⁷
2. Advocates in mediation need not only to be knowledgeable about the relevant tax rules, but also to be mindful of their impact on the negotiations. It is a delicate balance knowing when to focus on 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.

G. What Illinois Law and Court Rules Control?

1. The laws affecting mediation vary greatly among the states.²⁸
 - a. Some states, such as Texas, California and Florida, have comprehensive statutes governing the practice, while a majority of states including Illinois do not.²⁹
 - b. Illinois is one of the states which have court-annexed mediation or other types of court mediation programs.³⁰ Illinois Supreme Court Rule 99 authorizes each circuit court to establish its own program and impose its own set of rules upon the process.³¹ Rule 99 sets forth the matters to be addressed in each circuit's local rules for a mediation program and states that a person approved by the circuit to act as a mediator shall have the equivalent of judicial immunity.³²
2. Illinois has also adopted the Uniform Mediation Act, which is binding but may be modified by agreement.³³
 - a. Confidentiality is a critical aspect of mediation and is addressed by the Uniform Mediation Act ("UMA"). States which have not enacted the UMA

²⁷ See generally, 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).

²⁸ See <http://CourtADR.org> for the ADR Resource Center established by Resolution Systems Institute ("RSI").

²⁹ *Id.*

³⁰ *Id.*

³¹ ILCS S. Ct. Rule 99 (West 2016).

³² See ADR Resource Center, note 28 supra.

³³ Uniform Mediation Act ("UMA"), note 28 supra.

may have enacted other statutes governing confidentiality of the process, or otherwise have private confidentiality agreements.

- b. In Illinois, a privilege created under the UMA protects against disclosure of mediation communications; with certain limited exceptions, a mediator may refuse to testify in court proceedings or otherwise disclose the content of the mediation.³⁴
 - c. The privilege protects all parties, by 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.³⁵
 - d. In Illinois court mediations, confidentiality agreements will also be signed unless there has been a waiver.³⁶ The agreement would confirm that what is said and done in the mediation cannot be disclosed to third parties.
 - e. There is another aspect of confidentiality important to the process. If a party shares any information with the mediator confidentially, the mediator is not to divulge it to any other party or otherwise without specific permission to do so.
3. Nationally, the regulation of mediators varies dramatically.³⁷
- a. Some states have formal certification procedures and/or training requirements, but Illinois does not.
 - b. In Illinois each circuit court program may impose its own certification rules in compliance with Supreme Ct. Rule 99.³⁸
 - c. Some Illinois circuit court programs require that mediators be attorneys. 2010 Rules of Professional Conduct include Rule 2.4 applicable to lawyers serving as neutrals.³⁹

³⁴ UMA §§ 3-6; 710 ILCS 35/3 -710 ILCS 35/6.

³⁵ *Id.*

³⁶ *Id.* at § 8; 710 ILCS 35/8.

³⁷ *ABA Section of Dispute Resolution Task Force Report on Mediator Credentialing and Quality Assurance* (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).

³⁸ ILCS S. Ct. Rule 99(b)(2), *supra* at note 31.

- d. Model Standards of Conduct for Mediators adopted by the American Bar Association Section of Dispute Resolution, the Association of Conflict Resolution and the American Association of Arbitration, are the ethical guidelines applicable to all mediators, including attorney-mediators, but do not include and enforcement procedures and are not binding.⁴⁰

VI. Mediation Clauses in Estate Planning Documents

A. Cluses Which Encourage Trust and Estate Mediation.

1. The considerations in using mediation clauses differ from those for arbitration clauses. With mandatory arbitration clauses, the parties may be giving up rights otherwise available, including the right to appeal the arbitrator's decision. There are no comparable issues with mandatory mediation clauses; if the process is mandated, the parties may be required to mediate, but the decision whether to settle and the outcome of the dispute is always determined by the parties.
2. From informal surveys, it does not appear that Illinois attorneys routinely include mediation clauses in estate plans. As practitioners become more familiar with the practical benefits of mediation and more aware that there are no downsides to encouraging the process, it is likely that such clauses will be more common-- at least in particularly volatile situations.

B. Precatory Clauses v. Mandatory Clauses.⁴¹

1. For wills and trusts, a simple mediation clause might request that a potential contestant make good faith efforts to keep a dispute out of court through mediation, reflecting the testator's wishes.

