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COLUMN

Probate mediations: traveling the emotional highway to resolution

BY JUDGE MARY THORNTON HOUSE (RET.)



Probate litigation is unique. Civil lawsuits start with a singular event involving liability and damages. Family relationships begin in the womb. Lifetimes of dysfunctional interactions within a family emotionally fuel the litigation. "Sibling rivalry" is not just a concept. Today's blended families of step-children, half-siblings, and the proverbial wicked step-parent present road-blocks to resolution.

Mediators face parties fraught with emotions and unreasonable expectations. A probate mediator must move the parties towards a resolution by traveling on a two-lane highway - one lane is the "emotional lane" and the other lane is the "financial lane."

SCENERY AND ROAD SIGNS OF A PROBATE MEDIATION

An effective probate mediator explains to the parties the travel lanes of emotions and money to reach a resolution. With assurance that travel in both lanes is important, by day's end only a financial resolution is within the power of the mediator to fashion. Neutral language by the mediator is critical.

Typical lawsuits start with an offer, demand, cross offer, and a settlement. All of these terms evoke aggressiveness and giving in, which only ratchets up the emotional climate. It is important for the mediator to start by asking, "What are your specific goals today?" The parties can express a desire to have Mom's pearl ring or the blue rug, in addition to monetary assets. The mediator also assesses the expectations of the parties and where they need to be delicately lowered.

Next, the petitioner should be asked, "What is your proposal for resolution (PFR)?" Petitioner's counsel needs to talk with their clients ahead of the mediation about a PFR. Respondent's counsel should prepare clients for an array of possible proposals they might hear. This lessens the sticker shock that a mediator must contend with in conveying proposals for resolution that comprise high and oftentimes unrealistic expectations.

Probate mediations are an all-day event. Civil cases assess liability, damages, and defenses. Not so in the probate mediation rooms: The parties need to travel in the emotional lane and tell their stories. If they feel like they have had a "day in court," the matter usually resolves. Realistically, if the first PFR is conveyed before noon, that is speeding on the two-lane highway to resolution!

Once a PFR is conveyed, the mediator should ask of the responding party, "What is your response to this proposal and what part of it meets the goals discussed?" This begins to shape a resolution the parties feel they have achieved.

PREPARATION FOR TRAVELING THE EMOTIONAL AND FINANCIAL LANES TO RESOLUTION

However, before the mediation begins, counsel must educate the mediator about road conditions. Is this a court ordered Breslin mediation? Parties "forced" to mediate come with an additional layer of emotions and beneficiaries that are unrelated to the primal controversy.

Mediation briefs educate the mediator to understand a range of issues

critical to resolving the parties' positions. Counsel should include, as exhibits to the brief, a description of the parties with a family tree, current and prior trust and estate plans, inventory of assets such as IRAs and real property held outside an estate plan, settlement discussions to date, medical assessments, discovery status and upcoming hearing dates. They should also have updated attorney fees ready to provide to the mediator. Escalating fees are persuasive when charted out for the parties going forward to trial and shine a spotlight on the financial lane issues.

In addition to mediation briefs, counsel should provide the mediator with any pleadings that explain critical legal issues at stake. During a pre-mediation conference, counsel can advise the mediator about the sophistication of the clients, including their understanding of legal issues. They can also advise the mediator if prior settlement positions have changed. These discussions are included within the mediation privilege, so candor is greatly appreciated, particularly as to the emotional climate.

One of the most common mistakes counsels make is treating the mediation like a law and motion session or final argument to the court. Admirable advocacy, but such advocacy only strengthens the resolve of the clients not to settle the case. Providing this information permits the mediator to respond to this advocacy if advanced, or alternatively, if there's no advocacy, the information can form the basis of a collaborative atmosphere between the mediator and counsel.

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[EMOTIONAL] CONDITIONS DURING TRAVEL

At the beginning of any probate mediation, and regularly throughout the process, a mediator must be advised about the parties' emotional state. Without this information, the mediator faces significant challenges when giv-

ing guidance. Expect the mediator to routinely take counsel aside for an assessment of the emotional temperature in the room.

Such checks are critical when underlying motives or agendas of the parties are revealed. Comments such as "I'm tired of giving in," "I want my day in court," "It's not about the money," or "I want her to feel punished when this is all over," and "he has to pay for what he's done," signal a deep-seated

controversy and a potentially immutable position.

These positions cry out for the mediator to identify "off the beaten highway" routes with "out of the box" solutions. Sometimes, a written apology for past wrongs smooths bumps in the road. More persuasively, a flow chart of expenses going forward -- deducted from the value of the estate -- is an eye-opener for an unsophisticated litigant.

DRIVING LESSONS

Counsel should prepare clients to listen as the mediator explores possible outcomes. When parties listen, they can hear the mediator's realistic evaluation of the case, including evidentiary issues, trial costs, and potential negative results. It's human nature to close one's ears or not accept negative information. The effective mediator will make every effort to educate parties, without accusation, about the frailties of their positions.

CONCLUSION

Probate is a complex undertaking that involves relationships and hard-wired DNA. It is not "Family-Law Lite" but rather a journey that calls for strategy, flexibility and clear vision. Resolutions are achievable if counsel and the mediator collaborate on developing a strategic road map amongst all lanes of travel to a resolution.