Plenary Session
Mediation: Turning the Tables on Guardianship and Estate Litigation

Presented By:
Michael Burger, Esq.
and
Beth Polner Abrahams

BASICS OF MEDIATION

Presented by:

NEUTRAL MEDIATION GROUP℠

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BASICS OF MEDIATION

I. What is mediation?

A. Non-binding, party-driven, alternative dispute resolution mechanism.

II. What is the role of the mediator?

A. Neutral friend of the deal.

B. Facilitator who helps and empowers the Parties to reach a mutually satisfactory agreement.

C. Sounding board.

D. Objective Listener.

III. Who participates in mediation?

1. Parties
2. Friends, supporters
3. Attorneys: Mediation Advocates
4. Neutral Mediator

IV. Where does a mediation occur?

A. Mediation suite

B. Lawyer's office

C. Courthouse

D. Religious institution

E. Destination of your choice…

V. How does a case get to mediation?

A. Judicial referral (clause in will or trending judicial preference)

1. Mandated in some jurisdictions (e.g., United States District Court of the Southern District of New York)

B. Agreement of counsel

C. Agreement of parties

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VI. Timing of Mediation on the Litigation Calendar.

A. Pre or post suit?
B. Adjunct to discovery
C. Continues to settlement or impasse
D. Pivotal moments: Risk Assessment
    1. Summary Judgment Motion
    2. Pre-Trial
    3. During Trial
    4. On appeal
    5. A good mediator never gives up

VII. Cost.

A. Mediator's rates are similar to lawyers' rates
B. Split by the parties
C. Buy in is an incentive to make the most of the process

VIII. Selection of a Mediator.

Where the Parties have a choice (sometimes Judge selects), consider:

A. Mediator's Background
    1. Rapport, rapport, rapport (will she earn trust)
    2. Formal mediation training and coursework
    3. Lawyer with litigation experience
    4. Subject matter expertise
    5. Experience on both sides of the issues (Petitioners and Respondents)
    6. High EQ – student of human behavior
    7. Flexibility
    8. Patience
    9. Sense of humor
    10. Not afraid of conflict
    11. Former Judge? Pro and con. Mediation is a different skill set.
B. Tactical considerations
    1. Who will your adversary listen to?
    2. Who will your client listen to?
    3. Transformative vs. Evaluative Approach

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IX. Mediation mechanics (What to expect).

- A. Engagement and Confidentiality Agreement
- B. Pre-mediation call
  1. Dynamics
  2. Expectations
  3. Issues
  4. Discovery
- C. Mediation submissions
  1. Goals
  2. Disputes
  3. Personality dynamics
  4. Facts, law & evidence
  5. Mediator only vs Party exchange
- D. Plenary Session
  1. Optional
     - (a) Pros:
       - (1) Clients meet and are heard
       - (2) Conflict in open (yell, hug it out, etc.)
       - (3) Empowering – Smart clients figure it out
       - (4) Get lawyers out of the middle
     - (b) Cons
       - (1) Destructive intransigence
       - (2) Cause a Setback
       - (3) Emotional triggers
  2. Opening statements
     - (a) Mediator explains and promotes process
     - (b) Parties or counsel speak
       - (1) Collaborative, not incendiary
       - (2) Managing client expectations
       - (3) Client's Goals are Heard in a Positive Light
- E. Caucus
  1. Confidential unless otherwise stated or vice versa?
  2. Shuttle diplomacy
  3. Active listening
  4. Understanding goals within goals
  5. Probing for details and rationale

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X. Why Mediate? (Or why not?)