For example:

"I request, but do not require, that persons asserting a claim to or against my estate agree to make a good faith effort to resolve any disputes about the distribution of my estate through mediation."⁴²

³⁹ ILCS S. Ct. Rules of Prof. Conduct Rule 2.4 (West 2016).

⁴⁰ See Model Standards of Conduct for Mediators adopted by the ABA House of Delegates in August, 2005, available at http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf

⁴¹ Gary, Susan, Using Mediation and Arbitration to Manage Family Conflict, ACTEC 2015 Rocky Mountain Regional Meeting.

⁴² Lela P. Love & Stewart E. Sterk, *Leaving More than Money: Mediation Clauses in Estate Planning Documents*, 65 Wash. & Lee L. Rev. 539, 578 (2008).

Or:

“I request, but do not require, that any person asserting any claim to or against my estate {or trust estate}, and any heir or legatee {or beneficiary} asserting any claim against my executor {or the trustee}, agree to make a good faith effort to resolve any disputes about the distribution of my estate {or trust estate} through mediation.”⁴³

- a. Even if a party does not abide by the clause, it may serve another purpose by alerting attorneys to consider the mediation process earlier in the dispute before parties take fixed legal positions.⁴⁴ As indicia of testator intent, it may also cause a judge to be more likely to order mediation if there is statutory authority to do so.
- b. Unlike arbitration clauses where the logistics of the process need to be spelled out to avoid ambiguity and questions about enforceability, those issues may be left open (for example, how to select a mediator) in a precatory mediation clause. If there is conflict as to logistics at the time a dispute arises, that can be mediated as well.

For example, some attorneys prefer to allow the opposition to pick a mediator so long as it is someone acceptable to both sides. That means the opponent will more likely trust the mediator and that bodes well for the success of the process.

- c. To avoid conflict over responsibility for payment, the governing document should at a minimum authorize or preferably direct the executor or trustee to pay the mediator’s fees from the trust or estate.
2. Daniel Bent, a mediator from Hawaii, has suggested a mediation clause (the “Bent/Stirling Clause”) in the form of a personal statement, drafted in the first person and inserted in a trust agreement.
 - a. The following is the part of the Bent/Stirling Clause relating to mediation:⁴⁵

The Settlor has made the following statement that ____ (he/she) hereby incorporates into the Trust Instrument to have the same force and effect as any other language of the Trust Instrument:

⁴³ Expanded language suggested by Ryan Walsh, Esq., Chicago, Illinois.

⁴⁴ See Gary, supra at note 41.

⁴⁵ Bent, David, *My Bequest to My Heirs: Years of Contentious, Family Splitting Litigation*, 8 Hawaii Bar J. 28 (Feb. 2004).

As the Settlor, I expect that the Trustee and all beneficiaries will abide by the terms of the Trust which I have established. Indeed, I have intentionally given the Trustee wide permissible discretion. In the unlikely event that there should be any disagreement or dispute as to the meaning of the Trust's terms, the extent of the Trustee's duties (especially in light of the wide permissible discretion), the rights of any beneficiary, or any other matter whatsoever, I would be deeply disappointed if the estate that I have left for the benefit of my family and/or other beneficiaries would result in any negative impact on the relationships among them. Therefore, it is my fervent wish and directive that any such disagreement or dispute be resolved with the utmost civility, decency and consideration, and that all parties resolve it by mediation in good faith through the use of a neutral third-party. It would be to my profound and eternal sorrow that what I have provided in the interest of benefiting my loved ones would lead to any injury to their relationship.⁴⁶

- b. This clause specifies that it is both the settlor's wish and mandatory directive that any dispute be resolved by mediation. Also consider a precatory mediation clause using the Bent/Stirling Clause in substance, but modified to reflect only the settlor's wishes and not directive.

C. Mandatory Mediation/Arbitration Clauses

1. In addition to the Bent/Stirling Clause set forth above, Mr. Bent's article suggested a second part of the clause, directing the dispute to arbitration in the event it did not settle in mediation.⁴⁷
2. The two-step process, of directing arbitration if the dispute does not settle in mediation, is not uncommon in mandatory ADR clauses but adds some complex issues. Accordingly, the drafter of that type of mandatory ADR clauses would need to consider carefully the pros and cons of using arbitration clauses discussed in Chapter 1, including the issue of enforceability under the governing law.⁴⁸

D. Mediating in Good Faith.

1. If a mediation clause imposes a good faith requirement, simple guidelines for fulfilling that requirement might be included.

