DISPUTE RESOLUTION SECTION

January 2011

"Disputes arise across a broad spectrum of relationships and substantive areas of the law. Alternatives to litigation may best serve client needs for resolving many of these disputes. The NYSBA Dispute Resolution Section has prepared a series of White Papers to set forth some of the special advantages of mediation and arbitration in the various contexts in which disputes commonly arise."
Edna Sussman, Chair, NYSBA Dispute Resolution Section
David Singer, Chair, White Paper Subcommittee

THE BENEFITS OF MEDIATION AND ARBITRATION FOR DISPUTE RESOLUTION IN TRUSTS AND ESTATES LAW

By Robert D. Steele, Leona Beane, Kevin Murphy, Jill Teitel, and Barbara Levitan*

"Traditional litigation is a mistake that must be corrected... For some disputes trials will be the only means, but for many claims trial by adversarial contest must in time go the way of the ancient trial by battle... Our system is too costly, too painful, too destructive, too inefficient for really civilized people." Chief Justice Warren E. Burger of the U.S. Supreme Court

Any litigator – and certainly any participant in a lawsuit – can attest that litigation has become a lengthy and expensive proposition. It is a stressful process that destroys relationships. As some disputes will inevitably arise, lawyers seeking to best serve their clients must consider other forms of dispute resolution which can avoid much of the delay, expense and disruption of traditional litigation. Mediation and arbitration, both of which are responsive to party needs in a way that is not possible in a court proceeding, are two of the most frequently utilized forms of dispute resolution. They have particular applicability in the field of Trusts and Estates, which by its very nature often involves family members and has significant emotional components.

The following are the observations of four experienced trusts and estates lawyers who are presently involved in mediation and other forms of dispute resolution.

Following those presentations is a more general discussion of mediation and arbitration.

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The views expressed herein are the views of the author personally and do not in any way reflect the views of the New York State Bar Association or the Surrogate's Court.

Mediation as a method of dispute resolution in trusts and estates law presents the same potential benefits as it does in other practice areas – reduced financial and emotional costs to the litigants; expedited, certain and confidential results; and the empowerment of the litigants to participate in achieving a self-directed result. It is clear, however, that these potential benefits apply particularly to trusts and estates law for a number of reasons.

Most trusts and estates litigation involves a dispute among family members and/or outsiders over who is entitled to share in a decedent's estate. Most are family disputes – siblings vs. siblings, or children of a first marriage vs. a second spouse. More recently, an increasing number of disputes involve family members vs. non-family member caregivers (e.g., home healthcare aides). Most often, such disputes initially come before the court in the context of a contested probate proceeding or a contested administration proceeding. Although the legal issues are generally discrete, long-standing unresolved emotional issues between the parties, which courts are ill-equipped to resolve, usually drive the litigation.

Surrogate's Court has its own set of procedures, and many attorneys who do not regularly practice there often struggle to master the procedural differences between Surrogate's Court and other courts. They attempt to file procedurally infirm papers which the court must reject, sometimes several times. Invariably, it seems, the attorney charges these unsuccessful attempts to the client.

When issue is finally joined and discovery commences, the parties exchange allegations of misconduct or wrongdoing, and each litigant takes the allegations extremely personally. They become resentful of and indignant in their denial of allegations against them, and respond with vitriolic counter-allegations. Each side becomes entrenched in their respective positions, insisting that they must carry out the decedent's wishes "as a matter of principle." This results in a breakdown in whatever communication existed between the parties, or it extinguishes any hope of communication if there was none. Motion practice and extended litigation ensue, depleting the assets of the estate and increasing each party's attorney's fees. Consequently, each party demands a higher settlement during negotiations to offset the increased costs of litigation.

Unfortunately, the litigants often fail to realize or appreciate that the initial contested proceeding can be merely the first step in a series of contested, and therefore expensive, proceedings and appeals. As the emotional and financial costs and delay in finality increase, so does the litigants' disillusionment with their attorneys and the judicial system. Meanwhile, their inheritances decrease.