A. Most cases settle eventually!
B. Cost
C. Preserve or rekindle relationships
D. Seek relief beyond what a judge can order
E. The limits of judicial intervention
F. Confidentiality
G. Rapid discovery
H. Certain, speedy, tailored, and final resolution
I. Flexibility
J. (Allocation of scarce financial resources)
K. (Revealing trial strategy or tactics)
L. (Indifferent or unrealistic parties)

XI. Becoming a lawyer Mediation Advocate to enhance your law practice (litigator or not!)

A. Another tool in the toolbox
B. Holistic lawyering
C. Build bridges
D. Not constrained by the rules of Evidence
E. (But a "BATNA" consult may be indicated)
F. The British solicitor model
G. Bibliography

1. Anatomy of a Mediation by James C. Freund (PLI 2012);
2. Bey☺nd Smart Lawyering with Emotional Intelligence by Ronda Muir (ABA Dispute Resolution Section 2017);
3. Fair is Fair: Mediation Clauses in Wills and Trusts by Michael A. Burger, 50 NYSBA T&E Section Newsletter 6 (Summer 2017)[1];
4. Getting Past No by William Ury (Bantam Books 1991);
5. Getting to Yes by Fisher and Ury (Penguin Books 2011) (3d Ed.);
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9. Why Can't They Settle? The Psychology of Relational Disputes, *18 Cardozo J. Conflict Resol. 311*, Winter, 2017.
10. NYSBA and NYC Bar Training Seminars.

[1] Attached.

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XII. Hypothetical exercises

A. In-state/out-of-state child (Contested 81/Estate/Trust)

B. Divided room—cross the aisle

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MICHAEL A. BURGER

Michael Burger is a founding partner of Santiago Burger LLP, a litigation-based law firm in Rochester, NY, and he is a founding member of Neutral Mediation Group LLC. Prior to that, Mr. Burger was a partner in two Rochester, New York law firms. Before relocating to Rochester, New York, in 1999, Mr. Burger spent several years practicing law in a large non-profit New York City based public interest law firm where he handled a variety of constitutional law matters including impact litigation that successfully secured the right to a jury trial for housing court litigants city-wide.

Mike focuses his litigation practice on fiduciary relationships within New York State and Federal Trial and Appellate Courts. His representative clients run the range from businesses of various sizes and structures, trusts, estates, and individuals owed or under a fiduciary duty such as officers, directors, executors, trustees, agents under a power of attorney, and guardians. Mike also handles Election Law cases during the season for both petitioners and respondents. These practices are equally divided between representing plaintiffs and defendants, affording an alacrity with the issues and arguments attending all facets of litigated matters. The substantive areas he focuses on consists of complex commercial disputes, corporate, LLC, and partnership dissolutions and disagreements, challenges to agency authority, congested article 81 guardianship, labor and employment matters (including class and collective action experience as lead counsel), election law, campaign finance, ballot access proceedings, and civil rights impact litigation challenging laws that work a constitutional deprivation on a segment of the citizenry. Michael commonly employs mediation as a tool across disciplines as an alternative to litigation.

Mr. Burger is also a founding member of the Neutral Mediation Group, LLC which provides mediation services to parties and industries needing to mediate disputes both pre-suit and during litigation. Michael brings over 20 years of experience as a litigator to the process, as coursework, lecturing, and writing in the field of mediation dating back to law school coursework. Mr. Burger is a member of the New York State Bar Association Dispute Resolution Section and serves on the Monroe County Bar Association's Fee Arbitration Committee where he acts alternatively as mediator or arbitrator. A passionate proponent for the mediation process, Mr. Burger stresses the importance of the parties being heard and empowered to chart their own resolutions.

Mr. Burger has written and lectured before the state and local bar associations on a variety of topics within his practice concentrations, including mediation and mediation clauses. His ready rapport and ability to build bridges of trust make him a consummate friend of the honest deal.

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Fair Is Fair: Mediation Clauses in Wills and Trusts

By Michael A. Burger

At the 2016 Fall Meeting, the Estate Planning Committee luncheon featured in depth discussions about thorny tax issues, trust selection, valuation, drafting and decanting strategies, a survey of local and historical practices, cutting edge legislation, and inside baseball anecdotes about the development of the Surrogate's Court bar. Acronyms and statutory section numbers proliferated like bullets in an action movie firefight. Navajo code talkers would have been impressed by the impenetrable lexicon.

All of the thoughtful practice considerations we discussed will undoubtedly facilitate clients' estate planning, but most had only occasional application. Each of the legal and taxation issues discussed, taken separately, was unlikely to frustrate a client's plans as frequently as potential strife among the client's eventual heirs or creditors.