For example:

⁴⁶ *Id.* at 29 (crediting Thomas Stirling with developing the clause).

⁴⁷ *Id.*

⁴⁸ *See generally*, Blattmachr, Jonathan G., *Reducing Estate and Trust Litigation Through Disclosure, In Terrorem Clauses, Mediation and Arbitration*, 9 *Cardozo J. Conflict Resol.* 237 (2007-2008). The article suggests a variety of interesting approaches to ADR clauses.

“To mediate in good faith, the parties must appear in person for and participate in the mediation session; the attorneys must comply with mediator requests for mediation submissions prior to the session; and the parties should present their perspective and listen to that of the other side.”⁴⁹

2. Some clauses direct the mediator to certify whether the parties have participated in good faith, but that is difficult to mandate with clear and feasible requirements. To address this as a practical matter, consider including a practical standard for the mediator’s certifying a good faith finding, such as certification “that the participants could not reach agreement” or “that a specified period of time has passed without agreement.”⁵⁰

VII. Conclusion

Facilitative mediation offers an additional tool for resolving disputes that can 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 disputes continue to increase, facilitative mediation is likely to become a favored technique for resolving conflict 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.

⁴⁹ See Love & Sterk, *supra* at note 42, at 480.

⁵⁰ *Id.* at 579-80.

RESOURCES

Abramson, Harold L., *Mediation Representation: Advocating as a Problem-Solver* (3d Ed.) (Wolters Kluwer Law & Business 2013).

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Friedman, Roselyn L., *Focus on Facilitative Mediation: What Estate Planners and Fiduciaries Need to Know*, *Mediation for Estate Planners: Managing Family Conflict*, Ch.2 (American Bar Association 2016).

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

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Singer, Linda R., *Settling Disputes: Resolving Conflicts In Families, Businesses and The Legal System* (2d Ed.) (Westview Press 1994).

Uniform Mediation Act (Nat'l Conference of Comm'rs on Unif. State Laws 2001, amended in 2003).

Walker, Stephen, *Mediation Advocacy: Representing Clients in Mediation* (Bloomsbury Professional Limited 2015).

Appendix A

NOTE: This checklist is not geared to T&E disputes but includes a useful guide to mediation preparation which the attorney can modify to suit the practice.

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?

Representing Clients in Mediation (continued)

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?

Representing Clients in Mediation (continued)

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?

Rule 5-3.27 Probate Mediation Program

- A. Applicability.** This Rule is intended to govern mediation in probate matters. Unless otherwise addressed in these Rules, the provisions of the Uniform Mediation Act (710 ILCS 35/1 et seq.) shall apply.
- B. Purpose of Mediation Process.** Mediation under these Rules involves a voluntary confidential process where by a neutral mediator, selected by the parties or appointed by the Probate Judge, assists the parties in reaching a mutually acceptable agreement. It is an informal and non-adversarial process. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem-solving, exploring settlement alternatives and reaching an agreement. Parties and their representatives are required to mediate in good faith.

C. Disputes Eligible for Court-Annexed Mediation. Except as hereinafter provided, the Judge may order any contested probate matter referred to mediation. In addition, the parties to any such matter may file a written stipulation to mediate any issue between them at any time. Such stipulation shall be incorporated into an Order of Referral.

D. Mediator Qualifications

1. **List of Probate Mediators.** The Judge shall maintain a list of probate mediators who have been certified by the Court and who have registered for appointment. The list shall be submitted to the Judge, who shall have the discretion to include or remove persons from the list at any time or to waive any of the requirements below, when necessary to promote the highest standards of competency. An applicant denied inclusion on or removed from the list, may appeal the decision in writing within ten days to the Chief Judge. The Chief Judge shall decide the appeal after an opportunity for the applicant or member to be heard. The decision of the Chief Judge shall be final. The list shall be reviewed in every even numbered year.
2. **Certification.** Any person who meets the following criteria is eligible to apply to serve as a mediator for the purposes of this Rule, if the applicant:
 - a. Completes a forty hour mediation training program approved by the Chief Judge of the Nineteenth Judicial Circuit; and,
 - b. Is a member in good standing of the Illinois Bar with at least eight years of practice or a retired Judge; and,
 - c. Is of good moral character; and,
 - d. Submits an application that is approved by the Chief Judge or her/his designee; and,
 - e. Maintains an office in the Nineteenth Judicial Circuit and has a substantial concentration of her/his practice in probate; and,
 - f. Provides satisfactory proof of professional liability insurance covering the mediation process to the Judge.
3. **Continuing Legal Education.** An approved mediator shall attend ten hours of continuing education every two years on subjects related to probate, trusts, guardianships, taxation or other areas relevant to practice in probate. The mediator shall be responsible to provide proof of attendance by way of affidavit, of the specific course, seminar, or class attended to the Judge at least thirty days prior to her/his two-year anniversary date of certification.
4. **Mediator General Standards.** In each case, the mediator shall comply with such general standards as may, from time to time, be established and promulgated in writing by the Chief Judge of the Nineteenth Judicial Circuit.
5. **Decertification of Mediators.** The eligibility of each mediator to retain the status of a certified mediator shall be periodically reviewed by the Chief Judge and in any event no

