Family Mediation

By Brian McDonald, Isabella Horton Grant and Richard Collier

Family Feud -- Attorneys Can Use Mediation to Prevent Estate Disputes

Having prepared an estate plan, how does an attorney respond when a clear conflict is raised between family members? What if the attorney represents (or is perceived as representing) more than one family member? Virtually every estate planner recalls the sinking feeling when caught in the middle of warring factions of a client's family.

The attorney may be faced with questions that, because of confidentiality requirements, he or she may not be able to answer, even if the client is alive and can explain in person why the attorney was directed to prepare the estate plan the way in which he or she did.

The minimum steps on the part of the attorney required by the Code of Professional Responsibility are identifying the client; determining what restrictions on disclosure exist; and recommending that the "other side" or all parties engage independent counsel. What is not yet mandated by the code is a proactive approach to stop the inevitable drift toward litigation after sides have been chosen up and the "hired guns" engaged.

What can help (almost always sooner rather than later) is an independent, neutral third party to assist the parties and counsel in resolving their issues in a way that promotes, rather than destroys, family harmony.

While mediation is valuable after the death of both testators and settlors at the will contest phase, it is priceless when used even before "the will speaks." In open discussions facilitated by the neutral, the parties are able to identify their interests as opposed to their positions and, in many cases, expand the pie, as well as their own share. They may also assess the impact of various resolutions if nothing is done now, assess the potential for losses, and obtain a neutral view of their positions.

Other goals of pre-dispute mediation may be to promote or restore peace in the family or increase communications that are particularly important in the last months or years of the life of the family matriarch or patriarch.

Emphasis in estate planning frequently focuses on maximum reduction of federal taxes -- and woe to the specialist who does not accomplish that goal. However, especially with people living for up to 40 years in retirement mode, potentially conflicting situations frequently develop. How can a person make gifts now to avoid taxes and not jeopardize his or her ability to live decades from now? Further, conflicts arise by definition whenever dealing with joint clients, leaving the estate planner in search of a new process to approach the problems.

Consider the example: Twenty years ago an attorney drafted a will for mom and dad (with two children, a home and a small business). Ten years later, upon graduation from college, the son went to work in the business. At that time, the attorney implemented a revocable trust with a marital deduction trust and a bypass trust, with the remainder equally to the son and daughter. A dual representation conflict waiver was signed by the couple; the children were not involved in the conflict waiver nor in planning discussions, even though heirs and beneficiaries can be considered "indirect clients. See Lucas v. Hamm (1961) 56 Cal.2d 583 [at Cal. Rptr. 821]; Garcia v. Borelli (1982) 129 Cal. App. 3d 24 [180 Cal. Rptr. 768].)

The father passed away a few years ago and his stock was transferred to the appropriate sub-trusts. The attorney met with the daughter at that time, and suggested a living trust and drafted one for her.

The mother now has increasing symptoms of age-related incapacity and, in discussing this with the son, the son complained of frustration due to his efforts to build the company over the past 15 years and the fact that half the company will be owned following mom's death by his sister, who has never worked in the business. The son feels that a business opportunity may arise in the immediate future and wants the attorney to incorporate a new

business with the son and his spouse to take on the project. The daughter has no desire to participate in the family business and doesn't have any experience in management. If nothing is done, there will almost certainly be litigation when the mom dies, if not before.

Who is the attorney's client? The deceased father? The mother? The corporation? The son? The daughter? All of the above? What can or should the attorney disclose? For example, can the attorney alert the mom or daughter of the son's intentions? Probably not. See Flatt v. Superior Court (1994) 9 Cal. 4th 275 [36 Cal. Rptr. 2d 537] (duty of undivided loyalty to existing client negated any duty to inform prospective client of need for counsel or statute of limitations). If the attorney withdraws, who does the attorney have a duty to "alert" as to the possible diversion of corporate opportunities?

If the attorney discusses anything with family members without authorization, the attorney will be exposed to liability. Should the attorney simply advise each family member to secure independent counsel, step back, and let the battle begin? Who knows the most about the estate planning goals of the family and is in the best position to facilitate achieving those goals? The attorney. Luckily, there is an alternative to withdrawal.

An emphatic recommendation by the attorney for mediation with each of the parties in attendance with independent counsel, accompanied by waivers of conflicts signed by the parties, may allow the attorney to participate, perhaps even to represent the mom, for the purpose of the mediation. A mediator will generally assist the attorneys in developing an "Agreement to Mediate," which specifically allows the attorney, as family estate planner, to participate in the mediation as an advocate for one party.

If each party agrees that the attorney could participate in this confidential setting, the attorney may, without disclosing confidences of son, assist the mediator in developing solutions to various alternatives that could arise.

The mother, children and their advisors will have the reassurance of knowing the mediation process is confidential, which may encourage open communication and avoid the risk that anything said (by the attorney or others) would later involve the attorney in litigation. See California Evidence Code §1115, et seq.