As a trusts and estates litigator, I see the effects of postmortem litigation and the planners and heirs who call me are uniformly in distress about the prospect of a fight in Surrogate's or Supreme Court. Avoiding confusion and litigation is as much part of the estate planning practitioner's code of honor as it is a secret of their unique and ancient guild. Yet, we all wondered aloud why mediation clauses have not been employed in wills or trusts, even when carefully crafted *in terrorem* or no contest clauses increasingly proliferate.

Historically, Surrogates and their staff have ably performed a mediator-like function, albeit with the implicit threat of an adverse ruling against a recalcitrant party. In some jurisdictions they still do, but with mixed success and delays tied to calendar congestion. Some Surrogates frown on mediation due to the cost of engaging a mediator and the risk that the parties, left to their own devices, may conspire to pervert the testator's intent. But at the Spring Meeting, a panel of esteemed Surrogates discussed mediation as a dispute resolution mechanism in Surrogate's Court and all but one generally approved of the process.

A. The Pros and Cons of Mediation

Nearly all Surrogate's Court cases settle out of court. This is a powerful bit of knowledge for litigants and their counsel. If a case is statistically likely to settle eventually, why not do so as early as possible, before spending time and money on court battles? A litigation war chest can also fund a tailored, creative and even mutually beneficial compromise.

More importantly, litigants have an inherent sense of what is fair. We all do, really. Studies show that even toddlers have an innate sense of fairness.[1] As lawyers, we are primarily trained to funnel disputes over fairness into the court system. And of course Surrogate's Court, a court of equity, is uniquely oriented towards a fair result, not just a legally correct one. Still, clients are frequently disappointed by both the process and the outcome of litigated disputes, which is the reason for appellate courts. But even the smartest judges in the land, sitting on the highest courts, are not always able to agree on a fair outcome, sometimes dividing along partisan lines. Plus, the result is often a zero sum game. A "winner" and a "loser" are declared, in cold legal rhetoric.

If our clients know what is fair, why are we so quick to turn over their disputes to judges who do not know our clients or their families? In part, litigants yearn for a wise and impartial mind to resolve their troubles for them—even to vindicate them. Judges offer a keen understanding of the law and an impartial desire to see justice prevail that we naturally trust. But judges are also constrained by the contours of the matter before them, regardless of the intangible goals or overall family dynamic.

Yes, mediation involves an additional cost. But trials and appeals come at an even greater cost. Years of litigation, subpoenas, motions, depositions, hearings, trials, appeals, briefs and tens of thousands of dollars (or more) in fees. To say nothing of the emotional toll, health effects, and family turmoil attendant to a congested and procedure-laden process.[2]

The court process is, of course, a necessary and carefully constructed mechanism for producing justice, and we are fortunate to have the best and most independent judiciary in the world, but the court system is slow, expensive and necessarily limited by the rules of evidence, standing, ripeness and justiciability. And a decision by a third party—even an impartial and independent one—is no substitute for self-determination and empowerment.[3]

Independence and impartiality are essential for a neutral judge to be respected as unbiased. But with independence comes a detachment and distance from the dispute stemming from a lack of familiarity. From

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the standpoint of familiarity with the nuances of the dispute, including the intangible goals, and goals within goals, that make a possible result fair from the standpoint of a particular family—a significant and decisive factor in a court of equity. No one knows family like the family itself.

B. The Testator's Sacred Intent

What happens to the expressed intent of the testator when the parties negotiate privately, with or without a mediator?

Surrogate's Court litigation is arguably even more complex and uncertain than other litigation because there is essentially another "silent" party whose interests are paramount: the decedent or trust settlor. One of the Surrogate's solemn duties is to protect and enforce the testator's wishes. To be sure, a well-timed scowl from a wise jurist can help resolve a case.[4]

Mediation is not a substitute for the Surrogate but rather a ready and flexible supplement; an additional tool at the disposal of the Court and the litigants. If a court conference resolves a festering issue then mediation will not be necessary. But many cases soldier on past the best judicial efforts at brokering settlement.