longer than three years after date of appointment. Failure to adhere to this general Order governing mediation or the general standards provided for above may result in the decertification of the mediator by the Chief Judge or her/his designee.

6. **Special Programs.** From time to time, mediators may be required to attend specific trainings offered or sponsored by the Nineteenth Judicial Circuit, the Bar Association or other individuals or organizations.
7. **Low Income Cases.** Each calendar year, a mediator shall mediate two low-income cases, as identified by the Probate Court, at a reduced fee.

E. Appointment of the Mediator.

1. **Appointment by Stipulation.** In the Order of Referral or within fourteen days of the entry of the Order of Referral, the parties may agree upon a stipulation with the Court designating:
 - a. A mediator certified by the Nineteenth Judicial Circuit to serve as a Probate mediator; or
 - b. A mediator who does not meet the certification requirements of these Rules but who, in the opinion of the parties and upon review by and approval of the Judge, is otherwise qualified by training or experience to mediate all or some of the issues in the particular case.
2. **Appointment by Court.** If the parties cannot agree on a mediator within fourteen days of the entry of the Order of Referral, the Petitioner's attorney (or another attorney agreed upon by all attorneys) shall so notify the Judge within the next seven days and the Court shall appoint a certified mediator selected by rotation or by such other procedures as may be adopted by Administrative Order of the Chief Judge.
3. **Disqualification of a Mediator.** Any party may move to enter an Order disqualifying a mediator for good cause. If the Court rules that the mediator is disqualified from hearing a case, an Order shall be entered setting forth the name of a qualified replacement. Nothing in this provision shall preclude mediators from disqualifying themselves or refusing an assignment. The time for mediation shall be tolled during any periods in which a Motion to Disqualify is pending.

F. Motions to Dispense, Defer or for Emergency Relief.

1. **Motion to Dispense with Mediation.** A party may move, within fourteen days after the entry of the Order of Referral, to dispense with mediation if:
 - a. The issue to be considered has been previously mediated between the same parties pursuant to Local Court Rules of the Nineteenth Judicial Circuit;
 - b. The issue presents a question of law only;
 - c. Other good cause is shown.

2. **Motion to Defer Mediation.** Within fourteen days of the Order of Referral, any party may file a Motion with the Court to defer the mediation. The movant shall set the Motion to defer the mediation proceeding for hearing prior to the scheduled date for mediation. Notice of the hearing shall be provided to all interested parties, including any mediator who has been appointed. The Motion shall set forth in detail, the facts and circumstances supporting the Motion. Mediation shall be tolled until disposition of the Motion.
3. **Interim or Emergency Relief.** A party may apply to the Court for interim or emergency relief at any time. Mediation shall continue while such a Motion is pending absent a contrary Order of the Court or a decision of the mediator to adjourn pending disposition of the Motion.

G. Scheduling of Mediation.

1. **Conference or Hearing Date.** Unless otherwise ordered by the Court, the first mediation conference shall be held within eight weeks of the Order of Referral.
2. **Notice of Date, Time and Place.** Within twenty-eight days of being advised of the entry of an Order of Referral, the mediator shall notify the parties in writing of the date and time of the mediation conference. Unless all parties and the mediator otherwise agree, all probate mediations will be held at the Lake County Arbitration Center, 415 Washington Street, Suite 106, Waukegan, IL 60085.