With the assistance of willing parties and attorneys, a skilled mediator can successfully avoid the pitfalls common in trust and estates litigation. Litigants in Surrogate's Court proceedings often want to explain their position – whether it is to make allegations of wrongdoing against their adversary or refute allegations of wrongdoing made against them – to a neutral party. A skilled mediator can allow the parties to do so in a way which does not

jeopardize the possibility of a settlement. Starting mediation early in the process can result in significant savings of time, money and stress to the parties.

While some attorneys believe that the Surrogate or the court staff should act as mediator, courts are faced with increased caseloads and, especially in the present economic conditions, are asked to do more with less. Many courts, particularly those in which the Surrogate serves as a judge in other courts, simply lack the necessary resources, time, staff, experience and/or training to act as mediator in every contested case. Mediation offers a viable alternative in which the mediator can give a dispute the individual attention it deserves.

Consistent with this, Part 146 of the Rules of the Chief Administrative Judge allows the administrative judge of each judicial district to "compile rosters in his or her judicial district of [mediators and neutral evaluators] who are qualified to receive referrals from the court" (22 NYCRR § 146.3 [a]). It also provides requirements for qualifications and training of (§ 146.4) and continuing education for (§ 146.5) mediators and neutral evaluators serving on court rosters, and the approval of training programs (§ 146.6). This indicates that the Chief Administrative Judge supports the use of court supervised mediation to resolve disputes which otherwise would have to be resolved through litigation.

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A skillful mediator can be useful in the resolution of contested trust and estate proceedings. A trained mediator will be able to deal with the issues at hand and anticipate ones to come. Issues may arise at the inception of a Surrogate's Court proceeding which may challenge a mediator's skill in identifying all of the problems, such as, who will be the designated administrator or temporary administrator of the estate, how to recover property improperly taken from the estate, which debts are chargeable against the estate, how to construe an ambiguous provision in a will, and how to invest trust assets (to maximize return for the present beneficiaries, or those having future interests, or the creator if he or she retains an interest in the trust). These issues may beget a host of other issues and conflicts, which, if unresolved, may cause years of family squabbling. Such issue may be a spouse's – whether first, second, or third spouse -- right to a statutory elective share, or the rights of half-siblings. Familial strife, having lain dormant for years, is often unearthed and, absent skillful resolution, may explode.

Take, for instance, a party who needs letters of administration to marshal the assets of an estate. The petitioner appears in court, having duly served notice of the proceeding on all necessary persons requesting that the parties appear in court or consent to the petitioner's request to be named administrator. At the return date of the citation, the petitioner is suddenly confronted with an adversarial sibling or step-parent who may have priority or equal priority to obtain letters.

This unexpected challenge may lead petitioner to bring in counsel armed with damaging information and exacerbate the conflict and therefore make settlement even less likely. This strategy oftentimes creates an undesirable situation for the beneficiaries of the estate who must finance the legal battle. As bad as this is in substantial matters, it can be the death knell to more modest estates or trusts, as the attorneys escalate hostilities at the expense of the beneficiaries. Mediation, if successful, brings about a prompt and mutually agreed-upon settlement, resulting in reduced legal fees. Furthermore, the mediator can go beyond the matters formally before the Court and help the parties to resolve personal issues that would otherwise stand in the way of a settlement. This is an option not available to the Court, which can only deal with the matters formally before it.

The following is an example of a common controversy, an iteration of which is frequently seen in Surrogate's Court, whether it be in the context of a probate, administration or accounting proceeding.