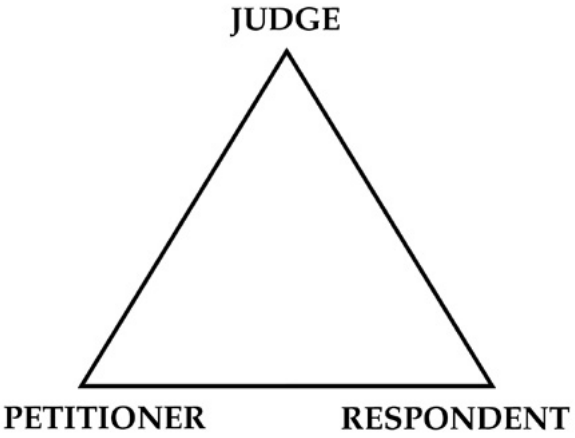
Working with seasoned counsel, the parties may find solutions not available to the Surrogate, while still scrupulously safeguarding the testator's intent. If the parties attempt to corrupt the testator's intent then the Surrogate, who will review any proposed decree, would understandably reject such a proposed decree.

Even with able and experienced counsel assisting each of the parties, common ground can be hard to find and impasse always looms as a possibility. In part, the fog of war can curtail settlement efforts, especially early on when they are most valuable. Posturing and jockeying for legal position can obscure weaknesses and hazards of litigation as counsel walk a tightrope between client relations and effective advocacy.

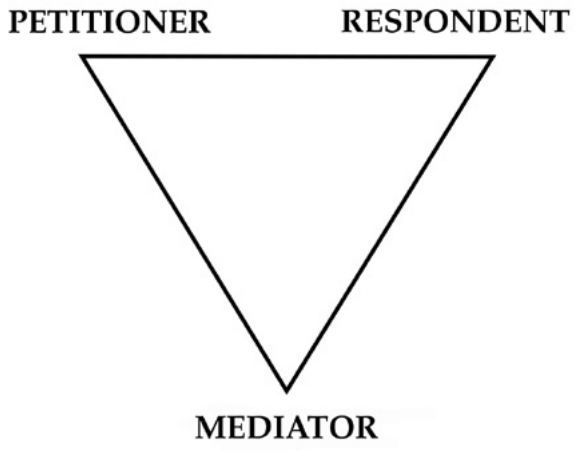
A seasoned mediator with trusts and estates experience will often be a helpmate in this regard, guiding the parties away from resolutions that will not pass judicial muster.

C. Maintaining Party Control: The Nonbinding Neutral

If we graphically display the court system as an equilateral triangle, with the Surrogate at the top point and the litigants at the bottom points, we can appreciate the power dynamics of a court-imposed result: the parties hand up the evidence and arguments supporting their opposing visions of a fair outcome, and the Surrogate hands down a mandated result.



Mediation turns this triangle paradigm on its head, allowing the litigants to fashion a mutually acceptable outcome which they dictate, subject to Surrogate approval, to the trained trust and estates mediator who helps facilitate the discussion towards the zone of possible agreement.



D. Mediation Clauses Are Valuable and Flexible Tools

Efforts to micromanage an outcome of a dispute from beyond the grave can frustrate the well-laid plans of even the most prescient testators. Mediation rewards compromise and ingenuity. And, if mediation begets impasse, litigation remains as an alternative, with mediation still available as the case progresses.

The value of earnest attempts at mediated compromise is increasingly recognized by both scholars and courts alike.[5] Early mediation has become mandatory in some courts,[6] and other courts have empaneled mediators to be available to the parties on an *ad hoc* basis.[7]

Through artful drafting the estate planning practitioner may require mediation as a condition precedent to a legacy. Together, counsel and the testator or settlor may preserve assets or corpus and empower heirs, legatees and beneficiaries to explore solutions beyond

those apparent at the time of drafting and execution. For instance, a mediation clause might be co-extensive with the safe harbor rules,[8] and be required prior to the filing of objections to a will or to an accounting.

Other essays have examined sample draft language.[9] This essay is not intended to promote a one-size-fits-all template for drafters, but rather as an informative guide to assist a drafter in tailoring dispute resolution mechanisms to the client—and the client's family. As planners who also eventually hope to assist the survivors in administering the estate, mediation also offers opportunities to foster client continuity and satisfaction.