A skilled mediator can assist the parties in identifying their true interests, as opposed to their positions. The son wants control of the business, the ability to pass it on and, perhaps, to obtain more compensation. The daughter may not want to participate in the business, but may want opportunities for herself and for her descendants.

In a private caucus with the mediator, the attorney can suggest that the mediator caucus with the son and counsel to explore what the outcome might be of various scenarios. A solution that is developed by one of the parties, but speaks through the neutral mediator, often is accepted much more readily by the others.

Here is another example that calls for mediation: The dad and mom implemented a standard living trust with income to themselves during each of their lifetimes and the remainder to their children, or to their grandchildren if children do not survive. The mom passed away 15 years ago and the children graduated from school and moved away to other parts of the country. The attorney developed an estate plan for one of the children and her husband prior to her moving away based upon the expectation she would inherit a sizeable estate on the death of her surviving parent.

A few years ago, the attorney met the dad at a social function and learned that he had hired a young live-in housekeeper. The dad now calls to say he wants to change "the family trust." He plans to remarry. He wants to introduce the attorney to his prospective bride, the 40-year-old housekeeper. He wants to leave the bulk of his estate to the housekeeper and volunteers that his children rarely visit but, when they do, ask for money and criticize him for his interest in the much younger housekeeper. He discloses he has already made significant gifts to his intended bride.

Who is the attorney's client? The deceased mom? The dad? The daughter for whom the attorney prepared her own estate plan? The grandchildren, if any? See Luther Avery, "CEB Estate Planning Practice," Chapter 1, §1.17, "The Family" and "The Situation.") Can or should the attorney disclose the dad's intended change of plans to children? The gifts previously made?

What are the family estate planning goals? The attorney is in a unique position to remind all concerned that the plan was to provide an orderly transition of the family wealth, provide for care and attention to the father, and make sure that the father has enough funds to pay for his health care needs. Can the attorney make the children

aware of the increased need for attention required by the dad? Or encourage a continued family relationship between the children and their father by relating his complaints, with the goal of avoiding litigation following dad's death?

The attorney and a mediator can help solve the problems and achieve the family estate planning goals. First, the parties can evaluate risks. Dad doesn't want his new friend/wife to be subject to litigation following his death, which is almost a certainty if there is a significant change without the children's knowledge and contrary to their interests.

Second, the mediation can expand the "pie": Depending upon the size of the estate and the income needs of the prospective wife, an additional unified credit can be developed which could ultimately benefit the children.

Third, the mediation can strengthen parties' relationships: A mediator in caucus, with proper authorization from the dad and his attorney, can send a message to the children more or less along the following lines: "Maybe because you live so far away, or because of your hectic schedules, you don't realize that dad needs someone here to spend time with him, to care for him, and this could result in your losing some portion of which you have grown up to believe is your legacy."

Fourth, the mediator can assist the parties in evaluating alternatives: "Would you want to consider having dad live with you in your home full time?" "If dad develops a significant relationship and depends upon the housekeeper, why would not a substantial gift to her be appropriate for the effort she devotes?"

A skilled mediator can probe and elicit long-suppressed or unspoken hopes or resentments in response to messages to participants sent directly or subtly. The mediator's job is to identify the hidden or underlying issues and interests and facilitate open discussions without the encumbrances of hidden agendas or conflicts.

A mediator can act not only as a buffer, but also as an agent of reality. Since the mediator does not have an attorney-client relationship, makes no decisions and, as a neutral rather than an advocate, is not subject to conflict of interest issues or disqualification, the mediator can speak with parties jointly and separately and address specific concerns and objectives necessary to develop a plan acceptable to all and protective of all.

If at least one testator is still competent, the inherent flexibility of the mediation process can provide an estate planner with a forum for addressing concerns similar to those posed by the above hypotheticals. The parties can develop a framework wherein they identify and resolve problems that will arise if there is no resolution at this time, assess loss possibilities (loss of relationships and wealth) and generally become educated, while at the same time obtain assistance to maintain relationships. Under traditional circumstances, these problems would remain hidden and not arise until after the death of the surviving spouse.

Further, participants in mediation uniformly report a higher level of satisfaction than in litigation. The attorney's efforts to help the clients resolve problems in an expedient manner without excessive costs will not only engender sincere appreciation, they may allow the attorney to maintain his or her client relationships. They will also serve the finest traditions of the legal profession while minimizing the risk of costly, estate-depleting, post-death litigation and potentially divisive family acrimony.

The parties will benefit from their involvement and the certainty of voluntary settlement rather than the roulette wheel of the traditional legal process. Even if the clients and their families are not familiar with the concept of mediation, it is the attorney's job as their advisor to explain it. Remember, the "financial life" the attorney saves may be his or her own.

Brian McDonald, Isabella Horton Grant, a retired Superior Court judge, and Richard Collier, an attorney at Titchell, Marltzman, Mark & Ohleyer, are all mediators.

This article was originally published in The San Francisco Daily Journal, September 27, 2000.