A sibling vs. sibling estate dispute creates the perfect storm. In one instance, such a dispute arose in a jurisdiction which recommended mediation in some of the more difficult estate proceedings. The issues were multifaceted, but all emanated from a sibling relationship gone awry decades earlier. The decedent had named his son as sole executor and left his son the profitable family business. The daughter was left a less profitable investment business. The daughter felt slighted and the son behaved as though the estate's coffers were available for his personal endeavors without having to account to anyone. The daughter brought a proceeding to remove her brother as executor. In the midst of the removal proceeding, the brother resigned as executor and a neutral third party administrator, c.t.a. was appointed. Resolved? Not really. The son stymied the distribution of the estate by bringing various claims against his sister to punish her for disgracing him before the community when she exposed his less than fiduciary behavior over a period of ten years. He also prevented disclosure of necessary business records and disparaged his sister so that her investment business suffered and her life was all but taken up by the strife. Further proceedings ensued: depositions of accountants of the decedent's businesses, expert witness testimony regarding suspect accounting procedures, and the prosecution of forgery allegations which required the retention of hand writing experts.

The mediator, a local and well-revered attorney and former judge, caucused the matter, met with each party individually and allowed the parties to voice their feelings, particularly about the past, and their disappointment with their attorneys and the concomitant waste of legal fees. The mediator permitted the parties to "present their cases" to him and to each other. Over the span of three sessions heard their stories and complaints concerning the length of the court proceedings, which at that point was well over three years. The intensity of the siblings' emotions did not dissipate and the parties did not transform into loving siblings, but they were able to gain their voices and be heard, if not by the other, at least by the mediator. The siblings settled their case for much less than it would have cost either of them to pay his or her attorney to proceed to a final accounting.

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One of the first significant uses of ADR in this country was George Washington's will, which provided that if there were any disputes relating to his will, the dispute would be resolved by arbitration with three arbitrators. Now, I am sure we all agree that George Washington was a very wise man.

Currently, arbitration of a will dispute may still be useful in certain instances, but I believe that most trusts and estates attorneys would prefer mediation rather than arbitration. In mediation, the parties maintain control over the process and outcome.

Both arbitration and mediation have many uses in resolving trusts and estate disputes. One key benefit of utilizing either method is that the proceeding is private, which may be important to the parties. They can avoid the need for allegations and counter-allegations to be set out in a public court file. Many families (and businesses that may be involved) prefer to keep their disputes private and to have no public court record. Both arbitration and mediation are confidential processes.

Many times there are disputes between numerous beneficiaries, distributees, other relatives, or business associates of the decedent. Furthermore, there are problems associated with second and third marriages, and further problems with dysfunctional families, which can be better served by mediation than by litigation. Mediation of these disputes is the most effective form of conflict resolution due to the inter-personal relationships involved. When there is a significant emotional component to the dispute, mediation provides a venue for the various parties to "vent" their anger and frustrations. Venting can and should occur during mediation, and certainly is not available in the courthouse.

Disputes arise with trusts of all types, wills and other trusts and estate documents. Many times there are disputes between co-fiduciaries, and between one or more of the beneficiaries and the fiduciary (trustee or executor or administrator).It has been shown that mediation is a good option when encountering one or more of these disputes.

In trusts and estate disputes, there can be a prior history of sibling rivalry, jealousy, animosity, and other emotional issues related to the family dynamics. Sometimes these disputes and animosity have been festering for years. The family history may explain the underlying reasons for the parties' actions, motives and agenda in dealing with each other, particularly while experiencing grief after the death of a loved one. Grief associated with the death of a loved one creates extra tension.

There have been many suggestions that trust instruments and wills should include provisions requiring the parties to proceed with mediation in good faith if there is a dispute. See *e.g*. Lela Love, Mediation of Probate Matters: Leaving a Valuable Legacy, 1 Pepp. Disp. Resol.

L.J., 256 (2001).[1] The inclusion of a dispute resolution mechanism in the instrument would encourage the settlement of disputes in advance of any dispute. Furthermore, it has been proposed to add to the Uniform Probate Code a discretionary clause requiring mediation[2]

When drafting trust documents, wills, and other estate type documents, parties should realize that if disputes should arise between the beneficiaries or between the co-fiduciaries, mediation provides a much better choice instead of filing proceedings and motions in the Surrogate's Court. In court, there may be delays until final resolution, along with the possibility of further expenses and delay with appeals. There are also large expenses relating to discovery and motion practice, obtaining expert witnesses and other expenses, all inherent in the court process till final resolution. The litigation scenario must be compared with mediation, where the parties rule who the mediator is, and the parties decide what resolution is agreeable to all.

