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12 Tips to Maximize Opportunities in Probate & Trust Mediations

- 1. Get to the Table.** The chances of settlement are huge if both parties make the time available to come together before a professional mediator. Get there early and often. Pick a good mediator – do you need a retired judge or attorney mediator or other (evaluative, facilitative, transformative or all of these?). Reluctant clients should know that mediation is a risk free opportunity to explore settlement, 95% of cases settle before trial, and the investment of time and money is small compared to other litigation processes. The potential savings in time and costs is huge. Unanticipated resolutions are frequent outcomes.
- 2. Bring the Right People.** Bring parties and ultimate decision makers, especially the ultimate beneficiaries if different than their representative. Talk to the mediator well in advance, individually or in a conference call, about the best way to maximize participation. Physical or conference call preference is best, and pre-mediation caucus sessions can be very beneficial. Be sure to let the mediator interact with the decision makers whenever possible or potentially beneficial – often they need to experience the events of the process.
- 3. Stay at the Table: the Goal is to Discover and Obtain the Best Offer/Solution from the Other Side.** Instead of focusing on the goal as “settlement,” focus on obtaining the best possible offer/result from the other side. Then, decide if that offer is a viable alternative to litigation/arbitration. Too many parties leave early if they think the first salvo is unacceptable – because mediation is a process, it usually takes time to get enough dialogue going to discover the hidden gem solutions possible or to get the other side to make enough moves to get to an offer/demand that truly can be considered a viable option. Declare your desire to settle the case.
- 4. You Have to Give to Get.** To get the best offer from the other side, you and your clients have to be willing to make counteroffers, offer solutions and compromise. Be willing to make several moves toward a settlement amount you could live with, and work cooperatively to help the other side do the same. If there are non-monetary solutions, be the first to explore alternatives and make suggestions; parties tend to mirror the behavior of the other side. Ask how could this work; don't shoot down every idea before examination.

- 5. Kill Them with Kindness.** You can catch more flies with honey than with vinegar. Be as civil as possible. An acknowledgement and thanks to the other side for coming to the mediation can be a tremendous boost to the process. Remember, you want the other side to move as far as possible, make as many concessions as possible, be as creative as possible.
- 6. Prepare, Listen and Learn.** Listen to the other side, the mediator, your client. Prepare before the mediation by taking an objective look at the strengths and weaknesses of your case; share this with your client. What are the risks of winning and of losing before a court/arbitrator? What are the costs of going forward? What are the family dynamics, economics, value of assets, balance in the accounts, legal issues? Review and adjust your analyses as you hear from the other side and talk over your case with the mediator. If there are weaknesses and risks, help the mediator and the mediation process by acknowledging them, not just arguing about how you will overcome them – make sure your client understands that arguments are what you make at trial, and they aren't always successful. Ask the mediator in a sidebar to help you engage your client in a realistic assessment if needed.
- 7. Focus on Needs and Interests.** What do you, and the other side, really want? What is driving the dispute? Often it is about something other than what the parties state they seek in their legal pleadings, or state they seek in the mediation. Try to determine your clients' needs and interests (not just monetary ones), address the other side's needs and interests, and compare their offers to your needs and interests. A good mediator will help you get this information from those stubborn clients.
- 8. Think Outside of the Box, Be Flexible, Be Creative.** Use the mediation session to explore alternatives. Brainstorm. What needs doing, what is unfinished, what issues will linger after the matter is adjudicated? Most mediations last several hours to an entire day; complex situations often go several sessions. Looking at many options brings fresh perspectives to the problem. Vindication and "winning" according to what a client hopes to get is only one tiny possible outcome of disputes. What other solutions might work? If you make it be just about money, you may miss the boat.
- 9. Make Relationship Inquiries.** What is the current/past status of parties' relationships? How do they want it to be (civil, friendly, close, etc.)? Draw a diagram for the mediator or spell it out up front in the brief, to help the mediator understand the family dynamics in the context of the litigation. What do they say they really want and what might they really want? Consider acknowledgment, apologies, respect, validation, attention, recognition, fairness, vindication, and explore ways they might receive/give these, instead of just the usual money/property remedies under the law. Help the mediator explore these and encourage your client to engage in this dialogue – amazing solutions result.

10. Be Patient. Stay in the process until the other side has stopped moving. If the case will not settle now, knowing that you have discovered the limits of what the other side is willing to do is valuable information as you proceed with litigation. Even then, don't give up – there is always the opportunity for a further session.

11. It's a Problem Solving Process. Lawsuits are like any other problems in life, they have solutions. Contribute to solving the problem. Courtesy, willingness and cooperation are winners. Ultimatums, demands, storming out of the mediation are losers.

12. It Isn't Over Until It's Over. Even if you leave without a settlement in place, stay open to further negotiations. Mediation is a process, not an event. Mediators will follow up and help the parties continue to discuss settlement. Mediate early, mediate often. Ask the judge to help you get back to the table if the other side needs a nudge.

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