With the foregoing primer on the mediation process, there is nothing mysterious about drafting a mediation clause. A plain vanilla mediation clause might read:

> **MANDATORY MEDIATION**: I direct that any dispute concerning my [will/trust] or [estate/trust] administration first be the subject of mandatory mediation between or among the parties to such dispute, with a trained, private neutral mediator. Only in the case of good faith mediated impasse, as determined by the mediator, may the parties seek judicial intervention. Every disposition and fiduciary appointment herein is expressly conditioned upon compliance with this directive. Any noncompliant party's appointment and/or legacy shall be deemed a nullity. The costs of the mediator shall be borne by the party or parties invoking mediation.

It is of course most advisable for the estate planning practitioner to confer with her client and craft language to meet her specific goals. One common consideration concerns the "teeth" inserted into a mediation clause, including, but not limited to, mediator selection and party recalcitrance. Some drafters may leave such possible eventualities to the sound discretion of the Surrogate, while others may wish to dictate specific remedies that are most likely to motivate those involved.

E. Contrary Views

Detractors may say that mediation is an invitation to the unscrupulous, or that the Surrogate can perform this function for free, or that the testator's intent will be frustrated. This may be so at times, and no solution is perfect. Counsel and the courts must consider the particular case, the personalities and the size and liquidity of the estate. However, a few related considerations:

- The unscrupulous contestant can also be managed with a carefully drawn *in terrorem* clause setting milestones delimiting the mediation time frame, or shifting its cost.
- The Surrogate and her staff have limited time and resources and are prone to reality testing that carries the court's imprimatur. Counsel cherish the glimpses into the fact-finder's viewpoint but simultaneously acting as a mediator and the ultimate finder of fact has its challenges.[10]
- If the Court is perceived as having a point of view as to the settlement terms, the parties' power of self-determination is curtailed. This may not be problematic from a legal point of view, but where value is placed upon preserving a relationship or encouraging the parties to take ownership of a tailored result of their own design, the "recommendation" of the ultimate finder of fact may not be ideal. Many a family fight has been resolved at the proverbial kitchen table. Perhaps as it should be.
- Where probate is at issue, the Surrogate will ultimately examine any proposed compromise anyway. This requires the parties to be thoughtful about protecting the testator's intent. A seasoned trusts and estates mediator will be watchful for this and help build safeguards into the mediation memorandum resolving the dispute. On the rare occasion that a judge rejects a proposal, the framework of a compromise remains and as the saying goes, where there is a will there is a way.
- Finally, where the dispute concerns the fiduciary's account mediation holds the prospect of a voluntary settlement of such account, thus avoiding further judicial intervention by way of a judicial settlement under the Surrogate's Court Procedure Act (SCPA) article 22. However, some accounts may require judicial intervention even where there is consensus (e.g., wrongful death *Kaiser* issues, attorney's fees under SCPA 2110, infant settlements, absent heirs, guardian ad litem recommendations, etc.).

F. Impasse Is Impermanent

Mediation is a fluid process. A good trusts and estates mediator will stay involved past the initial plenary sessions and caucuses. Additional and future shuttle diplomacy can be by telephone or separate meetings, to fit the case. Sometimes a more observant transformative process may carry the day, whereas in others gentle reality testing or decision tree analysis may be more effective. Above all, allowing the parties to be heard has profound benefits.[11]

The "top down" dynamics of a court-facilitated setting are not always suited to litigants who may be able

to resolve the matter themselves with the aid of a little humor, compassion, some food or just an alternative viewpoint.

As a trusts and estates mediator, steeped in the intricacies of Surrogate's Court practice, I have found that a litigant's opportunity to speak and be heard and feel the control of his or her own destiny can sometimes even turn an inevitable unpleasant result into a palatable one. But more often, the parties find mutually beneficial solutions that a court could not and would not order—and at far lesser cost to the parties.