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Trust and estate litigation particularly lends itself to mediation because the financial issues are often "covers" for the emotional issues at the root of the dispute. Sibling against sibling, children of a first marriage against the second wife - even children against their own parent - may argue that a will was the product of undue influence, or an executor "cooked the books" to her own benefit and the detriment of the other beneficiaries, when the underlying issues - who got the better birthday presents, or whom daddy loved more - have little or nothing to do with the legal issues raised.

Traditional litigation can do very little to address these issues, and as a result, clients spend astronomical sums in discovery, motion practice, dispositive motions and trial, and are unable to achieve the true result that will give them some sort of closure. Mediation, by contrast, allows the resolution of a dispute by giving the parties, rather than their lawyers, a chance to listen and be heard. This direct approach is often much more effective than having their lawyer argue a motion for discovery of documents, or sitting for days at a deposition which addresses the legal, but not the emotional, issues.

An experienced mediator will be able to recognize these hidden issues and draw them out, allowing the parties to say to each other, perhaps for the first time, what is troubling them.

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[1] Professor Love provides a sample mediation clause: "In keeping with my desire that our family remain strong and harmonious, any disputes arising under this will shall be resolved by mediation. The estate shall pay the cost of the mediation. I recommend the following mediators be considered: _____". Lela Love, Mediation of Probate Matters: Leaving a Valuable Legacy, 1 Pepp. Disp. Resol. L.J., at 265.

[2] . Andrew Stimmel, Mediating Will Disputes: A Proposal to add a Discretionary Mediation Clause to the Uniform Probate Code, 18 Ohio St. J. on Disp. Resol. 197 (2002)

General Discussion

I. Mediation

> ***"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, and expenses, and waste of time." Abraham Lincoln***

Mediation is the process in which parties engage a neutral third person to work with them to facilitate the resolution of a dispute. The growth of mediation over the past fifteen years has been exponential, a tribute to the success of the process. User satisfaction is high as parties retain control and tailor their own solution in a less confrontational setting that preserves relationships and results in a win/win instead of a win/lose. While not every case can be settled, an effort to mediate is appropriate in virtually any subject matter and any area of the law. The advantages of mediation include the following:

1. ***Mediation Works.*** Statistics have shown that mediation is a highly effective mechanism for resolving disputes. The rate of success through mediation is very high. For example, the mediation office of the U.S. District Court for the Southern District of New York reports that over 90% of its cases settle in mediation. Most cases in mediation settle long before the traditional "courthouse steps" at a significant saving of cost and time for the parties.

2. ***Control by the Parties.*** Each dispute is unique, and the parties have the opportunity to design their own unique approach and structure for each mediation. They can select a mediator of their choice who has the experience and knowledge they require, and, with the help of the experienced mediator, plan how the mediation should proceed and decide what approaches make sense during the mediation itself.

3. ***The Mediator plays a crucial role***. The mediator's goal is to help the parties settle their differences in a manner that meets their needs, and is preferable to the litigation alternative. An experienced mediator can serve as a sounding board, help identify and frame the relevant interests and issues of the parties, help the parties test their case and quantify the risk/reward of pursuing the matter, if asked provide a helpful and objective analysis of the merits to each of the parties, foster and even suggest creative solutions, and identify and assist in solving impediments to settlement. This is often accomplished by meeting with parties separately, as well as in a group, so that participants can speak with total candor during the mediation process. The mediator can also provide the persistence that is often necessary to help parties reach a resolution.

4. ***Opportunity to Listen and be Heard.*** Parties to a mediation have the opportunity to air their views and positions directly, in the presence of their adversaries. The process can thus provide a catharsis for the parties that can engender a willingness to resolve differences between them. Moreover, since they are heard in the presence of a neutral authority figure, the parties often feel that they have had "their day in court."