H. Mediation Procedures.

1. **Mediator.** The mediator shall at all times be in control of the mediation and the procedures to be followed in mediation.
2. **Mediation Summary.** At least seven days before the conference, each side shall present to the mediator a brief (one page), written summary of the case containing a list of issues as to each party. If the attorney filing the summary wishes its contents to remain confidential, she/he should advise the mediator in writing at the same time this summary is filed. The summary shall include the names of all participants in the mediation, the facts underlying the dispute, statement of the law, positions advocated by the parties and any offers or demands regarding settlement.
3. **Attendance at a Mediation Conference.** All parties, attorneys, representatives with settlement authority and other individuals necessary to facilitate settlement of the dispute, who are identified in the Order of Referral, shall be present at each mediation conference unless excused by Court Order.

A party is deemed to appear at a mediation conference if the following persons are physically present:

- a. The party or its representative having full authority to settle without further consultation; and,
- b. The party's counsel of record, if any.

Upon Motion, the Court may impose sanctions against any party or attorney who fails to attend the mediation conference and participate in good faith, as provided above, including, but not limited to, mediation costs and reasonable attorney fees relating to the mediation process.

4. **Adjournments.** The mediator may adjourn the mediation conference at any time and may set times for reconvening the adjourned conference. No further notification is required for parties present at the adjourned conference.
5. **Counsel.** Counsel shall be permitted to communicate privately with their clients.
6. **Communication with Parties.** The mediator may meet and consult privately with each party and her/his representative during the mediation process.
7. **Termination of Mediation.** Mediation shall be completed within seven weeks of the first mediation conference unless extended by the Order of the Court or by stipulation of the parties. Mediation shall terminate prior to the end of seven weeks in the following circumstances:
 - a. All issues referred for mediation have been resolved.
 - b. The parties have reached an impasse, as determined by the mediator.
 - c. The mediator concludes that the willingness or ability of any party to participate meaningfully is so lacking that an agreement on voluntary terms is unlikely to be reached by prolonging the negotiations.
8. **Report of Mediator.** Within fourteen days after the termination of mediation for any reason, the mediator shall file with the Court a report in a form prescribed by the Chief Judge as to whether or not an agreement was reached by the parties. The report shall be signed by the mediator and shall designate, "full agreement," "partial agreement" or "no agreement." A copy of the report must be sent to the parties and to the Arbitration Center.
9. **Sanctions.** In the event of any breach or failure to perform under the settlement agreement, the Court upon Motion may impose sanctions, including costs, attorney fees, or other appropriate remedies including entry of judgment on the agreement.
10. **Discovery.** Whenever possible, the parties are encouraged to limit Discovery (prior to completing the mediation process) to the development of the information necessary to facilitate a meaningful mediation conference. Discovery may continue throughout mediation.
11. **Confidentiality of Communications.** All oral or written communications in a mediation conference, other than executed settlement agreements, shall be exempt from Discovery and shall be confidential and inadmissible as evidence in the underlying cause of action unless all parties agree otherwise. Evidence with respect to alleged settlement agreements shall be admissible in proceedings to enforce the settlement.

Subject to the foregoing, unless authorized by the parties, the mediator may not disclose any information obtained during the mediation process.

I. Compensation of the Mediator.

1. **Hourly Fee.** The mediator shall charge an hourly fee to the parties, which they shall pay in equal shares unless the parties otherwise agree or the Court orders a different payment distribution. This hourly fee shall be paid to the mediator at the time of each session for the time spent in mediation at the session.
2. **Advance.** In addition to the hourly fee, the mediator may request an advance deposit covering up to two hours' time to be paid at the first session which shall be due simultaneously with the Mediation Summary. Such deposit may be applied to services rendered by the mediator outside of the mediation session, such as telephone conferences, correspondence, consultation with attorneys or other individuals, preparation of the Mediator Report and any other work performed by the mediator on the behalf of the parties.
3. **Additional Fees.** Any additional fees that exceed the deposit or the fees collected at the time of sessions for services rendered by the mediator shall be paid as required by the mediator.
4. **Suspension of Mediation.** In the event payments are not made as required under this Rule or otherwise agreed to by the mediator and the parties, the mediation process may be suspended by the mediator pending compliance.
5. **Expense of Administration.** Any fees charged to an estate shall be deemed an expense of administration.
6. **Pro Bono Cases.** If any party has been granted leave to sue or defend as an indigent person pursuant to Supreme Court Rule 298, the Probate Judge shall appoint a mediator who shall serve pro bono as to that party. Any such appointment shall be credited toward the obligation in LCR 5-3.27(D)(7), unless the indigent party receives an award sufficient, as determined by the Probate Court, to pay the mediator's fee.