Endnotes

1. *See Babies know what's fair*, 23 Psychological Science 196 (Association for Psychological Science Feb. 2012) (available online at https://www.sciencedaily.com/releases/2012/02/120218134639.htm).
2. *See* Robert D. Steele, Leona Beane, Kevin Murphy, Jill Teitel & Barbara Levitan, *The Benefits of Mediation and Arbitration for Dispute Resolution in Trusts and Estates Law*, NYSBA Dispute Resolution Law Section (Jan. 2011) (available online at https://www.nysba.org/Sections/Dispute_Resolution/Dispute_Resolution_PDFs/Trusts_estateswhitepaper12-21-2010_pdf.html).
3. *See, e.g.*, Joseph M. Lauria & Sharon S. Townsend, *A Decade of Reform in the New York State Family Courts*, N.Y. St. B.J. 46 (Jan. 2008).
4. *See* Chief Justice John Roberts, 2015 Year End Report on the Federal Judiciary, at 7.
5. *See* Jonathan G. Blattmachr, *Reducing Estate and Trust Litigation Through Disclosure, in Terrorem Clauses, Mediation and Arbitration*, 9 Cardozo J. Conflict Resol. 237 (2008).
6. *See, e.g.*, United States District Court for the Western District of New York Alternative Dispute Resolution Plan at 4 (June 24, 2011) (available online at http://www.nywd.uscourts.gov/sites/default/files/ADRPlanRevisedJune242011.pdf).
7. *See, e.g.*, Commercial Division, Supreme Court, New York County Rules and Procedures of the Alternative Dispute Resolution Program, at Rule 3 (available online at https://www.nycourts.gov/courts/comdiv/ny/PDFs/ADRCD.rulesprocs22016.pdf).
8. *See* SCPA 1404(4); *see also* EPTL 3-3.5(b)(3)(D).
9. *See* Steele et al., *supra* note 2.
10. *See* Yaraslau Kryvoi & Dmitry Davydenko, *Consent Awards in International Arbitration: From Settlement to Enforcement*, 40 Brook. J. Int'l L. 827, 843-44 (2015).
11. *See generally* James A. Beha II, *Mediation in Commercial Cases Can Be Very Effective for Clients*, N.Y. St. B.J. 10, n.1 (Sept. 2002).

BASICS OF MEDIATION

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Neutral Mediation Group LLC

RESOLVING COMPLEX LEGAL DISPUTES

NEUTRAL MEDIATION GROUP LLC

WHAT IS MEDIATION?

Mediation is an alternative dispute resolution mechanism that is:

- Voluntary.
- Non-binding.
- Party-driven.

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WHAT IS THE ROLE OF THE MEDIATOR?

A Mediator is:

- a Neutral friend of the deal.
- a Facilitator who helps and empowers the Parties to reach a mutually satisfactory agreement.
- a Sounding Board.
- an Objective Listener.

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WHO PARTICIPATES IN MEDIATION?

Participants can include:

- the Parties.
- Friends and Supporters.
- Attorneys for the Parties (the Mediation Advocates).
- The Neutral Mediator.

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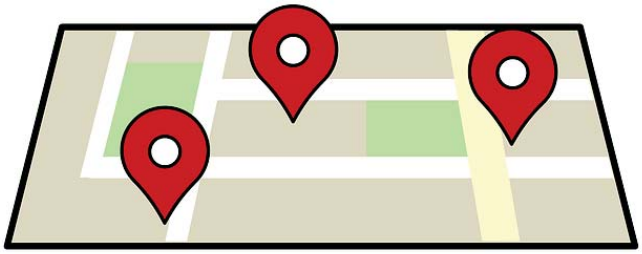
WHERE DOES A MEDIATION OCCUR?

A mediation can occur in a:

- Mediation suite.
- Lawyer’s office.
- Courthouse.
- Religious institution.
- Destination of your choice.



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HOW DOES A CASE GET TO MEDIATION?

A case may get to mediation by:

- Judicial Referral:
  (Mandatory in some jurisdictions.)
- Agreement of Counsel.
- Agreement of the Parties.