5. ***Mediation Helps In Complicated Cases***. When the facts and/or legal issues are particularly complicated, it can be difficult to sort them out through direct negotiations, or during

trial. In mediation, in contrast, there is an opportunity to break down the facts and issues into smaller components, enabling the parties to separate the matters that they agree upon and those that they do not yet agree upon. The mediator can be indispensable to this process by separating, organizing, simplifying and addressing relevant issues. A mediation that does not settle the case may nonetheless be partially successful. For example, even if the case does not settle, the process may eliminate certain issues and simplify the remaining issues and therefore simplify the ensuing litigation or arbitration.

6. ***Mediation Can Save An Existing Relationship.*** The litigation process can be very stressful, time consuming, costly and often personally painful. At the end of litigation, the parties are often unable to continue or restart any relationship. In contrast, in mediation disputes -- such as those between an employer and employee or partners in a business -- can be resolved in manner that saves a business or personal relationship that, ultimately, the parties would prefer to save.

7. ***Expeditious Resolution.*** The mediation can take place at any time. Since mediation can be conducted at the earliest stages of a dispute, the parties avoid the potentially enormous distraction from and disruption of one's business and the upset in one's personal life that commonly results from protracted litigation.

8. ***Reduced Cost.*** By resolving disputes earlier rather than later the parties can save tremendous sums in attorney's fees, court costs and related expenses.

9. ***Lessens the Emotional Burden.*** Since mediation can be conducted sooner, more quickly, less expensively and in a less adversarial manner, there typically is much less of an emotional burden on the individuals involved than proceeding in a burdensome and stressful trial. Furthermore, proceeding through trial may involve publicly reliving a particularly unpleasant experience or exposing an unfavorable business action which gave rise to the dispute. This is avoided in mediation.

10. ***Confidential Process and Result.*** Mediation is conducted in private -- only the mediator, the parties and their representatives participate. The mediator is generally bound not to divulge any information disclosed in the mediation. Confidentiality agreements are often entered into to reinforce the confidentiality of the mediation. Moreover, the parties may agree to keep their dispute and the nature of the settlement confidential when the matter is resolved.

11. ***Avoiding the Uncertainty of a Litigated Outcome.*** Resolution during mediation avoids the inherently uncertain outcome of litigation and enables the parties to control the outcome. Recent studies have confirmed the wisdom of mediated solutions as the predictive abilities of parties and their counsel are unclear at best. Attorney advocates may suffer from "advocacy bias" -- they come to believe in and overvalue the strength of their client's case.

In an analysis of 2,054 cases that went to trial from 2002 to 2005, plaintiffs realized smaller recoveries than the settlement offered in 61% of cases. While defendants made

the wrong decision by proceeding to trial far less often -- in 24% of cases -- they suffered a greater cost -- an average of $1.1 million -- when they did make the wrong decision.[3]

A mediator without any stake in the outcome or advocacy bias can be an effective "agent of reality" in helping the parties be realistic as to their likely litigation or arbitration alternative."

12. ***There are no "winners" or "losers."*** In mediation, the mediator has no authority to make or impose any determination on the parties. Any resolution through mediation is solely voluntary and at the discretion of the parties.

13. ***Parties Retain Their Options***. Since resolution during mediation is completely voluntary, the option to proceed thereafter to trial or arbitration is not lost in the event the mediation is not successful in resolving all matters.

14. ***The pro se litigant.*** Mediation can be very helpful when a party does not have an attorney and is therefore representing him/herself *pro se*. Court litigation can be very difficult for the *pro se* litigant who is unable to navigate the complexities of the court process and trial. With the downturn in the economy, studies showed that fewer parties are represented by counsel and that lack of representation negatively impacted the *pro se* litigant's case.[4] Dealing with a *pro se* litigant in court can also create difficult challenges for the party that is represented by counsel. However, in mediation, the parties can more easily participate in the process and benefit from the involvement of an experienced mediator.