J. Immunity. Mediators shall be entitled to such immunity as shall be provided by law.

K. Mechanism for Reporting. The Clerk of the Circuit Court shall keep and maintain compiled statistics and records on all cases referred to mediation; and shall file reports with the Administrative Office of the Illinois Courts, as directed by the Chief Judge.

L. Supervising Judge for Mediation of Probate Cases. The Presiding Judge of the Civil Division, or such other Judge as appointed by the Chief Judge, shall be the Supervising Judge for Mediation of Probate cases.

M. Duties of Probate Judge. The duties of the Probate Judge shall include the following:

1. Approve or appoint the mediator.

2. Hear motions to interpret all mediation rules.
3. Hear motions to disqualify a mediator.
4. Hear motions to advance, postpone or defer a mediation conference.
5. Hear all motions or petitions regarding the mediator's compensation.

N. Authority of the Court. Nothing in this Rule shall limit the Court's authority to enter any Order it deems appropriate on its own Motion or any party's Motion.

Rule 5-3.28 Probate Referral List for Guardians ad Litem and Court Appointed Attorneys

- A.** The Probate Judge shall prepare a Probate Referral List of qualified Guardians ad Litem and attorneys accepting Court appointments in accordance with the Illinois Supreme Court Rules, the Illinois Probate Act and the provisions and standards set forth in this Rule in the interests of maintaining the highest levels of competence and professionalism. The Presiding Judge of the Civil Division shall review the Probate Referral List for approval and it shall then be submitted to the Chief Judge.
- B.** The Chief Judge shall have the discretion to include or remove persons from the list at any time, or to waive any of the requirements of this Rule, when necessary to promote the highest standards of competency. An applicant denied inclusion on, or removed from the Probate Referral List, may appeal the decision in writing within ten days to the Chief Judge. The Chief Judge shall decide the appeal after an opportunity for the applicant or member to be heard. The decision of the Chief Judge shall be final. The Probate Referral List shall be reviewed in every odd numbered year.
- C.** Any attorney who meets the following criteria is eligible to apply to serve as a Guardian ad Litem or a Court appointed attorney for a period of two years for the purposes of this Rule:
1. Licensed to practice law in the State of Illinois and be in good standing with the Illinois Supreme Court.
 2. Experienced in the area of Minor and Disabled Persons Guardianship litigation.
 3. Provided proof of professional liability insurance, with satisfactory coverage for liability in the representation of Minors and Disabled Persons.
 4. Prior to the initial appointment to the list, attended three and a half hours of continuing legal education approved by the Chief Judge on the following topics:
 - a. The role of Guardian ad Litem;

- b. Ethics in guardianship and probate cases;
 - c. Relevant substantive state and federal statutory and case law in parental responsibility and parenting time matters, as well as disabled person guardianships and other probate matters;
 - d. Child development and Elder issues;
 - e. Family dynamics, including substance abuse, domestic abuse and mental health issues.
5. After initial appointment, the attorney must attend at least seven hours of continuing legal education courses every two years in topics related to issues outlined above. The attorney shall provide proof of attendance by way of affidavit, of the specific course, seminar, or class attended to the Judge of the Probate Court at least thirty days prior to his or her two-year anniversary date of certification. Training offered by the Illinois State Bar Association, the Lake County Bar Association, the Nineteenth Judicial Circuit, other judicial circuits in the State of Illinois, or other organizations approved by the Chief Judge will qualify for continuing legal education credits required by this Rule.
6. Attorneys appointed to participate in child custody and visitation matters must meet the additional qualifications delineated by Supreme Court Rule 906.
7. Accept appointment as a Guardian ad Litem, or Court-appointed attorney in at least two cases per year on a pro bono basis, in families where the parties are indigent.
- D.** All persons who meet the above requirements and are interested in acting as a Guardian ad Litem, or Attorney for Minors or alleged Disabled Persons shall complete the Nineteenth Judicial Circuit Application for Probate Court Appointments and provide proof by way of affidavit, supported by documentation of the aforesaid requirements.
- E.** A Guardian ad Litem or Court appointed attorney shall file an Appearance and Answer and shall defend on behalf of the Minor or alleged Disabled Person.