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TIMING OF MEDIATION

Mediation:

- Can occur pre or post suit.
- Can be an adjunct to discovery.
- Continues to settlement or an impasse.
- Can occur at pivotal moments | risk assessment:
  - Summary Judgment Motion
  - Pre-Trial
  - During Trial
  - On appeal
  - a good Mediator never gives up.

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COST

The Cost of a Mediator is:

- Similar to lawyers' rates.
- Split by the Parties.
- An incentive to make the most of the process.

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SELECTION OF A MEDIATOR

Mediator's Background:

- Rapport, rapport, rapport
- Formal mediation training and coursework
- Lawyer with litigation experience
- Subject matter expertise
- Experience on both sides of the issues
- High EQ – student of human behavior
- Flexibility
- Patience
- Sense of humor
- Not afraid of conflict
- Former Judge?

Tactical Considerations:

- Who will your adversary listen to?
- Who will your client listen to?
- Transformative vs. Evaluative Approach

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MEDIATION MECHANICS : WHAT TO EXPECT

- Engagement and Confidentiality Agreement
- Pre-Mediation Call:
  - Dynamics
  - Expectations
  - Issues
  - Discovery
- Mediation Submissions:
  - Goals
  - Disputes
  - Personality dynamics
  - Facts, law & evidence
  - Mediator only vs. Party exchange

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- Plenary Session : Optional

Pros – In a Plenary Session:

- Clients meet and are heard
- Conflict is in the open
- The Parties feel empowered
- The lawyers get out of the middle

Cons – But a Plenary Session May:

- Foster destructive intransigence
- Cause a Setback
- Stimulate emotional triggers

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- Opening Statements
  - Mediator explains and promotes process
  - Parties or counsel speak
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    - Managing client expectations
    - Client's Goals are Heard in a Positive Light

- Caucus
  - Confidential unless otherwise stated or vice versa?
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- Cost
- Preserve or rekindle relationships
- Seek relief beyond what a judge can order
- The limits of judicial intervention
- Confidentiality
- Rapid discovery
- Certain, speedy, tailored, and final resolution
- Flexibility

Some Reasons Not to:

- Allocation of scarce financial resources
- Revealing trial strategy or tactics
- Indifferent or unrealistic parties

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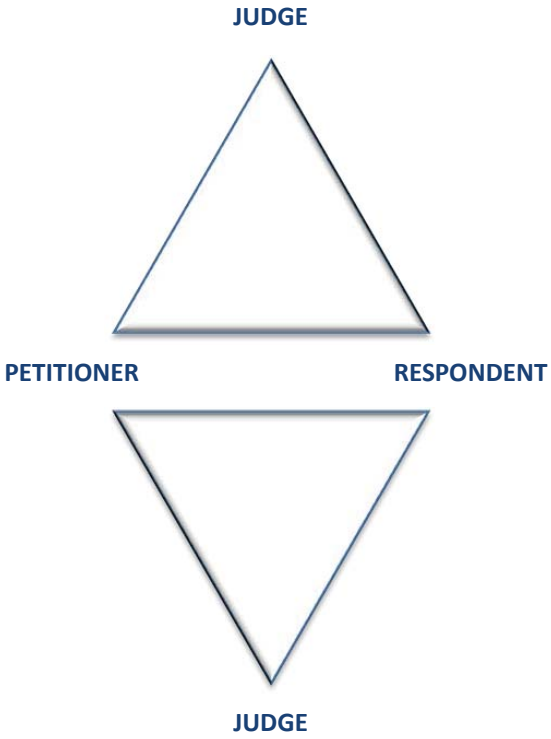

Mediation turns this triangle paradigm on its head, allowing the litigants to fashion a mutually acceptable outcome which they dictate.

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ADVOCATING FOR MEDIATION

Becoming a lawyer Mediation Advocate to enhance your law practice (litigator or not!)

- Another tool in the toolbox
- Holistic lawyering
- Build bridges
- Not constrained by the rules of Evidence
- (But a “BATNA” consult may be indicated)
- The British solicitor model

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BIBLIOGRAPHY

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HYPOTHETICAL EXERCISES

- In-state/out-of-state child (Contested 81/Estate/Trust)
- Divided room—cross the aisle

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