15. **More creative and long-lasting solutions**. Parties develop and create their own solutions to issues addressed in mediation and may enter into innovative, creative solutions tailored to their own particular lifestyle and business interests rather than being limited by the remedies available in Court or Arbitration. Because the parties are involved in crafting their own solutions, the solutions reached are more likely to be satisfying, long-lasting ones, adhered to by the parties.

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[3] Randall Kiser, Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients, (Springer Science + Business Media LLC New York publ.) (2010)

[4] Report on the Survey of Judges on the Impact of the Economic Downturn on Representation in the Courts (Preliminary), ABA Coalition for Justice, July 12, 2010, available at http://new.abanet.org/JusticeCenter/PublicDocuments/CoalitionforJusticeSurveyReport.pdf

II. Arbitration

> ***"Choice- the opportunity to tailor procedures to business goals and priorities- is the fundamental advantage of arbitration over litigation."***[5]

Arbitration is the process in which parties engage a neutral arbitrator or panel of three arbitrators to conduct an evidentiary hearing and render an award in connection with a dispute that has arisen between them. As arbitration is a matter of agreement between the parties, either pre-dispute in a contract as is generally the case, or post-dispute when a difference arises, the process can be tailored to meet the needs of the parties. With the ability to design the process and the best practices that have developed, arbitration offers many advantages including the following:

1. ***Speed and Efficiency***. Arbitration can be a far more expedited process than court litigation. Arbitrations can be commenced and concluded within months, and often in less than a year. Leading dispute resolution providers report that the median time from the filing of the demand to the award was 8 months in domestic cases and 12 month in international cases compared to a median length for civil jury trials in the U.S. District Court for the Southern District of New York of 28.4 months and through appeals in the Second Circuit many months longer.[6]

2. ***Less Expensive.*** The arbitration process can result in substantial savings of attorney's fees, court costs and related expenses because the arbitration process generally does not include time consuming and expensive discovery that is common in courts in the United States (such as taking multiple depositions and very extensive e-discovery). Time consuming and expensive motion practice is also much less common.

3. ***More Control and Flexibility.*** In cases where arbitration is required by contract, the parties can prescribe various preferences to suit their needs, such as the number of arbitrators hearing the case, the location of the arbitration and scope of discovery. Once the arbitration is commenced, a party seeking a more streamlined and less expensive process will be better able to achieve that goal than in court where the applicable procedural and evidentiary rules govern. The parties will also have input in scheduling the hearing at a time that is convenient.

4. ***Qualified Neutral Decision Makers.*** The parties can select arbitrators with expertise and experience in the relevant subject matter or that meet other criteria that they desire.

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[5] Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation*." 7 De Paul Bus. & Comm. L.J. 3 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1372291

[6] *Judicial Business of the United States Courts 2009* Table C-5, available at http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2009/tables/C05Mar09.pdf

Arbitration avoids a trial where the subject matter may not be within the knowledge or experience of the judge or jury.

5. ***Arbitration is a Private Process***. Arbitrations are conducted in private. Only the arbitrators, the parties, counsel and witnesses attend the arbitration. Confidentiality of the arbitration proceedings, including sensitive testimony and documents, can be agreed to by the parties. In contrast, court proceedings are generally open to the public. In the generally less adversarial context of a private arbitration, ongoing relationships suffer less damage.

6. ***Arbitration provides Finality.*** In court proceedings, parties have the right to appeal the decision of a judge or the verdict of a jury. In contrast, the grounds for court review of an arbitration award are very limited. The award of an arbitrator is final and binding on the parties.

7. ***Special considerations for international arbitrations.*** Party selection of arbitrators ensures that a neutral decision maker rather than the home court of one party decides the case, and allows the parties to select an arbitrator with cross cultural expertise and understanding of the different relevant legal traditions. Of crucial importance also is the enforceability of arbitration awards under the New York Convention, in contrast to the much more difficult enforcement of court judgments across borders.

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